the High Court and the county courts, removed the difference in the fee charged for an application for permission to appeal and for an actual appeal where permission had already been granted or was not required.[39] The fee for either now stands at £100 except in cases allocated to the small claims track where the fee is £80.

In cases where the appellant did not qualify for remission, we noted whether the correct fee was paid on the first occasion.

Table 5: Mistakes in the fee for lodging an appeal

Appeal centre	Correct fee paid	Fee problem	Percentage with fee problem
Birmingham	25	9	36%
Leeds	29	8	28%
Manchester	32	9	28%
TOTAL	86	26	30%

We made a note of other problems with the appellant's notice where there was a copy on file. Such problems were apparent in 20 (42%) out of 48 notices at both Birmingham and Manchester and 24 (48%) out of 50 at Leeds. The nature of the problems is referred to in the next section.

5.4 The design of the appellant's notice

The rule changes on appeals introduced a single appeal form irrespective of the court to which an appeal lies.[40] The notice is produced by the Court Service as Form N161 with accompanying guidance on Form N161a. There is also an amended version, Form PDIP1 for use in appealing from a decision of the county court or a registrar of the High Court in insolvency proceedings.[41] There are corresponding forms for respondents. References in the discussion below are to Form N161, which is reproduced at Appendix 4.

The first field to be filled in is the box in the top right of the first page of the notice which contains the words 'In the'. The appellant is intended to enter the name of the appeal court but this is not explicitly stated on the form or in the accompanying guidance notes. In the examples we examined, some appellants had left this box blank while others had entered the name of the lower court in which the order being appealed was made.

[39] However, the distinction remains in the fees charged for appealing to the Court of Appeal (Civil Division).
[40] CPR PD, para. 5.1.
[41] The forms can be downloaded at http://www.hmcourts-service.gov.uk/HMCSCourtFinder/FormFinder.do.

Section 1: Details of the case

The guidance states:

'Give the name of the court or tribunal whose order you are appealing against, the number of the case or claim in that court or tribunal, and the full names of all parties. You can take these details from the order or decision you are appealing against'.

Although this seems clear, it assumes that the appellant has a copy of the order and that the information stated is included on the order. Delays in the production of orders were referred to in our previous study and we found little evidence that the situation had improved. Court staff referred to the problems of obtaining a copy of an order where the lower court was not at the appeal centre. There was no order on the file in 33 (24%) out of 140 relevant study cases.

Even where a copy of the order is available, some of the required information may be missing. At least 19 (18%) out of 107 orders we looked at had defects of some kind in the information provided.

In answering the final question in this section, appellants were often confused about which of the six boxes to tick to describe their role in proceedings in the lower court. Confusion between the role of respondent in the appeal and the first instance case was common.

Section 5: Details of the order(s) or part(s) of order(s) you want to appeal

This was the most poorly completed section of the form and we encountered mistaken responses to every question. Orders normally contain, without explanation, both the date they were made and the date they were drawn up by the court; some appellants entered the wrong date in this section.

Track allocation is important in determining jurisdiction and caused problems for unrepresented appellants and solicitors alike. At least 17 of the notices we examined had incorrect track allocation information. Six of these had been completed by solicitors. A common mistake was to say a case was allocated to both the fast track and the multi-track.

The question of whether the order being appealed was a case management order caused even more confusion. The issue arises because such appeals have a potentially higher threshold for granting permission. Paragraph 4.5 of CPR PD 52 states:

> ‘Where the application is for permission to appeal from a case management decision, the court dealing with the application may take into account whether:
>
> (1) the issue is of sufficient significance to justify the costs of an appeal;
>
> (2) the procedural consequences of an appeal (e.g. loss of trial date) outweigh the significance of the case management decision;
>
> (3) it would be more convenient to determine the issue at or after trial.’

Paragraph 4.4 explains that:

> ‘case management decisions include decisions made under rule 3.1(2) and decisions about:
>
> (1) disclosure
>
> (2) filing of witness statements or experts reports
>
> (3) directions about the timetable of the claim
>
> (4) adding a party to a claim
>
> (5) security for costs.’

The guidance to completing Form N161 has a similar list of examples. Rule 3.1(2) provides a further 13 examples, including any order made ‘for the purpose of managing the case and furthering the overriding objective’. As the overriding objective sets the context for all court decisions, it could be argued that any order falls into this last category, or at least any order that is not a final order.[42]

It is hardly surprising that litigants find it difficult to decide whether the order being appealed is a case management order. In at least 24 (16%) of the appellants’ notices we looked at the case management question was left blank or answered incorrectly. Some judges to whom we spoke admitted they were not even aware that litigants were asked for this information.

[42] Curiously, the appellant’s notice does not ask whether the order being appealed is a final order, even though this is an important factor in determining the correct appeal court in multi-track cases.

Section 6: Permission to Appeal

There was some confusion among litigants about whether permission to appeal had been granted. Many left the boxes blank while a few mistakenly thought that the judge in the court below had granted them permission to appeal.

Other applications associated with an appeal should also be made on the appellant's notice. This section contains boxes to tick to indicate if other applications are being made. The details of these applications should then be entered in section 10. Some appellants seemed confused by the tick boxes. Thirty-nine notices included additional applications but in five the relevant box was left unchecked. Conversely, there were 11 notices where the box to indicate additional applications was ticked but there were no such applications in section 10 (see below).

Sections 7 and 8: Grounds for Appeal and Arguments in support of grounds

The terminology in these sections is taken from the Practice Direction to CPR 52 (it is not used in the rule itself) and is somewhat obscure for those who are not legally qualified. The accompanying guidance explains that 'grounds' are 'reasons for appealing' and an argument in support of grounds is 'referred to as a "skeleton argument"' (the latter term is used in the body but not the heading of section 8). It is not clear why the more accessible descriptions were not included on the form itself. There is no reference in either the form or the guidance to the fact that an unrepresented litigant is not required to provide a skeleton argument.[43]

Section 10: Other applications

Typical applications in this section were for an extension of time in which to file the notice, a stay of execution of the order being appealed and various cost-related applications. But in this section too there was misunderstanding of what was required. Sometimes what was written did not include an application. Others merely repeated the application for permission to appeal or to set aside the judgment being appealed. In one case, the notice contained no actual appeal but only an application for an extension of time in which to appeal. This was only picked up when the papers were reviewed by the DCJ.

[43] CPR PD 52, para. 5.9(3).

Section 11: Supporting documents

This section also causes confusion, particularly as some required documents are hardly ever available within the time allowed for filing the appellant's notice. The section offers a list of documents and asks appellants to tick 'the papers you are filing with this notice and any you will be filing later'. Where ticked documents are not filed with the notice, appellants must explain the reason and give an expected filing date in a 'free text' box.

The guidance to this section of the form, much of which is taken directly from the Practice Direction to Part 52, is long and somewhat ambiguous. It reads:

> **Do not delay filing your appellant's notice at the appeal court**. If you have not been able to obtain any of the documents listed below within the time allowed, complete the notice as best you can and ensure the notice is filed on time. Set out the reasons why you have been unable to obtain any of the information or documents and give the date when you expect them to be available.

Whenever possible, the following documents **must** be filed with your appellant's notice:-

> If your appeal relates to a claim in the small claims track, you **must** file the documents marked with an asterisk * below. You **may** file any of the other documents listed, if you wish, **except** the record of reasons for the judgment of the lower court. The appeal court will decide if a record of reasons is necessary. You will be told if one is needed.

*1) a sealed copy of the order you are appealing against;
*2) any order giving or refusing permission to appeal, together with a copy of the form giving the judge's reasons for giving or refusing permission (Form N460);
3) any witness statements or affidavits in support of any application included in Sections 6 or 10 of your notice or in a separate application notice (Form N244); and
4) your bundle of documents in support which should include copies of:

- your appellant's notice and any skeleton argument (if separate);
- a sealed copy of the order you are appealing;
- the documents at 2 and 3 above (if appropriate);
- any other affidavit or witness statement filed in support of the appeal;
- a suitable record of the reasons for the judgment of the lower court *(see note on page 10)*;
- any statements of case (that is, the particulars of claim, defence);
- any relevant transcript or note of evidence;
- any application notice or case management documentation relevant to the decision being appealed;

- if appropriate, any skeleton arguments relied on by the lower court; and
- relevant affidavits, witness statements, summaries, experts' reports and exhibits
- any other documents directed by the court to be filed in the appeal
- in a second appeal, the original order appealed, the reasons given for making that order and the appellant's notice appealing that original (first) order
- if the appeal is from a decision of a Tribunal, the Tribunal's reasons for that decision, the original decision reviewed by the Tribunal and the reasons for that original decision

A record of the judgment may be either
- an approved transcript of the judgment where the hearing was recorded; or
- a copy of the written judgment (endorsed with the judge's signature); or
- a note of the judgment. If you were not legally represented in the lower court but the respondent was, the respondent's advocate should make their note of the judgment available to you free of charge.

> You should remember that if you file any of the documents at a later date, you must check whether or not the information you are providing alters any of the details already given in your appellant's notice. If it does, you will need to apply to the court for permission to amend the notice. The court can tell you how to do this.

There is a tension between the two opening instructions: the first box directs the appellant to file the notice even if the supporting documents are not available; the text that follows refers to documents that **must** be filed with the appellant's notice wherever possible.

The list includes a bundle containing all the documents being submitted. The instruction that this must be filed with the appellant's notice is unrealistic. The bundle must include a transcript or note of the judgment being appealed, unless the case was assigned to the small claims track and, in practice, this is never available within the 14 days allowed for filing an appeal.

All court offices in our study allowed appellants 28 days after filing their appeal in which to provide a bundle. A judge could then grant further time. In appeals that need to be expedited, for instance appeals against eviction, the requirement for supporting documents was dispensed with and the case was brought into court at the first opportunity, even though there is no explicit provision for this approach in the rules. Even in less urgent cases, there was anecdotal evidence that judges often proceeded with an application for permission to appeal on the basis of the appellant's notice alone.

5.5 Transcripts

All High Court proceedings are recorded on tape or with the help of computer-aided transcription equipment. Court Service internal guidance on taping county court proceedings stipulates that '**All** hearings whether in open court or chambers should be recorded whenever the recording equipment is available' (emphasis in original).[44]

The Practice Direction to CPR 52 states that:

> 'Where the judgment to be appealed has been officially recorded by the court, an approved transcript of that record should accompany the appellant's notice'.[45]

The requirement to provide a transcript does not generally apply to first appeals in cases assigned to the small claims track, unless the court orders otherwise.[46] However, one DCJ pointed out the difficulty of proceeding without one if the litigant was unrepresented:

> *'A transcript should not normally be required at permission stage but it is frequently necessary to begin to understand what the appellant is complaining about'.*

As noted earlier, delay in obtaining of a transcript of the judgment of the lower court proved a major stumbling block to the effective processing of appeals. DCJs in our survey were critical of the unrealistic requirements of the Practice Direction and the wasted effort it caused.

> *'It is often impossible for litigants to obtain transcripts in time for their appellant's notice'*
>
> *'[The Practice Direction] is not capable of being complied with because transcripts can take up to six weeks and the appellant's notice has to be filed within 14 days. This leads to a massive waste of time in every case by rearranging the timetable for the date by which a transcript must be filed. It also duplicates work enormously'.*

The difficulty of obtaining a transcript within the allotted time also caused frustration among litigants. An unrepresented litigant who refused to complete our survey questionnaire but responded by letter was very angry at the problems encountered and the apparent lack of understanding on the part of court staff:

> *'The reason for dismissing [my] appeal was that I had not submitted an oral transcript of the judgment in the lower court. At the time of dismissal, I was awaiting a reply to my letter seeking clarification of a letter from Court Service staff working*

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[44] *Tape Recording of County Court Proceedings*, March 2003.
[45] Para. 5.12.
[46] CPR PD 52, para. 5.8 (4).

for the High Court, and daily asking Court Service staff in the lower court if the hearing was recorded, and could not obtain a reply'.

The procedure for obtaining a transcript involves a number of steps: completing and submitting a tape transcription request to the court on Form EX107; obtaining the tape from the court recording contractor that owns it; identifying the part of the tape to be transcribed; performing and returning the transcription; and getting the transcript approved by the judge who presided at the hearing. (There is no target time set for judges to approve transcripts, although study courts said they monitored the process closely). Litigants who cannot afford to pay for a transcript must apply to the court for the cost to be met from the public purse, introducing yet another possible source of delay.[47]

Courts reported that problems could arise at any stage. Solicitors' firms were as likely to run into difficulties as litigants in person.

'The appellant may have to agree a contract with the transcriber. Even solicitors do not realise they have to fill in form to get a transcription, or else they think that all proceedings are automatically transcribed' ***(member of court staff)***

'Quite a lot of practitioners do not appear to understand the mechanics of obtaining a transcript – never mind litigants in person. Sometimes they ask for the wrong part to be transcribed; there can be delays by the court sending out the tape; some transcribers are less efficient than others; and there are delays by judges in approving the transcript' ***(DCJ).***

Where the delay was caused by the contractor, there was little the court could do to speed things up because of the nature of court reporting contracts:

'There is a problem in getting the tapes released from the contractor who owns them. The easy route is to use the same contractor for transcription but sometimes solicitors want to use someone else.[48] This has been the subject of a complaint to HQ by the diary manager. There should be a clause in the contract dealing with release of tapes. At the moment, it is unclear if there is a contract at all' ***(member of court staff).***

In addition to delay, problems with the content of transcripts arose because of inadequate recording equipment in many courts, particularly smaller ones. This resulted in transcripts peppered with the word 'inaudible'.

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[47] Litigants who qualify for fee remission or exemption do not automatically receive a free transcript. See CPR PD 5.17 and also *Plender v Hyams,* 1 September 2000. A transcript of the judgment can be found at http://www.hrothgar.co.uk/YAWS/reps/plender.htm.

[48] The Court Service maintains a list of firms authorised to perform tape transcription of court proceedings. There is also a schedule of maximum prices that these firms can charge for transcription.

DCJs at regional appeal centres in our study adopted a pragmatic approach to transcripts. Despite the obvious difficulties, they would conduct an initial paper review, and in at least one court an oral permission hearing, in the absence of a transcript. This led to questioning of the rules governing transcripts:

> *'The problems call into question whether we should be so insistent on transcripts, particularly in modest but non small claims track claims and on interlocutory applications. I am regularly having to issue unless orders regarding the filing of the transcript. It is an area where the court tends to lose control of the matter. If we are going to stay with transcripts as the general principle, perhaps the system for obtaining them needs review'.*

Paragraph 5.12(1) of CPR PD 52 stipulates that where there is no officially recorded judgment, a written copy signed by the judge is acceptable instead. Some judges regarded a written judgement as an adequate substitute, even where a recording of proceedings existed:

> *'In nearly all cases I do not have a transcript of judgment. I try first to get a note of the judgment. Getting a transcript is hugely disproportionate in terms of cost'* ***(DCJ)****.*

Another DCJ suggested elevating the acceptability of the written judgment in the Practice Direction:

> *'To my mind, it is simpler to start with the written judgment and then to proceed to make it clear that if there is no written judgment then the next choice is the transcript. To start the paragraph off by saying the transcript must accompany the appellant's notice lacks common sense. How often is the transcript available that quickly? This paragraph can also cause confusion in the court staff with requests going off to appellants for a transcript when there is a written judgment'.*

A Lord Justice seemed to support this proposal, at least for appeals to a circuit judge:

> *'There is a real problem over transcripts in appeals from a district judge to a circuit judge regarding why a decision has been made in a particular way. A litigant in person often says that a decision is wrong and unjust. A judge needs to see the reasons for the decision in order to assess whether the appeal has any merit. It may be that district judges should be required to write out their reasons immediately on making an order … A transcript is the best solution but the question of proportionality arises in relation to the delay and expense involved in obtaining a transcript. A note approved by the judge should be sufficient'.*

A DCJ at one study court went even further:

> *In fact, [the transcript requirement] does not work well for between a quarter and a third of cases in which no transcript or bundle is needed. It is unwieldy for small claims or urgent appeals, for instance a refusal to take a case out of a trial list. Rather than an all-embracing provision, I would prefer a Practice Direction indicating to judges how to proceed but to require appellants to file their appeal and leave it to the judge to give directions as needed. The judge orders a transcript if he*

takes the view that one is required but it is not always necessary if the appellant's notice is based simply on the view that the judge in the lower court believed the wrong person. What is needed is a bespoke order in every case with the flexibility to dispense with the bundle and/or transcript'.

However, if the requirement for transcripts were to remain, there were two suggestions from DCJs as to how the delay in obtaining them could be reduced:

'Transcripts could be made available more efficiently if e-mailed directly to the DCJ'

'Bring the production of transcripts in-house while still charging a fee. That would bring the process under court control'.

6 The Bowman objectives

6.1 Introduction

The Bowman report set out a number of objectives for the reforms to appellate procedure.[49] Although Bowman had formulated these objectives with the Civil Division of the Court of Appeal in mind, most are equally desirable goals for appellate procedure in the lower courts. In interview, judges were asked whether the changes introduced in the wake of the Bowman report had produced the desired results in respect of appeals to the High Court and the county courts. Their responses are presented for each of the relevant Bowman objectives in turn. The chapter draws also on the experiences of unrepresented litigants and solicitors who responded to our survey.

6.2 Reducing the time cases take to reach a hearing

As discussed earlier, courts do not generate statistics that would provide definitive evidence as to whether this objective had been achieved. Judges were generally divided about whether waiting times had fallen. Two DCJs thought they had but a third was clear that the time to reach a hearing was longer than prior to the introduction of CPR 52.

Presiding Judges also differed in their estimate of the impact. One commented:

> *'The [waiting] time to hear appeals has reduced dramatically. Appeals used to take months or more to reach a judge. Nobody was sure what to do with them. Some benefits have come as a result of the Civil Procedure Rules and some because of changes to appellate procedures. The Woolf reforms have been particularly successful in relation to appeals'.*

Another felt that, in the case of appeals to a High Court judge, waiting times were driven by judicial itineraries rather than rules:

> *'In the High Court, the framework for hearing appeals is set by civil listing windows. High Court judges are available only for limited periods (unless some time becomes available in the timetable of a High Court judge hearing crime) and there could be a delay if an appeal cannot be heard within a window. I would be reluctant to "smash" our listing windows for the sake of appeals; the imminence of a High Court judge visit helps to generate settlements'.*

A High Court judge dealing with appeals at the RCJ was 'wholly unconvinced that we are saving time or money. In fact, I suspect the reverse is true'. A colleague saw little difference in waiting times as a result of the changes.

[49] Chapter 1, para. 37.

Solicitors were also asked about the time courts took to deal with appeals. They responded as follows:

Table 6: In general, are you satisfied with the time it takes to deal with appeals:

	Yes	No
to a circuit judge	10	5
to a High Court judge?	10	3

The others did not know or did not respond to this question.

Two of those who were not satisfied detailed their concerns:

> *'In some cases there are still delays in cases being listed for a hearing and delays in receiving the judgment'*
>
> *'Speed up process between lodging the appeal and the appeal hearing with, say, standard paper directions'.*

Three solicitors were specifically concerned about delay in hearing appeals against decisions that resulted in appellants being made homeless:

> *'The majority of appeals I bring are statutory appeals on homelessness brought under section 204 of the Housing Act 1996. There is a requirement that we use the appellant's notice which has little relevance to housing appeals. There are no court proceedings that the appeal is being brought within and this causes confusion and delay at the court. If injunctive relief is being sought on behalf of a homeless client this causes further confusion'*
>
> *'Families are often in temporary accommodation for many months which is totally unacceptable'*
>
> *'Appeals in homeless cases [take too long] while the appellant waits in often appalling temporary housing'.*

6.3 Reducing the length of the hearing

One DCJ felt that the length of an appeal hearing has probably reduced, because what was previously a re-hearing had generally become a review of proceedings in the lower court. Re-hearings had become unusual, but not unheard of:

> *'A re-hearing may occur if there was no transcript and both sides were unrepresented or if a district judge failed to give any reasons and it was impossible to discern the basis of the decision. This does happen' (DCJ).*

A Presiding Judge reported the views of a DCJ not in the study that the lengths of hearings had reduced because of the practice of timetabling appeals. But most thought that any

effect on hearing length was small. A High Court judge pointed out that appeals from bankruptcy registrars and Chancery masters and appeals in bankruptcy from the county court were already reviews of the lower court decision, not re-hearings. A Lord Justice observed that, if a significant number of appellants refused permission on paper renewed their application at an oral hearing, the question was really whether an oral permission hearing was shorter than an appeal. A High Court judge thought it was not:

> *'The oral [permission] hearing is of a similar length to an appeal as litigants must be allowed to explain their case'.*

6.4 Maintaining the quality of the decision-making

Judges consulted during the study were generally confident that the quality of decision-making had not deteriorated as a result of the reforms to appellate procedure. However, one DCJ was troubled by the possibility of mistakes in 'small' county courts where DCJs dealt with very small numbers of appeals.

There were no concerns expressed about a single High Court judge hearing appeals that would previously have come before a panel of Lords Justices in the Court of Appeal. One Lord Justice commented that the recent reduction in the number of second appeals (all of which lie to the Court of Appeal) indicated the high quality of appellate decisions in lower courts.

6.5 Simplifying procedure

Despite the introduction of a single appellate form and set of requirements, there was little support among DCJs for the claim that procedures were simpler than before.

> *'Having the same requirements for applications to all appeal courts does not make sense. Applicants must provide three copies of all paper work, including the appeals notice, and we do not need this. The paperwork requirements are overly bureaucratic'*

> *'I feel that the appellant's notice is far from user friendly. It is based on a one size fits all approach'.*

There was particular concern among DCJs about the difficulties faced by unrepresented litigants:

> *'Notices of Appeal, particularly in small claims cases, are still unnecessarily complicated ... litigants in person, who form the majority of small claims appellants, are generally incapable of completing Notices of Appeal properly because of lack of understanding and their complexity'*

> *'The process is difficult in the extreme for litigants in person. The rules and Practice Direction are complex and wide-ranging'*

'The list of documents is formidable, particularly for an appellant in person'.

A Lord Justice explained that 'the Rules Committee is keen to keep the same forms for practitioners across levels of appellate court' while another felt that 'you cannot make rules that distinguish represented from unrepresented parties'. However, it was acknowledged that the appellant's notice was unnecessarily complicated for small claims.

Unrepresented litigants in our survey complained that procedures were designed too much with lawyers in mind:

'For unrepresented people, the appeals process can be very daunting and difficult to understand'

'There is simply too much legal jargon and gobbledegook'

'Everything seemed to be aimed for the use of legal professionals and had to be "adapted" for somebody not legally represented. I felt the system highlighted my inexperience in legal matters'.

The complexity of appellate routes attracted criticism from many quarters. The view of one DCJ was typical:

'One difficulty has been replaced by another. Previously, it was necessary to master case law and arcane rules on what constituted an interlocutory appeal. The new concept of a final decision was intended to be simpler – it is one that determines the case, even if it is a preliminary ruling – but confusion still arises from time to time as to whether a decision was final or not within the meaning of the Destination of Appeals Order' ***(DCJ)****.*

A Presiding Judge who was generally supportive of the new rules also had reservations about appellate routes:

'Procedure is more uniform and logical but it is difficult to know which court to appeal to; that was not thought through as well as some aspects'.

Another Presider admitted that 'even judges sometimes have a problem in working out to which court an appeal lies'.

Only one of the 12 unrepresented litigants in our survey had found appellate procedures easy to understand. Six said they were hard to understand and five that they were impossible to understand without help.

Five of the 11 litigants who responded to the question had identified the appropriate appellate court from a leaflet or other written guidance and three were told by a court

office. One had been told by an advice agency, one said they learned from the order (although this does not identify the appeal court) and one said 'I just knew'.

Five had had problems in identifying the correct appellate court. Three referred to lack of clarity in the guidance, including one who said:

> *'From the information provided it was extremely difficult to understand what to do. The leaflet was not logical, specific or clear'.*

A lawyer who assists unrepresented appellants seeking help from the Citizen's Advice Bureau in the RCJ felt that procedure was no simpler since the introduction of CPR 52. He described the identification of the correct appellate court as a 'fundamental problem' which confused many litigants who sought his assistance.

In our previous study of the impact of the changes on the Court of Appeal, the suggestion of simplifying appellate routes by always appealing to the next level of judge was dismissed as unacceptable by some Lords Justices. However, some support for the idea was expressed during the current study:

> *'An interlocutory appeal against the order of a district judge in a High Court multi-track case could be heard by a circuit judge rather than a High Court judge. In general, it would be better if an appeal always went to the next level of judge'* ***(Lord Justice)****.*

> *'There would be no fundamental problem with a system based on appealing always to the next level of judge. For now, a case allocated to the multi-track in which liability was not in dispute is appealed to the Court of Appeal. It is doubtful whether this was anticipated'* ***(DCJ)****.*

However, a High Court judge disagreed. In his view, too many appeals had been devolved downwards from the Court of Appeal:

> *'It is correct that final multi-track orders from the county court should go to the Court of Appeal. It would be wrong for an appeal against a final decision to be heard by a single judge. For that reason, I consider that the current practice in relation to fast track appeals is unsatisfactory'.*

6.6 Reducing cost

There was some support for the view that costs to the parties had reduced:

> *'The regime is simpler to the extent that tiers of appeal have been reduced and this has had the knock-on effect of reducing costs'* ***(Presiding Judge)****.*

However, those who considered that procedures were still too complex pointed out the cost implications:

> *'The appeals procedure is too cumbersome, time consuming and costs disproportionate for many appeals against interlocutory orders'* ***(DCJ)****.*

Another DCJ agreed that costs were still too high, particularly in small claims cases:

> *'Typically, the cost of an appeal hearing will be £2,000+ for each side where there is legal representation. The amount in dispute, particularly in a small claims case, may be only hundreds of pounds. Even in the largest small claims case the amount at stake will not exceed £5,000 and it is my view that costs totalling £4,000+ (often "+") are disproportionate'.*

A Lord Justice pointed out that disproportionate costs could sometimes be traced to inappropriate assignment of a case to a judge or a track:

> *'District judges should not be making final orders in multi-track cases. Dyson LJ sent out a note on this after the case of Jones & Anor v Gallagher & Anor.*[50] *This was a fast track case which was assigned to the multi-track as it over-ran its time limit of one day. This was wholly inappropriate. The costs were phenomenal: appeal costs of £4,000 for a case worth £8,000'.*

But a DCJ was unhappy with this guidance in relation to county court cases:

> *'It would be very rare – it should not happen – that a district judge would be asked to assess damages [in a High Court case]. But this could happen in a county court case. A district judge could refer to the DCJ for guidance if necessary'.*

Even where case assignment was not an issue, savings in some areas had been balanced by additional costs elsewhere:

> *'The permission requirement means there are no respondents' costs at the paper stage and the costs of reconsideration at an oral hearing should be less. But the costs to the appellant are increasing'* ***(DCJ)****.*

The issue of reduced costs for respondents provoked a lot of comment. Much of it centred on an oral permission hearing and whether the respondent should be present:

> *'The current system may have attempted to save respondents' costs. However, there is not as much in that argument as first appears. Respondents are not obliged to do anything but they can tailor their response to what is required, which may only involve a solicitor's letter or other written response. There is no great cost involved in a solicitor advocate or counsel coming to a hearing. My experience is that most respondents get involved at an oral (permission) hearing anyway'* ***(HCJ)***
>
> *'Respondents should not have to attend a hearing which is intended to be a filter. It is an important justification for the permission process. The cost of attending an oral hearing is significant. If you are represented, the consideration of permission*

[50] [2004] EWCA Civ 10.

on paper is sensible in order to avoid the considerable cost of an oral hearing. Jolly v Jay[51] *dealt with the issue of respondents' costs in attending an oral hearing for permission to appeal, but it was not published in the All England law reports and so did not come to the attention of the High Court. We operate the Jolly v Jay regime in the Court of Appeal. I remonstrated with a respondent who turned up at a permission hearing with a skeleton argument. The hearing is intended to be a filter and, on Jolly v Jay lines, the respondent can submit a written argument if they so wish'* ***(Lord Justice)****.*

One judge criticised a practice that increased costs by, in effect, forcing respondents to attend an oral permission hearing and prepare for a possible appeal:

'Litigants in person are generally unwilling to accept that an appeal has no real prospect of success at the paper stage. There is no requirement in the Rules to give written reasons at this stage, beyond "no real prospect of success". In fact I, and some others, do give full written reasons at this stage in an attempt to head off an application for an oral hearing, but this is often not enough to satisfy litigants in person. Some judges thus resort to listing applications for oral hearings "to be followed if successful by the appeal", without a paper decision stage. I personally try to avoid this because, inevitably, it increases delay and costs' ***(DCJ)****.*

6.7 Reducing the demand on the court, the administration and the parties

Many felt that the changes had resulted in more, rather than less, work for appellate judges:

'The Woolf reforms have resulted in more pre-reading for judges: there may be less time spent in court but the overall effort has not reduced' ***(HCJ)***

'Adding a permission requirement increases the work for the judge and the cost of the administration' ***(HCJ)***

'Whilst there are significant demands on DCJs in dealing with applications for permission to appeal on paper, this is generally regarded as part of the job, even though it usually demands considerable work out of normal court hours!' ***(DCJ)***

'Consider litigants in person, who constitute around 80 per cent of our appellants. If I receive the file to consider on paper and refuse permission, they nearly all ask to renew their application at an oral hearing. I must still give the paper review proper attention and take time to understand the issues. This is more difficult than at an appeal as I do not have the respondent's legal representative there to assist me. The papers are often handwritten and hard to make sense of and the judgment of the court below is usually missing … On average, I estimate that it takes me half to one hour [to review on paper]. It would take me no longer to deal with an actual appeal at which the respondent was legally represented. It would take half to three-quarters of an hour for a hearing on a hopeless case. Under the current rules, such a hopeless case would require one hour of a judge's time to consider on paper plus the time required for oral hearing if application for permission was renewed (as is usually the case). The oral hearing is of a similar length to an appeal as litigants must be allowed to explain their case. The hearing involves the time of the judge, the litigant in person and possibly the respondent' ***(HCJ)****.*

[51] [2002] EWCA Civ 277.

The demands on the administration had also increased in the view of most judges, especially in cases involving unrepresented litigants:

> *'Litigants in person put relatively high demands on court staff when it comes to appeal procedure and documentation'* ***(DCJ)***

In the opinion of one judge, reviewing cases on paper had increased the loading on court staff unnecessarily:

> *'For the administration, the paper stage involves typing up the reasons for the decision, additional correspondence and listing the oral hearing. All this could be avoided if the office only had to chase the papers and, once they arrived, list for a 15 minute permission hearing. My opinion is firmly that we do not need the paper stage'* ***(HCJ)****.*

Demands on the parties were also thought to have increased, largely because of the difficulties of complying with the requirements for lodging an appeal:

> *'The list of documents is formidable, particularly for an appellant in person'* ***(DCJ****)*

> *'I accept it is a bit of a sledgehammer to impose on other courts the requirements of the Court of Appeal for skeleton arguments'* ***(Lord Justice)****.*

One judge took issue with the Bowman objective of reducing demand and complained that reforms designed with this in mind had caused litigants to seek alternative ways to resolve disputes:

> *'Reducing demand should not be an issue; we are here to provide a service, not to meet bureaucratic needs. The changes have been driven by the fact that available judge-power is overstretched and the administration is over-burdened. As a result of the changes, people are now frightened of going to litigation. We have driven them from the system and they often settle instead for mediation, an inferior form of dispute resolution which nevertheless entails the payment of large fees'* ***(Presiding Judge)****.*

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

See the discussion of permission to appeal in the next chapter.

6.9 Introducing greater certainty as to the cost and time.

None of the judges interviewed during the study offered a definitive view on whether this objective had been achieved; one said that 'probably' it had.

7 The permission requirement

7.1 Introduction

This chapter looks at the impact of CPR 52.3, which extended the permission requirement to nearly all appeals. It considers whether the provision has worked as an effective filter and whether a two-stage permission process is justified. The practicalities of having the same judge deal with a permission application on paper and at a subsequent oral hearing are examined. There is also a discussion of the attitude of respondents to attending permission hearings and remaining anomalies in the permission requirement.

7.2 Effectiveness of the permission requirement as a filter

Of the 16 DCJs consulted during the study, all but two felt that the nearly universal requirement for permission to appeal was effective at filtering out unmeritorious appeals at an early stage. One dissenter was against any permission requirement while the other took issue with the term 'early':

> *'For litigants in person, refusal of permission to appeal almost always leads to an oral application'.*

High Court judges were generally more guarded than DCJs in their attitude to the permission requirement.

> *'The filter is justified in principle but I am not sure if we have the right criterion. It is quite elusive and it can be applied differently by different judges. The filter is a useful device to throw out hopeless appeals but it is over-rigorous at this stage to consider whether the appeal would have a better than even chance of success. That is too high a threshold, takes too long to apply and is too close to the appeal itself' **(Presiding Judge**)*
>
> *'I would prefer to go back to the position before the new rules, possibly with a permission requirement linked to a financial limit. I am concerned that there should be access to the appeals systems. It may be that the universal permission requirement is an unfortunate necessity because of limitations on manpower and to restrict the volume of appeals but there should at least be a benign approach to granting permission **(Presiding Judge)***
>
> *'The only reason [for the permission requirement] is to weed out the hopeless appeals. It would not concern me if it were abandoned except that respondents would be exposed to expense' **(HCJ)**.*

One High Court judge expressed outright opposition to the requirement for permission in appeals to the High Court:

> *'The idea of introducing a general requirement for permission to appeal was to save time and money by weeding out the hopeless appeals. In the Court of Appeal, you save the time of three Lords Justices if you knock out a hopeless appeal at the paper review: in the High Court, the arithmetic is different as a High Court judge's*

time is spent reviewing the case on paper in order to save the time of a single High Court judge. It would be interesting to know if the High Court is achieving the intended benefits of the permission requirement or whether it is proving more trouble than it is worth. We need to look at the difference between what we are gaining and what we are spending. I know of no other jurisdiction comparable to ours with this requirement. We have interposed something that some may argue philosophically undesirable in an attempt to save money. All in all, I am wholly unconvinced that we are saving time or money. In fact, I suspect the reverse is true. I cannot see that removing the permission requirement would mean more time spent in court. The oral permission hearing is the litigant in person's last chance so you have to look at the matter carefully. There are still some cases, no more than 10 per cent, where something has gone wrong in the lower court. It takes a judge no longer to dismiss a hopeless appeal than to deal with an oral hearing for permission'.

In our survey, we asked solicitors whether, on balance, the introduction of a general requirement to apply for permission to appeal had made the appeals process more efficient. Eight said it had while five thought it had not; the other six who responded did not know.

7.3 The paper stage

Although many DCJs acknowledged that unrepresented litigants were seldom put off by a refusal of permission on paper, all those in favour of a permission requirement wanted to retain the option of making a paper decision. Of the 15 DCJs who provided information, 11 said they would review an application for permission to appeal to a circuit judge by a litigant in person and decide whether to make a paper decision on a case-by-case basis; three said they always made a paper decision; and one always listed for an oral hearing without a paper decision.

Eight DCJs were from centres where appeals to a High Court judge were heard. Of these, five routinely referred an application for permission to a High Court judge (or a section 9 judge in the case of an appeal from a district judge in the High Court) for a decision on the papers. Two others referred some cases for a paper decision while the remaining court listed the case directly for an oral hearing. Three DCJs reported difficulty in obtaining the time of a High Court judge to review a permission application on paper or to preside at an oral permission hearing.

A High Court judge who approved of the permission requirement in principle saw little point in the paper review:

'If the judge grants permission to appeal on paper then the case goes to a full hearing and the permission stage was unnecessary. If the application is hopeless or not winnable and permission is refused then unrepresented litigants invariably renew the application at an oral hearing. In either event, the paper is a complete waste of the judge's time.

For the administration, the paper stage involves typing up the reasons for the decision, additional correspondence and listing the oral hearing. All this could be avoided if the office only had to chase the papers and, once they arrived, list for a 15-minute permission hearing. My opinion is firmly that we do not need the paper stage'.

Other supporters of the permission stage conceded that the paper review served little purpose in the case of an unrepresented litigant.[52] There was sympathy for those courts that listed directly for an oral hearing without a paper decision. However, a Presiding Judge warned against this practice becoming too embedded in the local legal culture:

'I have no particular concerns about centres adapting administrative procedures in practical ways provided they do so in accordance with the rules and do not elevate them to the status of local practice directions. A direction by the DCJ to list for oral hearing all applications for leave which are made by litigants in person (who habitually seek oral hearings in any event) would be a local practice direction, but such a decision in an individual case would not. The distinction is a fine one'.

Applications for permission to appeal made by unrepresented litigants to the High Court at the RCJ are listed for an oral hearing without being reviewed on paper, unless the litigant explicitly requests otherwise. Table 14 in Appendix 1 shows that in 2002 and 2003, 24 per cent and 16 per cent respectively of permission applications renewed at an oral hearing were successful.

The (aggregated) position for the cases examined at the three regional appeal centres is shown in the following table:

[52] For the last eight years, the Court of Appeal has dispensed with a paper decision in an application for permission from an unrepresented litigant and listed immediately for an oral hearing. In response to concerns about this practice, alternative approaches have been tried on an experimental basis. In one such exercise, all unrepresented litigants refused permission on paper renewed their application at an oral hearing. In another experiment in 2003, all applications were first put before a Lord Justice. If the applicant was unrepresented, the Lord Justice would certify if the application was devoid of merit. There would then be an oral hearing before a separate Lord Justice who could say that it was without merit and dismiss the application.

Table 7: Number of appellants refused permission on paper and renewing at oral hearing

Stage	Total	LiPs (% of total)
Applications where a paper decision was made	60	18 (30%)
Refused on paper	34	16 (47%)
Renewed application at oral hearing	13	6 (46%)
Granted permission	5	1 (20%)

Despite a common belief that unrepresented litigants always renew at an oral hearing an application for permission refused on paper, only six out of 16 did so in study cases. This was a slightly smaller percentage than for represented litigants, among whom seven out of 18 renewed.

7.4 Judge continuity

There are clear advantages of efficiency if the judge who refuses an application on paper presides at an oral hearing at which the permission application is renewed. On the other hand, critics have pointed to the potential unfairness of a process that involves the judge deciding whether his previous decision was wrong. They prefer an independent assessment by a new judge.

Nine DCJs said that, whenever possible, they would preside at the oral permission hearing themselves. The other six spread such hearings among fellow circuit judges although three would endeavour to hear certain kinds of application themselves. Examples cited were appeals on a procedural point, costs appeals and appeals potentially devoid of merit.

The High Court at the RCJ tries to list hearings of renewed applications before the same judge that refused permission on the papers. This is easier where the judge sits in the Chancery Division as High Court judges in the Queen's Bench Division spend much of their time on circuit. In 2002 and 2003, the judge refusing permission on paper presided at the oral renewal in 36 per cent and 22 per cent of such hearings respectively.

The reliance on visiting High Court judges means that regional appeal centres seldom list the oral hearing before the same High Court judge who refused permission on paper. In our sample of cases, there were seven examples of a permission application being renewed in front of the same judge that refused on paper. Only one of these hearings was before a High Court judge; the other six were in front of the DCJ.

7.5 Respondents' attendance at oral hearings

The case for a permission requirement is undermined if respondents are routinely represented at oral hearings to decide whether permission should be granted. However, respondents are likely to be represented, and the costs of attending allowed, if the appeal is listed to follow immediately the permission hearing providing this is successful. DCJs were asked under what circumstances they would list in this way. One DCJ had never made such an order. Six said they would do so if the permission application was likely to be granted, although such predictions were sometimes unreliable:

> *'I do this quite frequently because often there seems to be something in the appeal but, when one hears the other side, the appeal is in fact hopeless'.*

Five DCJs listed a permission hearing 'with appeal to follow' if they wanted to hear from the respondent before deciding on permission. This meant that, if permission was granted, the matter could be resolved without the need for an additional hearing. Other reasons given were to save time and costs, if the value of the appeal was small or if hearing the case for permission would involve hearing all about the appeal.

A High Court judge said he occasionally listed an oral permission hearing with an appeal to follow if granted if the permission was likely to be granted or if the appellant was unrepresented and it was important to get assistance from the other side:

> *'This might happen, for instance, in the case of a mortgage possession appeal from the county court, where the respondent is a bank or building society and they can recover the costs without an order by adding it to the debt. The situation is different for a respondent who is a private individual. The costs incurred can be exorbitant'.*

Our survey of solicitors was carried out before the publication of revised guidance in CPR PD 52 stating that respondents should be informed of the date of an oral hearing for permission to appeal.[53] There was no change to the guidance that the court should not normally ask for submissions from or attendance by respondents at the permission hearing. The respondent's costs of attending the oral hearing should only be allowed if the court had made such a request and permission was refused.[54] Fourteen solicitors in the survey confirmed that they wished to be told the date of an oral permission hearing, three did not and the other two were not sure. Four said they would always, or almost always, attend an oral permission hearing when representing a respondent. Others cited the circumstances in which they would attend, including:

[53] Para. 4.15.
[54] Paras 4.22 – 4.24.

- if the appellant was legally aided;
- to oppose the application for permission or to seek permission to cross appeal;
- where the purported grounds for appeal were uncertain or ambiguous;
- where there was a concern that the appellant might not present the case fairly;
- in a complex matter;
- where the application hung in the balance; or
- if the client was keen to hear the outcome.

One responding solicitor was opposed to listing an appeal immediately after a permission hearing:

> *'We think it is undesirable for a judge who is involved in considering an application for permission to appeal to be involved in the hearing of the appeal itself'.*

7.6 Anomalies

Some judges commented on anomalies that persist in respect of the permission requirement. A DCJ observed that permission to appeal is not required in bankruptcy or insolvency decisions of a district judge or a circuit judge in the county court or a registrar in bankruptcy of the High Court.[55] He described the absence of a permission requirement in hopeless insolvency appeals as having 'no logic to it'. But a Lord Justice was warned that 'there are real problems in making changes that require legislation'.

[55] Insolvency Act 1986, section 375(2) as amended by Access to Justice Act 1999, Schedule 15, Part III. The appeal is to a High Court judge. An appeal from a (first instance) decision of a High Court judge in such matters lies to the Court of Appeal and requires the permission of the judge or of the Court of Appeal.

8 The quality of information available to litigants on the appeals process

8.1 Introduction

This chapter reports the views of judges and litigants on the guidance available on appellate procedure.

8.2 Written guidance

In our survey, unrepresented litigants were asked what written guidance they had consulted when completing their appellant's notice:

Table 8: Guidance referred to by unrepresented litigants

Guidance	Number who referred to it
Guidance on the appellant's notice and accompanying leaflet	8
The Civil Procedure Rules	5
The Practice Direction to Part 52	2
Access to Justice Act 1999	1
Legal text book	1
The Internet	1

One litigant described the quality of written guidance as 'excellent'. Ten others disagreed, including those who found the quality 'very poor', 'too limited' and 'not easy for lay people to understand'.

Thirteen responding solicitors felt the quality of the written guidance was adequate or better. Five were critical of the quality in varying degrees:

> *'too fragmented'*
>
> *'of limited assistance in housing cases'*
>
> *'not detailed enough; more explanation required'*
>
> *'could do with being more simplified'*
>
> *'not very clear [on what happens] once the appeal has been issued. Completing the appeal notice is OK but information on the subsequent conduct of the case is confusing'.*

Judges generally accepted that there was scope for improving the information available to litigants. Although the quality of information leaflets was thought to be good, many judges

doubted if they were read. Misunderstandings were not limited to unrepresented litigants and court staff bore the brunt of the damage:

> *'Solicitors also get things wrong and they would rather call the court than look things up'* ***(DCJ)****.*

A number of suggestions were made for improving the information available on appeals, including:

- simplifying the requirements;
- a step-by-step pictorial guide through the procedure along the lines of David Barnard's book 'The Civil Court in Action' published in the 1980s;
- clear guidance on the Internet; and
- reversing the erosion of access to civil legal aid.

Our previous study recommended the inclusion of tick-boxes on the standard form used for court orders which would be completed by the judge and provide information about any possible appeal.[56] There was judicial support for this idea in the current study:

> *'It would help to have tick boxes on orders to indicate whether or not they were final orders and to which court any appeal would lie. But this would need to be accompanied by a warning that appeals can be expensive. Even if this information was not on orders, it should be made readily accessible to litigants. If judges have to look up the definition of a final order then what about litigants in person? There is confusion, for instance, over whether an order striking out a claim is final. There should also be an explanation about the nature of an appeal hearing: that it is a review and not a re-hearing, so that litigants will not be able to present their evidence again'* ***(Presiding Judge****)*
>
> *'Orders should say whether or not they are final orders. This could be incorporated in the template'* ***(DCJ)****.*[57]

8.3 Advice from court staff

Judges' views about the help provided to litigants by court staff were mixed. Some praised their efforts:

> *'My impression is that the office staff bend over backwards to help'* ***(HCJ)***
>
> *'Court staff make heroic efforts'* ***(Presiding Judge)***
>
> *'The appeals clerk spends much time explaining things to would-be appellants'* ***(DCJ)****.*

However, a Presiding Judge pointed to the inexperience of the staff at regional centres in dealing with appellate matters:

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[56] Para. 9.3.
[57] The electronic template referred to in para. 0.

'London has experience in the administration of civil appeals but this is not the case on circuit. Staff on circuit appear to be 'scared' of appeals and put them before a judge to resolve problems which should be dealt with administratively. They lack hands-on experience of appeals, in contrast with the extensive experience available in the RCJ. As a result, the papers provided to the judge on circuit are often in a poor state. The Bar also complain about the attitude of unhelpful court staff in respect of appeals'.

Seven of the 12 unrepresented litigants in our survey had asked court staff by phone for help on appeals procedures; seven had done so at the public counter in the court building; and one had sought advice by letter. Three described the service provided as 'excellent'. Three praised the service but with reservations:

'Good on general matters'

'Court staff were helpful but they have limited time available due to pressure of work. Unless a LiP has done a considerable amount of research and is familiar with the process it is very difficult to appeal'

'Very helpful but not very knowledgeable. I kept having to seek information from elsewhere'.

This last litigant had been given a form by a member of the court staff 'that she said was not meant to be used for my appeal but was the closest and would have to suffice'.

Five litigants had formed a negative opinion of the service they had received:

'They were short in their reply, as if I should know'

'Very bad. They are not helpful and get angry when complainants ask about their case'

'Biased. In some instances actively preventing sensible evidence being given to the judge'

'Staff in the county court are unable to give help. They confuse it with "legal advice"'.

Two litigants had experienced difficulty in getting information about the correct appellate route from court staff. One of these had resorted to consulting an advice agency instead. The other commented:

'Getting advice on the appeals process was a problem. It was not clearly explained that the appeal court depends on the status of the [first instance] judge'.

Eight solicitors had asked court staff for help on appeal procedures. Most had received a good response and were pleased with the service they received. However, some felt there was room for improvement:

'The service could be improved if the same clerk was responsible for one case throughout'

'The staff are usually efficient and helpful but there is confusion as to the procedure on housing appeals (it seems). Staff ask me for help on the procedures to be followed rather than the other way round'

'Generally the staff are very pressed, particularly in assisting litigants in person'

'The quality of information on mediation was mixed'.

8.4 Suggestions for improvement

Unrepresented litigants were asked for suggestions about how the how the service might be improved. Some called for a simpler system:

'The process must be clear and easy. It is part of a long process which may or may not have gone wrong but it needs to be resolved quickly'

'The process needs reorganising by a systems analyst, not people steeped in legal processes'.

There were calls for easy-to-follow written guidance on how to appeal. One litigant suggested including a glossary to explain legal terms used and one thought that completed example forms would help. A third wanted more practical guidance on the court process for unrepresented litigants, including an 'explanation of what is accepted on hearing the appeal, the personnel in court, how to address the judge and what information to present'.

The most common plea was for more accessible personal help:

'The phone was not manned all the time'

'Courts should have a person assigned to help LiPs and guide them through the process. The person should be legally qualified so that the correct procedures and course of action are followed'

'I think to work as part of a team is good in order to deal with cases quickly. But this does not happen with staff who hide themselves away, creating problems for claimants. Staff should be better managed to ensure they provide a good service'.

Solicitors were not asked specifically about improvements but one volunteered that 'separate desks at court for those who have queries and those who do not would be helpful'.

9 The judicial role

9.1 Introduction

This chapter presents the views of judges interviewed during the study on four aspects of the judicial role relating to appeals: the need for consistency of approach between appeal centres and across the tiers of appellate courts; the use of recently introduced civil restraint orders which give judges more power to constrain the activities of vexatious litigants; judicial training; and the effectiveness of mechanisms to provide first instance judges with feedback on the outcome of appeals against their decisions.

9.2 Consistency of approach

Senior judges were asked for their views on the consistency of approach to appellate work across appeal centres. A High Court judge pointed to the difficulties of identifying inconsistencies:

> *'I cannot comment directly because judges do not see each other's work'.*

A Presiding Judge agreed:

> *'Queen's Bench High Court judges are so disconnected from one another that there is no corporate approach on any matter'.*

For most interviewees this was not a cause for concern:

> *'Consistency of judicial approach should "come out in the wash"'* ***(Presiding Judge)***
>
> *'There is some inconsistency but the guidelines are pretty clear and most judges should be able to identify hopeless appeals'* ***(HCJ)***
>
> *'Consistency does not matter in non-CPR cases'* ***(Lord Justice)****.*

But some judges acknowledged that inconsistency could create problems. One example was the diverse practice in relation to paper reviews referred to above. Another related to giving reasons for decisions:

> *'Differences in approach between DCJs can be a curious glitch in the system. Reasons are not always given for decisions at a paper review of an application for permission. A solicitor may accept a judicial decision that "I agree with the district judge" but a litigant in person is unlikely to do so'* ***(Presiding Judge)****.*

There was more concern about differences in approach between levels of appellate court:

> *'The requirements for appeals in lower courts (apart from small claims) should be the same as in the Court of Appeal'* ***(Lord Justice****)*

*'The profession needs to have confidence that there is a single system in operation across the board' **(HCJ)**.*

Nevertheless, differences existed, particularly in relation to unrepresented litigants. A number of judges referred to contrasting attitudes to applications for obtaining a transcript at public expense. The dismissal list used in the Court of Appeal and the High Court at the RCJ was not favoured by regional county courts or appeal centres which relied instead on 'unless' orders. A High Court judge disapproved:

'I dislike the use of "unless" orders as an alternative to the dismissal list: it just creates another set of orders to police'.

But some defended the differences:

*'Harmonisation is a worthwhile objective, but in the case of the permission requirement there is a good argument to do things differently in the High Court from the Court of Appeal' **(HCJ)***

*'Appeals to the Court of Appeal are a different kettle of fish from an appeal, say, from a district judge who has refused to set aside a default judgment. This flows in part from the fact that a large part of the Practice Direction applies across the board and I canvass whether an attempt should not be made to simplify the process at the lower level. A much more formalised and detailed procedure is plainly appropriate for the Court of Appeal' **(DCJ)**.*

Another DCJ agreed:

'The problem is that the process is born out of practice in the Court of Appeal. Part 52 and the Practice Direction works quite well for appeals against final orders in multi-track cases – there you need a transcript and a bundle – but it is not suited to an appeal from a district judge who refused to suspend a warrant for bailiffs to execute the next day'.

9.3 Civil restraint orders

In our previous study, judges complained about the activities of certain litigants in person who subverted the intention of the rules by making a series of hopeless and specious applications relating to the same events. This was often done at public expense by litigants who qualified for fee exemption. Vexatious litigant and *Grepe v Loam* orders were seen as too cumbersome to respond adequately to the situation. Since then, civil restraint orders have been introduced. The details are set out in the judgment in *Bhamjee v Forsdick and Others*.[58] Paragraph 53 of the judgment summarises the three kinds of order which may be made:

[58] [2003] EWCA Civ 1113.

1. A judge at any level of court should consider whether to make a civil restraint order if a litigant makes a number of vexatious applications in a single set of proceedings all of which have been dismissed as being totally devoid of merit. Such an order will restrain the litigant from making any further applications in those proceedings without first obtaining the permission of the court. Any application issued without such permission shall stand dismissed without the need for the other party to respond to it.

2. If a litigant exhibits the hallmarks of persistently vexatious behaviour, a judge of the Court of Appeal or the High Court or a designated civil judge (or his appointed deputy) in the county court should consider whether to make an extended civil restraint order against him. This order, which should be made for a period not exceeding two years, will restrain the litigant from instituting proceedings or making applications in the courts identified in the order in or out of or concerning any matters involving or relating to or touching upon or leading to the proceedings in which it is made without the permission of a judge identified in the order. Any application for permission should be made on paper and will be dealt with on paper.

3. If an extended civil restraint order is found not to provide the necessary curb on a litigant's vexatious conduct, a judge of the High Court or a designated civil judge (or his deputy) in the county court should consider whether the time has come to make a general civil restraint order against him. Such an order will have the same effect as an extended civil restraint order except that it will cover all proceedings and all applications in the High Court, or in the identified county court, as the case may be. It, too, may be made for a period not exceeding two years.

Guidance on the procedure for making these orders has been provided in a Practice Direction to supplement CPR 3.11.[59] The Court Service has issued separate guidance for its staff on the management of information relating to the orders.[60] This involves the use of two Excel spreadsheets: one held locally on which courts record orders made there and the other recording orders across all courts which is maintained centrally by the Civil Business Branch. Individual courts let the centre know when they make an order by completing and submitting a specially designed form. The central database can be accessed by courts through the Court Service Infonet.

[59] The Practice Direction was issued with the 36th update to the Civil Procedure Rules and can be found at http://www.dca.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part03c.htm.
[60] Guidance on Without Merit and Civil Restraint Orders, October 2004.

The spreadsheets record not only civil restraint orders but also instances where a court order records that a statement of case has been struck out or an application dismissed because it is totally without merit.[61] In such circumstances, the court should consider whether a civil restraint order should be made but it is not obliged to make such an order. By recording totally without merit claims on the central database, it is intended that courts can check the record of a particular litigant. This, in turn, will assist judges confronted with a claim totally without merit in deciding whether to make a civil restraint order.

Although the orders had been available for only a short time when fieldwork was conducted, we asked DCJs whether they had made use of them and how they viewed their effectiveness. Thirteen out of 16 DCJs had made such an order and most welcomed them as a much-needed measure to curb the activities of a small number of litigants who set out to abuse the system.

> *'I see Bhamjee as an enormously useful decision – the finest decision since the invention of the carbolic smoke ball'*
>
> *'They are likely to be a very useful instrument to prevent court and staff time and other parties' costs being wasted'.*

Many DCJs wanted more experience with the orders before assessing their effectiveness although initial signs were promising. But some could already point to weaknesses:

> *'[The process for making a civil restraint order] could do with some refinement. Most importantly, it creates a whole raft of new work for the hard pressed DCJ. To make an effective civil restraint order in a single case is a full day's (out of court) work … I see all the files, create an audit trail, then write a judgment and draft order. I then have the litigant in – I must listen to him before issuing the order'*
>
> *'It is a problem that the orders only apply to the court where they are made. A High Court judge refused permission to appeal and enlarged the order to include Manchester but the litigant can still go to other courts'*
>
> *'They result in more permission applications but give us some control'.*
>
> *'Not very [effective] until a national data base is set up upon which all such orders will be recorded'.*

This last comment was made before the creation in August 2004 of the spreadsheets recording civil restraint orders and orders totally devoid of merit. Judges have not been formally told of the existence of the spreadsheets. However, there has been judicial interest in the subject and a DCJ has set up a conference on FELIX, the judicial electronic

[61] The requirement to record this information on the order is contained in CPR 3.3(7).

conferencing system, on civil restraint orders with the names of those against whom an order has been made.

One DCJ felt that vexatious litigants were a fact of life for civil courts and warned of the human rights issue raised by the use of civil restraint orders:

> *'I am afraid we have to recognise that attempts will be made to exploit the system by those who are entitled to do so free of charge. Imposing restrictions will inevitably lead to argument about restriction of access to justice'.*

This note of caution was echoed by a High Court judge:

> *'At some point you must be able to tell the litigant that they can do nothing more but this is difficult because of ECHR considerations'.*

Presiding judges welcomed the new orders but they also reserved judgment on their effectiveness:

> *'One important test of success will be whether Bhamjee orders aggravate or reduce the amount of abuse that court staff receive at the public counter'*

> *'It is too early to say but it should make a major difference. DCJs report that it is already making a difference, but there is an issue of coordinating the information about orders made by different courts'.*

9.4 Training

The chapter on appeals in the Civil Bench Book produced by the Judicial Studies Board (JSB) is not yet available and there are no sessions at JSB seminars devoted specifically to civil appeals. Judicial interviewees were asked whether they would like to see such training for judges who hear appeals, particularly in relation to dealing with unrepresented litigants. Opinions on the point were divided. Some pointed out that the Judicial Studies Board (JSB) already included some material on unrepresented litigants (although not specifically in the context of appeals) at continuation seminars and in the Bench Book. Comments from those in favour of additional training included:

> *'I think that newly appointed High Court Judges should receive training'* ***(Lord Justice)***

> *'I have a concern that as things stand at present, the decision of an experienced circuit judge comes on appeal before a High Court judge who may have little experience in the area involved'* ***(Presiding Judge)***

> *'It is not just desirable but essential. It should be part of the JSB's civil training programme'* ***(Presiding Judge)***

'It is hard to argue against some passing on of judicial experience. It is common sense that all judges have been at the Bar and they are almost certain to have dealt with litigants in person. Most would feel there was not much you could tell them. It is important that litigants have their say while the judge listens and does not interrupt. The judge should never get embroiled in an argument with the litigant. Maybe there should be a short paper from the JSB on the subject. Judges are more user-friendly than they were 40 years ago but we do get feedback from the Bar about some "disappointing" judges' ***(HCJ)****.*

A Lord Justice indicated possible topics for inclusion in training:

'I think there is scope to set down some general principles, for instance:

- *letting unrepresented litigants have their say and feel they have had a fair crack of the whip. I make it clear at the outset that they only have a set amount of time to put their case;*
- *instilling confidence by letting litigants know that you have read the papers and saying, for instance, 'I think the problem you have is ... How would you get around it?'; and*
- *letting the litigant down gently'.*

A DCJ saw no need for judicial training on dealing with unrepresented litigants but considered that:

'there is a need for training in appeal management, particularly so that there can be consistency of approach across the country, and to avoid the numerous errors that one sees being perpetrated by judges at all levels'.

Others saw no need for training thanks to an adequate supply of judges with the requisite skills:

'Most High Court judges will have sat as a deputy prior to their appointment and will have done some of these cases' ***(HCJ)***

'I do not think this is necessary. The rules provide for DCJs to hear appeals in county courts. DCJs can, in consultation with Presiding Judges, nominate other judges to hear appeals. Such nomination will be limited to those judges who are experienced' ***(DCJ)***

'I would not be in favour of specific training for appeals, although I acknowledge that dealing with unrepresented litigants can be difficult for judges who do not have a background in civil work. It should be left to DCJs to allocate cases to those with the appropriate skills' ***(Presiding Judge)****.*

9.5 Feedback

It is accepted good practice that first instance judges should be told about the outcome of appeals against their decisions and provided with a transcript of the appeal judgment, at least in those cases where their decision is overturned. A Lord Justice told us:

'When I used to go on circuit, I got complaints from district judges that they had heard on the grapevine that they had been reversed. It is policy to let judges know the result of substantive appeals; I would be interested if you find evidence that this is not happening'.

The Civil Division of the Court of Appeal sends the lower court a transcript of every oral permission and appeal hearing and a copy of an order refusing permission on paper. Study courts were asked about their arrangements for providing feedback to lower court judges on the results of both applications for permission and substantive appeals. At the RCJ, the High Court Appeals Office sends a copy of any order made in respect of permission to appeal (on paper or at an oral hearing) to the court manager of the lower court. This includes both county courts and, in the case of appeals against a master in the High Court, Chancery and Queen's Bench court managers at the RCJ (the High Court Appeals Office could not confirm whether the information is passed on to the judge concerned). In the case of proper appeals, they again send a copy of the order. In addition, a list of successful appeals is compiled at the end of each month. The list is sent to the Mechanical Recordings section, which orders a copy of the transcript and sends it directly (marked personal) to the lower court judge. Confirmation that this has been done is sent to the High Court Appeals Office.

The position at the three regional appeal centres is summarised in the following table:

Table 9: Feedback to first instance judges on appeals at regional appeal centres

Appeal centre	Appeals to:			
	a circuit judge		a High Court judge	
	PTA	Appeal	PTA	Appeal
Birmingham	No routine feedback	CJ completes form explaining reasons, irrespective of whether appeal succeeded or failed	No routine feedback	HCJ completes form explaining reasons, irrespective of whether appeal succeeded or failed
Leeds	No routine feedback	No system for providing feedback routinely. Written judgments sometimes sent by e-mail to DJ	No routine feedback	No system for providing feedback routinely. Written judgments sometimes sent by e-mail to CJ
Manchester	No routine feedback	If appeal is successful, CJ completes a form for the DJ explaining reasons	No routine feedback	If appeal is successful, a transcript should be sent to the judge, but unclear if this is happening

Only the Court of Appeal and the High Court at the RCJ routinely provide feedback on the outcome of permission applications. The provision of feedback on substantive appeals was least likely where the appeal lay to a High Court judge: judges at Leeds and Manchester doubted if such feedback was reliably provided. Leeds had no system in place for providing feedback to district or circuit judges, but the DCJ favoured the introduction of such a system based on e-mail:

'I should not want to see a system that provided an automatic transcript. It would be an expensive option. For appeals from the small claims track, we could reach the position that the cost of the transcript [of the appeal judgment] far exceeds what was at stake in the case'.

At Birmingham, the DCJ has designed a standard form which he includes in all files at the time of his review. The same form is used whether the appeal lies to a circuit judge or a High Court judge.[62] The form requests the judge hearing the appeal to:

> 'Please give brief particulars of the hearing: the date and nature of the order under appeal, your decision and (if you allowed the appeal) the reasons for your decision plus any other comment you may wish to make'.

The court clerk is asked to ensure that the appeal judge completes the form and that it is sent to the lower court judge. Although this appears to work well in most cases, some of the case files we examined contained an uncompleted copy of the form.

A Presiding Judge was concerned that feedback should be limited to the content of the judgment, but acknowledged that the information this provided was often inadequate:

'A first instance judge who is overturned on appeal should receive a transcript of the appeal judgment. It would not be right to comment in any other form … In my view, it is important to give reasons in the judgment but often what is given is simply justification for the decision'.

[62] Manchester also uses a feedback form but only for appeals from a district judge to a circuit judge.

10 Conclusions

10.1 Contrasting appellate cultures

Part 52 of the CPR and the accompanying Practice Direction introduced a standard appeals procedure that applies to all levels of appellate court. There were some concessions to appeals in cases allocated to the small claims track but, otherwise, the provisions were largely based on the recommendations in the Bowman report which focussed on the needs of the Court of Appeal. This was particularly apparent in the detailed information which appellants must provide in the appellant's notice and supporting documents.

Revisions to the Practice Direction have gone some way to acknowledging that the needs of the Court of Appeal differ from those of lower appellate courts. Section 15 on 'Other special provisions regarding the Court of Appeal' has been expanded and the 36th update contains a specification of the content of bundles that applies only to the Court of Appeal. Nevertheless, the documentation requirements in all appellate courts remain complex and onerous. In the courts visited during the study, administrative staff lacked the time and knowledge to verify that documentation submitted by appellants complied with these requirements.

In these circumstances, it is hardly surprising that the High Court at the RCJ and regional appeal centres in our study had developed a more pragmatic approach, as described in chapter 3. Unlike the Court of Appeal, appellants' notices and supporting documents were accepted virtually irrespective of their content or organisation and it was usually left to the DCJ to make sense of the jumble of papers included in the case file.

There were also differences between the High Court Appeals Office at the RCJ and regional appeal centres. The latter were fairly relaxed about appellants' notices submitted a few days out of time, but with no application to extend the time allowed, whereas the High Court required the appellant to amend the notice to include an extension of time application. A mistake in the fee paid lead to rejection of an appellant's notice by the High Court Appeals Office but not in the regions.

These apparently minor differences in attitude to appellate requirements are nevertheless significant, because:

- unnecessary complexity leads to confusion and irritation on the part of appellants, particularly unrepresented appellants, who then make heavy demands on the time of court staff for procedural advice; and
- the proliferation of requirements that are not enforced in practice undermines confidence in the appellate system.

A point made in support of the *status quo* is the need for uniformity to make the process simpler for appellants to understand. In fact, the system is already riddled with anomalies and exceptions: a separate appellant's notice is used in bankruptcy appeals; the Court of Appeal charges different fees from lower appellate courts; Part 8 claims are not subject to the normal rules on appellate routes (see footnote 4); the permission requirement does not apply to certain insolvency and statutory appeals; and the need to provide a transcript does not apply automatically to small claims appeals. Even where uniformity of requirements exists, appellate courts differ in their attitude to enforcing them, which is surely just as confusing for appellants. The principle that the procedural complexity should be proportionate to the needs of the case underpins the Woolf reforms at the first instance. Why should this not also apply at the appellate level?

10.2 Adapting procedures to the needs of lower appellate courts

During the study, three main suggestions were made for procedural change to the way appeals are handled in the High Court and the county courts:

- simplification of the appellant's notice, at least for appeals in cases allocated to the small claims track
- the introduction of an expedited procedure to deal with urgent appeals, for instance those challenging an eviction order
- modified requirements in respect of transcripts.

These issues and others concerning the process for lodging an appeal were examined in detail in chapters 5 and 6. There was a widespread feeling among DCJs that the appellant's notice was too complicated for many of the appeals they dealt with and beyond the capabilities of most unrepresented litigants to complete properly. Some of the information requests in the notice could clearly be dispensed with or simplified. The time allowed for providing supporting documentation should be realistic and clearly explained.

During discussions on the findings emerging from the study, the researchers learned that the Rules and Practice Direction relating to small claims are currently under review. In

particular, a new and simpler appellant's notice for use specifically in small claims appeals is being designed. This should go a long way towards addressing the concerns referred to above.

There was a consensus among judges to whom we spoke about the need for a system to expedite certain appeals. In fact, an informal system operates at present with the rule book being put aside in the interests of justice to ensure urgent appeals are dealt with quickly. All the courts we visited operated such a system.[63]

There is an argument that this practice of expediting certain appeals should be formalised and brought within the scope of CPR 52. However, senior members of the judiciary cautioned against this. They pointed out that many changes had already been made to the Rules and these should be allowed to bed in before more amendments were made. Moreover, they pointed to the existing judicial power to vary time limits under CPR 52.6.

During the study, transcripts elicited more comment than any other topic. The discussion is presented at paragraph 5.5. There is a presumption in the rules that a transcript of the lower court will normally be available within the time allowed to lodge an appeal. This is clearly not the case. Moreover, in the view of most DCJs to whom we spoke, it is usually possible to achieve significant progress without a transcript, especially if a written note of judgment is available. Judges wanted more discretion as to whether a transcript should be required. Such a move would bring with it the twin benefits of reducing both cost and delay. The argument in favour of amending the Practice Direction to give reviewing judges such discretion appears strong.

In those cases where a transcript is deemed necessary, there is scope for improving the procurement process. Currently, the court has little control over the reporting firm that owns the tapes to be transcribed or the firm chosen to perform the transcription. The Court Service has indicated that it will shortly be re-tendering court reporting contracts and is considering ways in which to increase court control over quality of service in relation to transcripts. One option would be to contract a single firm to provide a total service that meets specified quality standards, with appropriate financial sanctions for performance failures. Until such measures are in place, courts and litigants will remain vulnerable to the weaknesses of the existing arrangements.

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[63] We understand that eviction appeals are now common in the Court of Appeal as a result of cases being allocated to the multi-track in the court below. The Court of Appeal also expedites such appeals, relaxing the normal documentation requirements where necessary.

Identifying the court to which an appeal lies continues to cause problems. Evidence from case files and the comments of litigants and others demonstrates the confusion that this issue can cause. In our previous study (Plotnikoff and Woolfson, 2003), we summarised the position as follows:

> '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'. [64]

In the current study, we did not canvass systematically whether a system in which appeals always lay to the next level of judge would be acceptable. Nevertheless, some judges interviewed indicated in the course of the discussion that they had no objections to appellate routes based only on level of judge; they agreed that the adoption of such a scheme would solve much of the jurisdictional confusion that exists currently. Ways of reducing this confusion by improving the information provided to litigants are discussed in the next section.

10.3 Information for litigants

The poor quality of the information on appeals procedure available to litigants was also addressed in our previous report.[65] The guidance on how to complete an appellant's notice remains complicated and confusing. Although the Court Service website has been re-designed twice in the last four years, it still offers little help to would-be appellants. Our suggestions for changing fundamentally the way information is presented have not been adopted. Entering the word 'appeals' in the site's search engine yields 249 hits, none of them helpful to someone seeking information on how to appeal. Although the Civil Division of the Court of Appeal now has its own website, the content is geared to the needs of that

[64] Para. 9.4.
[65] Para. 9.5.