Strict guidelines

Applications to set aside grants of permission to appeal continue to be made, even though few are likely to succeed. Daniel Lightman outlines the rules governing the Court of Appeal's rigid approach

CPR Part 52.9(1) gives the appeal court wide powers to strike out the whole or part of an appeal notice, to set aside permission to appeal in whole or in part, or to impose or vary conditions on which an appeal may be brought.

However, there are two restrictions:

- The court may only exercise its powers under Pt 52.9(1) "where there is compelling reason to do so": Pt 52.9(2).
- A party may not apply for an order that the court set aside permission to appeal or impose or vary the conditions on which a proposed appeal may be brought if s/he was present at the hearing at which permission to appeal was given: Pt 52.9(3).

In *Barings Plc (in liquidation) v Coopers & Lybrand* [2002] All ER (D) 278 (Jul), Jonathan Parker LJ said 'compelling reason' for the court to exercise its powers under Pt 52.9(1) connotes "something which is sufficiently serious to be in the nature of an irregularity in the grant of permission".

Laws LJ, in the same case, thought the court should very firmly discourage satellite litigation under the guise of an application under CPR Pt 52.9:

> "The rule is there to cater for the rare case in which the lord justice granting permission to appeal has actually been misled. If he has, the court's process has been abused and that is of course a special situation."

He added that while there may also be cases where (as Longmore LJ indicated in *Nathan v Smilovitch* [2002] EWCA Civ 759) some decisive authority or statute has been overlooked by the lord justice granting permission, where such a state of affairs is asserted the authority or statute must "be plainly and unarguably decisive of the issue. If there is anything to argue about, an application to set aside a grant of permission will be misconceived".

Laws LJ stressed that the power conferred by Pt 52.9(1) "is emphatically not a power to, in effect, entertain an appeal against the grant of permission... rather, its purpose is to enable the court to do justice in those rare cases where something in the nature of an irregularity has occurred in the granting of permission, whether by reason of the single judge having been misled or for some other like reason".

Dismissing the application, Laws LJ hoped that, in future, practitioners would think twice before launching an application of this kind, in the knowledge that only in very limited circumstances would it be likely to succeed.

His hopes, alas, have not been borne out. Respondents to appeals continue to make unsuccessful applications to set aside grants of permission to appeal. A recent example was *Okta Crude Oil Refinery AD v Mamidoil-Jetoil Greek Petroleum Company SA (No 3)* [2003] EWCA Civ 617; *The Times*, 19 June ('*Okta*').

In his judgment in *Okta* Clarke LJ quoted with approval the following 'Cautionary note' from the *White Book* in relation to Pt 52.9:

> "This tempting provision should not lure advocates into tactical skirmishing or into maneouvres designed to wear down the opposition. Save in exceptional circumstances it is a misuse of the court's resources and a waste of costs for the court to consider the substance of an appeal on some intermediate date between the permission hearing and the full appeal...".

Clarke LJ said the court relied on lawyers in commercial cases to assist the court by avoiding applications to set aside permission wherever possible, and stressed "the importance of solicitors and counsel for applicants putting applications for permission to appeal fairly before the single lord justice".

Clarke LJ pointed out that it is very difficult for a single lord justice to sort out the wheat from the chaff in complex commercial cases, and that considerable reliance is placed on the parties and their representatives. He added:

> "If there is a key authority which is crucial or potentially crucial to the prospective success of an appeal it should be referred to clearly by the proposed appellants in the skeleton argument and not left in some document annexed to it. In real life it is quite impossible for a single lord justice to read every word of the skeleton arguments prepared for the trial."

Clarke LJ said the application to set aside the grant of permission to appeal in *Okta* was much the same as in *Barings*. The respondents were seeking to persuade the Court of Appeal to say the appellant had no real prospect of success. They were inviting the court to reach a conclusion different from that of the single lord justice who had given permission to appeal. It was not appropriate for the Court of Appeal to seek to do that. Therefore Clarke LJ said he would not embark on any detailed analysis of the underlying merits, even though he could see the strength of the case put by the respondents' counsel, and would decline to set aside the permission to appeal.

Time limits for appeals generally

The CPR has laid down strict time limits for the prosecution of appeals. Appellants, if they are not granted permission to appeal by the court below, must ordinarily file an appellant's notice within 14 days of the date of the decision to be appealed (Part 52.4(2)(b)), and the appellant's notice must be served on each respondent as soon as practicable, and

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not later than seven days after it is filed: 52.4(3).

Where the application for permission to appeal is refused by the Court of Appeal on paper, if the appellant wishes the decision to be reconsidered at a hearing, he must file such a request within seven days after service of the notice that permission to appeal has been refused: 52.3(5). If no request is made for the decision to be reconsidered, it will become final after the time limit for making the request has expired: 52PD 4.14. Further, at the hearing of an appeal an appellant may not rely on any matter not contained in the appeal notice unless the appeal court gives permission: 52.11(5). An appeal notice may not be amended without permission of the appeal court: 52.8.

A respondent who wishes to file a respondent's notice must ordinarily do so within 14 days after the requisite date: 52.5(5). The respondent's notice must be served on the appellant and any other respondent as soon as practicable, and not later than seven days after it is filed: 52.5(6). A respondent may include an application, such as for an interim remedy or for security for costs, within his respondent's notice: 52PD 5.5. Where the respondent's skeleton argument is not included within his notice, it should be lodged and served no later than 21 days after he receives the appellant's skeleton argument: 52PD 7.7.

An application to vary the time limit for filing an appeal notice must be made to the appeal court: 52.6(1); the time limit cannot be extended by agreement of the parties: 52.6(2).

Time limits for applications under Pt 52.9

In contrast to the time limits outlined above, Pt 52.9 does not lay down any specific time-limit within which a respondent must apply under that rule. This could be because the powers under Pt 52.9(1) may only become exercisable by reason of a party's conduct or events which occur long after the time permission to appeal is granted.

For example, where a party fails to comply with court orders or directions for the conduct of the appeal, the power under Pt 52.9 to strike out an appeal notice may be exercised as a sanction for non-compliance with those orders or directions: see *Carr v Bower Cotton* [2002] EWCA Civ 789.

Another case would be where the appeal turns on a point of law in relation to which a decision constituting authoritative precedent, binding on the appeal court, is given in the period between the grant of permission to appeal and the appeal hearing.

In *Okta* the Court of Appeal emphasised the importance of applications to set aside the grant of permission to appeal being made promptly.

The appellant in *Okta* submitted that a respondent should apply under Pt 52.9 as soon as practicable and within a very short period of time, commensurate with the timetable laid down by Pt 52 and 52PD; a reasonable time for making an application under Pt 52.9 should not exceed 14 days; and any application made more than 14 days after the respondent has been served with the appellant's notice should only be entertained if the court is satisfied the respondent has provided a cogent explanation for the lateness of the application and the delay has caused the appellant no prejudice.

The appellant further submitted:

- Applications under Pt 52.9 should only be made if properly formulated and thought out at the time the application is issued;
- A respondent should not be permitted to file and serve a pro forma application under Pt 52.9 and subsequently to seek to maintain the application on a different or contradictory basis; and
- An application to shut out an appeal ought to proceed with urgency, in particular, where the appellant is likely to proceed on the basis that the appeal would go ahead. An appellant should not be put in a position where he proceeds to prepare an appeal on the footing that permission to appeal has been granted unconditionally, but is subsequently made subject to onerous conditions by an application made tardily or re-formulated after the application is made.

Clarke LJ, with whom Richards J agreed, accepted these submissions, subject to one overriding consideration:

> "It is to my mind of considerable importance that in the rare cases in which it is appropriate to make an application, an application to set aside the grant of permission to appeal or to impose conditions on the grant of permission should be made promptly; otherwise there may be significant costs, all to no avail. Once permission to appeal has been granted the court does its best to provide hearing dates for appeal. It tries to conduct its business fairly to the benefit of litigants generally. That business is likely to be interrupted if applications to set aside or to impose conditions on the permission granted are not made promptly."

Clarke LJ's acceptance of these submissions was subject to, he said, the overriding objective of the CPR, that applications should be disposed of justly or fairly.

> "There may be considerations of justice which lead to a different approach on the facts of a particular case. Such circumstances are to my mind however likely to be rare."

In relation to the Pt 52.9 application in *Okta* Clarke LJ rejected the respondents' contention that the permission to appeal granted should be made subject to the provision of an appropriate guarantee securing the whole of the amount of the judgment debt. He attached "some significance to the fact that this application was not made promptly, which has undoubtedly added to Okta's difficulties if very Draconian conditions are now attached to the permission to appeal".

There were only two months between the date the respondent's application was heard and the appeal. However, he did impose as a term of the continuation of the permission to appeal the obligation to pay two sums of money (totalling about 10 per cent of the judgment debt), failing which the permission to appeal would lapse.

Practice points

- Where permission to appeal has been granted on paper, the appeal court has power to set aside, in whole or in part, the grant of permission to appeal.
- There must be a compelling reason for the appeal court to exercise its power to set aside the grant of permission to appeal; in other words, there must have been an irregularity in the granting of permission.
- While CPR Part 52.9 does not lay down any specific time limit within which applications should be made under that rule, applications to set aside the grant of permission to appeal should be made as soon as practicable and ordinarily not more than 14 days after the respondent has been served with the appellant's notice.
- There may be rare cases in which considerations of justice would lead the appeal court to permit an application to set aside the grant of permission to appeal to be made tardily.