

# Appeals

White Paper Costs Conference

22 March 2023



**IN CONFIDENCE**

**This is a judgment to which the Practice Direction supplementing CPR Part 40 applies. It will be handed down on Friday 17 March 2023 at 10:30 remotely. This draft is confidential to the parties and their legal representatives and accordingly neither the draft itself nor its substance may be disclosed to any other person or used in the public domain. The parties must take all reasonable steps to ensure that its confidentiality is preserved. No action is to be taken (other than internally) in response to the draft before judgment has been formally pronounced. A breach of any of these obligations may be treated as a contempt of court. The official version of the judgment will be available from the Courts Recording and Transcription Unit of the Royal Courts of Justice once it has been approved by the judge.**

# Embargoed draft judgments

- Parties ✓
- Lawyers ✓
- Liability insurer ✗
- Funder ✗
- ATE insurer ✗
- Legal expenses insurer ✗

# PTA – Traps and Pitfalls

## 52.12— Appellant’s notice <sup>1</sup>

- (1) Where the appellant seeks permission from the appeal court, it must be requested in the appellant’s notice.
- (2) The appellant must file the appellant’s notice at the appeal court within—
  - (a) such period as may be directed by the lower court at the hearing at which the decision to be appealed was made or any adjournment of that hearing (which may be longer or shorter than the period referred to in sub-paragraph (b)); or
  - (b) where the court makes no such direction, and subject to the specific provision about time limits in rules 52.8 to 52.11 and Practice Direction 52D, 21 days after the date of the decision of the lower court which the appellant wishes to appeal.

# When the Decision is Made

- When announced in court, not when in an order (*Sayers v Clarke Walker* [2002] EWCA Civ 645)
- Including where decision announced with reasons to follow
- When a reserved judgment is handed down
- CPR 47.14(7)

(7) If an assessment is carried out at more than one hearing, then for the purposes of rule 52.12 time for appealing shall not start to run until the conclusion of the final hearing, unless the court orders otherwise.

# Extending Time

- *McDonald v Rose* [2019] EWCA Civ 4

- CPR 52.3(2)

(2) An application for permission to appeal may be made—  
(a) to the lower court at the hearing at which the decision to be appealed was made or any adjournment of that hearing; or

- CPR 52.12(2)(a)

(2) The appellant must file the appellant's notice at the appeal court within—  
(a) such period as may be directed by the lower court at the hearing at which the decision to be appealed was made or any adjournment of that hearing (which may be longer or shorter than the period referred to in sub-paragraph (b)); or

# The Effect of the Rules

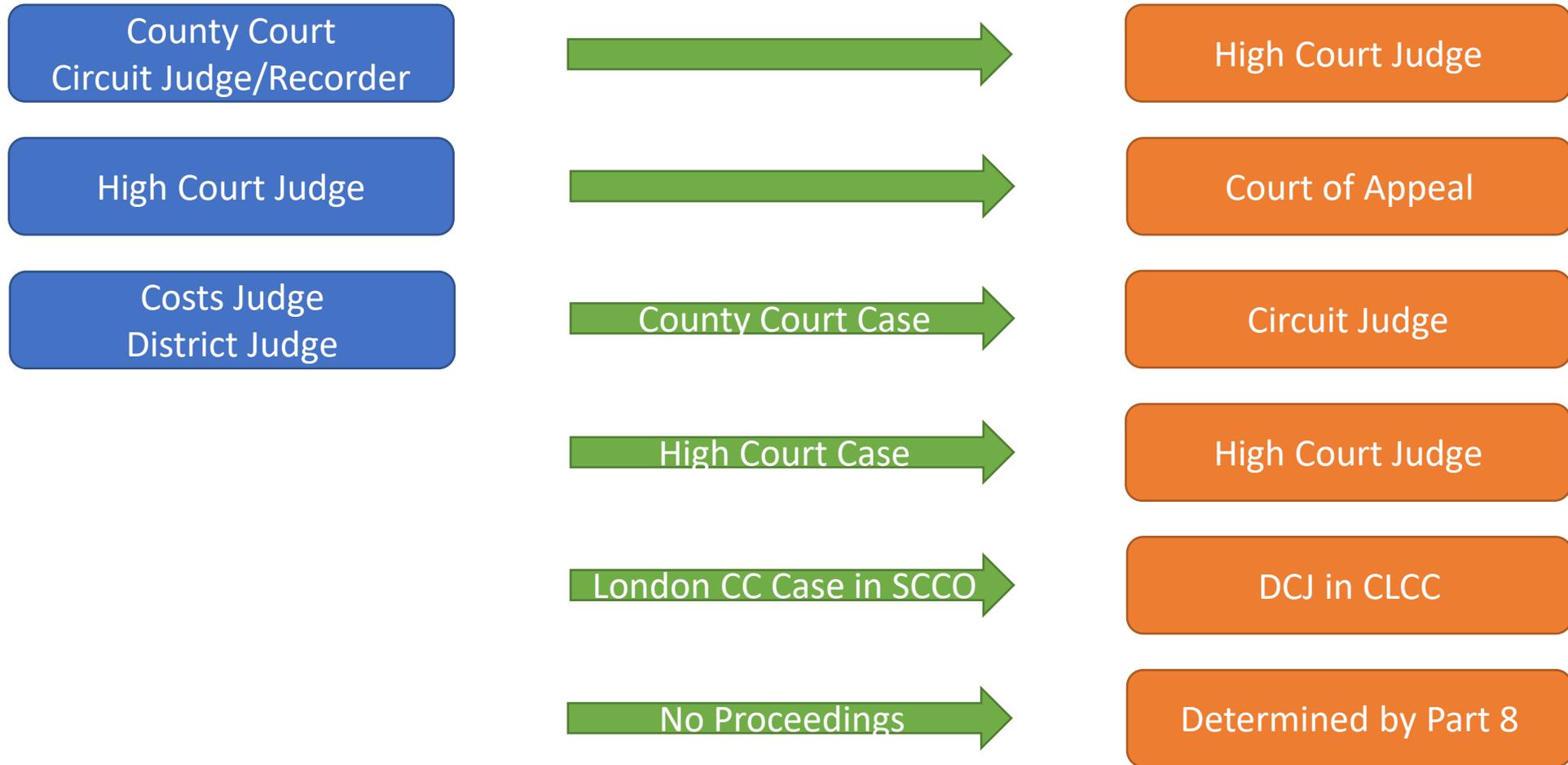
- No adjournment → no jurisdiction to consider PTA later: *Omya UK Ltd v Andrews Excavations Ltd* [2022] EWHC 1882 (TCC)
- Application for PTA made before handing down treated as made when the decision is made: *McDonald* at [15]
- Adjournment of the hearing when the decision is made does **not** extend time for filing the Appellant's Notice
- So ask for an adjournment of the hearing **and** an extension of time to 21 days after the decision on PTA (or 21 days after reasons)
- NB 21 day time limit applies even if PTA is granted

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# Oral Rehearings

- In the High Court and County Court if requested within 7 days (CPR 52.4)
- Not in the Court of Appeal

# Appeal Destinations



# Provisional Assessments and Costs Officers

- Automatic right of appeal (re-hearing) from Costs Officer to Costs Judge: CPR 47.21 to 47.24
- Right to oral re-hearing following provisional assessment (CPR 47.15)
- Appeal from Costs Officer to Costs Judge following provisional assessment re-hearing can only raise points in issue on the re-hearing: *PME v The Scout Association* [2019] EWHC 3421 (QB)

# The Test on Appeal

## 52.21— Hearing of appeals <sup>1</sup>

- (1) Every appeal will be limited to a review of the decision of the lower court unless—
  - (a) a practice direction makes different provision for a particular category of appeal;  
or
  - (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
  
- (2) Unless it orders otherwise, the appeal court will not receive—
  - (a) oral evidence; or
  - (b) evidence which was not before the lower court.
  
- (3) The appeal court will allow an appeal where the decision of the lower court was—
  - (a) wrong; or
  - (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

# What is “Wrong”?

- Pure point of law
- Exercise of discretion or equivalent: *Tanfern v Cameron-McDonald* [2000] 1 WLR 1311
  - Framework for decision was wrong
  - Irrelevant factors taken into account
  - Relevant factors not taken into account
  - Result is “plainly wrong”
- Factual finding
  - Unsupported by the evidence or perverse: *Haringey LBC v Ahmed & Ahmed* [2017] EWCA Civ 1861

# Costs Appeals

- *Mealing-McLeod v Common Professional Examination Board* [2000] 2 Costs LR 223 at 224, Buckley J:

*“[S]ince the appeal is not a re-hearing, I would regard it as inappropriate for the Judge on appeal to be drawn into an exercise calculated to add a little here or knock off a little there. If the Judge's attention is drawn to items which with the advice of his Assessors he feels should, in fairness, be altered, doubtless he will act. That is a matter for his good judgment. Permission to appeal should not be granted simply to allow yet another trawl through the Bill, in the absence of some sensible and significant complaint.”*

# Costs Appeals

- *Solutia v Griffiths* [2001] 2 Costs LR 247 at [10], Latham LJ:

*“Certainly it would not be useful to inquire whether different shades of meaning are intended to be conveyed by words such as 'blatant error' used by the President in the present case, and words such as 'clearly wrong', 'plainly wrong' or 'simply wrong' used by other judges in other cases. All these various expressions were used in order to emphasise the point that the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution, which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible.”*

# Costs Appeals

- *SCT Finance v Bolton* [2002] EWCA Civ 56 at [2], Wilson LJ:

*“This is an appeal brought with leave of the single Lord Justice from the county court in relation to costs. As such, it is overcast, from start to finish, by the heavy burden faced by any appellant in establishing that the judge’s decision falls outside the discretion in relation to costs conferred upon him under rule 44.3(1) of the Civil Procedure Rules 1998. For reasons of general policy, namely that it is undesirable for further costs to be incurred in arguing about costs, this court discourages such appeals by interpreting such discretion very widely.”*

- *Bohinc v Malmsten* [2019] 4 WLR 87 at [32], Marcus Smith J:

*“[A]ppeals concerning the quantum of costs are notoriously challenging from the appellant’s point of view”*

# Ranking Costs Appeals

Pure Point of Law:  
Construction of legislation/procedural rule  
Construction of costs order; indemnity principle; recoverability of categories of costs

Important Point of General Practice  
Exercise of Discretion Involving Point of Principle

Costs Order

Detailed Assessment

Summary Assessment

Costs Budgeting

*Havenga v Gateshead NHS Foundation Trust* [2014] EWHC B25 (QB); *Gray v Commissioner of Police for the Metropolis* [2019] EWHC 1780 (QB); *Easteye Ltd v Malhotra Property Investments Ltd* [2019] EWHC 2820 (Ch)

# Top Tips for Appellants

- Be realistic
- Always ask the first instance Judge for PTA
- Concise grounds of appeal, which address the right test
- Fewer rather than more grounds of appeal
- Remember you can still settle: CPR 36.4
- Carefully prepared appeal bundle

# Top Tips for Respondents

- Be realistic!
- Consider whether a Respondent's Notice is needed: CPR 52.13
  - 14 days from grant of permission or Appellant's Notice
- Stress the breadth of discretion
- *Piglowska v Piglowski* [1999] 1 WLR 1360 at 1372G:

*“The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as was given by the district judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account.”*