

# **PROCEDURE AND PRACTICE IN THE PRIVY COUNCIL**

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## **1. INTRODUCTION**

- 1.1 This paper will focus on the procedure and practice in the Privy Council, drawing on the experienced gained by Myers, Fletcher & Gordon (London) in dealing with some 20 Privy Council matters over the last 2 years.
- 1.2 Whilst by its very nature the paper will be from the perspective of a solicitor/privy council agent, I will highlight procedural matters of particular significance to Counsel.

## **2. JUDICIAL COMMITTEE PROCEDURE - A Brief History**

- 2.1 The current procedural rules came into operation 16 years ago but originate from an Act passed 166 years ago. It would appear that the rules have changed little during this period.
- 2.2 Whilst the rules maybe archaic, the procedure works well provided you know the rules and are aware of the potential pitfalls.

## **3. DISTINCTION BETWEEN CIVIL AND CRIMINAL APPEALS**

- 3.1 The procedural rules make no distinctions between civil and criminal appeals. The same rules apply to both types of appeal.
- 3.2 The role of the privy council agent is identical in respect of civil and criminal appeals.

#### **4. LEAVE TO APPEAL/SUBSTANTIVE APPEAL**

- 4.1 There is an important and significant difference in procedure and practice depending on whether the home Court of Appeal has granted leave to appeal to the Privy Council.
- 4.2 Where leave to appeal has been granted by the Court appealed from, the substantive appeal procedure can commence at once.
- 4.3 In the absence of such leave, it is necessary to first apply to the Privy Council for special leave to appeal.

#### **5. SPECIAL LEAVE TO APPEAL**

- 5.1 An application for special leave to appeal should be made “with the least possible delay after the date of the judgment from which special leave to appeal is sought”. In practice I have not known of a case where delay in bringing the application has been raised by either the Privy Council Office or their Lordships.
- 5.2 An application for special leave to appeal is made by petition. This needs to set out the relevant facts and deal with the merits of the case so as to explain the grounds upon which special leave to appeal is sought.
- 5.3 Before lodging the petition, a notice of intention to apply for special leave needs to be served on the other party.
- 5.4 The privy council agents will lodge 6 copies of the petition and judgment appealed against. At the same time an affidavit of service of the notice and an affidavit in support of the petition must also be lodged. The affidavit in support is purely a procedural document. It is the petition which is the most important document.
- 5.5 A recent directive from the Registrar of the Privy Council has reiterated the need for the petitioner to be ready for hearing at this stage. It will be assumed that the petition is ready

for hearing 10 clear days after being lodged. In practice very little notice of the hearing date may be given.

- 5.6 When a date has been fixed Counsel should prepare written submissions. These are to be lodged 3 clear days before the hearing.
- 5.7 No other supporting documents are required. Indeed the parties are discouraged from seeking to lodge bundles of papers or authorities.
- 5.8 Once a month the Privy Council will have a day set aside for hearing petitions for special leave to appeal. Up to five or six petitions will be listed for hearing on the same day. Each petition is therefore expected to last for no more than 30 minutes. In practice I have known of petitions for special leave to appeal to last for anything between 3 minutes and 3 hours.
- 5.9 The petition will be heard by just three Law Lords. If the petition is unsuccessful that is the end of the matter. If the petition succeeds the procedure for a substantive appeal can commence. There is no scope for the leave hearing being treated as the hearing of the substantive appeal.
- 5.10 Statistically the chances of a petition for special leave to appeal being successful are not good. During the 90's there have been an average of 60 petitions heard a year, of which only an average of 20 a year are successful.

## 6. SUBSTANTIVE APPEALS

- 6.1 Once leave to appeal has been obtained the substantive appeal procedure can commence. The procedure is the same whether leave has been obtained from the home Court of Appeal or the Privy Council by way of a petition for special leave to appeal.
- 6.2 As soon as an appeal has been admitted the first step is for both parties to enter an Appearance. A party can only be heard if an appearance has been entered by an



authorised privy council agent. In practice there are no specific time limits for entering an appearance, but a party wishing to be heard should obviously ensure that an appearance is entered as soon as possible.

- 6.3 It is the duty of the appellant to ensure that the Record of Proceedings is transmitted to the Registrar of the Privy Council. It is the preparation and reproduction of the Record which seems to cause the greatest problems in respect of Privy Council Appeals.
- 6.4 The Record of Proceedings is very similar to the bundle which will have been before the Court of Appeal. Obviously the judgments of the Court of Appeal and the order granting leave to appeal have to be added to that bundle. A certified copy of the Record needs to be sent by the Registrar of the Court of Appeal to the Registrar of the Privy Council. Until the Privy Council receive the certified Record the appeal procedure cannot progress.
- 6.5 Once the certified Record has arrived steps need to be taken for the Record to be reproduced. A total of 30 copies of the Record will be required. The Record can be reproduced in the home country, in which case the 30 copies of the Record should accompany the certified copy of the Record sent by the Registrar of the Court of Appeal. More commonly the Record is reproduced in the UK. Before this can be done there is a convoluted procedure for formally examining copies of the Record against the certified copy.
- 6.6 The procedure proper for the appeal commences as soon as the hurdle of the reproduction of the record has been cleared. The first step is the filing of a petition of appeal. Unlike the petition for special leave to appeal, a petition of appeal is a purely procedural document and will usually be prepared by the privy council agents.
- 6.7 The next step is the exchange of Cases. The Case is the written submissions of the party. No party to an appeal is entitled to be heard unless he has previously lodged his Case. In practice after each party has prepared their Case, the privy council agents arrange for the Cases to be simultaneously exchanged before lodging 20 copies of the Case with the

Privy Council Office.

- 6.8 The Case should succinctly set out the relevant facts, the merits of the appeal and the reasons why the judgment appealed against should be set aside or affirmed as the case may be. There are detailed rules as to the format of the Case (paper size, references to the Record etc) and these should be strictly complied with.
- 6.9 The rules make no provision for filing skeleton arguments or written submissions in respect of substantive appeals. A party will be expected to base their submissions upon their Case. Their Lordships will always read the Cases prior to the hearing of the appeal. Accordingly it is wise to invest time in the preparation of the Case.
- 6.10 Various time limits are set out for the filing and exchange of Cases. In practice there is a good deal of flexibility in this respect. It is, for example, possible to file a Dummy Case in order to comply with the rules and enable the appeal to be formally set down. Despite this flexibility Counsel are encouraged to commence preparation of the Case as soon as the Record has been finalised.
- 6.11 It should be possible to obtain an early indication from the Registrar of the likely date for the hearing of the appeal. The Registrar may be prepared to fix a provisional hearing date. This will be confirmed as soon as the Cases have been filed.
- 6.12 Closer to the hearing date Lists of Authorities need to be prepared. The formal requirement is for Lists of Authorities to be filed three clear days before the hearing. It is, however, prudent to address the question of Authorities a few weeks before the hearing, particularly if Counsel intends to rely on local unreported authorities. Ideally an agreed joint bundle of Authorities will be prepared and filed at the Privy Council a week before the hearing.
- 6.13 The hearing itself will be heard by five Law Lords. Counsel will hopefully have liaised with the privy council agents regarding the time estimate for the appeal. The parties will be expected to keep to that time estimate. My experience is that most appeals are



conducted well within the time estimate.

## **7. COSTS AND FEES**

7.1 In terms of fees payable to the Privy Council Office, an appeal to the Privy Council is relatively cheap by UK standards. A separate fee is payable for each step (filing of petition, lodging a Case etc). The fees become payable at the end of the appeal and generally amount to some £250/£350. The requirement to pay these fees is easily overlooked when telling a client of the likely cost of an appeal.

7.2 The costs of the appeal are at the discretion of their Lordships. The usual legal principals apply to the making of an order for costs. Generally, costs will follow the event.

7.3 A party who is awarded costs will need to be in position to present a Bill of Costs for taxation very shortly after judgment. The Registrar generally fixes a date for the taxation for the month following judgment.

7.4 If costs cannot be agreed with the other party, the taxation will take place before the Registrar. This taxation will be limited to costs incurred in England. Such costs will include Counsel's brief fee (whether Counsel is from the Jamaican or English Bar). Travelling expenses for overseas Counsel are not recoverable on taxation.

## **8 CONCLUSION**

8.1 Despite its archaic rules and procedures the Privy Council is a highly efficient court which produces justice of the highest calibre.

8.2 By way of example, I refer to last year's appeal relating to Century National Bank. The panel of Law Lords selected for the appeal included individuals who had not only given judgments in the leading authorities on banking and insolvency law, but who had also practised in these areas in their previous lives as leading Commercial Counsel. The appeal took just two days to determine. The authoritative written judgment was handed out

in under 4 weeks and the whole process in the Privy Council took just 6 months from beginning to end.

- 8.3 The expedition in Century compares favourably to other appeal processes. In my experience it is the norm in the Privy Council.
- 8.4 I trust that the explanation in this paper of the procedure and practice in the Privy Council will result in your experiences in the Privy Council being favourable.

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**April 1999**