Champagne without costs

Costs follow the event, except for respondents in the Court of Appeal who successfully resist permission to appeal, as Clive Freedman QC explains

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The changes in the rules relating to permission to appeal in the Court of Appeal have attracted considerable attention. The removal of the applicant's right to renew a permission application orally is a major change. Refusal of permission to appeal is the end of the road; the road is now shorter still when permission on a written application is refused.

In the changes which came into effect on 3 October 2016, there is a subtle change as regards whether a respondent should prepare submissions in response to a permission application. In short, it is to encourage, rather than direct, a respondent to make a written submission. However, the normal rule for a respondent at the permission stage remains that it must bear its own costs of the exercise even if permission is not given.

Prior to the change in the rules, CPR Pt 52C para 19 provided that a respondent need not take any action when served with an appellant's notice until notified that permission to appeal has been granted. In most cases, there is no need for a respondent to file submissions or attend a hearing. An order for costs would not normally be made in favour of a respondent who voluntarily made submissions or attended a hearing unless it was pursuant to a direction of the court; see CPR 52C PD paras 19 and 20.

The practice was to discourage a submission by the respondent, but one is permitted solely as whether the threshold for permission to appeal has not been satisfied or the applicant had misled the court; see *Jolly v Jay* [2002] EWCA Civ 277, [2002] All ER (D) 104 (Mar). While the court would normally not award costs, costs might be awarded where the intervention had been causative of the decision by the court to refuse permission: see *Deutsche Bahn AG and others (Respondents) v Morgan Advances Materials Plc (Appellant)* [2013] EWCA Civ 1484.

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The new CPR 52C PD para 19(1)a provides as follows: 'If the appellant seeks permission to appeal a respondent is permitted, **and is encouraged** [emphasis added], within 14 days of service of the appellant's notice or skeleton argument if later to file and serve upon the appellant and any other respondent a brief statement of any reasons why permission should be refused, in whole or in part.'

The statement is not to be more than three pages long and is to be directed to the relevant threshold test; see CPR 52C PD paras 19 (1) and 19(2).

Despite the encouragement to file a respondent's notice, CPR 52C PD para 20 continues to provide that 'there will normally be no order for the recovery of the costs of a respondent's written statement'. The position is different where the court 'directs' a respondent to file submissions or attend a hearing. In that case, costs will normally be awarded to a respondent if permission is refused.

In most cases, there will not be a direction to file submissions. However, faced with permission to file submissions and indeed encouragement, a respondent would be unwise not to avail itself of the opportunity. It is a very important stage. The refusal of permission avoids the costs as well as the litigation risk of an appeal.

It may have been thought that the costs of a respondent of producing a three page document are small. However, the well-known adage of Winston Churchill comes to mind, 'I'm going to make a long speech because I've not had the time to prepare a short one.' Sometimes it takes longer, and therefore involves greater costs, to produce a three page statement rather than a much longer offering. It is a skill to produce an effective and very well crafted short document.

Given the usual starting point that costs follow the event, it is therefore odd that the rules provide that costs of a respondent successfully resisting permission should not normally be awarded unless it has been directed to prepare a written submission. The rules would not have been changed to encourage a respondent to serve a written submission unless it was useful to the court to receive such a document. The purpose of the withdrawal of the right to an oral permission application was because of constraints on judicial time (see the Ministry of Justice consultation paper on *Appeals to the Court of Appeal: proposed amendments to Civil Procedure Rules and Practice Direction*, 2016), and it may be consistent with this to restrict rights to costs in respect of the permission application. However, this aspect of the change is blunt and is prima facie unjust. It is at the expense of a successful party who has been encouraged by the Practice Direction to file the submission. In these circumstances, it is regrettable that the change did not extend to provide normally for the costs of the successful respondent, even where it was not 'directed' by the court.

A respondent succeeding at this stage will be delighted with the result. Often it will celebrate with champagne. But having to bear its costs of the permission stage ever so slightly mars the sweetness of victory. NLJ

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