

CJRS 16/2008

**Subcommittee on Draft Subsidiary Legislation
Relating to the Civil Justice Reform**

**Leave to Appeal and
Interlocutory Applications of Pending Appeals
under Order 59**

Purpose

On behalf of the Judiciary, the Judiciary Administration presents this paper, which sets out the revised procedure for (i) applications for leave to appeal to the Court of Appeal (“CA”); and (ii) determination of interlocutory applications of pending appeals before the CA under the revised Order 59 – Appeals to the CA in the latest draft Rules of the High Court (Amendment) Rules 2008 (“Draft RHC”). It must be emphasised that where views on the law are expressed herein, such views are not to be taken as statements of law by the courts. Judicial determinations or statements of law may only be made in actual cases that come before the courts after hearing argument.

Present Position

2. Currently, appeals from the Court of First Instance (“CFI”) to the CA are as of right, i.e. leave is not required. Interlocutory applications of pending appeals may be heard and determined by two Justices of Appeal (“JA”).
3. The Civil Justice (Miscellaneous Amendments) Ordinance 2008 (“CJO”) introduces amendments to the High Court Ordinance (“HCO”) (Cap. 4) to provide that -
 - (a) an interlocutory appeal from the CFI to the CA can only be brought with leave of the CFI or the CA. One or two JAs can deal with such applications for leave to appeal. Refusal of leave

by the CA is final. See new ss.14AA & 14AB and amended ss.34B & 35 of the HCO; and

- (b) the CA, comprising two JAs, has jurisdiction to hear or determine interlocutory applications of pending appeals on paper without a hearing. See amended s.34B of the HCO.

4. With the above amendments to the HCO, amendments have to be made to Order 59 of the HCO to provide for (i) a procedure for an application for leave to appeal for interlocutory matters from the CFI to the CA, and (ii) the detailed procedures for the determination of interlocutory applications of pending appeals before the CA.

Existing Procedure for Application for Leave to Appeal

5. In formulating the procedure for application for leave to the CA for interlocutory appeals from the CFI, reference has been made to the present procedure under O.59 in relation to leave application for appeals from the District Court (“DC”). Currently, a party applying for leave for a DC appeal has to apply to the DC trial judge first. If the DC trial judge refuses to grant leave, the party may apply to the CA for leave to appeal within 14 days from the date of such refusal. Such an application should be made ex parte in writing - O.59, r.14(2)(b). If leave is refused otherwise than after a hearing in open court, the applicant has the right to renew the application ex parte in open court - O.59, r. 14(2A). If an application is granted otherwise than after a hearing inter partes, a party affected may apply to have the grant of leave reconsidered inter partes in open court - O.59, r.14(2B).

Revised Procedure for Applications for Leave to Appeal

6. As outlined above, the existing procedure for applications for leave to appeal to the CA is cumbersome and potentially costly. In formulating the application procedure for leave to appeal to the CA for CFI interlocutory matters, opportunity is taken to standardize the procedure irrespective of the type of proceedings or the level of court. It is also proposed that –

- (a) applications for leave to appeal should involve all parties (inter partes), and not just the party applying for leave (ex parte) initially, save in exceptional cases. This is to avoid the other party applying to the CA to set aside the initial order if leave is granted in his absence, thereby causing unnecessary delay and making the application procedure unnecessarily cumbersome and costly; and
- (b) the calculation of time for making applications (whether for leave to appeal or appeal) should start to run from the date of the relevant judgment, order or decision appealed against, instead of from the date of perfection of the order (as it is now).

7. Accordingly, amendments are proposed to standardize the provisions for leave to appeal to the CA, irrespective of the type of proceedings or the level of court. O.59, rr.2A and 2B deal, respectively, with (i) applications for leave to appeal to the CA, and (ii) applications for leave to appeal against interlocutory and other orders (such as costs) of the CFI. Specifically, amendments are proposed to provide that -

- (a) all applications for leave should be inter partes, unless the proceedings to which the judgment or order appealed against are ex parte - O.59, rr.2A(2) and 2B(5);
- (b) where the CA makes a determination on paper, an aggrieved party may request that the CA reconsider the matter at an oral hearing, but the CA may refuse to do so where it is of the view that the application is totally without merit - O.59, rr.2A(5), (7) and (8). (Reference is made to CPR 52.3(4) of the English Civil Procedure Rules);
- (c) where a single judge of the CA makes a determination on an application for leave to appeal, an aggrieved party may make a fresh application within 7 days to the CA - O.59, r.2C; and
- (d) in granting leave to appeal, the CA may give such directions or impose such conditions as it deems fit - O.59, r.2A(6).

Time

Application for Leave

8. Provisions are proposed to specify the time (14 days) within which applications for leave to appeal must be made. Such time starts to run from the date of the order or decision appealed against, and not from the date of perfection of the order : - O.59, r.2B(1).

Appealing

9. Where leave is required and is granted, a notice of appeal has to be filed within 7 days: O.59, r.4(1)(a). Where leave is not required, the time for appealing has been standardized so that the notice of appeal should be filed within 28 days from the date the relevant judgment, order or decision is made, and not (as now) from the date of perfection - O.59, rr.4(1)(b) and (c).

Applications to the CA

10. For interlocutory applications to the CA, any party affected by an ex parte order of the CA may apply to have the order reconsidered within 7 days of service - O.59, r.14(3A).

Interlocutory Applications of Pending Appeals

11. Amendments are proposed to provide that the CA may determine an interlocutory application on written submissions only without a hearing, and may direct that the application be heard before the CA consisting 2 or 3 JAs - O.59, r.14A. For the avoidance of doubt, it is provided that a judge of the Court of First Instance may sit as a judge of the Court of Appeal - O.59, r.14A(3).