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For discussion on
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Panel on Administration of Justice and Legal Services
of the Legislative Council
Leapfrog appeals to the Court of Final Appeal

Purpose

At a meeting of the Panel held on 15 June 1999 the Administration agreed to review the question of introducing a "leapfrog" procedure by which civil appeals could, in certain cases, go direct to the Court of Final Appeal (CFA), bypassing the Court of Appeal. This paper sets out information, analysis and the provisional views of the Administration for the consideration of the Panel.

Background

2. Under section 22 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) (CFA Ordinance) an appeal lies to the CFA in any civil cause or matter only from a judgment of the Court of Appeal.

3. During the passage of the CFA Ordinance in 1995 the Bar Association proposed a leapfrog procedure with the following main features –

(a) it would only apply to civil cases;

(b) it would apply to cases of great general or public importance where it is obvious that an appeal would eventually reach the CFA; and

(c) the leave of the CFA would be required.

4. The Administration did not agree with the Bar's proposal in 1995. Its preference was to allow the CFA to operate, at least initially, according to the system which prevailed in respect of the Privy Council. The Administration agreed, however, that the possibility of introducing a leapfrog procedure could be revisited after the CFA had been established for a number of years and its reputation established.

5. The Law Society advised the Panel at its meeting on 15 June 1999 that it did not object to the introduction of a leapfrog procedure provided that certain conditions applied in respect of the grant or refusal by the trial judge of a certificate for a leapfrog appeal, namely –

(a) a point of law of general public importance is involved in the decision which relates to the construction of an enactment or of a statutory provision, or is one in respect of which he was bound by a previous decision of the Court of Appeal or the CFA;

(b) a sufficient case has been made out to justify an application for leave to bring such an appeal; and

(c) all parties to the proceedings consent to the grant of the certificate.

Leapfrog appeals in the UK

6. Taken together, the leapfrog procedure proposed by the Bar Association and the Law Society is much the same as that provided by Part II of the Administration of Justice Act 1969 (UK) dealing with appeals from the High Court to the House of Lords. The relevant provisions of the 1969 Act are copied at **Annex A** to this paper. The 1969 Act largely reflected the recommendations made in 1953 in the Final Report of the Committee on Supreme Court Practice and Procedure, chaired by Lord Evershed MR

(Evershed Report). A copy of the relevant passages of the Evershed Report is attached at **Annex B**.

7. Part II of the 1969 Act applies to civil proceedings in the High Court before either a single judge or a Divisional Court (s.12(2)(a) and (c)). The main conditions for a case to leapfrog are –

(1) The parties must agree to leapfrog (s.12(1)(c)).

(2) The case must involve a point of law of general public importance (s.12(3)).

(3) The point of law must relate wholly or mainly to the construction of an enactment or of a statutory instrument and have been fully argued in the proceedings and fully considered in the judgment of the trial judge in the proceedings, or be a point of law in respect of which the trial judge is bound by a decision of the Court of Appeal or the House of Lords and have been fully considered in the judgments given by the Court of Appeal or the House of Lords (s.12(3)(a) and (b)).

(4) The trial judge must be satisfied that a sufficient case has been made out to justify an application to leapfrog (s.12(1)(b)).

(5) If satisfied in respect of conditions (1) to (4) above, the trial judge may issue a certificate (s.12(1)) which entitles the parties to apply for leave to leapfrog to an Appeal Committee of the House of Lords which will determine the application without a hearing (s.13(3)).

Arguments for a leapfrog procedure

8. The main advantage of a leapfrog procedure is the potential for speeding up the process of litigation, where that can appropriately be done, and saving costs. This

would apply in respect of the limited number of cases which by their character would eventually find their way to the CFA. In such cases it may be possible to avoid the expense and delay involved in first appealing to the Court of Appeal by going straight to the CFA (Evershed Report, paras 68(a) and 483).

Arguments against a leapfrog procedure

9. The main arguments against a leapfrog procedure include –

(1) The CFA would be deprived of the benefit of expository judgments of the Court of Appeal. Without the assistance of such judgments the deliberations of the CFA may need to be prolonged (Evershed Report, para. 495).

(2) One appeal from the trial court may not be sufficient. It is inherent in the legal system that cases should only reach the CFA by a regular gradation through the Court of Appeal and any departure from that system would be to the detriment of the body of law (Evershed Report, para. 496).

(3) In practice it is not easy to identify at first instance the cases which are suitable to go to the CFA or the points which require to be argued there. These are often not identified as such until after the cases have gone to the Court of Appeal (Evershed Report, paras 68(b) and 493-494).

(4) There is a risk that the CFA would become so overloaded with leapfrog applications and appeals that any advantage in the saving of costs would be more than offset by the serious delay with which litigants might be faced in the hearing of their appeals (Evershed Report, para. 493).

(5) The CFA is still a relatively new court notwithstanding that it has generated a significant body of jurisprudence in the few years since 1997. Therefore

the CFA should continue to be assisted by the refinement of argument and definition of the issues in the Court of Appeal.

UK response to arguments against a leapfrog procedure

10. The Evershed Report (paras 498-500) recommended that the arguments in para. 9(1) – (4) above against a leapfrog procedure be dealt with by specifying several criteria for cases to go direct to the House of Lords from the High Court, namely –

(1) The question involved should be one of substantial legal importance (para. 498(a)).

(2) The determination of such question should be essential to the determination of the dispute between the parties (para. 498(b)).

(3) Such question should have been fully argued and fully considered in the judgment appealed from (para. 498(c)).

(4) A case in which the point in issue has been the subject of a previous decision of the Court of Appeal should go to the House of Lords without the delay and expense of a hearing in the Court of Appeal (which would necessarily be purely formal) (para. 499).

(5) To help ensure that the House of Lords would not become overloaded by the leapfrog scheme, the question at issue should, as a first experimental step, be restricted to one of the construction of a statute or a statutory instrument, except where it is desired to test a previous decision of the Court of Appeal covering the issue in the instant case as in sub para. (4) above (para. 500).

11. As may be noted from para. 7 above, the recommendations made in the

Evershed Report were incorporated in Part II of the 1969 Act with some modifications in points of detail including –

(1) The consent of all parties to the proceedings is required to the grant of a certificate by the trial judge to bypass the Court of Appeal (s.12(1)(c)).

(2) The trial judge may also grant a certificate in cases where the question involved was fully considered in judgments of the House of Lords (s.12(3)(b)).

(3) Where the trial judge grants a certificate, to enable the House of Lords to retain control, the leave of the House is required for an appeal to be brought to it direct (s.13).

Construction of statute

12. The Evershed Committee said that it would have liked to extend the scope of its recommendation in this respect but noted that it was beyond its competence to consider procedure in the House of Lords (Evershed Report, para. 68(d)). The Committee considered that the restriction would meet the Law Lords' concerns about overloading on the ground that extending the class of cases beyond those of the construction of a statute or a statutory instrument would entail difficulty in definition and the risk that the issue between the parties would, upon appeal, be found not to depend upon the question originally presented for determination. The restriction was suggested as a first experimental step (Evershed Report, para. 500).

13. Arguments for the extension of leapfrog appeals beyond cases of statutory construction, without the condition that there be a decision of the Court of Appeal or the House of Lords covering the issue in dispute, include the view that if a point of law is of general public importance such that it should be dealt with by the House of Lords direct, it should be of no consequence whether the source of law is statutory or not.

Consent of the parties

14. The Evershed Committee noted that, "we do not think it necessary that there should be a consent by both parties to the litigation, either before the trial or afterwards, at the time the application is made" (Evershed Report, para. 502(b)). The requirement for the consent of the parties, however, was included in section 12(1)(c) of the Administration of Justice Act 1969 as an additional means of ensuring that the House of Lords would not become overloaded under the leapfrog procedure. A similar requirement applies in respect of the Canadian leapfrog procedure under section 38 of the Supreme Court Act.

15. Essentially the same arguments as those regarding the restriction of leapfrog appeals to the construction of statutes appear to apply to the requirement for the consent of the parties.

The views of the Judiciary

(a) Leapfrog procedure

16. The Judiciary has no objection to the introduction of a leapfrog procedure with the same requirements as apply in the UK, adapted as appropriate to Hong Kong, including the requirement that leave be obtained from the Appeal Committee of the CFA. The procedure would not apply to District Court cases or other cases where appeals go to the Court of Appeal.

(b) The Basic Law

17. The Judiciary has also expressed the view that questions concerning the interpretation of the Basic Law should be excluded from the leapfrog procedure for the time being. The Basic Law is the constitution under the new order and the jurisprudence has to be developed. Judgments of the Court of Appeal would assist both such development and the quality of judgments of the CFA.

The UK experience of leapfrogging

(a) Number of leapfrog cases

18. The Lord Chancellor's Department has advised that a comprehensive statistical record of leapfrog appeals since 1969 is not available. However, during the period 1978-1998 the House of Lords determined 82 petitions for leave of which 56 resulted in a hearing before the House of Lords. A search of the Department's library has shown 122 case references for appeals and applications brought under sections 12 and 13 of the Administration of Justice Act between 1969 and 1999.

19. The first leapfrog appeal was American Cyanamid v Upjohn Co. [1970] 1 WLR 1507, a patents case. Lord Wilberforce, at p.1521G, observed that, "This has resulted in an expeditious and practical way of disposing of what might otherwise have been prolonged and expensive litigation." No Law Lord adverted to the absence of judgments from the Court of Appeal (Blom-Cooper and Drewry Final Appeal, p.150).

(b) Requirement of consent of the parties and restriction to construction of statutes

20. These criteria (which reflect concerns expressed by the Law Lords of the time that the House of Lords would become overloaded by leapfrog applications and appeals) have not been further evaluated and the state of judicial business has not prompted a re-examination by the Lord Chancellor's Department of the efficacy of such criteria.

(c) Criminal Appeals

21. Decisions of a Divisional Court of the Queen's Bench Division in a criminal cause or matter were appealable direct to the House of Lords under section 1(1)(a) of the Administration of Justice Act 1960. Such an appeal required leave of the Divisional Court or the House of Lords which would only be granted if the Divisional Court certified that a point of law of general public importance was involved in the decision and it appeared to the court or the House of Lords that the point was one which

ought to have been considered by the House.

22. The Access to Justice Act 1999 made amendments to the Administration of Justice Act 1960 enabling criminal cases or matters previously determined by a Divisional Court to be determined by a single judge of the High Court. Accordingly, the 1960 Act has been amended to allow the House of Lords to hear appeals from a decision of a single judge of the High Court in a criminal cause or matter.

23. The Lord Chancellor's Department further advises that these provisions of the Access to Justice Act are part of an ongoing review examining the efficiency of the procedures governing the handling of criminal causes or matters in the appellate stages. Another proposal currently being considered involves using the Court of Appeal (Criminal Division) as a further tier of appeal between the Divisional Court and the House of Lords. If this proposal is implemented, appropriate changes will be made to section 12 of the Administration of Justice Act 1969 to allow the High Court to issue a certificate allowing an appeal in a criminal matter to be heard direct in the House of Lords. The wider implications of such a proposal are being considered in association with the other departments which share responsibility for the criminal system.

Other jurisdictions

24. Australia, Malaysia, New Zealand, Singapore and South Africa have no comparable leapfrog procedures; although in South Africa, with the leave of the Constitutional Court, a constitutional matter may be brought either to the Constitutional Court at first instance or on appeal to the Constitutional Court direct from any other court.

25. The Department of Justice of Canada has advised that the Canadian court system has a formal leapfrog procedure which is available only in limited situations and is infrequently used. Other features of the Canadian appeal system, including inadvertent gaps in the law, allow a result equivalent to leapfrogging. A copy of the relevant provisions of Canada's Supreme Court Act is attached at **Annex C**. The

Canadian system is noted below.

(a) Appeals per saltum

Appeals per saltum are the nearest Canadian equivalent to leapfrog appeals in the UK, the main differences being that in Canada such appeals are not restricted to civil matters or to matters arising out of the construction of a statute or statutory instrument. Nor is there a requirement for a binding court of appeal or Supreme Court judgment on the question in issue. Appeals per saltum are provided for under a rarely used provision of the Supreme Court Act (section 38) which allows appeals from a final judgment of a court of first instance to be heard by the Supreme Court of Canada if leave is granted by that court. The appeal must be on a question of law alone, and the parties must give their consent, verified by affidavit, to the appeal. This procedure allows the parties to bypass the usual appeal routes through the federal or provincial courts of appeal.

(b) Constitutional interpretation

Although it is not a leapfrog provision in the sense of an appeal from a lower court, the Supreme Court has jurisdiction, under section 53 of the Supreme Court Act, to consider, at first instance, important questions of law or fact concerning the interpretation of the constitution, the constitutionality or interpretation of any piece of legislation, or any other matter referred to it by the Governor in Council. However, only the Government may bring such proceedings.

(c) "Inadvertent" leapfrog effect

Since Canada's provincial courts of appeal are statutory courts, they have no inherent jurisdiction and may only exercise powers expressly granted to them by statute. In certain situations the powers granted to the courts of appeal, particularly in criminal matters, leave gaps in the appeals scheme.

The result is that the courts of appeal have no jurisdiction to entertain appeals from certain lower court decisions, and the only recourse for a litigant is to seek leave to appeal to the Supreme Court under section 40 of the Supreme Court Act. Appeals will only be heard under section 40 if leave to appeal is granted by the Supreme Court. The threshold for granting leave to appeal under section 40 is high, since leave is only granted in instances where the question involved is "by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it".

Criminal appeals in Hong Kong

26. The Administration is of the view that the proposed leapfrog procedure should not apply to criminal cases and that, except as provided in section 31 of the CFA Ordinance, the CFA should continue to be assisted by judgments of the Court of Appeal in such cases. Section 31 of the CFA Ordinance provides for an appeal to lie to the CFA from any final decision of the Court of Appeal, or from any final decision of the Court of First Instance (not being a verdict or finding of a jury) from which no appeal lies to the Court of Appeal. The latter type of decision includes decisions on appeals from magistrates.

27. The position in the UK in respect of criminal appeals under the Administration of Justice Act 1960 and the Access to Justice Act 1999 is noted in paras 21-22 above. As noted in para. 23 above, the UK is considering the implications of allowing leapfrogs from the High Court to the House of Lords in criminal causes or matters in the event that the Court of Appeal (Criminal Division) may be introduced as a further tier of appeal between the Divisional Court and the House of Lords. The Lord Chancellor's Department has kindly offered to provide the Administration with information on the results of such consideration.

28. In Canada, criminal cases are included in appeals per saltum under section 38 of the Supreme Court Act (see para. 25(a) above), although section 39 excludes from such appeals a judgment in a criminal cause, in proceedings for or on (a) a writ of habeas corpus, certiorari or prohibition arising out of a criminal charge; or (b) a writ of habeas corpus arising out of a claim for extradition made under a treaty.

Provisional views of the Administration

(a) Limited leapfrogging

29. The Administration is provisionally of the view that a leapfrog procedure should be introduced by amending the CFA Ordinance to enable certain civil appeals to be made to the CFA direct from the Court of First Instance, bypassing the Court of Appeal.

30. The form that it is proposed such leapfrog procedure would take is that suggested by the Bar Association, supplemented with the conditions suggested by the Law Society. This, in effect, would make the leapfrog procedure mainly the same as that presently in place in the UK under sections 12 and 13 of the Administration of Justice Act 1969.

31. In addition, it is proposed that questions of the interpretation of the Basic Law be excluded from the leapfrog procedure as suggested by the Judiciary, with the minor modification that this exclusion not apply where the Court of Appeal is bound whether by its own decision or a decision of the CFA. Whichever way the Court of Appeal is bound, there would be little point in further arguing a Basic Law question in the Court of Appeal and a leapfrog would both reduce costs and expedite the hearing of the case by the CFA. This approach would also be consistent with the conditions in respect of non-statutory points of law under the UK leapfrog procedure.

32. It is considered that, at least initially, it would be desirable to proceed

cautiously and introduce a leapfrog procedure in Hong Kong similar to that in the UK which is the jurisdiction in respect of which the Administration has been able to obtain the best information. In particular, it is known that on average only four leapfrog applications or appeals have been heard annually since the procedure was introduced in 1969, and that the state of judicial business has not prompted a re-examination of the leapfrog criteria by the Lord Chancellor's Department (see paras 18 and 20 above).

(b) <u>Proposed leapfrog procedure</u>

33. Based on the above, the form of the proposed leapfrog procedure would be –

(1) The parties must agree to leapfrog.

(2) The case must involve a point of law of general public importance.

(3) The point of law must relate wholly or mainly to the construction of an Ordinance or of subsidiary legislation and have been fully argued in the proceedings and fully considered in the judgment of the trial judge in the proceedings, or be a point of law in respect of which the trial judge is bound by a decision of the Court of Appeal or the CFA and have been fully considered in the judgments given by the Court of Appeal or the CFA.

(4) A point of law relating to the Basic Law may only leapfrog if, in respect of it, the trial judge is bound by a decision of the Court of Appeal or the CFA and it has been fully considered in the judgments given by the Court of Appeal or the CFA.

(5) The trial judge must be satisfied that a sufficient case has been made out to justify an application to leapfrog.

(6) If satisfied in respect of conditions (1), (2), (3) or (4), and (5) above, the trial judge may issue a leapfrog certificate which entitles the parties to apply for leave to leapfrog to the Appeal Committee of the CFA which will determine the application without a hearing.

34. A leapfrog procedure, if introduced, would be the subject of general monitoring and review.

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