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Briefing note January 2015

The final frontier: the UK Supreme Court in 2014

The UK Supreme Court overturned the decision of the lower court in more than half the cases it decided in 2014. However, only 66 cases reached the Supreme Court, giving rise to 68 decisions, a miniscule fraction of the cases in the UK's courts.

The Supreme Court is the UK's highest appeal court. It replaced the House of Lords in that role in 2009 when the Lords of Appeal in Ordinary migrated across Parliament Square to the former Middlesex Guildhall to be reborn as Justices of the Supreme Court.

The Supreme Court has jurisdiction over both civil and criminal appeals from England & Wales and Northern Ireland, and over civil appeals from Scotland. Some cases can go from the Supreme Court onwards and, perhaps (see below), upwards to the Court of Justice of the European Union or to the European Court of Human Rights, but the Supreme Court remains the ultimate arbiter on questions of domestic law.

There are twelve judges in the Supreme Court, traditionally made up of nine from England and Wales, two from Scotland and one from Northern Ireland. The Supreme Court sits in panels containing an odd number of judges, normally five but for one decision given in 2014 the Court went up to nine (*Nicklinson*, on the right to die), and on seven other occasions seven judges decided the case.

Getting to the Supreme Court

The Supreme Court is more readily accessible to visiting members of the public than the House of Lords is or was, but getting a case into the Supreme Court remains every bit as difficult. With one exception, it is necessary to secure permission to appeal to the Supreme Court. Permission can be granted either by the court against whose judgment the losing party wishes to appeal or by the Supreme Court itself. Except in cases that are obviously suitable for the Supreme Court (eg cases of constitutional significance), lower courts usually leave it to the Supreme Court to decide what cases it should hear.

In 2014, there were 198 decisions on applications to the Supreme Court for permission to appeal. 59 of these applications, or 30%, were successful. The standard reason offered for refusing permission was that the case "does not raise an arguable point of law of general public importance" or, more dismissively, that the proposed appeal "does not raise an arguable point of law". The underlying question is whether the case involves an issue that interests the Supreme Court, whether because the Supreme Court thinks that the lower court might have got it wrong, the law is unclear or the consequences of the case are very significant for the parties.

The exception to the requirement for permission to appeal applies to Scotland. A party to a Scottish civil case who wants to appeal needs generally only to persuade two advocates to certify that the case is suitable for an appeal. This less stringent requirement doubtless explains why the Supreme Court hears a disproportionate number of civil appeals from Scotland (see below).

Key facts

- The Supreme Court gave 68 individual decisions in 2014
- The decision of the lower court was overturned in whole or in part in 54% of cases
- 58% of cases had a public authority on one or other side
- There were dissents in only thirteen decisions, with a bare majority in four cases
- The Judicial Committee of the Privy Council gave a further 43 decisions
- Judges sat in court for an average of 1½ days a week, hearing 46 cases

Appeals in 2014

The Supreme Court gave 68 decisions in 2014, down from 81 in 2013 but up from 61 in 2012, 60 in 2011 and 58 in 2010. Two of these decisions were on issues of costs from substantive appeals already determined and one was a devolution issue, ie a dispute over the powers of (in this case) the Welsh Assembly. Of the 65 remaining decisions, the Supreme Court allowed the appeal in full in 31 cases, in part in four further cases, and dismissed the appeal in 30 cases.

If the Supreme Court is sufficiently interested to hear an appeal, there is therefore a 54% chance that the appeal will succeed in whole or in part. This very high success rate might suggest that the Supreme Court is too cautious in its selection of cases to hear. An application for permission to appeal is not meant to decide the case, but a better than 50% strike rate might suggest that it is too close to doing so.

In reaching its decisions, the Supreme Court is remarkably harmonious. In only thirteen of the 68 decisions (or 19%) was there a dissenting judgment, despite the fact that in more than half of its cases the Supreme Court disagreed with the lower court, itself a very senior court. In four of those thirteen cases, the decision in question was by a bare majority, whether 3-2 (on three occasions) or 4-3. If a party loses its appeal 5-0, or even 7-2 as in *Nicklinson*, the loser might be disappointed, even aggrieved, but the decision clearly represents the settled view of the highest court. A bare majority is, however, profoundly unsatisfactory for the losing party because it leaves the suspicion that if only the composition of the court had been different, the outcome of the case might also have been different.

The conduct of appeals in 2014

Hearings in the Supreme Court are relatively short, which places great importance on the written submissions lodged by the parties. The hearings leading to judgments in 2014 lasted an average of 1.6 days, and that exaggerates the length because it involves counting as a whole day a hearing which might in fact have finished early. 35 hearings leading to a decision in 2014 were completed within a single day, and another 25 within two days. *Nicklinson* was again the longest, at four days.

Having heard an appeal, the Supreme Court then took an average of 104 days, or 3½ months, to give its decisions in 2014. This ranged from 21 days (*Adamson v Paddico (267) Ltd*, a case on the registration of commons land in Huddersfield) to 251 days (over 8 months - *MacDonald v The National Grid Electricity Transmission plc*, a case concerning liability for mesothelioma, in which the court split 3-2 and 4-1 on the two issues). Three weeks is admirably efficient, but eight months represents an agonising wait for the parties.

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Despite the brevity of hearings, judgments run to an average of 30 pages. This ranges from 8 pages (*HMRC v Forde*, on national insurance) to 131 pages (*Nicklinson*). Notwithstanding the relative harmony amongst the judges, there are still an average of 2.3 individual judgments per case (though some are very short). Where the judges disagree as to the outcome or the reasoning, more than one judgment is to be expected but where, as is often the case, judges purport to agree but still give more than one judgment, it tends to lead to confusion.

The Scottish issue

The Supreme Court does not have jurisdiction to hear appeals from Scottish criminal courts (with one very limited exception), but can hear appeals in Scottish civil cases. As mentioned above, unlike appeals from the rest of the United Kingdom, the permission of a court is not required for a Scottish civil appeal to the Supreme Court. Instead, the notice of appeal must be certified as reasonable by two Scottish advocates.

In 2014, there were eleven decisions in the Supreme Court on appeal from Scottish civil cases. Leaving out of the equation appeals heard by the Supreme Court from criminal courts and those that were not appeals at all, Scottish civil appeals represented 18% of the total. Scotland has 8% of the population of the United Kingdom, and the volume of civil litigation in Scotland represents an even lower proportion of the civil litigation in the United Kingdom as a whole.

These statistics make it hard to avoid the unsurprising conclusion that the lack of a permission requirement for appeals in civil cases makes it easier to appeal from Scotland than it is from the rest of the country. Interestingly, this does not affect the proportion of cases in which appeals are successful. In 2014, it was just over 50% for Scottish appeals (six out of eleven), approximately the same as for appeals as a whole. Perhaps, Scottish advocates apply a more appropriate test than the Supreme Court Justices themselves.

The nature of the cases

Cases heard by the Supreme Court are dominated by public authorities. 38 of the cases decided in 2014, or 58%, involved on one side or the other a public authority of some sort, including criminal prosecutors, local authorities, tax collectors and

government departments. Of these, fifteen decisions arose from judicial review proceedings, and twelve concerned criminal conduct. Still more cases were publicly funded. For example, cases concerning children, whether or not the official solicitor was involved, may have received public funding. The Central Bank of Nigeria was also successful in its appeal challenging the jurisdiction of the English courts (*Williams v Central Bank of Nigeria*).

Commercial decisions were something of a rarity in 2014. The few there were included a case about misrepresentations inducing the purchase of a grouse moor in the Cairngorms (*Cramaso LLP v Ogilvie-Grant, Earl of Seafield*), nuisance arising from the operation of a speedway track (*Coventry v Lawrence*), the right to rescind a credit agreement and the liability of credit reference agencies (*Durkin v DSG Retail Ltd*), the limitation period for filing "follow-on" anti-trust claims *(Deutsche Bahn AG v Morgan Advanced Materials plc*), the effect of illegality on contractual and other rights (*Hounga v Allen* and *Les Laboratoires Servier v Apotex Inc* - another case on illegality (*Jetivia SA v Bilta*), involving a seven person panel, was heard in October 2014, with the judgment expected in 2015, indicating that the Supreme Court recognises that, despite two tries in 2014, this is a subject it has not yet resolved satisfactorily) and the nature of remedies for breach of fiduciary duty (*AIB Group (UK) plc v Mark Redler & Co Solicitors*). Each of these cases was important for the parties, but none caused major tribulations beyond the parties.

The Supreme Court also resolved the dispute between English courts and the Privy Council as to whether an agent holds a bribe in trust for his principal, holding that he does (*FHR European Ventures LLP v Cedar Capital Partners LLC*).

Cases that might have longer term importance are, perhaps, two decisions that deal with aspects of the UK's relations with Europe.

In *R (on the application of HS2 Action Alliance Ltd) v The Secretary of State for Transport*, the Supreme Court echoed its German equivalent in sending a sharp shot across the bows of the Court of Justice of the European Union. The CJEU has asserted that EU law tramples all before it, even the constitutions of the member states. In *HS2*, the Supreme Court indicated that it does not subscribe to that view. The UK constitution might be harder to find than the German basic law, but the Supreme Court considered that article 9 of the Bill of Rights of 1689 was unquestionably part of whatever constitution the UK has. Article 9 prevents courts from considering proceedings in Parliament, and the Supreme Court would take a lot of persuasion that EU legislation could change that position.

Greater confidence in dealing with Europe was also on display in *R (on the application of Haney) v The Secretary of State of Justice*, this time with regard to the European Court of Human Rights, not the CJEU. In *Haney*, the Supreme Court asserted that a decision of the ECtHR (reversing a decision of the House of Lords) was wrong and that it should not be followed.

The Privy Council

The Judicial Committee of the Privy Council is, for most practical purposes, the Supreme Court sitting as the final appeal court from decisions in various outlying British or formerly British territories. In 2014, the Privy Council gave decisions in 43 cases, involving Trinidad (9), Mauritius (7), Jamaica, the British Virgin Islands (both 5), Antigua, the Bahamas (both 3), Bermuda, St Vincent and the Grenadines (both 2), Turks & Caicos, St Lucia, Gibraltar, the Isle of Man and Jersey (all 1). In addition, the Privy Council heard appeals from the Disciplinary Committee of the Royal College of Veterinary Surgeons and the Appeal Court of the Sovereign Base Areas of Akrotiri and Dhekelia (Cyprus).

The success rate for appeals in the Privy Council is approximately the same as in the Supreme Court. Twenty of the 43 appeals on which decisions were given in 2014 were allowed in full, and a further three were allowed in part, again giving a success rate of better than 50%. Hearings were a little shorter than in the Supreme Court, averaging 1.3 days, and judgments were significantly shorter, averaging just under 15 pages. Perhaps because of that, the average delay between the hearing and the decision is shorter than in the Supreme Court, at 75 days.

In form, the Privy Council humbly advises Her Majesty that an appeal should be allowed or dismissed rather than disposing of the case itself. Her Majesty should receive one piece of consistent advice, and so historically there has only been one judgment and no dissents in the Privy Council.

Form has given way to substance, and dissents are now allowed, but they remain rare. There were only Privy Council two cases in 2014 with dissents, and in the vast majority of cases there was a single judgment. The biggest exception to this rule was in *Singularis Holdings Ltd v PricewaterhouseCoopers*, which concerned the ability of a court in one country to assist liquidators appointed by the courts of another country. Despite agreement as to the outcome, all the members of the court gave judgments since there was considerable disagreement as to the route to the outcome.

Judicial workload

The twelve judges of the Supreme Court decided 111 Supreme Court and Privy Council cases in 2014, aided by eleven appearances from other judges (eg Lord Dyson, a former Supreme Court judge and now the Master of the Rolls, sat in two cases in the Supreme Court, and Lord Collins, a retired Supreme Court judge, sat in two cases in each of the Supreme Court and the Privy Council). By way of contrast, the US Supreme Court gave judgment in 68 cases in 2014; the US Supreme Court has nine members and invariably sits en banc (ie all judges hear cases).

This resulted from some 853 sitting days by the full-time judges (counting any part of a day as a whole day), or an average of 71 days per judge. Allowing for holidays, the judges sat in court for some 1½ days per week, leaving 3½ days (not to mention weekends) to read papers and write the 201 judgments delivered in 2014, as well as dealing with applications for permission to appeal, giving speeches, and ceremonial and other duties.

Perhaps unsurprisingly, the President of the Supreme Court, Lord Neuberger, was the busiest Supreme Court judge. Lord Neuberger sat in 61 cases in the Supreme Court and Privy Council, delivering 26 judgments, significantly above the average of 46 cases per judge or roughly one a week. Lord Neuberger also gave the most speeches worthy of inclusion on the Supreme Court's website, at 15 out of the 32 listed, including 5 on a trip to Australia in August 2014.

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