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LIBRARY NOTE

The Appellate Jurisdiction of the House of Lords
(Updated November 2007)

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INTRODUCTION

This Library Note focuses on the appellate jurisdiction of the House of Lords. Part I looks at the historical development of that jurisdiction, whilst Part II discusses the contemporary judicial work of the House, giving an overview of the current jurisdiction and composition of the Appellate and Appeal Committees, and including a look at the Law Lords' role in the Judicial Committee of the Privy Council. Part III describes the new Supreme Court of the United Kingdom, to which the Lords' appellate jurisdiction and the devolution jurisdiction of the Judicial Committee of the Privy Council will be transferred when the relevant provisions of the Constitutional Reform Act 2005 are brought into force.

The Note supersedes LLN 2003/007. It updates LLN 2006/002, which contained a chronology of the Constitutional Reform Act 2005, tracing its antecedents and its passage through both Houses.

I. HISTORY OF THE APPELLATE JURISDICTION TO 1948

1. Origins – 1800

The origins of the appellate jurisdiction of the House of Lords lie in the distant precursor of Parliament, the *Curia Regis*, the advisory body to the King in the early Middle Ages, which combined what in modern parlance would be termed legislative, executive and judicial functions. The King dispensed justice through the *Curia Regis* and, although separate common law courts later split off, the “High Court of Parliament” retained its role as the highest court of royal justice. With the emergence in the fourteenth century of two distinct Houses, the House of Lords gradually inherited that role¹.

By the sixteenth century, however, the judicial work of the House was in marked decline. Between 1514 and 1589 only five cases are recorded in the *Journal*. The House did not accept any cases between 1589 and 1621, which may be attributed to improved procedures in the Court of King’s Bench and in the Court of Chancery. But the jurisdiction of the House was recognised both in legal treatises and in statute: thus it was acknowledged by the Error from the Queen’s Bench Act 1584 and by the Error Act 1588.

In the 1620s, Henry Elsyng, Clerk of the Parliaments, commented on the judicial role of Parliament that “The execution of all our laws has been long since distributed by Parliament unto the inferior courts, in such sort as the subject is directed where to complain, and the Justices how to redress wrongs and punish offences. And this may be the reason of the Judges’ opinions in Thorpe’s case *anno* 31. H. 6. n. 27. That actions at Common Law are not determined in this High Court of Parliament. Yet complaints have ever been received in Parliament, as well of private wrongs as of public offences. And according to the quality of the person, and nature of the offence, they have been retained or referred to the Common Law.” (E. Read Foster (ed.), *Judicature in Parliament*, by Henry Elsyng (1991), page 7).

Besides the right of a Peer to be tried by his Peers, Elsyng identified six cases in which judicature still belonged to Parliament: 1) in judgments against delinquents, as well for capital crimes, as misdemeanours, on accusations by the Commons, either by their complaints, or impeachments; by information from the King; by complaint of private persons; 2) in reversing erroneous judgments in Parliament; 3) in reversing erroneous judgments given in the Court of King’s Bench; 4) in deciding of suits long depending either for difficulty or delay; 5) in hearing complaints of particular persons on petition; 6) in setting at liberty any of their own Members or servants imprisoned; and in staying the proceedings at the common law during the privilege of Parliament².

On 3rd March 1621, James I sent the petition of Edward Ewer, a notoriously persistent litigant, to the House of Lords. Ewer had asked that the record of his case in the Court of King’s Bench be reviewed by the House of Lords. The King’s decision was noted by other litigants and thirteen other petitions were accepted by the House in the 1621 Parliament. The number of petitions accepted increased markedly in the Parliament of 1624, 1626 and 1628³. The petitions included

¹ For a detailed analysis of this period see the classic accounts by Luke Owen Pike in *A Constitutional History of the House of Lords* (1894, Chapter XIII) and Sir William Holdsworth in *A History of English Law* (7th ed., 1956, Volume I, Chapter IV).

² The right of a Peer to be tried by his Peers was abolished by the Criminal Justice Act 1948, as a result of an amendment in the House of Lords. Impeachment is technically still possible, but it was last used in 1804 with the impeachment of Lord Melville.

³ The total number of petitions accepted 1621-29 was 207; the number of petitions sent to the House was probably over 300.

both cases requesting a review of proceedings in a lower court and cases of first instance, where the petitioner took his grievance directly to the House.

With the gradual increase in the number of petitions, the House appointed a standing Committee for Petitions which grew in size from 8 Members in 1621 to 39 Members in 1629. Justices in the lower courts and other high legal officials were summoned by writs of assistance to provide expert legal advice⁴. At first, petitions were brought to the Clerk of the Parliaments who arranged for them to be read to the House which then decided whether the petition should be accepted and referred to the Committee. The great increase in the number of petitions led the House to give the Committee the power to accept or reject petitions itself.

After 1629, there was a period of eleven years when Charles I ruled without Parliament. The failure of the King's personal rule led to the calling of the Short Parliament in the spring of 1640. The House of Lords soon appointed a Committee for Petitions containing 41 Members. The importance of the committee is shown by the fact that the lay Peers included few men who had been sympathetic to the personal rule of Charles I. When the King had to return later in the year to Parliament and summoned the Long Parliament in November 1640, the House of Lords had to deal with a large number of petitions pleading for redress from arbitrary actions by the King's government in the 1630s. The gradual collapse of the King's government allowed the House of Lords to assume a greater role as a judicial body. However, the House's ability to act as a court of law was diminished by the outbreak of the Civil War in 1642 when the Lord Keeper, the Master of the Rolls and several of the judges decamped to Oxford where the King's government was then established. Only a few of the legal assistants who normally served the House on a regular basis remained in London. From 1643, when the House acquiesced in the ordinance passed by the House of Commons for the seizure of private property, the Lords found it difficult to remain aloof from the highly partisan politics of the time. The end came when the Commons voted on 6th February 1649 "That the House of Peers is useless and dangerous and ought to be abolished." The House was condemned as much for its judicial work as its legislative role⁵.

The Convention Parliament which met between 25th April and 29th December 1660 saw the House of Lords restored to its former position. A Committee for Petitions was appointed on 2nd May. Petitioners turned to the House both for redress of grievances arising from the Civil War and Interregnum and for redress of private grievances as in the decade of the 1620s. Again, the House dealt with cases of first instance and cases appealing from decisions of the lower courts.

However, a crisis with the House of Commons arose over the case of *Thomas Skinner v. East India Company*⁶. Skinner had entered the East India trade at a time when the Protectorate sponsored open trade. While he was establishing his trading base in the East, the Protectorate granted a monopoly of the trade to the East India Company which seized all of Skinner's property in the East Indies. Despite attempts at arbitration, sponsored by Charles II, the Company was obdurate and, at Skinner's request, the King referred the matter to the House of Lords in 1667. The East India Company was ordered to answer Skinner's petition to the House and, in a strong reply, the Company objected to the jurisdiction of the House mainly because this was a case of first instance and not a petition to review a decision by a lower court. This argument was not accepted by the House which proceeded to consider the case. At the request of the Company, four postponements were granted. Heneage Finch, the Solicitor General, appeared for the Company in the hearing which began in December 1667. Finch argued that the House had no right to hear cases of first instance, except where the lower courts could not provide a remedy.

⁴ The legal assistants advised on both legislative and judicial matters.

⁵ During the Protectorate a Second Chamber was briefly established, from 1657 to 1659, consisting of members appointed for life by the Lord Protector. See *Cokayne's Complete Peerage*, Volume IV, Appendix G, The Protectorate House of Lords, commonly known as Cromwell's "Other House" 1657–1659 (1916); C. H. Firth, *The House of Lords during the Civil War* (1910).

⁶ *Skinner v. East India Company* (1666) St. Tr. 710.

The case was further clouded by the question of parliamentary privilege because the leading figures in the Company were Members of the Commons. Matters dragged on until Spring 1668 when the House decided in favour of Skinner. The Company promptly petitioned the House of Commons for relief from the 'unusual' and 'extraordinary' proceedings of the Lords. The Commons considered the petition and came to the conclusion that the Lords had acted arbitrarily and Skinner himself had breached the Commons' privilege. The dispute between the two Houses over Skinner's case continued throughout 1668 and 1669. At the beginning of the new session of Parliament in February 1670, King Charles II asked both Houses to abandon their differences over the case. The Commons ignored this request. The King ordered all references to the dispute to be erased from the Journals of both Lords and Commons and that neither House continue with the dispute. The King's wishes were obeyed by both Houses. The House of Lords still retained the jurisdiction it held before the case. In practice, the House now limited its jurisdiction to appellate cases.

Another crisis with the House of Commons arose over the case of *Shirley v. Fagg* in 1675⁷. The defendant, Sir John Fagg, was a member of the Commons and the Lords were promptly warned by the other House to "have regard for their Privileges." Again, a furious and lengthy row ensued between the two Houses. It was exacerbated when the Commons discovered that there were two other cases before the Lords in which Members were defendants: Thomas Dalmahoy and Arthur Onslow. Two of the cases were appeals from the Court of Chancery and one from the equity side of the Court of Exchequer. The House of Commons continued to defend its privileges but now added a challenge to the jurisdiction of the House of Lords to hear appeals from court of equity. This claim by the Commons led to a complete breach with the House of Lords and a prorogation of Parliament by the King on 9th June 1675. The dispute continued unabated when Parliament met again on 13th October and tempers were so inflamed that the King prorogued the House in late November 1675. Tempers cooled during the prorogation which lasted until February 1677 and neither House returned to the matter nor were the two outstanding cases revived. The question of the right of the House to an appellate jurisdiction in equity became a subject of dispute for learned lawyers and it was referred to by the House of Commons during another great clash with the Lords over *Ashby v. White* in 1704, but the House's right to exercise this jurisdiction remained unchanged.

Following the Act of Union with Scotland in 1707, the jurisdiction of the House of Lords was extended to appeals from the Scottish courts. Article XIX of the Articles of Union stated that "no causes in Scotland be cognoscible by the courts of Chancery, Queen's Bench, Common Pleas or any other court in Westminster Hall; and that the said courts or any other of the like nature after the union shall have no power to cognosce, review or alter the acts or sentences of judicatures in Scotland, or stop the execution of the same." The Articles do not refer to the relationship of the Scottish courts after 1707 with the House of Lords. The question of the jurisdiction of the House did arise in the deliberations of both English and Scottish commissioners and there were discussions on erecting in Scotland a Court of Appeals, delegated from the House of Lords and containing Scottish nobility and gentry. This proposal was not pursued probably because, as Daniel Defoe noted in his *History of the Union*, the English commissioners were happy for appeals to come to London while the Scottish commissioners assumed that taking an appeal to London would be so inconvenient that litigants would accept the decisions of the Scottish courts. Another argument suggests that the English Commissioners may have believed that a direct reference to the appellate jurisdiction of the House of Lords in the Articles of Union would have risked another bitter conflict between the Commons and the Lords.

The first Parliament of Great Britain met on 23rd October 1707; the first petition from a decision of the Court of Session was delivered to the House of Lords on 16th February 1708. The petitioner in the case of *Rosebery v. Inglis* was the Earl of Rosebery, one of the Scottish

⁷ *Shirley v. Fagg* (1675) 6 St. Tr. 1122.

Commissioners in the negotiations over the Union, while the committee of the House of Lords which considered the petition included five other Scottish commissioners and five English commissioners. Parliament was dissolved before the defendant could present his case and there were no further proceedings on the appeal. However, the principle had been established and Scottish appeals, despite the long and difficult journey from Scotland, became so frequent that they soon far exceeded the number of other appeals. An order of the House on 19th April 1709 specified that after an appeal from any sentence or decree given or pronounced in any court in Scotland had been accepted by the House, then the sentence or decree appealed against must not be carried into execution and this encouraged Scottish appeals.

In 1713, the House accepted an appeal from the High Court of Justiciary, the highest criminal court in Scotland. In the case of *Magistrates of Elgin v. Ministers of Elgin*, the House reversed the decision of the Justiciary Court. However, in the case of *Bywater v. Lord Advocate*, a capital case in 1781, Lord Mansfield pointed out that there had been no appeal from the Justiciary Court before the Act of Union and, on this ground, it was decided that there could be no appeal from a decision of the Court to the House of Lords⁸.

2. 1801 – Present

The number of Scottish appeals resulted in a considerable number of cases waiting for a hearing by the early nineteenth century. Initially, a number of minor reforms were introduced to reduce appeals from Scotland. Under the Court of Session Act 1808, appeals could not be made on interlocutory matters, unless the Court of Session gave leave or if the members of that Court disagreed. Under the Administration of Justice (Scotland) Act 1808, the Court of Session was given the power to decide if an appeal justified a stay of execution, thus amending the House's order of 1709. These reforms did not have a great impact on the volume of appeals. Irish appeals, which came again to the House of Lords after the Act of Union of 1801, were much fewer in number but they added to the burden.

The Lord Chancellor presided over the House of Lords as a judicial body and also sat as the sole judge in the Court of Chancery. Lord Eldon, the Lord Chancellor for most of the period between 1801 and 1827, was noted for his prolonged and slow methods of dealing with the cases before him in Chancery and in the Lords. Pressure from reformers led to some changes. In 1812, an Appeal Committee of the House of Lords was established in order to hear preliminary points of procedure and petitions for leave to appeal *in forma pauperis* [on paper]⁹. Moreover, the standing orders of the House were altered to allow judicial business to be taken on three days a week, starting at 10 a.m. These reforms led to a considerable increase in the number of appeals heard: from 21 in 1812 to 81 in 1813-14. The problems in the Court of Chancery were to be solved by the appointment of a Vice-Chancellor, but this turned out to be a failure, at the beginning, because the decisions of the Vice-Chancellor could be appealed to the Lord Chancellor and almost all of the first Vice-Chancellor's decisions were so appealed.

By 1820, there were further demands for reform because the backlog of cases had increased again. In 1822, the Prime Minister, Lord Liverpool, set up a select committee of the House of Lords to examine the appellate jurisdiction. The select committee considered and rejected the formation of a regular Appellate Committee to hear appeals. However, it recommended that a Speaker, who did not have to be a peer, should preside over appeals and that a rota of four lay Members should be chosen by ballot and compelled by threat of a fine to attend at appeals, which should be heard during the session on five days a week from 10 a.m. to 4 p.m. This reform was

⁸ This did not prevent a number of attempts after 1781 to appeal in Scottish criminal cases to the House but this ended with the House's decision in *Mackintosh v. Lord Advocate* (1876) 2 App. Cas. 41.

⁹ This Committee is still in existence.

approved by the House at the beginning of 1824. Reforms relating to Scottish appeals, recommended by the select committee, were considered by a commission appointed by Lord Eldon. Eventually, Parliament gave statutory force to some of the reforms endorsed by the commissioners. The most significant reform laid down that appeals in cases which began in the sheriffs courts in Scotland could go from the Court of Session to the House of Lords on questions of law only.

Following these reforms, there was a considerable improvement in the judicial business of the House and the backlog of cases had eased considerably by 1827. The invention of the rota system did highlight the increasing irrelevance of the lay Members in hearing appeals. If a case went over one day, then a different panel or panels of lay Members would attend for the other day(s).

The reforming ministry of Lord Grey began the extension of the franchise with the Great Reform Bill of 1832. A leading member of this ministry was Lord Brougham, the Lord Chancellor, who had long had an interest in law reform as well as political reform. With great energy, Brougham reduced within four years the new backlog of cases in both the House of Lords and the Court of Chancery by increasing the number of hours in which the House sat judicially and by holding evening sessions in Chancery. Unusually, Brougham had qualified as an advocate in Scotland before he joined the English Bar. Brougham carried through a major reform programme both in the law and in the courts. Many of the reforms in the courts had an effect on the appellate jurisdiction of the House, e.g. the Master of the Rolls was empowered to sit in open court and thus relieve the Lord Chancellor of some of the work in equity cases. Brougham's lasting reform was the establishment of the Judicial Committee of the Privy Council which took over responsibility for the long established overseas appellate jurisdiction of the main Council. Brougham failed to carry through significant reform in the appellate jurisdiction of the House of Lords. In 1834, he had introduced a bill which would have separated the legal and political roles of the Lord Chancellor so that the head of the judiciary would not also be Speaker of the House of Lords. Ironically, he was persuaded to abandon this measure on the grounds that there was no backlog of cases for hearing – a fact which arose from Brougham's own efforts. In the same year, Brougham introduced a bill which merged the Judicial Committee of the Privy Council and the House of Lords as an appellate court. This bill made no progress because the Whig ministry, now led by Lord Melbourne, fell from power, for a brief period, in November 1834. Melbourne's strong dislike of Brougham meant that the latter was not re-appointed Lord Chancellor when the Whigs came back to power.

The role of the lay Members of the House in deciding cases had diminished with the introduction of the rota system. The number of Members who had been Lord Chancellor or judges in the lower courts increased to seven after 1835 and this allowed the formation of a professional panel to hear appeals. The last time the House decided an appeal in the traditional manner, i.e. with the Lord Chancellor on the Woolsack, the judges from the lower courts present as assistants, and the lay Members voting, was in June 1834. Ten years later, the convention that lay Members did not vote on appeals was established in the case of *O'Connell v. The Queen*¹⁰. Daniel O'Connell, the controversial Irish politician, was convicted of conspiracy by the Court of Queen's Bench in Ireland. When he appealed to the House of Lords, an impressive panel of law lords (the Lord Chancellor, three former Lord Chancellors, a former Lord Chancellor of Ireland, a former Lord Chief Justice) met to hear the appeal. They were advised by twelve judges from the lower courts. The law lords divided on the appeal: two for upholding O'Connell's conviction and three for allowing his appeal. The lay Members present began to give their opinions. Sir Robert Peel, then Prime Minister, had anticipated that the lay members would attempt to intervene. Lord Wharncliffe, the Lord President of the Privy Council, was despatched to the House where he strongly advised the lay Members not to divide the House on the question when the Law Lords

¹⁰ *O'Connell v. The Queen* (1844) 11 Cl. & Fin. 155.

had already given their opinion. The Government believed that a vote now would damage the reputation of the House as a judicial court and this would be a far worse outcome than to allow O'Connell's appeal. Wharnccliffe's arguments were accepted by the House and the role of the lay Members in the appellate work of the House ceased. The gradual retreat of the lay Members in the period from 1830 to 1845 had improved the standing of the House as a court of law. By 1834, the number of English appeals exceeded Scottish appeals. The growing professionalisation of the appellate work of the House meant that the House began to assume an important role in shaping English law¹¹.

The fact that the appellate work of the House relied on the presence of law lords in the House proved, by the late 1850s, to be a weakness. Failure to provide a reliable body of law lords drew increasing criticism from the legal profession, which, following Brougham's reforms, now expected professional work by the House as a court. Palmerston's government decided to promote lawyers into the House of Lords by granting them life peerages. Sir James Parke, a judge of the Exchequer Court, was created, in January 1856, Lord Wensleydale for life. Furious opposition from the Conservative members of the House forced the question of life peerages to the Committee for Privileges which ruled that the prerogative power could not create life peers. Parke was subsequently made an hereditary peer in the usual way. The Conservative leadership in the House agreed to the establishment of a select committee to consider the appellate jurisdiction. The committee failed to obtain much agreement on the reform required. Lord Derby, the Conservative leader in the House, suggested that a separate judicial committee should be appointed to consider appeals, but the select committee rejected his proposal and opted instead for the appointment of two paid judges, who were to be life peers, as Deputy Speakers. These proposals were drafted into a bill which was passed by the Lords, but encountered great opposition in the Commons both from the Conservatives led by Disraeli and from radical members who considered the proposed reforms to be inadequate. The bill disappeared into a select committee of the House of Commons which never met.

In 1867 a major achievement in political reform, the Second Reform Act which doubled the size of the electorate by granting the vote to working class men, was matched by a major initiative in legal reform when Roundell Palmer, a former Liberal Attorney General, persuaded the government to set up a Royal Commission on the Judicature. The first report of the Royal Commission, in 1869, recommended that a single supreme court be formed and that it would consist of a High Court in five divisions and a Court of Appeal. As for the House of Lords, the Royal Commission noted briefly that thought should be given as to whether the decisions of the Court of Appeal should be final unless either the Court of Appeal or the House of Lords granted leave to appeal. Little objection was raised to the concept of the Supreme Court but the questions raised over the role of the House of Lords as an appellate court hindered progress on the implementation of these recommendations. The first attempt to legislate, the Appellate Jurisdiction Bill 1870, included a proposal that the House of Lords should appoint a Judicial Committee of members and others to hear appeals. The House of Lords objected to the concept of a Judicial Committee while the judges refused to support the bill until the considerable backlog of cases in the Judicial Committee of the Privy Council had been cleared. Only then would it be possible to prepare suitable recommendations regarding the appellate jurisdiction. The bill failed. The Judicial Committee of the Privy Council Act of 1871 provided for the appointment of four paid judges as an answer to the complaints made by the judges on the backlog of cases. However, the Act provided that the new judges only held their office until parliament had agreed new arrangements for a supreme court of appellate jurisdiction. The government introduced the Supreme Court of Appeals Bill of 1872 to establish a new appeals court into which the appellate

¹¹ In the case of *Bradlaugh v Clarke* (1883) 8 App. Cas. 354 the second Lord Denman (son of the Chief Justice and a barrister of fifty years standing) sat throughout, spoke and voted. His vote, which was ignored, did not affect the result. This was the last time a lay Member attempted to vote on an appeal. See also R. E. Megarry, 'Lay peers in appeals to the House of Lords' (1949) 65 LQR 22.

jurisdiction of the House of Lords and of the Privy Council would be transferred. This bill failed but it led to another select committee of the House of Lords on the appellate jurisdiction. By a slim majority, the select committee proposed that a joint Judicial Committee of the House and the Privy Council should consist of the Lord Chancellor and four paid judges who would be both life peers and privy councillors. Other senior judges would be ex-officio members of the new Judicial Committee.

The proposals of the select committee were promptly dismissed by Roundell Palmer, now Lord Chancellor as Lord Selborne. He introduced the Judicature Bill of 1873 which accepted the reforms proposed by the Royal Commission on the Judicature and solved the question of the House of Lords by abolishing appeals to the House. The question of Scottish and Irish appeals led to heated debate during the passage of the bill and the government conceded that these appeals could still go to the House of Lords even when English appeals could no longer be heard by the House. Except for the issue of Scottish and Irish appeals, the bill passed through both Houses without much opposition and the Act was to come into force in November 1874.

Gladstone's government was not in a strong position and it fell in February 1874. The new Conservative government, under Disraeli, continued the work of reforming the appellate jurisdiction. Lord Cairns, again Lord Chancellor, introduced a bill which abolished Irish and Scottish appeals to the House of Lords and transferred them to the Court of Appeal, renamed the Imperial Court of Appeal. The bill encountered strong opposition in the House of Lords but it was passed with a satisfactory majority; in the House of Commons, the government took the bill through Second Reading and the Committee Stage with ease. However, the opponents of this measure had been lobbying strongly behind the scenes and the government suddenly announced that this bill would be abandoned and that the Judicature Act 1873 would not come into force until November 1875. Despite attempts by the Lord Chancellor to preserve his reforms of the appellate jurisdiction, Disraeli was lobbied strongly on the need to retain the appellate jurisdiction of the Lords throughout 1874 and 1875.

The Lord Chancellor introduced the Appellate Jurisdiction of the House of Lords Bill in 1876. The bill passed through both Houses without much opposition and received Royal Assent in August 1876. Under the Appellate Jurisdiction Act 1876, the appellate jurisdiction of the House of Lords was maintained, but:

- 1) petitions for leave to appeal were to be addressed to "Her Majesty the Queen in her Court of Parliament";
- 2) Appeals could not be heard or determined unless at least three of the following were present (a) Lord Chancellor; (b) Lords of Appeal in Ordinary to be appointed under the Act; (c) Peers of Parliaments who hold or have held offices in this Act described as high judicial office.
- 3) In order to assist the House in the hearing of appeals, the Queen could appoint by letters patent two qualified persons to be Lords of Appeal in Ordinary. A Lord of Appeal in Ordinary had to have held for at least two years a high judicial office as well as being for at least fifteen years a practising barrister in England or Ireland, or a practising advocate in Scotland. A salary of £6,000 was to be paid to each Lord of Appeal in Ordinary and he would be a member of the House of Lords while he held the office of Lord of Appeal in Ordinary¹².

¹² Under the Appellate Jurisdiction Act 1887, retired Lords of Appeal in Ordinary were allowed to sit for life.

- 4) The House of Lords could sit for the hearing of appeals during any prorogation of Parliament, and on the authority of Her Majesty, during a dissolution of Parliament.
- 5) When any two of the paid judges in the Judicial Committee of the Privy Council died or resigned, a third Lord of Appeal in Ordinary would be appointed, and on the death or resignation of the remaining two judges in the Judicial Committee, a fourth Lord of Appeal in Ordinary would be appointed.

The Act came into force in 1877; Lord Blackburn, an English judge, and Lord Gordon, a Scottish judge, were appointed the first two Lords of Appeal in Ordinary. From this time onwards, the House of Lords became primarily an English court; the number of English appeals regularly exceeded a far smaller number of Scottish appeals. The House had the power to hear criminal appeals on writs of error but it was a jurisdiction that had virtually lapsed. In 1907, the Criminal Appeal Act abolished the writ of error in criminal appeal and allowed, on the fiat of the Attorney-General, a right of appeal to the House of Lords¹³.

While the four Lords of Appeal in Ordinary proved sufficient for the appellate work of the House, the emergence of self-governing dominions within the Empire had increased the burden of work in the Judicial Committee of the Privy Council. The Appellate Jurisdiction Act 1913 permitted the appointment of two extra Lords of Appeal in Ordinary.

Gradually, appeals took longer to hear in both the House of Lords and in the Judicial Committee of the Privy Council. The professionalisation of the two courts had led to a more reflective approach. One measure to meet this problem was the appointment of an extra Lord of Appeal in Ordinary and this was granted under the Appellate Jurisdiction Act 1929. The other measure was to limit the right of appeal to the House; the Administration of Justice (Appeals) Act 1934 laid down that leave to appeal had to be granted by the Court of Appeal or the House of Lords.

Throughout this period, the convention remained that appeals were considered by the whole House of Lords. The Lords of Appeal in Ordinary heard appeals in the Chamber of the House. However, noise caused by workmen repairing war damage to the Palace of Westminster forced the Lords of Appeal in Ordinary to move to a committee room in 1948 and this resulted in the establishment of the Appellate Committee. Judgments were and are still given in the Chamber of the House¹⁴.

With appeals being heard away from the Chamber, it proved more difficult for Lord Chancellors to participate in the judicial work of the House. Nevertheless, they continued on occasion to sit judicially. Figures for recent years were given in the course of a debate, on the House of Lords and the separation of powers, on 17 February 1999 (HL *Hansard*, cols. 710–739). The then Lord Chancellor, Lord Irvine of Lairg, stated that Lord Gardiner, who was Lord Chancellor from 1964 to 1970, sat only 4 days; Lord Hailsham, during his first period of office from 1970 to 1974, sat 28 days, and in his second period of office from 1979 to 1987, for 53 days; Lord Elwyn-Jones, 1974 to 1979, for 8 days; Lord Havers, who was Lord Chancellor for a short period in 1987, did not sit at all; Lord Mackay of Clashfern, 1987 to 1997, for 60 days (col. 736). Lord Irvine himself sat for 17½ days, the last being on 25th October 2001, in the case of *AIB Group (UK) P.L.C. v. Martin I* [2002] 1 WLR 94.

¹³ The need for the Attorney-General's fiat was abolished by the Administration of Justice Act 1960. Scottish criminal appeals to the House were not, and are still not, allowed.

¹⁴ An historical description of the working environment of the Law Lords in the House of Lords is given by Lord Hope of Craighead in 'A phoenix from the ashes? – Accommodating a new Supreme Court' (2005) 121 LQR 253. He also gives an outline of the search process for accommodation for the new Supreme Court with a critical evaluation of the proposed options.

Lord Irvine's successor, Lord Falconer of Thoroton, never sat judicially. In the press release of 12 June 2003 from the Prime Minister's Office which announced his appointment together with the major constitutional changes which eventually resulted in the Constitutional Reform Act 2005, including the creation of a new Supreme Court, it was stated that the new Lord Chancellor would not sit as a judge in the House of Lords before the new Supreme Court was established (Prime Minister's Office, *Modernising Government – Lord Falconer appointed Secretary of State for Constitutional Affairs*, Press Release, 12 June 2003).

The number of Lords of Appeal in Ordinary has continued to be increased from time to time and currently stands at 12.

II. THE CONTEMPORARY JUDICIAL WORK OF THE HOUSE

1. Jurisdiction

The House of Lords is now the ultimate court of appeal in Great Britain and Northern Ireland, except for Scottish criminal cases. An appeal lies to the House:

- 1) in civil and criminal cases, from the Court of Appeal in England and Wales, by leave of that court or of the House of Lords;
- 2) in civil cases, from the Court of Session in Scotland, leave to appeal not normally being required;
- 3) in civil and criminal cases, from the Court of Appeal in Northern Ireland, by leave of that Court or of the House of Lords;
- 4) in civil and criminal cases, subject to statutory restrictions, direct from a decision of the High Court in England and Wales or the High Court in Northern Ireland, by leave of the House of Lords (known as the “leapfrog” procedure, because it bypasses the respective Courts of Appeal, instituted by the Administration of Justice Act 1969, but rarely used);
- 5) from the Court Martial Appeal Court, by leave of that court or of the House of Lords.

The House also exercises an original jurisdiction in regard to matters of peerage. *Halsbury’s Laws of England* states:

From the time of Charles II all doubtful or contested claims to peerage have been referred to the House by the Crown not least because (until the passing of the House of Lords Act 1999) the determination of such a claim affected the membership of the House. The Crown acts on the recommendations of the House made by humble Address following a resolution of the House made on report from the Committee for Privileges. The jurisdiction of the House extends to claims to Irish peerages, although peers of Ireland do not sit in the House.

(Halsbury’s Laws of England, 4th ed., Vol. 10, para. 357)

Under the Standing Orders of the House, sittings of the Committee for Privileges on peerage claims require the presence of at least three Lords of Appeal (S.O.78).

The September 2003 Consultation Paper on House of Lords reform, which envisaged the removal of all hereditary peers, proposed that the jurisdiction over peerage claims should be moved to the Judicial Committee of the Privy Council. It commented that with the final ending of any connection between an hereditary peerage and the right to sit in the House of Lords, there would also be a need to change the arrangements for resolving disputed claims to hereditary peerages or bringing them out of abeyance, and for keeping the Peerage Roll up to date; and the changes proposed to establish a new Supreme Court in any case had implications for the present arrangements, as the Law Lords would no longer be members of the House and thus unavailable to sit on the Committee for Privileges. The Government proposed that new arrangements should be introduced on the lines of those which presently applied to the baronetage. Accordingly, the successor or claimant would apply to have his or her name included on the official Roll; in difficult cases, the Secretary of State could consult the Law Officers and most difficult cases

would be referred to the Judicial Committee of the Privy Council (Department for Constitutional Affairs, *Constitutional Reform: next steps for the House of Lords*, CP 14/03, September 2003, para. 28).

2. Constitution of the House for hearing and determining appeals

Under the Appellate Jurisdiction Act 1876, s. 5 (as amended) an appeal may not be heard or determined by the House unless not fewer than three of the following persons, designated “Lords of Appeal”, are present: the Lords of Appeal in Ordinary (known colloquially as “Law Lords”) and any peer of Parliament who holds, or who has held, high judicial office. In practice, the latter category comprises the Lord Chief Justice, members or former members of the Court of Session who have peerages, members or former members of the Northern Ireland superior courts who have peerages and members or former members of Commonwealth superior courts who have peerages.

Formerly, s. 5 of the 1876 Act enabled the serving Lord Chancellor and former Lord Chancellors, as Members of the House of Lords, to sit on appeals, but they were excluded by an amendment to s. 5 which was consequent upon the modifications to the office made by the Constitutional Reform Act 2005 (whereby the Lord Chancellor could be a member of either House and a non-lawyer) (Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No. 2) Order 2006 (No. 1016)).

A Lord is not eligible to sit as Lord of Appeal after the age of 75, except for the purpose of completing proceedings already begun. This is the result of a provision added to s. 5 of the 1876 Act by the Judicial Pensions and Retirement Act 1993, s. 26(1), which also provided that Lords of Appeal in Ordinary must vacate office on attaining 70 years of age. Thus a Lord of Appeal in Ordinary, on resigning from office at 70, may still participate in judicial business until he is 75.

At present, the maximum number of Lords of Appeal in Ordinary is 12 (Administration of Justice Act 1968, s. 1(1) (a) as amended in 1994 by Order in Council), two of whom are normally appointed from Scotland (currently Lords Hope of Craighead and Rodger of Earlsferry) and one from Northern Ireland (currently Lord Carswell). They are appointed by the Crown by letters patent on the advice of the Prime Minister, qualification for appointment being to have held high judicial office for not less than two years or to have had right of audience in the superior courts for not less than 15 years (1876 Act, s. 6 as amended).

“High judicial office” is defined in s. 25 of the Appellate Jurisdiction Act 1876 (as amended by SI 2006 No. 1016) as meaning judges of the Court of Appeal and High Court of Justice in England, judges of the Court of Appeal in Northern Ireland and High Court of Justice in Northern Ireland and judges of the Court of Session in Scotland.

Until 1984 it was a convention that the office of Senior Law Lord was automatically assumed by the longest serving Law Lord. However, on 27th June 1984 (HL *Hansard*, cols. 914-918) Lord Hailsham, the Lord Chancellor, announced that henceforth the Senior Law Lord and his deputy would be appointed independently, following the appointment process for other Law Lords, bringing the process “into line with what is now the normal practice in other parts of the judicial system” (col. 916). Accordingly, the Lord Chancellor puts a list of names to the Prime Minister who then makes a recommendation to the Queen.

The maximum number of Lords of Appeal in Ordinary was originally 4 under the 1876 Act, but has gradually been increased. The maximum was set at 7 in 1945, 9 in 1947, 11 in 1968 and 12 in 1994 (HL *Hansard*, 11th December 2001, col. WA195).

In practice, it is the Lords of Appeal in Ordinary who carry out the bulk of the judicial work, sitting in panels of 5, but sometimes 7 or 9 for cases of great importance. Thus there was a panel of 7 members in *Pepper v. Hart* [1993] A.C.593 (the use of *Hansard* in cases of statutory interpretation), in *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3) [2000] 1 A.C. 147 (the re-hearing of extradition proceedings against General Pinochet of Chile, after the previous decision of the House was set aside on the ground that the Appellate Committee was improperly constituted), and in *A(FC) and others(FC) v. Home Secretary* [2005] UKHL71 (evidence obtained by torture); and a panel of 9 members in *A(FC) and others(FC) v. Home Secretary* [2005] 2 A.C. 68 (the legality of indefinite detention) and in *Jackson v. Attorney General* [2005] UKHL56 (the validity of the Parliament Act 1949 and the Hunting Act 2004 which was passed using the 1949 Act procedure).

Halsbury's Laws of England (4th ed., Vol. 10, para. 369, note 8) comments that the current number of 12 enables the Lords of Appeal in Ordinary "each day to form a panel of five in the House of Lords and a panel of five in the Judicial Committee of the Privy Council.... with two Lords able to work on other tasks both connected with these jurisdictions (such as petitions for leave and the drafting of opinions) and extra-judicial (such as other business in the House, participation as non-permanent judges of the court of final appeal in Hong Kong, the conduct of public inquiries and academic commitments). As most Lords of Appeal in Ordinary have extra-judicial commitments, the Lords of Appeal (largely being retired Lords of Appeal in Ordinary under the age of 75) are regularly called upon to sit."

As regards participation in debates and votes in the House, the Lords of Appeal in Ordinary made a statement in the House read by Lord Bingham of Cornhill, the Senior Law Lord, on 22nd June 2000, in response to a recommendation by the Royal Commission on the Reform of the House of Lords, setting out the general principles for such participation and also eligibility to sit on related cases, as follows:

I should tell the House that my noble and learned friends have considered this recommendation and have agreed on the terms of a Statement to give effect to it. I will now read the Statement which has been agreed by all the Lords of Appeal in Ordinary:

General principles

"As full members of the House of Lords the Lords of Appeal in Ordinary have a right to participate in the business of the House. However, mindful of their judicial role they consider themselves bound by two general principles when deciding whether to participate in a particular matter, or to vote: first, the Lords of Appeal in Ordinary do not think it appropriate to engage in matters where there is a strong element of party political controversy; and secondly the Lords of Appeal in Ordinary bear in mind that they might render themselves ineligible to sit judicially if they were to express an opinion on a matter which might later be relevant to an appeal to the House.

"The Lords of Appeal in Ordinary will continue to be guided by these broad principles. They stress that it is impossible to frame rules which cover every eventuality. In the end it must be for the judgment of each individual Lord of Appeal to decide how to conduct himself in any particular situation".

Eligibility

"In deciding who is eligible to sit on an appeal, the Lords of Appeal agree to be guided by the same principles as apply to all judges. These principles were

restated by the Court of Appeal in the case of *Locabail (UK) Ltd v. Bayfield Properties Ltd and others and four other actions* [2000 1 All E.R. 65 (CA)]¹⁵.

(*HL Hansard*, 22nd June 2000, cols. 419–420)

A table showing interventions in the House of Lords since that statement by the Lords of Appeal in Ordinary then in office is given in Appendix 8 to the Report of the Lords Select Committee on the Constitutional Reform Bill [HL], *Constitutional Reform Bill [HL]* (HL Paper 125-I, 2003–04).

3. Appeal Committees and Appellate Committees

Appeals from England and Wales and Northern Ireland require leave to appeal either from the court below or from the House. Petitions for leave to appeal are heard by an Appeal Committee of three Lords of Appeal. If leave is granted, or if leave is granted by the court below, the appeal proceeds to an Appellate Committee of five (sometimes seven or even nine, see above) Lords of Appeal for a full hearing.

Leave to appeal is not normally required for Scottish appeals which proceed directly to an Appellate Committee provided that two counsel have certified the reasonableness of the appeal. This was also the practice for English and Northern Irish appeals before legislation in 1934 and 1962.

Two Appellate Committees, of which all Lords of Appeal are members, are established at the start of each session of Parliament by Standing Order of the House, the chairman of any such Committee being the Lord of Appeal in Ordinary who is the most senior member of the panel.

The responsibility for determining the composition of Appellate and Appeal Committees lies with the Senior Lord of Appeal in Ordinary. Formerly, this was the responsibility of the Lord Chancellor, although for some years it had been the policy of successive Lord Chancellors to delegate it to the Senior Lord of Appeal in Ordinary (*HL Hansard*, 30 July 1998, col. WA220).

Over the past five years the judicial workload of the House has remained steady, with appeals from Scotland and Northern Ireland increasing, as follows:

Petitions for leave to appeal disposed of

	2001	2002	2003	2004	2005
England and Wales	260	261	191	258	248
Scotland	-	-	-	-	-
Northern Ireland	9	13	8	13	7
Total	269	274	199	271	255
Allowed	73	94	63	95	79

Appeals disposed of

	2001	2002	2003	2004	2005
England and Wales	80	66	59	64	95
Scotland	4	4	3	10	4
Northern Ireland	1	2	3	3	3
Total	85	72	65	77	102

(*Annual Judicial Statistics*, DCA)

¹⁵ In this case principles and guidelines were laid down regarding the disqualification of judges on grounds of bias.

4. Judicial Committee of the Privy Council

The Judicial Committee of the Privy Council was set up under the Judicial Committee Act 1833, under which appeals formerly heard before a committee of the whole Privy Council were to be heard by this special committee.

The core members of the Committee are the 12 Lords of Appeal in Ordinary. In addition, other judges who have been appointed as Privy Counsellors may sit. These include: retired Law Lords up to the statutory judicial retiring age of 75; the judges of the Court of Appeal in England and Wales and retired judges of that court up to the statutory age limit; the senior judges in Northern Ireland; senior judges in Scotland and those who have retired from office (up to 75); and senior judges from various Commonwealth countries.

The jurisdiction of the Committee comprises:

- 1) appeals from a number of independent Commonwealth states (former UK colonies, mostly in the Caribbean), British Overseas Territories, Guernsey, Jersey and the Isle of Man;
- 2) appeals from the regulatory body for veterinary surgeons (appeals from regulatory bodies for doctors, dentists and other health care professionals having been removed from the jurisdiction of the Judicial Committee to that of the High Court by the National Health Service Reform and Health Care Professionals Act 2002);
- 3) “devolution issues” under the Scotland Act 1998, Government of Wales Act 1998 and Northern Ireland Act 1998 (these will be transferred to the new Supreme Court when the relevant provisions of the Constitutional Reform Act 2005 come into force);
- 4) appeals under the Church of England Pastoral Measure 1983;
- 5) appeals from the Court of Admiralty of the Cinque Ports and appeals in prize cases from all Admiralty courts, including the High Court.

Although formally the House of Lords in its judicial capacity and the Judicial Committee are separate institutions, in practice their work overlaps as the core members of both bodies are the 12 Lords of Appeal in Ordinary; and when the new Supreme Court is set up it is envisioned that the Judicial Committee will be co-located in the same building (HL *Hansard*, 14 December 2004, cols. WS71–74). The Constitution Unit, in its study *The Future of the United Kingdom’s Highest Courts* (2001), commented:

It is normal for five Law Lords to be sitting on an Appellate Committee while, concurrently, others are sitting on a board of the Judicial Committee. ... The Law Lords have their personal offices in the Palace of Westminster and use the House of Lords’ library facilities when preparing judgments for the Judicial Committee as well as the Appellate Committee. The relationship between the two Committees has had to be expressed in formal legal rules of precedent in the UK’s legal system. Judicial Committee judgments given in its overseas jurisdictions are only of persuasive, not binding, authority in the courts of England and Wales, Northern Ireland and Scotland.

However,

The devolution Acts contain a significant new rule of precedent. The Scotland Act 1998, section 103(1) provides, like the others, that ‘Any decision of the Judicial Committee in proceedings under this Act shall be binding in all legal proceedings (other than

proceedings before the [Judicial] Committee).’ This applies to proceedings in the Appellate Committee like all other courts. In relation to devolution issues, which include questions of Convention rights, the Judicial Committee is therefore now the UK’s highest court.

(The Constitution Unit, *The Future of the United Kingdom’s Highest Courts* (2001) section 2.4)

When the new Supreme Court is created under the Constitutional Reform Act 2005 these provisions on precedent will be deleted by that Act as they will then be otiose, the devolution jurisdiction of the Judicial Committee being transferred to the new Court.

The bulk of the Committee’s work consists of appeals from independent Commonwealth states, British Overseas Territories, Guernsey, Jersey and the Isle of Man. Thus in 2001 the Committee disposed of 52 appeals from these sources; 59 in 2002; 59 in 2003; 60 in 2004 and 54 in 2005 (*Annual Judicial Statistics*, DCA).

All of these figures include New Zealand, which in each of the years given was one of the largest sources of appeals (the others being Jamaica and Trinidad and Tobago). However, in 2003 New Zealand legislated to abolish appeals to the Judicial Committee after the end of that year; at the end of 2005 there were only 3 appeals from New Zealand still outstanding (*Judicial Statistics 2005*, DCA, page 8).

In the Caribbean, the Caribbean Court of Justice, which would replace the Judicial Committee as a final court of appeal for most of the Commonwealth countries in that region, was established in April 2005. So far, however, only Barbados and Guyana have signed up to the final appellate role for the Court. The Court results from an agreement made in February 2001 by the signatories of the Treaty of Chaguaramas (1973), which established the Caribbean Community Single Market and Economy (CARICOM).

In its devolution jurisdiction the number of appeals disposed of by the Judicial Committee remains low. Thus in 2000 (when the jurisdiction began) there were 3 such appeals; 10 in 2001; 4 in 2002; 1 in 2003; 4 in 2004 and 2 in 2005. All were from Scotland (*Annual Judicial Statistics*, DCA).

Commenting on the combined effect of the loss of appeals from New Zealand, the establishment of the Caribbean Court of Justice and the forthcoming transfer of the devolution jurisdiction to the new Supreme Court, the DCA’s *Judicial Statistics 2005* concludes that “Looking ahead, there may be an eventual decline in the Judicial Committee’s volume of work” (page 8).

III THE FUTURE SUPREME COURT OF THE UNITED KINGDOM

1. Constitutional Reform Act 2005

The appellate jurisdiction of the House of Lords, together with the devolution jurisdiction of the Judicial Committee of the Privy Council, will be transferred to a separate Supreme Court of the United Kingdom, which will be established when the relevant provisions of the Constitutional Reform Act 2005 are brought into force. The Act also modifies the office of the Lord Chancellor and provides for the establishment of a Judicial Appointments Commission responsible for recommending judicial appointments in England and Wales. The Act effectively, therefore, in relation to the judiciary, creates a separation of powers between the executive, the legislature and the judiciary for the first time in British constitutional history. A chronology of the Act, tracing its antecedents and the passage of the Bill through both Houses, is given in LLN 2006/002, Part III.

The main provisions of the Act are contained in Parts 1 to 4. Part 1, which has only one section and which was inserted at Third Reading in the House of Lords after cross-party discussion (HL *Hansard*, 20 December 2004, cols. 1538–1540), concerns the rule of law, declaring that the Act does not adversely affect the existing constitutional principle of the rule of law, or the Lord Chancellor's existing constitutional role in relation to that principle. Parts 2 and 4 reflect the Concordat agreed between the Lord Chancellor and the Lord Chief Justice, dealing with the arrangements to modify the office of Lord Chancellor (consequent upon his relinquishing his judicial role and his role as Speaker of the House of Lords) (Part 2) and judicial appointments and discipline (Part 4). Parts 1, 2 and 4 were brought into force on 3 April 2006 (Constitutional Reform Act 2005 (Commencement No. 5) Order 2006 (No. 1014)).

2. Composition

The Supreme Court of the United Kingdom is dealt with by Part 3 of the 2005 Act. Section 23 provides that the Court will comprise 12 judges (to be known as “Justices of the Supreme Court”), including a President and Deputy President, appointed by the Queen by letters patent (the number can be increased by Order in Council). The first members of the Court will be the 12 Lords of Appeal in Ordinary in office when s. 23 comes into effect (s. 24), and they will then be disqualified from sitting and voting in the House of Lords as long as they remain Justices of the Supreme Court (s. 137, see below). Section 23 cannot be brought into force until the Lord Chancellor is satisfied, after consultation with the Lords of Appeal in Ordinary, that appropriate accommodation for the Supreme Court will be provided in accordance with written plans approved by him (s. 148(4)(5) – “sunrise” provisions which were inserted by a Government amendment at Report stage in the Lords).

The current qualifications for appointment (holding “high judicial office” for at least 2 years or at least 15 years as a qualifying practitioner) are replicated in s. 25, but a new method of selection is created by ss. 26–31 and Schedule 8. The recommendation for appointment will continue to be made to the Queen by the Prime Minister but this will be preceded by a process conducted by an ad hoc selection commission consisting of five members, comprising the President and Deputy President of the Supreme Court and one member each from the Judicial Appointments Commissions for England and Wales, Scotland and Northern Ireland (s. 26 and Schedule 8). The selection commission must consult senior judges, the Lord Chancellor and the devolved executives (s. 27(2)). Selection “must be on merit” (s. 27(5)), the commission must ensure that the judges of the Court between them have knowledge and experience of practice in the law of each part of the United Kingdom (s. 27(8)), and the commission must have regard to guidance given by the Lord Chancellor as to matters to be taken into account (s. 27(9)). The commission

must then report to the Lord Chancellor proposing a name to be notified to the Prime Minister, whereupon the Lord Chancellor must undertake further consultations (with the same persons he consulted under s. 27(2)) (s. 28(5)). Under s. 29 the Lord Chancellor may accept, reject or request the reconsideration of the selection, and s. 30 details the grounds on which the power to reject or require reconsideration of a selection may be exercised. Section 31 makes provision for the process that the selection commission must follow if the Lord Chancellor requests reconsideration of a selection.

On 8 October 2007 the Lord Chancellor, Jack Straw, announced in a Commons written statement that these procedures for appointment of Justices of the Supreme Court would be adopted “on a voluntary basis” from now on for all new appointees to the Appellate Committee of the House of Lords, as those appointees would “spend the majority of their career in the Supreme Court” and would “help to determine the character of the Court”. This decision would not impact upon other provisions of the 2005 Act that would come into force when the Supreme Court opens for business in October 2009. A selection commission, as envisioned under Schedule 8 of the 2005 Act, would therefore be formed when vacancies arose. All new judges appointed to the Supreme Court after its creation will not be Members of the House of Lords; they will become Justices of the Supreme Court” (HC *Hansard*, 8 October 2007, col. 21WS, as corrected by HC *Hansard*, 24th October 2007, cols. 11–12WS).

The tenure of a judge of the Supreme Court will be, as at present, that he will hold office during good behaviour, but removable on the address of both Houses of Parliament (s. 33). A judge will be able to retire or resign and there is procedure for declaring his office vacant if he is permanently disabled from performing his duties and is for the time being incapacitated from resigning (s. 36).

Under s. 38 judges of the Court of Appeal (and equivalent courts in Scotland and Northern Ireland) may be requested by the President of the Supreme Court to sit as acting judges; and under s. 39 there is to be a supplementary panel comprising persons who have recently held high judicial office and are under the age of 75.

3. Jurisdiction

The jurisdiction of the Supreme Court will, in effect, be the existing appellate jurisdiction of the House of Lords together with the devolution jurisdiction of the Judicial Committee of the Privy Council (s. 40 and Schedule 9). It is declared that the creation of the Supreme Court is not “to affect the distinctions between the separate legal systems of the parts of the United Kingdom” (s. 41(1)) and that a decision of the Supreme Court “on appeal from a court of any part of the United Kingdom, other than a decision on a devolution matter, is to be regarded as a decision of a court of that part of the United Kingdom” (s. 41(2)).

For hearing appeals, the Supreme Court must consist of an uneven number of judges (at least three), of whom more than half are permanent judges and therefore less than half are acting judges (s. 42(1)); and the Court will have power to seek the assistance in any proceedings of specially qualified advisers (s. 44).

The legislative prohibition on taking photographs in court is removed in relation to the Supreme Court by s. 47.

4. Administration

The Supreme Court will have a Chief Executive, appointed by the Lord Chancellor after consulting the President of the Court (s. 48(1)), and s. 49 deals with the appointment of officers and staff of the Court. The Lord Chancellor is responsible for ensuring that the Court is provided with appropriate accommodation and other resources (s. 50).

Because of the creation of the new Supreme Court, the existing “Supreme Court of England and Wales” (comprising the Court of Appeal, the High Court and the Crown Court) will be renamed the “Senior Courts of England and Wales” (and similarly in Northern Ireland the existing “Supreme Court of Judicature of Northern Ireland” will be renamed the “Court of Judicature of Northern Ireland”) (s. 59).

5. Parliamentary disqualification

Section 137 deals with the parliamentary disqualification of the judiciary. Judges are disqualified from membership of the Commons by the House of Commons Disqualification Act 1975, but the disqualification under that Act did not apply to the Law Lords as they were disqualified from the Commons by virtue of their life peerages. By s. 137 of the 2005 Act judges of the new Supreme Court will be disqualified from the Commons, and members of the Lords will be disqualified from sitting and voting in that House if they hold a judicial post that disqualifies them from the Commons. If therefore the existing Lords of Appeal in Ordinary become judges of the new Supreme Court they will, until they retire from that Court, be unable to sit and vote in the Lords. This will also apply to the Lord Chief Justice and other senior judges who hold life peerages.

Lords debate 20 June 2006

These provisions were discussed in the House of Lords on 20 June 2006 when Lord Waddington asked an oral question concerning the consequences for the House and Parliament of the prospective disqualification of the Law Lords from active membership of the House and the possibility that retired judges of the new Supreme Court would not be members of the House (HL *Hansard*, 20 June 2006, cols. 627–630).

Lord Waddington said that everybody that had looked into Lords reform, including the Royal Commission, had paid tribute to the contribution made by the Law Lords to the work of the House in Committee and on the floor of the House, and asked:

Is it not rather absurd that, when the Supreme Court is set up the Law Lords will be kicked out for no better reason than to emphasise the independence of the judiciary, which was never in doubt until the noble and learned Lord introduced his legislation, and to reinforce the doctrine of separation of powers, which was never part of our constitution? Surely we should try to save something from the wreck that the Government have created and at least make sure that, in any reformed House, there is room for at least some retired Supreme Court judges.

(HL *Hansard*, 20 June 2006, col. 628)

The Lord Chancellor, Lord Falconer of Thoroton, agreed that everyone who had looked at the work of the Law Lords in the House had paid tribute to it, but, he continued:

...the Government took the view that if you are to be appointed to the final court of appeal you should be appointed to a court and not to a Parliament. That is a view that

Parliament, in both Houses, in passing section 137 of the Constitutional Reform Act, agreed with. This House currently has 100 Members who have legal or judicial experience, including 18 former Law Lords. I hope that they will continue to make the contribution that they have made in the past, and I believe that they will ensure that the House has access to expert legal opinion and advice.

(*ibid.*, col. 628)

Lord Borrie suggested that it should become almost automatic that Lord Chief Justices should be appointed on retirement to be Members of the House, and the same could apply to former Law Lords who would be willing and interested to take part in the legislative work of the House (*ibid.*, col. 628).

The Lord Chancellor replied:

My Lords, I can see no objection whatever to retired Lord Chief Justices, not just from England and Wales but from Scotland and Northern Ireland, coming to this place; equally in relation to retired Supreme Court justices. We made provision in the Constitutional Reform Act for the Lord Chief Justices of the three nations to be able to address the House, so that we could be informed by them. I remain of the view—as do the Government and as does Parliament—that when you appoint someone as a judge, you appoint them as a judge and not as a Member of the legislature.

(*ibid.*, cols. 628–629)

Lord Wakeham said that there was a difficulty in picking some retired judges and putting them into the House but not others, as it might be thought by some as a favour for being a compliant judge; and he asked whether the best plan might be for all Supreme Court judges to become Members of the House on appointment, but not take their seat until they retire from the Supreme Court (*ibid.*, col. 629).

The Lord Chancellor agreed that it would be invidious to select some but not others, but not with Lord Wakeham's conclusion that one should become a Member of the House on appointment – “One has to wait until one has ceased to be a full-time judge. That is the view expressed in the Constitutional Reform Act, approved by Parliament” (*ibid.*, col. 629).

White Paper on House of Lords reform February 2007

The February 2007 White Paper on House of Lords reform, which proposed a partly elected and partly appointed House, included a proposal that every retiring Justice of the Supreme Court should be offered a seat in the House of Lords. This “would ensure the continuity of the kind of contribution brought by the current retired Law Lords. The value of the expertise brought to the work of the House by the retired Law Lords would justify the offer of a seat in the reformed House to retiring Justices. They would become part of the non party-political cohort of the reformed House, and would be appointed by the Statutory Appointments Commission at the next appointment round following their retirement” (Leader of the House of Commons and Lord Privy Seal, *The House of Lords: Reform*, Cm. 7027, February 2007, para. 9.24).

The White Paper also pointed out that it should be remembered that “the peerage, and a seat in the House of Lords, will be separate things in a reformed House. The question of whether all Justices of the Supreme Court should be offered an automatic peerage either on appointment or retirement is therefore separate from the question of a seat in the Lords, but will also be considered as part of the question of Lords reform” (*ibid.*, para. 9.25).

6. Accommodation and Costs for the Court

The accommodation and costs for the Court were the subject of discussion during the passage of the Constitutional Reform Act 2005 through Parliament and continue to be debated.

Announcement of Middlesex Guildhall – Lords written statement 14 December 2004

On the second day of the Report stage of the Bill in the House of Lords the Lord Chancellor, Lord Falconer of Thoroton, laid a written statement on the location of the Supreme Court and its cost. He stated:

The location and the setting for the UK Supreme Court should be a reflection of its importance and its place at the apex of the justice system, and the heart of the constitution. Providing the Supreme Court with its own building provides a physical demonstration of the separation between the judiciary and the legislature. Establishing the Supreme Court in the Palace of Westminster would be entirely inappropriate.

Following an extensive search and evaluation of potential sites in central London, I am today announcing that Middlesex Guildhall is my preferred option for housing the Supreme Court.

There are three key reasons for this decision:

its location on Parliament Square will mean that the judiciary, the legislature, the executive and the Church are each represented on the four sides of the square enhancing its position at the heart of our capital;

it is able to provide all the key design requirements of a modern Supreme Court and therefore represents a significant improvement on the Law Lords' current accommodation; and

it will deliver this much improved accommodation at a reasonable cost, demonstrating good value for money.

At this stage, I should stress that Middlesex Guildhall is my preferred option. As the detailed designs are developed, I will need to remain satisfied that they fully meet the operational requirements of a modern Supreme Court. This will, of course, require the normal planning approvals and my officials are consulting with English Heritage and Westminster City Council on the development of the designs. The Law Lords have continuing reservations as to the suitability of this building to house the Supreme Court of the United Kingdom. I will continue to consult with them closely on the issues.

The design proposals

The building for the new Supreme Court needs to meet the statement of requirements that was agreed with Lord Bingham of Cornhill in August 2003 and subsequently developed in discussion with the Law Lords' Supreme Court Sub-Committee, chaired by Lord Nicholls of Birkenhead. The headline requirement is for a building that measures at least 3,500 square metres, including sufficient space to enable co-location with the Judicial Committee of the Privy Council (currently based in Downing Street).

My view is that Middlesex Guildhall meets the statement of requirements and would enable much better facilities to be provided than the current arrangements. The proposals for this self-contained and dedicated building include:

three large hearing rooms, measuring between 143 and 190 square metres. This compares with 94 square metres for House of Lords Committee Room One;

greatly improved public access: we will ensure that both UK citizens and visitors from overseas have the opportunity to see the Supreme Court of the United Kingdom at work. The hearing rooms will provide approximately twice the number of public seats currently available in the Appellate Committee;

an education suite enabling information to be disseminated on the Supreme Court and providing the possibility of a live feed from the hearing rooms;

improved infrastructure, including better IT;

accommodation for the staff of the Supreme Court and the Judicial Committee of the Privy Council. This includes space for additional research assistants and secretarial staff. This will enable greater support to be provided to the Supreme Court justices and improve case management;

14 large en-suite judicial chambers; and

a world-class law library with an area of approximately 250 square metres. Considerable additional space for library records and less used materials will be available in the basement;

We are developing these plans for the building in close consultation with the Law Lords, English Heritage and Westminster City Council. We would of course need to apply for planning permission in the usual way. The city council is not in a position to accept the principle or the detail of the building scheme at this stage.

Delivering the Proposals

Providing the right building for the Supreme Court has financial implications. The cost of establishing the Supreme Court at Middlesex Guildhall will be approximately £30 million in current terms. This £30 million estimate contains two elements: base costs and “optimism bias”. The base costs are construction costs and statutory fees of £15 million; £2 million professional fees; and £3 million VAT. Those figures are then inflated by 50 per cent “optimism bias” in accordance with H M Treasury guidance on financial appraisal and evaluation (“The Green Book”). The optimism bias is applied to building projects as a contingency to cover risks, unforeseen issues and changing project specifications.

But I also need to ensure that the criminal justice system is not adversely affected by the selection of Middlesex Guildhall. I have therefore considered a number of options for providing additional courtrooms and I am confident that the Middlesex work can be decanted while sustaining criminal justice performance. I will be discussing these decant plans in detail with the judiciary and criminal justice partners over the next few months. Provision of the additional courtrooms will cost a further £15 million in current terms (including “optimism bias”).

The approximate annual cash running costs following establishment of the Supreme Court would be £8.8 million (£8.4 million relating to the Supreme Court; the remainder being the ongoing costs from courtroom re-provision). This figure includes £2.1 million judicial remuneration; £1.1 million staff salaries; £1.0 million administrative costs; £0.4 million utilities and rates; and £3.8 million building costs (including capital charge/lease costs and building maintenance costs).

It is not entirely straightforward to separate the administrative costs of the Appellate Committee from the generality of expenditure in the House of Lords, but the approximate annual cost to the public purse of the current arrangements are just over £3.2 million per annum. This figure includes judicial and staff remuneration, and general administrative costs. The table below compares the current and estimated running costs.

	Costs (£ million)	
	Appellate Committee Costs 2002-03	Supreme Court Estimated Costs
Judicial Salaries	2.1	2.1
Staff Salaries	0.6	1.1
Admin	0.4	1.0
Utilities and Rates	0.1	0.4
Building costs		3.8
TOTAL	3.2	8.4

This is a complex project which will require delivery in two key stages: the provision of additional courtrooms needs to be completed before refurbishment work can begin on Middlesex Guildhall itself. While I need to be satisfied that both stages are completed to a high standard, my aim is to establish the Supreme Court as soon as practicable. I would therefore hope that the court's first sitting would be in 2008.

The Supreme Court would not be established until the building was ready for operation.

The Search and Evaluation Process

The search for the Supreme Court has involved:

- reviewing the DCA estate in London;
- considering any suitable properties on the Greater London Magistrates' Court Authority estate;

- advice from the Office of Government Commerce on availability of property on the wide government estate in London;

- contacting 17 Whitehall departments to determine whether any of their buildings would be suitable; and

- commissioning professional agents to search commercially available property.

The search generated a long list of 48 properties, five of which merited further consideration after closer scrutiny against a number of criteria (size, operational efficiency, adaptability, suitability). After a full Treasury Green Book appraisal of these five options, two properties—Middlesex Guildhall and the New Wing of Somerset House—remained under active consideration.

In order to finalise the evaluation of the two options, more work was undertaken to identify how the current layouts could be adapted in order to meet the specific requirements of the Supreme Court (including engagement with the Law Lords, English Heritage and Westminster City Council).

Of these two strong options, my decision that Middlesex Guildhall should be the preferred option was based on the three key reasons set out above: its location on Parliament Square; its fit with the Supreme Court requirements; and its value for money.

(*HL Hansard*, 14 December 2004, cols. WS71–74)

“Sunrise clause” in Constitutional Reform Bill – 14 December 2004

On the same day a “sunrise clause” in relation to the Supreme Court was added by an amendment introduced by the Government (*HL Hansard*, 14 December 2004, cols. 1320–1321). The effect of the clause (which became s. 148 (4) (5) of the Act) is that the Supreme Court would not be set up until the Lord Chancellor is satisfied that the Court will be provided with appropriate accommodation in accordance with written plans approved by him, after consultation with the Lords of Appeal in Ordinary in office at the time.

The Lord Chancellor explained that only with “a clear and separate building does the functional and operational separation, so vital to the proposal, occur” and so he agreed with those who wished to insert a sunrise clause in the Bill, which had been “much discussed around the House” and had been “agreed with a senior Law Lord” (*HL Hansard*, 14 December 2004, col. 1215).

Lords Select Committee on the Constitution – 13 December 2005

After the Bill received the Royal Assent on 24 March 2005 the accommodation for the Court was among the subjects covered by the Lords Select Committee on the Constitution in its yearly meeting with the Lord Chancellor on 13 December 2005. Asked to run through the sequence of setting up the Court, the Lord Chancellor, Lord Falconer of Thoroton, stated that the Middlesex Guildhall would be refurbished as a Supreme Court, to be ready by 1 October 2008. On or by that date the Law Lords would move into Middlesex Guildhall to become the first members of the Supreme Court and the provisions of the 2005 Act creating a Supreme Court would be brought into effect, concluding that “the whole force of my case on the Supreme Court depends upon it being separate and identifiably separate from the House of Lords” (House of Lords Select Committee on the Constitution, *Meeting with the Lord Chancellor*, HL Paper 84, 2005–06, 13 December 2005, Q. 18).

After further questions, the Lord Chancellor stated that there was a continuing process of discussion between the Law Lords and those responsible for the refurbishment of Middlesex Guildhall. There were also planning permission and heritage issues, but although the process was not yet complete it was on target to start in accordance with the programme previously described (*ibid.*, Q. 39). The estimated cost of refurbishing Middlesex Guildhall remained at £30 million (in third-quarter 2004 prices, as announced to Parliament on 14 December 2004) (*ibid.*, Q. 42).

Opening date for new Supreme Court changed to October 2009

On 1 March 2006 the Lord Chancellor announced in a Lords written statement that the opening date for the Supreme Court was now October 2009. The refurbishment plans for the Middlesex Guildhall had been completed and would be formally presented to the Lord Chancellor on 7

March 2006 for statutory approval. The designs had been developed “in close consultation with the Law Lords, in accordance with section 148 of the Constitutional Reform Act, and meet the statement of requirement that was agreed with Lord Bingham of Cornhill in August 2003. The general opinion of the Law Lords is that the existing plans, very imaginatively, provide reasonable accommodation for the Supreme Court within the confines of the Middlesex Guildhall, although there were some members who remain unconvinced that the building can, even re-designed as proposed, provide a suitable modern setting for the Supreme Court of the UK. We are working within the financial parameters set out in my statement of 14 December 2004. Middlesex Guildhall is a grade II* listed building that requires consent from Westminster City Council before the designs can be finalised. Our aim is to submit an application for planning approval at the end of April” (HL *Hansard*, 1 March 2006, cols. WS28–30).

Amount spent up to 23 March 2006

In a Commons written answer of 23 March 2006 Harriet Harman, Minister of State, Department for Constitutional Affairs, replying to a question by Oliver Heald, stated:

The amount spent to date on establishing the Supreme Court is set out as follows. These costs are made up of both capital and resource expenditure and reflect the work to date in respect of developing the designs for both construction projects: the refurbishment of Middlesex Guildhall, to adapt it for use as the Supreme Court, and the creation of additional Crown court courtrooms.

	£		
	Capital	Resource	Amount
April 2003 to March 2004	—	228,602	228,602
April 2004 to March 2005	—	699,235	699,235
April 2005 to January 2006	3,035,495	405,520	3,441,015
Total	3,035,495	1,333,357	4,368,352

(HC *Hansard*, 23 March 2006, col. 567W)

Lords Oral Question on capital construction costs 24 July 2006

In the Lords, on 24 July 2006 the Lord Chancellor, Lord Falconer of Thoroton, in reply to an oral question by Lord Campbell of Alloway, stated:

My Lords, the capital construction costs remain as described in my Written Ministerial Statement of 14 December 2004, subject to those costs having been adjusted for inflation, and they now stand at £35.3 million. There will be additional associated costs, such as fees and furniture. Westminster City Council is currently considering a local planning application, on which it is expected to reach a decision over the Summer Recess. We do not yet know whether this decision will have an impact on the costs. Therefore, when the application has been decided, I propose to make a full report to the House, including the overall estimated costs, once Parliament returns. Subject to a successful application, it remains my intention that the UK Supreme Court should open for business in October 2009.

(HL *Hansard*, 24 July 2006, col. 1538)

In reply to a supplementary question by Earl Ferrers, the Lord Chancellor stated that seven other courts had to be rehoused and that the figures given did not include the cost of rehousing those courts; and in reply to a supplementary question by Lord Kingsland, the Lord Chancellor stated that “The construction costs involved in taking the seven courts out of Middlesex Guildhall was given as £15 million; they are now in the region of £18.2 million. There will be associated costs in relation to that” (HL *Hansard*, 24 July 2006, col. 1539).

In reply to a further supplementary question by Lord Kingsland, the Lord Chancellor stated that the approximate annual cost of having the Law Lords in the House of Lords was “between £3 million and £4 million, and the approximate annual cost of running the new Supreme Court will be somewhere between £8 million and £10 million. So it will cost substantially more” (HL *Hansard*, 24 July 2006, cols. 1539–1540).

Further details of Implementation Programme – Lords written statement 17 October 2006

Following the Summer Recess, the Lord Chancellor laid a written statement in the Lords on 17 October 2006 giving further details of the implementation programme. He stated:

I wish to make a Statement on the development of the Supreme Court for the UK in the light of recent progress since the matter was last discussed in the House on 24 July 2006. The Supreme Court Implementation Programme is on target to deliver the Supreme Court at Middlesex Guildhall in time for the start of the legal year in October 2009.

As the House knows, we submitted an application for listed building consent for the Middlesex Guildhall to Westminster City Council on 5 May 2006 and this application was considered at the council meeting on 7 September 2006. Throughout this process we have consulted widely with Westminster City Council, English Heritage and with the local amenity societies and local residents. Westminster City Council planning and city development committee resolved unanimously to grant the applications for planning and listed building consent, subject to formal authorisation from English Heritage and the completion of the Section 106 agreement.

We are currently working with English Heritage and Westminster City Council to finalise the terms of the s106 agreement.

In parallel with the planning application, we have now appointed Kier Group plc as our preferred bidder and we are in commercial discussions with them prior to agreeing the final contract. We expect to reach financial close with Kier Group early in the new year.

The Middlesex Guildhall construction project remains within the capital construction cost estimate of £30 million (at 2004 prices) as detailed in my Statement of 14 December 2004.

The capital construction costs involved in the refurbishment of the Middlesex Guildhall will be met by regular charges over a 30-year period as part of the lease and leaseback arrangement we are using and I will be in a position to make a Statement on these annual charges when we have achieved financial close. The asset value of the refurbished building, which may be different from the capital construction costs, will be recorded in the department’s balance sheet.

In addition to the capital construction costs, the implementation of the UK Supreme Court will incur other costs such as DCA professional adviser fees, the project team costs and

the non-capital element of the fit out costs including loose furniture, IT services and library books.

The Middlesex Crown Court will cease sitting on 31 March 2007. We have developed detailed transition plans in conjunction with the judiciary to manage the relocation of court work, judges and staff. The intention is to create extra courts at Isleworth Crown Court. On 21 March 2006, the planning committee of the London Borough of Hounslow refused planning permission for these extra courtrooms. On 25 May, an appeal was lodged against this decision and our appeal is due to be heard on 15 and 16 November 2006. We expect to hear the outcome of our appeal early in the new year.

Once we have reached financial close with Kier Group plc, I propose to make a further Statement describing the costs involved in setting up the Supreme Court and the re-provision of existing Crown Court facilities currently operating from Middlesex Guildhall.

(*HL Hansard*, 17 October 2006, cols. WS78–79)

Commons EDMs critical of Implementation Programme

In the Commons, criticism of the plans to renovate the Edwardian interior of the Middlesex Guildhall required by the implementation programme were voiced in two Early Day Motions, tabled by Andrew Mackinlay on 8 January 2007 (EDM 571) and Frank Field on 10 January 2007 (EDM 607). So far, these have attracted 24 and 29 signatures respectively.

Lords Oral Question 23 January 2007

In the Lords further discussion of the implementation programme occurred on 23 January 2007 when Lord Lloyd of Berwick asked an oral question as to the total cost of establishing the new Supreme Court in the Middlesex Guildhall and the eventual cost of creating seven new courtrooms elsewhere in central London to replace those currently in the Guildhall. The Lord Chancellor, Lord Falconer of Thoroton, replied:

My Lords, the capital construction costs for Middlesex Guildhall remain within the estimate of £30 million, at 2004 prices. The capital construction costs for the redevelopment of the Crown Courts at Isleworth remain in the region of £18.2 million, at 2006 prices. In addition to the capital construction costs, further costs will be incurred, such as DCA professional adviser fees, the project team costs and the non-capital element of the fit-out costs, including loose furniture, IT services and library books, as identified in my Written Ministerial Statement on 17 October 2006. Spend to date on both projects has been £5.9 million capital and £1.8 million resource. I will provide further information on reaching closure with the preferred bidders, which are Kier Group plc for the Middlesex Guildhall and Geoffrey Osborne Building Limited for Isleworth.

(*HL Hansard*, 23 January 2007, col. 995)

In a supplementary question Lord Lloyd of Berwick asked whether the bulk of money would come not from the Lord Chancellor's own Department or the Treasury, as it should, but from a levy on members of the public seeking justice in the lower courts. The Lord Chancellor replied that "Civil litigation incurs fees and some of those fees will contribute to the costs" (*HL Hansard*, 23 January 2007, col. 996).

Lord Howarth of Newport then asked whether, in estimating the cost of converting the Middlesex Guildhall, the Lord Chancellor had taken fully into account the fact that the building by James Gibson was listed Grade 2 starred and that English Heritage considered its interiors to be unsurpassed by any courtroom of its period in the quality and completeness of their fittings, and what assurance could the Lord Chancellor give that the quality of what was installed would be as fine as the quality of what was removed. The Lord Chancellor replied that “We are very conscious of the importance of the interiors of the Middlesex Guildhall and, in particular, the court furniture, which my noble friend rightly identifies as being among the best of its kind. Before the local authority gave planning permission it was extremely concerned that appropriate homes should be found for the exquisite court furniture. That has been done—and only once it had been done was final planning permission given (HL *Hansard*, 23 January 2007, col. 996).

The Lord Chancellor responded:

My Lords, once again, this is going back over issues that were fully debated at the time. Parliament, having heard all of these issues, concluded that we should have a Supreme Court. The reason why it is worth having a Supreme Court is that there should be a separate and identifiable court at the apex of the judicial system and that we should separate the legislature from the courts.

(HL *Hansard*, 23 January 2007, col. 996)

Implementation Programme update – Lords written statement 1 March 2007

A further update on the implementation programme was given by the Lord Chancellor in a Lords written statement of 1 March 2007, as follows:

I wish to update you on the implementation of the UK Supreme Court. As you know, on 7 September 2006 the Westminster City Council Planning and City Development Committee resolved unanimously to grant planning and listed building consent to the proposed renovation of Middlesex Guildhall in preparation for use as the UK Supreme Court. English Heritage fully supported the renovation plans.

Consent was granted subject to the completion of a Section 106 agreement, which was then signed by both parties on 21 November 2006. Both the planning and the listed building consents were also issued on 21 November 2006.

On 26 January 2007 an application was made for judicial review of the decision to grant listed building and planning consent for the renovation of Middlesex Guildhall. The application was made by SAVE Britain’s Heritage against Westminster City Council.

The judicial review is about the way in which the issues were presented by Westminster planning officers to the committee and as a result whether there was an error in law in the way in which Westminster City Council reached its decision. It is about the process; it is not about the content of the application. I am named as an interested party in the case, and my department and I are fully supportive of Westminster City Council. Westminster City Council lodged their defence of the decision on 16 February, which we supported. The courts are now deciding whether or not there is a case to be heard.

In the interim, I have decided to resubmit the application for listed building and planning consent for the Middlesex Guildhall to Westminster City Council. This demonstrates our confidence in the original case and gives us a better control over timescales.

I believe that this step is the best way to meet the needs of all parties involved and gives the best chance to deliver the Supreme Court in October 2009. Our second application will be lodged on 9 March 2007. This will be followed by the usual statutory consultation.

The Crown Courts at Middlesex Guildhall will still close on 30 March 2007 as planned. New courtrooms are being built at Isleworth Crown Court and will be available in autumn 2008. In the mean time, transition plans are in place to maintain the number of sitting days across London Crown Courts.

As announced in my Statement of 17 October 2006, I will update you on costs once we have reached financial close with our preferred bidders—Kier Group plc for the Guildhall renovation and Osborne’s for the Isleworth development.

(HL *Hansard*, 1 March 2007, cols. WS140–141)

Judicial review application by SAVE British Heritage 27 March 2007

The judicial review application by SAVE Britain’s Heritage referred to by the Lord Chancellor was rejected by the High Court (Administrative Court) on 27 March 2007. Mr Justice Collins held that the application could only succeed if there was an error of law, but there was no error of law. He said: “I appreciate that there are many who believe the decision to locate the Supreme Court in the old Middlesex Guildhall is a wrong decision, both because it fails to house the highest court in the land in an appropriate setting and because of the damage the alterations will cause to an important historic building, but the [Westminster planning] committee had the responsibility of deciding whether consent should be given to enable the alterations to go ahead. They were, on the material before them, entitled to conclude that this was the right location, and so that it was in the national interest and thus desirable and necessary in terms of PPG15 that the alterations should be permitted to go ahead in order to enable the Supreme Court to be accommodated in the building. There was no misdirection from either the officers or by themselves, and in my view they clearly applied the correct test” (*The Queen on the Application of SAVE Britain’s Heritage v. Westminster City Council and the Lord Chancellor*, 27 March 2007, paragraph 33).

Commons Select Committee on Constitutional Affairs 17 April 2007

On 17 April 2007 the Secretary of SAVE Britain’s Heritage, Adam Wilkinson, and also the Senior Architectural Advisor to the Victorian Society, Dr Kathryn Ferry, gave evidence to the Commons Select Committee on Constitutional Affairs, which was investigating accommodation for the Supreme Court. Both were critical of the Government’s plans for the Middlesex Guildhall.

Dr Ferry said that the Guildhall was a Grade II* listed building, a listing which covered the whole building, exterior and interior. It was a rare example of an Edwardian Gothic building and the important thing was to consider it as a whole, seeing it as an integral piece. The “interiors are such an important part of this that removing all of the furniture and the fittings will have a detrimental impact on the character and the historic importance of the building” (House of Commons Select Committee on Constitutional Affairs, *Accommodation for the Supreme Court*, Minutes of Evidence, HC 456-i, 2006–07, 17 April 2007, Q. 1).

Mr Wilkinson referred to the impact of the closure of the crown court on the work of other crown courts across London. He said:

The key point is that the building could remain in use as a crown court. Its closure has resulted in seven less courts in operation in London with its backlog of 500 cases and, of course, while they are doing adaptations down at Isleworth that will represent another three courts being closed. There is a massive net reduction in courts for a short time while they are doing these works, perhaps one or two years. The arguments are made by the DCA and its agents that the historic building was not up to modern standards for historic courts. In our report *Silence in Court* which we put together a few years ago, studying historic courts across the country, practically none of those would meet the requirements for a modern court building. It is a question of working with what you have got. In Scotland the Scottish Court Service has adapted every single one of its courts bar one to modern standards in a sympathetic and historic manner because it feels it has a moral duty to do so. It is the same with the crown court at Middlesex Guildhall, the Government has a moral duty to look after that building properly and to treat it sensitively and it really could adapt it if it had the time and energy to do it to modern uses, but I am afraid it is not interested.

(*ibid.*, Q. 5).

The Chairman of the Committee, Alan Beith, referred to “the strong emphasis by the Law Lords” expressed at earlier stages (when the Committee were discussing what the Supreme Court would be like, before the building itself was an issue) on the need to preserve the seminar-like atmosphere in which the Law Lords currently sit in a committee room within the House of Lords; and he asked Mr Wilkinson whether that need could have been satisfied to some extent “without the degree of vandalism, as you would call it, to the building that is now contemplated?” Mr Wilkinson replied that “It is difficult. Court number three, which is the old council chamber, is a very dramatic space. It has got this massive ceiling with hammer beam roof there is wonderful woodwork and a well” (*ibid.*, Q. 21).

The Lord Chancellor, Lord Falconer of Thoroton, then gave evidence to the Committee. Asked by Mr Beith to reiterate briefly why he chose Middlesex Guildhall and whether in making that choice he was aware that there would be very strong arguments that he would have to be very sensitive to the quality of the building and its fittings in particular, the Lord Chancellor stated:

We conducted an extensive search that boiled down to a shortlist ultimately of six, one of which was Middlesex Guildhall. We were aware before we made the choice of selecting Middlesex Guildhall that there were very, very significant parts in particular of the interior that had to be handled extremely sensitively. It was a Grade II listed building. Detailed plans were drawn up as to what was going to be done. Even bearing in mind all of that, we decided very clearly that Middlesex Guildhall was the right place for the Supreme Court for two reasons. The building is right, subject to the amendments that have been proposed in detail, and also because of its position right in the heart of Parliament Square, opposite Parliament, beside the Treasury, not that that is remotely relevant, and opposite Westminster Abbey as well. I am very aware of what the most impressive council chamber, now courtroom, looks like. It has been operating as a crown court for a very considerable period of time although it could have continued as a crown court, it could not have continued forever as a crown court, there were considerable amendments which would have been required under the Disability Act. It would also have been the only crown court in London that would not have had a secured dock because you cannot get secure access to Middlesex Guildhall. A question would eventually have arisen some time in the future as to whether or not Middlesex Guildhall could have survived as a crown court. Before we went ahead, detailed plans were drawn

up and they were approved initially by English Heritage, who have got considerable concerns about this, and then Westminster City Council.

(ibid., Q. 34)

Bob Neill, MP expressed some concern that ultimately the building might fail to satisfy the needs of the Law Lords. The Lord Chancellor responded:

Absolutely not because, as you know, the Constitutional Reform Act 2005 required that before the Lord Chancellor certified the building as appropriate he had to consult the Law Lords. There was detailed consultation with the Law Lords about the detail of the architectural changes inside Middlesex Guildhall and they were involved and they, although some of them would have preferred there not to be a Supreme Court at all, indicated as a group that they were satisfied with the appropriateness of the changes that we have made as a Supreme Court.

(ibid., Q. 51)

Jeremy Wright, MP asked about the consequences of Middlesex Guildhall “going out of business”; the long-term answer was that there would be another five crown courts at Isleworth, but he wanted to ask about the interim. There would obviously be the displacement of crown court cases, presumably to other courts in the London area. Was it the intention of the Department to cater for that extra demand by asking the crown court to introduce new ways to increase their utilisation levels, for example, using non-jury court rooms and improving list practices? The Lord Chancellor responded:

This represents 5% of the crown court capacity in London. As you rightly identify, we have to deal with those cases without the extra five courts in Isleworth between now and September-ish 2008. We are seeking to do that in precisely the ways you have described. I hope that will not lead to any significant increase in delays between now and September 2008, because different committal rooms will be used, there will be greater utilisation of courts, as you have described. You are absolutely right, Mr Wright, to say that I wish we had been more efficient in using those committal routes in the past. I wish that we had done all that we could to utilise these courts better in the past. We are doing that and I hope there will not be any material delays between now and September 2008 but I am afraid I cannot give you a complete assurance that will be the case.

(ibid., QQ. 90 and 91)

Other buildings that were considered as sites for the Supreme Court

In a Commons written answer of 8 May 2007 Vera Baird, Parliamentary Under-Secretary of State, Department for Constitutional Affairs, replying to Keith Vaz, MP, listed the buildings which were considered as a potential site for the Supreme Court, in addition to the Middlesex Guildhall, as follows:

In 2004 a statement of requirements for the building to house the UK Supreme Court was agreed in conjunction with the Lords of Appeal in Ordinary. This search generated a long-list of 48 properties but only eight of which, after closer scrutiny against a number of criteria (size, operational efficiency, adaptability, suitability), merited further consideration.

Central and Staple Court, WC2—commercial property

4 Mathew Parker Street, SW1—Crown Estate property
New Wing, Somerset House—Crown Estate/commercial property
Field House, Bream's Buildings EC4—DCA estate property
Victoria House, Bloomsbury Square WC1—commercial property
Middlesex Guildhall, Parliament Square
Stewart House, 24 Kingsway London WC2
St. Dunstan's House, London EC4 A1DQ.

The long list has never been made public as it includes several properties where no formal contact was made with regards to the search.

(HC *Hansard*, 8 May 2007, cols. 134–135W)

Options for a new build

In a further Commons written answer of 22 May 2007 to Keith Vaz, MP, who asked what representations the DCA had received from private contractors on (a) the refurbishment of Middlesex Guildhall and (b) the construction of a new building to house the new Supreme Court, Vera Baird replied:

Five developers were involved in the bid process to carry out the renovation of Middlesex Guildhall. In 2004, Land Securities approached the Department with two options for a new build; Fetter Lane (near the Royal Courts of Justice) and Buckingham Gate. Fetter Lane was deemed too large for use as the Supreme Court and was taken up by HMCS.

After detailed analysis, Buckingham Gate was ruled out because it offered a much less prestigious location at a higher cost.

(HC *Hansard*, 22 May 2007, col. 1258W)

Implementation Programme update – Commons written statement 14 June 2007

Another update on the implementation programme was given by the Lord Chancellor, Jack Straw, in a Commons written statement of 14 June 2007 as follows:

I wish to update you on the development of the UK Supreme Court in the light of recent progress.

The Supreme Court implementation programme is on target to deliver the Supreme Court at Middlesex Guildhall in time for the start of the legal year in October 2009.

We achieved two major milestones in our programme in the course of the past week. First, we reached agreement with Westminster City Council to discharge all the necessary planning conditions to allow us to start renovation of the Middlesex Guildhall. Secondly, we reached financial close with Kier Group plc, our preferred bidder, to carry out the

renovation of the Middlesex Guildhall as the new UK Supreme Court. As a consequence we started work on 13 June 2007.

This signals a major step forward in the creation of the Supreme Court in a place that is separate from the Houses of Parliament. Establishing the Supreme Court at the Middlesex Guildhall will symbolise the separation of powers between the judiciary and legislature. It is an opportunity to breathe new life into a fine historic building and to keep the building, which otherwise could not have continued in the long term as a Crown Court, in use as a centre for justice.

It also means greater visibility for the highest court in the United Kingdom and improved accessibility for all members of the public.

The renovation plans are heavily influenced by conservation. Conservation architects Feilden+Mawson developed the plans in conjunction with the Law Lords, Westminster City Council, English Heritage and many other interested groups.

Today, we have published images on our website that illustrate our plans in more detail. I invite you to view the pages to see the balance that has been struck between creating a home that reflects the importance of such an institution and capitalises on the building's historic features. (www.justice.gov.uk/whatwedo/supremecourt.htm)

I said that I would update the House on costs as soon as we reached financial close with Kier Group and that is what I am now doing. In December 2004 (*Official Report*, 14/12/04; col. *WS 117*) I announced that the cost of running the Supreme Court would be approximately £8.4 million per annum at 2004-05 prices. This would be the equivalent of £10.4 million at 2010-11 prices, the first full year of the Supreme Court's operations. We have refined these estimates based on our developing understanding of the building design and business requirements. Our estimate of the running costs is £12.3 million per annum at 2010-11 prices and is set out in the table below.

Running Costs	WMS 2004 £m	WMS 2004 inflated* £m	WMS 2007 £m	Increase (Cost growth) £m
Judicial Salaries	2.1	2.6	2.6	Nil
Staff costs	1.1	1.4	1.9	0.5
Admin (inc. security)	1.0	1.2	2.3	1.1
Utilities and rates	0.4	0.5	0.5	Nil
Building costs (including cost of capital, depreciation, lease charge and lifecycle costs)	3.8	4.7	5.0	0.3
Total	8.4	10.4	12.3	1.9

* Assumes inflation rate of 3.5% pa to first full year of operation; that is, 2010-11

The Middlesex Guildhall project will be carried out using a lease and lease-back arrangement where the capital construction costs will be met over a 30-year period. Having reached financial close we can announce the real cost in terms of an annual rental figure. The annual rent to be paid by MoJ to Kier will be £2.1 million per annum, increasing at a rate of 2.5 per cent per annum, for a period of 30 years from completion of the works and is included in the building costs above. This is less than the comparative figure included in the building costs (£3.8 million in table above) quoted in my Statement of December 2004.

In December 2004, we estimated the capital construction costs to renovate the Guildhall as approximately £30 million (£36.9 million when inflated). This previous figure was established on the basis of a traditional procurement and included VAT. On a like-for-like basis the capital construction costs of the renovation are now expected to be £36.7 million. This is within the costs announced in that Statement. As I pointed out in my Written Ministerial Statement of October 2006, this figure did not include MoJ professional adviser fees and the non-capital element of the fit-out costs including loose furniture, IT services and library books. These set-up costs related to the Middlesex Guildhall are expected to be an additional £14.3 million. The Ministry of Justice programme team will cost a further £5.9 million over the five years of the programme.

Significant progress has also been made since my last Statement to ensure that there is minimal impact on the London criminal justice system following the closure of the seven Crown courtrooms at Middlesex Guildhall on 30 March 2007. The number of Crown Court sitting days in London has not been affected by the closure and work undertaken by the courts is now allocated to nearby court centres. In December 2006, following a successful appeal, the department obtained planning consent for the construction of additional courtrooms at the Isleworth Crown Court Centre. The additional courtrooms will replace the loss in overall capacity by the closure of the Middlesex Guildhall. We are currently in commercial negotiations with Geoffrey Osborne (Building) over the plans and costs for the development at Isleworth. Our current plans are to commence construction in the summer 2007 and open the new courts in the spring of 2009.

(*HC Hansard*, 14 June 2007, cols. 61–62WS)

Further breakdown of set-up costs – Commons written answer 25 June 2007

A further breakdown of the set-up costs related to the Middlesex Guildhall referred to in the written statement of 14 June 2007 was given in a Commons written answer of 25 June 2007 by

Vera Baird, Parliamentary Under-Secretary of State, Ministry of Justice, as follows:

As mentioned in the written ministerial statement, 14 June 2007, *Official Report*, columns 60-62WS, the set-up costs related to the Middlesex Guildhall are expected to be an additional £14.3 million. These costs will be spread over the five years of the programme and are broken down as follows;

<i>Breakdown of Supreme Court set up costs</i>	
	<i>£ million</i>
<i>Resource costs</i>	
Furniture and artwork	3.4
IT costs	2.6
Decant	1.0
Library	0.3
	7.3
<i>Non construction capital costs</i>	
Professional and statutory fees	6.2
Surveys	0.4
Furniture removal	0.1
s106 costs	0.1
IT (broadcast and server)	0.2
Total	14.3

(*HC Hansard*, 25 June 2007, col. 359W)

7. Lords debate 4 July 2007

A wide ranging debate, considering all the issues to date, including the arguments for and against moving the Supreme Court out of the Palace of Westminster, and the costs involved, took place in the House of Lords on 4 July 2007. This was on a question for short debate, introduced by Lord Lloyd of Berwick, asking what progress the Government were making in moving the Supreme Court to the Middlesex Guildhall.

Lord Lloyd said that he accepted, although he did not agree with, the decisions of Parliament that there should be a Supreme Court and that the present Law Lords, as first members of the Supreme Court, should no longer be entitled to take part in legislative business in the House of Lords. But he did not accept that in order to achieve those two ends, whether laudable or not, it was necessary to move the Supreme Court into the Middlesex Guildhall. He continued:

The principal reason for doing so is that it would symbolise,

“the separation of powers between the judiciary and legislature”.—[*Official Report*, 14/6/07; col. WS 125.]

That is a direct quotation from the most recent Written Statement dated 14 June this year. The second reason given is that it would breathe new life into a fine historic building. I am all for cleaning up the Middlesex Guildhall, which has been allowed to become disgracefully drab and dingy both inside and out, due no doubt to a shortage of money, but when that task has been completed I see no reason at all why the Crown Courts should not return to the Guildhall where they have been for the past 100 years.

I come now to what it will all cost. We did not have the full costs when we debated these matters in 2005, but now that the contract has been let we are told that the total cost of setting up the Supreme Court in the Guildhall will be £57 million. However, the Ministry of Justice does not have £57 million to hand, so most of that cost will be met on what I might call the “never never” system. Thus the contractor’s costs of £36 million will be met by leasing the Guildhall to the contractor and then entering into a sub-lease under which the Ministry of Justice will pay rent of £2.1 million a year for 30 years, increasing at a rate of 2.5 per cent per annum.

That may seem an odd set-up for our prestigious new Supreme Court, but there it is. However, it is not the end of it. The great bulk of the £2.1 million which will be required annually will be met not out of the existing resources of the Ministry of Justice but by increasing the fees payable by civil litigants in the lower courts. That cannot be right. Why should litigants in the lower courts pay for the new Supreme Court? Of what conceivable interest is it to them?

Looking at costs the other way round, the cost of servicing the Law Lords where they are at present is very modest indeed. The additional cost of moving them to the Guildhall was estimated in 2004 at £5.2 million a year. It is now estimated at £9.7 million a year—nearly double, and far in excess of the current cost.

So far I have mentioned only the cost of setting up the Supreme Court in the Guildhall, but there is also the cost of creating seven new courtrooms to replace those which were used daily in the Guildhall until March this year. The plan was to create seven new courtrooms somewhere in the centre of London. That is where they are needed, especially since Knightsbridge Crown Court no longer exists. As I understood it, that was the plan in 2005, but it is now proposed to build five new courts at Isleworth—six new courts less one old court which has to be demolished—at a cost of £18.2 million.

However, Isleworth is nowhere near the centre of London and is not where new courts are needed. The total cost of this whole unnecessary operation will be £75 million—£57 million plus £18 million—and all to symbolise, as we have been told, the physical separation of the Supreme Court from the legislature. I emphasise the word “symbolise”.

...The Government could have the Supreme Court they want, exactly as they want it, tomorrow if only they would abandon the idea of moving it to the Guildhall. It would require only a very simple amendment to Section 148 of the Constitutional Reform Act, and Part 3 creating the Supreme Court could be brought into force now instead of having to wait until October 2009. Surely that would be symbolism enough. It is not too late for the Ministry of Justice to take that course and I urge it to do so. If we are serious about value for money, it is the only sensible course. Then, when the necessary refurbishment of the Guildhall is complete, at comparatively little cost, the Crown Courts could return to the Guildhall where they belong and the Law Lords could remain as the new Supreme Court where they are—here in the Palace of Westminster.

(HL *Hansard*, 4 July 2007, cols. 1089–1090)

Lord Howe of Aberavon said he was delighted to follow Lord Lloyd of Berwick’s presentation of the case and to make the point that, quite apart from the extravagance involved, the theoretical purpose underlying this change had no foundation whatever and the consequences of it would be damaging to the independence of the Supreme Court, when the opposite was the objective of the exercise. He continued:

The concept of the separation of powers, from which all this started, does not recognise that the real power which needs to be separated from the others is that of the Executive. For the most part the judiciary and the legislature work in a close partnership. The legislature is, of course, acknowledged to have the supremacy—the judiciary acknowledges that—but the judiciary has its own independence. As I say, they work in partnership. The trouble comes when the Executive’s influence is extended in either direction.

For example, one thinks about the change in the method of appointing judges to the High Court. Although it embraces one solid and sensible thing; namely, the establishment of an Appointments Commission and machinery of that kind, the ultimate political authority over it—there has to be some; it is there in the statute—has passed from the Lord Chancellor, whom we now see is becoming symbolic in name rather like the Chancellor of the Duchy of Lancaster, to a non-lawyer outside this House. That, if anything, diminishes the fraternity between the head of the judicial system, supervising the old system of appointment, and replaces it by a politically accountable authority. There is no sense in that. It is not only in that respect that the change is being made. If one looks at the financing as well, that has much the same effect.

...As the noble and learned Lord has pointed out, the expense is enormous and is already ravaging the budgets of the court system and doing nothing to improve the performance of the Supreme Court. If one looks at the way in which our present Supreme Court is financed, so far as I can discover its total budget, apart from the judicial salaries, administered as it is by this House, is about £200,000. It has been administered well, within that framework, for a very long time. Moreover, *Resource Accounts* for 2005-06 says:

“The House of Lords is outside HM Treasury’s administration costs control regime”.

... We have sacrificed independence of the Executive, both in financing and in the overall appointment of members of the Supreme Court, when we need have done none of those things and could well have remained—even under the legislation—as the noble and learned Lord has said, with the Supreme Court still functioning in this building with a separate, independent entrance. It is a case that I argued when we were looking at the so-called Constitutional Reform Bill. Why not have a separate entrance with as much aggrandisement as you like? You could have a very splendid special entrance for a good deal less than £50 million and the Supreme Court would remain functioning, manifestly and symbolically independent of this House. That would do at least something to mitigate the damage in the substance of the relationship, which I have tried to describe.

(*HL Hansard*, 4 July 2007, cols. 1091–1092)

Lord Goodhart said that Lord Lloyd of Berwick had returned to an important issue, but his purpose was not just to get the information requested by his Question but to suggest that the Supreme Court should remain in the Palace of Westminster. Lord Goodhart disagreed with that suggestion and continued:

I have always thought that it was absurd that the highest court in the land was technically a committee of your Lordships' House. That issue is not being raised again today, though perhaps we have come close to it. But the noble and learned Lord says that he accepts that decision. To keep the Supreme Court in the Palace of Westminster would be an entirely unsatisfactory halfway house. So long as the Supreme Court is perching in the Palace of Westminster, it will be seen as part of your Lordships' House. It will still use perhaps a Committee Room, perhaps the Lord Chancellor's old Room—certainly something that is a traditional part of the Palace of Westminster—for its hearings.

It will still have offices in the Palace of Westminster, or in one of the adjoining buildings in Millbank or elsewhere that belong to the House of Lords. It will still, in that capacity, be seen as an offshoot of your Lordships' House. But future justices of the Supreme Court, under the Constitutional Reform Act, will not be Members of your Lordships' House. They will not have a right to sit in this Chamber or to speak here, though no doubt they will have the right to use the refreshment facilities. They will in effect be strangers in their own building, and I do not believe you can have a Supreme Court with the proper authority that it should have if it has no building of its own, no courtrooms and no proper facilities for the judges.

Let me look briefly at the question of the conversion of the Middlesex Guildhall. The location is ideal—it is in the heart of the historic centre of government. The building is not ideal—I am not an admirer of it as a piece of architecture. Its neo-Gothic style was already out of date when it was built in 1911. It was built for a local authority, Middlesex County Council. Only later did it become a court, so already it has had one fundamental change of use. The internal fittings, while interesting, are not of great merit. But I think it is capable of conversion into something that would be a more than adequate home for the Supreme Court.

It is certainly much better than what the Law Lords have now. The Committee Room, as a court, has very little space for observers or indeed for lawyers. The Law Lords themselves have tiny rooms on the second floor. The refurbishment of the Middlesex Guildhall and providing accommodation for the courts displaced by its transfer to the Supreme Court will indeed cost money—quite substantial money. But is this country so poor that we cannot provide proper accommodation for our Supreme Court? Surely we do not want a Supreme Court stuck in an archaic rut in the Palace of Westminster. The Supreme Court needs to be a proper Supreme Court, with its own building, not an adjunct

of your Lordships' House, and of course the Supreme Court needs to be properly housed and with the proper facilities, which I believe it will get in the Middlesex Guildhall.

(*HL Hansard*, 4 July 2007, cols. 1092–1093)

Lord Norton of Louth raised two concerns: the relationship of the courts to the citizen, and the relationship of the courts to the Executive. He said:

When the Constitutional Reform Bill was going through your Lordships' House, the Government justified the need for a new Supreme Court on the grounds that the citizen could not distinguish between the House of Lords in its judicial capacity and the House of Lords in its legislative capacity. The justification was to do with perception, not with the delivery of justice. However, when I asked for empirical evidence to support the Government's claim, none was forthcoming. As I argued at the time, we thus proceeded on the Government's perception of the views of the ordinary citizen—in other words, the perception of a perception.

Given the extent to which the Government are prepared to rely on popular perception, perhaps the Minister could tell us what he thinks popular perception will be of the cost of the delivery of justice once the new building is complete. I refer not only to the £57 million set-up costs but also to the running costs. Can he confirm the point made by the noble and learned Lord, Lord Lloyd of Berwick, that the running costs will be met from fees paid by litigants? I am not so much concerned with the actual amounts involved, but simply with the principle and how this will be viewed by the public.

I turn to the relationship between the courts and the Executive. Moving the Law Lords across Parliament Square may be a relatively easy move in a physical sense but it is a potentially damaging one politically. Recent years have seen a notable clash between the Executive and the courts. Successive Home Secretaries have attacked court judgements. Following the Belmarsh case, Jack Straw claimed that the Law Lords were “simply wrong” to imply that detainees were being held arbitrarily. Even Prime Minister Tony Blair involved himself, declaring in August 2005 that,

“the rules of the game are changing”.

The extent of Ministers' attacks led the Lord Chief Justice to defend the judges, stressing that they were doing their job of applying the law and enforcing the rule of law. As he told the Constitution Committee of this House,

“it is the law that has changed”.

The relationship between the Executive and the courts has become increasingly strained. My fear is that moving the Law Lords out of the Palace of Westminster will leave them much more isolated. Having them within this House provides some degree of protection. Members of your Lordships' House have some appreciation of the role and significance of the Appellate Committee. The Law Lords gain some understanding of the parliamentary process, which is important in allowing some margin of appreciation for that process. Being within your Lordships' House provides something of a protective shield against the Executive. Once the Law Lords move across Parliament Square, they become isolated. Over time, this House will have less awareness of who they are and what they do. They will potentially be out on a much greater limb politically than is presently the case. Given the tensions between the Executive and the judiciary, this is arguably the worst time to be making such a move.

And why make such a move? It is, as I say, because of perceptions. If everything is in the name, why not, as the noble and learned Lord said, confine the change to one of name alone? Why does the Supreme Court have to exist outside the Palace of Westminster? I note, in response to the noble Lord, Lord Goodhart, that we would not be the first western country in history to have a supreme court sitting in the same building as the legislature. Leaving the Law Lords where they are, but changing the name of the court, would deal with the problems of perception, cost and political isolation. Given that, would there not be a case for leaving the Middlesex Guildhall as it is and leaving the Law Lords where they are?

(*HL Hansard*, 4 July 2007, cols. 1094–1095)

Lord Hope of Craighead said that he spoke as chairman of a Law Lords' sub-committee, of which the other members were Baroness Hale of Richmond and Lord Mance, who had been working with civil servants on the implementation programme team on the plans for the building and a large variety of other matters connected with the creation of the new court. Lord Hope stated that they were wholly committed to the project. Their main aim in the short term was to achieve a transfer of the business of the House's Appellate Committee to the new court as seamlessly as possible. But they were determined also to ensure that the new court would be accommodated and resourced in a manner that fitted its status as the country's Supreme Court. There were three problems in particular that he wanted to mention, as follows:

The first relates to timetable. The plan is that the Supreme Court should commence its operations on 1 October 2009, but the timetable is already very tight and there may be delays. I wish to stress that we cannot be expected to move into a building that is not yet fit for purpose—that is not proper, as the noble Lord, Lord Goodhart, mentioned, for a Supreme Court, and that is incomplete. There must be no shortcuts and no undue pressure just to meet the timetable. I stress that this is not to suit our own wishes. It is essential if we are to give the public the service that they require.

The second point relates to staff; it is the other side of the coin referred to by the noble Lord, Lord Goodhart. The key to a seamless and successful transfer lies in our staff's experience and in their commitment and loyalty to the project. But the implications for them of transferring to the Civil Service from employment here in the Palace of Westminster are very serious. That subject has not been addressed in this House so far as I can recall. The new court will be a tiny enterprise in the context of the Ministry of Justice as a whole, and unless some weighting is given in recognition of the court's importance in matters such as grading, this will have adverse consequences. The grading which our staff will receive under current Civil Service rules is well below the equivalent in this building. This means a standstill on salary increases for several years for those who choose to move. The conditions of service, too, are much less attractive. I am not convinced that enough has been done to address this problem. We may need some political muscle to address it.

The third matter relates to finance, the point raised by the noble and learned Lord, Lord Howe of Aberavon. The funding arrangements for the new court are novel and complex and, in important respects, are still unknown. There is no doubt that the court's removal from the protective umbrella of Parliament will expose it to the risk of undue pressure on its funding, and on its resources generally, by the Executive. The Executive will have to bear part—perhaps a substantial part—of the running costs, due to the nature of the business that we conduct. This is not a criticism of the present Government, but we cannot predict the future. Safeguards absent from the Act must be put in place. Progress cannot be made until the identities are known of the first President of the Court and of the chief executive. I hope that the Minister can give us his assurance that this vital matter

will receive his attention, and that of the Lord Chancellor, in discussion with those individuals once that stage is reached.

(*HL Hansard*, 4 July 2007, cols. 1095–1096)

Lord Thomas of Gresford agreed with Lord Norton of Louth that relations between the Executive and the courts were increasingly strained. The tension had increased for two reasons. Firstly, there had been unprecedented attacks on the judiciary by Ministers, such as comments aimed at decisions of judges, which were ill informed and would in a previous age have been regarded as outrageous. Secondly, the increasing use of judicial review had required the Executive to explain themselves to judges, adverse decisions by judges always seeming to be taken very hard by the Minister concerned. Lord Thomas then commented on Lord Norton's remarks on the move to the Middlesex Guildhall, saying:

The noble Lord, Lord Norton, thought that a move to the new building across the road would make the court more isolated. I should prefer to say that it will make it more independent. It will be seen to be much more independent of the Executive than if we continued with the arrangements in this House. That independence has been demonstrated in ways that I applaud. The noble and learned Lord, Lord Howe, does not applaud them but I think that it is very good to have the appointments of judges taken away from politicians and the Lord Chancellor, who had a political role, and put in the hands of a commission...

It is said that it is only a question of perceptions—that it is symbolic—to move across the road. One of the fine buildings in Washington is the Supreme Court; that symbolises the importance of the judiciary. In Australia, the High Court is in a wonderful modern building that demonstrates its independence of the executive in a very real way. Those are federal systems. It is significant that the Supreme Court will take over devolution issues from the Judicial Committee of the Privy Council. In dealing with devolution issues, there may well be conflicts between the Welsh Assembly, the Scottish Parliament, the Northern Ireland Parliament and this Parliament in Westminster. It is surely appropriate that conflicts of that nature should be decided in a completely different building that symbolises independence.

I disagree with the method of funding in the Government's proposals. It is astonishing that civil litigants are required to pay through increased fees for such a building. What has the ordinary run of civil litigation got to do with the numerous cases that come before the House of Lords? Civil cases must be a fairly small percentage; I would only be guessing if I gave a figure. So much of the business of the Judicial Committee—devolution issues, issues concerning criminal matters and so on—are nothing to do with civil litigation, yet the system is apparently designed so that it is paid for in that way.

We have heard of the practical problems from the noble and learned Lord, Lord Hope, and we know that there is a long way to go before the building is complete. I look forward to it and I hope that we have a building of which we are proud, and a building of which we are as proud as we are of our independent judiciary and of the Lords of Appeal, who are the apotheosis of that system.

(*HL Hansard*, 4 July 2007, cols. 1097–1098)

The Parliamentary Under-Secretary of State, Ministry of Justice, Lord Hunt of Kings Heath, responded to the debate. He said that the creation of the Supreme Court would achieve three main objectives: a clear separation between the judiciary, and the legislature; improved access to the highest court of the land; and the renovation of a significant, but rather dilapidated building.

Locating the apex of the judicial system away from the Houses of Parliament, yet right in the heart of the capital, would both symbolise its separation from the legislature and reiterate its national and international importance.

Lord Hunt went on to point out that he had visited a hearing of the Law Lords upstairs in a Committee Room. He commented that he had sat on a very hard bench, the room was very congested, the facilities for counsel were very limited, access for members of the public was very difficult, and he could not see any refreshment area. Although that might seem to be secondary to the quality of the decisions made by the Law Lords, none the less the Supreme Court of this land deserved to be housed in adequate facilities. He agreed with Lord Goodhart that Middlesex Guildhall was an interesting building, although not a fine building. Nevertheless, having seen the designs and met the builders he was convinced that the sensitive approach that had been taken would enable a modest but acceptable building to be provided in which the Supreme Court could do its job effectively. The work would restore some parts of the Middlesex Guildhall to its original glory and enhance rather than detract from its history.

Lord Hunt continued:

Questions have been raised about the cost of the establishment of the Middlesex Guildhall as the Supreme Court and the running costs, as well as how it is to be paid for. The noble and learned Lord the then Lord Chancellor updated Parliament on progress and costs on 14 June. The headline figures for set-up costs are £56.9 million, including a £36.7 million renovation cost, paid for by an annual lease charge of £2.1 million over 30 years. The noble and learned Lord, Lord Lloyd, questioned the method of payment, but a lease and leaseback route is not unusual. The whole scheme, which is a design and build procurement route, enables much of the risk of the building project to be transferred to the private sector provider.

Of course, I understand noble Lords questioning whether this is worth the money. It is a lot of money and, clearly, there are other necessary public expenditure services that it could have been spent on, including resources within the legal system. I fully accept that, but surely, in view of the importance of the Supreme Court and its having acceptable facilities to discharge justice, it is not a wasted figure. Of course, we must ensure that we are rigorous in controlling those costs and that the running costs of the Supreme Court are kept within balance, although noble Lords have tonight expressed rather mixed views to me on this. They have expressed concern about the cost, but also concerns about the role of the Executive in the budgeting. We clearly have to ensure—and I am sure that the Supreme Court will want to ensure—that the public have value for money. Equally, it is important that there are sufficient resources to enable the Supreme Court to do its job effectively.

The noble Lord, Lord Thomas of Gresford, made a number of points about fees, as did other noble Lords. Noble Lords will be aware that the intention is that civil fees for the Supreme Court will be recovered, which is estimated to make up about 50 per cent of the total cost. That will be made up of fees from appellants and a contribution from national jurisdiction. The balance between these two sources has yet to be finalised. We expect the total financial burden on lower court users to be less than 1 per cent of the total cost. The rationale for that contribution is for the Supreme Court to make a contribution to the overall wealth of the law, which is then used by all civil court cases. The Supreme Court clarifies issues of law for future use.

I say to the noble and learned Lord, Lord Hope, that these are matters for further discussion. He suggested, and I agree with him, that we might await the appointment of the new president and chief executive. I am happy to give him the assurance that, when

those persons have been appointed, the Government will be keen to discuss these matters further with them. ...The timetable is tight, but we are confident that the Supreme Court is on target to open in October 2009 as planned.

The noble Lord, Lord Norton, referred to the relationship between the Executive and the courts, as did the noble and learned Lord, Lord Howe of Aberavon. The Statement and the White Paper issued by the Government yesterday show a clear intent to ensure that the Executive are as fully accountable to Parliament as possible. I look forward to debating these matters in the future, but the noble Lords' remarks must be seen in the context of the Government's clear and stated intention to ensure that the Executive are properly accountable to Parliament, as they should be.

In response to the question of the noble Lord, Lord Norton, I have already said that the Government respect the independence of the judiciary and will continue to do so. I do not agree with him that moving the Supreme Court across the road to the Guildhall will in some way isolate the judiciary and undermine that independence. Surely it is the very opposite. Surely the Supreme Court will be more separately identified than the Law Lords are now. It will be more transparent.

(*HL Hansard*, 4 July 2007, cols. 1101–1102)

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