



HOUSE OF LORDS

Library Note

The Appellate Jurisdiction of the House of Lords (Updated November 2009)

From 1st October 2009 the appellate jurisdiction of the House of Lords was transferred to the Supreme Court of the United Kingdom under the Constitutional Reform Act 2005. This Library Note gives an account of the history of the appellate jurisdiction, its functioning in practice and describes the Supreme Court.

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Introduction

This Library Note focuses on the appellate jurisdiction of the House of Lords which (together with the devolution jurisdiction of the Judicial Committee of the Privy Council) was transferred to the Supreme Court of the United Kingdom from 1st October 2009 under the provisions of the Constitutional Reform Act 2005. Part I gives an overview of the history of the appellate jurisdiction, whilst Part II looks at how that jurisdiction functioned in practice, including the interplay with the Judicial Committee of the Privy Council and the work of the Law Lords as legislators. Part III describes the Supreme Court, including sections on the parliamentary disqualification of the Justices of the Supreme Court, the accommodation and costs for the Court, and a brief look at its future profile.

The Note supersedes previous Library Notes on the appellate jurisdiction of the House of Lords (most recently LLN 2007/008).

I. HISTORY OF THE APPELLATE JURISDICTION¹

1. Origins–1800

The origins of the appellate jurisdiction of the House of Lords lie in the early 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.² A significant part of that role, from the reign of Edward I, lay in providing remedies for petitioners either reluctant to pursue their causes in other courts or, to a lesser extent, wishing to appeal from a lower court. With the development of the two Houses of Parliament in the fourteenth century, petitions could be and were sent to either House. The Lords claimed, by the early fifteenth century, that judgment belonged to them alone: petitions considered by the Commons were sent to the Lords for confirmation, but petitions dealt with by the Lords were not referred to the Commons.³

By the sixteenth century, however, the judicial work of the House of Lords was in marked decline. Between 1514 and 1589 only five cases are recorded in the *Journals*. 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.

When Henry Elsyng, Clerk of the Parliaments, codified the rules of procedure in the House of Lords during the 1620s, he commented 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 (editor), *Judicature in Parlemtent, by Henry Elsyng* (1991), p 7).

Elsyng identified six cases in which judicature still belonged to Parliament: (1) judgments against delinquents, as well for capital crimes, as misdemeanours; (2) in reversing erroneous judgments in Parliament, or the Court of King’s Bench; (3) in deciding of suits long depending in other courts, either for difficulty or delay; (4) in hearing and determining the complaints of particular persons on petition; (5) in setting at liberty any of their own Members or servants imprisoned; and in staying the proceedings at the

¹ Section I, Parts 1 and 2 of this note are indebted to the essay by David Lewis Jones (Librarian of the House of Lords 1991–2006) on ‘The Judicial Role of the House of Lords before 1870’ in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (editors), *The Judicial House of Lords 1876–2009* (2009, Chapter 1); a substantive account of the history after 1870 is given in Chapters 2 and 12 to 16, whilst Chapter 17 gives a detailed perspective from Scotland and Ireland.

² 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). See also J. Enoch Powell and Keith Wallis, *The House of Lords in the Middle Ages: a history of the English House of Lords to 1540* (1968).

³ G. Dodd, *Justice and Grace: Private Petitioning and the English Parliament in the late Middle Ages* (2007); see pp 165–166 for the “prominence of the Lords in the petitionary process”.

common law against them during the privilege of Parliament; and (6) in certifying the elections and returns of Knights and Citizens for Parliament. Elsyng completed his chapter on the judicature of the House of Lords in August 1627 (*ibid*, xii, 10–11).

The previous six years had seen a remarkable revival of the judicial work of the House of Lords, which began on 3rd March 1621 when 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 five Parliaments held between 1621 and 1629 (the number of petitions accepted was 207; the number of petitions sent to the House was probably over 300). The petitions included 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 advice.⁴ 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 role.⁵

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

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).

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. 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 1675.⁷ 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 courts 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*⁸ in 1704–05, but the House's right to exercise this jurisdiction remained unchanged.

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

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

⁸ *Ashby v. White* (1703) 2 Ld. Raym. 938, 92 E.R. 126; (1704–1705) 14 St. Tr. 695.

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 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*,⁹ the House reversed the decision of the Justiciary Court. However, in the case of *Bywater v. Lord Advocate*,¹⁰ 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 Lords.¹¹

2. 1801–1948

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

⁹ *Magistrates of Elgin v. Ministers of Elgin* (1713).

¹⁰ *Bywater v. Lord Advocate* (1781) 2 Paton’s Ap. 564.

¹¹ 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.

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]. 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 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*.¹² 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, and 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 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. Wharncliffe'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 law.¹³

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

¹² *O'Connell v. The Queen* (1844) 11 Cl. & Fin. 155.

¹³ 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.

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 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 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 Counsellors. 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 (with the title of Baron for life). 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 Ordinary.¹⁴
- 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 Lords.¹⁵

¹⁴ Under the Appellate Jurisdiction Act 1887, retired Lords of Appeal in Ordinary were allowed to sit and vote for life.

¹⁵ 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 allowed (see above).

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. Another 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.

3. Establishment of the Appellate Committee 1948 to 2009

Throughout this period the convention remained that appeals to the House of Lords were considered by the whole House, with the Lords of Appeal in Ordinary hearing the appeals in the Chamber. But in 1948 a major change in the House's exercise of its judicial role took place with the establishment of the Appellate Committee.

James Vallance White explains:

Until 1948, appeals to the House of Lords were heard in the Chamber. Although referred to as 'judicial sittings', the proceedings were essentially the same as those for public business, with the mace on the Woolsack and a bishop reading prayers. At about 4 o'clock in the afternoon, the hearing would be suspended and the House adjourned. Then at 4.30 the sitting would be resumed for the House to transact its public business.

The destruction of the Commons' Chamber by an enemy bomb in 1941 led to a fundamental change in the way the Lords carried out their judicial role. Until the Commons could be rebuilt, that House sat in the Lords' Chamber, and the Lords moved into the King's Robing Room at the southern end of the palace. After the war the noise of rebuilding work made conditions in the Robing Room so intolerable that it was suggested that, as a purely temporary measure, an Appellate Committee should be appointed so that the Law Lords could hear appeals in one of the upstairs committee rooms where they would not be disturbed by the noise. In the light of later developments it is perhaps surprising to read in Hansard¹⁶ that the Lord Chancellor did not have an altogether easy task in persuading the House to agree to this suggestion. He was at pains to stress its temporary nature, which, he promised, would come to an end as soon as the building works were completed, and that meanwhile the committee should be authorised only to *hear* appeals: judgment, or any order arising from an appeal, would be made in the House following a report from the committee. But, like other aspects of the British constitution, the temporary expedient soon became a permanent fixture because it was so obviously more convenient than the arrangements that had preceded it. However, the conveniences did not come without a price: because the House now advanced the time of sitting to 2.30 in the afternoon, the services of the Law Lords for parliamentary purposes were

¹⁶ HL *Hansard*, 11th May 1948, cols 737–747.

denied to the House until after 4pm; and since the Lord Chancellor was expected to take his place on the Woolsack at the beginning of each day's sitting, it was more difficult for him to sit judicially.

(Louis Blom-Cooper, Brice Dickson and Gavin Drewry (editors), *The Judicial House of Lords 1876–2009* (2009, Chapter 3, 'The Judicial Office', by James Vallance White, Clerk of the Judicial Office 1983–2002, p 36))

Judgments continued to be delivered in the Chamber and the Law Lords' right to hear appeals in the Chamber was exercised when the House was in recess, usually during the first week of October each year.

Moreover, although it proved more difficult for Lord Chancellors to participate in the judicial work of the House, 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 17th 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 only a short period of time 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* [2002] 1 WLR 94.¹⁷

Lord Irvine's successor, Lord Falconer of Thoroton, never sat judicially. In the press release of 12th 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, 12th June 2003).

The number of Lords of Appeal in Ordinary continued to be increased from time to time, finally standing at 12.¹⁸

4. Appellate Committee to Supreme Court

Under the Constitutional Reform Act 2005 the appellate jurisdiction of the House of Lords and the devolution jurisdiction of the Judicial Committee of the Privy Council (see section II below) were transferred to a separate Supreme Court of the United Kingdom. The Act also modified the office of Lord Chancellor and provided 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 created a separation of powers between the executive, the legislature and the judiciary for the first time in British constitutional history.

¹⁷ An extensive analysis of the Lord Chancellor's role as Head of the Judiciary may be found in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (editors), *The Judicial House of Lords 1876–2009* (2009, Chapter 5, by Dawn Oliver).

¹⁸ 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.

A chronology of the Act, tracing its antecedents, the passage of the Bill through both Houses, and the choice of the Middlesex Guildhall as the location of the Supreme Court is given in Andrew Le Sueur's essay 'From Appellate Committee to Supreme Court: A Narrative' in *The Judicial House of Lords 1876–2009*, edited by Louis Blom-Cooper, Brice Dickson and Gavin Drewry (2009, Chapter 5). The Supreme Court came into being on 1st October 2009 (see Section III below).

The last sittings of the Appellate Committee took place in the Chamber from 27th to 30th July 2009, with the final judgment being delivered on 30th July 2009 in *R (Purdy) v Director of Public Prosecutions* [2009] 3 WLR 403 (terminally ill patient seeking clarification of DPP's policy in prosecuting complicity in another's suicide).

The final sitting of the Appeal Committee took place in the Chamber on 31st July 2009 to grant leave to appeal in *R (E) v Governing Body of JFS and Others* [2009] WLR (D) 209 (Court of Appeal had decided that a Jewish school which restricted its intake to Jews, as defined by the Office of the Chief Rabbi, had racially discriminated against applicants to the school who were not Jewish as so defined).

5. Tributes to the Law Lords 21st July 2009

Tributes were paid to the Law Lords from all sides of the House of Lords on 21st July 2009 (HL *Hansard*, cols 1507–1517).

Moving a Motion of Appreciation, the Leader of the House and Chancellor of the Duchy of Lancaster, Baroness Royall of Blaisdon, stated:

This is a significant day for this House, and a sad one too, but it is also an important day for British justice, for the British justice system, and for this country: its history and its future. It is significant because the move of the Lords of Appeal in Ordinary from the Palace of Westminster brings to an end a hugely important part of this House's history and role: the judicial work of this House. It is sad for the same reason, of course: because this House will lose the advantages of having in and around the House people of such calibre as the current 12 Lords of Appeal in Ordinary and their predecessors, who are still in the House. It is, however enormously important because of what they are going from this House to be: the first 12 Justices of the new United Kingdom Supreme Court – the new apex of the British justice system.

(HL *Hansard*, 21st July 2009, col 1507)

Baroness Royall outlined the judicial history of the House of Lords, pointing out that the legislative and constitutional changes in the Constitutional Reform Act 2005 had their precursors. She continued:

In 1834, the great reforming Lord Chancellor, Lord Brougham, introduced a Bill which would have separated his legal and political roles so that the head of the judiciary would not also be the Speaker of this House—precisely the reform we enacted 171 years later. In 1869, the Royal Commission on the Judicature proposed the establishment of a Supreme Court—precisely the reform we enacted a mere 136 years after that. It was that proposal which, after a slight slip between cup and lip as Gladstone's Government fell in 1874, led eventually not to a Supreme Court but to the 1876 Act establishing the Law Lords. I would hesitate before describing the long and illustrious history of the Lords of Appeal in Ordinary of the House of Lords as a 133-year-long detour, but it seems somehow fitting that we should now, finally, see the establishment of a Supreme Court...

...Of course, when noble and learned Lords retire from the Supreme Court they will be able to play an active part in this House on their retirement and I know the House will want to join me in expressing the hope that they do.

While in recent years the Law Lords have exercised much less often their right to take an active part in the legislating and debating functions of this House, they have often played an active role behind the scenes. I know that the House will again want to join me in thanking them for their work as successive chairmen of Sub-Committee E on Law and Institutions of your Lordships' European Union Committee. I pay tribute too to the work of successive Law Lords as chairmen of the Joint Committee on Consolidation Bills doing demanding and very parliamentary work...

...In conclusion, I pay tribute too to all noble and learned Lords who have served, to the work they have done, to the contribution they have made to the development of British and Commonwealth law, and indeed to international law beyond that. It has been remarkable—for this House, for this country, and for justice. The new Supreme Court will, I am sure, be equally influential. It will be more accessible and transparent. Its role will be clearer to the public. Its establishment will mark a proper separation of powers between the legislature and the judiciary.

(ibid, cols 1508–1509)

The Leader of the Opposition, Lord Strathclyde, supported the resolution before the House but not “with the same spirit of enthusiasm”. He continued:

For me, this day is one that closes the door on centuries in which this House has stood as the supreme arbiter of justice and, with the other place, the highest defender of the freedoms of this land. For 300 years that authority has been enshrined in ancient laws and customs that we were told had no relevance to the modern era, but which recent debates on the Parliamentary Standards Bill have reminded us are the very embodiment of hard-won and precious liberties. The presence of the judiciary in this House, as assistants or Members, has enriched our debates. They have informed our decisions and we have safeguarded them from executive interference.

I wonder how many of us, in the long hours of a Committee stage of a Bill, glance up and look at the murals above the Throne and above the Gallery. We see reflected in them the historic tripartite nature of the House—a convergence of the peerage, the Lords Spiritual and our judicial role. Over the Gallery is the “Spirit of Justice” by Maclise, and on the wall over the Throne there is Cope’s fresco of Prince Hal being constrained to acknowledge the authority of Chief Justice Gascoigne. They symbolise the age-old authority of justice in this place and the power of the high court of Parliament over the highest in the land.

We mark today the passing of the Lords of Appeal in Ordinary, but if they do not mind me saying so, and as the noble Baroness has pointed out, they are comparatively new fry. They came in in 1876, only three years after the previous attempt to end the judicial role of the House was written into law. Long before, in the late 17th and early 18th centuries, this House and the other place fought battles over their respective areas of authority. A settlement was reached that the other House would be supreme in finance and your Lordships’ House in justice. It was a good deal and served Britain well. Now that it is ending, who

knows where constitutional change will take us? Let us hope that the new Supreme Court will never come to set itself against this place...

... As a young Minister, I soon learnt to fear stirrings from those Benches: the long figure of Lord Scarman or the incisive rumblings from behind his eye patch of Lord Simon of Glaisdale. When you saw these movements, you knew you were doomed in a way that you were not doomed if a mere politician was probing your arguments. I see the same frowns of concern from my successors on the government side of the House sometimes when the noble and learned Lord, Lord Lloyd of Berwick, takes up his notes.

Who can forget in recent times the contributions of Lord Ackner, Lord Donaldson of Lynton, or that great draftsman, Lord Brightman—or indeed those noble and learned Lords who came here and spoke for the reforms of Scottish Law? Who doubts that this House and the laws that it made were far better for their being here? They followed in a long line of judicial authorities to pronounce in this place to the immeasurable benefit of this House and our country. Warmly though I wish, and sincerely though I thank those who are going, I do not entirely see this day as a cause for a great celebration. Indeed, I suspect that it is a day that we will come to regret.

(*ibid*, cols 1509–1510)

The Deputy Leader of the Liberal Democrats, Lord Wallace of Saltaire, said:

My Lords, I suppose that this is, in a sense, the last day on which we can refer to ourselves as the high court of Parliament, with all the confusion that that has left for many of us. Certainly, when I first became a Member of this House, I had to explain to many of my cousins and American friends that when they read that the House of Lords had ruled or decided, I had not personally been involved. The confusion was there for many people outside.

When I arrived here, I was puzzled at first by the little knots of people that would form on occasional days around the newspapers in the Library, almost as if unintentionally and unconsciously, and then would suddenly walk out together. At times I thought that they were a closed circle into which one could not insert oneself. Happily, because of the European Union Committee and the appointment to the Law Lords of someone with whom I used to drink in the pub as a junior law lecturer very many years ago, that circle has been broken and many of us have become good friends with members of the Law Lords as a group.

We also benefit in this House, as the noble Lord, Lord Strathclyde, said, from retired Law Lords and the many contributions that they make. The process of constitutional reform, of which this is now a part, leaves open the question of whether we will find many more retired Law Lords coming to us...

... The process of constitutional reform has been a slow one and will no doubt continue to move slowly. We on these Benches have supported the separation of courts from the legislature for a mere 200 years...

... The message from these Benches to the Law Lords must be that we have appreciated your company and look forward to seeing more of you. We do not want to lose you, but we think you ought to go.

(*ibid*, cols 1511–1512)

The Convenor of the Crossbench Peers, Baroness D'Souza, said:

My Lords, the separation of judicial and legislative powers is upon us. Today, we mark the end of 600 years of judicial work in the House of Lords. Some will lament its passing but, perhaps, it is the inevitable end point to a gradual withdrawal on the part of the Law Lords from the daily business of the House in support of the principle of the independence of the judiciary.

It was not ever thus. Lord Carson, appointed in 1921, was an outspoken controversialist in Irish politics; it is recorded that, contrary to convention, his maiden speech on Home Rule was neither short nor uncontroversial. In the past decade or so, there has been a significant decline in the Law Lords' participation in public business, and now it has for all practical purposes ceased to exist. That said, I have here to acknowledge the valuable chairmanship by the noble and learned Lord, Lord Mance, of Sub-Committee E of the European Union Committee.

There can be no doubt that the presence of the Law Lords has lent Parliament a dignity and a trust that has been very useful in the current climate. There is, too, something less easy to define—dignity and expertise certainly, but also the greatly valued aura of quiet and considered professionalism that the Law Lords have provided and which is conveyed to a wider public...

... Beyond this, the House has benefited immeasurably from the wisdom and experience of retired Law Lords in contributing to legislation. Here I would mention, for example, the noble and learned Lords, Lord Woolf, Lord Steyn, and Lord Lloyd of Berwick, and the late Lords Ackner and Slynn. The judgments delivered by the Law Lords have commanded respect and admiration from other courts around the world for their intellectual force, constitutional perspective and the downright good sense of speeches in the Appellate Committee. Despite the current self-imposed restraint, the importance that the Law Lords have attached to being part of the legislature can be gathered from their refusal, as recently as 1965, to move to the Middlesex Guildhall. The argument then is perhaps much the same now: being physically distant from the Chamber would in their opinion discourage participation in future debates and the necessary familiarity with the House and its practices. This is the issue which we must now tease out and resolve.

Clearly, some Law Lords who retire as Justices of the Supreme Court will return to this House and provide the expertise for which they are renowned. Unhappily, this pool of decades of legal experience will gradually dry up as the Law Lords are no longer automatically granted peerages. Some may well be appointed as Peers upon retirement, but this will also depend on which way House of Lords reform swings. I think it unlikely that these giants of the legal profession will submit themselves to the hurly-burly of electioneering, should a fully elected House be the choice. In the mean time, the task must be to devise mechanisms

to keep in touch with what goes on across the square and to ensure that what goes on here is similarly conveyed to Middlesex Guildhall. Conversations are continuing on this matter.

(*ibid*, cols 1512–1513)

The Lord Bishop of Portsmouth expressed his wholehearted support for the Motion of thanks and continued:

The noble and learned Lords have made their mark on this House, and that is to state the obvious. We on these Benches have found their companionship and their incisive contributions to this, yes, the high court of Parliament but perhaps not for much longer, congenial, constructive and, at times, appropriately challenging. Their presence here is very often an expression of deep moral courage.

I cannot let this occasion pass without two further comments. When your Lordships came to vote on the legislation creating a Supreme Court, these Benches took some persuading that it was the right course of action; I say that not lightly, because I am hardly one of those Bishops who does not believe that anything should be tried for the first time. So that is another, constitutional, reason for wanting to underscore the full import of this Motion.

Finally, these Benches have had a unique relationship with the Law Lords by virtue of reading Prayers before they sit and of witnessing their work afterwards.

(*ibid*, col 1513)

The Second Senior Law Lord, Lord Hope of Craighead, said that “it has struck me that what is really happening today is that the House is losing part of itself”. He continued:

After all, my Lords, the appellate function, which it has fulfilled with such diligence and attention to detail over many centuries, has been unique to this House. It was never part of the functions of the other place. It is unique, too, in the role that it has fulfilled as an appellate court. Its capacity to combine, within this Chamber, the legal traditions of the three separate jurisdictions within the United Kingdom—England and Wales, Scotland, and Northern Ireland—is something that the courts of none of those jurisdictions on its own could have achieved. The Scots insisted, when the Treaty of Union was entered into in 1707, that there should be no right of appeal to any court that sat in Westminster Hall, where the patriot William Wallace was tried and condemned for treason. But that did not apply to your Lordships’ House, so there was no obstacle to appeals from Scotland being heard here. The happy result of this combination—this historical accident, you might say—has been of immeasurable benefit to all three jurisdictions, and to the United Kingdom, due to the cross-fertilisation of ideas from these jurisdictions and a carefully balanced harmonisation which this system made possible. The system has been unique, too, in what the Law Lords wear: no wigs, no robes, dressed simply as everyone else is in this House. The authority of the Law Lords is undoubted, but this is due to what they have said and written and what they have done, not to any kind of dressing up. The system has been unique in a respect that, in the end, was to be its undoing: the fact that the Law Lords were entitled to take part in the work of the House as a legislature and of its committees, just like everyone else.

As a result of the way the appellate jurisdiction has been operated since 1876, when the Lords of Appeal in Ordinary were first admitted to the House's membership, the House of Lords has become a byword for judicial work of the highest quality. As a brand name it has been unsurpassed. The reputation of the whole House has been greatly enhanced by it, throughout the common-law world and beyond—so much so that the decision to end the appellate jurisdiction caused almost universal surprise overseas. Why give up something that seemed so valuable?

Of course, we recognise that the die has been cast and now we must go our separate ways. If I may be so bold, your Lordships are on your own now and, as we take the appellate jurisdiction away with us, so are we. I can assure your Lordships that in the Supreme Court we will carry on many of the traditions that have been built up here by the 117¹⁹ individuals who were privileged to have been appointed to this office, serving all three jurisdictions, wearing everyday business clothes and aiming to deliver judgments of the highest quality. Noble Lords will, of course, be welcome to come to the Supreme Court at any time as visitors, although preferably not all at once.

In recent years it was to the committees, such as the Committee on the European Union and Sub-Committee E in particular, that the serving Law Lords contributed most to the work of the House. In truth, it had become almost impossible for those of us who are still serving, and who would otherwise have wished to do so, to make any meaningful contribution to public business in this Chamber. Changing attitudes made it wise for us to refrain from speaking and voting, and changes in sitting times and the pressure of work on us made this element of self-restraint inevitable. Happily, those of us in the Supreme Court who are already Members of the House will be—if your Lordships will be good enough to approve of the House Committee's report this morning—allowed back into the precincts as if we were on leave of absence. We also hope to be able to make use of this privilege so that we can maintain contact with what goes on here. We look forward to the opportunity that retirement will offer us, as our disqualification is lifted and we have time to give, to follow the example of our predecessors, who gave—and, indeed, still give—so much to the work of the House in their retirement. For us on the Appellate Committee, as we leave the Chamber in a few moments to resume our judicial duties this morning upstairs in our Committee Room, it is not “adieu”—only “au revoir”.

(*ibid*, cols 1514–1515)

¹⁹ There have been 112 individuals appointed as Lords of Appeal in Ordinary (listed in Appendix 1 to Louis Blom-Cooper, Brice Dickson and Gavin Drewry (editors), *The Judicial House of Lords 1876–2009* (2009)), but 117 appointments under the Appellate Jurisdiction Act 1876, i.e. a number of individuals have been reappointed, the most recent example being Lord Phillips of Worth Matravers, who first served as a Lord of Appeal in Ordinary from 1999 to 2000, but was then Master of the Rolls from 2000 to 2005, Lord Chief Justice from 2005 to 2008, and reappointed to the House of Lords as Senior Lord of Appeal in Ordinary from 2008 to 2009 (and thus first President of the Supreme Court). Lord Kerr of Tonaghmore was the last Lord of Appeal in Ordinary to be appointed before the creation of the Supreme Court, being introduced into the House of Lords on 29th June 2009; he succeeded Lord Carswell as the Northern Ireland Lord of Appeal in Ordinary.

Earl Ferrers said that the Law Lords had been admired and respected by everyone, both inside and outside the House, but it was a pity that it all had to come to an end. He continued:

It is said that people who administer the law should not be involved with creating it, but those who have been involved all their lives in dealing with those who break the law have their own particular contribution to make in suggesting ways in which the law should be tightened. The views of the Law Lords were always valuable and cherished. When I had the privilege of serving as an ornament in the Home Office, and when we produced one of those frantically controversial Bills, such as the Home Office does produce from time to time, I remember the excitement which we all felt when it transpired that the noble and learned Lord the Lord Chief Justice was on our side and was going to speak in favour of what we were proposing. It gave the officials in the Home Office, not least the hapless Minister, great confidence that we might at least have been going somewhere near the right direction.

It seems a shame that this fine and select body of people should be excised from your Lordships' House to go across the road, to do the same work which they do at present—the same people, the same intellect, the same judgments but a different name and a different venue...

... In grieving the passing of the Law Lords—I do grieve their passing—I cannot help but think that it is all unnecessary. The Government have overseen the removal of most of the hereditary Peers—well, you can say, “That’s all right, time for them to go”—the removal of the Lord Chancellor, with the shell of his office now being in the hands of a Member of another place, the removal of the Law Lords, and now, one gathers from the papers, that the poor right reverend Prelates are in the firing line. This is pretty drastic stuff by any standard. It is an assault on your Lordships' House and an assault on the constitution.

(ibid, cols 1515–1516)

II. JUDICIAL POWERS OF THE HOUSE AND FORMER WORK OF THE LAW LORDS

1. Original Jurisdiction

As noted in Section I above, the House of Lords developed both an original and an appellate jurisdiction. The latter has now been transferred to the Supreme Court of the United Kingdom, but the House retains an original jurisdiction, viz., that in impeachment, over peerage claims and over any breach of its privileges.²⁰

As regards impeachment, the House of Lords has an original jurisdiction in regard to an impeachment by the House of Commons of any individual, either peer or commoner, for any crime whatever. *Halsbury's Laws of England* states:

This solemn form of trial was of frequent occurrence in earlier periods of English history, but has not been resorted to since the case of Viscount Melville in 1806. The Commons are the accusers and the Lords are the judges "exercising at once the functions of a High Court of Justice and a jury" [*Erskine May's Parliamentary Practice* (20th ed., 1983, p 68)]. A pardon under the Great Seal cannot be pleaded in bar of an impeachment, but the Crown may pardon the offender after conviction. The jurisdiction is of historical rather than current interest but the power has not been abolished.²¹

As regards peerage claims, the House of Lords has 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.²²

Under the Standing Orders of the House, sittings of the Committee for Privileges on peerage claims required the presence of at least three Lords of Appeal (S.O. 78). But presently it is not clear who will sit to determine disputed peerage claims in the future.

The House of Lords Procedure Committee discussed the procedural consequences of the establishment of the Supreme Court at its meeting on 18th May 2009. Most Members supported the proposal that the Committee for Privileges should retain responsibility for deciding peerage claims, while calling on serving judges to assist the Committee by issuing them with Writs of Assistance, although it was acknowledged that this solution might need to be reconsidered following any future reform of the House. The Lord Speaker dissented from this view, arguing that it was inappropriate for the House to retain a judicial function in relation to hereditary peerages, which were no longer the basis for membership of the House. The Clerk of the Parliaments undertook

²⁰ *Halsbury's Laws of England*, 4th ed., Vol. 10, para. 353. The former privilege of a peer to be tried by his peers, in cases of treason, felony or misprision of felony was abolished by the Criminal Justice Act 1948, section 30. The last case of trial by peers was of Lord de Clifford in 1935.

²¹ *ibid*, para. 355, referencing *Erskine May's Parliamentary Practice* (22nd ed., 1997, p 63).

²² *ibid*, para. 357.

to relay the proposal to the Ministry of Justice and the judiciary, and to report back at the next meeting (House of Lords Procedure Committee, Minutes, 2008–09, 2nd Meeting, 18th May 2009).

Previously, 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. Former Appellate Jurisdiction

The former appellate jurisdiction of the House of Lords, now transferred to the Supreme Court of the United Kingdom, was based on the provisions of the Appellate Jurisdiction Act 1876 and of later statutory modifications. The House was the ultimate court of appeal in Great Britain and Northern Ireland, except for Scottish criminal cases. An appeal lay 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 bypassed 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.

Constitution of the House for hearing and determining appeals

Under section 5 (as amended) of the 1876 Act an appeal could not be heard or determined by the House unless not fewer than three of the following persons, designated “Lords of Appeal”, were present: the Lords of Appeal in Ordinary (known colloquially as “Law Lords”) and any peer of Parliament who held, or who had held, “high judicial office” (as defined in section 25). In practice, the latter category comprised the Lord Chief Justice and the Master of the Rolls (who normally held peerages), and former

such, members and former members of the Court of Session who held peerages, members or former members of the Northern Ireland superior courts who held peerages, and members or former members of Commonwealth superior courts who held peerages.

Formerly, section 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 section 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 of Appeal was not eligible to sit to hear and determine appeals after the age of 75 (except for the purpose of completing proceedings already begun). This was the result of a provision added to section 5 of the 1876 Act by the Judicial Pensions and Retirement Act 1993, sections 26(7) and 27. Section 26 also provided that Lords of Appeal in Ordinary had to vacate office on attaining 70 years of age. Thus, although Lords of Appeal in Ordinary had to resign from office at 70, there was a pool of Lords of Appeal, aged between 70 and 75, who could still participate in judicial business if the number of available Lords of Appeal in Ordinary was insufficient to make up the normal Appellate Committee of 5.²³

The maximum number of Lords of Appeal in Ordinary was originally 4 under the 1876 Act (sections 6 and 14), but was gradually increased by subsequent legislation. The maximum number was set at 7 in 1945, 9 in 1947, 11 in 1968 and 12 in 1994 (HL *Hansard*, 11th December 2001, col WA195). Of the 12, two were normally from Scotland (latterly Lords Hope of Craighead and Rodger of Earlsferry, who will continue as Justices of the Supreme Court) and one from Northern Ireland (latterly Lord Kerr of Tonaghmore, who will also continue as a Justice of the Supreme Court). The Lords of Appeal in Ordinary were 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, section 6 as amended).

“High judicial office” was defined in section 25 of the 1876 Act (as amended) as meaning judges of the Court of Appeal and High Court of Justice in England and Wales, judges of the Court of Appeal 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 normal practice in other parts of the judicial system” (col 916). Accordingly, the Lord Chancellor would put a list of names to the Prime Minister who then made a recommendation to the Queen.

Appeal Committees and Appellate Committees

Appeals from England and Wales and Northern Ireland required leave to appeal either from the court below or from the House. Petitions for leave to appeal were heard by an Appeal Committee of three Lords of Appeal. If leave was granted, or if leave was

²³ There are similar arrangements for the Supreme Court of the United Kingdom under section 39 of the Constitutional Reform Act 2005: see below, Section III.

granted by the court below, the appeal proceeded to an Appellate Committee of (normally) five Lords of Appeal for a full hearing.

Leave to appeal was not normally required for Scottish appeals which proceeded directly to an Appellate Committee, provided that two counsel had 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 were members, were 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 was the most senior member of the panel.

The composition of the Appellate and Appeal Committees was the responsibility of 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*, 30th July 1998, col WA220).

In practice, it was the Lords of Appeal in Ordinary who carried 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* [2006] 2 A.C. 221 (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), in *R (Jackson) v. Attorney General* [2006] 1 A.C. 262 (the validity of the Parliament Act 1949 and the Hunting Act 2004 which was passed using the 1949 Act procedure), and in *R (On the Application of Gentle) v Prime Minister* [2008] 1 A.C. 1356 (State's duty to investigate death of servicemen killed in Iraq).

Halsbury's Laws of England (4th ed., Vol. 10, para 369, note 8) commented that the current number of 12 enabled 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".

In recent years the judicial workload of the House remained steady,²⁴ with appeals from Scotland and Northern Ireland increasing, as follows:

<i>Petitions for leave to appeal disposed of</i>							
	2001	2002	2003	2004	2005	2006	2007
England and Wales	260	261	191	258	248	188	186
Scotland	-	-	-	-	-	1	-
Northern Ireland	9	13	8	13	7	9	13
Total	269	274	199	271	255	198	199
Allowed	73	94	63	95	79	46	53

<i>Appeals disposed of</i>							
	2001	2002	2003	2004	2005	2006	2007
England and Wales	80	66	59	64	95	82	63
Scotland	4	4	3	10	4	10	14
Northern Ireland	1	2	3	3	3	2	5
Total	85	72	65	77	102	94	82

(Annual *Judicial Statistics*, DCA/MOJ)

Judicial Committee of the Privy Council

The jurisdiction of the Judicial Committee of the Privy Council arose from the prerogative of the Sovereign as the fountain of all justice to entertain appeals from the courts in his dominions. The Sovereign exercised this jurisdiction through his Privy Council, which acted as his advisors. As Parliament developed its power and influence the High Court of Parliament, as noted in Section I above, became the final appellate tribunal for appeals from the United Kingdom, but appeals from the overseas territories and certain other courts continued to lie to the Sovereign in Council. With the expansion of the British Empire in the eighteenth and nineteenth centuries this became a substantial jurisdiction. Under the Judicial Committee Act 1833 the Judicial Committee of the Privy Council was set up to hear appeals which were formerly heard before a committee of the whole Privy Council.

The core members of the Judicial Committee were the 12 Lords of Appeal in Ordinary, now the Justices of the Supreme Court. In addition, other judges who have been appointed as Privy Counsellors may sit (up to the age of 75: Judicial Committee Act 1833, section I, as amended by the Constitutional Reform Act 2005). These include: retired Law Lords and Justices of the Supreme Court; judges of the Court of Appeal in England and Wales and retired judges of that court; judges or retired judges of the senior courts in Scotland and Northern Ireland; and senior judges from various Commonwealth countries.

²⁴ In 'The processing of appeals in the House of Lords' (2007) 123 LQR 571 Brice Dickson compares the system for processing appeals in the House to the system that will be devised in the Supreme Court, relying primarily on research conducted on all the appeals processed in the House between 2003 and 2005.

The jurisdiction of the Judicial 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 the High Court by the National Health Service Reform and Health Care Professions Act 2002);
- 3) appeals under the Church of England Pastoral Measure 1983;
- 4) appeals from the Court of Admiralty of the Cinque Ports and appeals in prize cases from all Admiralty courts, including the High Court;
- 5) jurisdiction as to House of Commons disqualification—any person who claims that a person purporting to be a member of the House of Commons is disqualified by the House of Commons Disqualification Act 1975, or has been so disqualified at any time since his election, may apply to Her Majesty in Council for a declaration to that effect;
- 6) special reference—the Crown may refer to the Judicial Committee for hearing or consideration any other matter whatsoever as the Crown thinks fit (1833 Act, section 4, as amended), not necessarily arising from a judicial decision.

Formerly, “devolution issues” under the Scotland Act 1998, Government of Wales Act 1998 and Northern Ireland Act 1998 fell within the jurisdiction of the Judicial Committee but these have now been transferred to the Supreme Court under the Constitutional Reform Act 2005.

Although formally the House of Lords in its judicial capacity, and now the Supreme Court, and the Judicial Committee were and are separate institutions, in practice their work overlaps as the core members of both bodies were the 12 Lords of Appeal in Ordinary, now the Justices of the Supreme Court. Accordingly, when the Middlesex Guildhall was chosen as the preferred option for housing the Supreme Court it was envisioned that the Judicial Committee would be co-located in the same building (HL *Hansard*, 14th December 2004, cols WS71–74), and the latter’s offices have now been transferred from Downing Street to the Guildhall.²⁵

The Constitution Unit, in its study *The Future of the United Kingdom’s Highest Courts* (2001), commented that the relationship between the House of Lords Appellate Committee and the Judicial Committee was expressed in formal legal rules of precedent in the UK’s legal system, in that “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”. But the devolution Acts contained 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]

²⁵ The interplay between the House of Lords and the Judicial Committee of the Privy Council is discussed by Sir Kenneth Keith (Judge of the International Court of Justice, formerly Judge of the Supreme Court and Court of Appeal of New Zealand and member of the Judicial Committee of the Privy Council) in Chapter 18 of Louis Blom-Cooper, Brice Dickson and Gavin Drewry (editors), *The Judicial House of Lords 1876–2009* (2009).

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). However, these provisions on precedent have been deleted by the Constitutional Reform Act 2005 as they are now otiose, the devolution jurisdiction of the Judicial Committee having being transferred to the new Court.

The number of appeals disposed of by the Judicial Committee under its devolution jurisdiction was low. Thus in 2000 (when the jurisdiction commenced) there were 3 such appeals; 10 in 2001; 4 in 2002; 1 in 2003; 4 in 2004; 2 in 2005; 0 in 2006 (2 pending at the end of that year); and 2 in 2007. All were from Scotland (Annual *Judicial Statistics*, DCA/MOJ).

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; 54 in 2005; 66 in 2006; and 71 in 2007 (Annual *Judicial Statistics*, DCA/MOJ).

The MOJ's *Judicial Statistics 2007* commented that there "may be an eventual decline in the Judicial Committee's volume of work". New Zealand, one of the largest single sources of appeals, legislated in 2003 to abolish appeals to the Privy Council; the Caribbean Court of Justice, which had now been established, would take over the Judicial Committee's appellate jurisdiction in respect of some of the Commonwealth countries in the Caribbean; and the devolution jurisdiction would be transferred to the Supreme Court. "However, the Judicial Committee still receives a substantial number of appeals from its constituent jurisdictions and sits nearly every day during term-time" (p 8).

3. Law Lords as Legislators

The Writ of Summons issued to a Law Lord was in exactly the same terms as the writs issued to all other peers and thus the Law Lords, whether serving or retired, were entitled to participate in the legislative business of the House of Lords in the same way as other peers. Their contribution to the legislative process is analysed by Lord Hope of Craighead (formerly Second Senior Law Lord and now the first Deputy President of the Supreme Court) in Chapter 11 of *The Judicial House of Lords 1876–2009*.²⁶ He comments:

Prior to the last ten years of their membership of the House of Lords, it was the accepted practice for the Lords of Appeal in Ordinary to participate in the public business of the House as freely as they wished and as frequently as their other duties permitted. This was true also of other serving judges who, as holders of high judicial office, were eligible to sit as Law Lords. During the last ten years, however, a combination of factors led to a significant decline in their participation. By the end of this period, participation by the Lords of Appeal in Ordinary in the

²⁶ Louis Blom-Cooper, Brice Dickson and Gavin Drewry (editors), *The Judicial House of Lords 1876–2009* (2009). A more detailed analysis is given by Lord Hope of Craighead in 'Voices from the past – the Law Lords' contribution to the legislative process' (2007) 123 LQR 547.

public business of the House had for all practical purposes ceased to exist. In practice only those Law Lords who had retired from judicial office felt able to participate. Even then, only a few of those who were in that position did so.

(Louis Blom-Cooper, Brice Dickson and Gavin Drewry (editors), *The Judicial House of Lords 1876–2009* (2009), Chapter 11, p 168)

Lord Hope identifies various stages in the history since 1876 which explain the differing approaches taken by the Law Lords to participation in the legislative process, including changes in the sitting patterns and procedures of the House (which made it more difficult for the Law Lords to participate in public business) and changes made to its composition by the Life Peerages Act 1958 and the House of Lords Act 1999, illustrated with a wide range of examples of notable contributions made by various Law Lords, from the 1920s to recent decades. He takes the story up to the statement made in the House by Lord Bingham of Cornhill, the then Senior Law Lord, on 22nd June 2000, in response to a recommendation by the Royal Commission on the Reform of the House of Lords (chaired by Lord Wakeham), setting out the general principles for participating in debates and votes in the House and also eligibility to sit on related cases. This stated 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)”.²⁷

(HL *Hansard*, 22nd June 2000, cols 419–420)²⁸

²⁷ In this case principles and guidelines were laid down regarding the disqualification of judges on grounds of bias.

²⁸ 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).

Lord Hope then continues:

Unlike his predecessors, Lord Bingham had no desire either to speak or to vote in the House whatever the circumstance. He made it clear informally that he regarded this as incompatible with the judicial function which the Lords of Appeal in Ordinary were required to perform. Lord Steyn had already taken this view.²⁹ Their example was followed by other recently appointed Law Lords.

It still did not have universal support, however. It was not possible for the Law Lords to detach themselves completely from the work of the House. It was the practice for Sub-Committee E of the Select Committee on the European Union to be chaired by a Lord of Appeal in Ordinary. Among the functions of the Chairman was presentation in the Chamber of reports by the Sub-Committee selected for debate in the House. On 18th June 1999 Lord Borrie spoke appreciatively of this practice and said that it would be a great loss if it were to be discontinued.³⁰ Lord Hoffmann and Lord Scott of Foscote felt sufficiently strongly about the Hunting Bills when they were being debated in the House to record their dissent by voting against the proposals, despite the strong element of party political controversy. But the climate of opinion among the Law Lords generally had changed. Several of the Lords of Appeal in Ordinary spoke during the second reading of the Constitutional Reform Bill in 2004. But that was a special case. By then it had come to be generally recognised that it was inappropriate for a serving Law Lord to participate to any extent at all in the legislative process.

Participation in it to any meaningful extent had, in any event, by then become virtually impossible. Rules of the House require that any peer who speaks at Second Reading must be present in the House to hear the opening speeches at the start of the debate and the speeches by the closing speakers from the front benches at the end of it. Participation in debates during the committee stage used to attract the attention of many serving Law Lords. But this is only possible if the peer who wishes to do so is in touch with the issues that are being debated and has followed the progress of the argument. Changes in sitting times, coupled with the increasing demands of judicial business, put most of the legislative business out of the reach of the Law Lords even if they had wished to participate in it.

(Louis Blom-Cooper, Brice Dickson and Gavin Drewry (editors), *The Judicial House of Lords 1876–2009* (2009), Chapter 11, pp 176–177)

²⁹ He explained the view that he had taken on this issue during the Second Reading of the Counter-Terrorism Bill (HL *Hansard*, 8th July 2008, col 686).

³⁰ HL *Hansard*, 18th June 1999, col 624.

III. THE SUPREME COURT OF THE UNITED KINGDOM

The Supreme Court of the United Kingdom is dealt with by Part 3 of the Constitutional Reform Act 2005, which was brought into force on 1st October 2009 (Constitutional Reform Act 2005 (Commencement No. 11) Order 2009 No. 1604), thus establishing the Court from that date.³¹ This section gives an overview of the Court, together with a summary of the key references concerning the ongoing debate about its accommodation and costs.

A briefing on the Court from a Scottish perspective is given in a Scottish Parliament Information Centre Briefing, *The Supreme Court*, by Richard Hough (09/69, 29th September 2009).

1. Composition

Section 23 of the 2005 Act provides for a Court of 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 were the 12 Lords of Appeal in Ordinary in office when section 23 came into effect (section 24)³², being disqualified from sitting and voting in the House of Lords as long as they remain Justices of the Supreme Court (section 137).

The qualifications for appointment under the Appellate Jurisdiction Act 1876 (holding “high judicial office” for at least 2 years or at least 15 years as a qualifying practitioner) are replicated in section 25, but a new method of selection is created by sections 26–31 and Schedule 8. The recommendation for appointment continues 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 (section 26 and Schedule 8). The selection commission must consult senior judges, the Lord Chancellor and the devolved executives (section 27(2)). Selection “must be on merit” (section 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 (section 27(8)), and the commission must have regard to guidance given by the Lord Chancellor as to matters to be taken into account (section 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 section 27(2)) (section 28(5)). Under section 29 the Lord Chancellor may accept, reject or request the reconsideration of the selection, and section 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.

³¹ Because of the creation of the Supreme Court of the United Kingdom the former “Supreme Court of England and Wales” (comprising the Court of Appeal, the High Court and the Crown Court) has been renamed the “Senior Courts of England and Wales” (and similarly in Northern Ireland the former “Supreme Court of Judicature of Northern Ireland” has been renamed the “Court of Judicature of Northern Ireland”) (Constitutional Reform Act 2005, section 59).

³² Eleven out of 12 Lords of Appeal in Ordinary moved to the Supreme Court, Lord Neuberger having been appointed to succeed Lord Clarke of Stone-cum-Ebony as Master of the Rolls from 1st October 2009. The latter (who had served as Master of the Rolls from 2005) was the first Justice to be appointed directly to the Supreme Court from 1st October 2009, replacing Lord Scott of Foscote, who retired as a Lord of Appeal in Ordinary on 30th September 2009.

On 8th 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 opened 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*, 8th October 2007, col 21WS, as corrected by HC *Hansard*, 24th October 2007, cols 11–12WS). The first President of the Supreme Court, Lord Phillips of Worth Matravers, was appointed under this process (House of Lords Select Committee on the Constitution, *Meeting with the Lord Chief Justice and Sir Igor Judge, Q.C.*, Minutes of Evidence, 9th July 2008, Q. 48). He was appointed to succeed Lord Bingham as Senior Law Lord in October 2008.

Under the Constitutional Reform and Governance Bill it is proposed that the Prime Minister should be removed from the process of appointments to the Supreme Court (clause 35 and schedule 5). The Bill had its First Reading in the House of Commons on 20th July 2009 (HC *Hansard*, col 602), and was given a Second Reading on 20th October 2009 (HC *Hansard*, cols 799–878). The Bill was considered by a Committee of the Whole House on 3rd and 4th November 2009 but ran out of time to complete proceedings. The Bill is, however, subject to the carry-over procedure.

The tenure of a judge of the Supreme Court is (as formerly for the Law Lords), that he will hold office during good behaviour, but removable on the address of both Houses of Parliament (section 33). A judge is 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 (section 36).

Under section 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 section 39 provides for a supplementary panel comprising persons who have recently held high judicial office and are under the age of 75 (but excluding former Lord Chancellors appointed before 12th June 2003), in effect, the same persons who were formerly “Lords of Appeal” and enabled to sit in the Lords Appellate Committee by section 5 of the Appellate Jurisdiction Act 1876. The latter structure thus mirrors the arrangements that existed in the Appellate Committee of the House of Lords, whereby although Lords of Appeal in Ordinary had to formally retire at 70 they were still available to sit until they were 75 (see Section II above).

The retirement age for Supreme Court Justices was the subject of a Lords oral question on 25th March 2009, when Lord Pannick asked whether the Government would consider raising that age to 75. He argued that special consideration should apply to judges of the Supreme Court, in that they were the “cream of the judiciary and inevitably took time to rise to the top, normally after serving for several years in the High Court and then in the Court of Appeal”, and it was “therefore a terrible waste of our most valuable judicial resources to dispose of them after a short stay in the Supreme Court” (HL *Hansard*, 25th March 2009, col 654).

Lord Bach, Parliamentary Under-Secretary of State, Ministry of Justice, responded that the Government had no immediate plans to raise the retirement age of Supreme Court Justices but were “keeping this issue under review”. However, he continued, “there are arguments on the other side. We have to try to strike a balance between retaining

experience and ensuring the flow of high quality applicants to the highest judicial office. When we consider this—we consider it all the time—it will be only in relation to Supreme Court justices” (*ibid*, col 654).

2. Jurisdiction

The jurisdiction of the Supreme Court is, in effect, the former appellate jurisdiction of the House of Lords together with the former devolution jurisdiction of the Judicial Committee of the Privy Council (section 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” (section 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” (section 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 (section 42(1)); and the Court has power to seek the assistance in any proceedings of specially qualified advisers (section 44).

3. 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 section 137 of the 2005 Act judges of the Supreme Court are disqualified from the Commons, and members of the Lords are disqualified from sitting and voting in that House if they hold a judicial post that disqualifies them from the Commons. Accordingly, the former Lords of Appeal in Ordinary who became judges of the Supreme Court are, until they retire from that Court, unable to sit and vote in the Lords. This also applies to the Lord Chief Justice and other senior judges who hold life peerages.

Lords debate 20th June 2006

These provisions were discussed in the House of Lords on 20th 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*, 20th 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*, 20th 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).

White Paper on House of Lords reform July 2008

The July 2008 White Paper on House of Lords reform put forward proposals and options based on the March 2007 free votes in the House of Commons, amongst which were a significantly reduced maximum membership, either wholly elected or 80 per cent elected and 20 per cent appointed, with three options for further consideration and discussion as to how far the rights of life peers to sit and vote should continue during the transition to a wholly or mainly elected second chamber and whether they should continue after that phase is complete (Lord Chancellor and Secretary of State for Justice, *An Elected Second Chamber: Further reform of the House of Lords*, Cm 7438, July 2008, paras 8.15 to 8.17). The three options proposed were: allowing all life peers to continue to be members for life; existing peers depart after the third election of new members; and existing peers depart in three groups, each coinciding with the arrival of a group of new members (*ibid*, paras 8.18 to 8.27).

As regards the Law Lords, the White Paper stated:

The terms of appointment for Law Lords and life Peers are effectively the same once the judicial functions taken on by the Supreme Court have been excluded. Proposals about the role of existing life Peers in a reformed second chamber (see paragraphs 8.15–8.17) would therefore apply to those retired Justices of the Supreme Court who were formerly Law Lords and to retired Law Lords who will not become Justices of the Supreme Court. This will be irrespective of whether there is an appointed element in a reformed second chamber. If there were an appointed element, none of the existing life Peers, including Law Lords, would count towards the total for that element.

Any Justice of the Supreme Court appointed after the Supreme Court begins work will not be a member of the second chamber in Parliament. Therefore, the question of some form of automatic membership of the second chamber would not arise. However, the Appointments Commission could consider retired Justices of the Supreme Court for appointment in the normal way.

The Government proposes that the arrangements for membership of a reformed second chamber for those retired Justices of the Supreme Court who were formerly Law Lords should be the same as the arrangements for other life Peers. Justices of the Supreme Court who are not former Law Lords would not be members of a reformed second chamber.

(*ibid*, paras 6.57 to 6.59)

House of Lords Select Committee on the Constitution—Meeting with the Lord Chancellor 28th January 2009

The Lord Chancellor, Jack Straw, was questioned on the subject of life peerages for Justices of the Supreme Court when he appeared before the Lords Select Committee on the Constitution on 28th January 2009. Lord Woolf said that, at least in the past, “the Law Lords did perform an important function in the legislative process as being really

advisers of this House as to the law and some Law Lords would only use their power to appear in the legislative chamber for that purpose. Bearing that in mind, do you think that there should be some sort of arrangement where, when they reach retirement, the Judges of the Supreme Court are able to come back to this House—and there can be convention to that effect—so as to perform some of the roles which they continue to perform to this day in this House which are constructive?”

The Lord Chancellor replied:

Of course, that was one of the arguments against change and, in the event, the change was agreed. I can see the case and obviously it crucially depends on whether we continue with an all appointed House of Lords...

... If we go to a 20 per cent appointed, the numbers are fewer. Obviously if it is all elected, the point does not apply. My guess is—and of course it will be subject principally to the Appointments Commission at this end and not to ministers—that there will be a convention by which certainly some of the most senior Justices of the Supreme Court, if they wanted to, could come in here but, as I think you are aware, there is no direct provision for that. I certainly for myself think that the contribution which retired Law Lords are able to make in the process of legislation is very valuable.

(House of Lords Select Committee on the Constitution, *Meeting with the Lord Chancellor*, Minutes of Evidence, 28th January 2009, QQ. 44 and 45)

Lords debate 20th July 2009

The role of retired Justices of the Supreme Court was again discussed in the House of Lords on 20th July 2009 when Lord Pannick asked an oral question as to the Government's assessment of the arrangements for the transfer of judicial functions from the Appellate Committee of the House of Lords to the United Kingdom Supreme Court (HL *Hansard*, 20th July 2009, cols 1375–1377).

Lord Pannick said:

As justices of the Supreme Court who are appointed in the future will not be Members of this House, do the Government propose to ensure that this House will continue to benefit from the experience and expertise of retired senior judges? In particular, will they ensure that all retiring Supreme Court justices in the future are appointed to this House?

(HL *Hansard*, 20th July 2009, col 1375)

Lord Bach, Parliamentary Under-Secretary of State, Ministry of Justice, replied:

My Lords, Justices of the Supreme Court who are appointed after October 2009 will not automatically become Members of the second Chamber on retirement, but could be considered for appointment by the Appointments Commission. It is right to say that former Law Lords will be able to take up their places again in the House of Lords on retirement from the Supreme Court, and it is right that this House needs a lot of expertise, particularly in that field, but I cannot give the noble Lord the assurance that he requires.

(*ibid*, col 1375)

Lord Davies of Coity sought confirmation that the transfer of the Appellate Committee of the House of Lords to the United Kingdom Supreme Court was for the purpose of dividing political and judicial responsibilities, and asked:

If bringing Lords back into the House on that basis is the case, would it not have been better to leave them here in the first place?

(ibid, col 1376)

Lord Bach replied:

My Lords, my noble friend is right in half of what he says. It is right that the separation of powers between the judiciary, the legislature and the Executive should be made even clearer, which this move does. However, what it also does—in some ways, this is as important—is to make the most important court in our land much more accessible to the public for whom it is there to serve. Everyone knows that in this building it has not always been possible for the general public, particularly young people, to be able to watch the Law Lords in action. They will certainly be able to do that in the new court.

(ibid, col 1376)

Lord Grocott asked:

My Lords, while some of my best friends are lawyers, including my noble friend at the Dispatch Box, does he not agree that it would be quite difficult for an objective observer to suggest that what this House suffers from is a serious shortage of lawyers? Does he therefore agree that in any consideration of the future composition of this House it is vital that we have the widest possible spread of professions and occupations and that places are not given automatically to any particular profession?

(ibid, col 1377)

Lord Bach responded:

My Lords, I am sure that is exactly the way the Appointments Commission will deal with the matter.

(ibid, col 1377)

4. 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 have continued to be debated. The key references are summarised in this section.

Announcement of Middlesex Guildhall—Lords written statement 14th 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 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*, 14th December 2004, cols WS71–74)

“Sunrise clause” in Constitutional Reform Bill 14th 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*, 14th 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*, 14th December 2004, col 1215).

Lords Select Committee on the Constitution 13th December 2005

After the Bill received the Royal Assent on 24th 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 13th 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 1st 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, 13th 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 14th December 2004) (*ibid*, Q. 42).

Opening date for new Supreme Court changed to October 2009

On 1st 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 7th 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 14th 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*, 1st March 2006, cols WS28–30).

Amount spent up to 23rd March 2006

In a Commons written answer of 23rd 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*, 23rd March 2006, col 567W)

Lords Oral Question on capital construction costs and supplementary on costs of Law Lords in the House of Lords 24th July 2006

In the Lords, on 24th 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 14th 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*, 24th 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” (*ibid*, 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” (*ibid*, cols 1539–1540).

***Further details of Implementation Programme—Lords written statement
17th October 2006***

Following the Summer Recess, the Lord Chancellor laid a written statement in the Lords on 17th 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 24th 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 5th May 2006 and this application was considered at the council meeting on 7th 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 14th 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 31st 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 21st 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 15th and 16th 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*, 17th October 2006, cols WS78–79)

Lords Oral Question 23rd January 2007

In the Lords further discussion of the implementation programme occurred on 23rd 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 17th 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*, 23rd 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" (*ibid*, 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 II* 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 (*ibid*, 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.

(*ibid*, col 996)

Implementation Programme update—Lords written statement 1st March 2007

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

I wish to update you on the implementation of the UK Supreme Court. As you know, on 7th 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 21st November 2006. Both the planning and the listed building consents were also issued on 21st November 2006.

On 26th 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 16th 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 9th March 2007. This will be followed by the usual statutory consultation.

The Crown Courts at Middlesex Guildhall will still close on 30th 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 17th 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*, 1st March 2007, cols WS140–141)

Judicial review application by SAVE British Heritage 27th 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 27th 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*, 27th March 2007, para 33).

Commons Select Committee on Constitutional Affairs 17th April 2007

On 17th 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 (House of Commons Select Committee on Constitutional Affairs, *Accommodation for the Supreme Court*, Minutes of Evidence, HC 456-i, 2006–07, 17th April 2007, QQ. 1–30).

The Lord Chancellor, Lord Falconer of Thoroton, then gave evidence to the Committee. Asked by the Chairman, Alan Beith (Liberal Democrat), 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 (Conservative) 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 (Conservative) 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 8th May 2007 Vera Baird, Parliamentary Under-Secretary of State, Department for Constitutional Affairs, replying to Keith Vaz (Labour),

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

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*, 8th May 2007, cols 134–135W)

Options for a new build

In a further Commons written answer of 22nd May 2007 to Keith Vaz (Labour), 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*, 22nd May 2007, col 1258W)

Implementation Programme update—Commons written statement 14th June 2007

Another update on the implementation programme was given by the Lord Chancellor, Jack Straw, in a Commons written statement of 14th 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 13th 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 30th 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*, 14th June 2007, cols 61–62WS)

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

A further breakdown of the set-up costs related to the Middlesex Guildhall referred to in the written statement of 14th June 2007 was given in a Commons written answer of 25th June 2007 by Vera Baird, Parliamentary Under-Secretary of State, Ministry of Justice, as follows:

As mentioned in the written ministerial statement, 14th 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;

Breakdown of Supreme Court set up costs

	<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*, 25th June 2007, col 359W)

Lords debate 4th 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 4th 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 (HL *Hansard*, 4th July 2007, cols 1089–1103).

Comparison of costs of the Supreme Court and costs of the Lords Appellate Committee

A comparison of the costs of the Supreme Court with those of the Lords Appellate Committee was given in a Commons written answer of 8th October 2007. John Baron (Conservative) asked what estimates had been made of the costs of setting up and operating a Supreme Court and the cost of continuing with the Lords appellate function.

Maria Eagle, Parliamentary Under-Secretary of State, Ministry of Justice, stated:

As announced on 14th June 2007 the estimated running costs of the UK Supreme Court is £12.3 million per annum at 2010–11 prices. The annual running cost includes a rental figure of £2.1 million per annum, increasing at a rate of 2.5 per cent. per annum. The rental figure covers the cost of the renovation and will be paid to Kier Group over a 30-year period.

There are additional set up costs of £5.9 million for the Ministry of Justice programme team over the five years of the implementation programme and £14.3 million for items such as Ministry of Justice professional adviser fees and the non-capital element of the fit-out costs including loose furniture, IT and library books.

As previously announced the running costs of the Appellate Committee of the House of Lords were estimated at £3.2 million per annum at 2004 prices. This figure excludes building and services costs as it is not possible to extract these specific sums from the overall running costs of the House of Lords.

(HC *Hansard*, 8th October 2007, cols 207–208W)

Construction costs update

An update on construction costs was given in a Commons written statement by the Lord Chancellor, Jack Straw, on 3rd July 2008, as follows:

I wish to update the House on the construction costs of the Supreme Court for the United Kingdom.

The overall development of the Supreme Court is progressing according to plan and we expect to open the Supreme Court as predicted for the start of the legal year in October 2009.

At the beginning of 2008 some movement to the fabric of the building was found around the parapet and tower at Middlesex Guildhall. Over the years water penetration had reached structural steelwork embedded within the masonry at high level. The steel has corroded causing movement and cracking of the stone facing of the building.

The damage is, I am told, not a significant risk to delivery of the new Supreme Court. Repairing it will increase the overall cost of the building by around £2 million above those costs announced by my predecessor in June 2007.

In 2007, Lord Falconer reported estimated set up costs of £56.9 million (£36.7 million for building work, and £20.2 million for professional adviser fees, programme team costs, furniture, IT services and library costs).

We continue to work closely with Westminster city council and English Heritage to preserve and protect this important building for future generations.

In addition, the security provision at Middlesex Guildhall has been reassessed in line with other high profile central Government and Court buildings in Central London. We expect this to increase the overall construction costs to the programme and will inform the House when we have the final figure.

(*HC Hansard*, 3rd July 2008, col 59WS)

Logo for the Supreme Court

In a Commons written question of 17th March 2009 Dominic Grieve, Shadow Home Secretary, asked what was the cost of creating the emblem for the Supreme Court.

The Lord Chancellor, Jack Straw, replied:

The total cost of the design and development of the emblem is £26,200. This cost includes design and development by heraldic artist Yvonne Holton; redrawing and presentation to The Queen by Garter King of Arms; and development of the symbol in an electronic and adaptable format by design consultants. All costs are within original estimates announced by the Ministry of Justice on 14th June 2007.

(*HC Hansard*, 17th March, col 1126W)

Handing over of Middlesex Guildhall to Ministry of Justice

On 2nd April 2009 the Lord Chancellor, Jack Straw, announced the handing over of the renovated Middlesex Guildhall to the Ministry of Justice in a Commons written statement:

The renovation of Middlesex Guildhall has now been completed on time and within budget by Kier Group Plc. The building has been handed to the Ministry of Justice to carry out the final phase of works.

This is a major milestone in the development of a Supreme Court for the United Kingdom. We remain on track to deliver a fully functioning Supreme Court in time for the opening of the legal year in October 2009.

This renovation has breathed new life into a previously tired building, which sits in one of the most historic and recognisable public spaces in the world. The renovation works have been completed to the highest standard, as appropriate for its setting and required for a Grade II* listed building.

The Ministry of Justice will now take forward the final phase of works.

As announced in July 2008, work will soon begin to ensure the security provision at Middlesex Guildhall is in line with other high profile central government and court buildings.

I will ensure the House is kept updated on the progress of establishing the Supreme Court as work continues.

(HC *Hansard*, 2nd April 2009, col 80WS)

Implementation Programme—amount spent as at February 2009

In a Commons written answer of 2nd April 2009 the Lord Chancellor, Jack Straw, stated that as at February 2009 the Supreme Court Implementation Programme had spent £14.3 million. Replying to Dominic Grieve, Shadow Home Secretary, who had asked how much had been spent on the project to site the Supreme Court in the Middlesex Guildhall building on the latest date for which figures were available, the Lord Chancellor stated:

As announced on 14th June 2007, the estimated set-up costs for the UK Supreme Court are £36.7 million for capital construction, which will be met over a 30-year period through rental payments of £2.1 million per annum, increasing at a rate of 2.5 per cent. per annum, plus £20.2 million of other set-up costs (including provision of library, visitor facilities etc.). The only change to this estimate is an additional £2 million for repair work (as announced on 3rd July 2008) and new security measures (where we will update the House with costs once we have the final figure).

As at February 2009 the Supreme Court Implementation Programme has spent £14.3 million.

(HC *Hansard*, 2nd April 2009, col 1468W)

Postal address of the Supreme Court

The postal address of the Supreme Court was debated on a Lords oral question asked by Earl Ferrers on 23rd April 2009 (HL *Hansard*, 23rd April 2009, cols 1601–1603).

Lord Bach, Parliamentary Under-Secretary of State, Ministry of Justice, stated that the address would be “the Supreme Court of the United Kingdom, Parliament Square, London, SW1” (*ibid*, col 1601).

Implementation Programme—Supreme Court set up from 1st October 2009— Commons written statement 15th July 2009

Further progress on the Implementation Programme was announced in a Commons written statement by the Lord Chancellor, Jack Straw, on 15th July 2009, including written assurance from the Law Lords that they were satisfied with the refurbished Middlesex Guildhall, that the Lord Chancellor had signed the commencement order (SI 2009 No 1604) enabling the Supreme Court to come into being on 1st October 2009 and other administrative measures. The Lord Chancellor stated:

On 2nd April 2009 I announced that the Middlesex Guildhall had been handed over to the Ministry of Justice. I am pleased to be able to report further significant progress on the Supreme Court Implementation Programme—the programme remains on time and within budget.

First, I have received a written assurance from the noble and learned Lord Phillips of Worth Matravers that the Law Lords are satisfied that the refurbished Middlesex Guildhall will meet the needs of the new Supreme Court. The refurbishment has been completed to the highest standards, respecting the heritage of this unique building. This is consistent with both the status of the court and the needs of the Supreme Court Justices, court users and the public for modern accessible facilities. On this basis I have now signed the commencement order that will enable the court to come into being on 1st October 2009, as I am satisfied the court will be fully operational by that date.

Lord Phillips has made the rules that will underpin the workings of the court and these have been laid before Parliament. In making the rules, Lord Phillips has taken into account his statutory duty to ensure that the rules are both simple and simply expressed and that they have a view to ensuring the court is accessible, fair and efficient. The rules have been widely supported on consultation.

In addition the responses to public consultation on the fees payable in the court have been analysed. A summary of the responses to consultation and the Government's proposed way forward have now been published. Consultees were in general agreement with the course proposed, with the exception of fees for devolution cases. While consultees agreed that the fees for devolution cases should be brought into line with civil fees generally, they were concerned that to make this change in one step represented too steep an increase—we have therefore decided to implement this change in stages.

The Fees Order for the court will be laid on this basis.

I previously announced that the anticipated running costs for the UK Supreme Court would be £12.3 million. At present Her Majesty's Court Service pays £1.2 million pension and national insurance contributions with respect to the Law Lords. For transparency this will be transferred to the UK Supreme Court from

1st October. This does not represent any additional cost to the public purse. For the first year we have provided an additional £300,000 to cover transitional set-up costs, this is being met from within existing resources. The costs of some aspects of the court's operation, including security, remain to be finalised and so the anticipated running costs will continue to be refined and reviewed on an ongoing basis.

(HC *Hansard*, 15th July 2009, cols 32–33WS)

Handing over of Middlesex Guildhall from Ministry of Justice to Chief Executive of Supreme Court

In a Lords written statement of 5th October 2009 the Parliamentary Under-Secretary of State, Ministry of Justice, Lord Bach, announced the formal hand over of the Middlesex Guildhall from the Ministry of Justice to the Chief Executive of the Supreme Court, Jenny Rowe, as from 1st August 2009, and the laying of the Fees Order for the fees payable in the Supreme Court, as follows:

I am pleased to announce today that further significant progress has been made during the summer parliamentary recess towards the establishment of the UK Supreme Court.

The newly renovated Middlesex Guildhall building was formally handed over, from the Ministry of Justice, to Jenny Rowe, Chief Executive of the Supreme Court, on 1st August 2009.

The Fees Order specifying the fees payable to the court was laid in Parliament on 4th August 2009 following a full public consultation. The civil fees payable in the Appellate Committee were last amended in 2000. The vast majority of respondents to consultation agreed that it was equitable to uprate the fees payable in the UK Supreme Court to take account of inflation over that time. In addition, the fees order introduces a robust system of fee concessions to ensure that access to justice is ensured.

While respondents to consultation agreed that the fees for devolution cases should be brought into line with civil fees generally, they were concerned that to make this change in one step represented too steep an increase—we have therefore decided to implement this change in stages.

A review of the fees will be undertaken in approximately three years to take account of the actual running costs of the Supreme Court.

(HL *Hansard*, 5th October 2009, col WS 205)

Supreme Court pay

In a Commons written answer of 2nd November 2009, responding to Henry Bellingham, Shadow Minister of Justice, who had asked how many employees of the Supreme Court

earn more than (a) £50,000, (b) £75,000 and (c) £100,000 a year, the Lord Chancellor, Jack Straw, stated:

The Supreme Court has 39 employees. Of those 39 employees, four earn between £50,000 and £75,000, one earns between £75,000 and £100,000, and one earns more than £100,000.

(HC *Hansard*, 2nd November 2009, col 747W)

Comparison of costs of the Supreme Court and cost of the Lords Appellate Committee

In the Commons on 10th November 2009 Shailesh Vara (Conservative) asked an oral supplementary question concerning the running costs of the Supreme Court. He said that given that it was widely reported that the decision to set up a Supreme Court “was taken by Tony Blair and Lord Falconer over a glass of whisky, and that the annual cost of running the Supreme Court is some £14 million whereas the cost of the previous arrangement was £3 million a year, does the Minister agree that it has proved to be a very expensive glass of whisky?”

The Minister of State, Ministry of Justice, Michael Wills, replied:

No, I do not agree, and I counsel the hon. Gentleman—and I suspect his colleagues who will follow on shortly—that they must be very careful to ensure that they compare like with like. If I may, I will give the hon. Gentleman a few figures. The figures he quotes are roughly right, but they do not include all the costs incurred in the running of the Appellate Committee of the House of Lords, as they were not included when we looked at the costs of the Supreme Court. Let me just give an example. The costings he has quoted go back to 2002-03, I think. Inflation since then and the costs that cannot be separated out precisely from the running of Parliament, such as those for rent, security, IT, catering, library services, cleaning and non-cash items, amount to about £7 million. So when the hon. Gentleman looks at these figures and genuinely tries to arrive at a like-for-like comparison, he will find there is no significant difference. If I may, I will give him some comparative costs for elsewhere in the world. [*Interruption.*] Well, I will do so, because he is worried about cost efficiency. The costs of running the Supreme Courts in Canada and the United States are £23 million and £53 million respectively.

(HC *Hansard*, 10th November 2009, cols 142–143)

5. The Future of the Court

The future profile of the Supreme Court is unclear, comment in the press and in legal circles being divided between whether the change will be one of form or of substance.

Marcel Berlins in the *Guardian* of 28th September 2009 pointed out that the Justices of the Supreme Court would have exactly the same powers that they had as Law Lords, but “The reality might be more psychological than legal—that the new justices, breathing more freely than in the cocoon of the House of Lords, will feel inspired to be braver, more imaginative and more combative in the decisions they reach” (p 14).

The *Times* of 1st October 2009 featured an article by Edward Fennell on reaction in the City to the change. He commented: “The attitude of the highest appellate court in the land to the activities of the City lawyer has been, it must be said, ambivalent in recent

years. Some of its members, it is rumoured, would have preferred to have dropped commercial work from its remit in order to focus on the big constitutional and public law issues. For example, Lindsay Marr, chairman of the litigation committee of the City of London Law Society, reports that it was not consulted on the move and it may be significant—or at least indicative—that while the Supreme Court’s website features some examples of the work done at this level none are commercial” (p 69).

On the same day, Frances Gibb in the *Times* reported a survey of the Times law panel, a sounding board of 100 leading lawyers across all specialisms, showing that three-quarters believed that the reform was “worthwhile” and two-thirds believing that the move would not just mean business as usual, saying that in the longer term “the Supreme Court justices will be more activist—with the potential of more clashes with government”. A substantial minority did not support the reform, many also believing that nothing will change, commenting that the Law Lords had always displayed independence (p 67).

Another article by Frances Gibb in the *Times* of 1st October 2009 quoted Lord Phillips of Worth Matravers, the first President of the Supreme Court, as saying that it was “inevitable that there will be more interest in who is appointed to the Supreme Court—and I am bound to say that that is a perfectly legitimate state of affairs”, but that he would be opposed to any change in selection of the justices that went down the American road. “I am not in favour of the type of appointments process they have in the States, which tends to politicise the Supreme Court” (p 16).

A leader in the *Guardian* of 1st October 2009 asked whether the change marked a substantive change in the way the highest court in the land did its work, perhaps putting the judges on an institutional collision course with government, with potentially dramatic consequences, but thought that under the terms of the Constitutional Reform Act 2005 there was no reason why that should be so. The new Court was not like others of the same name around the world, having no power to nullify Acts of Parliament as unconstitutional, which alone ensured that it was unlikely to be confrontational. Nor did the new Court have new powers that were not exercised by the Law Lords, with the exception of being able to rule on devolution issues, which, although not an unconflictual area of law, was not one that was likely to seriously disrupt the essential continuity from the old system to the new. “Yet it is difficult to believe that the new court, with its own staff and, over time, its own culture, will not bring subtle changes. The new President of the Supreme Court, Lord Phillips, will have a more prominent public profile than the Senior Law Lord did in the past, not least because of the much-diminished role now rightly played by the Lord Chancellor” (p 34).

A leader in the *Daily Telegraph* of 2nd October 2009 described the change as “An unnecessary attack on the constitution”. The change was proposed to end what the Government considered an anomaly, whereby senior members of the judiciary also sat in the legislature. “But this was not an anomaly in our own realm, only when compared with other jurisdictions. There are many aspects of the British constitution that have evolved over the centuries that could be considered anomalous, and many more that are old-fashioned. The only worthwhile test to be applied is whether or not they work...There was no obvious failure in the system that justified what has turned into a very expensive ‘modernisation’...The vaunted independence of the new Supreme Court is not of itself enough to justify its existence. The danger is that it will take a far more pivotal—and politically ‘progressive’—role in deciding our laws, encouraged to do so by the Human Rights Act and the weakness of the House of Commons. The Court is likely to be emboldened to go much further than its predecessor in making rulings beyond what Parliament intended. The Law Lords were woven into the warp and weft of our constitutional settlement. We are unpicking it at our peril” (p 25).

An article in the *Financial Times* of 5th October 2009 by Michael Peel and Jane Croft focused on quotations from various eminent legal personalities. Professor Robert Hazell, Director of University College London's Constitution Unit, commented on the view of Lord Phillips of Worth Matravers who had said the metamorphosis would be "essentially one of form, not of substance". Professor Hazell thought it would be both "and that over time it will be seen as quite a big change of substance. Its media and public profile will be much higher. And that's happening at a time when their caseload is changing dramatically", taking on more "human interest cases". Lord Falconer, the former Lord Chancellor who oversaw the creation of the Supreme Court, said: "Although the jurisdiction doesn't change, the role—mainly vindicating people's rights against the state and being the guardian of the constitution—will be visible to all. And I believe more will be expected of it". Lord Neuberger, the new Master of the Rolls and formerly a Law Lord, had warned in a BBC interview of the potential of provoking a clash between overpowerful judges and the government of the day, saying: "The danger is that you muck around with a constitution like the British constitution at your peril because you do not know what the consequences of any change will be". Lord Phillips, however, had said that there was unlikely to be a significant change in approach. "The courts' job is not to do battle with the executive. It is to consider a particular challenge and rule on the legality of that challenge" (p 4).

Lord Neuberger's BBC interview had been with Joshua Rozenberg for a Radio 4 documentary on 8th September 2009 on the creation of the Supreme Court, entitled 'Top Dogs: Britain's Supreme Court'. Rozenberg summarised this programme in an article in the *Law Society Gazette* of 3rd September 2009, 'Top dogs ready to bark?'. He further quotes Lord Neuberger as believing that taking Britain's final court of appeal out of Parliament should have been considered as part of a much wider review. "The law of unintended consequences is one of the most reliable pieces of law on the non-existent statute book". Separated from Parliament, Lord Neuberger feared, the Supreme Court "could start to become more powerful, to try to assert itself in a way that is... foreign to the British system and would lead to a real risk of confrontation between the judiciary and the legislature, and, indeed, between the judiciary and the executive". In his view, there was a real risk of judges arrogating to themselves greater power than they have at the moment. "Democratic accountability is fundamental. And while it's right and proper that judges have independent power and provide a very important balance to the elected legislature and the non-elected executive, it's dangerous if they get too much power".

Lord Turnbull, Cabinet Secretary in 2003 when the constitutional reforms were announced, insisted that they were not "thought up on the back of a fag packet", but admitted that the Supreme Court may be more assertive and difficult for a future government than the current Law Lords, a trend that could be seen already.

His view was endorsed by Lord Falconer of Thoroton, who thought that the new Court will be bolder, both in vindicating individual freedoms and being willing to take on the executive, admitting that would lead to problems for future governments.

Lord Bingham of Cornhill, formerly Senior Law Lord, thought it unlikely that the Law Lords would behave any differently now that they are no longer in Parliament.

Lord Bingham's view was endorsed by Baroness Hale, saying, "I doubt very much whether it will change the way in which we do our work. Our jurisdiction will be the same, our powers will be the same, we won't get any greater or grander powers simply by becoming the Supreme Court of the United Kingdom".

But Lord Collins of Mapesbury, the first solicitor to be appointed a Law Lord, was less sure. He believed it would evolve gradually into a different type of body: "perhaps not as

pivotal as the US Supreme Court, but certainly playing a much more central role in the legal system and approaching the American idea of a government of laws and not of men”.

Lord Phillips of Worth Matravers took a more cautious approach. The change was one of form rather than substance, saying that the move “could well prove to be a catalyst for gradual change”, giving the example that the Court may experiment with majority judgments, something that parliamentary procedure did not permit.

Lord Hope of Craighead believed that having their own building may not be in the judges’ interests, pointing out that the Law Lords used to meet all sorts of people when they walked round the Palace of Westminster, which “keeps you in touch with humanity”. Their rooms in the House of Lords were crammed into a single narrow corridor “where interaction is very easy and relationships are very good”. In the Supreme Court, the judges would be dispersed around four corners on two floors “so that you have to make an effort actually to go and see somebody”. How the geography would affect the way the Court worked was “completely unknown”.

The possibility that the Court may give majority judgments, mentioned by Lord Phillips above, as well as the possibility of the Court sitting *en banc*, i.e. as a full court rather than in the present (usually) five-judge panels, has been the subject of academic discussion in legal circles. The key arguments in favour of these procedures, presented for example by Lord Pannick,³³ Lord Justice Carnwath,³⁴ Richard Buxton,³⁵ and Richard Clayton,³⁶ are: removal of legal uncertainty arising from different reasons being given for reaching the majority decision; arriving at the right answer for the right reasons by a collective pooling of distinct legal experience, ending the current position where “perming” 5 out of 12 often means that there are closely divided cases where the panel selection determines the result; more effective case management by appointing a lead or reporting Justice for each case following the grant of leave to appeal; and a shift toward a single judgment, with only dissenters giving separate judgments, would accord with the practice of the Judicial Committee of the Privy Council, where one “humble advice” is usually delivered.

The contrary view, given, for example, by Dawn Oliver,³⁷ is that an enforced collegiate approach would damage the common law tradition of individual judicial responsibility and would lead to a reduction in the quality of reasoning and skating over difficult or dissenting areas.

The first case to be heard by the Supreme Court, *HM Treasury v A (FC) and Others (FC)* (whether orders freezing the assets of suspected terrorists were unlawful because they infringed fundamental human rights) was heard by a panel of 7 Justices. The case of *R (E) v Governing Body of JFS and Others* (mentioned above as the last case to be heard by the Appeal Committee of the House of Lords, granting leave to appeal, concerning the question of whether there was racial discrimination against applicants to a Jewish school who were not Jewish as defined by the Office of the Chief Rabbi) was also heard by a panel of 7 Justices.

³³ David Pannick, Q.C., ‘How many Law Lords does it take to decide a case?’ *Times*, 12th February 2008.

³⁴ Lord Justice Carnwath, ‘Devil we know or new start?’ (2008) *Counsel*, June, 6.

³⁵ Richard Buxton, ‘Sitting *en banc* in the new Supreme Court’ (2009) 125 LQR 288.

³⁶ Richard Clayton, Q.C., ‘Decision making in the new Supreme Court: new approaches and new opportunities’ [2009] PL 682.

³⁷ Dawn Oliver, ‘Singularly supreme?’ (2008) *Counsel*, April, 8.

Scotland⁸⁸

The Scottish Secretary for Justice, Kenneth MacAskill, has commissioned Professor Neil Walker, Regius Chair of Public Law and the Law of Nature and Nations at the University of Edinburgh, to conduct a review of the final appellate jurisdiction in the Scottish legal system. Professor Walker has been asked to provide an overview of the historical development of the House of Lords as an appeal court for Scottish cases; to identify the established constitutional principles of that jurisdiction and to provide appropriate international comparisons. He has also been asked to appraise the features, benefits and disadvantages of the current Scottish arrangements and to assess options for future developments in order to present his conclusions and recommendations by December 2009.

The future role of the Supreme Court in relation to Scottish appeals was also raised by the Calman Commission³⁹ (the Commission on Scottish Devolution, chaired by Sir Kenneth Calman, Chancellor of Glasgow University, established by the Scottish Parliament and the UK Government to review the provisions of the Scotland Act 1998 and the working of the Scottish Parliament, which reported in June 2009). Although, as noted above, there is no right of appeal from the Scottish Courts in criminal matters to the House of Lords or the Judicial Committee of the Privy Council, the effect of the Scotland Act 1998 is to create an indirect right of appeal to the latter as a “devolution issue” (now transferred to the Supreme Court) where it can be shown that an aspect of criminal procedure can be characterised as being incompatible with Convention rights. The report of the Calman Commission suggested that this issue merited “urgent reconsideration” and identified the underlying question to be whether, and if so to what extent, Scottish criminal law and procedure should in future be subject to review by the Supreme Court (paras 5.29 to 5.37).

³⁸ See Scottish Parliament Information Centre Briefing, *The Supreme Court*, by Richard Hough, (09/69, 29th September 2009), pp 13 and 14.

³⁹ Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century*, Final Report, June 2009.

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