

LITIGATION COMMITTEE response to the Ministry of Justice Consultation on the departure from retained EU case law by UK courts and tribunals

The City of London Law Society (“CLLS”) represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response to the Consultation on the departure from retained EU case law by UK courts and tribunals has been prepared by the CLLS Litigation Committee with input from the CLLS Employment Law Committee. The response addresses the Consultation insofar as it relates to the courts and civil procedure of England and Wales. It does not, therefore, address the questions below insofar as they relate to the courts and civil procedure of Northern Ireland or Scotland.

Q1 Do you consider that the power to depart from retained EU case law should be extended to other courts and tribunals beyond the UK Supreme Court and High Court of Justiciary. Please give reasons for your answer.

In summary, there is a divergence of opinion amongst the Litigation Committee between (i) limiting the power to the Supreme Court (and High Court of Justiciary), as is presently the case, or (ii) extending the power to the Court of Appeal (and equivalents). However, there is unanimity amongst the Litigation Committee members that the power should not at this stage be extended any further, to the High Court or to other courts or tribunals.

It is difficult for the Government to proceed confidently with any option in the absence of a meaningful impact assessment of the different possible ways forward. It is not clear why such an assessment has not been attempted. In particular, there is no estimate as to the likely volume of litigation involving retained EU case law; this in turn makes it difficult to determine whether the Supreme Court (or the Court of Appeal) is likely to have sufficient capacity.

This lack of an impact assessment, together with the shortened consultation period, means that there is a lack of evidence upon which to base a decision as to the way forward, and a lack of time in which to explore possible additional options (for example, a judicial panel serving as a domestic reference court to decide points relating to retained EU case law for all UK courts and tribunals). Greater time and consideration (including by reflecting on feedback from this consultation) spent on what would be important changes to the court system might identify other options which, when analysed by reference to the available evidence, might better meet the stated policy objectives

The consultation paper refers to two policy objectives: (1) to provide legal clarity and certainty in our law, following the UK’s departure from the EU; and (2) to avoid UK courts and tribunals being bound by retained EU case law for longer than is appropriate, so that potential litigants have the ability to seek to change such law where it adversely affects them. As the consultation recognises, there is a tension between these two objectives.

It is the Litigation Committee's strong view that the first of these is more important than the second. English law is renowned for its relatively high degree of predictability engendered by the system of precedent and the clear hierarchy of courts and their decisions. Legal certainty for individuals and businesses and the baseline confidence this instils are crucially important in a modern democracy. Certainty and predictability of the law tend to improve dispute resolution because parties know where they stand, and clear legal advice can be given. Conversely, increased legal uncertainty tends to result in more litigation and, in view of other pressures on the commercial court system, risks adding cost and delay to resolving disputes, which may adversely impact the attractiveness of English law internationally and London as a global dispute resolution centre.

It is for this reason that the Litigation Committee rejects the consultation's options of extending the power to depart from retained EU case law to the High Court or to other courts or tribunals. The Committee favours either limiting the power to the Supreme Court, or extending it only to the Court of Appeal.

Restricting the power to the Supreme Court would be the strongest way of fostering legal certainty. Moreover, there is a good argument in the Committee's view that, in the absence of a currently demonstrated need for extra capacity, the prudent course would be to keep the system as it currently is and see what kind of issues are referred up to the Supreme Court. If it transpires that there are more cases than the Supreme Court can sensibly handle, this can be dealt with at that juncture.

The argument in favour of extending the power to the Court of Appeal is that the route to a Supreme Court appeal is a lengthy and often expensive one. In practice, very few cases in which we have been involved reach the Supreme Court, and leapfrog appeals are rare. In addition, the Supreme Court may struggle to cope with the increase in case load if it were the sole court with the jurisdiction to derogate from retained EU case law. This risks deterring parties from pursuing meritorious appeals on important points of legal principle, and impacting the Supreme Court's ability to hear other urgent business. If this option is pursued, it will be important to incorporate effective control mechanisms (discussed further below) in order to reduce the potential risks associated with extending the powers to the Court of Appeal.

Q2 What do you consider would be the impacts of extending the power to depart from retained EU case law in each of the options below? Please give reasons for your answer.

- a. The Court of Appeal and equivalent level courts;**
- b. The High Court and equivalent level courts and tribunals;**
- c. All courts and tribunals.**

(a) One impact would be an increase (albeit not significant) in the number of cases referred to, and heard by, the Court of Appeal. In the Litigation Committee's view, the Court of Appeal is better placed than the courts and tribunals referred to in (b) and (c) to provide legal certainty - for example, the smaller number of more senior judges means there is less scope for divergence. Furthermore, mechanisms already exist (in particular the need to obtain permission to appeal) which are (in the main) effective in preventing parties from using the appellate route as a mere tactical device, or as an opportunity to pursue fruitless appeals. This should mitigate against the risk of overburdening the Court.

(b) & (c) We believe that an extension of the powers to include the High Court and all courts and tribunals would be a step too far, and risks creating considerable uncertainty and lack of clarity in the law. Whilst it would unquestionably see more cases being heard (and being heard more quickly), we agree with the comments in the Consultation that such a move could encourage re-litigation, create legal uncertainty, and damage the UK's reputation as a destination in which to resolve disputes. In our view, those risks greatly outweigh any advantages that might be gained from extending the powers beyond the Court of Appeal.

Q3 Which option do you consider achieves the best balance of enabling timely departure from retained EU case law whilst maintaining legal certainty across the UK. Please give reasons for your answer.

The Litigation Committee favours either the status quo in the legislation (restricting the power to the Supreme Court) or Option 1 (extending the power to the Court of Appeal of England and Wales and its closest equivalents in other UK jurisdictions) for the reasons set out above.

Q4 If the power to depart from retained EU case law is extended to the Court of Appeal and its equivalents, do you agree that the list below specifies the full range of courts in scope?

- i. Court of Appeal of England and Wales;
 - ii. Court Martial Appeal Court;
 - iii. Court of Appeal of Northern Ireland;
 - vi. The High Court of Justiciary when sitting as a court of appeal in relation to a compatibility issue or a devolution issue; and
 - v. The Inner House of the Court of Session in Scotland.
- Please give reasons for your answer.**

We have no further additions.

Q5 If the power to depart from retained EU case law is to be extended to the High Court and its equivalents, do you agree that the list of courts below captures the full range of courts in scope?

- i. The High Court of England and Wales
 - ii. Outer House of the Court of Session in Scotland;
 - iii. The Sheriff Appeal Court in Scotland;
 - iv. The High Court of Justiciary sitting at first instance; and
 - v. The High Court in Northern Ireland.
- Please give reasons for your answer.**

We have no further additions.

Q6 In respect of either option, are there other courts or tribunals to which the power to depart from retained EU case law should be extended? If yes, in what circumstances should this occur? Please give reasons for your answer.

In our view, no. We note, however, that the Employment Appeal Tribunal is at an equivalent level to the High Court in terms of being chaired by the same level of judge and issuing judgments which are persuasive rather than binding.

Q7 Do you consider that the courts and tribunals to which the power to depart from retained EU case law is extended should be permitted to depart from retained domestic case law relating to retained EU case law? If yes, in what circumstances should this occur? Please give reasons for your answer.

When considering whether to depart from retained domestic case law relating to retained EU case law, the Litigation Committee sees no reason to alter the current rules which require the Court of Appeal to follow higher authorities (of the House of Lords or the Supreme Court), and to depart from its own case law only in limited circumstances,. See also comments in response to question 9(a) below.

Q8 Do you agree that the relevant courts and tribunals to which the power is extended should be bound by decisions of the UK Supreme Court, High Court of Justiciary and Court of Appeal and its equivalents across the UK where it has already considered the question of whether to depart from retained EU case law after the end of the

Transition Period, in the normal operation of precedent? Please give reasons for your answer.

Yes. As explained in answer to question 7 above, the Litigation Committee sees no reason to depart from those rules in relation to this issue.

Q9 Do you agree:

- a. **that the test that should be applied by additional courts or tribunals should be the test used by the UK Supreme Court in deciding whether to depart from its own case law?**
- b. **that this test is capable of being easily understood and applied across the jurisdictions by reference to the relevant case law?**

Please give reasons for your answers. If you do not agree, what alternative test do you consider should be applied? Please give reasons for your answer.

- (a) Yes, but we believe the Court of Appeal and members of the profession would benefit from clear and workable guidance as to the circumstances in which it can depart from its own case law on these matters. This is important in preserving legal certainty and avoiding a situation where appellate courts are applying different tests in each case.
- (b) The Litigation Committee believes the test is capable of being easily understood, but is less easy to apply in specific cases.

Q10 Are there any factors which you consider should be included in a list of considerations for the UK Supreme Court, High Court of Justiciary and other courts and tribunals to whom the power is extended to take into account when deciding whether to depart from retained EU case law? Please give reasons for your answer.

Rather than the Government providing a pre-determined set of guidelines, the Litigation Committee suggests that this should be left to the courts to develop through case law incrementally and over time, which would be more flexible, and would allow the Supreme Court at the appropriate juncture to lay down guidance. However, if the Government prefers to provide guidelines, the Litigation Committee suggests that the following factors should be included in the list of considerations:

- Has the EU case law in question already been adopted in existing English law authorities which the court in question is required to follow?
- Would a departure from retained EU case law preserve legal certainty and clarity, or undermine it?
- Would a departure from retained EU case law undermine existing and settled English legal case law principles?
- Is the EU law in question the subject of imminent legislative change?

Q11 As part of this consultation process, we would also like to know your views on how these proposals are likely to impact the administration of justice and in particular the operation of our courts and tribunals.

- a. **Do you consider that the changes proposed would be likely to impact on the volume of litigation started in UK courts and tribunals? Please specify where, in your view, this would occur and why?**
- b. **Do you consider that the changes proposed would be likely to impact on the type of litigation started in UK courts and tribunals? Please specify where, in your view, this would occur and why?**

- c. Do you consider that the changes proposed would be likely to have more of an impact on particular parts of the justice system, or its users? Please specify where this might occur and why.**
- d. Do you consider that the changes proposed would have more of an impact on individuals with particular protected characteristics under the Equalities Act 2010? Please specify where this might occur and why.**
- (a) It is difficult to estimate the volume of cases without undertaking an impact assessment. In our view any change to the existing arrangements may lead to an increase in the volume of litigation, particularly in the tax and employment fields. However, we expect that limiting the power to depart from retained EU case law to the Court of Appeal will lead to fewer cases compared to the option of extending the power to the High Court and other UK courts and tribunals.
- (b) Certain legal areas are impacted more extensively than others by EU law generally, and EU case law is particularly important within some of these areas. Areas which may be particularly affected include:
- (1) employment law - in particular: (i) TUPE; (ii) discrimination law (including equal pay); (iii) holiday pay (including requirements for holiday pay to include commission and overtime); and (iv) working time (including record-keeping requirements);
 - (2) intellectual property law - UK copyright law may be particularly affected, including the degree to which UK copyright law provides protection for product designs (UK law tended to restrict this, but recent ECJ decisions have required member states to apply the same test as for all copyright works and restricted their ability to lay down supplementary requirements). A case concerning this issue is due to be heard in March 2021 by the Court of Appeal and may provide an early example of how the power to depart will affect the UK judicial system. The law relating to trademarks is also likely to be particularly affected;
 - (3) tax law - The scope of VAT could be a particular area for re-litigation. This would have a wide impact on businesses.
- (c) We would expect that the parts of the justice system which hear employment, intellectual property and tax cases may be particularly impacted by the changes proposed. If the power to depart were limited to the Supreme Court, an increased volume of cases (which may, in some cases, have otherwise been settled at an earlier stage by lower courts), may increase pressure on the Supreme Court.
- (d) Particular areas in which groups with protected characteristics may be affected:
- (1) Pregnancy/maternity: EU case law has strengthened women's rights in areas such as protection for pregnant workers and the ability to depart from case law in this area may adversely affect people with this characteristic;
 - (2) Sex: advances in women's rights may come under threat if the UK does not enshrine the EU Charter on Fundamental Rights into domestic law. Women's EU-derived employment rights and the EU Charter's free-standing right to non-discrimination may be areas of particular concern;
 - (3) Age: Children and young people may be affected by the potential loss of rights otherwise guaranteed under the EU Charter of Fundamental rights and in CJEU case law, including support for child victims of trafficking under the EU Anti-Trafficking Directive and the right for children to be forgotten online under the EU Data Protection Directive;
 - (4) Race: Ethnic minorities may be affected by the loss of specific rights and protections against workplace racial discrimination. Any dilution of the rights of part-time workers may also disproportionately affect ethnic minorities, who have been shown to be more likely to be in part-time work;

- (5) Disability: Disabled people may also be affected by the loss of the EU Charter of Fundamental Rights. In particular, decisions to dilute rights provided by the EU Air Passenger Rights Directive may affect disabled people;
- (6) Sexual orientation: loss of the free-standing right to non-discrimination based on sexual orientation in the EU Charter of Fundamental Rights may adversely affect people with this characteristic.

Q12 Do you have any other comments that you wish us to consider in respect of this consultation.

In our view, it is important to take into account not just the impact on the individuals and businesses in the UK, but also on the attractiveness of English law and the English court system internationally as a means of resolving disputes.

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**THE CITY OF LONDON LAW SOCIETY
LITIGATION COMMITTEE**

Individuals and firms represented on this Committee are as follows:

Gavin Foggo	Fox Williams LLP (Chair)
Mark Lim	Lewis Silkin LLP (Vice Chair)
Jan-Jaap Baer	Travers Smith LLP
Patrick Boylan	Simmons & Simmons LLP
Andrew Denny	Allen & Overy LLP
Richard Dickman	Pinsent Masons LLP
Angela Dimsdale Gill	Hogan Lovells International LLP
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Daniel Spendlove	Signature Litigation LLP
Patrick Swain	Freshfields Bruckhaus Deringer LLP