APPEALS

by

Julian Greenhill

Julian has a practice which encompasses all aspects of property litigation including landlord and tenant (both commercial and residential), contracts of sale, land options, mortgages, restrictive covenants, easements, and adverse possession as well as related professional negligence and insurance claims, and claims for trespass and nuisance. He regularly gives talks and participates in seminars on property law topics, and related procedural issues.

Introduction

1. The purpose of this paper is to summarise the key principles in relation to appeals, with an emphasis upon some of those aspects of the appeal process that are of interest to property litigators.

2. The primary source of law in relation to appeals is CPR Part 52 and the Practice Direction – Appeals ("the Practice Direction") that accompanies it.

3. However, property litigators will often find themselves considering appeals from tribunals or persons other than the court. This may be either from one or other statutory body or appointed person (eg the Lands Tribunal, the Leasehold Valuation Tribunal or the Adjudicator to the Land Registry), or from the decision of an arbitrator made under the Arbitration Act 1996 ("the 1996 Act") (for example, on a rent review determination). Where relevant I will refer to the principles relating to those other decision-makers by way of comparison with the process under Part 52.

The powers and methods of an appeal Court

4. The question raised by any disappointed litigant is, can I overturn the judge's decision on appeal?

5. The starting point for his or her legal advisers has to be to consider whether the decision is one which the appeal court is likely to overturn. Answering this question requires consideration of two issues:

   (a) Will the appeal court simply review the judgment of the lower court or will it rehear the case?

   (b) What test will the appeal court apply in deciding whether to allow an appeal?

Review or rehearing?

6. Under 52.11(1):

   Every appeal will be limited to a review of the decision of the lower court unless –

   (a) a practice direction makes different provision for a particular category of appeal; or

   (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

7. So generally an appeal will be a "review" of the decision below. But this does not in itself answer the practical questions a prospective appellant will have as to the approach the appeal court will take.

   In considering the nature of an appeal, certain questions intrinsically arise. Will the appeal court start all over again as if the lower court had never made a decision? Will the appeal court hear the evidence again? What weight is to be given to the decision of the lower court? Will the appeal court admit fresh evidence and, if so, upon what principles? To what extent and upon what principles will the appeal court interfere with the decision of the lower court? These and related questions are not answered simply by labelling the appeal process as a review or a rehearing. Per May LJ in *E I Dupont de Nemours v Dupont* [2006] 1 WLR 2793

8. "Review" is not a term of art – it does not have a fixed meaning and it does no denote a strict approach by the appeal court. Rather, the approach of an appeal court on a review of a decision will differ depending upon the nature of the decision of the lower court and the types of issues it was required to determine. A review can, in appropriate circumstances involve the admitting of fresh evidence, the overturning of findings or inferences of fact, and can result in a rehearing being ordered in the lower court.

9. May LJ's judgment in *E I Dupont de Nemours v Dupont* [2006] 1 WLR 2793 now reported as a Practice Note on Appeals, makes the point as follows:

   94 As the terms of rule 52.11(1) make clear, subject to exceptions, every appeal is limited to a review of the decision of the lower court. A review here is not to be equated with judicial review. It is closely akin to, although not conceptually identical with, the scope of an appeal to the Court of Appeal under the former Rules of the Supreme Court. The review will engage the merits of the appeal. It will accord appropriate respect to the decision of the lower court. Appropriate respect will be tempered by the nature of the lower court and its decision making process. There will also be a spectrum of appropriate respect depending on the nature of the decision of the lower court which is challenged. At one end of the spectrum will be decisions of primary fact reached after an evaluation of oral evidence where credibility is in issue and purely discretionary decisions. Further along the spectrum will be multi-factorial decisions often dependent on inferences and an analysis of documentary material.

   …

> 96 Submissions to the effect that an appeal hearing should be a rehearing are often motivated by the belief that only thus can sufficient reconsideration be given to elements of the decision of the lower court. In my judgment, this is largely unnecessary given the scope of a hearing by way of review under rule 52.11(1). Further the power to admit fresh evidence in rule 52.11(2) applies equally to a review or rehearing. The scope of an appeal by way of review, such as I have described, in my view means that the scope of a rehearing under rule 52.11(1)(b) will normally approximate to that of a rehearing "in the fullest sense of the word" such as Brooke LJ referred to in Tanfern's case [2000] 1 WLR 1311, para 31. On such a rehearing the court will hear the case again. It will if necessary hear evidence again and may well admit fresh evidence. It will reach a fresh decision unconstrained by the decision of the lower court, although it will give to the decision of the lower court the weight that it deserves. The circumstances in which an appeal court hearing an appeal from within the court system will decide to hold such a rehearing will be rare, not least because the appeal court has power under rule 52.10(2)(c) to order a new trial or hearing before the lower court. … it will be rare for the court to consider that the interests of justice require a rehearing in the fullest sense of the word. All other appeals to which rule 52.11 applies will be limited to a review capable of extending in an appropriate case to the extent which I have described.

10. Those exceptional cases in which the appeal court will conduct a re-hearing are defined in general terms in the Practice Direction which provides (paragraph 9):

> The hearing of an appeal will be a re-hearing (as opposed to a review of the decision of the lower court) if the appeal is from the decision of a minister, person or other body and the minister, person or other body –
>
> (1) did not hold a hearing to come to that decision; or
>
> (2) held a hearing to come to that decision, but the procedure adopted did not provide for the consideration of evidence.

11. An example of a decision that will proceed by way of re-hearing on appeal is a decision of the Adjudicator to the Land Registry established under Part 11 of the Land Registration Act 2002 where the Adjudicator did not hold a hearing to come to his decision: see *Starclass Properties v Dudgeon* [2006] All ER (D) 203 (Feb) deciding that the Adjudicator is a "person" within the meaning of paragraph 9. Under section 111(1) of the 2002 Act a person aggrieved by a decision of the Adjudicator may appeal to the High Court on a point of law or a point of fact.

Grounds on which an appeal may be allowed

12. Having established the broad parameters of the approach the appeal court is likely to adopt, the next issue is the test to be applied.

13. Pursuant to CPR 52.11(3):

> The appeal court will allow an appeal where the decision of the lower court was –
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

14. In what circumstances will an appeal Court overturn a decision on the basis that it was “wrong”? Much depends upon the nature of the decision sought to be overturned: is the court below said to have made an error of law or an error of fact, or has it exercised a discretion erroneously?

Error of Law

15. Conceptually there is no great difficulty in determining whether a court has decided a point of law in a way that is wrong. The court may have misinterpreted a statute, contract, or trust deed. Or it may have misapplied case law. But the following are also errors of law:

    (a) a finding made in the absence of any evidence to support it - *British Telecommunications v Sheridan* [1990] IRLR 27

    (b) a decision that is perverse in the sense that it was not a permissible option open to the lower court – *Piggott Bros & Co v Jackson* [1991] IRLR 309. Such a decision is not one that the appeal court merely disagrees with in the sense that it would not have reached the same decision itself. The decision must be so clearly wrong as to fall outside the permissible range of options open to the trial judge.

    (c) a decision for which no reasons are given – *Flannery v Halifax Estate Agencies* [2000] 1 WLR 377. However, this ground of appeal is narrow in ambit and it is essential to consider the judgment of the Master of the Rolls in *English v Emery Reimbold* [2002] 1 WLR 2409. In the light of that case it will only be possible to overturn a judgment for lack of reasons if, despite a party’s reading of the judgment in the knowledge of the evidence and submissions at trial, that party is genuinely unable to understand why the judge had reached the decision he or she did.

    (d) a failure to resolve conflicts of evidence or opinion central to the case – *Lloyds TSB v Hayward* [2002] EWCA Civ 1813. For example, a judge cannot simply resort to the burden of proof in relation to an issue unless he makes clear that he has striven to make a finding in relation to the issue in question and gives clear reasons why he was unable to do so: *Stephens v Cannon* (2005) Times May 2, 2005.

Error of fact

16. When will the appeal court overturn a finding of fact? Courts have traditionally paid considerable deference to the findings of fact of a lower court and are reluctant to hold those findings to have been “wrong”.

17. There is a long-standing presumption that the lower court was correct in its findings of fact. This presumption derives from the recognition given by the appeal court to the advantage gained by the judge who had the evidence presented to him in full at trial including hearing the oral evidence of witnesses of fact.

18. However, the presumption may be displaced. Obvious examples are where the lower court failed to take into account material matters, for example because it can be demonstrated that witnesses perjured themselves. Or the grounds given by a

judge for preferring the evidence of one witness over another are unsatisfactory due to material inaccuracies or inconsistencies in his reasoning.

19. Yet these are not the only circumstances in which a finding of fact can be held to be wrong. CPR Part 52 recognises that the willingness of an appeal court to overturn a finding of fact must depend upon the nature of the issues of fact. An important distinction is drawn between primary facts and inferences drawn from primary facts. Pursuant to CPR 52.11(4) an appeal court is expressly permitted to draw any inference it wishes from primary facts. The traditional view has been that an appeal court is in just as strong a position to draw inferences as the lower court. Equally, findings based on oral evidence are much harder to overturn that those based solely on documents. As with inferences from primary facts, the appeal court may be in just as strong a position to make findings on the basis of documents as was the lower court.

20. In practice findings of pure inference or based solely upon documentary evidence will be rare. The judgment of Clarke LJ in *Assicurazioni-Generali v Arab Insurance* [2003] 1 WLR 577 makes clear that there is a spectrum of different types of factual issues requiring varying amounts of weight to be attached to the findings below. He said:

> 13 …I observe that CPR r 52.11.1(4) expressly gives the appeal court (which of course includes this court) power to draw any inference of fact which it considers justified on the evidence. There is no suggestion that that rule applies only to appeals by way of rehearing under rule 52.11(1)(b), so that the court has that power when conducting a review. In these circumstances, it seems to me that in the type of appeal in which the court is asked to reverse findings of fact based upon the credibility of the witnesses, the same approach should be adopted in this court whether the appeal is by way of review or rehearing.
>
> 14 The approach of the court to any particular case will depend upon the nature of the issues kind of case determined by the judge. This has been recognised recently in, for example, *Todd v Adams & Chope (trading as Trelawney Fishing Co)* [2002] 2 Lloyd's Rep 293 and *Bessant v South Cone Inc* [2002] EWCA Civ 763. In some cases the trial judge will have reached conclusions of primary fact based almost entirely upon the view which he formed of the oral evidence of the witnesses. In most cases, however, the position is more complex. In many such cases the judge will have reached his conclusions of primary fact as a result partly of the view he formed of the oral evidence and partly from an analysis of the documents. In other such cases, the judge will have made findings of primary fact based entirely or almost entirely on the documents. Some findings of primary fact will be the result of direct evidence, whereas others will depend upon inference from direct evidence of such facts.
>
> 15 In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere. As I see it, that was the approach of the Court of Appeal on a "rehearing" under the Rules of the Supreme Court and should be its approach on a "review" under the Civil Procedure Rules 1998.

16 Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way.

…

22 … the extent to which the findings of fact depend upon oral evidence or what Lord Hoffmann called the "penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance" will vary from case to case. In the instant case, the judge had the considerable advantage of seeing the witnesses and of assessing their credibility, although, as ever, he did so against the documentary material that was available. In these circumstances we should, I think, take particular care before holding that his conclusions of fact were wrong, especially since (as appears below) some of his conclusions depended to a significant extent upon the view which he formed of the witnesses. On the other hand this is not a case in which the judge was concerned to weigh a number of factors such that the judgment which he was called upon to make was a matter of degree.

21. In the same case, Ward LJ said at 197:

I would pose the test for deciding whether a finding of fact was against the evidence to be whether that finding by the trial judge exceeded the generous ambit within which reasonable disagreement about the conclusion to be drawn from the evidence is possible. The difficulty or ease with which that test can be satisfied will depend on the nature of the finding under attack. If the challenge is to the finding of a primary fact, particularly if founded upon an assessment of the credibility of witnesses, then it will be a hard task to overthrow. Where the primary facts are not challenged and the judgment is made from the inferences drawn by the judge from the evidence before him, then the Court of Appeal, which has the power to draw any inference of fact it considers to be justified, may more readily interfere with an evaluation of those facts.

Difference between a point of fact and a point of law

22. The distinction between a point of fact and a point of law remains important. A number of tribunals can only be appealed on a point of law. The Lands Tribunal is one of them (see section 3(4) of the Lands Tribunal Act 1949, though the former requirement for the Lands Tribunal to state a case no longer applies: *Re Girl's Day School Trust v Dadak* [2002] 1 P&CR 4).

23. So too in relation to an appeal from an arbitrator which can only be on a point of law. Moreover, the definition of a point of law in relation to an arbitration is of rather more narrow compass than in a court, a point of law being more narrowly defined in the context of the 1996 Act than under Part 52.

24. An arbitrator's findings of fact are conclusive. Under section 69(1) of the 1996 Act an appeal can only be made "on a question of law arising out of an award made in

proceedings". "Question of law" is defined in section 82(1) as being "a question of the law of England and Wales". So it does not include a question of foreign law.

25. "Question of law" has a narrower meaning than in equivalent court proceedings. This is chiefly because it is to be interpreted in the context of other provisions of the 1996 Act, including section 68 which provides that an arbitrator's award can be challenged on the basis of serious irregularity. So, for example a number errors that have been held by the Courts to be errors of law for the purposes of appeal from a judge's findings, are not a point of law within the meaning of the 1996 Act but rather are irregularities challengeable under section 68. For example:

    (a) unlike the position outlined above in relation to an appeal from a judges decision, a failure by an arbitrator to resolve an issue is an irregularity which should form the subject of a challenge under section 68(2)(d) of the 1996 Act, not an appeal under section 69.

    (b) also where there is no evidence to support a finding of fact, an appeal is made very difficult by section 34(2)(f) which enables an arbitrator to dispense with strict rules of evidence. It has on a number of occasions been said that such a ground of appeal is inconsistent with the narrow scope of the right under section 69 of the 1996 Act: see *Secretary of State for the Environment v Reed International* [1994] 1 EGLR 22.

    (c) a decision is that is perverse in the sense that it was not a permissible option open to the arbitrator is likely to come under section 68 rather than form the basis of an appeal under s69. s68(2)(b)(c) or (d).

    (d) and a failure to give reasons will not normally form a ground of appeal from an arbitrator. Under section 70(4) of the 1996 Act the Court has power to require the tribunal to give reasons for the purpose of an appeal but the failure to give them will not found the basis of an appeal in itself.

Appealing the exercise of a discretion

26. Returning to consideration of appeals from the decision of a lower court, in seeking to appeal the exercise of a judicial discretion, the test to be satisfied is a high one:

> Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale. *AEI Rediffusion Music v Phonographic Performance Ltd* [1999] 1 WLR 1507 per Lord Woolf MR

27. Costs are in the discretion of the court and so the same test is applied to a judge's decision on costs: *Adamson v Halifax Plc* [2003] 1 WLR 60. It is important to distinguish between an appeal against a judge's order on costs (both as to where the costs will lie and as to their amount on a summary assessment) and the question of appeal against a detailed assessment carried out pursuant to a judge's order. In the latter case, if the assessment is carried out by an authorised court officer, it is not subject to part 52 (see 52.1(2)) but rather to special rules under CPR 47.20 to 47.23.

Appealing a case management decision

28. Equally, the test to be satisfied in persuading the Court to overturn the decision of a judge on a question of case management is undoubtedly a high one. Case management is a matter in relation to which the court has wide discretion. As Chadwick LJ said in *Royal & Sun Alliance v T&N* [2002] EWCA Civ 1964 at [38]:

> this Court should not interfere with case management decisions made by a judge who has applied the correct principles, and who has taken into account the matters which should be taken into account and left out of account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge. It is pertinent to have in mind, in the present case, that the judge was well aware of the need for caution when considering whether to direct a trial of issues on assumed facts; and was well aware that there were dangers in the course which he decided to take. The judge appreciated that there was a risk that his decision would lead to delay and to wasted costs. If his approach to the evaluation of the risk was correct, I would not think it right to substitute my own view for the conclusion that he reached.

To whom do you appeal?

29. Having decided there is merit in an appeal, it is essential to work out the proper destination of your appeal. Appeals from the decision of a judge are dealt with comprehensively in Table 1 of the Destination Tables at paragraph 2A of the Practice Direction.

30. Generally an appeal lies to the next highest judge in the hierarchy (for these purposes a High Court judge being next senior to a county court judge) except that a final decision in a multi-track case will always go direct to the Court of Appeal even from a district judge of the county court. It follows that all decisions of a county court judge other than a final decision by in a Part 7 claim allocated to the multi-track will be appealed to a High Court judge. In particular a final decision of a Part 8 claim will go to a High Court judge. Second appeals must go the Court of Appeal.

31. Again care needs to be taken to work out the route of appeal in relation to the various other tribunals encountered. For example, an appeal from the decision of a Leasehold Valuation Tribunal lies (with permission) to the Lands Tribunal: section 175 of the Commonhold and Leasehold Reform Act 2002. An appeal from the Lands Tribunal lies direct to the Court of Appeal: section 3(11)(a) of the Lands Tribunal Act 1949.

Permission to appeal

32. Subject to very narrow exceptions, it is necessary to obtain permission to appeal from a decision of a judge in the county court or the High Court: CPR 52.3(1).

33. An application should always be made to the lower court because it is a costs free opportunity to persuade someone fully apprised of the matter that it should be heard on appeal. Moreover, if that application succeeds there is no need to go through the

permission process provided it is a first appeal (and moreover there is no obligation to pursue the appeal having obtained permission below).

34. The position in relation to second appeals is different – the permission of the Court of Appeal is always needed in that case: CPR 52.13.

35. If the lower court refuses permission then there is a right to seek permission from the appeal court in an appeal notice. If that application results in a refusal of permission without a hearing, there is a right to renew the application at an oral hearing before the appeal court. In other words, there is an entitlement sufficient to enable you to always get your client in front of an appeal court for an oral permission hearing if you wish.

36. Pursuant to CPR 52.3(6):

> Permission to appeal may be given only where –
>
> (a) the court considers that the appeal would have a real prospect of success; or
>
> (b) there is some other compelling reason why the appeal should be heard.

37. The "real prospect of success" hurdle under (a) is familiar from applications for summary judgment under Part 24. It requires the appeal to have a more than fanciful prospect of success but it need not be shown that the appeal is likely to succeed on the balance of probabilities.

38. Paragraph (b) provides an alternative basis for the granting of permission. Conceptually there is some difficulty with the idea that there should be a compelling reason to hear an appeal that does not have a real prospect of success. However, it has been held to apply, for example, where a well-funded party wished to pursue an important point of principle albeit with slender prospects of success, or where the judgment below was sufficiently unclear that it was not possible to reach a view on the merits at the permission stage.

Refusal of permission

39. If permission is refused that will generally be the end of the matter. In particular, the Court of Appeal has no jurisdiction to hear an appeal against the refusal of a lower appeal court to grant permission: paragraph 4.8 of the Practice Direction and section 54 of the Access to Justice Act 1999.

40. Can a refusal of permission to appeal be the subject of a challenge by way of judicial review? This question has been the subject of a number of recent decisions the result of which is that, in the cases of those courts and tribunals whose jurisdiction is founded in statute judicial review is available in exceptional circumstances: *Sivasubramanim v Wandsworth County Court* [2003] 1 WLR 475.

41. However, in general there will be no right to seek judicial review of the decision of a judge to refuse permission to appeal because the statutory scheme provides adequate protection and it is only in very rare circumstances that a judge's statutory right to decide whether to grant permission will be exceeded in such a way as to found a judicial review. It is not enough that the judge gets the decision on

permission “wrong” in the eyes of the High Court. Lord Phillips MR in *Sivasubramanim* said as follows:

> 54 This scheme we consider provides the litigant with fair, adequate and proportionate protection against the risk that the judge of the lower court may have acted without jurisdiction or fallen into error. The substantive issue will have been considered by a judge of a court at two levels. On what basis can it be argued that the decision of the judge of the appeal court should be open to further judicial review? The answer, as a matter of jurisprudential theory, is that the judge in question has limited statutory jurisdiction and that it must be open to the High Court to review whether that jurisdiction has been exceeded. But the possibility that a circuit judge may exceed his jurisdiction, in the narrow pre- *Anisminic* sense, where that jurisdiction is the statutory power to determine an application for permission to appeal from the decision of a district judge, is patently unlikely. In such circumstances an application for judicial review is likely to be founded on the assertion by the litigant that the circuit judge was wrong to conclude that the attack on the decision of the district judge was without merit. The attack is likely to be misconceived, as exemplified by the cases before us. We do not consider that judges of the Administrative Court should be required to devote time to considering applications for permission to claim judicial review on grounds such as these. They should dismiss them summarily in the exercise of their discretion. The ground for so doing is that Parliament has put in place an adequate system for reviewing the merits of decisions made by district judges and it is not appropriate that there should be further review of these by the High Court. This, we believe, reflects the intention of Parliament when enacting section 54(4) of the 1999 Act. While Parliament did not legislate to remove the jurisdiction of the High Court judicially to review decisions of county court judges to grant or refuse permission to appeal, we do not believe that Parliament can have anticipated the spate of applications for judicial review that section 54(4) appears to have spawned.
>
> 55 Everything that we have said should be applied equally to an application for permission to claim judicial review of the decision of a judge of a county court granting permission to appeal. We are not aware that such an application has yet been made.
>
> *Exceptional circumstances*
>
> 56 The possibility remains that there may be very rare cases where a litigant challenges the jurisdiction of a circuit judge giving or refusing permission to appeal on the ground of jurisdictional error in the narrow, pre- *Anisminic* sense, or procedural irregularity of such a kind as to constitute a denial of the applicant's right to a fair hearing. If such grounds are made out we consider that a proper case for judicial review will have been established.

42. The same principles apply in relation to the Lands Tribunal. In order to bring an appeal from a decision of a leasehold valuation tribunal to the Lands Tribunal, it is necessary to obtain the permission of either the LVT or the Lands Tribunal. In principle it is open to an aggrieved appellant to seek judicial review of a refusal by the Lands Tribunal to grant permission to appeal: *R v The Lands Tribunal ex p Sinclair Gardens Investments* [2005] EWCA Civ 1305. However, again, because the nature of the statutory scheme was an adequate system and provided proper

redress it would take an exceptional case for judicial review to be justified. This would require not just an error of law in the permission decision, but also that the error in question was sufficiently grave as to bring the case within an exceptional category of cases.

Arbitration

43. The requirements of permission are stricter in relation to an arbitration under the 1996 Act. An appeal from an arbitrator can only be made with the leave of the Court (unless the parties agree) and leave will only be given in the event (pursuant to section 69(3) of the 1996 Act):

    (a) that the determination of the question will substantially affect the rights of one or more of the parties,

    (b) that the question is one which the tribunal was asked to determine,

    (c) that, on the basis of the findings of fact in the award—

        (i) the decision of the tribunal on the question is obviously wrong, or

        (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

    (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

44. It will be unusual for a point of law arising in, say, a rent review arbitration to raise a question of general public importance, chiefly because such a point will usually relate to the interpretation of a specific provision in a lease. So it will usually be necessary to persuade a court that the arbitrator's award was "obviously wrong". An example of a recent rent review case in which the court was satisfied that the determination of the question would both substantially affect the rights of the parties and the award was obviously wrong is *Watergate Properties v Securicor Cash Services* [2005] EWHC 3438(Ch).

45. Pursuant to section 69(5) the court is entitled to determine an application for leave to appeal without a hearing. Where permission to appeal is refused by the court, there is no right in general for the applicant to have an oral hearing to renew the application for permission: *BLCT v Sainsbury's* [2003] EWCA Civ 884.

Can new points be made or fresh evidence adduced?

46. Although proper preparation of the case at first instance ought to render it unusual, it is quite common for parties to wish to introduce points or evidence not put before the court below. Can they do so?

Raising new points of law not raised below

47. A party will not generally be permitted to raise on appeal a matter which could and should have been raised before the court below: *Jones v MBNA International Bank*

June 30 2000. This is said to be a principle based not only on efficiency, but also on substantive justice, namely that parties at first instance are entitled to know what the issues are and to have them determined once and for all at trial. There is a residual discretion to allow new points to be raised, but it will only be exercised in exceptional circumstances. In particular the court will be astute not to permit a party to put forward on appeal a fresh case built upon the judge's findings of fact at first instance: see eg *Singh v Singh* [2002] EWCA Civ 992.

48. Again the situation is even stricter in relation to arbitration where the narrow discretion in relation to exceptional circumstances will not apply. An appeal against an arbitrator's award can only be made in relation to a point of law that the tribunal was asked to determine (section 69(3)). If the arbitrator was did not have a particular issue put before him, it cannot be raised on appeal: *Marklands v Virgin Retail* [2004] 2 EGLR 43. This reflects the contractual origins of the arbitration process, namely that the arbitrator considers and determines those points which the parties agree to put before him.

Introducing fresh evidence

49. Under CPR 52.11(2) an appeal Court will not receive evidence that was not before the lower Court unless it orders otherwise. The starting point in considering the admission of fresh evidence is the classic three limb test in the case of *Ladd v Marshall* [1954] 1 WLR 1489. Lord Denning said as follows:

> To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

50. It is now clear that, under the CPR, *Ladd v Marshall* provides the starting point. But having applied the *Ladd v Marshall* test, the court must consider, in the light of the overriding objective and the circumstances of a particular case, whether any relaxation of the *Ladd v Marshall* principles is appropriate: see *Sun Bank Plc v Wootten* [2004] EWCA Civ 1423.

51. In practice the Ladd v Marshall criteria are hard to satisfy. One type of case in which the court will be prepared to admit fresh evidence is where there is a demonstrable risk that a fraud has been perpetrated on the court: *Couwenbergh v Valkova* [2004] EWCA Civ 676. But even then, the evidence in question must pass the *Ladd v Marshall* criteria. In one case the fresh evidence in a forgery case took the form of a confession by a party that, contrary to the finding of the court, she had in fact forged the document in question. By the time of the hearing for permission, the witness had withdrawn the confession and the appeal court held among other things that the requirement that the evidence be credible could not be satisfied by reason of her vacillating version of events: *Sun Bank Plc v Wootten*.

52. Finally, two practical points that it is worth bearing in mind.

Appeals are against orders not judgments or reasons

53. First, it must be remembered that an appeal is against an order not against a judgment. Often clients may object to the reasoning or something else said in the judgment. But this cannot form the subject of an appeal. In particular if a party has succeeded in full, they cannot appeal simply because they object to the judge's reasoning.

54. There may be a concern that a finding not forming part of the order could bind one or both of the parties in the future even though it does not appear in the order or even affect its contents. If it is desired to make such a finding the subject of an appeal the best course would be to request the lower court to make a declaration as to that finding so that it may be appealed as part of the order.

Can your objective be achieved by other means?

55. Second, it is always worth checking that there is not another simpler method by which the judgment can be put right without mounting an appeal. Some obvious examples are:

    (a) Set aside – there are numerous provisions of the CPR that expressly provide for the set aside or variation of judgments or orders without there being any need for an appeal, for example:

        (i). power of the court to vary or revoke order made under CPR under CPR 3.1(7)

        (ii). application to set aside judgment without trial obtained after striking out under CPR 3.6

        (iii). application to vary or set aside an order made without notice under CPR 23.10(1)

        (iv). application by party who failed to attend trial to set aside judgment or order made against him under CPR 39.3(3)

    (b) the "Slip rule" – the court has power to correct an accidental slip or error in a judgment or order at any time under CPR 40.12.

©Julian Greenhill
Wilberforce Chambers
020 7306 0102
jgreenhill@wilberforce.co.uk

November 2006