

7. Appeals

7.1 Introduction

An appeal process is an essential part of the judicial system in any democratic society. It is a useful discipline to be subject to that process, and no judge should feel aggrieved at being appealed. We all make mistakes from time to time, although we should, of course, always strive in our judgments to deal with the important issues of fact and law clearly and concisely. The rules are not entirely straightforward and are often overlooked by professional representatives, never mind litigants in person.

7.2 Core sources

The starting point is Pt 52 Civil Procedure Rules (CPR) and its Practice Direction (PD). It should be noted that significant changes were made to the PD in May 2004. It is helpful to have in mind a number of other sources. They include:

- the Access to Justice Act 1999 (Destination of Appeals) Order 2000 (SI 2000/1071) and any amendments to it. Amendments tend to be made by Civil Procedure (Modification of Enactments) Orders. The most recent was the 2003 Order (SI 2003/490)
- *Tanfern v Cameron-MacDonald* [2002] 2 All ER 801, in which Brooke LJ considered at length the changes to the appeal regime introduced in 2000. (He subsequently made minor corrections in *Clark v Perks* [2001] EWCA Civ 1228 and *Dooley v Parker* [2002] EWCA Civ 96.)
- *Colley v Council of Licensed Conveyancers* [2001] 4 All ER 998
- *Asiansky Television v Bayer-Rosin* [2001] EWCA Civ 1792
- *Woodhouse v Consignia* [2002] 2 All ER 737
- *London Borough of Barnet v Hurst* [2002] 4 All ER 457
- *Jolly v Jay* [2002] EWCA Civ 277 (although some of the issues raised were addressed by subsequent amendment to the Practice Direction)
- *Hertfordshire Investments v Bubb* [2000] 1 WLR 2318

7.3 Routes of appeal

The general rule is that an appeal is to the next level of judge. So, in the High Court, an appeal from the decision of a High Court judge is to the Court of Appeal and from a master or district judge to a High Court judge. In the county court, an appeal from a circuit judge (other than on a final decision) is to a High Court judge and from a district judge to a circuit judge. However, there are, inevitably, exceptions. These three can be found in Articles 4 and 5 of the Destination of Appeals Order:

- an appeal against a final decision in a Part 7 claim allocated to the multi-track is to the Court of Appeal
- an appeal against a final decision made in various specialist proceedings or under the Companies Acts 1985 and 1989 is to the Court of Appeal

- second appeals are to the Court of Appeal.

In addition, there are three tables in the PD which set out the routes of appeal clearly and reference should be made to them to ensure that the correct destination of an appeal is set out in the order you make. They are:

- 52PD.3.1 (Civil appeals from the county court)
- 52PD.3.2 (Insolvency proceedings)
- 52PD.3.3 (Proceedings which may be heard in the Family Division of the High Court and to which the CPR may apply).

(There is an interactive routes of appeal guide on the Court of Appeal website at: http://www.hmcourts-serice@gsi.gov.uk/infoabout/coa_civil/routes_app/index.htm)

An appeal in committal proceedings from an order made by a circuit judge is to the Court of Appeal – see *Hurst*. This is the effect of s.13 Administration of Justice Act 1960 (which was overlooked at the time of introducing the new appeal regime). Technically the same route is available from a decision of a district judge as a result of *King v Read and Slack* [1999] 1 FLR 425 and *Hampshire County Council v Gillingham* (CAT 22 June 2000), but the Court of Appeal in *Hurst* made it clear that this route should now be regarded as redundant.

An appeal can be ‘leapfrogged’ to the Court of Appeal – see CPR 52.14 and also s.57 Access to Justice Act. This power should be used sparingly, and, if you are considering a leapfrog, it is a good idea to consult your designated civil judge. This is particularly important if you sit part time as a deputy district judge or as a recorder. Examples where it may be appropriate include (a) where the point is already before the Court of Appeal in another case, and (b) where there appear to be conflicting authorities on a point of importance.

Each circuit has specified venues for the management and hearing of appeals to the High Court – see PD 52 s.8.

7.4 ‘Final decision’

These words have caused considerable confusion. The definition is found in article 1(2)(c) and (3) of the Destination of Appeals Order and appears also in PD52 2A.3–5. The result is, for example, that an order striking out a claim under CPR Pt 3 or granting summary judgment under CPR Pt 24 is *not* a final decision, because it is not a decision which would finally determine the proceedings whichever way the court decided the issue. On the other hand, where the court orders the trial of a preliminary issue (e.g. limitation), the decision on that issue will be a final decision. An assessment of damages is a final decision, so that if a district judge assesses damages in a Part 7 claim allocated to the multi-track, any appeal will be to the Court of Appeal. An order made on a summary assessment of costs/detailed assessment of costs or on an application to enforce a decision is not a final order.

Note PD 52 2A.6: where the decision to be appealed is a final decision in a Part 8 claim treated as allocated to the multi-track under CPR 8.9(c), consideration should be given to the appeal being heard by the Court of Appeal.

Where a judge hearing a claim allocated to the multi-track in the county court granted a defendant's submission that there was no case to answer without putting the defendant to its election as to whether to give evidence, that was a final decision which the Court of Appeal had power to determine: *Graham v. Chorley Borough Council* [2006] EWCA Civ .

It is of considerable importance to know and make clear on the face of the order whether the order you make is a final order or not. Part 40, 2(4) CPR provides that all judgments or orders shall state: (i) whether or not the judgment or order is final; (ii) whether an appeal lies from the judgment or order and, if so, to which appeal court; (iii) whether the court gives permission to appeal; and (iv) if not, the appropriate appeal court to which any further application for permission to appeal may be made.

PD 52 4.3B provides that where a party requests further time in which to make an application for permission to appeal, the court may adjourn the hearing to enable that party the opportunity to do so. This power should be exercised sparingly and a fixed date should be determined as soon as possible when the court will consider any such application.

7.5 Time limits

Unless the lower court specifies a different period, the appellant's notice must be filed within 21 days after the date of the decision of the lower court. On the face of it, any different period should not normally exceed 28 days – see PD52 5.19. Any application to vary the time limit for filing an appeal notice (whether the 21 days or the alternative period specified by the lower court) must be made to the appeal court, and the parties cannot agree to extend the time limit – see CPR 52.6. Any application for an extension should be made in the appellant's notice with reasons – see PD 52 5.2. However, in *Aujla v Sanghera* [2004] EWCA Civ 121, the Court of Appeal said that the lower court can give a direction under 52.4(2)(a) not only on the date of its decision but also at a later date.

Arguments can arise as to what was the date of the decision of the lower court. Assistance can be derived from *Sayers v Clarke Walker* [2002] 3 All ER 490 and *Owusu v Jackson* [2002] EWCA Civ877. The latter case is a useful reminder of the need, when reserving judgment, to fix a date for the handing down of or pronouncement of the judgment. It also gives useful guidance as to how this can be achieved where the judge is part-timer or, where although the judge is in post, there is a practical impediment to that judge actually pronouncing the judgment. The date when the judgment is handed down is the date of the order and when the court will normally consider any application for permission to appeal.

7.6 The permission requirement

The general rule is that permission to appeal is required, but again there are exceptions: where the appeal is against:

- a committal order
- a refusal to grant habeas corpus
- a secure accommodation order under s.25 Children Act 1989, or
- an order specified in the relevant practice direction – see CPR 52.3(1).

A committal order means an order committing the person to prison and includes a suspended sentence. Any other order made by a court in the exercise of its jurisdiction to punish for contempt requires permission to appeal – see *Hurst*. Either the applicant or the contemnor can appeal against a committal order and neither needs permission to appeal: see *Wood v Collins* [2206] All ER (D) 165 (May).

It is important to note that, so far as statutory appeals are concerned, permission is not required, unless the statute specifies otherwise. The intention was to apply the general permission requirement to these appeals, but in *Colley* the Court of Appeal concluded that this intention had not been achieved. As yet, the position has not been rectified.

CPR 52.3(2) and PD 52 4.6 provide that the application for permission can be made (a) to the lower court at the hearing at which the decision to be appealed was made, or (b) to the appeal court in the appeal notice. The wording of the first limb is sometimes overlooked, particularly in relation to hearings before a district judge, with practitioners writing in after the event asking the judge who made the decision, for permission to appeal. The lower court has no power to consider such an application. Where a litigant in person appears before a District Judge, he should be informed of the need to apply for permission to appeal. This can be done at the beginning of the hearing and before any decision is made so as not to give the impression that an appeal is being encouraged.

In the county court, permission applications are usually considered by the designated civil judge or his deputy.

7.6.1 Form N460

If, at the conclusion of a hearing, you are asked for permission to appeal, you should complete Form N460 in every case, whether you refuse or grant the application. It should then be handed to the party who asked for permission. The reason is that this form is one of the documents which an appellant is expected to file with his appellant's notice – see PD 52 5.6. It is not necessary to give a lengthy exposition of your reasons: a concise summary will suffice. Always check that there is a supply of the forms in your court/chambers.

7.6.2 Observations in relation to an appeal

It was the practice in some courts, where the appeal is from the decision of a district judge, to seek the observations of that judge in relation to the appeal. This is highly undesirable, unless, perhaps, there is no suitable record of the decision. If it is done, it is essential that those observations are communicated to the parties.

7.6.3 Raising the issue of permission

There are divergent views as to whether a judge should raise the issue of permission on their own initiative. Some feel that it is ridiculous to ask the party, who has just lost: 'Do you wish permission to appeal?' and to follow this up with a swift refusal when that party says 'Yes'. This is arguably a somewhat simplistic approach, and indeed the Court of Appeal has indicated that judges should not be afraid to raise the issue. Flexibility is required, having regard to all the circumstances. Where the parties are legally represented, the losing party may raise the issue anyway. If it is not raised, more often than not matters may be best left there, but if you feel that there is a finely balanced issue, no harm is done by raising it.

Where a litigant in person is involved, there may be an immediate indication of dissatisfaction, in which event it is plainly appropriate to explain the appeal regime and address the issue of permission. If there is no such reaction, then you will be guided by your own feel for the case in deciding whether or not to raise the topic.

If you have raised the issue of permission to appeal at the commencement of the hearing, there may be no need to raise it again at the end unless the hearing has been long and the litigant in person may have overlooked the need to apply for permission to appeal.

7.6.4 Deciding whether or not to give permission

In deciding whether or not to give permission, follow the criteria, which are to be found in CPR 52.3(6). The appeal must have a real (i.e. not fanciful) prospect of success or there must be some other compelling reason. There is nothing wrong with you having the courage of your convictions and saying: 'No'. However, if you really feel that the issue is finely balanced or that it raises an important point of principle, it may be perfectly proper to give permission. However, in the context of case management decisions, do not forget that PD52 4.5 sets out further factors to be considered.

7.6.5 Lower court refuses permission

If the lower court refuses permission, the application can be renewed to the appeal court. Any application to the appeal court for permission is made by appeal notice, and is commonly first considered on paper. If the decision on paper is to refuse permission, the order should set out the reasons for refusal – see PD52 4.13.

7.6.6 Reconsidering a decision

The appellant can ask for the decision to be reconsidered at a hearing – see CPR 52.3(4). The request must be filed within seven days after service of the notice of refusal – see CPR 52.3(5). PD52 4.13 provides that the oral hearing can be before the same judge. Usually, if the appeal is to a circuit judge, the designated circuit judge will have nominated particular circuit judges who are to hear appeals. Note the particular requirements of PD52 4.14A(2), where the appellant requesting reconsideration is legally represented, and 4.17 where the appellant has public funding.

7.6.7 Directing a permissions hearing

It is possible to dispense with the paper process and direct a permission hearing. This may be appropriate if the issue appears finely balanced. There are differing views as to whether it is worth dealing with a permission application on paper where the appellant is a litigant in person. Some consider that there will inevitably be a request for reconsideration, so it is quicker and cheaper to proceed straight to a hearing. Much will depend on personal experience, but it is certainly not the case that the written refusal in these cases is always followed by a request for a hearing. A proper explanation for the reasons for refusal may well concentrate the mind of the appellant. It may also assist the judge holding a reconsideration hearing to ensure that everyone focuses on the core issues.

7.6.8 Granting a limited permission

The grant of permission can limit the issues to be heard and/or can be subject to conditions – see CPR 52.3(7). If you grant a limited permission, you should either expressly refuse permission on the other issues or reserve that question to the court hearing the appeal – see PD52 4.18. An obvious example of a condition is requiring the appellant, who is challenging an order requiring him to pay money, to pay the relevant sum into court.

Remember that permission for a second appeal (i.e. an appeal from a decision of the High Court or a county court, which was itself made on appeal) can only be given by the Court of Appeal – see s.55 Access to Justice Act 1999 and CPR 52.13. Advocates often overlook this.

7.6.9 Right of appeal

There is no right of appeal against an order refusing permission to appeal made at an oral hearing – see s.54(4) Access to Justice Act and PD52 4.8. There is, however, a right to appeal any other order made at such a hearing (*Riniker v University College, London* [2001] 1 WLR 13) and the usual appeal route applies (*Jolly*). Brooke LJ also drew attention to the importance of this distinction in *Foender v Bond Lewis* [2001] 2 All ER 1019. In exceptional cases, the refusal of permission to appeal in the county court may be amenable to judicial review (*R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738).

7.7 The appellant's notice

The requisite form is N161 unless it is an appeal from the decision of a district judge hearing a claim allocated to the small claims track when N164 is the appropriate form. The N161 is not a user-friendly document and the requirements regarding documentation are set out in detail in PD52 s.5.6 (2). The grounds of appeal must specify in respect of each ground whether it raises an appeal on a point of law or is an appeal against a finding of fact. When N164 is used, PD52 s.5.8(2) provides the more limited documents to be filed.

The key document is, arguably, the 'suitable record of the reasons for judgment of the lower court'. PD52 5.12 fleshes out what is meant by this. The reason for the importance of this document is that an appeal is generally by way of review. However, where the appeal relates to a claim allocated to the small claims track, a suitable record is not required, unless the court decides it is needed to enable the court either to decide if permission should be granted or, if granted, to decide the appeal – see PD52 5.8(5).

7.7.1 Transcripts for unrepresented appellants

An unrepresented appellant may be entitled to a transcript at public expense. If the request is simply for a transcript of the judgment, the test is entirely means-based. If the request is for a transcript not only of the judgment but also of the evidence or the hearing, the court must be satisfied that there are reasonable grounds for appeal – see PD52 5.18. The Court of Appeal has a detailed form for an appellant to provide financial information. This form, or adaptations of it, is in use at some other courts. The fact that an appellant is fee exempt does not necessarily mean that the request must be granted. Some people may have assets which do not disentitle them to benefits, but which it is not reasonable to ignore. There is no entitlement to partial remission of the transcriber's fee – either the appellant must pay or it is provided at public expense.

7.7.2 Note of judgment as an alternative

Transcripts can be expensive and your court may not have a formal budget for them. An alternative solution which should not be overlooked, particularly in modest claims where the other party was legally represented, is to require the advocate to supply a note of judgment see PD52 5.12(3).

7.8 The respondent

Unless the court orders otherwise, the appellant's notice must be served on the respondent – see CPR 52.4(3). A request for reconsideration at an oral hearing must also be served – see PD52 4.14. However, unless the court otherwise directs, a respondent need not take any action until notified that permission has been granted – see PD52 5.22. Unfortunately, it is not unusual for respondents to ignore this and, for example, to write in setting out reasons why permission should be refused. Notice of a permission hearing has to be given to a respondent, but he is not required to attend unless so requested by the court – see PD52 4.15. Respondent's costs of permission applications are addressed in PD52 at 4.22 to 4.24.

It is worth bearing in mind that delay and expense may be avoided by directing in an appropriate case that the permission hearing will, if permission is granted, be followed immediately by the appeal. This is especially so when the application for permission to appeal is from a decision made in a case allocated to the small claims track.

Where permission has been granted, CPR 52.5 and PD52 s.7 come into play. If the respondent wishes the appeal court to vary the order below, he must appeal, using a respondent's notice, and the permission requirement is the same as for the appellant. A respondent who contends that the order below should be upheld for additional or different reasons is also required to file a respondent's notice, but permission is not required. In other cases the respondent may file a respondent's notice, but this is optional.

7.9 The appeal hearing

PD52 contains extensive provisions about such matters as appeal bundles and skeleton arguments. Note 5.10(6) which provides for sanctions where a skeleton argument does not comply with the requirements and/or is filed late. A legally represented respondent, who wishes to address the court, must file a skeleton argument except in a claim allocated to the small claims track when he is encouraged to do so to assist the court – PD52 7.6 and 7.7A.

CPR 52.11 introduced fundamental changes to the conduct of the hearing.

7.9.1 Review and not a rehearing

First, the appeal is a review and not a rehearing, unless a practice direction provides otherwise (e.g. PD52 9.1) or the court considers that the interests of justice require a rehearing.

In *Tanfern Brooke* LJ observed that in 'interlocutory' appeals, the decision of the lower court will attract much greater significance and that on a review the appeal court could only interfere in the limited circumstances set out in CPR 52.11(3).

In *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642, Clarke LJ suggested that there was little practical difference between a review and a rehearing in an appeal against a trial judge's findings of fact, but this proposition is open to question. It was not shared by Ward LJ in the same case.

When is a rehearing appropriate? It is suggested that the answer is: rarely. The Court of Appeal gave some guidance, albeit very generalised, in *Asiansky* and also in *Audergon v La Baguette* [2002] EWCA Civ 10. It may in certain circumstances be necessary if there is no suitable record of the decision. The absence of a reasoned decision may also justify conducting a rehearing, but in that context note the important decision of the Court of Appeal in *English v Emery Reimbold & Strick* [2002] 3 All ER 385.

7.9.2 Receiving evidence

Secondly, the appeal court will not, unless it orders otherwise, receive evidence which was not before the lower court. Under the old regime, it had become routine for one or more parties to put in further evidence for the appeal. This is broadly incompatible with an appeal by way of review. Vigilance is necessary, but it is not uncommon for appellants in particular to file one or more witness statements in support of the appeal without asking for or obtaining permission, and without explaining why it is sought to put in further evidence. This occurs despite the clear warning by Brooke LJ in *Tanfern* and, more recently, in *Woodhouse*, in which he said:

‘[This] case provides a very good illustration of what may happen if they do not. The evidence before the district judge was very sparse, and the circuit judge refused to admit a much fuller witness statement on the appeal. The moral of this story is that greater attention needs to be paid to the quality of the evidence adduced at the first hearing, because there may not be a second chance on appeal.’

The well-known case of *Ladd v Marshall* [1954] 1W.L. R. 1489; [1954] 3 All ER 745 remains an important guide as to the principles on which further evidence may be admitted, although the court does now, of course, have to apply also the overriding objective. In addition to *Hertfordshire Investments*, see, for example, *Gillingham v Gillingham* [2001] EWCA Civ 906.

7.9.3 Grounds for allowing an appeal

Thirdly, there are two grounds for allowing an appeal: the decision of the lower court was (a) wrong; or (b) unjust because of a serious procedural or other irregularity. Both are onerous.

Assicurazioni Generali Spa v Arab Insurance Group (BSG) [2002] EWCA Civ 1642; [2003] 1 W.L.R. 577 does contain some helpful guidance as to the approach to an appeal based on alleged errors of fact by the lower court. In relation to appeals where the decision involved an exercise of discretion, Brooke LJ referred in *Tanfern* at paragraph 32 to the guidance in *G v G*: has the judge exceeded the generous ambit within which a reasonable disagreement is possible?

For ground (b) to apply, the irregularity must be serious and must have rendered the decision below unjust.

The appeal court’s powers are wide – see CPR 52.10. Sometimes it may be necessary to remit the matter back to the lower court, but if this can be avoided, so much the better, because time and expense will be saved.

7.9.4 Case management

Do not forget that, whether the appeal succeeds or fails, some further case management may be appropriate if the appeal does not determine the claim finally. Active case management includes, at CPR 1.4(2)(j), dealing with as many aspects of the case as it can on the same

occasion. You should also expect to deal with summary assessment of costs of the appeal unless the appeal has lasted for more than a day – see PD52 14.1.

7.9.5 Informing the judge below

It is important, especially if you allow an appeal, to inform the judge below of your reasons. In an ideal world this would be done by sending that judge a transcript of your judgment. Transcripts of Court of Appeal decisions should be sent automatically to the judge below, whether the appeal succeeded or failed, but there are occasional lapses. Where an appeal is allowed by a High Court judge, but not where it is dismissed, a transcript should be sent to the judge below. Where the circuit judge hears the appeal, however, it is necessary for the judge to send a personal note to the district judge, unless the decision has been handed down in writing.

Note: It is a matter of professional courtesy and the personal responsibility of the judge hearing the appeal to ensure that a copy of the order made is sent to the judge whose decision is the subject of the appeal. It is particularly important that a brief note of the reasons for allowing any appeal is provided to the judge at the same time, unless a transcript of the judgment is available when a copy should be provided.

7.10 Some problems

- 1 An appeal does not operate as a stay on the order of the lower court unless either the lower court or the appeal court directs – CPR 52.7(2). This is often overlooked by appellants. When considering the appellant's notice, check if it includes an application for a stay. If it does, consider it immediately and make an order on paper. If you grant a stay, the respondent can always apply to set aside or vary under CPR 23.10. A stay can be made subject to conditions, for example, paying the judgment debt into court.
- 2 Who hears appeals? In the High Court PD 52 8.13 and 8.14 provide the answer. In the county court, go to PD52 8A.1. However, part-time judges should not, as a general rule, hear appeals from court decisions (particularly from full-time judges). This may be impracticable in the county court, particularly in more rural areas, but a recorder, who finds an appeal in the list, should check with the designated civil judge that they can hear it, unless it is obvious from the papers that the DCJ has already given a direction to that effect. However, there is no objection to a part-time judge hearing a statutory appeal (e.g. under s.204 Housing Act 1996).
- 3 The urgent appeal. An obvious example is an appeal against the refusal by a district judge to suspend a warrant of possession where the eviction is imminent. There simply is not time for the appellant to complete N161 and collate all the appropriate documentation. If at all possible, there should be an oral hearing on notice at which the permission application and the appeal will be heard together. If this is not practicable, then a stay may be inevitable pending the hearing, but arrangements should be made for the hearing to take place as soon as possible.

4. While the appeal may appear to have merit, the costs involved may be disproportionate but the appeal is not against a case management decision, so that PD 52 4.5 cannot be invoked. It may be worth giving permission, but directing a stay for a short period for the parties to attempt settlement. If you make such an order, it is advisable to set out the reasons in the order so that they are apparent to the parties. It may also be worthwhile reminding them of the expectation of the court that the parties will indeed make a proper effort to settle. An unreasonable refusal to negotiate may result in a successful party being penalised in costs. This has happened in *Dunnett v Railtrack*. In that context regard should be had to *Halsey v Milton Keynes General NHS Trust/Steel v Joy & Halliday* [2004] EWCA Civ 576.
5. Allowing an appeal by consent: the mere fact that the parties agree is insufficient. The position is set out at PD52 13.1. For an example of the Court of Appeal declining to approve an agreed appeal, see *Stevens v Gullis* [2000] 1 All ER 527.
6. Withdrawal of an appeal is covered by PD52 s.12. Appellants, even when legally represented, commonly overlook the requirement to obtain the respondent's consent if the appeal is to be dismissed with no order as to costs.
7. The power of the county court under CCR Ord. 37 r.1 to order a rehearing where no error of the court was alleged was revoked with effect from 2 December 2002. Not all members of the legal profession appear to be aware of this.
8. The Court of Appeal and the High Court have power in exceptional circumstances to reopen an appeal. The county court has no such power.
9. For the powers of the court to deal with persistent unmeritorious appellants, refer to *Bhamjee v Forsdick* [2003] EWCA Civ 1113 and, consequent on that decision, to (a) changes to CPR 52.10(5) and (6) effected by the Civil Procedure (Amendment No 2) Rules 2004 with effect from 1 October 2004, and (b) the relevant PD made pursuant to new CPR 3.11.