APPEALS
- Another throw of the dice?

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by

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1. Introduction

Many litigants do not give much thought to an appeal until a decision goes against them. Then it is "panic stations" as the team rushes around trying to work out what the next steps might be. The message of this talk is: be prepared. Knowing your way around the process in advance will help you be ready to launch an appeal, or respond to an appeal, when the time comes.

2. Routes of Appeal

There is a welter of complex legislation and rules governing the route of appeal, i.e. determining the court which has jurisdiction to hear an appeal. It is particularly important to get this right: you may otherwise end up bringing your appeal out of time, by lodging the Appellant's Notice in the wrong place.

Courts

In 2016, there was a major overhaul of the main legislation[1] prescribing the destination of appeals and of CPR 52, which governs appeals. The two key aims of this project were to relieve pressure on the Court of Appeal – which had become overwhelmed and faced a massive backlog of cases – and to abolish previous differences between routes of appeal for interim and final orders.

Now the general rule is that any appeal is to the next judicial tier: an appeal from a District Judge is to a County Court Judge; an appeal from a County Court Judge is to a High Court Judge; an appeal from a Master is to a High Court Judge; an appeal from a High Court Judge is to the Court of Appeal and from there to the Supreme Court[2]. There is a handy table summarising the effect of the legislation in paragraph 3 of Practice Direction 52A.

There are, however, exceptions to the general rule. For example, where a decision of a County Court Judge or High Court Judge was itself made on an appeal, the destination for a second appeal is the Court of Appeal[3].

There are also provisions allowing for "leapfrog" appeals. Under s.13 of the Administration of Justice Act 1969 an appeal from a High Court Judge can "leap over" the Court of Appeal[4] to the Supreme Court. This procedure is only permitted where the case involves a point of law of general public importance and in certain defined circumstances, such as where the point in issue relates to the interpretation of legislation, where the Court of Appeal would be bound by authority to dismiss the appeal or where the proceedings entail a decision relating to a matter of "*national importance*". The prospective appellant must first obtain a certificate[5]

[1] See Access to Justice Act 1999 (Destination of Appeals) Order 2016 (SI 2016/917) and commentary at Civil Procedure 2019, Vol I, para. 52.0.3
[2] The Supreme Court's jurisdiction is handily summarised in Supreme Court Practice Direction 1.
[3] Access to Justice Act 1999 (Destination of Appeals) Order 2016 (SI 2016/917), Art. 6. There is an exception for decisions of officers authorised to assess costs by the Lord Chancellor: see CPR 47.21, 22.
[4] A recent example of a leapfrog appeal in the property field is *S Franses Ltd v The Cavendish Hotel (London) Ltd* [2018] UKSC 62, [2019] AC 249.
[5] Under Administration of Justice Act 1969, s.12

from the High Court Judge that the relevant conditions are satisfied and that a sufficient case has been made for an appeal to the Supreme Court and then apply for permission to appeal from the Supreme Court[6]. There are tight statutory timescales for both stages. If permission for a leapfrog appeal is given, there is no right of appeal to the Court of Appeal but instead the appeal proceeds to the Supreme Court[7]. A somewhat less prescriptive provision, s.57 of the Access to Justice Act 1999, allows an application to be made to appeal a County Court decision to the Court of Appeal, leapfrogging the High Court.

Where the appeal is to the High Court, the legislation and rules do not explain which division the appeal should go to and it is not clear who decides this and how. If an application for permission to appeal is made, the order being appealed is supposed, by CPR 40(2), to give details of the appeal court and division, but in my experience this is rarely observed. Equally, when a judge refuses permission to appeal, he or she must specify the court to which any further application for permission should be made[8], but the form which is filled out does not have a specific box to show the relevant division of the High Court, where that is the appeal court. Prospective appellants should ask the judge whose order is being appealed to specify the relevant division.

Tribunals

There is a general right to appeal from the First Tier Tribunal to the Upper Tribunal on a point of law in s.11 of the Tribunals, Courts and Enforcement Act 2007 but specific legislation may widen the scope of any appeal beyond points of law[9]. There is a right of appeal from the Upper Tribunal to the Court of Appeal on a point of law in s.13 of the 2007 Act, and s.14A of the 2007 Act makes similar provision for leapfrog appeals to the Supreme Court from the Upper Tribunal as apply to the courts under the Administration of Justice Act 1969[10].

Statutory Appeals

There remains a residual category of statutory appeals where legislation prescribes a particular route of appeal but the jurisdiction has not been folded into the Tribunals system. Where the appellate body is the Court of Appeal, High Court or County Court, CPR 52 will apply, subject to any rule, enactment or practice direction which sets out special provisions with regard to any particular category of appeal[11]. Practice Direction 52D applies to statutory appeals.

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[6] Under Administration of Justice Act 1969, s.13

[7] This applies only to the points for which permission has been given by the Supreme Court. The appellant can proceed in the Court of Appeal (subject to getting permission) on other points: *R (Jones) v Ceredigion CC* [2007] UKHL 24; [2005] 1 WLR 3626

[8] CPR 52.3(3)

[9] For example, by s.176B(1) of the Commonhold and Leasehold Reform Act 2002 there is a right of appeal to the Upper Tribunal from FTT proceedings under the 2002 Act, the Leasehold Reform Act 1967, the Landlord and Tenant Act 1985, the Landlord and Tenant Act 1987, the Leasehold Reform, Housing and Urban Development Act 1993 and the Housing Act 1996.

[10] See *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, [2018] 1 WLR 5273, [57]-[60]

[11] CPR 52.1(1) and (4)

Although there is a table of statutes containing prescribed routes of appeal in the practice direction, it is important always to go back to the legislation to check: for example, PD 52D has not been updated to reflect the transfer of functions of the Adjudicator to the Land Registry to the First Tier Tribunal in 2013[12]: it shows the route of appeal under the Land Registration Act 2002 as being to the High Court, whereas it is now from the FTT to the Upper Tribunal[13]. Practice Direction 52D applies to all statutory appeals, including those not specifically listed in it[14].

3. Applying for Permission – Catching the Court's Attention

Permission to appeal is required for almost all court appeals[15] and may be granted on conditions or limited to specific issues.

Permission may be requested from the lower court at the hearing at which the decision to be appealed was made, or from the appeal court[16]. It is best to make an application for permission to appeal as a matter of routine when any adverse order is made (though such applications are generally refused!). If permission is refused by the lower court, a further application may be made to the appeal court[17]. If applying to the appeal court, the application is made in the Appellant's Notice[18]. The application is made first on paper with the potential for reconsideration at an oral hearing[19].

Permission to appeal may only be given for a first appeal where the court considers that the appeal would have a real prospect of success or there is "*some other compelling reason*" for the appeal to be heard[20]. A "real" prospect of success is one which is realistic rather than fanciful: it is not necessary to show that the appeal has more than a 50% chance of succeeding[21].

Where permission is sought for a second appeal to the Court of Appeal, a more stringent test applies[22]. The Court of Appeal will not give permission unless it considers that the appeal would have a real prospect of success and raise an important point of principle or practice, or there is some other compelling reason for the Court of Appeal to hear it[23].

The Supreme Court will only give permission to appeal where a case raises an arguable point of law of general public importance which ought to be considered by the Supreme

[12] Transfer of Tribunal Functions Order 2013 (SI 2013/1036), art. 4
[13] Land Registration Act 2002, s.111
[14] PD 52D para. 1.1. For example, it (and CPR 52) apply to an appeal to the County Court under s.10(17) of the Party Wall etc Act 1996 even though that legislation is not specifically mentioned: *Zissis v Lukomski* [2006] 1 WLR 2778
[15] CPR 52.3(1). Permission to appeal to the Supreme Court is required by s.40(6) of the Constitutional Reform Act 2005
[16] CPR 52.3(2)
[17] CPR 52.3(3)
[18] CPR 52.12
[19] In the County Court and High Court, there is generally a right to an oral hearing if permission is refused on paper: CPR 52.4(2), (3); whereas in the Court of Appeal there will only be an oral hearing if the judge considering the application on paper so directs: CPR 52.5(2).
[20] CPR 52.6
[21] *R (A child)* [2019] EWCA Civ 895 at [29]-[31]
[22] See *Tanfern Ltd v Cameron Mcdonald (Practice Note)* [2000] 1 WLR 1311 at [41]-[46]
[23] CPR 52.7

Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal[24]. The application for permission is made in writing, although in a rare case the Supreme Court may refer the application for a 30-minute oral hearing[25].

Permission is also generally required for an appeal from the FTT to the Upper Tribunal[26] and from the Upper Tribunal to the Court of Appeal[27]. Whether permission is required for a statutory appeal depends on the particular Act under which the appeal is brought.

Often the key to a successful application for permission to appeal is to persuade the relevant court that an appellate court needs to look at the issues because they have a wider impact: whilst of course it is important to demonstrate that your client has a good chance of succeeding in an appeal (and that is built in to the first and second appeals tests for appeals below the Supreme Court), the application will carry most weight if it can be shown that there is a point of law or procedure which is controversial and will affect other people, for example because there are conflicting views in textbooks or because the contractual provisions under scrutiny are very common.

4. Time Limits and Other Rules

The rules about appeals are peppered with various time limits and other rules about what must, or must not, be done. Some of the practice directions, particularly Practice Direction 52C relating to appeals to the Court of Appeal, are very prescriptive. There is really no substitute for knowing your way around the rules and directions relevant to your appeal and ensuring that every step in the process is diarised and actioned in good time.

The most important time limit of all for an appellant is the time for lodging the Appellant's Notice which commences the appeal and, if necessary, asks for permission to appeal. In court appeals, unless the lower court directs a shorter or longer period, the Appellant's Notice must be filed within 21 days[28]. When applying for permission to appeal to the lower court, it is worth considering whether it is appropriate to ask for an extension of the 21-day period (if, for example, there are particularly complex issues to consider or an impending holiday period). It is possible to apply to the lower court subsequently to extend the time, but that involves additional cost and the risk of the 21-day period expiring before the application is heard. Although the appeal court has power to extend time for an Appellant's Notice[29], the 21-day period reflects a policy of finality and time will only be extended for good reason.

Applications for permission to appeal from the FTT to the Upper Tribunal must be received by the Upper Tribunal not later than 14 days after the date that the FTT sent notice of its

[24] Supreme Court Practice Direction 3, para. 3.3.3
[25] Supreme Court Practice Direction 3, para. 3.3.2
[26] S.11(3) Tribunals, Courts and Enforcement Act 2007; s.176B(4) Commonhold and Leasehold Reform Act 2002
[27] S.13(3) Tribunals, Courts and Enforcement Act 2007
[28] CPR 52.12(2)
[29] CPR 52.15

refusal of permission to appeal[30]. If permission has already been granted by the FTT, a notice of appeal must be lodged within a month after the FTT sent notice of such permission[31]. Statutory appeals are governed by their own legislation and the court may not have a discretion to extend any time limit laid down in it: a missed date in such cases will inevitably result in a negligence claim!

Do not assume that the procedures of different appellate courts will be the same. For example, the Court of Appeal rules in PD 52C require skeleton arguments from both parties to be filed and served[32], whereas PD 52B para. 8.3 actively discourages the filing of skeleton arguments on appeals to the County Court and High Court.

5. Acting for a Respondent

It can be quite difficult to know how a respondent should react to an application for permission to appeal by their opponent. The convention is that the application for permission is a matter between the applicant and the court, but in practice many respondents want to take an active part, particularly if they consider that the prospective appellant has mischaracterised the issues or omitted important information.

If an application for permission to appeal is made at the hearing at which the lower court makes its order, the judge will usually permit the respondent's advocate to make some submissions on it. Where the application is made to the Court of Appeal, PD 52C para.19(1) permits the respondent to lodge a 3-page statement of objection to the application; in the Supreme Court it is 5 pages[33]. There is no equivalent rule where the appeal is to the County Court or High Court, but a similarly short document is likely to be admitted and read by the judge deciding the application for permission. However, there are limitations on the respondent's ability to recover costs of attendance at permission hearings[34].

If permission to appeal is given, a respondent needs to give careful consideration whether to (a) make a cross appeal or (b) seek to uphold the judge's decision on different or additional grounds. If it wishes to take either step, a Respondent's Notice must be filed[35]. In the Court of Appeal, that significantly accelerates the deadline for the respondent's skeleton argument[36].

In some ways, respondents in the Supreme Court have it the hardest. They must file their written case (the detailed arguments which will be made on the appeal) only two weeks after being served with the appellant's[37]. No doubt it is assumed that respondents will know the appellant's arguments inside out as a consequence of the earlier stages of the proceedings, but this is not always the case.

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[30] Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010, rule 21(2)
[31] Rule 24(2)
[32] Paras. 3(3)(g), 9, 13
[33] Supreme Court Rule 13; Practice Direction 3 paras 3.1.8, 3.3.6
[34] PD 52B para. 8.1 (County Court and High Court); PD 52C para 20 (Court of Appeal); Supreme Court Practice Direction 3, para 3.5.1 (Supreme Court).
[35] CPR 52.13. In the Supreme Court a respondent need only take steps if it wishes to argue for a variation of the order appealed from: if it wishes to uphold the existing order on different grounds it need only include the arguments in its written case: Supreme Court Rule 25.
[36] A respondent which files a Respondent's Notice must lodge its skeleton argument within 14 days of the notice under PD 52C para. 9; otherwise it comes 35 days after the date of listing window notification: para. 13
[37] Supreme Court Practice Direction 6, paras 6.3.9, 6.3.10

6. Fact, Discretion, Law: The Appeal Court's Approach

CPR 52.11 provides that every appeal will be limited to a "*review*" of the decision of the lower court, unless a practice direction makes different provision for a particular category of appeal, or the court considers it would be in the interests of justice to hold a "*rehearing*". It will allow the appeal where the decision of the lower court was "*wrong*" or "*unjust because of a serious procedural or other irregularity in the proceedings*".

The distinction between a "review" and a "rehearing" has caused confusion, not least because the word "rehearing" can mean different things. For example, before the CPR came into force, an appeal from an interlocutory order was a "rehearing" in the sense that the appeal court would start all over again in deciding how a discretion should be exercised[38]. On the other hand, the Court of Appeal's conduct of an appeal was called a "rehearing" but that did not mean that the court heard the case again from the start[39]. As used in CPR 52.11 a "rehearing" means that the court hears the evidence again, admits new evidence as appropriate and reaches a fresh decision unconstrained by the decision of the lower court[40]. Outside special cases where a practice direction or legislation makes specific provision for a rehearing, a rehearing of this nature on an appeal will be very rare[41].

The dividing lines between appeals on fact, on discretion or on points of law are less rigid than might initially be supposed. Where an appeal involves a pure point of law, the appeal court can readily reach the conclusion that the trial judge was "wrong" about that point of law without disturbing the judge's findings of fact. Where an appeal is on an issue of fact, an appeal court will always give considerable weight to the advantage which the trial judge enjoys of seeing and hearing the witnesses, and this appellate reluctance to interfere applies, not only to pure questions of fact but also to issues of evaluation[42], such as whether a particular course of action is "reasonable"[43]. On the other hand, in an appropriate case an appeal court may conclude that a judge is wrong even about a witness' credibility, for example if he or she decides that a witness is not to be believed on grounds which have not been put to that witness[44]. When dealing with the exercise of a discretion (such as in relation to a procedural direction), the appeal court will interfere with the lower court's decision only if it finds that the judge has erred in principle, taken into account irrelevant considerations or failed to take into account relevant ones, or that the decision was wholly wrong because the court is forced to the conclusion that the judge has not balanced the various factors fairly[45]. A similar approach is taken by appellate courts to an evaluative judgment which involves the weighing of various factors, such as whether a particular action is an abuse of process[46].

A judge's decision – for example why he or she prefers one party's expert witness over another - should be sufficiently reasoned, and a failure to give adequate reasons is a free-standing ground of appeal[47]. If a party contends that the judge has failed to give adequate reasons, it should make that submission to the judge so as to enable the judge to set out

[38] *Tanfern v Cameron McDonald (Practice Note)* [2000] 1 WLR 1311 , [31]
[39] *Dupont de Nemours v S T Dupont* [2003] EWCA Civ 1368, [89]-[90]
[40] *Dupont de Nemours*, above, [96]
[41] At least in an appeal to a court. It may be different in a Tribunal setting: see for example Hague on Leasehold Enfranchisement, 6th edn, at 16-20
[42] *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2003] 1 WLR 577, [14]-[22]
[43] *Lambeth London Borough v Agoreyo* [2019] EWCA Civ 322, [66]-[68]
[44] See, e.g. *Chen v Ng* [2017] UKPC 217, [48]-[61]
[45] *Tanfern*, above, [32]; *AEI Rediffusion v Phonographic Performance* [1999] 1 WLR 1507 at 1523 C-D
[46] *Aldi Stores v WSP* [2007] EWCA Civ 1260, [16]; *Stuart v Goldberg Linde* [2008] EWCA Civ 2, [76], [81]
[47] *Flannery v Halifax Estate Agents* [2000] 1 WLR 377

further reasons for the decision made, if appropriate[48].

7. Fresh Evidence

CPR 52.21(2) provides that "*unless it orders otherwise*", the appeal court will not receive oral evidence or evidence which was not before the lower court. Whilst the discretion to admit new evidence is unconstrained, the "*Ladd v Marshall* criteria" remain highly relevant[49]. Under the *Ladd v Marshall* test[50], fresh evidence is not admitted on an appeal unless the evidence (a) could not, with reasonable diligence, have been obtained for the trial; (b) is such that, if given, it would probably have had an important (though not necessarily decisive) influence on the result of the case; and (c) is apparently credible (though not necessarily incontrovertible).

Fresh evidence is potentially admissible by exercise of the Court's discretion under CPR 52.21(2), whether the appeal is by way of "review" or "rehearing"[51].

8. Conclusion

Appeals are not to be undertaken lightly. They raise the stakes, and costs, of litigation. But they are an important safety valve to protect litigants against unfair and wrong decisions and bring controversial and important points of law and practice into sharp focus. Giving proper thought to the prospect of an appeal at an early stage, and researching the steps that will need to be taken if an appeal is to be brought, will help you ensure that your client responds to an adverse decision in an orderly and appropriate way.

[48] *English v Emery Reimbold* [2002] EWCA Civ 605; *Re M (children)(fact finding hearing, burden of proof)* [2008] EWCA Civ 1261
[49] *Terluk v Berezovsky* [2011] EWCA Civ 1534
[50] See *Ladd v Marshall* [1954] 1 WLR 1489
[51] *Dupont de Nemours*, above, [96]