Civil Justice Quarterly

2001

The new appeal: re-hearing or revision or what?

J.A. Jolowicz

Subject: Civil procedure. **Other related subjects:** Civil evidence

Keywords: Appeals; Evidence

Legislation: CPR Pt 52

C.J.Q. 7 Under the Rules of the Supreme Court, appeals to the Court of Appeal were "by way of rehearing".[1] That phrase did not mean, however, what the uninitiated might suppose it to mean, namely that the entire case was heard over again on appeal. Exceptional circumstances apart, the evidence presented to the court of first instance was not reheard on appeal: documents used at first instance were available to the judges of appeal, but for the oral evidence they had to rely on a transcript of what had taken place below or, if there was no official record, on the trial judge's notes of evidence. This meant that appellate judges were most unlikely to interfere with the trial judge's findings of fact in so far as they depended on his assessment of the credibility of witnesses, but it did not mean that they were judges only of law. As Lord Sumner put it, an appellate court had jurisdiction to "retry the case on the shorthand note".[2] It had "all the authority and jurisdiction of the court or tribunal from which the appeal was brought",[3] it had power to draw inferences of fact and to "give any judgment and make any order which ought to have been given or made, and to make such further order as the case may require."[4]

These provisions were enough to ensure that the Court of Appeal was indeed a court of *appeal,* not what is called elsewhere a court of cassation. In France, for example, there are Courts of appeal, on the one hand, and a Court of cassation on the other, and the difference between them is well understood. In a court of appeal, the issues decided below are brought before the appellate court "so that they may be decided afresh in fact and in law",[5] and a court of appeal substitutes its own judgment for that of the court below. The Court of cassation, by contrast, censures the "non-conformity of the judgment under attack to the rules of law" [6] : if it does not affirm, then, in principle, it can only ***C.J.Q. 8*** quash the judgment before it and remit the case for a new decision to the level of jurisdiction from which it came.[7]

Unlike the languages of other developed legal systems, English lacks a word in general use which is equivalent to the French "cassation"[8] : "appeal" has to serve even in those cases where the appellate court is not a judge of fact and can only affirm or quash the decision brought before it, as in the phrase "appeal by way of case stated". That has not changed with the coming into force of the new rules for appeals in Part 52 of the CPR,[9] and the rules make use of the familiar word "re-hearing". Nevertheless, a re-hearing is no longer the only form of appeal for ordinary civil cases. On the contrary, it is pushed into second place by the novel rule that, subject to two exceptions, "every appeal will be limited to a review of the decision of the lower court".[10] The exceptions are, first, where a practice direction makes different provision for a particular category of appeal and, secondly, where "the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing".[11]

Obviously, a "review of the decision of the lower court" is intended to be different from a "re-hearing", but neither word is defined, and neither appears in the Glossary. How, then, are they to be understood under the new dispensation? Some help might have been expected from the Court of Appeal in *Tanfern Ltd v. Cameron-MacDonald,* [12] --a case under the old rules of no enduring interest but one in which the Court of Appeal, through Brooke L.J., took the opportunity to explain the effect of the changes in the arrangements for civil appeals.

Broadly speaking, these changes relate to three topics--the routes of appeal, the general requirement for permission to appeal, and what Brooke L.J. called the "appellate approach", with the last of which alone this note is concerned.

Unfortunately the help given by the Court of Appeal on this topic leaves the most important question unanswered. When it is engaged on a review of the decision of the lower court, is the appeal court

entitled to have regard to the documents and to the written record of the oral evidence presented to the lower court? Does it have jurisdiction, within the limits established under the former law, to "retry the case on the shorthand note"? If the answer is ***C.J.Q. 9*** affirmative, it must then be asked how a re-hearing differs from a review. If the answer is negative, it must then be asked whether the role of the appeal court is ordinarily limited to that of a court of cassation which, if it does not affirm, can only quash the judgment and remit the case elsewhere for decision.

In his explanation Brooke L.J. did stress that the new rule marked a significant change of practice in relation to "interlocutory appeals" from a Master or District Judge because, formerly, the appeal to a judge "was a rehearing in the fullest sense of the word" and the judge exercised his discretion afresh. Now, according to the Lord Justice, the appeal court's duty is limited to a review of the decision below and that decision will "attract much greater significance". Evidently, however, his Lordship considered the change to be significant for appeals from final judgments also, for he stressed the need for accurate recording of all first instance judgments.[13] He also drew attention to the rule that the appeal court will allow an appeal where the decision of the lower court was "wrong", or "unjust because of serious procedural or other irregularity", a rule which he seems to have regarded as restrictive.[14]

It is quite likely that some English judges would prefer the appeal in this country to resemble the French cassation more closely than does the rehearing as hitherto understood. Indeed, over the years various restrictions on the scope of the retrial on the shorthand note were introduced through judicial decision. Over and above the necessary rule that appellate judges will not ordinarily reconsider a trial judge's finding of fact where his finding depended on his assessment of the credibility of witnesses examined and cross-examined in his presence, appellate judges have generally been unwilling to reconsider, for example, either the exercise by the judge of his discretion or his assessment of such matters as the respective shares of two or more actors for the same damage.[15] In such cases something out of the ordinary was necessary if an appellate court was to interfere, and the principal reason for this self-denying ordinance was to discourage appeals on matters of that kind.[16] In his Review of the Legal Year 1989-1990, Lord Donaldson M.R. went so far as to describe the notion that the Court of Appeal exists to give the litigant "a second bite of the cherry" as a misconception.

It is respectfully submitted that, under the law as it then was, the Court of Appeal did indeed exist to give the appellant a second bite,[17] but the introduction of the almost universal requirement that permission to appeal be obtained has altered that.[18] The idea that permission to appeal should be a requirement in all but a few categories of case is not new, but the Bowman ***C.J.Q. 10*** Report[19] did more than recommend adoption of such a rule. It also stated that a dissatisfied litigant should always be able to have his case looked at by a higher court to see whether there appears to have been an injustice, and if so to allow an appeal to proceed. There is no barrier to an application for permission to appeal, and if permission is refused by the lower court a further application may be made to the appeal court. The application for permission to appeal thus provides the dissatisfied litigant with an approximation to a second bite of the cherry, and removes the need that he should have that bite in the form of a full-blooded appeal. That, however, is not reason enough to reduce the appeal, once permission has been given, to a procedure equivalent to that of the French Court of cassation.

Powerful arguments, both of legal policy and on the interpretation of the new rules, exist to support the view that, even on a review, the appeal court should examine the evidence given in the lower court and, if it considers the decision of that court to be "wrong", in fact or law or both, should normally replace it with its own. Any other conclusion would give the last word on all questions of fact--including questions of the inferences to be drawn from or the qualifications to be given to the primary facts--to the judge of first instance, and there would be no right of appeal properly so called. What is more, whenever the appeal court held, on whatever grounds, that the judgment of the lower court was wrong, it would have to order a new trial, with all the expense and delay that that would involve. For practical purposes there would be a return to the days of the Writ of Error.

Turning to the text of the rules themselves, it is to be noted that the appeal court has conferred upon it a range of powers that are broadly similar to those that were possessed by the Court of Appeal under the Rules of the Supreme Court. It has all the powers of the lower court,[20] and included in the powers specified are the powers to "affirm, set aside or vary any judgment or order made or given by the lower court",[21] to receive oral evidence or evidence which was not before the lower court,[22] and to draw any inference of fact which it considers justified on the evidence.[23]

No doubt an appeal court would not exercise its power to receive oral evidence when engaged on a review of the decision of the lower court, but what of its other powers? If these may be exercised on a

review as well as on a re-hearing, then an appeal court is bound to look at the evidence that was given in the lower court. Otherwise, it is true, it might still be able to set aside the judgment of the lower court, but only if that judgment contained such inconsistencies of reasoning or errors of law that it simply could not be allowed to stand. Without the evidence, however, it would be virtually impossible for ***C.J.Q. 11*** the appeal court to affirm the lower court's judgment and it would be quite impossible for it to vary that judgment. Furthermore, if the appeal court could not look at the evidence, the power given to it to draw inferences would be meaningless. Common sense dictates that the appeal court may look at the evidence given in the lower court, whether it proceeds by way of re-hearing or by way of review, and this is confirmed by the practice direction which specifies, without qualification, that when evidence is relevant to an appeal, an official transcript or, if the evidence was not officially recorded, the judge's notes, must be obtained.[24]

If it is right that an appeal court conducting a review of the decision of the lower court may take account of the evidence given at the trial and may exercise all the powers conferred on it by the rules, then the new review differs little, if at all, from the procedure formerly used in the Court of Appeal. Given the changes in appeal routes and the general requirement that permission to appeal must be obtained, this is perfectly satisfactory. The only difficulty is that the Rules of the Supreme Court described that procedure as a “rehearing”. The conclusion that “review” and “re-hearing” amount to the same thing is not open under the new rules. If the new “review” is the same as the old “rehearing”, then the new “re-hearing” must mean something different from the old.[25]

It is one of the objectives of the reforms which have followed Lord Woolf's reports that the new rules should avoid technical language as far as possible, and Lord Woolf himself has said that the White Book is now only of historic interest. It can therefore be suggested, to meet this last problem, that the “re-hearing” of the new rules can and should be understood as the uninitiated would understand it, that is as a re-hearing of the entire case, witnesses and all--a procedure which is well described in some systems as a “second first instance”. This may appear to some as a surprising conclusion, but it is submitted that it is a perfectly sensible one, and one that fits well with the rules as they are drafted. The only relevant practice direction calls for a re-hearing where the decision had been reached without the consideration of evidence,[26] and the rule itself states that a re-hearing may be held if the court considers that to be in the interests of justice in the circumstances of the appeal.[27] The rule also gives the court an unfettered discretion to receive oral evidence as well as evidence which was not before the lower court. In other words, if it so orders, it can “re-hear” the case as a whole.

At the end of the day, both “review” and “re-hearing” become intelligible and together give appeal courts a valuable choice in their manner of proceeding. Provided that “review” is understood as it is suggested here that it should be understood, then the appeal court will only occasionally need to order a (new style) re-hearing. Its power to re-hear an entire case does, however, constitute a valuable instrument for use in the interests of individual ***C.J.Q. 12*** justice. It is only a pity that the position as, it is submitted, it turns out to be, could not have been made more obvious by the rules themselves. It would have taken little more then a short definition section or other explanation of the difference between “review” and “re-hearing” to do it.

J. A. Jolowicz

C.J.Q. 2001, 20(Jan), 7-12

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1. RSC, Ord. 59, r. 3(1).

2. *S.S. Hontestroom v. S.S. Sagaporak* [1927] A.C. 37.

3. Supreme Court Act 1981, s. 15(3); RSC, Ord. 59, r. 10(1).

4. *ibid.,* Ord. 59, r. 10(3).

5. *Nouveau code de procédure civile,* art. 561.

6. *ibid.,* art. 604.

7. In modern French law the Court of cassation has quite extensive power to substitute its own decision for that of the court below, thus blurring the distinction between appeal and cassation. The fact remains, however, that it is always a precondition to exercise of the power that the court below shall have found and stated the facts sufficiently for the Court of cassation to be able to dispose finally of the case without entering into any aspect of the facts.

8. Most other European languages use two words: *appel, cassation; appello, cassazione; apelación, casación; Berufung, Revision; and so on.*

9. Part 52 came into force in May 2000.

10. CPR, r. 52.11(1)

11. *ibid.* The supporting practice direction provides that, in certain specified cases in which a decision was reached without a hearing, or where the procedure for the hearing did not provide for the consideration of evidence, “the hearing of an appeal will be a re-hearing (as opposed to a review of the decision of the lower court)”: P.D. 52, para. 9.1.

12. [2000] 1 W.L.R. 1311. Lord Woolf M.R. and Peter Gibson L.J. agreed with Brooke L.J.'s explanation.

13. [2000] 1 W.L.R. at pp. 1317-1318, paras 30-35.

14. CPR, r. 52.11(3). In his statement of the rule Brooke L.J. inserted the word “only” between “will” and “allow”.

15. *E.g. Birkett v. James* [1978] A.C. 297; *The Macgregor* [1943] A.C. 197.

16. See, *e.g. Brown v. Thompson* [1968] 1 W.L.R. 1004, 1008-1011, *per* Winn L.J.

17. See Final Report of the Committee on Supreme Court Practice and Procedure (Cmd 8878, 1953), para. 473; Jolowicz, [1991] C.L.J. 54.

18. CPR, r. 52.3. The rule was first brought into operation on January 1, 1999 by *Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments*) [1999] 1 W.L.R. 2.

19. Review of the Court of Appeal (Civil Division), Report to the Lord Chancellor, September 1997, p. 35.

20. CPR, r. 52.10(1).

21. CPR, r. 52.10(2)(a).

22. CPR, r. 52.11(2). The negative form in which this rule is drafted does not limit the court's discretion to make an appropriate order. Note that the power to receive “further” evidence is not subject to the restrictions that applied under RSC, Ord. 59, r. 10(2).

23. CPR, r. 52.11(4).

24. P.D. 52, paras 5.15, 5.16.

25. Even so, there is probably no significance in the change of spelling: “rehearing” in the RSC has become “re-hearing” in the CPR.

26. *Ante,* n. 11.

27. *ibid.*