ESSEX COURT CHAMBERS
BARRISTERS

REMOTE SECOND CHANCES:
APPEALS ON FACT IN THE CORONAVIRUS ERA

Tuesday 18th May 2020, 1pm

Richard Millett QC, Naomi Hart and Ciaran Keller

The doctrine of appellate restraint:

Henderson v Foxworth Investments Ltd [2014] 1 WLR 2600

- Unless compelling reason to the contrary, assumption that the trial judge has taken the whole of the evidence into his consideration.
- Weight of evidence a matter pre-eminently for the trial judge
- Must be “rationally insupportable”

What does “plainly wrong” mean?

Lord Reid at [62]:

“the adverb “plainly” [in plainly wrong] does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. **What matters is whether the decision under appeal is one that no reasonable judge could have reached”.**

Applies to primary facts, their evaluation and inferences to be drawn from them:

Fage UK Ltd v Chobani [2014] EWCA Civ 5, at [114].

"Trial is not a dress rehearsal. It is the first and last night of the show"

"the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping."

Atmosphere of the courtroom?

Lewison LJ in *Fage*: “The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence). … even if it were possible to duplicate the role of the trial judge, it cannot in practice be done: See also JSC *BTA Bank v. Ablyazov* [2018] EWCA Civ 1176 at [30]-[46] per Leggatt LJ, and *Perry v. Raleys Solicitors* [2019] UKSC 5 at [52] per Lord Briggs.

Shades of Hoffman's "penumbra"

Piglowska v Piglowski [1999] 1 WLR 1360, and *Biogen v Medeva*

[1997] RPC 1:

"The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance. . . of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

Omissions

Staechelin v ACLBDD Ltd [2019] EWCA Civ 817 Lewison LJ at [31], [33]:

- The fact that the judge has not mentioned a piece of evidence does not mean that he overlooked it
- The appellate court will interfere only where there is no evidence to support a challenged finding of fact…

Also see:

- *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614
- *Bank St Petersburg v Arkhangelsky* [2020] EWCA Civ 408, Vos C at [30]-[33]

An appeal court interfering with a trial Court's treatment of witness evidence

The general principle

- Thomas v Thomas [1947] AC 484, 487–488: "*Where a question of fact has been tried by a judge … an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.*"
- Akerhielm v De Mare [1959] AC 789, 806: "*their Lordships are satisfied that this is not one of those exceptional cases in which an appellate court is justified in reversing the decision of a judge at first instance when the decision under review is founded upon the judge's opinion of the credibility of a witness formed after seeing and hearing him give his evidence.*"

Recent case law

- R (SS) Sri Lanka v Secretary of State for the Home Department [2018] EWCA Civ 1391, [34]–[41] (Leggatt LJ): the First-Tier Tribunal considering an asylum claim had been correct to place minimal emphasis on the witness' "*demeanour*".
- Simetra Global Assets Ltd v Ikon Finance Ltd [2019] EWCA Civ 1413, [48]–[49] (Males LJ): contemporaneous documents are "*generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence*".

Will the principles be affected if the trial was conducted remotely?

When will the Court of Appeal receive fresh evidence which was not before the lower court?

- CPR 52.21(2)
- The pre-CPR position: Ladd v Marshall [1954] 1 WLR 1489
- The CPR position: Terluk v Berezovsky [2011] EWCA Civ 1534

  Muscat v Health Professions Council [2009] EWCA Civ 1090
- Appeals against summary judgment/strike out: US Mortgage Finance II LLC v Dew [2017] EWCA Civ 299

When will the Court of Appeal receive evidence of matters occurring since the order under appeal?

- R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982

- Easygroup Ltd v Easy Rent a Car Ltd [2019] 1 WLR 4630

R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982 at [34]-[37] (Brooke LJ)

"34. In the ordinary run of litigation in the courts the legal rights of the parties fall to be decided in accordance with the facts as they appear to the first instance judge. There is little room for the admission of evidence of changed circumstances at the hearing of an appeal. From time to time, however, such evidence was admitted. Case law reveals the following examples under the pre- CPR regime:

i) Where there has been a change of circumstances after the granting of an interlocutory injunction such that if the new circumstances had been before the judge they would have justified the variation of the injunction […];

ii) More generally, where a change of circumstances since the trial has falsified the basis on which discretionary relief was granted […];

iii) Where the passage of time since a trial has falsified a conclusion of the trial court based on complaints of delay […];

iv) From time to time, on the basis that the court should not speculate where it knows, damages will be assessed on the facts as they appear at the date of the appeal hearing […]"

Easygroup Ltd v Easy Rent a Car Ltd [2019] 1 WLR 4630 at [13] and [70] (David Richards LJ)

- "*An appeal court will not normally admit evidence of events which have occurred since the making of the order under appeal: R (Iran) v Secretary of State for the Home Department"*
- New evidence admitted which was *"capable of having a profound effect on the application of both articles 29 and 30 in this case*"
- "*the position is now fundamentally different*"

Issues

- The significance of the new evidence
- Finality of litigation
- The appellate function
- Importance of clarity

Mousavi-Khalkali v Abrishamchi

- Appeal against a finding that C had not shown that there was a real risk that substantial justice would not be obtainable in the appropriate forum
- Application to adduce new evidence of matters post-dating the order under appeal
- Judgment pending

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