Neutral Citation Number: [2024] EWHC 1452 (KB)

Case No. M23Q096

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

Manchester Civil Justice Centre
1 Bridge Street West, Manchester, M60 9DJ

Date: 14 June 2024

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- - - - - - - - - - - - - - - - - - - -

Between :

GARRY JARVIS

Claimant/
Appellant

- and -

METRO TAXIS LIMITED

Defendant/
Respondent

- - - - - - - - - - - - - - - - - - - -

The Appellant appeared **in person**
The Respondent appeared by its general manager, **Graham Simpson**

Hearing date: 6 June 2024

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Approved judgment

This judgment was handed down remotely on 14 June 2024
by circulation to the parties and by release to the National Archives.

THE HONOURABLE MR JUSTICE PEPPERALL:

1. This case concerns the question of whether an appeal from the decision of a circuit judge dismissing a claim, after first allowing an appeal from a district judge and then rehearing the case, is a second appeal such that it lies only to the Court of Appeal, or a first appeal such that it lies to the High Court. In declining jurisdiction on the papers, Turner J held that it was a second appeal. Garry Jarvis now seeks to set that order aside.

THE BACKGROUND

2. Mr Jarvis worked for Metro Taxis Ltd as a driver. By his claim, he sought modest damages for alleged underpayment; Metro's failure to provide him with a replacement vehicle when his rented car was off the road; and for reimbursement of the rent paid on the defective car. The claim was heard by District Judge Wasim Taskeen on 29 November 2022. Mr Jarvis appeared in person and the company was represented by its general manager, Graham Simpson. The district judge dismissed Mr Jarvis's claim.

3. On 17 July 2023, Mr Jarvis's appeal came before His Honour Judge Craig Sephton KC. The judge allowed the appeal on the basis that, while the district judge had noted at the start of the hearing that Mr Simpson was not giving evidence but would make submissions, he subsequently treated Mr Simpson's submissions as evidence.

4. Having allowed the appeal, Judge Sephton considered whether to remit the case for a fresh hearing before a district judge. Rather than take that course, the judge decided to hear the claim afresh. He did so and also gave a judgment in which he dismissed Mr Jarvis's claim.

5. Mr Jarvis now appeals to the High Court upon four grounds:

   5.1 First, he seeks to rely on fresh evidence from Stockport Council which, he argues, directly contradicts Mr Simpson's evidence to Judge Sephton.

   5.2 Secondly, he argues that the judge should have required the witnesses to take an oath.

   5.3 Thirdly, he complains that the defendant's representative was allowed to interrupt and "shout him down."

   5.4 Fourthly, he argues that the judge had an incomplete grasp of the details of his claim.

6. The appeal to the High Court was referred to Turner J who, by an order dated 14 March 2024, held that he did not have jurisdiction to hear the appeal. The judge observed:

> "These applications have proceeded on the basis that the decision of HHJ Sephton KC was subject to the procedure applicable to a first appeal rather than a

> second appeal. It has been assumed hitherto that because he overturned the decision of the District Judge before deciding the case afresh then an appeal should proceed to the High Court. I am not satisfied that this is correct. Reference can be made to the decision of the Court of Appeal in JD (Congo) v. Secretary of State for the Home Department [2012] EWCA Civ 327, [2012] 1 W.L.R. 3273. I am of the view that I lack jurisdiction and that the only route to appeal would be via permission from the Court of Appeal and by the application of the more stringent test for second appeals. Since I have not had the advantage of hearing any legal argument on this issue, I have ordered that any application to vary or set aside this order should be made by way of a formal application compliant with CPR 23."

ARGUMENT

7. Before me, Mr Jarvis submitted that an appeal hearing in Manchester would be more proportionate and convenient than a hearing before the Court of Appeal in London. His remaining submissions were directed towards the merits of his proposed appeal and to seeking to establish that Judge Sephton had been misled. Mr Simpson's submissions were focused on that allegation, and he insisted that Metro had not deliberately sought to mislead the court.

8. None of those submissions addressed the actual issue that arises on this application. That is not a matter of criticism since neither Mr Jarvis nor Mr Simpson is legally trained. Understandably, they were more concerned with the merits of the matter than upon the dry question of the proper route of appeal in this case. Nevertheless, the end result is that, like Turner J, I do not have the advantage of any legal argument on that issue.

ANALYSIS

9. Save in contempt cases, appeals from a circuit judge sitting in the county court ordinarily lie to the High Court: see Practice Direction 52A, para.3.5, table 1, and – less accessibly – art.5 of the Access to Justice Act 1999 (Destination of Appeals) Order 2016. Permission to bring such an appeal may be given 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: r.52.6.

10. Appeals from decisions of the county court which were themselves made on appeal, lie only to the Court of Appeal and are subject to more exacting requirements:

    10.1 Section 55 of the Access to Justice Act 1999 provides:

> "Where an appeal is made to the county court, the family court or the High Court in relation to any matter, and on hearing the appeal the court makes a decision in relation to that matter, no appeal may be made from that decision unless the Court of Appeal considers that–
>
> (a) the appeal would raise an important point of principle or practice, or

(b) there is some other compelling reason for the Court of Appeal to hear it."

10.2 Section 56 of the Act authorises the Lord Chancellor to specify that appeals which would otherwise lie to the High Court should instead lie to the Court of Appeal.

10.3 Pursuant to such power, art.6 of the 2016 Order provides:

"Where—

(a) an appeal is made to the county court or the High Court (other than from the decision of an officer authorised to assess costs by the Lord Chancellor); and

(b) on hearing the appeal the court makes a decision,

an appeal shall lie from that decision to the Court of Appeal and not to any other court."

10.4 Rule 52.7(1) provides:

"Permission is required from the Court of Appeal for any appeal to that court from a decision of the county court, the family court or the High Court which was itself made on appeal, or a decision of the Upper Tribunal which was made on appeal from a decision of the First-tier Tribunal on a point of law where the Upper Tribunal has refused permission to appeal to the Court of Appeal."

10.5 Rule 52.7(2) provides the enhanced test for permission in second appeals:

"The Court of Appeal will not give permission unless it considers that

(a) the appeal would–

(i) have a real prospect of success; and

(ii) raise an important point of principle or practice; or

(b) there is some other compelling reason for the Court of Appeal to hear it."

11. The essential policy is that parties in civil cases who have already enjoyed access to one appeal should only exceptionally be granted a further right of appeal. Such restriction on second appeals assists in rationing access to the senior courts so that the High Court can focus upon its first trial work and the Court of Appeal upon the resolution of first appeals and those second appeals (i) that are properly arguable and raise important matters of principle or practice; or (ii) where there is some other compelling reason for allowing a second appeal to be argued. Further, by restricting access to second appeals, the policy assists in controlling the total costs and length of litigation.

12. While one might think that the policy is particularly directed at cases where the first appeal is dismissed, the law is not so limited. As the editors of the White Book (2024 Ed.) recognise in their pithy commentary at para 52.7.1, "the rule applies to 'two-time losers' and to 'one-time losers'."

13. Mr Jarvis's case is plainly a second appeal in the sense that there has already been one earlier appeal from the district judge. That is not, however, the test and the critical issue is to identify whether the instant appeal is against the judge's *decision on the appeal* from the district judge.

14. It is not unusual for an appellant to be successful on a ground of appeal but nevertheless have their appeal dismissed. By way of example, a claim might be dismissed upon a judge finding that no breach of duty had been established and that, in any event, the claimant had failed to prove any loss. Success on appeal in establishing that the judge was wrong to find that there was no breach of duty would not of itself be sufficient to win the appeal unless the appellant could also establish that the judge was wrong to find that there was no loss. Unless successful on both grounds, the appellate judge's decision on the hearing of such an appeal would be to dismiss the appeal. Any further appeal would be a second appeal within the meaning of art.5 and r.52.7 since it would be an appeal from the decision made on appeal.

15. In the instant case, it can be argued that the only decisions made on the first appeal were that it should be allowed and the claim reheard. While Judge Sephton did not choose to remit this small claim for rehearing before a district judge and instead reheard the claim himself on the same day, it is arguable that neither of those circumstances changed the nature of what was then happening. The appeal had been allowed on the basis of a serious procedural irregularity and the matter was being reheard. Judge Sephton's conclusion that there was no merit in the underlying claim did not lead him to dismiss the appeal, but rather to dismiss the claim. On that logic, it is arguable that the judge's decision to dismiss the claim was not a decision made on the hearing of the appeal.

16. In reaching the contrary conclusion, Turner J referred to JD. That case concerned an appeal from the Upper Tribunal (Immigration & Asylum Chamber). The Court of Appeal considered the application of the second-tier appeal test to cases where (a) the applicant had succeeded before the First-tier Tribunal before failing before the Upper Tribunal; or (b) the Upper Tribunal had set aside the decision of the First-tier Tribunal that had been adverse to the applicant but, on remaking the decision, dismissed the appeal. The court held that neither circumstance of itself amounted to "some other compelling reason" that would justify the grant of permission for a further appeal to the Court of Appeal, although such circumstance was capable of being relevant to that question.

17. The latter circumstance was, no doubt, the matter that Turner J particularly had in mind since - like the instant case - it involved a junior appellate judge allowing an appeal and then remaking the decision. Care, however, needs to be taken with the analogy since JD was a decision on different statutory provisions applicable to appeals from the Upper Tribunal:

    17.1 In England & Wales, appeals from the Upper Tribunal lie to the Court of Appeal: s.13(12) of the Tribunals, Courts & Enforcement Act 2007. Thus, venue

was not in issue in JD.

17.2 Section 13(6) of the 2007 Act gives the Lord Chancellor the power to make an order applying the enhanced permission test to appeals from a decision of the Upper Tribunal on an appeal under s.11 of the Act.

17.3 On hearing an appeal under s.11 and upon determining that the decision of the First-tier Tribunal should be set aside, the Upper Tribunal has express power under s.12 to remake the decision.

17.4 Article 2 of the Appeals from the Upper Tribunal to the Court of Appeal Order 2008 provides that permission to appeal from the Upper Tribunal to the Court of Appeal should not be granted unless "(a) the proposed appeal would raise some important point of principle or practice; or (b) there is some other compelling reason for the … appellate court to hear the appeal."

17.5 Further, there was no issue in either PR (Sri Lanka) v. Home Secretary [2011] EWCA Civ 988, [2012] 1 W.L.R. 73 or JD as to whether the appeals in those cases were subject to the more exacting second-tier appeals test. The issue was as to how the second-tier appeals test should be applied in such cases: PR, at [53]; JD, at [3].

18. While not apparent on its face, art.2 is limited by the terms of s.13(6) to appeals from decisions of the Upper Tribunal on appeals from s.11: PR, at [14]. This construction is consistent with the current terms of r.52.7(1).

19. In MM (Unfairness) Sudan v. Secretary of State for the Home Department [2014] UKUT 105 (IAC), McCloskey J, the then President of the Upper Tribunal (Immigration & Asylum Chamber), observed, at [26]:

> "By s.12 of the 2007 Act, where the Upper Tribunal concludes that the decision of the First-tier Tribunal involved the making of an error on a point of law and decides to set the decision aside, it must either remit the case to the First-tier Tribunal or remake the decision itself. We consider that, as a fairly strong general rule, where a first instance decision is set aside on the basis of an error of law involving the deprivation of the Appellant's right to a fair hearing, the appropriate course will be to remit to a newly constituted First-tier Tribunal for a fresh hearing. This is so because the common law right to a fair hearing is generally considered to rank as a right of constitutional importance and it is preferable that the litigant's statutory right of appeal to the Upper Tribunal should be triggered only where the former right has been fully enjoyed."

20. This passage was endorsed by Stuart-Smith LJ in AEB v. Secretary of State for the Home Department [2022] EWCA Civ 1512, [2023] 4 W.L.R. 12, at [17]. At [40], the judge explained the practical difference between remitting the case to the First-tier Tribunal and the Upper Tribunal remaking the decision:

> "There was no dispute between the parties that the 2007 Act has established what in normal cases will be a two-tier system (FTT/UT) with the possibility of a second appeal thereafter if the more stringent requirements of the second

> appeal test are satisfied. Equally, it was common ground that there may be circumstances in which it is appropriate for the UT to remake a decision and that the effect of its doing so may be that a party only has the prospect of appealing a primary finding of fact (or law) by the UT if they can satisfy the second appeal test. I fully accept that this is recognised by the structure established by the 2007 Act and that such an outcome is not necessarily objectionable …"

21. In MM, McCloskey J explained the various ways in which the decision might be remade, at [18]:

> "If [the Upper Tribunal] decides to [remake the decision], it will, in effect, conduct an appeal on the merits, either applying the correct legal principles in play to findings of fact preserved from the First-tier Tribunal determination or, in cases where those findings have given rise to the relevant error of law, evaluating all the evidence, forming its own views and making its own findings and conclusions. The timing of this exercise, where performed, is telling: it is separated from the error of law hearing, whether it is conducted immediately thereafter or, where unavoidable, at a later date. It is a re-making exercise."

22. The tribunal cases do not directly assist with venue since any appeal from the Upper Tribunal lies to the Court of Appeal regardless of whether it is a second appeal. It is, however, clear that these cases all proceeded on the basis that where, on hearing a s.11 appeal, the Upper Tribunal:

    22.1 sets aside the decision of the First-tier Tribunal; and

    22.2 remakes the decision pursuant to s.12,

    any appeal from its decision is an appeal from the Upper Tribunal's *decision on the appeal* within the meaning of s.13 such that it engages the enhanced second-tier tribunal test.

23. Given the clear affirmative answer to that question in the authorities even where the appeal lies against the remaking of the decision by the Upper Tribunal under s.11, I conclude by analogy that Judge Sephton's decision dismissing the claim was likewise a decision made on the hearing of Mr Jarvis's appeal within the meaning of art.6 and r.52.7.

24. Accordingly, in my judgment, Turner J was right to conclude that the High Court does not have jurisdiction to entertain Mr Jarvis's appeal and that any appeal lies to the Court of Appeal. I therefore dismiss this application to set-aside the judge's order.