

## Are cases becoming too complex for the appeal courts? Rhian Howell, September 2007

Two recent decisions by the Court of Appeal (*Yorkshire Water Services Ltd v Taylor Woodrow Construction (Northern) Limited* [2005] EWCA Civ 894 and *Thomson v Christie Manson & Woods Ltd* [2005] EWCA Civ 555) have brought about a sea change in the willingness of the Court of Appeal to consider appeals on the facts. May LJ has been the driving force behind this move and he has developed guidelines which have been followed in applications for permission to appeal (see *Mirant v Ove Arup* [2005] EWCA Civ 1585).

The judgments have toughened the burden in an already tough arena for appellants seeking to appeal on points of fact where the facts are of a complicated or technical nature. The greater the complexities in the case the less likely the Court of Appeal will allow permission to appeal on the factual conclusions reached by the judge at first instance unless the Judge was 'palpably incompetent'. This approach appears to be counter intuitive as it is in precisely these cases - where the facts are complicated and the issues technical - that the judge at first instance may have made the wrong findings.

### Comments by May LJ

Permission to appeal is only granted where the court considers that the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard (CPR 52.3 (6)). A case where there are complexities, which potentially have been wrongly decided by the judge at first instance, would seem to fulfil these criteria.

However, this is in direct contradiction to the comments of May LJ who has suggested that cases involving complex factual and technical issues will not generally be amenable to appeal. May LJ has said:

*A cynic might say that the need to re-open highly complicated factual and technical issues on which a highly competent technical judge has immersed himself for over a period of thirteen months and produced a masterpiece of a judgment was a compelling reason why the proposed appeal should not be heard. The cynic would not be far from the mark.*

According to May LJ, implementation of Part 52 of the CPR has not '*altered this court's approach to applications for permission to appeal from the factual decisions of TCC judges*'. Given the practical difficulties faced by an appeal court in deciding what the correct finding of fact was in a complex technical matter, May LJ is of the view it would make the whole procedure of review a disproportionate exercise for the parties and the court in terms of time and expense.

### Professional negligence cases

The principles applied in TCC cases also seem to be relevant to decisions reached in any case where technical expert evidence is required. The *Thomson* case involved experts valuing antiques where it was held that the court would rarely disturb a judge's finding of fact reached after hearing oral evidence and having made an assessment on personal credibility. The court would more readily depart from evaluative judgments made by a judge of expert evidence where the evidence is in writing. This suggests the approach taken in the TCC would apply to any professional negligence case where expert evidence is required.

## **Practical implications**

So where does this leave an aggrieved party? It appears clear that appellate review in cases of a technical nature on a point of fact will now become even more of a rarity. This reinforces the need to get the evidence before the court right the first time, and illustrates the importance of having first-class expert evidence.

More importantly, the factors behind the decision between choosing litigation or arbitration as a forum for hearing disputes may now change. The more advantageous appeal system in the courts is no longer such a compelling reason to choose the more expensive litigation process. Parties may therefore wish to reconsider their standard contract clauses on disputes and which jurisdiction to choose.

For further information, please contact:

E: [Rhian Howell](mailto:Rhian.Howell@bealeandcompany.com)

T: +44 (0) 117 915 4163