Appellate advocacy revisited

HUGH FRASER JA

Thursday 26 April 2012

CONTINUING PROFESSIONAL DEVELOPMENT SEMINAR

APPELLATE ADVOCACY REVISITED [1]

Introduction

1. Appeals are creatures of statute.[2] There are a variety of Queensland statutes conferring rights of appeal.[3] It should be emphasised that, in any particular appeal, it is necessary to be familiar with the terms of the statutory provisions conferring jurisdiction, defining the nature of the appeal, and stating the powers of the appeal court. An intimate knowledge of the appellate jurisdiction and powers is essential if the advocate is to frame an effective argument that the appellate court should, or should not, alter the decision of the primary tribunal.

Nature of appeals to the Court of Appeal

2. This paper concerns appeals to the Court of Appeal. So far as criminal appeals are concerned, most appeals to the Court of Appeal in relation to conviction and sentence are brought under s 668E and (Attorney-General's appeals against sentence) s 669A of the *Criminal Code* 1899. There are also frequent appeals by leave under s 118(3) of the *District Court Act* 1967 from decisions in that court on appeal from the Magistrates Court under s 222 of the *Justices Act* 1886. My co-presenter will discuss aspects of appeals in the criminal jurisdiction.

3. Section 254 of the *Supreme Court Act* 1995 confers a right of appeal from judgments and orders of a judge of the Supreme Court to the Court of Appeal.[4] (That is qualified by s 253: no appeal lies from a consent order or an order as

---

[1] This paper draws heavily on the author's earlier paper, 'Appeals: Findings Contrary to the Evidence and Further Evidence' (Paper presented at the Bar Association of Queensland Continuing Professional Development Seminar, 2006).

[2] *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [8]

[3] Many of the statutes are mentioned in *Civil Procedure Queensland* (Butterworths), in the annotations to Chapter 18 Part 1 – Appeals to the Court of Appeal - by the late Honourable Justice PR Dutney.

[4] It has been held that this does not confer a right of appeal in a criminal proceeding against an acquittal, including on a contempt charge: *Henderson v Taylor, Information Commissioner of Queensland* [2006] QCA 490

to costs only left to the discretion of the judge making the order, except by leave of the judge.) The nature of that appeal appears from r 765 of UCPR:

> "(1) An appeal to the Court of Appeal under this chapter is an appeal by way of rehearing.
>
> (2) However, an appeal from a decision, other than a final decision in a proceeding, or about the amount of damages or compensation awarded by a court is brought by way of an appeal.
>
> (3) An application for a new trial is brought by way of an appeal.
>
> (4) Despite subrules (2) and (3) but subject to the Act authorising the appeal, the Court of Appeal may hear an appeal from a decision mentioned in subrule (2) or an application for a new trial by way of rehearing if the Court of Appeal is satisfied it is in the interests of justice to proceed by way of rehearing."

4. The nature of the "rehearing" in r 765(1) is illuminated by the Court's powers in r 766 :

> "(1) The Court of Appeal –
>
> (a) has all the powers and duties of the court that made the decision appealed from; and
>
> (b) may draw inferences of fact, not inconsistent with the findings of the jury (if any), and may make any order the nature of the case requires; and
>
> (c) may, on special grounds, receive further evidence as to questions of fact, either orally in court, by affidavit or in another way; and
>
> (d) may make the order as to the whole or part of the costs of an appeal it considers appropriate.
>
> (2) For subrule (1)(c), further evidence may be given without special leave, unless the appeal is from a final judgment, and in any case as to matters that have happened after the date of the decision appealed against."

5. The High Court discussed very similar provisions in *Fox v Percy* (2003) 214 CLR 118 at 124[29] et seq. This "rehearing" is generally a rehearing on the record, not one involving the rehearing of witnesses, although in exceptional cases additional evidence may be admitted. It may be contrasted with a "rehearing *de novo*", which is neither a strict appeal nor an appeal by way of

rehearing, but is more akin to a trial. (It is convenient to adopt the taxonomy of strict appeals, appeals by way of rehearing, and rehearings *de novo*, whilst recognising that the precise nature of the appellate jurisdiction and powers must be ascertained from the relevant statute.[5])

The fundamental rule in appeals: the appellant must demonstrate error.

6. It is a fundamental rule, informing all aspects of advocacy in appeals by way of rehearing and strict appeals, that the appellant must demonstrate error in the decision of the primary tribunal. In *Allesch v Maunz* (2000) 203 CLR 172, Gaudron, McHugh, Gummow and Hayden JJ said, at 180 –181 [23]:[6]

> "For present purposes, the critical difference between an appeal by way of rehearing and a hearing de novo is that, in the former case, the powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error, whereas, in the latter case, those powers may be exercised regardless of error[7]. At least that is so unless, in the case of an appeal by way of rehearing, there is some statutory provision which indicates that the powers may be exercised whether or not there was error at first instance… "

7. The rule extends to challenges to findings of fact based on inferences drawn by the primary judge from findings of primary fact. McPherson JA (Williams JA and Chesterman J agreeing) said in *DPP v Hart* [2005] 2 Qd R 246 at [28]:

> "[The trial judge's] findings of fact, including those based on inference, are therefore to be taken as correct unless and until the contrary is demonstrated. This is to state no more than the elementary rule that, in an appeal raising issues of fact, it is for the appellant to satisfy this Court that the decision of the judge below is wrong. If authority is needed, it can be found in *Savanoff v Re-Car Pty Limited* [1983] 2 Qd R 219, 223, 231." [8]

---

5 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [56] – [58].

6 See also per Kirby J at [44]: "Error must be shown."

7 See *CDJ v VAJ* (1998) 197 CLR 172 at 202-202[111], per McHugh, Gummow and Callinan JJ.

8 See also *Minister for Immigration v Hamsher* (1992) 35 FCR 359 at 369 (Beaumont and Lee JJ); *Branir Pty Ltd v Owston Nominees (No 2) Pty* Ltd [2001] FCR 1833; 117 FCR 424 (per Drummond, Mansfield and Allsop JJ); *Williams v Minister Aboriginal Land Rights Act 1983* [2000] NSWCA 255 per Heydon JA (with whom Spigelman CJ and Sheller JA agreed) at [60]; (2000) Aust Torts Reports 81-578, at 64,148; *Cadwallader v Bajco Pty Ltd* [2002] NSWCA 328 per Heydon JA (Santow JA, Gzell J concurring) at [116] - [118].

8. Therefore, it is has been said that it is not good enough to "… invite the court to survey for itself, afresh, all the evidence on particular points and arrive for itself at particular conclusions about them, without essaying the necessary task of positively demonstrating that the trial judge was wrong"; [9] the appeal court does not "sit, as it were, as a second trial court and consider, as if presented for the first time, the arguments advanced by counsel for the [appellant]".[10]

9. The fundamental rule is reflected in *UCPR's* requirements for a notice of appeal in civil matters that it state "briefly and specifically the grounds of appeal" (r 747). It is reflected also, in more detail, in the requirements in the Practice Direction[11] for the appellant's written outline, discussed below.

10. The rule requires qualification in some cases, for example where the judgment is set aside by reference or partly by reference to evidence admitted for the first time on appeal. That is, however, very unusual. My co-presenter will discuss the admission of new evidence in criminal appeals. In civil appeals regulated by *UCPR* "special grounds" are required before evidence of events occurring before judgment after a trial may be admitted after a final judgment: *UCPR* r 766(1)(c). It has been held that the test for admission of such further evidence on appeal generally requires that that it could not have been obtained with reasonable diligence for use at the hearing, it would probably have an important (though not necessarily decisive) influence on the result of the case, and it must be apparently credible (though not necessarily incontrovertible).[12]

11. Though it is not necessary to show "special grounds" for the admission of evidence of events occurring after judgment, (*UCPR* r 766(2)), the admission of such evidence has also been held to be discretionary.[13] The test is

---

9 *Williams v Minister Aboriginal Land Rights Act 1983* [2000] NSWCA 255 per Heydon JA (with whom Spigelman CJ and Sheller JA agreed) at [61]; (2000) Aust Torts Reports 81-578, at 64,148.

10 *Cadwallader v Bajco Pty Ltd* [2002] NSWCA 328 per Heydon JA (Santow JA and Gzell J concurring) at [118].

11 Supreme Court of Queensland Practice Direction 2 of 2010.

12 *Atlantic 3-Financial (Aust) Pty Ltd v Marler* [2004] 1 Qd R 579, citing *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404, 408 and *Langdale v Darby* [1982] 3 All E R 129, 137-138; *Hawkins v Pender Bros Pty Ltd* [1990] 1 Qd R 135 at 137 per Thomas J

13 *Hawkins v Pender Bros Pty Ltd* [1990] 1 Qd R 135 at 137 per Thomas J, citing *Mulholland v Mitchell* [1971] AC 666 (see 679-680); but note the reservation by Muir J (McPherson JA agreeing) in *Thomson v Smith* [2005] QCA 446 at [59] as to whether r 766(2) differs from

apparently less stringent when the failure to adduce the evidence at trial is associated with some misdirection, malpractice, misconduct, or like event, though the precise criteria for the admission of the evidence in such cases depends upon the interests of justice in the particular circumstances.[14] (The possible application of *UCPR* rr 667(2)(b) and 668(1) should also be considered.[15]) When the appeal is not from a "final judgment", it is not necessary to obtain "special leave" to adduce further evidence: *UCPR* r 766(2). But again, it appears to remain in the Court's discretion whether the evidence should be admitted.[16]

12. As I have mentioned, cases in which new evidence are admitted in appeals in the Court of Appeal are exceptional. I put them to one side in what follows.

Constraints in factual challenges on appeal

13. The fundamental rule that the appellant must demonstrate error in the decision at first instance finds expression in some well-known constraints in the appellate process.

<u>A party is ordinarily not permitted to take new points on appeal</u>

A new point that might have been met by rebutting evidence or cross-examination ordinarily will not be permitted on appeal

14. The classic statement is that of Latham CJ, Williams and Fullagar JJ in *Suttor v Gundowda Pty Limited* (1950) 81 CLR 418 at 438:

> "Where a point is not taken in the court below and evidence could have been given there which by any possibility could have prevented the point from succeeding, it cannot be taken afterwards."

RSC O 70 r 10 and the rules considered in *Mulholland v Mitchell,* which preserved the court's discretion in relation to the admission of further evidence.

14 *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134, per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

15 See *Ivi Pty Ltd v Baycrown Pty Ltd* [2006] QCA 461.

16 *Kitto v Medalion Homes Ltd* [2000] QCA 288, per Thomas J, with whose reasons, and the reasons of Davies JA, Mullins J agreed. Note also the reservation by Muir J (McPherson JA agreeing) in *Thomson v Smith* [2005] QCA 446 at [59] as to whether r 766(2) differs from RSC O 70 r 10 and the rules considered in *Mulholland v Mitchell* which preserved the court's discretion in relation to the admission of further evidence

15. In *Coulton v Holcombe* (1986) 162 CLR 1, at 8-9, Gibbs CJ, Wilson, Brennan, and Dawson JJ said that it was "fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish", and that:

> "In a case where, had the issue been raised in the court below, evidence could have been given which by any possibility could have prevented the point from succeeding, this Court has firmly maintained the principle that the point cannot be taken afterwards."

16. Similarly in *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447; 77 ALJR 1598 Gleeson CJ, McHugh and Gummow JJ said at 1608 [51]:

> "…It would be inimical to the due administration of justice if, on appeal, a party could raise a point that was not taken at the trial unless it could not possibly have been met by further evidence at the trial. Nothing is more likely to give rise to a sense of injustice in a litigant than to have a verdict taken away on a point that was not taken at the trial and could or might possibly have been met by rebutting evidence or cross-examination…."

A new point is commonly (though not inevitably) allowed on appeal where there is no question of further evidence

17. Paragraph [51] of the joint judgment in *Whisprun Pty Ltd v Dixon* continues:

> "... Even when no question of further evidence is admissible, it may not be in the interests of justice to allow a new point to be raised on appeal, particularly if it will require a further trial of the action…Not only is the successful party put to expense that may not be recoverable on a party and party taxation but a new trial inevitably inflicts on the parties worry, inconvenience and an interference with their personal and business affairs."

18. Examples of appeals where a new point was not permitted to be raised, even though it did not require any further evidence, may be seen in *Tabtill Pty Ltd v*

Creswick[17] and *Multicon Engineering Pty Ltd v Federal Airports Corporation*.[18]

What is a "new" point?

19. What is a new point depends upon the pleadings, the particulars and the conduct of the trial. A point may be new even though it was pleaded and within the particulars, if the actual conduct of the trial demonstrates that the point was not litigated: *Water Board v Moustakas* (1988) 180 CLR 491 at 497; *Whisprun Pty Ltd v Dixon* at 1607[50], 1608[52]-[53]. Conversely, a point may not be new, even though it was not pleaded or not within the particulars, if the conduct of the trial demonstrates that it was litigated.

Material used for deciding if the point might have been met by evidence

20. In some cases the possibility that a new point might have been met by evidence is obvious, and nothing is required to demonstrate it. In other cases, appeal courts rely upon statements by counsel about the course that counsel would have taken had the new point been raised below. In *Cummings v Lewis* (1993) 41 FCR 559[19] Sheppard and Neaves JJ said, at 567:

> "If the case now made had been the one made at trial, [counsel] may have cross-examined quite differently, other witnesses may have been called or witnesses who were called may have been asked questions about this aspect of the matter. Naturally counsel could not identify precisely the extent of the prejudice which each claimed was involved. This is understandable. It is very difficult for counsel, having conducted a case on one basis, to say precisely how the case would have been conducted if it had been put in a different way. Courts do not accept as of course statements made by counsel as to possible prejudice to their clients in circumstances such as this. Courts, however, recognise that counsel are placed in a substantial difficulty when asked to specify a claim of prejudice with any precision. If prejudice is claimed, a court is likely to give effect to that claim unless the circumstances clearly point to there being in fact no prejudice."

---

17 [2011] QCA 381 at [143]. Special leave to appeal from this decision was refused: [2012] HCATrans 62.

18 (1997) 47 NSWLR 631 at 645-646

19 Followed by the New South Wales Court of Appeal in *Hypec Electronics Pty Ltd v Mead* [2004] NSWCA 221 (Tobias JA, Sheller JA and Ipp JA agreeing) at 74 and again in *Whitehouse v BHP Steel Ltd* [2004] NSWCA 428 Tobias JA (McColl and Giles JJA agreeing).

21. In particular circumstances, an appellate court might require evidence to demonstrate the possibility that the course of the trial might have been different if the new point had been raised (see *Ellington v Heinrich Constructions Pty Ltd* [2004] QCA 475), but that has been said to be exceptional: see *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 134 at [86].

There are significant constraints in challenges to a finding of fact based on the primary judge's assessment of credibility of oral evidence.

22. In *Fox v Percy* (2003) 214 CLR 118 at 127 [26]-[27], Gleeson CJ, Gummow and Kirby JJ referred with approval to a trilogy of earlier cases, including the following observations of Brennan, Gaudron and McHugh JJ in *Devries v Australian National Railways Commission*,[20] as to the correct approach of an appellate court where findings of fact based on credibility are challenged:

> "More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against – even strongly against – that finding of fact. [See *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842; *Jones v Hyde* (1989) 63 ALJR 349; *Abalos v Australian Postal Commission* (1990) 171 CLR 167.] If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge 'has failed to use or has palpably misused his advantage' [*SS Hontestroom v SS Sagaporack* [1927] AC 37 at 47.] or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable'." [*Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842 at 844.]

23. There is, however, no "short exhaustive formula" that can meet every case: *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 160 ALR 588 at [3] per Gaudron, Gummow and Hayne JJ, quoting from *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 480 per Deane and Dawson JJ.

---

[20] (1993) 177 CLR 472 at 479.

24. Review has been found to be justified, for example, "where in a complex pattern of events incontrovertible evidence can only be fitted into the pattern if a different view of the credibility of a witness is taken by the court on appeal": *Agbaba v Witter* (1977) 51 ALJR 503 at 508 per Jacobs J, approved in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 160 ALR 588 at [4] by Gaudron, Gummow and Hayne JJ. And it has been held that in some "quite rare" cases, an appeal court might conclude that a decision should be overturned even though the facts fall short of being "incontrovertible", where, for example, the decision is "glaringly improbable" or contrary to "compelling inferences"[21]. Accordingly, it is unsurprising that there remains some disagreement about the use of particular verbal formulae to describe the extent of this constraint.[22]

<u>An appeal court is significantly constrained in setting aside a finding that reflects a value judgement or an exercise of discretion.</u>

25. The difficulty in many cases of persuading an appeal court to overrule a discretionary decision is well known. A mere difference of opinion about the way in which the discretion should be exercised is not a sufficient justification for review.[23] The appellate court may not interfere unless the discretion has miscarried:[24]

> "It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution, for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or

---

[21] *Fox v Percy*, at 128[29].

[22] See *CSR Ltd v Maddalena* (2006) 80 ALJR 458, per Callinan and Heydon JJ at 492[180]; contrast per Kirby J (Gleeson CJ agreeing) at 466[23].

[23] *Norbis v Norbis* (1986) 161 CLR 513 at 518.

[24] *House v The King* (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ. See also *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 176-178; *Norbis v Norbis* (1986) 161 CLR 513 at 517-519.

plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance."

26. Similar constraints have been held to apply where the decision, though not necessarily discretionary in the strict sense, involves elements of opinion, value and the like. In *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at [24], Allsop J, with whom Drummond and Mansfield JJ agreed, said that "demonstration of error may not be straight-forward where findings or conclusions involve elements of fact, degree, opinion, or judgment ..."

27. An example of the difficulty is encountered in challenges to a trial judge's apportionment of liability. In *A V Jennings Construction Pty Ltd v Maumill* (1956) 30 ALJ 100, 101, 2nd col., it was observed that such an apportionment:

> "... is not lightly reviewed by a court of appeal. As Lord Wright observed in *British Fame (Owners) v Macgregor (Owners)* [1943] AC 197, at p 201), it is a finding upon a question 'not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds.' Accordingly re-consideration of the question in the exercise of an appellate jurisdiction is subject to the limitations imposed by the principles which govern all appeals against judgments given in the exercise of discretions, principles which this Court has stated repeatedly in recent cases. Consequently, as Lord Simon remarked in the case just cited at pp 198-199, 'the cases must be very exceptional indeed in which an appellate court, while accepting the findings of fact of the court below as to the fixing of blame, none the less has sufficient reason to alter the allocation of blame made by the trial judge.' " [25]

<u>The appeal court exercises great caution in reviewing interlocutory decisions, particularly those which do not determine substantive rights.</u>

28. In the oft-cited words of Sir Frederick Jordan in *In re the Will of F B Gilbert (dec'd)*[26]:

---

[25] See also *Pennington v Norris* (1956) 96 CLR 10, 15-16; *McPherson v Whitfield*. [1996] 1 QdR 474, 477; *Owbridge v Murphy & Anor* [2002] QCA 197.

[26] (1946) 46 S.R. (N.S.W.) 318 at 323.

" … I am of opinion that, … there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of Judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a Judge in Chambers to a Court of Appeal."[27]

29. Thus it has often been said that the courts exercise great caution in reviewing interlocutory decisions, particularly discretionary decisions on a point of practice or procedure which do not determine substantive rights: see, e.g., *Coster v Bathgate* [2005] 2 Qd R 496 at 501 [27]-[28]; *MGM Containers P/L v Wockner* [2006] QCA 502 at [29].

<u>The appeal court will not set aside even a finding of fact based on inference from a finding of primary fact unless the appellant demonstrates error by the primary judge in drawing the inference.</u>

30. When the finding is not referable to credibility of oral evidence, demonstration of error is not attended by the difficulty thrown up by the disadvantage of the appeal court not having seen the witnesses, but nevertheless the appellant must demonstrate error. Precisely what must be shown to demonstrate such error has been the subject of ongoing debate. But in *Fox v Percy,* Gleeson CJ, Gummow and Kirby JJ affirmed (at 127[25]) the rule earlier confirmed in *Warren v Coombes* (1979) 142 CLR 531 at 551 that:

"[I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge but, once having reached its own conclusion, will not shrink from giving effect to it."[28]

---

[27] In Queensland, this statement was adopted in *Queensland Trustees Ltd v Fawckner* [1964] Qd R 153 at 166: see per McPherson JA in *Seabrook v Alliance Australia Insurance Limited* [2005] QCA 58 at [17].

[28] Contrast *White Industries Qld Pty Ltd v. Hennessey Glass & Aluminium Systems Pty Ltd* [1999] 1 Qd R 219, per Pincus JA, which cites Barwick CJ's judgment in *Whiteley Muir & Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505 at 506 followed in *Zuvela v Cosmarnan*

Effect of the error

31. Although it is perhaps trite to say so, an error is irrelevant unless it affected the primary court's decision and the appeal may be dismissed if the result is plainly correct in any event: see, for example, *De Winter v De Winter* (1979) 23 ALR 211 at 217.

Absence of constraint

32. It is also of importance in formulating the best available argument to bear in mind the kinds of arguments which involve no constraint upon appellate correction, such as arguments that there is no evidence supporting a particular finding. Similarly an argument that evidence was wrongly excluded or admitted involves no such constraint, although it has been said that it is a rare case in which such rulings falsify findings or justify an order for a new trial.[29]

33. And of course, merely because the primary judge has rejected particular evidence of a witness does not necessarily mean that all of that witness' evidence is worthless on appeal. It all depends on the findings. If "the credit of his oath"[30] remains intact, reference to the witness' other evidence may remain useful.

The grounds of appeal

34. Drafting the grounds of appeal is the appellate advocate's first opportunity to persuade the court that there might be substance in the appeal. The scattergun approach is widely regarded as being less effective than a judicious selection of the best points: a lengthy and unsustainable recitation of error in numerous findings is calculated to conceal any good point.

35. The notice of appeal is also not the vehicle for argument. The grounds should be stated clearly and succinctly. So much is made mandatory for civil appeals by *UCPR*, r 747 and for criminal appeals by the *Criminal Practice Rules*, rr 65

Concrete Pty Ltd (1996) 71 ALJR 29 at 30, per Brennan CJ, Toohey, McHugh, Gummow and Kirby JJ (which has not been overruled expressly).

29 *Deputy Commissioner of Taxation v Luckhardt* [2006] QCA 53 per Keane JA at [45], referring to *UCPR* r 770. Appeal courts are also usually in a position to decide the case, rather than remit it for retrial: see *Fox v Percy*, per Gleeson CJ, Gummow and Kirby JJ at 132[43]-[46].

30 *Wren v Emmett Contractors Pty Ltd* (1969) 43 ALJR 213, 221 per Windeyer J

(2)(b), 66(2)(b) and 84(2)(b). If it is impractical to identify the real issues when the notice of appeal is lodged, grounds may subsequently be abandoned, with the court and the opponent to be notified as soon as practicable.

Written outlines of argument

36. Practice Direction No 2 of 2010 sets out procedural requirements that must be followed in the Court of Appeal. Much of it, I suggest, simply reflects the practice of effective appellate advocates.

37. The Practice Direction (paragraph 39) includes provision for an outline of argument by the appellant and one by the respondent. In addition, a party may provide one further written outline of argument or reply in accordance with the timetable letter distributed by the registry. The purposes of the outlines are identified in paragraph 13 of the Practice Direction. They are to assist understanding of the contentions before the hearing and enhance the utility of the oral argument; to ensure that each party is aware of each other party's contentions; and to shorten the hearing; but not to replace oral argument.

38. The written outlines of argument in appeals are of great importance. The reasons why this is so include the following:

(a) It should be assumed that the judges will read the outline before the hearing of the appeal. It is thus the advocate's first opportunity to persuade the Court to the appellant's point of view by reasoned argument.

(b) The Practice Direction provides (paragraph 20) that, unless the Court or a judge of appeal directs, a party's oral argument will ordinarily be restricted to issues raised in the written outline of argument. Though the Court may permit departures from this stricture, it should not be assumed that it will do so.

(c) In reserved cases, though the Court may order a transcript of the oral argument, the outline will be an easy point of reference for the judges in writing a judgment.

39. The Practice Direction requires (paragraph 14(5)) that the written outline (including any chronology or factual summary) not exceed ten pages in length. If it is substantially longer, the Registrar must be informed (and a justification for that will be required).

40. Though no general rule about length may be expressed, various considerations discussed below strongly favour brevity. Ten pages is the usual **maximum**, not a starting point. That is emphasised by the statement in the Practice Direction (paragraph 14(5)) that the outline "will often be less than 10 pages".

Appellant's outline

41. As to the essential content of the outline in a fact appeal, the Court's Practice Direction 2 of 2010 provides (at paragraph 15) that it must:

> "(a) concisely state the grounds of appeal being argued and any grounds of appeal being abandoned;
>
> (b) identify any error or errors said to have been made by the court or tribunal whose order is subject to appeal and the basis in principle or authority for that contention;
>
> (c) where it is contended that a finding of fact should not have been made or that a finding of fact which was not made should have been made, set out the basis for that contention by reference to the evidence;
>
> (d) where it is contended that the decision-maker whose order is subject to appeal erred in law, the precise error or errors of law and the basis in principle or authority for that contention."

42. The following remarks are not intended to be prescriptive. They are matters to which attention might usefully be directed in the settling of the outline. For convenience the points are separated, though in practice they will be considered together.

43. First (after identifying the grounds of appeal argued and any grounds abandoned), identify any alleged error: paragraph 15(b) of the Practice Direction. This should be encapsulated succinctly very early in the outline – not concealed in a mass of legal or factual remarks. Justice Sackville observed that it is an important part of the task, particularly of the appellant's counsel,

"to identify early and precisely those rulings that are challenged and the basis for each challenge" (*Appellate Advocacy*, The Hon. Justice Ronald Sackville (1996 - 1997) 15 ABR 99 at 100).

44. Secondly, in consequence of the fundamental rule mentioned earlier, the appellant must carefully identify each finding of fact (or failure to find a fact), or finding of law, that must be challenged if the appellant is to succeed. Obviously those findings will be at the centre of the advocate's attention. These should be clearly identified in the outline as findings that are challenged, together with the evidentiary basis, or basis in principle or authority, for the challenge: paragraphs 15(c) and (d) of the Practice Direction.

45. Thirdly, it is necessary to consider whether to refer to other findings (of fact or law) that it might be desirable to challenge in support of an appeal.

46. Fourthly, it is equally important to identify in the outline any relevant findings upon which the appellant relies in support of the appeal.

47. Fifthly, the appellant must consider all of the evidence adduced at trial that supports or opposes an impugned finding of fact (or failure to make a finding).

48. Sixthly, the appellant should consider the arguments that might persuade the appeal court to set aside the contentious finding (or make the omitted finding) – particularly bearing in mind, the well known constraints upon challenging credibility-based findings of fact in civil appeals. Those arguments will be referable to, but not necessarily confined by, the findings and evidence identified in the earlier tasks. The other material notably includes the inherent probabilities upon the basis of the known facts.

49. The appellant's next task is to select which of those arguments should be run on appeal. This is critical. Where there are a number of arguable points, it will often be a very bad strategy to run every arguable point. The good points

might get lost amongst the bad ones. There is high authority for this proposition. For example, Justice Hayne has said:[31]:

> "For my own part I am a firm believer in the "infection" theory of advocacy. A bad point always manages to infect good points. If a court concludes that one of the ways in which the case is put is legally infirm, human nature dictates that the other methods of putting the case are examined more closely. It follows that step one is to jettison the point which you think is bad. If, as sometimes happens, the Court picks up the discarded point and proffers it in aid of counsel, counsel will do far better to point out why that way of putting the case is flawed than they will if they simply adopt the gift from the bench and allow the Court later to discover for itself that it is wrong."

50. The final task is to write the outline. It is not possible to generalise about how to do this. But it will be useful to consider some critical matters:

    (a) The judges reading it will have little time. Thus it should be concise, and the most attractive argument should be put early.

    (b) The court will not be pre-disposed to find error. The challenge should be clearly articulated, with no obfuscation, exaggeration, or unnecessary adjectival flourish. It must be faced head on. Identify the particular part of the reasons containing the challenged finding and say why those findings are wrong.

    (c) In relation to each proposition, ask oneself: "To what particular issue is this relevant and how does it advance my argument?"

<u>Respondent's outline</u>

51. Practice Direction 2 of 2010 provides, (at paragraph 16) that the respondent's written outline of argument must:

> "(a) not repeat matters set out in an appellant's written outline;
>
> (b) clarify those matters which are not in dispute; and
>
> (c) summarise the respondent's answers to an appellant's arguments, referring to the authorities relied on and the

[31] *Advocacy in the High Court of Australia, An Address to the Wesern Australian Bar Association, 25 October 2004*, Justice Hayne, published on the High Court's website.

> evidence for any factual assertions made, particularly if the facts relied on by an appellant are contested."

52. The respondent's outline is substantially the obverse of the appellant's. The fundamental rule mentioned earlier has the consequence that the starting point will nearly always be specific reliance on the impugned findings of fact, reliance on supporting findings, and reference to the evidence supporting each such finding.

53. In addition, the respondent may wish to rely upon evidence not relied upon in any finding, or even to impugn findings adverse to the respondent, even at the cost of having to meet constraints on such challenges discussed earlier. If so, a notice of contention will be necessary: *UCPR* r 757.

<u>Reply outline</u>

54. An outline in reply is often not necessary or useful. If one is filed, it must indicate what parts of the respondent's outline are accepted: Practice Direction, paragraph 14(4).

<u>The record book and bundles of authorities</u>

55. One opportunity for advocacy which may be overlooked concerns the record book. If an appeal turns on a point which does not require a complete record, the Practice Direction requires that a complete record not be prepared: paragraph 42 and, for criminal appeals, paragraph 32. As the President of the Court of Appeal observed in a paper delivered at the 2011 Bar Association Conference (*Common Mistakes in Appeals*), a thin record book is itself good advocacy since is assists in keeping the Court's focus upon what the appeal is really about. The same is true of the judicious selection of only those authorities which truly do bear upon the real point in issue.

<u>Oral submissions</u>

56. This section of the paper concerns appellate oral advocacy generally, including in criminal appeals. The following remarks are intended to provoke

thought about this topic. Every appeal is different, and every advocate has a different approach. There is no one "correct" approach.

57. It goes without saying that an advocate must speak clearly and loudly enough for the judges to hear what the advocate says. Nor is there any secret about the importance of being succinct. As it has sometimes been put: stand up, speak up, and shut up. Exaggeration, untenable submissions about the facts or law, discourtesy to the opponent, point scoring, and the like are bad in themselves, but such behaviour is also bad advocacy because of its potential to distract attention from the advocate's argument.

58. Unnecessary reference to cases is also capable of detracting from the persuasive force of an argument. The Court of Appeal must usually follow indistinguishable decisions of other intermediate courts of appeal as well as the Court's own decisions and decisions of the High Court. But many appeals ultimately turn upon the facts rather than upon a disputed legal proposition. Where a point of law is in issue, the good advocate will find the leading case and cite only it and such other authority as is strictly necessary, avoiding reference to a plethora of decisions on their own facts which merely apply the leading case.

59. The hearing of the appeal presents the advocate with two valuable opportunities:

    (a) To persuade the Court to the advocate's point of view, particularly by emphasising the best points.

    (b) To discover what the judges think about the arguments and tailor submissions accordingly.

60. The question is how best to take advantage of those opportunities. As to the first, books have been written on the art of persuasion. It is proposed only to make a few points here that apply specifically in appeals.

61. Experienced appellate advocates commonly identify the contentious issue succinctly in their opening statement, immediately followed by reference to

the part of the reasons deciding the issue, followed by reference to the primary findings supporting that decision (or the absence of them), and then by reference to the evidence (or absence of it) supporting those findings.

62. Many advocates prepare an entirely new document for oral submissions. The form of this varies, of course, from advocate to advocate and from appeal to appeal. It might be in the form of brief notes, as an aide memoire, or constitute a somewhat fuller text of intended oral submissions. What each form has in common is that, though in writing, it represents intended speech. There are a number of reasons for this approach. They illustrate some general features of the task:

(a) Writing down what one must stand up and say in the near future to three judges of appeal tends to concentrate the mind.

(b) The outline usually will have been prepared a long time before the hearing. By the time the appeal is heard, each counsel will have had the chance to consider the opponent's outline and to reflect further on the appeal. Often this results in a refinement of the issues, and sometimes the identification of new points.

(c) The judges will already have read the outline. They can be expected to refer to it when preparing judgments. Counsel can gain no advantage – and may well quickly discover a serious disadvantage - in simply repeating it, or even merely putting it all into slightly different words.

(d) Inevitably the judges will have to read the transcripts and exhibits during submissions. Using a new document may prevent any tendency to invite the judges also to read lengthy parts of the outline during the hearing. If the judges are reading the outline they are necessarily diverted to some extent from watching and listening to the advocate, thus potentially reducing the impact of the oral advocacy.

(e) The written outline usually will not have been prepared with the oral submissions in mind.

(f) In many cases the best way of emphasising the best points will be to complement the points made in the written outline, rather than simply to re-phrase them. (One must also bear in mind, though, that one or more of the judges may not have had time carefully to study the outlines before the hearing.)

(g) Finally, the written submissions usually will have been prepared before the appeal record is prepared. Though the advocate should have prepared the written outline with access to the same material, preparing a new document is an effective way to start the vital task of learning the appeal record.

63. Preparing to take the fullest advantage of the second valuable opportunity presented by the hearing – to discover and use to advantage what the judges think about the arguments – is rather more difficult.

64. In a facts appeal, the primary requirement is, of course, to know the facts. That does not mean just knowing what the facts are, what the evidence about the facts is, and what the findings are, though all of that is necessary. It is also necessary to know where in the appeal record are the evidence and findings about each relevant fact. Of course, there are various aids in that respect – electronic (bookmarks etc) or documentary (notes, stickers, highlighting etc) – but there is no substitute for mastery of the appeal record.

65. One of many reasons for that is that simply reading a prepared speech is not effective advocacy. Apart from producing a poor impression, questions from the Bench may quickly create problems in finding one's place.

66. Justice Kirby identified ten "rules"[32] (which his Honour observed are not really rules, but suggestions that provide a starting point):

(1) Know the court or tribunal that you are appearing in;

---

[32] *Ten Rules of Appellate Advocacy* (1995) 69 ALJ 964.

(2) Know the law, including both the substantive law relating to your case and the basic procedural rules that govern the body you are appearing before;

(3) Use the opening of your oral submissions to make an immediate impression on the minds of the decision-makers and to define the issues;

(4) Conceptualise the case, and focus the attention of the court directly on the heart of the matter viewed from the interest you are propounding;

(5) Watch the bench and respond to them;

(6) Give priority to substance over attempted elegance;

(7) Cite authority with discernment;

(8) Be honest with the court at all times;

(9) Demonstrate courage and persistence under fire. You will generally be respected for it. In any case it is your duty; and

(10) Address any legal policy and legal principles involved in the case and show how they relate to the case.

67. Much of this is, of course, easier said than done. As to the best way to respond to questions from the bench, the natural temptation to focus upon one judge who asks many questions should not lead the advocate into disengaging from the other judges. The advocate must also decide when it is appropriate to defer an answer, although it usually seems better to answer questions immediately. Hayne J said [33] in relation to appeals in the High Court:

> "Because the Court wants to gain as much as it can from oral argument, it is inevitable that argument never quite follows the order which counsel intends to follow. Answering a question from the bench with "I will come to that later" is not often sensible. Much more often than not it is better to deal with the question then and there at least in

[33] *Advocacy in the High Court of Australia*, *An Address to the Western Australian Bar Association, 25 October 2004*, Justice Hayne, published on the High Court's website.

> summary form. But it means that you will have to alter the way in which you intended to present your argument."

68. It follows, of course, that complete familiarity with the appeal record is essential.

Further Reading

Ten Rules of Appellate Advocacy (1995) 69 ALJ 964.

Advocacy in the High Court of Australia, *An Address to the Western Australian Bar Association, 25 October 2004*, Justice Hayne, published on the High Court's website, recommends that the appellate advocate read *The role of Counsel and Appellate Advocacy*, Sir Anthony Mason (1984) 58 ALJ 537; *Appellate Advocacy*, Justice Sackville (1997) 15 ABR 99; *Appellate Advocacy*, DF Jackson QC (1992) 8 ABR 245; *Practice in the High Court of Australia*, DF Jackson QC (1997) 15 ABR 245; and *Advocacy before the United States Supreme Court* , Justice Robert Jackson, (1951) 37 Cornell Law Quarterly (2003).

Appellate Advocacy – New Challenges, The Dame Ann Ebsworth Memorial Lecture, Justice Kirby, 21 February 2006.

Common Mistakes in Appeals, the Hon Justice Margaret McMurdo AC, Bar Association of Queensland Conference 2011, 5 March 2011

HUGH FRASER JA 26 April 2012