Everything you wanted to know about civil appeals (but were afraid to ask)[1]

[1] Rights of appeal are conferred to permit a losing litigant to obtain a remedy when error has been made in the determination of their case. Rights of appeal are almost never conferred merely to permit the losing litigant to have a second go, untrammelled by what has already occurred. The exception is the appeal *de novo*, but that is a rare beast.

[2] The proposition that the purpose of appeals is to enable error to be corrected informs the substantive and procedural law regulating appeals. It informs how appellate judges approach their work. And because that is so, it necessarily informs the conduct of those who seek to persuade appellate judges.

[3] In this paper I seek to identify what I regard to be the most important aspects of the substantive and procedural law regulating civil appeals to the Queensland Court of Appeal. I seek to do so in the context of the articulation of certain practical rules, aimed at giving the appellate practitioner the guidance necessary to avoid the mistakes which are most commonly made in the conduct of appeals.

Rule 1: Identify the governing statutory provisions

[4] Appeals are creatures of statute. If a statute does not confer a right of appeal there will not be one.

[5] Accordingly, the first critical issue for the adviser to a losing litigant is whether a statute confers a right of appeal in relation to the decision of which their client is aggrieved.

[6] Appellate practitioners must develop an intimate understanding of the terms of the statutory provisions conferring jurisdiction to appeal, defining the nature of the appeal, and stating the powers of the appeal court. These considerations can have a significant effect on how the appeal may be run.

[7] It must be appreciated that if a statute does confer a right of appeal, there are a number of ways in which that right may be conferred. Understanding the legal ramifications of the difference between those ways is important.

[8] In *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124, the High Court identified the four most familiar types of appeal in this passage:

> … an "appeal" is not a procedure known to the common law, but, rather, always is a creature of statute. Further, the term "appeal" may be used in a number of senses. In *Fox v Percy*, Gleeson CJ, Gummow and Kirby JJ referred to the fourfold distinction drawn by Mason J in an earlier decision as follows:
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> > "(i) an appeal *stricto sensu*, where the issue is whether the judgment below was right on the material before the trial court; (ii) an appeal by rehearing on the evidence before the trial court; (iii) an appeal by way of rehearing on that evidence supplemented by such further evidence as the appellate court admits under a statutory power to do so; and (iv) an appeal by way of a hearing *de novo*".
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> But these categories cannot represent a closed class and particular legislative measures, such as those with which this appeal is concerned, may use the term "appeal" to identify a wholly novel procedure or

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[1] This paper draws heavily on (and in some cases adopts verbatim) the thoughts of the Honourable Justice Hugh Fraser as expressed in his paper, 'Appellate advocacy revisited' (Paper presented at the Bar Association of Queensland Continuing Professional Development Seminar, Brisbane, 26 April 2012). That paper in turn drew upon his Honour's own earlier paper, 'Appeals: Findings Contrary to the Evidence and Further Evidence' (Paper presented at the Bar Association of Queensland Continuing Professional Development Seminar, 2006).

> one which is a variant of one or more of those just described. It was in that vein that McHugh J pointed out in *Eastman v The Queen*:
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> > "Which of these meanings the term 'appeal' has depends on the context of the term, the history of the legislation, the surrounding circumstances, and sometimes an express direction as to what the nature of the appeal is to be."
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> In short, it is the proper construction of the terms of any particular statutory grant of a right of appeal which determines its nature.

[9] Against that background, let us examine first the nature of the appeal to the Court of Appeal from a single judge of the Supreme Court.

[10] Section 62 of the *Supreme Court of Queensland Act 1991* confers a right of appeal from –

(a) any judgment or order of the court in the Trial Division; and

(b) any opinion, decision, direction or determination of the court in the Trial Division on a stated case; and

(c) any determination of the court in the Trial Division or the District Court in a proceeding remitted under section 61.

[11] Two important matters must be remembered. First, the right of appeal is qualified by ss 63 and 64 of that Act: no appeal lies from a consent order or an order as to costs only left to the discretion of the judge making the order, except by leave of the judge. Second, the truism that appeals are from orders, not reasons.

[12] A recent example where the parties had paid no attention to the latter point is to be found in *Hartley v Hartley* (2022) 10 QR 791. On an application for family provision, the primary judge published written reasons for judgment explaining his reasons for concluding that he would make an order that further provision be made for the proper maintenance and support of the applicant. Because there were some complexities in the formulation of the order, the only order which the primary judge made at the time he published his reasons was "I will hear further submissions from the parties about the form of order consistent with this decision, and any application as to costs." Before the primary judge had received those submissions, the losing party applied to the Court of Appeal for an extension of time to file a notice of appeal. That party argued that the primary judge had made a decision capable of being appealed, because of what he had written in his reasons. The Court of Appeal found that argument to be misconceived, observing at [21]:

(a) The appeal right in this case is that conferred by s 118(2) of the *District Court of Queensland Act 1967*, namely a right conferred on a party who is dissatisfied with a final or interlocutory judgment of the District Court in its original jurisdiction.

(b) The term "judgment" is defined in s 3 of that Act to include "a judgment, order, or other decision or determination of the court." The terms in which the appeal right has been conferred are not apposite to be construed as a reference to anything other than the formal operative judicial act which disposes of or deals with the particular proceeding or aspect of the proceeding.

(c) The primary judge had not made such a judgment. Although his reasons expressed his conclusion and that conclusion was adverse to the present applicant, the primary judge has not yet made a formal operative judicial act which adversely affects the present applicant's rights. He expressly contemplated hearing further submissions before he did so. An expression of a conclusion in reasons published in advance of a final order does not affect rights: cf *Australian Competition and Consumer Commission v Valve Corporation (No 4)* [2016] FCA 382 per Edelman J at [16].

[13] So, let us assume that the Supreme Court of Queensland has made an order which does affect an aggrieved party's rights. What must next be understood? The nature of the appeal appears from r 765 of the *Uniform Civil Procedure Rules 1999*:

> (1) An appeal to the Court of Appeal under this chapter is an appeal by way of rehearing.
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> (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.
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> (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.

[14] The rule provides for two types of appeals. First, that referred to in r 765(1), namely an appeal by way of rehearing. Second, that referred to in rr 765(2) and (3). The latter type of appeal is regarded as an appeal *stricto sensu* (in the strict sense). As has been mentioned, on such an appeal the question considered is whether the judgment complained of was right when given; that is, whether the order appealed from was right on the material which the lower court had before it: *Builders Licensing Board and Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616, at 18.

[15] The nature of the appeal by way of "rehearing" in r 765(1) is illuminated by the Court's powers as expressed in r 766:

> (1) The Court of Appeal –
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> (a) has all the powers and duties of the court that made the decision appealed from; and
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> (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
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> (c) may, on special grounds, receive further evidence as to questions of fact, either orally in court, by affidavit or in another way; and
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> (d) may make the order as to the whole or part of the costs of an appeal it considers appropriate.
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> (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.

[16] An appeal by way of "rehearing *de novo*" is not mentioned because it does not apply to an appeal from a single judge. As the name suggests, it is neither an appeal in the strict sense, nor an appeal by way of rehearing, but is more akin to a fresh hearing in which the court or tribunal hearing the appeal determines the issue afresh, permitting further evidence, and without regard to the way in which the decision below went: see *Harpur v Ariadne Australia Ltd* [1984] 2 Qd R 523.

[17] Of course, there are quite a number of other avenues by which litigants can get to the Court of Appeal. Without attempting to be exhaustive, at least the following possibilities exist:

(a) Appeals as of right from final or interlocutory judgments of the District Court in its original jurisdiction in particular circumstances: see s 118(2) of the *District Court Act 1967*.

(b) Appeals by leave of the Court of Appeal from any other judgment of the District Court, whether in that Court's original or appellate jurisdiction: see s 118(3) of the *District Court Act 1967*.

(c) Appeals from the Planning and Environment Court pursuant to s 63 of the *Planning and Environment Court Act 2016*, only on the ground of error or mistake in law or jurisdictional error and only with the leave of the Court of Appeal.

(d) Appeals from a final decision of the appeal tribunal of the Queensland Civil and Administrative Tribunal, pursuant to s 150 of the *Queensland Civil and Administrative Tribunal Act 2009*, which may be only on a question of law and only if the applicant has obtained the Court's leave to appeal. (This avenue of appeal sometimes throws up some complexities, as to which see *Kerr v Ray White Gladstone Residential & Anor* [2023] QCA 106 at [31].)

[18] It will be noted that some of those avenues are conditioned on the need for leave to appeal, and others are conditioned on a constraint as to subject matter. That provides a neat segue to the second rule.

Rule 2: Identify and satisfy any preconditions to the exercise of jurisdiction

[19] There are many occasions on which the right to appeal is conditioned on the grant of leave to appeal. And there are occasions in which the statute makes some form of specific alteration to the powers of the Court of Appeal. In those cases it is essential to identify and then to seek to satisfy the considerations which are necessary to be established if the Court is to be persuaded to grant leave, and to bear carefully in mind the considerations which limit the powers of the Court of Appeal.

[20] So, for example, in *McDonald v Queensland Police Service* [2018] 2 Qd R 612, Bowskill J (as the Chief Justice then was, and with whom Fraser and Philippides JJA agreed) summarised the relevant principles in relation to an application for leave to appeal to the Court of Appeal from a decision of the District Court in its appellate jurisdiction in these terms (at [39]):

> By way of summary, the following are the principles that apply, to appeals to this Court from judgments of a District Court in its appellate jurisdiction:
>
> (a) the nature of the appeal is governed by ss 118 and 119 of the *District Court of Queensland Act 1967*;
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> (b) an appeal from a judgment of the District Court in its appellate jurisdiction lies only with the leave of this Court: s 118(3);
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> (c) this Court's discretion to grant or refuse leave to appeal is unfettered, exercisable according to the nature of the case, but leave to appeal will not be given lightly, given that the applicant has already had the benefit of two judicial hearings;
>
> (d) the mere fact that there has been an error, or that an error can be detected in the judgment is not ordinarily, by itself, sufficient to justify the granting of leave to appeal – leave will usually be granted only where an appeal is necessary to correct a substantial injustice to the applicant and there is a reasonable argument that there is an error to be corrected;
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> (e) if leave is granted, the appeal is an appeal in the strict sense (cf s 118(8)), in respect of which the Court's sole duty is to determine whether error has been shown on the part of the District Court, on the basis of the material before the District Court. This Court is not engaged in a rehearing; as such, it is not this Court's task to decide where the truth lay as between the competing versions of the witnesses; and it is not for this Court to substitute its own findings for those of the District Court judge;
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> (f) a factual finding of a District Court judge, on an appeal to that court (which may be different from, or additional to those made by the Magistrate at first instance, or which may confirm the findings of the Magistrate at first instance, since the appeal to the District Court is by way of rehearing) may only be reviewed on an appeal to this Court if there is no evidence to support it, or it is shown to be unreasonable, in the sense discussed in *Hocking v Bell* in relation to findings of fact by a jury;

(g) on the hearing of an appeal, this Court has power to draw inferences of fact from facts found by the District Court judge, or from admitted facts or facts not disputed, but, except where there is no evidence on which the judge below might have reached his or her conclusions, or the conclusions are unreasonable, any such inferences shall not be inconsistent with the findings of the District Court judge (s 119(1)); and

(h) the appeal to this Court is not limited to errors of law.

[21] Regard might also be had to the subsequent summaries on similar subjects expressed in:

(a) *Commissioner of Police v Antoniolli* [2021] QCA 237 at [105] to [118] in relation to an application for leave to appeal from a decision of the District Court in its appellate jurisdiction.

(b) *Crime and Corruption Commission v Andersen* [2021] QCA 222 at [14] in relation to an application for leave to appeal from a decision of the appeal tribunal of QCAT.

[22] When an appeal is confined as to subject matter, it is necessary that the appellant be capable of demonstrating that the appeal is within that subject matter. So if an appeal right is conferred "on the ground of error or mistake in law", then it is axiomatic that the applicant clearly and distinctly identify that type of error.

[23] In *Trinity Park Investments Pty Ltd v Fabcot; Dexus Funds Management Limited v Fabcot Pty Ltd* [2021] QCA 276, the Court of Appeal was critical of the way in which litigants had sought to identify the error of law by general statements made in their written submissions, observing at [76]:

> The first problem with both statements is that they are hopelessly general and do not condescend to the identification of any particular legal error or mistake in either the imposition or formulation of the limitations set out in paragraphs [22] to [25] of the primary judge's reasons. On an application of the present nature, it is not up to this Court to wade through the documents to see if a question of law can somehow be found by the examination of written or oral arguments which in an undifferentiated way merely contend that a primary judge erred "in law" in reaching a particular outcome. If there is legal error, it must be specifically identified. As Posner J famously observed in *US v Dunkel* 927 F. 2d 955 (7th Cir 1991), "Judges are not like pigs, hunting for truffles buried in briefs."

Rule 3: Identify the error in the decision below

[24] It is a fundamental rule, informing all aspects of advocacy in appeals by way of rehearing and strict appeals, that the appellant must demonstrate that the decision made by the primary court or tribunal is the result of some legal, factual or discretionary error.

The general proposition

[25] In *Allesch v Maunz* (2000) 203 CLR 172, Gaudron, McHugh, Gummow and Hayne JJ made this point in the course of a useful explanation of the difference between the three main types of appeals, at 180 to 181 [23]: [2]

> 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. 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. And the critical distinction, for present purposes, between an appeal by way of rehearing and an appeal in the strict sense is that,

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[2] See also per Kirby J at [44]: "Error must be shown." See recently *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439 at 464[59], per Nettle J.

> unless the matter is remitted for rehearing, a court hearing an appeal in the strict sense can only give the decision which should have been given at first instance whereas, on an appeal by way of rehearing, an appellate court can substitute its own decision based on the facts and the law as they then stand.

[26] 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.[3]

[27] 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";[4] the appeal court does not "sit, as it were, as a second trial court and consider, as if presented forthe first time, the arguments advanced by counsel for the [appellant]".[5]

[28] The fundamental rule is reflected in the *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[6] for the appellant's written outline, discussed below.

Things might be different if further evidence is admitted but that provides its own problems

[29] The rule requiring the identification of error in the decision below 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, unusual.

[30] When considering the possibility of seeking to have further evidence admitted for the first time on an appeal, a conceptual distinction may be drawn between "fresh evidence" and evidence which is merely "new" or "further" evidence. In *R v Spina* [2012] QCA 179 McMurdo P (with whom Fraser JA and Margaret Wilson AJA agreed) observed at [32]:

> Australian appellate courts have long recognised an important distinction between admitting fresh evidence and admitting new evidence. Fresh evidence is evidence which either did not exist at the time of the trial or which could not then with reasonable diligence have been discovered. … New or further evidence is evidence on which a party seeks to rely in an appeal which was available at trial or could with reasonable diligence then have been discovered. The distinction between fresh and new evidence is sometimes blurred but it should remain significant for two reasons. The first is because the community has an interest in ensuring that defendants charged with criminal offences ordinarily have only one trial at which they have an opportunity to put forward all the available evidence upon which they rely. It is not in the public interest for defendants to hold back evidence so that, if they are unsuccessful at trial, they can use the withheld evidence to appeal and obtain a new trial. The second

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3 See also *Minister for Immigration v Hamsher* (1992) 35 FCR 359 at 369 (Beaumont andLee 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] to [118].

4 *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.

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

6 Supreme Court of Queensland Practice Direction 3 of 2013.

> reason is that, where there is admissible fresh evidence, it is equally against the public interest for a conviction to stand as the conviction would not be based on all the available relevant evidence.

[31] Although those observations were expressed in relation to criminal appeals and, accordingly, the policy considerations to which they advert have greater importance in that area of the law, the distinction is still relevant to civil appeals where similar policy considerations may be seen to have informed the way in which the applicable rules have been drafted.

[32] In civil appeals regulated by the UCPR, "special grounds" are required before evidence of events occurring before judgment after a trial may be admitted after a final judgment: r 766(1)(c). It has been held that the test for admission of such further evidence on appeal generally requires (1) that that it could not have been obtained with reasonable diligence for use at the hearing, (2) it would probably have an important (though not necessarily decisive) influence on the result of the case, and (3) it must be apparently credible (though not necessarily incontrovertible): *Brisbane City Child Care Pty Ltd v Kadell* (2020) 5 QR 367 per Mullins JA, Ryan J and Wilson J at [41], citing *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404 per Thomas J (with whom Campbell CJ and Andrews SPJ agreed) at 408. Though it is not necessary to show "special grounds" for the admission of evidence of events occurring after judgment (per UCPR r 766(2)), the admission of such evidence has also been held to be discretionary.[7]

[33] The test is 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.[8] (In such circumstances, the possible application of UCPR rr 667(2)(b) and 668(1) should also be considered.[9]) 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.[10]

[34] Cases in which new evidence are admitted in appeals in the Court of Appeal are exceptional. They may be put to one side in what follows.

Effect of the error

[35] 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.

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7 *Hawkins v Pender Bros Pty Ltd* [1990] 1 Qd R 135 at 137 per Thomas J, citing *Mulholland vMitchell* [1971] AC 666 (see 679 to 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 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.

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

9 See *Ivi Pty Ltd v Baycrown Pty Ltd* [2007] 1 Qd R 428.

10 *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.

Absence of constraint

[36] 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.[11]

[37] 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"[12] remains intact, reference to the witness' other evidence may remain useful.

Rule 4: Be prepared to justify running a new point on appeal

[38] The fundamental rule that the appellant must demonstrate error in the decision at first instance finds expression in the constraints against advancing arguments on appeal which were not run below.

What is a "new" point?

[39] Obviously enough if an appellant seeks to run an argument which was not run below, it will be impossible to demonstrate error. But it will not necessarily be the case that the appellant will be permitted to run a new point on appeal.

[40] 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* (2003) 200 ALR 447 at [50] and [52] to [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.

[41] A new point can be an argument about the facts, or about the law, or about both. Whether a new point should be permitted to be taken on appeal is, ultimately, to be determined by reference to the interests of justice (see *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 125 at [13]) and necessarily against the background of the overriding obligations of the parties and the Court as expressed in UCPR r 5.

[42] For a recent appellate examination in which detailed attention was paid to the way in which the case below was advanced, and what implications that might have had for the conduct of the appeal, see *Compass Marinas Australia Pty Ltd v State of Queensland* (2021) 9 QR 703.

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

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

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11 *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] to [46].

12 *Wren v Emmett Contractors Pty Ltd* (1969) 43 ALJR 213 at 221 per Windeyer J.

> 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.

[44] In *Coulton v Holcombe* (1986) 162 CLR 1 at 8 and 9, Gibbs CJ, Wilson, Brennan and Dawson JJ said:

> It is 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. … 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.

[45] Similarly, in *Whisprun Pty Ltd v Dixon* Gleeson CJ, McHugh and Gummow JJ said at [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….

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

[46] 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.

[47] 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* [2011] QCA 381 at [143][13] and *Multicon Engineering Pty Ltd v Federal Airports Corporation* (1997) 47 NSWLR 631 at 645 to 646.

[48] 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[14] 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.

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13 Special leave to appeal from this decision was refused: [2012] HCATrans 62.

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

[49] 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 at [37] to [41]), but the question is usually determined by the appellate court without requiring the party alleging prejudice to go into evidence to prove that the hearing would have taken a different course. Indeed, that has been said that there is no obligation to go into evidence to show actual prejudice: see *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 134 at [86].

Rule 5: The demonstration of factual error is the subject of particular constraints

[50] The Court of Appeal recently summarized relevant principles of appellant restraint in the personal injuries case of *Sutton v Hunter & Anor* (2022) 102 MVR 343 in these terms:[15]

> [46] On an appeal of the present nature, it is for the appellant to satisfy this Court that the order that is the subject of appeal is the result of some legal, factual or discretionary error: *Allesch v Maunz* (2000) 203 CLR 172 per Gaudron, McHugh, Gummow and Hayne JJ at 180-181 [23].
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> [47] Where, as here, the alleged errors are in many respects alleged errors in fact finding, an appellant faces formidable (albeit not necessarily insurmountable) hurdles. An appellate court is required to exercise restraint when invited to interfere with a judge's findings of fact, at least where those findings are likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence.
>
> [48] Thus 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* (1993) 177 CLR 472 at 479, as to the correct approach of an appellate court where findings of fact based on credibility are challenged (footnotes omitted):
>
> > "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. 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" or has acted on evidence which was "inconsistent with facts incontrovertibly established by the evidence" or which was "glaringly improbable"."
>
> [49] That direction towards appellate restraint was emphasised by the High Court in *Robinson Helicopter Company Incorporated v McDermott* (2016) 90 ALJR 679 per French CJ, Bell, Keane, Nettle and Gordon JJ at [43] in the following terms (footnotes omitted):
>
> > "The fact that the judge and the majority of the Court of Appeal came to different conclusions is in itself unremarkable. A court of appeal conducting an appeal by way of rehearing is bound to conduct a "real review" of the evidence given at first instance and of the judge's reasons for judgment to determine whether the judge has erred in fact or law. If the court of appeal concludes that the judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings. But a court of appeal should not interfere with a judge's findings of fact unless they are demonstrated to be wrong by "incontrovertible facts or uncontested testimony", or they are "glaringly improbable" or "contrary to compelling inferences". In this case, they were not. The judge's findings of fact accorded to the weight of lay and expert evidence and to the range of permissible inferences. The majority of the Court of Appeal should not have overturned them."
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> [50] At first blush, that instruction seems to leave very little room for an appellate court to be persuaded of factual error. The passage was explained in the subsequent decision of *Lee v Lee* (2019) 266 CLR 129 per Bell, Gageler, Nettle and Edelman JJ at [55] in these terms (footnotes omitted):

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15 Per Bond JA, with whom Crow J and Mellifont J agreed.

> "A court of appeal is bound to conduct a "real review" of the evidence given at first instance and of the judge's reasons for judgment to determine whether the trial judge has erred in fact or law. Appellate restraint with respect to interference with a trial judge's findings unless they are "glaringly improbable" or "contrary to compelling inferences" is as to factual findings which are likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence. It includes findings of secondary facts which are based on a combination of these impressions and other inferences from primary facts. Thereafter, "in 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"."

[51] The grounds of appeal advanced in this case also challenge the evaluative judgments made by the primary judge in reaching his assessment of the value of the impairment of the appellant's earning capacity, both in the years preceding trial (past economic loss) and for the years after trial (future economic loss). Both evaluative judgments necessarily involved the consideration of hypothetical events, having regard to what the primary judge had heard and seen of the witnesses, including the appellant and medical experts. Neither task was straightforward. And it could not be thought that there was any one right answer. In such circumstances, the observations by Allsop J, with whom Drummond and Mansfield JJ agreed, in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at [24]-[25] are instructive:

> "What is error in any given case depends, of course, not only on the evidence, but also on the nature of the findings or conclusions made by the primary judge. The demonstration of error may not be straight-forward where findings or conclusions involve elements of fact, degree, opinion or judgment or when the findings or conclusions in question can be seen as made with the advantage of hearing the evidence in its entirety, presented as it unfolded at the hearing with the opportunity over the course of the hearing and adjournments for reflection and mature contemporaneous consideration and assessment, in particular in a long and complex hearing: ….
>
> This is not to elevate ordinary factual findings to the protected position of those based on credit, but it is to make clear, first, the advantages of the trial judge and, secondly, the need for demonstration of error. The inability to identify error may arise in part from the unwillingness of the appeal court to be persuaded that it is in as good a position as the trial judge to deal with the issues, because of the kinds of considerations referred to in [24] above. Or, it may be that the nature of the issue is one such that (though not a discretion) there cannot be said to be truly one correct answer. In such cases the availability of a different view, indeed even perhaps the preference of the appeal court for a different view, may not be alone sufficient: …. In circumstances where, by the nature of the fact or conclusion, only one view is (at least legally) possible (for example, the proper construction of a statute or a clause in a document, where, although, as often said, minds might differ about such matters of construction, there can be but one correct meaning: …) the preference of the appeal court for one view would carry with it the conclusion of error. However, other findings and conclusions may be far more easily open to legitimate differences of opinion eg valuation questions, …"

[51] That lengthy quote justifies four points:

(a) First, appeal courts are required to conduct a real review of the evidence, and do not simply assume the correctness of the primary judge's findings.

(b) Second, and nevertheless, if impugned factual findings are likely to have been affected by the primary judge's impressions about the credibility and reliability of witnesses as a result of seeing and hearing them give their evidence, the appeal court will not interfere unless the findings are shown to be wrong by "incontrovertible facts or uncontested testimony", or they are "glaringly improbable" or "contrary to compelling inferences".

(c) Third, but for some factual findings, the appeal court will regard itself as not so constrained, and all that will be necessary is to persuade the Court that an error was made.

(d) Fourth, there is another category of factual findings which involves the formation of an evaluative judgment. In such circumstances demonstration of error is not so easy.

Rule 6: The demonstration of discretionary error is the subject of particular constraints

[52] 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.[16] The appellate court may not interfere unless the discretion has miscarried. The classic statement is that made in *House v The King* (1936) 55 CLR 499 at 504 to 505 per Dixon, Evatt and McTiernan JJ.:[17]

> 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 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.

[53] 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. As has already mentioned, 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". This is the fourth point made under the previous heading.

[54] An example of the difficulty is encountered in challenges to a trial judge's apportionment of liability. In *AV Jennings Construction Pty Ltd v Maumill* (1956) 30 ALJR 100 at 101 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.' [18]

[55] A similar point was recently made in *Morant v Ryan (The State Coroner)* [2023] QCA 109. Section 30(8) of the Coroner's Act empowers a judge of the District Court to order an inquest to be held "if satisfied it is in the public interest to hold the inquest". The judge

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16 *Norbis v Norbis* (1986) 161 CLR 513 at 518.

17 See also *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 176 to 178; *Norbis v Norbis* (1986) 161 CLR 513 at 517 to 519.

18 See also *Pennington v Norris* (1956) 96 CLR 10 a t 15 to 16; *McPherson v Whitfield* [1996]1 Qd R 474 at 477; *Owbridge v Murphy & Anor* [2006] QCA 53.

refused an application that she make such an order because she found that she was not so satisfied. The Court of Appeal found that it would not interfere unless error in the *House v The King* sense could be demonstrated.

Rule 7: The demonstration of discretionary error on a point of practice and procedure is the subject of even greater constraints

[56] In the oft-cited words of Sir Frederick Jordan in *In re the Will of F B Gilbert(dec'd)*:[19]

> … 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.[20]

[57] Thus it has often been said that the court's 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] to [28]; *MGM Containers P/L v Wockner* [2006] QCA 502 at [29]; *Wiggins Island Coal Export Terminal Pty Ltd v Civil Mining & Construction Pty Ltd* [2017] QCA 296 at [7] per McMurdo JA (with whom Fraser JA and Gotterson JA agreed); *Bond v Chief Executive, Department of Environment and Science* [2020] QPELR 650 at [2] to [3] per Fraser JA (with whom Philippides JA and Crow J agreed).

[58] Recently the Court of Appeal applied *In re the Will of F B Gilbert (dec)* in *Adeva Home Solutions Pty Ltd v Queensland Motorways Management Pty Ltd* (2021) 9 QR 141. That case concerned a plaintiff's appeal from a security for costs order which required security be provided in the form of an unconditional bank guarantee. The plaintiff had obtained litigation funding and had sought that it be permitted to provide security in the form of a deed of indemnity from an insurer based in England. After citing *In re the Will of F B Gilbert (dec)*, Bond JA (with whom Fraser JA and Wilson J agreed) observed at [13] to [14]:

> In appeals from an exercise of judicial discretion in an interlocutory decision concerning questions of practice and procedure, although there is no absolute rule and each case must be considered in light of its own particular circumstances, generally an appellate court will not interfere unless, in addition to error of principle, the appellant demonstrates that the order will work a substantial injustice to one of the parties: see *Just GI Pty Ltd v Pig Improvement Co Aust Pty Ltd* [2001] QCA 48 at [14] per Williams JA (with whom Davies JA and Mullins J agreed) and *Santos Limited v Fluor Australia Pty Ltd* [2020] QCA 254 at [29].
>
> The present appeal is an appeal from an exercise of judicial discretion in an interlocutory decision concerning questions of practice and procedure and calls for an exercise of appellate restraint in accordance with the above principles: Spe*cialised Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd [*2010] 2 Qd R 85 at 99-100 [56] to [57] per Muir JA (with whom Holmes JA and Philippides J agreed); *Robson v Robson* [2010] QCA 330 at [19] per Muir JA (with whom Chesterman JA and Philippides J agreed); and *Base 1 Projects Pty Ltd v Islamic College of Brisbane Ltd* [2012] QCA 114 at [23] to [24] per Margaret Wilson AJA (with whom McMurdo P and Applegarth J agreed).

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19 *In re the Will of F B Gilbert(dec'd)* (1946) 46 S.R. (N.S.W.) 318 at 323.

20 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].

Rule 8: You must follow the procedural rules

[59] The procedural rules governing appellate proceedings are found in Chapter 18 of the UCPR and in Practice Direction No 3 of 2013. The appellate advocate should become familiar with both and ensure that the requirements there set out are actually met.

The notice of appeal

[60] The advocate must be aware of the substance of the law as already identified in this paper, because it will inform how the advocate identifies the error said to have been made by the primary judge.

[61] Much like a pleading, the notice of appeal will confine the argument on appeal. The result is that, much like a pleading, it is important that the document be prepared with a view to framing the case on appeal. Adopting a scattergun approach is unpersuasive. A judicious selection of the best points is far better.

[62] Of course, sometimes the selection of the points to be run will not occur until a later time, perhaps when the outline is prepared. If it proved impractical to identify the real issues when the notice of appeal was lodged, grounds may subsequently be abandoned, with the court and the opponent to be notified as soon as practicable.

[63] It is important to appreciate that the notice of appeal is also not the vehicle for argument. UCPR r 747 requires that grounds must be identified briefly and specifically.

[64] Finally, the notice of appeal must identify the remedy which the appellant seeks. Particular care should be given to the articulation of the order which is sought.

[65] Of course it is not only the appellant who must consider how the appeal should be framed. Respondents must consider the possibility of cross-appeal or notice of contention. The former occurs when a respondent wants to contend for a variation of the outcome obtained in the court below, the latter occurs when a respondent wants to support the outcome obtained in the court below but by reference to a ground other than that relied on by the primary judge. UCPR rr 755 and 757 respectively prescribe the content of such notices, and in each case, the respondent is adjoined to identify the grounds they advance "briefly and specifically".

Written outlines of argument

[66] Practice Direction No 3 of 2013 sets out procedural requirements that must be followed in the Court of Appeal. Much of it simply reflects the practice of effective appellate advocates.

[67] The Practice Direction (at 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.

[68] 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 (at 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.

[69] The Practice Direction requires (at 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).

[70] 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 (at paragraph 14(5)) that the outline "will often be less than 10 pages".

Appellant's outline

[71] As to the essential content of the outline in a fact appeal, the Court's Practice Direction 3 of 2013 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.

[72] By the time the advocate has finalised the outline, the advocate will have performed at least the following tasks.

[73] First, the advocate must have conducted a critical assessment of the notice of appeal with a view to determining whether amendment is necessary, either by way of abandoning points not to be run; amendment of the framing of points to be run; or the addition of points not mentioned, but which are to be run. The selection of which arguments should be run on appeal is of the utmost importance. 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:[21]

> 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

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

> 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.

[74] Second, the assessment just referred to will then have permitted the advocate to identify in the outline the errors said to have been made: paragraph 15(b) of the Practice Direction. This should be encapsulated succinctly very early in the outline.

[75] Third, the advocate must carefully identify the findings of fact which are to be challenged and those which are not. Where challenge is to be made, compliance with paragraph 15(c) of the Practice Direction is critical. And that should be done having firmly in mind the well-known constraints upon challenging credibility-based findings of fact in civil appeals, those constraints being the subject of rule 5 above.

[76] Fourth, the advocate must carefully identify the findings of law which are to be challenged and those which are not. Where challenge is to be made, compliance with paragraph 15(d) of the Practice Direction is critical.

[77] Fifth, the advocate must ensure that any reference to the evidence should be footnoted to the appeal record. If the outline is to be prepared before an appeal record is finalised, then references should be made to the evidence and transcript below and updated by amendment once the appeal record is prepared.

[78] 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) Identify the arguments which have a real chance of success. Pursue them and abandon the others. Don't bury good points in a pile of bad points.

(b) The judges reading it will be under time pressure. Make the submissions as clear, concise, accurate and comprehensive as the subject matter permits. Simplify them. Remove any hyperbole and invective which has crept in. Think twice about adjectives and adverbs. Then remove them. Simplify again.

(c) The court will not be pre-disposed to find error. The challenge to the reasoning and orders made by the primary judge should be clearly articulated. It must be faced head on. Identify the particular part of the reasons containing the challenged finding and say why those findings are wrong.

(d) Fulfil your duty to the Court. Do not mislead either as to the facts or the law. Identify relevant authority and apply it. If authority is against you, do not pretend the contrary. Acknowledge the apparent application of authority and distinguish it if you can. Or in those rare cases where there is binding authority and you can't distinguish it, so you are counting on a win in the High Court, acknowledge that the Court is bound to apply it and flag your intention to seek to argue the contrary in the High Court.

(e) Proof-read as carefully as you can to eliminate errors in spelling and grammar. An absolutely pedantic insistence on accuracy of references to evidence is essential. The same applies to citations of statutes, cases, texts and articles.

Respondent's outline

[79] Practice Direction 3 of 2013 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 evidence for any factual assertions made, particularly if the facts relied on by an appellant are contested.

[80] The respondent's task is substantially the obverse of the appellant's task. 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.

[81] 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.

Reply outline

[82] 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).

The appeal record

[83] 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.

[84] But the converse is also true. If you are seeking to overturn an exercise of discretion, and then to have the Court of Appeal re-exercise the discretion itself and in your client's favour, then the appeal record must have the material before it which was before the primary judge whose discretion miscarried.

[85] The family provision case of *Hartley v Hartley* earlier mentioned is instructive in this regard. It will be recalled that that was the case in which there was no order capable of being appealed. What has not yet been mentioned is that the fact that there was no order capable of being appealed was only identified during the course of oral argument. Until that time, the disarray of the appeal record had led to the Court assuming, contrary to the fact, that there must have been an order, but it was missing like much of the other relevant material. The Court observed at [12]:

> The appeal record prepared for the hearing of the application before this Court was manifestly inadequate. It contained only the affidavit evidence of the applicant before the primary judge; it omitted the affidavit evidence on which the respondent before the primary judge had relied; it omitted the transcript of the first day of the hearing before the primary judge in which deponents were cross-examined; and it omitted – so this Court assumed – evidence of the occurrence of the events which had been contemplated by the order made by the primary judge and the outcome of those events, namely an order consistent with the primary judge's reasons and which also disposed of any application made as to costs.

[86] Careful attention should be given to ensuring that the appeal record is adequate.

Rule 9: You should treat the preparation for oral submissions as a separate and distinct task

[87] The opportunity to make oral submissions to the Court of Appeal is not an opportunity for an advocate simply to recapitulate what the advocate has already put in writing. The judges will almost certainly have read at least the primary judge's decision; the notice of appeal; and each side's submissions. Mere repetition is not appreciated.

[88] The better course for the advocate is to deliberately treat the oral submissions as a separate and distinct task, the proper performance of which requires the advocate to focus upon the critical areas of differences between the parties – identifiable having regard to each side's submissions – and to consider the best way to persuade the Court as to why the advocate's solution to the area of dispute is to be preferred to that suggested by the opponent.

[89] The task is not "on this point, we say this …". If the written submissions have been done properly the Court already knows what you say. At the hearing, the Court is more concerned with whether what you say is right and is to be preferred to what your opponent says.

[90] And while I'm on this topic of the language which should be used, the task is **never** "on this point, I think …" or "on this point, my view is …" , or "on this point, my opinion is …". I have, over the past few years, noticed an increasing prevalence of the use of such language. But it is fundamentally wrong. Advocates are not witnesses. They are not giving opinion evidence. They are independent legal practitioners advancing submissions, not opinions, on behalf of their clients. This is not simply my own idiosyncratic view of things. Barristers who use these expressions breach rule 43 of the *Barristers' Conduct Rules*, which is in these terms:

> A barrister must not make submissions or express views to a court on any material evidence or issue in the case in terms which convey or appear to convey the barrister's personal opinion on the merits of that evidence or issue.

[91] To my mind the best way to prepare for oral submissions is for the advocate to prepare an entirely new document representing how the advocate would seek to discharge the task which I have just identified. Whether the document takes the form of notes; dot points; or a script matters not. What is important is that it represents the advocate's best judgment as to how the oral argument should be presented.

[92] There are many reasons why the course just suggested is a helpful one:

(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) Writing down a plan, means that you will have one. In particular:

  (i) You will have asked yourself how you should open the argument, and whether, as I think is often helpful, you should give a quick introduction of how you propose to structure your oral argument.

  (ii) You will have asked yourself how and in what detail to do the task of exposition of the facts without losing the attention of the court.

  (iii) You will have decided which points should be emphasized orally and how.

  (iv) You will have decided how much of the decided case law you will specifically take the Court to, noting that too much is boring.

  (v) You will have decided which points should be left on the basis that they are sufficiently developed in the written submissions.

(c) And, of course, there will be some points where you want to be very clear on the wording of a submission where it will help you to have the wording already formulated.

[93] Of course, although in planning your oral argument you will have tried to anticipate which parts of your argument may draw critical attention and have sought to prepare responses, you must know that no plan survives first contact with the enemy. The judges are unlikely

just to sit back meekly and simply admire your brilliance. By far the greater likelihood is that you will be distracted from your chosen path by questions and you will not have anticipated at least some of those questions.

[94] Sometimes we ask questions simply to obtain information about the facts or about the course of the litigation below. We may not have completely understood the facts or know where particular information is to be found. To respond to such questions the advocate must not just know what the facts are, what the evidence about the facts is, and what the findings are, though all of that is necessary; the advocate must know where in the appeal record are the evidence and findings about each relevant fact. Complete mastery of the appeal record is essential.

[95] Sometimes we ask questions to seek to identify with precision exactly what we have to decide. We often try to discern the issue on which a line of argument really turns.

[96] Sometimes we ask questions to elicit more detail about a proposition of fact or law that has been advanced, because we haven't understood it as it was first expressed. On other occasions, we have concerns about the correctness of a proposition of fact or law, and ask questions to see if there is some answer to those concerns. All of these things can and do often occur without us having even a preliminary view as to the correctness of the argument.

[97] But of course, being human, sometimes we will have formulated preliminary views on issues arising in the appeal based on what we have already read, and we ask questions with a view to giving the advocate the opportunity to dissuade us from those views. Speaking for myself, it is not an irregular occurrence that my advancing a question informed by a preliminary view elicits a response not previously expressed which serves as a good answer to the preliminary view.

[98] That we ask questions like this is a good thing.

[99] After all, the opportunity to focus the Court's attention on the good bits of your argument is not the only purpose of oral submissions. A related and, in some respects more important, purpose is that oral submissions provide an opportunity to engage with the Court to discover what is the judges' reaction to the arguments and what points seem to be of concern to them.

[100] The mark of a good advocate is how they respond to questions from the bench. To my mind that is where the real persuasion occurs.

[101] As Hayne J said in relation to appeals in the High Court:[22]

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

Conclusion

[102] If you are already a competent appellate advocate, then nothing I have said will be new to you. You will already be experienced in the application of all of the rules I have identified. But I hope that, from time to time, you will be assisted, as I was when I was a barrister reading the papers Fraser JA wrote on the present subject, by a quick refresher.

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

[103] If you are not yet experienced in appellate work, then I encourage you to reflect on the issues I have touched upon each time you prepare an appeal. The more you do, the better you will be.

[104] Finally, I note that the concepts discussed in this paper are transportable and may be used to inform the conduct of any form of appellate process, and in any jurisdiction. It will just be a matter of identifying the relevant statutory provisions, and, from there, looking to the relevant case law in the jurisdiction to find the authoritative commentary addressing the relevant concept.

John Bond

Judge of Appeal, Supreme Court of Queensland

12 June 2023