

Appellate Advocacy

Introduction

1 There has been enormous emphasis, over the last two decades, on improving the skills of the advocate, much of it done through advocacy courses where the emphasis is on the presentation of the case in court.¹ I do not propose to replicate, in this seminar what you are taught in those courses. However, I would make two observations about the common thrust of many of those courses:

(1) Advocacy is frequently spoken of as the ‘Art of Persuasion’. However, there is no effective persuasion absent focus on the issues in the case. So if advocacy is the art of persuasion, preparation is the tool of the artist.

(2) I am not personally a proponent of the “case theory method” of advocacy.

2 The problem with a case theory approach as I have, on occasions, observed it, is that that facts are construed and legal principle said to apply so as to conform to the theory. There is a problem at trial if the evidence that comes out is unexpected, and is not the evidence upon which the theory of the case was based. There is a problem on an appeal if the facts as found do not fit the theory. In other words, it can have a strait-jacketing effect on the case.

3 I can usually sense when a case was run at trial on the basis of a case theory and when, on appeal, the party courting the case theory seeks to maintain it in

* I express my thanks to my researcher, Kathleen Heath, for her extensive research and valuable assistance in the preparation of this paper. Some of the problems raised in this paper were drawn to my attention by judges of the Court of Appeal, who considered them to be sufficiently common or serious to warrant drawing them to the profession’s attention.

¹ See The Hon Justice Michael Kirby AC, “Ten Rules of Appellate Advocacy” (speech delivered at the Australian Advocacy Institute Appellate Skills Workshop, Sydney, 5 May 1995), <http://www.lawfoundation.net.au/lif/app/&id=50F875B247E96DD4CA2571A8007DBAE3>, for an excellent example of such a presentation.

the face of differently found facts. This may simply reflect the bad use of a good tool. But if a tool is not well used it may as well be put back in the tool kit and a simpler tool found.

4 For myself, I see no reason why, on an appeal, the basic time worn approach of applying established principle to the facts as found ought not to be the primary tool used. If the first instance court has applied a wrong legal principle, the good advocate demonstrates the correct principle to the appellate court. If the first instance judge has erred in the fact finding process, establish why the judge was wrong to find that fact or those facts.

5 This is conceptually and practically different from an approach on appeal that seeks to persuade the Court that the appellants' evidence should have been preferred.

“Fact finding is not immutable. One judge may make findings of fact on the evidence with which another judge may not agree. That does not make the fact finding wrong. It merely illustrates that particular evidence can be assessed differently by different fact finders.”²

6 Having made those initial points, what I propose to do today is to draw your attention to some of the omissions that we see in the Court of Appeal which reveal either a fundamental misunderstanding of the processes of the Court or the requirements of the particular matter. I wish to do so against this background.

7 First: The processes of the Court have changed dramatically in the last 20 years, most particularly in the requirement for written submissions. The impact of this in the terms of advocacy is that effectively 50 per cent of the case is over by the time an advocate stands up in the court to deliver the oral part of the appeal. I will say something more about both oral and written submissions later. However, I wish to impress upon you at the outset what is really comprised in the advocate's role on an appeal.

²*Macquarie Radio Network Pty Ltd v Arthur Dent* [2007] NSWCA 261 at [50]. See also *Vairy v Wyong Shire Council* [2005] HCA 62; (2005) 223 CLR 422 at [3]-[35].

8 Secondly: There is a legal obligation not to bring an appeal which has not merit.

9 Thirdly: there is an ethical obligation not to waste the client's money.

The art of persuasion

10 So, what is really involved in this art of persuasion? May I suggest that it has two fundamental aspects; preparation and doing nothing wrong – or to put the second matter positively, it's about getting the basics right. A good advocate minimises the errors that distract a court from the substance of the case. The good advocate should be able to state the facts, the findings and the law simply and correctly.

11 Let me give you a simple example. In a recent case the advocate's opening gambit was that the essential error in the trial judge's reasons was to be found at [188], where the judge said:

“The consensus of medical opinion appears to indicate that the plaintiff has recovered from the effects of the accident.”³

12 Excellent opening. It took the court to the heart of the matter. The advocate quickly moved to the medical reports to establish why that was simply wrong. There were two difficulties with the opening. First, the judge hadn't only said that. His Honour had continued in the same paragraph:

“...with the rider that she has some bad days, requiring physiotherapy at times and more often painkilling medication... I accept... that the accident was traumatic, but the consequential effects are now of somewhat lesser gravity...”⁴

13 Secondly, a reading of the medical reports contained statements such as: “*she makes no complaint of pain in her neck today*”, “*she is capable of full time work*”, etc. When those matters were drawn to the Court's attention by

³ *Iacopetta v Woolworth Ltd* (unreported, 31 January 2014, Lakatos DCJ).

⁴ *Ibid.*

the respondent, the appellant's case hurtled to the ground like a lead balloon. The Court gave a short form judgment.

Good preparation

14 I have referred to preparation as being one of the two essential aspects for good advocacy. There is no room for self-satisfaction in good preparation. Good preparation should at least ask these questions:

- (1) Should this appeal be brought – or defended?
- (2) Do the grounds of appeal capture the error that is sought to be advanced?
- (3) In what jurisdiction should the appeal be brought?
- (4) Have all proper parties been joined to the appeal?
- (5) Are the written submissions structured so as to reflect the grounds of appeal? How do I prepare my written submissions?
- (6) How, when I commence oral argument, is the Court's attention best captured?

Should the appeal be brought or defended?

15 The good advocate is neither an automaton nor a gun for hire. Advocates who frequently, and sometimes routinely, bring appeals that are seriously unlikely to succeed (or be successfully defended) commit at least two transgressions. They waste the Court's time. This is contrary to s 56 of the Civil Liability Act. And they waste the client's money. There are a number of possible consequences. The Court might exercise its powers under s 99 of the *Civil Procedure Act 2005* to require the practitioner to indemnify the client against a costs order.

- 16 But why be high-minded about it? The reputational damage is incalculable.
- 17 The following examples are illustrative of the problem.
- 18 In one case a few years ago, there was an appeal against a judgment which contained a few unflattering statements about the appellant. But an order had been made in the appellant's favour. Senior counsel took that brief and, I have to say, didn't grasp the problem. The hapless appellant had an order for indemnity costs made against him within five minutes of senior counsel opening. Those who brought that appeal apparently failed to understand what is meant by a judgment or order.

“A judgment is the decision of a court which determines the proceedings (or an identifiable or separate part of them)... An order is a command by a court that something be done (or not done).”⁵

The reasons are the reasons for decision – they provide the basis from which error is argued – but reasons for decision do not fall within the meaning of “*judgment or order*” from which an appeal may be brought.

- 19 Another area where an appeal may be inappropriately brought or defended is where the executive arm of government is a party and so has an obligation to conduct itself as a model litigant.⁶ The problem tends to arise more often where a private solicitor is acting – but not only. The executive government must act fairly and in a way which assists the Court to arrive at the proper and just result, and must endeavour to avoid litigation where possible or at least attempt to keep the costs of litigation to a minimum.
- 20 However, the best practice standards enforced by the courts in relation to model litigants have much to recommend themselves to private parties who are seeking to save costs and achieve better outcomes. They are also consistent with the general obligation of all participants in the court process to

⁵ *R v Steffan* (1993) 30 NSWLR 633 at 636. See also *Cheiko v R* [2008] NSWCCA 191; *El-Zayet v The Queen* [2014] NSWCA 296.

⁶ See *Mahenthirarasa v State Rail Authority of NSW (No 2)* [2008] NSWCA 201 at [16]-[20] per Basten JA (Giles and Bell JJA agreeing).

facilitate the “*just, quick and cheap resolution of the real issues in the proceedings.*”⁷

21 The recent decision of *Grills v Leighton Contractors Pty Limited*⁸ provides an example. The appellant was a senior constable with the Police Highway Patrol. He was seriously injured when he collided with a boom gate while taking part in a security operation relating to the official visit of the Vice President of the United States to Sydney.

22 For the purpose of the security operation, the Eastern Distributor was to be closed to civilian traffic to allow the Vice President’s motorcade to travel to Sydney Airport. The appellant was directed to conduct an urgent final ‘sweep’ of the Eastern Distributor on his police motorcycle in both directions. On the return trip the appellant collided with a boom gate that had been lowered across the ED in error by a motorway controller in the employ of Leighton Contractors Pty Ltd (Leighton), the operator of the Eastern Distributor.

23 The second respondent, the State of NSW, made what I described in the judgment as an “*extravagant*” submission that there should be a finding of 75 per cent contributory negligence. It was extravagant because that was contrary to the evidence of its own witnesses, namely the senior police officers involved in the security operation who had explained that it was the duty of the police officer charged with that final sweep to travel at high speeds. In my judgment, with which Barrett and Gleeson JJA agreed, I stated that:

“[I]t must be questioned whether the State, as a model litigant, ought to have advanced such a case in circumstances where it was contrary to the evidence of its own witnesses.”⁹

24 In that case, counsel had also persuaded the trial judge to approach the determination of the duty question through the prism of the *Civil Liability Act*

⁷ *Civil Procedure Act 2005* (NSW), s 56.

⁸ [2015] NSWCA 72.

⁹ *Id* at [179].

s 5B. However, the authorities are clear that s 5B relates to duty¹⁰ (although there is some overlap, as the risk of harm in respect of which a duty exists is the same risk of harm that is relevant to the question of breach). The point to be made in respect of advocacy is that counsel having persuaded the judge to apply s 5B on the question of duty, then appealed on the basis that that was an error! That was something that needed to be done, but should have been made plain at first instance.

25 In *Reznitsky v Director of Public Prosecutions (NSW)*,¹¹ Mr Reznitsky, brought judicial review proceedings pursuant to s 69 of the *Supreme Court Act* against a decision of a District Court judge dismissing his application he brought under s 22 of the *Crimes (Appeal and Review) Act 2001*. The applicant's complaint was that the judge had denied him procedural fairness, and that his decision was accordingly affected by jurisdictional error.

26 The Court of Appeal held that the applicant had been "*contumeliously denied procedural fairness*".¹² The applicant had been denied an opportunity to be heard, and when he indicated that he wished to make further submissions, his Honour told him to "*just sit down*".¹³ Prior to even hearing the applicant, the judge had stated that "*this is sort of a raving of some kind of lunatic here*"¹⁴ – an insulting, disrespectful and inappropriate remark, and, as the Court commented, a "*gross departure*" by the District Court judge from the desirable standard of behaviour expected of a senior judicial officer.¹⁵

27 Despite clear evidence of a denial of natural justice, the DPP made no concession until, in effect, being shamed into it by the Court. Tobias AJA, with whom Meagher and Emmett JJA agreed, made the following critical remarks:

¹⁰ *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420.

¹¹ [2014] NSWCA 79.

¹² *Id* at [32] (per Tobias AJA, Meagher and Emmett JJA agreeing).

¹³ *Id* at [30].

¹⁴ *Id* at [25], [29].

¹⁵ *Id* at [29].

“[T]he Director initially made what I would regard as a lame attempt to support Judge Hughes' decision. I say that attempt was lame as the submissions never grappled directly with his Honour's conduct. Ultimately, when senior counsel for the Director realised from the nature and tone of the questions from the members of the Court that her attempt to support the decision was entirely without merit, she wisely sought a short adjournment to seek further instructions. Upon the Court reconvening, senior counsel indicated that she had been instructed to concede that there had been a denial of procedural fairness and that the Director no longer opposed the granting of the relief sought by the applicant with respect to the orders of Judge Hughes.

That concession should have been made long before the summons was listed for hearing. As a model litigant, the Director or those advising him should have appreciated well before he or they did that the applicant had been subjected to a gross injustice by Judge Hughes. Why the Director continued up to and including the hearing to defend the indefensible remains a mystery. It is nevertheless disturbing not least because it involved a waste of this Court's resources and the possible imposition upon the applicant of unnecessary stress and anxiety.”¹⁶

28 A further example is *AHB v NSW Trustee and Guardian*.¹⁷ The appellant's elderly mother suffered from severe dementia and was under the guardianship of the state.¹⁸ The respondent, the NSW Trustee and Guardian, made a decision to sell the mother's family home so as to fund a place for her in an extra services nursing home. The appellant appealed to the Administrative Decisions Tribunal, the Appeal Panel of the ADT and ultimately to the Court of Appeal, each time unsuccessfully. His primary concern was to prevent the respondent from acting on its decision to sell his mother's house.¹⁹ Given its success on the appeal, the respondent sought an order that the appellant pay its costs of the appeal.

29 The Court refused the order. A number of months prior to the hearing of the appeal, the Public Guardian issued a new report indicating a change in its position. The report stated:

“The Public Guardian has since come to the view that, as there has been a long delay in selling her home, and in the intervening time [the mother] had deteriorated, she would only be distressed and confused by a move to

¹⁶ Id at [35]-[36].

¹⁷ [2014] NSWCA 216.

¹⁸ Pursuant to the *Guardianship Act 1987* (NSW).

¹⁹ At [32].

another facility and now lacks the capacity to enjoy the benefits of such a move.”

- 30 The Court commented that “*the decision which was the subject of the appeal had been overtaken by subsequent events.*”²⁰ Meagher JA, with whom McColl and Basten JJA agreed, stated:

“That being the case, the question is whether the respondent should have taken steps to avoid the need for a hearing of an appeal, the outcome of which was almost certainly irrelevant, except perhaps as to any question of costs.”²¹

- 31 His Honour reminded the parties of their obligations under s 56 of the *Civil Procedure Act*, as well as the standard of conduct in litigation expected of government agencies, being a part of the executive government. His Honour stated:

“[T]here should have been a reassessment of the need to continue litigation concerning a decision which was no longer relevant. [That omission] involved a failure on the part of the respondent to adhere to the requirements that it endeavour to avoid litigation and to keep the costs of litigation to a minimum. That failure should be taken into account in the exercise of the discretion as to costs. It justifies a departure from the ordinary rule that costs follow the event.”²²

- 32 The above cases indicate that an appeal should not be brought or contested when the prospects of success are unreasonably low or where the subject matter of the appeal becomes irrelevant.

- 33 Another matter that may be considered is whether there are avenues other than an appeal that may be more effective and efficient to achieve the desired outcome. The Court of Appeal recently alerted parties to one such method in *RHG Mortgage Ltd v Rosario Ianni*,²³ namely, requesting a court to re-open a judgment it has pronounced prior to the formal entry of the judgment or by utilising the provisions of UCPR 36.16(2).

²⁰ Id at [39].

²¹ Id at [40].

²² Id at [46].

²³ [2015] NSWCA 56.

34 The jurisdiction a court has to re-open a judgment is one that is exercised with great caution because of the public interest in the finality of litigation.²⁴ In practice, the circumstances where this course of action would be appropriate are rare.²⁵ In appropriate circumstances, however, it is a procedure that may save the parties the considerable costs of bringing an appeal.

35 Mason CJ set out the requirements for enlivening the exercise of the jurisdiction in *Autodesk Inc v Dyason (No 2)*.²⁶ His Honour stated:

“What must emerge, in order to enliven the exercise of the jurisdiction, is that the court has apparently proceeded according to some misapprehension of the facts or the relevant law and that this misapprehension cannot be attributed solely to the neglect or default of the party seeking the rehearing.”²⁷

36 His Honour cautioned that:

“The purpose of the jurisdiction is not to provide a backdoor method by which unsuccessful litigants can seek to reargue their cases.”

37 *RHG Mortgage Ltd v Rosario Ianni* concerned an allegation that a loan agreement entered into by the parties was unjust within the meaning of the *Contracts Review Act 1980*. Judgment given in favour of RHG was successfully appealed and the matter was retried.

38 At the second trial, the parties came to an agreement as to what evidence from the first trial would be admissible in the second trial. They advised the primary judge of this during both pre-trial hearings and final submissions. Crucially, the parties did *not* agree to admit the evidence of a key witness, Mr Joe Ianni, who was not called again during the second trial. Nonetheless, the primary judge stated, at [6], that the parties had reiterated that his Honour could and should have regard to all the evidence given in the first trial. In the

²⁴ *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 at 302 per Mason CJ. Although Mason CJ was dissenting as to the outcome, his statements of principle accorded with the majority.

²⁵ *Ibid* at 322 per Gaudron J.

²⁶ (1993) 176 CLR 300.

²⁷ *Id* at 303.

final judgment, his Honour made extensive reference to the evidence of Mr Ianni. This was a misapprehension of the position of the parties.

- 39 On the appeal the parties agreed, by referring to the evidence of Mr Ianni, his Honour had erred. His Honour's misapprehension could not be laid at the feet of either party. McColl JA (Emmett JA and Sackville AJA agreeing) stated:

“...I observe that it is a matter of regret that the parties expended the considerable resources on an appeal founded on an error about which both agreed, rather than ask the primary judge to reopen the hearing prior to the entry of the judgment.”²⁸

The grounds of appeal

- 40 The formulation of the grounds of appeal requires a critical eye to be directed to the identification of error in a judgment. It is not an error for the trial judge to choose the other party's witness or expert over your witness or expert. The function of the grounds of appeal is not to itemise a litany of findings of the trial judge that the losing party found unpalatable.

- 41 It is an error to:

- (1) Apply a wrong legal principle;
- (2) Wrongly admit or reject evidence;
- (3) Find in favour of a witness where there is “*incontrovertible evidence*” to the contrary.²⁹

- 42 Whilst an appeal to the New South Wales Court of Appeal is by way of rehearing³⁰ there still needs to be an eye to error – or something in the case that will cause the court to exercise its own judgment.³¹

²⁸ [2015] NSWCA 56 at [97].

²⁹ *Fox v Percy* (2003) 214 CLR 118.

43 Error means error as I have explained – not some slip of language that only appears to be an error when a statement in the judgment is isolated from its context. One of the legal principles in question in *Grills v Leighton Contractors Pty Ltd*³² related to the apportionment of liability between two parties. The primary judge, at [214], had correctly stated the test on in *Podrebersek v Australian Iron & Steel Pty Ltd* [1985] HCA 34; 59 ALJR 492 at [10]. At [215], her Honour reiterated that the determination of apportionment required:

- (1) A comparison between the culpability of the parties; and
- (2) An assessment of the relative importance of the various negligent acts and omissions established by the evidence.

44 Her Honour then set out all the facts that she considered were relevant to both the culpability of the parties and the relative importance of their acts in causing the damages.

45 Counsel’s complaint was that when, in her conclusion, the primary judge had expressed that the apportionment of liability that she had found “*properly [reflected] their respective contributions to the materialisation of the risk to which [the appellant] was exposed*”, her Honour had applied the wrong test.

46 As I stated in my judgment:

“This challenge reflected the advocate’s error of taking an isolated statement in a judgment out of context. That approach to arguments on appeals should be discouraged.”³³

47 The converse, however, is also true – there is a need to identify with precision the statements that are contended to be in error. In *Re Felicity; FM v*

³⁰ *Supreme Court Act 1970* (NSW), s 75A(5).

³¹ *Fox v Percy* (2003) 214 CLR 118.

³² [2015] NSWCA 72.

³³ *Id* at [154].

Secretary, Department of Family and Community Services (No 3),³⁴ Basten JA stated, at [50], that:

“The proposition that [the primary judge] did not give adequate consideration to the submissions on behalf of the applicant was simply a misrepresentation of her reasons for judgment... No specific passage in the judgment was relied upon, nor was there reference to specific submissions which were disregarded.”

48 As the costs order made against the solicitor in that case reminds advocates,³⁵ a failure to competently identify legal error before bringing an appeal may expose a legal practitioner to liability for costs under s 99 of the *Civil Procedure Act 2005*.

49 Excessive, repetitive and unnecessary grounds of appeal are a waste of time and money. In *Salmon v Osmond*,³⁶ the Court was faced with 19 grounds of appeal, many in the alternative and many with subclauses. In my judgment, I commented that “[t]he multiplicity of grounds and sub-grounds does not readily facilitate the articulation of the issues on the appeal.”³⁷

50 In *Sze Tu v Lowe*,³⁸ Gleeson JA described the grounds of appeal in these terms:

“Sunly and Gordon raised 59 appeal grounds in their further amended notice of appeal. Helen raised 38 appeal grounds. Margaret raised 6 appeal grounds, which in turn raised 22 sub-grounds. There is much in common between them.”

51 Gleeson JA condensed the grounds to 6 issues.

52 In one appeal brought to the Court last year, the appellant raised 79 grounds of appeal, with the very final ground being, somewhat ominously, “[t]here are

³⁴ [2014] NSWCA 226.

³⁵ [2014] NSWCA 19, especially at [38].

³⁶ [2015] NSWCA 42.

³⁷ Id at [35].

³⁸ [2014] NSWCA 462.

other grounds".³⁹ The grounds were drafted by a self-represented litigant, but the small sample of other cases here indicates that there are occasions where counsel are sometimes not far behind.

53 Litigation is often complex, and sometimes multiple grounds of appeal are necessary. But usually nothing is so complex as to require even 20 grounds of appeal with sub-grounds. More often than not it telegraphs to the Court and presumably to the other side that there is a problem with the case. Ipp JA commented on this in *Ohlstein v E & T Lloyd*:⁴⁰

"An extravagantly excessive number of causes of action, or grounds of appeal, or particulars of negligence, are often a sign of serious problems with the health of the case being advanced. At the very least, they demonstrate a lack of appropriate consideration in formulating the issues and are obstacles in the path of justice. Apart from causing unnecessary delay and costs, the scattergun approach obscures the true issues, camouflages the pleader's best points, and unnecessarily complicates the task of the judge."

54 McHugh J made a similar point in *Tame v State of New South Wales*:⁴¹

"Australian, as well as United States, counsel would be well advised to heed Judge Aldisert's statement that when he sees 'an appellant's brief containing seven to ten points or more, a presumption arises that there is no merit to any of them'."

55 In *Day v Harness Racing New South Wales*,⁴² Hamill J faced a different problem but of a similar complexion - excessive amounts of material being placed before a primary judge. His Honour remarked:

"When I enquired when I was expected to read the material that had been placed before me, I was told that I did not need to read it, but that I would be taken through it. I make the observation that if I did not need to read the material, I find it difficult to understand why it is necessary in a busy duty list that a judge be burdened with such an avalanche of material. Perhaps it is like the preacher of whom President Lincoln spoke when he remarked that he would have given a shorter sermon but he didn't have enough time to prepare it."⁴³

³⁹ *Bobolas v Waverley Council* [2014] NSWCA 78 at [23].

⁴⁰ [2006] NSWCA 226; (2006) Aust Torts Reports 81-866.

⁴¹ (2002) 211 CLR 317.

⁴² [2014] NSWSC 1024.

⁴³ *Id* at [21].

56 Although I will return to the topic of written submissions below, it is pertinent at this point to discuss the relationship between the grounds of appeal and the written submissions. It is essential that the written submissions relate to the grounds of appeal. The linking of the submissions to the particular ground(s) of appeal is an important discipline. It acts as a cross-check against the ground of appeal. If the submission can't be articulated satisfactorily and supported by evidentiary references and relevant legal principle, it is likely that there is something awry with the ground. Two options are then available: amendment or abandonment. In the case of multiple grounds which are aspects of the same issue, the grounds and submissions should be organised according to the issues.

Proper appellate jurisdiction

57 Invoking the wrong jurisdiction will result in an adverse costs order. *Eberstaller v Poulos*⁴⁴ arose out of divorce proceedings between a husband and wife in the Family Court of Australia that were settled by consent orders. Those consent orders required the husband to transfer his interest in the family home in Bellevue Hill, Sydney, to the wife upon her discharging the existing indebtedness of the property.

58 The husband purported to transfer his interest in the property to a third party instead. The wife brought proceedings in the NSW Supreme Court. She obtained a judgment setting aside the contract between the husband and the third party and ordering that the husband deliver a duly executed transfer of the property to the wife.⁴⁵

59 The jurisdiction question concerned with the identification of the “*source and character of the authority*” that the Court was being asked to exercise.⁴⁶ The Court, in a judgment delivered by Leeming JA, stated that:

⁴⁴ [2014] NSWCA 211.

⁴⁵ [2013] NSWSC 1849.

⁴⁶ See [2014] NSWCA 211at [15].

“[t]he substance of the proceedings before the primary judge was the enforcement of consent orders made in the Family Court of Australia. Those orders resolved the dispute arising under the Family Law Act 1975 (Cth) between husband and wife as to the matrimonial property. Proceedings to enforce such a settlement comprise a matter arising under federal law.”⁴⁷

60 Section 7(5) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) prohibits the institution and determination of appeals the subject matter of which is a matter arising under the *Family Law Act* in any court other than the Family Court.⁴⁸ The Court accordingly dismissed the appeal on the basis that there was no jurisdiction to hear the matter, and also indicated that the primary judge was erroneous in his assumption that he had jurisdiction to make the requested orders. Because the husband had wrongly invoked the Court of Appeal’s jurisdiction, he was ordered to pay the wife’s costs.

61 Other jurisdictional pitfalls that parties should be alert for include:

- (1) Whether leave to appeal to the Court of Appeal is required under the *Supreme Court Act 1970*, s 101(2) or the *District Court Act 1973*, s 127(2). The need to seek leave will most commonly arise when the decision appealed from is an interlocutory decision or the matter at issue amounts to a value of less than \$100,000: s 101(2)(r). If the matter at issue is not about money or property, leave to appeal will be required.⁴⁹
- (2) Whether proceedings should be brought in the Court of Appeal or Court of Criminal Appeal: see *El-Zayet v The Queen*.⁵⁰
- (3) Whether the appeal is from a specified tribunal.⁵¹ The question whether an appeal lies from the Appeal Panel of NCAT is problematic at the moment. The better view is that such an appeal is to the Supreme

⁴⁷ Id at [2].

⁴⁸ Subject to limited exceptions in sub-ss (7) and (8) of that section.

⁴⁹ *Re DG and the Adoption Act 2000* [2007] NSWCA 241; 244 ALR 195; *Re Sarah* [2013] NSWCA 379 at [11].

⁵⁰ [2014] NSWCCA 298.

⁵¹ *Supreme Court Act 1970* (NSW), s 48.

Court not the Court of Appeal, unless perhaps when the President of NCAT is a member of the Appeal Panel. My current practice in that case is to allow the appeal to remain in the Supreme Court.

- (4) An appeal from the associate judge an interlocutory matter is to the Supreme Court, not to the Court of Appeal. Somewhat inconsistently, an appeal from the Registrar of the District Court comes to the Court of Appeal because of definitional matters.

(I should indicate that the Act and the rules around the last two matters need attention).

- 62 If an appeal is brought as of right, rather than by grant of leave, UCPR r 51.22 requires a party to file and serve an affidavit setting out the material facts on which the appellant relies to show that no restriction on the right to appeal applies in their case. The affidavit needs to contain a realistic assessment of the claim.

Parties to the appeal

- 63 There is another basic and preliminary point in addition to jurisdiction, namely what parties are necessary parties to the appeal.
- 64 UCPR r 51.4(1) and (2) provides:

“51.4 Parties

(1) Each person who:

- (a) is directly affected by the relief sought, or
(b) is interested in maintaining the decision of the court below,
must be joined as a respondent.

(2) The court below or other decision-maker is not required to be joined as a respondent in appeal proceedings, but must be joined in other proceedings in the Court.”

- 65 UCPR r 59.3, which governs the parties which must be joined to judicial review proceedings:

“59.3 Commencement and parties

...

(2) If a decision to be reviewed arose in the course of a dispute between parties, each party who is interested in maintaining the decision must be joined as a defendant.

(3) If the proceedings seek to prohibit, injunct or mandate a step that has not been taken, each body or person who may be directly affected by the relief sought must be joined as a defendant.

(4) The body or person responsible for a decision to be reviewed must be joined as a defendant, but not as the first defendant unless there is no other defendant.”

66 The dictates of natural justice, as well as the efficient administration of justice, provide the rationale for this rule. In *Victoria v Sutton*⁵² McHugh J stated:

“The rules of natural justice require that, before a court makes an order that may affect the rights or interests of a person, that person should be given an opportunity to contest the making of that order. Because that is so, it is the invariable practice of the courts to require such a person to be joined as a party if there is an arguable possibility that he or she may be affected by the making of the order. That practice also assists in avoiding duplication of hearings on the same issues and in avoiding the spectre of inconsistent decisions by courts or the judges of the same court.”⁵³

67 The obligation to join the necessary parties rests upon the person applying for orders.⁵⁴ In the case of an appeal that is the appellant. However, respondents must also be alive to the question. If the proper parties have not been joined to the appeal, the court may be unable to make the orders finalising the appeal. From the perspective of all parties, the omission to join all necessary parties can cause delay and expense pending remedial action.

68 Where property is involved, the question of joinder will require consideration to be given to parties who *might* have interests in the property. In *Menzies v Paccar Financial Pty Ltd (No 4)*,⁵⁵ the appellant’s company, Menzies Haulage Pty Ltd, had borrowed money from the respondent, Paccar Financial, to

⁵² [1998] HCA 56; 195 CLR 291.

⁵³ *Id* at [77].

⁵⁴ *John Alexander Clubs Pty Ltd v White City Tennis Club Pty Ltd* [2010] HCA 19; (2010) 241 CLR 1 at [131]-[138].

⁵⁵ [2014] NSWCA 210.

purchase equipment. The appellants had guaranteed that loan. Menzies Haulage Pty Ltd fell into arrears on the loan and was wound up. The respondent brought proceedings against the appellants under the guarantee for money owing, and also sought an order pursuant to the *Corporations Act 2001* (Cth), s 568F, that the equipment vest in the respondent.

69 The liquidator of Menzies Haulage had disclaimed interest in the equipment. On the appeal, a question was raised as to whether, by reason of the liquidator's disclaimer of any interest in the equipment, title to the Vehicles may have vested in the Crown.

70 The Court, comprised by Emmett and Leeming JJA and Sackville AJA, held that that argument was "*at least arguable*", and that the "*default position*" that the Crown should be joined to the appeal should apply.⁵⁶ Their Honour's stated:

"It is not to the point that the nature of those rights or liabilities may be attended by doubt or, in the case of property subject to a security interest, that the value of the property is unlikely to exceed the amount required to discharge the security ... The order that Paccar is entitled to the Equipment adversely affects the legal rights of the Crown (assuming it can rely on the doctrine of *bona vacantia*), because the order appears to be intended to extinguish its rights as owner of the Equipment."⁵⁷

71 The Court therefore concluded that the respondent was required to file in the court an affidavit indicating that the Attorney General of New South Wales does not wish to be joined to the proceedings, or otherwise take steps to join the State to the appeal. This challenge to the competency of the appeal delayed the outcome sought by the respondent, namely that the appeal be dismissed.

72 The requirement to join all necessary parties may also give rise to procedural difficulties. In *Burwood Council v Ralan Burwood Pty Ltd (No 2)*,⁵⁸ the

⁵⁶ Id at [101]-[102].

⁵⁷ Id at [102].

⁵⁸ [2014] NSWCA 179.

appellant Council appealed against the decision of the Land and environment Court dismissing proceeding brought by it against the first respondent, Ralan. Ralan was the developer of a major residential and commercial development project in Burwood. The Council claimed that the design and construction of the building was inconsistent with the Council's development consent, and sought orders requiring Ralan to undertake extensive rectification works.

73 The procedural difficulty which arose was that the property in question was subject to a strata plan containing 330 lots. Ralan was the proprietor of only 10 of those lots. Ralan objected to the competency of the appeal on the basis that the Council ought to serve notice of the proceedings upon all owners and occupiers of the lots comprised in the strata plan, inviting any interested person to apply to be joined as a party to the appeal. The evidence showed that the rectification works sought by the Council would require internal access, and alterations to, lots not owned by Ralan, and further would require changes be made to the common property in which each lot proprietor had an interest as tenant in common.

74 The Council was required to concede that the lot owners were necessary parties to the proceedings. Of course, the practical challenges to joining all owners and occupiers were vast. The Council instead sought orders seeking to be appointed to represent the owners and occupiers of the lots who support the making of the orders sought by the Council, and that Ralan be appointed to represent the owners who oppose the orders sought by Council.

75 The question to be resolved was whether the court had the jurisdiction to make representative orders of that nature. UCPR r 7.4, which had previously provided expressly for the making of such orders, had been repealed. The *Civil Procedure Act 2005*, part 10, only provided for the *commencement* of proceedings by a representative party.

76 Sackville AJA held that the Court did have such jurisdiction. It was first sourced in the traditional equity jurisdiction which is preserved by s 22 of the

Supreme Court Act 1970. He also held that ss 56-58 of the *Civil Procedure Act 2005*, which set out the objectives of case management which the court must have regard to when making orders or directions for the management of proceedings, provided an additional source of authority to make an order that one or more defendants represent other persons with a common interest in the proceedings. There were two other sources of jurisdiction: s 61(1), which permits the court, by order, to “*give such directions as it thinks fit (whether or not inconsistent with rules of court) for the speedy determination of the real issues between the parties to the proceedings*” and UCPR 2.1 which is in similar terms.

- 77 Although the requirement to join parties is essential, active participation by all parties is not required, and in some cases will be inappropriate. Counsel for a respondent ought to consider whether a submitting appearance should be filed pursuant to UCPR r 6.11. Appellants should likewise consider whether it would be prudent as a costs measure to take advantage of UCPR r 51.4(5) and (6), which provide:

“(5) An applicant or appellant who considers that respondents need not be separately represented may notify them that objection will be taken to more than one set of costs being allowed between them.

(6) An applicant or appellant who considers that a respondent should file a notice of appearance under rule 6.11 and take no active part in the proceedings may notify that party that objection will be taken to any order for costs, incurred after that date, other than costs as a submitting party, being made in favour of that respondent.”

- 78 In *Pasade Holdings v Sydney City Council*,⁵⁹ Bryson J was concerned with a request for costs by three defendants all represented by one counsel. The matter related to an application for the grant of an easement for light and air under s 88K of the *Conveyancing Act 1919*. It was appropriate that those three defendants be joined to the matter; however, their interests were not affected in any real way by the claim, and their counsel had not opposed the application.

⁵⁹ [2003] NSWSC 913.

- 79 After the hearing, the defendants made a costs claim of \$24,783.58 set out in a Bill of Costs from their solicitors. The Bill charged fees to counsel totalling \$17,666.00. Bryson J was highly critical of the conduct of the matter. His Honour stated:

“The intensity of the attention given to the interests of these defendant, the amount of professional time expended and the charges made were completely out of proportion to any adverse impact on the interest of these defendants which the plaintiff’s application could reasonably, have been feared to have...

In my view I should assess costs on the basis that the principal of the firm used the time required to consider the matter [and] to discern that it was sufficient and appropriate for these defendant to take the position of submitting defendants... [N]o attendances by counsel should be allowed for in the assessment.”⁶⁰

- 80 His Honour concluded:

“I regard the claim for costs of \$24,783.58 as scandalously high, obviously completely unjustified and an affront to my readiness to give consideration to the question. At the charging rate adopted by the firm’s principal of \$275 per hour, implying \$302.50 per hour with GST, that charge implies about 82 hours of professional attendance. ... **If lawyers cannot do work of this kind for charges of the kind I have assessed they risk being challenged and replaced by someone who can.**”⁶¹

Preparing written submissions

- 81 Written submissions are now as essential and integral to the appeal process as is oral advocacy. They are not *mere* preparations for the appeal, nor a procedural precondition for the appeal. As I have already indicated, they are the first half of the appeal. It is very hard to recover from a bad start.
- 82 Written submissions will be used by the bench at three points in time: prior to the hearing, during the oral argument, and during the writing of the judgment. They need to be drafted so as to be useful at each of these stages.

⁶⁰ Id at [12] and [14].

⁶¹ Id at [17].

- 83 First, the written submissions are read by the bench before the appeal. Written submissions must contain a short, coherent and readable encapsulation of the essence of your argument. The less argumentative the written submissions, the more intelligible, coherent and powerful they will be.
- 84 Secondly, written submissions can be used by counsel during the oral argument to help the bench follow and understand the argument. The structure and text should reflect (with modification) how you intend to speak. A judge may ask “Where are you in your written submissions?” That question can be a precursor to real irritation if the submission is badly organised; or, it can capture the court’s attention. (It also tends to keep the bench quieter if they know what you are doing, where you have come from and where you are going).
- 85 The third function is that written submissions will be used after the hearing to write the judgment. The written submissions, annotated and marked by the judge, are an important reference point when writing the judgment.
- 86 All of these functions are defeated if the written submissions are dense or lack structure. They will be hard to grasp (first function not fulfilled), useless during argument (second function not fulfilled), and will not be used as part of the process of information gathering and intellectual synthesis by the Court (third function not fulfilled).
- 87 Justice Sackville made these points in a compelling way in the *C7* litigation. He wrote to the parties in the following terms:

“At the risk of stating the obvious, part of the art of advocacy is to make it easy for the decision-maker to understand what issues need to be resolved and to explain clearly, cogently and concisely how and why the crucial issues should be resolved in favour of a particular party. To leave the Judge, if not completely at large, then without a reliable working compass in a vast sea of factual material, is not a technique calculated to advance a party’s case. This, I hasten to say, is not because any Judge would consciously penalise a party by reason of the bulk of its submissions or the manner in which its arguments are presented. It is because the cogency and persuasiveness of submissions

depends on the ability of the Judge to follow them and to isolate the critical legal and factual issues upon which a case is likely to turn.”⁶²

88 There was a wonderful example of respondent’s submissions recently. The opening line was: “*There are four fundamental flaws in the appellant’s contentions.*” These four flaws were then laid out, in numbered paragraphs (i)-(iv), taking up exactly one A4 page, formatted in a way that was easy to read. Every relevant fact was footnoted. From that one page, the legal issues, the key relevant facts and the respondent’s arguments were exposed with clarity. That is the gold standard of submissions.

89 It seems almost too obvious to say, but as a very minimum we need to be able to *read* your written submissions. UCPR r 57.36 sets a page limit of 20 pages on written submissions. Often, if the Court requests additional submissions, a shorter page limit will be set to reflect the size of the issue being addressed. Such an order was made in the matter of *ACES Sogutlu Holdings Pty Ltd (in liq) v Commonwealth Bank of Australia*,⁶³ where the appellant was given leave to file supplementary submissions of no longer than 5 pages at the conclusion of the hearing on specified topics. Leeming JA had this to say in the final judgment:

“There was literal compliance with that direction. It must be said that the submissions, which occupy precisely five pages, are typed in the smallest font I have ever seen in submissions to a court. There are 57 lines of text on page 3.”

90 In adhering to page limits, *literal* compliance is not to be at the expense of readability. A microscopic font does not assist you and is about to be subject to a banning order by way of a rule change. The rules of court are not an arbitrary imposition for no purpose – submissions that adhere to a page limit are the most effective and helpful to us.

⁶² *Seven Network Ltd v News Ltd* [2007] FCA 1062 at [34].

⁶³ [2014] NSWCA 402.

91 In any event, rules of court will be introduced in the near future regulating font sizes and spacing. So you may as well practice now as to how to write 20 pages of readable and coherent submissions.

92 Written submissions should not be argumentative. They should be an explanation of how the relevant legal principles apply to the facts. They should not be bald assertions about the quality or lack thereof of the other side's submissions. The perfect case to illustrate this is *Hamod v State of New South Wales*.⁶⁴

93 Mr Hamod's case was colourful. The trial judge described it as being akin to a "spy novel". This led to an allegation in the appeal of a breach of natural justice. Mr Hamod said he should have had an opportunity to address his Honour to dissuade him from any such perception. That ground of appeal did not succeed. However, the point I want to make is how the respondent dealt with many of the submissions advanced by Mr Hamod:

- "The ground of appeal is nonsense."
- "The ground of appeal is incoherent and fanciful."
- "The ground is not pressed. Query how it ever came to be raised."
- "The ground of appeal was always unarguable and hopeless."

94 However, the Court cannot be as dismissive. We have a very heavy obligation to give reasons for our decision. The court is entitled to and expects the assistance of the advocate to know why the point is good or bad; why the trial judge was correct or not correct.

95 As the Court stated:

"... unfortunately, the State's written submissions, which failed to refer to the particular statements in the newspaper reports or to the law relating to witness immunity, were not of assistance to the Court. Nothing was added in oral submissions. Had the State attended to these matters, particularly in the

⁶⁴ [2011] NSWCA 375.

written submissions, Mr Hamod's legal representatives may have realised that there was nothing in this ground of appeal and abandoned it before the hearing. The result was that the Court was required to undertake the search in the fine print of nine pages of poorly reproduced material for the relevant material upon which Mr Hamod relied and which the State contended did not bear out his claim. The Court is entitled to rely upon the assistance of the legal representatives to aid it in the determination of disputes. Unfortunately, that assistance was not forthcoming on this occasion."⁶⁵

The oral argument

96 Every appeal is different so that the manner in which oral argument is ordered will depend upon the nature of the appeal, the nature of the alleged error, and the type of case involved. Was the case essentially documentary or reliant upon oral evidence? Does the case involve error of law only? These are a few of the considerations that are involved in determining the structure of the oral argument.

97 However, there are probably three ways to commence an appeal that commend themselves to the advocate:

- (1) If the case is essentially documentary or dependent upon the evidence, it may be useful to start with the documents or the evidence.
- (2) If the case involves error of law or there is some significant error in the judgment which the Court should understand at the outset, then there is benefit in taking the Court to the judgment, including the structure of the judgment and pointing out where the error of which complaint is made is to be found in the judgment.
- (3) It may be that dealing, seriatim, with the issues raised on the appeal is the most logical approach. This is a hybrid of the previous two approaches so that the Court will be taken to the evidence and the judge's reasons (in the most logical order in the particular case) in respect of each issue.

⁶⁵ Id at [715].

- 98 Whichever approach recommends itself to the advocate, it is always useful for the advocate to tell the Court at the outset how the argument is going to be ordered.
- 99 It is rarely useful to address the Court for any period without taking the Court to the judgment or the evidence or the authorities. By making specific reference to the judgment, the evidence or the authorities, the judges have something that concretises this case in their minds. A mere talk fest, albeit that counsel is in oral submissions, without reference to the documents fails to ensure that the Court is given something whereby this case is imprinted on the judicial memory. It is also of fundamental importance when the judgment is being prepared that the judges have material they have marked and often annotated for later consideration.

Conclusion

- 100 I wish to conclude with a variation on the imagery. Advocacy is like crystal. When it is clear, precise, simple and polished, it sparkles. When it is dense, unfocussed or missing the point, it is like the dirty washing up. Your advocacy will thrive in the former case. Your reputation, at least with the court, will suffer severely in the latter.
