APPEALS TO THE COURT OF APPEAL

ADVCACY, PITFALLS AND FREQUENTLY ASKED QUESTIONS

A PAPER DELIVERED AT THE NSW YOUNG LAWYERS CONFERENCE

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Legislative Framework

Section 101 of the Supreme Court Act 1970 NSW provides the statutory jurisdiction for appeals to the Court of Appeal in non jury matters whether by right or by leave. Section 102 provides an equivalent relating to a jury trial. Reference should also be made to the Uniform Civil Procedure Rules which provides for the relevant rules that apply to any proceedings which have been assigned to the Court of Appeal.

Orders

Appeals are against orders. Before one appeals it is necessary to closely examine the proceedings below and determine whether or not you have a right to appeal or a right to apply for leave to appeal.

You appeal against orders not reasons. You cannot appeal against an order of a court which is entirely in your favour. Beazley JA spoke of a matter before the COA where Senior Counsel appeared for the appellant in proceedings where he had nothing to appeal from...the order from which he was appealing was an order entirely in his favour. He left the court having secured an order against his client for indemnity costs.

Effective, Efficient and Timely

It is the goal of the court to preside over proceedings which are effective, efficient and timely. This phrase is taken from a judgment of Mahoney JA in *GIO v Glasscock* [1991] NSWJB 11.

Effective

Bringing an end to the dispute which best achieves the purposes of your client.

Efficient

Using for that purposes no more resources than are appropriate to achieve that end.

Timely

That what is to be done is done in due time.

Its modern counterpart is to be found in s56 *Uniform Civil Procedure Act, 2005*.

The Civil Procedure Act 2005

Section 56 of the UCA has been described by Beazley JA as the court's mantra.

56 Overriding purpose

(1) The overriding purpose of this Act and of rules of court, in their application to a civil dispute or civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the dispute or proceedings.

(2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.

(3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.

(3A) A party to a civil dispute or civil proceedings is under a duty to take reasonable steps to resolve or narrow the issues in dispute in accordance with the provisions of Part 2A (if any) that are applicable to the dispute or proceedings in a way that is consistent with the overriding purpose.

(4) Each of the following persons must not, by their conduct, cause a party to a civil dispute or civil proceedings to be put in breach of a duty identified in subsection (3) or (3A):
(a) any solicitor or barrister representing the party in the dispute or proceedings,
(b) any person with a relevant interest in the proceedings commenced by the party.

(5) The court may take into account any failure to comply with subsection (3), (3A) or (4) in exercising a discretion with respect to costs.

(6) For the purposes of this section, a person has a "relevant interest" in civil proceedings if the person:
(a) provides financial assistance or other assistance to any party to the proceedings, and
(b) exercises any direct or indirect control, or any influence, over the conduct of the proceedings or the conduct of a party in respect of the proceedings.

Note: Examples of persons who may have a relevant interest are insurers and persons who fund litigation.

(7) In this section:
"party" to a civil dispute means a person who is involved in the dispute.

There are 3 fundamental obligations imposed by s56 at subsections (2), (3), (3A) and (4)

These are imposed upon the Court, the parties and the legal profession.

I also draw your attention to sub section 5. You cannot embark upon *any* step in litigation without considering s 56 and in particular the consequences of not attending to its requirements.

Grounds of Appeal

The starting point of any appeal is the grounds of appeal. Grounds are often drawn soon after a judgment is handed down. Often they will need refinement when attention is given preparing an appeal.

A properly drafted notice of appeal is the beginning of good advocacy in the Court of Appeal.

Properly drafted a ground of appeal will identify error with precision and indicate why the particular statement identified is erroneous.

For example, a ground which reads "the trial judge was in error in finding that the defendant was not negligent" is hopeless flawed and will do nothing to excite any interest in a court of appeal.

Generalised complaints like this are to be avoided.

A better way of expressing this ground is:

"the trial judge erred in determining that in circumstances where:

1 the defendant drove his unlit vehicle after 10.00pm, (AB XX)

2 on a beach, (AB XX)

3 at a speed admitted by the defendant to be in excess of 80 kilometres an hour, (ABXX)

4 when it collided with the plaintiff who was beach fishing

was not negligent."

It will not win an appellate court to your side because you have set out 20 grounds of appeal most of which relate to the evidence. One needs to be discerning when selecting the battlefield upon which to fight your appeal.

When drafting grounds keep in mind that you are looking to identify and establish error. Error in this context means applying a wrong principle, accepting the wrong evidence without adequate reasons, misapplying some rule of law etc. It does not mean accepting one witness's evidence over another's without more. It does not mean rejecting the evidence of X, without more especially after the High Court's decision in *Abalos v The Australian Postal Commission* (1990) 171 CLR 167.[1]

Appeal Books

The fundamental tool used to navigate through an appeal book is the Index. Judges rely upon this when working on appeals.

[1] McHugh J with whom the other members of the court agreed said at [31]: *when a trial judge resolves a conflict of evidence between witnesses, the subtle influence of demeanour on his or her determination cannot be overlooked. It does not follow that, because her Honour made no express reference to the demeanour or credibility of either Professor Ferguson or Mrs Archer, demeanour or credibility played no part in her findings on the supervision issue. But in any event, no matter how impressive Professor Ferguson's evidence may appear, it cannot claim the consideration of an appellate court to the extent necessary to overcome the advantage which her Honour enjoyed in seeing and hearing Mrs Archer give evidence. There is simply no basis for concluding that, in so far as her Honour preferred the evidence and demonstrations of Mrs Archer to the evidence of Professor Ferguson, she failed to use or palpably misused the advantage which she had of seeing and hearing the witnesses.*

Black Book: It is extremely useful to have an index to the transcript. Ideally it ought to isolate the place relevant exhibits were introduced into the evidence. Here I am referring to exhibits which are the subject of key evidence in the appeal. It isn't much use to have an index which identifies "plaintiff's docs page AB1" or "defendants docs page AB251". If a number of witnesses have given evidence about a relevant document then identify the place in the transcript where that evidence can be found.

Blue Book: Solicitors have apparently indicated to the court that it is too expensive to sift out the relevant documents from the exhibits when the blue books are brought together. Try and include only the documents that are necessary for the appeal. If it is not possible to obtain agreement to sift the documents at the stage that the blue book is compiled review the documentary exhibits again and if necessary prepare a critical document folder.

I do this whenever it is necessary to condense the documents to just those few that are important for the appeal. It may be useful to provide this to the court (and your opponent).

If you follow this example it can be useful to provide this to the court at least a week before the appeal is to be heard in the hope that the court will familiarise itself with your selection of documents.

Orange Book: Submissions and chronology

Chronology

A chronology can be a most useful tool in an appeal. Care and thought should go into the construction of the chronology. I favour a chronology which identifies relevant exhibits and relevant evidence as well as the dates upon which things happened.

Written submissions

Part 51.36 UCP Rules deals with written submissions:

51.36 Content of written submissions (cf SCR Part 51, rules 46 and 46A)
(1) Written submissions filed in an appeal must:
(a) be divided into paragraphs numbered consecutively, and
(b) so far as practicable, refer to matter in the Appeal Book by section name, volume number (if any), page number and letter, and not extract that matter, and
(c) so far as practicable, not extract matter in a judicial authority, and
(d) be signed by the barrister or solicitor who prepares it or, where the party is not represented by a barrister or solicitor, by the party, and
(e) have the following typed or printed in a neat and legible manner under the signature referred to in paragraph (d):
(i) the name of the signatory,
(ii) a telephone number at which the signatory can be contacted,
(iii) if available, the signatory's facsimile number,
(iv) if available, the signatory's email address, and
(f) not exceed 20 pages (not counting the pages of any statement included in the submissions for the purposes of

subrule (2)).
(2) Submissions raising substantial challenges to findings of fact must include a statement in narrative form (not exceeding 20 pages) setting out:
(a) the findings challenged, and
(b) the findings contended for and the reasons why the Court should substitute those findings, and
(c) supporting references to the transcript and other evidence.
(3) If damages for death or bodily injury are in issue:
(a) the appellant's written submissions must state:
(i) the manner in which the damages were assessed, or in the case of trial by jury, may be supposed to have been assessed, and
(ii) the heads of damages that are in issue in the appeal, and
(iii) briefly but specifically, the basis of the challenge, and
(iv) where applicable—the alternative assessment contended for, and
(b) the respondent's written submissions must state:
(i) the extent to which the assessment will be challenged or supported by cross-appeal or contention, and
(ii) any alternative assessment sought, and briefly but specifically, the basis for it.
(4) The written submissions must address:
(a) any claim for an order for reinstatement or restitution and the form of the order sought, and
(b) where restitution is sought with interest that is at a rate other than the relevant rate set out in Schedule 5—the rate of interest that should be applied.

A great deal depends upon preparation. It is almost impossible to over prepare an appeal although this does not mean that all of your preparation and research will be spelt out in your submissions. You must get everything down in 20 pages.

Sir Harry Gibbs speaking at the 2nd Biennial Conference of the Australian Bar Association[2] said:

"Quintilian [writing in the 1st century AD on the decay of oratory] said Festinat enim judex ad id quod potentissimum" (the judge hurries to get to the strongest point). That statement is true of the High Court and it ought to be true to counsel. Fundamental to success in appellate advocacy is the ability to perceive the point or points which the resolution of the appeal will depend and to cut a path directly to those points, without meandering to explore side issues, however interesting, or worse sill entangling the court in a thicket of irrelevancies of fact or law. The skill lies in discerning what are the critical issues and in distinguishing between what is and what is not necessary to be presented to enabe the argument directed to those issues to be properly understood."

Your written submissions have a job to do before, during and after the oral argument.

[2] Appellate Advocacy *(1986) 60 ALJ 296 at 297*

Before

They should lend themselves to being picked up quickly. Imagine that the judge is reading them at the end of a long and tedious day in court or on a Sunday night. They need to capture attention and interest.

They will fail to do this if they are too dense.

It helps if your submissions are visually attractive: clearly set out and appropriately divided by subheadings.

It is useful to have a short and pithy introduction to the appeal and the points which you seek to make.

They ought to introduce the court to your argument: what the appeal is about and why you should win.

During

If the written submissions are to assist the court to follow your oral argument they require a structure which is logical, crisp and clear. At this level they ought to provide a guide to your argument. Detailed references to transcript and exhibits can be made in argument, however the written submissions need to contain the appeal book references. In this way they operate as an index to your argument. In this way your submissions will follow the line and logic of your argument.

Identify the passages that contain error.

In oral argument take the court to the relevant passage. At this time your aim is to have the court following your argument by following it through the appeal books.

Identify the error and then explain why the identified statement is erroneous. Your written submissions will contain the references to the material that proves the error.

If the error is an error in statutory interpretation then take the court to the legislation and the scheme of the legislation.

Do not take time reading large passages of the law. You can direct the court to the relevant case law without necessarily reading it out to the court. You may need to read a paragraph or a sentence. However, whilst you are reading you are not necessarily persuading.

It is a good sign if you have kept the court working through the time you are on your feet.

After

Your written submissions if well drawn will not only attract and hold the attention of the judges but they will go with the judges when the oral argument has concluded. If they have been set out in a way which anticipates your oral argument then they will greatly assist the court to remember your best points and the way in which you have put your case.

Judges have to write judgments. The best written submissions are those that best assist them to do this.

In summary:

1. Capture attention;
2. Present material in a way which is attractive, easy to read and digest and which has a definable form and logic;
3. Early on provide an overview of where you are going;
4. Be succinct and concise;
5. Make short statements in easily digestible pieces, one thought or point to a sentence;
6. Use sub-headings and numbered subparagraphs to make your points in a logical way that predicts and will assist your oral argument;
7. Relate your arguments to the grounds of appeal;
8. Avoid long quotes;
9. Your written submissions should be a handy index to your oral argument. Ensure that the written submissions contain the references to the passages/exhibits to which your argument relates so that the court can easily follow your oral argument;

Oral Argument

Know the court

These days the composition of the bench is published the day before when the list is published. It is important to know the bench. It pays to spend some time the night before checking through recent unreported judgments to determine whether any of the judges who will hear your case have dealt with any similar points recently.

It is useful to know something about the form of the judges who will hear the appeal. By this I do not mean that there is use in some kind of result oriented analysis of judgments. Rather I mean to draw attention to the fact that just as each judge will have his or her own judicial manner and temperament, each judge with have his or her own interests in the law or policy and many have identifiable approaches[3].

Engaging opening

Do not waste the opportunity that your opening statement presents to capture the interest of the court. Open strongly and in a way that captures that interest. Do not lose the court by going straight into reading legislation or quotes from the reports. Maintain eye contact. Listen to the judges. Their questions and comments are important guidepost to their thinking.

Do not just stand at the bar table and read your written submissions. Use the opportunity to engage the court and win it to your cause.

Bench friend or foe?

[3] Ten Rules of Appellate Advocacy *(1995) 65 ALJ 964 at 967*

Beware the leading question from the bench! Not every leading question which appears to be designed to draw an affirmative answer from counsel is posed by a judge who favours your argument. On the other hand sometimes a judge will offer a suggestion which is intended to be helpful, yet the advocate may be wary of taking it up having already considered and discarded it. The problem here is that by not taking it up the advocate may fail to secure that judge's support for his case. Yet if it is taken up the advocate runs the risk of losing support from other members of the bench who like him or herself have already rejected it.

At some point you may have to decide that a particular judge is against you and no matter what you say you will not win him or her over. In this case you may simply just have to concentrate your attention on the remaining judges. This can be a difficult decision to make. You cannot be too hasty in making a decision like this. A judge who appears to be against you may just be playing devil's advocate and testing your argument before committing to it.

Candor

Confess and avoid but above all be frank about any matter which is against you. It cannot be ignored. It will not go away. If you have to concede that some point of evidence, for example, is against you then do so and move on to neutralise it either by isolating it or explaining it away. Sir Harry said:

"It should go without saying that another quality which an advocate should endeavour to acquire, even if he has not had it bestowed upon him by nature is candour. Sir Owen Dixon said that candour could be used as a weapon in advocacy; the absence of candour can prove an Achilles heel. Nothing can be more destructive to an argument that for a court which has viewed it with favour to discover, when opposing counsel comes to address, or when the court retires to consider the matter, that counsel who was putting the argument has failed to refer to some fact, statutory provision or decision that seems to present an insuperable obstacle to the acceptance of his argument. O the other hand, nothing is more effective than to direct the court's attention to what seems to be one's opponent's strong point to reveal its hidden weakness before one's opponent can fortify his position." [4]

Never try and bluff your way through something. If you are asked a question that you do not know the answer to, accept that you do not have the answer and seek time to address it. Perhaps you can address it later in the day, after lunch, or you can seek leave to put on a short note dealing with that matter.

Flexibility

On the other hand it is important to respond to judge's questions immediately if that is possible. If a judge has asked a question of counsel it is because the judge is interested in some point or other. If the point is in your favour or may be turned to your favour you lose that opportunity if you put the judge off. By the time you come back to it the judge may have lost interest.

[4] Appellate Advocacy *(1986) 60 ALJ 296 at 498-499*

Flexibility in oral argument is the mark of a good advocate. You must be prepared to deviate from your prepared case plan. The court may become interested in a matter of policy or in the factual merits of your case. You need to be prepared for this and to move with it.

This does not mean that you should be deflected from your argument. It is possible to be led astray and to momentarily lose your place in the argument and find it difficult to know where to come back to. I deal with this possibility by having available at the lectern in view throughout my oral submissions a brief summary in point form of what I intend to deal with in oral argument. If I am appearing for a respondent I add to this during my opponent's oral argument so that I can respond orally to those submissions. I try to keep this to one page. I use it as a check list, rather than speaking notes. However its serves as a handy road map which I can tick off as I go.

The High Court has now introduced a practice or requiring counsel to hand up a summary of their arguments before they commence submissions. It can be no longer than 3 pages. In my view this can serve the same purpose as my check list.

Enough already

Know when to stop. The quality of your submissions is not improved by repetition.

Further reading:

Advocacy in Practice, JL Glissan Lexis Nexis 5th Ed

Transcipts of argument, High Court of Australia web page

John Agius SC

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