APPEALS FROM THE MAGISTRATES' COURT AND THE VCAT TO THE SUPREME COURT ON A QUESTION OF LAW

Adam Coote
Barrister

GREENS LIST
BARRISTERS

Appeals from the Magistrates' Court and the VCAT to the Supreme Court on a Question of Law

Adam Coote

Barrister

Greens' List

Introduction

1. This paper discusses appeals on a question of law from the Magistrates' Court of Victoria and the Victorian Civil and Administrative Tribunal (the VCAT) to the Supreme Court of Victoria Trial Division. Specifically, it deals with appeals pursuant to s 109 of the *Magistrates' Court Act*[1] and s 148 of the *Victorian Civil and Administrative Tribunal Act*[2]. I discuss each separately but there is obviously some overlap between the two. Finally, I have focused on procedural aspects of the appeals as I expect this will be of most assistance to practitioners.

Enlivening the Jurisdiction of the Supreme Court

Re: Appeals from the Magistrates' Court

2. Section 109 (1) of the *Magistrates' Court Act* provides that "a party to a civil

[1] 1989 (Vic)
[2] 1998 (Vic)

proceeding in the Court may appeal to the Supreme Court, on a question of law, from a *final* order of the Court in that proceeding" [emphasis added].

3. The order appealed from must be a *final* order. As observed by Gibbs CJ in *Carr v Finance Corporation of Australia Ltd (No 1)*, [3] the test for determining whether a judgment is final or not is "whether the judgment or order appealed from, as made, finally determines the rights of the parties."

4. Gibbs CJ went on to state "[i]n my opinion the test in Licul v. Corney requires the Court to have regard to the legal rather than the practical effect of the judgment. If this were not so, the question whether a judgment is final or interlocutory would be even more uncertain than it is at present."[4]

5. An appeal under s 109 must be instituted no later than 30 days after the final order was made[5] and must be brought in accordance with the rules of the Supreme Court.[6]

Re: Appeals from the VCAT

6. Section 148 (1) of the VCAT Act provides:

> A party to a proceeding may appeal, on a question of law, from an order of the Tribunal in the proceeding –

[3] [1981] HCA 20 at [2]. This test has been held to be proper test with respect to s 109 of the *Magistrates' Court Act,* see *Guss v Johnstone* [1994] Unreported.

[4] *Carr v Finance Corporation of Australia Ltd (No 1)* HCA 20 at [3]
[5] *Magistrates' Court Act* 1989 (Vic) s 109(2)(a)
[6] Ibid s 109(3)

(a) to the Court of Appeal, if the Tribunal was constituted by the President or a Vice President, whether with or without others; or

(b) to the Trial Division of the Supreme Court in any other case –

if the Court of Appeal or the Trial Division, as the case requires, gives leave to appeal.

7. An application for leave to appeal must be made no later than 28 days after the day of the order of the Tribunal and in accordance with the rules of the Supreme Court.[7] However, if the Tribunal gave oral reasons for the making of an order and a party requests written reasons pursuant to s 117 of the VCAT Act, the day on which the written reasons are given to the party is deemed to be the day of the order.[8] If leave is granted by the Trial Division the appeal must be instituted no later than 14 days after the day on which leave is granted and in accordance with the rules of the Supreme Court[9] and the appellant must notify the principal registrar of the VCAT.[10]

What is a Question of Law?

8. It is at times difficult to identify what constitutes a question of law for the purposes of an appeal. Indeed, there has been no definitive test identified. As the High Court has observed:

[7] *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) s 148(2)
[8] Ibid s 148(4)
[9] Ibid s 148(3)
[10] Ibid s 148(6)

> The distinction between questions of fact and questions of law is a vital distinction in many fields of law. Notwithstanding attempts by many distinguished judges and jurists to formulate tests for finding the line between the two questions, no satisfactory test of universal application has yet been formulated.[11]

9. It is beyond the scope of this paper to undertake a detailed analysis of this topic other than to make the following observations.

10. Firstly, it is suggested, in circumstances where there is no definitive test, the starting point for any practitioner is to look to the decided cases for those questions which have already been recognised as being questions of law. Jason Pizer SC provides a very useful discussion in *Pizer's Annotated VCAT Act* on recognised questions of law which serves as an excellent starting point.[12]

11. Secondly, the following general propositions identified by the Federal Court in *Pozzolanic*, which have been cited with approval by the High Court,[13] may also be of some assistance:

    (a) the question whether a word or phrase in a statute is to be given its ordinary meaning or some technical or other meaning is a question of law;

---

[11] *Collector of Customs v Agfa Gevaert Ltd* [1996] HCA 36, 4 per Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ

[12] See Jason Pizer (2012) *Pizer's Annotated VCAT Act* (4th Ed) JNL Nominees Pty Ltd, Melbourne at [148.220] – [148.380]

[13] *Collector of Customs v Agfa GevaertLtd* [1996] HCA 36, 5 per Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ

(b) the ordinary meaning of a word or its non-legal technical meaning is a question of fact;

(c) the meaning of a technical legal term is a question of law;

(d) the effect or construction of a term whose meaning or interpretation is established is a question of law; and

(e) the question of whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law.[14]

As already noted these are not to be taken as definitive and indeed there is some difficulty in their application and interaction as general propositions.[15]

12. Thirdly, under the VCAT Act there are also some questions which are deemed to be questions of law.[16]

Re: Appeals from the VACT - Application for Leave

13. Section 148 provides that before an appeal may be instituted the Supreme Court must grant leave to appeal. In the leading case of *Secretary to the Department of Premier & Cabinet v Hulls*[17] (*Hulls*)the Court of Appeal outlined

[14]*Pozzolanic* (1993) 43 FCR 280, 287
[15]*Collector of Customs v Agfa GevaertLtd* [1996] HCA 36, 5 per Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ
[16]See *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) ss 47(7), 55(4) and 75(5)
[17] [1999] VSCA 117

the following principles as relevant to an application for leave to appeal an order of the VCAT pursuant to s 148[18]:

(a) the applicant must identify a question of law which is important to the appeal succeeding or failing;[19]

(b) it is not necessary that an error below is established (which is of course the question for the appeal itself) rather, ordinarily the applicant will need to show there is a real or significant argument to be advanced that an error exists. There is no definitive test but it has been said that it must be shown there is a "prima facie case", "an arguable case" or the decision below "is attended with sufficient doubt to justify the grant of leave to appeal";[20]

(c) although not essential, sometimes the public or general importance of the question of law which has been identified may be a consideration on the application for leave;[21]

(d) if the order is a final order, a question of law has been identified and sufficient doubt shown ordinarily leave to appeal will be granted. But the grant of leave to appeal is always subject to it being just to grant leave. "It directs attention to the position of the parties – and perhaps third parties if directly affected by the

[18]They are intended only as guidelines and may be found to be inadequate in a particular case. See *Hulls* [1999] VSCA 117 at [16]
[19]*Hulls* [1999] VSCA 117 at [9]
[20] Ibid at [10] and [12]
[21] Ibid at [11]

order below or the proposed appeal – and perhaps the simplest example arises when the order below is plainly interlocutory.";[22]

(e) if it is an interlocutory order (or "interim order" as the VCAT Act terms it) order there may be reasons (based on injustice to both parties) for not granting leave to appeal;[23]

(f) even if the order sought to be appealed is a final order, the Court may sometimes require persuasion that there would be prejudice to the applicant if the order below were allowed to stand, notwithstanding it is tainted by error;[24]

(g) the discretion to grant leave, as conferred by s 148 in untrammelled terms, cannot and should not be fettered by judicial decision. "From time to time a case will arise in which any preconceived guidelines will be found not wholly sufficient. In the end, whether leave is granted or not must always depend upon the justice of the case, as it appears to the court from whom leave is sought."[25]

Procedure in the Supreme Court

14. The Supreme Court list which generally deals with appeals pursuant to s 109 of the *Magistrates' Court Act* and also s 148 of the VCAT Act is the Judicial Review and Appeals List. I refer practitioners to Practice Note No.4 of 2009 –

[22] Ibid at [13]
[23] Ibid at [14]
[24] Ibid at [15]
[25] Ibid at [8]

Judicial Review and Appeals List, which provides much guidance about the operation of the list, procedural requirements and standard directions. This paper does not exhaustively cover every procedural step and I refer practitioners to the Practice Note.

Re: Appeals from the Magistrates 'Court

15. Part 3 of Order 58 of the *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) (Chapter I Rules) governs, along with the Practice Note, procedural matters concerning appeals pursuant to s 109 of the *Magistrates' Court Act*.

16. An appeal is instituted by filing a notice of appeal in the Trial Division.[26] Rule 58.08(1) of the Chapter I Rules sets out the prescribed contents of the notice of appeal and provides it must:

> (a) be in writing signed by the appellant or the appellant's solicitor;
>
> (b) set out or state –
>
> > (i) the order which is the subject of appeal;
> >
> > (ii) whether the appeal is from the whole or part only of the order and, if so, what part;
> >
> > (iii) the question of law upon which the appeal is brought;
> >
> > (iv) concisely the grounds of appeal;

[26]Chapter I Rules, r 58.07

(v) the order sought in place of that from which the appeal is brought; and

(c) at its end, name all the persons on whom it is proposed to serve the notice of appeal.

17. As soon as practicable after filing the notice of appeal the appellant must:

(a) deliver a copy to the registrar or other proper officer of the court that made the order the subject of the appeal;

(b) unless the Court otherwise orders, serve a copy of the notice on all persons directly affected by the appeal.[27]

18. Within seven days of filing the notice of appeal the appellant must also file and serve an affidavit outlining the various matters prescribed in r 58.09 of the Chapter I Rules. Also within seven days the appellant must apply on summons to an Associate Justice of the Supreme Court for directions (and also leave to appeal if the appeal is out of time).[28]

19. The following steps also need to be taken prior to the return date on the summons:

(a) not less than 14 days before the day for hearing on the summons, the appellant must serve on the respondent a copy of

[27]Ibid r 58.08(2)
[28]Ibid r 58.10(1)

the summons and the affidavit filed pursuant to r 58.09, including any exhibits;[29] and

(b) not less than five days before the day for hearing on the summons, the respondent must file and serve a copy of any affidavit in answer, including any exhibits.[30]

Re: Appeals from the VCAT

20. Order 4 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008* (Vic) (Chapter II Rules) governs, along with the Practice Note, procedural matters concerning appeals pursuant to s 148 of the VCAT Act.

21. An application for leave to appeal is made by originating motion.[31] As soon as practicable after filing the originating motion the applicant must:

(a) deliver a sealed copy of the originating motion to the registrar or other proper officer of the tribunal; and

(b) serve a copy of the originating motion on the proposed respondent to the appeal.[32]

22. Within seven days of filing the originating motion the applicant must also file and serve an affidavit[33] outlining the various matters prescribed in r 4.07(2)

[29]Ibid r 58.10(3)
[30]Ibid r 58.10(4)
[31] Chapter II Rules, r 4.06(2)
[32] Ibid r 4.06(4)
[33] Ibid r 4.07(1)

and (3) of the Chapter II Rules and must apply on summons to an Associate Justice of the Supreme Court for the leave sought in the originating motion.[34]

23. The following steps also need to be taken prior to the return date on the summons:

    (a) not less than 14 days before the day for hearing on the summons, the applicant must serve on the respondent a copy of the summons and the affidavit filed pursuant to r 4.07, including any exhibits;[35] and

    (b) not less than five days before the day for hearing on the summons, the respondent must file and serve a copy of any affidavit in answer, including any exhibits.[36]

24. If leave to appeal is granted, an appeal is commenced by filing a notice of appeal with the Court.[37] The required contents of the notice of appeal are set out in r 4.11 of the Chapter II Rules and are effectively the same as those as for a notice of appeal under r 58.08(1) of the Chapter I Rules detailed above.

Re: Appeals from the Magistrates' Court and the VCAT - Return of the Summons in the Supreme Court

25. The first return of the summons will be before an Associate Justice of the Supreme Court. At the first hearing the Associate Justice is required to give

[34]Ibid r 4.08(1)
[35]Ibid r 4.08(3)
[36] Ibid r 4.08(4)
[37] Ibid r 4.04

directions.[38] Practitioners should prepare proposed directions orders (preferably by consent), having regard to the nature of the appeal, the orders sought and the standard orders contained in the Practice Note. If you don't know who your opponent is or it isn't possible to prepare proposed consent orders then just prepare your own proposed orders as this will be appreciated by the Court, and indeed your opponent who may not have been aware of the Practice Note.

26. The application for leave to appeal pursuant to s 148 of the VCAT Act will usually be heard at the first hearing and if it is likely the hearing will take longer than two hours then the parties should contact the Court and let it know of a time estimate.[39]

Re: Appeals from the Magistrates' Court

27. With respect to an appeal under s 109 of the *Magistrates' Court Act*, the Associate Justice may dismiss the appeal if satisfied:

    (a) the notice of appeal does not identify sufficiently or at all a question of law on which the appeal may be brought;

    (b) the appellant does not have an arguable case on appeal or to refuse leave would impose no substantial injustice; or

[38] For Magistrates' Court Appeals see Chapter I Rules r 58.10(6) and for VCAT Appeals see Chapter II Rules r 4.13(6)
[39]Practice Note No.4 of 2009, Judicial Review and Appeals List at [3.2]

(c) the appeal is frivolous, vexatious or otherwise an abuse of the process of the Court.[40]

Re: Appeals from The VCAT

28. Of course the requirement of obtaining leave to appeal acts as a filter with respect to unmeritorious cases. In addition, with respect to an appeal under s 148 of the VCAT Act the Associate Justice may dismiss the appeal if satisfied:

(a) that the applicant does not have a prima facie case on appeal; or

(b) that to dismiss the appeal would impose no substantial injustice.[41]

Application for a Stay of the Order being Appealed

Re: the Magistrates' Court and the VCAT

29. It is important to note that an appeal of itself does not operate as a stay of the order of the Magistrates' Court[42] or the order of the VCAT.[43] If a stay is sought it is necessary to make an application in the Supreme Court which may grant any stay necessary for the proper hearing of the appeal.[44]

30. The test to be applied in Victoria to an application for a stay of an order pending the appeal remains that outlined in *Cellante v G Kallis Industries Pty Ltd (Cellante).*[45] But it has also been clarified more recently by the Court of

[40] Chapter I Rules r 58.10(8)
[41] Chapter II Rules r 4.13(7)
[42] *Magistrates' Court Act* 1989 (Vic) s 109(2)(b)
[43] Chapter II Rules r 4.04(c)
[44] Regarding appeals from the Magistrates Court see Chapter I Rules r 58.12 and from the VCAT see Chapter II Rules 4.13(9)
[45] [1991] 2 VR 653

Appeal in *Neate v Thoroughbred International Marketing Pty Ltd* (*Neate*)[46] and *Johnson v Cressy and Ors (Johnson)*.[47] The following principles are relevant:

(a) the Court has a discretion as whether or not a stay is ordered and the party seeking the stay generally bears the onus of proving it is justified;[48]

(b) the discretion to order a stay is only to be exercised where special or exceptional circumstances exist which justify departure from the ordinary rule that a successful litigant is entitled to the fruits of his litigation pending the determination of the appeal;[49]

(c) generally, where the appeal, if successful, will be rendered nugatory (for whatever reason) if a stay is not granted, those special circumstances will exist;[50]

(d) it is necessary for the applicant to show serious injury if the stay were not granted and it is not enough to rely on argument that the judgment below may be wrong or the appeal might succeed;[51]

[46] [2012] VSCA 65
[47] [2009] VSCA 123
[48] *Neate* [2012] VSCA 65 at [5]
[49] *Cellante* [1991] 2 VR 65, 4
[50] Ibid, 4 and 5 and *Neate* [2012] VSCA 65 at [6]
[51] *Johnson* [2009] VSCA 123 at [39]

(e) even after the threshold of special or exceptional circumstances has been crossed by the applicant a discretion falls to be exercised by the Court;[52] and

(f) if the grant of a stay would cause serious injustice to the respondent the stay may be refused, despite special or exceptional circumstances having been shown by the applicant.[53]

31. The VCAT also has power to stay its own orders pending an appeal.[54]

Orders Which Can Be Made on Appeal

Re: Appeals from the Magistrates' Court

32. Relevantly, s 109 of the *Magistrates' Court Act* provides:

(6) After hearing and determining the appeal, the Supreme Court may make such order as it thinks appropriate, including an order remitting the case for re-hearing to the Court with or without any direction in law.

(7) An order made by the Supreme Court on an appeal under subsection (1), other than an order remitting the case for re-hearing to the Court, may be enforced as an order of the Supreme Court.

Re: Appeals from the VCAT

[52] *Neate* [2012] VSCA 65 at [11]
[53] Ibid
[54] See the VCAT Act s 149(1)

33. The Supreme Court has similarly broad powers concerning the orders open on an appeal from the VCAT. Relevantly, s 148 of the VCAT Act provides:

> (7) The Court of Appeal or the Trial Division, as the case requires, may make any of the following orders on an appeal –
>
> (a) an order affirming, varying or setting aside the order of the Tribunal;
>
> (b) an order that the Tribunal could have made in the proceeding;
>
> (c) an order remitting the proceeding to be heard and decided again, either with or without the hearing of further evidence, by the Tribunal in accordance with the directions of the court;
>
> (d) any other order the court thinks appropriate.
>
> (8) If the court makes an order under subsection (7)(c), it must give directions as to whether or not the Tribunal is to be constituted for the rehearing by the same members who made the original order.

34. There must be a good reason if the Tribunal is to be differently constituted. As stated by Kyrou J:

> For the Court to be persuaded to order remittal to a differently constituted primary decision-maker, good reason for doing so, based on established principles, must be shown by the party seeking such an order. The guiding principle is that remittal will be to a differently constituted primary decision-maker where there is some feature of the conduct or reasons for decision of the primary decision-maker which would render it unfair to the successful

party or give the appearance of unfairness to that party (whether arising from strongly expressed views on key issues, adverse findings on the credit of witnesses, apprehended bias or otherwise) if the matter were remitted to the same decision-maker or where it would be impracticable for the same primary decision-maker to redetermine the matter.[55]

Costs on Appeal

Re: Appeals from the Magistrates' Court and the VCAT

35. The Supreme Court has broad discretion to order costs, albeit the discretion must be exercised judicially and in accordance with established principles. I do not intend to go into a detailed discussion of possible costs orders open on an appeal. What I do wish to highlight is some relevant provisions of the *Appeal Cost Act*[56]. Section 4 of the *Appeals Costs Act* relevantly provides that if an appeal against a decision of a court in a civil proceeding to the Trial Division of the Supreme succeeds, a respondent to that appeal may apply to the Supreme Court for, and the Court may grant, an indemnity certificate in respect of costs.[57]

36. If the respondent is granted an indemnity certificate under s 4 of the *Appeal Costs Act*, then the respondent is entitled to be paid by the Appeal Costs Board:

> (a) an amount equal to the appellant's costs (if any)—

[55] *Vegco Pty Ltd v Gibbons* [2008] VSC 363 at [33]
[56] 1998 (Vic)
[57] *Appeal Costs Act* 1998 (Vic) s4(1)(a)

(i) of the appeal in respect of which the indemnity certificate was granted; and

(ii) if the court makes an order for a new trial—of any new trial that is held as a consequence of that order; and

(iii) if the appeal in respect of which the indemnity certificate was granted is an appeal in a sequence of appeals—of any appeal or appeals in the sequence that preceded that appeal—that the respondent has been ordered to pay and has actually paid; and

(b) an amount equal to the respondent's own costs—

(i) of the appeal in respect of which the indemnity certificate was granted; and

(ii) if the court makes an order for a new trial—of any new trial that is held as a consequence of that order; and

(iii) if the appeal in respect of which the indemnity certificate was granted is an appeal in a sequence of appeals—of any appeal or appeals in the sequence that preceded that appeal—that have not been ordered to be paid by any other party, as assessed by the Board on a party and party basis, or as agreed to by the Board and the respondent; and

(c) if the costs referred to in paragraph (b) are assessed, an amount equal to the costs incurred by the respondent in connection with the assessment.[58]

[58] Appeal Costs Act 1998 (Vic) s5(1)

37. The definition of "court" includes any tribunal from whose decision there is an appeal to a superior court on a question of law.[59] Generally, there is a cap of $50,000.00 as the maximum amount payable to a respondent under an indemnity certificate granted pursuant to s 4 of the *Appeal Costs Act*.[60]

Conclusion

38. The *Magistrates' Court* and the VCAT deal with a great variety of legal issues. They are called upon, on a daily basis, to deal with disputes which are governed by statute. Inevitably, the resolution of these disputes involves statutory interpretation which may lead to an error of law. Statutory interpretation is just one aspect of the Court's and Tribunal's work that may give rise to an error of law and it therefore follows that a wide variety of questions of law come before the Judicial Review and Appeals List. In these circumstances, a sound understanding of and adherence to the procedure of the List becomes even more essential as it serves to streamline proceedings and identify with precision the issues for determination by the Supreme Court. It is hoped that this paper may be a helpful reference point for practitioners in getting across this procedure.

Adam Coote

Barrister – Greens' List

Stawell Chambers

11 March 2014

[59] Ibid s 3
[60] Ibid s5(2)