  - the remaining half to be paid to the first respondent (if there is a loss, half of the loss to be paid by the first respondent).
- receivers entitled to be remunerated as soon as funds are available out of the net proceeds of the sale of the Properties;
- receivers to dissolve the partnership once net profit or loss of the partnership divided between the appellant and the first respondent;
- all caveats lodged by or on behalf of the party to be withdrawn;
- respondents to pay appellant's costs.

The orders are instructive in setting out the type of orders that can be obtained in the breach of fiduciary duties situation.

QUEENSLAND

MINING COMPENSATION APPEALS[*]

Under the *Mineral Resources Act 1989* (Qld) (the MRA), a party aggrieved by a compensation determination made by the Queensland Land and Resources Tribunal has a right of appeal on questions of both law and fact.[1] Several recent decisions of the Tribunal have highlighted the need to approach mining compensation appeals with care. This note discusses some of the issues that may arise in compensation appeals in Queensland.

Instituting an appeal

A party may appeal against either a determination of compensation or a review of compensation. An appeal is heard by a Tribunal panel, may deal with questions of both law and fact and is "final and conclusive".[2] The procedure for commencing an appeal involves some notable differences to the usual appeal procedures. Section 282(2) of the MRA sets out three steps for instituting an appeal:

(a) lodging in the tribunal, written notice of appeal which shall include the grounds of appeal; and

(b) serving copies of the notice of appeal on the mining registrar and each other party; and

(c) giving security (approved by the registrar of the tribunal) for the costs of the appeal.

Each of these steps must be taken within 20 business days of the determination at first instance. The first step of lodging a notice of appeal is straightforward enough. The second step of effecting service on the mining registrar and other parties is also uncontroversial, although it should be noted that service must occur within the 20 business day time period.

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[*] Matt Black, research officer to the presiding members, Queensland Land and Resources Tribunal. Opinions expressed are those of the author.

[1] Section 282. If only questions of law are raised an appeal may be available under the *Land and Resources Tribunal Act* s 67: see *Land and Resources Tribunal v Schmidt* [2005] QCA 195.

[2] *Mineral Resources Act 1989*, s 282.

Giving security

The third step of "giving security" may present difficulties. In *Schmidt's case*[3] the appellant's solicitor wrote to the Tribunal registrar within the time for appeal requesting "urgent advice" as to what security was required. The registrar advised that security would be determined "once the appeal had been filed".[4] However, no advice or determination was forthcoming and no security was given.

The respondent argued that the appeal had not been validly instituted, submitting that "it was not for the Registrar to 'determine' what security was required but to approve an amount and form of security proffered". The Tribunal noted that this submission was "consistent with the ordinary meanings of the words" *give* and *approve*.[5]

However, the Tribunal indicated that the registrar and the appellant had shared a "misconception of the Registrar's function in relation to security for costs".[6] Kingham DP explained:

> s.282(2)(c) [MRA] requires security to be given as a step in the institution of the appeal, without application by any party and without order of the Tribunal ... There is no discretion as to whether security must be given.[7]

Kingham DP referred to *Project Blue Sky Inc v Australian Broadcasting Authority*,[8] where the High Court explained that when "determining the validity of an act done in breach of a statutory provision … [the] test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid". Applying this approach, consideration was given to whether it was intended that an appeal should be invalidated if there had not been strict compliance with s 282(2)(c).

Strict compliance with that section requires action not only by an appellant (giving security) but also by the registrar (approving security). In *Schmidt's case*, Kingham DP noted that even if the appellant had given security, a failure by the registrar to approve it would result in non-compliance. She accepted that it was reasonable for the appellant to infer from the registrar's actions that no amount or form of security would have been approved.

Kingham DP rejected the idea that the legislation intended that parties' appeal rights could depend upon circumstances outside their control. She held that in the circumstances, the appeal had been validly instituted despite the failure to give security for costs.[9]
Schmidt's case highlights that the onus is upon the appellant to offer an amount of security for the registrar to approve. As the Tribunal has subsequently reiterated, an appellant must "proffer security in an amount it considers to be reasonable in the circumstances of the case, for the Registrar's approval."[10] In this author's opinion, the correct and safest approach is to lodge the proposed security with the notice of appeal.

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3 *Schmidt v Australis Mining Operations Qld Pty Ltd* [2005] QLRT 110.
4 Ibid, [7].
5 Ibid, [8].
6 Ibid, [10].
7 Ibid, [11].
8 (1998) 194 CLR 355, [93].
9 *Schmidt v Australis Mining Operations Qld Pty Ltd* [2005] QLRT 110, [15].
10 *Re Xalco Pty Ltd & Colonial Agricultural Company Ltd* [2005] QLRT 124, [20].

This requires practitioners to determine for themselves a reasonable amount of security. In the general law, it has been said that "the amount of security ordered seldom affords a complete indemnity for the prospective costs of appeal".[11] Generally, the amount should be "a reasonable proportion of the likely total costs … [of] the respondent".[12] The most suitable form of security would seem to be a bank guarantee.

The nature of the appeal steps

Each of the three steps of filing a notice of appeal, service and giving security "is a statutory prerequisite to the due institution of an appeal" and the Tribunal has rejected the suggestion that they are not "obligatory requirements".[13] However, as the High Court has made clear, the question is "whether it was a purpose of the legislation that an act done in breach of the provision should be invalid".[14]

In this respect, there seems at first glance to be some inconsistency between two recent Tribunal decisions. In *Broad v Anglo Coal (Moura) Ltd*[15] (*Broad's case*), the appellant lodged the appeal within time but, without any reasonable explanation, served notice on the mining registrar outside the time allowed. Koppenol P held that the appellant had failed to comply with s 282(2)(b) of the MRA and struck out the appeal. In contrast, Kingham DP, in *Schmidt's case*,[16] held that an appellant who did not give security pursuant to s 282(2)(c) had nevertheless validly instituted an appeal.

The reconciliation of these two cases could lie in the differing nature of each paragraph in s 282(2). Paragraph (b) requires notice to be served on the mining registrar and each other party within the time allowed. Compliance with this provision is entirely within the control of the appellant. On the other hand, paragraph (c) requires the giving of security approved by the registrar. Compliance with this provision depends (at least partly) upon actions of the registrar that are beyond the control of the appellant.

Whilst this arguably has some logic in terms of recognising the impact of circumstances beyond an appellant's control, it results in the situation where a substantively minor failing (late service) could have worse consequences than a substantively more important failing (giving security for costs). It also overlooks another factor which may be explored further in the Tribunal: the concept of substantial compliance.

In formulating the purpose-based test of validity enunciated in *Project Blue Sky*, the High Court was moving away from the question of substantial compliance, partly because in most cases there was usually either compliance or there was not.[17] However, the MRA retains the need to consider substantial compliance by making it a statutory consideration in some circumstances.

Section 392 of the MRA provides that where something must be "done in the prescribed way, but that thing has not been done in the prescribed way … the thing shall be deemed to have been done

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11 *Bell v Bay-Jespersen* [2004] QCA 68, [20].
12 *East Grace Corporation v Xing (No 1)* [2005] FCA 219, [7].
13 *Broad v Anglo Coal (Moura) Ltd* [2005] QLRT 45, [9].
14 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, [93].
15 *Broad v Anglo Coal (Moura) Ltd* [2005] QLRT 45.
16 *Schmidt v Australis Mining Operations Qld Pty Ltd* [2005] QLRT 110.
17 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, [92].

in the prescribed way" if the Tribunal is satisfied that there has been "substantial compliance with the prescribed way". In *Schmidt's case*, Kingham DP considered whether, if she was wrong about the validity of the institution of the appeal, s 392 could cure the deficiency. She concluded that it could.

Kingham DP explained that, as a remedial provision, s 392 "should be given a generous construction so as to permit the fullest relief which will be allowed on a fair reading of its language".[18] She further indicated that s 392 could apply to s 282(2) so that substantial compliance allows the Tribunal to deem an appeal validly instituted.

The question of s 392 was not argued or considered in *Broad's case*, however the discussion in *Schmidt's case* suggests that it may have relevance. The Tribunal has not yet articulated a clear approach to assessing substantial compliance with statutory requirements, but the Federal Court has embraced a "practical effect" test in analogous situations. In *Re Asset Risk Management*,[19] Burchett J explained:

> substantial compliance is a matter of degree. What the court is concerned with is the practical effect of what has been done, which should be compared with the practical effect the legislature appears to have sought to achieve. But each case is likely to raise its own problems, and it will always be necessary to apply afresh the statutory language.[20]

This approach has been approved by the Full Court of the Federal Court in *Federal Commissioner of Taxation v Comcorp Australia Ltd*.[21] Using this approach to apply s 392 to compensation appeals, one would compare the practical effect sought to be achieved by the prescribed way of instituting an appeal with the practical effect of what has actually been done. The question is then whether there is such a difference that substantial compliance has not been achieved.

Decisions regarding s 392 in the Tribunal have been somewhat mixed. In *Re ACI Operations Pty Ltd and Friends of Stradbroke Island Association Inc*,[22] the Tribunal considered an objection to a mining lease that had been lodged 8 days outside the time allowed. Koppenol P found it "difficult to accept that an objection lodged after the prescribed last date could ever substantially comply with the requirement to lodge by that date" and struck out the objection.[23]

However, subsequent decisions seem to reflect a greater willingness to find substantial compliance. In *Re Hicks*[24], an applicant for a mining lease was required to lodge certain landowner consents within the time stipulated in s 238(2) of the MRA. The applicant lodged these consents some 3½ months out of time. The President observed that there was "no evidence that any prejudice has been caused by the delay" and held that there was substantial compliance pursuant to s 392.

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18 *Schmidt v Australis Mining Operations Qld Pty Ltd* [2005] QLRT 110, [20] quoting from *McAusland v Deputy Federal Commissioner of Taxation* (1993) 47 FCR 369, 374.

19 (1995) 59 FCR 254.

20 Ibid, 257.

21 (1996) 70 FCR 356, 395. Kirby J has also indicated approval: *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1999) 195 CLR 636, [58].

22 [2000] QLRT 7.

23 Ibid, [11], [15].

24 [2002] QLRT 107.

The balance of Tribunal decisions[25] suggest that a failure to comply with time requirements under the MRA is not necessarily fatal, although it will depend upon the context and whether there is any issue of prejudice to other parties. One factor that may be important is how the concept of "prescribed way" is approached.

In compensation appeals, one must ask: what is the "prescribed way" with which there must be substantial compliance? In *Broad's case* there was late service on the mining registrar. That requirement was contained in s 282(2)(b). If the "prescribed way" is conceived of as being the specific requirements of that paragraph, there may be only limited scope to find substantial compliance. However, if the "prescribed way" is viewed in terms of the overall procedure set out in s 282, there is greater scope for finding substantial compliance.

In *Broad's case*, notice was served on the mining registrar 5 days out of time.[26] There was no dispute over compliance with the other steps involved in instituting an appeal. At this point, there is some uncertainty about whether the Tribunal could be convinced of substantial compliance in those circumstances, but it appears to be a submission worth making.

Extensions of time

Extensions of time within which to appeal are available, but only if the application is made "prior to the lodgement of the appeal".[27] This means that an attempt to commence an appeal that fails to fulfil the three steps within time could entirely defeat a party's chances of pursuing the appeal. Of course, the best approach is to ensure that all steps are taken within time but if this is not possible, an application for an extension of time will need to be made.

If seeking an extension of time, this author suggests that practitioners lodge the application and then, as soon as possible, lodge the notice of appeal and set about serving notice and giving security. This should ensure that the application for extension of time is valid, because it will have been lodged "prior to the lodgement of the appeal" as required by s 282(1).

Taking this approach should preserve the power of the Tribunal to extend time. It should also increase the prospects of being granted an extension of time because it shows proactive prosecution of the appeal. The High Court has held that when an "application for an extension of time merely concerns the doing of an act in respect of an appeal already lodged … [a] liberal approach" to extensions of time is warranted.[28]

In *Re Xalco Pty Ltd & Colonial Agricultural Company Ltd*[29] the Tribunal granted an extension of time to an appellant who, with only two days left in the appeal period, realised that it may not have been able to give approved security in time. The Tribunal indicated that the main issues to consider in an application for extension of time were "whether the applicant can explain the delay that has occurred and any potential injustice or prejudice that might be suffered if the application is

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25 In addition to *Schmidt's case*, see *In the matter of Anglo Coal (Callide) Pty Ltd* [2001] QLRT 21; *Re Newcrest Operations Ltd* [2003] QLRT 66; and *Re CAML Resources Pty Ltd* [2004] QLRT 88.

26 [2005] QLRT 45, [15].

27 *Mineral Resources Act 1989*, s 282(1).

28 *Jackamarra v Krakouer* (1998) 195 CLR 516, 520.

29 [2005] QLRT 124.

refused".[30] Other factors include the prospects of the appeal and any potential prejudice to the respondent.

Struber v Lowe[31] is an example of a case where an extension of time was refused. There, the applicants failed to adequately explain a delay of some five months between the decision and the application. They were also unable to show how they had been prejudiced or that the appeal had any prospect of success if an extension was given.

Further evidence on appeal

Section 282(6) of the MRA provides that the Tribunal must not admit further evidence in a compensation appeal unless "it is satisfied that admission of the evidence is necessary to avoid grave injustice and there is sufficient reason that the evidence was not previously adduced" or the parties agree to its admission. In *Schmidt's case* the Tribunal considered an application to admit further evidence and set out the principles that should be followed.

Applications to admit Further Evidence

Kingham DP explained that a party seeking to rely on further evidence must produce the actual evidence when seeking permission to adduce it.[32] This is so whether the further evidence application is brought by way of a preliminary hearing or at the final hearing. She held that an assessment of admissibility without recourse to the evidence would require speculation about the nature and affect of the evidence and why it was not previously adduced.

Some of the evidence that the appellants wished to lead in *Schmidt's case* was produced to the Tribunal but other evidence was merely referred to. To the extent that any further evidence was not produced, its admission was refused. This highlights the need to carefully identify and prepare any further evidence which is sought to be relied upon.

The Test for Admissibility

There are two hurdles to be overcome before further evidence will be admitted. The first is that the evidence must be "necessary to avoid grave injustice". In *Schmidt's case*, Kingham DP adopted the test set out by the Land Appeal Court in *Barns v Director-General, Department of Transport*[33] when dealing with a similar provision:

> it is necessary for the appellants to demonstrate that there exists a real prospect that the proposed new evidence will affect the decision of this Court on the issue to which it is addressed. In our view, only if evidence goes that far can it be said that to proceed to a contrary result without it would result in a grave injustice.

The second hurdle is to demonstrate "sufficient reason that the evidence was not previously adduced". The types of reasons that might be sufficient for these purposes include:

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30 *Re Xalco Pty Ltd & Colonial Agricultural Company Ltd* [2005] QLRT 124, [6].
31 [2005] QLRT 98.
32 [2005] QLRT 110, [33].
33 (1995) 15 QLCR 544, 549.

- the party was not given sufficient opportunity to adduce the evidence;[34]
- the evidence was not previously available;[35] or
- the party had no reason to suspect that the evidence was available.[36]

Types of Evidence

In *Schmidt's case*, a number of different types of evidence were discussed. Affidavits relating to the nature and use of a vegetation map used in the valuation process were accepted as having passed the tests described above. The applicants also sought to tender further valuation evidence. The Tribunal held that the mere passage of time since the valuations were prepared is a routine feature of appeals and, alone, would not pass the admissibility tests.[37]

The applicants sought an order that the valuers at first instance be made available for cross-examination. However, cross-examination of a witness on appeal involves adducing further evidence[38] and the applicants did not advance any basis on which the cross-examination could be said to pass the admissibility tests.

Finally, the applicants requested that the Tribunal undertake a view of the property in question, as occurred at first instance. Strictly speaking, a view does not consist of evidence. Rather, a view "is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence and to apply it, but not to put the result of the view in place of evidence".[39] This means that the question of whether or not a view will be undertaken on appeal depends upon the circumstances of the case. In *Schmidt's case*, the Tribunal accepted that a view should be carried out.

Appeal costs

Section 50 of the *Land and Resources Tribunal Act 1999* (the LRT Act) provides that "[e]ach party … must bear the party's own costs … [unless] the tribunal considers, in the special circumstances of the proceeding, an award of costs is appropriate". This is the normal approach to costs in the Tribunal, however in compensation matters the Tribunal is empowered to "make such order as to costs between the parties to the determination as it thinks fit".[40]

For some time, it seems that the Tribunal considered s 50 of the LRT Act to be the appropriate costs provision in compensation matters. For example, in the decision of *Re Messer v Rossi*[41] the Tribunal refused an application for costs of a mining compensation determination on the grounds that special circumstances had not been established. Similarly, in *Re Xalco Pty Ltd & Colonial Agricultural Company Ltd*[42] a costs order was made under s 50 of the LRT Act following a finding that there were special circumstances. Neither case referred to the specific power to award costs in compensation matters.

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34 *Schmidt v Australis Mining Operations Qld Pty Ltd* [2005] QLRT 110, [47].
35 *Wills v Minerva Coal Pty Ltd* (1998) 19 QLCR 55, 62-3.
36 *Barns v Director-General, Department of Transport* (1995) 15 QLCR 544, 549.
37 *Schmidt v Australis Mining Operations Qld Pty Ltd* [2005] QLRT 110, [50].
38 *Dudzinski v Kellow* [2003] FCAFC 207, [11].
39 *Scott v Numurkah Corporation* (1954) 91 CLR 300, 313.
40 *Mineral Resources Act 1989*, s 281(7), 282(5).
41 [2001] QLRT 6.
42 [2005] QLRT 94.

However, the Tribunal has recently held that the power under s 282(5) of the MRA to award costs "as it thinks fit" in compensation appeals prevails over the usual need to establish special circumstances. In *Armstrong v Brown*,[43] an appellant was wholly unsuccessful in an appeal against a compensation determination. Koppenol P stated that the "appeal had no serious prospects of success" and that "no reason has been advanced why costs should not follow the event". As such, he ordered that the appellant pay the respondent's costs.

The case does not establish that a wholly successful party will always get its costs. A discretion as to costs must be exercised judicially[44] and "having regard to the subject matter, scope and purpose of the statute".[45] However, the case does show that taking a weak case on appeal can be dangerous and a successful party to an appeal seems to have greater scope to seek costs than was previously thought to be the case.

Conclusion

The mining compensation appeal procedures present "difficulties for parties attempting to comply",[46] but a careful approach can reduce these difficulties and ensure that clients' interests are protected. This note discussed several recent Tribunal cases that highlight some of the issues involved.

Compensation appeals involve the unusual aspect of the appellant having to give security as a step in instituting the appeal. It was suggested that practitioners determine a reasonable amount of security for costs and lodge it in the form of a bank guarantee along with the notice of appeal. If the appeal steps, including giving security, cannot be fulfilled within time an application for extension of time must be lodged prior to the notice of appeal itself.

The steps in instituting a compensation appeal are prerequisites to a valid proceeding. Nevertheless, there may be some situations where a failure to strictly comply will not be fatal. This may be the case where substantial compliance can be demonstrated or where the failure to comply was beyond the power of the party involved.

Although questions of fact may be agitated on appeal, it is not a *de novo* hearing. Where an appellant wishes to rely upon further evidence, it must be shown that the evidence is necessary to avoid injustice and there must be sufficient reason why it was not previously adduced. Also, the further evidence must be identified and produced for the Tribunal to assess before it will be allowed in.

Several recent Tribunal decisions have highlighted difficulties that may arise in pursuing mining compensation appeals. These cases show that careful attention should be paid to the specific legislation and case law so as to avoid unnecessary cost and delay or loss of appeal rights.

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43 [2005] QLRT 73.
44 *Oshlack v Richmond River Council* (1998) 193 CLR 72, 81.
45 *Duke Eastern Gas Pipeline Pty Ltd* (2001) ATPR 41-827, [6].
46 *Schmidt v Australis Mining Operations Qld Pty Ltd* [2005] QLRT 110, [11].