“Court Of Appeal Review And Appeals In The District Court”

A revised version of a paper delivered at
THE DISTRICT COURT OF NSW ANNUAL CONFERENCE: 27 APRIL 2011

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Judge of the NSW Court of Appeal

As you will appreciate, I am here under false pretences. I must offer the apologies of President James Allsop who, according to tradition, you would expect to hear delivering this paper. He is currently overseas on leave.

The reason why you have me and no one more senior from the Court is that when the President realised the need to obtain an alternative speaker, I was on leave and hence not in a position to refuse his suggestion that I volunteer to speak. Perhaps to ease my way, or perhaps because he thought I was not up to the full task, he advised the Judicial Commission that I would speak about administrative law, rather than attempting the usual annual overview of the work of our respective Courts over the preceding year. To an extent, the need for such an overview may be diminished if the Court of Appeal’s recently established website at http://infolink/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_ca is serving part of its purpose. Decisions of interest, both chronologically and by catchwords, are available both for our Court and other intermediate courts of appeal around the country.

On the other hand, if there are issues of concern in relation to the work of our Courts you wish to raise, whether in particular substantive areas, in relation to procedure, or more generally, such as matters of style, language and perception, I would be happy to deal with them.

(1) Supervisory jurisdiction

(a) role of Court of Appeal

Since the decision of the High Court in *Kirk's Case*,[1] we know that the supervisory jurisdiction of the Supreme Court is largely, or wholly, constitutionally protected as a part of the defining characteristics of a "Supreme Court", as referred to in s 73 of the Constitution. The consequence of that conclusion is to focus attention on the role of the Supreme Court (and frequently the Court of Appeal) in policing the boundaries of jurisdiction of courts having statutorily limited jurisdiction and powers. In relation to the Land and Environment Court, the Industrial Court and the District Court, together with tribunals over which judges preside, the relevant jurisdiction is vested in the Court of Appeal. [2]

Our supervisory jurisdiction is not frequently engaged in respect of cases coming from your Court. In relation to Part 4 of the *District Court Act 1973* (NSW), dealing with the Court's criminal jurisdiction, the scope for judicial review is limited by s 176 which states that "no adjudication on appeal of the District Court is to be removed by any order into the Supreme Court". This is somewhat archaic language, as orders of removal are not made these days. A judgment can be quashed or set aside by an order "in the nature of" certiorari without there being any formal removal of the proceedings.[3] Nor, I think, is there any need to remit where the challenge is upheld: at that stage, whatever the initiating process in this Court, once the judgment has been set aside the matter remains undetermined. In any event, as was noted last year in *Downey v Acting District Court Judge Boulton (No 5)*[4], the effect of s 176 of the *District Court Act* is to limit the supervisory jurisdiction of the Court of Appeal to challenges based on jurisdictional error.

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1 *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1; 239 CLR 531.

2 By s 48 of the *Supreme Court Act 1970* (NSW).

3 An order for removal was made in *Sasterawan v Morris* [2008] NSWCA 70, but it was an unnecessary formality.

4 [2010] NSWCA 240; 272 ALR 705.

The fact that appeals from the District Court exercising criminal jurisdiction come on occasion to the Court of Appeal might be thought anomalous.[5] In some related areas, we have tried to ensure that such matters go to the Court of Criminal Appeal, which is the more appropriate body to deal with such cases. However, with one qualification, there is no mechanism, other than judicial review under s 69 of the *Supreme Court Act,* for challenging decisions of this Court on appeal from convictions or sentences in the Local Court. Those matters come to the District Court pursuant to the *Crimes (Appeal and Review) Act 2001* (NSW), particularly ss 18-20.

(b) Local Court appeals to the District Court

It was no doubt a vote of confidence in the competence of magistrates sitting in the Local Court that, in 1998, the right to a fresh hearing in this Court was abolished.[6] (As a practical matter it may also have reflected the widespread use by then of sound-recording in Local Courts.) In its place, the appeal proceedings in this Court are conducted as appeals by way of rehearing on the basis of a transcript of the hearing in the Local Court, with leave required for fresh evidence to be given.[7] The departure from the long-standing "all grounds" appeal under s 122 of the *Justices Act 1902*, and its successors, was readily accommodated, although the language of s 122 has, on occasion, been adopted in circumstances where it is no longer appropriate. On the other hand, there have, from time to time, been complaints that this Court has not conducted a full rehearing and has been content to affirm the judgment of the magistrate.[8] Earlier this month, in *McKellar*, we were asked to review an appeal from a magistrate at Dubbo in proceedings where there had been one witness called in the Local Court, acceptance of whose evidence resolved the matter in favour of a conviction. The appellant did not seek to have the witness re-examined in the District Court and Acting Judge Woods dismissed the appeal. The

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5 See *Swansson v Regina* [2007] NSWCCA 67; 168 A Crim R 263 at [45] (Spigelman CJ).

6 The amendments were the result of extensive review and consultations: see New South Wales,. Justices Act Review Steering Committee *Report of the Justices Act Review Steering Committee* (1992) and New South Wales, *Parliamentary Debates*, Legislative Council, 17 September 1998, 7595 (Jeff Shaw, Attorney General).

7 *Justice Legislation Amendment (Appeals) Act 1998* (NSW), Schedule 1, cl [2], inserting into the *Justices Act 1902* (NSW), Part 5A, Div 2.

8 See, most recently, *McKellar v Director of Public Prosecutions (NSW)* [2011] NSWCA 91.

judgment below being affirmed, the Court of Appeal was asked to intervene on the basis that this Court had misconceived its jurisdiction by limiting the reassessment of the evidence inappropriately. (That complaint was rejected.)

Where an appeal to the District Court has been upheld and the conviction set aside, in some circumstances the matter has been "remitted" to the Local Court for rehearing. Such an order has given rise to a question as to whether this Court has the power to remit matters.[9] The absence of such a power might be thought surprising, because there are circumstances where the proceedings in the Local Court have miscarried, but it is not within the power of the appellate court to resolve the matter. An obvious example would be an error of law on the part of a magistrate which has resulted in a conviction on a wrong basis, with a failure to make a necessary finding of fact. If the witnesses are not called in this Court, it may be difficult on appeal to make the missing finding. Similar situations arise in civil appeals, as you will fully appreciate, resulting in cases being remitted from the Court of Appeal to be reheard in the District Court. In *Emanuel* I noted:

> "There are two possible ways to resolve these difficulties. The first is to require that a defendant who asserts that proceedings have miscarried on procedural grounds, leading to their invalidity, must seek relief in the Supreme Court, either by adopting the procedure under ss 52 and 53 of the *Appeal and Review Act*, or by seeking judicial review under s 69 of the *Supreme Court Act*. Such a requirement has the potential to increase expense and delay and will provide for bifurcated rights of appeal, in circumstances where a defendant may seek to rely upon different grounds in the alternative."

The alternative was to imply a power of remittal.[10] In *McKellar*, if this Court had been inclined to uphold the appeal, it is not clear how the matter would have proceeded, if the successful ground of appeal cast doubt on the findings made by the magistrate on the basis of the sole witness' evidence. It would only be if the evidence and the findings themselves remained that Woods ADCJ would have been able to deal with the matter to a conclusion. In the absence of a power of remitter, it may be that the only practical course is to adjourn the matter and have the prosecution present the evidence again on the appeal.

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[9] See *Director of Public Prosecutions v Emanuel* [2009] NSWCA 42, 193 A Crim R 552 at [16]-[17] (Spigelman CJ), where it was conceded that it had been an error to remit.

[10] See at [52]-[61].

(c) stated cases under *Criminal Appeal Act*

The qualification to the need for parties dissatisfied with the outcome of an appeal to the District Court to seek judicial review in the supervisory jurisdiction is s 5B of the *Criminal Appeal Act 1912* (NSW). I remember coming to terms with the pitfalls of that provision as an inexperienced barrister in 1977.[11] I wished to have Judge Thorley state a case in relation to an appeal which was about to be dismissed, but his Honour announced the result before I could jump to my feet to interrupt. Before the addition of sub-s (2), a question could only be stated prior to the determination of the appeal. His Honour was flexible enough to withdraw his orders and the stated case went ahead. Nevertheless, the procedure remains fraught, as was explained last year in the Court of Criminal Appeal by Simpson J in *Talay v R*.[12] There are issues which can arise in relation to an appeal from the Local Court which cannot properly be dealt with under s 5B, without expanding that provision to provide a general right of appeal – a course which should not be taken.[13]

Sasterawan v Morris involved what should have been a straightforward charge, brought against a taxi driver, of altering a cabcharge docket. The defendant was convicted and duly appealed to the District Court. His appeal was dismissed by Judge Nicholson. He then sought to raise, by way of a stated case a challenge which was, in substance, to the authority of the officer of the Ministry of Transport to lay the information. He also instituted proceedings for judicial review in the Court of Appeal, alleging insufficiency of reasons in the judgment of this Court and a failure to find that the defendant knew the particulars in the documents were false.[14] Those proceedings were abandoned to allow the s 5B proceeding in the Court of Criminal Appeal to be determined. The matters which could not be raised under s 5B found themselves back in the Court of Appeal pursuant to fresh judicial proceedings. The Court of Appeal set aside the decision in this Court, in part because it found an inadequacy of the reasons and in part because of a failure to identify and address certain elements of the relevant offences. A third error was identified, involving an

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[11] See *R v Fraser* [1977] 2 NSWLR 867.
[12] [2010] NSWCCA 308 at [5]-[20].
[13] See *Sasterawan v Morris* [2007] NSWCCA 185; 69 NSWLR 547 at [10].
[14] [2008] NSWCA 70.

apparent reversal of the onus of proof. The matter was remitted to this Court for reconsideration.

This Court has a limited power to refuse to submit or augment questions of law for the Court of Criminal Appeal under s 5B: on the other hand, it is preferable that where questions of such a kind do arise they should go to that Court. At present, however, it seems inevitable that the supervisory jurisdiction of the Court of Appeal will remain and will, from time to time, be engaged by dissatisfied defendants. The procedural complexity if separate proceedings are to be brought under s 69 of the *Supreme Court Act*, may allow a long delay before final resolution.

The saga of *Sasterawan v Morris* did not end there. After being returned to the District Court, the defendant sought leave to appeal pursuant to s 5F of the *Criminal Appeal Act* against two interlocutory orders made by Judge Sweeney. I expressed some doubt that this provision was available in such circumstances, but assumed for the purposes of the hearing that it was. Leave was refused.[15]

(2) Review for error of law in the District Court

(a) the CTTT Act, s 67

So far, I have been dealing with judicial review from the perspective of the Court of Appeal: there is, however, a relatively new jurisdiction conferred on the District Court which involves the hearing of appeals with respect to questions of law, an activity not dissimilar to judicial review. I have in mind the jurisdiction conferred by s 67 *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) ("the CTTT Act"). As you will be aware, this provision was amended in September 2008 to provide that appeals from the CTTT should now come to this Court. As a matter of principle, that was an entirely appropriate reform. However, there were two related complications which were not addressed. The first is the terms in which the right of appeal was formulated, namely where, in respect of any particular proceedings, "the Tribunal decides a question with respect to a matter of law": s 67(1). This language is not limited to the CTTT Act, but there remains an apparent distinction, which has been

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[15] *Sasterawan v Morris* [2010] NSWCCA 91; 201 A Crim R 302.

recognised in various authorities over the years, between a right of appeal for error of law and a right of appeal in respect of a decision with respect to a matter (or point) of law. The latter is more limited and assumes that the Tribunal has indeed made such a decision. Authorities in our Court have long accepted that this section operates with respect to implicit decisions as well as with respect to express decisions. However, there remain doubts about the scope of the right of appeal and, in particular, the difficulty of finding that the Tribunal has decided a particular question if the issue had not been raised before it. That point would arise starkly if, for example, there were a question of bias, where the facts were only identified after the decision had been handed down, on the basis of information which then became available to the parties.

The second problem flows from the first: if the appellant wished to raise a ground that did not fall squarely within the appeal provision. While appeals from the CTTT were brought to the Supreme Court, such difficulties could be circumvented by permitting the applicant to amend to include a claim for judicial review under s 69 of the *Supreme Court Act*. No such opportunity arises in your Court, with the risk that an applicant may either have to commence separate proceedings in the Supreme Court or risk failure on an appeal to the District Court. It is possible that, to avoid such a result, there would need to be a removal of the proceedings in the District Court to the Common Law Division but that is, to say the least, an unsatisfactory and undesirable exercise, because it undermines the statutory change.[16]

I note that there is no right of appeal under the *District Court Act* from a decision in a s 67 appeal,[17] meaning that challenges to this Court's decisions under the CTTT Act will be limited to proceedings for review in the supervisory jurisdiction of the Court of Appeal.

It is necessary to refer to the terms of s 67 of the CTTT Act to explain the scope of the appeal:

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[16] Cf *Chand v Lifestyle Homes Pty Ltd* [2010] NSWCA 135.

[17] *Sullivan v St George Community Housing Ltd* [2010] NSWCA 248, approved in *Muldoon v Church of England Children's Homes Burwood* [2011] NSWCA 46 at [43] (Campbell JA), [45] (Macfarlan JA) and [65] (Young JA).

> **67 Appeal against decision of Tribunal with respect to matter of law**
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> (1) If, in respect of any proceedings, the Tribunal decides a question with respect to a matter of law, a party in the proceedings who is dissatisfied with the decision may, subject to this section, appeal to the District Court against the decision.
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> …
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> (3) After deciding the question the subject of such an appeal, the District Court may, unless it affirms the decision of the Tribunal on the question:
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> (a) make such order in relation to the proceedings in which the question arose as, in its opinion, should have been made by the Tribunal, or
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> (b) remit its decision on the question to the Tribunal and order a rehearing of the proceedings by the Tribunal.
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> …
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> (8) A reference in this section to a matter of law includes a reference to a matter relating to the jurisdiction of the Tribunal.

The wording of the section raises a number of questions, which is unfortunate given the nature of the jurisdiction and the fact that proceedings in the Tribunal are meant to be expeditious and informal, although the degree of informality and expedition will obviously depend upon the complexity of the issues and the amount at stake, which in respect of a home building claim, may be as much as $500,000.[18] The fact that referees in the Tribunal need not be legally trained may give rise to some unease as to whether the Tribunal will always be able to deal properly with quite significant claims before it.

Consideration has been given to the scope of these provisions (at a time when appeals went to the Supreme Court) by the High Court in *Kostas v HIA Insurance Services Pty Ltd*.[19] That case, as was pointed out by French CJ, does not provide an instructive example of matters being dealt with informally and expeditiously. The issue was whether the owners had terminated a building contract in May 2000. The hearing in the High Court came almost exactly a decade later.

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[18] *Home Building Act 1989* (NSW), s 48K(1).
[19] [2010] HCA 32; 241 CLR 390.

The legal principle which was established in the joint judgment[20] was that one should infer that a decision was made with respect to a matter of law in circumstances where there was no evidence or other material capable of supporting a factual finding made by the Tribunal.[21] Needless to say, the referee in the Tribunal did not ask himself, somewhat self-consciously, in respect of each fact-finding exercise whether there was any evidence to support a finding, before making it.[22] On one view, the problem was that he did not explain in adequate terms the basis on which he held that the builder had served on the owners notices seeking extensions of time, without which the claim that the owners had lawfully terminated would no doubt have succeeded.

The Court of Appeal had accepted that a decision with respect to a matter of law might be inferred in some circumstances where the question of law undoubtedly underlay the conclusion reached by the Tribunal.[23] However, it was thought to be artificial to infer a decision as to whether or not there was any evidence to support a finding: to do so tended to equate what appeared to be more limited statutory language with language granting a right of appeal wherever error of law could be identified.[24] In adopting a restrictive approach in that sense, we were wrong and the High Court has squarely held that an appeal under s 67 may succeed on the basis of a "no evidence" ground.[25] (No doubt the factual finding must be necessary, or at least material, to the conclusion reached by the Tribunal.)

The High Court held that there was no material to support the finding that the requests for extension of time had been served on the owners in accordance with the contract. The primary judge in the Common Law Division (Rothman J) had accepted that the existence of the letters themselves provided some support for a finding, as did an affidavit of the builder, that the letters had been served. However, in the joint judgment in the High Court, the conclusion was reached that "for the reasons given by the primary judge, there was no evidence before the Tribunal" of

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[20] Of Hayne, Heydon, Crennan and Kiefel JJ.
[21] At [69] HCA.
[22] At [80] HCA.
[23] *HIA Insurance Services Pty Ltd v Kostas* [2009] NSWCA 292.
[24] At [136]-[137] NSWCA.
[25] At [91] HCA.

the matter in dispute.[26] This appears to be a reference to his Honour's conclusion that the evidence was silent as to whether service occurred in the manner prescribed by the contract.

(b) "question with respect to a matter of law"

The proper construction of s 67, more broadly, is a matter of immediate interest. It has recently been argued in our Court (though not in relation to the CTTT Act) that the apparent restriction on the kinds of legal questions which could be raised on an appeal should not be treated as limited in any way. In other words, there was just to be an appeal on a question of law.

That admirably sensible result may be achieved by adopting one or both of the following approaches. First, *Kostas* being authority for the proposition that any finding of fact involves an implicit decision that there was some material before the Tribunal capable of supporting that finding, that reasoning would operate in respect of all the other standard error of law grounds. Thus, if a particular consideration were not taken into account, there must have been an implied decision that such a consideration was permissible. If an otherwise apparently relevant consideration was not taken into account, there must have been an implied finding that such a consideration was impermissible. The adoption of any form of reasoning must also involve the implicit conclusion that the reasoning is not capricious, arbitrary, irrational or manifestly unreasonable.

There is undoubtedly some support for this approach. Thus, our Court has consistently held that where there is a question of law which must have been determined, at least implicitly, for the Tribunal to reach the decision it did, there is an implicit decision on a question of law. On one view, once that is accepted, any limitation on "implied decisions" is somewhat arbitrary. On the other hand, unless there is some limitation, the appeal is, in substance, one for error of law, which is not the language of the statute.

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[26] At [91] HCA.

A second way in which the broad construction may be upheld is by permitting an appeal from the ultimate decision or orders of the tribunal. Such an approach would conform to the general principle that appeals are brought from orders, and not from reasons. Section 142N of the *District Court Act*, dealing with appeals from the Court's residual jurisdiction,[27] uses the term "award", which is defined as including "interim award, order, decision, determination, ruling and direction".[28] To add to the linguistic confusion, the *Land and Environment Court Act 1979* (NSW), which gives an appeal to our Court in particular circumstances, provides for the appeal to be "against an order or decision … of the Court on a question of law".[29] Thus, so the argument went, an appeal against an order may be treated differently from an appeal against a decision of the Court below on a question of law.

The issue is complicated for the District Court because there are, on the one hand, decisions of the Court of Appeal taking a restricted view of the scope of an appeal, whereas there may be an implication to be derived from the more recent decision of the High Court in *Kostas*, suggesting a liberal approach to all legal errors, and based upon the language of the CTTT Act.

The only thing I can say with confidence at the moment is that there is no clear answer. In principle, to the extent that the Court of Appeal has ruled on a specific aspect of the jurisdiction, for example, in rejecting a challenge as not being with respect to a decision on a question of law, the error being something other than a no-evidence ground, the District Court will be bound by the decision of the Court of Appeal. To the extent that the logic of the High Court's approach extends beyond the circumstances upon which *Kostas* was decided, the correct approach is a matter to be determined by the Court of Appeal. In short, to the extent that the issue was not expressly decided by the High Court, but has been decided by the Court of Appeal, prior to *Kostas*, the Court of Appeal decisions stand, unless and until overruled by the High Court, or the Court of Appeal itself determines that they are inconsistent with the principle established by the High Court.

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[27] Under Pt 3, Div 8A of the *District Court Act*.
[28] Section 142M(1).
[29] *Land and Environment Court Act 1979*, s 57(1).

We are aware of the difficulty and regret that it has not been resolved by now. However, there are a several appeals involving decisions of the CTTT which are listed for hearing in the Court of Appeal in the third week of May. Precisely which issues will be resolved and how rapidly it will be possible to deliver judgments, are not matters on which I can usefully comment further today. We are, however, fully conscious of the unsatisfactory position in which, at least temporarily, the District Court must continue to exercise its jurisdiction.

(c) powers of Court on appeal

There is a further aspect of s 67 which may affect the scope of the matters to be determined on an appeal. It relates to the powers of the Court, where it seeks to intervene, as opposed to merely affirming the decision of the Tribunal. Thus, s 67(3) provides that the Court may:

> "(a) make such order in relation to the proceedings in which the question arose as, in its opinion, should have been made by the Tribunal, or
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> (b) remit its decision on the question to the Tribunal and order a rehearing of the proceedings by the Tribunal."

Assuming that final orders have been made, and assuming a material error has been identified, it will be clear that the order of the Tribunal must be set aside, although, curiously, s 67 makes no provision for such an order. The important question, however, is what consequential relief should follow. This issue was dealt with in the matter of *B & L Linings Pty Ltd v Chief Commissioner of State Review*,[30] an appeal which came to our Court from the Administrative Decisions Tribunal, on a question of law. The appellant argued that, once it had identified an error of law, it was open to this Court to exercise its powers on an appeal by way of rehearing to make such order as should have been made by the Tribunal. The Court rejected that submission, concluding that the Court had no authority to engage in fact-finding on the merits of the case.[31] There remains an issue as to whether the Court should proceed to draw inferences from findings of fact made by the Tribunal and seek to reach its own conclusion as to the appropriate orders. In that regard, there is also

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[30] [2008] NSWCA 187; 74 NSWLR 481.
[31] At [77]-[78] (Allsop P).

authority for the proposition that appropriate costs orders can be made by the appellate court on an appeal from the Land and Environment Court.[32]

In contrast to the joint judgment in *Kostas*, which expressly abjured dealing with a range of issues not necessary for determination of the appeal, French CJ provided an overview of the jurisdiction of the Supreme Court on appeal. In particular, he addressed an issue which has given rise to some awkwardness in our Court, namely the inter-relationship of a provision such as s 67, limiting a right of appeal to decisions with respect to questions on a matter of law, with the broader mandate provided under s 75A of the *Supreme Court*, empowering the Court to conduct a rehearing and to exercise any of the powers of the court or tribunal from which the appeal has been brought.[33] It may be that part of the impetus for granting special leave in *Kostas* was a consciousness of differences in emphasis given to the inter-relationship of such provisions within the Court of Appeal. While there is no equivalent in the *District Court Act* to s 75A of the *Supreme Court*, dealing only with the appellate jurisdiction of the Supreme Court, an appeal in the District Court will engage the provisions of UCPR r 50.16, although it must be assumed that this is subject to a contrary indication in a specific statute conferring appellate jurisdiction. In any event, the operation of s 75A was not directly addressed in the High Court's joint judgment.

The issue is really one of legal policy. A restrictive view relies upon the fact that Parliament has conferred jurisdiction on a specialist tribunal, subject to a limited right of appeal. That exclusive jurisdiction is not limited to unreviewable fact-finding in some narrow sense, but arguably extends to the drawing of inferences from the facts as found and the exercise of discretionary powers. Underpinning the liberal approach to the powers of the appellate court, is perhaps a greater distrust of specialist tribunals, but more importantly, a desire to limit delay and expense where error has been identified and the Court feels able to dispose of the proceedings itself.

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[32] See *Thaina Town (On Goulburn) Pty Ltd v City of Sydney Council* [2007] NSWCA 300; 71 NSWLR 230 at [92] (Spigelman CJ).

[33] At [27]-[32] HCA.

These are difficult issues, but sometimes the parties will have a common view as to what course should be taken if the appeal is to be upheld. Because of the fine line between findings of primary fact and drawing inferences from such findings (the inferences themselves being factual), caution would suggest that the preferable course is to remit the matter to the Tribunal for a rehearing, when in doubt. There is, of course, no need for the "rehearing" to be conducted in any particular manner and it would usually be sufficient for the Tribunal to resolve for itself any outstanding issues, its obligation being to resolve such issues in accordance with the decision of the Court on appeal.[34]

(d) errors of law v errors of fact-finding

The distinction between errors of fact and errors of law must be kept clearly in mind: it is implicit in the statutory limit on the appeal. As with jurisdictional error and other errors of law, the distinction between fact and law has often been described as unsatisfactory. It is one of those areas where the law requires a line to be drawn, but where the concepts (and therefore the boundary between them) are imprecise.

The purpose of a restriction on appellate jurisdiction, limited to error of law, is to permit the Tribunal freedom to engage in fact-finding, without review. The law is largely concerned with defining the limits of jurisdiction, the principles to be applied and the procedures to be adopted.

Even that statement reveals that one is not purely concerned with a boundary between law and fact, unless one identifies law in a way which is, at least, unusual. Thus, the law itself can identify a fact as representing a boundary of jurisdiction. For example, the jurisdiction of a tribunal may be limited to resolving "building disputes". The definition of a building dispute may require determination of primary facts or characterising those facts in a particular way. Where a fact defines jurisdiction, it is described as a "jurisdictional fact" which, in the case of a challenge, means a fact that the appellate court must determine for itself.

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[34] CTTT Act, s 67(4).

Secondly, some challenges which are clearly based on error of law may require the appellate court to engage in its own fact-finding. Thus, a claim of procedural unfairness may require the appellate court to determine what opportunity the complainant had to address the particular issue and, to the extent that the opportunity was limited, whether procedural unfairness resulted.

Such facts may be thought to stand outside the factual dispute which falls within the jurisdiction of the Tribunal to determine "on the merits". However, that is not strictly accurate. It would be a rare case in which the Tribunal had no power to determine its own procedures, for example, because those procedures had been fully defined by law.[35] In most (and to some extent in all) cases the Tribunal will have power to determine its own procedure.[36] Common provisions, state that the Tribunal is "not bound by the rule of evidence"[37] and "may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of procedural fairness".[38] The Tribunal is also required to act "with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms".[39] As will appear from such provisions, the Tribunal is bound to apply rules of procedural fairness, although these are not defined. Where there has been debate about the appropriate procedure, it is arguable that a failure, for example, to grant an adjournment, may involve a decision that, in all the circumstances, procedural fairness did not require the grant of the adjournment sought. Thus, the question posed by the appeal provision is whether that decision was one to be determined, within bounds defined by concepts such a reasonableness and rationality, by the Tribunal, or whether the characterisation of the opportunity as sufficient, absent an adjournment, was a matter for the Court to judge.

That fact-finding is open to review on a no-evidence ground, is not seen to infringe the principle that findings of fact cannot be reviewed by the appellate court. Review

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35 The *Migration Act 1958* (Cth) is a contender for such a characterisation.
36 See CTTT Act, s 28(1).
37 CTTT Act, s 28(2). Although commonly stated, it is unclear why anyone would think a tribunal was so bound.
38 CTTT Act, s 28(2).
39 CTT Act, s 28(3).

on the basis of no evidence is review on a question of law, the legal question being whether there was indeed any evidence capable of supporting a particular finding. Nevertheless, such a conclusion must involve an assessment of the inferences which can reasonably be drawn from the whole of the material before the Tribunal. In some cases it may be helpful to note the differences which can arise in respect to categories of fact. Some can be determined by reference to precise criteria, whereas others require evaluative judgment, by reference only to vague standards.

These exercises are undoubtedly difficult, but they are not in any sense novel. In criminal cases (and in the past in civil cases with juries) it is not uncommon for a judge to be required to rule upon whether there is evidence fit to go to the jury, in respect of a particular issue. Such a judgment is, in effect, determining the adequacy of the evidence in advance, rather than after the event.[40] Importantly, that exercise is undertaken on the basis that the jury may accept such evidence as is available to support a particular inference. There being such evidence, it is of course possible that the jury, despite instruction, may have drawn the inference without accepting the supporting evidence. That is because the fact-finding process of the jury is a black box, the contents of which are not revealed to the court. In contrast, the Tribunal is required to give reasons for its conclusions. Those reasons must "set out the findings on material question of fact" and must "refer to the evidence or other material on which the findings of fact were based".[41]

(3) Reasons and fact-finding

The last point leads me into a separate issue, which is a matter that may be viewed from either side of the appellate divide, namely adequacy of reasons as a ground of appeal. In dealing with CTTT appeals, it is necessary for the District Court to decide whether a claim of inadequate reasons constitutes a relevant form of legal error and, as a Court subject to appellate review, there will be occasions on which the District Court's judgments may be reversed because of inadequacy of reasons.

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[40] Although the *ex post facto* exercise may also be undertaken on appeal.
[41] CTTT Act, s 49(3).

The obligation of the Tribunal to give reasons is identified in the CTTT Act, s 49. It is notable that the obligation only arises upon request, the request being made within 14 days of a party receiving notice of the Tribunal's decision. The primary statutory obligation of the Tribunal is not to give reasons as such, but to give "notice of its decision".[42] According to the Regulation, such notice must be given within "7 days after the Tribunal makes the decision".[43] This language is somewhat unclear. Section 46 of the Act provides for a decision of the Tribunal that has been reserved, to be handed down (rather than "given") if it is set out in writing, by being "delivered" by any Member. No doubt if a document is produced and signed by a Member, the decision may have been made on the day on which the document is signed. Then the notice provision will take effect 7 days thereafter. In any event, the point for present purposes is that the obligation to give reasons is conditional upon a party requesting a statement of reasons, by notice in writing to the Registrar after the conclusion of the proceedings concerned.[44]

Pursuant to the Uniform Civil Procedure Rules, an appeal must be filed within 28 days after the date on which notice of the decision was given.[45] On one view, the very latest day on which a decision is given is when the Tribunal makes its final orders. If it does not at the same time deliver reasons, a party has a further 14 days to request reasons and the statement of reasons must be provided within 28 days after the request is made.[46] Because a request cannot be made before the conclusion of the proceedings,[47] difficulties may arise in respect of interlocutory decisions and even in respect of decisions which are implicit in the final order. Particularly would that be so if no reasons were provided.

The point, for present purposes, is that it may be difficult to identify the manner in which inadequacy of reasons constitutes an appellable decision with respect to a matter of law for the purposes of s 67(1). Different views have been expressed, in

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[42] CTTT Act, s 49(1).
[43] Consumer, Trader and Tenancy Tribunal Regulation 2009 (NSW) ("CTTT Regulation"), cl 35(1).
[44] From my experience, the Tribunal routinely gives reasons with its decisions, but that is a practice rather than a legal obligation.
[45] UCPR, r 50.3.
[46] Section 49(2).
[47] See CTTT Regulation, cl 35(2), if that regulation is valid.

varying statutory contexts, as to whether inadequacy of reasons does constitute an error of law which can give rise to a statutory appeal.[48]

It is helpful, in any event, to say something about the content of any such obligation. Section 49(3) provides as follows:

> "(3) The statement may be brief but must:
>
> (a) set out the decision and the reasons for it, and
> (b) set out the findings on any material question of fact, and
> (c) refer to the evidence or any other material on which the findings of fact were based."

It is perhaps unfortunate that this provision, and others like it, obscure both the function and the preferable structure of reasons for decision, by reversing the most rational orderly way of setting out reasons. Different structures are available, but there are a number of key steps which must be undertaken whenever an obligation to provide reasons is engaged. These steps are:

- first, the issues to be determined must be identified with care and precision;
- secondly, it is necessary to identify the factual disputes which must be resolved in order to reach a conclusion about each particular issue;
- thirdly, relevant legal principles must be identified, having particular regard to any statutory requirements;
- fourthly, each of the factual issues must be addressed, by reference to the evidence, although the extent to which the evidence needs to be summarised or set out will vary from case to case;
- fifthly, the relevant legal principles must be applied to the facts as found, so as to lead to a conclusion on any relevant issue;
- sixthly, it may be worth checking if there are any issues raised by the parties which have not been addressed, in order to explain why that is so.

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[48] *SAS Trustee Corporation v Pearce* [2009] NSWCA 302 at [117]-[121] (in my judgment, Beazley JA agreeing); [22]-[27] (Giles JA); cf *Sherlock v Lloyd* [2010] VSCA 122 at [43] (Maxwell P, Ashley JA and Byrne AJA).

The foregoing template is not intended to impose a rigid straightjacket on any decision-maker, whether it be a court, tribunal or administrator. However, a template of some kind provides important discipline to each of us engaged in decision-making, because it effectively requires us to make a conscious effort to why we may feel impelled to depart from it. It may be of assistance to give an example, drawn from the most common area of decision-making, both on appeal and at trial. Thus, in an everyday action for damages for negligence, it is helpful to start with a checklist such as the following statement of issues:

> Is a duty of care owed?
> Has there been a breach of duty?
> What loss does the plaintiff claim to have suffered?
> Was the plaintiff's loss caused by the breach of duty identified?
> Was the plaintiff contributorily negligent?
> What is the appropriate quantification of the damages suffered?

The next part of the exercise will be to identify what matters are in dispute in respect of each element and then to identify the relevant legal principles.

To impose such a framework on cases of a bread-and-butter kind may seem like overkill. However, it has benefits despite that, and perhaps because of our assumed understanding of how we should go about such tasks. First, identification of the issues in dispute leads one back to the pleadings. It may be that, by the end of the trial, the ways in which the parties have put their cases have departed from the pleadings, but if that is so it is a matter which should be noted and, if the hearing is not complete, pointed out to the parties themselves.

Secondly, identification of the issues, and hence the relevant legal principles, should prompt a question as to the terms of any relevant statutory provision and thus identify any aspects of the legal principles which are derived solely from the general law. We are inclined to assume that legislation tends to codify, rather than vary general law principles. Accordingly we feel content to restate general law principles in the terms to which we have become accustomed and with which we are comfortable. However, that is a dangerous practice and inevitably leads us to take less note of the terms of legislation than we should. I suspect it took approximately a

decade for the majority of judges to routinely identify a section in the *Evidence Act* as the basis for a ruling on admissibility. If that is right, there may be another year before most of us will routinely refer to relevant provisions in the *Civil Liability Act 2002* (NSW) in determining negligence cases.

Once the relevant issues in dispute are identified, it is much more likely that the relevant factual disputes can be identified and organised into a logical framework. That framework will almost never be the form in which the trial proceeded. Usually more than one witness will give evidence relevant to a particular issue and each witness will give evidence relevant to more than one issue. In those circumstances, a chronological recounting of the evidence given at the trial may be useful to ensure that nothing is forgotten, but will not, of itself, result in resolution of disputed facts, nor will it ensure that all facts in dispute are addressed. Indeed, in my experience, it tends to obscure the matters on which findings are required.

From the point of view of an appeal court, to say nothing of the legitimate concerns of the parties, inadequate fact-finding is more of a difficulty than inadequate reasons, although notices of appeal routinely confuse the two. The majority of appeals heard in our Court are by way of rehearing. If the reasons for coming to a conclusion are inadequate, we can formulate our own reasons. If the fact-finding is inadequate, there will often need to be a retrial. At least that must be so where a particular finding depends upon acceptance or rejection of the evidence of a witness or witnesses, where one or more must be mistaken or where there are issues of credibility which cannot be resolved on the transcript. If it is possible for the Court of Appeal to resolve issues, we invariably seek to do so, to avoid further delay and expense to the parties. Often that cannot be done where there is an omission to find facts; such omissions usually occur where there has been a failure to identify and address issues in a structured manner.

There are also occasions on which it may be desirable to make contingent findings, against the possibility of a different approach being adopted on appeal. Campbell JA

recently adopted the following view, which he described as a “counsel of prudence”:[49]

> "It is often desirable in the case of a trial judge, who has heard evidence on a matter, to determine factual questions arising from the evidence, even if they are not necessary on conclusions which have been reached on other issues. That is because some account must always be taken of the possibility of a successful appeal, requiring the further evidence to be assessed, or in all likelihood repeated on a rehearing. The costs which are likely to flow to the parties in such an event will rarely be justified by the savings in judicial time. Further, such an event is more likely where there is a full appeal by way of rehearing, than where there is a more limited right of appeal."

Of course, ‘counsel’ is the correct descriptor; it is an approach which must be borne in mind rather than slavishly followed in all circumstances. Also, where contingent findings are made, they must be properly reasoned – half-considered remarks are of no value.

(4) Case management

Finally, another area which has caused a degree of difficulty (though perhaps the overall incidence of appeals is reasonably low) is the area of case management. Since the days of Sir Frederick Jordan and *In Re the Will of Gilbert*,[50] being a time when intervention with procedural rulings was close to anathema, there has been an increasing tendency for challenges to be brought to procedural steps and even to the composition of the trial court where there have been numerous interlocutory hearings.

There is nothing new in the tension between the need to keep cases moving (to avoid breach of time limits and, often, interlocutory orders) and the need to allow litigants a reasonable opportunity to have their cases determined on the merits.

Attempting to hold parties to timetables and compliance with orders is not, of course, merely an exercise in court administration: delays and failures to comply by one side may well cause prejudice and irrecoverable expense to the other. On the other

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[49] *Evans v Evans* [2011] NSWCA 92 at [142].
[50] (1946) 46 SR (NSW) 318.

hand, as we well know, a degree of flexibility is required, even when one has a strong suspicion that one party, for whatever reason, is not making the necessary efforts.

Challenges to interlocutory steps which have come up for consideration is recent years include:

(a) expressions of judicial frustration in the course of trials at the tactics of counsel or the parties;[51]

(b) strike out applications for non-compliance with court or rule derived timetables;[52]

(c) judges both conducting interlocutory hearings and sitting on trials;[53]

(d) attempts to reopen cases which were thought to be determined[54] or raise issues belatedly.[55]

All of these cases involve difficult matters of judgment often undertaken by the sitting judge in a busy list or in the course of a fraught hearing. Sometimes a mistake has been made which needs to be corrected and should be corrected without any necessary criticism of the judge involved. In many circumstances, however, the words of Sir Frederick Jordan in *Gilbert* still ring true and there is much to be said for the view that appellate judges should stay their hand, lest intervention in one marginal case encourages other litigants to appeal adverse interlocutory decisions.

Conclusion

I am conscious that the issues I have covered will have greater resonance for some members of the Court than for others and that there are many important topics of a

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51 *Lee v Cha* [2008] NSWCA 13.
52 *Salzke v Khoury* [2009] NSWCA 195; 74 NSWLR 580.
53 *Nicholls v Michael Wilson & Partners Ltd* [2010] NSWCA 222.
54 *Satchithanantham v National Australia Bank Ltd* [2009] NSWCA 395.
55 *Richards v Cornford [No 3]* [2010] NSWCA 134 at [37]-[46] and [98]-[110] (Allsop P) (McColl JA and I agreeing).

recurring kind which I have not addressed. I am also conscious that I have left a number of loose ends unresolved.

Nevertheless, I hope you will bring me back on track and that any questions you may have will range equally across the issues I have raised and those which I have not, but should have.

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