APPEALS FROM VCAT TO THE SUPREME COURT

Author: Graeme Peake

Date: 15 August, 2018

FOLEY'S LIST

APPEALS FROM THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL TO THE TRIAL DIVISION OF THE SUPREME COURT

Graeme Peake
Barrister
Foley's List

This paper covers three topics relevant to appeals to the Court from the Victorian Civil and Administrative Tribunal, pursuant to s. 148 *Victorian Civil and Administrative Tribunal Act 1998* ("VCAT Act"): -

(1) Recent changes to the procedure for instituting appeals;

(2) Recent changes to the test for the granting of leave to appeal; and

(3) the nature of appeals from the Tribunal to the Court and the consequent limitations on such appeals.

Background

Appeals to the Trial Division of the Court are brought pursuant to the right to seek leave to appeal conferred on litigants by s.148 VCAT Act. Section 148(1) relevantly provides: -

> *A party to a proceeding may appeal on a question of law from an order of the Tribunal in the proceeding -*
>
> *(a) [Appeals from the President or a Vice President to Court of Appeal]*
>
> *(b) in any other case, to the Trial Division of the Supreme Court with leave of the Trial Division.*

As can be seen, all appeals are by leave. There is no as of right appeal.

The first step in appealing a decision of the Tribunal to the Court is to lodge an application for leave to appeal.

Until 1 May 2018, the procedure to seek leave to appeal was by originating motion, summons on originating motion and supporting affidavit, seeking leave. If leave was granted, the Court would then order that a notice of appeal be lodged with the Court within a fixed period.

Since November 2014, appeals from VCAT have been somewhat unique, in the sense that the provisions of s. 14A – 14C *Supreme Court Act 1986,* which were inserted by the *Courts Legislation Miscellaneous Amendments Act 2014* on 10 November 2014 did not apply directly to appeals from VCAT. In *Metricon Homes Pty Ltd v Softley*[1], Warren CJ held that, in relation to appeals from VCAT to the Trial Division, s. 148 continued to apply and the test for leave to appeal remained the test set out in *Secretary to the Department of Premier and Cabinet v Hulls.*[2]

Therefore, from November 2014, the test for leave to appeal from VCAT to the Court of Appeal, was different to the test that applied to an appeal from VCAT to the trial division. The test for an appeal to the Court of Appeal is as set out in s.14C *Supreme Court Act*:-

> *"14C* ***Appeal must have real prospect of success***
>
> *The Court of Appeal may grant an application for leave to appeal under section 14A only if it is satisfied that the appeal has a real prospect of success."*

The test for appeals to the trial division remained the *Hulls* tests.

On 1 May 2018, s. 148 was amended to adopt the real prospect of success test from s. 14C which is discussed below.

The Recent Change to the Procedure for Instituting an Appeal to the Trial Division.

On 1 May 2018, the *Supreme Court (Appeals to the Trial Division, Judicial Review and Further Powers of Judicial Registrars Amendment) Rules 2018* came into effect. Relevantly, the new rules substituted new Chapter II rules 4.04 to 4.13. The effect of the change is to discontinue the former process of seeking leave by originating motion, to seeking leave by filing a notice of appeal. Rule 4.04 now relevantly provides: -

> *"Commencement of appeal or application for leave to appeal except as otherwise provided by any act or rule –*
>
> *(a) an appeal or an application for leave to appeal under this part is commenced by filing a notice of appeal in the Court;*
>
> *(b) subject to rule 4.08(9), the appeal or the application for leave to appeal shall be commenced within 28 days after the day of the order of the Tribunal; and*
>
> *(c) the appeal or the application for leave to appeal shall not operate as a stay of proceedings unless the Court otherwise orders."*

---

1 [2016] VSCA 60
2 [1999] 3VR 331; [1999] VSCA 119.

The requirements for the new notice of appeal are set out at rule 4.06.

In summary, the new procedure is: -

(1) file a notice of appeal that complies with rule 4.06 within 28 days after the day of the order of the Tribunal;

(2) deliver a copy of the notice of appeal to the Registrar of the Tribunal and serve it on all persons directly affected by the application;

(3) within seven days after filing the notice of appeal, file and serve a supporting affidavit complying with rule 4.07;

(4) within seven days after filing the notice of appeal, apply on summons for directions in accordance with rule 4.08.

A copy of the new chapter 3, part 2 and a copy of the Court's new template orders are attached.

It appears that these rule changes only have two practical implications: -

(1) whilst it was often possible to delay formulating the relevant questions of law and grounds, these will now need to be formulated within the 28 days as they must be set out in the Notice of Appeal;[3]

(2) thought will need to be given as to what orders for the disposition of the proceeding are sought, in the event that the appeal is successful. Rule 4.06(1)(vii) does not sit all that well with appeals from VCAT heard in Planning and Environment List and therefore heard in the Valuation, Compensation and Planning List in the Court, in that it is unusual for a party to request the Court to make a final order in substitution for the Tribunal's order.

Section 148(7) VCAT Act sets out the orders that the Court can make, including 148(7)(b):

> *"An order that the Tribunal could have made in the proceeding"*.

The Court, being conscious of its role to review only errors of law and to not stray into the exercise of the discretion of the Tribunal, at least in the Valuation, Compensation and Planning List, will usually order that the Tribunal's decision be set aside and the matter be remitted to the Tribunal for further hearing in accordance with the law.

---

[3] Rule 4.06(1)(v) and (vi).

In *Osland v Secretary to the Department of Justice*,[4] the High Court considered the circumstances in which the Court should exercise the power to make an order in substitution for the Tribunal's order, in the context of an FOI application. The decision in the Tribunal had been made by the then President, Morris J (as he then was), so the appeal had been heard in the Victorian Court of Appeal. The Court of Appeal allowed the appeal and substituted an order for the Tribunal's order, being that the decision of the Delegate (to refuse access to certain documents) be affirmed.

Ms Osland appealed to the High Court.[5] The High Court, after one hearing in the Trial Division, two hearings in the Court of Appeal and two hearings in the High Court, decided that it had sufficient information to make a decision in substitution for the decision made by the Tribunal. However, in doing so the majority[6] said:

> "The Court of Appeal, in the exercise of its jurisdiction under s 148 of the VCAT Act, may make substitutive orders where only one conclusion is open on the correct application of the law to the facts found by the Tribunal. Such a case arises when no other conclusion could reasonably be entertained[7]. In that event, the Court can make the order that the Tribunal should have made. The language of s 148(7) is also wide enough to allow the Court of Appeal to make substitutive orders in other circumstances. But its powers must, as with the equivalent powers of the Federal Court in relation to the AAT, be exercised having regard to the limited nature of the appeal. Absent such restraint, a question of law would open the door to an appeal by way of rehearing. Where there is a factual matter that has to be determined as a consequence of the appeal, it may be that it is able conveniently to be determined by the Court of Appeal upon uncontested evidence or primary facts already found by the Tribunal. When the outstanding issue involves the formation of an opinion which is, as in this case, based upon considerations of public interest, then it should in the ordinary case be remitted to the body established for the purpose of making that essentially factual, evaluative and ministerial judgment."

In the earlier appeal, when the High Court remitted the matter to the Court of Appeal,[8] the High Court had remitted the matter to the Court of Appeal for further determination as there was a discretion to be exercised pursuant to s. 50(4) FOI Act, that required an examination of the documents in question.

---

4 [2010] HCA 24.

5 Ms Osland had been convicted by the Supreme Court of the murder of her husband and had unsuccessfully appealed that conviction to the Court of Appeal and then to the High Court. All unsuccessfully. Undeterred, Ms Osland then partitioned the Attorney-General for a pardon in the exercise of the royal prerogative of mercy. The FOI application occurred in the context of that petition having been denied.

6 French CJ, Gummow and Bell JJ

7 *Repatriation Commission v O'Brien* (1985) 155 CLR 422 at 430 per Gibbs CJ, Wilson and Dawson JJ.

8 *Osland v Secretary to the Department of Justice* [2008] 234 CLR 275; [2008] HCA 37.

In *Boroondara City Council v Sixty-Fifth Eternity Pty Ltd*,[9] Justice Emerton held that it was generally appropriate to remit a matter to the Tribunal. Her Honour said:

> *"However, the imposition of permit conditions is a job best left to the Tribunal. It forms part of the essentially factual, evaluative and ministerial judgments the legislature has given the Tribunal to make."*

Her Honour's decision is consistent with other decisions of the Court, to the effect that, where there is a discretion that remains to be exercised, it is appropriate for the Court to remit the matter, and not to engage in a consideration of the merits.

Recent changes to the test for leave to appeal

Whilst the test for the leave to appeal to the Court of Appeal was amended by the *Courts Legislation Miscellaneous Amendments Act 2014* on 10 November, 2014, to the "real prospect of success" test, until 1 May 2018, the long standing tests in *Hulls* continued to apply to appeals from the Tribunal to the trial division.

On 1 May 2018, s. 148 VCAT Act was amended so as to be consistent with the *Supreme Court Act 1986* by inserting s. 148(2A):

> *"The Trial Division of the Supreme Court may grant an application for leave to appeal under this section only if it is satisfied that the appeal has a real prospect of success."*

In essence, the former *Hulls* test was:

- whether or not leave is granted depends upon the justice of the particular case;
- to obtain leave the applicant must identify a question of law in respect of which there is a real and significant argument that the error exists (alternatively stated as showing that there is sufficient doubt attending the question to grant leave to appeal);
- leave to appeal is more likely to be granted if the question is one of general or public importance.

There are important differences between the traditional test in *Hulls* and the real prospect of success test. In *Hulls,* the Court said: -

> *"It is not possible to lay down in advance any standard of satisfaction for much may depend upon the importance of the question of law to the remedy to be sought".*[10]

---

[9] [2012] VSC 298.
[10] per Phillips JA at [10].

By way of contrast, the real prospect of success test arguably elevates the *Hulls* test of real or significant argument.

The *Hulls* test required the appellant to demonstrate it had an arguable case, whereas the real prospect of success test suggests that the applicant for leave to appeal needs to persuade the Court that there is real substance to the argument. It seems that there is probably a difference between having an arguable point and having a point that has a real prospect of success.

In the context of appeals to the Court of Appeal (there not yet being any reported decisions in relation to s. 148(2A)), in *Kennedy v Shire of Campaspe,*[11] the Court of Appeal referred to its decision in *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd,*[12] and held that the Court may only grant leave: -

> *"Where the appeal has a 'real' as opposed to a 'fanciful' chance of success."*

The Court went on to say:

> *"For the purposes of leave, it is only necessary to distinguish between those whose prospects are real and those whose prospects are fanciful. There is no bright line that divides the two."*

In *Ikosidekas v Karkanis,*[13] Mandie JA said:

> *"The case of an appeal with a real prospect of success (that is, not a fanciful prospect of success) would usually be the same as a case in which the decision under appeal was attended by sufficient doubt as would justify a grant of leave."*

It appears that His Honour was postulating that there may be no difference between the two tests.

It is notable that whilst s. 14C of the *Supreme Court Act*, and s. 148(2A) of the VCAT Act now use the same words, the context can be quite different, having regard to the different nature of civil appeals to the Court of Appeal, as compared to appeals on a question of law under s.148.

There are many decisions regarding the meaning of "no real prospect of success" in the context of applications for summary judgment. There are not yet any decisions in relation to what constitutes a real prospect of success for the purpose of s. 148(2A). Whether the view of

---

[11] [2015] VSCA 47.
[12] [2013] VSCA 158 (a case concerning the phrase "no real prospect of success" in relation to an application for summary judgment).
[13] [2015] VSCA 121.

Mandie JA, to the effect that there is no real difference between the new and the old test will apply in the context of appeals on a question of law from the Tribunal.

It may be that, in practical terms it does not matter in the case of appeals from the Planning and Environment List of VCAT to the Valuation, Compensation and Planning List of the Supreme Court, due to the usual practice in the court being to hear the leave application and the appeal together.

At the Valuation, Compensation and Planning List Users Group Meeting on 16 May 2018, Emerton and Ginnane JJ expressed the view that they expected this practice to continue.

It remains to be seen whether the new test encourages respondents to seek a separate hearing to oppose leave, on the basis that the new test imposes a higher standard on applicants than the former *Hulls* test. It also remains to be seen how the real prospect of success test is applied in appeals that are restricted to questions of law.

The peculiar nature of "appeals" from the Victorian Civil and Administrative Tribunal

An appeal from the Tribunal to the Court is limited to an appeal on a question of law. The use of the word "appeal" is somewhat misleading, as the authorities make it clear that, when considering an "appeal" under s. 148, the Court is not exercising appellate jurisdiction, but original jurisdiction. The Court's role is limited to examining for legal error what has been done in an Administrative Tribunal.[14] The proceedings are in the nature of judicial review, not in the nature of an appeal proper.

Therefore, the formulation of the questions of law is of fundamental importance because:

> *"The existence of a question of law is … not merely a qualifying condition to ground the appeal, but also the subject matter of the appeal itself."*[15]

If the questions of law articulated in the notice of appeal (as distinct from the grounds), do not identify a question of law in respect of which there is a real prospect of success, leave to appeal will be refused.

Whilst none of the authorities expressly say so, in practice, there is a judicial reluctance to set aside a decision of VCAT unless it is clear that the Tribunal has made an error of law and that

---

[14] See *Roy Morgan Research Centre v Commissioner of State Revenue (Vic)* [2001] 207 CLR 72.
[15] See *TNT Skypak International (Aust) PL v FCT* [1988] 82 ALR 175.

the error is vitiating, in the sense that had the Tribunal correctly applied the law, the outcome of the proceeding before the Tribunal was likely to have been different.[16]

When considering whether the Court should disturb the decision of the Tribunal, the Court will: -

(1) decline to enter into the fact-finding exercise which the Legislature has deliberately entrusted to a specialist tribunal;[17]

(2) respect the role entrusted by the Legislature to the Tribunal and will not subvert this decision by seeking out error;[18]

(3) not engage in an "overly pernickety examination of the reasons", but focus the substance of the decision and whether it has addressed the real issue presented by the contest between the parties;[19]

(4) not examine the reasons of the expert Tribunal in an overly legalistic manner or indulge in "overzealous drawing of inferences";[20]

(5) not interfere with the Tribunal's decision unless it is satisfied that there was in fact a vitiating error of law, as compared to the Tribunal's reasons being expressed so as to suggest the possibility that it proceeded upon a wrong view of the law;

(6) interfere with a finding of fact unless it is shown that the tribunal arrived at a finding that was simply not open to it.[21]

Proving that a particular finding of fact was not open to the Tribunal can be particularly difficult because the Tribunal is not bound by the rules of evidence and can base its findings on any probative material.[22]

As Guard J recently said in *Datta Yoga Centre Australia Pty Ltd v Wyndham City Council*:[23]

> *"The Victorian Civil and Administrative Tribunal is an expert tribunal. Thus, it has been said that the Court should confine itself to inquiring whether, on*

---

16 *Portland Properties Pty Ltd v MMBW* [1971] 48 LGRA; *Versus (Aus) Pty Ltd v ANH Nominees Pty Ltd* [2015] VSC 515.
17 *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] 1 VR1.
18 *Versus* (supra).
19 *Roncevich v Repatriation Commission* [2005] 22 CLR 115 per Kirby J at 136.
20 *Portland Properties Pty Ltd v Melbourne & Metropolitan Board of Works* [1971] 38 LGRA 6; *Michaelis Bayley (Vic) Pty Ltd v MMBW* [1980] 40 LGRA 65.
21 *S v Crimes Compensation Tribunal* [1998] 1 VR 83.
22 See VCAT Act, section 98.
23 [2018] VSC 353.

> *any reasonable view of the evidence, the Tribunal's decision on a question of fact can be supported. The Court is to bear in mind that the matters before it are areas in which members of the Tribunal have special expertise and experience, which the relevant legislation plainly intends them to employ. The Court should be slow to conclude that on no reasonable view could the Tribunal decide a particular matter of fact as it has."*

The limitations of the right to seek leave to appeal from VCAT to the Court are often misunderstood. The Court is restricted to a supervisory role, in the nature of judicial review. It will not interfere with the decision of the Tribunal, unless it is satisfied that there is a clear error of law and that the identified error is one that had a bearing on the ultimate decision, to the extent that the decision may have been different if the identified error had not been made.

Having said that, a quick examination of the section 148 appeals in the *Valuation, Compensation and Planning List* of the Court shows that of 17 appeals disposed of by the Court since the beginning of 2016, seven appeals have been allowed and 10 appeals have been dismissed.

Summing up

1. The new procedure of instituting appeals by filing a notice of appeal will require early consideration to be given to identifying the errors of law and formulating the questions of law.

2. The questions of law are of paramount importance in appeals from VCAT because it is the stated questions of law that must reveal an error of law in respect of which there is a real prospect of success.

3. Whilst there is some judicial authority (per Mandie JA) that the real prospect of success test is the same as the former *Hulls* test, it remains to be seen whether that is correct, in the context of appeals in the nature of judicial review under s. 148 VCAT Act.

4. Appeals under s.148 VCAT Act are not appeals. They are in the nature of judicial review. The Court will not indulge in any form of fact finding mission. Unless the Court is satisfied that a vitiating error of law is disclosed, the appeal will not succeed.

5. The usual order of the Court is that the appeal be remitted to the Tribunal for rehearing in accordance with the law. It is unusual for the Court, in the Valuation, Compensation and Planning list to substitute its decision for that of the Tribunal.

GRAEME PEAKE

Barrister

Foleys List

15 August 2018