An appealing change

As a result of recent legislative changes, leave is now required to appeal against most final and interlocutory decisions in Victoria's civil jurisdiction. This article discusses the new appeals regime and explores the context in which it arose. **BY CAMERON CHARNLEY**

Legislation has come into effect which changes the process for civil appeals in Victoria. As a result of amendments brought about by the *Courts Legislation Miscellaneous Amendments Act 2014* (Vic) (the Amending Act),[1] a party wishing to appeal against a final decision of a court must, subject to a few exceptions, apply for leave to appeal. This creates a uniform approach to the civil appeals process as only interlocutory decisions have typically required leave to appeal. This article examines the legislative requirement and its impact on court rules, as well as the way in which the Court of Appeal has interpreted this requirement recently.

The legislation

Historically, a party wishing to appeal against a final decision in the civil jurisdiction could do so as of right. An appeal would be commenced upon the appellant's service on the respondent of a notice of intention to appeal.

As of 10 November 2014, most civil appeals to the Court of Appeal now require leave. This complements the existing system for criminal appeals in Victoria as introduced by the *Criminal Procedure Act 2009*. It also accompanies existing practice for interlocutory appeals in the civil jurisdiction. However, whereas leave to appeal from

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an interlocutory decision traditionally required satisfaction of a common law test, namely that the primary decision be met with enough doubt to justify leave and that substantial injustice would flow if the decision were not reversed,[2] changes to the civil appeals regime replace this with a uniform, legislative test.

The new regime was brought about as a result of measures by parliament to "modernise and simplify appeal processes and to improve the flexibility of courts . . . to finalise unmeritorious cases".[3] Changes to the civil appeals regime were part of a broader suite of reforms seeking to "reduce administrative burden and allow the resources of the civil justice system to be deployed more efficiently and effectively".[4] In the second reading speech for the Courts Legislation Miscellaneous Amendments Bill 2014, the then Attorney-General cited the inefficiencies and the impact, both on the Court of Appeal's resources and on parties' own costs, in having a full appeal heard and determined by the Court, notwithstanding that it lacked merit.[5]

The Amending Act inserts new ss14A–14D into the *Supreme Court Act 1986*. The Amending Act also modifies a number of existing provisions in that Act. Corresponding changes have been made to the *Supreme Court (General Civil Procedure) Rules 2005*, inserting new O.64 and revoking former O.65. Changes have been made to other legislation, including the *Accident Compensation Act 1985*,[6] the *County Court Act 1958*[7] and the *County Court Civil Procedure Rules 2008*.[8]

The regime also applies to an appeal from a question of law from an order of VCAT. Amendments have been made to s148 of the *Victorian Civil and Administrative Tribunal Act 1998* to require leave to appeal from an order by the president or a vice president of VCAT. In any other case, leave is to be obtained from the Trial Division of the Supreme Court.

This article focuses on changes made to the Supreme Court's jurisdiction.

Section 14A of the *Supreme Court Act* provides:

"1. Subject to subsection (2), any civil appeal to the Court of Appeal requires leave to appeal to be obtained from the Court of Appeal.

2. Leave to appeal is not required –
- for an appeal from a refusal to grant habeas corpus; or
- for an appeal under the *Serious Sex Offenders (Detention and Supervision) Act 2009*; or
- if the Rules provide that leave to appeal is not required, whether in any particular class of application or proceeding or generally.

3. For the purposes of this section, 'civil appeal' means an appeal from a judgment or order made in exercise of civil jurisdiction, including an appeal by way of rehearing or judicial review, for which this Act, any other Act or the Rules provide an appeal to the Court of Appeal."

Section 14B provides that, subject to the Rules, an application for leave must be filed within 28 days of the date of the primary decision (whether a judgment, order, determination or "other decision" subject to an appeal). This is in contrast to the previous limits of 14 or 21 days.

Under this new provision, an application for leave is commenced upon filing the application itself. This is distinct from previous practice where an application was initiated upon service on the respondent. The issue with the earlier system, according to parliament, was that the Court of Appeal and Court Registry could not track the commencement of the appeal and could not properly control the administrative processes at that stage.[9] Giving Registry greater oversight over the initiation of an application for leave to appeal would also promote the parties' compliance with procedural obligations.[10]

Section 14C contains the threshold that an applicant must meet to succeed in seeking leave to appeal. The section provides that "[t]he 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".

Section 14D provides the mechanism for determining an application for leave. One or more Judges of Appeal may determine the application, and may do so with or without an oral hearing. Parliament sees this as a means to prevent "completely unmeritorious applications" from occupying the Court's resources.[11]

Where the application is determined on the papers and the application is dismissed, the applicant may in accordance with the Rules apply to have the dismissal set aside or varied at an oral hearing before at least two Judges of Appeal. The applicant may not do so, however, if the Court has determined that the dismissed application is "totally without merit".

Two exceptions to s14D apply: where the appeal is from a refusal to grant habeas corpus, or an appeal is under the *Serious Sex Offenders (Detention and Supervision) Act 2009*. This is consistent with the exception in s14A that such matters do not require leave to appeal to the Court of Appeal.

With the addition of these new provisions, the Amending Act modifies existing provisions of the *Supreme Court Act 1958*. The Amending Act makes several amendments to s11 to permit the Court of Appeal to be constituted by a single Judge of Appeal. This change is designed to accommodate a situation where an application for leave to appeal may be determined by a single Judge of Appeal, with the hope that this will allow for better allocation of judicial resources.[12]

SNAPSHOT

- Legislation effective from November last year has transformed the civil appeals process in Victoria, with parties now requiring leave to appeal against both final and interlocutory decisions.
- Additional broader changes have been made to the appeals process, seeking to enhance administrative processes and to facilitate the better allocation of judicial resources.
- The Victorian Court of Appeal decision in *Kennedy v Shire of Campaspe* explores the new legislative test for leave to appeal.

The Amending Act also modifies s17A of the *Supreme Court Act 1958* to remove redundancies that have arisen as a result of the insertion of new s14A. Specifically, the Amending Act removes references in s17A to the ability of the Trial Division of the Supreme Court to grant leave to appeal in relation to orders made in the Trial Division. This highlights the fact that under the new s14A leave to appeal must be obtained from the Court of Appeal. Moreover, the Amending Act repeals s17A(7), which permitted an application for leave to appeal to be made without notice unless the party was otherwise directed. This is consistent with the new requirement that an application be made on notice to the respondent and that such application commence upon the filing of the notice.

Case law

The Court of Appeal recently considered in *Kennedy v Shire of Campaspe*[13] (*Kennedy*) an application for leave to appeal against a decision of a judge of the County Court.[14]

The judge held in the first instance that the applicant, who had suffered injuries when she tripped and fell on the pavement, was precluded in succeeding in her claim for compensation due to a defence said to be available under the *Road Management Act 2004*.[15] This was so, notwithstanding that the judge considered there to be "an arguable plaintiff's case in negligence".[16] The applicant sought to appeal against this decision pursuant to s74(1) of the *County Court Act 1958*.

In a joint decision, Whelan and Ferguson JJA addressed the "real prospect of success" formulation. In doing so, their Honours noted the similar expression in s63 of the *Civil Procedure Act 2010*. That provision relates to circumstances where a court may award summary judgment, namely where the opponent's case has "no real prospect of success".

The Court had earlier considered that formulation in *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd*.[17] In that case, Warren CJ and Nettle JA held that s63 of the *Civil Procedure Act* should be construed as requiring that there be a "'real' as opposed to a 'fanciful' prospect of success", a formulation their Honours considered more liberal than the "hopeless" or "bound to fail" test that had historically been applied.[18] Their Honours left open the possibility of a situation where a case, although not characterised as hopeless or bound to fail, may still lack a real prospect of success.[19]

In addressing the "real prospect of success" formulation, the Court in *Kennedy* held that it should adopt the "real" as opposed to "fanciful" prospect dichotomy outlined in *Lysaght Building Solutions*. The Court acknowledged that "[t]here is no bright line that divides the two".[20]

In citing the discretionary basis for granting leave to appeal, the Court held there may be circumstances where, notwithstanding an appeal having a real prospect of success, the Court might refuse leave. The Court held that this may arise, for example, where "even though the prospects of the appeal are real, no substantial injustice will be done if the decision stands", as might be the case where the appeal is from a decision relating to practice and procedure.[21]

The Court went on to grant leave to appeal. Their Honours were persuaded by the fact that the primary judge had considered the applicant's case at first instance to have been meritorious, and that the impediment said to have been raised by the *Road Management Act 2004* was not supported by applicable Victorian case law. Moreover, their Honours considered that the applicant's case raised "difficult issues" about procedural and legal matters.[22]

The interpretation in *Kennedy* of the s14C test has since been cited by the Court in decisions.[23] In *Note Printing Australia Ltd v Leckenby*,[24] Tate JA agreed with their Honours' interpretation in *Kennedy*, adding that:[25]

"[T]he assessment [under s14C] is being made only for the purpose of granting or refusing leave to appeal. It is not incumbent on an applicant for leave to appeal to demonstrate that it is likely that the appeal will be successful; only that its prospects are not fanciful".

Practical notes

Practitioners should be mindful of the discretion vested in the Court of Appeal to grant or refuse leave; satisfying the "real prospect of success" threshold does not entitle an applicant to appeal, as s14C vests the Court with a discretion. As the Court of Appeal considered in *Kennedy*[26] and as the wording of s14C appears to make clear, the Court "may" grant an applicant leave to appeal but is not compelled to do so, even where the appeal has a real prospect of success. In the circumstances of a particular case there may be other factors that go against granting leave to appeal.

At the same time, failure to meet that test will defeat an appeal. The Court held that this is so "even if . . . there is some other compelling reason why the appeal should be heard or a matter of public importance is at issue".[27] This is to be contrasted with the discretionary factors to be considered in applications for special leave to appeal to the High Court.[28]■

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1. Section numbers in the body of the article refer to the *Courts Legislation Miscellaneous Amendments Act 2014* (Vic) unless otherwise specified.
2. See *Niemann v Electronic Industries Ltd* [1978] VR 431, 441–2.
3. Victoria, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 25 June 2014, 2276 (Robert Clark, Attorney-General).
4. Note 3 above.
5. Note 3 above, 2277.
6. Former s134AC of the *Accident Compensation Act 1985* has been repealed to reflect the fact that there is no distinction between final and interlocutory decisions.
7. See s74.
8. See O.64A.
9. Victoria, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 25 June 2014, 2277 (Robert Clark, Attorney-General).
10. Note 9 above.
11. Note 9 above.
12. Note 9 above.
13. [2015] VSCA 47.
14. [2014] VCC 1833.
15. Note 14 above, at [134].
16. Note 14 above, at [91].
17. [2013] VSCA 158.
18. Note 17 above, at [29].
19. Note 17 above.
20. Note 13 above, at [13].
21. Note 13 above, at [14].
22. Note 13 above, at [18]. The appeal was subsequently allowed in *Kennedy v Shire of Campaspe* [2015] VSCA 215.
23. See, eg, *Savino v Schieven* [2015] VSCA 67, [47]; *Haque v State of Victoria* [2015] VSCA 83, [44]; *Finch v Arnold Thomas & Becker Pty Ltd* [2015] VSCA 86, [43].
24. [2015] VSCA 105.
25. Note 24 above, at [82].
26. Note 13 above, at [5].
27. Note 13 above, at [11].
28. See *Judiciary Act 1903* (Cth) s35A.