Roger Traves QC (RT): Good evening, my name is Roger Traves. Thank you for joining us and welcome to this webinar 'Appeals: When is a Trial Judge "Wrong"?'. The topic is intended to promote discussion of the nature of and the limitations on appellate review, and a comparative analysis of the law in the United Kingdom and in Australia.

But first I should introduce our speakers. We are very privileged indeed to have with us the Right Honourable Sir Richard McCombe, Lord Justice of the Court of Appeal of England and Wales. Lord Justice McCombe was called to the Bar at Lincoln's Inn in 1975 and was appointed Queen's counsel in 1989. He was appointed to the High Court in 2001 where he served on the Queen's Bench Division. In 2012 Sir Richard was appointed a Lord Justice of Appeal and to the Privy Council. He has agreed to provide for us a perspective on the scope of appellate review in the United Kingdom, and there is no one better place to do so. Lord Justice McCombe has a particular penchant for languages. He speaks no fewer than six of them. Thank you so much, My Lord. I have always wanted to be able to say that. Thank you so much, My Lord, for agreeing to participate in this webinar. It is no coincidence that we have with us this evening, not only you, but almost 400 registrants.

Sir Richard McCombe (RM): Thank you very much. It is an honour to be asked and it is lovely to travel 16,000 kilometres to the Australian sunshine.

RT: Thank you very much Judge.

Mohammed Jaamae Hafeez-Baig is our other speaker. Jaamae is a barrister in our chambers Level Twenty Seven. He practices in commercial and Public Law, encompassing a wide range of subject areas and experience. Jaamae holds a Bachelor of Laws with First Class Honours from the University of Queensland and a Master of Laws from that same university. He holds the University Medal. He holds a Bachelor of Civil Law with Distinction from the University of Oxford. Jaamae is co-author of the forthcoming Federation Press book 'The Law of Tracing' and he is a former Associate to his Honour Justice Keane AC at the High Court of Australia. Thank you, Jaamae for agreeing to present for us this evening.

Mohammud Jaamae Hafeez-Baig (MH): Thank you, Roger.

RT: In the decision of *State of Queensland v Masson* delivered by the High Court recently, the High Court restored the decision of the trial court that an ambulance officer did not act negligently in the treatment of a young woman suffering from acute asthma. Sadly, the woman suffered irreversible brain damage after a terrible attack. She died many years later, but not after a significant amount of time and money as well as the love of her parents and relatives had been spent with her. The proceedings were brought by her estate against the State of Queensland. The case ultimately turned on whether the oral evidence of the treating

ambulance officer should be accepted in the face of an earlier written statement by him which was, on one view of the statement, inconsistent with his oral evidence. The trial judge accepted the oral evidence having watched the witness carefully.

The Court of Appeal in overturning the decision of the trial judge found the oral evidence inconsistent with the written statement and preferred the evidence from the earlier written statement to the oral evidence of the witness.

The High Court reinstated the decision of the trial judge and found that the appeal court had acted beyond its appellate role by failing to have due regard to the opportunity of the trial judge to observe and hear the witness and to form a view based on his assessment of the witness' credibility.

The decision is a reminder to us all about the limitations of appellate review in respect of factual findings of a trial court, particularly in circumstances involving oral evidence and findings by trial judges based on the observations of a witness. *Masson* was a case involving an appeal on findings of fact. As we shall see, the scope of appellate review depends on the nature of the decision being challenged.

APPEALS – A PRIVATE & PUBLIC FUNCTION

RT: Appeals are characterised by a tension. On the one hand appeal courts have functions that they are required by statute to discharge. Appeals serve both the public interest in the creation of guidance for the lower courts and in the in the correction of errors. And they serve private interests by the correction of errors in particular cases.

On the other hand, appellate courts must observe the natural limitations that exist in an appeal proceeding wholly or substantially on the record and must give due respect to the advantages enjoyed by the trial judges. Those limitations, which are recognised in the authorities, include that the appellate court will not have seen the witnesses or have been able to assess their credibility, that the appellate court reading the transcript cannot fully share the feeling of the case that we all have when we sit through it. The appellate court does not usually have time to read all of the evidence of the trial, and nor is the appellate court ordinarily taken to all of the evidence. Finally, the appellate court does not usually have the benefit of an extended period of time to reflect upon the evidence and draw conclusions from it.

As the High Court said in *Fox v Percy*, "The difficult question in this area is how to resolve the dichotomy between appellate obligations and appellate restraint." How this dichotomy is resolved determines not only how appellate courts decide appeals but also how solicitors and council prepare the case and argue the appeal. The balance has been struck in a slightly different way in Australia and in England.

Jaamae.

THE COURT OF APPEAL'S FUNCTION

MH: Thanks very much Roger.

The first topic we are going to discuss is the respective functions of the Queensland Court of Appeal and the English Court of Appeal. In relation to the Queensland Court of Appeal, the starting point is the *Uniform Civil Procedure Rules* 1999 and in particular rule 765(1). What that rule tells us is that an appeal to the Queensland Court of Appeal is by way of a rehearing. Now rehearing is one of those tricky words in the law which has a number of different meanings, and the particular meaning depends on the context in which it is used. But in the context of the UCPR and in the equivalent provisions in every Australian state and territory 'rehearing' has a very settled meaning and it has a defined incidence. In particular, the word 'rehearing' in this context means that the Court of Appeal determines whether there has been an error in the trial judge's decision. Despite the word 'rehearing' sounding like the Court of Appeal conducts a *de novo* hearing, where it considers the matter afresh, in fact, the court's task is to conduct a real review of the trial judge's reasons and the evidence and to see if it can identify any error. That error may be a legal error, a factual error, or a discretionary error. But the Court of Appeal cannot exercise its powers unless some error is established.

Now that error has to be established either by reference to the trial judge's reasons and the evidence before the trial judge, or by reference to any fresh evidence which the Court of Appeal allows the parties to deduce. There is power to do that in rule 766. If the Court of Appeal is satisfied that an error is established it is required to give the judgment that it considers ought to have been given in the court below and it has all of the powers of that court for that purpose.

RT: Thank you, Jaamae. Lord Justice McCombe.

RM: Thank you Roger. Thank you Jaamae.

The referencing in your materials to the *Civil Procedure Rules* from England and Wales are important because they reflect a change in our emphasis, if I put it that way, in the approach to appeals that took place in the 80s and 90s because of the huge pressure on the lists in the courts, and particularly appeal courts. We got rid of, rightly or wrongly, the right to appeal from a final order, and you always had to get leave or as it is now called 'permission' to go to the appellate court.

In the *Civil Procedure Rules*, the rules specifically changed the emphasis of the criterion for, or the nature of the appeal hearing, to one of review rather than rehearing, which was the word

used in the old *Rules of the Supreme Court* in 1965, as amended. Now, if you care to look it up, you will see that an appeal before us is now always a review. That is meant there has been a slight shift in emphasis. The early cases, if you look for example at the one that cited in your materials *El Du Pont* [*De Nemours & Company v S.T. Dupont*], Lord Justice May said at one end of the spectrum "There will be decisions of primary facts reached after an evaluation of evidence where credibility is an issue and purely a discretionary decision. Further along the spectrum, multifactorial decisions are dependent on inferences and balances of documentary material."

We have seen several cases since, up to 2016. Justice Sales said, in a case called *Smech Properties* [*Ltd v Runnymede Borough Council & Anor*], "The task of this court is to ask whether the judge had legitimate and proper grounds for reaching the decision she did, rather than simply for this court to approach the matter completely afresh, and make up its own mind without regard to what the judge decided." So the emphasis, if I put it that way, has somewhat changed between the rules of the Supreme Court as early cases and now very much the emphasis being on the nature of a "review hearing" as the *Civil Procedure Rules* provide.

RT: Thank you, Sir Richard. Having heard from Lord Justice McCombe and from Jaamae, it is clear that there are a number of similarities in the procedures adopted by the two courts. A 'rehearing' in the Queensland Court of Appeal and a 'review' in English Court of Appeal are both procedures for the correction of error. In each case the appellate court considers whether the trial judge erred by reference to the evidence before the trial judge and any additional evidence or fresh evidence produced with permission. Neither procedure involves what might be called rehearing *de novo* where the appellate court considers the matters afresh with the same witnesses and further witnesses might again be called, as if it were before the court for the first time.

The important point, at the risk of belabouring it, is that the appeal barrister, the legal team, must point to error on the part of the judge. It is not infrequent that submissions will commence with the proposition, "Your Honours, these are the errors to which we point." And it is a fair question for the Court of Appeal when the matter is first called on to ask indeed, what are the errors? It is not a matter of simply asking the court, would you come to a different view?

WHAT AMOUNTS TO AN APPELLABLE ERROR?

RT: That said though, what amounts to an appellable error, that is what sort of areas can be the subject of appeal, cannot be determined without directing attention to the nature of the decision which is the subject of the appeal. There are four types of decision which are relevant here. First findings of fact, of which *Masson* was one example. Secondly, determinations of law. Thirdly, discretionary decisions. Fourthly, decisions known as evaluative decisions. Each of these decisions carry with them separate tests and considerations when determining whether

or not there was an appellable error to which a party might point. We will deal with each of those in turn. Jaamae, I will ask you to start. Thank you.

APPEALING FINDINGS OF FACT

MH: Thank you, Roger.

The first of the four types of decisions is what we have called findings of fact. An example of that is where in the trial court there is conflicting testimony between two witnesses and the trial judge has to decide which witness is to be believed on a particular point. Another example is where a witness gives testimony which conflicts with contemporaneous documentary evidence. The trial judge has to decide whether to believe the witness or whether to believe the documents, that is another example of a finding of fact.

In Australian law, the High Court has adopted quite a strict standard for overturning such findings of fact. In particular, I am referring to those findings of fact which are affected by the trial judge's impressions of either the reliability or the credibility of witnesses. In a series of decisions, the most important of which is *Fox v Percy*, which will be on the list of citations, the High Court has said that there are really only three circumstances in which a Court of Appeal should ever overturn findings of fact of this type, i.e. of the type that are affected by having seen the witnesses. The first circumstance is where the findings are demonstrated to be wrong by incontrovertible facts or uncontested testimony. The second is where the findings are glaringly improbable. The third is where the findings are contrary to compelling inferences.

Those three categories have been reaffirmed time and time again by the High Court in recent years in the *Robinson Helicopter* [*Co Inc v McDermott*] case, in *Lee v Lee*, and most recently in the case with which Roger opened, *Queensland v Masson*.

Importantly, in a case called *Lee v Lee* last year, the High Court made clear that the appellant restraint which is required doesn't just extend to primary findings of fact, it also extends to secondary findings of fact which are based on a combination of the trial judge's impressions and inferences from other primary facts. The example which the court gave, which you will all be familiar, is in cases involving unconscionable conduct, in the Ahmadiyya sense. What the court said was that proof of the interplay between the dominant and subordinate position in a personal relationship depends on a) inferences drawn from other facts, and b) an assessment of the character of each of the parties. And so, that is a finding of fact which isn't a primary finding of fact, it is a secondary finding of facts. But the appellant restraint still applies because it is a finding of fact which is affected by the trial judge's assessment of the witness' credibility or liability. And that is a really important point.

RT: Thank you Jaamae. Lord Justice McCombe, appeals against findings of fact in the UK.

RM: The test is very similar, the threshold is very high. I was interested in Jaamae's comment that there is slight merging, which you will see in one of the references I am going to come to about cases where you are drawing inferences from findings of primary fact where the matter becomes much more blurred. But the primary rule, coming strangely enough from two Scottish cases, I shouldn't say strangely enough, we all like the Scottish cases, they are very influential with us too. The best are McGraddie v McGraddie and *Henderson v Foxworth Investments Ltd*, both Supreme Court decisions from Scotland. I think the summary can be taken from what Lord Reed said in the *Henderson* case, "The appeal court should only interfere with a finding infected by some identifiable error, material error of law, making a critical finding of fact which has no basis in the evidence, the demonstrable misunderstanding of relevant evidence, or demonstrable failure to consider relevant evidence, or the finding cannot be reasonably explained or justified."

I hope some of you might take the trouble to look at the decision of my good friend, the Lord Justice Lewison, in [*Fage UK Ltd v*] *Chobani* [*UK Ltd*]. He puts it so beautifully graphically, and it encapsulates entirely, I would say, the approach of the English Court of Appeal these days. Just note at the outset, he says that "Appellate courts have been frequently warned by recent cases at the highest level, not to interfere with findings of fact by trial judges unless compelled to do so." Note this bit, "This applies not only to findings of primary facts, but also to the evaluation of those facts and to inferences be drawn from them." The reasons are many, I will give just two of them, "the expertise of a trial judges is in determining facts"; I love this one "The trial is not a dress rehearsal, it is the first and last night of the show"; and then finally, this is another frequent quotation raised in later cases, "In making his decisions, the trial judge will have regard to the whole of the sea of evidence presented to him, whereas the appellate court will only be island hopping". Many is the time that I have sat in the court whenever I or one of my colleagues has said Mr. So-And-So, you are just island hopping. You are not seeing the whole sea." I think that summarises precisely the, I'm afraid, practical approach that we now have to take to the voluminous evidence, paper and all that we get to see on an appeal hearing.

RT: I say judge, an accusation of "island hopping" from the bench sounds like a death knell for an appeal.

RM: Well, it is not a good start, let's put it that way.

RT: Judge, I am assuming that your good friend Lord Justice Lewison is the author of that wonderful book, on 'The Interpretation of Contracts', for which there is now an Australian equivalent, which he also authored.

RM: He is. He also got a staggeringly high First in the English tripos at Cambridge before he decided to go to the Bar and do the law.

RT: Well, thank you very much judge. It appears from what you have said in respect of findings of fact that the appellant restraint exercised by the English Court of Appeal extends to findings of fact that are not based on the trial judge's impressions of credibility and reliability of witnesses alone. In fact, they go further than the restraint which is generally shown by the Australian court. Would you agree with that?

RM: I would. That is the multifactorial element that even Lord Justice May was identifying back in 2006, I think it was. There is a quotation, which perhaps I will give you a little bit later, from Lord Hoffman in one of the cases in the mid-range between then and now. It is a question of advantage, what advantage did the trial judge have? If we see that he or she had the distinct advantage, well, back off, unless there is a sort of identifiable error that Jaamae was talking about in relation to our cases.

RT: Thank you.

APPEALS FROM DETERMINATIONS OF LAW

RT: All right, can I turn into the appeals from the second category of decisions? And we can deal with this briefly. But Jaamae, they are appeals from determinations of law.

JH: That is right. The second category is really just pure questions of law. The classic example of this sort of decision is a decision on the construction of a statute, or a contract, or a will. And that statute, contract, or will has one meaning and one meaning only. If the Court of Appeal decides that the trial judge picked the wrong meaning, then they are bound to allow the appeal and to substitute their meaning. So the standard of appellate review, for these sorts of decisions, is simply correctness - the trial judge is right or the trial judge is wrong, there is no appellate restraint involved. I should say that is so even though their decisions on which reasonable minds may reasonably differ.

Another example of this, in the Australian context, is the question of whether a particular statute is unconstitutional. We know from the many, many split decisions in the High Court that that is a question on which reasonable minds will regularly differ. But at the end of the day, there is only one answer, one correct answer, to that sort of question. I would assume the position must be the same in England. Is that right Lord Justice?

RM: It is indeed. I do think there is a cigarette paper's difference between us on those points, looking at the materials you have kindly given us. I was interested to note the quotation you referred to me from Justice Edelman of your High Court, who I had the honour of calling to the benches as an Honorary Bencher in Lincoln's Inn when I was Treasurer last year. It was great to see him, I made some comments about teenage High Court judges in Australia, which he grinned at.

RT: All right, thank you Jaamae and Judge.

APPEALS FROM DISCRETIONARY DECISIONS

RT: Can we move then to the third category of decision? And that is appeals from discretionary decisions. Jaamae, can I ask you to lead on that, please?

JH: Thanks, Roger.

This is where things start getting a bit more interesting. Discretionary decisions, which is the third of the fourth type of decision. Generally speaking, they are decisions where no one consideration is determinative of the outcome. Usually, these are the types of decisions where the trial judge has to apply broad principles to a range of relevant facts and circumstances.

The most obvious example of this is interlaboratory decisions on practice and procedure. For example, the decision as to whether to allow a party to amend a pleading late in the day, and we all know that that takes place by reference to the considerations set out in *Aon Risk* [*Service Australia v Australian National University*]. Another example is the decision of whether or not to grant an interlocutory injunction or a decision about whether or not to grant costs, which we all know lie in the court's discretion.

Interestingly, another one, which not many people think about as discretionary is the decision of whether or not to grant bail. In Australia, it is not enough that the appellate court would have reached a different answer to the particular question. The classic statement is in *House v The King* by Justices Dixon, Evatt and McTiernan. I think this might be the, or one of the, most cited decisions in Australian law. What their Honours said was that in order for a Court of Appeal to overturn a discretionary decision the appellant has to establish one of five types of error. The first is the trial judge acted on the wrong principle. The second is the trial judge allowed extraneous or irrelevant matters to guide him or her. The third is the trial judge mistook the facts. The fourth is that the trial judge failed to take into account some material consideration. And the last catch all category is that the trial judge's decision is unreasonable or plainly unjust.

So, the Court of Appeal can infer that some error took place. But the important point is that it is not enough that the Court of Appeal would have reached a different conclusion. Can I add an aside, there is also a line of High Court authority which treats a little bit separately interlocutory decisions on matters of practice and procedure. That lot of authority says that where such interlocutory decision is concerned with practice and procedure and there is no question of general principle some particular caution should be exercised in reviewing that sort of decision. So, it seems that when you are dealing with that sort of case even more appellate restraint should be shown than the otherwise general rule applicable to all discretionary considerations.

RT: Thanks Jaamae. Lord Justice McCombe, appeals against exercises of discretion in the UK.

RM: Again, I think one would find the approach virtually identical to that described by Jaamae a few seconds ago. And it has not changed. The position has been that since I was called to the Bar in 1975 and continuing. No good that the appellate court might have taken a different decision itself. The same sort of criteria are applied by our appeal courts in assessing whether to interfere with a discretionary decision of a first instance judge, classically on interlocutory injunctions and the like. You are not going to get too far unless there has been some error of principle.

There is one quotation, which Jaamae kindly picked out of the sea of authorities, if I put it this way, on that this point from Justice Brooke, in a case called *Tanfern v Cameron McDonald* back in 2000. It would apply today just the same way. He said that "The epithet wrong is to be applied to the substance of the decision made in the lower court. The appeal is against the exercise of a discretion. The decision of the House of Lords in *G v G* warrants attention. In that case, Lord Fraser of Tullybelton said 'The appeal court should only interfere when it considers that the judge of first instance may prefer an imperfect solution, which is different from an alternative imperfect solution, which the Court of Appeal might or would have adopted but has exceeded generous ambit within which a reasonable disagreement is possible.'" I think that would be much the same. There are various nuances in the authorities one could cite saying much the same thing. But on discretionary decisions, it is a question of really error of principle. It is almost as a Wednesbury test. I wouldn't like to use that exactly. It is that sort of approach to it, I would say.

RT: Thanks judge.

APPEALS FROM EVALUATIVE DECISIONS

RT: All right, can I move then to the fourth type of decision, and the discussion will take a little longer on this topic because it is a little more involved. The fourth type of decision for discussion relates to appeals from evaluative decisions.

Evaluative decisions are decisions involving the application of an imprecise legal standard, to facts as found. In England, such decisions are sometimes referred to as decisions involving the exercise of judgment, value judgments, appraisals or evaluations. This type of decision has also sometimes been referred to as a multifactorial decision, as a mixture of fact and law, or as a kind of jury question about which reasonable people may reasonably disagree.

In a case called *JSC* which will be in some notes that we will send you, if we haven't already done so, Lord Justice Leggatt distinguished between findings of primary fact and factual

findings which involve evaluating and drawing inferences from such primary facts, though His Lordship did note that the distinction was one of degree.

Examples of evaluative decisions include whether certain conduct falls within a statutory prohibition on conduct that is unconscionable, or did the defendant fail to exercise reasonable care, or is the proceeding an abusive process? Australian and English courts have taken different approaches to appellate review of evaluative decisions. Indeed, it is in the field of evaluative decisions that there would appear to be the most difference between English and Australian law. Jaamae.

JH: Thanks very much, Roger.

I personally think this is the most interesting part of this topic. It is the part where you can see the most divergence between what we do and what the English courts do. To my mind, it all comes down to a different judgment as to the advantages which are enjoyed by the trial judge, and I will explain what I mean by that in just a moment.

To start with the Australian position. In summary, there are only two standards of appellate review in Australian law. There is the standard which is applicable to discretionary decisions, which comes from *House v The King*, which I explained a moment ago. And there is the correctness standard. That is, is the trial judge's decision right or wrong? Evaluative decisions are not considered to be discretionary decisions in Australian Law. So the appropriate standard is the correctness standard. What that means is that the Court of Appeal is not required to defer to the trial judge's decision, appellant restraint is not necessary. It simply has to consider the question which the trial judge was asked to consider. If it comes to a different view, then the Court of Appeal must allow the appeal and substitute its decision for the trial judge. In this way, it is actually a lot like determinations of pure questions of law.

The leading case on this, and one of the most important cases and appeals in Australian jurisprudence, is a decision called *Warren v Coombes*. That was about negligent driving. The issue before the trial judge was whether the respondent had failed to exercise reasonable care. The trial judge held that the respondent had not failed exercise reason, he was not negligent.

In the Court of Appeal, the Court of Appeal deferred to the decision of the trial judge and it required the appellant to establish some error in the approach of the trial judge. It essentially said that it was not enough that the Court of Appeal would have come to a different conclusion. That was then criticised by the appellant when they later went to the High Court.

In the high court, the question the Court posed for itself is, what duty does an appellate court have when questions of credibility have been decided? And the matter which remains for

decision is what inferences should be drawn from particular facts which have been found and are no longer in contest. To put that in other words, what is the duty of an appellate court when all the primary facts have been found and the only question left is what inferences should be drawn from those facts? Or to use the language of some of the English cases, how should those facts be evaluated? What the High Court said was that, in general, an appellate court is in just a good a position as the trial judge to determine what inferences should be drawn from facts, which are undisputed, although they were once disputed, have now been decided by the trial judge. I think that is really the key point of difference between English law and Australian law in this particular area, which is the holding by the High Court that the trial judge and the appellate court are in the same position.

The court went on to say that the Court of Appeal will give proper weight to the trial judge's decision. But if it is convinced the trial judge has erred, that they would have come to a different conclusion, then it must allow the appeal and substitute its judgment. If I can quote one passage for you, the court said, the Acting Chief Justice Gibbs and Justices Jacobs and Murphy said, "The duty of the appellate court is to decide the case, the facts, and the law for itself. In so doing, it must recognise the advantages enjoyed by the judge who conducted the trial but if the Judges of Appeal consider that in the circumstances the trial judge was in no better position to decide that particular question than they are themselves, or if after giving full weight to his decision they consider that it was wrong, they must discharge their duty and give effect to their own judgment. Applying this to the facts, the court held there was no reason in logic or policy to treat the question of whether the respondent had failed to exercise reasonable care as one which is purely within the province of the trial judge or in respect of which the trial judge had any significant advantage. Remember that, because when the Lord Justice speaks I am sure he will explain what the English courts approach would be to a question of reasonable care.

I do want to raise one more point. There was an argument which was put to the High Court in *Warren v Coombes*, which was that trial judges often differ, and differ markedly, in these sorts of questions. For that reason, appellate courts should be shy to interfere with these sorts of decisions. The High Court actually turned that on its head and said, that is in fact not a reason for more power restraint. It is a reason for less upheld restraint because the resolution of these questions by different appellate courts, they said, will ultimately lead not to uncertainty but to consistency and predictability.

Finally, to give you one more example, of an evaluative decision called the *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd*, and it concerned s 21 of the *Australian Consumer Law* which prohibits conduct that is unconscionable. That is an evaluative decision. All members of the High Court expressly or implicitly accepted in that case that the standard is one of correctness. It is not the standard which applies to discretionary decisions. The Court of Appeal must decide whether the conduct is

unconscionable and if it comes to a different conclusion than the trial judge it must substitute that conclusion.

You can see that as with reasonable care in *Warren v Coombes*, and as with unconscionable conduct in the *Berbatis* case, the position the court has come to is that you are either in breach of the relevant norm or you are not. If the Court of Appeal takes a different view then the appeal should be allowed.

RT: Thanks Jaamae, that was a really useful explanation. Lord Justice McCombe, the situation in respective appeals against evaluative decisions in the UK.

RM: Well yes. UK, I would exercise caution, England and Wales here, but there we are.

I think there is to be seen in the two different strands of authorities in Australia and in England and Wales there is certainly a distinct difference of emphasis. Even in quoting the Australian decision, however, I think Jaamae mentioned one of the High Court justices saying that much depends on whether there is a real advantage available to a trial judge or first instance judge on questions of evaluation.

Of course, questions or evaluation cover all sorts of ranges. There is negligence, there is proportionality. There is, for example, in our company law, I don't know whether you still have the same thing in Australia, unfair prejudice to a minority shareholder, for example. There is a chap called McCombe who looked at evaluative decisions in overall and tried to pull things together in a case called [*Re*] *Sprintroom* [*Ltd*], which is right at the bottom of your list of authorities, back last year. But a much higher authority than that, I might just go to what Lord Hoffman said in *Biogen* [*Inc*] *v Medeva* [*Plc*] in 1997, which I think does show the distinction of emphasis. He said this, "The need for appellate caution and reversing the judge's evaluation of the facts is based upon much more solid grounds of professional courtesy. It is because specific findings of facts, even by the most meticulous judge, are inherently an incomplete statement of the impression aided by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, nuance, which time and language do not permit exact expression, which may play a most important part in a judge's overall evaluation. It would, in my view, be wrong to treat *Benmax* [*v Austin Motor Co*]" that is a 1955 case much in the same line as the Australian primary authorities to which Jaamae referred, "It would, in my view, be wrong to treat *Benmax* as authorising or requiring an appellate court to undertake a *de novo* evaluation with facts in all cases in which no question of the credibility of witnesses is involved." This is the important passage, I think, "The application of the legal standards such as negligence or obviousness, involves no question of principle but it is simply a matter of degree. An appellate court should be very cautious in differing from the judge's evaluation."

Again, there is a reference to that sort of principle still being applied even in cases and largely perhaps on a high volume of documentary evidence. In that case of *Smech v Runnymede Borough Council* mentioned at the outset in a different context, and what I said in a case called [*R*] *Bowen* [*v Secretary of State for Justice*] back in 2018, referring to the Lord Justice Sales' judgment, I said this, "It seems to me that Lord Justice Sales was addressing the sequences of reviewing a first instance judge's assessment of primary facts, even where, as in our case the evidence before the court below is entirely in writing, all depend on the circumstances of the case and what opportunity the court has in reality to improve and correct the overall assessment of the evidence before." As I say, that I did try to summarise, pulling a few threads together in that last case, which I won't bore you in this meeting, a case called *Sprintroom*, which pulls a few threads together, I hope usefully for our practitioners. Difference of emphasis. I think you are right Jaamae, there is that but it will turn in the end with us, and with you by the sounds of things, to questions of advantage which the trial judge may or may not have had in assessing the evidence. But Lord Hoffman's comments in 1997 were pretty strong.

RT: Judge, Lord Hoffman's reservation that it is difficult for a judge to completely segregate a finding of fact from the evaluation of finding of fact as a whole is a really interesting one, that judges would be in a unique position to comment on. As I understand it, the proposition would be that you cannot completely separate the process of findings of fact and its evaluation. That it is an iterative process which occurs all at once and that it is artificial as Lord Hoffman would say to think that you can find fact and say and then to move to its evaluation is two separate steps.

RM: Yes, I think that is right Roger, if I may say so. I think it also reflects that spectrum that Lord Justice May was talking about back in 2006, of pure fact, credibility, law, and then you know, the colour spectrum shifts all away along the line. There would be different advantages for a trial judge at different stages along that spectrum line. It is not easy to explain and it is not exactly as clear perhaps as one would like but that is what the arguments tend to turn on I find in appeals that are before us, that what advantage did the trial judge have. Often there is, even in a documents case, a vast range of stuff. An assessment of the persuasiveness say of arguments of expert evidence on witness statements, which I had not too long ago, and questions about the valuation of a particular property which was most convincing on paper. The judge took one way, well, one might have taken a different view, but he had to take that view with the rest of the evidence upon which that expert evidence turned. That is the sort of argument we tend to get into these days hearing appeals day to day on all sorts of things, just like that unfair prejudice case I was mentioning right at the end, *Sprintroom*.

RT: Thank you Judge. In summary, with respect to evaluative decisions, the difference between Australia and English law appears to be stark. Australian law, as set out in *Warren v Coombes*, takes the position that generally an appellate court is in just a good a position as

the trial judge to decide on the proper inferences to be drawn from findings of primary fact. English law on the other hand takes the view that the reasons for appellate restraint in relation to findings of primary fact apply equally to findings which involve evaluating and drawing inferences from those primary facts.

One way to illustrate the difference in approach is to compare two recent similar cases. The decision of the High Court in the *Minister of Immigration and Border Protection v SZVFW* which I will ask Jaamae to explain and the decision of the United Kingdom Supreme Court *in R (on the application of AR) v Chief Constable of the Greater Manchester Police* which I will ask Judge for you to address.

Jaamae.

JH: Thanks very much Roger.

SZVFW, can I start out by commending this decision to all the attendees. It is one of those rare decisions which contains a beautiful summary of this entire area of the law. Can I recommend in particular the judgment of Justice Gageler which explains both the history and operation of the two strands of appellate review which exist in Australian law.

In brief, the facts were that a couple had applied to the Minister for protection visas. Those applications had been rejected by a delegate of the Minister, the couple had then applied for review in the Refugee Tribunal. In the Refugee Tribunal, the tribunal had invited the two applicants in to make submissions and to appear at hearings a number of times and they had not responded. Ultimately, the Tribunal went ahead and affirmed the decisions of the Minister's delegate.

The applicants then sought a judicial review of the tribunal's decision in the Federal Circuit Court and the ground of the review was that the decision was legally unreasonable, what used to be called *Wednesbury* unreasonableness. In the Federal Circuit Court, the judge held that the decision was legally unreasonable.

The Minister then appealed to the Full Court of the Federal Court and in that court some attention was given to the nature of the appeal to that court. The Court held that it was incumbent on the Minister to demonstrate some sort of error in the approach which the trial judge had taken to the question of whether the administrative decision was legally unreasonable. In was not sufficient that the Full Court of the Federal Court might have reached a different conclusion than the trial judge. That is very similar for appeals from discretionary decisions. The Court was not satisfied the trial judge had erred in that way so they dismissed the appeal.

The Minister then appealed to the High Court. The interesting issue in the High Court was, what approach should the Full Court of the Federal Court have taken on the appeal? All five members of the Court held that the Full Court of the Federal Court should have considered for itself the question of whether the administrative decision was legally unreasonable and if it differed from the decision of the trial judge it should have given effect to it. In substance, the Court was saying that it is sufficient if the Court of Appeal of the Full Court would have come to a different conclusion and it is duty bound to give effect to that conclusion. In fact, all five judges in the High Court went on to consider whether the decision was legally unreasonable and all five of them held that is it was not. Which is the opposite conclusion to what the trial judge reached.

RT: Thank you Jaamae. Lord Justice McCombe, the decision in R in the application of *R (on the application of AR) v Chief Constable of the Greater Manchester Police*.

RM: It is interesting you picked that one out as I think it was Jaamae who had his interest excited by the difference between the *Minister for Immigration* and this one.

This was one where McCombe's homework was slightly corrected by the Supreme Court. It was a case where the claimant in judicial review had been acquitted of rape in the Crown Court and subsequently for what is called an Enhanced Criminal Record Certificate in connection with…In his past position he had been a technical college lecturer I think, he was also a taxi driver in more exacting circumstances. He wanted to go back to that and the rape acquittal, an accusation of rape against him while driving a taxi. The certificate was issued with the rape charge and the acquittal noted on the certificate, to which some of you may think may be a kiss of death perhaps by way of application for employment. Another certificate was issued which also contained the same information and the certificate was challenged in the Court of Judicial Review. The trial judge concluded that although disclosure of the acquittal interfered with the claimant's rights to a quiet family life as ratified by the European Convention, it was reasonable and proportionate given the need to protect the vulnerable, young, students and potential passengers in the taxi.

The claimant appealed. We concluded that we should only consider the issue of proportionality for itself where we found that the trial judge had made a significant error of principle. We found that the judge had made no such error and dismissed the appeal. The question turned again on what was the standard of review for the question of proportionality.

The Supreme Court held, there is a slightly different emphasis, I don't think my homework was corrected too much, that is would not be sufficient for the Court of Appeal that it would have reached a different conclusion. However, the trial judge's decision might be wrong because of an identifiable flaw in the judge's reasoning such as a gap in logic, a lack of consistency, or failure to take account of some material factor which undermines the cogency of the

conclusion. Net result? The appeal was also dismissed in the Supreme Court, a slightly different test of the criterion for the challenge of proportionality decision which had been taken. A contrast, I see Jaamae, that is interesting.

RT: It seems that the Australian courts then, the appellate courts, will be permitted to interfere with evaluative decisions and the appellate court permitted to substitute its own decision effectively for that of the trial court where it takes the view that the decision is wrong. The approach in the courts of England and Wales is more restricted and it will be necessary to point to some identifiable flaw in the trial judge's reasoning before the decision will be interfered with.

WOULD THE COURT OF APPEAL OF ENGLAND AND WALES HAVE DECIDED DIFFERENTLY THE CASE OF STATE OF QLD V MASSON?

We are running a little short of time so I wanted to move on briefly to the decision in *Masson* with which we began. Lord Justice McCombe, you will recall in *Masson* that the ambulance officer was said to be negligent by the plaintiff because the ambulance officer applied to the patient a drug called Salbutamol while not applying instead adrenaline. The ambulance service members were all given a manual which suggested in cases of severe asthmatic attacks where there was an imminent heart attack that the drug adrenaline should be applied in preference to any other drug. The ambulance officer though, in the particular circumstances of the case where the patient not only had a very high heart rate but a very high blood pressure, elected instead to apply a drug called Salbutamol which is the drug where the operative ingredient is what is used in puffers asthmatics use on a day to day basis. Unfortunately, the result was a disappointing one but by the same token there was found by the trial judge to be a reasonable body of medical opinion which supported the use of Salbutamol in those circumstances. The question became one, as I mentioned earlier, whether or not the ambulance officer had considered the use of adrenaline as the manual the ambulance officers had been given required he do. He said in his oral evidence that he did consider the use of adrenaline but then applied Salbutamol in the particular circumstances. An earlier statement that he made, albeit one five years after incident and some years before trial, on one view that he did not consider adrenaline at all but thought the manual said that he could not in fact apply adrenaline in the circumstances.

The trial judge accepted the witness' evidence that he did consider the use of adrenaline but the Appeal Court overturned that decision on the basis that the earlier, or prior, statement suggested that he thought in fact that at that time he was precluded from the use of adrenaline. The High Court overturned the Court of Appeal's decision finding that the Court of Appeal ought to have greater deference to the advantage of the trial judge in assessing the credibility of the ambulance officer when he said that he did indeed consider using adrenaline on the patient.

Do you think *Masson* would have been applied any differently in England and Wales? Do you think the Appeal Court would have been similarly constrained as the High Court found it should have been in *Masson*'s case?

RM: I think Roger that the decision in England would have been exactly the same for the sort of reasons I have been trying to alumbrate. It was a classic case of a judge assessing the evidence overall, assessing what that ambulance driver or paramedic exercised on the scene. He took a view and I think it would be very difficult for an appellate court to properly challenge or reverse that on an appeal.

It is very similar but in a totally different context to the type of result that was reached in *Henderson v Foxworth* about what was the consideration or a particular bargain, was it an undervalue or not? The Lord Ordinary in Scotland decided one way, the Extra Division of the House of the Court of Session decided differently and Lord Reed, Scottish Supreme Court judge, said no way, the trial judge was entitled to reach the decision he did. It was a very similar approach in a very different context. I think your case of *Masson* would have been decided precisely the same way by our Supreme Court if the same happened in our Court of Appeal.

RT: Thank you Judge.

We have just a moment left. Can I ask our hostess at Level Twenty Seven Chambers, I can see we have two questions which have been lodged.

APPELLATE PRINCIPLES IN THE AUSTRALIAN FEDERAL COURT

Tamara McCombe/Level Twenty Seven Chambers (TM): Yes. Thank you Roger and thank you speakers. There are actually three but the two most pertinent ones are, "My question is whether the principles discussed today apply equally in the Federal jurisdiction, and in the Supreme Court I assume in the UK?"

RT: Jaamae?

JH: My understanding is that the principles are the same in every intermediate court of appeal in the country. The main difference is in appeals to the High Court, which are a different type of appeal, where the court has to put itself in the shoes of the Court of Appeal and decide what the correct outcome should have been, but it can't receive evidence. There are various constitutional limits on what the Court can do. But as far as intermediate courts are concerned the principles, to the best of my knowledge, are the same in every Australian jurisdiction.

RT: And the other [question]?

PRACTICAL TIPS FOR REVIEWING & ADVISING CLIENTS ON POSSIBLE APPELLABLE ERRORS

TM: Does the panel have any practical tips for practitioners when reviewing the judgment to aid in identifying or advising a client on whether there may be an appellable error?

RT: That is a question where we encourage you to look at the notes. Tamara, have we sent the notes out yet?

TM: The case citations were but no notes have been circulated yet.

RT: Are we proposing to send further notes?

JH: Roger, I might have an answer to that question. I think, the most important thing is to work out what sort of decision you are appealing from and to be very clear about what sort of errors are actually appellable errors. We have set out the four different types of decision and what sorts of errors need to be identified for those decisions to be overturned at appeal. Can I also emphasise that the classifications are not always super obvious and it is worth researching the particular type of decision that you are proposing to appeal to work out what the standard is.

To give you an example, the Family Courts have power to alter the interests in a divorced couple in the Matrimonial Court of Property. Many of you will be familiar that the Court can make an order that is just an equitable, changing the parties' interests. That decision is in fact one that, if you appeal, the Full Court of the Family Court will apply the test applicable to discretionary decisions. You might not think that to be an obvious conclusion but that is the law. Knowing that will be of great assistance in actually working out whether there has been an error. Similarly, an assessment of general damages in common law is also a decision which attracts the discretionary standard of appellate review.

Finally, there are also some decisions where it is in fact not yet clear. One example of that is where the trial judge concludes that a proceeding is an abuse of process. The current authority in the Court of Appeal in New South Wales is that an appeal from that should also be determined on the test for discretionary decisions. It was recently before the High Court in a case called *UBS [AG] v Tyne* where all of the Court bar one left the question open. So, we don't know what the position is there but the current law is that the discretionary test also applies.

The important thing is to work out what is the type of decision you are proposing to appeal from and what sort or errors are appellable errors for the purposes for that type of decision.

RT: Thanks Jaamae. I think in terms of the categories that we have discussed, appeals against matters of law are easily identifiable. Appeals against matters of fact are readily identifiable.

Decisions involving inferences from facts, evaluative decisions, you need sometimes to have a feel for the decision in some respects, and in particular there is a grey area between what are classically regarded as evaluative decisions and decisions involving discretion.

For example, is the decision on the value of land in Australian law an evaluative decision or a discretionary decision? I think the authorities would favour the view that that is a discretionary decision. Likewise, a decision about the award of damages would typically be in Australian law one of discretion rather than an evaluative decision.

You need to be aware of that distinction and you need to know about the cases to talk about it, they are in the cases we will send to you. Justice Gageler referred to the point in *Minister of Immigration and Border Protection*, can I just read from that, "The line is not drawn by reference to whether the primary judge's process of reasoning to reach a conclusion can be characterised as evaluative or is on a topic on which judicial minds might reasonably differ. The line is drawn by reference to whether the legal criterion applied or purportedly applied by the primary judge to reach the conclusion demands a unique outcome, in which case the correctness standard applies or tolerates a range of outcomes in which case *House v The King* applies. The resultant line is not bright but it is tolerably clear and workable."

I think it is important, I think Jaamae is exactly right, that the critical thing is to identify the nature of the decision appealed against. In some respects there are some grey areas, particularly with evaluative decisions and discretionary decisions. Once that decision is made, apply the relevant tests, facts and law.

TM: Just one final question Roger. I know one person asked this and I am sure quite a few people are interested, what is the picture behind you and who is the artist?

RT: It has got a bit of a history. I can't tell you the artist because I can't read Russian. But when the Iron Curtain came down in 1989 there was a flood onto the European art market of Soviet political paintings. They were typically large and they bore characteristics of Soviet nationalism. This is a depiction of the Soviet invasion of the Kuril Islands at I think between the First and Second World Wars. You can see it is totally idealistic and unrealistic. You can see how the combatants have caps on and small bags that look like medicine bags and things. They don't really look like real soldiers, but I don't think that was the purpose of the painting. So I can't tell you the artist. It was painted before 1989 and painted by a citizen of the Soviet Union, or what was then the Soviet Union. I bought it, incidentally Judge, at an auction in London.

RM: Roger, send me a picture of the signature. I will try and get it for you because I can transliterate Russian into our script.

RT: I will do that.

TM: Thank you to all the speakers and to our audience for joining us.