Some aspects of judicial restraint in civil appeals

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[1] Appellate courts exercise judicial restraint as to the extent to which they are prepared to interfere with decisions reached by primary courts or tribunals. The extent of their restraint varies according to the nature of the primary proceeding and of the appellate jurisdiction concerned.

[2] The purpose of this paper is to identify the reasons why that is so, and the ways by which appellate advocates should proceed to identify, and therefore be in a position to deal with, the degree of such judicial restraint which will be encountered in any particular case.

[3] Some of the principles covered in this paper will not be new, but the experience of appellate courts has been that they continue to be inadequately appreciated or wrongly applied, especially by inexperienced appellate advocates. But some of the principles covered are relatively new and often overlooked, even by experienced appellate advocates.

[4] The first observation to be made is that, for reasons I have developed elsewhere, it is always necessary that appellate advocates familiarize themselves with the terms of the statutory provisions which confer the appellate jurisdiction which they invoke, which define the nature of the appeal, and which state the powers of the appeal court.[1] The extent of judicial restraint will not be an issue if the appellate court has no jurisdiction to enquire into the error which the appellate advocate suggests was made.

[5] Let us eliminate much of that enquiry from the start and commence by assuming the existence of a civil appeal to the Court of Appeal of the Supreme Court of Queensland from a final decision made by a judge of the trial division of that court who sat alone and without a jury. The right of appeal in question is that conferred on the appellant by s 62 of the *Supreme Court of Queensland Act* 1991, with the consequence that pursuant to r 765 of the *Uniform Civil Procedure Rules* 1999 the appeal is an appeal by way of rehearing.

[6] These are significant assumptions because, as Gageler J (as the Chief Justice of Australia then was) observed in *Minister for Immigration and Border Protection v SZVFW*, "appeals are creatures of statutes", and "incidents of appeals can vary from statute to statute".[2] Established case law describes the nature of the incidents of such appeals.

[7] One of the recognised incidents of an appeal by way of rehearing, is that the role of the appellate court is to conduct a real review of the record of the hearing below and of the primary judge's reasons with a view to determining whether the appellant can demonstrate that the order made by the primary judge was the result of some legal, factual or discretionary error.[3]

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1 *Civil Appeals* (2024) 1 QLJ 1 at 1 to 7.

2 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 per Gageler J at [29].

3 *Allesch v Maunz* (2000) 203 CLR 172 per Gaudron, McHugh, Gummow and Hayne JJ at 180–181 [23].

[8] In Australia, and unlike the position in Federal administrative law in the USA, appellate courts exercise no judicial restraint when reviewing a primary judge's conclusion as to the legal meaning of a legislative provision or the common law.[4] The appellate court regards itself in just as good a position as the primary judge to reach a view on what the law is. The position may be different, however, if the issue on appeal is a suggested factual or discretionary error. In such cases and to a greater or lesser degree the appellate court may exercise restraint against being persuaded of error.

[9] We can again turn to observations made by Gageler J in *SZVFW* for a neat encapsulation of why that must be so. His Honour observed (footnotes omitted):

> "Performing its obligation to conduct a "real review", the appellate court "must, of necessity, observe the 'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record". Limitations of that nature can include: "those occasioned by the resolution of any conflicts at trial about witness credibility based on factors such as the demeanour or impression of witnesses; any disadvantages that may derive from considerations not adequately reflected in the recorded transcript of the trial; and matters arising from the advantages that a primary judge may enjoy in the opportunity to consider, and reflect upon, the entirety of the evidence as it is received at trial and to draw conclusions from that evidence, viewed as a whole". The appellate court needs to be conscious that "[n]o judicial reasons can ever state all of the pertinent factors; nor can they express every feature of the evidence that causes a decision-maker to prefer one factual conclusion over another". The more prominently limitations of that nature feature in a particular appeal, the more difficult it will be for the appellate court to be satisfied that the primary judge was in error."[5]

[10] Let us pause there to consider the significance of his Honour's summary. Technology now exists which could be used to eliminate many of those limitations. Virtually every aspect of the trial could be digitally recorded from the point of view of the primary judge so that an appeal hearing could, in theory, be held in such a way that could make the members of the appellate court virtual spectators of the entirety of the primary hearing. In criminal appeals, whilst leaving room for exceptions justified by a particular forensic purpose, the High Court has actively discouraged appellate courts from usurping the role of the jury by seeking to make their own assessments of the credibility of a witness by watching a recording of the witness: see *Pell v The Queen* (2020) 268 CLR 123, [36]. Would a similar approach be taken to an attempt to have civil appellate courts usurp the position of the trial judge if the record of the trial included an audio-visual recording of a witness's evidence as well as a transcript record? While the case for an affirmative answer to that question is weaker for civil

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4 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 per Edelman J at [150], comparing the Australian position as to questions of statutory construction with that discussed in *Chevron USA Inc v Natural Resources Defense Council Inc* (1984) 467 US 837.

5 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 per Gageler J at [33].

appeals than criminal appeals, I think the answer should still probably in the affirmative, but the matter may not be free from doubt.[6]

[11] What amounts to "appealable error" in a judgment cannot be understood without reference to a standard of appellate review. Again, Gageler J explained in *SZVFW*:

> "Whilst the conception of error is integral to the conception of an appeal, what amounts to "appealable error" in a judgment cannot be understood without reference to a standard of appellate review. Subject to constitutional limitations, a standard of appellate review amounts to a legislative or common law allocation of decision-making authority between the trial court and the appellate court."[7]

[12] The two most common standards of appellate review are, on the one hand, the *House v The King* standard, and, on the other hand, the *Warren v Coombes* correctness standard.[8] It must be acknowledged that those two standards may not be the only standards of appellate review. Other considerations may affect the standard of appellate review in a particular category of case.[9] For example, the standard of appellate view of interlocutory decisions concerning questions of practice and procedure may, but will not always, attract a degree of added judicial restraint.[10] And, of course, the ordinary standard to be applied might be altered by the terms of the particular statute concerned.

[13] For present purposes, let us limit ourselves to a consideration of the *House v The King* standard and the *Warren v Coombes* correctness standard.

[14] The nature of the *House v The King* standard of appellate review is well understood. Where it applies, the appellate court will not interfere with the primary judge's decision merely because its members might have reached a different decision had they been sitting as a court of first instance. Indeed, appellate advocates will inevitably encounter resistance from an appellate court invited to form its own view on an impugned decision by a primary judge unless they have first sought to persuade the court of the existence of the requisite error. The application of the *House v The King* standard of review means that the appellate court will only entertain the possibility of preferring its own judgment to that of the primary judge if they have been persuaded that the exercise of the discretion below miscarried because of error.

[15] The standard derives from the following statement in the judgment of Dixon, Evatt and McTiernan JJ in *House v The King*:

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6 Cf *Appellate Court – civil rehearing and role and use of audio-visual records of witnesses at trial* paper by de Jersey CJ delivered at the Supreme and Federal Judges Conference Canberra on 26 January 2010 and, in the US context, Judge Jack M Sabatino, *The appellate digital deluge: addressing challenges for appellate review posed by the Rising tide of video and audio recording evidence*, 2024 96 Temple Law Review 11.

7 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 per Gageler J at [35].

8 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 per Gageler J at [37] – [41].

9 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 per Gageler J at [48].

10 *In re the Will of F B Gilbert (dec'd)* (1946) 46 SR (NSW) 318 at 323; *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 176-177; *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 78 [53]; *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at 664-665 [34]; *Adeva Home Solutions Pty Ltd v Queensland Motorways Management Pty Ltd* (2021) 9 QR 141 at [12] – [14].

> "It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance."[11]

[16] It is helpful to think of the demonstration of *House v The King* error as requiring the demonstration of either **specific error** by the primary judge (i.e. acting on a wrong principle; allowing irrelevant considerations to guide; mistaking the facts; failing to take into account relevant considerations) or **inferred error** by the primary judge (i.e. the outcome is so unreasonable or plainly unjust that error should be inferred even though it cannot be specifically identified).

[17] That distinction is significant. Appellate courts often receive submissions contending for specific error where the advocate contends that the primary judge gave "insufficient" weight to some aspect of the case or "inadequately" took account of some relevant consideration. Such submissions do not identify specific error and can really only be taken account in the context of a submission explaining why error should be inferred. Fraser JA has made this point in *R v Coutts* [2016] QCA 206 at [4]. Gotterson JA made the same point in *R v Minniecon* [2017] QCA 29 at [22]. Although those cases dealt with alleged error in the exercise of a criminal sentencing discretion, their Honours' observations are just as relevant to civil cases. In *Minniecon* Gotterson JA observed:

> "I preface my discussion of these grounds with the observation that, insofar as each of Grounds 1 and 2 contends that the factor referred to in it was not "adequately" taken into account, that is to say, did not accord sufficient weight to the factor, it does not articulate any error of the kinds described in *House v The King* as errors that vitiate the exercise of the sentencing discretion. Nevertheless, it remains open to the applicant to rely on an inadequate taking into account of the factor as causing or contributing to manifest excessiveness in the sentence in all the circumstances."

[18] The *Warren v Coombes* correctness standard of appellate review is also well understood. The leading High Court authorities are *Warren v Coombes;*[12] *Allesch v*

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11 *House v The King* (1936) 55 CLR 499 at 504-505.

12 *Warren v Coombes* (1979) 142 CLR 531 at 551.

Maunz;[13] *Fox v Percy*;[14] *Robinson Helicopter Company Incorporated v McDermott*;[15] and *Lee v Lee*.[16] Where the correctness standard applies, the appellate court will conduct a real review of the proceeding below and will substitute its own view for that of the primary judge if it is persuaded that the primary judge erred. It is critical, however, to appreciate that the fact that the appellate court's review proceeds wholly or substantially on the record means that there remains some degree of judicial restraint in relation to interference with a primary judge's fact-finding.

[19] The principles deriving from the High Court cases to which I have referred were recently summarised by the Court of Appeal in this way:

> "(a) On an appeal by way of rehearing, it is for the appellant to satisfy the appellate court that the order that is the subject of appeal is the result of some legal, factual or discretionary error.
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> (b) On such an appeal, the appellate court is bound to conduct a "real review" of the evidence given at first instance and of the judge's reasons for judgment to determine whether it should be so satisfied.
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> (c) If the appellate court concludes that the judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings.
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> (d) When determining whether a judge has erred in fact, in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge.
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> (e) However, in determining whether the judge has erred in fact, an appellate court is required to exercise restraint when invited to interfere with a primary judge's findings of fact, at least where those findings are likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence. Such appellate restraint applies not merely to findings of primary facts but also applies to findings of secondary facts which are based on a combination of these impressions and other inferences from primary facts.
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> (f) In such cases, a finding of fact is not to be set aside because an appellate court thinks that the probabilities of the case are against – even strongly against – that finding of fact. The finding must stand unless it can be shown that the trial judge "has failed to use or has palpably misused [his or her] advantage" or has acted on evidence which was "inconsistent with facts incontrovertibly established by the

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13 *Allesch v Maunz* (2000) 203 CLR 172 at 180-181 [23] per Gaudron, McHugh, Gummow and Hayne JJ.

14 *Fox v Percy* (2003) 214 CLR 118 at 127 [26]-[27] per Gleeson CJ, Gummow and Kirby JJ.

15 *Robinson Helicopter Company Incorporated v McDermott* (2016) 90 ALJR 679 at [43] per French CJ, Bell, Keane, Nettle and Gordon JJ.

16 *Lee v Lee* (2019) 266 CLR 129 at [55] per Bell, Gageler, Nettle and Edelman JJ.

> evidence", or which was "glaringly improbable", or which was "contrary to compelling inferences." [17]

[20] The proper application of the correctness standard is critical to any attempt to persuade the Court of Appeal that a primary judge erred in the process of fact-finding. On the one hand, the correctness standard requires the Court of Appeal to conduct a real review to determine whether there was error and there will undoubtedly be circumstances in which the appellate court is in as good a position as the primary judge to determine the facts or draw inferences from them. But where that is not so, the appellate advocate must squarely grapple with the significant burden of overcoming the judicial restraint articulated in the last two subparagraphs of the preceding summary. It is not uncommon for the Court of Appeal to be confronted with submissions which invite it to discern error in a primary judge having preferred the evidence of witness X over the evidence of witness Y, but where the submission make no discernible effort to come to grips with the hurdles confronting such a submission.

[21] Against that background, let us turn to the question how one determines which standard of appellate review applies in any particular case.

[22] For much of my career at the bar, the orthodox view had been that the *House v The King* standard applied to conclusions reached by a primary judge which turned on the exercise of what could be characterised as a "judicial discretion." Indeed, it was also often suggested that the *House v The King* standard applied where the primary judge's decision turned on an evaluative conclusion reached by the application of some imprecisely defined legal criteria.

[23] Two recent decisions of the High Court of Australia – namely *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore*[18] and *Moore (a pseudonym) v The King*[19] – have created a new orthodoxy. The line of demarcation between the two standards of appellate review is not to be drawn either by reference to the use of the potentially misleading "discretionary" label, or according to whether the primary judge's decision was reached by a process of "evaluative" reasoning.

[24] In *GLJ*, the High Court determined that the correctness standard applied to the question whether to grant a permanent stay of proceedings on the ground that a trial would be necessarily unfair or so unfair or oppressive to the defendant as to constitute an abuse of process. Kiefel CJ, Gageler and Jagot JJ made the following observations (Steward and Gleeson JJ separately agreeing generally with their Honours on the appellate standard of review):[20]

> "The reasoning in *House v The King* applies to judicial decisions involving an exercise of discretion. It has been said that the concept of

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17 *Wang v Hur* [2024] QCA 126 at [23] – [24].

18 *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857 at [16] per Kiefel CJ, Gageler and Jagot JJ, Steward and Gleeson JJ separately agreeing generally with the majority's view on the appellate standard of review, and in particular their Honours citing with approval *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 562 to 563 [46]–[49] per Gageler J.

19 *Moore (a pseudonym) v The King* (2024) 98 ALJR 1119, per Gageler CJ, Edelman, Steward, Gleeson and Beech-Jones JJ at [15].

20 *GLJ v The Trustees of the Roman Catholic Church of Lismore* (2023) 97 ALJR 857 at [16] per Kiefel CJ, Gageler and Jagot JJ, at [95]–[96] (Steward J), and [161] (Gleeson J).

> a "discretion" is "apt to create a legal category of indeterminate reference", but the presently relevant essential characteristic of a discretionary judicial decision is that it is a decision where more than one answer is legally open. In *Norbis v Norbis*, for example, the power of a court to make an order altering the interests of parties to a marriage was characterised as a judicial discretion because the decision called for "value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right". The line separating discretionary decisions (in which appellate review is confined to the *House v The King* standard) and other decisions (in which the "correctness standard" applies) was identified as that between questions lending "themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions" in which event "it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance", and questions to which there is but one legally permissible answer, even if that answer involves a value judgment."

[25] In *Moore* the High Court held that the correctness standard applied to an interlocutory appeal concerning a trial judge's refusal to exclude evidence under s 137 of the *Evidence Act 2008* (Vic) which provided that "[i]n a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused". The unanimous judgment of Gageler CJ, Edelman, Steward, Gleeson and Beech-Jones JJ, expressed the position in this way (footnotes omitted):

> "The basis for intervention identified in *House v The King* was expressed to be dependent upon the subject matter of the appeal, being the exercise of a judicial "discretion". *House v The King* was an appeal against the imposition of a sentence of three months imprisonment for an offence under the *Bankruptcy Act 1924* (Cth). While what constitutes a "discretionary decision" in this context can be ambiguous, in essence it refers to the circumstance where the decision maker is allowed "some latitude as to the choice of the decision to be made". A determination of which standard of review is applicable does not depend on whether the reasoning to be applied is evaluative or in respect of which reasonable minds may differ. Instead, the determination turns on whether the legal criterion to be applied "demands a unique outcome, in which case the correctness standard applies, or tolerates a range of outcomes, in which case the *House v The King* standard applies."

[26] It may be observed that the view just expressed that *GLJ* and *Moore* articulate a new orthodoxy may well be contestable. The test approved in *GLJ* and *Moore* was the test expressed by Gageler J in the 2018 decision of *SZVFW*. And in *SZVFW* his Honour concluded that the line of demarcation expressed by the test represented the consistent understanding on which the course of High Court authority since the 1979 case of *Warren v Coombes* had proceeded.

[27] Whether the current test is new or not new is not significant for present purposes. It now undoubtedly represents the law.

[28] Cases in which in the test has been applied include:

(a) *Harlen (a pseudonym) v The King* [2023] VSCA 269 in which McLeish, Niall and Kennedy JJA concluded that interlocutory appeals about the admissibility of evidence, including the admissibility of tendency evidence, were governed by the principles in *House v The King*.

(b) *Harika v The King* [2023] VSCA 317 in which Priest, Macaulay and Taylor JJA found that the correctness standard applied to the question whether the legal criterion prescribed by s 115(5)(c) of the Evidence Act had been satisfied. The section provided that picture identification evidence was not admissible if the accused was in custody unless "it would not have been reasonable to have held an identification parade that included the accused".

(c) *Keremestevski v Shaun McLeod as executor of the estate of Mark Adrian McLeod* [2024] WASCA 12 in which Quinlan CJ, Vandongen JA and Seaward J found that the standard of appellate review for a finding that a de facto relationship exist (or does not exist) was the correctness standard.

(d) *Sentinel Property Group Pty Ltd v ABH Hotel Pty Ltd* [2024] QCA 14 in which Bond JA (with whom Morrison and Boddice JJA agreed) found that the question whether a contracting party had complied with a contractual standard to act reasonably in all the circumstances was one to which there could be only one right answer, and on appeal the correctness standard applied.

(e) *Connelly v Transport Accident Commission* [2024] VSCA 20; 73 VR 257; 107 MVR 58 in which Beach and Niall JJA and J Forrest AJA found that a decision as to whether an injury satisfied a legal criterion of "very considerable" attracted the correctness standard.

(f) *Duncan (a pseudonym) v The King* [2024] VSCA 27 in which Priest and Beach JJA applied the correctness standard to a decision concerning the legal criterion which had to be met before a court could grant leave to compel the production of protected evidence under s 32D(1) of the Evidence Act.

(g) *FT v The King* [2024] VSCA 90 in which Beach, McLeish and Niall JJA concluded that an appeal from an order refusing the grant of bail attracted the *House v The King* standard.

(h) *The Chief Executive Officer Department of Health v KMD* [2024] NTCCA 8 in which Reeves and Burns JJ (with whom Blokland J agreed) concluded that whether a supervised person posed a serious risk if released on a non-custodial supervision order attracted the correctness standard.

(i) *Kajula Pty Ltd v Downer EDI Ltd* [2024] VSCA 236 in which Macaulay, Lyons and Orr JJA) addressed the question as to which of two open group proceedings should have the ability to pursue a securities class action against a corporate defendant. The Court found that the judge's decision to stay the one proceeding and permit a consolidated proceeding to go forward on the terms imposed was a discretionary decision, with the result that the applicable standard of appellate review is the *House v the King* standard.

(j) *Caporaso Pty Ltd v Mercato Centrale Australia Pty Ltd* [2024] FCAFC 156 in which Katzmann, Wheelahan and Hespe JJ found that the determination of whether trademarks were deceptively similar to each other attracted the correctness standard of review. Their Honours observed:

> The correctness standard has been applied by Full Courts to evaluative decisions in a number of contexts, such as those involving defamatory meaning, and whether a deed of company arrangement should be terminated: see *Bazzi v Dutton* [2022] FCAFC 84; 289 FCR 1 at [22]–[26] (Rares and Rangiah JJ), and *Project Sea Dragon Pty Ltd (Subject to a Deed of Company Arrangement) v Canstruct Pty Ltd* [2024] FCAFC 141 at [114]–[118] (Jackman J, O'Callaghan J and McElwaine J agreeing). The correctness standard has also been applied by the High Court to the evaluative question whether tendency evidence has "significant probative value" for the purposes of s 97(1)(b) of the Evidence Act 2008 (Vic*): R v Dennis Bauer (A Pseudonym*) [2018] HCA 40; 266 CLR 56 at [61] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ), with the Court stating that on appeal, "it is for the court itself to determine whether evidence is of significant probative value, as opposed to deciding whether it was open to the trial judge to conclude that it was".

(k) *Tredders Investments Pty Ltd as trustee for Warren Tredrea Trust v Channel 9 South Australia Pty Ltd* [2024] FCAFC 164 in which Perry, McEvoy and McDonald JJ) addressed a statute which permitted a costs order to be made if the Court was satisfied that there has been an unreasonable act or omission by a party causing another party to incur costs in connection with the proceeding The Court rejected a submission that the correctness standard applied to the question whether the primary judge erred in not being satisfied that there had been an unreasonable act or omission.

(l) *Palmer v Palmer* [2024] QCA 263 in which by majority of the Court determined that the *House v the King* standard applied to the appellate review of a decision by the primary judge in which the primary judge was fixing a receiver's remuneration by the application of the legal norm of reasonableness. The majority concluded that by seeking to fix the amount of the receiver's remuneration the primary judge was making an evaluative judgment by the application of a legal criterion which necessarily would tolerate a range of outcomes. The majority felt that it would have been different if the task for the primary judge was to decide whether the amount claimed was reasonable, because that decision would tolerate only one outcome.

[29] Given the significance of the determination of the standard of appellate review applicable to any particular appeal, appellate advocates must be prepared to justify their submissions by reference to a rigorous application of the law stated in *GLJ* and *Moore*. This will require appellate advocates to consider carefully the legal criterion applied by the primary judge, and which is under review by the appellate court. My observation is that rigorous application of the law stated in *GLJ* and *Moore* has not yet become widespread amongst appellate advocates in Queensland. That must change.

[30] The application of the test may not be straight forward. For example, it may thought to be difficult to reconcile *Caporaso Pty Ltd v Mercato Centrale Australia Pty Ltd* and *Palmer v Palmer* with *Tredders Investments Pty Ltd as trustee for Warren Tredrea Trust v Channel 9 South Australia Pty Ltd*. My speculation is that the rigorous application of the test may well result in applications of the correctness test to categories of decision which might hitherto have been thought to be subject of the *House v The King* test. The converse might also be true. For obvious reasons I will not speculate further in this extra-judicial occasion.