How to Manage Cases and Directions Hearings in the District Court Civil Jurisdiction

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This paper and presentation is designed to give practitioners an insight into the practical matters required for case management in the Civil Jurisdiction of the District Court of NSW, principally in the Sydney Case Managed List.

At the same time it also intends to provide some practical hints for good case management and advice for practical advocacy at directions hearings, which when combined should assist practitioners in achieving better outcomes in litigation not only for themselves and their clients, but for the Court as well.

The District Court Civil Jurisdiction – Described in Figures

The vast majority of civil work of the District Court is performed in Sydney, either in the Case Managed List before the Judicial Registrar, the List Judge or the specialist lists.

Some of the recent statistics are:

- For January 2016 Sydney Case Managed List has 4,306 cases pending, the Court's whole caseload including regional registries is 5,995.
- 230 to 250 cases are lodged and finalised each month in Sydney.
- 70% of cases are personal injury, workers compensation and motor vehicle accidents.
- In Sydney approximately 40 to 70 cases are listed for hearing each week by a panel of judges in the civil jurisdiction that range from 4 in holiday periods to up to 15 judges during the term.
- Progress to finalisation is approximately 50% to 60% of cases progress from a Pre Trial Conference to a Status conference; 25% from a Status conference to a hearing; of all cases, 80% are settled, dismissed or discontinued prior to hearing and only about 10 to 12% at any given time are heard at trial. The balance transfer to other jurisdictions.
- Of all cases in Sydney, 16% to 24% at any given time are pending longer than a year to two years, 3 to 7% are pending longer than two years and 13% are inactive.

The District Court's Strategic Plan intends to dispose of 90% cases within 12 months and 100% within 24 months.

The Court measures its performance by the indicators set by the Australian Productivity Commission within the framework of the Report on Government Services.

The principal performance index is the backlog indicator, which measures for the age of the pending case load into three categories: up to 12 months, 12 to 24 months and over 24 months.

Across all jurisdictions nationally, the standard is no pending caseload for 12 to 24 months should be greater than 10%.

As at January 2016, the District Court's indicator for 12 to 24 months is 21% (currently 810 cases). The indicator for greater than 24 months is 7% (currently 256 cases).

Historically, the District Court of NSW has been either to first or second best performing Courts in the Australia.

Why is this important? It is not a competition between Courts; rather the purpose of the standards is to achieve economic benefits for consumers, users and other interested parties in the Court system. The more rapid the disposal of case, the greater the economic benefits to all users. Or, the faster cases resolve, the more money flows into payments for services, cash flow to businesses (including solicitors and barristers) and directing parties' attention away from the chilling effects of litigation to generating opportunities for business. Of course, the Court benefits by reducing its caseload so there are less cases to hear, maximising the time spent by judges on other important work, such as criminal cases.

In summary, not only does the District Court intend to achieve good performance, but best outcomes to all users of the Court System.

How is Case Management Achieved? The Civil Procedure Act and Practice Note 1

Case Management – History and Legislation

If you aren't aware of the *Civil Procedure Act 2005* and the *Uniform Civil Procedure Rule 2005*, nor have a good knowledge of their provisions, you won't get very far in any civil jurisdiction in NSW!

Most importantly, an understanding of the intention and the history of these pieces of legislation are critical.

When both were introduced in 2005, sections 56 to 60 introduced a new era of case management, ahead of *Aon Risk Management v ANU*, the well-known decision of the High Court delivered in 2009, which is often viewed as a more significant development.

Both the legislative change and *Aon* displaced previous principles in case management, in particular notions that if the only prejudice is costs, then adjournments and delays may be forgivable.

Sections 56 to 60 of the *Civil Procedure Act2005* introduced into legislation the concepts of "just, cheap and quick" as an overriding purpose and the objects to be regarded in managing any case including:

a) The just determination of the proceedings;

b) The efficient disposal of the business of the Court;

c) The efficient use of available judicial and administrative resources;

d) The timely disposal of the proceedings, **and all other proceedings in the court, at a cost affordable to the respective parties.** (Bold my emphasis).

In my view the last object was one of the most significant changes as it moved the focus from the needs of the individual case to the needs of all users. It is important to bear in mind when making submissions about issues that are governed by the requirements of section 56 to 60 of the *Civil Procedure Act2005*, namely you can't just focus on your own case and its importance – the Court will look at it in light of all the work it has to perform.

Rather than conduct a review of all the relevant case law, I will list a sample of number of cases, which discuss these issues. You should have a working knowledge of them if dealing with any issues under section 56 to 60 of the *Civil Procedure Act 2005*.

- *Micallef v ICI Australia Operations* [2001] NSWCA 274
- *Hans Pet Constructions Pty Limited v Cassar* [2009] NSWCA 230
- *Pacanowski v Simon Wakerman & Associates* [2009] NSWCA 402
- *Bi v Mourad* [2010] NSWCA 17
- *Richards v Cornford (No 3)* [2010] NSWCA 134
- *McMahon v John Fairfax Publications Pty Ltd* [2010] NSWCA 308

There are some statements from each of these cases that I rely upon to get across the main points of cases management, they include:

> "It must also be remembered these days that ss 56 to 60 of the *Civil Procedure Act* 2005 set up a regime that requires the courts to turn away reluctant gladiators and to ensure that they either prosecute their claims in due time or get sent away from the court." – Young J at paragraph 31 in *Bi v Mourad* [2010] NSWCA 17

> "The presentation and adjudication of the case in the courts below do cause it to merit a place in the precedent books. The reasons for placing it there turn on the numerous examples it affords of how litigation should not be conducted or dealt with. The proceedings reveal a strange alliance. A party which has a duty to assist the court in achieving certain objectives fails to do so. A court which has a duty to achieve those objectives does not achieve them. The torpid languor of one hand washes the drowsy procrastination of the other" – Heydon J at paragraph 156 of *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 (5 August 2009).

> "The judge had been invited on the arguments of the parties to come to a view on whether "enough is enough", given the history and the explanation for the latest application. He did so. In my opinion, his decision was readily open and no appellable error has been shown" - Giles JA in paragraph 61 in *McMahon v John Fairfax Publications Pty Ltd* [2010] NSWCA 308.

> "One way of managing cases in which the court is concerned that parties may not be focusing appropriately on getting the matter ready, is to set the matter down for hearing. Experience shows that such a step will focus the parties on making sure their cases are ready. This would have been an appropriate step to take in this case. It certainly would have triggered the provisions of UCPR 15.14(4). Although so-called guillotine orders should not be made without good reason, they are part of the court's case management tools. Such an order can be made limiting a party to particular evidence and/or reliance on certain particulars as provided at a particular date. It is imperative that during the management of cases, judicial officers and registrars with managerial responsibility ensure that the real issues are explored and determined." Bergin J in paragraph 83 of *Baffico v YMCA of Great Lakes Inc* [2014] NSWCA 61.

> "64 Having regard to s 56 of the CP Act, parties to proceedings in this Court and their lawyers are required to engage in prompt, courteous and genuine cooperation (including the provision of reasonably required information or explanations) with the firm intention of resolving interlocutory issues, as far as possible, without involving the processes of the Court. If complete resolution is not possible, then the parties' conduct should at least ensure that only those issues that are really in dispute are submitted for adjudication. "Unduly technical and

costly disputes about non-essential issues are clearly to be avoided": *Expense Reduction and Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; (2013) 303 ALR 199; (2013) 88 ALJR 76 ("Expense Reduction") at [57] per the Court. The approach I have identified should be followed in all cases except where there is a real basis for the urgent filing of a motion.

…

69 First, it must be emphasised that s 56 of the CP Act and its related provisions are not just pious exhortations to be acknowledged and then ignored. They have real consequences for the clients and lawyers in this Court and are to be applied rigorously in the conduct of all litigation, great or small.

70 Second, solicitors and barristers are members of a profession. It is of the essence of a profession that relations between its members are characterised by civility, trust and mutual respect. The Court sees far too much correspondence between lawyers that bears none of those qualities. They must never be abandoned at the behest of clients or in the misguided belief that that is what successful representation of a client requires.

71 Third, many interlocutory issues can be solved or at least better understood by a simple telephone call. It has been suggested that some lawyers no longer speak to their opponents on the telephone for fear of being "verballed" in an affidavit. If that is true, then it is a retrograde development which the CP Act gives legislative authority to the profession to reverse.

72 Fourth, if one party requires information or an explanation from another, then the request should be reasonable and focused. A clear justification for the request should be given.

73 Fifth, faced with a reasonable request, the recipient should not automatically respond with an unthinking denial of legal entitlement to the information. The obligation to facilitate the overriding purpose will sometimes require information or an explanation to be given to which the party may not be "legally" entitled. Furthermore, if it is information which would be required to be produced in response to a subpoena or notice to produce then it is contrary to the s 56 obligations of a party and that party's lawyers to resist providing it unless and until the Court's process is invoked. If there is concern for the confidence of such material then an undertaking of the kind considered in *Hearne v Street* [2008] HCA 36; (2008) 235 CLR 125 (which would apply if the information were provided under compulsion) should be sought and given.

74 Sixth, the filing of a motion should be regarded as a last resort. It will inevitably add to costs, and delay the progress of the matter to hearing.

75 Seventh, no motion should be filed without the putative respondent being given final, written notice of the relief to be sought, the reason for it and a reasonable opportunity to respond. The Court sees far too many examples of deadlines of a day or less being set in

> correspondence. My own view, as a rule of thumb, is that three clear business days is reasonable to allow for a response on any matter of substance. If the recipient requires more time to obtain instructions, then they should send a prompt request with an explanation to that effect and an indication of when a proper reply will be provided. In relation to challenges to pleadings it was once the practice for opposing counsel to confer before a strike out motion was filed. To the extent that practice has been lost, it should [be] resurrected.
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> 76 Eighth, once a motion is filed, the parties are obliged to ensure that only the real or essential issues are litigated. This calls for discrimination in both the preparation of evidence and argument. As to the former, real thought must be given to the precise evidence required. The practice of exhibiting "everything" or "the file" to provide an evidentiary cornucopia from which only a few morsels are ultimately selected to be referred to in argument is completely unacceptable. Where it becomes apparent that an application or argument is unsustainable, it should be abandoned, and that abandonment notified to the other parties, at the earliest opportunity.
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> 77 Ninth, where delay or unnecessary expense has been caused by conduct which is contrary to the obligations of parties and their lawyers under s 56 and its related provisions, parties and lawyers should not be in any doubt that in appropriate cases the Court will exercise its power in relation to costs (see s 56(5) of the CP Act) to provide some measure of justice in response to such conduct." Kunc J in *Ken Tugrul v Tarrants Financial Consultants Pty Ltd (No 5)* [2014] NSWSC 437

Practice Note 1

If you haven't heard of Practice Note 1 – Case Management in the General List and you practice in the District Court then you are very far behind.

Practice Note 1 is issued under sections 56 to 57 of the *Civil Procedure Act2005*, a copy is attached to this paper.

Practice Note 1 sets out in detail the method in which cases are to managed including critical matters such as:

1. Time Standards
2. Matters to be addressed on commencing
3. Consent Orders
4. Representation
5. Pre Trial Conferences
6. Subpoenas

7. Motions
8. Status Conferences
9. Show Cause Hearings
10. Adjournments
11. Settled Matters

Again, I will address the requirements of the Practice Note in more detail later when I deal with practical matters, however, an overview will assist.

Case Managed List

The General List or the Case Managed List as it also known is a daily list and it operates with a number of specific features as follows:

- PTC

The first return date of all cases. It is the most important directions hearing in my view. It is two months after filing. Agreement on short minutes should be reached prior to attending and all important matters should be considered and included in them.

- SC

To allocate a hearing date, seven months after filing. BOTH PARTIES MUST ATTEND. If the case is not ready, explanations must be offered and be credible. If no explanations are offered, matters may be referred to show cause hearings. Alternatively if you seek further directions, explanations for them must be credible.

- CMLDH

Directions hearing when a matter requires further or staged management.

- Specialist Lists

The District Court has a number of specialist lists, including:

Tuesdays: Professional Negligence List

Wednesdays: Care List

Thursdays: Defamation List

Friday: Approvals List

Transfers to the Professional Negligence list require an affidavit or very persuasive submissions.

- NSL or “Note Settled List”

If a matter is settled and/or is pending a deed, payments or other steps to resolve, is it listed on the first or second Tuesday afternoon at 2pm with a standing order that if the Consent judgments, orders or other documents to finalise the proceedings are finalised the directions are vacated. Abandoned matters will be dismissed!

- Inactive Matters

Matters pending steps or events that are beyond the control of the parties, such as independent assessment processes, internal determinations or injury instability are placed in the inactive list. Time does not run, so to speak, when a matter is in the inactive list.

If there is a dispute about whether a matter should be in the inactive list it is determined by affidavit evidence.

- Mediations/Settlement conferences

A mediation or settlement conference may occur at any time, however, case preparation should not cease in order to conduct them.

When a matter is listed for hearing, unless good reason is shown a parties will be directed to mediate or to engage in a settlement conference.

- NO motions in the Case Managed List!

No motions will be heard in the Case Managed List. Unless by consent, all motions will be referred to a Friday listing for hearings.

- Motions

Motion are listed before the Assistant Registrar on Fridays, when called the parties must confirm if the motion is ready to be heard or requires further directions. If ready, an estimate of time is required. Motions under half an hour are referred to the Judicial Registrar, those over that estimate to the List Judge for referral to available judges. Otherwise, longer motions are specially fixed for hearing.

When estimating time for a motion to be heard a basic process should take place.

Estimate how long it will take to:

i) present your evidence;

ii) make your submissions

iii) combine your estimate with your opponent for one and two above;

iv) add any reading time for affidavits or material you provided the judge/registrar

v) finally, add some time for the judge registrar to make a determination.

Underestimating any of the above will attract adverse comments or consequences for the scheduling of your motion.

- Hearings

Practice Note 1 and the Strategic Plan of the Court all focus on preparing a case with an entire timetable including a hearing date within a pre-determined time frame.

The whole focus of case management is to work towards the fixing the case for hearing within the prescribed range of dates. Cases should be fixed for hearing, earlier rather than later as even though more than half of cases settle, the purpose achieved is that parties will focus their minds on the job at hand, either by preparing or settling the case resolving it sooner rather than later.

Estimating hearing length is a similar exercise to that set out above when setting down a motion, but usually time isn't included for a determination because a judge is likely to reserve any determination is a longer case.

A critical point to observe is that there is no such thing as a one day personal injury case when all matters of liability and damages are in contest. Further, almost every hearing will commence on a day so that it completes within the week it starts: a two day hearing will never start on a Friday.

However, a critical step in setting down a hearing is obtaining all the relevant available dates for parties, witnesses, experts and yourself! Obtain these well in advance and if you need guidance, the District Court Registry listing section may be contacted to obtain a range of dates in advance.

<u>Practical Hints for effecting Good Case Management at Direction Hearings</u>

Having apprised you of the basic structure of case management and directions hearings, from here on, I intend to make this paper entirely practical. Most of these issues I address can be applied to other jurisdictions.

I will address a number of issues by general topics all with the intent of giving you an insight to what is expected in case management in specific situations and how to implement them with good advocacy.

1) Advocacy:

Appearing at a directions hearing requires essentially the same skills as any kind of appearance. Confidence, clarity and purpose.

You have to be able to present in the shortest space of time the exact position of the case, the orders you seek and the reasons why. The best presentations are those

where the conclusion is evident before you finish speaking and you say what you have to say in less than a minute, preferably within 20 seconds.

But don't forget some basics:

DO!

- Speak clearly.
- Announce your appearance, your name, the party you represent, but only once you have reached the bar table. Don't start speaking from the minute you leave your seat, it just isn't audible in most cases.
- Have short minutes of order prepared, typed or at least written out to hand up so you can speak to them. Nothing frustrates a registrar or a judge more than a lawyer standing in front of them spouting out proposed orders as if they are dictating them. If you try that, expect to be sent away to write them down.
- An ideal expression is to gauge the pace of your presentation is to "watch the pen" Try not to speak too fast, at least not faster than anyone can write.

DON'T!

- Interrupt and object needlessly. A directions hearing isn't a hearing. If you take issue with a presentation of the circumstances of the case, wait your turn and keep you powder dry.
- Don't sledge or antagonise. Nothing annoys a registrar or a judge more, mostly because you are simply wasting time. Further, it is distracting from the true issues to determined.
- Don't start with an un-timed monologue of the history of the case with no apparent direction. You will be asked to get to point. Make the point first and explain why after.

2) Preparation for directions

DO PREPARE!

I cannot emphasise enough that preparation for directions hearings cannot be underdone.

If you are the solicitor with carriage of the file, bring it with you and have at your fingertips every piece of information you need to answer questions about the case and its preparation.

If you are mentioning the matter, an agent or counsel briefed, do as much preparation as you can. Demand those who instruct you give you the time to explain the case, access to the file and ensure their availability on the phone if you need

more information. If there is a failure to afford you these basics, you cannot be held responsible for adverse results.

Finally, if it takes you an hour or so to cover everything, do it. As I said earlier, you need to boil down your presentation to a very short succinct statement that is accurate and believable. You can only do that if have knowledge of all of the case.

Further, the Court has about a tenth if not less of the documents you have, so you will be asked for information to fill the gaps. An answer to such a request will only be impressive if it is quick and complete.

DON'T WING IT!

Do your preparation as you cannot rely on the expression "It's not my matter."

If you are being sent to a directions hearing without complete information, take an opportunity to stand the matter in the list if you need to get the information or make it look like you have down your best.

3) Planning your Case and setting out your Short Minutes of Order

Case management doesn't include pattern litigation.

Each direction hearing has a purpose and an adjournment to the next directions hearing must have a purpose.

The first is the most important directions hearing in the District Court being the Pre Trial Conference.

Parts 2 and 3 of Practice Note 1 are most relevant.

DO!

- Propose consent orders and confer with the solicitor for the other party. It is a not a good look to spring a set of short minutes on another party when the matter is first mentioned.
- If you cannot agree, at least have two versions of short minutes to propose and to be handed up to resolve the disputes.
- Make practical plans that show in the short minutes! Short minutes of order that make general or vague statements will attract attention and require explanation most cases. For example:
    - Differentiate between the kinds of evidence you are going to serve, expert liability, medical and lay.
    - Identify the experts, as required by the Practice Note

- Confer to establish if a view is necessary, can be agreed, or better, whether a concession can be sought and/or given – notices to admit facts are very useful for slippery floors, traffic lights that will effectively dispose of expensive experts reports.
- Have your categories of discovery attached to the short minutes of order.
- Consider if informal discovery is a more practical alternative.
- Consider if experts should conclave/prepare joint reports.

DON'T!

- Commence an argument at the bar table about evidence in the case. If there is a material dispute, schedule its determination by way of a motion in your short minutes.
- Request an adjournment with no purpose.
- Attempt to obtain an adjournment, or oppose one, knowing it is contested, without a statement or affidavit to support your version of the facts.
- Complain of lack of compliance with answers to particulars, lack of production of documents, lack of discovery months after the issue has arisen. Don't wait between directions hearings to bring an issue to a head, file a motion and progress the case.

Contacting the Judicial Registrar & the Online Registry

You may contact me by email on judicialregistrar@justice.nsw.gov.au

Emails are an effective way of disposing of non-contentious matters, such as basic directions, unopposed adjournments and requests for advice and information.

Please observe the procedures for emailing, a copy of which is attached.

Similarly, the Online Registry is now available and documents and short minutes can be lodged online, after hours even! See https://onlineregistry.lawlink.nsw.gov.au

However, apply the same principles as above: set out your requests, short minutes, or other business succinctly.

James Howard
Judicial Registrar
5 March 2016