

Timetables and Case Management

Presented by

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Agenda

- Context
- The Driving Force behind just, quick and cheap law
- Standards in the District and Supreme Courts
- Practice and Procedure in the General Lists
- Case Law and changes in attitude
- Questions

The Evil the Civil Procedure Act Aims to Address

As long ago as 1852 Dickens wrote of endless court cases slowly rotting into bad jokes and madness and the worst of them all was JARNDYCE AND JARNDYCE;

“Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit.

The Evil the Civil Procedure Act Aims to Address (cont'd)

The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless.

s.56 of the Civil Procedure Act

Overriding purpose

- (1) The overriding purpose of this Act and of rules of court, in their application to civil proceeding, is to facilitate the **just, quick and cheap** resolution of the real issues in the proceedings.
- (2) The court **must seek to give effect** to the overriding purpose **when it exercises any power** given to it by this Act or by rules of court **and when it interprets any provision** of this Act or of any such rule.
- (3) A party to civil proceeding is under **a duty to assist the court to further the overriding purpose** and, to that effect, to participate in the processes of the court and to **comply with directions** and orders of the court.

s.56 - Consequences for solicitors of not facilitating the just, quick and cheap resolution of the real issues

- (4) A solicitor or barrister **must not, by his or her conduct**, cause his or her client to be put in **breach of the duty** identified in subsection (3).
- (5) The court may take into account any failure to comply with subsection (3) or (4) **in exercising a discretion with respect to costs.**

Objects of Case Management

S.57 of the Civil Procedure Act states;

.....proceedings in any court are to be managed having regard to the following objects:

- (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 by the respective parties.

Note the emphasis in the above section on efficiency, time and cost.

But if our courts are no longer Dickensian we perhaps should ask do they more closely resemble the work of Fredrick Winslow Taylor?

Quality Management & Statistics

The Driving Force behind Quick and Cheap Justice

The Supreme Court of NSW

EQUITY DIVISION TOTALS

	2010	2011	2012	2013	2014
Filings	5,172	4,694	4,500	4,202	4,439
Disposals	4,932	4,476	4,422	4,534	5,288
Pending cases at 31 December	3,502	4,007	3,899	3,539	2,713

Quality Management & Statistics

The Driving Force behind Timetables

The Supreme Court of NSW

COMMON LAW DIVISION TOTALS - CIVIL

	2010	2011	2012	2013	2014
Filings	5,396	5,923	5,112	4,573	3,679
Disposals	4,374	4,000	6,257	6,239	4,879
Pending cases at 31 December	4,751	6,768	5,499	3,965	2,771

Productivity & Statistics

The District
Court of NSW

SYDNEY in 2014 Calendar:

- Registrations fell by 4%
- Finalisations fell by 3%
- Pending cases rose by 0.5%
- Median finalisation rose from 9.0 months to 12.4 months.

IN NSW in 2014 Calendar

- Registrations fell by 5%
- Finalisations fell by 1%
- Pending cases remained steady
- Median finalisation time rose from 10.0 months to 12.6 months

Timetable Standards in the District Court of NSW

- In 2000, the Court established a Civil Business Committee.
- Under that Committee's plan the Court's business is to be conducted in accordance with the following standards:
- 90% of cases disposed of within 12 months of initiation and 100% within 2 years, apart from exceptional cases in which continuing review should occur;
- deferred cases which cannot comply with the time standard are included in a not ready list for case management;
- All cases in the general list are now case managed and a case may not be listed in a specialist list unless application is made at either the pre-trial conference or thereafter (See DC No.1 at 5.4).

Timetable Standards in the District Court of NSW (cont' d)

- all cases are to be offered a hearing date within 12 months of initiation;
- motions are to be offered a return date on the first available Friday after filing in theory parties should be ready to argue a motion at the first return;
- not reached cases are to be offered the next available dates for hearing not more than 3 months after the not reached hearing date and will be given priority on that date;
- cases not listed before a Judge on the hearing date will be listed before the List Judge in the reserve hearing list;

Case Management in general in the District Court

- All cases are to comply with timetabling requirement in the Practice Note for the relevant list.
- Cases will not be listed for hearing unless they are ready for hearing.
- It is the responsibility of the legal advisers to ascertain the availability of their clients and witnesses before a hearing date is taken.
- Accordingly: cases will not be adjourned, except in exceptional circumstances;
- applications for adjournment will generally not be heard on the day of hearing;
- where appropriate, cost orders will be made in a sum of money payable within a nominated time and legal practitioners may be called upon to show cause why they should not personally pay the costs ordered.

General Practice and Procedure in the District Court

- Civil Practice Note 1 (Case Management in the General List provides that parties should:
 - expect to be allocated a trial date within 12 months of commencement of proceedings. Parties must plan to meet this time standard.
- In Summary, the Practice Note provides:
 - the plaintiff must serve a timetable for the conduct of the case on the defendant with the statement of claim;
 - any proposed amendments to the timetable by the defendant must be served on the plaintiff at least 7 days before the Pre-Trial Conference;

General Practice and Procedure in the District Court (cont'd)

- a Pre-trial Conference, which will entail an in-depth review of the case, will be held 2 months after commencement (See DC No.1);
- directions and orders will be made at the Pre-Trial Conference, which must be complied with or otherwise it may lead to cost orders;
- a Status Conference will take place 7 months after commencement and parties should be ready to take a trial or arbitration date;
- the trial date allocated will generally be within 1 to 3 months of the Status Conference;
- at any stage a case may be referred to a directions hearing before the List Judge or the Judicial Registrar;
- the Court will only grant adjournment applications where there are very good reasons.

Case Management in general in the District Court

- Motions in a matter must be filed and served with three clear days notice.
- Motions are referred from the Registrar's Court to the Judicial Registrar for hearing by the Judicial Registrar each Friday or referred by the Judicial Registrar to a Judge for determination.
- Section 18FA of the District Court Act 1973 provides for the appointment of a Judicial Registrar.
- The Judicial Registrar of the District Court in Sydney is

Judicial Registrar Howard

Timetable Standards in the Supreme Court of NSW

- The Court relies on legal practitioners giving accurate estimates of hearing times.
- Willfully misstating the length of a trial will be considered a serious matter.
- The Court expects each direction to be faithfully obeyed.
- No case will be stood over generally...draft orders must contain a definite date when the proceedings are next to be considered by the Court.
- Before a date is taken, legal practitioners are expected to have considered the pleadings and the evidence and have satisfied themselves that no amendments are required and that all witnesses and documents are available and that they are in a position to give a genuine and accurate estimate of the length of hearing.

General Practice and Procedure in the Supreme Court Equity Division - Registrars List

- Subpoenas are returnable before the Deputy Registrar in the 9am list. The practice of making subpoenas returnable at the first day of hearing is to be avoided as this usually causes delay. No subpoena should be made returnable in the Registrar's 9:00 list unless the matter is to be heard that day.
- Separate Registrars sit to deal with Common Law, Equity and Corporation List matters at 9.00 am each weekday.
- All order/directions by consent should be reduced to writing to be handed to Court Officer for handing to the Registrar. Consent orders are made before contested directions.
- Where the parties cannot agree on the orders to be made, competing versions should be written and handed to the Registrar.

General Practice and Procedure in the Supreme Court Equity Division - Registrars List

- Referrals to the Duty Judge or to the Associate Judges' List are made at the commencement of the Registrar's List. No referrals are made after 9:40am.
- Where the Registrar has the power to do so they deal with motions at the end of the list as time permits.
- Motions exceeding one hour need to be specially fixed so always have a list of available dates with you in Court.

General Practice and Procedure in the Supreme Court Equity Division - Registrars List

- On the hearing of the motion the applicant should:
 - * file submissions of no more than 2 pages in length in support of the motion at least three clear working days before the hearing and serve the same on all opposing parties;
 - * ensure that all material to be relied on is in the court file; and
 - * identify to the Registrar the source of the registrar's power to deal with the matter.
- On the hearing of the motion the respondent should:
 - * file submissions of no more than two pages in length in opposition to the motion and serve the same on the applicant not later than noon on the day before the hearing; and
 - * ensure that all material to be relied upon is on the court file.

General Practice and Procedure in the Supreme Court Equity Division - General List

- Where proceedings are not “Default proceedings” (or where a defence has been filed in Default proceedings) the proceedings will be allocated a Directions Hearing on filing of the Summons or Statement of Claim (or defence as appropriate) and case managed by the Registrar.
- When the matter is set down for hearing the Registrar will make the Usual Order for Hearing. If for any reason the parties are of the view that the Usual for Order for Hearing should be modified, they must provide a Consent Modified Order for Hearing on the day the matter is set down for hearing.
- Notwithstanding the making of the Usual (or Modified) Order for Hearing, the Trial Judge may notify the parties that a pre-trial direction will be held prior to the hearing date.

General Practice and Procedure in the Supreme Court Equity Division - General List

- Unless directions are otherwise made, before any trial of any matter other than Duty Judge matters, at least three working days before the hearing each party will provide to the Judge's Associate and to all other parties: a full list of affidavits to be read, a list of objections to opponent's affidavits and a list of persons to be cross-examined (NB, it is assumed that all such witnesses will already have been informed and are available) and a short set of submissions.
- All exhibits and all agreed bundles of documents are to be delivered to the trial judge's Associate at least three working days before the hearing.

Changes in Case Law and the Court's attitude to Delay

- *State of Queensland v JL Holdings Pty Limited* is the most frequently quoted decision by parties seeking to be excused for delay but in recent years the Court of Appeal has begun to move away from the concept that the need for justice will always prevail over every error and unexplained delay. In this regard in *Iovanescu v McDermott* [2004] NSWCA 106 Counsel for the plaintiff argued that there was no statutory requirement to, provide an explanation for the delay. The Court of Appeal said that is not correct and that every application for an exercise of discretion for an extension of time required an explanation for the delay. In this case the court found there was no adequate explanation.

Iovanescu v McDermott [2004] NSWCA 106

- Justice Windeyer said “That is because it goes to the question of whether it is just unfair to grant the indulgence sought, ... It cannot just be a question of prejudice and ability to have a fair trial. If that were the position and everything else could be sorted out by appropriate costs orders then the accepted requirements for case management would go out the window. Hence the principles of case management assume that the parties will comply with rules or give proper reasons for failure to do so.”
- Justice Young noted that “Senior Counsel for the plaintiff... almost used the phrase “merely a matter of case management” as some sort of mantra which would excuse all non-compliances with the Court rules.”

Iovanescu v McDermott [2004] NSWCA 106

- It is true, as has been said many times over, that the rules must be the servant and not the master, in litigation. However, the authorities, when properly examined, do not stop there, but actually make it clear that prima facie the rules must be observed and that a person who seeks dispensation from them, particularly because of delay, must show good reason why such dispensation should be granted and must endeavour to explain away his or her apparent blameworthiness in connection with the total delay involved.
- The Court of Appeal allowed the appeal, thus preventing the claim from being litigated.
- The position of the Court in *Iovanescu v McDermott* [2004] NSWCA 106 with respect to Case Management has now been reinforced by the High Court in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 which has now become the leading case in this area.

Tolcher v Gordon [2005] NSWCA 135

- This was an appeal from the District Court for an extension of time in respect of an action under s588FF(1) of the Corporations Act 2001 by a liquidator seeking orders to recover amounts the subject of potentially voidable transactions which had been dismissed by the Court for want of due dispatch. The Full Court held; “When an application is made to the Court for relief from the consequences of delay, an explanation should always be given as to why the delay occurred, even if it is only that the matter was overlooked. In the absence of an explanation, such an application would ordinarily be dismissed. Alternatively, if the Court considers that the fault is with a legal adviser of the party and that the party itself is not at fault and should not be penalised, it may be appropriate to require an affidavit from the legal adviser³. per Hodgson JA at 6.

In the End - Inherent Justice

The delay of justice is a denial of justice. Magna Carta will have none of it. "To no one will we deny or delay right or justice" [Magna Carta ch 40] All through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time. [Hamlet Act 3 sc 1] Dickens tells how it exhausts finances, patience, courage, hope. [Bleak House ch 1] To put right this wrong, we will do all in our power to enforce expedition: and, if need be, we will strike out actions where there has been excessive delay. This is a stern measure. But it is within the inherent justice of the court. And the Rules of Court expressly permit it.

■ Lord Denning MR in *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229,245

Thank you for your attention!