# Case List

**Topic 1 Week 2 Introduction to civil practice, jurisdiction and Guiding Principles**

## *Damjanovic v Maley* [2002] NSWCA 230

Appeal from decision of trial judge.
Decision to refuse use by an unrepresented party to have a lay advocate – "However, she was not offering to be an interpreter. Ms Vukic indicated that although the appellant was able to afford legal representation, he did not trust lawyers because of bad experience he had had in the past."
Exercise of court's discretion to permit or refuse leave for lay advocate to appear.
*Held*: Power of court to regulate proceedings.
Whether trial judge erred.
*Held*,
(i) The concluding words of sub-clause (b) of s 43(1) of the (NSW) District Court Act 1970 confer a discretion on the trial judge to refuse of grant leave to a lay advocate to appear on behalf of the appellant.
(ii) There was no error in proper exercise of the discretion by the trial judge.
(iii) The trial judge was entitled to take into account the complexity of the litigation in deciding whether or not to allow a lay advocate to appear.
**(iv) The public interest is the effective, efficient and expeditious disposal of litigation may be achieved by the engagement of professional advocates.**

**Order**
1) Appeal dismissed
2) Appellant ordered to pay the costs of the respondent

## *Phornpisutikul v Mileto* [2006] NSWSC 57

- Courts are reluctant to strike out a claim without having been given a fair hearing

The plaintiff withdrew instructions of Mr Lewis, who had been appearing for her up to the time of the matter being listed before McDougall J, and instructed another firm.
Plaintiff has been in repeated breach of directions given by the Court.
On 5 April 2005 consent orders were made requiring her to file further evidence by 6 May 2005.
The matter was stood over on three separate occasions after that, still without the plaintiff having filed the evidence. On 25 October 2005 she was ordered to file affidavits by 10 November 2005. Again that was not done.
(old lawyer who is re-hired) seeks a further, and final, indulgence, to enable himself and senior counsel who had previously appeared for the plaintiff to assess the prospects of the case and decide what evidence should be put on.
**Civil Procedure Act 2005 commenced** on 15 August of 2005. That Act alters in significant ways the power of the Court to give directions concerning the conduct of proceedings, and in broad terms **expects the Court to take a firmer hand in the preparation of matters than had previously been the case**.
**Section 56 r**equires the overriding purpose of any decision made under the Act to be the just, quick and cheap resolution of the real issues in the proceedings.

**s 57** allows the Court to have regard to not only the just determination of proceedings but also the **efficient disposal of the business of the Court, the efficient use of judicial and administrative resources, timely disposal of the proceedings and all other proceedings in the Court at a cost affordable by the parties**.

Section 61(1) and (2) confers on the Court a wide power to give pre trial directions. Section 61(3) specifically provides that if a party to whom a direction has been given fails to comply with the direction the Court may, amongst other things, dismiss the proceedings. I would accept that the powers under s 61 should be exercised bearing in mind the principle that (to adopt the words used by s 62(4) in relation to directions as to the conduct of a hearing) each party is entitled to a fair hearing and must be given a reasonable opportunity to lead evidence, make submissions, present a case and, at a trial, to cross-examine witnesses. However, a reasonable opportunity does not mean multiple repeated opportunities. Litigants and the profession should not expect that failure to comply with pre trial directions will be accepted lightly by the Court.
**[10]** There is some reluctance on the Court to dismiss a case when there has not been a hearing on merits. However, if a party, by repeated failures to comply with directions, demonstrates that she is not prepared to play her role in the expeditious advancing of the proceedings, it is that party's own conduct which has prevented a hearing taking place. The power to dismiss proceedings for failure to comply with directions is one which will be used in appropriate cases.

**What facts about the Plaintiff's case did the court consider relevant to application of the Guiding Principles?**

> In the present case I have been influenced by the fact that the proceedings have been on foot for a considerable time, since 2003. While it is true that over a year has now passed since McDougall J gave the first direction for the plaintiff to file their affidavits, and she has not filed a single piece of paper which advances her case in chief, she has been, for part of that time, representing herself in court. As well, as earlier mentioned, the Civil Procedure Act 2005 came into effect only in the middle of August 2005. While the profession and litigants might be entitled to some time in which to become accustomed to the new regime, that time is running out.

**[12]** I am also influenced in this case **by the fact that the plaintiff is a Thai national, and much of the evidence which she would seek to obtain is in Thailand**. It appears, from what she has put before the Chief Judge on 6 February 2006, that she is well advanced in the preparation of an affidavit.

Today, Mr Lewis sought approximately one month as a final opportunity for the plaintiff to put her evidence on. In all the circumstances, and only after considerable hesitation, I have decided to grant that application.

**What was the outcome?**

Today, Mr Lewis sought approximately one month as a final opportunity for the plaintiff to put her evidence on. In all the circumstances, and only after considerable hesitation, I have decided to grant that application.

On 17 March 2006 these proceedings will by force of this order be dismissed unless the plaintiff has by 5 pm 15 March 2006 filed in the Court and served on the solicitors for the defendant :

- S62(4) A direction under this section must not detract from the principle that each party is entitled to a fair hearing, and must be given a reasonable opportunity:
    - (a) to lead evidence, and
    - (b) to make submissions, and
    - (c) to present a case, and
    - (d) at trial, other than a trial before the Local Court sitting in its Small Claims Division, to cross-examine witnesses.

    all affidavits on which she seeks to rely as evidence-in-chief in the proceedings, together with
- (b)

    a certificate in writing from the solicitor on the record that the plaintiff has filed all the evidence-in-chief on which she seeks to rely.

**[16]** I order that after 15 March 2006 the plaintiff may not file any further evidence-in-chief in these proceedings without either the consent of the defendant or leave of a judg
I order the plaintiff to pay the defendant's costs of the motion heard by Young CJ in Eq on 6 February 2006.

1. What was the outcome?

**"**I order that after 15 March 2006 the plaintiff may not file any further evidence-in-chief in these proceedings without either the consent of the defendant or leave of a judge"
I order the plaintiff to pay the defendant's costs of the motion heard by Young CJ in Eq on 6 February 2006.

**Topic 2: Case Management**

*Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146

In JL Holdings, as opposed to Aon, they're saying the primary function of the judge is to do justice between the parties, and if that involved amending the hearings then that's ok and the remedy is costs (make a costs order – if you incur costs in terms of the hearing lost then can make a cost order that protects that party), the judge is there to get to the real issues.

*Aon Risk Service v Australian National University* (2009) 239 CLR 175

In Aon, costs are not regarded as a sufficient cure to the problems crated by delay. It is still true that the purpose of the courts are to determine the true issues between the parties, but justice is conceived more broadly, not just justice between the parties, but justice to the whole court system. JL Holding could be decided the same today, because Aon lawyers didn't offer a good reason as to why they wanted to delay.

**Topic 3 Week 4 Parties & causes of action**

*O'Sullivan v Challenger Managed Investments Ltd* (2007) 214 FLR 1

In interpreting UCPR r 7.4 for representative actions, the relief claimed must be "beneficial to all" and that representative proceedings will not be appropriate for damages claims where loss must be demonstrated by each individual. Restricts the scope for representative proceedings where quantum, reliance and/or causation must be individually proved.

*Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007)

“A Defence has been filed by the first and second defendants denying liability and contending that they are not the proper parties to the action.

Representative proceedings may be brought in tort claims for damages, but only where the basal requirement of showing that the numerous persons have the “same liability” in the proceedings is satisfied.

The plaintiff has not disclosed whether he is seeking to bind all members of the Church in the Sydney Archdiocese at the time of the alleged tort, the time when the proceedings were commenced, or the time of judgment. This significant omission may, in a proper case, be able to be met by confining the terms of a representative order. But in reality it points to difficulties of substance in using representative proceedings in the present case, as well as unsurmountable obstacles to establishing liability against the class or classes aimed at.

One essential condition under the rule for representative orders is the requirement that the numerous persons sought to be bound have the same interest in the proceedings at the time the proceedings begin

This decision does not assist the plaintiff because he does not plead facts or suggest a basis for inferring that all of the members of the Catholic Church in the Diocese at the time or times of Father Duggan’s alleged misconduct were vicariously liable

The requirement that each member of the class have identical defences may not be an absolute proposition. “

**Topic 4 Week 5 Drafting pleadings & court documents**

*Gunns Ltd v Marr* [2005] VSC 251

Whether they are being deliberately used for that purpose or not, they are embarrassing in a pleading because the opposite party cannot be certain as to what facts are being alleged against him."

- The fact that a defendant has to grapple with a document as long as V3 with perhaps a further 2000 or so paragraphs of particulars, is, in itself, embarrassing.

That the pleading is embarrassing:
(a) because it is too long;
(b) because it is inadequately particularised;
(c) because it is speculative or fishing in crucial areas;
(d) because of its formulaic allegations of agency; and
(e) because of its inadequate pleading of knowledge in various places.

That the "Campaign against Gunns" plea will embarrass or delay the fair trial of the action because of the way it is pleaded as it brings together in one action matters which should be the subject of separate proceedings; and

**Topic 5 Week 6 Commencing litigation**

*Ainsworth v Redd* (1990) 19 NSWLR 78

Service was held to be valid where the defendant told the process server to give it to his representative who was standing next to him and afterward the defendant was heard to say “we’d better look at these”

**Topic 6 Week 7 Interlocutory proceedings**

*Vaughan v Dawson* [2005] NSWSC 33

- The only evidence the court needs to hear is the evidence that relates to the orders being sought (focus on what the court needs to know.

The plaintiffs filed a notice of motion seeking expedition on 4 January 2005, returnable today. That notice of motion stated that the orders were sought upon the basis of two specific affidavits. Those affidavits are affidavits which were sworn for the purpose of the principal proceedings. They are the only affidavits filed by the plaintiffs so far, and seem to tell the whole story of the plaintiffs' involvement in the development. One of the affidavits refers repeatedly to documents contained in a bundle of documents. The substance of the affidavit is not fully comprehensible without access to that bundle of documents. Being an exhibit, of course, that bundle of documents was not filed.

- Affidavit(s) must have all the evidence. "most helpful if it states all the facts…"
- All the evidence you intend to rely on in the affidavit.
- Generally cross-examination is done through affidavits.
- Should not be necessary to read the pleadings to understand. The application should be self-contained (Rob disagrees – many applications are about discovery and those are decided on the real issues, which are decided by reference to the proceedings)
- By addressing all the factors, the court is able to determine the real issues in the context of the interests of justice.
- Follows through requirements of ss 57-60

**Topic 7 Week 8 Defending proceedings**

*Borowiak v Hobbs* [2006] NSWSC 1089

- Application was made to set aside the default judgment pursuant to r 36.16 of the UCPR
- Rule confers unfettered discretion having regard to the particular facts of the case before the court so that the dictates of justice are best served.
- Applicant bears the onus of satisfying the court the judgment should be set aside
- Unlikely to succeed unless there is a bona fide defence on the merits
- Each case will turn on its own particular circumstances
- Overriding purpose in s 56 is also important
- Summons was dismissed, plaintiff is to pay costs of the proceedings.

---