QUEENSLAND LAW SOCIETY

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Applications – strategy and tactics

Judge John McGill

[1] It is an observation of mine that the applications jurisdiction of the District Court is not as busy as it used to be. To some extent this is due to the general decline in civil work, particularly in the District Court, but there are also other factors involved. One is that there is a growing familiarity with the working of the UCPR, and also with the pre-litigation provisions of the various statutes regulating claims for damages for personal injuries, so that applications, other than those associated with relatively slow claims in that area, are much less common than they used to be. I suspect as well there are a lot of applications which in the past would have been fought out but are now resolved in a spirit of practical compromise. Nevertheless, courts still sometimes see applications which either should never have been made, or which are not being pursued the way they should be.

Before filing

[2] Preparing an application really starts before the application is filed, with the process of deciding whether or not it seems worth applying to the court for what you want. That involves a clear understanding of what you might reasonably expect to obtain if you do get to court, something which should always be investigated before rushing off to the registry. Start with the fundamentals such as jurisdiction and power: does the court have jurisdiction in the matter that you want to raise, and if the jurisdiction of the court will be properly invoked, does it have power to make the order you're seeking. It is a good idea to be able to say exactly what statutory provision or rule you are relying on, and indeed if the application relies on a specific statutory provision or rule, that should be quoted in the application itself.[1]

[3] Once you identify the relevant power, see whether this is something you are entitled to under the rules, or whether it is a matter for discretion, and if the latter what are the

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1 For an originating application, this is required by r 26(6). For an application in a proceeding, it is specified in the form for such an application, Form 9, which is required by r 31(2).

factors relevant to the exercise of the discretion. Try to find and read some decisions in relation to the exercise of the power. See if you can find one which is similar to the situation you have. The best decision to use in this situation is a recent decision of the Court of Appeal, or failing that a recent decision of a Supreme Court judge, or a recent decision of the judge who is hearing your application, if known. If you cannot find a decision which is quite close to your facts, try to find a general statement as to how the rule or section operates. Depending on the nature of the application, there may be lots of these (as would be the case for example with an application for security for costs against a company) or very few (an application to substitute alternative security for a lien over a chattel).[2]

[4] Try, through a combination of research and experience, to work out whether you are likely to obtain the relief you are seeking, and if it is a question of how much relief, how much relief you are likely to get. It is best to do this before you get into a fight with the other side about the point. It is not a good idea to get into an argument about whether or not you are entitled to X, and then start looking for authorities to support the proposition that you are entitled to it. Work out what you are likely to be able to get if you do apply to the court first, and then ask the other side for it. If they refuse, send a r 444 letter if applicable, or at least a letter threatening to apply to the court.

[5] Unless the matter is really urgent, always give the other side a reasonable opportunity to comply with your reasonable demands before heading to court. That will help in relation to costs, particularly if after you file the application they cave in and agree to everything, but then argue that they should not have to pay the costs of the application because it was filed prematurely. Preliminary correspondence is therefore a matter of some importance, particularly in protecting your position in relation to costs.

[6] Another useful point to remember when writing letters is that you may at some point want to put them in an affidavit. Judges do not like having to read excessively aggressive letters. Even if you know the solicitors on the other side from bitter experience and have no opinion whatever of their ability, do not go beyond being politely forceful and direct in your correspondence. Few things get a court offside as effectively as what we regard as unduly aggressive letters.[3] Of course if your opponent is someone disposed to write aggressively rude letters, do not react by

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2 See *Civil Proceedings Act* 2011 s 24.

3 See *Simic v Norton* [2017] FAMCA 1007 at [2], [15]-[20], quoted in (2018) 92 ALJ 74.

refraining from engaging them in correspondence: give them the opportunity to write at least one and preferably two or three such letters on the subject, for inclusion in the affidavit material to the court. This is actually a weakness for your opponent even if the opponent does not recognise that.

[7] In some matters the application will be simply either won or lost, and in that situation there is not much room for compromise. But in many cases the real issue is "how much," and in that situation it is helpful to appear willing to engage in reasonable compromise. Even if the ultimate result differs from something you were willing to offer or accept at one stage, the fact that you were willing to make concessions in order to achieve a compromise agreement should stand you in good stead on the question of costs. Do not forget to mark offers "without prejudice except as to costs".

Formulating the application

[8] Having, hopefully, lured your opponent into a position of disadvantage, you then are able to file your application with a reasonable degree of confidence. Make sure you file the right application: if there is already a proceeding on foot, it is an interlocutory application in form 9. This should set out the order sought, and should also seek costs. You do not need to ask specifically for something like "any other order the court may think appropriate", but if there is some specific consequential relief or alternative relief you seek, put that in as well.

[9] One common mistake is the idea that the title of the proceeding changes if an interlocutory application is filed. It does not. The title is exactly the same as in the previous court document filed.[4] If the application is filed in a proceeding started by a claim, the parties are still plaintiff, defendant etc, and should be described as such in the application. In a proceeding commenced by claim, the application should never refer to a party as the "applicant".[5] If the party applying is already a party of the proceeding, that party may be described by the party's existing designation in the proceeding e.g. "application by the plaintiff…", or "the plaintiff applies to the court". There is a respondent (or respondents) to an interlocutory application: r 31(3). They

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4 This used to be quite rare, as the registry would not accept a document without the correct title. These days registries are less strict, and it takes a seriously defective document to provoke a refusal to accept: eg *Perpetual Trustees Victoria Ltd v Riggall* [2014] QDC 80.

5 Despite my warning in *Queensland Building Services Authority v Dragonstone Pty Ltd* (2004) 25 Qld Lawyer Reps 162 this remains a common fault.

should be identified as such on the form, and the application and affidavits served on them at least 2 business days before the hearing: r 31(5). Bear in mind that a party will not necessarily be a respondent, and the respondent may be a non-party.

[10] If the proceeding was commenced by an originating application, that document will define who is the applicant and who is the respondent or are the respondents, and they should be described in an interlocutory application using the same terminology as in the originating application. Again the title does not change. It will however still be necessary to identify the "respondent(s)" to the interlocutory application.

[11] It is possible to have an application by a non-party, for example to set aside a subpoena under r 416, or for leave to withdraw as a solicitor for a party under r 991,[6] or an application against a non-party, for example to enforce a notice requiring third party disclosure over objection under r 247. Again, the title does not change, and the non-party does not get a mention in the title of the document. But the non-party should be identified by name as applicant or respondent as the case may be. Note however that if an interlocutory application is filed by a person who is not a party, it must have on the application the information required by r 17 to be on an originating application, unless that has already been provided on a document filed in the proceeding, such as an earlier application by the non-party: r 31(4). You also need to identify the correct respondent or respondents to the application. For example an application by the solicitors of the plaintiff for leave to withdraw should identify as the respondent the plaintiff personally, not the defendant.

[12] If there are not already proceedings between the parties, you need to decide if the matter can be dealt with by an originating application,[7] or if it is necessary to file a claim and statement of claim first to give the court jurisdiction before filing, perhaps with the claim and statement of claim, an application in the proceeding which has been commenced. An originating application is only appropriate if it seeks some relief which invokes the jurisdiction of the court. This will not be a problem in the Supreme Court; it is often a problem in the District Court, and for all I know in the Magistrates Court, although the limits of the Magistrates Court jurisdiction are simpler and probably better known. The District Court does not have general equitable jurisdiction, but only the equitable jurisdiction conferred specifically by s

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6 As to which, see *Commonwealth Bank of Australia v Davis* [2004] 1 Qd R 363.

7 See UCPR r 9-11.

68(1)(b). If however you have a claim which is within the jurisdiction of the District Court under s 68, an application for pretty much any equitable relief which is relevant to the pursuit of that claim can be brought before the court under s 69.[8]

[13] There are other statutes which confer jurisdiction on the District Court, though often it is necessary for the application or material in support of it to make some particular allegation or establish some factual matter in order to show the court has jurisdiction. For example, the court has jurisdiction in respect of the pre-litigation procedures under the personal injuries statutes, but only if the claim is one which would be within the jurisdiction of the court. So to show that the District Court has jurisdiction in an application for, say, an order to commence a proceeding urgently under PIPA s 43, it is necessary to show that your client's injuries would not justify damages beyond $750,000.00. That requires some material to set out at least some information about the circumstances of the client and the nature and consequences of the injuries.[9]

[14] Some applications, such as for substituted service, have to be made ex parte, and applications for a freezing order are generally made ex parte, at least at first, although there should be some evidence that giving notice first would risk frustrating any order. In general however applications for injunctions should be on notice. Even if there is some urgency about the matter, short or informal notice is better than no notice.[10] If you are proceeding ex parte, there is a duty to disclose any relevant matter, including any matter which would tend against the order you are seeking.[11] Failure to do this can result in an injunction being set aside regardless of the merits.

Drafting affidavits

[15] It is important that affidavit evidence be provided of all facts which need to be proved to support the application made. A consideration of the relevant rule and the law as to what order can or should be made ought to identify those facts which need to be before the court to justify or support the making of the order you are seeking. Once you have identified the relevant facts, set out those facts as succinctly as conveniently possible, without sacrificing completeness. Bear in mind that if there are relevant

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8 For the fundamental distinction between "jurisdiction" and "power", see *Rizeq v Western Australia* [2017] HCA 23 at [125] – [134] per Edelman J.

9 *Woolworths Ltd v Graham* [2007] QDC 301; 28 Qld Lawyer R 311.

10 *Re Griffiths* [1991] 2 Qd R 29 at 34 per Byrne J, who was always hot on the need for notice.

11 *Re South Downs Packers Pty Ltd* [1984] 2 Qd R 559.

facts which are stated in an earlier affidavit on the file, it is not necessary to refer to them again in this affidavit; the earlier affidavit can be read as well, but you do need to note in the application that the earlier affidavit will also be relied on.

[16] If you are exhibiting documents, a brief reference to the relevance of the contents of the document is desirable, but it is unnecessary to quote extensively from the document; the court would prefer to look at the actual exhibit for that purpose. Bear in mind the rules in relation to the use of hearsay. Broadly speaking, if the application is interlocutory, that is, it does not lead to final relief, hearsay is admissible provided that it is put forward by the deponent on the basis of information and belief: the source of the knowledge must be identified, and the reasons why the information is believed should be deposed to.[12] In the case of an application for summary judgment, though the application is for final relief, such hearsay is also admissible.[13] Nevertheless, in seriously contested applications of that nature, if there is some doubt about the matter, an affidavit from the client will always carry more weight than an affidavit from a solicitor passing on the client's instructions, even if the solicitor deposes to believing them.[14] It is insufficient simply to depose to the fact that the client's instructions are xyz, even if they are said to be believed. In matters where hearsay is not admissible under the rules it is necessary to have original evidence; that is evidence which the deponent to the affidavit could give orally within the rules of evidence.[15]

[17] When assembling exhibits, bear in mind that, in the case of documents already filed in the court, not only is it unnecessary for copies of them to be exhibited to an affidavit, it is actually against the rules to do so.[16] In addition, affidavits should not exhibit documents which have already been exhibited to other affidavits, including affidavits already filed by the other side. I have refused a party leave to file an affidavit which simply exhibited a bundle of correspondence which had already been exhibited to an affidavit filed by the other party. If leave is refused in these circumstances, the affidavit cannot be read on the application, and on a party and party basis you cannot charge costs in respect of it. Do not simply exhibit every document in sight; only exhibit those documents not already before the court which

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12 UCPR r 430(2); *Deputy Commissioner of Taxation v Ahern (No.2)* [1988] 2 Qd R 158; *Hanson Construction Materials Pty Ltd v Davey* [2010] QCA 246 at [31], [32].

13 UCPR r 295(2).

14 *McPhee v Zarb* [2002] QSC 4 at [31].

15 UCPR r 430(1).

16 UCPR r 435(12).

need to be referred to in order to support the application. Be conscious of, and comply with, the detailed instructions for assembling multiple exhibits in r 435(9) – (11). With emails, think about the email trail: do you need it? If not, crop it.

[18] Cross-examination on the hearing of an application is generally discouraged, and requires leave. The necessary notice must have been given: r 439. It can happen in some matters, such as an application for an extension of a limitation period, but most judges will not allow it on an application for summary judgment, for example, on the basis that any issue of credibility should be decided at a trial.

[19] Can I draw attention to a much neglected rule: in cases within r 444, r 447 restricts the making of an application until after a reply to the r 444 letter has been received, or the nominated time for applying has passed. Furthermore, copies of the r 444 letter, any reply under r 445, and other relevant correspondence "must be filed with the application": r 447(2). Under r 448(2), the court can take into account the contents of such letters on the hearing of the application, and may receive affidavit evidence only if the court directs: r 448(3). In my experience it is in fact extremely rare for anyone to comply with these rules, but if you have a case where the necessary material can be put before the court in this way, it seems to me that there cannot be any harm in doing so, at least where the r 444 letter has been replied to, thereby demonstrating that it was sent and received. It may be, however, that additional facts need to be proved in order to justify the order sought. The rule was inserted to avoid the necessity to file a supporting affidavit in applications where the relevant issue has already been ventilated in correspondence. There are many situations where that will not apply, and in practice even where it might apply the rule is neglected.

Outlines of argument

[20] There has for some time been a Supreme Court Practice Direction[17] requiring outlines of argument in contested applications to be exchanged before the hearing, and to be provided to the Judge on the hearing. Recently a similar Practice Direction has been introduced in the District Court[18]. Significantly, this limits the length of the outline of argument to four pages. This should not be treated as a challenge. The Practice Direction requires the outline of argument to be sent to the court and to the other

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17 Supreme Court Practice Direction 6 of 2004.
18 District Court Practice Direction 1 of 2017.

party, when requested by the Judge but in any event not later than 4 pm on the day before the hearing. It is essential that the document be provided to the other party not later than at the same time as it is emailed to the court.

[21] Traditionally the rule is that neither party should communicate privately with the Judge anything which might be relevant to the determination of a matter which is or is to be before the Judge. Receipt of a private communication is a matter which may force a particular Judge to refrain from hearing the application, which is why any such communication must be filtered through the associate. Indeed it is a contempt of court to communicate with a Judge something which is calculated to influence the outcome of a proceeding before the Judge without the knowledge and consent of the other party to the proceeding. In *Re JRL; ex-parte CJL* (1986) 161 CLR 342 at 350, Mason J said:

> "It would be inconsistent with basic notions of fairness that a Judge should take into account, or even receive, secret or private representations on behalf of a party or from a stranger with reference to a case which he has to decide."

[22] He went on to cite with approval a statement in an earlier case:[19]

> "The sound instinct of the legal profession – judges and practitioners alike – has always been that, save in the most exceptional cases, there should be no communication or association between the Judge and one of the parties (or the legal advisors or witnesses of such a party) otherwise than in the presence of or with the previous knowledge and consent of the other party."

[23] Further guidance as to the correct procedure was given by the Victorian Court of Appeal in *R v Fisher* (2009) 22 VR 343, where the court said at 351, 2:

> "[38] It is common-place for judges, whether in the course of case management or otherwise, to be provided with bundles of materials, documents for tender, affidavits, and emails not all of which will be tendered or read. But in all such cases the party providing them is bound to simultaneously provide them to the other side. The circumstances in which direct communications may be made to the judge's associate are subject to important qualifications. Written communications between a party to litigation and the judge's associate should normally be confined to matters concerning practice or procedure. Communications including emails containing allegations, matters of substance or requests for substantive advice should not be forwarded to a judicial officer without the [opposite] party's express agreement (save in an exceptional case warranted for example by an ex parte application).

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19 *R v Lilydate Magistrates' Court; ex parte Ciccone* [1973] VR 122 at 127.

> [39] **Unless the subject of express prior consent of the other parties, written communications should not include information or allegations which are material to the substantive issues in the litigation. In all circumstances, the other parties to the litigation should be copied in on any such correspondence. If a communication which apparently fails to comply with those requirements is received in chambers, it would be for judicial staff promptly to enquire whether the other party has been notified before engaging in any further exchanges with the sender.** The ubiquity and prevalence of informal email communications between courts and litigants entails many advantages but, unless approached with an appropriate protocol by litigants and within judges' chambers, presents potential risks of the errors demonstrated in the present case.
> [40] A failure to strictly comply with such procedures threatens the integrity of the proceedings and gives rise to the risk of an allegation of at least a perception of bias." (*emphasis added*)

[24] That decision was applied in *Tugrul v Tarrants Financial Consultants Pty Ltd* [2013] NSWSC 1971, where Kunc J said at [21], [22]:

> As a practical matter, and consistently with the principles and rules to which I have referred, I summarise the position as follows. There should be no communication (written or oral) with a judge's chambers in connection with any proceedings before that judge without the prior knowledge and consent of all active parties to those proceedings. Particularly in relation to written communications, given the ubiquity and speed of emails, the precise terms of any proposed communication with a judge's chambers should be provided to the other parties for their consent. There are four exceptions to this:
> (1) trivial matters of practice, procedure or administration (e.g. the start time or location of a matter, or whether the judge is robing);
> (2) ex parte matters;
> (3) where the communication responds to one from the judge's chambers or is authorised by an existing order or direction (e.g. for the filing of material physically or electronically with a judge's associate); and
> (4) exceptional circumstances.
> There are three other matters. **First, any communication with a judge's chambers which falls into any of the categories set out in sub-paragraphs [21] (2), (3) and (4) above should expressly bring to the addressee associate's or tipstaff's attention the reason for the communication being sent without another parties' knowledge or consent. Second, where consent has been obtained, that fact should also be referred to in the communication. Third, all written communications with a judge's chambers in relation to proceedings should always be copied to the other parties.** (*emphasis added*)

[25] An extreme example of a private communication which was obviously improper, and which led to a finding that there was a contempt of court, may be found in *R v Vasiliou* [2012] VSC 216, where a litigant in person sent a lengthy email to various people

including the associate to the judge who was hearing a matter in which he was a party. In that case the email was copied to the other party in the proceeding, but it was still held to amount to a contempt to send it to the associate: [36]. In *FAL Management Group Pty Ltd v Denham Constructions Pty Ltd* [2015] NSWSC 1035, McDougall J of the New South Wales Supreme Court pointed out that it was contrary to both the Barristers' Rules and the Solicitors' Rules for legal advisors for one party to communicate to the court without the **prior** knowledge and consent of the other party or parties to the litigation concerned. In that case his Honour did not regard the fact that the email was copied to the other party's solicitor as excusing such behaviour: [4], where this was described as a "small and insufficient" attempt to rectify that deficiency. Consideration was given to referring the matter to the Office of Legal Services Commissioner, but in the event after hearing further submissions no such reference was made.

[26] Finally in *Legal Services Commissioner v Trost* [2017] QCAT 171, the tribunal presided over by Thomas J cited this and other decisions in the course of illustrating a proposition at [21]:

> "In all cases, it is necessary to consider the particular conduct to determine whether the conduct is professional misconduct or unsatisfactory professional conduct (or neither). The focus is on the underlining conduct. For example, in terms of the nature of the conduct, at law, improper ex parte communications with a court may amount to serious contempt, showing that the offender is not a fit and proper person to engage in legal practice."

[27] Given the terms of the Practice Direction, it is permissible for the outline to be forwarded in accordance with it so long as the other party or the solicitor for the other party is copied into the forwarding email. Nevertheless this exception to the general principle does not detract from the force of the proposition that forwarding material to a court which is relevant to the matter before the court, with a view to influencing the outcome in that matter (which of course is precisely what an outline of argument is) is prima facie a contempt of court, and potentially a serious one. It is important to bear in mind the limits of the exemption from any such contempt conferred by the Practice Direction.

[28] It sometimes occurs that an application is made to a court on an ex parte basis, for example for a search order or a freezing order. If circumstances are such that an ex parte application to a court is otherwise proper, then an ex parte submission of an

outline prior to the hearing of the matter would be unexceptionable. It is important to distinguish between that situation and a situation, which sometimes happens, where the other party is aware of the application to the court, but there is some material which is to be put before the court which is not to be provided to the other party.

[29] For example, on an application to sanction the compromise of a claim by a person under a disability under the *Public Trustee Act* 1978, s 59, certain material required to be produced to the court is not to be served on the other party: r 98(2), (3). Apart from this material, it is common for a copy of an opinion prepared by counsel to be handed up to the court when considering such an application, though that document is not shown to the representative of the other party, and after it has been read it is placed in an envelope marked "not to be opened except by order of the court". When this is done in open court, the fact that it is being done will be obvious to the other party, so the issue averted to by Mason J will not arise. To forward such material to a Judge hearing the application prior to the hearing without the prior knowledge and consent of the other party, however, falls literally within the formulation of what constitutes contempt in the passage referred to from his Honour.

[30] If the material is to be forwarded as an attachment to the email, the issue other party cannot be copied into the email. In those circumstances, the party wanting to provide the material prior to the hearing should advise the other party of this and obtain the other party's consent to the material being provided to the court in this way prior to the hearing, and should state in the email to the judge's associate that that has occurred, so that the material is being provided to the court with the knowledge and consent of the other party. If the other party will not consent, only the outline, a copy of which can be provided to the other party, should be forwarded to the court, and the other material must only be handed up on the hearing of the application.

[31] As for the content of an outline of argument, this is necessarily an exercise in compromise. It also depends on the particular circumstances of your application. In some contested applications the parties have narrowed the point at issue considerably before the hearing, so by the time the matter gets to a hearing the parties have identified with some precision what is usually a fairly narrow point on which the application turns, which is fairly arguable on the material. In such a situation, explain briefly how the point arises, summarise the factual basis relied on in your argument

as disclosed by the evidence, and set out in summary form the reasons relied on as supporting the conclusion contended for.

[32] If there are relevant authorities, refer to them, but do not quote great slabs of text from them, as this wastes space. If it is necessary to refer to the precise wording of a passage from a decision, have a copy of the decision available to be handed up to the judge and refer the judge to the relevant passage in the course of oral submissions. For example, in some cases it is possible to set out the test to be applied on the hearing of the application in the words used in a particular decision. If you are simply quoting what was said to be the test it can be put as a quote followed immediately by a reference to the decision concerned. If however there is any element of paraphrasing involved in your submission it should not be put as a quote but simply a statement of the test followed by the authority relied on to support that statement.

[33] Few applications turn on a detailed debate as to the applicable law, though it is possible in some cases, for example on a summary judgment application where the real issue between the parties is essentially one of law. In those circumstances reference to a number of authorities may be justified, and all authorities relied on should be at least listed. In most cases however judges will not need a dissertation on the law, and the issue will be how well established propositions of law should be applied in the particular circumstances of the case. (Having said that, I acknowledge that some judges need more help with the law than others. It helps in this, as in most aspects of advocacy, to know your court).

[34] It is also important not to go to the other extreme with an outline, and plunge immediately into the narrow issue between the parties. This approach can lead to the outline being difficult to follow because the judge will not know the context in which the point arose. Explain briefly the nature of the substantive proceeding between the parties (unless it is an originating application) and how this particular issue arose, then identify the point or points specifically in issue between the parties. Then refer to the test and the grounds relied on to justify the order you are seeking.

The hearing

[35] A “rule” which has these days somewhat fallen out of fashion is what used to be referred to as the “ten minute rule”, under which the parties to a particular proceeding should arrive at the court room ten minutes before their matter is due to start. This

allows a margin for error for things such as being held up in traffic, or being directed to a different courtroom, and also allows the opportunity to have some contact with the party opposite if the matter is being contested. I suspect the willingness of judges to hear lawyers who turn up late has increased in recent years, leading to some laxity in this area. Despite this modern trend, there is a risk associated with running late due to another modern trend, the fall in the number of applications. If a judge goes into court and there is only one application left on the list, and no one there to appear in it, the judge is not likely to be in the courtroom for very long, and it may be difficult to get the judge back. There are some litigants in person who seem to make it a point of honour to be late for court, but this is not conduct which any of us encourage.

[36] At the beginning of the hearing "read" your material, that is, identify all the material you want the judge to look at. If any affidavits have not yet been filed, ask for leave to read and file them. If you have unserved affidavits to file by leave, give them to the other side as soon as possible, not just when they are handed to the court, since a judge will not even look at them until your opponent has at least read them. If your opponent then wants to answer something, leave may be opposed except on terms of an adjournment. If there is a risk the other side will not turn up, you should have an affidavit of service to read and file; if the other side appears, one is not necessary.

[37] In the old days judges would know nothing about the application until the lawyers explained in court what the matter was about; these days with outlines of argument being provided in advance, judges would usually know something about the matter even before the hearing starts. Most judges will have read at least the outlines, and quite a few will have read all the material and prepared matters to the point where it may be difficult to shake their preliminary views as to the outcome. In these circumstances, what you say during the hearing may largely depend on what questions you are asked by the judge. It is probably safe enough to assume that the judge has read the outlines, and oral argument be initially advanced on that basis, but be prepared for the possibility that the judge may not have read the outlines. Most judges would indicate whether they had or had not read the outlines.

[38] If so, the judge should be in a position to direct attention to those matters on which the judge requires further submissions, but not all judges will approach the matter in that way, and you will need to be able to deliver an oral argument in the absence of any particular judicial prompting or questioning. The actual conduct of the hearing

is probably the area which depends most on the individual judge. If I have read the outlines and nothing in particular has struck me as a relevant matter which the parties have overlooked, I will commonly call on the side which on my preliminary view ought to lose, either simply to advance that side's argument, or perhaps to respond to a particular difficulty which it seems to me that side faces. I have to say however that I am simply not aware of the extent to which other judges follow the same approach. The advantage of the provision of outlines in advance is that it should permit the oral hearing to be conducted more efficiently in this way, although sometimes there can be a bit of toing and froing with the oral hearing.

[39] It is important to be thoroughly across all of the facts in the material before the court, so that if the judge asks a question about some factual issue you will be able to refer the judge to the relevant passage in the affidavit, either initially or as justification for your answer to the question. Conversely, if the matter is not covered by the affidavit material, you will be able to say so. The appropriate response to a question about a factual matter may be to say that the point is not covered directly, but there is indirect reference to it in a letter which is exhibited to a particular affidavit, or paragraph X of some other affidavit. That may be enough for the judge's purpose. What is not helpful is a response, in effect, that there may be something there or there may not.

[40] In some circumstances, if a deficiency in the material is identified during the hearing, it may be possible for that deficiency to be remedied quickly, and the appropriate course may be to ask the judge to stand the matter down to enable some additional affidavit material to be prepared. Most judges should be willing to do this if asked, particularly if there is some urgency about the matter, and they have concluded that there is a deficiency which has to be addressed.

[41] If you are not sufficiently familiar with the particular judge hearing your application to be able to know how the oral argument needs to be prepared for presentation to that particular judge, the main thing is to be flexible in your response to the way the hearing develops. On the other hand, it is important to ensure that a desire to respond properly to any questions raised by the judge does not lead you to avoid aspects of your oral submission which do need to be stated to the court. So if you are intending to cover grounds a, b, c and d, and you get a question at the beginning which takes you to directly to ground d, after you have said what you can say on that ground do

not forget to go back and deal with grounds a, b and c, unless you are actually stopped in respect of those grounds.

[42] Two other brief points. If your involvement is essentially formal, and you are not based at the relevant centre, you can appear by telephone or (less often) video-link. This must be arranged in advance with the court or associate. It can be useful in urgent matters, or if you do not have much to say, but it is difficult for both you and the court if you try to put forward any significant argument by telephone. If a matter is settled so that an order is to be made by consent, many consent orders can be made by a registrar under r 666. If there is no time for that, many judges will make a consent order in court without the need for any appearance if both sides confirm by email to the associate that a consent order is to be made in particular terms. Failing that, if one person is also to represent the other side, have a letter from that side to confirm to the court that the order in the terms sought is by consent.

Draft orders

[43] If the matter is one where there is going to be some issue about the detail of the terms of any particular order which is made, it may be helpful to have a draft order which can be handed up at the beginning of the hearing of the application. Most judges however will not expect to see a draft order until they have reached the point of deciding what should be done with the application, at least in general terms. A draft order will then be of assistance in finalising the precise wording of the order. I am probably unusual in the extent to which I am fussy about the wording of draft orders.

[44] There is a form for an order, form 59, which provides for recording the judge who made the order, the date of the order and the initiating document. This will commonly be an application, and these days there can be one order which deals with more than one application. (In the old days there would be a separate order taken out in respect of each application before the court). Sometimes however the matter is before the court in some other way, such as on a review, or pursuant to an order that a question or questions be decided in advance of the trial,[20] if that has been ordered separately. Commonly a review can be characterised as the adjourned hearing of an application to place a matter on the commercial list, or simply an application for directions, and if it can be identified in that way, the date of the original application can be entered.

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20 Under UCPR Chapter 13 part 5.

If not, there will usually be a previous order that the matter be reviewed on the particular date, and that order can be identified as the initiating document.

[45] The introductory words to the formal order are "The order of the court is that". If the order is an order by consent the words "by consent" should be inserted before "is". Note the presence of the word "that" at the end of the introductory words. That word is there so that it is not necessary to begin the individual paragraphs within the order with the word "that". Nevertheless, a proliferation of such "that"s is a common deficiency in draft orders. The order should be drafted so that each paragraph makes sense if it is read immediately following the introductory words. It should also be expressed as an order of the court, that is to say, an instruction or command that a party do something, or that something be done, or not done.

[46] There is also a separate heading if what is being done is technically a direction rather than order: "The court directs that". In some cases an order is made on an undertaking, such as "the usual undertaking as to damages"[21] and that needs to be recited prior to the introductory words of the order.

[47] One particular fault which often occurs here with an application for summary judgment, or indeed any judgment on another basis than after a trial, is to seek an order that judgment be "entered" in certain terms. There is no provision in the current rules for this to occur: even in the case of default judgment, under r 283 (3), in the relevant circumstances "the court, as constituted by a registrar, may *give* judgment". The wording of rules 292 and 293 dealing with summary judgment is the same. Rule 661 speaks about the process by which a formal written judgment is prepared in the registry as "filing an order". In this rule the term "order" includes "judgment": see the definition of "order" in schedule 4.

[48] If judgment is given for a sum of money, it is not appropriate for the judgment to be expressed as a judgment that the defendant pay the plaintiff $X together with interest thereon at a particular rate from a date to the date of judgment.[22] The interest payable either under an agreement or under the *Civil Proceedings Act* 2011 s 58 should be

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21 Or "undertaking as to damages in the usual form": *Cousins Securities Pty Ltd v CEC Group Ltd* [2007] 2 Qd R 520 at [53]. For the need for, and effect of, such an undertaking, see *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1979) 146 CLR 249 at 260-8, 311-4. Whether the proffered undertaking is of any real value can be contentious: *The MCF Group Pty Ltd v Coleman* [2015] QCA 268.

22 *Wash Investments Pty Ltd v SCK Properties Pty Ltd* [2016] QCA 258 at [42].

calculated, and the specific amount stated in the judgment. I always give judgment in the form that the defendant pay the plaintiff $X, including $Y by way of interest, stating whether the interest is under an agreement or under the Act. If the interest is under an Act, it is not taken into account in applying the monetary limit of the District Court jurisdiction: District Court of Queensland Act 1967 s 68(2)(c). If the interest is recoverable under a contract however it is taken into account, so the judgment including interest cannot exceed $750,000.[23]

Costs

[49] Costs on originating applications should normally follow the event, because a proceeding commenced by originating application is a discrete proceeding, and once final relief has been granted the proceeding is really spent, except for the purposes of enforcing any orders made in it, such as for example an order for costs. There is not even the potential complication of costs being affected by an offer to settle under the rules, because under r 352 offers to settle under the rules can be made only in a proceeding started by claim, or ordered to continue as if started by claim under r 14, or if there has been an order or direction made for pleadings or other documents defining the issues.

[50] A party may make a "Calderbank" offer to settle such an application, that is an offer to settle "without prejudice except as to costs" which expressly threatens an application for indemnity costs if the offer is not accepted, but the court still has to be persuaded in the case of a Calderbank offer that it was unreasonable to reject the offer before costs on an indemnity basis will be ordered, and even then usually only from the date when the offer was made.[24] Under the rules, by contrast, there is a prima facie position that costs are to be on the indemnity basis if a plaintiff has done better than the plaintiff's offer.

[51] There is a great deal of scope for variability in orders for costs on interlocutory applications. At one time it was common for a successful applicant on an interlocutory application to get the costs of the application made that party's costs in the proceeding, commonly expressed as "costs in the cause". That gave the costs of the application to that party but only if that party won in the end, and in effect made

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23 *Platinum Investment Group Pty Ltd v Anderson* [2018] QSC 2.

24 *J & D Rigging Pty Ltd v Agripower Australia Limited & Ors* [2014] QCA 23; *Kitchen v Vision Eye Institute Ltd* [2017] QCA 32.

the costs of the application part of the costs of running the proceeding as a whole. The difficulty with this approach is that it does not provide any disincentive to an unreasonable approach to the conduct of interlocutory applications. Judges are often influenced more by considerations of the extent to which the application has been made necessary by the attitude of a particular party, and whether the application could have been avoided if one party or the other had adopted a more reasonable approach.

[52] So if an application is brought and ultimately not resisted, costs will not necessarily follow the event. The opposite party who omits to put up a fight may then argue successfully that the application was brought prematurely, or without giving that party a proper opportunity to submit to the reasonable demands of the other party without the need for an application. A judge who is keen to discourage unnecessary interlocutory disputation will frequently view such arguments with sympathy.

[53] Another reason why a successful party might be deprived of an order for costs is if the successful party was successful on grounds which had not been ventilated in advance, so that the other party can argue that if they had been raised in advance the application would never have been made. A classic example of this is if an application is made for summary judgment after a defence is filed which contains nothing of substance, and after the application is filed and served an affidavit of the defendant is filed raising for the first time an issue which is sufficient to defeat summary judgment. In those circumstances a court may well take the attitude that the application was brought only because of the defendant's failure to raise the defence at the proper time, and order the defendant to pay the costs of the application even though it was unsuccessful.[25] On the other hand, if an application for summary judgment is made and resisted successfully on grounds of which the plaintiff had ample notice, the plaintiff would normally have to pay the costs, since the application was inappropriate.[26]

[54] There are sometimes grounds for reserving the costs of a summary judgment application: if an application is made and resisted successfully on the basis of an affidavit setting out factual issues which are contentious, the court may feel that while it cannot resolve such factual issues on the hearing of an application for summary

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25 cf *Deputy Commissioner of Taxation v Lister* [2002] QCA 270, where no order as to costs was made when relevant material had been provided late.

26 UCPR r 299; *Davis v Perry O'Brien Engineering Pty Ltd (No.2)* [2016] QSC 285 at [10].

judgment, it should reserve the costs of the application, since in a trial findings of fact will be made which will determine whether the application was successfully resisted on the basis of a false affidavit.[27] In those circumstances, the defendant should pay the costs of the application for summary judgment even though it was unsuccessful. If, however, at the trial the facts alleged by the defendant are made out, the plaintiff should pay the costs of the summary judgment application, as well as (in all probability) the costs of the trial. There is also the possibility that ultimately the trial may turn on an issue which had not even been raised by either party at the time of the summary judgment application, a further complication. So it is quite possible for a summary judgment application to be dismissed but with costs reserved.

[55] Another factor which sometimes influences costs orders in interlocutory applications is a desire to avoid making an order which might stifle the litigation, or which might make the litigation harder to settle, particularly in the latter case where the litigation is not just a conventional fight about money. For example, if in a claim by a person who does not have a lot of money there is an interlocutory application where the plaintiff is unsuccessful, an order may be made that the plaintiff pay the defendant's costs of the application "in any event". The effect of those words is to postpone the recoverability of those costs until the substantive proceeding has been heard and determined.[28] This is an order which is usually made in circumstances where there is a risk that extracting the costs of the interlocutory application from the other party at that stage in the proceeding may stifle the claim, which may be thought to be unjust. It may be also used in personal injury litigation where a defendant obtains an order for costs, on the basis that it is likely that the plaintiff will get damages at the end of the day and that would provide a fund out of which those costs could be satisfied.

[56] There have been cases where an interlocutory application has been fought and won where it is clear that the parties personally have a good deal of emotional investment in the proceeding. In these circumstances, I sometimes simply reserve costs, on the basis that making an order for costs in favour of one party may make it more difficult for the parties to negotiate a pragmatic settlement of the dispute, and in that way may lead to the prolongation of litigation which ought to be settled.

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27 *State of Queensland v Nixon* [2002] QSC 296 at [6], [7]; *Davis* (*supra*).

28 *Allied Collection Agencies Ltd v Wood* [1981] 3 All E.R. 176. In England this was then the usual form of costs order on interlocutory applications. In Queensland it is and has been unusual, although not rare. It is authorised by r 682(2).

[57] Overall, therefore, there is a good deal of flexibility about the approach to costs in an interlocutory application. The practical lesson to learn from this I suppose is that it is unwise for parties to proceed on the assumption that costs will necessarily follow the event.

[58] At one time judges were being encouraged to fix the costs of applications,[29] and occasionally I am still asked to do so. If a court does fix costs in this way, it will usually be on a fairly rough and ready basis, and will not necessarily equate with the amount which would be recovered if costs were assessed in the usual way.[30] Some judges are more willing to do this than others.[31] I am generally willing enough to do it, but some parties do not ask me to do it more than once, as they think I am not as generous about costs as I ought to be. Bear in mind that if you are going to put an estimate of costs before the court for the purpose of asking for costs to be fixed, the estimate needs to be calculated on the basis of the scale, unless the circumstances are such that it is appropriate to fix costs on an indemnity basis.

Conclusion

[59] I attach to the paper a list of tips for the conduct of applications. This is a re-worked version of a much re-worked list which I inherited many years ago from another judge, and by and large is still good practical advice. I would, however, add a caveat that it was formulated at a time the application lists were much longer than they generally are these days, and when there was more pressure to get through a long list as efficiently as possible. There are not the same pressures today, and no doubt as a result some judges at least will look into applications more thoroughly than may have occurred in the past. As well, some aging judges may use the hearing of an application as an opportunity to provide instruction on the law of procedure to whichever hapless practitioners happen to be before them at the time. If this happens to you, console yourself with the thought that no charge is being made for this.

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29 Practice Direction 3 of 2007.

30 *Goodwin v O'Driscoll* [2008] QCA 43 at [12]; *Farrar v Julian-Armitage* [2016] QCA 141 at [5]. For an interesting discussion of the process of fixing costs in a substantial matter in the Federal Court, see *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd* [2011] FCA 661.

31 *Venn v Bendigo Bank Ltd (No 4)* [2007] QDC 332 at [20].

QUEENSLAND LAW SOCIETY SEMINAR

Tips to Overcome Common Problems in District Court Applications

1. Check to make sure District Court has:
   (a) jurisdiction to deal with the proceeding;
   (b) power to make the order sought in the application;
   (and know the reason why).

2. Do you need to have complied with r 444? Have you?

3. If preparing material:
   (a) get the title right;
   (b) the application should state the rule or section relied on;
   (c) do not duplicate material already on the file;
   (d) do not "crave leave".

4. Focus on what has to be established, and check that the material relied on does that. Unless confident that the respondent will be there, prepare an affidavit of service.

5. Prepare, and use, checklists for matters frequently encountered, e.g. substituted service; summary judgment; dismissal for want of prosecution; adding/substituting a party when the limitation period has elapsed.

6. Prepare written submissions; do not exceed 4 pages. If the affidavit material is lengthy, summarise in the outline of submissions. (Some judges like to get them in advance).

7. Photocopy for the judge the more important authorities referred to (you can use relevant extracts).

8. If referring to a section of an Act, have a copy of it or relevant parts of the Act to hand up.

9. Prepare a list of material to be read, including any to be filed by leave, and a copy for the associate.

10. Prepare a draft order. Don't include "His Honour . . . . . .".

11. Have your Uniform Civil Procedure Rules with you. Know which rule(s) applies to your application or the argument in opposition.

12. Give all material to your opponent in advance.

13. Discuss in advance with your opponent:
    (a) matters in or not in issue;
    (b) any objections to admissibility.

14. Give a realistic time estimate at any call-over.

15. Don't call a matter a consent order when it is really a matter for the exercise of discretion by the judge.

16. Get full instructions (even for a consent order or adjournment; e.g. know the reason for an adjournment). If not admitted, seek leave to appear.

17. Begin with a concise overview. Ask the judge whether the preference is for he or she to read the material or for you to go through it.

18. Outline the terms of the orders sought if it is not just as set out in the application. If the matter is complicated, the judge may ask for a draft order at the beginning. Alternatively, you may ask the judge if he or she would like a copy of your draft order early.

19. Be familiar with your material including exhibits, and your opponent's. Be familiar with the history of the proceeding, especially earlier orders which have been made.

19. Be clear. Don't be flustered. Don't defer to others unnecessarily

OVERALL:

Make it easy for the applications judges – they may have a big workload and will appreciate your efforts.

McGill DCJ
June 2018