Proceedings in the Expedition List

By The Hon Justice J R Sackar

Practice Note SC 8 deals with urgent matters in the Equity Division. The original Practice note governing the Expedition List in the Equity Division (Practice Note 42) dates from 1987. Theoretically however all lists in the Division have some capacity to expedite matters where necessary and do so from time to time.

The Equity Division deals with urgent matters in two quite distinct ways. The Duty Judge is theoretically available at all times, all year as the first port of call. That judge however will usually only deal with short matters ranging from applications for short service of proposed proceedings which may take minutes, to contested applications for interlocutory relief which may take several hours.

The Duty Judge rarely if ever will hear matters on a final basis. The more common course is that after the interlocutory process is concluded and only if necessary the matter will be referred to the Expedition List for allocation of a date or dates for a final hearing.

However matters can, on application be brought directly into the Expedition List which is generally held each Friday. If application is made direct to the List, SC 8.8 sets out the required procedure.

In 2005 Campbell J (as he then was) in *Vaughan v Dawson* [2005] NSWSC 33, discussed the List and reviewed the authorities. He adopted what Young J (as he then was) had earlier said in *Greetings Oxford Hotel Pty Ltd v Oxford Square Investments Pty Ltd* (1989) 18 NSWLR 33 at 42–43 as follows:

> [8] …when considering whether to expedite proceedings in this Division there are at least six factors which are taken into account.

These are:

1. Is this the appropriate Court for the litigation, in particular:
   (a) does the litigation fall into the work normally done by this Court;

   and

   (b) is there a sufficient nexus with New South Wales.
2. Is there a special factor involved which warrants expedition. Usually these

factors will be:

(a) the loss of witnesses if the case is not fixed at an early date;

(b) matters of public importance;

(c) that the subject matter of the litigation will be lost if it is not heard quickly;

(d) that the litigation to date has been delayed through no fault of the applicant;

(e) that the applicant is suffering hardship not caused through his own fault;

(f) that there is self-induced hardship (including those cases where corporate bodies fix a meeting date in the near future and then expect the Court to displace all other matters to hear their dispute before that date);

(g) the nature of the case (e.g., ejectment, child custody); and

(h) that there are large sums of money involved.

There may, of course, be other matters which can count as special factors, but the list that I have given is what occurs in the usual case. The health or age of parties or witnesses may, of course, come under (a), (c) or (e) or all of those headings.

3. Have the parties proceeded up to the date of the hearing of the motion for expedition with due speed?
4. Are the parties willing if expedition is granted to do all in their power to abridge the hearing time including joining in an agreed bundle of documents, preparing statements of witnesses, filing lists of objections to affidavits, making admissions of matters not really in dispute and restraining wide-ranging cross-examination. Of course there will always be cases where one party's interests are to delay resolution of the dispute as much as possible. Such cases can usually be recognised and special procedures adopted.

Then there are two factors dealing with the exigencies of the list, viz:

5. Any application for expedition must be judged in the light of the number of other cases of equal or higher priority that also seek an expedited hearing.
6. Any 'right' to expedition is a right to have the case fixed on one occasion. If, after a date has been fixed, it has to be vacated, it is difficult indeed to justify again expediting the proceedings: *Ron Hodgson Cabramatta Pty Ltd v Wewoka Pty Ltd t/as B P Cabramatta Motors* (Waddell CJ in Equity, 30 March 1989, unreported).

The question here is whether there is a seventh guideline, namely, that one should not expedite a case where the chances of the applicant for expedition securing what it wants in the proceedings are not high. This point arises because the defendant submits that because of the matters I have already canvassed, the chances of the plaintiff obtaining equitable relief must, according to the defendant, be slim.

I do not think that the Court ought, in an application for expedition, to make an assessment of the applicant's chances of success. However, I do agree that there is a seventh guideline, namely, that the Court should not expedite a case if it considers that in all the circumstances the chances of the applicant obtaining what it seeks in the litigation cannot be put as higher than speculative.

In the balance of his judgment, Campbell J went on to discuss what he saw was needed to enable the principles of granting expedition to work in practice. To a very large extent what the judge said provides the basis of the current practice note.

Practitioners should keep in mind that as a rule of thumb matters which have an estimate of five days or more will generally not be heard in the Expedition List. For the List to provide a meaningful response where urgency is required, judgment must also necessarily be expedited. Cases over five days usually require more work from the judge's point of view which tends to slow the adjudication process. In addition it will frequently be the case that many proceedings which come into the List are initially commenced by summons. Practitioners should expect that it is highly likely orders will be made that the matter be pleaded in full. It is imperative, as always, where expedition is granted that the issues are as precisely identified as is practicable.

If a case is in urgent need of final hearing, (but where the practitioners are of the view the case might or will exceed five days) application should nonetheless be made to the List. The Division obviously stands ready to assist litigants. If a case has an estimate of more than five days the Chief Judge will normally be consulted to explore more general availability. Accommodation will be found for lengthier cases, if necessary.

At the hearing of the motion for expedition whatever length of hearing is estimated the Court will explore whether liability can be separated from quantum or whether the determination of a question or questions could or should be ordered. Where the only or principal reason for expedition is the age or ill health of one of the parties or their witnesses orders can readily be made for the taking of that person's evidence on commission usually before a person appointed under UCPR, 24.3 and 31.6. This will not necessarily be the trial judge as the Court may wish to retain flexibility over who eventually hears the matter. The evidence will usually be audio visually recorded. This procedure will often take the urgency out of the proceedings generally.

The Expedition List is run for the benefit of litigants. It is to be expected that consideration is given before application is made to the need if expedition is granted strictly to abide by the timetable fixed for procedural steps. Failure to do so may lead to the matter being removed from the List. As Pembroke J observed in *Smithson & Ors v National Australia Bank & Anor* [2011] NSWSC 312:

1. It is important for the profession to recognise that the expedition list is run for the benefit of all litigants in this Division of the Court who can justify the requirement for urgency. The conduct of the list necessarily requires the Court's constant re-assessment and re-balancing of the competing claims for urgent hearings by an ever-widening group of litigants. The necessity of taking that approach means that, depending upon the nature and number of competing urgent claims, it is sometimes necessary to take a strict approach to defaults by parties in complying with timetables set by the Court. It also means that, if through no fault of any particular party, time estimates prove to be inaccurate or optimistic, the parties may forfeit the preferential dates that have been allotted to them.
2. In this respect, the conduct of proceedings in the expedition list differs from the conduct of proceedings in the general list. The expedition judge takes a less generous, and more demanding, approach to delay or obfuscation, inaccurate estimates of hearing time, or incompetence in the preparation of the case for hearing. The consequence is that circumstances may all too frequently arise when expedition will be revoked, the hearing date vacated and the parties' priority forfeited.

In deciding whether or not to expedite a matter the Court plainly exercises a discretion. This involves a balancing process. On the one hand the Court must as an institution be placed to expedite or fast track cases requiring urgent determination. However the litigation can only proceed if no party is unreasonably denied an opportunity to put its case forward. Issues involving disclosure, and/or subpoenas, especially those directed to third parties, will require a somewhat pragmatic approach. Practice Note SC 11 also comes into focus. Expert evidence can be a particular problem and thought must always be given to the possibility of retaining a single expert.

Ss 56–60, of the Civil Procedure Act 2005 should be daily reminders for litigants and the clients, nevermore so than in the Expedition List.