NSW YOUNG LAWYERS CLE SEMINAR SERIES 2010

CLASS 5 HEARINGS FROM THE PERSPECTIVE OF THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

BEFORE THE HEARING

The Relevant Legislation

1. The ambit of the Court's summary Class 5 jurisdiction is set out in s 21 of the *Land and Environment Act Court 1979* (NSW).

2. Part 5 of the Land and Environment Court Rules 2007 (NSW) ("the LEC Rules") deals with proceedings of the Court in Class 5 matters. Relevantly it states that Pts 55 (contempt) and 75 (criminal proceedings) of the Supreme Court Rules 1970 (NSW) apply.

3. It also states that some, but not all, provisions of the Uniform Civil Procedure Rules 2005 (NSW) ("UCPR") apply. In particular, it states that orders may not be made under r 31.3 of the UCPR in respect of the evidence given by an accused person without the accused person's consent (summary disposal).

4. The other statute to which regard must be had is the Criminal Procedure Act 1986 (NSW). Chapter 4, Pt 5 of that Act sets out the procedure to be followed in the summary jurisdiction of this Court.

5. There is, as yet, no practice note in the Court governing the running of a Class 5 proceedings, however, this is anticipated to change soon.

Commencing Proceedings

6. In order to commence Class 5 proceedings in the Court, r 5.3 of the LEC Rules must be complied with. It states that the originating process, the summons (usually accompanied by an order), is to be accompanied by the affidavits intended to be relied upon as establishing *prima facie* proof of the offence charged.

7. This does not mean that the prosecution will be precluded from filing additional evidence but it does mean that, unlike most civil proceedings, the filing of an originating process alone will be insufficient.

8. An appointment is made with the duty judge once the summons, order and the affidavits are ready, and provided that the judge is satisfied that a *prima facie* case has been established, the judge will sign the order, which once filed in the Registry, commences the prosecution.

At the First Directions Hearing

9. At the first directions hearing the Court will anticipate that a plea is entered and a timetable is set for the filing and serving of the evidence on which the prosecutor intends to rely. This includes both lay evidence and expert evidence.

10. Sometimes particulars of the charge are requested by the defence in order to determine what plea is going to be entered or what evidence is required. This may delay the setting down of a timetable for evidence. The Court will only entertain so many requests for an adjournment for this reason (or indeed any reason). The earlier the request is made for particulars the better. That is to say, don't wait until shortly before, or worse, after the first mention date.

11. It must also be remembered that in sentencing the Court is required to take into account a plea of guilty (s 21A(3)(k) and s 22(1)(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW)). The earlier the plea is entered the higher the utilitarian value of the plea and thus a greater discount (up to 25%) will be

granted in sentencing (see *Director-General, Department of Environment and Climate Change v Rae* (2009) 168 LGERA 121 at [58]-[64]).

12. Ideally any orders sought at any directions hearing should preferably be by consent and should always be in writing (unless very simple).

13. Consideration should be given by the parties to filing an agreed statement of facts, even if the hearing is defended. It is almost always the case that some factual matters can be agreed upon. Every fact that the parties can agree on will reduce the evidence that is required to be filed by the parties, will reduce the demands placed on the Court's time and will reduce costs (see ss 257B and 257C of the *Criminal Procedure Act* as to the Court's power to award costs, particularly in favour of the prosecutor if a conviction is secured). In sentencing hearings the filing of a fulsome agreed statement of facts is expected.

14. Likewise, consideration should be given to an agreed bundle of documents.

15. If there are multiple but related charges this should be brought to the Court's attention as soon as possible so that an order can be made that the files travel together (and later, so that the evidence in one matter is, if appropriate, evidence in the other).

16. The short minutes of order should include a provision for liberty to restore, not apply, to the Court's list.

At Subsequent Directions Hearings

17. The function of subsequent directions hearings is to ensure that the matter is properly and expeditiously prepared for hearing. Typically the orders will concern the filing and serving of further evidence, including any evidence from the defendant. This is particularly so in respect of any expert evidence upon which either party seeks to rely. Of course a defendant's right to silence means that they cannot be compelled to file any evidence in advance of the hearing, but if the evidence relied upon is to be in written form, particularly expert evidence,

there is an expectation that it will be filed and served before the hearing commences. Otherwise, late service on the prosecution may necessitate an adjournment of the proceedings.

18. If there is a breach of the timetable previously ordered by the Court, the Court will expect an explanation on the next occasion the matter comes before it. If the breach is serious or sustained, that explanation should be contained in an affidavit. In addition to the explanation for the breach, the party in default should also provide to the Court a remedy for the breach.

19. By the third or fourth directions hearing the parties should be ready to take a hearing date. The short minutes of order should seek an order "that leave be granted forthwith to approach the Registrar to seek a hearing date (estimate of X days)". The estimate should be realistic given the number of witnesses it is anticipated will give evidence and be required for cross examined. If closer to the date of the hearing less time is required than the estimate previously given because the issues and/or evidence in the case have narrowed, the Court should be informed so that another matter may be allocated to the hearing days not required.

20. If there are any other practical matters that need to be addressed they should be brought to the attention of the Court at this time. Remember that if a problem arises either party can, and should, exercise the liberty to restore to bring it promptly to the Court's attention. Do not wait until the next mention date.

Pre-trial Conference

21. For matters of four or more days, a pre-trial conference will usually be held at least a week before the hearing is due to commence, preferably before the judge allocated to hear the matter.

22. By this time the Court expects that the parties will have completed their preparation for the hearing. That said, the purpose of the pre-trial conference is

to finalise any matters that remain outstanding, including any minor evidential matters.

23. Where expert evidence is required, the parties should discuss prior to the hearing how this evidence is to presented. That is to say, concurrently (the Court's preference), consecutively or, first, as part of the prosecutor's case, and then second, as part of the defendant's case.

24. The pre-trial conference will typically make orders in relation to:

    (a) the provision of a chronology;
    (b) the provisions of an outline of legal issues and a list of authorities;
    (c) objections to evidence;
    (d) a list of the affidavits to be read; or
    (e) confirmation that the matter is ready for hearing and will be completed in the time it has been set down for hearing.

25. Applications that can be dealt with prior to the commencement of the hearing should be made at this stage (if not already dealt with). For example, an application for a view.

DURING THE HEARING

26. The prosecutor's opening will be expected to give a brief overview of the case including the elements of the offence and the evidence to be relied upon. Likewise the defendant, in its opening, should give a brief outline of the defences and evidence it seeks to rely upon.

27. An opening will generally not be necessary for sentencing hearings if it is not overly complex.

28. For complex matters the parties should consider providing the Court with working copies of all affidavits.

29. Remember, all affidavits and exhibits should be securely fastened (ie stapled or in a folder - never bulldog clipped!) and always, always be paginated, including annexures.

30. Objections to evidence will be dealt with after an affidavit is read and before any oral evidence is given by a witness.

31. The parties should ensure that all hearing time is efficiently used and that the Court does not waste time waiting for witnesses.

32. In closing, always provide, even if brief, the Court with written submissions, referring to both the evidence and the relevant case law.

33. If any particular authorities are to be relied upon that are not on a list of authorities already provided to the Court, provide copies to the Court and your opponent. Remember to provide the Court with copies of unreported decisions. If a large number of cases are to be relied upon, it may be easier to provide a folder of authorities to the Court.

34. If the hearing is a sentence hearing, the parties should endeavour to provide the Court with comparable cases for the purpose of ensuring consistency in sentencing. Judicial Information Research System or JIRS (maintained by the Judicial Commission) statistics may also be of assistance provided the sample is large enough.

FUTURE CONSIDERATIONS

35. The *Criminal Procedure Amendment (Case Management) Act 2009* (NSW) does not currently apply to the summary jurisdiction of the Land and Environment Court. That said, it is likely that it will apply to Class 5 matters in the near future. Accordingly, practitioners should familiarise themselves with the Act's provisions. The aim of the Act is to allow courts to greater case manage criminal trials to ensure efficiency and avoid delay.

36. In particular, the Act gives a court the power to, amongst other things, order:

(a) notice of the prosecution case to be given to an accused. This includes a copy of the indictment, a statement of facts, a copy of each witness statement the prosecutor proposes to rely upon, copies of each document, exhibit, chart or explanatory material the prosecutor proposes to adduce at trial, a copy of any document that may reasonably be regarded as relevant to the prosecution's case or the defence case that had not otherwise been disclosed and a list identifying any information, document or thing which may be relevant but not in the possession of either the prosecutor or the accused and a copy of any information in the possession of the prosecutor that is relevant to the reliability or credibility of a prosecution witness (s 137);

(b) notice of the defence case to be given to the prosecution. This includes the name of the legal practitioner appearing on the accused's behalf, any consent given under s 190 of the *Evidence Act 1995* (NSW) in relation to witness statements, the prosecutor's summary of evidence, notice of alibi and notice of intention to adduce evidence of substantial mental impairment (s 138);

(c) pre-trial conferences to determine whether the defendant and the prosecutor are able to reach agreement regarding the evidence to be admitted at the trial (s 140). Where there is a pre-trial conference, the parties will be required to complete a pre-trial conference form (s 140(8)). The form is to indicate the areas of agreement and disagreement between the parties regarding the evidence (s 140(9)(a)). The parties will be prevented from objecting to evidence unless stated in the pre-trial conference form absent a grant of leave (s 140(10)). Leave will not be granted unless it would be contrary to the interests of justice to refuse it (s 140(11));

(d) pre-trial hearings where the court can make such orders, determinations or findings or give such rulings as it thinks appropriate for the efficient

management and conduct of the trial. This includes giving a ruling on a question of law that might arise at trial (s 139);

(e) pre-trial disclosure in respect of the prosecution and the defence, where it is in the interests of the administration of justice that it do so (ss 141-143). Thus orders can be made in relation to the accused to state whether the accused agrees with the prosecutor's statement of facts, whether the accused intends to dispute the admissibility of any proposed evidence, and the basis of the objection, to disclose any expert evidence the defendant intends to rely on, to disclose whether a witness is required to corroborate surveillance evidence, to disclose if there is any issue with the custody of an exhibit, to disclose any issue with transcripts, to raise any objection to the accuracy or authenticity of evidence or to raise any significant issues regarding the form of indictment, the severability of the charges or whether separate trials ought to take place (s 143); and

(f) non-compliance with pre-trial disclosure may result in exclusion of evidence not disclosed, exclusion of expert evidence where the report is not provided or the granting of an adjournment (s 146).

CONCLUSION

37. From the above discussion it will be apparent that once a Class 5 matter is commenced, the Court expects that its preparation will proceed as orderly and as expeditiously as possible.

38. In this regard, cooperation is expected, wherever possible, between the parties, irrespective of whether or not the matter is defended. To the extent that problems may arise, the Court expects that they are brought to its attention promptly so that they may be resolved as expeditiously as possible.

2 June 2010 **Justice Pepper**
Land and Environment Court of NSW