

PRACTICE NOTE SC CL 6

Supreme Court Common Law Division - Possession List

Commencement

1. This Practice Note was issued on 10 March 2010 and commenced on 15 March 2010.

Application

2. This Practice Note applies to proceedings in, or to be entered in, the Possession List.

Definitions

3. In this Practice Note:

ADR means alternative dispute resolution

List means the Possession List

Registrar, CLCM means the Registrar, Common Law Case Management

UCPR means the Uniform Civil Procedure Rules 2005

4. In this Practice Note ADR includes:

- (a) mediation;
- (b) arbitration; and
- (c) referral to a referee under UCPR Part 20.

Introduction

5. The purpose of this Practice Note is to explain the operation of the List which is provided for by UCPR Rule 45.4.

6. UCPR Rule 45.4(1) specifies that, subject to exceptions in Rule 45.4(2), proceedings in the Common Law Division in which a claim for possession of land is made are to be entered in the List.

Short form of Statement of Claim

7. In the case of a claim for possession, or possession and debt, against a Defendant who is a borrower/mortgagor, it is open to the Plaintiff to commence proceedings by filing a short form of Statement of Claim in accordance with [Annexure 1](#) of this Practice Note. The principal purpose of the short form is to provide a simplified form of pleading to facilitate an understanding by the Defendant of the nature of the claim which is brought and of the practical consequences which may result.

8. The short form is not a prescribed form, nor is its use compulsory. A Plaintiff may commence proceedings by way of a Statement of Claim pleaded in conventional form, in particular where the claim is not straightforward and involves additional parties (including guarantors). It is necessary for a Statement of Claim, whether or not in short form, to comply with the requirements as to pleadings contained in UCPR Rule 14.15.

Cover sheet to Statement of Claim

9. A cover sheet in the approved form (Form 93), which incorporates information for the Defendant translated into several different languages, is required by UCPR Rule 6.8A to be used with all initiating process in the Possession List, including both the conventional form and short form of Statement of Claim.

Removal from the list

10. Upon proceedings being removed from the List, this Practice Note shall not, subject to paragraph 11 below, apply to the proceedings from the making of the order.

11. The Court may direct that this Practice Note shall continue to apply to the proceedings to the extent stated in the direction.

12. The making of an order removing proceedings from the List shall not affect any orders made or directions given prior to such removal.

Directions hearings

13. Defended proceedings in the List will be managed by way of Directions Hearings.

14. Upon a Defence or a Cross-Claim being filed, the registry will give notice to all parties with an address for service in the proceedings of the date of the Initial Directions Hearing before the Registrar, CLCM.

Action prior to Initial Directions Hearing Before the Registrar, CLCM

15. It is expected that, where practicable, the parties' solicitors will have discussed the case before the Initial Directions Hearing before the Registrar, CLCM and will have:

- (a) narrowed issues;
- (b) agreed on suitable interlocutory orders, directions or arrangements;
- (c) prepared a draft timetable for the future management of the proceedings;
- (d) prepared draft orders to be sought at the Directions Hearing; and
- (e) discussed the possibility of settling the dispute by mediation or other ADR processes.

16. At the Initial Directions Hearing, the Registrar, CLCM may make such orders as are appropriate in the circumstances and will, at this or at a subsequent Directions Hearing, list the matter for a Directions Hearing before a Judge ("Judicial Directions Hearing").

Judicial Directions Hearing

17. A Judicial Directions Hearing of defended matters will be listed before a Judge and is intended to achieve the following:

- (a) to allow the Judge to scrutinise, at an early time, the issues raised in the proceedings including the nature of the Defence and any Cross-Claim - if no reasonable defence on the merits is disclosed, the Judge may consider striking out the Defence at that time, whether or not a Notice of Motion seeking such an order has been filed and served;
- (b) identification of steps which are required to facilitate the just, quick and cheap resolution of the real issues in the proceedings: s.56 *Civil Procedure Act 2005*;
- (c) early examination of the likelihood of a Cross-Claim or joinder of other parties to the proceedings - if a party indicates that consideration is still being given to the joinder of other parties (including the issue of a Cross-Claim), the Court will expect a clear explanation as to the steps being taken in this respect, and the time within which any application will be made;
- (d) the Court will consider a referral to mediation under Part 4 (ss.25-34) *Civil Procedure Act 2005*, given the advantage of mediation occurring at a time before costs and interest have accumulated.

18. At the Judicial Directions Hearing the Judge may:

- (a) order that the proceedings be referred for mediation: s.26 *Civil Procedure Act 2005*;
- (b) adjourn a matter for further directions before that Judge, if that is considered appropriate to facilitate the just, quick and cheap resolution of the real issues in the proceedings (including by way of mediation);
- (c) otherwise adjourn the matter for further directions before the Registrar, CLCM;
- (d) consider any application which a party has notified (orally or in writing) to other parties as being an application which may be made, including an application to strike out a pleading or an application for summary judgment or default judgment, whether or not a Notice of Motion seeking such an order has been filed and served - if default judgment is to be sought, the Plaintiff must ensure that all necessary affidavits are in Court to allow the application to proceed.

19. It is not intended that the Judicial Directions Hearing procedure will involve protracted or intensive case management of defended matters by Judges, instead of the Registrar, CLCM. The procedure is intended to promote early resolution of defended matters (in particular by way of mediation), to remove matters from the Defended List if no reasonable defence is disclosed and to reduce delay, in the interlocutory phase, of defended matters which are to proceed to hearing.

Representation

20. Each party not appearing in person must be represented at each Directions Hearing before a Judge or Registrar, CLCM by a barrister or a solicitor familiar with the subject matter of the proceedings and with instructions sufficient to enable all appropriate orders and directions to be made.

Action at Directions Hearing

21. At a Directions Hearing before a Judge, Associate Judge or Registrar, CLCM, the Court may give directions and make orders as it considers appropriate with a view to the just, quick, cheap and effective management and disposal of the proceedings. Orders or directions may include:

- (a) if the List is not the most appropriate place for the proceedings, the removal of the proceedings from the List, with consequential orders and directions;
- (b) setting a timetable for case management;
- (c) for the whole or any part of the evidence in the proceedings to be given on affidavit;
- (d) for adjournment of the Directions Hearing;
- (e) the filing of other pleadings;
- (f) the provision of any particulars;
- (g) the making of admissions;
- (h) the filing of lists of documents;
- (i) the provision of copies of documents;
- (j) the administration and answering of interrogatories;
- (k) the service and filing of affidavits or statements of evidence;
- (l) orders for the preservation of evidence;
- (m) hearing of applications for summary disposal under UCPR Part 13 or for judgment on admissions;
- (n) applications under UCPR Part 14 or Part 15 which relate to pleadings and particulars;
- (o) matters relating to proof; and
- (p) the provision of any further information to the Court;
- (q) the making of any order or judgment under UCPR Rule 16.3 (default judgment) including an order granting possession of land (in the case of the Registrar, CLCM, where the Registrar may so order under delegation).

Alternative dispute resolution

22. At a Directions Hearing before a Judge or Registrar, CLCM, the Court will consider whether the proceedings are suitable for ADR. Legal practitioners should ensure that instructions have been obtained prior to a Directions Hearing so that it may be indicated to the Court whether the matter can be mediated.

23. If the matter appears to the Court to be appropriate for resolution by mediation, the Court will refer the proceedings for mediation with or without the consent of the parties.

24. In the event that a party or parties to existing defended matters in the Possession List are reluctant to engage in mediation, the Registrar, CLCM may refer such matters to the Possession List Judge so that mediation may be directed under s.26 *Civil Procedure Act 2005* if the Court sees fit, without the consent of the parties to the proceedings.

25. The Court may give directions requiring statements from parties including a timetable to enable parties to be prepared for mediation.

Call-Up of delayed defended matters

26. There will be a quarterly call-up before the Possession List Judge of defended matters in which there is no listing for final hearing or referral for mediation and (subject to the determination of the Possession List Judge in a particular case) more than nine months have elapsed since the filing of a Defence or Cross-Claim. At the call-up, the parties and/or their legal representatives will be required to explain to the Court why the matter has not been listed for final hearing and what steps have been and are being taken to comply with the parties' statutory duty to assist the Court to further the overriding purpose of the Civil Procedure Act 2005 and the UCPR of facilitating the just, quick and cheap resolution of the real issues in the proceedings (s.56 Civil Procedure Act 2005). The Court will have regard to the

guiding principles contained in ss.56-60 Civil Procedure Act 2005 and will utilise appropriate case-management measures with a view to eliminating unreasonable delay between the commencement of proceedings and their final determination (s.59).

Joint statement

27. When ready for trial, proceedings will be listed by the Registrar, CLCM, for hearing. Where matters are listed for hearing, a standard direction that all parties are to complete, sign and file at least 7 days prior to the hearing date a clear, concise, joint statement of matters of fact and law that are really in dispute and nominating the evidence specifically relevant to those matters, is deemed to have been made, unless the Court otherwise orders.

Non-urgent applications for stay

28. A non-urgent application to stay the execution of a writ of possession arises where no time has been fixed for the Sheriff to take possession of the property or such time has been fixed and that time is more than four working days from the time when application is brought to stay the execution of the writ. In these circumstances, the application should be brought by Notice of Motion and Affidavit in support, to be served on the opposing party, with the application to be listed for hearing before the Registrar, CLCM. Annexed to the affidavit should be any documents to be relied upon by the applicant, such as:

- (a) where the loan is to be refinanced – proof of steps undertaken to refinance;
- (b) where the subject property is to be sold – copies of agent sale agreements, contract for sale of property, advertisements, etc.;
- (c) where the proceedings are to be defended – a draft Defence; and
- (d) where hardship is claimed - the facts and circumstances relied upon in this regard.

In the event that an order abridging time for service of the Notice of Motion and Affidavit is required, application for such an order should be made to the Duty Registrar who is available from 9.00 am to 5.00 pm each weekday.

Urgent applications for stay

29. Urgent applications to stay the execution of a writ of possession arise where a time has been fixed for the Sheriff to take possession of the property and that time is less than four working days from the time of the stay application. In those circumstances, application should be made to the Duty Registrar who is available from 9:00am to 5:00pm each weekday. Applicants should ordinarily produce an affidavit in support annexing documentary material, such as:

- (a) where the loan is to be refinanced – proof of steps undertaken to refinance;
- (b) where the subject property is to be sold – copies of agent sale agreements, contract for sale of property, advertisements, etc.;
- (c) where the proceedings are to be defended – a draft Defence; and
- (d) where hardship is claimed - the facts and circumstances relied upon in this regard.

30. A Duty Registrar determining an urgent stay application on an ex parte basis may order that the execution of a writ of possession be stayed for a period (usually not exceeding seven working days) and direct the applicant to file and serve a Notice of Motion seeking appropriate orders and an Affidavit in support of the motion, and may abridge time for service of any order and motion, and list the matter before the Registrar, CLCM. In the event that an ex parte stay is granted, the Duty Registrar should record short reasons for granting the stay by reference to the relevant circumstances referred to in paragraph 29.

31. In the ordinary course, an officer of the Court will inform the Sheriff by facsimile if an ex-parte stay has been granted and will provide the Plaintiff's solicitor by email or facsimile with copies of the Court order and any affidavit relied upon on the stay application.

32. In the case of an applicant who has previously been granted a stay, unless there is good reason not to do so, the Duty Registrar should stand down an urgent application, and require the applicant to notify the Plaintiff that application for a stay is to be made so as to permit that party an opportunity to appear on the application. Where the Plaintiff does not oppose an urgent stay application, the Duty Registrar should determine the application. Where the Plaintiff opposes an urgent stay application, the Duty Registrar should refer the application to the Registrar, CLCM, so that the application may be heard and determined in open court.

Stay Applications Generally

33. The Duty Registrar or Registrar, CLCM, must refer the proceedings to an Associate Judge or Duty Judge for consideration where a Judge or Associate Judge has refused the applicant a stay on an earlier occasion.

34. The Duty Registrar or Registrar, CLCM, may refer the proceedings to an Associate Judge or Duty Judge for consideration:

- (a) where the Duty Registrar or Registrar, CLCM, is not prepared to grant a stay to the applicant, or
- (b) where the Registrar, CLCM, is not in a position to hear an urgent and opposed stay application which has been referred by the Duty Registrar in accordance with paragraph 32.

35. Apart from the circumstances referred to in paragraphs 33 and 34 above, it is expected that all stay applications in Possession List matters will be considered and determined by the Registrar, CLCM or a Duty Registrar.

36. If a stay application is made directly to an Associate Judge or to the Duty Judge, the applicant will be directed to the Duty Registrar.

Disposal of Applications

37. Applications, to which all relevant parties consent, may be dealt with at any time by arrangement with the Registrar, CLCM.

38. Applications for summary disposal will be listed at a Directions Hearing for referral to an Associate Judge or Duty Judge for determination.

39. Applications to set aside default judgment will be heard by the Registrar, CLCM.

Listing for hearing

40. When ready for trial, proceedings will be listed by the Registrar, CLCM, for hearing with no priority over other proceedings unless an order for expedition is made.

41. All applications for expedition should ordinarily be made in the first instance to the Registrar, CLCM.

Adjournment

42. To ensure efficient use of Court time, proceedings fixed for trial will not normally be adjourned unless special circumstances have arisen which could not have been foreseen.

43. An application for adjournment requires supporting affidavits.

44. An application for adjournment will not usually be granted unless the party on whose behalf the application is made is present at the time the application is made or has sworn an affidavit verifying that that party is aware of the reasons for the application and identifying those reasons.

Inactive proceedings

45. If a Defence or application for default judgment is not filed within 6 months of the claim being instituted, the Court may dismiss the proceedings on its own motion pursuant to UCPR Rule 12.8.

46. The Court will give the Plaintiff notice that the claim (or where appropriate, the proceedings) will be dismissed unless, within a specified period, the Plaintiff notifies the Court of its desire to show cause why an order for dismissal should not be made.

47. The Court may, if the Plaintiff gives notice in accordance with paragraph 46, list the proceedings for further consideration by the Registrar, CLCM or the Possession List Judge, and notify the Plaintiff of such listing, and on the occasion listed, the Court may make such order as is appropriate, including dismissal of the claim or the proceedings.

48. Paragraph 45 does not apply to proceedings, or to a claim, that have or has been disposed of by judgment, final order, discontinuance or dismissal.

49. Unless the Court otherwise orders, where proceedings have been dismissed under UCPR Rule 12.8 and the Plaintiff applies to have the matter restored to the List, application is ordinarily to be made by Notice of Motion and affidavit in support, to be served upon the Defendant and made returnable before the Registrar, CLCM.

Summary disposal

50. An application for summary disposal, made after proceedings are listed for hearing by the Registrar, CLCM, will be heard at the same time as the substantive proceedings, unless the Court otherwise orders.

Default judgment

51. Entry in the List will not affect a party's entitlement to apply for default judgment.

Notice to Residential Tenants

52. Section 71A of the Residential Tenancies Act 1987 requires a mortgagee to give a tenant a minimum of 30 days' notice in writing before taking possession of the property. A Plaintiff is required:

- (a) to include information in affidavits prepared for the purposes of UCPR Rules 16.4(3) or Rule 39.3(2) as to whether or not the property is subject to a residential tenancy;
- (b) to advise the Sheriff for the purposes of UCPR Rule 39.3A whether the property is subject to a residential tenancy and, if so, whether and when notice was given to the residential tenant.

J J Spigelman AC
Chief Justice of New South Wales
10 March 2010

Related information

See also:

Practice Note SC CL 1 Supreme Court Common Law Division - General
Practice Note SC Gen 1 Supreme Court – Application of Practice Notes
Practice Note SC Gen 6 Supreme Court – Mediation
Supreme Court Rules 1970
Uniform Civil Procedure Rules 2005

Amendment history:

Issued on 10 March 2010 and commenced on 15 March 2010: This Practice Note replaces the previous version of SC CL6 issued on 2 November 2007.

2 November 2007: Practice Note SC CL 6 replaced the previous version of SC CL 6 issued on 17 August 2005.

17 August 2005: Practice Note SC CL 6 replaced Former Practice Note No. 106.

ANNEXURE 1

Supreme Court Short Form of Statement of Claim for Possession [and Debt] against a Borrower/Mortgagor

RELIEF CLAIMED

1. Judgment for the Plaintiff, [name of Lender], for possession of the land comprised in [Title/Folio numbers] being the land situated at and known as [address].
2. #Judgment for the Plaintiff, [name of Lender], against the [role of party, eg Defendant] for \$[amount].
3. The [role of party, eg Defendant] pay the Plaintiff's costs.]

PLEADING AND PARTICULARS

1. You are the owner of property at [address/folio identifier etc].
2. You obtained a loan from [name of Lender] on [date]. ["Lender"]
3. You mortgaged your property as security for this loan by a mortgage [number].
4. This mortgage means that if you default under your loan, the Lender can:
 - (a) take possession of your property; and
 - (b) obtain a judgment against you for the amount you owe the Lender.
5. You are in default of your loan by breach of [specify breach to comply with requirements concerning pleadings in Rule 14.15 Uniform Civil Procedure Rules 2005].

Particulars of default

Failure to pay the following amounts due [if applicable].

\$ due

Non-monetary default by virtue of [if applicable]

6. Notice of default pursuant to s80 of the Consumer Credit (New South Wales) Code, has been served. [if notice required]

Particulars

Notice dated _____

OR

6. Notice pursuant to s80 of the Consumer Credit (New South Wales) Code is not required. [if notice is not required]

7. Given your default, the Lender now claims against you, judgment for:

- (a) possession of your property.
- (b) the full amount of your loan, being \$.....as at.....[if claimed]; and
- (c) continuing interest and fees in accordance with the loan [if claimed];
- (d) costs.

[On a new page, replace the Notice to Defendant and How to respond sections of the approved form of Statement of Claim with the following:]

NOTICE TO DEFENDANT AND HOW TO RESPOND

You may have a defence to the above claim.

If you do have a defence:

- a. You must file a Defence within 28 days in the Supreme Court.
- b. If you fail to file a Defence within 28 days, judgment may be obtained against you.

If you are unsure whether you have any defence, it is in your interests to seek legal advice:

You may either:

- c. Telephone Law Access NSW on 1300 888 529 (a local call from anywhere in NSW), for free information or referral for legal advice (see www.lawaccess.nsw.gov.au); or
- d. Telephone the Law Society of NSW on 9926 0300 for the name of a private solicitor in your area.

If you do not have any defence:

- e. The Lender can obtain a judgment against you for possession and evict you from your property.
- f. The Lender may also obtain a judgment against you for the loan plus fees and expenses and take enforcement action against you to recover the judgment.
- g. The Lender may sell your property. It may be necessary for the Lender to have served on you a notice under section 57(2)(b) Real Property Act 1900 and for you to have not complied with it before the Lender can sell your property.
- h. If the property is sold for less than the amount of the loan, you may be liable for the remaining balance of the loan.

Voluntary surrender

- i. You may wish to voluntarily surrender your property to the Lender. If so, you should contact the Lender on _____ . This may result in a saving of costs.

Extension of time to vacate property

If you have no Defence, but wish to apply for an extension of time before you are required to vacate the property, you should also contact the Lender's Collection Manager or solicitor to request further time for you to vacate the property.

If you cannot reach agreement as to a date for vacating the property then you can apply to the Duty Registrar of the Supreme Court – Level 5, Law Courts Building, Queen's Square, Sydney for an extension of time, which may enable you to remain in the property, subject to certain conditions.

Any such application should show:

- 1. if the loan is to be refinanced – proof of steps undertaken to refinance – copies of any loan offer or refinance proposal;
- 2. if the subject property is to be sold – copies of agent sale agreements, contract for sale of property,

advertisements, etc;

3. any other reason you have for seeking an extension of time.