DEBT RECOVERY LITIGATION SEMINAR – LAW SOCIETY OF WA

BY RICHARD GRAHAM[1]

[1] Legal Practitioner Director at Vogt Graham Lawyers.

Author of the online and loose-leaf service, *Civil Procedure Western Australia Magistrates Court*, published by LexisNexis.

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FEATURES OF DEBT RECOVERY LITIGATION

Features

1) The focus is on pre-litigation recovery.

2) Usually, pre-litigation work is done by a debt collection agency or in-house law clerk(s).

3) When a case is commenced:

   a) lawyers are usually acting for the Claimant;

   b) many cases will be undefended;

   c) most defended cases will be determined early, at a pre-trial conference or summary judgment;

   d) there are many self-represented defendants;

   e) clients usually do not commence a case with an intention to take it through to trial; and,

   f) the client's decisioning about whether to sue is largely based on enforcement risk.

The jurisdiction

4) The vast majority of debt recovery litigation in Western Australia takes place in the Magistrates Court.

5) This paper is about practical things I have learnt over the past 13 years doing work in the Magistrates Court.

6) The Court does not have a practice direction for civil cases. Therefore, you just learn the Court's practices 'on the job'.

Commerciality

7) In order for debt recovery litigation to be commercial and profitable, it needs to be done very efficiently.

8) Contrary to popular perception and counter intuitively, it is often harder and more labour-intensive to take a case through the Magistrates Court than it is in either the District Court or the Supreme Court. This is because:

    a) There are more documents that need to be lodged.

    b) There is less time that lawyers can reasonably charge clients for.

    c) You need to be thinking on your feet, agile and systematic.

    d) There is less room for a tailor-made solution for steps in the process, as compared to the other Courts.

    e) There is less case management by the Court.

    f) The Court has less resources and is less able to tailor-make how it deals with each case.

Risk

9) Also, although I do not have any evidence for this, anecdotally and intuitively it seems that lawyers doing work in the Magistrates Court, in this field, are more exposed to professional risk.

10) That is, the risk of:

    a) being sued for negligence;

    b) a complaint being made about you to the Legal Profession Complaints Committee; or

c) a complaint made about your fee and potentially a taxation of costs of your solicitor-client bill.

Skills

11) The skill set revolves around being quick, whilst maintaining consistency and quality and being resilient.

12) These are excellent skills for then becoming a more broad advocate in the other Courts.

Structure of this paper

13) This paper is broken up into:

    a) Dealing with the other party.

    b) Dealing with clients.

    c) Dealing with the Court in writing.

    d) Dealing with the Court in person.

    e) Dealing with enforcement.

DEALING WITH THE OTHER PARTY

Letter of demand

14) Frequently, the first dealing with the other party is sending out a letter of demand.

15) The letter of demand must not make a demand for a sum of money not then yet legally owing to your client.[2]

[2] See G E Dal Pont, *Lawyers Professional Responsibility*, 5th ed, Lawbook Co, 2013, pp 719-721. See also an article by the same author in *Brief Magazine*, Law Society of Western Australia, Volume 41, Number 10, November 2014, p 8.

16) A common misconception, therefore, is making a demand for legal costs prior to the commencement of any litigation. This would be, for example, legal costs of the client having taken legal advice.

17) As at that point in time there is no legal obligation on the recipient of the letter of demand to pay that money that could be enforceable.

18) Therefore it cannot be demanded.

19) Making such a demand puts the lawyer at risk of an indefensible complaint to the Legal Profession Complaints Committee.

20) It also shows the lawyer to be unprofessional in the eyes of the client.

21) The "grey area" is if the demand is made to someone who has entered into a contract making themselves legally liable for all legal costs incurred in the debt recovery process by the other side.

22) Although this is not tested, as far as I am aware, in a professional complaint that has gone on to the State Administrative Tribunal, the position is probably made less risky for the lawyer if there is a footnote or endnote explaining:

    a) that this sum is being claimed pursuant to the specific contract or terms of trade;

    b) what consequence would or might follow if the sum is not paid. This is, that the creditor might still commence a proceeding against the debtor for that sum of money.

23) I caution against implementing anything like this without first checking with the Rapid Response Team at the Legal Profession Complaints Committee if they would <u>not</u> have a problem with this kind of demand being sent.

24) In my experience, they are receptive to providing upstream feedback to lawyers about these kinds of questions and regard it as one of the reasons they exist.

Starting the case

25) The next step is issuing the originating process, which will generally be the *General Procedure Claim***.**

26) I would never choose bailiff service for any claim issued by the Magistrates Court.

27) Although the sum charged is slightly less than what the average process server will charge, it is hardly ever worth it.

28) I tried using bailiff service a few times and have been unsuccessful in achieving service, except where the defendant is quite obviously going to be easily served.

29) Also, most private process servers accept the PDF version of the *General Procedure Claim* by email and get onto it almost immediately, whereas the bailiff seems to take about 2 weeks.

30) I cannot think of any good reason to <u>not</u> commence a proceeding in the Magistrates Court using either of the 2 online services.

31) This avoids the repetition of manually completing the form and means that there is a PDF version provided to you immediately, which can be emailed to the process server and takes 1/3 of the time to fill out.

Self-represented parties

32) In dealing with self-represented other parties, there are a few themes that I notice recur.

33) <u>First</u>, there is often a no-win scenario. What I mean by this is that when it comes to a decision about how you deal with the self-represented litigant, quite often you can put yourself at risk by either doing something or not doing the same thing.

34) <u>Second</u>, having a self-represented party on the other side almost always means nil chance of cooperation in relation to procedural questions.

35) Third, in my experience if a case goes to trial, Magistrates and Judges become wary about objections in relation to evidence. This is potentially an instance where we as the lawyers face a no-win scenario. On the one hand, we continue with our objections and being finicky with respect to the evidence and incur the likely displeasure of the Magistrate, but then the case goes on appeal and some favourable position results to the other side as result of us having failed to object.

36) Fourth, any legal costs estimate to your own client should be provided on the basis that the other party is self-represented.[3] This is difficult to explain to a client. The client's intuition is that:

a) they should be at an advantage in a legal case where they are represented by a lawyer but the other side is not; and

b) we should be able to bring things to a speedy conclusion, cheaply.

37) Instead, we present them a cost estimate that assumes the other party remains unrepresented and will continue to be unrepresented and that therefore the costs are likely to be more.

38) Fifth, the self-represented party will often be incapable of expressing themselves clearly in writing and will want to telephone you, at whim. This comes at a cost to your own client, who will reasonably start to get irritated at paying for telephone calls like this. My tip is to get a written instruction from your own client providing the pros and cons of the client providing you an instruction to simply not engage in any sort of substantive telephone call with the other party and provide a recommendation that the client instructs you to not do so.

[3] Section 260 of the *Legal Profession Act 2008 (WA)* requires lawyers to provide an estimate of the total legal costs. This includes an explanation of the major variables that will affect the calculation of those costs. In my opinion, having a self-represented party on the other side is a major variable.

39) This seems like "overkill," but can become important as a case develops and a self-represented party gets habituated to telephoning and wanting to discuss things.

40) Generally, there is little to be gained by being assertive or aggressive with the self-represented party, especially in the face of provocation and in Court.

41) If we imagine ourselves as a Magistrate or a Judge, we can see how looking down and seeing a lawyer getting irritated as compared to a lawyer being calm and accepting it and just offering a few well-chosen words in response, the Magistrate or Judge can see through what is going on and does not need the issue to be laboured by the lawyer.

42) This is difficult, because usually the lawyer has been the subject of personal attack (and in high volume) from the self-represented litigant if the case has gone on for quite some time and getting close to a trial, all of which the Magistrate or Judge has not seen. In the high pressure environment of court, it is difficult to maintain composure.

43) There really is no choice, though, without putting the Magistrate or Judge offside.

DEALING WITH CLIENTS

Commissions payable to debt collection agencies

44) Quite often, the first time we actually come into contact with clients in a debt recovery litigation is at a pre-trial conference.

45) Oftentimes the debt has been referred by a debt collection agency and we have had little or no contact directly with the client.

46) Clients in those situations are often not fully conscious about whether there is any contingency/commission that they need to pay to the debt collection agency.

47) Therefore, before coming to any settlement agreement, it is best to be fully informed from the debt collection agency about what contingency/commission the debt collection agency

will be seeking from the settlement agreement, as well as what your legal costs are, so that the client can fully appreciate the net sum they will receive.

Legal cost estimates

48) We should always be mindful of our legal obligation to provide legal costs disclosures at:

a) pre-trial conferences; or

b) during settlement negotiations.[4]

Legal costs risks

49) I suggest, as well, that some kind of standard correspondence be sent to:

a) clients; or

b) the debt collection agency to send to clients;

in advance of commencing a proceeding, so that clients know about their legal costs risks:

c) should they wish to discontinue the case after it is started; or

d) if the case is put onto the *Inactive Cases List* and discontinued that way.

50) Oftentimes, we fail to appreciate that clients do not realise they can be at risk of an adverse costs order should they change their mind partway through a case.

51) Most debt collection clients are not committed to taking a case to trial or, even, further than a pre-trial conference. They need to own this risk.

[4] *Legal Profession Act 2008 (WA)*, s 264.

Checking who has authority

52) Where the client has been referred by a debt collection agency, we need to be satisfied we are receiving appropriately authorised instructions.

53) I see this as a real, but rare, risk.

54) The risk is reduced by having a standard form identifying:

    a) the role of the person who is instructing the debt collection agency;

    b) who is instructing you; and,

    getting someone to sign off.

55) For large-scale companies involved in credit collection, this is a low risk.

56) The risk I am thinking of is where there is:

    a) a small business;

    b) a bookkeeper has provided instructions to a debt collection agency; and,

    c) the director of the small business only later appreciates that when the case was commenced they had been committed to either taking it to trial or running the risk of an adverse costs order if the case is discontinued; and,

    d) they had not owned that decision.

DEALING WITH THE COURT IN WRITING

Lodgement

57) From an efficiency point of view, it is hard to see a good reason to send outside clerks or secretaries down to the Court registry to lodge documents.

58) There is no reason to lodge originating processes this way, given the online lodgment system.

59) In relation to lodging applications, in my experience the fax lodgment system is reliable. I have had some instances where I lodged applications and they have gotten lost at the Court.

60) However, maintaining a process for following up on and receiving back the documents from the Court is not such a bad thing, anyway, even if you are comparing this against the alternative of lodging documents in person.

61) This is because even if you lodge an application in person, all of the original and copy documents are taken away and no hearing date and time is provided to you there and then.

62) If the document is too long to lodge by fax, lodging by post has in my experience been 100% reliable.

63) A recent innovation of the Court is to make available mailboxes at the Central Law Courts for law practices that want them.[5]

Applications

64) **Default judgment.** For a standard application for default judgment, it is always going to be necessary to do some kind of basic interest spreadsheet. This might as well be attached to the application and provided to the Registrar.

65) What I have noticed is that many law practices simply insert the summary information on the form,[6] without attaching the more detailed spreadsheet showing how they had arrived at the interest calculation.

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[5] The Court's Manager of Administration Services sent a letter about on-site mailboxes to law practices, dated 4 February 2016.

[6] Form 13.

66) Difficulties seem to arise in applications for default judgment where anything more than the statutory interest rate is being claimed[7] or if there is anything over and above the *legal cost determination*[8] claim being made for legal costs.

67) These seem always to then be referred off to a Magistrate for an assessment of damages.[9]

68) Sometimes, it goes further, and default judgment is not even granted by a Registrar and the whole question of default judgment is referred to a Magistrate.[10]

69) The customer service staff at the Registrar will not provide or seek any explanation from the Registrar as to why default judgment has not been granted.

70) You are therefore "blind" as to the reason the hearing has been called.

71) A problem arises (which is another one of the no-win scenarios) where you have to decide whether to attend the hearing.

72) It seems that the customer service staff routinely tell you that you do not need to attend the hearing.

73) You then have to make a choice between:

   a) attending the hearing and incurring the costs for your client (which would be better for us, selfishly, as lawyers, but put us at risk of a complaint about our fees); or

   b) not attending the hearing and assuming it is dealt with similarly to applications for substituted service, in the absence of the parties.

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[7] *Magistrates Court (Civil Proceedings) Act 2004 (WA)*, s 12.

[8] *Legal Profession (Magistrates Court) (Civil) Determination 2004 (WA)*, item 12.

[9] *Magistrates Court (Civil Proceedings) Rules 2005 (WA)*, r 22.

[10] *Magistrates Court (Civil Proceedings) Rules 2005 (WA)*, r 25.

74) If there is a hearing set for an assessment of damages after default judgment has been granted by a Registrar, my advice is to anticipate what the issues are and have your clients swear an appropriate affidavit in advance of the first hearing.

75) Otherwise, you are likely to end up with multiple hearings and the first hearing will often be wasted.

76) **Summary judgment.** My view about summary judgment is that Magistrates are cautious about awarding summary judgment:

   a) even if there is a paucity of evidence put forward by the respondent;

   b) especially where there is any potential evidence which might be given at trial, on which the case might turn and which is oral evidence in dispute.

77) If everything on which the case might turn is in writing, then there might be some utility in summary judgment.

78) In my experience, it has become less common in the Magistrates Court as compared to 10 or 15 years ago.

79) This is counterintuitive, given the substantive change in the law in 2005, which on the face of it made it easier.[11]

80) A recent decision of then Acting Master Getting is useful when advising clients of the risks of summary judgment not being granted, even where evidence is not specifically put up by the other side.[12]

81) **Special appointments.** Any application that is going to involve more than a cursory argument will be referred to a special appointment.

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[11] *Magistrates Court (Civil Proceedings) Act 2004 (WA)*, s 18.

[12] *Szulc -v- Szulc* [2015] WASC 451 at [19].

82) What I have started doing, recently, is if it seems to me that going to the Court for the first hearing is inevitably going to lead to a special appointment, I ask the other side for their consent for orders that:

a) the first hearing be vacated;

b) the hearing to be immediately listed for a special appointment of whatever period of time we agree; and

providing the Court our unavailable dates in the *Memorandum of Consent Order*.

83) Otherwise, it is an unjustifiable waste of costs to go to the first hearing.

84) I suggest you be prepared to deal with the question of costs at the special appointment hearing, by:

a) having a spreadsheet ready; and

b) seeking instructions from your own client as to what costs you can compromise on with the other side if the application is lost;

so as to avoid the assessment of costs process and to seek for fixed costs to be awarded.

85) **Further and better particulars.** There do not seem to be many applications for *further and better particulars* made to Magistrates.

86) My best guess is that lawyers are quite understandably unsure about:

a) how such an application "fits in" with the fact that the Court is not a court of pleading; and

b) what, in practical terms, not being a court of pleading means.

87) I think it is best to forget the concept of whether the Court is a court of pleading, because it confuses rather than illuminates.

88) The real question is:

Is there a failure to disclose information that, as at this stage of the case, causes an unfair surprise and disadvantage?

89) When it comes to applications for further and better particulars, the way I look at it is:

a) Am I disadvantaged in my preparation of witness statements to attach to the *Listing Conference Memorandum* as result of the *Statement of General Procedure Claim* or *Statement of Defense to General Procedure Claim* being absent of particularity?

and,

b) Does the absence of particularity mean that at a Listing Conference I would need to ask to be able to amend my *Listing Conference Memorandum* and witness statements or seek orders for expert evidence, that I could have sought earlier had the particulars be provided?

90) **Security for costs.** The trend I have noticed is an increasing reluctance to make orders for security for costs against corporations, without more financial information about the corporation, as compared to what was previously required 5 to 10 years ago.

91) It is best to at least confer with the other side about making an application and try and put yourself in a situation where:

a) if an application is made and the respondent only then provides financial information which makes the application unviable;

b) you can respond to say you had sought the information before making the application; and

c) had you received that information voluntarily beforehand, you would <u>not</u> have made the application and therefore the other side should be liable for legal costs.

92) **Chronologies.** A key role we have is being persuasive with Magistrates.

93) This is built up in a number of ways, including:

a) having a good substantive argument;

b) reputation;

c) performance in Court;

d) writing well;

e) <u>but importantly</u>, making the job as easy for the Magistrate as possible.

94) In my experience and thinking about it from a Magistrate's point of view, an unnecessarily difficult task that Magistrates face is demonstrating in their reasons for decision that they have not made errors of fact.

95) It is easy for us in presenting our arguments and case to marshall the facts, as our clients see them, into a chronology.

96) Hardly ever will a Magistrate turn down the opportunity for a chronology to assist them.

97) My standard practice is to bundle up a chronology with written submissions.

98) **Interrogatories.** I would not make an application for interrogatories[13] until after discovery of documents.

99) This is because the only realistic argument that can be made in most cases about why leave should be granted is that there is some absence of information useful for the purpose of:

a) settlement; or

b) preparing for trial;

that is absent from discovery and needed in some way in order to make the process more efficient.

[13] *Magistrates Court (Civil Proceedings) Act 2004 (WA)*, s 16(n)(1); *Magistrates Court (Civil Proceedings) Rules 2005 (WA)*, rules 35-38.

100) In my experience, Magistrates take a cautious and reluctant approach to interrogatories and require quite some considerable persuasion in order to make the order.

Affidavits

101) The main areas of non-compliance in relation to affidavits[14] lodged in the Magistrates Court are:

a) A failure to date every page.

b) A failure by the witness to fully state their qualification. For example, just stating "A solicitor" instead of stating that they are a legal practitioner who has been in practice for more than 2 years and who currently holds a practicing certificate.

c) A failure to strike out whether the deponent is giving evidence under oath or by affirmation.

d) A failure to properly state the grounds of information or belief.

102) In my early days, I objected to affidavits on this basis and sought for the Magistrate to make an order that the evidence be disregarded.

103) However, I learned this was being seen as an overly harsh approach.

104) Instead, usually now I draw the deficiency to the Court's attention and if it results in the evidence being less reliable, I ask the Magistrate to take this into account when considering the weight of the evidence.

105) The context to the procedural issues also has to be that the *Oaths, Affidavits and Statutory Declarations Act 2005 (WA)* provides that a Court can essentially look past deficiencies in the form of an affidavit.[15]

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[14] *Magistrates Court (Civil Proceedings) Rules 2005 (WA)*, rules 114-115.

[15] Section 16.

Taking the initiative

106) Although the Registry staff would sometimes make you think otherwise, it is a good idea to try and take initiative when it comes to dealing with the Court in writing.

107) For example, if making an application that you want the Court to consider on the papers, one approach is to:

   a) lodge the application and make it plain on the face of the application that you are seeking for this to occur through a reference to the Rules;[16] and

   b) provide a cover sheet also making the request.

108) I tend to think that the permanent civil Magistrates are reasonably open to this kind of approach.[17]

109) It is unlikely that there is a risk of the:

   a) application simply being dismissed; or

   b) any kind of embarrassment or being made to feel as though you had done the wrong thing;

   because at the end of the day you are only trying to save your client legal costs (rather than be lazy) and this should mollify any apprehension that you are not doing the right thing.

110) It is also quite patently a good idea in some situations where having a hearing would be a waste of everyone's time and disproportionate exercise. For example, I would be reluctant to make a low-level costs application at an oral hearing, especially when many costs

[16] *Magistrates Court (Civil Proceedings) Rules 2005 (WA)*, rules 113(b).

[17] There are 2 Magistrates who permanently do civil work at the Central Law Courts. Usually, there is also a 3rd Magistrate who is not permanently listed to do civil work, but is newly appointed or returning to the City from the Country and who does a rotation of a few months doing civil work at the Central Law Courts.

applications in the District Court and Supreme Court are dealt with on the papers routinely, anyway.

Communicating with the Court

111) The absence of there being Associates to Magistrates means it is comparatively difficult to communicate with the Court in order to get updates.

112) If you were in the Supreme Court and being case managed by a Judge or Registrar, then if you lodged an application and not yet received any hearing date and a few weeks had gone by, you would simply email the associate and find out where things were at.

113) In my experience, the generic email address for the Court provides relatively accurate, useful and timely responses, these days.[18]

114) Where there is a difference, however, is that the Associate in the Supreme Court would follow up and do something if there was some delay, whereas generally the customer service staff at the Magistrates Court will provide an update and then not do anything more.

115) For example, they will tell you that the application has been received and no date has yet been set.

116) You do then need to be a little bit assertive and email back and thank them for the update and ask them if they can bring this to the attention of a Registrar and then usually something happens.

[18] A copy of the email must be sent to the other party.

DEALING WITH THE COURT IN PERSON

Pre-trial conference

117) **Where to wait and whether to pre-meet.** It would be helpful if the Court would issue a practice direction providing insight to lawyers about the Registrars' expectations when it comes to pre-trial conferences.

118) The uncertainties are:

a) Whether you should speak with the other side beforehand or not.

b) Whether you should wait in a conference room or not, including whether you should let the receptionist know which conference room you are in.

119) On occasions in the past I found Registrars to be unhappy that I had:

a) failed to engage in a pre-discussion with the other side, where the other side was represented by a lawyer;

b) engaged in a pre-discussion with the other side, where the other side was self-represented.

c) taken my clients to a conference room and waited for the Registrar to find me, after letting the receptionist know.[19]

120) I just realised there is no easy way to get this right and so I do these things:

a) If the other party is self-represented, I do not speak to them in the absence of the Registrar.

[19] However, if you do the alternative and sit in the general waiting room on L7 you put yourself at risk of: (a) not using the time productively to take instructions from clients and provide them advice; and (b) if you do try and have a meaningful discussion with your client, being overheard (even inadvertently).

b) If the other party is represented, I will speak to the other lawyer about whether they think a discussion should happen beforehand, but only after I have found out whether we are next in line to see the Registrar or whether the Registrar is available. This is because it would be counter-productive to lose our slot with the Registrar because we were speaking with each other and thereby mean we were even more delayed.

c) I always take a conference room, if one is available, in order to use the time waiting to see the Registrar productively with the clients and not be overheard.

d) I make sure I let the receptionist know that I am in the conference room and just run the risk that the Registrar does not get unhappy about the fact that I have not immediately responded when the case is called by them. I also ask the receptionist to make a note that that is where we are and to let the Registrar know.

121) **Making best use of waiting time.** Potentially, a lot of time can be wasted at pre-trial conferences waiting for the Registrar to be ready or, alternatively, during breakout sessions waiting for the other side.

122) I make sure I take a Dictaphone with me and take the opportunity to try and build up my witness statement.

123) You need to be conscious of the fact that if you have more than one potential witness in the room, that you need to separate out the witnesses whilst discussing evidence with them.[20]

124) **Position paper.** Although I have not done it recently, I have been impressed by being in pre-trial conferences in recent times where the other lawyers have had a 1 sheet spreadsheet ready:

[20] *Legal Profession Conduct Rules 2010 (WA)*, rule 40.

a) showing how the claim is broken down; and

b) for them to hand over.

125) This is best if it:

a) shows the interest calculation;

b) shows the breakdown of assessable legal costs that are being claimed; and

c) attaches printouts from the online “date duration calculator” for the calculation of interest.

126) It creates a useful framework for discussing settlement.

127) **Laptop / Ipad.** Sometimes I have taken an iPad into pre-trial conferences together with a keyboard and made notes.

128) Although the tapping of the keyboard might seem distracting, this needs to be balanced against the benefit of capturing as much as possible of what is being said.

129) In the Magistrates Court, and also in the other Courts, the pre-trial conference/mediation is often the first time you hear about many issues and evidence from the other side.

130) For it to not to be captured is contrary to what the other side wants to achieve.

131) The other side is telling you this because they want you to know and hear what they are saying.

132) A failure to capture it is also a waste, because it is useful for providing advice to the client during the breakout sessions about settlement.

133) My experience tells me that it is best to:

a) get the permission of everyone in the room before starting to type;

b) not use a keyboard which is going to make much noise; and,

c) use a computer that makes a small footprint and does not obscure the ability of people to look at each other.

Hearings of applications

134) **Consequential orders.** It is sensible to have ready any consequential programming orders that should be made and for this to actually be included as one of the orders in the application.

135) **Humour / familiarity.** Realistically, there is no room for humour in the Court room except if it is within context and there are only lawyers in the Court room.

136) Any attempt at humour is likely to be poorly received, not because it might not be funny but because the Magistrate, from the Magistrate's point of view looking at everyone in the room, sees it quite differently and can see how a party could react (or a member of the public gallery).

137) There should also always be deference to the Magistrate for a similar reason.

138) Even if we know Magistrates personally, we should not initiate any kind of informality, (bearing in mind that the transcript may be relied upon in an appeal) such as by saying, "good morning" and "I hope you are well".[21]

139) **Written submissions.** The Court has a not well-publicised practice direction that deals with written submissions.[22]

140) I cannot think of many situations in which I would be in Court nowadays for a hearing in which I had not provided some written submission beforehand.

141) The written submissions always get through to the Magistrate if emailed a day or so before.

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[21] Brief Magazine, Law Society of Western Australia, *Basic Trial Advocacy, A Survival Guide to Court Etiquette*, The Hon Justice McKechnie QC, Volume 42, Number 4, May 2015.

[22] Practice Direction 2/2014.

142) Even if the Magistrate has not had the opportunity to read the document in advance of the hearing, it will almost always be useful for them to be able to read whilst you are speaking.

143) Anyone who has done an appeal in the Supreme Court will know that quite often where there is much written material before the Judge or Judges, you continue speaking although the Judge will be:

a) looking down, reading, making notes and writing; and

b) not making much eye contact;

but still taking in everything that is being said.

144) Magistrates are experienced at being able to listen and read at the same time and <u>not</u> providing them something that provides a roadmap as to what you are saying is missing an opportunity to be persuasive.

Trial

145) **Knowing who the Trial Magistrate is.** If a Magistrate is the Magistrate at the Listing Conference, then almost always that Magistrate will be the Trial Magistrate.

146) The exceptions are if the Magistrate is going to be on leave or sick.

147) I consider it appropriate to confirm with the Magistrate at the Listing Conference that the Magistrate will be the Trial Magistrate.

148) It is useful to know, in case you need to lodge written submissions or other documents and ask the Registry to bring the document to the attention of that Magistrate.

149) "**Other work"**. Recently, the Registrars have come to what I consider the legally correct view that "other work"[23] requires a specific order from the Trial Magistrate.

[23] *Legal Profession (Magistrates Court) (Civil) Determination 2014 (WA)*, iItem 26 and paragraph 9(2).

150) You need to be ready when the decision is handed down about this question or otherwise risk losing out on what can often be a significant sum.

DEALING WITH ENFORCEMENT

Who is the bailiff?

151) The Bailiff service has been contracted out to the private sector. The current provider is Baycorp. The contract is long-standing and likely to be in place until at least 2020.

152) Baycorp continues to run its private debt collection business.

153) Baycorp does the bailiff work at a loss, in order to do profitable work that is also part of the tender, including running the Fines Enforcements Registry.

What are the standard processes?

154) The Sheriff provides directions to Baycorp by the *Bailiffs' Manual*.

155) The Sheriff does not voluntarily provide lawyers access to the manual.

Useful information from Baycorp

156) I have asked Baycorp some questions. The questions and answers are summarized in this table:[24]

[24] This table is mostly word-for-word the responses I have received from Baycorp management to an email I sent them. I am grateful for their co-operation.

DEALING WITH BAYCORP	
Communicating with Baycorp	Q: What is the best way? A: Phone 1300 700 397, letter or email. (The author's view – email is reliable when dealing with Baycorp). Q: How long do replies to emails usually take? A: 3-5 business days. Q: What information should lawyers include in the emails, so they are easily tracked at Baycorp? A: Court case number including issuing court, or bailiff reference, if known. Names of parties. When known, Baycorp's replies will also record the claimant/creditor reference number.
Addresses for debtors	Q: Do you ever check addresses? Or, do you only rely on what is provided to you by the Court / lawyer? A: Baycorp checks the validity of the address only (eg spelling of name/suburb), RMB, PO Box or an address such as the Perth Airport, Curtin University. If there is no street or street number Baycorp will request clarification from the claimant/creditor. Baycorp has to go by what is on the court order, unless there are written instructions to attend an alternative address. Q: What happens if someone answers the door and gives you the new address for the debtor / defendant? A: Providing the occupant is reasonably believed to be over 18, then the document is served. Information is noted by the agent & relayed to the creditor via updates.
Expiry of sale periods / expiry of orders	Q: Does Baycorp follow up / provide notice of pending expiry of a PSSO or sale period or is the lawyer required to monitor this? A: It is the creditor's responsibility to monitor this.

	PSSO expiry: As a courtesy Baycorp sends a letter advising that the order is due to expire. This is also provided verbally when discussing with creditor. Sale periods: Updates are provided post investigation, which includes the sale period expiry date. Not all lawyers/creditors notify Baycorp when the PSSO has been registered, which means that Baycorp cannot track the registration expiry date. This can cause the file to be closed & returned to the issuing court. This scenario also applies where extensions to the sale period have not been notified to the Bailiff.

PROCESS SERVER WORK
Q: What constitutes an “attempt” at service? A: Attending the address provided on the claim. Q: What are the standard operating procedures? For example, attempting in the afternoon, after having attempted in the morning? A: Unless there are written instructions for best times of service, then up to 3 x attempts are made on different days of the week and at different times of the day. Morning: before 9am. Business hours 9am to 5pm. Evening/outside business hours: after 5. Weekends are considered after hours.

ENFORCEMENT	
Calculation of judgment sums	Q: What is the best way for the lawyer to get the current judgment sum, plus interest, plus costs amount in a broken-down figure, rather than just a lump sum? A: Baycorp will always provide a financial statement report to creditors when asked. Q: Does the sum quoted include what is payable to Baycorp? A: Yes, poundage is shown as part of the costs.

PSSO (personal property)	Q: What information should a creditor communicate to Baycorp about property that the debtor is likely to have? A: Description of property (eg make/mode/registration # of vehicle). Companies – PPSR report, as this can help to exclude items from seizure. Q: How should this be best communicated? A: Email/letter or fax. Q: What steps does the bailiff take after they arrive on-site? This includes to assess what is available to seize? A: Attempt to raise the occupants, if no-one home, they make inquiries with neighbours and where possible check the letterbox for subject mail. Discretion used when seizing goods, based on recovering costs & some/all of judgment. Agents are not assessors/valuers. If proof of ownership is not provided at the time, then seizure will be carried out.
PSSO (real estate)	Q: Has Baycorp ever taken a jointly owned property successfully to sale? This includes a property that is owned as tenants in common. A: Not to my knowledge. Q: Are valuations provided to creditors? A: No.
Warrants for arrest (means inquiry)	Q: What steps are followed? What are the OH&S issues that inform the process? A: There are 2 steps. **First**, a Baycorp staff member will visit the property. If the debtor is there, they will ask the debtor to contact the Baycorp office for arrest by appointment. If the debtor is not there, a calling card is left. If, subsequently, contact is made with the Baycorp office, then this results in a date being set for *arrest by*

	appointment. The *Warrant for Arrest* is then carried out, providing the debtor turns up. **Second**, where there is no response from the debtor, contact is made with the creditor to ask whether the creditor is prepared to pay for 2 members of Baycorp staff to go to the address provided and physically arrest the debtor and convey them to Court. A deposit is required to be paid to cover the costs of the 2nd staff member. This is a legislated fee. There is a refund of the balance of the deposit at the conclusion of the process. There are OH&S issues. The safety of the Baycorp agent is paramount when there is an instruction to convey to Court, rather than arrest by appointment. It is the same as a civil arrest by member of the public, so the Baycorp agent does not have any forms of defence, such as gun, taser or pepper spray. They do not have handcuffs. The person arrested is conveyed in a Baycorp private vehicle and 1 of the 2 Baycorp staff members sits in the back of the vehicle with the person who does not want to be there. The Baycorp staff members can request police assistance if a threat is made, but they are reliant on the availability of police. Excessive delays in police arriving can result in the attempt being aborted. This also makes any subsequent attempt on that debtor more difficult because they are likely to become evasive. The *rule of thumb* is that the Baycorp staff member must retreat or abort if they feel threatened.
Debt appropriation order	Q: How does this work? Do you get many of these or is this relatively rare? A: Bailiff has no jurisdiction - Registrar/Magistrate only.

Earnings appropriation order	Q: How does this work? Do you get many of these or is this relatively rare? A: Bailiff has no jurisdiction - Registrar/Magistrate only.

Restraint of Debtors Act 1984 (WA)

157) Applications pursuant to this Act are dealt with pursuant to Part 21 of the *Magistrates Court (Civil Proceedings) Rules 2005 (WA).*

158) The Act provides the Court surprisingly wide powers to restrain:

a) absconding debtors from leaving the State;[25]

b) the transfer of any of property of a debtor that is situated in the State;[26] and,

c) the removal from the State of any of the property of a debtor that is situated in the State.[27]

159) I suspect generally Magistrates would:

a) take a cautious approach to applications; and,

b) require very persuasive evidence that a debtor is intending to defeat a creditor.

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[25] *Restraint of Debtors Act 1984 (WA)*, s 5(1).

[26] *Restraint of Debtors Act 1984 (WA)*, s 17(1)(a).

[27] *Restraint of Debtors Act 1984 (WA)*, s 17(1)(b).

PRECEDENTS

Extension of sale period

160) Application:

MAGISTRATES COURT of WESTERN AUSTRALIA (CIVIL JURISDICTION) APPLICATION FORM 23

Registry:	Case number:

Claimant	

Defendant	

To: The Registrar

The Claimant makes application for the following order:

NATURE OF ORDER SOUGHT:

1. Pursuant to subsection 133(13) of the *Transfer of Land Act 1893 (WA)* the sale period be extended by 6 months.
2. Pursuant to subsection 102(4) of the *Civil Judgments Enforcements Act 2004 (WA)* the PSSO be extended to expire at the same time as the extended sale period.
3. The Judgment Debtor pay the costs of this application, to be fixed at $XXX.

161) Affidavit in support:

MAGISTRATES COURT of WESTERN AUSTRALIA (CIVIL JURISDICTION) GENERAL FORM OF AFFIDAVIT FORM 2

Registry: Phone: Facsimile:	Case number:

Claimant	

Defendant	

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AFFIDAVIT OF RICHARD VICTOR GRAHAM	PAGES 1 - 2
ATTACHMENT RG1	PAGES 3 - 4

I, Richard Victor Graham of XXX in the State of Western Australia, Australian Lawyer, being duly sworn make oath and say as follows:

1. I am the Claimant's lawyer.
2. I swear this affidavit in support of the Judgment Creditors' application dated 27 July 20XX.
3. The sale period is due to expire on Wednesday, 30 August 20XX.
4. This morning I received a telephone call from XXX, who is an Assistant Bailiff.
5. Amongst other things and in summary, XXX said to me that:[28]

[28] No need to state source of information or belief, because evidence is what is being said by someone else, rather than that these things are true.

a. the sale process is nearing completion but will not occur before 30 August 20XX;

b. [Additional detail about the sale process so far].

6. I **attach** and mark as RG1 a true copy of an email from XXX to me sent on 27 July 20XX at 12:15 PM.[29]

[29] This email will be from XXX confirming what was said during the telephone conversation.

Inspection of banker's books

162) Application:

MAGISTRATES COURT of WESTERN AUSTRALIA (CIVIL JURISDICTION) APPLICATION FORM 23

Registry:	Case number:

Claimant	

Defendant	

To: The Registrar

The Claimant makes application for the following order:

NATURE OF ORDER SOUGHT:

1. Pursuant to s 94 of the *Evidence Act 1906 (WA)* the Claimant be at liberty to inspect and take copies of any entries in the Commonwealth Bank of Australia Ltd banker's book relating to the electronic funds transfer made by the Claimant to BSB XXX XXX account number XXXXXXX on 17 November 20XX.

163) Affidavit:

MAGISTRATES COURT of WESTERN AUSTRALIA (CIVIL JURISDICTION) GENERAL FORM OF AFFIDAVIT FORM 2

Registry: Phone: Facsimile:	Case number:

Claimant	

Defendant	

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I, Richard Victor Graham of XXX in the State of Western Australia, Australian Lawyer, being duly sworn make oath and say as follows:

1. I am the Claimant's lawyer.

2. Wherein this affidavit I refer to documents attached to this affidavit as 'true copies' I do so having compared the copy attached to this affidavit to the original and having satisfied myself that the copy is a true copy of the original.

3. I swear this affidavit in support of an application by the Claimant for an order pursuant to s 94 of the *Evidence Act 1906 (WA)* to be exercised pursuant to s 96 of that Act.

4. I have received my instructions about this case from the Claimant's in-house counsel, Ms XXX, which I believe to be true.

5. By way of background to the application, the Claimant's in-house counsel has instructed me these facts that are relevant to this application:

    a. On 17 November 20XX the Claimant electronically transferred $XXX to the Defendant.

    b. The money was transferred by mistake and should have been transferred to someone else, being a creditor.

    c. The Claimant subsequently asked the Defendant to return the money.

    d. The Defendant did not do so.

    e. The Claimant commenced this case to recover the money.

6. I **attach** a true copy of the letters shown in this table, which are marked as shown in the table:

Letter marked as	Description of letter	Date of letter
RG1	Letter from myself to John XXX	25 August 20XX
RG2	Letter from myself to John XXX	13 September 20XX
RG3	Letter from the Defendant to myself	14 September 20XX
RG4	Letter from John XXX to myself	20 September 20XX

7. The letters I have written that are attached to this affidavit include statements based on information I have received from the Claimant's in-house counsel, which I believe to be true.

Restraint of Debtors Act

164) Application

Registry at:	MAGISTRATES COURT of WESTERN AUSTRALIA (CIVIL JURISDICTION) APPLICATION UNDER CONFERRING ACT FORM 53	Case number: Date lodged: Service type:
Claimant	Name: Address:	
Defendant	Name: Address:	

APPLICATION MADE UNDER THE FOLLOWING ACT: *Restraint of Debtors Act 1984 (WA)*

REASON FOR APPLICATION: See attached written submissions

ORDERS REQUIRED:

1. Pursuant to s 19 of the *Restraint of Debtors Act 1984 (WA)* the Defendant be restrained from transferring the land in certificate of title volume XXX Folio XXX being Lot XXX on Deposited Plan XXXXX more commonly known as XXXX Thomas Road, Nedlands in the State of Western Australia until further order.

2. Pursuant to s 19 of the *Restraint of Debtors Act 1984 (WA)* the Defendant pay the Claimant's costs of the application, to be assessed if not agreed.

165) Written submissions

IN THE MAGISTRATES COURT OF WESTERN AUSTRALIA No. XXXX of 20XX
HELD AT PERTH

BETWEEN:

XXX Judgment Creditor

and

XXX Judgment Debtor

JUDGMENT CREDITOR'S WRITTEN SUBMISSIONS re
APPLICATION DATED 7 NOVEMBER 20XX
FOR HER HONOUR, MAGISTRATE XXX

Date of document:
Filed on behalf of: The Judgment Creditor
Date of Filing:

Prepared by:
Vogt Graham Lawyers Telephone: (08) 9328 5999
Level 5, 102 James Street Facsimile: (08) 9328 6046
NORTHBRIDGE WA 6003 Reference:

EVIDENCE

166) The Judgment Creditor relies on the affidavits of Richard Graham sworn on:

a) 7 November 20XX; and

b) 19 November 20XX.

Key facts relied upon

167) The key facts the Judgment Creditor relies on in support of the application are:

a) The Judgment Debtor saying that he intended to transfer the property based on what he said to Richard Graham on 29 April 20XX.[30]

b) The lack of other real estate owned by the Judgment Debtor against which the Judgment Creditor could enforce the judgment.[31]

c) The previous intention of the Judgment Debtor to sell the property, as shown by the previous sales listing history.[32]

d) The previous failure of the Judgment Debtors to satisfy a costs order, even after enforcement action had been taken.[33]

e) The failure to appeal the judgment.[34]

f) That the Judgment Debtor fails to accept responsibility, based on these statements of Her Honour, Magistrate XXX at page 33 of the written reasons for decision:

> XXX ....

LAW

168) The Judgment Creditor's lawyers have done a *LexisNexis* Casebase search for cases in which the *Restraint of Debtors Act*[35] (**the Act**) has been judicially considered.

169) The Casebase results are **attached**.

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[30] Affidavit of Richard Graham sworn on 19 November 20XX, [5] - [21].

[31] Affidavit of Richard Graham sworn on 7 November 20XX, [5] - [7].

[32] Affidavit of Richard Graham sworn on 7 November 20XX, [8] - [9].

[33] Affidavit of Richard Graham sworn on 7 November 20XX, [10] - [16].

[34] Affidavit of Richard Graham sworn on 7 November 20XX, [17] - [20].

[35] *Restraint of Debtors Act 1984 (WA).*

170) The Judgment Creditor's lawyers have read through the cases and will bring a copy to the hearing. This is in case the Court wants them available to hand up.

171) Unfortunately, the cases are of limited assistance because they deal with decisions to arrest a debtor, rather than make an order to prevent a transfer of property.

172) They offer no useful statements of legal principle.

173) The Act requires that an order restraining the transfer of property shall not be made unless the Court making the order is satisfied as to "all material matters".[36]

174) Relevantly, the Act provides that a Court is satisfied as to "all material matters" in relation to an application if it is satisfied that there are reasonable grounds for believing that:[37]

a) the debtor is indebted to the applicant;

b) the debtor has property situated in the State;

c) property of the debtor is about to be transferred;

d) transfer of the property would defeat, endanger or materially prejudice prospects of enforcing a judgment;

e) the alleged debt is for an amount that is not less than $500;

f) the application has been made within a reasonable time after the circumstances relied on as evidence of the impending transfer came to the knowledge of the applicant.

175) The Judgment Creditor submits that the primary issue is whether the Court is satisfied that there are reasonable grounds for believing that the property is about to be transferred.

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[36] *Restraint of Debtors Act 1984 (WA)*, s 19(2).

[37] *Restraint of Debtors Act 1984 (WA)*, s 3(4).

ARGUMENTS IN FAVOUR OF THE APPLICATION

176) The Judgment Creditor submits that the combined facts of:

a) the conversation between the Judgment Debtor and Richard Graham on 29 April 20XX;

b) previous sales history;

c) judicial finding as to the Judgment Debtor's failure to accept responsibility in the written reasons for decision;

reasonably give rise to an inference that the property is about to be transferred.

177) This is especially within the context of the legal requirement[38] on the Judgment Debtor to:

a) pay the judgment debt on 7 October 20XX; and

b) previous costs order when assessed; and

his continuing failures to do so.

ARGUMENTS AGAINST THE APPLICATION

178) The application has been made *ex parte*.

179) This means that the arguments against the application are required to be put to the Court.

180) The arguments against the application are that:

a) The Judgment Debtor might allege that the conversation held on 29 April 20XX:

i) was without prejudice; or

ii) did not occur.

[38] *Civil Judgment Enforcements Act 2004 (WA)*, s 11.

b) The previous sales history is of limited probative value, because the buying and selling of land is frequent and common and does not indicate a continuing intention to sell the property.

c) Transfer would not materially prejudice enforcement, because there are other judgment debtors.

JUDGMENT CREDITORS' COUNTERARGUMENTS

181) The counter arguments are that:

a) The previous sales listings happened more than once and therefore shows a pattern.

b) Although there are other judgment debtors, this property is the only real estate owned by any of them.

182) Generally:

a) The Judgment Debtor can seek a review of any orders made.[39]

b) The Judgment Debtor may pursue civil remedies in tort for any losses he may suffer.[40]

WHETHER THE APPLICATION SHOULD BE GRANTED *EX PARTE*

183) The Judgment Debtor might argue that the application should not be dealt with on an *ex parte* basis.

184) The counterargument is that the application has been made *ex parte* in order to avoid the Judgment Debtor being provided notice and seeking to transfer the property before any hearing and order.

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[39] *Restraint of Debtors Act 1984 (WA)*, Part V.

[40] See, for example, *Wan v Sweetman* (1998) 19 WAR 94 at 100-01; BC9800063 per Parker J.

185) Relevantly, the Act provides that the Court may:

a) hear and determine an application *ex parte*;[41] and

b) order that the applicant serve:

i) a copy of the application and any affidavit in support; or

ii) notice of the application;

on the debtor.[42]

CHRONOLOGY

186) This is a chronology of relevant events:

Date	**Event**
29 March 20XX	• Day 1 of trial • Conversation between XXX and Richard Graham (as deposed to in affidavit of Richard Graham sworn on 19 November 20XX).
6 September 20XX	Her Honour, Magistrate XXX handed down her written reasons for decision and awarded judgment in favour of the Judgment Creditor.
12 October 20XX	*Certificate of Judgment* issued.
7 December 20XX	• Application lodged • Affidavit of Richard Graham sworn in support.
18 December 20XX	Further affidavit of Richard Graham sworn in support of application.

[41] *Restraint of Debtors Act 1984 (WA)*, s 18(1).

[42] *Restraint of Debtors Act 1984 (WA)*, s 18(2)(b).