

Civil Procedure and Arbitration

Topic: Instituting Proceedings, Pleading and Joinder of claims and parties, Representative and Class Actions

Originating Process

The process by which proceedings are commenced: s3 CPA

What is a pleading?

Pleadings are formal written statements of the plaintiff's claim and the defendant's defence. They contain the material facts the parties intend to allege at the trial and the issues in dispute are defined in the pleadings. Pleadings limit the scope of particulars, discovery of documents and interrogatories. They show what facts are in dispute and what issues the court will have to determine.

INSTITUTING PROCEEDINGS

Proceedings can be initiated by using a statement of claim or summons: 6.2 UCPR.

Statements of claim are required where there are disputed contentions of fact and will initiate the pre-trial and trial processes.

A statement of claim or summons must specifically state the relief claimed by the plaintiff: UCPR 6.12(1). The statement of relief is placed at the end of the statement of claim. If several items of relief are claimed these should be listed separately. In the case where more than one cause of action is relied upon then the relief sought in respect of each should be set out. If injunctive relief or a declaration is required the plaintiff should set out the precise terms proposed. The court may award other general or specific relief if the relief claimed is inadequate. (UCPR 36.1).

The rules forbid claiming a specific amount for unliquidated damages (UCPR 14.13). If special damages are claimed such as loss of income and medical expenses then these should be specifically claimed. Any unusual damages should also be claimed. A claim for interest to the date of judgment should be pleaded (UCPR 6.12(6)).

In the Federal Court particular care should be taken to ensure that all elements of the statutory cause of action are pleaded. For example it is not sufficient to plead that the facts relied on establish that the respondent has engaged in conduct that is misleading or deceptive and this has caused damage to justify a s 18 Australian Consumer Law cause of action. The plaintiff must also allege that the respondent is a corporation and it carried out these actions in the course of trade or commerce.

UCPR 6.3: Where statement of claim required

Proceedings of the following kinds must be commenced by statement of claim:

- (a) proceedings on a claim for relief in relation to a debt or other liquidated claim,
- (b) proceedings on a claim for relief in relation to a tort,
- (c) proceedings on a claim based on an allegation of fraud,
- (d) proceedings on a claim for damages for breach of duty (however arising) and the damages claimed consist of or include:
 - (i) damages in respect of the death of any person, or
 - (ii) damages in respect of personal injuries to any person, or

- (iii) damages in respect of damage to any property,
- (e) proceedings on a claim for relief in relation to a trust, other than an express trust wholly in writing,
- (f) proceedings on a claim for possession of land,
- (g) proceedings on a claim for relief under the Property (Relationships) Act 1984,
- (h) proceedings on a claim for relief in relation to the publication of defamatory matter.

Summons required where a question of law and not substantial dispute of fact, is at issue. It usually stimulates a summary procedure. Applications to the Court of Appeal for leave to Appeal and proceedings where there is no defendant must be commenced by summons (UCPR 6.4). Proceedings commenced by summons do not have pleadings and the evidence is taken on affidavit. A summons is not appropriate for defining issues of fact for trial nor for determining contested issues of fact at the hearing. Proceedings where the sole question is the construction of an Act, or of a document or of a question of law or in which substantial dispute of fact is unlikely are more appropriate to be commenced by summons.

UCPR 6.4 Where summons required

- (1) Proceedings of the following kinds must be commenced by summons:
 - (a) proceedings in which there is no defendant,
 - (b) proceedings on an appeal or application for leave to appeal, other than proceedings assigned to the Court of Appeal,
 - (b1) proceedings before the Supreme Court in the exercise of its jurisdiction under section 69 of the Supreme Court Act 1970,
 - (c) proceedings for preliminary discovery or inspection under Part 5,
 - (d) proceedings on a stated case,
 - (e) proceedings on an application for approval under section 75 of the Civil Procedure Act 2005 of an agreement for the compromise or settlement of a claim,
 - (f) proceedings on an application for a transfer order under Part 9 of the Civil Procedure Act 2005,
 - (g) proceedings on an application for the removal or transfer of proceedings to the court under any Act, other than an application for a transfer order under Part 9 of the Civil Procedure Act 2005,
 - (h) proceedings (other than proceedings on a claim for damages) on any application made under any Act (other than the Civil Procedure Act 2005),
 - (i) proceedings on an application to the court under any Act, other than:
 - (i) proceedings on an application under the Supreme Court Act 1970, the District Court Act 1973 or the Local Court Act 2007, and
 - (ii) proceedings on an application that may properly be made in existing proceedings,
 - (j) any other proceedings that, pursuant to these rules or any other rules of court, are required to be commenced by summons.

REQUIREMENTS OF PLEADINGS

Pleadings only apply to statements of claim. UCPR 14.7 states that subject to this Part, Part 6 and Part 15, a party's pleading must contain only a summary of the material facts on which the party relies, and not the evidence by which those facts are to be proved.

A pleading must be as brief as the nature of the case allows: UCPR 14.8

A party must plead all the facts, which are necessary to constitute a complete cause of action or defence so that if the facts are proved the party will be entitled to the relief claimed. Immaterial facts ought not to be pleaded. Facts, which merely evidence the facts establishing the cause of action or defence, should not be pleaded it is necessary to distinguish material facts from evidence: *Phillipps v Phillipps*. The pleader is generally not required to state the legal consequences. Where the contents of documents or oral conversations are material the rules allow the effect of the document to be pleaded: UCPR 14.9.

In most cases the plaintiff need not plead the performance of any condition precedent: UCPR 14.11). A party is not required to plead any matter of fact which the law presumes in his/her favour or where the other party has the burden of proof unless there has been a specific denial of that fact: UCPR 14.10. A party may by his/her pleading raise any point of law: UCPR 14.19. So that if the plaintiff's statement of claim does not reveal a cause of action this may be pleaded as a defence.

SEQUENCE OF PLEADING

- The plaintiff's statement of claim (see above)
- The defendant's defence and
- The plaintiff's reply to the defence

If the defendant has a cross-claim it is pleaded with the defence and the process is commenced again so there is a plaintiff's defence to the defendant's cross-claim and the defendant's reply to the defence to the cross-claim. A pleading subsequent to the reply cannot be given unless the court grants leave. If a third party is joined by the defendant the defendant pleads a case against the third party who lodges a defence to which the defendant can reply.

Defendant's Defence

The defendant must answer each allegation made by the plaintiff in the statement of claim. The defendant may-

- admit some, or all, of the plaintiffs allegations
- deny or traverse all or some of the plaintiffs allegations
- plead additional facts to cast the plaintiffs allegations in different context, that is to make a plea of confession and avoidance
- challenge to the sufficiency in law of the plaintiff's claim

- allege any additional facts which constitute a defence to the plaintiffs claim
- allege a set-off or counter-claim

If the issues are not fully defined in the statement of claim and the defence then further pleadings are required. Every fact alleged in the statement of claim should be answered in the defence. If not and there is a failure to traverse the facts they cease to be an issue in the proceedings. So the defendant has to plead all facts which may surprise the plaintiff or which raise matters of fact not arising out of the statement of claim. It is permissible to make inconsistent pleas in the alternative.

For example a defendant may deny the making of a contract alleged by the plaintiff and also allege that if there is a contract it is unenforceable because of the absence of writing or even continue to cross-claim for breach of contract (see Colbran). It must be clear that these inconsistent defences are alternatives.

The defendant may not allege a defence which is known to be false. The defendant must make it clear what is admitted and what is denied and should plead each specific allegation. A denial puts the other party to proof of the allegation denied. Any allegation in the statement of claim which is not denied or stated to have been admitted will be taken to have been admitted except in respect of damages (which are deemed to be in issue). A defendant should be careful when denying a negative proposition as the double negative may be construed as an affirmative proposition. The defendant should make the position clear and provide adequate particulars. A defendant should make admissions where appropriate. In a plea of confession and avoidance a defendant may admit or confess an allegation but add further facts which avoid the effect of the allegation. For example if the basis of the defence is that the contract is illegal this should be specifically pleaded in the defence (see Colbran).

Cross-claim

A defendant usually follows the same procedures as for the statement of claim and should reveal a cause of action by pleading the necessary material facts. It is permissible for the defendant to incorporate matters pleaded in the defence into the cross-claim and then allege any additional facts necessary for the cross-claim.

Reply and Defence to Cross-claim

The plaintiff may reply to the defence (UCPR 14.4) but in most jurisdictions this is only necessary where the defence has raised a new issue of fact which requires a response. If no reply is delivered the rules provide that all allegations in the defence are deemed denied (UCPR 14.27(2)).

VERIFICATION OF PLEADINGS

In certain circumstances both statement of claim and defence must be verified: UCPR 14.23. The exceptions are damages for defamation, malicious prosecution, false imprisonment, death or personal injury (UCPR 14.22). The affidavit verifying the pleading is to be made by the party pleading and is to state:

- in respect of allegations of fact in the pleading, that the deponent believes the allegations are true

- in respect of allegations of fact denied in the pleading, that the deponent believes those allegations to be untrue;
- in respect of allegations of fact that the pleading does not admit, that after reasonable inquiry, the deponent does not know whether or not the allegations are true

Particulars

A pleading must give such particulars of any claim, defence or other matter pleaded by the party as are necessary to enable the opposite party to identify the case that the pleading requires him/her to meet. (UCPR 15.1) Particulars must be provided of negligence or breach of statutory duty in a claim for common law damages in tort (UCPR 15.5). If a party claims out of pocket expenses in an award of damages he/she must give particulars of those expenses (UCPR 15.6 SCR). A party who claims exemplary damages or aggravated damages must give particulars (UCPR 15.7 15.8).

The function of particulars is to make sure the other party knows the case and is able to determine what evidence must be prepared for trial. Particulars limit the generality of pleadings and assist to clarify the issues and limit the questions to be tried and any discovery or disclosure required. If the particulars are short they may be included in the pleading otherwise a separate document should be delivered.

Pleadings and particulars

The range of evidence, the admissibility of evidence and discovery are governed by the particulars. The particulars explain the allegations in the pleadings they do not modify the cause of action. The role of particulars is to limit the issues of fact to be investigated at the trial. If the plaintiff establishes a cause of action on the facts then judgment follows.

Pleadings define the issues in general terms. They restrict the evidence to be led by the parties to the trial and let the other party know what case he/she will be met with at the trial. The pleading can be supplemented by particulars where it has inadequately set out the material facts. However particulars cannot assist a defective pleading. If the pleading does not allege material facts at all then the pleading is defective and may be struck out.

Southern Cross Exploration NL v Fires & All Risks Insurance Co Ltd – Supreme Court of NSW

An issue in dispute in this case was whether one of the defendants was in breach of its obligation to make full discovery of documents relevant to the matters in dispute in the proceedings. The defendants claimed its obligations had been complied with unless the plaintiff's particulars were taken to have enlarged its statement of claim. The trial judge regarded the particulars as being part of the pleaded case and that this should have been clear to the defendant.

Waddell J – refers to the former Supreme Court Rules Pt 15 r 7(1) which requires that a pleading shall contain, and contain only, a statement in summary form of the material facts relied upon. Part 16 r 1 requires that a party pleading shall give the necessary particulars.

Waddell referred to *Bruce v Oldhams Press Ltd* a case where the plaintiff sued for defamation but failed in the pleading to identify the defendant with the defamatory words. As the material facts were not pleaded the defective pleading could be struck out. Generally particulars could not correct a defective pleading but in *Oldhams* the defendant was content to have the facts pled by using the particulars. The plaintiffs argued that the particulars in this case might validly have enlarged the plaintiff's proposition in the statement of claim. Waddell rejected this argument and considered this case was like that of *Bruce v Oldhams Press*.

Waddell said "The case was one, like *Bruce v Oldhams Press Ltd*, in which the applicant for particulars would have been entitled to apply to have the pleading struck out as embarrassing but contented himself with an application for particulars. This case is an instance of the distinction between the particulars and statement of material facts in a pleading being blurred for practical reasons.

In my opinion the authorities cited make it clear that a party is not entitled, in effect, to amend a pleading by giving particulars of further material facts. To permit a party to do so would be to allow amendment contrary to the rules which require, in various circumstances, the filing of an amended pleading, the consent of other parties, or the leave of the court. But it is possible that particulars in effect amending a pleading might be accepted by the opposite party and a proceeding might be conducted on that basis."

Particulars and Evidence

Strictly the court should exclude evidence as to matters not alleged in the pleadings and particulars. In practice evidence is admitted if the parties have ignored inadequacies in the pleadings if this is not likely to cause surprise or injustice to the other party.

Katsilis v Broken Hill Pty Ltd

Plaintiff was injured after a piece of metal flew into his left eye when employed by the defendant. The plaintiff was assisting to remove old railway lines.

A fragment from the pick head flew off when struck by the hammer – the pick should not have been used in this way. It was alleged the defendant was negligent because it did not provide a safe system of work. Trial judge found that the employee had been instructed not to use the pick in that way and the employee was personally negligent. Majority of the full court in the Supreme Court dismissed the appeal. The plaintiff appealed to the High Court.

Stephen, Mason, Jacobs and Murphy JJ – No difficulty would have occurred if the plaintiff had alleged in the alternative the vicarious liability of the defendant for the dangerous removal of the railway lines. The defendant would have been liable.

"Can it matter that the pleading does not take that form? We think not, and for this reason that at least in this instance the case made out by the plaintiff, although framed

in terms of a breach of the so-called ‘personal’ duty resting upon his employer, is in fact no different from that which would establish vicarious liability in the defendant.”

JOINDER OF CAUSES OF ACTIONS AND PARTIES

Under what circumstances (if at all) can the Statement of Claim include:

- *the plaintiff suing the same defendant in respect of more than one cause of action: (joinder of causes of actions).* UCPR 6.18 allows in any originating process, the plaintiff may claim relief against the defendant in respect of more than one cause of action. For the purposes of joinder ‘cause of action’ means every fact the plaintiff must prove to support a right to judgment. Joinder of causes of action is separate from joinder of parties. In *Smith v Foley* [1912] it was decided that the causes of action could only be joined if there was a common question. In this case the plaintiffs joined in one action against the defendant several causes of action for slander. There was no connection between the offending statements so there was no joinder.

- *the plaintiff suing different defendants in respect of different causes of action:* look at UCPR 6.19 – 6.28. (***joinder of parties***). (See legislation for rules 6.19 -6.28)

Joinder of Plaintiffs

All persons may join as plaintiffs/defendants where a common question of law or fact arises where the relief claimed in the proceedings relates to, or arises out of the same transaction (or series of transactions) and or if the court grants leave. (See UCPR 6.19). Separate trials are ordered if the court considers that joinder will prejudice or delay the trial. Parties with a separate cause of action against the defendant may still have joinder. “Transaction” is liberally construed and is not restricted to a breach of a contractual relationship.

Payne v. Young (1980):

Facts: Seven plaintiffs joined in an action for the repayment of slaughter fees and for a declaration that the regulations under which the fees were levied were invalid as imposing an excise. The fees were levied for meat inspections.

High Court upheld the defendants’ arguments against joinder. Each plaintiff had entered into a separate transaction with the inspection authorities. The transactions were not related. There was a common interest in the validity of the regulations but this was not enough to justify joinder.

Rule: Joinder is not authorised when the relief claimed arises out of two or more different series of transactions, when the participation of each plaintiff is limited to participation in one series of transactions, the other plaintiffs not participating in that series: *Payne v Young* (Pg 432)

Barwick CJ Mason J – there was no common participation by the plaintiffs in the inspection services “each series of transactions was peculiar to each individual plaintiff”

Bishop v Bridgelands Securities Ltd. (1990) (Colbran p 430 ff)

Facts: They were concerned about oral evidence provided by the plaintiffs, which was a problem in the case. the case involved 114 persons concerning representations made in letters about monies invested in a failed company.

Look at page 435 at the last 2 paragraphs about unfairness.

Held: Leave ought not to be granted unless the court is affirmatively satisfied that joinder is likely to be unfair to any party. Only one firm of solicitors must be representing the parties. There must be common or similar facts, however there may be differences between the evidence intended to rely in support of their claims.

If it would be unreasonable for the respondent (defendant) to simultaneously work on 114 separate claims, with different pleadings, directions etc and the court would not be able to accommodate the hearing of a multitude of separate cases within an acceptable period of time then joinder would be acceptable and will unlikely result in any unfairness to any party.

Birtles v Commonwealth [1960] –(Colbran p 431 ff).

Facts: A solicitors failure to issue a notice of the plaintiffs intention to sue within the time limit was a transaction allowing the joinder of the solicitor as a co-defendant in the plaintiff's personal injury action.

Rule: The plaintiffs must show a causal act or breach by the defendant, which damaged the plaintiff.

Compulsory joinder

Where a plaintiff claims relief to which any other person is liable jointly with the plaintiff then all such persons must be joined as plaintiffs. A person who will not consent to join as plaintiff is joined as a defendant. Proceedings shall not be defeated by reason of the misjoinder or the non-joinder of any person as a party. (UCPR 6.23)

Plaintiff in doubt as to the correct defendant

If the plaintiff is in doubt about the identity of the correct defendant the plaintiff should join all likely parties. Further defendants may be added during the course of the proceedings if any doubt develops about whether the correct defendant has been sued. The innocent defendants are not dismissed from the proceedings until the end of the case. An innocent defendant is