

**CIVIL PROCEDURE FINAL**  
**EXAM NOTES**

1. Order of things up to trial
2. Jurisdiction and Forum
3. Commencement and Defendant's Response
4. Parties, Joinder
5. Service
6. Applications (in pending proceedings)
7. Disclosure and Evidence
8. ADR (Mediation and Arbitration) and Settlement
9. Ending Proceedings Early
10. Costs
11. Enforcement
12. Trials – Evidence, Failure to Appear
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14. Civil Procedure in Context (Essay material)

## (9) Ending Proceedings Early

### Chapter 9 UCPR

Part 1 – Judgment by Default

Part 2 – Summary judgment

Part 3 - Discontinuance and Withdrawal

Part 4 - Alternative Dispute Resolution

Part 5 - Offers to Settle

### DISCONTINUANCE AND WITHDRAWAL

#### Options for Ongoing release of liability

##### 1. Release of liability (Contractual)

- Mutual release from counterclaims and claims that may arise out of same facts/circumstances
- If a party sues in breach of release – innocent party entitled to be indemnified (if for some reason court gives judgment against innocent party)

##### 2. Orders discontinuing proceedings

**Rule 308a** – Discontinuance by parties when proceeding settled

- Each party must immediately give notice to registrar

**BUT NOTE:**

**Rule 310** - Earlier discontinuance is not a bar to fresh proceedings

#### See also – discontinuing proceedings:

**Rule 304** - Discontinuance by plaintiff or applicant  
Before defence filed

**Rule 306** – D's Withdrawal of Notice of Intention to Defend

**Rule 308** – D's Withdrawal of Defence or counterclaim

##### 3. Consent judgment Rule 666

- Formal judgment of court with same binding effect as judgment at a hearing

Defendants generally resist because goes on public record that judgment entered against them

### 1. JUDGMENT BY DEFAULT

Where failure to file notice of intention to defend. DJ does not involve any consideration of merits of claim.

#### a) Dismissal of Proceedings (order against Plaintiff)

*Failure by plaintiff to prosecute action properly*

- Plaintiff/applicant fails to take a step/comply with order within certain time and they don't
- The other party can apply for order dismissing proceeding for want of prosecution

**Policy objective: Rule 5** – direct parties toward efficient/effective litigation with minimum time and expense

*Cooper v Hopgood v Ganim*

Members of community entitled to get on with lives without consequences of litigation hanging over them. D ought not be left with threat of litigation because of lack of action by P.

#### Rule 280 – Default by Plaintiff or Applicant

(1) If—

(a) the plaintiff or applicant is required to take a step required by these rules or comply with an order of the court within a stated time; and

(b) the plaintiff or applicant does not do what is required within the time stated for doing the act;

a **defendant or respondent in the proceeding may apply to the court for an order dismissing the proceeding** for want of prosecution.

(2) The court may **dismiss the proceeding** or **make another order** it considers appropriate.

(3) An order dismissing the proceeding for want of prosecution may be set aside only on appeal or if the parties agree to it being set aside.

(4) Despite subrule (3), the court may vary or set aside an order dismissing the proceeding for want of prosecution made in the absence of the plaintiff or applicant, on terms the court considers appropriate, and without the need for an appeal.

#### NOTE:

##### District Court and Magistrates Court

Do not have inherent jurisdiction

Only Statutory Power to dismiss proceedings for want of prosecution

##### Section 22 Civil Proceedings Act

- If 2 years since last step taken in proceeding, court may dismiss proceeding

##### Supreme Court

Inherent jurisdiction to dismiss for want of prosecution

- Don't need technical failure to comply with certain step
- Eg. history of non-prosecution of proceedings – can dismiss  
But **s22 CPA** good guide – SC will consider exercising inherent jurisdiction after around 2 years of delay

**Will not likely dismiss for minor breach eg. 1 day** (unless urgent circumstances etc) – usually must be extended in time, non-compliance

#### Application for Dismissal for Want of Prosecution

**Rule 280(2)** The court may dismiss the proceeding or make another order it considers appropriate.

If P has explanation for lack of prosecution/delay, court may just make other orders for future conduct of matter

- Could send to supervised case list

- Guillotine order – one last chance, proceeding to be dismissed by self-executing order if do not comply

#### Old test: whether prejudice to D

*Burkett v James (1978)*

Show either:

- P or A delay was intentional or contemptuous, or
- Prejudice the other party (D) – would give rise to substantial risk that won't have fair trial of issues
- Eg. availability of witnesses, document destruction policies after a time

*Cooper v Hopgood and Ganim* – adopted *Burkett v James* in Qld 11 years after cause of action. Claim against solicitors still not properly pleaded. Held: Prejudice to D from properly defending itself. 11 years was inexcusable delay, proceeding dismissed.

#### New test: Many factors to consider

*Tyler v Custom Credit Corp*

12 factors relevant to dismissing proceedings for want of prosecution

1. How long ago events in statement of claim occurred
2. How long ago litigation commenced or causes of action added [and how long after cause of action arose – if it was within limitation period, was it close to 6 year limitation period?]
3. What prospects plaintiff has of success in action [is there any point letting a marginal claim go on?]
4. Whether or not disobedience of court orders or directions
5. Whether or not litigation categorized by period of delay in between taking steps
6. Whether delay attributable to P, D or both – if D keeps applying for extensions of time etc.
7. Whether impecuniosity of P has been responsible for delay in litigation, and whether or not D responsible for P's impecuniosity
8. Could litigation be concluded by striking out P's claim [eg. if still within limitation period – is there anything stopping P from going and initiating proceedings again?]
9. How far litigation has progressed
10. Whether or not delay caused by P's lawyers [would favour P]
11. Whether explanation for delay
12. Whether delay resulted in prejudice to D leading to inability to conduct fair trial (same as in *Cooper* and *Burkett v James*)

#### Plaintiff Appeal against Order for Dismissal for Want of Prosecution

**Rule 280(3)** - Where orders made in ordinary way

- appeal in ordinary way of appealing any judgment of court

**Rule 280(4)** - Where some irregularity

- If D application not brought properly, not served on P properly etc.

## **b) Default Judgment (against Defendant)**

### **Rule 281**

(1) This division applies if a defendant in a proceeding started by claim has **not filed a notice of intention to defend** and the time allowed under rule 137 to file the notice has ended. [28 days]

(2) This division also applies if a defendant in a proceeding started by claim files a conditional notice of intention to defend that becomes an unconditional notice of intention to defend and the defendant does not file a defence within the time required under rule 144(6). [7 days]

**\*\*P loses right to apply for DJ after defence filed (even if late)**

Money judgment for Plaintiff – straightforward

### **BUT where other relief sought by Plaintiff:**

- 283 – **debt or liquidated demand.**
  - o Registrar can give summary judgment
- 284 – **damages that are not liquidated** (no money figure) –
  - o Registrar can give judgment but conditional upon assessment of damages under Ch 13 Part 8
- 285 - **claims for return of goods**
  - o Registrar can give judgment for return of goods, or for value of goods conditional on assessment of value of goods
- 286 – **recovery of possession of land**
  - o Registrar can give judgment for necessary steps to return, or costs
  - o but registrar can't make order if land is subject to mortgage (286(4))
- 287 – **claims for more than one** of the preceding things
  - o Plaintiff is entitled to more than one
- 288 – **anything else** - catch all provision
  - o if P seeks relief not contemplated by rules must apply to Court (judge) for judgment (288(2))
- 289 – **costs**
  - o If D has paid judgment debt, registrar can then deal with costs

### **Costs if DJ given**

If DJ given, costs must be in accordance with scale (**Rule 694**)

## **Defendant application to set aside Default Judgment**

### **Rule 290**

Judgment can only be set aside with court's discretion

### **Irregularly obtained – set aside as matter of course**

- Essential to comply strictly with rules for filing, service etc.
- Even if D knew about it but service was not properly made (*Easy Frame v Alcoat Australia*)

*Elders Finance v Inaway* – Affidavit in support of application for default judgment contained hearsay evidence. Irregularity – D didn't have to show anything more, DJ was set aside.

**\*\*NOTE:** Decided under old SC rules (no UCPR) – now, can have hearsay (r430)

### **Regularly obtained**

*Aboyne v Dixon Homes (1980)*

### **Courts will look at some considerations:**

- Whether D gave satisfactory explanation of failure to appear
- Any delay by D in application to set aside DJ
- Whether D has prima facie defence on merits

*Evans v Bartlam (approved in Cooke v DA Manufacturing)*

No limit on court discretion to set aside DJ, but unlikely to get DJ set aside unless satisfy obvious factors:

- Whether useful purpose served by setting aside judgment (whether D actually has reasonable defence to action)
- Explanation of how applicant (D) became bound by judgment to which they could have set up defence

If **no reasonable explanation** and a **hopeless case** – may not get DJ set aside.

**\*\*D should produce whole defence as affidavit to show court that has reasonable defence case**

*Yankee Doodles v Blemvale (1999)*

D must have **very compelling reason** for failing to appear or file a defence.

### **Delay by D in bringing application to set aside DJ**

*National Mutual Life v Oasis (1981)*

**Not often that D with good ground of defence would be refused chance to defend.**

*National Australia Bank v Singh (1995)*

**Absent prejudice to P, unusual that D would be prevented from defending simply because of temporal or administrative error.**

**Old case:** *Grimshaw v Dunbar (approved in Rosing v Ben Shemesh (1960))*

Application should be brought promptly, delay must be explained.

P must not suffer prejudice by reason of delay to bring application to set aside DJ. Whether any prejudice could be cured by costs.

### **Where Default Judgment Set Aside**

**Usually order setting aside DJ comes with direction to file and serve notice of intention to defend and defence within certain time**

### **Costs after a Setting Aside**

Ordinarily have to pay P's costs of entering DJ and application to set aside DJ (subject to court discretion)

- But where irregularly obtained DJ (fault on part of P)
- P may have to pay D's costs of setting aside DJ
- Eg. if D was not given proper service by P

## **2. SUMMARY JUDGMENT**

**Requires that one party has no real prospects of success on their claim or defence**

Obtained by P in respect of D's defence, or by D in respect of P's statement of claim

- Must be shown that trial not needed to determine claim
- Can be for all or part of a claim

### **Rule 292 – summary judgment for plaintiff**

May apply after D files notice of intention to defend

\*Note if D actually has reasonable defence, court likely to give leave to amend

### **Rule 293 – summary judgment for defendant**

May apply after filing notice of intention to defend

### **'No real prospect of success'**

*DTC v Salcedo (2005)* - Nothing in UCPR (eg. Rule 5 aiming for efficiency) supplants need for justice. Only give SJ in the clearest of cases. Otherwise, disputes to be determined to the fullest extent.

*Agar v Hyde (2000)* HC Case – high degree of certainty about ultimate outcome of proceeding.

UK cases – r292 and 293 based on UK law:

*Swain v Hillman (2001)*

**'Real' – distinguished from fanciful prospects of success. Direction to give DJ does not arise merely because court concludes success is 'improbable'.**

It is in interests of claimant to know ASAP if have case that is bound to fail.

*Foodco Management v Go My Travel (2002)*

Test is not 'improbability of success'. Clearest of cases, where no way that D is going to succeed resisting P's claim, or P's claim so untenable that not going to succeed.

*Gray v Morris (2004)* - Court must keep in mind why interests of justice usually require issues be investigated at trial.

### **Examples:**

- Where claimant not a party to contract – cannot sue for breach of contract. D could have SJ.
- Where A sues B for car crash, but B claims they were passenger, not driver – question of evidence, should be determined at trial

**Not sufficient to show P may not ultimately prosecute claim** or be able to prosecute claim

Eg. Financial difficulties and improbable will fund litigation.

Not proper test for SJ – D still has to answer a proper cause of action

### **Can appeal against Summary Judgment**

No regime for setting aside as under Default Judgment