

## Seminar 2: Pleadings, Joinder and Collective Redress

### **Pleadings:**

- pleadings are formal written statement 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. Material facts are the things that go to the facts of the case
- pleadings are important as it outlines immediately what the issues are between the parties

### **Example:**

- Contract: Plead there was a contract, plead the terms of the contract that are in issue, plead there was a breach, plead what it is that you seek.
- pleadings limit the scope of particulars, discovery of documents and interrogatories
- they show what the **facts are in dispute** and what issues the court will have to determine.

### **Rule 14.3 Defence**

- 1) the defendant has 28 days after service to file a defence
- 2) if before the defendant files a defence, a notice of motion for summary judgment under rule 13.1 is served on the defendant, and the court does not on that motion dispose of all the claims for relief against the defendant, then court may fix a time for the D to file a defence.

### **Rule 14.4 Reply**

- 1) In proceedings in the Supreme Court or the District Court, a plaintiff may file a reply to a defence.
- 2) In proceedings in the Local Court, a plaintiff may file a reply to a defence only by leave of the Court.
- 3) The time limited for the plaintiff to file a reply is 14 days after service of the defence on the plaintiff.

### **Rule 14.5 Further Pleadings**

- 1) Except by leave of the court, a party to proceedings may not file any pleading subsequent to a reply.
- 2) The time limited for a party to seek leave to file a pleading subsequent to a reply ( "**the further pleading**" ) is 14 days after service on the party of the pleading to which further pleading responds.

### **Rule 14.7 Pleadings to contain facts, not evidence**

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.

### **Rule 14.8 Pleadings to be brief**

A pleading must be as brief as the nature of the case allows.

### **Rule 14.9 References in pleadings to documents and spoken words.**

If any documents or spoken words are referred to in a pleading:

- a) the effect of the document or spoken words must, so far as material, be stated, and
- b) the precise terms of the document or spoken words must not be stated, except so far as those terms are themselves material.

### **Rule 14.10 Certain facts need not be pleaded.**

A party need not plead a fact if:

- a) the fact is presumed by law to be true, or
- b) the burden of disproving the fact lies on the opposite party,

except so far as may be necessary to meet a specific denial of that fact by OP's pleading.

## Cases:

*Al-Medenni v Mars UK Limited [2005] EWCA Civ 173 [21] (Dyson LJ):*

- “It is fundamental to our adversarial system of justice that the parties should **clearly identify the issues** that arise in the litigation, so that each has the **opportunity of responding** to the points made by the other. “
- “The function of the judge is adjudicate on those issues alone.”

*Banque Commerciale SA En Liq. V Akhil Holdings Ltd (1990) 169 CLR 279*

- akhil sued Banque and two other defendants for breach of trust for selling shares without Akhils authority
- all defendants pleaded that the action was statute-barred
- in reply to **two** of the defendants, the plaintiff pleaded that bar did not apply as the proceeding was in respect of a fraudulent breach of trust
- no reply was made to Banque and it was not involved in the trial akhil was unsuccessful at trial but successful on appeal where the Court found the bank to be a party to fraud.

Mason CJ and Gaudron J

- the function of pleadings is to state with sufficient clarity the case that must be met
- in this way, pleadings serve to ensure the basic requirement of **procedural fairness** that a party should have the opportunity of meeting the case against him or her and, incidentally, **to define the issue for decision**
- Akhil was only entitled to relief available on the pleadings

The Function of pleadings: *Pilato v Metro Water Sewerage 7 Brainage Board (1959)*

- pleadings **define** the issues in general terms
- Particulars control the generality of the pleadings and restrict the evidence to be led by the parties at the trial and give the other party such information as may enable him to know what case he will be met with at the trial and prevent surprise.
- Evidence enables the tribunal, within the ambit of the general definition of the issues...to decide where the truth lies.

*Phillips v Phillips (1878) 4 QBD 127*

- The defendants were in possession of Picton Castle and were receiving funds from the possession. The plaintiff claimed entitlement on the basis of ancestry.
- The pleading included the following:
  - “Under and by virtue of certain deeds, assurances and documents in the possession of and control of the defendants, the plaintiff is entitled to possession of the said premises.”
- Court of Appeal held that pleading did not contain *allegata probanda*.
- The pleading was drafted as “fishing statement” and was not precise.

## Rule 14.12 Pleading of facts in short form in certain money claims.

- 1) Subject to this rule, if the plaintiff claims money payable by the defendant to the plaintiff for any of the following:
  - a) goods sold and delivered by the plaintiff to the defendant,
  - b) goods bargained and sold by the plaintiff to the defendant,
  - c) work done or materials provided by the plaintiff for the defendant at the defendant’s request,
  - d) money lent by the plaintiff to the defendant,
  - e) money paid by the plaintiff for the defendant at the defendant’s request,
  - f) money had and received by the defendant for the plaintiff’s use,
  - g) interest on money due from the defendant to the plaintiff, and forborne at interest by the plaintiff at the defendant’s request,

h) money found to be due from the defendant to the plaintiff on accounts stated between them,

it is sufficient to plead the facts concerned in short form (that is, by using the form of words set out in the relevant paragraph above).

### **Pleadings: Short Form**

- use when we know it's a simple debt
- party cannot claim an unliquidated damage claim as a liquidated damage.  
**Unliquidated damages:** sums of money not agreed upon by the parties pre-contract, or something that cannot be fixed by calculation.  
**Liquidated Damages:** where clause in contract stipulates a particular sum of money payable upon breach.
- pleadings cannot claim an amount for unliquidated damages: **Rule 14.13**
  - except if it is in the LC and is recovery of: **Rules 14.13(2)(a)**
    - ~ motor vehicle repair
    - ~ the value, less any salvage value, of a MV
    - ~ the towing of a MV
    - ~ the cost of hiring a replacement car
  - or is a claim for recovery of: **Rule 14.13(2)(b)**
    - ~ the cost of repair to property other than MV
    - ~ the value of property, other than MV
- the pleader should plead anything that would otherwise 'take the opponent by surprise'. **Rule 14.14**
- A defendant who relies on contributory negligence must plead specifically the contributory negligence. **Rule 14.16**

### **Rule 14.15 Pleadings concerning possession of land**

- 2) The plaintiff must plead specifically the following matters:
- a. the nature of any instrument (such as a certificate of title, conveyance, will, trust instrument, mortgage or lease) from which the plaintiff's claim is alleged to be derived,
  - b. if any such instrument is alleged to impose an obligation on the defendant whose breach has given rise to the plaintiff's claim, the existence of that obligation and the occurrence of any such breach,
  - c. if any such instrument is alleged to confer a right on the plaintiff that vests at a specified time or is contingent on the occurrence of a specified event, the existence of that right and the occurrence of any such time or event,
  - d. if the plaintiff's right to possession arises from the defendant's failure to pay money to the plaintiff, particulars of the date on which the failure began, the amount of owed and the method by which that amount has been calculated,
  - e. if the plaintiff's right to possession arises from any other act or omission by the defendant, particulars of the date on which the act or omission occurred and the nature of the act or omission,
  - f. if the plaintiff's right to possession is not exercisable until notice is given to the defendant of the plaintiff's intention to exercise that right, the date on which, and the terms in which, such notice was given.

### **Rule 14.17: New matter may be raised in pleadings**

- a party may plead any matter even if it has arisen after the commencement of proceedings.

### **Rule 14.18: Pleadings to be consistent with allegations of fact**

- a party must not make an allegation of fact or raise any ground or claim inconsistent with any of their previous pleadings.

### **Rule 14.19: Pleadings may raise points of law.**

### **Rule 14.23: Verification of certain pleadings.**

- 1) this rule applies to SC and DC
- 2) a party's pleading must be verified by affidavit
- 3) affidavit must state:
  - a) as to any allegations of fact in the pleading, that the D believes that the allegations are true
  - b) as to any allegations of fact that the pleading denies, that the D believes are untrue
  - c) as to any allegations that the pleading does not admit, that after reasonable inquiry the D does not know whether or not are true.

### **Rule 14.24: Court may order pleadings to be further verified**

- 1) within 14 days after service of affidavit, party may apply for a direction that the pleader verify or further verify the pleading

### **Rule 14.27: Joinder of issue**

- 1) a pleading may expressly join issue on a previous pleading
- 2) if there is no reply by a plaintiff to a defence, then there is an implied joinder of issue
- 3) if there is no answer to a reply or subsequent pleading then there is an implied joinder of issue on the reply.
- 4) There can be no joinder of issue express or implied on a statement of claim.

### **Rule 14.28 Circumstances in which court may strike out pleadings.**

- 1) The court may at any stage of the proceedings order that the whole or any part of a pleading be struck out if the pleading:
  - a. discloses no reasonable cause of action or defence or other case appropriate to the nature of the pleading, or
  - b. has a tendency to cause prejudice, embarrassment or delay in proceedings, or
  - c. is otherwise an abuse of the process of the court.

## **Particulars**

- Particulars narrow the generality of the pleadings and provide particularity to assist the opponent to respond either by pleading or by evidence.
- 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 the D to meet. **Rule 15.1**
- Court may order Scotts schedule be used in proceedings involving a building, technical or other matter in which several items of a claim are in dispute as to liability or amount. **Rule 15.2**
- Particulars are required for proceedings including:
  - allegations of behaviour in the nature of fraud: **Rule 15.3**
  - allegations as to condition of mind: **Rule 15.4** (i.e any disorder of disability of mind, not knowledge though)
  - allegations of negligence and breach of statutory duty in CL claims in tort: **Rule 15.5**
  - claims for out of pocket expenses: **Rule 15.6**

- Claims for exemplary damages: **Rule 15.7** and aggravated damages: **Rule 15.8**

### ***Katsalis v Broken Hill Pty Limited (1977) 18 ALR 181***

- Katsalis sued Broken Hill after he was injured at work.
- Broken Hill argued contributory negligence as Katsalis was instructed against the work method he adopted.
- Katsalis attempted to argue, in the alternative, that Broken Hill was vicariously liable. Both the trial judge and Court of Appeal found against Katsalis.
- On appeal to the High Court
  - Broken Hill would have been liable if Katsalis had expressly pleaded vicarious liability.
  - The “Personal” duty owed by an employer is no different from vicarious liability and so Katsalis was able to raise this submission despite not expressly pleading this.

## **Certification and Verification**

- Pleadings must contain:
  1. certification by a lawyer
  2. verification by party
- Lawyer must certify:
  - that under section cl 4 of Schedule 2 of the Legal Profession Uniform Law Application Act 2014 (NSW) that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success; and
  - that the lawyer has advised the plaintiff that court fees may be payable during the proceedings.
- incorrectly certifying may result in **costs award** against the lawyer and a finding of **professional misconduct/unsatisfactory professional conduct**.
- Party must sign affidavit verifying the following – **UCPR 14.21**:
  - He or she is the plaintiff or is authorized to give the affidavit on behalf of the plaintiff
  - For a statement of claim, he or she believes that the allegations of fact are true
  - For denials in defence, that he/she believes those allegations to be untrue.
  - For allegations not admitted in defence, that after reasonable inquiry, the deponent does not know whether or not the allegations are true.