

Week 4

CH. 2: CASE MANAGEMENT AND OTHER PRE-COMMENCEMENT CONSIDERATIONS

Preliminary court processes

Preliminary discovery

- granted prior to any claim being filed in court.
- most common reason - identity or location of the potential defendant is unknown
- covered by UCPR rule 5.2 + *Federal Court Rules 2011 (Cth)* rule 7.22

Federal Court Rules 2011 (Cth) r 7.22

7.22 Order for discovery to ascertain description of respondent

- (1) A prospective applicant may apply to the Court for an order under subrule (2) if the prospective applicant satisfies the Court that:
 - (a) there may be a right for the prospective applicant to obtain relief against a prospective respondent; and
 - (b) the prospective applicant is unable to ascertain the description of the prospective respondent; and
 - (c) another person (the **other person**):
 - (i) knows or is likely to know the prospective respondent's description; or
 - (ii) has, or is likely to have, or has had, or is likely to have had, control of a document that would help ascertain the prospective respondent's description.
- (2) If the Court is satisfied of the matters mentioned in subrule (1), the Court may order the other person:
 - (a) to attend before the Court to be examined orally only about the prospective respondent's description; and
 - (b) to produce to the Court at that examination any document or thing in the person's control relating to the prospective respondent's description; and
 - (c) to give discovery to the prospective applicant of all documents that are or have been in the person's control relating to the prospective respondent's description.
- (3) The prospective applicant must provide the person with sufficient conduct money to permit the person to travel to the Court.

- Prelim discovery also granted in some jurisdictions to enable a potential plaintiff to determine whether it has a cause of action; UCPR rule 5.3; *Federal Court Rule 7.23*

Federal Court Rules 2011 (Cth) r 7.23

7.23 Discovery from prospective respondent

- (1) A prospective applicant may apply to the Court for an order under subrule (2) if the prospective applicant:
 - (a) reasonably believes that he or she may have the right to obtain relief in the Court from a prospective respondent whose description has been ascertained; and
 - (b) after making reasonable inquiries, does not have sufficient information to decide whether to start a proceeding to obtain that relief; and
 - (c) reasonably believes that:
 - (i) the prospective respondent has or is likely to have or has had or is likely to have had in the prospective respondent's control documents directly relevant to the question whether the prospective applicant has a right to obtain the relief; and
 - (ii) inspection of the documents by the prospective applicant would assist in making the decision.
- (2) If the Court is satisfied about matters mentioned in subrule (1), the Court may order the prospective respondent to give discovery to the prospective applicant of the documents of the kind mentioned in subparagraph (1) (c) (i).

Urgent Preliminary Injunctions

Anton Piller orders

- 'search orders' - granted by courts to allow a party to seize documents without notice from another party where it is likely they would otherwise be destroyed.
- UCPR uses term 'search orders' in rule 25.18-25.24.

C.T Sheet Metal Works Pty Ltd v Hutchinson (2012) FCA 17

Justice Kenny

- search order of this kind is directed to searching for, and preserving evidence, that is relevant to proceedings **not** to obtaining evidence to assist a party to conduct its proceedings.
- power of O 25B - 'for purpose of securing or preserving evidence'.

Mareva orders

- 'freezing orders' - order of the court freezing assets of a party so as to prevent those assets being dissipated or hidden offshore.
- can include: orders instructing third parties, such as banks, to freeze assets of their clients - occurred in *Cradle v LED Builders Pty Ltd* (1999) HCA 18.

Deputy Commissioner of Taxation v Hua Wang Bank Berhad (2010) FCA 1014

Kenny J

- granted a freezing order pursuant to order 25A *Federal Court Rules*.
- Must:
 - first establish a prima facie cause of action against the respondent, and
 - secondly, a 'danger' or 'real risk' that a judgement debt will go unsatisfied because assets are removed from the jurisdiction or disposed of in some way.

CH. 4: PLEADINGS & PARTICULARS

Amending Pleadings

- leave to amend pleadings is most likely to be refused where there is delay in seeking the amendment, particularly where such delay was a deliberate tactic.
- discussed in *Aon Risk Services Australia Ltd v ANU* (2009) HCA 27.

Ensuring pleadings are complete

- doctrines that protect the finality of court proceedings
 - **res judicata**
 - > principle that parties may not re-litigate matters already determined by the court.
 - **issue estoppel**
 - > prevents a new claim that would require the new court to reconsider an issue already determined by virtue of prior proceedings.
 - **Anshun estoppel**
 - > prevents parties bringing new claims for matters that should have been raised in earlier proceedings had the parties acted reasonably and diligently in the prior proceedings.

Habib v Radio 2UE Sydney Pty Ltd (2009) NSWCA 231

- Habib had previously, unsuccessfully, run Supreme Court jury proceedings against Nationwide News Pty Ltd for publication of the original Telegraph article.

Analysis

- a plaintiff with cumulative remedies is not required to choose between them and may have both; *Tang Man Sit v Capacious Investments Ltd* (1996) AC 514
- *Res judicata* - broad rule of public policy based on two maxims:
 - first maxim expresses 'the need, based on public policy, for judicial determinations to be final, binding and conclusive'
 - second maxim looks to position of individual and reflects injustice that would occur if he or she were required to litigate afresh matters which have already been determined by the courts.
- *Ashun estoppel* -> involves an extended doctrine of *res judicata*.

Held

- CA held Habib entitled to run his District Court proceedings.
- Primary judge erred in finding no abuse of process because:
 - District Court proceedings would not lead to judgements inconsistent with prior Supreme Court proceedings (no breach of *res judicata*)
 - publications were different
 - not unreasonable for Habib not to have joined 2UE in previous Supreme Court proceedings against Nationwide (no Anshun estoppels).

CH. 12: SUMMARY DISPOSITION - Cases Courts reject

Access to Justice: The theory behind civil procedure

Limiting unmeritorious proceedings and procedures

- Unmeritorious and poorly run cases clog the courts, increase the public cost and impose unnecessary costs of litigation on other parties.

Statutory authority for the Court's balancing act

- *Civil Procedure Act* s 63 gives discretion to the judge to treat failures to comply with procedure as fatal to the defaulting party's case
 - > Preserves right of all proceedings to continue, despite procedural failures where the judge considers this appropriate.

The role of summary disposition in civil procedure theory

- Most obvious forms:
 - **Summary judgement for plaintiff:** (including default judgement) is where a court gives judgement in favour of the plaintiff without hearing the matter.

• **Summary judgement for defendant** (summary dismissal): where a court dismisses the plaintiff's claim without hearing the matter.

- Summary dismissal can result in a denial of access to justice if a party's claim or defence is dismissed unfairly without a proper hearing.

The role of costs orders in civil procedure

- Legal costs are one of the main reasons why justice can be inaccessible and are a chief deterrent to litigants.
- Legal costs orders are a tool that judges can use to encourage settlement.
- Where a court does not consider that a breach of civil procedure warrants summary disposition - likely court will make an adverse costs order as a lesser penalty for breach.

Abuse of process

- One common factor in summary disposition cases is the concept of abuse of process.
- Actions taken in breach of civil procedure rules will often be labelled an 'abuse of process of the court'.
 - > common basis for courts striking out claims, defences, parts of pleadings or permanently staying proceedings.

Michael Wilson & Partners Ltd v Nicholls (2011) HCA 48

- concerned alleged breaches of employment terms by ex-employees and conflicts of jurisdiction where arbitration and litigation proceedings were running simultaneously and in multiple jurisdictions.

Gummow, Hayne, Crennan and Bell JJ

- *Rogers v The Queen* - McHugh J - many cases of abuse can be identified as falling into one of 3 categories:
 - 1) the court's procedures are invoked for an illegitimate purpose
 - 2) use of the court's procedures is unjustifiably oppressive to one of the parties
 - 3) use of the court's procedures would bring the administration of justice into disrepute

Held

- no abuse of process, because NSW Supreme Court proceedings were not limited by the nature and extent of relief sought in the London arbitration.
- Multiplicity of proceedings was not in this instance an abuse of process, but would be subject to the equity that the respondents would have to prevent double recovery.

Disposing of problem plaintiffs

- Plaintiffs most commonly pose difficulties for courts and defendants in the following ways:
 - commencing proceedings that are an abuse of process
 - excessively and vexatiously commencing proceedings
 - failing to comply with requirements for originating process or service
 - delaying or failing to comply with court directions in preparation of their case
 - failing to appear at directions hearings, interlocutory hearings or final hearing
 - initiating excessive, unnecessary interlocutory disputes
 - failing to engage in dispute resolution mechanism
 - failing to pay an adverse costs order made by the court.

Courts may deal with problem plaintiffs by:

- Summary dismissal
- Declaration that the plaintiffs or their proceedings are vexatious and thereby banned from the courts
- Adverse costs orders

Summary dismissal

- Summary dismissal is where a court dismisses the claim made by the plaintiff without hearing the case.
- A court may summarily dismiss litigation on application from a defendant or by its own motion.
- s 31A *Federal Court of Australia Act 1976* (Cth)
 - > enables a judge to grant summary judgment in favour of either party where the other party's case has no reasonable prospects of success.
- Power of s 31A far from settled (see *Spencer v Cth*)

***Spencer v Commonwealth* (2010) HCA 28**

- Full HC in 3 separate judgements determined s 31A should not have been applied to summarily dismiss Mr Spencer's case.

French CJ and Gummow J

- s 31A(2) requires a practical judgement by the Federal Court as to whether the applicant has more than a 'fanciful' prospect of success.
- How should 'no reasonable prospect' be understood?
- Full weight must be given to expression as a whole.
- FC may exercise power under s 31A if, and only if, satisfied that there is 'no reasonable prospect' of success.