

## Commencement

### *Supreme Court (General Civil Procedure) Rules 2015*

- **Letter of demand**
  - Whilst not always legally necessary to send a letter of demand to a defendant prior to the formal filing of the originating process, practitioners often do this in the hopes of a speedy resolution to a case, for preliminary information to be obtained and other such things.
  
- **Originating process**
  - **Proper identification of parties**
    - The originating process will identify the parties to the dispute and will contain a description of the parties, their contact details, their address and other relevant particulars - r 5.02.
    - An adequate description of the parties on the originating process is essential - *Cameron v National Mutual Life Association of Australasia Ltd.*
  
  - **Addresses of parties and solicitors**
    - Court held in *Sheen v Burke* that the address on the originating process must be the plaintiff's residential address and not the plaintiff's solicitor's address.
    - Failing to provide an address is not fatal and is merely an irregularity.
  
- **Vexatious litigants**
  - *Vexatious Proceedings Act 2014* (Vic) allows for the court to declare litigants with a history of baseless proceedings to be declared vexatious and therefore limit their ability to commence proceedings.
  
- **Time of commencement of proceedings**
  - Proceedings commence once the court registry seals and issues the originating process - r 5.11.
  
  - In Victoria, plaintiffs are required to certify, along with their originating process, that, prior to the commencement of the action, they made genuine efforts to negotiate the matter and reach a settlement. Not doing this will not be a reason for invalidating the proceedings but may be the basis of an adverse costs order.
  
- **Commencement of proceedings**
  - Proceedings are commenced by writ or originating motion unless the rules provide otherwise or it is required under an Act - r 4.01.

If proceedings do not raise a substantial factual dispute so that pleadings and discovery are not required, it is appropriate for the plaintiff to commence by way of an originating motion - r 4.06.

## Discovery

- Discovery is the compulsory disclosure to a party before trial of information relating to questions to be determined in the proceeding which may assist the party to establish their claim of defence.
- **‘Make discovery of documents’**
  - Where the rules refer to a party having to ‘make discovery of documents’, they mean that the party is to make an affidavit of documents in compliance with the rules, file it into court and serve a copy on the party who is entitled to make discovery.
  - The affidavit of documents identifies documents which relate to the question at issue in the proceedings, as identified in the pleadings where they are currently or have formerly been in the party’s possession, custody or power.
  - The documents must be made available for the other party to inspect and those documents identified by the other party must be produced at trial, unless an objection to their inspection and production is raised on the basis of privilege.
- **Relevance and matters in question**
  - Rule 29.01.1 provides that discovery applies to documents a party relies on or that advance or damage either parties’ case.
  - A document which the party seeking discovery already has in their possession is not subject to disclosure by the discovering party.
  - Discovery can also be used before a proceeding being commenced where:
    - An applicant who has a cause of action uses discovery to identify a defendant against whom process should be commenced - r 32.03;
    - An application who has identified a defendant uses discovery to determine a cause of action in order to obtain a remedy against that person - r 32.05.
- **Possession, custody or power**
  - Rule 29.01 provides that a document in a party’s possession, custody or power must be included in the party’s affidavit of discovered document, and produced for inspection, subject to claims of privilege.
  - The rules provide that a party is in possession of a document if they are the owners of the document; a party has custody if they physically hold the document; and a party has power over documents if they can assert an immediate right of possession against another person having custody.
- **Searching for documents**
  - A party giving discovery must carry out a reasonable search to determine the existence of discoverable documents.
  - What is reasonable depends on the circumstances of the case but can include:
    - Complexity of the proceedings;
    - Number of documents to be discovered;
    - Relevance of the document;
    - The convenience and cost of locating a document.

## Joinder of parties and claims

- **Important terms**
  - **Res judicata/cause of action estoppel** – this plea of estoppel precludes the re-litigation of claims made in earlier proceeding between the same parties. There is a public interest in the finality of litigation. Party estopped from re-litigation.
  - **Issue estoppel** – this plea precludes the redetermination of an issue in an earlier proceeding.
  - **Anshun estoppel** – claims which could reasonably have been made in earlier proceedings but were not cannot subsequently be made in later proceedings.
  
- As proceedings develop, it may be necessary to join other parties as plaintiffs or defendants or to substitute some parties for others.
- Joinder of parties occurs before proceedings are commenced.
  
- **Permissive joinder - r 9.02(a)**
  - Rule 9.02(a) provides:  
Two or more persons may be joined as plaintiffs or defendants in any proceeding -
    - (a) Where -
      - (i) If separate proceedings were brought by or against each of them, some common question of law or fact would arise in all the proceedings; and
      - (ii) All rights to relief claimed in the proceeding (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions; or
  - Rule 9.02 applies to the joinder of claims and parties by the plaintiff - *Walker v Commonwealth Trading Bank of Australia*.
  - Co-plaintiffs may join in the same proceeding where separate proceedings would involve common questions of law or fact and all of the rights to relief claimed by the parties are in respect of or arise out of the same transaction or series of transactions. The court can also grant leave for joinder.
  
  - Where parties have similar claims eg. against a company for the same fraudulent behaviour, but their claims themselves arise out of separate transactions, joinder will not be permitted - *Payne v Young, Bishop v Bridgelands Securities*.
  
  - Different causes of action may be joined provided they arise out of the same transaction or series of transactions. Different plaintiffs do not therefore require the whole of their transactions to be involved in the proceeding - *Cameron v National Mutual Life Association of Australasia*.
  - Plaintiffs may have different causes of actions joined as long as they arise out of the same transaction or series of transactions.

## Trial

- **Mode of trial**
  - Together rr 47.02 and 47.04 constitute a code determining the mode of trial for a proceeding.
  - In the normal course of proceedings, the trial is conducted before a judge alone without a jury.
  - A trial before a jury must be specifically applied for - *Jenkins v Bushby*.
  - Where a party does not select a mode for trial in the originating process or the leadings and does not apply to the court for a jury trial, trial is conducted before a single judge - r 47.02.
  
- Rule 47.02 provides:
  - (1) A proceeding commenced by writ and founded on contract or on tort shall be tried with a jury if-
    - (a) The plaintiff in the writ or the defendant by notice in writing to the plaintiff and to the Prothonotary within 10 days after the last appearance signifies that the plaintiff or the defendant (as the case requires) desires to have the proceeding so tried; and
    - (b) The prescribed fees for the purposes of section 24 of the *Juries Act 2000* are paid.
  - (2) Any other proceeding shall be tried without a jury, unless the Court otherwise orders.
  - (3) Notwithstanding any signification under paragraph (1), the Court may direct trial without a jury if in its opinion the proceeding should not in all the circumstances be tried before a jury.
  - (4) Trial shall be with a jury of six.
  
- Proceedings falling outside r 47.02(1) such as proceedings commenced by originating motion are conducted before a judge alone subject to the court ordering otherwise - r 47.02(2).
  
- **Court may order trial without jury despite party's signification of trial with jury**
  - Despite the plaintiff or defendant signifying their desire for a trial before a jury, the court nevertheless retains the power to order a trial without a jury - r 47.02.
  - A trial that has been commenced with a jury may be continued before a judge alone with all the evidence adduced to that point before the judge if in the court's opinion it is necessary to discharge the jury.
  
  - A jury trial is denied if it is desired only to satisfy the party's personal interest or preference - *Maroubra Rugby League Football Club Inc v Malo*.
  - Instances of jury trials being refused includes where the court determined that such a mode of trial was not suited to the subject matter or on the basis that the matter would be too complex for a jury (*Acir v Frosster*)

## Amendment

- Order 2 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) governs the consequences of a party's failure to take a step or their failure to do so in a manner determined by the rules.
- Rule 2.01 provides:
  - (1) A failure to comply with these Rules is an irregularity and does not render a proceeding or any step taken, or any document, judgement or order in the proceeding a nullity.
  - (2) Subject to Rules 2.02 and 2.03, where there has been a failure to comply with these Rules, the court may -
    - (a) Set aside the proceeding, either wholly or in part;
    - (b) Set aside any step taken in the proceeding, or any document, judgement or order in the proceeding;
    - (c) Exercise its powers under these Rules to allow amendments and to make orders dealing with the proceeding generally.
- Rule 2.02 provides:

The Court shall not wholly set aside any proceeding or the ordinary process by which the proceeding was commenced on the ground that the proceeding was commenced by the process.
- Rule 2.03 provides:

The Court shall not set aside any proceeding or any step taken in any proceeding or any document or order in any proceeding on the ground of a failure to which Rule 2.01 applies on the application of any party unless the application is made within a reasonable time and before the applicant has taken any fresh step after becoming aware of the irregularity.
- Rule 2.04 provides:
  - (1) The Court may dispense with compliance with any of the requirements of these Rules, either before or after the occasion for compliance arises.
- **Non-compliance an irregularity only**
  - Non-compliance, in accordance with r 2.01 is to be treated as an irregularity, and will not automatically render a proceeding void. This is up to the discretion of the Court.

## Costs

- **Jurisdiction to award costs**
  - Courts and tribunals have no power to make orders for costs outside the power that has been conferred upon them by statute for that purpose – *Re Birkman*.
  - In Victoria, the *Supreme Court Act 1986* (Vic) confers upon the court a discretion as to the award of costs from which the court's jurisdiction to award costs arises by necessary implication.
  - A court lacking the jurisdiction in any particular matter brought before it for litigation nevertheless has jurisdiction at general law to determine its jurisdiction in the matter. A court can therefore determine for itself whether it has jurisdiction to hear parties on the questions of costs of the proceeding – *Carr v Stringer*.
  - However, a court cannot exercise jurisdiction they lack nor can they be conferred a power to award costs in a matter by consent of the parties, general law or statute when they lack jurisdiction over the matter or have purported to exercise a non-existent jurisdiction – *Khatri v Price*.
- **Discretion to award costs**
  - The statute and rules of the Supreme Court of Victoria confers upon it a discretion to award costs. They also confer upon the court a jurisdiction to determine who will pay costs and what amount of costs is to be paid.
  - Section 24 of the *Supreme Court Act 1986* (Vic) provides:
    - (1) Unless otherwise expressly provided by this or any other Act or by the Rules, the costs of and incidental to all matters in the Court, including the administration of estates and trusts, is in the discretion of the Court and the Court has full power to determine by whom and to what extent the costs are to be paid.
    - (2) Nothing in this section alters the practice in any criminal proceeding.
  - Rule 63.02 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) provides:
    - The power and discretion of the court as to costs under s 24 of the Act shall be exercised subject to and in accordance with this Order.
  - Rule 63.04 provides:
    - (1) The court may make an order for costs in relation to a particular question in or a particular part of a proceeding.
    - (2) Where the court makes an order under paragraph (1), the court shall by order fix the proportion of the total costs of the proceeding which is attributable to the particular question in or the particular part of the proceeding.