

LLB450 Civil Procedure Exam Notes

Overview

- 'The term 'procedure' is used to describe the formal steps taken in judicial proceedings and a distinction is usually drawn between substantive law on one hand and procedural law on the other' (Fiocco, *Civil Procedure in WA*, UWA: Perth 1987).
- It is the rules under which we litigate.

Sources of Civil Procedural Law

Common Law

In the form of a superior court's inherent jurisdiction to ensure the proper administration of justice. It is usually reduced to writing in the court's Practice Directions (but it doesn't have to be so it is possible for procedural rules to be unwritten e.g. Norwich Orders, Mareva Injunctions, Anton Pillar Orders)

Statute Law

Legislation –

Enabling Act – usually does at least 4 things:

- Establishes the court and its officers (e.g. magistrates, judges, registrars and their duties/powers)
- Sets out the court's jurisdiction (i.e. what type of matters the court can hear/monetary limit)
- Gives power to the Court, including powers to punish parties for contempt
- Gives the Court a role in its own administration, such as the making of rules
- e.g. *Supreme Court Act 1935* (WA) (s 167(1)(a)) and *District Court Act 1969* (WA)

Supplementary Act – any Act necessary to further define a court's role or jurisdiction

Subsidiary Legislation –

Statutory Rules - made under the Enabling Act by a committee of the Court that set out:

- The procedure for bringing and defending claims; and
- The forms to be used (unless on the court's/tribunal's website)
- e.g. *Supreme Court Rules 1971*
- Rules have force of law as rules of practice and procedure but cannot confer or take away the court's existing jurisdiction – *TK, PB ad LS v Australian Red Cross Society* (1989) 1 WAR 335

Statutory Regulations – also made under the Act by the Governor which set out:

- Court/tribunal fees
- Other administrative matters that may affect other departments
- Criminal procedure

Criticisms of Civil Procedure

1. Cost of litigation – the more the Court takes control of a situation/the more steps they put in, the greater the cost
2. Delay in getting to trial
3. Balancing interests of justice – flexibility/proportionality

Responses –

- Adoption of pro-active case management
- Greater use of technology

- Expansion and acceptance of alternative dispute resolution in its many and varied forms e.g. mediation, conciliation, early neutral evaluation, case appraisal, mini trial/case presentation, the use of referees, case conferencing, arbitration etc.
- Creation of specialised courts

The different stages of Civil Proceedings

- *Pre-commencement of proceedings* – assessing technical restrictions on litigation (such as limitation periods) and choice of court and jurisdiction; getting full instructions to assess case merits; advising client; assessing all options; costs disclosure and agreement and monies on trust to fund litigation.
- *Commencement and service of proceedings* - choosing correct party to sue (plaintiff) and to be sued (defendant); notice of claim; choosing, compiling and filing correct process to commence proceedings; and effecting proper service.
- *Issues stage (pleadings)* - properly setting out the claim or defence; amending claim/defence; joining parties and causes of action; requesting particulars; enforcing rights in respect of other party's late/faulty pleadings.
- *Evidentiary stage* – Period from the close of pleadings up to entry for trial where, in order to obtain relevant evidence, mutual discovery is required to be given and, if necessary, request for admission of facts, and if leave given, interrogatories issues (interlocutory orders) (often called getting up)
- *Attempt to settle stage* – usually after matter is entered for trial, a pre-trial conference or mediation conference is held to try and resolve the matter formally (but can settle informally at any stage)
- *Setting down for trial* –if matter fails to settle, listing conferences are held to set the matter down for trial with some procedures leading up to that (ie evaluation conference in Supreme Court) or orders made
- *Preparation for trial* – final preparation from the listing conference up to the trial involving procedural matters and personal preparation
- *Trial* – opening addresses, presentation of evidence, closing addresses
- *Post trial* – costs issues, enforcement and execution, possible appeal

Steps

- Identify who is to be sued
- Prepare and file a writ
- Serve the writ on the other side (needs to be personally served)
- Defendant to file an appearance (if they ignore the writ, can file a default judgment against them)
- Status conference in the Supreme Court
- Parties then explain their respective cases (pleadings) –
 - Statement of Claim
 - Defence (and any Counter-Claim)
 - Reply by Plaintiff to Defence (and Defence to Counter-Claim by Plaintiff)
 - Pleadings close
 - One party can dispute the other's pleadings (attack on pleadings) or seek to amend their own
- Consider whether other parties need to be joined/third party proceedings
- Gathering evidence –
 - Discovery and inspection of documents
 - Interrogatories – where parties are obliged to answer questions
 - Notices to admit
 - Inspection of objects
 - Medical examinations
 - Collecting evidence for your client (witness, experts) and challenging that with other parties
 - Consider whether we need a court order for any reason e.g. interlocutory application for further discovery
- Attempting to settle –
 - Notice of compromise (Order 24A)
 - Case evaluation conference (Supreme Court)
 - Court required mediation

- Going to trial –
 - Entry for trial
 - Certificate of readiness (no further interlocutory steps without the leave of the court)
 - Trial and judgment
- Costs orders –
 - Winning party usually gets costs awarded
- Enforcement of judgment
- Consider if there are grounds of appeal

Preliminary Steps to Litigation

Client Care

- Lawyer-client relationship – providing advice
- Getting full instructions – due diligence
- Communication – importance of regular communication, keeping the client informed at each stage
- Professional obligations – ethical obligations, compliance with the Legal Professional Rules/Professional Conduct Rules, costs disclosure requirements, must understand the basic chronology/steps of the litigated action.

Taking Instructions

- Parties (consider other parties involved in the matter - not always clear. May need to do research)
- Objectives of litigation (causes of action, ask the client what they want)
- Relevant events (when did incident occur, limitations period)
- Feasibility of litigation (jurisdiction)
- Timing of next steps/options
- Client's responsibilities (more information, informed consent)
- Confirm in writing (usually with costs agreement and layout of next steps in litigation (costs, trust monies). Nb. Cost agreement doesn't need to be signed – if work continues then that is enough.

Legal Professional Conduct Rules 2010 (WA) Fundamental Duties

- Paramount duty to the court (r 5)
- Other fundamental duties (r 6):
 - Act in the best interest of the client
 - Be honest and courteous in all dealings
 - Deliver legal services competently and diligently
 - Avoid compromise to integrity and professional independence
 - Comply with these Rules and the law
 - Not engage in conduct that demonstrates practitioner not fit and proper person to practice law, may be prejudicial to or diminish public confidence in the administration of justice or bring the profession into disrepute

Limitations and Practicalities

- Statute of Limitations – always look at this
- Necessary parties (capacity, legal capacity, joinder)
- Jurisdiction
- Financial matters
- Prospects of recovery (if judgment granted)
- Documentary and other evidence

Limitation periods

- A limitation period to bring a particular cause of action is set out by statute
- *Limitation Act 2005* (WA) – causes of action accruing after 15/11/2005 (s 4)
- *Limitation Act 1935* (old Act) – causes of action before 15/11/05
- General limitation period – 6 years (s 13), except for where the Act specifies a limitation period for a particular cause of action (Division 3)