

Topic 4: Multiple Parties and Joinder of Claims:

a. Pre Trial Discovery to Identify Def:

Where P has made reasonable enquiries yet is unable to identify the D to bring proceedings against, and it appears that a person has relevant documents or knowledge to assist in the identification, the court may order that person to attend court, or to make discovery (on pain of contempt of court) of information to identify the D (**r32.03 SCR**)

- **NB.** Not necessary for statutory schemes such as TAC, as these are no fault schemes where a D is not required

Application:

OFT P has made the [the following enquiries] which may be regarded as reasonable, with [X] having [information/documents] which point towards [Y] as being the D. On this basis the VSC would likely order [X] to court for pre-trial discovery (see discussion in *Minogue v Dougherty [2017] VSC*)

Abuse of Process:

However, the court will not order pre-trial discovery of a D where P is seeking not for discovery but for some other purpose which amounts to an abuse of process (*Dallas Buyers Club*)

- *Dallas Buyers Club*: order not granted because they did not want discovery of illegal downloaders to sue them as they said but rather they wanted to invoice them, this amounted to abuse of process and would set a precedent in Australia that the courts were not willing to allow.

b. Capacity of Parties

Both the P and the D must have capacity to sue and be sued.

Persons Under a Disability (Including Children): Must have a litigation guardian to sue or be sued, with the litigation guardian engaging a solicitor to act on its behalf to avoid conflicts of interest or breaches of their duty of care to the P/D (**r15.01-03 SCR**)

Partnerships: As Partnership are not a separate legal entity/identify the partnership may only be sued in either the firms name (i.e. the entire partnership) or the partner individually as partnerships have joint and several liability (**r17.01**)

Corporations/Companies: Must act and be sued via a solicitor because although having a separate legal identity they are not a natural person (**r1.17**). Care must be taken to ensure you are suing the right company, not a related entity with a similar name, and that that company satisfies all elements of the action.

Companies Being Wound Up: Must seek leave from the courts to sue where the company is being wound up (**s.500(2) Corporations Act**)

Unincorporated Bodies: As they are not a legal entity, P may only sue the UB members, who were members at the time of the conduct giving rise to the action.

Bankrupts: Are immune from suits regarding debt but they can still be a Def in personal injury actions. Despite being bankrupt, you may want to sue a for their insurance policy or acknowledging that judgements are enforceable for 15 years.

c. Standing of Parties:

The P must have standing to sue; this requires some:

- Private right
 - party to a contract
 - tenant in possession
- Satisfaction of some legislative test
 - right to internment under the *Cemeteries Act*
- Having a special interest
 - public interest matter,
 - 'special interest' need not involve a legal or pecuniary right but must be more than a 'mere intellectual or emotional concern' and must be an interest that is different than that of an ordinary member of the public (*ACF v Cth*)
 - Public Interest Groups must also be representative of a significant public concern and have an established interest in the area.

d. Interveners

An intervener has interests that will be affected by the judgement but is not ordinarily entitled to be a party.

- No direct involvement in the transaction,
- Have a vested interest in the outcome
- Precedent/Outcome may significantly affect them

OFT [X] has interests in the action because [how does the action effect X?] but would be unable to be a party to proceedings as [X] does not have standing and was not directly involved in the transaction. On this basis [X] may seek leave under [common law application OR statute ACCC, HREOC, AG's] from the courts to intervene and become a party to proceedings. If granted [X] may be awarded orders in their favour or be subject to cost orders. Although P has a right to respond to an application to intervene, it is ultimately in the courts discretion as to if they are admitted to proceedings.

Levy v State of Victoria (1997) 189 CLR 579

- Regulations made under the Victorian *Wildlife Act 1975* and the *Conservation, Forests and Lands Act 1987* made it an offence to be within an area set aside for the hunting of game birds at the beginning of the hunting season without a licence.
- Laurence Levy opposed duck shooting and in June 1994, at the commencement of the duck shooting season, he was charged with being in a hunting area during a prohibited time without a licence.
- Levy argued that the regulation under which he was charged was invalid as it infringed the implied freedom of political communication.
- In six separate judgments, all seven members of the High Court rejected Levy's argument and upheld the validity of the regulation.

e. Amicus Curiae

Whether or not [Y] will be permitted to be heard as amicus curiae is entirely at the courts discretion, considering whether or not the usefulness of the assistance being offered is disproportionate to the additional time and cost involved in hearing them.

- Court requested Amicus Curiae in *CBA v Doggett* where the issues were novel and of potential general significance to the banking industry.

If permitted [Y] will offer the court submissions on law or relevant fact to assist the court in a way in which it would not have otherwise been assisted (*CBA v Doggett*). As a 'friend of the court' [Y] is not a party but rather a more akin to a witness knowledgeable on a certain area.

CBA v Doggett – Amicus Curiae

- D claimed the Bank lent them money without making sure they could afford the repayments
- This is in breach of a voluntary Code of Practice the big banks signed up to.
- The unrepresented parties D were unable to provide the Court with any assistance as to the legal issues concerning the incorporation of the Code of Practice into the loan facility.

Held:

- The Court asked the Vic Bar to nominate counsel to assist it, as amicus curiae, on the legal issue of whether the Code was incorporated as a term of the loan facility, and if so, what is the scope of the banks contracted obligations.
- The request was made because the issues were novel and are of potential general significance to the banking industry. The Bank did not oppose the involvement of amicus curiae.
- Amicus curiae considered the legal issues and provided written submissions. The Bank replied to those written submissions and amicus curiae provided further submissions as a result. The D also made submissions, although these were of no utility on these issues.

f. Resolving Disputes and Avoiding Multiplicity of Proceedings

One of the courts aims is to hear all of the disputes between the parties completely and to finality with a multiplicity of actions to be avoided (*SCA s.29(2)*). Similarly, the CPAs overarching objective is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute (*CPA s1(1)(c)*)

- Thus the court will be guided by efficiencies and do not want a multiplicity of actions,
- BUT there is a balancing act and depending on what the disputes are it might be that if the court if hearing to too many disputes in one court case they court starts to lose some of its efficiencies.

g. Joinder of Parties: *Necessary Joinder, Permissive Joinder, Mis-Joinder,*

At the commencement of proceedings, it may be necessary to join other parties, that is, P or D, some of which are necessary whilst others are permissible/optional. This occurs before proceedings commence (**r 9.02 and 9.03**), with parties joining proceedings afterwards considered additions (**r 9.06**).

Necessary Joinder Plaintiff:

P must join proceedings where someone else is jointly entitled to the relief that P is claiming, as all person jointly entitled must be joined (**r 9.03**). This rule is a practical necessity for the avoidance of multiplicity of proceedings.

- **Example:** A and B Lend 10K to C, A wants to sue to recover, A must join B to proceedings to sue C as B is jointly entitled to 10K.
- **Practical Solution:** However, if B does not want to sue C to recover the 10K and refused to join A's proceedings, A may still commence proceedings by serving a writ to B and C. Although there is not action against B, the courts will be satisfied that should B not attend courts he is aware of that action.

Necessary Joinder Defendant:

Where Def's are **jointly liable** under a contract with someone else the P should claim against all person jointly liable, a failure to do so may result in the court ordering a stay of proceedings until those persons are joined (**r 9.03(3)**)

- **Example:** Banks suing both mortgagors who are jointly liable on default

Where D is **jointly and severally liable** with another person, the other person need not be joint (**r 9.03(2)**).

- **Example:** Utility bills.

Permissive Joinder Plaintiff or Defendants:

Two or more persons can be joined as P's or D's in any proceeding where:

- Separate proceedings brought by or against each of them give rise to some common question of law and fact AND arise out of the same transaction or series of transactions. (r 9.02(a)(i) and (ii))

OR

- Where the court gives leave to do so (r 9.02(b)) (NB. Courts have a tendency to give leave where on of the two criteria above have been made out *A & J Partitions*)

r 9.02(a)(i) Common Questions of Law or Fact:

- Consider the broad and narrow construction of questions (*Birtles v Commonwealth of Australia*)

r 9.02(a)(ii) Arising out of the Same Transaction or Series of Transactions:

- As a remedial rule the 'same transaction' is to be construed broadly (*Birtles v Commonwealth of Australia*)
- Where events are peculiar to P and do not have any commonality pr common participation (i.e. separate and independent workplace inspections) they will not amount to a series of transactions (*Payne v Young (1980)*)

r 9.02(b) Interest of Justice:

- Where joinder will not result in any significant prejudice or disadvantage to the parties, and having regard to limiting cost and delay and achieving a just resolution, joinder may be in the interest of justice (*Wilcox J Bishop v Bridgelands Securities*)

The court has a wide discretion to give leave to permit joinder, with its exercised conditioned by the *CPA*.

Accordingly, in determine r 9.02(b) courts should: (*Lee v Korean Society of Victoria*)

- Give effect to the overarching purpose (s8)
- Take the course most conducive to the just, efficient, timely and cost effective resolution of the real issues in dispute (s7)
- Have regard to the efficient conduct of the business of the court (s9(1)(c)),
- The efficient use of judicial and administrative resources (s9(1)(d)); and
- Any prejudice that may be suffered by a party as a consequence of any order proposed to be made or direction proposed to be given by the court (s9(2)(f)).

PTO for SUMMARY and CASES