

MLL335 CIVIL PROCEDURE & ADR
TOPIC 3
COMMENCEMENT OF PROCEEDINGS

LETTERS OF DEMAND

- Not always legally necessary to write letter of demand to defendant
- BUT often a practice carried out by legal practitioners in the hope that:
 - o It will bring about speedy resolution
 - o May prompt “without prejudice” negotiations
 - o Strengths and weaknesses of the respective cases may be revealed
 - o Preliminary information may be obtained
- Care must be taken about the contents however, as it is unethical:
 - o To threaten criminal proceedings in a civil matter;
 - o To demand payment from a person who has no legal liability to make payment;
 - o To make demand for costs which are unreasonable or excessive
 - In these circumstances, letters of demand may constitute misleading rendering that practitioner to penalty

COMMENCING PROCEEDINGS: ORIGINATING PROCESS

Terminology

- *Cause* has two or more parties
- *Matter* has only one party
 - o i.e. Trustee seeking instructions on how to administer trust
- Most common civil cause is an *action*
 - o Cause which is usually commenced by writ of summons
 - *Herbert Berry Associates v Inland Revenue Commissioners*
- Procedures based on *action* contemplate that the dispute concerns **factual issues**
 - o **A writ must be prepared (FORM 5A Supreme Court Rules)**
- Procedures based on *matter* contemplate that the party wants clarification by the court of a legal issue (i.e. meaning of contract, statutory interpretation)
 - o **An originating motion must be prepared**
- An action will formally commence when the writ and statement of claim is taken to the prothonotary office at the Supreme Court and is stamped and signed (**filing of the writ: r 5.11**): r 5.11(1A)(a)
 - o Originating process can now be lodged electronically, and sealed copies for service will bear a computer-generated court stamp: rr 5.11, 28.10, 28.11
- A third form of initiating process is the **motion**: see p 307

WRIT

- In order for action to be commenced through writ, the writ must contain either:
 - o A **general indorsement: r 5.4.2b**
 - o A **special indorsement: r 5.4.2a**
- A writ is a written command of the sovereign which summons the defendant to appear in court

SUPREME COURT (GENERAL CIVIL PROCEDURE) RULES 2005 - REG 4.01

How proceeding commenced

Except where otherwise provided by or under any Act or these Rules a proceeding in the Court shall be commenced by writ or by originating motion.

SUPREME COURT (GENERAL CIVIL PROCEDURE) RULES 2005 - REG 4.04

When writ required

- (1) Except as provided by Rules 1.12, 4.05 and 4.06 and Order 58, every proceeding shall be commenced by writ.
 - (2) For the purposes of these Rules, an originating process filed or to be filed in RedCrest which contains an indorsement of claim in accordance with Rule 5.04(2) is deemed to be a writ.
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General indorsement

- No more than a 1 paragraph summary of what the P alleges.
- Normally used where the limitation period is about to expire, no time for SoC
 - o OR, if the law is about to be changed to disadvantage plaintiff
- MUST satisfy r 5.04(2)(b) **in order to be sufficient**

SUPREME COURT (GENERAL CIVIL PROCEDURE) RULES 2005 - REG 5.04

Indorsement of claim on writ

- (1) A writ shall contain an indorsement of claim.
- (2) The indorsement of claim shall be—
 - (a) a statement of claim; or
 - (b) a statement sufficient to give with reasonable particularity **notice of the nature of the claim** and the **cause thereof** and of the **relief or remedy sought** in the proceeding.
- (3) An indorsement of claim on a writ shall constitute a statement of claim if, but only if, it is headed "Statement of Claim"

Renowden v McMullin

"it suffices if it [general indorsement] conveys that information generally and without particularity save where and to the extent to which particularity is indispensable to notify the required elements of the indorsement... on the other hand, the indorsement marks out the parameter or range of the area within which the plaintiff may express his claim in a formal fashion in his statement of claim"

Ruzeu v Massey Ferguson (183) I VR 733

FACTS: Writ was issued containing indorsement that: 'the Plaintiff's claim is for damages for injuries he received to his back in an accident which occurred on or about 2 December 1975 whilst he was in the course employment with the Defendant. The accident occurred as a result of the negligence of the defendant, its servants or agents and the plaintiff claims damages.'

ISSUE: Appeal from an order made that the writ be set aside. Does the indorsement satisfy the required elements?

YOUNG CJ: 'The question whether the indorsement of the writ complies with [the requirements] falls to be determined upon **examination of the indorsement and evidence is generally not admissible** to assist in this task. In particular, the knowledge of the defendant as to the allegations in the endorsement is totally relevant at that stage.'

'The application to set aside the writ for non-compliance with [the requirements] should have been considered without regard to any evidence. It simply raised a **question whether the indorsement on its proper construction complied with the rule**. It was only if it was decided that it did not, that a question would have arisen whether the writ should be set aside. **It would not be, by reason of a defective indorsement, a nullity**: *Hill v Luton Corp*'.

"It was said that the indorsement was defective in that it did not give sufficient notice of the "cause" of the claim and that to comply with the requirements of the rule it should have said what caused the injury for which the plaintiff complained. For example, it should have said that he was hit by moving machinery or fell off the scaffold, or what ever the case might be. **But in our opinion the word "cause" in the rule is not directed to the physical acts, which cause the accident or injury. It is directed to the cause of action. Thus, what the indorsement must contain is sufficient notice of: (a) the nature of the claim; (b) the cause of action relied upon; and (c) the relief or remedy required.** In an action based on negligence, particulars (a) and (b) will often be run together. In the present case the particulars are: (c) damages for; (a) personal injuries caused by; and, (b) the negligence of the defendant. Thus, the indorsement clearly covered all the requirements of the rule"

"It is [in *Elsum v Jameson*], clear ... that the Full Court regarded because of the claim as meaning the cause of action in the technical sense"

"But we might add, **even if we had been of a contrary opinion**, we would not have thought that it was correct to set the writ aside. Setting aside a writ is a drastic measure, which of course puts an end to the action. If the indorsement had been properly held to be defective, **the appropriate order might well have been to order the plaintiff to give particulars**, but as we do not think that it was defective, we shall not pursue the matter further, save to say that any particulars delivered could not, of course, have gone beyond the confined of the endorsement"

HELD: Appeal judge erred in finding that indorsement was not sufficient. Also erred in setting aside writ as a result of defective indorsement. Orders set aside.

Dowling v Watson [2000] TASSC 165

FACTS: P initiated proceedings against the defendant in negligence for damages caused while riding a horse at equestrian centre run by the defendant. The writ was generally endorsed with the following statement:

"The Plaintiff's claim against you is for damages for personal injury suffered by the Plaintiff as a result of your negligence and/or the negligence of your servants and/or agents at the Sandford Equestrian Centre, 'York Grove', Musk Road, Sandford in Tasmania on or about the 17th November 1996."

ISSUE: Was the general endorsement given by the plaintiff sufficient?

MASTER HOLT: 'A plaintiff cannot deliver a statement of claim going outside the perimeter marked by the endorsement. Where a statement of claim is delivered which omits a cause of action covered by the endorsement, the plaintiff is deemed to have abandoned that cause of action: *Renowden v McMullin*'

'It is obvious that, accordingly, the assessment of the adequacy of an endorsement of claim is to be undertaken without inquiry as to whether in fact the defendant did or did not know the nature of the claim and the relief sought against him. The issue is whether upon a fair construction, the endorsement discloses these matters. *Ruzeu v Massey-Ferguson (Aust) Ltd*'

'There is no authority in support of the proposition that a general endorsement of a claim for damages for personal injury **must specify the nature of the injury**.'

'The endorsement in this case does set the perimeter for the claim. **It sets that perimeter by identifying the relief claimed, being damages, and the nature of the claim being for personal injury caused by the negligence of the defendants at the defendants' equestrian centre on or about 17 November 1996.** The endorsement could have been drafted in more confined

terms so as to narrow the perimeter of the claim...It was not and, in my view, **did not have to be. It is sufficient that it establish some recognisable perimeter disclosing the essential nature of the action**, and it does this.'

Re Elsum: 'There, the endorsement was as follows:

"The plaintiff's claim is for damages arising out of a motor car accident that occurred on or about 12 December 1968 on Burwood Highway, Vermont, as a result of which the plaintiff suffered loss and damage."

The *Rules of Court* required that the endorsement, in addition to specifying the remedy sought, give notice of the nature of the claim and the cause of action. The endorsement failed to identify the way in which the defendant was to be regarded as answerable. Was it a property damage claim and, if so, in what right was the claim put? Was it a claim for damages for personal injuries resulting from the negligence of the defendant? Was it a claim on behalf of the estate of a fatally injured person? These questions were left totally unanswered by the form of the endorsement. It plainly disclosed neither the nature of the claim, nor the cause thereof. It was held that the endorsement was defective. The case lends no support, however, for the defendants' contention that the endorsement in this case is defective. Here, the endorsement, unlike in *Elsum*, discloses the essential nature of the action. It does that sufficiently in accordance with what was said in *Ruzeu*'

- General indorsement is not a pleading, rather a general statement which puts the defendant on notice of the claim and foreshadows a statement of claim
- Should be construed as a statement of claim, but read as what it is, namely, a notice of the nature of the plaintiff's claim, and the cause thereof, and the remedy sought
 - o *Renowden v McMullin*
- WHERE SERVICE OUTSIDE OF AUSTRALIA: Plaintiff must outline the facts and particular rule upon which the plaintiff seeks to rely to authorise service outside of the jurisdiction: r 7.02

Statement of claim

- See r 5.04(2)(a) *SCR* as outlined above
- Statement of claim is the plaintiff's statement which pleads the cause(s) of action that the plaintiff intends to rely, and the relief claimed
- Statement of claim must plead all those facts which establish the cause(s) of action.
- Hence, for example:

(Breach of contract)

- a. There was a contract.
- b. What the relevant terms of contract were
- c. Allege terms have been breached
- d. Allege as a result of breach, P received loss and damage

(Negligence)

Further and in the alternative,

- a. at all material times, the defendant owed the plaintiff a duty of care
- b. The duty of care was breached
- c. As a result of breach, P suffered loss and damage

(Misleading & deceptive conduct)

Further and in the alternative,

a.

Then plead damages....

- Statement of claim is the first document which constitutes "pleadings"
 - o Further, the defendants **defence**, and the plaintiff's **reply**
 - The causes of action upon which the plaintiff may rely are to be ascertained exclusively by reference to what has been pleaded in statement of claim
 - Court may strike it out if does not disclose a cause of action, is scandalous or vexatious
- **Originating motion** is primarily used in resolving "legal disputes" rather than "factual" issues. Therefore is no need for formal pleadings. Used in issues such as: statutory interpretation; construction of wills and contracts; family provision claims; construction of trust instruments etc**

RENEWING A WRIT

SUPREME COURT (GENERAL CIVIL PROCEDURE) RULES 2005 - REG 5.12

Duration and renewal of originating process

- (1) A writ or an originating motion shall be valid for service for one year after the day it is filed.
- (2) Where a writ or originating motion has not been served on a defendant, the Court may from time to time by order extend the period of validity for such period from the day of the order as the Court directs, being not more than one year from that day.
- (3) An order may be made under paragraph (2) before or after expiry.
- (4) The plaintiff may apply under paragraph (2) without notice to the defendant, but if the Court considers that the defendant ought to be heard, the Court shall adjourn the further hearing and direct the plaintiff to give notice to the defendant by summons or otherwise.
- (5) Where an order is made under paragraph (2), the Prothonotary shall stamp any sealed copy originating process for service with the date of the order and the extended date of validity.