

## Civil Litigation Exam Notes 2018

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## Justification for civil justice system

- Procedural justice – is about getting a fair hearing and the process up until the decision was just – does not care about the end result

## Litigation Process

- Pre-action procedures
  - o Protecting positions
- Commencing proceedings
  - o Defining the issues
- Gathering information
  - o Interlocutory applications
- Settling cases
- Trial
- Costs
- Enforcement and execution
- Appeals
  - o Usually only 21 days to appeal
  - o One right to appeal

## Who can be involved in litigation?

- Non-party intervention r89
  - o Person seeking to intervene in the action
- Representative Action r80-81
  - o Group of persons with a common interest in the subject, therefore bringing the action as representative of the group
- Joinder of Action
  - o Avoid multiplicity of action, can include claim for more than one cause of action r30(4)
  - o Court can also decide on their own merit to join a person to the action r74

## Intervenors

*Supreme Court Civil Rules 2006 (SA) r 89*

- The States (through the A-G) have the right to intervene in a constitutional law case on behalf of the State
- If you have a legal interest that is somewhat affected/legal interest involved
- Not common

## Cases

- Jeavons v Chapman (2008) SASC 249
- Levy v Victoria (1997) 189 CLR 579

**Normally matters that involve govt. policy implications where other parties may seek to intervene. Court can set conditions as to what they can and can't do in the matter**

## Representative Actions

r80, r81

- Also known as class actions in SA we have two different rules & two different actions
- Several identifiable P's and can have one P to represent all
- Class action: class is identified by description and not by identity, they might have their legal rights decided without being involved in the case and may not even know anything about it

### 80—Bringing of representative action where common interest exists

- 1) If a group of persons has a common interest in the subject matter of an action or proposed action and a member of the group is authorised in writing by the other members of the group to bring or defend the action as representative of the group, the person may bring or defend the action as representative of the group.
  - 2) A person who brings an action as representative of a group under this rule must file in the Court the written authorisation to represent the group when filing originating process.
  - 3) A person who defends an action under this rule as representative of a group must file in the Court the written authorisation to represent the group as soon as practicable after the authorisation is given.
  - 4) The written authorisation must contain a list of the names and addresses of the persons authorising the person bringing or defending the action to act on their behalf.
  - 5) The Court may, at any time, terminate the right of a representative plaintiff or defendant under this rule to represent the relevant group of plaintiffs or defendants.
- traditional approach
    - o *Markt v Knight Shipping* [1910] 2 KB 1021
  - HCA revised traditional
    - o *Carnie v Esanda Finance* (1995) 182 CLR 398

### 81—Court's power to authorise representative actions

- 1) The Court may authorise a plaintiff to bring an action **as representative of a group with a common interest** in questions of law or fact to which the action relates.
- 2) If a plaintiff intends to apply for an authorisation under this rule, the action may be commenced in the ordinary way but the originating process must bear an endorsement in the approved form stating that the plaintiff proposes to apply for the authorisation.
- 3) An application for an authorisation under this rule must be made within 28 calendar days after the time allowed for the defendant to file a defence.
- 4) An authorisation under this rule is not to be refused on the ground that—
  - a. damages which would require individual assessment are sought by way of remedy; or
  - b. the action is based on separate contracts or transactions between individual members of the group and the defendant.

## Federal Court

- Federal Court of Australia Act 1976 (Cth) Part IVA Representative proceedings

- ss 33A – 33ZJ

## Secondary Actions

- Cross claim/action (or counter-claims) **SCCR, r 35**
  - P sues D and then D sues P
- Third party notices/action **SCCR, r 36**
  - Third party process is when you bring other people into the action that might have other people's rights affected
  - Situation that exists in the context of D's being sued and says, actually, someone else is responsible or if I'm responsible, so are they
  - P is not suing the 3<sup>rd</sup> party – liability only arises subsequently to the D's liability being established
    - *Duke Group v Arthur Young (1990)* 54 SASR 498

## Consolidation

- Supreme Court Civil Rules 2006 (SA) s 31
- Different cases commenced that have similar facts/legal issues then the Court can bring cases together

## PRACTICAL PROCEEDING LIMITATIONS

Limitations are very important because they can stop you from suing

- Limitation of Actions
- Pre-action notice and settlement
- Protecting Positions – eg. pre-action injunction
- Pre-action disclosure
- Originating process
- Service
- Appearances

## Limitations of Actions Act 1936 (SA)

- Tort and Contract
  - 6 years (s 35 LoAA)
- Except personal injury
  - 3 years (s 36LoAA)
    - When damages claimed consist of personal injury s36(1)
    - Begins when the injury first becomes known to the individual if latent period s36(1)(a)
- Defamation
  - 1 year (s 37)
- Most others
  - 15 years

## Extension of time

- *Limitations of Actions Act 1936 (SA)* ss 46A, 47, 48



- Filed at the same time as the *statement of claim*
- Court has *the power to extend* the time: S48(3)(b)
  - If new facts of material information comes about within twelve months prior to the actions being instituted and after the expiration period (3)(b)(i)
  - Or if the failure to institute proceedings prior to expiration occurred due to the conduct of the defendant (3)(b)(ii)
- Will only be *material* if: s48(3a)
  - It forms an essential element of plaintiff cause of action (3a)(a)
  - Or major significance on an assessment of plaintiffs loss (3a)(b)
- Must be *just to grant an extension* s48(3b)
  - (a) Would not prejudice a fair trial
  - (b) Consider the desirability to bring litigation to end within reasonable time
  - (c) Nature and extent of plaintiffs loss and conduct
  - (d) Any other relevant factors

## Jurisdiction

### Cross jurisdiction

*Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth)*

- If commence in wrong court does not mean fatal to your claim, it will be transferred to the most appropriate court see: s5 *Cross Vesting Act*
- Can hear all matters from other Supreme courts
- Removes the common law writ system
- Allows SC to hear Federal Court matters

### Territorial jurisdiction

- Geographical limits of a Court
- Level of complication with Federal law level as well as State

Three questions:

1. Does the court have jurisdiction to view this matter?
2. Should the court view it?
3. Which law applies to it?

At common law the power of a court to hear a case depends upon one thing:

**was D properly served with proceedings (summons) in SA? (Personal service)**

- D has to be subject to the courts proceedings

### Cross-vesting

All the States in the Cth govt. convey jurisdiction on each other's Courts

- can transfer matter to a more appropriate court
- BUT**

- only applies to Supreme Court jurisdiction
  - o but you can transfer a case from District Court to Supreme Court on application under s 24 of the District Court Act 1991 (SA)
- State can't confer jurisdiction on the Federal Court but the Federal Court can confer onto the States (and the States can confer between them)
- The Court weighs up a series of factors to work out which court is better suited to hear the case (looks at all the facts of the case)

#### Jurisdiction of Courts (Cross-vesting) Act 1987 (SA) s 5

- This attempts to overcome some of the difficulties of overlapping and competing jurisdictions inherent in a Federal system.
- It "cross vests" jurisdiction between Courts. Commonwealth, States and Territories have vested civil jurisdiction in each other's Supreme Courts and in the Federal and Family Courts.

#### Corporations Act 2001(Cth) s 1337H

Transfer of proceedings by the Federal Court and State and Territory Supreme Courts

#### Principles, criteria & test for cross vesting

Need to use cases for application of the

#### **Bozkurt v Bozkurt** (Granting the application)

Held:

1. The matter is relevant to proceeding within the meaning of the Jurisdiction of Courts (Cross-vesting) Act 1987 (SA) and the Jurisdiction of the Courts (Cross-vesting) Act 1987 (WA)
2. As the plaintiff is resident in WA, the most sensible course is for a manager based in WA to be appointed to manage the plaintiff's award of damages
3. In these circumstances, the appropriate Court to supervise the management of the plaintiff's funds is the Supreme Court of WA. It is therefore in the interests of justice to transfer the proceeding to the Supreme Court of WA

#### **BHP Billiton v Schulz (2004) 221 CLR 400 at 422**

The ordinary basis of jurisdiction of common law Courts in personal actions is the presence of the defendant within the Court's territory, and the defendant's resulting amenability to the Courts process.

#### Cross-vesting Example:

- If you have a personal injury claim where the accident occurred in another State to where the P lives in SA
- you could bring the action in SA and use the *Service of Execution and Process Act 1992* (SA).
- Could make the arguments that
  - o because P suffered injuries then the medical evidence & expert witnesses for that evidence might be based in SA (unless in other State)

- their injuries make it difficult for them to travel to the other State, etc.

## WHAT ARE THE OPTIONS

- Non-court
- Court

### Non-court

Consider if a non-court option is available including;

- Offer to settle
  - o Formal
  - o Informal
  - o Cost implications
    - Unreasonable or imprudent rejection of offer
- ADR
  - o Negotiation
  - o Mediation
  - o Arbitration
  - o Conciliation
  - o Court appointed 3rd parties
- Is there a risk in litigating? Costs, counter claim etc

### Pre-action Settlement

- o Processes to encourage pre-litigation settlement

#### **33—Offers of settlement before action**

- o As a plaintiff you tell defendant what figure you want and then substantiate why and how that loss is owed.

#### **33(2) – notice**

- o Personal Injury: At least **90 Days**
- o All other cases: At least **21 Days**

Before commencing action the plaintiff must give to the defendant or the defendants insurer, a written notice containing:

- a) An offer to settle the claim on a basis set out in the notice and
- b) Sufficient detail of the claim with supporting material to ascertain reasonableness of offer
- c) Copies of Expert reports (if in possession)

#### **33(4) response**

- o Personal Injury: 60 days
- o Other matters: 14 days

Defendant must respond in written to notice by:

- a) Accepting offer of settlement

- b) Making counter-offer which is accompanied by sufficient details supporting material and enabling informed response
- c) Stating liability denied and on what grounds

### 33(5) Expert reports

Defendants response must be accompanied by any *expert reports* they have

- But typically at this point you don't have access to reports as might not have done all investigation

### IF NOT FOLLOWED

- When making a costs order the court may take into account;
  - If this rule was complied with r(7)(a)
  - The terms of offer or counter offer and the extent to it being reasonable or unreasonable r7(b)

## Offers

- Ethical duty to advise client of alternative means of settling matter, ADR
- Formal Offers
  - RULE 33: Offer of Settlement before action
    - Integral for costs
  - Making a Formal offer: Following Rule 187
    - Time for withdrawing, making and accepting offer
- Informal Offers
  - Calderbank (courts prefer formal)

### Formal and informal

#### How Do Offers Work

- Comparison between judgment and offer.
- If judgment no more favourable, then costs consequences naturally flow.

#### For comparison purposes make offer:

- Uncomplicated
- Exclusive of costs and interests
- Genuine offer of reasonable settlement

#### Your Advice on Offer

- You must assess the case
  - Make an accurate decision on what outcome would be if it goes to trial compared to accepting offer
  - Due to potential cost consequences should the offer not be better than the judgement.