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3.2 Cause Prejudice/Embarrassment/Delay [r 14.28(b)]

Test: embarrassing if where it is unintelligible, ambiguous, and vague or too general, so as to embarrass the opposite party who does not know what is alleged against him or her (**Priest v NSW**)

Examples: pleading susceptible to various meanings, inconsistent allegations, confusingly intermixed alternatives, or irrelevant allegations made to increase costs (**Shelton v NRMA**)

3.3 Abuse of Process [r 14.28(c)]

3 Categories: (**NSW v Williams**):

1. Court's procedures are invoked for an illegitimate purpose
2. Use of the court's procedures is 'unjustifiably vexatious, oppressive or unfair to one of the parties'
3. Use of the court's procedures would bring the administration of justice into disrepute

NSW v William (*State was trying to defend an allegation that it had previously conceded in criminal court, William applied for it to be strike off as abuse*) Held: a collateral attack on earlier decision of court is NOT necessarily a abuse of process, sometimes legitimate to make an attack, no abuse.

3.4 Consequences

Need leave to re-plead: If pleading struck out and wishes to pursue case, will have to re-plead (leave must be granted to file an amended SOC) (**Silverside Superfunds v Silverstate Developments**)

7. Further Pleadings – Plaintiff & Defendant

12.1: When can have further pleadings?

Trial without further pleadings: If after the defence if filed, the court believes, that the issues can be defined without further pleadings, NO further pleadings may be allowed (**r 14.2**).

Reply: If the court does not do so, the plaintiff may file a reply within 14 days of service of defence (**r 14.4**)

Pleadings following reply: To file further pleadings subsequent to a reply, a party MUST be granted leave AND must be granted within 14 days of the service of last pleading (**r 14.5**)

12.2 Reply/Further pleadings sometimes necessary

New Argument: In response to arguments made in the filed Defence, the Plaintiff wants to raise new arguments, then MUST file and serve a 'reply' or further pleadings to Defendant.

Banque Commercial v Akhil (*didn't serve reply of new argument to one D, went to trial and court made finding of fact about new argument. D successfully appealed as it was not raised in pleading against it*)

- If P has chosen some issue different from disclosed in pleadings as basis for determination in court, then court cannot make that determination unless it was served as a reply OR further pleading.

12.3 Limitations on Reply/Further pleadings

Consistency: new pleadings must have consistency with previous pleadings (**r 14.18**)

- 1) P must NOT make an allegation of fact/raise any claim, inconsistent with previous pleadings
- 2) HOWEVER, can raise grounds in the alternative

12.4 No reply does NOT equal to admission

Once an allegation is made and not responded to then it is considered 'joined' and thus deemed denied (does not apply to SOC) **r 14.27**

- E.g. if Plaintiff does not reply to Defence, then deemed that Plaintiff denies allegations in Defence **r 14.27(2)**

8. Service in NSW

Purpose: service is the means by which a plaintiff alerts a defendant that the plaintiff has commenced proceedings against the defendant

Service what? Originating Process; Notice of Motion; Subpoenas

Overall Steps:

- Step 1: What is being serviced?
- Step 2: Was it Personally Served?
- Step 3: Affidavit provided?
- Step 4: If all fails, perform substitute service
- Step 5: Apply for approval of substitute service
- Step 6: Any waiver to contest service?
- Step 7: What is result?

Step 1: What is being served

Originating Process **r 10.20(2)**: any Originating Process in the SC or DC MUST be personally served

Subpoena: **r 33.5** subpoena to attend to give evidence/produce documents in SC MUST be personally served on the addressee

- Except: **r 10.20(2)(d)** in DC or LC can be served by post
- Order for substituted service CANNOT be made in respect of a subpoena to give evidence (**Nash v Stewart** [2010] NSWSC 513)

Step 2: Was it Personally Served Directly?

YES: served correctly

NO: can apply for substituted service

2.1 Served as Soon as Practical?

P files a document must serve copies of the document on EVERY active party 'as soon as practicable' **r 10.1**:

2.2 Given to Person Directly?

Directly Give: leaving a copy of the document with the person **r 10.21(1)**

- Need not be given in physical possession of P2, can be left with a representative of the person standing right next to P2 and P2 acknowledges it (**Ainsworth v Reid**)
- P called out that he had documents and threw them on the ground and rep of D picked them up and told D they were for him (**Bulldogs Rugby League v Williams**)

Refuses Service? person does not accept the copy, by putting the copy down in the person's presence and telling the person the nature of the document **r 10.21(1)**

- If refuses, document may be left by pushing it under his door (**Graczyk v Graczyk**), or fixing it to door (**Re Hudson: Ex parte G E Crane & Sons**)
- Nature of the doc explained: not needed if the nature of the doc is clear on its face and doc is NOT in an envelope/concealed (**Lawindi; Re Elkateb v Elkateb**)

Violence? by violence/threat of violence, P1 prevented from approaching another P2 for service, P1 may deliver the document by leaving it as near as practicable to P2 (**r 10.21(2)**)

Is D a Corporation?

(a) personally serving the document on a principal officer of the corporation, or (b) by serving the document on the corporation in any other manner in which service of such a document may, by law, be served on the corporation **r 10.22** e.g. Leaving it or posting to the company's registered office (**s 109X(1)(a) Corps Act**)

Is D a Business?

P2 operating under unregistered business name (**r 10.9**), registered business name (**r 10.10**), or a partner in a limited partnership (**r 10.11**), may be personally served by:

Step 1: P able to join under three methods?

YES: then properly joined
NO: See Step 3 for remedy

Method 1: Common Question of Law or Fact

Before Proceedings

Two or more parties can be joined as of RIGHT if: **r 6.19(1)**

- a) Separate proceedings would give rise to a common question of law or fact: AND
- b) All rights of relief claimed in the originating process are in respect of the SAME transaction/series of transactions.

'Transaction' an act which all parties to be joined are involved with; not limited to contractual relations (*Bendir v Anson*)

Series of transactions: refers to a series of the same transactions and not to separate causes of action (*Payne v Young*). E.g Each P's claim arises out of his own transactions with a particular D. No transaction to which all Ps are party = cant be joined.

Proceedings Already Commenced

Parties can be joined after the proceedings have commenced: UCPR **r 6.19(2)**

Method 2: Grant Joinder by Leave

Court has power to grant leave to join a party EVEN if there is NO common question of law or fact and rights of relief do not arise out of the same transaction: UCPR **r 6.19(1)**

Court balances several factors in deciding whether to exercise discretion (*Dean Willcocks v Air Transit International*)

- Overriding purpose in CPA s 56
- Unfairness or inconvenience to parties caused by joinder
- Practical matters such as if parties are represented by different solicitors
- The joinder of multiple Ds leads to cost/delay to D materially greater than would have occurred if the cases had been brought separately
- D forced to defend case in an inconveniently located court

Method 3: Order of Court After Proceedings Started

Step 1: Apply for Joinder – r 6.27

A person who is not a party may apply to the court to be joined as a party: UCPR **r 6.27**.

- P applies: 'necessary to the determination of all matters in dispute' should not be interpreted as only matters existing between the P and D (*Qantas v A F Little*)

- D applies: they will only be joined where the existing parties cannot settle the issues without them (*Walker v Commonwealth Bank*)

Step 2: Court may approve if joinder proper and necessary

Court believes a person ought to have been joined, or whose joinder is necessary to the determination of all matters in dispute, that P may be joined: **r 6.24(1)**

Test: will the person's rights against or liabilities to any party to the action, in respect of the subject matter of the action, be directly affected by any order which may be made in the action? (*News Ltd v ARL*)

Example: Joinder necessary to ensure that all issues in the dispute are resolved in the proceedings

Weber v Ankin (dispute as to who owned a piece of road. Should Council be joined?) - Yes, Council needed to be joined in order to decide who was the owner of the land (because it was seriously arguable that the road was a public road), which would affect the rights of the parties on both sides of the record.

Step 3: Is Consent Required?

Plaintiff - consent required to join (**r6.25**), if no consent then will be a Defendant
Defendant - No consent required: ref to *New Idafe Inc v Barnard*

Step 4: Should P then be separate from Proceedings?

Reason 1: cause embarrassment, inconvenience or delay?

6.22 Court may order separate trials if joinder of P or cause of action may embarrass, inconvenience or delay the conduct of the proceedings, the court:

- (a) may order separate trials, or
- (b) may make such other order as it thinks fit.

This decision is made with reference to the overriding purpose **CPA s 56-60**

Reason 2: Improperly Joined or ceases to be necessary

6.29 The court may order that a person:

- (a) who has been improperly or unnecessarily joined, or
- (b) who has ceased to be a proper or necessary party, be removed as a party.

12. Amending Cause of Action/Document

Court may grant leave to amend any document in proceedings even if the document would add or substitute a cause of action AFTER the commencement of proceedings (**CPA s 64**).

Limitation Periods

Where an amendment introduces a NEW party or cause of action, the date of such an amendment, in relation to the cause of action, is the date on which the amendment is made (**UCPR r 6.28 and CPA s 64(3)**).

BUT where proceedings have commenced before a limitation period expires but the limitation period has since expired and a plaintiff seeks to amend the originating process, the amendment is taken to have had effect from the date proceedings commence: **CPA s65**.

13. Class Actions

What are they? Allows the claims of a number of people against the same D to be determined in one suit:

- Representative P: is the only party to the action
- Class members: bound by the decision between D and representative P

Steps for Commencing CA:

Step 1: Have Standing?

Step 2: Can Commence CA?

Element 1: 7 + people against same D

Element 2: Arising same/similar/related circumstances

Element 3: Substantial common question law/fact

Step 3: Originating Process/Pleadings

Step 4: Discontinue?

Step 5: Any Ds Opt Out?

Step 6: Settlement?

Step 1: Does Representative P have standing?

s 158(1), CPA – RP has sufficient interest to commence representative proceedings against another person if P has standing to commence proceedings on the person's own behalf against that other person

s 158(2), CPA – P can commence proceedings against more than one defendant irrespective of whether or not the person and

A) EQUITY DIVISION

General Steps: Discovery in Equity Division

- Step 1: Evidence Filed or Not Filed?
- Step 2: Provide Affidavit
- Step 3: After satisfy requirements of PN then apply UCPR

Step 1: Evidence Filed or Not?

1. Evidence Already Filed

Evidence MUST first be filed and then it MUST be 'necessary' for the resolution of the real issues in dispute in the proceedings. (PNSC Eq 11(5))

Test:

Necessary is when disclosure is shown to be 'reasonably necessary' for disposing of the matter fairly or in the interests of a fair trial". (*Leighton*)

2. Evidence Not Filed

If evidence is not filed then unless there are 'exceptional circumstances' necessitating disclosure there can be no disclosure. (PNSC Eq 11(4))

Test:

Exceptional Circumstances when something out of the ordinary; they need not be unique; ... not "exceptional" at large but "exceptional" because they necessitate disclosure. (*Leighton Internation v Hodges*)

Examples:

- Doc not publicly available or highly relevant info solely or largely in possession of 1 P *Graphite; Mempoll*
- Necessity as unable to serve its evidence without certain documents *Denihel v Manning*
- Evidence incomplete and there is proximity of expedited final hearing *Graphite Energy v Lloyd energy systems*

Step 2: Provided Affidavit?

Any application for an **order for disclosure**, consensual or otherwise, MUST be supported by an **affidavit** setting out; (PN SC Eq 11(6))

- why disclosure is **necessary** for the resolution of the real issues in dispute;
- **classes of documents** for disclosure; and

- likely **cost** of disclosure.

Step 3: Apply UCPR Rules for Discovery

[See below rules for common law division]

B) COMMON LAW DIVISION PARTY 1

P1 applies for discovery and then P2 complies

PARTY 1: Overall Steps for Apply:

- Step 1: Application by Notice of Motion
- Step 2: Personal Injury Case?
- Step 3: Categories of Docs identified Sufficiently Clearly?
- Step 4: Docs Relevant to Fact in Issue?
- Step 5: Excluded Docs?
- Step 6: P2 Complied with Discovery request?
- Step 7: Restrictions on Use

Power: Court has the power to order discovery of classes of documents under **r 21.1, UCPR**

Step 1: Application by Notice of Motion

- 1.1 P1 files and serves **notice of motion** (with supporting affidavit) seeking discovery pursuant to **r 21.2**.
- 1.2 Notice of motion heard and court may **order discovery** of a 'class of documents': **r 21.2(1)(a)**
 - (a) By relevance to facts in issue: r 21.2(3)(a)
 - (b) By description of the nature of the documents and the period within which they were brought into existence: r 21.2(3)(b)
 - (c) Manner as the court considers appropriate: r 21.2(3)(c)
NB: discovery does not apply to excluded documents (see r 21.3.1)

Step 2: Personal Injury Case?

Discovery will NOT for personal injury cases be ordered unless there are 'special reasons' – ie. discovery is necessary for a fair trial (r 21.8; *Percy v GMH*)

Test:

- (1) There are **special reasons** for an order of discovery

- Need something unusual/different to take the matter out of the ordinary course (*Boscolo v Secretary Department of Social Security*)

- P's claim arose in an extraordinary circumstance: he alleged harassment by senior police officers as a result of whistleblowing (*Priest v NSW*)
- Docs, such as policy docs in the exclusive control of D
- Psychological nature of the claim = harder to prove than personal injury

- (2) Court should **exercise its discretion** to make order

- Consider the relevance of the classes of documents to the issues in the proceedings.

Step 3: Categories Identified Sufficiently

Class of Docs must not be specified in more general terms than court considers justified in circumstances **r 21.2(2)**

Test: whether the categories of documents are identified sufficiently clearly in the circumstances of the case (*Priest v NSW*)

- If not identified clearly would otherwise be **oppressive and burdensome**: 'seriously and unfairly burdensome, prejudicial or damaging' and 'productive of a serious and unjustified trouble and harassment.'

Examples

Hamilton v Oades: 'and all related documents' (too broad) O
Priest v NSW: 'all records from 1993-1999' (over too lengthy period of time)

Step 4: Docs Relevant to Fact in Issue

Order may not be made for a doc UNLESS relevant to a fact in issue: **r 21.2(4)**

Relevance: rationally affect the assessment of the probability of the existence of that fact, regardless of whether the document would be admissible in evidence (**r21.2(2)**)

Step 5: Excluded?

Certain documents are excluded from discovery – see the definition of 'excluded documents' in r 21.1 eg. any document that wholly came into existence after the commencement of the proceedings

Step 6: P2 Complied with Discovery?

[See below]

Step 4: Was it rejected?

The refusal of a *Calderbank* offer **does not** necessarily lead to indemnity costs (*SMEC Testing Services v Campbelltown City Council*)

Calderbank offer will only be consideration for court in making usual costs orders

21. Costs – Lawyer or Party

3.1 Power to Order Costs

Absolute Discretion s98(1)(a): to whom, by whom and to what extent (1)(b); and award on indemnity or ordinary basis (1)(c).

- Discretion CANNOT be exercised capriciously or punitively (*Oshlack v RR Council*)

3.2 When Payable? Only when an cost order made s98(2)

Costs orders may be made at any time but not "assessed" until the conclusion of the proceedings unless the court orders otherwise s98(2)

3.3 General Steps determining Cost Order

Step 1: Consider Proportionality s 60:

practice and procedure should be implemented with the object of resolving the issues in such a way that the cost is proportionate to the importance and complexity of the subject-matter in dispute.

- Applied in conjunction with overriding purpose s 56
- 'importance/complexity': if cost of undertaking task outweighs the benefit gained from it then cost is not proportionate *Zanella v Madden*

Step 2: Consider Duty of Litigants/Lawyer

2.1 Duties:

Parties: s56(3) have a duty to assist the court

legal representatives: s56(4)(a) must not cause the parties to breach their duty. 'Cards on the table approach' must exercise a degree of co-operation to express the issues before/during trial (*Baulderstone*)

2.2 Failure to Comply s 56(5):

any failure to comply with these provisions can be taken into account by the Court in exercising its discretion as to costs

2.3 Example: *Priest v NSW*:

indemnity costs ordered against D for failure to comply with s 56 obligations in regard to approach to discovery. Need to be model litigant.

Step 3: Courts Power to Order for Party

3.1: Overall Power S98: unlimited power to award on indemnity or ordinary basis.

3.2 Ordinary or Indemnity?

(a) Start with Ordinary: Ordinary basis applies as default "costs follow event" r 42.1 unless a specific order is made for indemnity costs r 42.2.

- Unsuccessful P will be required to pay costs even if successful P was not successful on all issues (*Baulderstone*)
- Ordinary basis will apply unless 'it appears that some other order out to be made as to whole/part of costs (*Baulderstone*)
- unsuccessful P will pay the successful P legal costs which were reasonably incurred in the proceedings e.g. fixed court fees, reasonable hrs work as assessed by costs assessor

(b) Determine if losing side can claim: If losing P can identify clearly dominant or separable issues that the successful P lost than can claim costs for them. (*Baulderstone*).

- success in a separate issue that played a very minor part cannot be allowed (*Macourt v Clarke (No 2)*)

(c) Determine if Indemnity Should Apply: a court will order indemnity costs when it is established by evidence there is:

- 'Abuse of Process': (*Baulderstone*)
- 'Unreasonably rejected offer of compromise': (*Nair-Smith v Perisher Blue*)
- 'breach s 56': (*Priest v NSW*)
- 'Waste courts time': commenced proceedings in wilful disregard of known facts or unduly prolonging resolution with groundless contentions (*Colgate- Palmolive v Cussons*)

Indemnity costs are not ordered for: Fighting fiercely, leaving no stone unturned (*Berkeley Admin v McClelland*)
• Indemnity includes all costs incurred except those that appear to have been unreasonably incurred or unreasonable amount (r 42.5)

3.3 Failure to Comply with Orders r 42.10?: power to order costs against P when P fails to comply with rules/order to pay such of the other parties' costs as occasioned by the failure/any failure to comply with duty to assist court can be taken into account in exercising its discretion as to costs s 56(5) CPA.

Step 4: Courts Power to Order for Lawyer

Decide if P can reclaim costs from lawyer

4.1: Lawyer costs can be ordered against lawyer personally s 99 CPA/Sch 2 of LPA.

4.2 Under Sch 2 of LPA: costs against lawyer for services provided to P without *reasonable prospects of success*.

- Must reasonably believe on the basis of provable facts and a reasonably arguable view of the law that the claim/defence had reasonable prospects of success.
- 'the reasonable belief as to prospects' must be objectively founded in material available to the lawyer at the relevant time
- No reasonable prospects of success' defined 'so lacking in merit or substance as to be not fairly arguable' is high threshold, as lawyer can't judge credibility of witnesses or validity of args (*Treadwell v Hickey*)
- Lawyer bears the onus of establishing that there were provable facts 6(3) LPA.

4.3 Under s99(1) CPA: lawyer will be liable for costs incurred due to their (a) serious **neglect, incompetence or misconduct** (b) or for any costs incurred **improperly and without reasonable cause** for which lawyer is responsible.

- 'Improper': significant breach of a substantial duty imposed by code of professional conduct (*Ridehalgh*)
- 'Unreasonable': designed to harass the other side rather than advance the case's resolution (*Ridehalgh*)
- 'Negligent': failure to act with the competence reasonably to be expected of lawyers (*Ridehalgh*)

4.4 Awarding Cost: The court may order lawyer to :

- Reimburse client whole or part of costs s99(2)(b), Sch 2, 5(1)(a) LPA
- Indemnify any P against costs s99(2)(c), Sch 2, 5(1)(b) LPA

22. Costs – Offer of Compromise/Calderbank Letters

A) Acceptance: Cost Consequences

Step 1: Accepted Offer and NO provision for costs?

R 42.13A: Offer proposed in favour of P1, then P1 is entitled to an order against P2 for P1's costs assessed on ordinary basis up to the time when offer was made.

Exam Note: only one step here.

B) Rejection: Steps for Cost Consequences

Step 1: Offer Real and Genuine?

Step 2: Determine circumstances after rejection?

Step 3: Can Court still reject ordering indemnity?

Step 1: Offer Real and Genuine?

Before awarding any indemnity costs following a rejected offer; offer must involve a "genuine offer of compromise" and not

merely be made so as to trigger the costs consequences under the rules ***Leach v The Nominal Defendant (QBE Insurance Australia Ltd)***

- real element of compromise is determined objectively according to the circumstances of the particular case at the time the Offer was made rather than with the benefit of hindsight.

Step 2: Determine circumstances after rejection

r 42.17(1): Before court makes orders under **42.14 or 42.15** the offeror must be found to have been willing and able to carry out the offer at all material times:

(a) Defendant Rejected + Plaintiff Wins + Damages More Favourable: r 42.14

- D rejects offer BUT Plaintiff wins and judgment MORE favourable to Plaintiff, the court unless orders otherwise: **P gets costs** (a) on ordinary basis up to day after offer made and (b) **P gets indemnity costs** from day after offer was made.

Example:



(b) Plaintiff Rejected + Plaintiff wins + Damages Less Favourable r 42.15

- P rejects D's offer to settle but P rejects and still wins HOWEVER, judgment LESS favourable to plaintiff, the court unless orders otherwise: **P gets costs** (a) on ordinary basis up to day after offer made and (b) **D gets indemnity costs** from day after offer was made.

Example:



(c) Plaintiff rejects + Defendant wins r 42.15

- P rejects D's offer to settle and D actually wins the court unless orders otherwise: **D gets costs** (a) on ordinary basis up to day after offer made and **D gets indemnity costs** from day after offer was made.

Example:



Then, is there a question of interest?

See r 42.16: no interest on damages after offer is made for P

Step 3: Can Court Order "otherwise" and reject indemnity?

Even where a genuine offer is rejected and the indemnity costs provisions of rr 42.14-42.15A are triggered, the court is NOT obligated to order indemnity costs:

Court's discretion to NOT award indemnity costs after rejection: (***Hart Security Australia Pty Ltd v Boucousis***)

- offer involved only a very minor element of compromise;
- settlement tantamount to a surrender on the part of the plaintiff
- Where party's case was difficult but by no means hopeless, frivolous or vexatious then NOT an offer likely to encourage early settlement.
- Whether there was a real element of compromise is determined **objectively** according to the circumstances of the particular case at the time the offer was made, rather than with the benefit of hindsight (***Leach v The Nominal Defendant***)

Calderbank

Cost consequences - rejection of offer must be unreasonable

The rejection of even a genuine Calderbank offer **does not** automatically mean that costs are awarded on an indemnity basis: ***SMEC v Campbelltown City Council***. (Reaffirmed in ***Jones v Bradley***)

Court determines whether the failure to accept the offer was **unreasonable** enough to warrant indemnity costs and departure from the ordinary rule as to costs

That the offeror ends up worse off than if the offer had been accepted does not of itself warrant departure P bears an onus of persuasion that the conduct of D in refusing the offer was unreasonable (***Lee v Carlton Crest Hotel***)

If a party is not provided with sufficient material to make an informed assessment as to the reasonableness of the offer, then ordinarily it would follow that the court simply cannot be satisfied that its refusal of any offer was unreasonable (***Lee v Carlton Crest Hotel***)

Relevant factors (***Miwa v Siantan properties***)

- Whether there was sufficient time to consider?
- The extent to which the compromise was fair.
- Whether there was adequate information given to consider the offer?
- At what stage was the offer made? Have there been any developments since the offer was made?
- What were the prospects of success?
- Whether any conditions were attached to the offer and whether they were unreasonable

A rejection of a settlement offer, after the offeree had been warned of a challenge to the truthfulness of his evidence may be held to be unreasonable (***Blagojevich v Australian Industrial Relations***)

Depends on the individual - difference of \$6090 between judgment sum and offer (a differential of 2.5% - \$206,090 vs. 200,000) was held to be significant as the offeree was not that well off → not unreasonable rejection of offer (***Maitland Hospital v Fisher***)

23. Settlement Negotiation Privilege

4.1 Purpose: excludes from evidence communications which are brought into existence to settle a dispute. Such communication often tried to be used for cost determination.

4.2 General Steps determining SNP

Step 1: Determine where communication arose:

- (a) Negotiation or Volunteered Mediation: apply s 131 of EA.
- (b) Mediation: if court-mandated mediation, then EA does NOT apply and must rely on s 30 CPA; go to Step [2B]

Step 2A: Negotiation: what type of communication?

S 131(1) EA:

- (a) **communication** made between persons in dispute, or between one or more persons in dispute and a 3rd P, in connection with an attempt to negotiate a settlement of the dispute
- (b) **document prepared in connection** with an attempt to negotiate a settlement of the dispute

Step 3A: Negotiation: Disclosed Reasonably Incidental to Settlement Negotiation?