

- It waives technical breaches of the rules
- The following points need to be noted:
 - An unconditional appearance waives technical breaches of the rules such as 'stale' or expired writs (a writ not being served within the one year period, pursuant to order 5 rule 12). It must be here noted that an error in beginning a proceeding or an error at any stage of a proceeding is an *irregularity* and does **not** nullify the proceeding or any step in the proceeding
 - *Serving of the writ beyond the 12 month period makes the service irregular. Breach of a rule and t/f service is irregular*
 - Whilst an unconditional appearance constitutes a submission to the jurisdiction, it does not confer on the court a subject matter jurisdiction it does not otherwise possess (court has inherent jurisdiction to determine whether or not it has jurisdiction to hear and determine the matter brought before it)

2.01 - Effect of non-compliance

- 1) A failure to comply with these Rules is an irregularity and does not render a proceeding or any step taken, or any document, judgment or order in the proceeding, a nullity.
- 2) Subject to Rules 2.02 and 2.03, where there has been a failure to comply with these Rules, the Court may—
 - a) set aside the proceeding, either wholly or in part;
 - b) set aside any step taken in the proceeding, or any document, judgment or order in the proceeding;
 - c) exercise its powers under these Rules to allow amendments and to make orders dealing with the proceeding generally.

- HOWEVER not all errors in the beginning of proceedings are mere irregularities. Some errors can amount to a '*nullity*' in which case the filing of an unconditional appearance will not and cannot "*cure*" or waive that error
- IF the defendant disputes the jurisdiction of the court from which originating process has been filed, an unconditional appearance ought not to be filed, but a conditional appearance should. Questions of the court's jurisdiction may arise in the following examples:
 - Where the defendant is served outside the jurisdiction;
 - Where a foreign defendant is served while inside the jurisdiction;
 - Where a resident is served in respect of a cause of action with foreign elements.
- It must be remembered that even though the plaintiff may have a right under the rules to effect service on a defendant outside the jurisdiction does not necessarily mean that the court will exercise the jurisdiction created by that service.

- The court from where the originating process was filed may be clearly inappropriate to hear and determine the dispute

Sheldon v Brown Bayley's Steel Works Ltd [1953]

- P sued 2 defendants
- Writ when served upon defendant beyond the 12 month period, was 3-4 days late → stale writ
- When writ was served on first defendant, lawyers realised writ was served too late and t/f entered a conditional appearance which allowed them to raise arguments about late writ to set aside service
- Prevented P from getting default judgement
- Second defendant filed an unconditional appearance, not realising that the writ was served beyond 12 month period
- Soon after D2 filed unconditional appearance, they applied to court to have service set aside once they realised mistake
- **Lord Denning denied application, as D2 had filed an appearance already and had waived the irregularity of filing a stale writ**

A conditional appearance

- Filing a conditional appearance preserves the right of the defendant to object to any service irregularities or jurisdiction of the court
 - A defendant who intends to draw and irregularity to the courts attention or any irregularity with regard to staleness of the writ must file a conditional appearance OR make application to have service set aside
 - **Where defendant wants to raise statute barred defence – serves conditional writ**
- A conditional appearance has the same effect as an unconditional appearance unless the court orders otherwise
- Preserves the right of D to object to any service irregularities or the jurisdiction of the court
- Prevents P from obtaining a default judgement
- Allows D to make application to court to have service set aside because of irregularity – an irregular proceeding may only be invalidated by the court setting it aside
- **Allows D to apply to the court for the appropriate order to stay the proceedings OR set aside the originating process/service: r 8.08**

Alternatives to conditional appearance

- **Rule 8.08 and 8.09**
 - D can apply **under r 8.08** to stay proceedings or have service set aside – D's rights are preserved and P is barred from entering a default judgment
 - **Under r 8.09** a defendant can apply to have originating process or its service set aside **BEFORE** the filing of an appearance (whether conditional or unconditional)
 - This rule establishes an ALTERNATIVE procedure to that of conditional appearance under **R 8.08** in the case of

challenge to the jurisdiction of the Court, or to the validity of originating process, or its service or of application to the Court to stay a proceeding.

- If time limit for appearance expires while application under **8.09** is pending, P may enter a default judgment (D would have to bring application under 8.09 way before time limit for appearance is up)
- H/E application *without* appearance has the advantage that if the application fails, the D can fairly argue that he has done nothing that could be taken to constitute a submission on his part to the jurisdiction of the Court
- This may be important if the D does not desire to defend the claim on the merits but wants instead to prevent the P from enforcing a default judgment against his assets in a foreign country on the basis that the judgment should not be recognized in that country.
- Prompt action still required **under 8.08**, because it will otherwise stand as an unconditional appearance unless court on application orders otherwise
- **Under r 2.03** where non-compliance with the Rules, D can apply to have originating process set aside – ONLY IF a) the application is made within a reasonable time and b) before the applicant has taken any fresh step after becoming aware of the irregularity

R 2.03 – Application to set aside for irregularity

- The Court will not set aside a proceeding or step in a proceeding which is an irregularity by reason of non-compliance with the rules if the party objecting has not applied to the Court A) within a reasonable time or B) has taken a fresh step in the proceeding after becoming aware of the irregularity.
- **Reasonable time:**
 - to an order for service of a Writ out of the jurisdiction, 14 months after service: *Reynolds v Coleman (1887)*
 - to the improper joinder of causes of action, at trial: *Re Derbon; Derbon v Collis (1888)*
 - that an action was irregularly instituted, after judgment was given: *Charles P Kinnell & Co Ltd v Harding Wace & Co [1918]*
 - to the sufficiency of an indorsement of claim on a Writ, four months after service: *Pontin v Wood [1962]*
- **Fresh step:**
 - “... in order to establish a waiver, you must show that the party alleged to have waived his objection has taken some step which is only necessary or useful if the objection has been actually waived, or if the objection has never been entertained at all.”
 - The words or conduct of the party alleged to have waived the objection must be of such a nature as to properly raise the inference that the party does not intend to rely upon the objection.

- The following instances of steps which have been held to amount to an objection:
 - Filing an unconditional appearance
 - Arguing the merits of the case on the hearing of the objection
 - Applying for an order that the P deliver a SOC after objecting that a default judgment was entered upon irregular service of the writ
 - Attending a hearing and disputing the facts alleged in an Affidavit object as to irregular

8.08 - Conditional appearance

- 1) A defendant may file a conditional appearance.
- 2) A notice of conditional appearance shall be in Form 8B.
- 3) A conditional appearance shall have effect for all purposes as an unconditional appearance, unless, on application by the defendant, the Court otherwise orders.
- 4) Application under paragraph (3) shall be made by summons within 14 days after the day the conditional appearance is filed.

8.09 - Setting aside writ or originating motion

Notwithstanding Rule 8.08, the Court, on application made by the defendant before filing an appearance, whether conditional or not, may exercise its jurisdiction to—

- a) set aside a writ or originating motion or its service;
- b) make an order under Rule 46.08; or
- c) stay a proceeding

Amendment from unconditional to conditional

Can an unconditional appearance be converted to a conditional appearance?

- **R 25.01 – Withdrawal of Appearance** - A party who has filed an appearance in a proceeding may withdraw the appearance at any time with the leave of the Court.
- D may seek leave of court to correct a mistake in filing an unconditional instead of conditional appearance, as long as appearance was made *conditional* prior to the notice of appearance being served on P
- D must file, not solicitor
- Court has complete discretion as to whether to allow an unconditional appearance to be amended to a conditional appearance
- For the discretion to arise, and for court to make order, the unconditional appearance must have been filed **by accident or mistake**
 - E.g. where there has been a failure of communication between solicitor or client or misunderstanding between them
- Court will not grant order where entered **deliberately and on proper advice or consideration that such appearance be filed**

- E.g. where there was an intention to file an unconditional appearance
- Application to change the appearance must be done properly and it must be shown that the plaintiff will not be prejudiced
- Discretion will be exercised where application made promptly and it is clear the appearance was entered by genuine mistake, court will grant application
- Once notice of appearance has been given to P, an application to amend the appearance will need to be made on notice, otherwise via *ex parte* application
- **Camm v Lidner (1982)** - D applied for leave to amend unconditional entry of appearance to make it conditional. D's sought to deny jurisdiction of Court. Application refused because of delay, prejudice to P & because it was result of mere oversight & not due to any accident or mistake

SUMMARY

- Failure to file an appearance will enable the plaintiff to maintain judgement in default of appearance
- Appearance, whether conditional or unconditional, will inform P that action is going to be defended
- Unconditional appearance - acknowledges courts jurisdiction and waives any irregularities
- Conditional appearance – D has preserved rights to make application to the court to have service set aside

TOPIC 6 - PARTIES AND JOINDER OF CLAIMS

PARTIES

Introduction

- P must be able to show that their private rights have been infringed and must be able to show that they have suffered material damage, personally
- P must be able to show an individual cause of action
- P must be able to show that they have standing to sue
- P must show they have capacity to sue – must be competent – has capacity that enables him/her to make decisions in their own best interests
 - Where P suffering from legal disability to the point they can't make decisions in their own interest, person sues through litigation guardian

Parties capacity and standing to sue

- Parties must have ***locus standi***, which means a sufficient interest or standing in the subject matter of proceedings commenced by them
- All parties must have legal capacity to sue or be sued