

Principles of Litigation.....	3
OVERRIDING PURPOSE.....	3
OBJECTS OF CASE MANAGEMENT.....	3
DICTATES OF JUSTICE.....	3
ELIMINATION OF DELAY.....	3
Pre-Commencement Considerations.....	4
STEP 1: WHETHER THE CLAIM IS BARRED BY A LIMITATION PERIOD.....	4
STEP 2: WHETHER THE PARTY HAS STANDING TO SUE.....	4
STEP 3: WHETHER THE ISSUE IS BARRED BY RES JUDICATA ESTOPPEL.....	5
STEP 4: WHETHER PROCEEDINGS SHOULD BE JOINED.....	6
STEP 5: WHETHER THE COURT HAS JURISDICTION OVER THE CLAIM.....	6
CLASS ACTIONS.....	7
STEP 6: WHETHER REQUIREMENTS FOR A CLASS ACTION ARE MET.....	7
Pre-Commencement.....	8
STEP 1: WHETHER INTERIM INJUNCTIONS CAN BE GRANTED TO PROTECT THE PLAINTIFF'S POSITION.....	8
STEP 2: WHETHER A FREEZING ORDER CAN BE GRANTED TO PROTECT AGAINST DISPOSAL OF FUNDS.....	8
STEP 3: WHETHER A SEARCH ORDER SHOULD BE GRANTED TO PRESERVE EVIDENCE.....	9
Commencement.....	10
STEP 1: WHETHER THE ORIGINATING PROCESS HAS BEEN FILED PROPERLY.....	10
STEP 2: WHETHER THE DEFENDANT HAS RESPONDED TO THE ORIGINATING PROCESS PROPERLY.....	11
STEP 4: WHETHER SUBSEQUENT REPLIES HAVE BEEN WITHIN THE TIME PERIOD.....	11
STEP 5: HAVE THE REQUIREMENTS OF PLEADINGS BEEN MET?.....	12
STEP 6: WHETHER PARTICULARS BEEN GIVEN IN ACCORDANCE WITH RULES.....	13
STEP 7: WHETHER THE COURT CAN STRIKE OUT PLEADINGS.....	13
Service.....	14
STEP 1: WHETHER SERVICE WAS CARRIED OUT CORRECTLY.....	14
STEP 2: WHETHER PERSONAL SERVICE IS REQUIRED.....	14
STEP 3: WHETHER PERSONAL SERVICE HAS BEEN EFFECTED.....	14
STEP 4: WHETHER SUBSTITUTED SERVICE IS VALID.....	16
After Commencement and Before Judgement.....	17
OFFERS OF COMPROMISE.....	17
STEP 1: WHETHER THE FORMAL REQUIREMENTS OF THE UCPR OFFER HAS BEEN MET?.....	17
STEP 2: WHAT ARE THE COST CONSEQUENCES FOR REJECTED UCPR OFFERS?.....	18
STEP 3: WHETHER REJECTION OF THE UCPR OFFER WAS UNREASONABLE.....	18
CALDERBANK OFFERS.....	19
STEP 1: WHETHER THERE HAS BEEN A GENUINE OFFER OF COMPROMISE.....	19
STEP 2: WHETHER THERE WAS REASONABLE OPPORTUNITY TO CONSIDER THE OFFER.....	19
STEP 3: WHETHER THE REJECTION OF THE OFFER IS UNREASONABLE.....	19
STEP 4: WHETHER THE FORMAL REQUIREMENTS HAVE BEEN MET.....	19
SECURITY FOR COSTS.....	20
STEP 1: WHETHER SECURITY FOR COSTS CAN BE ORDERED.....	20
Client Legal Privilege.....	21
STEP 1: WHETHER CLP CAN BE ESTABLISHED.....	21
STEP 2: WHETHER CLP HAS BEEN LOST.....	22
Discovery.....	22
STEP 1: WHETHER DISCOVERY CAN BE ORDERED.....	22
STEP 2: WHETHER DISCOVERY CAN BE ORDERED FOR PERSONAL INJURY CASES.....	23
STEP 3: WHETHER DISCLOSURE CAN BE ORDERED IN THE EQUITY DIVISION.....	23
STEP 4: WHETHER DISCOVERY CAN BE SET ASIDE.....	23
STEP 5: WHETHER D HAS COMPLIED WITH DISCOVERY REQUIREMENTS.....	23
Subpoenas.....	24
STEP 1: WHETHER REQUIREMENTS OF THE SUBPOENA HAVE BEEN MET.....	24
STEP 2: WHETHER THE RECIPIENT HAS TO COMPLY WITH THE SUBPOENA OR THEY ARE EXCUSED.....	24
STEP 2: WHETHER THE RECIPIENT HAS FAILED TO COMPLY WITH THE SUBPOENA.....	24
STEP 3: WHETHER THE SUBPOENA CAN BE SET ASIDE.....	24
Affidavits.....	25
STEP 1: WHETHER THE DEPONENT CAN MAKE AN AFFIDAVIT.....	25
STEP 2: WHETHER THE AFFIDAVIT HAS BEEN SWORN OR AFFIRMED CORRECTLY.....	25
STEP 3: WHETHER THE AFFIDAVIT HAS BEEN CORRECTLY WITNESSED.....	25
STEP 4: WHETHER THERE HAS BEEN FALSE SWEARING IN THE AFFIDAVIT.....	26

Summary Disposal.....	26
STEP 1: WHETHER THE PLAINTIFF CAN CLAIM DEFAULT JUDGEMENT.....	26
STEP 2: WHETHER THE DEFENDANT CAN SET ASIDE DEFAULT JUDGEMENT.....	26
STEP 3: WHETHER THE PLAINTIFF CAN CLAIM SUMMARY JUDGEMENT.....	27
STEP 4: WHETHER THE DEFENDANT CAN CLAIM SUMMARY DISMISSAL.....	27
STEP 5: WHETHER THE COURT WILL APPLY A WANT FOR PROSECUTION.....	27
Costs.....	28
STEP 1: WHETHER THE PARTY IS ENTITLED TO COSTS ON AN ORDINARY OR INDEMNITY BASIS.....	28
STEP 2: WHETHER THE COURT MAY ORDER THE LAWYER TO BE LIABLE FOR COSTS.....	29
APPEALS.....	29
STEP 1: WHETHER THERE IS A RIGHT TO APPEAL.....	29
ENFORCEMENT.....	30
STEP 1: WHETHER A WRIT OF EXECUTION CAN BE ORDERED.....	30
STEP 2: WHETHER A GARNISHEE ORDER CAN BE ORDERED.....	30

Principles of Litigation

S 56	OVERRIDING PURPOSE	To facilitate the just, quick and cheap resolution of disputes
S 57	OBJECTS OF CASE MANAGEMENT	Just determination of proceedings
		Efficient disposal of business of the court
		Efficient use of available judicial + administrative resources
		Timely disposal of proceedings at an affordable cost
S 58	DICTATES OF JUSTICE	Overriding purpose applies to any making any order for case management such as amendment, adjournment, stay, procedural orders or any direction
		Regarding difficulty/ complexity of issues, degree of expedition or lack thereof, degree of fulfilment of duties or any injustice that may be suffered
S 59	ELIMINATION OF DELAY	Practice + procedure of the court should be implemented with the purpose of eliminating any lapse of time beyond that reasonably required and necessary for a fair trial

Pre-Commencement Considerations

STEP 1: WHETHER THE CLAIM IS BARRED BY A LIMITATION PERIOD

Locate the relevant limitation period

Breach of Contract	LA s 14(1)	6 years
Tort	LA s 14(2)	6 years
Arrears of Income	LA s 24	6 years from discovery of cause of action
Defamation	LA s 14B(1)	1 year from date of publication
Personal Injury	LA s 18A(2)	3 years from discovery of cause of action
	LA s 50C(1)(b)	12 years from the time of act/omission causing injury
	LA 50D(1)	Discoverable CoA is when a P knows a sufficiently serious injury/death has occurred + was caused by D
Compensation to Relatives (death)	LA s 19(1)(a)	6 years from date of death where CoA before 1 Sep 1990
	LA s 19(1)(b)	3 years from date of death where CoA after 1 Sep 1990

Determine when the issue occurred, from the facts

- ◇ When the accident happened; when the client suffered injury or loss
- ◇ Establish contract dates or dates of breaches
- ◇ Identify when the limitation period started + ended

Limitation period can be extended in some cases

Defamation	LA s 56A(2)	May extend by up to 3 years if just and reasonable
Personal Injury	LA s 62A(2)	May extend by up to 3 years if just and reasonable

Consider grounds or special circumstances for extending the limitation period such as disability, fraudulent concealment etc. where it would be just & reasonable to postpone the limitation period

STEP 2: WHETHER THE PARTY HAS STANDING TO SUE

A) PRIVATE PLAINTIFFS

Private Standing is not generally an issue where P is obviously the one who has suffered injury or loss	Natural person	May sue personally or through a solicitor under UCPR r 7.1(1)
	Companies	A company defined under the Corporations Act may sue via solicitor, solicitor, authorised officer or employee under UCPR r 7.1(2)
	Other Corporations	A corporation not defined as a company under the Corporations Act may sue via solicitor or authorised officer/employee under UCPR r 7.1(4)
	Local Court	Broad allowance for non-lawyer representatives unless the court orders otherwise under UCPR r 7.1(5)

B) PUBLIC PLAINTIFFS

Public Standing becomes an issue	Relator	AG grant a fiat to allow a private person to sue (becoming a relator), where the relator is liable for costs of actions
	◇	When P wants to enforce public rights/duties under statute or challenge constitutional validity of laws

STEP 4: WHETHER PROCEEDINGS SHOULD BE JOINED

A) JOINDER OF CAUSES OF ACTION

Description	Multiple claims in one proceeding
Legal Test	Relief can be claimed against D for more than one CoA if P claims D is liable in the same capacity for each CoA

B) JOINDER OF PARTIES

Description	Multiple Ps or Ds in one proceedings
Legal Test	r 6.19(1)(a) Separate proceedings would give rise to a common question of law or fact
	r 6.19(1)(b) All rights of relief claimed arise out of the same transaction or series of transactions
	r 6.19 The court may also grant leave for them to be joined (even if there is no common question of law/fact)
Joining Parties	r 6.20 Where multiple persons are jointly entitled to relief, all must be joined as plaintiffs (with consent), or otherwise joined as defendants (without consent)
	r 6.21 If there is joint liability, D may be sued alone without joining others & D can apply for stay of proceedings until all jointly liable parties are joined (when D knows another is liable)
	r 6.24 Court can order the joinder of a person who should have been joined
	r 6.25 A person cannot be joined as a plaintiff without consent
	r 6.29 Court can remove a party that is no longer necessary
Supporting Cases	Even when claims arise from separate transactions, joinder may be permitted BY LEAVE if doing so would be fair, efficient & not cause disadvantage to either party (Dean-Willcocks)
	Transactions does not necessarily require a contractual relationship (Bendir)
	Transactions can involve claims that are closely connected in fact & context such as an accident + injury against an employer & negligence of a solicitor for missing limitation periods (Birtles)
	Must be same series of transactions, not merely similar or related ones (Payne)
Implied Rules	Under UCPR r 6.19 , it is implied that P may sue both Ds together or in the alternative when they are unsure which is liable
	If a successful D was unnecessarily joined, P may be liable for their costs; if an unsuccessful D caused the joinder, the court may issue a Bullock / Sanderson court order against them

C) OTHER JOINDERS

Order for Decision	r 28.2	Common questions in DIFFERENT proceedings heard together for a binding decision for that issue, where the rest of the balance of each proceeding are heard separately
Consolidation (rare)	Different proceedings brought together where for efficiency in cost & time → tried at the same time, immediately one after the other, or for one to be stayed until the determination of another	
	r 28.5	If several proceedings are pending & involve a common question, rights to relief arise out of the same or series of transactions or it is desirable to make this order for some reason

STEP 5: WHETHER THE COURT HAS JURISDICTION OVER THE CLAIM

Identify which court has jurisdiction over the matter

Supreme	Over \$1.25m
District	Limit of \$1.25m
	Unlimited jurisdiction in personal injuries from motor vehicle or work injuries
Local Court	Up to \$20,000 (Small Claims Division)
	\$20,000 to \$100,000 (General Division)
	Limit of \$60,000 for personal injury or death claims

Commencement

STEP 1: WHETHER THE ORIGINATING PROCESS HAS BEEN FILED PROPERLY	
Under UCPR r 6.2, proceedings are initiated using a statement of claim or summons	
Statement of Claim under UCPR r 6.3	Summons under UCPR r 6.4
Where proceedings involve issues of FACT	Where proceedings involve issues of LAW
Claim for debt relief, tort, fraud, breach of duty, damages for death / injury / property, land possession, defamation → claims involving DAMAGES	Proceedings with no D, application for leave to appeal, preliminary discovery, Commercial / Tech / Construction list, judicial review, approval of settlements → no damages involved
Any case where pleadings, discovery & testing of evidence will be required	Any cases with no major factual dispute but rather pure questions of law eg. contract, legislation
Initiates pre-trial & trial processes	Initiates summary procedure & RETURN date for determination of the matter
When the case is fact-heavy, involves oral evidence or required detailed allegations to be tested at trial	When the case is law-heavy, procedural or requires statutory/equitable relief without need for oral evidence
Even if incorrect originating process is used, the court may consider proceedings as duly commenced	
Under UCPR r 6.5 , the court may order that any pleadings filed be filed as affidavits or other orders to fix it	Under UCPR r 6.6 , the court may order that any affidavits stand as pleadings or make orders for filing SoC
Technical requirements of originating process must be met	
Under UCPR 6.12 , the relief claim must be stated	Under UCPR 6.12 , the relief claim must be stated
Under UCPR r 6.13 , there must be notice to D indicating consequences for not filing defence/appearance	Under UCPR r 6.14 , there must be notice to D indicating consequences for not filing defence/appearance
Under UCPR r 6.13 , must give the address of registry where SoC is filed (further documents filed here)	Under UCPR r 6.15 , the summons must specify a return date
Under UCPR r 6.2(3) , the originating process must be served on each D	Under UCPR r 6.2(3) , the originating process must be served on each D
Under UCPR r 6.2(3A) , must include seal of court, case number / unique ID & listing date	Under UCPR r 6.2(3A) , must include seal of court, case number / unique ID & listing date
If these requirements are not met, the court has discretion to set aside proceedings or treat the failure as an irregularity that does not invalidate the proceedings under CPA s 63	
Under UCPR r 10.20(2), originating process must be personally served on each D to the proceedings	
The timeframe for valid service (period in which the originating process must be served) is 6 months for SC & LC → UCPR 6.2(4)	
1 month for DC unless SoC is only for a debt claim or D is outside of NSW, then it will be 6 months → UCPR 6.2(4)	
Failure to serve within the timeframe does not prevent P from commencing fresh proceedings by filing another originating process under UCPR r 6.2(5)	

STEP 5: HAVE THE REQUIREMENTS OF PLEADINGS BEEN MET?

The purpose of pleadings is to provide a permanent record of the boundaries of the case & provide information to the parties / court of issues in proceedings

Sets out P's claim & D's response to the claim with a binding nature on parties (regarding factual allegations) where the last unanswered pleading is deemed to be denied unless further pleadings are served

Includes SoC, defence, reply & any subsequent pleadings that were given leave for → not mandatory provided there is agreement on issues so there is no unfairness

Eg. for a breach of contract, pleadings should show that a valid contract exists through offer, acceptance, intention & consideration, then whether the incorporation of the term was express/implicit + the breach

REQUIREMENTS OF PLEADINGS

r 14.7 Pleading should only contain a summary of material fact → no evidence should be pleaded

r 14.8 Pleading must be as brief as the case allows

r 14.9 Should not plead details of conversation or quote content of document unless critical to supporting CoA

r 14.10 Facts presumed by law or the onus of proving it lies on the other party do not need to be pleaded

r 14.14 In the SoC, P must specifically plead all matters that may take D by surprise or challenge the other parties' case as invalid, such as fraud, limitation, voluntary assumption of risk, facts showing illegality

r 14.17 New matters may be raised in pleadings even if the matter arose after commencement of proceedings

r 14.18 Party must not make any allegation of fact, ground or claim that is inconsistent with previous pleadings

r 14.19 May raise any point of law

r 14.20 May not plead the general issue

r 14.23 Pleadings must be verified by affidavit, stating any facts claimed that the deponent thinks are true & any facts denied that the deponent believes is false

SUPPORTING CASES

Relief must be based on pleaded issues unless parties clearly agree otherwise (can be inferred), to protect procedural fairness; a party cannot be held liable on an unpleaded ground where mere awareness of an unparticularised allegation does not mean agreement (**Banque v Akhil**)

A pleading must clearly state all material facts necessary to support the cause of action to give fair notice to the other party and avoid procedural unfairness (**Szanto**)

P may cross-examine on matters raised in the defence, even if not pleaded, but may not use that evidence to run an unpleaded case without leave to amend (**Asic v Rich**)

D was not making submission that the accident was explained by mechanical failure as agreed, but merely suggesting that P was UNABLE to exclude that as a reason for the accident (**Kasupene**)

Pleadings may be overridden where parties have mutually conducted the trial on different issues than those originally pleaded (**Dare v Pulham**)

If the pleadings mischaracterise the case, the court can still decide it on the correct legal basis supported by the evidence, as long as the parties had a fair chance to respond. (**Films & Casting Temple**)

A court must not determine a case on unpleaded grounds without giving parties notice and a chance to respond, or it will breach procedural fairness (**Krnjulac**)

If a court wishes to resolve a case on a basis outside the pleadings, it must raise this with the parties during trial to allow submissions and further evidence (**Gould**)

A pleading omitting any material fact necessary for a cause of action is bad and liable to be struck out (**Odham Press**)

Where a pleading omits material facts rather than mere particulars, the preferable remedy is to strike out with liberty to amend (**Rubenstein**)

Courts should assess pleadings with practical fairness, not technicality, asking whether fair notice of the case is given (**Arthur Young**)