

Personal Jurisdiction

1. Is there jurisdiction?

- a. By presence; or
- b. Submission by agreement or conduct
 - i. Submission: If FJC → go to discretionary non-exercise and go through elements to establish whether exclusive vs non-exclusive. If it is non-exclusive then can co-exist then they can submit.
- c. Objection to jurisdiction

2. Has the mode of service been properly effected?

3. If NSW does not have jurisdiction in CL:

- a. Service elsewhere in Australia
- b. Service in NZ
- c. Service outside Australia (Schedule 6)
 - i. General
 - ii. Contract
 - iii. Tort
 - iv. Other provisions
 - v. Other authorities

4. Defendant's response to service

Note: Service 'outside' Australia are only relevant when:

- No Personal Jurisdiction: Service inside the jurisdiction is not possible; e.g. D has not appeared within Aus to be served
- No Submission: D has not submitted to jurisdiction (no agreement / conduct)
- Service not agreed/international:
 - Parties have not agreed on method of service
 - Service is not interstate (SEPA) / NZ (TTPA)

Common Law - Service

1. Is there jurisdiction?

A. Jurisdiction based on Defendant's Presence

At common law, the Court has personal jurisdiction if the D is present in the forum **at the time of effective service** (cf at the time it is issued) (*Gosper v Sawyer*; *Laurie v Carroll*)

a. INDIVIDUALS

- There **will be** jurisdiction where:
 - **Served & Issued:** D is **present in the jurisdiction when** the originating process is **issued and served** (*Laurie v Carroll*)
 - **Length of presence**
 - **Does not matter how short or fleeting the presence is** (*Laurie v Carroll*; *HRH Maharanee*)
 - Eg: D served when he 'popped into' the races (*HRH Maharanee*)
 - Even though this may have ruined his day, and some may regard it as 'bad form', this does not matter. Court can only strike out service if it is vexatious/oppressive or an abuse of process (*HRH Maharanee*, *Davies LJ*)

- Even if the D is transiting through the forum (*Sapphire Group*)
- Valid if D came into the jurisdiction specially to be served (*Perrett v Robinson*)

o Purpose of presence

- Generally the **purpose of D's presence in the forum is irrelevant** to whether the Court has jurisdiction (*Laurie v Carroll, 331; Perrett v Robinson*)
- **Fraud Exception:** where P tricked or fraudulently enticed or physically coerced D into the jurisdiction for the sole concealed purpose of P to serve them (*Perrett v Robinson*)
 - Narrow exception: concealed purpose must be the sole purpose
 - *Perrett v Robinson*: No fraud where P wanted to sue in Qld, so drove D to Qld where he served process on him – **D had come willingly** and there was no concealed purpose

- There is **no jurisdiction** where:

- o (i) D leaves **before the originating process is issued** (*Laurie v Carroll*)
- o (ii) D was in the jurisdiction when the originating process was **issued but left before it was served** (*Laurie v Carroll*)
 - **Once D leaves, they are no longer amenable to the jurisdiction** (*Laurie v Carroll*)
 - D left Vic a day before writ was issued, knowing P may sue, but there was no indication he deliberately evaded service. D was therefore outside jurisdiction
 - **Exception:** a person who left after originating process was issued and who either: **knew the process had been issued or left jurisdiction evade service of process** is regarded as being within the Court's jurisdiction (*Laurie v Carroll, 328; Joye v Sheahan [20]*)
 - Strong evidence D knew of summons and left country to evade service – hence Court had jurisdiction where:
 - o 9 Dec: P's solicitors told D's solicitors summons issued, and asked whether they had instructions to accept service
 - o 13 Dec: D left jurisdiction
 - o 16 Dec: D's solicitors told P's solicitors they had no instructions to accept service
- o (iii) Unlikely that jurisdiction can be established where **D was only in the forum's airspace** at the time originating process was issued (*Joye v Sheahan, 421*)
 - D must **know** about the writ being issued – no substituted service can be made

b. CORPORATIONS

- Registered companies

- o **Australian corporation:** all companies incorporated in Australia are considered present in the forum jurisdiction (*SEPA s 15*)

- o **Foreign company (non-NZ) registered in Australia:** to be present, foreign registered companies must
 - Be registered as a foreign corporation (*Corporations Act s 601CD*)
 - Have a registered office (*Corporations Act s 601CT(1)*)
 - Have appointed a local agent (*Corporations Act s 610CG*)

- **Unregistered foreign companies**

- The corporation must be present in the jurisdiction for service to be affected. The test is whether the corporation was ‘**carrying on business**’ in the territory of NSW (*Wimbourne*, 165 per Holland J).

- **Indicia:**

- o **(1) Agent:** Presence may be established where the company is represented in the forum by an agent who has authority to make binding contracts with persons in the place.

▪ **Agency if:**

- Agents must have **binding authority**, not be mere ministerial agents
- Look at whether they have much **discretion and control**, or simply performing functions under instructions (e.g. local bank not an agent in *Wimborne*)
- Note: a **company secretary** has authority to bind the company

▪ **No agency if:**

- The **local representative is a ‘mere ministerial agent’** such that they have no authority to contract (*Wimbourne*)
 - o A ministerial agent is an agent performing an administrative function with little discretion
 - o Are they actually a local representative or merely working out of Australia?
 - o *Local NSW bank not an agent for foreign co via an arrangement where it collected proceeds from NSW importers and remitted it back to foreign co [foreign co more like the local NSW bank’s client; local bank like advisor]*
- The agent carries out his **own business** in the forum and not the foreign co’s (*Adams v Cape*)
- Likely agent if they are the **exclusive dealer in the jurisdiction** (*Vautin*)
 - o *US yacht manufacturer was present in Aus through exclusive dealer, who was required to give yacht service facilities and authority to bind the merchant by furnishing warranty – this was a ‘succession of acts designed to advance enterprise of co pursued for pecuniary gain’*
- A **solicitor is appointed to represent the foreign co** in forum proceedings (*Wimbourne*, 165)

▪ **Subsidiaries:**

- The parent of a local subsidiary does not carry on business **unless** their degree of control was such as to enable **piercing of the corporate veil**. It is necessary to

demonstrate a lack of separate corporate personality between the subsidiary and the parent. (*Adams v Cape*)

- **Relevant factors to whether a subsidiary's business is that of parent co:**

- o direct reimbursement [cost accommodation and staff], contributions, remuneration from parent; reserving resources for parent, displays parent's name; acts in name of parent to bind it with or without specific authorisation; what business they transact as principle exclusively on own behalf; degree of control; purpose for acquiring fixed place

- o **(2) The business is conducted in a fixed and definite place in the forum**

- The business must also be conducted in a fixed and definite place in NSW.
- Relevant considerations (*Wimbourne, 165 per Holland J*)
 - Whether the foreign co's name is displayed at the agent's place of business
 - Whether it owns or leases the premises or pays rent
 - Whether it employs staff, or particular staff are allocated by the agent to its business and it pays their wages or office expenses
- Merely having assets in the forum is insufficient (*Adams v Cape*)
- **Conclusion:** Thus on balance, [Funtime] unlikely has a fixed and definite place in the forum.

- o **(3) The business has been conducted in the forum for a sufficiently substantial period**

- 9 days considered sufficient
- **Apply XX:** The business must also have conducted in the forum for a sufficiently substantial period. Since the MD resides in Australia it is not improbable that work conducted in Australia is more than 'minimal' (Cape Industries).

- **Result:** Has the Wimbourne test been satisfied?

- o Yes: Co is present in the forum territory, and hence is amenable to jurisdiction of the forum court
- o No: Consider *UCPR Sch 6*

B. Jurisdiction based on Defendant's Submission

A defendant who submits to the Court's jurisdiction may be served outside jurisdiction without leave of the Court

1. Submission by Agreement

- D can positively indicate submission to the Court's jurisdiction by agreement through:

- **(1) A Jurisdiction Clause (go to FJC scaffold to establish this)**

- o **Apply XX:** Funtime can positively indicate submission to the Court's jurisdiction by agreement through a jurisdiction clause whether exclusive or non-exclusive (*Oceanic Sun*).
- o **Incorporation:** Has the clause been incorporated into the agreement? (*Oceanic Sun*)

- The applicable law to determine whether a jurisdiction clause is incorporated is the **lex fori** (*Oceanic Sun*)
 - o E.g. “The Parties agree to the (exclusive) jurisdiction of the courts of NSW to resolve any dispute under this contract...” is sufficient
 - o **Apply XX:** The first issue is whether Funtime’s JC is incorporated based on lex fori rules.
- **If yes:** the parties may be taken to have submitted to the specified jurisdiction (*Howard*)
 - An agreement to submit should not be construed narrowly, but the agreement must be express and cannot be inferred from the contractual terms (*Telesto*)
- A **choice of law** clause standing by itself is not sufficient to give rise to submission (*Gilman*)

- (2) Agreement about Service Method

- o The parties, can by agreement, **set out a process for service**, adherence to which indicates acceptance of jurisdiction (*UCPR r 10.6(1)*; *Howard [23] per Drummond J*)
 - This will be considered sufficient service (*UCPR r 10.6(2)*)
 - Claim for the possession of land: the agreement referred to must be made **after** the originating process is filed but before it is served (*UCPR r 10.6(1A)*)

- (3) Instructions to Lawyers

- o A person who knows litigation is pending may **instruct a lawyer to accept service** of originating process on their behalf
- o A foreign party may include a contractual provision which authorises a lawyer within the jurisdiction to accept service on its behalf (*UCPR r 10.13*)

2. Submission by Conduct

- **IF NO:** There are no facts to indicate submission by [Funtime]’s conduct to NSW jurisdiction (*Vertzyas*) such as via ongoing litigation.
- D has submitted if D has done anything **inconsistent with objecting to jurisdiction** (*Vertzyas*) or taken a step in the proceedings which amounts to a **recognition of the Court’s jurisdiction** in respect of the claim (*The Messiniaki Tolmi*)
- **Test:** Has there been a voluntary act **unequivocally** evincing an intention to abandon or not assert a right to object to jurisdiction

- Examples of submission:

- o **Application for summary dismissal that did not raise any issue as to jurisdiction** (*Garsec*)
 - An application of this type is **substantive**, not **procedural**

- **If procedural** – ie steps taken to better understand the case / consider their options – would not be submission
- **Procedural examples:** seeking **further particulars**, or the production of documents [52]
 - o Note: seeking further particulars was a factor in favour of D submitting
- **Garsec:** D entered notice of appearance [done deliberately, after careful consideration appreciating the risks]. D did not immediately seek leave to withdraw its appearance after P withdrew its SOC and filed an amended SOC. D sought summary dismissal instead. Held: submitted.
 - Decision to move for summary judgment was made deliberately, to seek to secure some perceived tactical advantage.
- o **Arguing merits at the same time as objecting to jurisdiction** (*Vertzyas; Wimborne 177*)
 - Not every act seeking to raise the merits of P's is inconsistent (*Vertzyas [105]*)
 - Only submission where there is an 'unequivocal intention' to contest [the case] on its merits (*Vertzyas [105]*)
 - *Filing a defence which pleaded a defence on the merits [ie arguing issues about the cause of P's injury and the nature of 'bodily injured suffered' as well as a lack of jurisdiction, D submitted.*
 - *D sent letter to P's solicitors seeking further particulars relating to the merits, requiring P to attend exam by medical practitioners engaged by D*
- o **Counterclaims / cross-claims which are founded on or directly arise out of the same subject matter** as P's claims (*Marlborough, Wimbourne 174*)
 - **A foreign P**, who brings a claim, submits himself by necessary implication to the Court's jurisdiction including to any **related cross and counter-claims of D** (*Wimbourne 174*)
 - **Does a party submit to the jurisdiction of the larger claim by defending itself against a related cross claim?**
 - Generally, a party who submits to the jurisdiction for the purposes of an action does not submit to jurisdiction for all cross claims (*Marlborough*)
 - **Amended claims: But:** where the first cross-claim's subject matter (which D submitted to) is **essentially the same** as the amended/subsequent cross-claim, D will be unable to object to the court's jurisdiction (*Marlborough*)
 - o *Marlborough submitted to NSWSC jurisdiction re initial cross claim for negligence. When cross-claimants amended their claim to include a contract claim for damages for loss of ship [also because of negligence], Marlborough could not object to jurisdiction as the 2 cross claims had the*

same subject matter [the sinking of the ship + parties' responsibility for the sinking]

- Even though some additional matters may need to be determined, the connection between the two claims was not substantially different or coincidental or unrelated (231)
- **Where the cross-claims are distinct from the main claim, no submission** (*Wimbourne*)
 - o A mere connection with evidence given or facts found in P's action is not sufficient (175)
 - o *Cross-claim 1 relating to Swiss assets and cross claim 2 re if a building contract breached separate to the main lawsuit – no submission*
- o **Waiver** (*Wimbourne*, 180)
 - Requires words or conducts of such a nature an inference can properly be drawn that the party alleged to have **waived the objection does not intend to rely upon it**
 - **Actions outside of Court do not constitute waiver** – only regard what is presented to Court
 - Eg sending emails / negotiating outside of Court – not waiver.
 - *Letters by D's solicitor regarding intention to proceed in court (ie going to the merits of the case) were **not** held to constitute submission*
 - **If D consistently maintains its objection to jurisdiction**, it has not waived its right to object even if it makes other applications which go beyond a protest to jurisdiction
- o **Entering an appearance by a respondent** outside jurisdiction (*Howard* [19] per Drummond J)
 - *Marlborough submitted to the jurisdiction by making an appearance in relation to the initial cross-claim (Marlborough)*
 - *E.g. Solicitors accepting service*
- o **Other:**
 - Allowing the substantive claim to be heard (*Rimini*, 30)
 - Consenting to interlocutory orders (*Esal v Pujara*)
 - Arguing against the extension of applicable limitation period to the claim (*Portelli v Seltsam*)
 - Producing documents in response to a subpoena (*Walker v Newmont*)
 - Applying for an order of security for costs (*Lhoneux, Limon & Co; cf White v Hardwick*)
 - Seeking document discovery, interviewing witnesses (Nygh and Mortensen)

3. Objection to jurisdiction

- (i) In **NSW**: D may object to a NSW Court's jurisdiction without submitting by **seeking an order** under *UCPR r 12.11* to set aside originating process (*UCPR r 12.11(1)(a)*) or service (*UCPR 12.11(1)(b)*) without having to enter an appearance
 - o Must be done within the time to file a defence (usually 28 days)
 - o Such an application will not constitute submission to the Court (*UCPR r 12.11(4)*) unless D starts to argue the merits of the case
- (ii) **D can refuse to enter an appearance**
 - o If D refuses to enter an appearance, P cannot proceed except by leave of court (*UCPR r 11.8AA*)

2. Has the mode of service been properly effected?

Note: If D is:

- In **NSW**: serve according to UCPR
- In **another S/T**: serve according to SEPA
- In **NZ**: serve according to TTPA
- **Overseas**: UCPR Schedule 6

A. Personal Service on Parties in NSW

1. Individuals

- **PQ**: As to mode of service, given X is present in NSW, under *UCPR r 10.20(2)(a)*, P must be personally served for [NSWSC] to have jurisdiction. They must be served effectively for example via leaving it on their person as per the rules in *UCPR r 10.21(1)*.

- Superior courts rules for Service including NSWSC:

- o Originating process in all courts (except local courts) must be personally served (*UCPR r 10.20(2)(a)*)
 - **General**: Personal service under *UCPR r 10.21(1)*
 - Personal service effected by **leaving a copy** of the OP with the person **or**
 - If the person does not accept, by **putting the copy down in the person's presence** and telling the person the nature of the document.
 - **If P is prevented from approaching D due to violence or threat of violence**, P may deliver OP to the other person by leaving it as near as practicable to them (*UCPR r 10.21(2)*)
 - This is taken to be personal service (*UCPR r 10.21(3)*)
 - **Note**: provisions for personal service on Crown Solicitor (*10.23*), judicial officers (*10.24*), inmate (*10.25*), person who 'keeps house' (*10.26*)
- o **Substituted service**:
 - If the originating process (*UCPR r 10.14(1)*)
 - **(a)** cannot practically be served on the person or
 - **(b)** cannot practically be served on the person in the manner provided by law

The Court may by order, direct that instead of service, such steps be taken as are specified to bring the document to the notice of the D

▪ **Methods**

- **[Court order]** *UCPR r 10.14(2)*: Court may direct document be taken to be effectively served following a process
- **[ask for forgiveness]** *UCPR r 10.14(3)* If steps have been taken other than under an order for the purpose of bringing the document to the notice of the person concerned, Court may deem service to be effective

▪ **Effect**: Substituted service is taken as personal service

▪ Eg *Joye v Sheahan*: *allowed order of substituted service where D left forum to evade service*

- **Local/District Courts for Service (UCPR r 10.20(2)(b))**

- o (i) May be personally served on the D
- o (ii) May be left, having been addressed to D, at D's business or residential address, with a person who is apparently of or above the age of 16 and apparently employed at or residing at that address

2. Corporations

a. Registered Australian Co

- i. Service of OP can be effected in accordance with *UCPR r 10.22(a)* and/or *CA s 109X* [ie as under *UCPR r 10.22(b)*]
- ii. Unpersuasive argument SEPA may override this but this seems counter to SEPA's purpose
- iii. Methods:
 - 1. Leaving it or posting it to the registered office (*CA s 109X(1)(a)*)
 - 2. Delivering personally to a director who resides in Australia or an external territory (*CA s 109X(1)(b)*)
 - 3. Personally serving the document on a principal officer of the corporation (*UCPR r 10.22(a)*)

b. Registered foreign company (non-NZ) [registered in Aus]

- i. Service of initiating process can be effected in accordance with:
 - 1. *CA s 601CX* [ie as under *UCPR r 10.22(b)*]
 - a. Leaving it at or posting it to the registered office (*s 601CX(1)(a)*)
 - b. If a registered foreign company: leaving it at the address of a local agent of the foreign company (*s 601CX(1)(b)*)
 - 2. *UCPR r 10.22(a)* [probably, although 'corporation' is not defined in the UCPR]
 - a. Personally serving the document on a principal officer of the corporation

c. Unregistered Foreign Company

- i. Service of initiating process can be effected in accordance with *UCPR r 10.22(a)* [but corporation is not defined in the UCPR
 - 1. However, this is only if the foreign company is “**present**” in NSW (*Wimbourne*)
 - 2. Methods:
 - a. Personally serving the document on a principal officer of the corporation (*UCPR r 10.22(a)*)
 - b. In any other manner in which service of such a document may, by law, be served on the corporation (*UCPR r 10.22(b)*)