

## JOINDER - RESOLVING DISPUTES BETWEEN PARTIES AND AVOIDING MULTIPLICITY

### Joinder

- N/B: Parties must have capacity and standing before these issues arise

#### STEP 1 INTRODUCTION

**STATE:** Per *s 29(2) SCA*, the court must exercise its jurisdiction to ensure matters are completely and finally determined and a multiplicity of proceedings for those matters is avoided.

- This is reinforced by *s 1(c) CPA* which requires the court to facilitate the just, timely and efficient resolution of a dispute
  - → Where there are multiple proceedings on foot all dealing with the same issues, it undermines the [D] in the CPA.

**May arise where there are:**

##### 1) Multiple parties

- Joinder of parties at the outset (by P);
- Addition, removal and substitution of parties (by either party)
- Amicus Curiae and Intervenues

##### 2) Multiple claims

- Res Judicata — Issue Estoppel; Anshun estoppel
- Joinder of claims — by P; by D (incl. counterclaim, set off, 3P procedure)
- Consolidation

### **Joinder of parties**

N/B: sometimes before Joinder – may also want to consider discovery from prospective P

- → Where [P] has not issued proceedings but knows who [D] is and needs more information to make an informed decision about whether to commence proceedings, they can apply for preliminary discovery order (*SCR r 32.05, Hunter*). Per *SCR r 32.05*, [P] can undertake preliminary discovery of documents from a non-party to help identify the nature of the parties' claim.

#### STEP 1 INTRODUCTION

**STATE:** Courts must exercise jurisdiction to avoid multiplicity of proceedings and ensure all matters in dispute are completed and finally determined (*s 29(2) SCA*)

- At the commencement of litigation it may be necessary to join other parties —
  - **Join Plaintiffs** — if they suffer the same 'legal injury' in similar circumstances, it may be both strategic for the parties from a costs liability perspective but required under the CPA;
  - **Join Defendants** — if there are multiple entities responsible for the wrongdoing / deep pocket concerns;
- N/B: Different rules exist under the SCR to deal with multiple parties depending on whether they are modified at the start or during proceedings.
  - joinder = pre proceedings

	<ul style="list-style-type: none"> <li>○ addition/ substitution / removal = during proceedings</li> </ul> <p>Note:</p> <ul style="list-style-type: none"> <li>● If the limitation period for the action has expired under the <b>LAA</b> — the party may not be able to be brought into the action; <ul style="list-style-type: none"> <li>○ Implications for damages—may be calculated from the point of litigation.</li> </ul> </li> <li>● Additional costs liability may be incurred by adding parties for all claims lost, P must pay costs for the D’s</li> <li>● If there are more than 6 plaintiffs — is a class action a more appropriate avenue?</li> <li>● Before a D is joined: does P</li> </ul>		
<p><b>STEP 2 JOINDER - PRE PROCEEDING</b></p>	<p>The P must consider whether any other parties share the harm or liability to shape the bringing of the claim from the outset:</p> <ul style="list-style-type: none"> <li>● <b>R 9.03</b> – P must join other jointly entitled P’s</li> <li>● <b>R 9.03</b> – P may join other P’s</li> <li>● <b>R 9.02</b> – P must join certain D’s w/ joint liability (c.f. joint and several)</li> <li>● <b>R 9.01</b> – P may sue multiple D’s in multiple capacities</li> </ul> <table border="1" data-bbox="477 856 1432 1892"> <tr> <td data-bbox="477 856 716 1892"> <p><b>Compulsory joinder</b></p> </td> <td data-bbox="716 856 1432 1892"> <p><b>Joinder of other P’s by the P (P jointly entitled)</b></p> <ul style="list-style-type: none"> <li>● If a P claims relief to which someone else is <b>jointly entitled</b>, then all persons jointly entitled <b>must</b> be joined to the claim (<b>r 9.03(1) SCR</b>) <ul style="list-style-type: none"> <li>○ <b>Example:</b> If P + [another person] have made a loan to D and D has not paid = joint entitlement in the debt recovery claim</li> <li>○ Therefore → if P is aware of another person with entitlement to the relief sought, they do have a duty to join them to the proceeding.</li> </ul> </li> <li>● <b>N/B: Options</b> - the Plaintiff can also by consent join other P’s who want to be involved (e.g. traditional/permissive joinder or via representative proceedings in class actions)</li> </ul> <p><b>Joinder of D’s by the P (D jointly liable)</b></p> <ul style="list-style-type: none"> <li>● Where D is jointly liable under a contract with someone else, P must claim against <b>all persons jointly liable</b> - otherwise the court can stay proceedings until those D’s are joined (e.g. mortgagees) (<b>SCR r 9.03(3)</b>) <ul style="list-style-type: none"> <li>○ C.f. - if there is <b>joint and several liability</b> with another D, then that person need not be joined (e.g. utility bills, partnerships) (<b>SCR r 9.03(2)</b>)</li> </ul> </li> <li>● <b>N/B: Options</b> - In addition, the P may join other parties via permissive joinder (<b>SCR r 9.02</b>)</li> </ul> </td> </tr> </table>	<p><b>Compulsory joinder</b></p>	<p><b>Joinder of other P’s by the P (P jointly entitled)</b></p> <ul style="list-style-type: none"> <li>● If a P claims relief to which someone else is <b>jointly entitled</b>, then all persons jointly entitled <b>must</b> be joined to the claim (<b>r 9.03(1) SCR</b>) <ul style="list-style-type: none"> <li>○ <b>Example:</b> If P + [another person] have made a loan to D and D has not paid = joint entitlement in the debt recovery claim</li> <li>○ Therefore → if P is aware of another person with entitlement to the relief sought, they do have a duty to join them to the proceeding.</li> </ul> </li> <li>● <b>N/B: Options</b> - the Plaintiff can also by consent join other P’s who want to be involved (e.g. traditional/permissive joinder or via representative proceedings in class actions)</li> </ul> <p><b>Joinder of D’s by the P (D jointly liable)</b></p> <ul style="list-style-type: none"> <li>● Where D is jointly liable under a contract with someone else, P must claim against <b>all persons jointly liable</b> - otherwise the court can stay proceedings until those D’s are joined (e.g. mortgagees) (<b>SCR r 9.03(3)</b>) <ul style="list-style-type: none"> <li>○ C.f. - if there is <b>joint and several liability</b> with another D, then that person need not be joined (e.g. utility bills, partnerships) (<b>SCR r 9.03(2)</b>)</li> </ul> </li> <li>● <b>N/B: Options</b> - In addition, the P may join other parties via permissive joinder (<b>SCR r 9.02</b>)</li> </ul>
<p><b>Compulsory joinder</b></p>	<p><b>Joinder of other P’s by the P (P jointly entitled)</b></p> <ul style="list-style-type: none"> <li>● If a P claims relief to which someone else is <b>jointly entitled</b>, then all persons jointly entitled <b>must</b> be joined to the claim (<b>r 9.03(1) SCR</b>) <ul style="list-style-type: none"> <li>○ <b>Example:</b> If P + [another person] have made a loan to D and D has not paid = joint entitlement in the debt recovery claim</li> <li>○ Therefore → if P is aware of another person with entitlement to the relief sought, they do have a duty to join them to the proceeding.</li> </ul> </li> <li>● <b>N/B: Options</b> - the Plaintiff can also by consent join other P’s who want to be involved (e.g. traditional/permissive joinder or via representative proceedings in class actions)</li> </ul> <p><b>Joinder of D’s by the P (D jointly liable)</b></p> <ul style="list-style-type: none"> <li>● Where D is jointly liable under a contract with someone else, P must claim against <b>all persons jointly liable</b> - otherwise the court can stay proceedings until those D’s are joined (e.g. mortgagees) (<b>SCR r 9.03(3)</b>) <ul style="list-style-type: none"> <li>○ C.f. - if there is <b>joint and several liability</b> with another D, then that person need not be joined (e.g. utility bills, partnerships) (<b>SCR r 9.03(2)</b>)</li> </ul> </li> <li>● <b>N/B: Options</b> - In addition, the P may join other parties via permissive joinder (<b>SCR r 9.02</b>)</li> </ul>		

		<p><b>Joinder of parties by the D (D jointly and severally liable)</b></p> <ul style="list-style-type: none"> <li>• See below</li> </ul>
	<p><b>Permissive joinder</b></p>	<p><b>STATE:</b> Per <i>SCR r 9.02</i>, two or more persons may be joined as either P's or D's in the proceeding if one of the two limbs are met:</p> <ul style="list-style-type: none"> <li>• <b>LIMB 1 –</b> <ul style="list-style-type: none"> <li>○ If separate proceedings were brought by/against each party a common question of law/fact would arise (<i>r 9.02(a)(i)</i>); <b>OR</b></li> <li>○ All rights to relief claimed arise out of the transaction (<i>r 9.02(a)(ii)</i>); <b>OR</b></li> </ul> </li> <li>• <b>LIMB 2 -</b> <ul style="list-style-type: none"> <li>○ Where the court gives leave because joinder is in the interests of justice (<i>r 9.02(b)</i>).</li> </ul> </li> <li>• N/B: If you can make out one limb in <i>r 9.02(a)</i>, you have a good chance of success under <i>r 9.02(b)</i>.</li> </ul> <p><b><u>Sub-section (a)(i)</u></b></p> <p><b>STATE:</b> Separate proceedings have been brought by or against [<b>the persons</b>], with <b>common questions of law or fact</b> arising in all the proceedings: <i>r 9.02(a)(i)</i>;</p> <ul style="list-style-type: none"> <li>• <b>Exam tip:</b> state the 1. question of law (e.g. negligence, breach of contract causing personal injury and economic loss) and 2. question of fact (e.g. all ate contaminated berries)</li> </ul> <p><b><u>Sub-section (a)(ii)</u></b></p> <p><b>STATE:</b> All rights to relief claimed (joint, several or alternative) are in <b>respect of / arise from the same transaction(s)</b></p> <ul style="list-style-type: none"> <li>• 'Same transaction' = is accorded a liberal interpretation: incl. the actual accident and injury, and any other matter of relevance in the action against the original D's.</li> <li>• <b><i>Birtles v Cth</i></b> — work injury claim where all D's maintained worker was statute barred — P sought to join solicitors to the action for negligent advice re litigation → same transaction</li> <li>• <b><i>Aston (Australia) Properties</i></b> — Various taxpayers sought appeal on the assessment for their land tax and duties. The appeal sought to raise questions common to all the taxpayers, and the joinder did not give rise to any unfairness, so it was adopted</li> <li>• <b><i>Re Robin Bishop</i></b> — 115 applicants joined the proceeding: all deposited funds as a result of misrepresentations in letters sent by the</li> </ul>

		<p>respondents. Want to have just resolution w/ limited costs and delays.</p> <ul style="list-style-type: none"> <li>○ Not likely to cause unfairness (c.f. cases where the sheer number overburdens one of the parties). Also not appropriate to grant joinder if the P's are represented by different groups of solicitors. Substantial overlap in evidence.</li> <li>● <b>Payne v Young</b> — Two separate proceedings re invalidity of WA regulations → not the same: no common participation in regulative scheme, each P's circumstances were unique</li> </ul> <p><b>Sub-section (b)</b></p> <p><b>STATE:</b> Where the court gives leave because joinder is in the interests of justice</p> <ul style="list-style-type: none"> <li>● N/B: If the parties can establish one of the limbs in (a) — i.e. either there is a common question of law/fact OR its part of the same transaction(s), then the court will likely give leave under (b) (<b>A&amp;J Partitions v Jolly</b>)</li> <li>● N/B: CPA and joinder → The court has a wide discretion to give leave to permit joinder, with its exercised conditioned by the CPA (<b>Lee v Korean Society</b>). They should: <ul style="list-style-type: none"> <li>○ Give effect the overarching purpose: <b>s 8</b>;</li> <li>○ Take action conducive to the just, efficient, timely and cost effective resolution: <b>s 7</b>;</li> <li>○ Regard to the efficient conduct of the business of the court: <b>s 9(1)(c)</b>;</li> <li>○ The efficient use of judicial and administrative resources: <b>s 9(1)(d)</b>; and</li> <li>○ Any prejudice that may be suffered by a party as a consequence of any order proposed to be made or discretion proposed to be given by the court: <b>s 9(2)(f)</b></li> </ul> </li> </ul>
<p><b>STEP 3 - ADDITION / SUBSTITUTION / REMOVAL</b></p>	<p>The emphasis of these rules is to get the right parties in the proceeding at the right time</p> <ul style="list-style-type: none"> <li>● N/B: Where an order is made under <b>SCR r 9.06</b>, the originating process shall be amended within 10 days + if a new D is added/substituted, they must be personally</li> <li>● served with the originating process (<b>SCR r 9.11</b>)</li> </ul>	
	<p><b>Addition</b></p>	<p><b>STATE:</b> [Party] could apply for the court to exercise its power under <b>r 9.06</b> to add another party.</p> <ul style="list-style-type: none"> <li>● Per <b>SCR r 9.06(b)</b> — the court may order that any of the following be added as a party:</li> </ul>

		<ul style="list-style-type: none"> <li>○ Persons who <b>should have been joined</b> (<i>SCR r 9.06(b)(i)</i>) <b>OR</b> → necessary joinder</li> <li>○ presence is necessary to ensure <b>all questions are effectually and completely determined</b> (<i>SCR r 9.06(b)(i)</i>) <b>OR</b> → permissive joinder</li> <li>○ Person between whom and P/OP there is a question related to the proceeding where it is just and convenient to determine it (<i>SCR r 9.06(b)(ii)</i>) <ul style="list-style-type: none"> <li>■ ‘Just and convenient’- can consider: <ul style="list-style-type: none"> <li>● Prejudice to the D’s;</li> <li>● Cost and time implications</li> <li>● Multiplicity of proceedings</li> <li>● Questions of liability arise</li> </ul> </li> </ul> </li> <li>● N/B: courts are generally reluctant to permit a defendant to add another defendant, because this would force a defendant on an often unwilling plaintiff (<i>Vandervell</i>) but could be possible in certain circumstances.</li> <li>● N/B: If the court wishes to add a P, they must have the consent of that proposed P in writing or otherwise ordered (<i>SCR r 9.07</i>) <ul style="list-style-type: none"> <li>○ An application to add a person must be supported by affidavit, demonstrating that persons interest in the proceeding (<i>SCR r 9.07(2)</i>)</li> <li>○ May be hard in class actions</li> </ul> </li> </ul>
	<b>Removal</b>	<b>STATE:</b> The court can order that a person who is not proper or necessary cease to be a party: ( <i>SCR r 9.06(a)</i> )
	<b>Substitution</b>	<b>STATE:</b> Per <i>SCR r 9.06(c)</i> , a person under <i>(b)</i> [addition] can be substituted for another under <i>(a)</i> [removal]
<b>STEP 4 - NON-PARTY PARTICIPATION IN PROCEEDINGS - amicus curiae / interveners</b>	<b>USED TO:</b> Get parties involved whose rights have not directly been affected, but can still have a bearing on proceedings.  <b>Interveners</b>	<ul style="list-style-type: none"> <li>● A person whose interests are directly and significantly <b>affected by judgment</b> but they are not ordinarily entitled to be a party as they <u>have no direct involvement in the transactions/subject matter of dispute.</u> <ul style="list-style-type: none"> <li>○ They are more than just preferring one outcome over another — the judgment may have significant implications.</li> </ul> </li> </ul>

- PRACTICAL:
  - To become an intervener — some statutes confer the powers of intervention (e.g. ACCC, HREOC, AG's), but everyone else must seek the leave of the court.
  - They become a party with all the burdens associated with it.
  - Example: In *Levy* — various media outlets sought intervener status (Fairfax, Herald Sun etc)

**Amicus curiae**

- A 'friend of the court' who wishes to be involved in proceedings but is not a party in proceedings. Per Brennan CJ in *Levy*, an amicus will be heard when:
  - Court believes the case will be significantly assisted by the amicus' submission on the law or relevant fact in a way the court would not have otherwise been assisted; **and**
  - The costs /delay is not disproportionate to the expected assistance.
- N/B: Enables the bringing of arguments that may not otherwise be presented. An amicus can be State, NGO's, Law Reform groups, academics (eg Castan Centre). However, as there is no direct effect to their interest ≠ lead evidence.
- Example:
  - *In Levy* — the Australia Press Council sought status as an amicus;
  - *In CBA v Doggett* — members of the Vic Bar's pro bono scheme became amicus curiae. This was not opposed by the CBA and helped propel submissions.

**ANALOGISE / DISTINGUISH**

- *Levy* - Regulations made under two pieces of legislation made it an offence to be within an area set aside for the hunting of game birds without a license. Levy opposed duck shooting and was charged for being in a prohibited hunting area without a license. Levy claimed his presence was to:
  - (a) collect dead and wounded ducks (and other species) illegally shot; and
  - (b) draw media attention to the cruelty of duck shooting. Argued the regulations were invalid for infringing on the IFPC.
 HELD: Rejected by HCA unanimously.

**Multiple claims**

- P must bring all their actions at once:
  - Res judicata
  - Anshun estoppel and
  - Issue estoppel
  - [Unless: the joinder is inconvenient: see below]
- N/B: D can also join claims (see below)

**STEP 1**

- **Res judicata** – related to the entire cause of action - a final judgment

<p><b>INTRODUCTION / OVERVIEW</b></p>	<p>on the merits of an action precludes the parties from re-litigating issues that were raised in that action</p> <ul style="list-style-type: none"> <li>○ <b>Subset: Anshun estoppel</b> — enables the D to seek a stay on the grounds that a claim ought to have been raised in earlier proceedings; <ul style="list-style-type: none"> <li>■ It's the <u>same</u> as res judicata but extends it to issues that could have been raised in the prior action</li> </ul> </li> <li>● <b>Issue estoppel</b> - Occurs when a particular matter (of law or fact) has been decided in earlier proceedings → that prior court decision may preclude re-litigation of the issue in a different cause of action involving a party to the first case.</li> <li>● N/B: Each doctrine pushes parties to bring their litigation in a way that furthers the overarching purpose of the CPA</li> </ul>	
<p><b>STEP 2 ESTOPPEL</b></p>	<p><b>Res judicata</b></p> <p><b>** also known as 'cause of action' estoppel</b></p>	<p>→ Where a <b>final judgment</b> on the <b>merits of the action is made</b>, parties are <b>precluded from re-litigating</b> the issues raised in the action</p> <p><b>Ensuring the relevant claims are brought in the proceeding —</b></p> <ul style="list-style-type: none"> <li>● Doctrine that prevents a party re-litigating a matter the court has decided in an earlier proceeding (e.g. in a different jurisdiction or court) because the party is estopped from doing so <ul style="list-style-type: none"> <li>○ Also extends to any claims that could have been made in the earlier proceeding b/w/een the same parties (Anshun estoppel) → the failure to bring the claim is not a basis for re-litigation</li> </ul> </li> <li>● Policy rationale is two-fold: <ol style="list-style-type: none"> <li>(a) a case should decide all matters between the parties → coming back to court with a variation on the same dispute is inefficient; and</li> <li>(b) public interest requires an end to litigation <ul style="list-style-type: none"> <li>○ Founded on a necessity for the ordinary administration of justice, the avoidance of reanimation of issues that could have been/should have been decided in earlier litigation (<i>Anshun</i>)</li> </ul> </li> </ol> </li> </ul> <p>N/B: Practical considerations —</p> <ul style="list-style-type: none"> <li>● P - must consider res judicata in the drafting of a SOC and possible defence from D (which parties and claims should be in the proceeding); <ul style="list-style-type: none"> <li>○ Should bring as many reasonable useful claims as possible, but must also keep costs reasonable and proportionate: s 24 CPA</li> </ul> </li> <li>● D - If the D believes that P is seeking to re-litigate</li> </ul>

		<p>a matter already judged, they plead res judicata as a defence</p>
	<p><b>Anshun estoppel</b> ** subset of Res judicata</p>	<ul style="list-style-type: none"> <li>• The res judicata principle will extend to estop parties from bringing valid claims/ defences that ought to have been brought in an earlier proceeding at the first instance (<i>Anshun</i>)</li> <li>• The basis for this is the [party] ought to have brought their case in its entirety — which required to support the policy intention of the civil justice and public/private interest (<i>Angeleska</i>)</li> <li>• Prevents the re-opening of matters already decided by a court of competent jurisdiction;</li> <li>• ⇒ <b>TEST</b>: Was [claim] so closely connected to the [initial claim] that it was unreasonable for [party] to have failed to rely on it? (<i>Anshun</i>)</li> </ul> <p style="text-align: center;"><b>ANALOGISE / DISTINGUISH</b></p> <ul style="list-style-type: none"> <li>• <i>Anshun</i> - Worker injury claim re steel girders on a crane operated by Anshun Pty Ltd (employer) at Melbourne Port. In earlier litigation, he sued Anshun and Melbourne Port Authority = award of \$43K + costs. Court also ordered Melbourne Port could recover 90% of damages from Anshun. MPA issued proceedings against Anshun claiming indemnity under the crane hire agreement. HCA HELD: Although there was indemnity in the contract of hire, the indemnity claim was so closely connected to the matters raised in the workers compensation claim that it was unreasonable for MPA to have failed to rely on it → estopped from raising it</li> </ul>
	<p><b>Issue estoppel</b> ** decided issue</p>	<ul style="list-style-type: none"> <li>• A party is prevented from re-opening an issue that has previously been determined between the same parties. <ul style="list-style-type: none"> <li>○ Applies even if the SM is different — must have an essential element common to 2+ sets of proceedings involving the parties (<i>Arnold</i>)</li> </ul> </li> <li>• Example: Factual matters already decided — If there are two proceedings — injury claim and property claim caused by an explosion. If the injury claim finds that the D was responsible for the explosion, then its not open for them to re-litigate this re the property damage.</li> </ul>
<p><b>STEP 3A JOINER OF</b></p>		<ul style="list-style-type: none"> <li>• <b>STATE:</b> Per <i>SCR r 9.01</i>, a [P] may join any number of claims against a [D]</li> </ul>

<p><b>CLAIMS BY P</b></p> <p>→ <b>P is joining the claims</b></p> <p>→ USE FOR MULTIPLE CLAIMS</p>	<ul style="list-style-type: none"> <li>○ whether the [P] makes claims in the same or different capacities, and</li> <li>○ whether the claims are made against the [D] in the same or different capacity</li> <li>● Therefore, P can bring as many claims against D as they like — however, practical considerations include: <ul style="list-style-type: none"> <li>○ CPA obligations - all claims must have a ‘proper basis’ (<i>s 18 CPA</i>)</li> <li>○ Cost Implications - for all claims that are not successful (‘lost’): P must pay the other side’s costs.</li> <li>○ ‘Embarrassing pleadings’ will be struck out (e.g. too many claims against too many parties)</li> </ul> </li> <li>● <b>STATE:</b> As above, P must bring all their actions at once: res judicata, Anshun estoppel and issue estoppel. <b><u>Unless the joinder is inconvenient.</u></b></li> </ul> <p><b><u>Is the joinder inconvenient?</u></b></p> <ul style="list-style-type: none"> <li>● <b>STATE:</b> Per <i>SCR r 9.04</i>, if a joinder would <b>embarrass</b> or <b>delay</b> the trial of a proceeding, or <b>cause prejudice</b> or is <b>otherwise inconvenient</b>, the court may order: <ul style="list-style-type: none"> <li>○ Separate trials</li> <li>○ Exclusion of claim</li> <li>○ Compensation (costs) for attending irrelevant part of trial</li> <li>○ Removal of parties</li> </ul> </li> <li>● ‘Embarrass’ — [The joinder of claim or party] is <b>unintelligible, ambiguous, vague or too general</b> so as to embarrass the opposite party who does not know what is alleged against them (<i>Meckiff v Simpson</i> per Winneke CJ, Adam and Gowans JJ, cited in <i>Gunns Limited v Marr</i>).</li> <li>● Before making a finding under <i>r 9.04</i>, the court considers — <ul style="list-style-type: none"> <li>○ Res Judicata, Anshun estoppel and issue estoppel [re joinder of claims];</li> <li>○ The overlap of claims and evidence to be called (<i>Thomas v Moore</i>)</li> </ul> </li> <li>● <b>HOWEVER</b> — Per <i>r 9.05</i>, the failure of the party to affect an appropriate joinder (i.e. by non-joinder or misjoinder of a party or person) will not defeat a proceeding (i.e. not fatal). The Court may determine all questions in the proceeding in so far as they affect the rights and interests of the parties.</li> <li>● This does require remedying given the OO’s of the parties → May need to add or remove parties to fulfill.</li> </ul>	
<p><b>STEP 3B JOINDER OF CLAIMS BY D</b></p> <p>→ <b>D is joining the claims</b></p>	<p><b>Joinder of other D’s</b></p>	<ul style="list-style-type: none"> <li>● While the P brings the action and typically ‘joins’ the claims, the D can also join parties and actions.</li> <li>● <b>STATE:</b> The D can ‘add’ parties via court order for addition (<i>SCR r 9.06</i>) [<b>see above for details</b>]</li> </ul> <p>WHY: It may be in their interest — e.g. if they have a contract for indemnity, seek to share liability or for costs</p>

		implications.
	<p><b>Counterclaim</b></p> <p>** part of the defence doc</p>	<ul style="list-style-type: none"> <li>● <b>STATE:</b> Rather than bringing a separate action, D may counterclaim against P in the proceeding (<i>SCR r 10.02(1)</i>). Any counterclaim must be made by OP as part of their pleadings of defence (<i>SCR r 10.02(3)</i>). <ul style="list-style-type: none"> <li>○ Enables D to add further issues into the proceedings</li> <li>○ Example: P sues D in negligence for damage to their car; D counterclaims for damage to their own car</li> </ul> </li> <li>● D is <b>not limited</b> to a counterclaim against the P only, they <b>can join any other person</b> in accordance w/ <i>r 9.02</i> (<i>SCR r 10.03</i>, applying <i>SCR r 10.02</i>) <ul style="list-style-type: none"> <li>○ But requires a common question of law / fact</li> <li>○ Practice exam – D can counterclaim against another 3P who might have caused the car crash</li> </ul> </li> <li>● The counterclaim is <b>part of the defence document</b> and must be properly served.</li> <li>● <b>HOWEVER</b> — Per <i>SCR r 10.06</i>— An embarrassing claim (or one that delays or causes prejudice to any party or cannot conveniently be tied w/the claim enables to court to: <ul style="list-style-type: none"> <li>(a) Order separate trials of the counterclaim and claim;</li> <li>(b) Order any part (claim) in the counterclaim be excluded;</li> <li>(c) strike out the counterclaim w/out prejudice for the D to assert the claim in a separate proceeding;</li> <li>(d) Order any person be joined as D to the counterclaim cease to be a party to the counterclaim</li> </ul> </li> </ul> <p><b>OPERATION:</b></p> <ul style="list-style-type: none"> <li>● It is pleaded in a ‘defence and counterclaim’ document: <i>r 10.02(3)</i>;</li> <li>● For the counterclaim, the parties are reversed: P is the D, and D is the P: <i>r 10.02(2)</i>; → implications on other rules</li> <li>● Its <b>legal operation is as a sword</b> not merely a shield → <b>it is a separate proceeding in its own right</b>, albeit under the banner of P’s proceeding (i.e. wholly independent as opposed to a mere defence to P’s claim)</li> </ul>

		<ul style="list-style-type: none"> <li>N/B: If P succeeds on a claim and D succeeds on the counterclaim, the court can give judgment for the balance: <i>r 10.09</i></li> </ul>
	<p><b>Set-off</b></p>	<ul style="list-style-type: none"> <li>A set off = a statutory defence to the P’s action: <i>r 13.14</i> <ul style="list-style-type: none"> <li>Example: P sues D in negligence for damage to their car; but P already owes D money for services re a fence □ enables set off</li> </ul> </li> </ul> <p><b><u>OPERATION:</u></b></p> <ul style="list-style-type: none"> <li>D can rely on a <b>money claim</b> against P as a defence to whole or part of P’s money claim against them → enabling them to set off the value owed against the value claimed.</li> <li>Legally it’s a <b>shield</b> → It is not a separate proceeding in its own right — it only exists in so far as the original proceeding is not resolved: i.e., if the P discontinues their action, the claim has no independent life and ceases to exist (c.f. counterclaims)</li> <li>Results in a single judgment, and is <b>restricted</b> to the amount P claims → cannot obtain judgment in set off for the excess of P’s claim</li> </ul> <p><b><u>PRACTICAL ADVICE</u></b></p> <ul style="list-style-type: none"> <li>As D cannot recover a sum in excess of P’s claim, its often smart to plead a counterclaim and a set-off simultaneously (especially since the counterclaim is a separate cause of action)</li> </ul>
<p><b>3P proceedings</b></p> <p>** filed after defence</p>	<p><b>When might this be raised?</b></p>	<ul style="list-style-type: none"> <li>D may be arguing: <ul style="list-style-type: none"> <li>Their default was <b>attributable</b> or <b>due to</b> the conduct of others;</li> <li>Its <b>liabilities were to be met by others</b> (e.g. contractual indemnity clause);</li> <li>The <b>subject matter</b> of the proceedings is <b>connected with a claim against another.</b></li> </ul> </li> <li>→ If that person is <u>not already</u> a party then they can be joined as a 3P per <i>r 11.01</i>.</li> <li>N/B: This rule changes who is the ‘plaintiff’ and ‘defendant’ for the 3P claim → implications on the other rules.</li> <li>D may be to commence separate proceedings against 3P, but this is generally ill advised as it would be more costly, may result in a conflicting judgement or issue estoppel against it, and/or be a breach of P’s paramount duty (<i>s 16 CPA</i>) to</li> </ul>

further the administration of justice efficiently

#### Application of this rule

- **STATE:** Per *SCR r 11.01* — if D seeks to claim against someone who is not already a party to the proceeding (i.e. the 3P) – then that 3P may be joined by filing and serving a 3P notice. D must be seeking to claim:
  - (a) Any contribution or indemnity; **OR**
    - **N/B:** Consider – contributory 3P - D also has the option of issuing a contribution notice against 3P under *r 11.15*.
  - (b) Any relief / remedy relating to or connecting with the original SM of the proceeding and is substantially the same as some relief or remedy claimed by the P; **OR**
  - (c) Where any question relating to/connected with the original SM of the proceeding should be determined not as between P and D, but also between either/both of them and the 3P
- Enables for D to bring in their insurer or seek a contribution by bringing that party into the proceedings (*SCR r 11.04*)
  - Means that the 3P becomes the D to the 3P notice; and the D acts as a plaintiff for the purposes of that claim.
  - Example: P sues D and D is insured or can seek to claim a contribution from another (e.g. bring a 3P in and bring another claim such as indemnity)

#### Process – Form 11A

- **STATE:** To join, OP must personally serve Form 11A endorsed with a statement of claim on the 3rd party and state a time which the 3P may file an appearance (*SCR r 11.02, 11.03*). This also must be filed and served on D personally (*SCR r 11.04*) and must be served within 60 days of being filed (*SCR r 11.07*)
- **Time** - A 3P notice **cannot be filed until the defendant has first served a defence** (*SCR r 11.05(1)*). If they have, then per *11.05(2)* — the notice can be filed:
  - Within 30 days after time for the service of defence; **OR**
  - Any time with the courts leave / consent of the P and all relevant parties entering

		<p>appearances.</p> <ul style="list-style-type: none"> <li>● <b>Process</b> - Assuming the above is met, then the notice is to be filed and served in the same manner as originating process (<i>SCR r 11.04(2)</i>) <ul style="list-style-type: none"> <li>○ It must state a time within which the 3P may file an appearance in the proceeding (<i>SCR r 11.03</i>)</li> </ul> </li> <li>● <b>Effect</b> - The filing of a 3P Notice means the 3P becomes a party to the proceeding (<i>SCR r 11.04</i>)</li> <li>● <b>3P ACTION: Appearance and defence</b> - The 3P must file an appearance within the time specified per <i>r 11.03(1): r 11.08(1)</i>. <ul style="list-style-type: none"> <li>○ A 3P who files an appearance shall serve a defence in 30 days (<i>SCR r 11.09(1)</i>)</li> <li>○ A 3P w/ a claim against D or P may assert a counterclaim and <i>r 10.02</i> applies (<i>SCR r 11.10(1)</i>)</li> <li>○ With leave, the 3P can join a 4P and so on (<i>SCR r 11.16</i>)</li> </ul> </li> </ul>
<p><b>STEP 4 CONSOLIDATION OF CLAIMS</b></p>		<ul style="list-style-type: none"> <li>● Consolidation = the process of bringing together claims into one proceeding where separate proceedings commence dealing with common SM (i.e. should have been joined at the outset).</li> <li>● <u>Example</u>: To avoid different decisions between different jurisdictions on the same SM (Fed / Supreme). <ul style="list-style-type: none"> <li>○ E.g. A + B bring separate proceedings against same D &amp; registry realises there are similar facts / issues)</li> </ul> </li> <li>● Per <i>SCR r 9.12(1)</i>, if there are <b>two or more proceedings</b> pending in the court — the court may order those proceedings consolidated / to be tried at the same time / immediately after one and other / any of them to be stayed pending further determination, if: <ul style="list-style-type: none"> <li>(a) There are common questions of law or fact arising in all claims; OR</li> <li>(b) The rights to relief claimed in the proceedings arise out of / are wrt the same transaction(s); OR</li> <li>(c) It is desirable in the circumstances.</li> </ul> </li> <li>● N/B: This is subject to the discretion of the judge (<i>SCR r 9.12(2)</i>)</li> </ul>