

PRE-COMMENCEMENT CONSIDERATIONS

1. Is the claim barred by a limitation period?
2. Is the claim barred by Res Judicata or Anshun Estoppel?
3. Are there alternatives to litigation? (Can take place at any time)
4. Who are the proper parties? – Joinder, consolidation, standing, RPs and funding litigation
5. Which court has jurisdiction over the claim?
6. Will litigation fulfil the overriding purpose of civil procedure?

PRE-COMMENCEMENT OR EARLY ORDERS

1. Interim preservation orders
 - a. Freezing orders/Mareva injunctions/Mareva orders
 - b. Search orders/Anton Piller orders

CASE MANAGEMENT

1. Case management broadly
2. Technology
3. Ethical duties

PLEADINGS

1. Originating process
 - a. Statement of claim
 - b. Summons
2. Defence/reply
3. Particulars
4. Striking out pleadings

SERVICE

1. Is service required?
2. Is there an affidavit of service?
3. Personal service
4. Substituted service

EVIDENCE

1. Client legal privilege
 - a. Loss of client legal privilege
2. Discovery
3. Notices to produce
4. Subpoenas
5. Witness preparation
6. Affidavits

JUDGMENT

1. Costs and costs orders
2. Security for costs
3. Offers of compromise
4. Calderbank offers

SUMMARY DISPOSAL

1. Default judgment
2. Summary judgment
3. Summary disposal
4. Want of prosecution

APPEAL

ENFORCEMENT AND EXECUTION OF JUDGMENT

PRE-COMMENCEMENT CONSIDERATIONS

1. Is the claim barred by a limitation period?

Contract, tort, duty, trust

- 6 years from the date the cause of action comes into existence
- Breach of contract: [s 14\(1\)\(a\) Limitation Act](#)
- Torts: [s 14\(1\)\(b\) Limitation Act](#)
- Damages for breach of statutory duty: [s 14\(1\)\(b\) Limitation Act](#)
- Breach of trust: [s 48 Limitation Act](#)

Defamation

- 1 year from the date of publication of the matter complained of: [s 14B\(1\) Limitation Act](#)

Judgment

- 12 years from the date on which the judgment first became enforceable: [s 17 Limitation Act](#)

Deed & land recovery

- 12 years from the date the cause of action comes into existence
- Deed: [s 16 Limitation Act](#)
- Recovery of land: [s 27\(2\) Limitation Act](#)

Personal injury

- Claims before 6 Dec 2002 – 3 years from date which cause of action first accrues: [s 18A Limitation Act](#)
- Claims after 6 Dec 2002 – 3 years from date of discovery by P of the cause of action OR within 12 years from when act/omission resulting in the injury occurred, whichever earlier: [s 50C Limitation Act](#)

Extension of limitation period

- Up to 3 years from date of publication of matter if P satisfies it is just and reasonable to allow it to proceed: [s 56A Limitation Act](#)

2. Is the claim barred by res judicata or Anshun Estoppel?

Must be pleaded as early as possible so not waived – if not in defence/reply, then must be raised at trial!!

1. Cause of action estoppel (aka Res Judicata)

- Prevents re-litigating a cause of action that has previously been adjudicated in a judgment
- Merger in judgment: cause of action merges into a judgment and cannot be independently pursued
- **Chamberlain**: cause of action having merged and no longer has an independent existence.

2. Issue estoppel

- Prevents re-litigating issues of fact or law determined in prior proceedings between the same parties
- **Blair**: denied if the cause of action is to address facts or laws that were already decided in a previous judgment or order
- **Arnold**: issue estoppel is not binding in later litigation if fresh evidence demonstrates that the former decision was wrong.

3. Anshun estoppel

- Prevents raising a claim or defence that could have been raised in previous proceedings but was not.
- **Test (Anshun)**: matter in a new claim is so relevant to the subject matter of the previous claim that it was unreasonable not to rely upon it then.
 - Unreasonable where matter was so relevant that it can be said to have been unreasonable not to rely upon it: **Chamberslife**.
 - Insufficient that matter could have been raised in first proceeding – SHOULD have been.

PLEADINGS

1. **Originating process – Has proceeding been properly initiated by plaintiff?**
 - a. **Statement of claim**
 - b. **Summons**

Proceedings are initiated by using either a statement of claim or summons: [r 6.2\(1\)](#).

1. Has the correct process been used by the plaintiff?

Statement of claim (SOC): r 6.3	Summons: r 6.4
• Proceedings involve disputes contentions/allegations of fact • Claims for: ○ Relief re debt or other liquidated claim ○ Relief re a tort ○ Allegation of fraud ○ Damages for breach of duty (damages re death, personal injury, property) ○ Relief re a trust (other than express) ○ Possession of land ○ Defamation	• Primary issues are questions of law rather than disputed facts. • Proceedings for: ○ No-defendant ○ On appeal or on application for leave to appeal ○ SC which plaintiff intends to be entered in the Commercial List or Technology and Construction List. ○ Preliminary discovery ○ Injunction application ○ Appointment of receiver application

IF NO – Court may still consider proceedings as duly commenced

- Proceedings incorrectly commenced by SOC instead of summons taken to be duly commenced as from the date of filing and may continue: [r 6.5](#).
 - Court may make any orders to regularise process (ie as if pleadings were filed as affidavits).
- Proceedings incorrectly commenced by summons instead of SOC taken to be duly commenced as from the date of filing: [r 6.6](#)
 - Court may order proceedings continue on pleadings – affidavits to stand as pleadings and party must file a SOC or other pleading.

2. Have the technical requirements been met?

- Must state the relief claimed: [r 6.12](#).
- Must contain a notice to D indicating consequences of not filing a defence or notice of appearance: [r 6.13](#) (SOC), [r 6.14](#) (summons).
- Summons must specify a return date: [r 6.15](#).
- Originating process must be served on each D: [r 6.2\(3\)](#).
- Originating process served must include seal of court, case number or unique identifier and listing date: [r 6.2\(3A\)](#).
- IF NO – Court has discretion to set aside proceedings or treat failure as irregularity that does not invalidate the proceedings: [s 63 CPA](#).

3. Service of originating process and whether it has been served in correct time frame

- Originating process must be personally served on each D in SC and DC: [r 10.20\(2\)\(a\)](#).
 - In LC served: personally or left at D's business or residence with someone over 16: [r 10.20\(2\)\(b\)](#)
- Time frame for valid service: [r 6.2\(4\)](#)
 - SC or LC: valid for 6 months
 - DC: 1 month (unless SOC for only a debt or liquidated claim or if D is served outside of NSW then 6 months)
- Failure to serve with prescribed time does not prevent P from commencing fresh proceedings by filing another originating process: [r 6.2\(5\)](#).

SERVICE

1. Is service required?

1. Have the general requirements been met?

- Party filing a document must as soon as practicable serve copies on each other party: [r 10.1\(1\)](#)
 - Document is filed when lodged at Court registry and sealed or filed in Court during proceedings.
- Affidavits not filed but intended for use must be served within a reasonable time before use: [r 10.2\(1\)](#)
 - Otherwise court leave is required to use it: [r 10.2\(2\)](#)
- Methods of service – personal service, posting a copy of document to persons or leaving a copy of document at person's address: [r 10.5](#)
- Proof of service – affidavit of service required per [r 38.5](#)

2. Is personal service required?

- An originating process must be served on each defendant: [r 6.2\(3\)](#)
- Originating process must usually be served personally on the defendant: [r 10.20\(2\)](#)
- Cross-claims an exception for personal service where cross-defendant is already a party: [r 9.6\(1\)](#)
- Notice of motion – when person is not a party or an active party to the proceedings: [r 18.5](#)
- Subpoena must be personally served on the addressee: [r 33.5\(1\)](#) and other active parties: [r 33.5\(2\)](#)
 - EXCEPT – subpoenas for production in DC or LC can be served by post: [r 10.20\(2\)\(d\)](#)

2. Is there an affidavit of service?

- An affidavit of service **must contain:** [r 35.8\(2\)](#)
 - (a) Statement as to when, where, how and by whom service was effected; and
 - (b) Words of recipient: as close as possible to actual words said by the person served about the service or subject matter of proceedings; and
 - (c) Statement that deponent is over 16
- Affidavit of service must clearly identify the document served but must not annex a copy unless it has not been filed: [r 35.8\(1\)](#)

3. Personal service

Personal service effected generally

- Standard method – [r 10.21\(1\)](#): leaving copy of document with person or if refused, place copy down in presence and state the nature of the document
- If threat of violence – [r 10.21\(2\)](#): leave document as near as practicable to person.
- **Accepted service**
 - Validly served by leaving a copy of the document with person, not necessary to describe it.
 - Valid even if not physically taken (*Ainsworth v Redd* – given to representative next to him).
- **Refused service**
 - Document may be placed in their presence and nature explained to the person.
 - Fulfilled by pushing it under a locked door: *Gracysk*.
 - Satisfied by attaching doc to front of locked door and explaining: *Re Hudson*.
 - Explaining does not require detailed description especially where document is self-explanatory or recipient already aware of the proceedings due to prior involvement: *Lawindi*.
- **Doubt about the validity of personal service:**
 - Apply under [r 10.14](#) for a court order confirming informal service
 - Court may deem person served under [r 10.14](#) if:
 - Procedural fairness is satisfied, and
 - Person has actual notice of the claim
- **Non-compliant service** can lead to setting aside default judgment unless excused under [s 63](#)
 - Non-compliance = irregularity only does not automatically invalidate proceedings: [s 63\(2\)](#)
 - Court may: [s 63\(3\)](#)
 - (a) Set aside the proceedings/steps/order wholly or partially
 - (b) Allow amendments or make other remedial orders
 - Party must apply within a reasonable time and before taking any fresh step in the proceedings after becoming aware of the irregularity: [s 63\(4\)](#)

EVIDENCE

1. Client legal privilege

a. Loss of client legal privilege

1. Onus of proof on claimant making the privilege claim

- Party claiming privilege bears onus of establishing the claim and party seeking production does not bear onus of excluding privilege (*Mitsubishi Electric v Victorian WorkCover*).
- Usually supported by affidavit evidence that proves the facts necessary to establish the claim.
- Claim can be made:
 - In response to a subpoena seeking production of documents
 - In response to an order for discovery under Pt 21 UCPR
 - To object to answering an interrogatory
 - In response to a notice to produce
 - In response to other compulsory acquisition of documents (search warrants and search orders)
- Objection to production (subpoena, notice to produce, etc) is permitted under r 1.9(3).
 - Person may nevertheless be compelled to produce the document to the Court for the purposes of ruling on the objection: r 1.9(5).
 - Production of a document to the Court under a claim for privilege does not constitute a waiver of privilege: r 1.9(4B).
- Objection to production in response to an order for discovery – done through r 21.3 (go to discovery).

2. What stage of proceedings are we in?

Pre-trial

- Includes: producing documents under a subpoena, discovery, search warrants, notices to produce.
- Is the party asserting the privilege also the person who is being asked to produce the documents?
 - IF YES – What to say: “The stage of the proceedings in the present circumstances is considered pre-trial. For pre-trial stages, s 131A EA informs us to determine the objection to production as if it were in the context of adducing evidence at trial. Thus, we must turn to the relevant process for doing so which begins at s 117 EA.” – THEN GO TO 3.
 - IF NO – What to say: “The stage of the proceedings in the present circumstances is considered pre-trial. Given the party asserting the privilege is not the person who is being asked to produce the documents, s 131A EA does not apply, so the relevant assessment is the dominant purpose test laid out in *Eso Australia*.” – CL DOMINANT PURPOSE TEST (same as ss 118, 119 tho).

At trial

- Includes: literally only the adducing of evidence at trial.
- Just automatically go to 3.

3. Must be a professional relationship between lawyer and client

- Client includes: s 117(1) EA
 - (a) A person or body who engages a lawyer to provide legal services
 - (b) An employee or agent of a client
- Lawyer includes: s 117(1) EA
 - An Australian lawyer
 - A foreign lawyer
 - An employee or agent of either of them

4. Communications/documents must be of a confidential character – oral or written

- Confidential communication/document (s 117(1) EA): a communication/document made/prepared in such circumstances that the person who made it or the person to whom it was made was under an express or implied obligation not to disclose its contents.
- Can be between a lawyer and a client or a lawyer and a third party or can attach only to a third party communication (eg an expert report).
- Communications between a third party and client can be protected if (*Pratt Holdings*):
 1. The function of the communications is to enable the client to obtain legal advice; and
 2. Third party is so implicated in the communications made by client and legal adviser as to bring the third party's work product within the rationale of the privilege.

- Where offeree has not been given documents so as to enable offeree to fully consider the offer, they may give notice to the offeror that: [r 20.26\(4\)](#)
 - (a) They're unable to assess the reasonableness of the offer because of the lack of docs (must raise this w/ offeror w/in 14 days); and
 - (b) Where [r 42.14](#) applies, they can seek a court order under that rule.

2. Has the offer been accepted?

- Party may accept an offer by serving written notice of acceptance during the period: [r 20.27](#).
- A party who accepts may withdraw acceptance by serving notice of withdrawal: [r 20.28\(1\)](#)
 - (a) Within 28 days after acceptance if sum payable or act ordered by offer is not complete; or
 - (b) If court grants party leave to withdraw.

3. Has the offer been complied with?

- If P fails to comply, D is entitled to: [r 20.29\(1\)](#)
 - (a) Such judgment or order as is appropriate to give effect to the terms of the offer; or
 - (b) An order that the proceedings be dismissed, and to judgment accordingly.
- If D fails to comply, P is entitled to: [r 20.29\(2\)](#)
 - (a) Such judgment or order as is appropriate to give effect to the terms of the offer; or
 - (b) An order that the defence be struck out, and to judgment accordingly.
- If any party fails to comply, Court may make any such order as it thinks fit: [r 20.29\(3\)](#).

4. Determine costs

- If accepted offer has no provisions for costs –
 - Offer in favour of P: P entitled to costs paid by D assessed on ordinary basis
 - Offer in favour of D: D entitled to costs paid by P assessed on ordinary basis

Rule	Offer by	Rejected by	Terms	Costs up to and including date of offer	Costs from the day after offer is made
42.14	Plaintiff	Defendant	P obtains an outcome no less favourable to it than the offer it made.	D pays P's costs on an ordinary basis.	D pays P's costs on an indemnity basis.
42.15	Defendant	Plaintiff	P obtains an outcome no more favourable to it than the offer D made.	D pays P's costs on an ordinary basis.	P pays D's costs on an indemnity basis.
42.15A	Defendant	Plaintiff	D obtains an outcome no less favourable to it than the offer it made.	P pays D's costs on an ordinary basis.	P pays D's costs on an indemnity basis.

On deciding whether to allow indemnity costs or 'order otherwise'...

LEACH v THE NOMINAL DEFENDANT

FACTS	Nominal Defendant made an offer of compromise which was rejected and then sought indemnity costs. Court found the offer was not a genuine offer. Nominal Defendant argued it should still be entitled to indemnity costs on the ground that the rejection was unreasonable. Leach argued Court is empowered to 'order otherwise' under r 42.15A(2) and should do so.
HELD	In order for a walk-away offer (that is – where offeror says let's settle on the ground that each party bears its own costs) to successfully trigger the indemnity costs mechanisms, the claim/defence would have to be frivolous or vexatious in character. The present case is not frivolous or vexatious – Leach suffered serious injuries. The offer only compromised on costs and did not offer anything by way of damages for Leach's injuries – not unreasonable to reject. No indemnity costs.

SUMMARY DISPOSAL

1. Default judgment

Judgment in favour of P without a trial if D is in default. Applicable to proceedings commenced by a SOC.

1. Is the defendant in default?

- Circumstances where defendant is in default: [r 16.1](#)
 - (a) D fails to file a defence within the time allowed;
 - (b) D fails to file any affidavit verifying his or her defence in accordance with any requirement; or
 - (c) Court orders that the defence filed by D is to be struck out.
- Defendant is not in default if it has: [r 16.2](#)
 - (a) Made a payment towards a liquidated claim;
 - (b) Filed an acknowledgement of claim under [r 20.34](#); or
 - (c) Filed a defence after the time limited by the rules, but before a default judgment is given

2. If the D is in default, plaintiff may apply for a default judgment

- Plaintiff may apply for judgment against the defendant in default and may carry on the proceedings against the other party: [r 16.3](#).
- Application may be made in absence of the parties and need not be served on D: [r 16.3\(1A\)](#).
- Application must be accompanied by: [r 16.3\(2\)](#)
 - (a) An affidavit of service of the SOC, and
 - Unless service effected by LC under [r 10.1\(2\)](#) in which case unnecessary: [r 16.3\(3\)](#).
 - (b) An affidavit in support of the application.
 - Valid if it has been sworn within 14 days before the date application is filed: [r 16.3\(4\)](#).

3. Is the plaintiff's claim liquidated or unliquidated? Procedures for application

Liquidated damages claim – amount claimed is known or can be determined by a formula

- Judgment may be given for the P for a sum not exceeding the sum claimed and interest up to the judgment and costs: [r 16.6\(1\)](#).
- Supporting affidavit must: [r 16.6\(2\)](#)
 - (a) State amount due to P in respect of the cause of action at time originating process was filed;
 - (b) Give particulars of any reduction of that amount and costs as a consequence of any payments made since originating process was filed;
 - (c) State the source of deponent's knowledge of the matters stated concerning the debt;
 - (d) State the amount claimed by way of interest;
 - (e) State whether costs are claimed and if so how much is claimed on account of: (i) professional costs, (ii) filing fees, and (iii) serving the originating process; and
 - (f) State when and how the originating process was served on D.
- Entry of default judgment will occur after P files a special form of notice of motion accompanied by relevant affidavits and it is recorded on the Court Registry's computer system.

Unliquidated damages claim – amount claimed requires assessment by the Court

- Judgment may be given against D for damages to be assessed and for costs: [r 16.7\(1\)](#).
- Supporting affidavit must: [r 16.7\(2\)](#)
 - (a) State that the matter has not been settled with the D;
 - (b) State the source of deponent's knowledge of the matters stated in affidavit concerning claim;
 - (c) State whether costs are claimed and if so how much is claimed on account of: (i) professional costs, (ii) filing fees, and (iii) serving the originating process; and
 - (d) State when and how the originating process was served on D.
- Quantum of damages assessed after judgment is entered. D may make submissions on the assessment hearing as long as notice of appearance filed.

4. Can the D set aside the default judgment?

- Judgment may, on sufficient cause being shown, be set aside if the judgment was given or entered irregularly, illegally or against good faith: [r 36.15\(1\)](#).
- Court may set aside or vary a judgment or order if notice of motion for the setting aside or variation is filed before entry of the judgment or order: [r 36.16\(1\)](#).