

LAWS2244 LITIGATION DISPUTE MANAGEMENT
FINAL EXAM SUMMARY: STEPS TO RESOLVING DISPUTES

I Before commencing proceedings

(1) Prospects and process advice	(i) Prospects of success
(2) Limitation periods	
(3) Info and evidence gathering	(i) Preliminary disclosure (ii) Inspection and testing of property (iii) Search order (Anton Pillar Order) (iv) Freezing order (Mareva Order)
(4) Costs disclosure	(i) Party/party (standard) costs (ii) Solicitor/client costs (iii) Indemnity basis (iv) Other matters relating to costs
(5) ADR/settlement	(i) Mediation
(6) Jurisdiction	(i) Presence of a defendant in the jurisdiction (ii) Submission to the jurisdiction (iii) Statutory extension of territorial jurisdiction (iv) Transfer of proceedings (cross-vesting)
(7) Types of proceeding	(i) Class actions/representative proceedings
(8) Parties	

II Commencing proceedings

(1) Originating process	(i) Originating claim (ii) Originating application
(2) Service	(i) Manner of service (ii) Service on special parties
(3) Defending proceedings	(i) Enter an appearance (conditional or unconditional) (ii) Apply to set aside OP (iii) Do nothing → default judgment

III After proceedings have commenced

(1) Pleadings	(i) Rules of pleadings (ii) Particulars (iii) Answering pleadings (iv) Defence of set-off (v) Counterclaims (vi) Striking out pleadings
(2) Amendment	(i) When will you need the court's leave to amend? (ii) When must the court grant leave to amend? (iii) When may the court grant leave to amend? (iv) When may the court grant leave after the limitation period has passed? (v) What are the consequences of amendment?
(3) Discovery	(i) Requirements (ii) Discovery from non-parties and potential parties (iii) Disclosure checklist
(4) Resisting discovery	(i) Client legal privilege (ii) Professional confidential relationship (iii) Journalistic privilege (iv) Religious confessions (v) Settlement negotiations

(5) Early resolution of claims	(i) Discontinuance/withdrawal (ii) Default judgment (iii) Summary judgment (iv) Abuse of process (v) Vexatious litigant
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IV Trial

(1) Settlement	(i) Calderbank offer (ii) Offer of compromise
(2) Judgment & appeal	

I Before commencing proceedings

(1) Prospects and process advice

Prospects of success

Before a lawyer decides to commence proceedings on behalf of a client, the lawyer should be satisfied that the case has merit.

If a lawyer commences proceedings that have no legal foundation, the proceedings may constitute an abuse of process and such proceedings could be struck out or permanently stayed by the court: **Williams v Spautz**

Courts have express power to order a party's lawyer to pay or forgo cost where the lawyer has incurred costs improperly or without reasonable cause: r 1753

If not comply → professional misconduct or adverse costs orders against the lawyer personally

Lawyers must provide a certificate that the claim or defence has reasonable prospects of success when lodging a pleading in a damages action: s 188 of the Civil Law (Wrongs) Act 2002 (ACT)

(2) Limitation periods

What are limitation periods?

- Limitation periods are time periods which proceedings must be commenced.
- Failure to commence proceedings within the limitation period will bar the action, subject to possible suspension or extension of the limitation period.

Running of time

- Commencement of proceedings occurs when the relevant originating process is issued by the plaintiff – when it is accepted by the court registry
- Limitation period continues to run even if plaintiff's proceeding is dismissed prior to judgment or settlements → an attempt to bring new proceeding may be statute-barred
- Statute-barred means no longer legally enforceable owing to a prescribed period of limitation having lapsed

Limitations period are removed in claims brought by survivors of child sexual abuse.

(i) What is the limitation period?

Limitation Act 1985 (ACT)

- S 11 general: 6 years
- S 13 deed: 12 years
- S 16A workers compensation: 3 or more years
- S 16B damages for personal injury: 3 or more years
- S 21B defamation: 1 year

(ii) When does the limitation period start?

Limitation Act 1985 (ACT)

- S 11: running from the date when the cause of action first accrues to the plaintiff
 - 'Cause of action' is the fact or combination of facts that gives rise to a right to bring a civil proceeding: **Paramasivam v Flynn**
 - **Thomson v Lord Clanmorris**: a cause of action accrues when the necessary facts have occurred, and there is in existence a competent plaintiff who can sue and a competent defendant who can be sued
 - In contract: from the time the breach occurred
 - In negligence: from the time the damage was suffered
 - In **Cth v Cornwell**: HC held that his cause of action in contract accrued on breach due to the giving of negligent advice in 1965, therefore was statute-barred
 - However, Cornwell had suffered economic loss in tort because his retirement benefit was worth less than it would otherwise have been
 - His cause of action accrued on his retirement in 1994 and was not statute-barred
- S 13: the date the cause of action accrues
- S 16A: the day the injury happened
- S 16B(2)(a): the day the injured person first knows (i) that the person has suffered an injury that is or includes a disease or disorder; and (ii) that the injury is related to someone else's act or omission

- Subjective test: the date of discoverability is not when the claimant in fact discovered the damage and that the damage was caused by the negligence of another, but rather when a reasonable person in the claimant's position should have made the discovery
- S 21B: the day of publication

(iii) Was the limitation period postponed?

Limitation periods may be postponed where there has been:

- A confirmation by the defendant only if he or she acknowledges the cause of action to the plaintiff (s 32(2)(a)(i)) or makes payment to the plaintiff (s 32(2)(a)(ii))
- Fraud or concealment (s 33) or mistake (s 34)
- Disability (s 30)

(iv) Was the limitation period suspended at any point?

- S 30 disability: if a person is under a disability the limitation period is suspended for the duration of the disability
 - Disabilities are defined in the Act dictionary to include children under 18 or those who cannot manage their affairs for 28 days or more due to intellectual retardation, physical disabilities, mental illness, brain damage, senility, war or war-like operations or circumstances arising out of war or war-like operations
 - Where the plaintiff is a minor, the limitation period will only begin to run when they attain majority, which is 18 years of age
- S 30A special provision for injuries to children
- S 30B special provision in relation to children – claims relating to health

(v) Is there a possibility of an extension?

- Defamation: if not reasonable to bring within one year, court must extend to 3 years after date of publication for defamation: s 21B(2)
- Personal injuries: court may extend the limitation period if it thinks it is just and reasonable to do so: s 36(2) and the court should have regard to all the circumstances of the case including:
 - Length of and reasons for delay: s 36(3)(a)
 - Prejudice to defendant: s 36(3)(b)
 - Conduct of defendant after the cause of action accrued to the plaintiff: s 36(3)(c)
 - The duration of any disability of the plaintiff arising on or after the date of the accrual of the cause of action: s 36(3)(d)
 - Whether the plaintiff has acted promptly or reasonably in response to the act or omission by the defendant: s 36(3)(e)
 - The steps taken by plaintiff to obtain medical, legal or other expert advice: s 36(3)(f)
- Very limited application because s 36(5) says:
 - This section does not apply in relation to a cause of action under s 16B and the *Civil Law (Wrongs) Act 2002* part 3.1 (Wrongful act or omission causing death).
 - S 16B says it applies to a cause of action for damages for personal injury other than a cause of action to which s 16 (Compensation to relatives) or section 16A (common law claims for workers compensation) applies
 - Meaning that only claims brought under s 16 (Compensation to relatives) or section 16A (common law claims for workers compensation) may be applied for extension of time permitted under s 36
 - The extension applies to personal injuries suffered by children except for personal injuries relating to the provision of a health service: s36(6)
- Latent damage to property/economic loss as a result of latent damage
 - A court may extend the limitation period for a further period (not exceeding 15 years) beginning on the day when the act or omission that gave rise to the cause of action occurred if it considers it just and reasonable to do so: s 40(1)

(3) Info and evidence gathering

(i) Preliminary disclosure

1. Gather all relevant documents/information:

What is a document?

Any record of information r 600/Legislation Act 2001 (ACT) and includes:

- Anything on which there is writing
- Anything on which there is figures, marks, numbers, perforations, symbols or anything else having a meaning for people qualified to interpret them
- Anything from which images, sounds, messages or writings can be produced or reproduced, whether with or without the aid of anything else
- A drawing map, photograph or plan

2. If you don't know a potential defendant's identity:

- Preliminary discovery under the CPRs r 650
 - Available to an applicant who is likely to have a cause of action against the potential defendant: r 650(1)(b)(i)
 - The applicant must first make reasonable enquiries: r 650(1)(c)
 - Someone else may have information, or may have or have had possession of a document or thing, that tends to assist in ascertaining the identity or whereabouts of the potential defendant: r 650(1)(d)
- The court may order the respondent to do a number of things including:
 - Attend court and be examined: r 650(5)(a)
 - Produce for inspection by the application a document or thing: r 650(5)(d)
- BUT the respondent can claim privilege: r 652

3. If you are unsure whether your client has a cause of action against a potential defendant:

Reasonable prospect of success under s 188 of the Civil Law (Wrongs) Act 2002 (ACT)

R 651 CPRs to identify right to claim relief:

- The applicant, after making reasonable inquiries, cannot obtain sufficient information to decide whether to start a proceeding in the court against the potential defendant: r 651(1)(b)(1)
- The applicant has reasonable grounds for believing that the potential defendant has or has had possession of a document or thing that can assist in deciding whether to start the proceeding: r 651(1)(c)
- Applicant can make original application: r 651(2)
- Court may order potential defendant to produce document or thing: r 651(5)
 - BUT the potential defendant can claim privilege: r 562
- You can make an original application for preliminary discovery under r 651 **and** an order for preservation of that document/thing under r 715
- If you are concerned that prior notice may prompt the potential defendant to destroy the document/thing then you make an application for a search (Anton Pillar) order: rr 750-755
- If you are concerned that defendant may dissipate their assets to frustrate judgment, then you make an application for a freezing order (Mareva order): rr 740-745

(ii) Inspection and testing of property

Under s 715, the court may make an order for the inspection, detention, custody or preservation of property if:

- (a) the property is the subject of a proceeding or,
- (b) inspection of the property is necessary for deciding an issue in a proceeding.

In the ACT, the court may not make an order under r 715 unless it is satisfied that sufficient relief is not available under s 169 of the Evidence Act 1995 (Cth).

The rules extend to property not in the possession, custody or power of a party,

(iii) Search order (Anton Pillar Order)

Ex parte orders authorising the search, preservation and seizure of documents and other evidence, if there are strong grounds for thinking that the defendant will otherwise destroy or remove such evidence.

Not search warrants and do not permit forceable entry to premises.

- S 751 general: the court may make this order for the purpose of securing or preserving evidence which requires the defendant to allow people to enter premises for the purpose of securing the preservation of evidence relevant to an issue in the proceeding
 - Subsection (2) specifies a list of information to be included to support an application for a search order
- S 752 the court may make this order if it is satisfied that:
 - (a) the applicant has a strong prima facie case on the accrued cause of action, and
 - (b) the potential or actual loss or damage to the applicant will be serious if this order is not made, and
 - (c) there is sufficient evidence in relation to a respondent that (i) the respondent possesses important evidential material and (ii) there is a real possibility that the respondent might destroy the material
- S 753 prescribes the terms of the order to (a) allow people named in the order to enter premises, and (b) be provided with information, thing, or service described in the order
- S 754 the court must appoint an independent solicitor to execute the order
- S 755 the court may make any order about costs that it considers appropriate

(iv) Freezing order (Mareva Order)

Limited to preventing a defendant (or respondent to a counterclaim) from disposing of assets or removing them from the jurisdiction, so as to defeat any judgment that the plaintiff may obtain against the defendant at trial.

- S 741 general: the court may make this order for the purpose of preventing the frustration or inhibition of the court's process by ensuring that an order of the court is not made valueless or diminished in value
 - Subsection (3) restrains a respondent from removing any assets, or from disposing of, dealing with, or diminishing the value of, those assets
 - Subsection (6) sets out a list of information to be included to support an application for a freezing order
- S 742 the court may make an ancillary order to a freezing order for the purpose of:
 - (a) finding out information about assets relevant to the freezing order
 - (b) deciding whether the freezing order should be made.
- S 743 freezing order and/or ancillary order against an enforcement debtor
- S 744 freezing order and/or ancillary order against a third party
- S 745 the court may make any order about costs that it considers appropriate

(4) Costs disclosure

S 269 Legal Profession Act 2006 (ACT)

Disclosure must state (among other things)

- basis upon which legal costs calculated;
- estimate of total costs;
- for litigious matters the range of costs that could be recovered and the range of costs that may be required to be paid to the other side

(i) Party/party (standard) costs r 1751

All costs to be assessed on a party and party basis unless an order of the court or ACT law says otherwise: r 1751(1)

Party and party basis means:

- All costs that were fair and reasonable for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed: r 1751(2)
- Use the scale in schedule 4 of the CPRs: r 1722(1)

How a lawyer charges	How party/party costs are calculated (amount you will get back)
By contract	By statute
By time spent	By task completed
Charge for all work undertaking for the client	Only for work essential to the proceedings

(ii) Solicitor/client costs r 1752(1)(a)

The court may order that costs be paid on a solicitor/client basis: r 1752(1)(a)

All costs reasonably incurred and of a reasonable amount, having regard to:

- The scale in schedule 4; and
- Charges ordinarily payable by a client to a solicitor for the work: r 1752(3)

Court has discretion but may exercise it where (e.g.):

- A party is sued or sues as a trustee: r 1752(2)(b)
- An application is brought for non-compliance with a court order or breach of an undertaking: r 1752(2)(c)
- A settlement offer is made

(iii) indemnity basis r 1752(1)(b)

Court has discretion to award costs on an indemnity basis: r 1752(1)(b)

Indemnity basis means the registrar must allow all costs other than costs unreasonably incurred (party to pay costs has onus of proof): r 1752(4)(a)

May have regard to any costs agreement between the party to whom the costs are payable and the party's solicitor: r 1752(4)(b)

Court has discretion but may get costs on an indemnity basis where there has been:

- An abuse of process: **White v Flower & Hart**
- Where there were no chances of success: **Rosniak v GIO**

(iv) Other matters relating to costs

Complicated cases

- Plaintiff wins but in the wrong court: r 1725
- Parties who win on some issues but lose on others: **Rosniak v GIO**

Special cases

- Third party funders
 - A party is entitled to a costs order even if their case is conducted/funded by a third party (e.g. insurer or trade union) **Westworth v Rogers**
- Unrepresented litigants
 - Not entitled to costs or loss of time/income (the rules on costs act as an indemnity not as a punishment): **Cachia v Hanes**
 - Exception for self-represented solicitors: **Guss v Veenhuizen**
- Can obtain a costs order if have contingent fee agreement: **Wentworth v Rogers**
- Pro-bono clients – not entitled to costs because they have no liability to pay costs (the rules on costs act as a reimbursement not as a punishment): **McCullum v Ifield**

Costs against non-parties

- Generally not allowed in the ACT (some exceptions): r 1703
- One exception is that costs can be awarded against practitioners: r 1703(2)(g)

Costs against practitioners

- Costs can be awarded against a party's legal representative if he/she brings a case that is an abuse of process: **White v Flower & Hart**
- Costs can be awarded against a practitioner if they displayed a 'serious dereliction of duty': **De Sousa v Minister for Immigration**
- Costs can be awarded against a practitioner if the hearing or application did proceed because the practitioner failed to do something: r 1753(1)(a)
- Costs can be awarded against a practitioner if a party incurred costs because of delay, misconduct or negligence of the practitioner: r 1753(1)(b)
- Court may order that practitioner not charge client if justice requires it: r 1753(3)
- Civil Law (Wrongs) Act 2002 (ACT):
 - Any claim for damages requires lawyers to certify reasonable prospects of success (ss 187 and 188)
 - If no reasonable prospects of success, lawyer could be liable to pay costs and/or repay costs paid by the client to the lawyer (s 189)
 - See **Degiorgio v Dunn (No 2)** 'so lacking in merit or substance as to not be fairly arguable'

Cost assessment – the process

- See Division 2.17.5 CPR