

LAWS2371 • Term 2 2026 • UNSW Law & Justice

Resolving Civil Disputes

Exam Package

Order of Play • Problem-question frameworks • Essay frameworks
Ethics cross-reference • Master case table • Legislative quick reference

NSW civil procedure: Civil Procedure Act 2005 (NSW) (CPA) and Uniform Civil Procedure Rules 2005 (NSW) (UCPR)

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Part 2 — Order of Play: Master Flowchart

If this → do this. From pre-litigation to enforcement. Use this table as the issue-spotting checklist for every problem question; the right-hand column sends you to the full framework in Part 3 (or Part 4 for essay-type material).

Stage	Step / decision	Key authority	Go to
Pre-litigation	ADR clause? → enforce or bypass	Enforceability of ADR clauses (UGL v RailCorp)	P1, E2
Pre-litigation	Negotiate / Calderbank letter	EA s 131; without prejudice	P1, P14
Pre-litigation	Consider arbitration	Commercial Arbitration Act 2010 (NSW) s 8	P1, E3
Commence	Which court has jurisdiction?	Grassby v The Queen (1989) 168 CLR 1	P2
Commence	Does plaintiff have standing?	Private/public; CPA s 157 (class actions)	P2, P3
Commence	Statement of claim or summons?	UCPR rr 6.3–6.4; date of filing = limitation	P2
Commence	Joinder / consolidation?	UCPR r 6.19; r 28.5	P2
Service	Personal service effected?	UCPR rr 10.20–10.22	P4
Service	Failed? → substituted service	UCPR r 10.14; Flo Rida [2013]	P4
Service	Outside NSW?	SEPA; UCPR Sch 6; Hague; Trans-Tasman Act 2010	P4
Pleadings	Defence filed within 28 days?	UCPR r 14.3	P5
Pleadings	NO → apply for default judgment	UCPR rr 16.6–16.7; Dunwoodie [2014]	P6
Pleadings	YES → is defence adequate?	UCPR rr 14.7, 14.14, 14.26, 14.28	P5
Case mgmt	Court gives directions	CPA ss 56–61 — just, quick and cheap; always apply	P7
Interlocutory	Interim injunction needed?	ABC v O'Neill (2006) 227 CLR 57	P8
Interlocutory	Freezing order needed?	UCPR r 25.14; Jackson v Sterling (1987)	P8
Interlocutory	Search order needed?	UCPR rr 25.20–25.23; Findex v McKay [2019]	P8
Security	Security for costs application?	UCPR r 42.21; KP Cable / Idoport [2001]	P9
ADR	Court-referred mediation?	CPA ss 26–27; Aversa [2023]; s 30(4) privilege	P10
Discovery	Discovery — list of documents	UCPR r 21.2; Esso v FCT (1999)	P11
Discovery	Notice to produce	UCPR r 21.10 (pre-hearing); r 34.1 (to court)	P12
Subpoena	Subpoena — three stages	Waind v Hill [1978]; r 33.4 set-aside grounds	P12
Privilege	Client legal privilege claimed?	EA ss 117–119; Mann v Carnell (1999)	P11
Evidence	Witness preparation & affidavits	UCPR Pt 35 (affidavits); ASCR rr 24–25; r 14.23 (verification of pleadings)	P13
Costs	UCPR formal offer of compromise	UCPR r 20.26; rr 42.14–42.15A	P14
Costs	Calderbank letter	Della Franca [2022]; SMEC Testing [2000]	P14
Disposal	Summary judgment (plaintiff)	UCPR r 13.1; General Steel (1964)	P6
Disposal	Summary dismissal (defendant)	UCPR r 13.4; CPA s 91	P6
Disposal	Want of prosecution	UCPR r 12.7; Building Insurers v Touma [2010]	P6
Trial	Hearing — relief confined to pleadings	Banque Commerciale v Akhil Holdings (1990)	P5, P16
Costs	Costs order — default: costs follow the event	CPA s 98; UCPR r 42.1	P15
Costs	Non-party costs?	CPA s 98; FPM Constructions criteria	P15
Costs	Costs against lawyers?	CPA s 99; Muriniti [2021]	P15
Appeal	Leave required?	SCA s 101; Fox v Percy (2003) 214 CLR 118	P16

- Was s 57(1)(a) [just determination] given sufficient weight?
- Was s 61(3) used to punish rather than facilitate? (*BAT v Cowell*: NOT to punish a litigant)
- Was the s 62(4) right to a fair hearing respected?
- Were the effects on other litigants and on court resources considered? (*Halpin*; *Aon Risk*)

Key cases

***Aon Risk Services v ANU* (2009) 239 CLR 175** — Late amendment sought on day 3 of trial refused. Case management is fundamental; *JL Holdings* overruled. Just resolution requires minimising cost and delay; costs orders are not always an adequate remedy; parties have no right to amend.

***Expense Reduction Analysts v Armstrong (ERA)* (2013) 250 CLR 303** — Positive duty on parties and lawyers to assist. Satellite litigation over 13 inadvertently disclosed privileged documents was "the very kind of conduct which should be avoided". Powers are not at large — not exercised according to a judge's "individualistic idea of fairness" ([57]).

***Hans Pet Constructions v Cassar* [2009] NSWCA** — ss 56 + 57 are statutorily compulsory considerations. Striking out a defence without giving s 57(1)(a) fundamental weight = error. The reforms deny parties the ability to say "what are you going to do — that'll take years".

***Halpin v Lumley* [2009] NSWCA** — Court must consider cost and delay — not just how the parties wish to resolve the issues — and the effect on the efficient disposal of the court's business and other litigants.

***Baulderstone Hornibrook v Gordian Runoff* [2008] NSWCA 243** — Co-operation is an essential aspect of modern civil procedure; the s 56 duty is wide.

Culture of compliance — Tugrul / Zhao: 9 practical points on s 56

1. s 56 is not a pious exhortation — apply it rigorously.
2. Correspondence between lawyers must be civil and respectful.
3. Many issues can be solved by a phone call.
4. Requests for information must be reasonable and focused.
5. The obligation to facilitate the overriding purpose may require giving information without legal entitlement.
6. Filing a motion is a last resort.
7. No motion without written notice and 3 clear business days to respond.
8. Once filed — only real issues; exhibiting "everything" is completely unacceptable.
9. Breach of s 56 obligations → costs consequences.

EXAM TIP Dictates of justice under s 58: s 57 mandatory; s 58(2)(a) mandatory; s 58(2)(b) discretionary. Allsop CJ's warnings (front-loading costs; over-management; cookie-cutter approach; practitioner passivity) are the policy counterweight → E4.

P8. Interim preservation orders

Comparison table

Feature	Interim injunction	Freezing order (Mareva)	Search order (Anton Piller)
Purpose	Restrain a party from acting	Prevent asset dissipation	Preserve evidence from destruction
Threshold	Prima facie case (<i>ABC v O'Neill</i>)	Good arguable case (r 25.14)	Strong prima facie case (r 25.20)
Source of power	Inherent jurisdiction; s 66(4) Supreme Court Act 1970 ("just or convenient")	Inherent jurisdiction; UCPR rr 25.10–25.17	Inherent jurisdiction; UCPR rr 25.18–25.24
Ex parte?	Can be	Usually yes	Always yes
Undertaking as to damages?	Yes — r 25.8 (mandatory)	Yes — r 25.8	Yes — r 25.8
Third parties targeted?	No	Yes — <i>Cardile</i> ; r 25.13	No

Feature	Interim injunction	Freezing order (Mareva)	Search order (Anton Piller)
Independent solicitor?	No	No	Yes — r 25.23
Practice note	—	SC Gen 14	SC Gen 13
Key limitation	Cannot finally dispose of the action	NOT security for the plaintiff — <i>Jackson</i>	NOT an investigatory tool — <i>Findex v McKay</i>

A. Interim injunction — *ABC v O'Neill* (2006) 227 CLR 57

1. **Prima facie case:** "sufficient likelihood of success to justify preservation of the status quo pending trial" — does NOT mean a >50% chance; depends on the nature of the rights and the practical consequences.
2. **Balance of convenience:** injury to the plaintiff if refused must outweigh injury to the defendant if granted.
 - Factors: irreparable damage; public interest; strength of case; undertaking as to damages (mandatory: r 25.8).
 - District Court: temporary injunctions up to 14 days only (ss 140–141 District Court Act 1973).

B. Freezing orders — UCPR r 25.14

1. Judgment obtained OR a **good arguable case** on an accrued or prospective cause of action: r 25.14(1).
2. **Danger** that a judgment will be wholly or partly unsatisfied because assets may be disposed of, dealt with or diminished: r 25.14(4).
 - Risk of dissipation must be established by **evidence, not mere assertion** (*Marango* [2019] at [16]).
 - Purpose is process protection, NOT security — cannot give the plaintiff priority over other creditors.

***Jackson v Sterling Industries* (1987) 162 CLR 612** — Purpose: prevent disposal of actual assets to frustrate the court's process — NOT to provide security. Cannot circumvent insolvency laws or give the plaintiff a secured position.

***Cardile v LED Builders* [1999] HCA 18** — Freezing orders may be made against non-parties where (i) the third party holds assets of the judgment debtor, OR (ii) the court's process may require the third party to disgorge property or contribute. A drastic remedy — not lightly granted.

Duty of candour on ex parte applications — SC Gen 14 [19]

- Full and frank disclosure of all material facts, including possible defences and any doubt about ability to meet the undertaking.
- "Material" = what the opposing party would have wanted to bring to the court's attention (*Madsen v Darmali* [2024]).
- Breach → order may be discharged entirely or substituted.

Practical limits — SC Gen 14

- [9] Ex parte order limited to the return date (usually 1–2 days).
- [12] Must carve out dealings with assets for legitimate purposes: living expenses, legal fees, normal course of business, pre-existing contracts.
- [17] Applicant may be required to provide security for the undertaking.

C. Search orders — UCPR r 25.20 (higher threshold)

1. **Strong prima facie case** on an accrued cause of action.
2. Potential or actual loss or damage will be **serious** if the order is not made.
3. Respondent possesses important evidentiary material AND there is a **real possibility** it will be destroyed or made unavailable.
 - Independent solicitor must be appointed by the court — r 25.23: serve, explain rights, supervise, list items, file report.
 - SC Gen 13: served 9am–2pm on a business day; must not coincide with a police search. Applicant cannot inspect seized items without leave.

***Findex Group v McKay* [2019] NSWCA 93** — Scope is constrained by the purpose of the original order. Cannot be used as an investigatory fishing tool. Once the cause of action is abandoned, the order is spent.

EXAM TIP Identify which order is sought, apply the right threshold (prima facie → good arguable → strong prima facie), and always raise the duty of candour for ex parte applications.

Part 4 — Essay Frameworks

Policy and theory for essay questions (CLO1, CLO3, CLO5). Each framework gives the competing positions and the authority for each, so you can build a thesis, test it against the counter-argument and conclude.

E1. When is litigation needed? (ADR vs litigation)

Five triggers for litigation (over ADR)

Trigger	Key point
1. Rights / public interest	Rule of law requires courts to bind all members of society, including government. ADR risk: lost precedent. Some disputes are non-arbitrable (criminal, divorce, IP, competition, insolvency). Some require court approval even if settled (class actions; competition penalties). Litigation needed where: (a) constitutional / government regulation issues; (b) conduct affecting the wider public (securities, competition, environment); (c) private rights (contract, property, tort) require public examination.
2. Procedural protections	Litigation provides an impartial adjudicator; a reasoned decision; open justice; notice; an opportunity to be heard. Most significant where power imbalances exist: family law, discrimination, Indigenous Australians, minorities — though these protections can also be exploited in litigation (e.g. discovery as a bludgeon). Equalising effect regardless of relative power. ADR lacks the coercive powers of the state.
3. Urgent relief	Interim injunction; freezing order (can bind third parties; can be made ex parte); search order. An arbitral tribunal cannot grant interim measures before it is appointed and cannot act ex parte.
4. Compelling disclosure	Preliminary discovery (identity of the defendant, or whether a right exists). Subpoenas: a mediator cannot compel; arbitral discovery is limited; subpoenas in aid of arbitration require the tribunal's permission.
5. Access to state enforcement	Writs of execution, garnishee orders, bankruptcy, statutory demands. No default judgment in arbitration — the claimant must still prove its case.

EXAM TIP If no trigger is present, consider ADR first.

Why courts still matter (Armstrong; Legg & Ng)

Litigate when: an important legal principle or precedent is needed; the client needs to send a market message; settlement would invite copycat claims; the claim is bogus; the law strongly favours your client; multiple parties prevent consensus.

The settlement debate

Position	Argument	Authority
Against settlement	Courts exist to explicate public values in authoritative texts — settlement deprives society of that function. "Parties might settle while leaving justice undone."	Fiss (1984)
For settlement	Consensual settlements are democratic, flexible, creative, and can be more just than binary win/lose adjudication. Caveat: legitimacy depends on genuine consent — coercive or power-imbalanced processes undermine it.	Menkel-Meadow (1995)
Courts as the third branch	Courts are not just one door among many — their constitutional function must not be compromised by ADR integration.	French CJ
Symbiosis	Parties "bargain in the shadow of the law" — litigation prospects shape every settlement. ADR and litigation are intertwined, not alternatives.	Moffitt

ADR taxonomy (from the NADRAC definition)

DEFINITION ADR is "an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them." (NADRAC)