

## Week 1 – Procedural Preliminaries

### CAUSES OF ACTION

#### **Contract:**

- Intention
- Offer
- Acceptance
- Consideration
- Breach

#### **Negligence:**

- Duty of Care
- Standard of care
- Breach of Duty
- Damage
- Causation
- Foreseeability

## RULES OF THE COURT

Rules vary; but broad similar objective is that court based dispute resolution is:

- Fair
- Efficient
- Accessible
- Affordable; and
- Effective (Timely)

**SCR 3** – Objects of these rules are to minimize cost and delay and promote early dispute resolution.

### HOW DOES SCR ACHIEVE THESE RULES

1. Process to **Penalise Breaches** if a '**Procedural Irregularity**' occurs.

- **Procedural Irregularity:**
  - o Failure to comply with rules and orders;
  - o Causing unnecessary delay
  - o Prolivity (*Long Windedness*) in statement of the parties case
  - o Unnecessary, vexatious or improper commencement of or steps in proceedings
  - o Unreadiness to proceed with a case or step in proceedings (refuse comply time limits)

2. Impose fines - rules permit court to punish a party by awarding costs against the party/solicitor.

## CASE MANAGEMENT

Supreme and District court require parties to make offers of settlement BEFORE starting proceedings; to prepare "litigation plans" that anticipate the prospects of resolution and settlement AND to engage in ADR as directed.

- **Duty to assist orderly progress of case (SCR 113)**
  - o Parties and lawyers have a duty to the court to ensure that they keep the case moving and comply with directions in a timely manner
- **Plaintiff is responsible for carriage of proceedings (SCR 114)**
  - o Plaintiff has primary responsibility for ensuring the orderly carriage of proceedings.
- **Power to manage litigation (SCR 116)**
  - o Court has power to manage litigation to the extent necessary to ensure it is conducted fairly, expeditiously, economically and consistently with the proper administration of justice
- **Power to make orders controlling conduct of litigation (SCR 117)**
  - o Court may make a order it considers necessary for the proper conduct of a proceeding or otherwise in the interests of justice. The court may: (SCR 117(2))
    - a. Dispense with compliance with a rule
    - b. Extend or reduce time for taking any step in a proceeding;
    - c. Fix the time for taking a step in a proceeding if the time is otherwise fixed;
    - d. Permit party to withdraw a pleading or other document;
    - e. Strike out a document or proceeding if the court considers it frivolous; vexatious or an abuse of process of the court;
    - f. Requires parties state issues in particular ways; (i.e. Schedule)
    - g. Make orders giving effect to, or modifying litigation plans;
    - h. Require parties to prepare joint or separate statement on the issues between them;
- **Court may extend a time limit even though relevant time period expired (SCR 171(3))**

### Preliminary Legal Issues – Parties / Jurisdiction / COA (Pg 2)

## PARTIES

### MULTIPLE PARTIES (SCR 73)

- A single action may be brought by more two or more plaintiffs or against two or more defendants if:
  - o The claims by/against each arise out of the same or similar facts
  - o The claims by/against each involve the determination of a common question of law or fact
  - o The court gives permission

### Interpretation:

- It is not necessary that each joined party share the same cause of action (**Smurthwaite v Hannay**)
- There is no suggestion that all of the issues of fact or law for each person should be identical. It is sufficient that there is some common question, even though there may also be many different questions (**Nixon v Philip Morris**)

### JOINDER (SCR 74)

- P can seek to join other P's or D's. The D can seek to join other D as a 3<sup>rd</sup> Party to the action.
- A court may, on application or of its own initiative, order that a person who is not a party to the action **be joined as a party if satisfied that:** (SCR 74(1))
  - o The person has an interest in the subject matter of the action or in a question of law or fact involved in the action; or
  - o The court may require the person's cooperation in order to enforce a judgment; or
  - o The person has a right to joinder as a party under an Act or rule; or
  - o The person should be joined as a party to ensure that all matters in dispute in the action are determined; or
  - o The person should be joined as a party in order to enable determination of a related dispute and thus avoid multiplicity of proceedings.
- SCR 74(2): Court may, on application or own initiative, **order the disjoinder** of a party, if satisfied that it is in the interests of the efficient administration of justice to do so.
- SCR 74(5); court can not join a person as defendant to an action if would be past period of limitation:
  - o THOUGH SCR 74(6); may extend (statute of limitation) (6(a)) or join a person if P genuinely intended to bring against them but failed to identify person correctly as defendant (SCR 74(6)(b)).
- SCR 77: The mis-joinder or non-joinder of a party does not affect the validity of an action.

REMEMBER → COSTS ORDER; Bullock Order / Sanderson In costs for MULTIPLE DEFENDANTS

### Interpretation:

- Parties are not to be joined if it would cause unfairness to any party or if there are practical difficulties that would follow any joinder (**Bishop v Bridges**)

### REPRESENTATIVE PROCEEDINGS (SCR 80-81) → Class Actions

#### SCR 80 -- By Written Consent of the Group:

- A group of persons with a common interest in the subject matter of an action or proposed action can authorise one person in writing to bring or defend the action as representative of the group (r 80) → can be a plaintiff or defendant

#### SCR 81 -- By Authorisation of the Court

- Court may authorise a **plaintiff** to bring an action as representative of a group with a common interest in the questions of law or fact to which the action relates → can only be a plaintiff
  - a. Authorisation is not to be refused on the ground that damages might require individual assessments or that the matter arose out of separate contracts or transactions (r 81(4))

#### 'Common Interest':

- Those represented have a community of interest in any substantial question of law or fact (**Carnie v Esanda Finance Corp**)
- Claims of each member do not need to be for the same relief and need not be based on the same conduct of the defendant, but can arise out of the same, similar or related circumstances that give rise to a common issue of law or fact (**King v GIO Australia Holdings**)

# Week 1 – Ethics / Abuse of Process (Hopeless Case)

## ETHICS

### Three Fundamental Duties

- Duty to Client to act with zeal, confidence, competence and loyalty (no conflict).
- Duty to the profession to engage with them using courtesy, fair dealing, and not to bring profession into disrepute.
- Duty to the court which constitutes of a duty to the administration of justice and a duty not to mislead the court.

### Consequences of Breach

1. **Unsatisfactory Professional Conduct** (E.g. Serious neglect, undue delay, charging excessive fees, failure to maintain reasonable standards of competence and diligence).
2. **Professional Misconduct** (E.g. improperly influencing a witness or misappropriating trust accounts)
  - **Disciplinary action** by Legal Practitioners conduct board; BUT not by a 3<sup>rd</sup> party - ASCR 2)
  - Revocation of practicing certificate → More serious breaches
  - Suspension, fines or compensation orders → Less serious breaches
  - Breach of fiduciary duty → Remedy in equity
  - Breach of retainer agreement → Remedy in Contract
  - Personal costs order against the lawyer (**SCR 13(2)**).

### DUTY TO THE CLIENT

- **Duty of Representation**
- **Barristers** are required by the Cab-Rank rule to take on any case that comes within his/her professed area of practice, experience and level of skill unless:
  - o He/she is unavailable
  - o The matter is outside his/her area of practice or beyond competence.
  - o Client is unable to pay an acceptable fee
  - o There exists a 'valid reason' or 'good cause' for refusing it (e.g. Asking the lawyer to participate in illegal activity; the cause is vexatious).
- **Solicitors** can refuse to take a case, but generally only do so if busy or no reasonable prospect of success.
- Disliking a client, or revulsion of subject matter does not = a valid reason for refusal.
- **Duty to Inform, Advise and Act on Instructions:**
- Must **act in clients best interests** (ASCR 4.1.1)
- Must **provide clear and timely advice to assist clients understanding** of relevany legal issues and to make **informed choices** on action to be taken (ASCR 7.1)
- Must **advise about alternatives to litigation** (ASCR 7.2)
- Must **follow clients lawful, proper and competent instructions** (ASCR 8.1)
- Confidentiality (ASCR 9.1)