

LLAW3212 Civil Litigation

Cheat Sheet

Exam 2016

6/20/2016

You got this 😊

Examinable:

- How to commence proceedings
- Jurisdiction, parties and pleadings
- Case management
- Summary and default judgements
- Interlocutory applications and injunctions
- Disclosure
- Alternative dispute resolution
- Settlement
- Enforcement and execution of judgements

Setting up Your Problem Question Answer

What does the client want?

- Think carefully about the goals of the client
- Identify the interests involved
- The perspective of the different stake holders
- It might be that litigation might not be appropriate in this matter
 - o Can say this in your answer
 - o Then say, assuming that non-court option doesn't work and we need to litigate, then this is what would happen...
 - o Litigation might not be the best option!

Can I do it? Is it something which I as a lawyer can achieve?

- Analyse the dispute:
 - o Identify cause of action
 - o Its essential elements
 - o Theory of the case
 - o Who are the parties
 - o Etc. *Supreme Court Civil Rules 2006 (SA)* rr 73-89
- If you cannot remember substantive law then make an assumption, you're not being marked on it
- Just need to know enough in order to answer the question

How do I do it?

- Is there a non-court option?
- If it has to go to court, what sort of dispute resolution method am I going to try to use?
- If it has to go to court, which court?
 - o Jurisdiction: subject matter, territorial
 - o Overlapping jurisdiction
 - o Cost rules

If it has to go to court, what should I do before we begin proceedings?

- Are there matters of urgency requiring ex parte orders (e.g. protecting positions, rr 147, 246-256)
- Do we need more info which we cannot get other than by use of procedural tools? (e.g. pre-action discovery, r 32)
- What does the court require us to do before commencing proceedings (e.g. 90 day rule? R 33, pre-action requirements)
- Remember that there are some exceptional remedies (do not raise if there is no prospect of it, you can say in the exam that you won't raise it because the facts don't support it)

What do I have to do to commence proceedings?

- Originating process
 - o Summons
 - o rr 34-38
 - o Pleadings
 - o Statement of claim
- What goes with originating process?
 - o Pleadings
 - o rr 90, 91, 96
- Service
 - o Rr 39-41; 58-72; SEPA
 - o Can only serve within the State: Lorry v Farrel
 - o Jurisdiction extends to where

Defining the Issues

- Are the essential elements of the cause of action pleaded? rr 98-105
- If they're not, what can we do about it? rr 102-104
- What are the 'live' issues?

Can we get a result now?

- Default judgment? rr 228-231
- Summary judgment? rr 232
- Settlement?
- Mediation/arbitration? rr 220-222 & PD
- Filed offers? rr 187-188
 - o Means of promoting settlement

Gathering Info from Others

- Disclosure? rr 136-146
- Pre-trial examination by written questions? rr 150-152
- Notices to Admit? rr 156-158
- Experts? rr 160-161 & PD
- Subpoenas? rr 171-183

After Trial

- Costs? Act and rr 262-279
- Interest? Pre and post judgment r 261
- Appeals? Rr 282-300

Should I do it?

- Ethical issues
 - o Professional rules re advice on costs, ADR
 - o Foundation/motives for the litigation
 - o Use of procedure for collateral benefits e.g., delay

Firstly, Summarise

1

Client	1
Parties	1
Joinder	1
Causes of Action	2
Parties	2
Disjoinder	2
Intervenors	2
Representative Actions	3
Secondary Actions	3
Consolidation	4
What law are we going to apply?	4
ARE THERE ARE LIMITATIONS?	4

Firstly, summarise!

1

Summarise:

CLIENT:

Their goals, interests, and the different perspectives of the stakeholders

- Who are they and what do they want?
 - o What kind of relief? Monetary? Discretionary (injunctive or declarative)?
- Why are we going to sue?
 - o Most important question, the reasons as to why will affect how you proceed
 - o E.g., compensation, financial loss, vengeance, want a public explanation, want to hold a party accountable (publicly)

PARTIES:

Explain who the parties are → who is the P? Who is the D?

- Who can sue and be sued?
- Matter of substantive law
- Have to have reason to sue
- What do you need to know about who you want to sue?
 - o E.g., is the company still on foot (if they're a company)?
 - o This is important because it affects your ability to sue

Once you've identified who then you need to determine:

- Disabilities → age and mental capacity = litigation guardian (*Supreme Court Civil Rules 2006 (SA)* rr 78-79)
- Bankruptcy → *Bankruptcy Act 1966 (Cth)*
- Companies in Liquidation → Corporations Law – need to go to the courts to apply to sue them and usually use the insolvency process
- Partnerships & Unincorporated bodies → (*Supreme Court Civil Rules 2006 (SA)* rr 85 – 88)
- Deceased persons → Legislation, executors can step in and manage (*Survival of Causes of Actions Act 1940 (SA)*; *Supreme Court Civil Rules 2006 (SA)* r 76)
- Government or statutory bodies
 - o *Crown Proceedings Act 1972 (SA)*
 - Useful because it can be tricky on who you can sue
 - o Depends on how they're set up (are they set up by legislation?)
 - o Enforce judgment against the State – have to serve the warrant against the Governor

JOINDER (if applicable)

In law, a joinder is the joining of two or more legal issues together. Procedurally, a joinder allows multiple issues to be heard in one hearing or trial and is done when the issues or parties involved overlap sufficiently to make the process more efficient or fairer. It helps courts avoid hearing the same facts multiple times or seeing the same parties return to court separately for each of their legal

disputes. The term is also used in the realm of contracts to describe the joining of new parties to an existing agreement.

When a dispute involves more than one party or more than one causes of action (cause of action = legal right or remedy/the legal basis for legal relief)

General rule: the Courts are keen to avoid multiplicity of actions before it and therefore our rules provide for various joint causes of action (*Supreme Court Act 1935* (SA) s 27)

Causes of Action

- *Supreme Court Civil Rules 2006* (SA) rr 30 – 31
- You can join more than one P in an action and more than one D in one action (rr 30 – 31)
- Cases give rise to a twister list: Courts have held that if you have the same parties and the same facts then you have to bring all your claims in the same proceedings
 - o *Port of Melbourne Authority v Anshun* (1981) 147 CLR 589
 - o *Truthful Endeavour v Condon* [2015] FCAFC 70

Parties

- *Supreme Court Civil Rules 2006* (SA) r 73
- Insurers as defendants
 - o *AMP v Balfour* (1993) 61 SASR 492
 - o *JN Taylor v Bond* (1993) 59 SASR 432
 - o *CGU Insurance Ltd v Blakely* [2016] HCA 2
- Applying to be plaintiffs
 - o *Ong v Lottwo Pty Ltd* (in liquidation) [2013] SASCFC 57
- Joining trustee coy in estate claim
 - o *Zerella v Zerella* (2014) SASC 100

Disjoinder

- When you have facts that are different or so complicated that it would actually take longer joined together the Court has the power to disjoint and have separate proceedings
 - o *Supreme Court Civil Rules 2006* (SA) rr 31 & 74

Who can be involved in litigation?

Intervenors

- *Supreme Court Civil Rules 2006* (SA) r 89
- The States (through the A-G) have the right to intervene in a constitutional law case on behalf of the State
- If you have a legal interest that is somewhat affected/legal interest involved
- Cases
 - o *Jeavons v Chapman* (2008) SASC 249
 - o *Levy v Victoria* (1997) 189 CLR 579

- Not common

“Friend of the court”

- Can apply to join the case this way too
- A person is linked as a mission on law/relevant fact to assist the court
- They just have info that might be of interest of the court in making a decision
- Don't see this very often at all

Representative Actions

- Also known as class actions → in SA we have two different rules & two different actions
- The capacity to bring actions on behalf of other people
- Several identifiable P's and can have one P to represent all
- Class action: class is identified by description and not by identity, they might have their legal rights decided without being involved in the case and may not even know anything about it
- *Supreme Court Civil Rules 2006* (SA) rr 80 – 81 (two options)
 - o R 80 – must have a ‘common interest’
 - *Markt v Knight Shipping* [1910] 2 KB 1021 – traditional approach required ‘same interest’
 - *Carnie v Esanda Finance* (1995) 182 CLR 398 – HCA revised traditional approach and class action process became much broader to ‘common interest’
 - o R 81 – class action
 - Requires court authorisation to proceed
 - What and how the group must be defined (questions of law and fact)
 - *Proude v Visic* (no 3) (2012) SASC 234 – bush fire case
- Federal Court
 - o *Federal Court of Australia Act 1976* (Cth) Part IVA Representative proceedings
 - ss 33A – 33ZJ

Secondary Actions

- Cross claim/action (or counter-claims)
 - o *Supreme Court Act 1935* (SA) ss 29(2), 35
 - o P sues D and then D sues P
- Third party notices/action
 - o Third party process is when you bring other people into the action that might have other people's rights affected
 - Situation that exists in the context of D's being sued and says, actually, someone else is responsible or if I'm responsible, so are they
 - If I'm liable to P then so are you because you're also liable
 - Done by the D!
 - P is not suing the 3rd party – liability only arises subsequently to the D's liability being established
 - o *Supreme Court Act 1935* (SA) ss 29(3), 36

- *Supreme Court Civil Rules 2006 (SA)* s 36
- *Duke Group v Arthur Young* (1990) 54 SASR 498

Consolidation

- Different cases commenced that have similar facts/legal issues then the Court can bring cases together
- *Supreme Court Civil Rules 2006 (SA)* s 31

What law are we going to apply? (Substantive law)

- Make note of any essential elements of the matter, any theories that stand out (e.g. what area of law?)
 - Tort law? Negligence? SA tort law? Whose tort law? Is interstate or international law involved?

ARE THERE ANY LIMITATIONS?

Is it too late? Important! Limitations are very important because they can stop you from suing

Limitations of Actions Act 1936 (SA)

- Tort and Contract = 6 years (s 35)
- Except personal injury = 3 years (s 36)
- Defamation = 1 year (s 37)
- Most others = 15 years

Extension of time

- *Limitations of Actions Act 1936 (SA)* ss 46A, 47, 48
 - If you find a material fact you have 12 months to commence proceedings (remedial legislation allowing people to access courts)
 - Thought Courts were being too generous and therefore brought in s 48(3a)
 - E.g., *Ireland v Wrightman* [2013] SASC 139
- Disability
- Minor: you have until 18
- Capacity: you have time until you have capacity
- For children: certain process
- Industrial injuries: *Workers Rehabilitation and Compensation Act 1986 (SA)* s 54

Secondly, what are the options? Court vs no court?

2

Non-Court Option	1
Settlement	1
The Ordinary Rule	1
Courts Will Now Consider in Ordering Costs	2
Ethical Considerations	2
Offers to Settle	3
Formal	3
Informal	7
Cost Implications	8
Unreasonably or Imprudently Rejected	8
Difference between Formal and Informal Offers	8
Alternative Dispute Resolution	9
Negotiation	9
Mediation	9
Arbitration	11
Conciliation	12
Other Court Appointed 3 rd Parties	12
 Court Option	 13
Which Court?	13
Jurisdiction	14
Subject Matter	14
Choosing Between Courts	15
Territorial	16
Choosing Within Courts	18
Going to Court	19
Originating Process	19
Service of Documents	19
Pleadings	20
Types of Pleadings	21
Defining the Issues	23
Case Management	25
South Australia	25
Liquidated Debt Claims	26
Fast Track Cases	26
Ordinary Stream	27
Early Termination	28
Default Judgments	29
Inaction	30
Self-Executing Orders	30
Setting Aside Default Judgments	30
Summary Judgments	31
The Point of Summary Judgements	32
Urgent Cases	32

Secondly, what are the options? Court vs no court?

2

Non-Court Option

Is there a non-court option (ADR, Settlement)? What can be done instead of taking D to court? Anything?

It is actually rare for civil disputes to go to court. Sometimes a judgement requires enforcement, but this is not an option in settlement as it is a mutual agreement.

Are there any risks of litigation?

Settlement

Good idea because it resolves the dispute without going to court, probably therefore much lower costs and relationships between parties may be salvageable or maintainable. Is a way of taking genuine steps to resolving disputes before civil proceedings are instituted. It is also a less stressful, less costly and quicker way of resolving disputes.

Legislative Duty to attempt settlement before going to trial:

Civil Disputes Resolution Act (Cth) s 3

“The object of this Act is to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted.”

- Agreement between the parties to bring an end to their dispute
- Agreement is enforceable as a contract (quite a complex settlement contract which occurs through a deed of settlement)
 - o If failure to abide by settlement agreement, then new cause of action arises for breach of that contract
- Courts promote settlement by penalising parties that fail to accept certain settlement offers from the other party

The Ordinary Rule

Costs follow the event, and that such costs are taxed on a party-party basis (*Donald Campbell and Co v Pollak*) this rule will generally be followed unless there exists “special circumstances” (*Ritter v Godfrey*) to warrant a departure from the rule. The existence of offers to settle, and the unreasonable rejection of such offers, is now deemed to constitute such special circumstances. The financial penalty is achieved by the imposition of adverse costs orders made against the party that unreasonably rejects such an offer. These costs may amount to an award of indemnity costs, there is an unambiguous financial incentive to accept reasonable offers to settle.

.....