Principles of Civil Procedure in Victoria

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Principles of Civil Procedure in Victoria

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Preface

Civil procedure has always been a mainstay of the legal curriculum, and one of the perennial subjects of reform. Lord Coke celebrated it as "the truest guide to the knowledge of the common law" as "the KEY, that opens its inmost recesses, and an EXPOSITOR, that discloses and explains the most abstruse parts of it." However, its place has changed and we can no longer confidently assert the grandeur of the pleading as "the most important single title in the law". It has, for a start, moved from being a first year offering to a final and (for some students who graduate without it, not intending to practise) even an optional unit. This in part reflects a change in the relationship between legal training and legal education, and between the profession and the degree-conferring institutions. When judges and practitioners ran the law schools the undergraduate degree served as an adjunct to an apprenticeship-based training. However, the institutionalisation of law replaced a vocational and experiential with a scholastic training in "thinking" (rather than acting) like a lawyer. In this context procedure was subordinated to substance and assumed the status of a remote reality associated with the life of the working advocate rather than the reflective novitiate uncompromised by experience.

The centrality of procedure was therefore historically situated. It reflected the nature of society insofar as it emerged from the practice of lawyers seeing the law in the form of an action which conditioned their views of legal rights and wrongs. Theory and practice, substantive and adjectival law, merged in procedure, especially in pleadings, because law was the search for a remedy through the medium of pleadings without which the very idea of law was obsolete. The rights of substantive law were real only if litigation could deliver them. As anachronistic as that view surely is, it nevertheless draws attention to the current dissatisfaction with procedure courses. Procedure, as a subject matter, is difficult and elusive because it is divorced from the practice in which it is enlivened and which gives it relevance. It is seen as a rule-based technical exercise separated from, if not at odds with, the litigant's experience of the law. At the same time courses in civil procedure are rarely practically grounded so that the best opportunity to acquire lawyering skills appears to be wasted, leaving graduates unprepared for work.

Learning civil procedure requires an acquisition of the knowledge of the place that the procedural law occupies in the larger system of law; teaching civil procedure involves imparting a desire on the part of the student to develop a critical perspective on procedure and its function in the system of laws. What is required is a departure from the aridity of rules to the rationality of action, inclusive of an ethical concern for why we do things — whether the decision to litigate in the first place, or the strategies adopted during the pre-trial process or at the hearing itself.

Textbooks are servants to a purpose. Some are celebrated servants, but all have as their purpose to enable the newcomer the find a path through the complex thicket of law. In attempting to introduce the reader to a vast terrain the text must balance the need for comprehensiveness with sufficient attention to detail. Mindful of the realities of study they must be adaptable to the lecture theatre, responsive to the needs of students, and provide a foundation for the extension of the law course through problem solving, mooting and other devices.

Those devices are increasingly being seen as essential to overcoming the passivity of lecture- and seminar-based pedagogy. They are equally crucial to addressing the alienation of the law student from the legal process by introducing them, through what happens in a case, to the lawyer's role in adjudication. That role situates the lawyer at the nexus of often competing demands — from clients, colleagues and jurisdiction — and makes demands on them as skilful strategists, compels them to attend to ethical duties through hard choices, and negotiate the interrelationship between substance and procedure.

The benefit of using the civil action as a point of departure is that it provides a synoptic introduction to the substantive law that grounds the quest for relief, the procedural machinery both at the disposal of and governing the parties' actions, and the decisions lawyers are required to make prior to, at the commencement of, and during, the suit at law. Simulations, while they cannot teach the art of advocacy — a lifelong endeavour — may impart an appreciation for the practise of law.

The same moral and ethical questions that are etched into the features of the law are inseparable from a complete concern with the subject of procedure. Dilemma ferments in procedure because competing interests and the contest over rights strain the adversarial system. As hard and as self-consciously as the rules strive to achieve fairness they are grounded in assumptions to which they are necessarily blind, and impressed with unquestioned values. Civil procedure courses necessarily impart a correct understanding of the rules that determine and constrain lawyers' practice, and should also offer a chance for reflection on, and the critical evaluation of, those actions. Extending discussions of procedure by locating its principles in an ethical framework raises questions about the relationship between legal work and social resources, the value of truth compared with resolution, and the rights of individuals and communities.

CLAUDIO BOZZI

Melbourne
9 June 2016

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1 The New Proceduralism

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If justice goes, there is no longer any value in men's living on the earth[1]

THE GOALS OF CIVIL PROCEDURE

[1.10] The civil justice system is comprised of two co-existing, inseparable, interrelated, and historically variable aspects.[2] On the one hand civil justice refers to the process of resolving disputes between individual parties using the system of state courts. This feature is evident with very little variation in all justice systems. It is the central procedural ideology of liberal states where it assumes the material form of a neutral

1 I Kant, "Metaphysical First Principles of the Doctrine of Right" in *The Metaphysics of Morals* (M Gregor trans, Cambridge University Press 1991), S 49(E)(I) at I4I [Ak 332].

2 A Uzelac, "Goals of Civil Justice and Civil Procedure in the Contemporary World: Global Developments – Towards Harmonisation (and Back)" in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer International Publishing, Switzerland, 2014), pp 8–9; I Lorange Backer, "Goals of Civil Justice in Norway: Readiness for a Pragmatic Reform" in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer International Publishing, Switzerland, 2014), p 114.

forum for resolving conflicts over individual rights. In this conflict-resolving mode it aims at substantive justice: that is, the production of an enforceable judgment determining the substantive rights and obligations of individuals. The other, and less evident, function of civil justice is social rather than individual: civil procedure is an instrument for implementing social policies and realising social goals in accordance with the dominant or official political ideology.[3]

In liberal ideology procedural law as a method of resolving disputes concerning individual rights relies on a concept of the liberal subject as the bearer of inalienable pre-existing rights which are identified and affirmed through litigation. The purest form of liberal procedural ideology provides the individual whose rights have been purportedly infringed a neutral forum, which the parties effectively control (*domini litis*) with minimal intervention from the state, for resolving the matter finally (*res judicata*) between them exclusively (*facit ius inter partes*). The classical legal doctrine of knowable rights and litigation as a proven method for determining those rights depends on the pre-existence and separability of fact and law. Facts and rights objectively exist before their discovery, description and categorisation by law, and facts are only revealed and rights merely asserted by legal processes such as discovery and pleadings. Further, adjudication is based on the doctrine which procedure had revealed to be applicable in the case. Consequently, procedure is applied to doctrine to yield truth, and legal questions admit of determinate answers, by using unequivocally valid approaches.

The self-determining individual affirms their identity and rights through procedural law which enables the full participation of the litigant in the procedure.[4] Participation is realised through procedural instruments such as service, notice, pleadings, discovery and appearance. As Tribe observes:

> It might as well be recognized that unfairness inheres in disposing of an individual's situation without allowing that individual to participate in some

3 A Uzelac, "Goals of Civil Justice and Civil Procedure in the Contemporary World: Global Developments – Towards Harmonisation (and Back)" in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer International Publishing, Switzerland, 2014), pp 3–34: the social policy function of procedure operates in fewer jurisdictions than the individualist function, and conceives of its concrete objectives inconsistently across those jurisdictions.

4 Later research concerned procedural justice and the fairness of the process by which decisions are reached: JW Thibaut and L Walker, *Procedural Justice* (Erlbaum, Hillsdale NJ, 1975). Thibaut and Walker's theory and research emphasised direct participation in the decision and the opportunity to voice one's opinion as key principles by which people judge the fairness of a process. See also S White, *The Recent Work of Jürgen Habermas: Reason, Justice and Modernity* (Cambridge University Press, Cambridge (UK) and New York, 1989) on Habermas's ideal speech situation as "rules for discourse" (p 55), and as a linguistic and philosophical theory of fairness. A fair process requires that anyone interested must be able to attend, initiate discourse, participate in discussion, and influence the collective consensus decision (pp 55–57).

> meaningful way — not simply because more mistakes are likely to be made thereby, but because such treatment seems incompatible with the person's claim to be treated as a human being.[5]

Justice therefore inheres not only in the correctness of the judicial outcome but in the extent to which the procedure evinces respect for human dignity:[6]

> The validity and moral authority of a conclusion are largely dependent on the mode by which it is reached. No better instrument has been devised for arriving at truth than to give a person in jeopardy of a serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to [proper] government, that justice has been done.[7]

In liberal states individuals participate in the civil justice system as individuals for the purpose of affirming individually held rights, and not for any trans-individual purpose. The social function of procedural law is a more explicit policy in certain socialist or formerly socialist states, and in European countries where principles of social solidarity are historically rooted. For example, in Hungary and Austria, civil justice is said to protect the legal order as a whole; in China its purpose is to maintain social order consistent with an ideology of harmonious social development; and in Russia the social aim of civil proceedings is to strengthen legal order and law and order.[8]

The individual and trans-individual purposes of civil justice are inseparable. Trans-individual objectives of social justice within the particular vision of society serving the rule of law are ineliminable even where social and historical conditions may alter the balance between the objectives — both systemically and in any particular case. Thus, the formal ideological individualism of liberal procedure and the rights-

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5 LH Tribe, *American Constitutional Law* (Foundation Press, Mineola NY, 1978), p 538.

6 The importance of being treated with dignity is also implicated in Lind's and Tyler's group value model: see E Lind and T Tyler, *The Social Psychology of Procedural Justice* (Plenum, New York, 1988). They suggested that people are concerned with their social standing in society, and experiences of justice or injustice indicate how others evaluate them. EA Lind, TR Tyler and YJ Huo, "Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgments" (1997) 73 *Journal of Personality and Social Psychology* 767; K Van den Bos, EA Lind, R Vermunt and HAM Wilke, "How Do I Judge My Outcome When I Do Not Know the Outcome of Others? The Psychology of the Fair Process Effect" (1997) 72 *Journal of Personality and Social Psychology* 1034; and EA Lind, R Kanfer and CP Early, "Voice, Control and Procedural Justice" (1990) 59 *Journal of Personality and Social Psychology* 952 found that much of the variance in procedural fairness attributed to voice was explained by group value variables, lending support to the hypothesis that being able to express oneself gives one a sense of dignity.

7 *Joint Anti-Fascist Refugee Committee v McGrath* 341 US 123 (1951) at 171–172 (Frankfurter J concurring).

8 A Uzelac, "Goals of Civil Justice and Civil Procedure in the Contemporary World: Global Developments – Towards Harmonisation (and Back)" in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer International Publishing, Switzerland, 2014), p 9.

affirming aim of civil justice do not necessarily restrict it to a purely individualistic purpose. In the United States, for example, civil litigation has enabled the enforcement of public laws through private litigation without administrative intervention; while class action litigation has been, in some cases, an ostensibly private mechanism for social engineering.[9]

The Productivity Commission in Australia identified "social stability and economic growth"[10] as an objective of the civil justice system. It further stated that the "overarching aim is to ensure that the community has access to a fair system of justice that protects the rights of individuals and organisations/legal entities and contributes to community safety."[11] While centralising the liberal values of individual and corporate rights, the Commission acknowledges that establishing the enforceable rights and obligations between individuals also has a socially instrumental value. Further, civil procedure has a central role in sustaining the liberal ideology of the rule of law. By fulfilling the social needs and expectations of a functional system of litigation in which proceedings are conducted effectively, and laws are uniformly interpreted and consistently applied, litigation sets clear boundaries for liberal subjects to act and interact within the system. In clearly defining and advancing respect for those boundaries in individuals' common practices civil litigation contributes to social justice.

THE "CRISIS" OF CIVIL PROCEDURE

[1.20] In Reinhart Kossellek's analysis the reference to "crisis" in modernity merges a number of historical usages: in the first place, the legal or juridical sense of crisis as a decision, verdict, or judgment for the maintenance of civic order; secondly, its theological reference to the Last Judgment in early Christianity; and, lastly, its role in medicine to denote the decisive point in the course of an illness determining whether a patient will live or die. As the signifier of an historical moment crisis suggests that the events constitute a decisive and structural break with the past indicating the need for, and at the same time ushering in, new forms and identities.[12] Consistently with the employment of the term in

9 R Marcus, "American Exceptionalism in Goals for Civil Litigation" in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer International Publishing, Switzerland, 2014), p 126. See also the examples of: correcting inappropriate government activity (Brazil): T Arruda Alvim Wambier, "Judicial Activism as Goals Setting – Civil Justice in Brazil" in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer International Publishing, Switzerland, 2014), pp 245–260; and reaching social harmony (China): Fu Yulin, "Social Harmony at the Cost of Trust Crisis: Goals of Civil Justice in China" in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer International Publishing, Switzerland, 2014), pp 167–182.

10 See Victorian Law Reform Commission, *Civil Justice Review: Report* (2008), p 89.

11 Cited in Victorian Law Reform Commission, *Civil Justice Review: Report* (2008), p 89.

12 R Koselleck (trans M Richter), "Crisis" (2006) 67 *Journal of the History of Ideas* 357.

modernity to refer to an historical rupture all great reform agendas have had as their prelude the characterisation of civil justice as a system in crisis.

The concept of crisis had become commonplace in assessments of the dysfunctional state of the civil justice system in common law jurisdictions in the 1990s. Sir Gerard Brennan, then Chief Justice of the High Court of Australia, for example, said:

> The courts are overburdened, litigation is financially beyond the reach of practically everybody but the affluent, the corporate or the legally aided litigant; governments are anxious to restrict expenditure on legal aid and the administration of justice. It is not an overstatement to say that the system of administering justice is in crisis.[13]

Lord Woolf concluded that the system in the United Kingdom had been disabled by systemic problems of cost, complexity and delay.[14] Echoing Brennan's remarks, Lord Woolf concluded that these inextricably interrelated problems constituted, "a denial of access to justice".[15]

The Victorian Attorney-General in introducing the *Civil Procedure Bill 2010* (Vic) observed similar features of a system in a critical condition:

> the process to achieve resolution of civil matters that are started in the courts, including the cases that are settled before trial, is often unduly long and costly. The current cost of litigation has reached a point where access to the civil courts is beyond the reach of most Victorians.
>
> …
>
> The bill recognises that the civil litigation system has become out of balance and is increasingly unable to achieve essential goals of accessibility, affordability, proportionality, timeliness and getting to the truth quickly and easily.

Debate ensued regarding the proper characterisation of the state of and the disturbances within the system. Zander, for example, rejected Lord Woolf's analysis of the civil justice system as the promulgation of "cliches" unsupported by empirical evidence, and with them Lord

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13 G Brennan, "Key Issues in Judicial Administration" (Paper delivered at the 15th Annual Conference of the Australian Institute of Judicial Administration, Wellington, 20–22 September 1996).

14 Lord Harry Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995), Ch 3, [1]. These same defects had been identified as early as 1974 by the British Section of the International Commission of Jurists (ICJ) which concluded that the system of civil litigation in England and Wales "is too slow, too expensive, too cumbersome and too formalistic": *A Justice Report, Going to Law: A Critique of English Civil Procedure* (Council of Justice, British Section of the International Commission of Jurists, 1974), [75]. The same problems were identified with the civil justice systems in the United States. The problems were discussed at the 1975 Pound Conference in the United States and articulated by Justice Warren Burger in "Isn't There a Better Way?" (1982) 68 *American Bar Association Journal* 274.

15 Lord Harry Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995), Ch 3, [13].

Woolf's proposed reforms.[16] Similarly, Wright and Melville denied any factual basis to the concerns expressed by critics of the system.[17] The Australian Law Reform Commission also concluded that Brennan's crisis theory was not supported by its own empirical investigations presented in its 2000 report, *Managing Justice: A Review of the Federal Civil Justice System*.[18] In particular its analysis could find

> no "litigation explosion"; small numbers of cases taking two to three years to finality, evident room for improvement in case duration, but no systemic, intractable delay in case processing or resolution; and a range of very high and medium legal costs and much litigation assistance from lawyers and government.[19]

The enquiry, which was limited to courts and tribunals exercising federal jurisdiction, found no evidence to support the view that the majority of

16 M Zander, "Why Lord Woolf's Proposed Reforms of Civil Litigation Should be Rejected" in AAS Zuckerman and R Cranston (eds), *Reform of Civil Procedure: Essays on Access to Justice* (Clarendon Press, Oxford, 1995), p 81.

17 It has also been said that the "claims concerning rising litigation rates are not necessarily founded on fact": T Wright and A Melville, "Hey, But Who's Counting? The Metrics and Politics of Trends in Civil Litigation" in W Prest and S Roach Anleu (eds), *Litigation: Past and Present* (University of New South Wales Press, Sydney, 2004), p 96.

18 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (2000) inquired into courts and tribunals exercising federal jurisdiction in Australia including the High Court, the Federal Court and the Family Court. The Commission's terms of reference were limited to a review of federal courts and tribunals in Australia: [1.48]. The Commission's empirical research led it to conclude that "[t]he adage that the justice system is open only to the very rich and very poor was not confirmed": [1.47]–[1.48]. However, Weisbrot and Davis note that "many of the major themes arising from the Managing Justice report can be applied to the Australian justice system as a whole (and, indeed, to civil justice systems generally)": D Weisbrot and I Davis, "Litigation and the Federal Civil Justice System" in W Prest and S Roach Anleu (eds), *Litigation: Past and Present* (University of New South Wales Press, Sydney, 2004), p 125.

19 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (2000), [1.47]–[1.48]: "Quite the opposite appears to be the case – there is evidence that, far from there being a litigation explosion early this century, there has been a decrease in the number of lodgments received by courts (or at least, no significant increase in litigation) in civil jurisdictions in Australia, the United Kingdom and the United States." See also S Roach Anleu and W Prest, "Litigation: Historical and Contemporary Dimensions" in W Prest and S Roach Anleu (eds), *Litigation: Past and Present* (University of New South Wales Press, Sydney, 2004), p 7; D Bamford, "Litigation Reform 1980–2000: A Radical Challenge?" in W Prest and S Roach Anleu (eds), *Litigation: Past and Present* (2004), p 147; D Weisbrot and I Davis, "Litigation and the Federal Civil Justice System" in W Prest and S Roach Anleu (eds), *Litigation: Past and Present* (University of New South Wales Press, Sydney, 2004), p 125. For a discussion of the position in the United States, see M Galanter, "A World Without Trials?" [2006] *Journal of Dispute Resolution* 7 at 13. For information on filings in the United Kingdom, see R Dingwall and E Cloatre, "Vanishing Trials?: An English Perspective" [2006] *Journal of Dispute Resolution* 51 at 68–69.

ordinary persons (those not wealthy enough to purchase their own legal services, or poor enough to have it publicly funded) found access to the courts prohibitively costly.[20]

Still, other analysts, while acknowledging problems in the litigation system, identified lawyers' motivational and ethical failings as causes, rather than attributing the malfunction to systemic defects. Lord Woolf referred to lawyers' failure to exercise proper discipline in conducting proceedings as efficiently as possible.[21] Zuckerman argued that lawyers were presented with incentives to exploit opportunities to prolong, delay and complicate proceedings resulting in mounting costs; however, the tendency to produce complex, slow and costly proceedings was not a feature integral to the system itself, but the product of the legal profession's monopolistic control over the production of substantive justice.[22] Davies, however, attributed the expense of proceedings to the labour intensiveness of legal practice.[23] Hanycz refers to the systemic wastefulness caused by aligning the client's interest in zealous advocacy with the protracted proceedings that stem from adversarialism.[24]

Distinguishing between the nature and the misapplication of the rules is to some extent misleading. Lord Woolf observed that the subversive practices[25] lawyers engaged in may involve either using rules contrary to

20 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (2000), [1.47]–[1.48]. However, an earlier report had drawn conclusions similar to Lord Woolf's in the context of the Australian court system: Australian Institute of Judicial Administration, *Delays and Efficiency in Civil Litigation* (1985).

21 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (2000), [36]. See also DA Ipp, "Reforms to the Adversarial Process in Civil Litigation – Part I" (1995) 65 *Australian Law Journal* 705 at 728 for more examples of "adversarial excesses". Lord Harry Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995), maintained that delay "allow[ed] litigators to carry excessive case loads in which the minimum possible action occurs over the maximum possible timescale": [12].

22 AAS Zuckerman, "Lord Woolf's Access to Justice: Plus ça change…" (1996) 59 *Modern Law Review* 773 at 773. Also see, for example, DA Ipp, "Opportunities and Limitations for Change in the Australian Adversary System" in H Stacy and M Lavarch (eds), *Beyond the Adversarial System* (Federation Press, 1999), p 83 who comments that "As long as costs are defined by the length of time spent on the case, advocates are effectively rewarded for delay, ineptitude and obstructionism".

23 GL Davies, "The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System" (Paper presented at the 20th Australasian Institute of Judicial Administration Annual Conference, Brisbane, 12–14 July 2002), p 7. Other examples of wasteful professional and business practices by lawyers are provided by the references cited at Victorian Law Reform Commission, *Civil Justice Review: Report* (2008), p 79.

24 C Hanycz, "More Access to Less Justice: Proportionality and Costs in Canadian Civil Justice Reform" (2008) 227 *Civil Justice Quarterly* 1 at 98, 106.

25 Lord Harry Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995), [8].

the purposes for which they were intended,[26] or using the rules to the fullest possible extent to advance their own cause or frustrate the opposition's.[27] A professional ethos of inflexible adversarialism drives advocates to use all tools at their disposal to defeat the opposition.[28] The construction of proceedings as a relationship of absolute enmity between the parties encourages tactical and unco-operative interpretations of the rules of procedure,[29] while the passive role of the judge[30] in the common law system permits extremist practices to develop unrestrained.[31] Party autonomy in litigation invites litigants to ignore the rules and the courts not to enforce them.[32]

A range of commentators conceded that, regardless of its grounding in fact, perceptions of a dysfunctional system were widespread. The ALRC report, for one, acknowledged "significant controversy and disquiet" in

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26 Lord Harry Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995), "pleadings which fail to state the facts as required and to establish the issues in the case; sham defences" and, "witness statements which may be used to obscure witness evidence, rather than to clarify it": [9].

27 Lord Harry Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995), "excessive discovery pursued without regard for economy, efficiency and relevance" ([10]); "the use of and approach to expert evidence which resulted in the involvement of too many, too 'eminent' witnesses subject to partisan pressure" ([11]); and "the repeated use of interlocutory hearings to ensure that the opposing side fulfills the requirements of the rules, or use of those rules in tactical skirmishing to delay the progress of the case": [41].

28 GL Davies, "The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System" (Paper presented at the 20th Australasian Institute of Judicial Administration Annual Conference, Brisbane, 12–14 July 2002), referred to as "the adversarial imperative" consisting of twin compulsions that each party has "to see the other as the enemy who must be defeated" (p 6), and "the perceived need to leave no stone unturned": p 7. In some jurisdictions expediency has been associated with an adversarial system: CH van Rhee, "Civil Justice in Pursuit of Efficiency" in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer International Publishing, Switzerland, 2014), pp 61–78; CH van Rhee, "The Law's Delay: An Introduction" in CH van Rhee (ed), *The Law's Delay: Essays on Undue Delay in Civil Litigation* (Intersentia, Groningen, 2004), p 12; see also EH Glatz, "Accelerating Civil Justice in Hungary" in CH van Rhee (ed), *The Law's Delay: Essays on Undue Delay in Civil Litigation* (Intersentia, Groningen, 2004), pp 93–106; and J Kekkonen, "Reform and Attempts to Reform Civil Procedure in Nineteenth-Century Finland" in CH van Rhee (ed), *The Law's Delay: Essays on Undue Delay in Civil Litigation* (Intersentia, Groningen, 2004), pp 171–180.

29 Lord Harry Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995), [36].

30 GL Davies, "The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System" (Paper presented at the 20th Australasian Institute of Judicial Administration Annual Conference, Brisbane, 12–14 July 2002), p 7.

31 Lord Harry Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995), [5].

32 Lord Harry Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996), [2]. See also International Commission of Jurists, *A Justice Report, Going to Law: A Critique of English Civil Procedure* (Council of Justice, British Section of the International Commission of Jurists, 1974), [153].

relation to State jurisdictions,[33] while Sackville referred to the broad if unjustified public perception that that justice system was "costly, inaccessible and beset with delays".[34] Ipp described the situation not as actual dysfunction but as "dissatisfaction with the court system", and an "erosion of confidence in the justice system".[35]

The nature of the crisis

[1.30] Clearly, opinion was divided as to whether the civil justice system was beset with systemic contradictions indicative of genuine crisis. If the system was in crisis, its normal functioning would make it prone to deterioration ("theological crisis" in Kossellek's terms) under certain historical conditions: for example, if the pursuit of substantive justice by some court users were to harm access to justice for other court users when the system's resources failed to expand to meet an increasing demand for justice. Then the civilising project of justice (truth and substantive justice for some) is purchased at too high a price (decreased access to justice for all) because the procedural rules have been uncoupled from, and are incapable of being organically recoupled with, their normative basis in the rule of law.[36]

The claim that the system is only dysfunctional because certain features are exploited by some practitioners[37] and that the problems of cost, complexity and delay reflect an abuse rather than a use of the rules, is nevertheless an admission of crisis. The civil justice system is a unity (of judiciary, practitioners, users and laws) to which the ethos of the legal profession is integral. The procedural rules, for example, are only realised by being put into practice. If the enactment of the rules invites the deterioration of justice the system has self-contradictorily dislodged itself from its normative basis in fact (and indeed in theory). The instrumentalisation of the rules by lawyers is a systemic problem because it reflects lawyers' ethos, the potential in the laws for their misuse to be justified as consistent with their interpretation, and judicial tolerance.[38] Neither is it possible to claim that the system can reflexively (that is to say, from its own resources) address this problem in the sense that the exploitation in question is a measurable departure from the rule of law

33 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (2000), [1.50].

34 R Sackville, "Reforming the Civil Justice System: The Case for a Considered Approach" in H Stacy and M Lavarch (eds), *Beyond the Adversarial System* (Federation Press, 1999), p 35.

35 DA Ipp, "Reforms to the Adversarial Process in Civil Litigation – Part I" (1995) 69 *Australian Law Journal* 705 at 705.

36 T Bingham, *The Rule of Law* (Allen Lane, London, 2010), pp 37–40.

37 AAS Zuckerman, "Lord Woolf's Access to Justice: Plus ça change" (1996) 59 *Modern Law Review* 773.

38 See A Uzelac, "Turning Civil Procedure Upside Down: From Judges' Law to Users' Law" in *Tweenonderd jaar/Bicentenaire Code de Procedure Civile* (Kluwer uitgevers, Mechelen, 2008), pp 413–427.

open to judicial or other correction. Rather, the exploitation is not measurable by the rules which permit that departure because it is in fact an inherent feature of the rule.

Further, the deep and widespread feelings and opinions marked by disaffection from or hostility to the system are not in themselves systemically insignificant.[39] First, those perceptions may indicate that the justice system has lost its credibility as a fair mechanism for adjudicating disputes, or as a forum for equitably allocating and distributing social resources such as justice.[40] Secondly, to ignore or dismiss them as mere perceptions is to denigrate and demote the view of court users[41] relative to the legal profession.

Procedural law is essential to the law's fairness and ultimately to its legitimacy. In its instrumental function (substantive justice) procedural norms and the procedural system promote accurate fact finding on which legal truths are raised enabling justice to be done. The purpose of meticulously observing procedural formalities is therefore to ensure the fairness of the decision arrived at in the proceeding. Classical legal theory[42] assumed procedural forms to be transparent,[43] in the sense both that forms existed suitable to the particular facts raised, and that procedure was merely a medium for applying the correct rule to the facts

39 User satisfaction surveys have only relatively recently come into use in relation to litigants as court users. They reveal that in Holland 84% of users are generally satisfied; that users are less happy with the length of proceedings, the empathy displayed by the judge and some other special issues: CH Van Rhee, "Civil Justice in Pursuit of Efficiency" in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer International Publishing, Switzerland, 2014), pp 61–78. Also, regarding Lower Austria, that 86% of participants thought that judicial proceedings lasted too long or "much too long": Christian Koller, "Civil Justice in the Austrian-German Tradition" in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer International Publishing, Switzerland, 2014), pp 35–60.

40 A Uzelac, "Turning Civil Procedure Upside Down: From Judges' Law to Users' Law" in *Tweenonderd jaar/Bicentenaire Code de Procedure Civile* (Kluwer uitgevers, Mechelen, 2008), p 417.

41 A Uzelac, "Turning Civil Procedure Upside Down: From Judges' Law to Users' Law" in *Tweenonderd jaar/Bicentenaire Code de Procedure Civile* (Kluwer uitgevers, Mechelen, 2008), p 415, n 5, noting that "the term 'justice system users' is of recent coinage. It first entered currency in the UK, and has been adopted by the European Commission for the Efficiency of Justice of the Council of Europe (CEPEJ), see <http://www.coe.int/cepej> (consulted in March 2008)."

42 A Kennedy, "Toward an Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940" (1980) 3 *Research in Thought and Sociology* 3; A Kennedy, "Form and Substance in Private Law and Adjudication" (1976) 89 *Harvard Law Review* 1685; JW Singer, "The Legal Right Debate in Analytical Jurisprudence from Bentham to Hohfeld" [1982] *Wisconsin Law Review* 975; RM Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (Free Press, New York, 1976).

43 A Kennedy, "Toward an Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940" (1980) 3 *Research in Thought and Sociology* 3; JW Singer, "The Legal Right Debate in Analytical Jurisprudence from Bentham to Hohfeld" [1982] *Wisconsin Law Review* 975.

without itself making a material contribution to the determination of the dispute. The role of procedure in adjudication therefore was neutral in that it merely ensured the adjudicatory system generated the correct outcome from the discovered facts, and formal in that it only made immanent the justice latent in the facts themselves.[44]

However, questioning the unproblematic relationship between procedure and truth strips procedural rules of their inherent value as ideal regulative instruments ensuring fairness.[45] Further, the status of procedure as a scientific instrument for discovering truth is undermined by the opacity of procedural formalism, and the manner in which procedural law and substantive law condition each other.[46] The classical legal doctrine of knowable rights and a proven method for determining those rights was overturned by legal realist analyses of the inseparability of fact and law. Neither facts nor rights objectively exist prior to their discovery, description and categorisation by law, nor are they independent of the historical and social contexts which establish them. Legal doctrine and processes such as discovery and pleadings produce rather than merely reveal facts.[47] Further, adjudication plays a constructive role in that decisions were not simply based on the doctrine which procedure had revealed to be applicable in the case, but were applications of policy and other contextual factors. Consequently, rather than applying doctrine through procedure to yield truth, legal questions may admit of no determinate answer, or of equally valid conflicting approaches;[48] and adjudication does not simply follow rules to a predestined conclusion, but is itself necessarily a law-making process.

Realist analysis of liberal procedural institutions show them to be thickly historical, ideological and capable of being instrumentalised by and subjected to interests and power. In a well-known study, Galanter, for example, divided users of the civil justice system into "one-shotters" and

44 See J Bentham, "Principles of Judicial Procedure with the Outline of a Procedure Code" in *The Works of Jeremy Bentham Vol II* (William Tait, Edinburgh, 1843), p 5: "procedure is the course taken for the execution of the laws"; *Re Coles and Ravenshear Arbitration* [1907] 1 KB 1 at 4 per Collins MR: "the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress".

45 Socialist jurisprudence had assumed the task of revealing the manner in which bourgeois class interests structured truth and determined legal rights through litigation: see A Vyshinsky, *The Law of the Soviet State* (The MacMillan Company, New York, 1948), pp 73–76.

46 On the research of the legal realists led by Charles E Clark see JH Schlegel, "American Legal Realism and Empirical Social Science: From the Yale Experience" (1979) 28 *Buffalo Law Review* 459 at 491–569. The empirical research on litigation by Law and Society scholars is voluminous. For a survey and useful bibliography of work up to 1980–1981, see "Special Issue on Dispute Processing and Civil Litigation" (1980–81) 13 *Law and Society Review* 391.

47 See Note, "Plausible Pleadings: Developing Standards for Rule 11 Sanctions" (1987) 100 *Harvard Law Review* 630 at 645–647.

48 See, for example, KN Llewellyn, "Some Realism About Realism – Responding to Dean Pound" (1931) 44 *Harvard Law Review* 1222.

"repeat players": the former being individuals who used the court system either infrequently or only once, while the latter tended to be wealthy institutions who enjoyed, for example, advantages of procedural intelligence, procedural skill, and the possession of or access to expertise. As frequent users of the court system repeat players' individual proceedings were assisted by economies of scale, and the capacity to allocate resources, and absorb risk. Further, while one-shotters used the court system to achieve an outcome, repeat players could use it to determine future outcomes by seeking precedent-making procedural rulings, or lobbying for changes to procedural law.[49]

The sense that justice is contingent on power and resources undermines the relationship between individuals and the courts (characterised by participation) and deprives litigants of the sense of self-worth and dignity which liberal theory warrants can be redeemed through the enforcement of rights, and which constitutes the basis of the civil justice system's claim to be considered right and just, and its worthiness to be recognised. Only relatively recently in legal history have procedural reforms "turn[ed] the focus from judicial professionals to citizens as principal users of civil proceedings"[50] countering the justice system's tendency to self-centredness. That self-centredness is nourished by an historical tendency to view the judicial profession as natives of the system and litigants as outsiders. It is identifiable as an excessive formalism representing "insider's values", ignoring the litigant's role as an actor in the proceedings.[51] Empirical studies of the lawyer's reconstruction of the client's liberal subjectivity by, for example, urging them to accept resolutions that the lawyer believes to be feasible, and the lawyer's manipulation of the client's desire constraining them to choices from amongst solutions that the system is prepared to deliver, question the liberal ideology of procedure as self-empowering, and rights affirming.[52]

Parties tend to assess the system in terms of justice and effectiveness, whereas lawyers and judges assess it by the formal criteria of procedural

49 M Galanter, "Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 *Law and Society Review* 95.

50 C Koller, "Civil Justice in the Austrian-German Tradition" in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer International Publishing, Switzerland, 2014), p 46; I Lorange Backer, "Goals of Civil Justice in Norway: Readiness for a Pragmatic Reform" in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer International Publishing, Switzerland, 2014), p 117.

51 A Uzelac, "Goals of Civil Justice and Civil Procedure in the Contemporary World: Global Developments – Towards Harmonisation (and Back)" in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer International Publishing, Switzerland, 2014), p 27.

52 See A Sarat and WLF Felstiner, "Law and Strategy in the Divorce Lawyer's Office" (1986) 20 *Law and Society Review* 93 at 116–125. Even countries with a strong tradition of formalism as a way of delivering certain and predictable decisions, such as Germany, rejected proceduralism if it failed to achieve the instrumental purpose of civil proceedings: rendering justice in the particular case (A Uzelac, "Goals of Civil Justice

norms and values. Procedural formalism normatively guarantees the legitimacy of the decision reached by the trial process, enabling the litigant to experience the procedure as fulfilling or fair. The litigant, however, is alienated by excessive formalism, which only underlines the gap in the criteria by which different users assess court processes. Excessive formalism has been criticised as both "eco-centric" and "ego-centric".[53] Individuals experience the alienating *ecocentricty* of procedure when they perceive it to be a law made by judges and lawyers, for the purpose of enabling professionals to engage solely with each other.[54] That engagement takes the form of formal, strategic and adversarial applications of the law uncoupled from the individual's substantive rights and the liberal norm of self-determination.

CIVIL PROCEDURE REFORM

[1.40] A rational reform of the system of civil procedure requires an informed reconceptualisation of its goals. Identifying and defining desirable and attainable goals is therefore a precondition of a functional system, and of systematic reform. The efficient production of truth through legal processes has been a longstanding concern. Roman jurists were required to take practical measures to deliver accurate and cost-effective decision-making in *modicum tempus* (reasonable time).[55] However, traditionally, common law jurisdictions have demanded truth as an absolute goal in civil litigation and the only basis upon which justice could be done. Prioritising truth as the ultimate procedural value has resulted in a system in which generating proof of alleged facts represents the dominant use of time and resources in litigation, and has marginalised the civil justice system's other goals. However, this truth at any price approach is now the subject of serious questioning.

Consumed by the same efficiency problem affecting other important public services civil justice systems were forced to reconceptualise their procedural goals. Rather than single-minded and unflinching commitment to merits-based determinations, courts were expected to deliver high

and Civil Procedure in the Contemporary World: Global Developments – Towards Harmonisation (and Back)" in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer International Publishing, Switzerland, 2014), p 11).

53 A Uzelac, "Goals of Civil Justice and Civil Procedure in the Contemporary World: Global Developments – Towards Harmonisation (and Back)" in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer International Publishing, Switzerland, 2014), p 27.

54 A Uzelac, "Turning Civil Procedure Upside Down: From Judges' Law to Users' Law" in *Tweenonderd jaar/Bicentenaire Code de Procedure Civile* (Kluwer uitgevers, Mechelen, 2008), p 413: "… civil procedure is presently also generally perceived as the law that is made for judges and by judges – in two words, civil procedure *is* the Judges' Law." (emphasis in original; writing in the context of Central and Eastern European civil justice systems).

55 Ulpian's fragment Ulp, D.4.8.21.12. See R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Clarendon, Oxford, 1996), p 111.

quality justice effectively, efficiently and fairly.[56] The pursuit of truth with the aim of achieving substantive justice no longer justified inordinate delays and mounting costs in civil litigation. Litigation would now also be assessed on the basis of whether it avoided unnecessary costs and delays and spared where possible the consumption of the court's resources in determining matters.

The Attorney-General of Victoria, in introducing the *Civil Procedure Bill 2010* (Vic), drew particular attention to abuses, and the need for reform, of discovery procedures. Referring to the Victorian Law Reform Commission's finding[57] regarding the exorbitant costs of and time spent in producing evidence for trial the Attorney-General identified the principal problems as being:

> Issues of expense, scale and delay, as well as abuse of discovery obligations. It is identified by stakeholders as the most expensive aspect of the civil justice system. For example, it was reported that in one Supreme Court case, a party spent $40 million on the discovery process alone, and that 120 legal professionals worked on the discovery process.

Similarly, Brazil's excoriating study of the abuse of discovery in procedure, and the practice of using it other than for establishing matters of fact, raises serious questions about whether the centrality of truth-finding in litigation is justifiable, and suggests the need for extensive and deep-seated reform.[58]

The search for improved cost effectiveness in civil litigation has resulted in a reconceptualisation of procedural rules and practices to produce efficiencies in the justice system. Accurate and legally correct judgment are now no longer valued above everything else. Ensuring that resources are distributed appropriately so that cases are dealt with in accordance with their importance to the parties and the public, and the greatest possible accessibility of justice, are as important as producing correct judgments in particular cases.[59]

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56 A Zuckerman "The Challenge of Civil Justice Reform: Effective Court Management of Litigation" (2009) 1 *City University of Hong Kong Law Review* 49 at 54; AAS Zuckerman, "Interlocutory Remedies in Quest of Procedural Fairness" (1993) 56 *Modern Law Review* 325; AAS Zuckerman, "Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments" (1994) 14 *Oxford Journal of Legal Studies* 353; AAS Zuckerman, "Dismissal for Delay – The Emergence of a New Philosophy of Procedure" (1998) 17 *Civil Justice Quarterly* 223; AAS Zuckerman, "A Colossal Wreck – THE BCCI – Three Rivers Litigation" (2006) 25 *Civil Justice Quarterly* 287; AAS Zuckerman, "Civil Litigation: A Public Service for the Enforcement of Civil Rights" (2007) 26 *Civil Justice Quarterly* 1. See also L Kaplow, "The Value of Accuracy in Adjudication: An Economic Analysis" (1994) 23 *The Journal of Legal Studies* 307.

57 Victorian Law Reform Commission, *Civil Justice Review: Report* (2008).

58 See W Brazil, "The Adversary Character of Civil Discovery: A Critique of Proposals for Change" (1978) 31 *Vanderbilt Law Review* 1295.

59 A Zuckerman "The Challenge of Civil Justice Reform: Effective Court Management of Litigation" (2009) 1 *City University of Hong Kong Law Review* 49 at 54; AAS Zuckerman "Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments

THE CONCEPTUAL-PHILOSOPHICAL BASIS OF REFORM

Benthamite utilitarianism

[1.50] Successful historical reforms have been built on the foundation of thoroughly examined goals being used as firm guidelines for setting policies and drafting the procedural rules for attaining them. Franz Klein's reform of the Austrian system of civil justice in the 1890s, for example, centred on the social function of the judge as an active participant in the proceedings,[60] Lord Woolf's reforms of the 1990s identified the importance of framing procedural reforms within an "overriding objective".[61] The Victorian reforms of the first decade of the 21st century articulated the system's "overarching obligations". [62] To be both logically and historically effective those goals must be provided with a sound conceptual basis. The more extensive, radical and effective the goals are intended to be the greater the importance is attached to properly conceptualising those goals.[63]

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for Timely Judgments" (1994) 14 *Oxford Journal of Legal Studies* 353; AAS Zuckerman, "Interlocutory Remedies in Quest of Procedural Fairness" (1993) 56 *Modern Law Review* 325; AAS Zuckerman, "Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments" (1994) 14 *Oxford Journal of Legal Studies* 353; AAS Zuckerman, "Dismissal for Delay – The Emergence of a New Philosophy of Procedure" (1998) 17 *Civil Justice Quarterly* 223; AAS Zuckerman, "A Colossal Wreck – THE BCCI – Three Rivers Litigation" (2006) 25 *Civil Justice Quarterly* 287; AAS Zuckerman, "Civil Litigation: A Public Service for the Enforcement of Civil Rights" (2007) 26 *Civil Justice Quarterly* 1. See also Kaplow, "The Value of Accuracy in Adjudication: An Economic Analysis" (1994) 23 *The Journal of Legal Studies* 307. See also Kaplow, "The Value of Accuracy in Adjudication: An Economic Analysis" (1994) 23 *The Journal of Legal Studies* 307. D Chan and PCH Chan, "Chinese (Hong Kong) Report" in D Maleshin (ed), *Civil Procedure in Cross-cultural Dialogue: Eurasia Context: IAPL World Conference on Civil Procedure* (18–21 September 2012, Moscow) (Statut 2012), available at http://www.iaplaw.org/index.php/en/documents, pp 172–180. Still, some procedural fundamentalists advocate a one-dimensional concept, that is, truth at all costs. See, for example, the "extremism" of US advocacy (R Marcus, "American Exceptionalism in Goals for Civil Litigation" in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer International Publishing, Switzerland, 2014), pp 123–142) which does not produce the right balance between truth and efficiency.

60 CH van Rhee, "Civil litigation in Twentieth-Century Europe" (2007) 75 *Legal History Review* 307.

61 J Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (Cambridge University Press, London, 2014).

62 *Civil Procedure Act 2010* (Vic), ss 16 – 27.

63 See A Uzelac, "Goals of Civil Justice and Civil Procedure in the Contemporary World" in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer International Publishing, Switzerland, 2014), p 8: "In some civil justice systems … there appears to be little interest in defining the goals of civil justice, and a greater focus on 'pragmatic and practical solutions, on micro-management of affairs.'" Refer to E Silvestri, "Goals of Civil Justice When Nothing Works: The Case of Italy" in D Maleshin (ed), *Civil Procedure in Cross-cultural Dialogue: Eurasia Context: IAPL World Conference on Civil Procedure* (18–21 September 2012, Moscow) (Statut 2012), available at http://www.iaplaw.org/index.php/en/documents, pp 79–104.

To implement efficient and effective justice the justice system as an organisation is required to allocate fixed resources across competing agents (that is, litigants) in an equitable manner in an environment in which each agent seeks to maximise their individual utility. The problem is framed in classical utilitarian terms as requiring the institution to deliver the greatest possible utility over disutility, or otherwise the least possible disutility relative to utility. The classical solution indicates nothing regarding the distribution of benefits and harms. Average utilitarianism on the other hand requires the justice system to do that which will bring about the highest possible average happiness level.[64] In maximising overall social welfare it assumes that benefits are aggregable trans-individually over all members of society[65] — even if at the same time the allocation is not perfectly equitable — and does not value actions for any intrinsic merit but only indirectly for the good it bestows on society. Bentham found acceptable the dilemma that an efficient distribution of goods may not be equitable. Equity may outweigh individual unhappiness when individuals, although less satisfied, nevertheless enjoy the greater utility which devolves to them from the maximisation of social utility.

Where agents have criteria of utility different to and independent of others, each will prefer their own. Such egocentric utilitarianism determines that the most desirable allocation of resources is one which favours them so that they will act to maximise a distribution in their favour, or minimise any redistribution to others.[66] In a litigation setting this version of utilitarianism generates radically adversarial advocacy, with parties seeking the maximal possible endowment of court resources, including judicial determinations which will further allocate benefits in their favour.

Bentham believed that procedural reforms could contribute to making courts conduits for socially beneficial ends because of the indirect effects

64 J Rawls, *A Theory of Justice* (Harvard University Press, 1971), p 162; N Rescher, *Distributive Justice* (The Bobbs-Merrill Company Inc, 1966), p 27; CD Broad, *Five Types of Ethical Theory* (Routledge and Kegan Paul, 1930), p 250, regard the average principle as superior to the classical principle. Compare G Myrdal, *The Political Element in the Development of Economic Theory* (trans P Streeten, Routledge and Kegan Paul, Ltd, London, 1953), p 38. See also JJC Smart and B Williams, *Utilitarianism for and Against* (Cambridge University Press, 1973), p 28 in which Smart favours the classical formulation of utilitarianism.

65 J Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (Cambridge University Press, London, 2014), p 77.

66 A selection from the abundant literature on utilitarian accounts of property law in modern law and economics: see H Demsetz, "Toward a Theory of Property Rights" (1967) 57 *American Economic Review* 347; G Calabresi and AD Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 *Harvard Law Review* 1089; and FI Michelman, "Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law" (1967) 80 *Harvard Law Review* 1165.

procedural law was capable of having on substantive law.[67] While substantive law was capable of producing beneficial social outcomes directly, procedural law played the collateral role of enhancing the effects of utility and ameliorating the disutility[68] which substantive law could have on social order and social progress.[69] Rather than focusing on traditional products of court processes — determination of the discovered facts in the light of the true law[70] — that is to say, truth in decision making — justice was ensured by the enforceable effects of law which, by producing tangible social benefits, enhance aggregate social utility and minimise social disutility. Further, the tangible beneficial effects of enforcement would inspire voluntary compliance.

Procedural mechanisms could be designed to interact with substantive law so as to augment the likelihood of its maximising utility or minimising disutility where justice could only be achieved at too high a price. Examples include where discovery was excessive relative to the value of the claim sued upon in the action. In such a case pursuing evidence to the extent required to establish all the facts necessary to achieve substantive justice may be more harmful than beneficial.

However, judicial discretion threatened to undermine utilitarian aims since, if a court was able to mediate between utility and justice through the exercise of a discretionary power, it could favour justice over utility in the particular case, and thereby defeat the systemic intention of producing maximum utility or minimal disutility.[71] Removing judicial determination to the greatest possible extent consistent with social order by drafting effective rules was a preferable mechanism for achieving aggregate utility.[72] Nevertheless, flexibility was required to ensure courts could exercise discretion in favour of utility when justice threatened to assume priority in the particular case. Mediation through discretion therefore also adopted and applied utility as the measure of societal benefits relative to societal harms.

According to Sorabji, the Benthamite legacy of utilitarianism conferred two central elements to institutional design undertaken by the Woolf

67 J Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (Cambridge University Press, London, 2014), p 81.

68 J Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (Cambridge University Press, London, 2014), p 86.

69 J Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (Cambridge University Press, London, 2014), p 82.

70 J Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (Cambridge University Press, London, 2014), p 83.

71 J Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (Cambridge University Press, London, 2014), p 89.

72 J Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (Cambridge University Press, London, 2014), p 90.

reforms.[73] First, judicial case handling occurred within a hierarchical structure and applied a managerialist approach. Secondly, truth in decision making — or, the delivery of a substantively just and legally correct judgment in the light of all the relevant truthful evidence — was subject to the principle of proportionality. In effect, substantive justice was relegated as a goal subordinated to the primacy of utility. Utility provided a calculus (the gain to be measured by the conferred utility, or by avoiding disutility) for determining the procedural steps to take when courts were confronted with having to assess the larger social benefit of achieving substantive justice in the particular case. The calculus balanced the allocation of time and money relative to the value and importance of the claim. Utility is a panoramic concept which takes into account the effect not only of the instant cases and the parties therein involved, but also calculated the effect on other cases and users of the system to base the appropriateness of decisions on a general benefit to society as a whole. Utility promoted efficiency — calculated as the requirement for court processes to produce benefits in the public interest at a reduced public cost — as a laudable goal for justice; and demoted the traditionally insuperable position of justice.

Rawlsian utilitarianism: the original position

[1.60] Rawls' theory of justice conceptualises "justice as fairness".[74] It employs the methodological device of the original position as a "a purely hypothetical situation" in which the participants — whose purpose is to strike a social contract — arrive at an agreement by principled reasoning from behind a veil of ignorance: that is, with no knowledge or awareness of their own personal statuses, material wealth, identity, and endowments.[75] The original position is the counter-factual undistorted reality presupposed by existing institutions. It specifies the conditions under which justice can be achieved by universal agreement.

Rawls constructs his participants as equal and undifferentiated with respect to social position, available personal resources, and rights. He argues that, alleviated of the specific material considerations and embodied concerns which would otherwise distort their decision making, and radically equalised by the device of the original position, individuals desiring to organise themselves socially will be led in the first place "to a

73 J Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (Cambridge University Press, London, 2014), p 97.

74 J Rawls, *A Theory of Justice* (Harvard University Press, 1971).

75 It resembles Habermas's approach to legitimation: How would the members of a social system, at a given stage in the development of productive forces, have collectively and bindingly interpreted their needs (and which norms would they have accepted as justified) if they could and would have decided on the organisation of social intercourse through discursive will formation, with adequate knowledge of the limiting conditions and functional imperatives of society?: J Habermas, *Legitimation Crisis* (London, Heinemann, 1976), p 113.

certain conception of justice".[76] Establishing just social conditions, argues Rawls, is a priority because, "[j]ustice is the first virtue of social institutions, as truth is of systems of thought."[77]

Rawls argues that rationally self-interested individuals will accept as just only those institutions that protect and promote the "two principles of justice": freedom and equality. Specifically, principled reasoning will lead an individual to exercise liberty only of a kind and to an extent compatible with the kind and extent of liberty available to all others. Further, that inequality is unjustifiable unless its net effect is to benefit the disadvantaged over those with a greater share of resources.[78]

As an analytical device therefore the original position structures decision making about the distribution of entitlements. Rational decisions aggregate benefits in a manner consistent with freedom and equality. In fact, the original position demonstrates that interests and justice converge since individuals make decisions promoting the principles of justice in the process of promoting their best interest.

The second principle suggests that the right to be treated equally is enforceable if the only reason for subverting it is another's difference of power, wealth, position or authority. However, it may be legitimately subordinated if the inequality produces benefits which would not

76 J Rawls, *A Theory of Justice* (Harvard University Press, 1971), p 12.

77 J Rawls, *A Theory of Justice* (Harvard University Press, 1971), p 3. The point is made by Habermas. In Habermas's view the idea of undistorted communication, although counter-factual, is not an abstraction from ordinary speech and discourse, because the commitment to truth and rationality are contained within or presupposed by ordinary discourse: No matter how the inter-subjectivity of mutual understanding may be deformed, the design of the ideal speech situation is necessarily implied in the structure of potential speech since all speech, even intentional deception, is orientated towards the idea of truth. This idea can be analysed with regard to a consensus achieved in unrestrained and universal discourse. In so far as we master the means for the construction of the ideal speech situation, we can conceive the ideas of truth, freedom and justice which interpenetrate each other — although of course only as ideas: J Habermas, "Towards a Theory of Communicative Competence" (1970) 13 *Inquiry* 360.

78 The argument would have to resemble something like Hayek's concept of echelon growth: "If today in the United States or Western Europe the relatively poor can have a car or refrigerator, an airplane trip or a radio, at the cost of a reasonable part of their income, this was made possible because in the past others with large incomes were able to spend on what was then a luxury. The path of advance is greatly eased by the fact that it has been trodden before. It is because scouts have found the goal that the road can be built for the less lucky and less energetic…. Many of the improvements would indeed never have become a possibility for all if they had not long before been available for some. If all had to wait for better things until they could be provided for all, that day would, in many instances, never come. *Even the poorest today owe their relative material wellbeing to the result of past inequalities*." (F Hayek, *The Constitution of Liberty* (Routledge and Kegan Paul, London, 1960)). See also the work of Anthony Crosland. Crosland argued that economic growth is a necessary condition for democratic redistribution in favour of equality, but at the same time he was a non-cognitivist in moral philosophy — that is, we cannot give an objective basis for our convictions about equality: see R Plant, "Democratic Socialism and Equality" in D Lipsey and D Leonard (eds), *The Socialist Agenda* (Cape, London, 1981).

otherwise be enjoyed by those lacking material or social resources, including liberty. Of course if it is precisely equality, however defined, that guarantees social benefits there is no conceivable advantage in, and no justification for, being deprived of it. Equality may not then be traded for other benefits. In fact the original position is an instrument for demonstrating that inequality is the product of social arrangements unjustifiably organised on the basis of antecedent differences by powerful administrators favouring certain social, personal, economic, cultural or other characteristics, and advancing the good of persons bearing those characteristics, over others. The original position, on the other hand, enforces equal treatment because in it no conception of the good prevails, and no preference can be exercised, over any other to divert decision making away from equality.

Rawls's theory legitimises administrative intervention even in essentially private disputes such as civil litigation to the extent necessary to ensure that inequality between parties is not the basis for decision making. It justifies the redistribution of opportunity and resources towards equality — because they would be endorsed as structuring institutional norms when subjected to undistorted reconsideration. If all engagement presupposes equality the original position specifies the conditions under which the normative values embodied in equality (equal access, equal opportunity, equal respect) are to be realised.

PROPORTIONATE JUSTICE

[1.70] Substantive and procedural justice are now blended into a single concept: proportionate justice. Proportionate justice required the system of justice to be redesigned, and a new jurisprudence fully appreciative of the goals of proportionality and access to the courts, so that substantive justice could be enforced with the greatest efficiencies of time and cost, fairness to all court users, and with an expenditure proportionate to the social and monetary importance, complexity and value of the case.

The principle of proportionality "efficiency and expedition are as important as the correctness of the outcome"[79] is now a virtually universally established concept of justice. In introducing the *Civil Procedure Bill 2010* (Vic) the Attorney-General stated its aim to[80]

> reform, modernise and unify the procedure for the conduct of civil litigation. Courts play an important role in adjudicating civil disputes and procedural rights and that role should, of course, continue. But as a public resource, courts must be used responsibly. Parties should not abuse their right of access to the courts by unnecessarily tying up court resources, thereby preventing other from accessing justice. A well-resourced litigant should not be able to use their

79 A Zuckerman, "The Challenge of Civil Justice Reform: Effective Court Management of Litigation" (2009) 1 *City University of Hong Kong Law Review* 49 at 49.

80 Attorney-General Hulls, "Second Reading: Civil Procedure Bill" (Speech delivered at Parliamentary Assembly, Victoria, 24 June 2010).

> power to play tactical games and draw out litigation until the other party is forced into unfair settlement or withdraws.
>
> …
>
> At the core of these reforms is the concept of proportionality. Participants in litigation will be required to use reasonable endeavours to ensure that legal and other costs spent in the proceedings are reasonable and proportionate to the complexity or importance of the issue in dispute. The courts will also be required to deal with a civil proceeding in the same manner.
>
> These provisions are designed to cure unnecessary expenditure on litigation and the inappropriate use of the courts as a public resource.

Zuckerman characterised necessary reforms as requiring the replacement of the single criterion of substantive justice with a tripartite approach balancing justice, economy and efficiency. This "three-dimensional justice" requires a consideration of each factor in order to achieve an equitable distribution of resources across the civil justice system.[81] Zuckerman acknowledges that these may "pull in different directions and call for compromise".[82] Klein's reforms in Austria appear, in the current context, idealistic, having been modelled on the supposition that establishing substantive truth and producing judicial determinations efficiently were compatible and reconcilable objectives.

Compromise requires balancing social reality against maintaining the possibility of critique so that as many changes as can be realistically made in the circumstances are made without jettisoning the values of the institution.[83] At the same time compromise should not focus proceedings on effectiveness and efficiency to the exclusion of the instrumental values of fact and truth finding, and producing substantive justice, and the intrinsic values of participants' inclusion in the justice system. Proportionate justice does not in essence differentiate between the importance of a court determining cases efficiently and expeditiously and

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81 J Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (Cambridge University Press, London, 2014), pp 140–141. But Sorabji identifies Zuckerman as a traditionalist because he places the requirement of substantive justice outside and above the rules as an unassailable constitutional commitment (p 142), rather than being the product of the new approach. He identifies Zuckerman's misinterpretation of the rules as a means to achieving the ends of substantive justice, citing him to this effect: "Doing justice on the merits remains a major goal, but it is supplemented by a concept of proportionality that consists of two goals: reasonable expedition and reasonable use of resources. The 'overriding objective' of dealing with cases justly represents, therefore, a three dimensional strategy of justice. The court must aim to achieve not just a correct outcome, but must do so within a reasonable time and by a reasonable and proportionate use of procedural resources." (pp 141–142). Instead Sorabji identifies a merging of substantive justice, efficiency and effectiveness (p 147), not a supplementation of justice by considerations of cost and delay.

82 AAS Zuckerman, "Justice in Crisis: Comparative Dimensions of Civil Procedure" in AAS Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (1999), p 3.

83 Resembling the "objective possibility" described by M Weber, "Objective Possibility and Adequate Causation in Historical Explanation" in *The Methodology of the Social Sciences* (The Free Press, New York, 1949), pp 164–188.

arriving at correct decisions. Zuckerman's model of three-dimensional justice and the administrative revolution introduced by the Woolf reforms equalised the relative importance of time and cost required to dispose of the rights and obligations of the parties in a trial and delivering just and enforceable decisions.[84] Substantive justice based on proven facts remains the aim of litigation, for which procedurally fair litigation respecting the right of each side to be heard and treated equally before an impartial tribunal provides the means. As Sorabji explains,[85] under the new regime four elements were required to be taken into consideration in the management of trials:

> First, access to the justice system "for all users of the system" had to be ensured by an equitable distribution of resources.
>
> Second, substantive justice had as far as possible to be done in individual cases.
>
> Third, costs and delays in the conduct of litigation had to be reduced to the greatest extent possible.
>
> Fourth, the principle of proportionality was to be applied if necessary to deny a party substantive justice.
>
> Courts were not required to seek the truth, only to arrive at a substantively just decision on the basis of the balance of probabilities in the light of the evidence before it — as accurate a decision as that permits.[86]

Substantive justice is an immanent feature of the rules. It can no longer be isolated but must be achieved through the application of the rules guaranteeing cost effective and prompt determinations; because otherwise proportionate justice will be threatened by costly and dilatory proceedings.

Distributive justice

[1.80] Distributive justice obliges courts to implement a "three-dimensional concept of justice" in Zuckerman's sense to ensure other litigants' access to the civil justice system, by limiting any individual litigant's consumption of the court's resources only to what is strictly necessary, and without prioritising accurate and lawful decisions as essentially necessary to the administration of justice. However, cases must

84 AAS Zuckerman, "Interlocutory Remedies in Quest of Procedural Fairness" (1993) 56 *Modern Law Review* 325; AAS Zuckerman, "Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments" (1994) 14 *Oxford Journal of Legal Studies* 353; AAS Zuckerman, "Dismissal for Delay – The Emergence of a New Philosophy of Procedure" (1998) 17 *Civil Justice Quarterly* 223; AAS Zuckerman, "A Colossal Wreck – THE BCCI – Three Rivers Litigation" (2006) 25 *Civil Justice Quarterly* 287; AAS Zuckerman, "Civil Litigation: A Public Service for the Enforcement of Civil Rights" (2007) 26 *Civil Justice Quarterly* 1. AAS Zuckerman, "Justice in Crisis: Comparative Dimensions of Civil Procedure" in AAS Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (1999), p 3.

85 J Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (Cambridge University Press, London, 2014), pp 137–139.

86 J Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (Cambridge University Press, London, 2014), p 139.

continue to be treated individually. The efficiency paradigm cannot require courts to disregard the differences between cases. Courts handle varying case loads, types and mixes.[87] The nature of the case requires the court to apply proportionate justice appropriately. Inferior courts tend to process numerous similar and routine cases. But even there difficult and indeed unique cases arise — just as higher courts carry a higher proportion of complex cases but nevertheless also process routine case loads. The efficiencies appropriate to the former category of cases are not the same as the efficiencies to be achieved in relation to the latter.

As Sorabji explains

> Resource use was to be matched to the nature of the dispute so as to ensure that all litigants have effective access to justice. In other words it justified distinctions being drawn between different types of cases and the level of resources that could be afforded to them, that is, which linked resource use to claim value and complexity and the need to provide an equitable distribution of those resources to all court users as specified in CPR r 1.1(2)(b), (c) and (e).[88]

Proportionate justice supports the rule of law by ensuring that litigants have equitable access to the justice system; whereas merits-based determinations, by potentially depriving other litigants of the opportunity to access the courts, threatens to undermine the rule of law. Developing a theory of justice around the balancing of the cost and time invested in establishing the truth of allegations against the willingness to accept

87 Further, the approach to the application of proportionate justice differs between jurisdictions and amongst countries with different legal traditions. Possibilities of efficiency may vary depending on whether the legal system is in principle prepared to consider all cases (as in civil law countries, where even frivolous causes will be thoroughly examined prior to being rejected: see E Silvestri, "Italian Report" in D Maleshin (ed), *Civil Procedure in Cross-cultural Dialogue: Eurasia Context: IAPL World Conference on Civil Procedure* (18–21 September 2012, Moscow) (Statut 2012), available at http://www.iaplaw.org/index.php/en/documents, pp 506–511) or is reluctant to introduce small claims into the court system and expose them to judgment: *de minimis no curat praetor* (the court is not to be concerned with petty cases which it shall adjudge an abuse of process). Some legal cultures (China, for example) eschew hard cases for their tendency to make it more difficult to achieve social harmony through adjudication and will therefore encourage their mediation and settlement. The stress on some judicial systems is such that routine processing of similar cases is preferred to socially significant but more complex cases. Refer to A Uzelac, "General Report" in D Maleshin (ed), *Civil Procedure in Cross-cultural Dialogue: Eurasia Context: IAPL World Conference on Civil Procedure* (18–21 September 2012, Moscow) (Statut 2012), available at http://www.iaplaw.org/index.php/en/documents, pp 111–135.

88 J Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (Cambridge University Press, London, 2014), pp 183–184: The practical implementation of this resource allocation consistent with case categorisation is to be found in the case tracking system. Proportionality requires fitting claim and procedure. Only the highest value and most complex claim had the full range of procedures available to it (this is known as "multi-tracking"), while small claims and fast-tracked cases were not treated so generously. Because complex cases varied procedure was still required to be fitted to the nature of the claim. Further, complex cases were not treated as an exception to proportionate justice. The processes to which they were subjected and the resources they absorbed must still be compatible with universal accessibility to justice, and the efficient and timely resolution of the matter.

imperfect justice demands raising matters of economy as being as normative as substantive justice. Prioritising access to justice as the justice system's new substantive aim redefines the fair trial as one in which the court system's resources are appropriately shared and not wasted on unnecessary litigation or procedure.[89] The public interest in ensuring as wide as possible an access to the justice system represents the absolute limit of substantive justice such that it would be legitimate to abandon the pursuit of a merits-based determination where, in any particular case, it constitutes an over-allocation of resources.[90]

THE ADMINISTRATION OF JUSTICE

[1.90] Case management is the most significant structural change in the civil justice system, enabling the economical production of substantive justice. Despite identifying potential constraints on case management, the Victorian Law Reform Commission nevertheless acknowledges it as a "paradigm shift in the way civil litigation is conducted by the parties and managed by the courts".[91] Lord Woolf had identified its absence as one of the factors that had produced the intolerable circumstances in which the system of civil justice in England had found itself.[92] In Victoria, Parliament's intention in introducing the case management reforms under the *Civil Procedure Act 2010* (Vic) was

> to impose strict discipline on the conduct of civil proceedings … In short, the legislature could not have expressed more clearly its intention to improve the cost-efficiency of civil litigation and — to that end — to authorise sanctions for non-compliance, including the sanction of denying a party a hearing.[93]

By identifying real issues at an early stage, laying down strict timetables for the parties to abide by, and imposing party discipline and inter-party co-operation to avoid tactical litigation, case management enables the court to control litigation consistently with the new theory of proportionate justice. Judicially managed cases either proceed to trial or to consensual settlement without becoming trapped in interlocutory snares.

The judicial management of cases has been accorded greater prominence in the administration of justice in Australian courts since the High Court decision of *AON Risk Services Ltd v Australian National University*[94] ("*AON*"). In *JL Holdings* the court had held that "the ultimate aim of a

89 J Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (Cambridge University Press, London, 2014), p 178.

90 J Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (Cambridge University Press, London, 2014), pp 180–181.

91 Victorian Law Reform Commission, *Civil Justice Review: Report* (2008), p 76.

92 Lord Harry Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995), [13].

93 *National Builders Group IP Holdings Pty Ltd v ACN 092 675 164 Pty Ltd (in liq)* [2015] VSCA 260 at [41].

94 *AON Risk Services Ltd v Australian National University* (2009) 239 CLR 175.

court is the attainment of justice and no principle of case management can be allowed to supplant that aim."[95] Samuels JA had said in *GSA Industries Pty Ltd v NT Gas Ltd*[96] that

> In a more leisured age an order for costs was generally regarded as a complete compensation for delay occasioned either by the grant of an amendment or the grant of an adjournment. However the emollient effect of an order for costs as a panacea may now be consigned to the Aladdin's cave which Lord Reid rejected as one of the fairy tales in which we no longer believe.

In *AON* French CJ[97] had observed:

> In the proper exercise of the trial judge's discretion, the applications for adjournment and amendment were not to be considered solely by reference to whether any prejudice to AON could be compensated by costs. Both the primary judge and the Court of Appeal should have taken into account that, whatever costs are ordered, there is an irreparable element of unfair prejudice in unnecessarily delaying proceedings. Moreover, the time of the court is a publicly funded resource. Inefficiencies in the use of that resource, arising from the vacation or adjournment of trials, are to be taken into account. So too is the need to maintain public confidence in the judicial system. Given its nature, the circumstances in which it was sought, and the lack of a satisfactory explanation for seeking it, the amendment to ANU's statement of claim should not have been allowed. The discretion of the primary judge miscarried.

In *AON* the court's predisposition to allow a party an adjournment was qualified to accord with case management principles, and has been strengthened with the enactment of the *Civil Procedure Act 2010* (Vic), and subsequent cases. The provisions of the *Civil Procedure Act 2010* and the overarching obligations set out there[98] mandate against permitting inexpedient approaches to litigation.

The overarching purpose, as stated in the *Civil Procedure Act 2010* is set out at s 7:

> 7 **Overarching purpose**
>
> (1) The overarching purpose of this Act and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.
>
> (2) Without limiting how the overarching purpose is achieved, it may be achieved by—
>
> (a) the determination of the proceeding by the court;
>
> (b) agreement between the parties;
>
> (c) any appropriate dispute resolution process—
>
> (i) agreed to by the parties; or
>
> (ii) ordered by the court.

95 *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 at 154 per Dawson, Gaudron and McHugh JJ, 170 per Kirby J.

96 *GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710 at 716.

97 *AON Risk Services Ltd v Australian National University* (2009) 239 CLR 175 at [5].

98 See *Civil Procedure Act 2010* (Vic), ss 19, 23, 24, 25.

The overarching purpose applies to the court "in the exercise of any of its powers" however they arise, including all powers arising under "any procedural rules or practices of the court."

> **8 Court to give effect to overarching purpose**
>
> (1) A court must seek to give effect to the overarching purpose in the exercise of any of its powers, or in the interpretation of those powers, whether those powers—
>
> (a) in the case of the Supreme Court, are part of the Court's inherent jurisdiction, implied jurisdiction or statutory jurisdiction; or
>
> (b) in the case of a court other than the Supreme Court are part of the court's implied jurisdiction or statutory jurisdiction; or
>
> (c) arise from or are derived from the common law or any procedural rules or practices of the court.

The overarching purpose of the *Civil Procedure Act 2010* is the "just, efficient, timely and cost-effective resolution of the real issues in dispute." The Act's and the procedural rules' overarching purpose therefore includes both the just and fair, and the efficient and timely, resolution of disputes. In *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd*[99] — a case which considered the "overriding purpose" of the *Civil Procedure Act 2005* (NSW) — the High Court summarised the purpose of the Act:

> The evident intention and the expectation of the CPA is that the court use these broad powers to facilitate the overriding purpose. Parties continue to have the right to bring, pursue and defend proceedings in the court, but the conduct of those proceedings is firmly in the hands of the court. It is the duty of the parties and their lawyers to assist the court in furthering the overriding purpose.
>
> That purpose may require a more robust and proactive approach on the part of the courts.

The Attorney-General of Victoria, in introducing the *Civil Procedure Bill 2010* (Vic) said that its aim was to provide

> [C]lear legislative guidance to judges to proactively manage cases in a manner that will promote the overarching purpose — that is, the just, efficient, timely and cost-effective resolution of the real issues in dispute. This will empower them to give clear, effective directions in cases by requiring the parties to keep to the real issues in dispute. It should reduce the number of interlocutory applications in complex litigation and …, for example, the time taken up in oral submissions.

Orders issued by the court in their management of cases cannot be ignored in a post-*AON* and post-*Civil Procedure Act 2010* (Vic) environment. As Gummow, Hayne, Crennan, Kiefel and Bell JJ observed in *AON*:[100]

> Of course, a just resolution of proceedings remains the paramount purpose of r 21; but what is a just resolution is to be understood in the light of the

99 *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at [56]–[57].

100 *AON Risk Services Ltd v Australian National University* (2009) 239 CLR 175 at [98]–[100].

> purposes and objectives stated. Speed and efficiency in the sense of minimum delay and expense, are seen as essential to a just resolution of proceedings. This should not detract from a proper opportunity being given to the parties to plead their case, but it suggests that limits may be placed upon re-pleading, when delay and cost are taken into account. The Rule's reference to the need to minimise costs implies that an order for costs may not always provide sufficient compensation and therefore achieve a just resolution. It cannot therefore be said that a just resolution requires that a party be permitted to raise any arguable case at any point in the proceedings, on payment of costs.
>
> In the past it has more readily been assumed that an order for costs occasioned by the amendment would overcome injustice to the amending party's opponent. In *Cropper v Smith* Bowen LJ described an order for costs as a panacea that heals all. Such a view may largely explain the decision of this court in *Shannon v Lee Chun*, which upheld a decision allowing the plaintiff to raise a new case at the second trial, but which imposed a condition as to costs. The modern view is that even an order for indemnity costs may not always undo the prejudice a party suffers by late amendment. In the present case it is difficult to see that such an order could be sufficient compensation, given that AON would be required to again defend litigation which was, effectively, to be commenced afresh.
>
> The views expressed by Lord Griffiths in *Ketteman v Hansel Properties Ltd*, that justice cannot always be measured in money and that a judge is entitled to weigh in the balance the strain the litigation imposes upon litigants, are also now generally accepted. In *Bomanite Pty Ltd v Slatex Corporation Aust Pty Ltd*, French J said of Bowen LJ's statement in *Cropper v Smith*:
>
> … That may well have been so at one time, but it is no longer true today … Non-compensable inconvenience and stress on individuals are significant elements of modern litigation. Costs recoverable even on an indemnity basis will not compensate for time lost and duplication incurred where litigation is delayed or corrective orders necessary.

In *Eaton v ISS Catering Services Pty Ltd*[101] the appellant's failure to serve expert evidence in time as ordered by the court breached the overarching obligations to which the appellant's solicitors were subject. The failure undermined the overarching obligations under the *Civil Procedure Act 2010* (Vic) because the orders to file the evidence were issued in furtherance of those obligations' objectives to inform the parties at mediation and thereby encourage settlement "with the consequent saving of costs to the parties and the preservation of scarce judicial resources" as well as notifying the party of the case they were required to meet at trial and providing them with an opportunity to respond. The Court of Appeal further commented:[102]

> If there is a perception among plaintiffs' lawyers in personal injuries litigation that they need not comply with court directions which require steps to be taken before mediation, including seeking expert reports, or a practice of not doing so, such a practice is in our opinion contrary to the overarching obligations. It is no excuse that "no win, no fee" lawyers wish to see whether a case settles at

101 *Eaton v ISS Catering Services Pty Ltd* (2013) 42 VR 635.

102 *Eaton v ISS Catering Services Pty Ltd* (2013) 42 VR 635 at [55].

> mediation before spending the necessary funds required to comply with court orders. Although each case must, of course, depend upon its own facts and circumstances, the adoption of such a practice may well lead to an application to vacate the trial date or, as here, to adjourn the trial being refused.

Where far-reaching reforms are introduced the problem is one of legitimising interventions of state in practices which had previously been thoroughly autonomous. The judicial control of proceedings which has depended on and developed around party autonomy, and the recessive and arbitral role of the judge is a case in point. Previously the state had merely secured the general conditions of civil justice: for example, by enforceable sanctions through its monopoly on violence.[103] Now that it is actively engaged in the administration of justice that engagement can only be rendered legitimate as a way of recoupling the administration of justice with the rule of law. In particular, case management is proactive behaviour on the part of judges to secure equal chances of the weaker party in the proceeding, and the equal opportunity of all users of the justice system, to protect their rights and represent their interests.

The judge as allocator

[1.100] Judges, in making orders, whether judicial or managerial, regulate through new institutional norms. The original position provides a principled basis for suggesting that lawyers and parties should comply with those orders since they apply rules to which they have antecedently agreed (based on the principles of justice). The order is right when it is given for the purpose of realising collective goals. Fair allocation in a pure exchange economy occurs when agents having the same initial endowments enter competitive fair allocation. In litigation, however, participants are rarely if ever in a relation of principled equality. As Galanter demonstrated, it cannot be assumed that the justice system is a pure exchange society in which rational self-interest alone will produce equitable allocations of the goods of the justice system, or society. Parties approach litigation having different resources of time, money, skill and power. Therefore there must either be a justification of this inequality of endowments and opportunities; or else some parties must be assisted for a fair allocation to be reached. The new proceduralism envisages that the judge, acting fairly and according to principles acceptable to and accepted by all actors, will perform the role of an equitable allocator of opportunities.

Ethos

[1.110] The *crisis* of civil procedure arose not for a want of norms but within a context of norms and normative institutions. Party autonomy and the concept of the judge as a passive referee — the procedural system that Klein likened to "a war without the Red Cross"[104] — meant that

103 See J Habermas, *Legitimation Crisis* (Heinemann, London, 1976), p 36.

104 F Klein, *Pro Futuro* (Deuticke, Leipzig/Wien, 1891), p 39.

lawyers could exploit rules as a means to self-interested and strategic ends governed only by instrumental calculations. The interactions between parties were governed only by egocentric interpretations or distortions of utility[105] and co-ordinated actions resulted from the coincidence of isolated interests, and not as an objective pursued consensually by the parties. Co-operation and conflict alike were functions of the parties' interests such that any agreement between parties to pursue certain ends was only stable until one of the parties took the opportunity to seize an advantage despite the agreement. This is an inevitable consequence of the norms of adversarialism which encouraged parties to see themselves as isolated actors, and to assume combative stances.

The new institutional norms of proportionate justice, however, require parties to view themselves as actors interacting with others, most of whom are neither immediately present nor known to the party. In that context the court plays a vital co-ordinating role by applying and enforcing institutional norms that regulate the actors' legitimate ends. The rules are the institutionally guaranteed norms by which actors co-ordinate their communicative interactions, and overcome any conflict emerging from that interaction. The co-ordination of action is the legitimately recognised relation between the parties, and to a certain extent through the observance of overarching obligations, is constitutive of the parties' roles in the action, in that it shapes the interpretive schemes, value standards and motivations of the participants to the action, and instituting the norms of the trial.

Ideally, the legitimacy established under the new procedural rules renders the competence of participants in the trial process somewhat less a matter of pure calculation and instrumental rationality (which — despite its tendency to undermine the legitimacy of civil justice — nevertheless remains a valued skill), and somewhat more a matter of solidarity in reproducing the integrity, coherence and co-ordinating and socialising function of the court system sufficient for it to deliver appropriate forms of justice to its users. However, the trial as an adversarial process has not been entirely superseded, and in practice retains numerous opportunities for lawyers to continue to structure their interactions strategically rather than co-operatively or communicatively.

Adversarialism was at least the informal structure of the civil justice system because it was constituted by the common practice amongst lawyers. Even if the new proceduralism introduces a different coercive structure of commands and sanctions, that structure will only achieve its effects through the actions constituting the enactment and embodiment of those rules. While Rawls assumed that the rational choices of social actors would secure collective justice without the need for social devices and

105 J Habermas, *Theory of Communicative Action Volume One: Reason and the Rationalization of Society* (trans TA McCarthy, Beacon Press, Boston, 1981), p 101.

interventions,[106] the assumption can only work on the elimination of all competing motivations, conventions and structures.[107] The assumption may usefully and conveniently negate the reactions of disappointed actors after the veil of ignorance is lifted, and underestimate the extent to which justice is achieved through irrational virtues such as altruism and benevolence,[108] but is also a highly restrictive understanding of choice and social participation.

It does not follow either that complying with rules consistent with distributive justice makes no demands on personal choices and preferences, or that "procedural changes will necessarily facilitate a change in forensic behaviour".[109] This is because first, rules cannot be perfectly designed so that there is always scope and incentive within them for adversarialism to be reasserted;[110] secondly, it is not possible to achieve justice by means purely of the structure provided by the rules even if they are rigorously interpreted[111] and willingly obeyed in part, at least, because delays and their concomitant costs may result from external factors over which parties and lawyers have no control;[112] and finally, because ethos is a necessary condition and causative requirement of justice.

A supportive ethos is required to ensure conformity of actions with the value orientations of the users of the civil justice system. Certain moral expectations which cannot be reduced to strict rules are required if the system is to operate. The overarching obligations and lawyers' ethical rules express that there is a moral basis to the conduct of and exchange between parties and their representatives. That ethos informs lawyers' choice of actions from those made available by the system of rules and orients that choice towards the goals of distributive justice.

While choice is the manifestation of ethos, ethos itself is constituted by the individual and collective attitudes, opinions, and sentiments enabling and

106 J Rawls, *A Theory of Justice* (Harvard University Press, 1971), p 142.

107 For example, he notes that the rational individual does not "suffer from envy" (J Rawls, *A Theory of Justice* (Harvard University Press, 1971), p 143).

108 See B Williams, *Ethics and the Limits of Philosophy* (Harvard University Press, 1985), p 78.

109 As the Victorian Law Reform Commission sceptically noted in *Civil Justice Review: Report* (2008), p 81.

110 See Justice Kenneth Hayne, "The Vanishing Trial" (paper presented at the Supreme and Federal Court Judges Conference, 23 January 2008), p 2 cited in Victorian Law Reform Commission, *Civil Justice Review: Report* (2008), pp 13–14.

111 See Productivity Commission findings as reported in Victorian Law Reform Commission, *Civil Justice Review: Report* (2008), pp 92–93; see also CH van Rhee, "The Law's Delay: An Introduction" in CH van Rhee (ed), *The Law's Delay: Essays on Undue Delay in Civil Litigation* (Intersentia, Groningen, 2004), pp 1–22 for a survey of the multiple categories and causes of delay including the misapplication of rules by magistrates and judges.

112 On the external factors causing delay see CH van Rhee, "The Law's Delay: An Introduction" in CH van Rhee (ed), *The Law's Delay: Essays on Undue Delay in Civil Litigation* (Intersentia, Groningen, 2004), pp 1–22.

inspiring court users to make distributive justice normal practice. That ethos must be reinforced by the traditions and shared professional ethics of lawyers. However, because litigation remains individualistic and competitive, and the norms of professional engagement are subject to personal interest and open to self-serving interpretations, it encourages moral subjectivism and provides only an unstable basis for ethical practice.

A system of justice based only on rules is unstable because it lacks an integrated moral basis. Actors remain isolated in their purposive attempt to attain an end by efficient application of means. However, when considered from the perspective of the actor who must live with others, the importance of institutional norms in co-ordinating and even constituting actors' pursuit of ends becomes obvious. The new proceduralism provides that actors harmonise their plans of action on the basis of common situation definitions.[113] Habermas defines "the situation" as "the segment of the life-world that is bounded with regard to a theme"; the theme "arises in connection with the goals and interests of action" of at least one of the participants, and that theme "circumscribes the sphere of relevance" of the components of the situation.[114] Participants are encouraged to master the situation consensually using the same "cultural standards of interpretation, value, and expression."[115]

Reform is not restricted to procedural rules or institutional design but extends to lawyers' formative experiences, and identity. Consequently, the Australian Law Reform Commission recommended both "tak(ing) education and training seriously, as an essential aspect of promoting a healthy legal culture and maintaining high standards of performance among lawyers, judges and tribunal members", and "plac(ing) the onus on the legal profession to develop professional practice standards which promote ethical behaviour and professional responsibility".[116] Reform requires the nurturing of a legal professional culture that establishes and maintains attitudes, value orientations and behaviours that are effective for the attainment of institutional and systemic goals of civil justice, and,

113 J Habermas, *Theory of Communicative Action Volume One: Reason and the Rationalization of Society* (trans TA McCarthy, Beacon Press, Boston, 1981), p 286.

114 J Habermas, *Theory of Communicative Action Volume Two: Lifeworld and System: A Critique of Functionalist Reason* (trans TA McCarthy, Beacon Press, Boston, 1981), p 194.

115 J Habermas, *Theory of Communicative Action Volume Two: Lifeworld and System: A Critique of Functionalist Reason* (trans TA McCarthy, Beacon Press, Boston, 1981), p 203.

116 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, 2000), [1.154]. For similar recommendations see, for example, D Pearce, E Campbell and D Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987), Vol 1; The American Bar Association, *Legal Education and Professional Development – An Educational Continuum, Report of The Task Force on Law Schools and the Profession: Narrowing the Gap* (1992); and the Lord Chancellor's Advisory Committee on Legal Education and Conduct, *First Report on Legal Education and Training* (1996), [2.4] and [4.13].

of equal importance, for self-formation.[117] Culture and self-formation are mutually reinforcing. An ethos may in itself be too functionally weak to underpin the system of civil justice if it is from the perspective of the isolated actor in an inherently conflictual, adversarial, egocentric, and excessively formalistic system. However, an actor who stands with others is subject to the solidarity of the group whose values they have internalised.

CRISIS, FORM AND RE-FORM

[1.120] Crises represent (in Kossellek's "medical" sense) both the diseased contradictoriness of the system, and the curative potential to establish a new formal unity from the disintegrated elements of the same system.[118] Therefore, while a crisis signals an end to the old form of the system, it is a precondition for the system continuing in another form. While evoking a crisis raises a case for radical transformation, very often external intervention merely satisfies the normative demand of formal continuity. This occurs when excessive attention is paid to the form of the crisis (arising from the logic of the system itself) rather than to the cause (the particular historical instances of dysfunction) of the crisis.

The political will to pursue reform despite the lack of an empirical understanding of the system's actual problems, exemplifies the determination to maintain formal systemic coherence rather than to undertake effective change.[119] Hence, Galanter asserted in relation to tort law reform that it had "little to do with modifying the adversarial character of legal institutions and practices … (but) was (i)nstead directed at reducing accountability and curtailing access and remedies".[120] Similarly, Oberhammer doubted whether procedural reforms in The Netherlands were undertaken with the intention of improving the speed and efficiency of proceedings rather than securing savings in public spending since delay could be more readily addressed by funding the

117 See A Sorensen, "From Critique of Ideology to Politics: Habermas on Bildung" (2015) 10(2) *Ethics and Education* 252 and the references therein.

118 See K Marx, *Theories of Surplus Value, Part 2* (Lawrence and Wishart, Moscow and London, 1968) on systemic crisis.

119 Hence, the observation that reform may be driven by the perception rather than the reality. Bamford, for one, notes that the perception, whether or not it was soundly based, was real and acted as a "catalyst for procedural change": D Bamford, "Litigation Reform 1980–2000: A Radical Challenge?" in W Prest and S Roach Anleu (eds), *Litigation: Past and Present* (2004), p 148. Similarly, some authors have claimed that calls for reform were made without questioning the existence of a crisis: W Prest and S Roach Anleu (eds), *Litigation: Past and Present* (2004), p 11.

120 M Galanter, "Dining at the Ritz: Visions of Justice for the Individual in the Changing Adversarial System" in H Stacy and M Lavarch (eds), *Beyond the Adversarial System* (Federation Press, 1999), p 123.

judiciary rather than "the ineffective but relatively cheap, simple and politically visible instrument of legislation."[121]

The lack of research as to whether and to what extent the procedural rules cause the pursuit of justice to be slow and costly have resulted in expedient rather than effective approaches to reform. Legislative change is a relatively inexpensive response which itself produces the perception that the rules are the cause of the system's failure to satisfy community demands for justice. However, the expedience of this under-researched measure merely reproduces the cycle of crisis by failing to address real causes such as underfunding and understaffing.

Allocating limited public resources equitably across the justice system reduces public expenditure, and streamlined procedures improve cost effectiveness. However, in some jurisdictions justice has been threatened by the need to improve efficiency and effectiveness. Silvestri describes how in Italy the goal of producing fair and just decisions has been completely subordinated to "bare effectiveness"[122] — the need to process large volumes of cases so as to both clear the backlog and meet current demand.[123] In The Netherlands the goal of civil justice appears to have capitulated before the need to cut public expenditure generally. Controversial measures to increase court fees and mandate mediation have alleviated the demand on the court system where litigation is held in reserve as the *ultimum remedium* (last resort).[124]

Compromise means negotiating the conflict between things (including justice) as they are and as they should ideally be. On the one hand the moral legitimacy of institutions may not simply be imposed upon them

121 P Oberhammer cited in CH van Rhee, "The Law's Delay: An Introduction" in CH van Rhee (ed), *The Law's Delay: Essays on Undue Delay in Civil Litigation* (Intersentia, Groningen, 2004), p 4.

122 A Uzelac, "Goals of Civil Justice and Civil Procedure in the Contemporary World: Global Developments – Towards Harmonisation (and Back)" in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer International Publishing, Switzerland, 2014), p 11.

123 E Silvestri, "Italian Report" in D Maleshin (ed), *Civil Procedure in Cross-cultural Dialogue: Eurasia Context: IAPL World Conference on Civil Procedure* (18–21 September 2012, Moscow) (Statut 2012), available at http://www.iaplaw.org/index.php/en/documents, pp 187–195; see further V Varrano and A Simoni, "Italian Report" in D Maleshin (ed), *Civil Procedure in Cross-cultural Dialogue: Eurasia Context: IAPL World Conference on Civil Procedure* (18–21 September 2012, Moscow) (Statut 2012), available at http://www.iaplaw.org/index.php/en/documents, pp 42–55. See also E Silvestri, "Goals of Civil Justice When Nothing Works: The Case of Italy" in D Maleshin (ed), *Civil Procedure in Cross-cultural Dialogue: Eurasia Context: IAPL World Conference on Civil Procedure* (18–21 September 2012, Moscow) (Statut 2012), available at http://www.iaplaw.org/index.php/en/documents, pp 79–104. The Italian case may be one of the more dramatic, but many other systems suffer from similar deficiencies.

124 H van Lith, "Dutch Report" in D Maleshin (ed), *Civil Procedure in Cross-cultural Dialogue: Eurasia Context: IAPL World Conference on Civil Procedure* (18–21 September 2012, Moscow) (Statut 2012), available at http://www.iaplaw.org/index.php/en/documents, pp 512–520.

and determine the way they function; on the other hand neither may moral legitimacy simply be derived from the way those institutions function. A theory of justice must be developed for the actual conditions of existing institutions, without merely being adapted to those conditions. Normative justice is not an independent, constructive concept that determines how systems should be constituted, but is used to foster institutional practices to realise the justice system's own values.

2 Commencement of Proceedings

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ORIGINATING PROCESS

Selecting originating process

[2.10] Matters involving questions of fact are differentiated from matters involving questions of law in all jurisdictions, including requiring different originating processes for each. Where facts are to be disputed the originating process triggers processes integral to a determination of those facts. These include pre-trial processes such as pleadings, documentary disclosure, case management procedures, appropriate dispute resolution, and the process of the trial itself. If a party raises a question of law alone a summary procedure enabling the expeditious determination of the dispute is commenced. After the parties have filed affidavits the court brings on the matter. Commencing proceedings using the wrong initiating process is merely an irregularity which the court is able to remedy through the use of an appropriate order.[1]

General principles as to originating process

[2.20] The rules prescribe the proper form of originating process to be used.

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1 *Phelts v Denny* (1994) 122 FLR 117.

Proper identification of the parties

[2.30] The originating process will identify the parties to the dispute, since it is fundamental to the integrity of the legal system that justice is open and public. The originating process will contain a description of the parties along with their formal particulars, contact details, residential address, address for service, and sufficient information to identify the cause of action by which the plaintiff brings the matter before the court.

Date of the originating process

[2.40] An associated consideration is the point at which a proceeding is validly commenced. The date of the originating process is conclusive evidence of the date when proceedings were commenced. The date of commencement indicates the completion of the cause of action and determines whether the defendant can raise a defence of limitation of action.

Whether an originating process will be issued is determined as a matter of administration by the court registry, and not as a matter for judicial determination. Under normal circumstances the court registry cannot refuse to issue an originating process. Nevertheless, the registry may refuse to issue an originating process administratively for *prima facie* irregularity including using non-prescribed forms, or using prescribed forms incorrectly. Or the registry is authorised by the rules of procedure to refuse to issue proceedings which are irregular, baseless, or vexatious. It may also refer the matter to the court for directions. Citizens have a right to access courts and this right cannot be denied simply because a court refuses to accept an originating process — nor do courts have inherent jurisdiction to do so.[2] However, courts *do* have inherent jurisdiction to prevent the abuse of court processes and this can be effected through issuing a stay of proceedings after accepting an originating process.[3]

Vexatious litigants

[2.50] In approaching vexatious litigants courts must balance restricting a person's ability to pursue vexatious litigation with preserving the litigant's access to the courts by allowing them to bring meritorious litigation. Courts are authorised by statute to declare litigants vexatious who have a record of initiating baseless proceedings. In Victoria the *Vexatious Proceedings Act 2014* (Vic) replaced the former regime dealing with vexatious litigants set out in s 21 of the *Supreme Court Act 1986* (Vic). The Act commenced operation on 31 October 2014, and applies to all civil proceedings and all criminal proceedings in a Victorian court or tribunal.

Section 21 of the *Supreme Court Act 1986* (Vic) allowed the Supreme Court to declare a person to be a vexatious litigant if they habitually,

2 *Commonwealth Trading Bank of Australia v Inglis* (1974) 131 CLR 311.

3 *Williams v Spautz* (1992) 174 CLR 509.

persistently and without reasonable grounds instituted vexatious proceedings against the same or different persons. The *Vexatious Proceedings Act 2014* (Vic) lowers the threshold for making an order against a vexatious litigant and extends the power to control vexatious behaviour to courts beyond the Supreme Court. The Supreme Court, County Court, Magistrates' Court, Children's Court and VCAT are now given powers to control vexatious behaviour. The Act defines "vexatious application" and "vexatious proceeding" to include an interlocutory application or a proceeding that is

- an abuse of the process of the court or tribunal;
- made to harass or annoy, to cause delay or detriment, or for another wrongful purpose;
- commenced or pursued without reasonable grounds; or
- conducted in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.[4]

The Full Federal Court in *Freeman v National Australia Bank Ltd*[5] set out factors that the court may take into account when considering whether to declare a litigant vexatious. These factors include other court proceedings where the issues raised by the litigant in the current matter were finally determined. In the court's view a vexatious litigant could be described as one who took action "as a matter of course or almost automatically", and who "continues in the face of difficulty or opposition with a degree of stubbornness." Vexatiousness could be evidenced in the litigant launching an appeal in an attempt to re-litigate a final decision, applying to have a decision set aside, or seeking an order restraining the enforcement of the court's order. The court does not determine the vexatiousness of proceedings on the basis of the litigant's subjective belief in the justice of their cause. The vexatiousness or otherwise of proceedings is determined objectively.

The *Vexatious Proceedings Act 2014* (Vic) empowers the courts and VCAT to make a range of orders including:

- a limited,[6] extended[7] or general[8] litigation restraint order;
- an acting in concert order;[9]
- an appeal restriction order;[10]
- an order granting leave to proceed;[11] and

4 *Vexatious Proceedings Act 2014* (Vic), s 3.

5 *Freeman v National Australia Bank Ltd* (2006) 230 ALR 213 at [24].

6 Under *Vexatious Proceedings Act 2014* (Vic), Pt 2.

7 Under *Vexatious Proceedings Act 2014* (Vic), Pt 3.

8 Under *Vexatious Proceedings Act 2014* (Vic), Pt 4.

9 Under *Vexatious Proceedings Act 2014* (Vic), Pt 5.

10 Under *Vexatious Proceedings Act 2014* (Vic), Pt 6.

11 Under *Vexatious Proceedings Act 2014* (Vic), Pt 8.

- an order varying or revoking a litigation restraint order.[12]

The limited litigation restraint order prevents a person from continuing or making further interlocutory applications or specified types of interlocutory applications in a particular proceeding without first obtaining the leave of the court or VCAT.[13] Only the Magistrates' Court and the Children's Court can make Extended Litigation Restraint Orders ("ELROs") that relate to intervention order legislation. An ELRO prevents a person from continuing or commencing any legal proceedings against a specified person or other entity, or in relation to a specified matter, without first obtaining leave to do so only within the jurisdiction of the court or tribunal in which it is made, unless it is issued by the Supreme Court. Under Pt 5 of the *Vexatious Proceedings Act 2014* (Vic), an acting in concert order prevents a person from acting in concert with a person who is the subject of any litigation restraint order. An appeal restriction order made by a court or VCAT does not affect a person's right to make or continue another type of interlocutory application in a Victorian court or tribunal, or to commence or continue a proceeding in a Victorian court or tribunal (other than the appeal). A person subject to a litigation restraint order may apply for leave to proceed to make an application of the kind restricted by the order under Pt 8 of the Act, or for a variation or revocation of the orders under Pt 9 of the Act.

Describing parties

[2.60] It is essential to describe the parties adequately on the originating process.[14] Such a description is central to the public nature of court proceedings and is vital for the impartial administration of justice,[15] in the sense that it ensures the equal and fair treatment of all litigants. It also maintains the incorruptibility and independence of the courts and judiciary.[16] In those rare cases where justice is not served by making proceedings or the identity of parties public there is provision for the court to order that the matter proceeds privately, or that a party's identity not be revealed. A litigant who fears the prejudicial effect of the openness of court proceedings may seek to avoid disclosing their identity on the originating process. The various orders that can be sought to achieve this — generically known as suppression orders although their effects are diverse — disrupt the principle of open justice to different extents. In *Re Application by Former Officer of Australian Security Intelligence Organisation*,[17] Brooking J observed with respect to the range of potential interruptions on the principle of open justice:

12 Under *Vexatious Proceedings Act 2014* (Vic), Pt 9.

13 *Vexatious Proceedings Act 2014* (Vic), s 12.

14 *Cameron v National Mutual Life Association of Australasia Ltd (No 2)* [1992] 1 Qd R 133.

15 *Chief Executive Officer, Department for Child Protection v Grindrod (No 2)* (2008) 36 WAR 39 at [115]–[117] per Buss JA, [185]–[198] per Murray AJA.

16 *Russell v Russell* (1976) 134 CLR 495 at 520 per Gibbs J.

17 *Re Application by Former Officer of Australian Security Intelligence Organisation* [1987] VR 875 at 876–877.

> … it is clear that there is inherent power to impinge by order in a given case upon the general principle that the courts shall conduct their proceedings in public. The impingement may be great or small, as circumstances warrant. At times the encroachment is so slight as to pass without notice: a witness is permitted to write down his address, which is then recorded in the transcript or sometimes only in the judge's notes, in the latter case the address being communicated privately to the judge alone. On occasions a witness is permitted to go further and to write down not merely his address but also his name, so that he will give evidence as "Mr X" or "Col B" …
>
> In exceptional circumstances, the whole or part of the hearing may take place in private.

The court is required by ss 18(1)(a) and 30(2)(a) of the *Open Courts Act 2013* (Vic) to make orders "necessary to prevent a real and substantial risk of prejudice to the proper administration of justice" and adopt the means that least interferes with the openness of the administration of justice. The test of necessity is that the prejudice "cannot be prevented by other reasonably available means". The example given in the statute of "another reasonably available means" to the proceedings suppression order governed by s 18(1)(a) is that the judge give appropriate "directions to the jury." The example at s 30(2)(a) of an alternative to closing proceedings to the public is "directions to the jury, making a proceeding suppression order, or orders excluding only certain persons or a more limited class of persons from the court or tribunal." Alternatives to using the names of parties such as the use of pseudonyms, and prohibiting the publication of names, are seen as steps for dealing with sensitive issues without requiring the closure of the court.[18] In *Re TK* Malcolm CJ said: "Each application for privacy must be considered on its merits, but the applicant must satisfy the court that nothing short of total privacy will enable justice to be done."[19]

In *D v Australian Securities Commission*[20] an accountant, whom the Australian Securities Commission applied to have dealt with pursuant to s 1292(1)(d) of the *Corporations Law* for failing to properly perform the duties or functions of an auditor, applied to prevent his name being published on the basis that publication would adversely affect his professional reputation, and the business of a well-known firm at which he was a partner. The application was refused. In *Re TK*[21] the plaintiff, who was a haemophiliac, alleged that they had acquired HIV as a result of the defendant's negligence in supplying contaminated blood to them. Malcolm CJ ordered that the description "TK" be used in place of the plaintiff's name in the writ. In cases where a party may be particularly susceptible to publicity and suffer prejudice beyond "the normal embarrassment, discomfort and general unpleasantness" that normally

18 *XY v Board of Examiners* [2003] VSC 196 at [11] per Cummins J.

19 *Re TK* (1989) 1 WAR 335 at 338.

20 *D v Australian Securities Commission* (1994) 52 FCR 187.

21 *Re TK* (1989) 1 WAR 335.

accompanies such proceedings identifying details may be suppressed.[22] The court in *Re Application by Former Officer of Australian Security Intelligence Organisation*[23] held that it possessed but refused to exercise its discretion to describe the plaintiff as "a Former Officer of the Australian Security Intelligence Organisation".

In *J v L & A Services Pty Ltd (No 2)*[24] the HIV-positive plaintiffs, who alleged their employers' negligence caused them to contract the disease, had secured orders for proceeding anonymously at first instance, which were reversed on appeal. The appeal court reasoned that the discrimination likely to be suffered by the plaintiffs if their status was known in the community did not outweigh the public interest in ensuring justice was pursued publicly and openly. Fitzgerald P and Lee JA nevertheless recognised exceptions to the principle, such as circumstances where the public nature of proceedings would prevent justice being enforced or rendering the court's decision futile, or in order to secure covert security operations. However, their Honours did not recognise the loss of privacy and the attendant discomforts and stress or other "collateral disadvantages" accompanying it as grounds for keeping the public from being informed about proceedings.[25] They were also of the view that different purposes may be served by different types of suppression and degrees of confidentiality depending on whether the identity of persons should be kept secret or information should be protected by confidentiality.

In *E v SE*[26] the plaintiff applied to be permitted to bring an action by using letters rather than names on the court documents. The plaintiff

22 *CC v Djerrkura* [2002] FMCA 372 at [50]; see further the decision of Brown FM in *CC v Djerrkura* [2002] FMCA 372 at [50]–[51]. This matter was previously considered in *CC v DD* [2002] FMCA 221, in which Brown FM made *ex parte* orders on an interim basis under *Federal Magistrates Act 1999* (Cth), s 61 forbidding publication of the name of the applicant and respondent (under s 61(1)(b)) and information likely to enable the identification of the applicant (under s 61(1)(c)). The order in relation to the respondent was subsequently set aside. In both instances discretion was exercised on the basis that publication of the applicant's name or information enabling her identification may prejduice the administration of justice in dissuading the applicant from prosecuting a rightful claim.

23 *Re Application by Former Officer of Australian Security Intelligence Organisation* [1987] VR 875.

24 *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10.

25 Compare the majority's refusal to recognise the potential damage that may be caused by the loss of privacy with *PD v Australian Red Cross Society (NSW)* (1993) 30 NSWLR 376, in which the court had to decide whether the plaintiff, who had contracted HIV from a contaminated blood transfusion, should be entitled to discover the identity of the relevant blood donor in order to pursue a claim for damages against the Red Cross. Rather than allowing outright disclosure, the Court of Appeal devised a careful and supervised procedure for making the necessary information available to the plaintiff's solicitors through the intervention of a social worker, thereby keeping to a minimum the number of people who would be told the blood donor's name; see also *DM v TD* (unreported; NSWSC; Cole J; 4 February 1994).

26 *E v SE* [2007] SASC 198.

brought the civil action at the same time as facing criminal prosecution after a highly publicised arrest. This timing was intentional, as it would preserve the action in case s 36 of the *Limitations of Actions Act 1936* (SA) operated to bar it from being brought on after the criminal proceedings had been determined. The plaintiff sought anonymity because facts and allegations in a statement of claim in the civil proceeding that the two defendants had acted unlawfully were likely to prejudice the criminal proceeding in which the plaintiff was a defendant. Debelle J made an order granting the plaintiff anonymity, and an order suppressing the publication of the instigation of proceedings. While the court recognised the centrality of "the fundamental principle of open justice"[27], it also acknowledged that the exception to the principle was based on the "more fundamental principle"[28] that the role of the court was to ensure that justice was done, and that courts of justice had an inherent power[29] to continue proceedings in a closed court if that was required to preserve the subject matter of the proceeding.

In *Re Opes Prime Stockbroking Ltd (No 2)*[30] the court was required to consider whether the names of various clients of the fund manager should be kept confidential. One such client had committed suicide in the midst of extremely stressful proceedings where many families lost their entire life savings, another client was suicidal due to their failed investment, and other clients had suffered catastrophic financial losses and attendant psychological and emotionaldistress.

The court identified exceptions to the rule that proceedings are to be public and open in s 50 of the *Federal Court of Australia Act 1976* (Cth). This section empowers the court to order "forbidding or restricting the publication of particular evidence, or the name of a party or witness, as appears to the Court to be necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth."

The court determined that it was not in the interests of justice and would cause unnecessary harm to the family of the deceased client for the circumstances of his death to become public, and would be potentially detrimental to the client at risk of suicide.[31] Their identities were to be kept secret. The court expressed sympathy for the other investors whose

27 *E v SE* [2007] SASC 198 at [7].

28 *E v SE* [2007] SASC 198 at [8], citing Viscount Haldane LC in *Scott v Scott* [1913] AC 417.

29 The court's inherent power to protect the confidentialty of parties or proceedings is supplemented by *Evidence Act 1929* (SA), s 69A. That provision "authorises the court to make a suppression order to prevent prejudice to the proper administration of justice" (at [9]; the reference is to the wording of s 69A(1)(a)), which is informed by the common law principles indicating the circumstances in which an order under s 69A may be made. The example given in *E v SE* [2007] SASC 198 was the making of orders to preserve confidentiality in circumstances where the parties would otherwise be deterred from bringing proceedings because they feared repercussions from their identities being disclosed in public: citing *Re TK* (1989) 1 WAR 335.

30 *Re Opes Prime Stockbroking Ltd (No 2)* [2008] FCA 1578.

31 *Re Opes Prime Stockbroking Ltd (No 2)* [2008] FCA 1578 at [10].

suffering it also took into account but considered such suffering insufficient to prevent the disclosure of their identity in court.[32]

It has been recognised that it is justifiable to close the court to protect trade secrets in exceptional circumstances.[33] In *R v Chief Registrar of Friendly Societies; Ex parte New Cross Building Society*[34] the Court of Appeal in England ordered that a proceeding be privately held. The court held the possibility of a run on the society's funds if news of the hearing became public was sufficient for it to grant a confidentiality order. Lord Donaldson MR in that case said: "It is not sufficient that a public hearing will create embarrassment for some or all of those concerned. It must be shown that a public hearing is likely to lead, directly or indirectly, to a denial of justice".[35] A request for closed proceedings to preserve confidentiality was refused on appeal in *David Syme & Co Ltd v General Motors-Holden's Ltd* because it was decided that other means short of court closure, such as refraining from referring to sensitive information during the hearing of the appeal, could be employed to protect confidentiality.[36]

Statutory provisions such as s 50 of the *Federal Court of Australia Act 1976* (Cth) tend to confer a more concrete power for the court to decide whether to permit or withhold disclosure of information on the nature of a party to prevent prejudice to the administration of justice and the security of the Commonwealth. Where the security of the Commonwealth is not at issue the only consideration is the administration of justice.[37]

Representative capacity

[2.70] A plaintiff who sues in a representative proceedings must state on the originating process that they are suing in a representative capacity.

Addresses of parties and solicitors

[2.80] In *Sheen v Burke*[38] the prothonatory refused to issue a writ to the plaintiff because the plaintiff had listed their "address" on the originating process as being that of their solicitor. The matter was referred to the court and the prothonatory's decision was upheld. The court held that the address stated on the originating process must be the plaintiff's residential address. Supplying only the plaintiff's solicitor's address is inadequate.

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32 *Re Opes Prime Stockbroking Ltd (No 2)* [2008] FCA 1578 at [11].

33 *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294 at 307 per Street CJ.

34 *R v Chief Registrar of Friendly Societies; Ex parte New Cross Building Society* [1984] QB 227.

35 *R v Chief Registrar of Friendly Societies; Ex parte New Cross Building Society* [1984] QB 227 at 235.

36 *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294 at 296–297 per Street CJ.

37 *A v Minister for Immigration and Ethnic Affairs* (1994) 54 FCR 327.

38 *Sheen v Burke* [1993] 1 VR 584.

Originating processes are indorsed with addresses to enable the proper service of documents. If the originating process is indorsed with the name and address of a solicitor, the solicitor is required on request to state whether he or she filed the originating process.

It should be noted, however, that failing to provide an address is not fatal to an originating process — it is merely an irregularity. The process remains valid until and unless the court sets it aside. Determining the defendant's address (in order provide it on the originating process) enables the plaintiff to know whether service upon the defendant will be able to be undertaken using the process for service within the jurisdiction, or whether the requirements for service outside the jurisdiction will have to be met. A plaintiff who fails to state a correct address may be required to pay security for costs, on the basis that the incorrect address may signal an attempt to avoid the consequences of the enforcement of a judgment in favour of the defendant.

An originating process stands as null and void if it is filed by a plaintiff's solicitor without the plaintiff's authority, but it may be validated if the plaintiff ratifies their solicitor's actions.[39]

Time of commencement of proceedings

[2.90] Proceedings commence once the court registry seals and issues the originating process.

Determining when proceedings commenced is essential if the defendant raises a defence that the action is statute barred because it lies outside the limitation period.

Victoria

[2.100] In Victoria plaintiffs are required to certify, along with their originating process, that, prior to the commencement of the action, they made genuine efforts to negotiate the matter and reach a settlement with the defendant.[40] Not seeking to enter into or not entering into negotiation is not a ground for invalidating the proceeding, but it may be the basis of an adverse costs order. In Victoria the rules provide that a proceeding is commenced either by issuing a writ or an originating motion, or initiated in any other way required by the rules or an Act.[41] Summary proceedings disputing questions of law are initiated by originating motion. A writ commences proceedings in which pleadings are delivered. According to the rules, a proceeding is a matter in court. It may or may not be between parties.[42] The rules therefore provide for a single class of process whether

39 *Victoria Teachers Credit Union Ltd v KPMG* (2000) 1 VR 654.

40 See B Cairns, *Australian Civil Procedure* (10th ed, Thomson Reuters, 2014), [2.440], [2.780], [2.790].

41 *Supreme Court (General Civil Procedure) Rules 2015* (Vic), r 1.13. Legislative references in the remainder of this chapter are to these rules unless otherwise specified.

42 *Supreme Court Act 1986* (Vic), s 3. Other than a criminal proceeding.

the matter is conducted in court or in chambers, because all the court's transactions are now conducted in court due to the legislative abolition of the distinction between court and chambers.[43]

COMMENCEMENT OF PROCEEDINGS

[2.110] Proceedings are commenced by writ or originating motion unless the rules provide otherwise or it is required under an Act.[44] The rules provide guidance on the proper form of originating process. If proceedings do not raise a substantial factual dispute so that pleadings and discovery are not required it is appropriate for the plaintiff to opt to commence them by originating motion.[45] Proceedings initiated by originating motion do not involve pleadings,[46] and require a party to seek leave to make discovery[47] and present evidence on affidavit.[48] However, if proceedings will raise disputed questions of fact process should be commenced by way of writ since, under the rules, pleadings and discovery will automatically follow.

The plaintiff is best placed to know how proceedings are likely to progress and therefore which originating process to select. However, the selection may be reviewed and corrected by the court under the rules. The rules state that a writ is the appropriate form of originating process unless commencement by originating motion is expressly required under them.[49] Commencement of proceedings must be by originating motion where there is no defendant, or an application is being made to the court under a statute, or where required under the rules.[50] Otherwise the plaintiff may opt to sue either by writ or originating motion. The court may order that a proceeding commenced by originating motion continue as if commenced by writ, thereby engaging the interlocutory processes of pleadings, discovery, and interrogatories. Similarly, a proceeding commenced by writ may be varied by the court to proceed by originating motion and to continue as a trial by affidavit. This obviates the need for interlocutory processes.

Writ

General indorsement

[2.120] The *Supreme Court (General Civil Procedure) Rules 2015* (Vic) define an "originating process" as a "writ, originating motion or other

43 *Supreme Court Act 1986* (Vic), s 4.

44 Rule 4.01. An indorsement of claim in accordance with r 5.04(2) that is or is intended to be filed in RedCrest is deemed a writ.

45 Rule 4.06.

46 Rules 14.02, 14.04.

47 Rules 29.07(2), 30.02(3).

48 Rule 40.02(c).

49 Rule 4.04.

50 Rule 4.05.

process by which a proceeding is commenced".[51] The writ is a prescribed form under the rules.[52] The rules also govern its content, which provide that a writ must contain an indorsement of claim, which must be either

- a statement of claim; or
- a statement which complies with r 5.04(2)(b).[53]

Under the rules an indorsement of claim on a writ that is headed "Statement of Claim"[54] is a statement of claim and is defined as a pleading.[55] The heading constitutes the indorsement as a statement of claim by the plaintiff's representation that for the purposes of the rules of pleading it is a statement of claim. Basing the distinction between an indorsement and a statement of claim specifically on the heading simplifies, and is intended to avoid, disputes about whether an indorsement is a statement of claim. A statement satisfies r 5.04(2)(b) if it gives the defendant notice of the nature of the claim being brought against them, the cause of action by which the action is claimed, and the remedy the plaintiff seeks.

A statement of claim indorsed on the writ must satisfy O 13 and be sufficient as a pleading. This will of course ensure that it meets the requirements of an indorsement. An indorsement that is sufficient as a statement of claim is defined under the rules as a pleading.[56]

Order 13 determines whether an indorsement is sufficient as a statement of claim. An indorsement that is not sufficient as a statement of claim may be struck out or ordered to be amended by the court.[57] An indorsement of claim is not a valid pleading if it fails to disclose a cause of action, is scandalous or vexatious, is prejudicial or embarrassing, or may delay the hearing of a trial, or is otherwise an abuse of the court's process.[58]

An indorsement that is not headed "Statement of Claim" does not become a statement of claim by virtue of being extensively detailed, but remains a mere indorsement. Under the rules the plaintiff must, after serving the indorsement, serve the defendant with a statement of claim.

Rule 23.02 provides that in compliance with the rules of pleading a defendant must plead and serve a defence in response to an indorsement that constitutes a statement of claim,[59] and that if they fail to do so they

51 Rule 5.01.

52 Rule 5.02.

53 Rule 5.04(2)(b) is taken from *Rules of the Supreme Court 1884* (Vic), O 3 r 1. See *Elsum v Jameson* [1974] VR 529 at 530.

54 Rule 5.04(3).

55 Rule 1.13.

56 Rule 1.13.

57 Rule 23.02.

58 Rule 23.02.

59 Rule 14.04(a).

will be subject to default proceedings.[60] The defence must be filed within 30 days of the appearance.[61] A defendant must file a defence to an indorsement entitled "Statement of Claim" notwithstanding that, as assessed by O 13, it is defective as a pleading.[62]

A general indorsement that fails to comply with r 5.04(2)(b) is not null and void. The non-compliance renders it merely irregular. As a general rule the court will permit defects to be corrected by the plaintiff in order to keep the proceedings on foot. However, it remains open to the court to set aside either the writ or its service, or to set aside the indorsement. An irregularity in an indorsement may be overcome by serving the statement of claim.[63] The service of a statement of claim would suffice to cure any non-compliance with r 5.04(2)(b) in relation to a claim.

Indorsement not a statement of claim

[2.130] An indorsement of claim that lacks the heading "Statement of Claim" will have its validity for the purposes of r 5.04(1) assessed by determining its compliance with r 5.04(2)(b). Rule 5.04(2)(b) provides that the indorsement of claim that is not a statement of claim must be a statement "sufficient to give with reasonable particularity notice of the nature of the claim and the cause thereof and of the relief or remedy sought in the proceeding".[64] The rules require the indorsement to disclose with reasonable particularity the nature of the claim, the cause of action, and the remedy the plaintiff seeks.[65] In determining whether or not the indorsement is sufficient to notify a defendant of the nature of the claim against them the question is answered as a matter of substance, not form.[66]

The degree of particularisation required of the indorsement was explained in *Renowden v McMullin*[67] in the judgment of Barwick CJ and McTiernan J:

60 Rule 14.04.

61 Rule 14.04(a).

62 *Leed v National Australia Bank Ltd* [1996] 1 VR 627.

63 *Hill v Luton Corporation* [1951] 2 KB 387 at 391; *Elsum v Jameson* [1974] VR 529 at 533, 543.

64 This expression in r 5.04(2)(b) is taken from *Rules of the Supreme Court 1884* (Vic), O 3 r 1. However, added to the new rule are the words "with reasonable particularity". The result may be that the plaintiff must now give rather more information than was the case previously. Another view is that the change in language does no more than state a requirement held by the courts to exist under the earlier rule.

65 *Ruzeu v Massey Ferguson (Aust) Ltd* [1983] 1 VR 733.

66 For further detailed examples see DL Bailey and JK Arthur, *Civil Procedure Victoria* (LexisNexis, subscription service), [1 5.04.10], [1 5.04.15], [1 5.04.20]. The distinction between the modern judicature fact system of pleading and the previous common law system, which required the pleader to assert his or her cause of action in conventional form rather than the facts relied upon to establish it, is fully described by Barwick CJ in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 473–474, 578. See also *Scott v Davis* (2000) 204 CLR 333 at [266] per Gummow J, referring to Barwick CJ's comments in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd*.

67 *Renowden v McMullin* (1970) 123 CLR 584 at 595.

> The indorsement on the writ not being a statement of claim is not in the nature of a pleading. In our opinion, it should not be construed as such but read for what it is, namely, a notice of the nature of the plaintiff's claim, of the cause thereof and of the relief sought in the action. It suffices if it conveys the information generally and without particularity save where and to the extent to which particularity is indispensable to notify the required elements of the indorsement, eg on some occasions identification of the instrument on which a claim is founded.

Although a general indorsement does not constitute a pleading it defines the parameters of the action against the defendant who is thereby notified of the basis of the right to relief that the plaintiff asserts, the legal cause of action and the remedy that is sought.[68] The indorsement may inform the defendant generally of these matters unless notification requires them to be put with greater particularity.[69] The claim is formally pleaded by the statement of claim which cannot exceed the scope defined by the indorsement. In *Weldon v Neal*[70] Lord Esher said:

> If a statement of claim is amended within the range of the indorsement of the writ there is of course no need to amend the indorsement of the writ. But this does not mean that the indorsement has ceased to have effect. Clearly enough, in our opinion, the ambit of permissible amendment of the statement of claim will be determined by reference to the terms the indorsement. If the statement of claim, or a proposed amendment of it, should exceed the indorsement, the statement of claim would be struck out or leave to make the amendment would be refused, as the case may be, unless the indorsement can be amended. O 20 r 2(2) Rules of the Supreme Court provides: That a statement of claim must not contain any allegation or claim in respect of a cause of action unless that cause of action is mentioned in the writ or arises from facts which are the same as, or include or form part of, facts giving rise to a cause of action so mentioned.

The statement of claim must fall within the scope of the indorsement because it is "the specific way of stating the claim [the plaintiff] has endorsed on the writ."[71] It will do so even if the statement of claim alters, extends or modifies the indorsement — but it cannot amend it.[72] A statement of claim that exceeds the claim in the indorsement forces an amendment of the indorsement, and will be struck out, or the application

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68 *Renowden v McMullin* (1970) 123 CLR 584 at 595 per Barwick CJ and McTiernan J: "The alteration, modification or extension of the claim … must, in our opinion, remain within the area marked out by the indorsement. The basic nature of the claim in respect of which the action has been commenced may not be changed, however much room there is under the rules for variation in the statement of facts, or the extent of the remedy or relief sought." In *Dundas v Incorporated Nominal Defendant* [1976] VR 667 at 669 Young CJ, Gowans and Harris JJ held that: "… the statement of claim must remain within the area marked out by the indorsement and cannot completely change the cause of action …".

69 *Renowden v McMullin* (1970) 123 CLR 584 at 595 per Barwick CJ and McTiernan J.

70 *Weldon v Neal* (1887) 19 QBD 394 at 395.

71 *Renowden v McMullin* (1970) 123 CLR 584 at 595 per Barwick CJ and McTiernan J.

72 O 20 r 2(3).

for leave to amend the indorsement will be refused, where the amendment is incapable of amendment.[73]

The judgment of Barwick CJ and McTiernan J also states:

> Where it is sought to strike out a statement of claim on the ground that it asserts a claim not included in the writ or to amend a statement of claim the indorsement of the writ governs or determines whether the statement of claim should be struck out or amended as the case may be. The right given to the plaintiff by O 20, r 2, of the Victorian Rules does not in our opinion require any modification of that statement. The alteration, modification, or extension of the claim pursuant to this rule must, in our opinion, remain within the area marked out by the indorsement. The basic nature of the claim in respect of which the action has been commenced may not be changed, however much room there is under the Rules for variation in the statement of facts, or the extent of the remedy or relief sought. "A plaintiff may amend his statement of claim once without leave by which I understand that he may widen it or lessen it or express it in better terms, so long as he keeps it in substance consistent with what he claims in his writ."[74]

Referring to the effect of a statement of claim filed subsequently to a writ and indorsement of a writ the joint judgment held:[75]

> But, while the indorsement of the writ determines the essential nature of the action, it does not define, nor necessarily form part of the definition of the issues for trial. That is done by the pleadings of which the writ does not form part. When a statement of claim has been delivered it will in its finally amended form determine the issues for trial. It will not normally be necessary to refer to the indorsement on the writ of summons to ascertain such issues. Possibly, however, where there is ambiguity in the statement of claim the indorsement may serve to throw light upon the meaning of the statement of claim or of expressions in it. Only inasmuch as the statement can be said to be the initiation of specific issues for trial in the action, can it be properly said that the statement of claim supersedes the indorsement of the writ.

As a matter of settled practice, there can be no alteration to an indorsement to add a claim after the limitation period of a cause of action has expired, if to do so would cause prejudice to the defendant.[76] If, however, the prejudice was of a kind that could be compensated by an award of costs, an adjournment, or by some other means, under the rules the court may exercise its discretion to allow an amendment.[77] Unless specifically empowered in exceptional circumstances the courts will not allow an amendment that deprives a defendant of a defence that has arisen under *Limitation of Actions Act 1958* (Vic). The court will apply the rule in *Weldon v Neal*[78] against its discretion to deprive the defendant of

73 *Renowden v McMullin* (1970) 123 CLR 584 at 597 per Barwick CJ and McTiernan J.

74 *Renowden v McMullin* (1970) 123 CLR 584 at 595–596 per Barwick CJ and McTiernan J citing Dowse B in *Moore v Alwill* (1881) 8 LR Ir 245 at 247–248.

75 *Renowden v McMullin* (1970) 123 CLR 584 at 597 per Barwick CJ and McTiernan J.

76 See *Rubenstein v Truth & Sportsman Ltd* [1960] VR 473 at 475.

77 Rule 36.01.

78 *Weldon v Neal* (1887) 19 QBD 394 at 395 per Lord Esher MR.

the defence that the action is statute barred. Further, it will neither allow a plaintiff to add nor substitute a new cause of action to its case.[79]

In *Sterman v EW & WJ Moore Ltd*[80] the plaintiff sought to amend a general indorsement which had failed to specifically plead a cause of action. The indorsement on the writ had been issued by the plaintiff in person within the limitation period, but the leave to amend was not sought until after the action became statute barred by solicitors whom the plaintiff consulted for advice and who identified the defect. The Court of Appeal allowed the amendment after the application to a Master had been refused and an appeal to the trial judge upheld the Master's decision. In doing so Lord Denning endorsed the view of the court in *Chatsworth Investments Ltd v Cussins (Contractors) Ltd* that the restrictive practice of the rule established in *Weldon v Neal* be discarded in favour of "giv(ing) Ord 20 r 5(1) it full width … (and) … allow an amendment whenever it is just to do so, even though it may deprive the defendant of a defence under the Statute of Limitations."[81] By "giv(ing) full effect to the wide words of Ord 20 r 5(1)"[82] the court was able to cure "technical defects" in a genuine case commenced before the expiration of the limitation period.[83] In *Sterman* the defect was technical in the sense that the applicant's claim was clearly a monetary claim (of £500 for loss of earnings, plus special damages, plus costs) and the respondent had sufficient knowledge of the claim.[84]

While the statement of claim must accommodate the indorsement on the writ unless the indorsement is capable of amendment, a cause of action in the indorsement that disappears from the statement of claim is considered to have been waived or abandoned. No subsequent amendment can reincorporate the cause of action into the statement of claim once the statutory limitation period has expired. In *Renowden v McMullin* Owen J said:

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79 *Marshall v London Passenger Transport Board* [1936] 3 All ER 83; *Batting v London Passenger Transport Board* [1941] 1 All ER 228.

80 *Sterman v EW & WJ Moore Ltd* [1970] 1 QB 596 at 604.

81 *Chatsworth Investments Ltd v Cussins (Contractors) Ltd* [1969] 1 WLR 1 at 5.

82 *Sterman v EW & WJ Moore Ltd* [1970] 1 QB 596 at 604.

83 See Holroyd Pearce LJ in *Pontin v Wood* [1962] 1 QB 594, applying to O 2 r 2 and O 21 r 5(1), interpreting the rule and the orders made on it as directed "to regularising the procedure of a known genuine case commenced before the time limit expired but containing technical defects" and "to saving rather than destroying" (at 609). See also the view of Lord Denning in *Chatsworth Investments Ltd v Cussins (Contractors) Ltd* [1969] 1 WLR 1 at 5 that the strict rule of practice in *Weldon v Neal* (1887) 19 QBD 394 should be discarded, and O 20 r 5(1) be broadly interpreted and applied. See also Lord Denning MR in *Sterman v EW & WJ Moore Ltd* [1970] 1 QB 596 at 604 speaking of the equivalent English rule to O 21 r 5 said that the court "should give full effect to the wide words of Ord 20 r 5(1) … [and] would not cut them down by reference to subrules (2), (3), (4) and (5)."

84 Lord Denning MR in *Sterman v EW & WJ Moore Ltd* [1970] 1 QB 596 at 604.

> [T]he plaintiff was to be regarded as having dropped his claim for breach of contract by omitting it from his statement of claim. … to allow him to re-introduce it by amendment at a time when it would have been statute barred, had [the plaintiff] then begun an action to enforce it, would not be a proper exercise of … discretion.[85]

An indorsement will convey sufficient information when the defendant is able to determine the events relied upon to found the cause of action and the remedy. But what is sufficient information may depend on the cause of action or the remedy sought by the plaintiff. An action for libel must particularise the publications sufficiently to allow them to be identified.[86] If, for example, the plaintiff sues for an account of profit that remedy must be expressly stated.[87] A plaintiff who on an indorsement on a writ claims only a debt must specify both the amount claimed in debt and the amount claimed for costs, and that paying the debt and costs prior to the expiry of the time allowed for filing an appearance will cause proceedings to be terminated.[88]

The Victorian rules' requirement for an indorsement to state the cause of the action is not a reference to the physical causes, or factual circumstances, on which the claim is based, but to the legal cause of action for which they provide a foundation.[89] The general indorsement on the writ in *Ruzeu v Massey-Ferguson (Aust) Ltd* read:

> The Plaintiff's claim is for damages for injuries he received to his back in an accident which occurred in or about the 2nd December, 1975 whilst he was in the course of his employment with the Defendant. The accident occurred as a result of the negligence of the Defendant its servants or agents and the Plaintiff claims damages.[90]

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85 *Renowden v McMullin* (1970) 123 CLR 584 at 609–610. The majority (Owen J giving the reasons for the majority, Kitto and Menzies JJ agreeing) in that case were not in disagreement with the dissenting judgment of Barwick CJ and McTiernan J regarding the nature of a general indorsement: that it is required only to inform the defendant generally of the nature of the plaintiff's claim, the cause of the action, and the relief they seek. The function of the general indorsement does not require particularisation unless that is indispensable to its notice purpose. Nevertheless, the indorsement marks out the range within which any amendment to the claim may be made since the statement of claim only specifies what has been endorsed on the writ, and may not in substance deviate from the claim on the writ.

86 Rule 13.10(5).

87 Rule 5.05(a).

88 *Weldon v Neal* (1887) 19 QBD 394. The defendant may pay the debt and have the costs taxed. If the costs indorsed on the writ are reduced by more than 1/6 the plaintiff's solicitor must pay the costs of taxation.

89 *Ruzeu v Massey-Ferguson (Aust) Ltd* [1983] 1 VR 733 at 737; *Shell Co of Australia Ltd v Esso Australia Ltd* [1987] VR 317 at 343. A review of the history of the English rule can be found in *Elsum v Jameson* [1974] VR 529 at 530–541.

90 *Ruzeu v Massey-Ferguson (Aust) Ltd* [1983] 1 VR 733 at 733.

A single judge, McGarvie J, of the Court of Appeal ordered that a writ of the action be set aside. The Full Court of Appeal[91] upheld the adequacy of the indorsement *qua* indorsement. Following *Elsum v Jameson*[92] the Full Court explained that the cause of the claim required to be detailed in an indorsement is "the cause of action in the technical sense." The reference to "cause" in the rule is not a reference[93]

> to the physical acts which caused the accident or the injury. It is directed to the cause of action. Thus what the endorsement must contain is sufficient notice of (a) the nature of the claim, (b) the cause of action relied upon and (c) the relief or remedy required. In an action based on negligence particulars (a) and (b) will often be run together. In the present case the particulars are: (c) damages for (a) personal injuries caused by (b) the negligence of the defendant. Thus the indorsement clearly covered all the requirements of the rule.

The court held, however, that the indorsement restricted itself and could not accommodate a cause of action arising on 22 January 1976, and that it would offend the rule in *Weldon v Neal* to permit the plaintiff to amend the indorsement to introduce an action arising on that date as opposed to the date that appeared on the indorsement. Young CJ only required that the indorsement contain an identifiable cause of action. He did not require that the indorsement explicitly state a cause of action.

The defendant is notified of the cause of action by facts the plaintiff alleges. The cause of action emerges from those allegations, and not by affixing a label identifying the facts as a legal cause of action.

In *Williams v Milotin*[94] the cause of action had to be identified for the purpose of determining whether it was barred on the basis of a number of potentially applicable limitation periods. The court determined that the cause of action would be identifiable from the alleged facts not from any specific assertion of the plaintiff.

The cause in Victorian law is a legal cause of action, not a physical cause or factual circumstance.[95] Nevertheless, the technical cause of action will be identified from the allegation of facts in the indorsement. This is because under the rules all that is required of the indorsement is for it to sufficiently state the nature and the cause of the claim. By doing this the defendant is put on notice of the claim being advanced against them on the basis of the matters contained in the indorsement. This does not require the cause of action to be labelled.[96]

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91 Comprising Young CJ, Starke and Fullagar JJ.

92 *Elsum v Jameson* [1974] VR 529, which both appellant and respondent relied upon.

93 *Ruzeu v Massey-Ferguson (Aust) Ltd* [1983] 1 VR 733 at 737.

94 *Williams v Milotin* (1957) 97 CLR 465 at 471.

95 *Elsum v Jameson* [1974] VR 529.

96 *Shell Co of Australia Ltd v Esso Australia Ltd* [1987] VR 317 at 343 per Nathan J.

In *Buttigieg v VL Finance Pty Ltd*[97] Murphy, Fullagar and Nathan JJ upheld the adequacy of an indorsement which provided, in narrative form, the facts by which a defendant became indebted to a plaintiff and how the remaining defendants guaranteed that debt. It was held that the indorsement sufficiently alleged that the plaintiff had a cause of action against each defendant. Their Honours referred to *Ruzeu*[98] in explaining that

> The endorsement does not have to employ the precise legal nomenclature of a cause of action, such as "detinue" or "breach of contract", but it must be such as to give sufficient notice of what the cause of action is. In the present case we think the endorsement makes it clear enough that the cause of action against the first defendant is breach of a contract to pay money …
>
> … [and] also makes clear enough what is the cause of action relied upon against the defendants other than the first defendant — it is again breach of contract, being a breach of a "guarantee in writing".

It is an irregularity for an indorsement not to be compliant with the rules. The court may either order the writ be set aside or order that the plaintiff amend it.[99] A defendant applying to have a process struck out must do so before taking any other step in the proceeding.[100] If the defendant takes a procedural step having become aware of the irregularity, it is taken as the defendant's waiver of the plaintiff's need for compliance. A defective indorsement can be rectified by the plaintiff serving a statement of claim provided the statement of claim alters, modifies or extends the indorsement without amending it.[101]

Time for service

[2.140] Rule 5.12 provides that an originating process (whether a writ or originating motion) which does not specify a return date may be validly served for one year after the day it was filed, unless another period is otherwise specified under the rules.[102] It is immaterial to the calculation of time what time of day service is affected.[103] An originating process becomes "stale" and is no longer in force if it has not been served within the time provided by r 5.12.

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97 *Buttigieg v VL Finance Pty Ltd* [1986] VR 392.

98 *Buttigieg v VL Finance Pty Ltd* 1986] VR 392 at 397.

99 Rule 2.01.

100 Rule 2.03.

101 Rule 14.03; see also *Pontin v Wood* [1962] 1 QB 594; *Hill v Luton Corporation* [1951] 2 KB 387.

102 Rule 5.12(1). For example, a writ filed on 1 July must be served no later than 1 July of the following year. See r 3.01(2). Under *Rules of the Supreme Court 1884* (Vic), O 8: "No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date" (O 8 r 1) so that the date of issue was included in the calculation, and therefore the last day for filing the writ in the hypothetical instance would be 30 June.

103 *Trow v Ind Coope (West Midlands) Ltd* [1967] 2 QB 899.

If the originating process has not been served during the period of its validity a court may, from time to time,[104] extend the period of validity for service for up to one year from the day the order for extension is made, that is, for such a period of time as directed by the court being not more than one year.[105] The decision to extend an originating process is subject to the terms of the rules. In Victoria the court's discretion to renew an originating process is unfettered.[106] However, the discretion extending the period for validly serving process is to be exercised in accordance with the purpose for which the court is empowered with the discretion.[107] In deciding whether to fix a period of time of less than one year to the validity of the originating process for service the court will consider the time that has passed since the cause of action has accrued, and how realistic is the probability that renewing the originating process will enable the plaintiff to serve the defendant without further delay.

The application for the extension of the period of validity may be made while the originating process is valid for service, or after the period in which it may be validly served has expired.[108] An originating process that

104 Rule 5.12(2). That is to say, more than once, or as the case requires.

105 Rule 5.12(2). As to whether, if the period of validity for service has already been extended once, application for a further extension must be made within the original period of extension see *Singh v Duport Harper Foundries Ltd* [1994] 1 WLR 769 at 896. Farquharson LJ limited these to "exceptional circumstances and where the interests of justice so require", the applicant being required to satisfactorily explain the failure to effect service of the writ within the period of original validity, and then furnish good reasons for the extension.

106 Vic r 5.12; see also NT r 5.12; SA r 39; Tas r 107; WA O 7 r 1; compare ACT r 74; and Qld r 24, where the court may renew the originating process if it is satisfied that reasonable efforts have been made to locate or serve the defendant, or if there is some other good reason to renew the claim. In New South Wales service of a stale originating process, as with any failure to comply with a requirement of the Act or the rules in respect of time, is treated as an irregularity in accordance with *Civil Procedure Act 2005* (NSW), s 63.

107 *Finlay v Littler* [1992] 2 VR 181 at 186.

108 Vic r 5.12(3). For a comparison of r 5.12 with *Rules of the Supreme Court 1884* (Vic), O 8 r 1, see *Kleinwort Benson Ltd v Barbrak Ltd* [1987] AC 597; *Zappelli v Falkiner* (unreported; VSC; O'Bryan J; No 81/1986; 21 September 1987); *Ramsay v Madgwicks* [1989] VR 1. An application before the Federal Court has to be served before the date set for the first direction hearing: FCR r 8.06. In *Kleinwort Benson Ltd v Barbrak Ltd* the court set out the principles for the exercise of the discretion to extend the period of validity of the writ: it should be exercised for good reasons based on all the circumstances of the case, and the hardship likely to be experienced by the parties were the application for extension to succeed. Both Victorian cases were decided after the introduction of O 5 r 12 of the *General Rules of Procedure in Civil Proceedings 1986* (Vic), which came into effect on 1 Janurary 1987 and was in form similar to the English rule, being silent as to the criteria for exercising discretion. In both *Zappelli v Falkiner* and *Ramsay v Madgwicks* the court reviewing the authorities held that good reasons were implied into the new rules despite the absence of the express words to that effect, and that the discretion to extend the validity of a writ was to be exercised for good reasons considering all the circumstances of the case.

has become stale because the original period for service, or a subsequent extension, has expired, must be renewed in order to be validly served.[109]

When proceedings are issued against multiple defendants serving one of the defendants within the period of the writ's validity will not validate service on any other defendant outside the writ's validity period. Only an order extending the period of the writ's validity for service will render service valid.[110]

Serving a stale originating process does not invalidate proceedings unless otherwise ordered by the court. A proceeding does not end merely because an originating process has not been served within the period during which it is valid for service.[111] A stale originating process may be effective for purposes other than service. In *Re Kerly, Son & Verden*[112] the defendant's solicitors, who provided an undertaking to accept service and enter an appearance, did not enter an appearance because they were served with a stale writ which had not been renewed. The plaintiff was successful in his application to the court to enforce the solicitor's undertaking to file an appearance on the defendant's behalf. The solicitor, having given the undertaking to the plaintiff, was not required to effect personal service of the writ and was able to validly serve the expired writ pursuant to the undertaking, which had not been discharged because the defendant had not been served on time.[113] Further, non-service of an originating process commenced within the limitation period does not make the proceeding statute barred if the process is extended or renewed and is served outside that period.

Service of a stale originating process is merely an irregularity which the court may waive in circumstances where the originating process may be validly renewed,[114] or where the defendant enters an unconditional appearance[115] or unconditional notice of intention to defend.[116] A defendant served a stale writ who wants the proceedings set aside for irregularity must apply to the court either without filing an appearance, or after filing a conditional appearance.

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109 The revalidation for service of an originating process is provided under r 5.12(2).

110 *Jones v Jones* [1970] 2 QB 576.

111 The position is different in the County Court. See *County Court Civil Procedure Rules 2008* (Vic), r 34A.15 which provides for the automatic dismissal of a proceeding in the circumstances therein mentioned.

112 *Re Kerly, Son & Verden* [1901] 1 Ch 467.

113 *Simpson v Brereton* [1964] VR 332; *Re Kerly, Son & Verden* [1901] 1 Ch 467 was applied in *Simpson v Brereton*.

114 *Gillies v Dibbetts* [2001] 1 Qd R 596 at 603.

115 *Sheldon v Brown Bayley's Steel Works Ltd* [1953] 2 QB 393.

116 See, generally, *Sheldon v Brown Bayley's Steel Works Ltd* [1953] 2 QB 393; *Rust v Barnes* [1980] 2 NSWLR 726; *Van Leer Australia Pty Ltd v Palace Shipping KK* (1981) 180 CLR 337 at 340; *Verdich v McKechnie* [1981] Tas R 91; *Payabi v Armstel Shipping Corporation (The Jay Bola)* [1992] 1 QB 907; *Brealey v Board of Management Royal Perth Hospital* (1999) 21 WAR 79.

A stale originating process which has not been renewed cannot validly be made the subject of an order for substituted service.[117]

Application to extend period of validity

[2.150] The application to the court to exercise its discretion to renew or extend the period of validity for service of a stale originating process is usually made *ex parte*.[118] *Ex parte* applications depend on the applicant's candour. If the plaintiff makes an *ex parte* application for an extension or renewal of an originating process they are required to put before the court all matters that might affect the exercise of the court's discretion.[119]

However, the court may direct that the application be made on notice to the defendant[120] by summons in accordance with r 46.02. The requirement that the defendant be notified arises if there is reason to believe that the defendant, once served, will challenge the order. The defendant may object to an order renewing or extending the period of validity of service of process if it had been made after the expiry of the action's limitation period. Rule 46.08(b) empowers the court to set aside the order made *ex parte* on the defendant's application.[121]

A court is empowered by r 5.12(3) to make an order that the time for validly serving an originating process be extended after the time for service has expired.[122] It is a matter of some discussion as to whether the court considers the merits of an application to extend the time for the

117 *Bernstein v Jackson* [1982] 1 WLR 1082. See also *Farley & Lewers (Qld) Pty Ltd v Fitzgerald* [1983] 1 Qd R 231.

118 *Finlay v Littler* [1992] 2 VR 181 at 186.

119 See *Savcor Pty Ltd v Cathodic Protection International APS* (2005) 12 VR 639.

120 Rule 5.12(4). See *Savcor Pty Ltd v Cathodic Protection International APS* (2005) 12 VR 639 at [11].

121 See *Irving v Carbines* [1982] VR 861 at 863.

122 *Rules of the Supreme Court 1884* (Vic), O 8 made no provision for renewal of a stale writ. The plaintiff applied before the expiration of 12 months from the date of the writ: "… but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the Court or a Judge for leave to renew the writ; and the Court or a Judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ" (O 8 r 1). The court would, in an appropriate case, extend a writ which had expired. However, first it was necessary to enlarge the time of 12 months fixed by O 8 r 1 for making an application to renew. It was held that O 64 r 6 ("Time for defence where security for costs"; see now r 3.02(1)) empowered the court to make the enlargement. Under the new rules the court is authorised to make an order extending the period for service of originating process after expiry of the process. It is not therefore necessary for the plaintiff to obtain any enlargement of the time fixed by r 5.12(1) for applying. The court's power is discretionary and the relevant factors taken into account to determine whether or not to exercise that discretion in favour of the applicant include the application not having been made during the currency of the

service of an originating process,[123] or whether the merits of the plaintiff's application are irrelevant to the court's decision to grant an extension or renewal of process.[124] The rules do not contain any express reference to requirements to consider any particular factors in arriving at a determination regarding the renewal or extension of a process. Rule 5.12(2) states simply that the court "may … by order extend the period of validity" of the originating process.

There is authority, however, for construing the rules as implying that the court will exercise its discretion on the basis of good reasons for granting the enlargement,[125] and that extension and renewals will not be granted automatically.[126] In *Kleinwort Benson Ltd v Barbrak Ltd*[127] Lord Brandon preferred a construction of the rules that placed a condition on the power to grant an extension or renewal of process. In his Lordship's view the rules, by implication, required the power to be exercised only when good reasons for doing so had been demonstrated.

In *Kleinwort Benson Ltd v Barbrak Ltd* an order of the court required a mortgaged ship to be sold by the Admiralty Marshall. Prior to the sale the cargo on board was found to be the property of about 200 different owners and that property required discharging. The plaintiff mortgagee and some owners entered into a dispute about the costs of discharging the cargo. The court ordered the mortgagee to pay the costs of discharge pending a resolution of the dispute. The need to determine who was liable for the discharge costs arose when the mortgagee discovered those costs exceeded the combined value of the ship and the security paid by some owners for delivery of their cargo.

The plaintiff filed and served a writ on the largest cargo owner, and filed but did not serve a further writ naming the remaining cargo owners. The plaintiff did this in order to avoid the expiration of the limitation period to act against the cargo owners. The latter writ was renewed once under RSC O 64 r 7 prior to the court determining that the cargo owners bore the expense of discharging the cargo, whereupon the plaintiff duly served

originating process, amongst other cirucmstances of the case. Rule 68.05, in contrast to r 5.12(3), provides that a warrant of execution is valid from one year after the day of issue (r 68.05(1)) and, although renewable from time to time (r 68.05(2)), will not be renewed after it has expired: r 68.05(3).

123 See *Hingston v Katsikas* [1963] VR 441; *Walker v Buksh* [1981] VR 1061; *Irving v Carbines* [1982] VR 861 at 862.

124 See *Protec Pacific Pty Ltd v Steuler Industriewerke GmbH* [2007] VSC 93, referring to *Ramsay v Madgwicks* [1989] VR 1 at 5.

125 *Kleinwort Benson Ltd v Barbrak Ltd* [1987] AC 597 at 622.

126 The two steps of the procedure which are for convenience considered together involve an extension of time for making the application and an extension of time for service of the summons. However, an enlargement of time for the making of the application would not ordinarily be granted solely for the purpose of refusing the application for renewal: *Irving v Carbines* [1982] VR 861 at 864.

127 *Kleinwort Benson Ltd v Barbrak Ltd* [1987] AC 597 at 622.

the writ on the remaining owners. The remaining owners objected to service and applied to have it set aside on the basis that the writ had been improperly renewed.

The House of Lords read the rule empowering the court to "extend the validity of the writ" in the light of authority. Those authorities suggested that the proper construction of the rule enabled the court to order an extension of time for service of the writ for good cause or good reason, and was not restricted to the narrower requirement of exceptional circumstances. It was also relevant to consider the balance of hardship to the plaintiff were the extension of time to be refused, and the hardship to the defendant caused by granting the extension.[128] The House of Lords ruled the court had validly granted the extension, and that service upon the cargo owners was proper.

Similarly, in Victoria, regardless of the absence of express language in the rules,[129] application for the extension of the validity of service of originating process requires the plaintiff to show that good reasons exist for granting the extension.[130] Good reasons for extending the period of valid service of the originating process must be shown whether the application for extension is being made before or after the expiry of the period of valid service.[131] Plaintiffs are required to show good reasons for an extension of the period of validity for the service of process on both an *ex parte* application for the extension, and when both parties are present on a review of the order made *ex parte*.[132]

To show good reasons for an extension of the period for valid service means to demonstrate that there was good reason why the writ was not served while valid.[133] The application is supported by an affidavit stating the date of the originating process, and, where applicable, the date on which the process was last renewed. The affidavit must also address other

128 *Kleinwort Benson Ltd v Barbrak Ltd* [1987] AC 597 at 619.

129 Rule 5.12(2) states simply that the court "may … by order extend the period of validity" of the originating process.

130 *Ramsay v Madgwicks* [1989] VR 1; *Finlay v Littler* [1992] 2 VR 181. See also *Bugden v Ministry of Defence* [1972] 1 WLR 27; *Kleinwort Benson Ltd v Barbrak Ltd* [1987] AC 597; [1987] 2 All ER 289 at 299; *Zappelli v Falkiner* (unreported; VSC; O'Bryan J; No 81/1986; 21 September 1987); *Waddon v Whitecroft-Scovill Ltd* [1988] 1 WLR 309 (HL); *Boocock v Hilton International Co* [1993] 1 WLR 1065; *Coyne v Sun Securities Ltd* (1992) 8 WAR 218; *Singh v Duport Harper Foundries Ltd* [1994] 1 WLR 769; *Bell Group NV (in liq) v Aspinall* (1998) 19 WAR 561; *Mali v Benchmark Healthcare Pty Ltd* [2005] VSC 72.

131 *Battersby v Anglo-American Oil Co Ltd* [1945] KB 23 at 32; *Stevens v Services Window & General Cleaning Co Ltd* [1967] 1 QB 359; *Kleinwort Benson Ltd v Barbrak Ltd* [1987] AC 597; *Waddon v Whitecroft-Scovill Ltd* [1988] 1 WLR 309 (HL); *Dagnell v JL Freedman & Co (a firm)* [1993] 1 WLR 388 (HL).

132 *Soper v Matsukawa* [1982] VR 948 at 954; *Mali v Benchmark Healthcare Pty Ltd* [2005] VSC 72.

133 *Waddon v Whitecroft-Scovill Ltd* [1988] 1 WLR 309 (HL); *Dagnell v JL Freedman & Co (a firm)* [1993] 1 WLR 388 (HL); *Singh v Duport Harper Foundries Ltd* [1994] 1 WLR 769.

relevant factors the court takes into consideration when deciding to order an extension of the time for service. The factors[134] relevant to the court's decision include

- how long service has already been delayed, as revealed by the date of the writ or originating motion and its renewal;
- the reasons the originating process has not been served, and proof that reasonable attempts have been made to effect service;[135]
- how the parties have conducted themselves;
- the hardship that may be caused to the plaintiff by refusing to renew the process, or to the defendant by granting the renewal; and
- other good reasons for the extension.

Whether good reasons exist for the making of an extension is a question of fact. Although an order extending the period for service might have been made without good reason having been shown, the order will be allowed to stand if in fact there was good reason for making the order.[136]

In determining whether to extend the validity of an originating process the court exercises its discretion as to which factors provide good reasons, and what weight is to be accorded to those factors.[137] Because the criterion of good reasons is applied at the court's discretion in all the circumstances of the case, the facts, and the significance of the facts, the court takes into consideration can neither be categorised nor circumscribed. It has been suggested that courts will now relax rigid time limits in relation to the extension or renewal of the period of validity for the service of process as long as it is legally possible, and the facts and circumstances of the case demonstrate that it can be achieved without hardship or prejudice to the defendant, and other parties.[138]

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134 *Muirhead v The Uniting Church in Australia Property Trust* [1999] QCA 513. Pincus JA extracted some general guidelines from the decision of Stephen J sitting as a single judge at first instance in *Van Leer Australia Pty Ltd v Palace Shipping KK* (1981) 180 CLR 337.

135 Good reasons are still required under the rules despite not being explicitly stated in the text. Good reason may be demonstrated by proof that reasonable efforts were made to serve the writ. Where the applicant relies upon the inability to serve the writ good reasons may be demonstrated by proof that reasonable efforts were made to serve the writ on the defendant. Considerable importance is attached to proving that such reasonable efforts were made: *Finlay v Littler* [1992] 2 VR 181.

136 *Bugden v Ministry of Defence* [1972] 1 WLR 27.

137 *Soper v Matsukawa* [1982] VR 948 at 954; *Kleinwort Benson Ltd v Barbrak Ltd* [1987] AC 597; *Savcor Pty Ltd v Cathodic Protection International APS* (2005) 12 VR 639 at [41]; *Arthur Andersen Corporate Finance Pty Ltd v Buzzle Operations Pty Ltd* [2009] NSWCA 104.

138 *Sailorchard Pty Ltd (Administrators appointed) v Thrifty (Australia) Pty Ltd* [2003] QSC 41. In *Irving v Carbines* [1982] VR 861 the Full Court acknowledged what Bray CJ had noted in *Victa Ltd v Johnson* (1975) 10 SASR 496 at 502, namely, that there was in relation to renewal, "as in cognate branches of the procedural law, a tendency to relax rigid time limits where that is legally possible and where it can be done without prejudice or injustice to other parties." See also *Van Leer Australia Pty Ltd v Palace Shipping KK* (1981) 180 CLR 337 (Stephen J on examining the authorities adopted the more liberal views of

In *Bell Group NV (in liq) v Aspinall*[139] the Full Court of the Court of Appeal of Western Australia opined that the court exercised its discretion to grant an application for the extension of time for the validity of service of an originating process in the interests of justice, unqualified by the rules. The appropriate test was the interests of justice, and neither the rules, nor relevant factors such as the reasons for failing to serve the defendant on time, overrode or qualified the court's discretion. According to the Victorian Full Court in *McKenna v McKenna*[140] the unfettered discretion conferred on the court by statute to decide on an extension of the time for service was exercised anew each time the court considered an application. Previous decisions based on the same discretion might exemplify or clarify, but did not formalise or impose conditions on, its exercise. In *Ramsey v Madgwicks*,[141] however, the Full Court held that a proper construction of the rules required that demonstrating good reasons for granting an order was a pre-condition for the success of an application for an extension of the time for service.[142] The court held that when a court decided whether to renew or extend the period of validity of service of a writ under r 5.12[143] it considered the effect of the delay on the defendant as a relevant factor in exercising its discretion. The prejudice to the defendant may be mitigated by the plaintiff's notice to litigate sufficiently to remove a ground for the court's refusal to renew the originating

certain South Australian and Canadian decisions); *Soper v Matsukawa* [1982] VR 948 (Southwell J following *Van Leer Australia Pty Ltd v Palace Shipping KK*); *Foxe v Brown* (1984) 59 ALJR 186; compare *Donoghue v Perry Engineering Ltd* [1967] SASR 338.

139 *Bell Group NV (in liq) v Aspinall* (1998) 19 WAR 561 at 574–575.

140 *McKenna v McKenna* [1984] VR 665 at 674.

141 *Ramsey v Madgwicks* [1989] VR 1.

142 Whereas in the Australian Capital Territory, Queensland and South Australia there is a requirement in the rules for the plaintiff to explain the failure to effect service the court must be satisfied on this ground as a pre-condition to renewing the originating process. Where reasonable efforts had not been made to serve the defendant there must exist "other good reasons" for the writ to be renewed. Even so, it is proper for the courts in those jurisdictions to emphasise the good cause limb of the rule rather than dwell on the plaintiff's failure to effect service in time. Long delays may, however, be taken into account, although failure to effect service in time is only a relevant (although substantial) consideration and not decisive a factor. This is especially true if the failure to serve qualification is expressed as an alternative to renewing the originating process for "good cause": *Van Leer Australia Pty Ltd v Palace Shipping KK* (1981) 180 CLR 337 at 341–346. In that case the court weighed the nature of the delay (it was lengthy, deliberate, and no notice of it given to the defendant) against the prejudice to the plaintiff of the loss of the right to proceed were the writ to be set aside. It held that the writ should not have been renewed.

143 See also *Cull v Stewart* (1991) 15 MVR 149 (VSCA); *Mali v Benchmark Healthcare Pty Ltd* [2005] VSC 72; *Savcor Pty Ltd v Cathodic Protection International APS* (2005) 12 VR 639 at [41].

process.[144] However, it has been held inappropriate to allow an extension of the period of valid service when a plaintiff has delayed service to await a litigation funder's decision.[145]

Form of order

[2.170] Order 5 authorises the plaintiff to serve an originating process after the period of validity for service has expired. The authenticated order extends the period of validity for service which would have been an irregularity were it not for the order. The order authorises the plaintiff to take a step. The "step taken" referred to in r 2.01(1) is service. The authenticated order enables the prothonotary to seal a copy of the originating process for service on the defendant with the date the order was made, and the date to which the new validity period extends. Rule 5.12(2) provides that the court may "by order extend the period of validity for such period from the day of the order as the court directs". The order renews the originating process. The prothonotary's seal merely authenticates a renewed originating process for service on the defendant.[146]

Renewing the originating process after expiry of the limitation period

[2.180] The plaintiff must show good reason for an extension of the period of validity for service even though the relevant period of limitation has not expired.[147]

Applications for the extension of the validity of the period of service of an originating process are frequently contested when they are made after the expiry of a relevant limitation period. An originating process valid for all purposes except for service can be renewed after the expiry of a limitation period. In these circumstances the court must grant a retrospective extension of the period of validity for service if the plaintiff is to serve the originating process and bring proceedings.[148]

The court is empowered to renew at its discretion the originating process that was issued before but was not served until after the expiry of the

144 See *Van Leer Australia Pty Ltd v Palace Shipping KK* (1981) 180 CLR 337 at 350; *Savcor Pty Ltd v Cathodic Protection International* [2002] VSC 201 at [25].

145 See *Arthur Andersen Corporate Finance Pty Ltd v Buzzle Operations Pty Ltd* [2009] NSWCA 104.

146 Under *Rules of the Supreme Court 1884* (Vic), O 8 r 1 it was held that renewal of a writ was not complete until the original writ was marked by the prothonotary with a seal bearing the the day, month, and year of such renewal indicating that the writ was renewed.

147 *Binning Bros Ltd (in liq) v Thomas Eggar Verral Bowles (a firm)* [1998] 1 All ER 409.

148 See *Kleinwort Benson Ltd v Barbrak Ltd* [1987] AC 597; [1987] 2 All ER 289 at 295. If the limitation period has yet to expire, it may be more convenient for the plaintiff to simply file a new commencing process than seek an extension of the period for service of process in the original proceeding. The plaintiff will then have another period of a year for service of process. See *Kleinwort Benson Ltd v Barbrak Ltd* at 295. For a case of refusal

limitation period. As explained in *Victa Ltd v Johnson*,[149] the defendant does not acquire complete immunity from suit by virtue of not being served before the expiration of the time for taking action. The time that has expired is the time that would have been the limitation period if an originating process had not been filed by and issued to the plaintiff. The defendant has a right as against the originating process to petition the court not to grant an application for its renewal,[150] which is subject to the court's discretion to renew the originating process.

Older authorities demonstrate that the basis for granting an extension of the time for service of the originating process was the existence of exceptional circumstances explaining why service was not effected during the period of the validity of the process.[151] The basis for this requirement was that special cause had to show why a defendant should be deprived of a legitimate defence acquired under the statute of limitations.[152] The strictness of this approach has been alleviated in Victoria since the decision in *Irving v Carbines*[153] which ruled that the court's unfettered discretion in determining whether to order an extension was not subject to an interpretation of the rule that extensions after the expiry of the limitation period would only be permitted in exceptional circumstances, but only to the provision that the extension would not unjustly prejudice the defendant.[154]

In *Soper v Matsukawa* Young CJ,[155] referring to *Irving v Carbines*, said that the expiry of the limitation period for an action for a proceeding that commenced within the time allotted was a relevant but not conclusive consideration for exercising the discretion to extend the period for service. It was a relevant but not decisive factor.[156] For Lush J[157] the expiry of the limitation period did not place a further burden on the plaintiff's

of an application to extend the period for service of the writ made before the expiry of the limitation period, the plaintiff having failed to show good reason for an extension, see *Binning Bros Ltd (in liq) v Thomas Eggar Verral Bowles (a firm)* [1998] 1 All ER 409.

149 *Victa Ltd v Johnson* (1975) 10 SASR 496 at 503–504 per Bray CJ.

150 See also *Finlay v Littler* [1992] 2 VR 181 at 186–187; *Arthur Andersen Corporate Finance Pty Ltd v Buzzle Operations Pty Ltd* [2009] NSWCA 104 at [41]–[45] per Ipp J.

151 See *Battersby v Anglo-American Oil Co Ltd* [1945] KB 23; *Heaven v Road and Rail Wagons Ltd* [1965] 2 QB 355; *Baker v Bowketts Cakes Ltd* [1966] 1 WLR 861; *Hingston v Katsikas* [1963] VR 441; *Pino v Prosser* [1967] VR 835; *Travis v Colonial Mutual Life Assurance Society Ltd* [1977] VR 249.

152 For instance, see *Kleinwort Benson Ltd v Barbrak Ltd* [1987] AC 597 at 616. See also in New South Wales *Wakim v Coleman* [2008] NSWSC 1377.

153 *Irving v Carbines* [1982] VR 861.

154 The court (at 865) referred to the judgment of Stephen J in *Van Leer Australia Pty Ltd v Palace Shipping KK* (1981) 180 CLR 337 and to his adoption of what he called "the more liberal view" which had been preferred in certain South Australian and Canadian decisions. The South Australian cases included *Victa Ltd v Johnson* (1975) 10 SASR 496.

155 *Soper v Matsukawa* [1982] VR 948 at 952.

156 *Krawszyk v Graham* [1966] SASR 73; *Van Leer Australia Pty Ltd v Palace Shipping KK* (1981) 180 CLR 337; *Irving v Carbines* [1982 VR 861; *High Top Pty Ltd v Lawrence* [2010] QCA 270.

application to show that the period of validity should be extended. Similarly, the Full Court in *Finlay v Littler*[158] held that the burden of proof on the plaintiff seeking renewal of the originating process was not increased by the expiration of the limitation period — and, at the same time, that the expiration in itself did not satisfy the requirement of goods reasons for the order to be made.[159] The requirements that need to be met in an application to renew an originating process after the expiry of the limitation period are not as rigorous as those for seeking an extension of the limitation period pursuant to a limitations statute.[160]

English courts since *Kleinwort Benson Ltd v Barbrak Ltd*[161] have distinguished between the complete discretion exercised by the court in deciding applications for an extension of the period of service for an originating process whose period of validity had not expired, and the need to provide good reasons in support of an application to extend the period of service of a writ that had been allowed to go stale. In the latter case the courts still exercise discretion whilst taking into account factors such as any hardship or prejudice that may be suffered by the parties in all the circumstances of the case.[162]

The position in Victoria

[2.190] While in Victoria the expiration of a statutory limitation period does not further burden the plaintiff's application for an extension of service, it assumes importance because of the potential of delay to prejudice the defendant.[163] If the extension prejudices the defendant's ability to conduct their defence in a manner that cannot be compensated the application is likely to be defeated.

If the delay in the service of the writ is a consideration relevant to the exercise of the court's discretion the relevant passage of time is that since

157 *Soper v Matsukawa* [1982] VR 948 at 953.

158 *Finlay v Littler* [1992] 2 VR 181 at 187.

159 See also *C & M Brick (Melbourne) Pty Ltd v Boral Besser Masonry Ltd* [1998] VSC 186; *Muirhead v The Uniting Church in Australia Property Trust* [1999] QCA 513 at [13] per Williams J.

160 *Kleinwort Benson Ltd v Barbrak Ltd* [1987] AC 597; *Burgess v Ferguson* (1992) 111 FLR 349.

161 *Kleinwort Benson Ltd v Barbrak Ltd* [1987] AC 597.

162 See also *Waddon v Whitecroft-Scovill Ltd* [1988] 1 WLR 309 (HL); *Boocock v Hilton International Co* [1993] 1 WLR 1065; *Tyson v Morgan* [2000] 1 Qd R 100. For a case of extension of the period of validity of a writ for service where the writ was filed after the expiry of the limitation period, see *Rowland v Commonwealth* (unreported; VSC; Smith J; No 27/1988; 2 July 1993). In that case the solicitor for litigants contacted the solicitor for the Commonwealth regarding the service of stale writs in relation to the *HMAS Voyager* claims. The solicitor for the Commonwealth indicated that no legal point on compliance with the rule of service would be taken, the Commonwealth having decided to negotiate and settle all claims. However, the government subsequently declined to consent to late service. The court held that "good reasons" for renewing the writ still had to be shown under r 5.12.

163 *Ramsay v Madgwicks* [1989] VR 1.

the cause of action arose and not from the expiration of the originating process.[164] An application made pursuant to r 5.12 after the expiration of a limitation period may involve the same considerations of factors as are relevant to an application for an extension of the limitation period pursuant to s 23A of the *Limitation of Actions Act 1958* (Vic).[165]

The court is more likely to exercise its discretion to renew a stale originating process if:

- the failure to serve the writ within the valid period was due to negligence on the part of the plaintiff's solicitor, and the delay did not cause irremediable prejudice to a defendant notified of the litigation against him;[166]
- in the court's opinion, the plaintiff has an action against the solicitor. This is because of the court's general reluctance to allow the negligence of a solicitor to bar a plaintiff from raising their claim against the defendant;[167]
- the court considers that an injustice may be done to the parties in all the circumstances of the case. For instance, in *Zappelli v Falkiner*[168] a plaintiff whose solicitor negligently served the writ out of time succeeded in an application to extend the period of service of the writ because the court was of the view that to do otherwise would require the plaintiff to take "inconvenient, time consuming, [and] wasteful" action against his solicitor, thereby "bring the law into disrepute", and "delay the prosecution of this proceeding… contrary to the interests of justice";[169]
- the plaintiff had withheld service at the defendant's request;[170]
- a process server engaged by the plaintiff wrongfully informed the plaintiff's solicitor that the writ had been personally served on the defendant;[171]
- the defendant, by trickery, induces the writ to be served out of time;[172]
- the defendant breached an undertaking to accept service;[173]

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164 *Tyson v Morgan* [2000] 1 Qd R 100.

165 *Waddon v Whitecroft-Scovill Ltd* [1988] 1 WLR 309 (HL). See also *Tyson v Morgan* [2000] 1 Qd R 100; [1998] QSC 90.

166 *Krawszyk v Graham* [1966] SASR 73; *Jones v Jebras* [1968] Qd R 13; *Victa Ltd v Johnson* (1975) 10 SASR 496; *Irving v Carbines* [1982] VR 861.

167 See *Soper v Matsukawa* [1982] VR 948; *Williams v FS Evans & Sons* (1988) 52 SASR 237; *Cull v Stewart* (1991) 15 MVR 149 (VSCA); *C & M Brick (Melbourne) Pty Ltd v Boral Besser Masonry Ltd* [1998] VSC 186); and compare *McKenna v McKenna* [1984] VR 665 per McGarvie J (dismissal for want of prosecution).

168 *Zappelli v Falkiner* (unreported; VSC; O'Bryan J; No 81/1986; 21 September 1987).

169 *Zappelli v Falkiner* (unreported; VSC; O'Bryan J; No 81/1986; 21 September 1987) per O'Bryan J.

170 *Re Chittenden* [1970] 1 WLR 1618.

171 *Pino v Prosser* [1967] VR 835.

172 *Hingston v Katsikas* [1963] VR 441.

173 *E Ltd v C* [1959] 2 All ER 468.

- the writ was only served slightly out of time without that causing hardship to the defendant;[174]
- the application to the court for a renewal or extension of process was not unacceptably delayed and the defendant suffered no hardship as a result of the delay;[175]
- the liquidator of a bankrupt corporation was unwilling to use any part of what remained of the corporation's resources to resist the proceedings that would be initiated by a defendant once served;[176]
- the delay was caused by the need for the plaintiff's solicitor to make further enquiries to determine the strength of the plaintiff's case.[177]

However, delaying the service of a writ in order to await the decision pending in parallel proceedings will not provide sufficient foundations for an extension of the writ's period of validity for service.[178]

Originating motion

[2.200] Proceedings are normally commenced by writ or originating motion. Rule 5.02 prescribes the form of the writ,[179] and the four forms of the originating motion.[180] In general, the plaintiff initiates proceedings by originating motion if a writ is not required to do so, or, under the rules, the plaintiff is entitled to elect by which originating process (writ or originating motion) they will proceed.[181] In the normal course of proceedings a plaintiff serves an originating motion and can take no further steps in the proceeding until the time for the defendant to file an appearance has expired, even where the defendant files an appearance ahead of that time.[182]

The defendant may be exempted from filing an appearance by the court if the defendant is not contesting the plaintiff's claim, or if the plaintiff makes an urgent application for relief. The plaintiff's application to the

174 *Zappelli v Falkiner* (unreported; VSC; O'Bryan J; No 81/1986; 21 September 1987).

175 *Traj v Cannery Board* [1990] 1 Qd R 494. Compare *Finlay v Littler* [1992] 2 VR 181 where the delay exceeded three years, and an order was refused.

176 *Noitaroproc Pty Ltd v Price Waterhouse* (unreported; VSC; Byrne J; No 4632/1996; 26 March 1997).

177 *Mali v Benchmark Healthcare Pty Ltd* [2005] VSC 72. As to whether the existence of negotiations to settle the proceeding might be relevant, compare *The Prins Bernhard* [1964] P 117, and *Easy v Universal Anchorage Co Ltd* [1974] 1 WLR 899; [1974] 2 All ER 1105 at 1107.

178 *Noitaroproc Pty Ltd v Price Waterhouse* (unreported; VSC; Byrne J; No 4632/1996; 26 March 1997).

179 Form 5A.

180 Forms 5B, 5C, 5D, 5E, 5F.

181 Rules 4.05, 4.06; Form 5B.

182 Rule 5.03.

court is made without notice to the defendant if no originating motion has been served, however, no remedy is granted until the motion is served upon the defendant.[183]

In undefended matters, the plaintiff is merely required to set out the relief sought on the form of originating motion, and where applicable the Act under which the claim is being made.[184] If the plaintiff commences a proceeding for the summary recovery of land the appropriate form of originating motion is Form 5E.[185] The circumstances in which the summary procedure by way of originating motion is available are where only that person or those persons who entered into occupation, or a licensee or licensees of the land, occupy it without the plaintiff's licence or consent.[186] Beyond these highly circumscribed parameters the writ is the appropriate means of commencing a proceeding for the recovery of land.

The originating motion is served personally unless the plaintiff does not know the names of the land's occupants, in which case it may be served by leaving it in a conspicuous position on the land.[187] At the time the proceeding is commenced the plaintiff must also file an affidavit supporting the application deposing to the plaintiff's interest in the land, the circumstances of the land's occupation giving rise to the plaintiff's right to relief, and that the plaintiff is unaware of the occupant's name.[188] The applicant's claim for relief is determined on affidavit evidence alone; pleadings, discovery of evidence, interrogatories, and testimonial evidence from witnesses is not required.

The very narrow circumstances in which the procedure may be used indicate that it is applicable only in cases where the plaintiff has very clear rights to the land. As a result, it cannot be applied to an application made by a mortgagee or successor in title to land occupied by a mortgagor or successor in title.

Summons

[2.210] A judgment or order of the court in a proceeding is made by a party applying to the court for the judgment or order to be made. Rule 4.02 provides that an application for an order or judgment on notice to another person must be made by summons. An application made without notice is an oral application supported by affidavit evidence.

Rule 4.02 provides:

183 Rule 45.05(6) (notice is given to the defendant on Form 45B); the court authorises the plaintiff to commence a proceeding on originating motion using Form 5C: r 45.05(2)(b).

184 Form 5D.

185 The circumstances in which the procedure is available are set out in r 53.01.

186 Rule 53.01(1).

187 Rule 53.05(3)(a)(i); and additionally where practicable leaving a copy addressed to "The Occupiers" in a place for the purpose of receiving mail on the land (r 53.05(3)(a)(ii)), or elsewhere as directed by the Court: r 53.05(3)(b).

188 Rule 53.04.

4.02 Interlocutory application [Supreme Court only]

An interlocutory or other application in a proceeding made on notice to any person shall be by summons.

4.02 Interlocutory application [County Court only[189]]

Unless the Court otherwise orders, an interlocutory or other application in a proceeding made on notice to any person shall be by summons and, if not on notice, shall be made orally.

The reference to "[a]n interlocutory or other application" is to an application that is made at any stage of a proceeding. An application that a court stay an execution of judgment[190] is made by summons. An application made to the Court of Appeal other than an application for leave to appeal to the Court of Appeal, or for a new trial, or to set aside a judgment, an order, a verdict or a finding, is made by summons.[191]

A party gives notice of an application when notice is required by summons.[192] Some applications specifically require notice under the rules. An application for summary judgment is by way of summons.[193] There is no requirement for a summons on an application to renew a writ,[194] or when applying for a judgment in default of appearance or defence.[195] Rule 46.02 governs the procedure for applying by way of summons. An application on notice to any person is made by summons.[196] A judgment is not obtained by way of originating motion, so notice of motion is not provided for under the rules.[197] Nevertheless, the requirement under r 46.02(1) that an application on notice be made by summons is qualified. For example, a party must apply for judgment if at the end of a jury trial they are entitled to judgment in accordance with the verdict. The presence of the other party at trial allows the application to be made orally and not by summons.[198] An application on notice is commenced by summons, and is made when the summons is filed.[199]

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189 *County Court Civil Procedure Rules 2008* (Vic), r 4.02.

190 Rule 66.16.

191 Rule 64.03.

192 Rule 4.02.

193 Rule 22.03(1) application for a summary judgment under O 22.

194 Rule 5.12(4); but the court may desire to hear the defendant and direct the plaintiff to notify them by summons or by some other appropriate means.

195 Rule 21.04(2) (certain claims are excluded from this procedure under r 21.04(1): debt, damages, and property).

196 Rule 46.02(1).

197 A judgment of the court is not obtained by motion: the former practice of motion for judgment is not preserved. Summons has replaced the notice of motion. As to notice of motion: see *Thunderbird Products Corporation v Thunderbird Marine Products Pty Ltd* (1974) 131 CLR 592 at 602–603.

198 See *Turner v Manier (No 1)* [1958] VR 350 at 353. Formerly, the party entitled to judgment moved for judgment.

199 Rule 46.02(2).

The purpose of r 4.02 is to provide a procedure for the making of an application, not to determine the kinds of applications that can be made. Applications are made by summons or orally. The principles of law and statutory provisions govern whether a particular application can be made in a proceeding that is under way. For example, an application to set aside an authenticated judgment cannot be entertained in law, and r 4.02 has no relevance or application because the proceeding has ended.[200]

In those cases where the rules do not expressly provide for notice, whether or not notice applies is decided by reference to the usual practice of the court, whether notice is required to do justice in all the circumstances of the case, the hardship or prejudice that may befall a party who is not notified given the decision the court is asked to make in the case, and the need to be fair to all parties, and common sense. There is, for example, no express requirement under r 23.02(a) for a party applying to have a proceeding struck out or amended for not disclosing a cause of action to notify the affected party. There can be no room to doubt, however, that, on the bases mentioned, the party has a right to be notified. On the other hand, a plaintiff who has served a defendant outside Victoria with an originating process under r 7.04 may seek leave to proceed from the court, and thereby apply to enter judgment without being required to notify the defendant.

200 See *Phillips v Walsh* (1990) 20 NSWLR 206 at 209.

3 Service of Process

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[3.10] Service is a feature of nearly all civil processes, and is normally a prerequisite for the valid assertion of personal jurisdiction. Service ensures that the two fundamental requirements of civil processes are satisfied. These are, first, that the defendant have notice of the existence of a claim against them[1] and, secondly, that the notice provides them with an opportunity to be heard in the disposition of the claim. Service should therefore employ the means most likely to bring the proceedings to the defendant's attention.

SERVICE

[3.20] The assurance of notice has been a requirement of service from its inception. To this end medieval practice employed the sheriff to locate and summons the defendant's appearance at a hearing. The sheriff took office under an oath requiring him to exercise his abilities fully in the service of writs.[2]

One pressing question faced by the plaintiff was whether to summon the defendant pursuant to the original writ, or to have the defendant

1 *Annetts v McCann* (1990) 170 CLR 596; *Re Willshire-Smith; Ex parte Randle & Taylor Services Pty Ltd* (1994) 48 FCR 371.

2 See C Karraker, *The Seventeenth Century Sheriff* (1930), pp 166–168. The illustrative oath of office administered in England to Sheriff William Ffarington in 1636, included the undertaking that "yee shall trulye return and trulye serve all the Kings Writtes as far forth as it shall bee in yor cunnige": Karraker, pp 167–168. The Sheriff's Oath of Office, Virginia, 1641 stated: "You shall truely retorne and truely serve all the Kings writts as farr forth as shall be to you Cunning." In Virginia and Maryland it was clearly expected that the sheriff would give persons notice of pending proceedings in the courts: Karraker, pp 96, 102–103, citing the Virginia and Maryland court records. By the mid-1800s the role of the sheriff in serving the recognised forms of summons and other civil process "not requiring bail" was well established. See A Gwynne, *A Practical Treatise on the Law of Sheriff and Coroner with Forms and References* (1849), pp 72–79 (giving Ohio and Kentucky examples, including writs of *capias ad respondendum* and a court-issued summons). See Charter of Dvina Land, Art 6, reprinted in G Vernadsky (ed and trans), "Medieval Russian Laws" in AP Evans (ed), *Records of Civilisation No 41* (Columbia University Press, 1947), p 58 (private capture and release of wrongdoers by victim permitted). Integration of previously fragmented Russian lands into a single state was heavily reliant upon the unity of the legal system. In September 1497 the *Sudebnik Code of Laws* entered into force which reflected and unified the regulations of such legal documents as Russian Pravda, the Regulating Charters of Dvina and Belozersk, the Pskov Court Charter, and a number of decrees and orders of the princes of Moscow. Modern forms of service are several steps removed from the personal participation of the plaintiff. See J Collier, *Law and Social Change in the Zinacantan* (1973), pp 36–38 examining the litigation procedures of the Zinacantan, a Mayan tribe in Mexico adhering to ancient traditions. A would-be plaintiff among the Zinacantan must personally help to move the judicial apparatus to cause service of process upon the defendant. Normal litigation protocol calls for the plaintiff to visit the local liquor store, purchase a bottle of rum, and then appear before El Presidente, a ranking administrative and judicial authority. The plaintiff may place the bottle of rum at the feet of El Presidente at the outset of the audience or may elect to keep it in his pocket while describing the background of the action, producing and offering it only when making a formal prayer for relief. If El Presidente is satisfied with the composite liability and libation application he directs the Mayores, minor officials, to summon the defendant for further proceedings in the matter.

peremptorily arrested. Securing the defendant's appearance in the Court of Common Pleas required purchasing an original writ from a range of writs provided to be used depending on the severity of the personal action brought forward in it.[3] In the first place the defendant's assets were seized, but if the defendant had no assets, or the attachment of the defendant's assets failed to produce his appearance, the writ of *capitas ad respondendum* directed the sheriff to arrest the defendant.[4]

In the 18th century both plaintiff and defendant had to appear personally or arrange to have their attorneys appear on their behalf.[5] The plaintiff was brought into court by the defendant filing bail. However, Parliament created mechanisms by which the court could proceed to judgment where a defendant served with process had failed to appear. In 1725 Parliament provided that if within four to eight days of the return of process by the sheriff the defendant had not appeared, the plaintiff was able to enter an appearance for the defendant "as if he had really appeared; and may file common bail in the defendant's name, and proceed thereupon as if the defendant had done it himself."[6] In personal actions, actual service was still an absolute requirement to entering a default judgment on the suit against the defendant.[7] In 1732 Parliament passed the *An Act for Making Process in Courts of Equity Effectual Against Persons Who Abscond, and Cannot Be Served Therewith, or Who Refuse To Appear 1732*.[8] The Act provided for decrees *pro confesso* against defendants in equity who had evaded service.[9]

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3 See R Millar, *Civil Procedure of the Trial Court in Historical Perspective* (1952), p 74.

4 R Millar, *Civil Procedure of the Trial Court in Historical Perspective* (1952), p 75. A writ of *capias ad respondendum* then available to a plaintiff directed the sheriff to arrest the defendant. In the King's Bench, the typical compulsory process was the Bill of Middlesex: W Holdsworth, *A History of English Law* (1926), pp 249–250 (cataloguing forms of compulsory process). See also N Levy Jr, "Mesne Process in Personal Actions at Common Law and the Power Doctrine" (1968) 78 *Yale Law Journal* 52 at 68 (discussing "appearance" by filing bail). By the 18th century, the *capitas ad respondendum* had become the "first process" against the defendant in Common Pleas. This was in an attempt to hasten the commencement of the suit in Common Pleas which was at the time competing with the King's Bench, which offered a more expeditious compulsory process: see, for example, SFC Milsom, *Historical Foundations of the Common Law* (2nd ed, Oxford University Press, 1981), pp 61–65.

5 W Holdsworth, *A History of English Law* (1926), p 252.

6 W Blackstone, *Commentaries*, p 287. See, for example, *An Act to Prevent Frivolous and Vexatious Arrests 1726 (12 Geo 1 c 29, 1)*; see also C Nelson, "Sovereign Immunity as a Doctrine of Personal Jurisdiction" (2002) 115 *Harvard Law Review* 1570 n 39.

7 N Levy Jr, "Mesne Process in Personal Actions at Common Law and the Power Doctrine" (1968) 78 *Yale Law Journal* 52 at 95. The court was limited to a judgment of outlawry if the defendant could not be personally served: at 69 n 84.

8 *An Act for Making Process in Courts of Equity Effectual Against Persons Who Abscond, and Cannot Be Served Therewith, or Who Refuse To Appear 1732 (5 Geo 2 c 25, 1)*.

9 Default judgments were also available in *in rem* actions after "the initial issuance of a summons commanding the defendant to appear and answer the plaintiff's allegations".

Between the 13th and 16th centuries arrest at the outset became the norm rather than the exception in civil matters[10] based on the fiction that the defendant had failed to appear in response to the service of more moderate writs.[11] In response to the growth in the unrestricted right to arrest the defendant, a series of 18th-century Acts required the defendant to be given notice of the claim against him, and to respond to that notice, before arrest could be effected.[12]

Notice was increasingly emphasised in the 19th century and statutory reform required that the defendant being summoned be personally served[13] and disclose the cause of action alleged against him.[14] Finally, arrest was restricted to those very few instances where it could be demonstrated that the defendant was at risk of flight from the jurisdiction.[15]

The writ of attachment usually issued at the same time as the summons satisfied the judgment by means of the attached property. See C Nelson, "Sovereign Immunity as a Doctrine of Personal Jurisdiction" (2002) 115 *Harvard Law Review* 1570 at 1573–1574.

10 See W Blackstone, *Commentaries*, p 281.

11 R Millar, *Civil Procedure of the Trial Court in Historical Perspective* (1952), p 75. Similar fictions were used in King's Bench and Exchequer proceedings: Millar, p 76; see also W Blackstone, *Commentaries*, pp 279–286.

12 See, *An Act to Prevent Frivolous and Vexatious Arrests 1726 (12 Geo 1 c 29, 22 1-2)*, s 4 (5 Geo 2 c 27), cited in R Millar, *Civil Procedure of the Trial Court in Historical Perspective* (1952), pp 76–77. This reform was accompanied by an arcane set of fictions under the rubric of "bail". Certain actions were routinely bailable (a defendant could provide a bail bond in lieu of arrest), while other actions were not bailable (release was granted upon the lodging of fictitious pledges from John Doe and Richard Roe). See Millar, p 77. The defendant in Common Pleas or King's Bench, for example, constructively appeared by filing common bail as security that he would participate in the suit after the sheriff served process on him.

13 The *Common Law Procedure Act 1852 (15 & 16 Vict c 76)*, s 17; and the rules promulgated under the Judicature Acts (*Rules of the Supreme Court 1883*, O 9, r 2).

14 *Uniformity of Process Act 1832 (2 & 3 Will 25 c 39)*, s 1, Sch 1 abolished forms of action (that there was only one form of writ in which the plaintiff could insert the cause of action). It introduced a uniform writ of summons for all personal actions wherein the nature of the action was to be indorsed. Although the *Uniformity of Process Act 1832 (2 & 3 Will 25 c 39)* abolished the old writs and replaced them with a new form of writ the plaintiff was still required to insert one of the known forms of action. The technical requirement to name the form of action in personal actions was removed in the *Common Law Procedure Act 1852 (15 & 16 Vict c 76)*, s 3, which contained merely a summons to appear. The *Common Law Procedure Act 1852 (15 & 16 Vict c 76)* replaced the system of common law writs with one writ of summons for all personal actions — a writ of summons in replevin — and a writ of summons in ejectment. All other real actions involved a uniform writ. Thenceforth it was not necessary to mention any form or cause of action in any writ of summons in personal actions. Finally, the *Judicature Act 1873* and the 1875 Rules made under the Act abolished the common law forms of action by requiring the concurrent administration of common law and equity. The 1875 Rules assimilated replevin and ejectment to personal actions resulting in a single universal form of writ with an indorsement to inform the defendant of the claim.

15 Arrest as a feature of initial process was formally abolished in 1838. See *Judgments Act 1838 (1 & 2 Vict c 110)*, s 1.

While the practice of peremptory arrest as a matter of course was extinguished the courts continued to express power over the person of the defendant through the personal service of process.[16] This reflected the foundational premise of personal jurisdiction over the defendant being power over the person of the defendant. In general, therefore, the court expressed jurisdiction over the defendant by demanding their physical presence before it, the correlate of which required commencing process through personal service. Only defendants resident outside the state to which the court's jurisdiction and power did not directly extend could be served constructively.[17]

PERSONAL SERVICE: RULE 6.02(1)

[3.30] Rule 6.02 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) provides:

> **6.02 Personal service of originating process**
>
> (1) Except where otherwise provided by or under any Act or these Rules, originating process shall be served personally on each defendant.
>
> (2) Where a defendant to any originating process files an unconditional appearance, the originating process shall be taken to have been served on the defendant personally on the day on which the appearance is filed or on such earlier day as may be proved.

The general rule is that originating processes should be served personally on the defendant unless the rules expressly provide for specific alternative procedures of effective service.[18]

Service and jurisdiction: physical borders of the State

[3.40] The court's jurisdiction over an action *in personam* is based on the defendant's physical presence within the jurisdiction. In *Laurie v Carroll*[19] the defendant (Laurie) permanently left Victoria, and one day later the plaintiff (Caroll) issued a writ of summons from the Supreme Court of

16 *Common Law Procedure Act 1852 (15 & 16 Vict c 76)*, s 17 and the rules promulgated under the Judicature Acts (*Rules of the Supreme Court 1883*, O 9, r 2) continued this requirement of personal service.

17 Constructive service was rare. Constructive service in actions at law, allowed since the late 1500s in older real property actions, used a procedure to summon a tenant that featured placing a white stick on his property. Other procedures included proclaiming the summons from the doorway of the town church: see R Millar, *Civil Procedure of the Trial Court in Historical Perspective* (1952), p 92. Equity courts also permitted a wider use of constructive service. Under a 1732 statute, a court, upon receiving an affidavit by a plaintiff reciting that the defendant was avoiding process, could authorise service by publication in the *London Gazette*: see *Equity Procedure Act 1731 (5 Geo 2 c 25)*. Such service was deemed valid and a judgment was then available. This statute became a model for later American provisions regulating constructive service: see Millar, pp 92–93.

18 Rule 6.02. Legislative references throughout this chapter are to these rules unless otherwise specified. See *Graczyk v Graczyk* [1955] ALR (CN) 1077; *Pino v Prosser* [1967] VR 835; *Johnsen v Duks* [1963] NSWR 730.

19 *Laurie v Carroll* (1958) 98 CLR 310.

Victoria, and obtained orders *ex parte* to substitute service of the writ upon the defendant's solicitors resident in Victoria for service personally upon the defendant. Laurie did not enter an appearance to the service of the writ. Laurie's application to have the *ex parte* orders for substituted service set aside was dismissed by the Victorian court. The High Court granted Laurie special leave to appeal on the application.

The High Court held that the Victorian court had exercised jurisdiction it did not have in issuing an order for substituted service. It reasoned that the extent of a court's legal jurisdiction is limited to where a writ can legally be served.[20] Under the common law the writ operates within the limits of the State. Therefore a defendant is only subject to a writ's command if the defendant is within the territory of the State, and not if he is beyond it. Laurie lacked any relationship with the State of Victoria which would give its courts jurisdiction *prima facie* over him in that he was not a resident of the State, did not conduct business in the State, and was not at the relevant time domiciled there. However a writ may be indorsed and served in other State and Territory jurisdictions in conformity with either the *Service and Execution of Process Act 1901* (Cth) or under the conditions prescribed by s 139 of the *Supreme Court Act 1928* (Vic). The action in this case being *in personam* the court's jurisdiction was prescribed by the rules of service.

There are two contending theories for determining whether the court had jurisdiction over the defendant. The classical and accepted view is that the court has jurisdiction as long as the defendant is present in the jurisdiction at the time of service, regardless of why they are there (unless their presence was produced by another's fraudulent conduct), how long or how fleetingly they are present, or whether they are foreigners to, or citizens of, the State. Under a contending theory a court has jurisdiction if the defendant is within the jurisdiction at the time the writ is issued. It follows that the court exercises jurisdiction by issuing the writ, and a defendant knowing of the issue of the writ is on notice. This approach, however, deprives service of its function of notification — although service remains a necessary precondition for triggering the consequences of the defendant's default of appearance. Because the subject is no longer under jurisdiction which is based on personal service once they have left the jurisdiction, a subject is not under notice if they know a writ has been issued even though they have yet to be served with that writ.

In *Maharanee of Baroda v Wildenstein*[21] the question arose as to whether the foreign defendant's temporary presence within the territory of the state subjected him to the jurisdiction of the court. The plaintiff put up for auction at Sotheby's in London a painting (*La Poesie*) purchased from the defendant as the work of Francois Boucher in 1965 in Paris, where both were resident at the time, for £33,000 in a transaction under French law.

20 Per Dixon CJ, Williams and Webb JJ.

21 *Maharanee of Baroda v Wildenstein* [1972] 2 QB 283 also published in: [1972] 2 WLR 1077; [1972] 2 All ER 689.

The painting failed to sell and its authenticity was questioned by an expert. Sotheby's revalued the work at approximately £750. The plaintiff issued a writ from a court in England and affected personal service on the defendant at Ascot race track on a brief visit the defendant paid to England to attend the races. Under the writ the plaintiff sued to have the contract rescinded and the money outlaid for the painting repaid. Wildenstein applied to have the Maharanee's actions set aside, and obtained an order from Bridge J that the actions be stayed on the basis that serving the defendant on a brief visit to England was presumptively oppressive.

The Court of Appeal reversed the judge's decision. Lord Denning MR held that the proposition founding the decision was vacuous in law. A writ properly served may be set aside on the basis of oppression or as constituting an abuse of the court's process, neither of which had arisen in the circumstances: "In this case the writ has been properly served on the defendant in this country. … [the Maharanee] has validly invoked the jurisdiction of our courts in this, the one and only action she has brought".[22] This reflects the approach of the English courts to service of English proceedings on foreign defendants who are briefly visiting England: that even without having specifically designated that venue for the exercise of jurisdiction (such as the agreement through a contractual provision to accept commencement of proceedings in that jurisdiction), there is a strong inference that, if the service is permitted in a given country, it is agreed that it will be service of proceedings that have been issued in the courts of that country. Such service is an effective commencement of proceedings in the English courts.[23] Moreover, the plaintiff's interest in bringing the action within the English jurisdiction was both valid and advantageous. Both parties were "citizens of the world",[24] with sound social and business connections to England.[25] Nor was the plaintiff prevented from commencing proceedings there by reasons of legal residency, or other reasons.[26] Moreover, both the plaintiff

22 Per Lord Denning MR. The decision was supported by Edmund Davies LJ who added that: "Both in taking … out [the writ] and serving it (albeit when the defendant was only fleetingly on British soil) [the Maharanee] was doing no more than our law permits … Some might regard her action as bad form; none can legitimately condemn it as an abuse of legal process."

23 *Maharanee of Baroda v Wildenstein* [1972] 2 QB 283 at 292.

24 *Maharanee of Baroda v Wildenstein* [1972] 2 QB 283 at 293.

25 *Maharanee of Baroda v Wildenstein* [1972] 2 QB 283 at 293.

26 *St Pierre v South American Stores (Gath & Chaves) Ltd* [1936] 1 KB 382 applied and *Devine v Cementation Co* [1963] NI 65 applied; *Re Norton's Settlement* [1908] 1 Ch 471 explained, and dicta of Sir Gorell Barnes P in *Logan v Bank of Scotland (No 2)* [1906] 1 KB 141 explained.

and the defendant enjoyed forensic advantages such as being able to call and cross-examine expert witnesses.[27]

Service has the objective of bringing to the defendant's notice a proceeding that has been commenced against them by the plaintiff.[28] In *Hope v Hope*[29] Lord Cranworth LC, taking into account the different principles on which the Court of Chancery proceeded compared with a Court of Law, said:

> The object of all service is of course only to give notice to the party to whom it is made, so that he may be made aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the Court may feel perfectly confident that service has reached him, everything has been done that is required.

In this case his Lordship upheld substituted service on the defendant's agent in England as valid. Although the agent was not authorised to accept service on the principal's behalf, the agent could be expected to bring the proceedings to the defendant's attention.

Service of process

[3.50] Rule 6.03 provides:

> **6.03 How personal service effected**
>
> (1) To effect personal service it shall not be necessary to show the original document.
>
> (a) leaving a copy of the document with the person to be served; or
>
> (b) if the person does not accept the copy, by putting the copy down in the person's presence and telling the person the nature of the document.
>
> (2) In the case of originating process, the copy for service shall be sealed in accordance with Rule 5.11 and in the case of originating process filed electronically in accordance with Part 2 of Order 28, shall have attached to it a copy of the filing confirmation notice.
>
> (2.1) In the case of originating process filed in RedCrest under Order 28A, the copy for service shall be a copy of the originating process as sealed in accordance with Rule 28A.07.
>
> (3) To effect personal service it shall not be necessary to show the original document.

In *Ainsworth v Redd*[30] the issue was whether the defendant had been properly served in the sense that the documents had been left with him. The defendant refused to take documents which he looked at while they were held out to him, at the same time as he was told that the documents were intended for him. They were instead, however, taken by another

27 *Maharanee of Baroda v Wildenstein* [1972] 2 QB 283 at 293. In France, however, expert witnesses are appointed by the courts, evidentiary materials are restricted, and courts are satisfied with only a written opinion; no cross-examination of the witness takes place.

28 *Re Willshire-Smith; Ex parte Randle & Taylor Services Pty Ltd* (1994) 48 FCR 371.

29 *Hope v Hope* (1854) 4 De GM & G 328; 43 ER 534 at 342; 539–540.

30 *Ainsworth v Redd* (1990) 19 NSWLR 78.

man who was with the defendant at the time. Later both men were seen looking at the documents. The court held that the defendant had been served. "Leaving" does not require the defendant to take physical possession of the documents. In this case the documents had been properly left with the defendant. Kirby ACJ (as his Honour then was) held that to conclude otherwise would frustrate the object of the rule, which was to notify the defendant of proceedings against them so that they could be held responsible for a default of appearance. It follows from the decision in *Ainsworth v Redd* that, if a defendant refuses to accept service of a document it may be left with them or left in their presence, at the same time as they are informed of its nature by the person effecting service, but the document is not required to be shown to the defendant.

Service by agreement

[3.60] The rules permit valid service to be effected pursuant to an agreement between the parties.[31] In Victoria service on a principal outside the jurisdiction may, by agreement made either before or after the commencement of proceedings, be effected through service on an agent within the jurisdiction.[32] The agent may have actual or apparent authority to make such an agreement on behalf of the principal. In *Howard v National Bank of New Zealand* the defendant's solicitor's acceptance of service in New Zealand on behalf of the foreign defendant constituted an agreement between the plaintiff and the defendant for the defendant's agent to be served on behalf of the principal.[33] The court's jurisdiction over the defendant was completed by the plaintiff serving the agent in accordance with the rules.[34]

Service may be effected by agreement whether the document requires personal service, or substituted service, and whether the document (including a subpoena) is to be served on a party or on a non-party. Defendants may instruct their solicitors to agree to accept service of an originating process. Pursuant to r 6.09 personal service is not required if the solicitor has provided an undertaking to accept service and enter an appearance on a party's behalf. The solicitor is bound by the undertaking. In the case of a default the plaintiff may apply for a court order to enforce the solicitor's undertaking to enter an appearance. The plaintiff may

31 Rule 6.14. See *Samarni v Williams* [1980] 2 NSWLR 389 where service was validly effected on the defendant's insurer pursuant to an agreement between the parties. P Taylor et al, *Ritchie's Uniform Civil Procedure New South Wales* (LexisNexis, subscription service), [10.6.5], notes that foreign insurance companies may agree to service on a local agent where service outside the jurisdiction may sometimes be required.

32 Compare restrictions imposed in the Australian Capital Territory, Tasmania and Western Australia: the rule applying only to actions in contract to which the agreement about service relates.

33 *Howard v National Bank of New Zealand Ltd* (2002) 121 FCR 366 per Drummond J.

34 *Howard v National Bank of New Zealand Ltd* (2002) 121 FCR 366 at 378.

apply for an order that the solicitor enter an appearance[35] even if the solicitor's undertaking was given without any instruction from the party, or contrary to the party's instruction, regarding entering an appearance.[36] However, even if the plaintiff's solicitor is of the view that the defendant's solicitor would accept service and enter an appearance on the defendant's behalf they are not obliged to effect service even on a willing solicitor and may serve the defendant personally.[37]

Provided the solicitor is appropriately authorised, service is effected when the solicitor indorses a copy of the document of service by annotating it. The note states that the solicitor has accepted service on behalf of the party served, and the date of service. The document is returned by mail if it was posted to the solicitor, and by handing it back if it was handed to the solicitor. A solicitor cannot oppose entering an appearance without first being released by the court from their undertaking to accept service on behalf of the defendant,[38] otherwise they are bound by the undertaking to enter an appearance even if doing so waives an irregularity.[39] In *Cain v Cain*[40] a solicitor accepted service without prejudice, and subsequently appeared to challenge the jurisdiction of the court thereby not admitting that service had been sufficiently effected.

Once the defendant has entered an appearance, or the defendant's solicitor has provided notice of service, the plaintiff need not prove personal service was effected.[41] The plaintiff who seeks to enter a default judgment against a defendant who fails to appear within time must prove service on, and indorsement by, the solicitor by affidavit. It is insufficient to produce a copy of the indorsed writ before the Registrar or Prothonotary.[42]

Personal service on a corporation

[3.70] Companies incorporated under the *Corporations Act 2001* (Cth) ("Corporations Act") may, "for the purpose of any law", be served in accordance with s 109X at its registered office by registered post, or by

35 *Squires v Weeks* (1893) 9 WN (NSW) 122. Or seek an attachment order against the solicitor: see *Re Kerly, Son & Verden* [1901] 1 Ch 467.

36 *Darley v Hyman* (1894) 15 LR (NSW) 189.

37 *Sargent v Veneris* (unreported; VSC; Beach J; No 1303/1995; 20 December 1995).

38 *Simpson v Brereton* [1964] VR 332.

39 In order to avoid such situations undertakings should be expressed as without prejudice to preserve the right to challenge the originating process: *Cain v Cain* (1918) 18 SR (NSW) 26; *Lee v Johnson Taylor & Co Pty Ltd* [1990] WAR 381.

40 *Cain v Cain* (1918) 18 SR (NSW) 26.

41 *The Crimdon* [1900] P 171; *Re Kerly, Son & Verden* [1901] 1 Ch 467.

42 See *Elders Finance Ltd v Invaway Pty Ltd* [1991] 2 Qd R 398.

personal mode of service upon a director or other high office holder on behalf of the corporation.[43] Section 109X(1) of the Corporations Act provides for service by:

(a) leaving it at, or posting it to, the company's registered office; or

(b) delivering a copy of the document personally to a director of the company who resides in Australia or in an external Territory; or

(c) if a liquidator of the company has been appointed—leaving it at, or posting it to, the address of the liquidator's office in the most recent notice of that address lodged with ASIC; or

(d) if an administrator of the company has been appointed—leaving it at, or posting it to, the address of the administrator in the most recent notice of that address lodged with ASIC.[44]

Nothing in the terms of s 109X affects the power of the court, pursuant to any other provision of the Corporations Act, or any other law, to authorise or permit a document to be served in a different way (s 109X(6)), such as by substituted service.[45]

For service on a company to be valid under s 109X(1) documents must be sent by registered post, from inside or outside of Australia,[46] to the company's registered head office. Service is not effective if documents are sent to another office, such as a branch office,[47] unless that office is also the registered office.[48] In *Peters v Oscar Mayer*,[49] service documents were not sent to the registered office, but to the office address normally used in correspondence between the parties. It was held that notice was properly served on the company by sending it to an address where it was likely to be received.[50]

A plaintiff who enters judgment in default of appearance knowing that no person within the corporation knew or was made aware that the originating process had been left at the registered office of the corporation abuses process.[51]

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43 Section 109X does not apply to a company not incorporated under the Act: see *Nord Deutscher Lloyd v Ockerby & Co* (1917) 19 WALR 104.

44 The liquidator's or administrator's office is the most recent such address registered with ASIC.

45 In *Re Otway Coal Co Ltd* [1953] VLR 557 an order was made for substituted service on the company's largest shareholder.

46 See *Tricontinental Corporation Ltd v Goldstocks Ltd* (1990) 3 ACSR 257 (NSWSC).

47 *Watkins v Scottish Imperial Insurance Co* (1889) 23 QBD 285; *McCue v Australasian United Steam Navigation Co Ltd* (1889) 15 VLR 332.

48 See *Watson v Sheather* (1886) 2 TLR 473; *Watkins v Scottish Imperial Insurance Co* (1889) 23 QBD 285; *Wood v Anderston Foundry Co* (1888) 36 WR 918; *Vignes v Stephen Smith & Co Ltd* (1909) 53 Sol Jo 716; *McCue v Australasian United Steam Navigation Co Ltd* (1889) 15 VLR 332; *Eagles v Eagles* [1960] VR 400 at 401; *Rochester Communications Group Pty Ltd v Lader Pty Ltd* (1997) 143 ALR 648 (FCA). Compare *Singh v Atombrook Ltd* [1989] 1 WLR 810.

49 *Peters v Oscar Mayer Pty Ltd* [1963] VR 390.

50 But see *Rochester Communications Group Pty Ltd v Lader Pty Ltd* (1997) 143 ALR 648 at 667 (FCA).

51 *Deputy Commissioner of Taxation (Cth) v Abberwood Pty Ltd* (1990) 19 NSWLR 530.

Under certain circumstances the registered office need not be the address for effective service. A statutory demand served in the prescribed form by a creditor corporation under s 459E of the Corporations Act, stating an address for service of documents on the creditor other than its registered office, makes delivery to the stated address effective service on the creditor.[52]

Service is deemed effective irrespective of whether the company receives the process or not,[53] unless evidence is presented proving that it was ineffective.[54] In *Anscorp Pty Ltd v GRS Nominees Pty Ltd*[55] a letter was posted from Melbourne to a corporation's registered office in Werribee. An Australia Post employee gave evidence that under normal conditions the letter would have been delivered to the address the following day. No evidence was led to the contrary and the court accepted that evidence of having sent the letter by registered post was proof of delivery on that day.

Service on an unregistered corporation

[3.80] Under some circumstances a company not registered within the jurisdiction may nonetheless receive service within the jurisdiction. The plaintiff and defendant, for example, may have entered an agreement an express[56] provision of which is that in the event of a dispute the foreign company submits to the local jurisdiction and agrees that it may be properly served within the jurisdiction.[57] A registered foreign company is served in the same way as a resident company.[58] It is not required that a cause of action arise within the jurisdiction for service in that jurisdiction to be effective.[59]

A corporation having a principal place of business or head office outside the jurisdiction and not subject to an agreement as to service may nevertheless be served within the jurisdiction if it has a substantial connection with, or a substantial presence in, the jurisdiction.[60] The sole basis upon which a foreign company will have a substantial connection with the jurisdiction if it is carrying on a business within the

52 *Rochester Communications Group Pty Ltd v Lader Pty Ltd* (1997) 143 ALR 648 (FCA).

53 *A/S Cathrineholm v Norequipment Trading Ltd* [1972] 2 QB 314; *Peter Kurts (Developments) Pty Ltd v Glenbar Homes Pty Ltd* (1978) 2 ACLC 698; *Re Third Lojebo Pty Ltd* [1982] VR 379.

54 *Re Gasbourne Pty Ltd* [1984] VR 801 (process was returned unclaimed); *Re Willshire-Smith; Ex parte Randle & Taylor Services Pty Ltd* (1994) 48 FCR 371.

55 *Anscorp Pty Ltd v GRS Nominees Pty Ltd* (unreported; FCA; Olney J; No VG 3391/1993; 11 March 1994).

56 The provision must be express and will not be implied by the court: *Vogel v R & A Kohnstamm Ltd* [1973] QB 133.

57 *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 670; *Emanuel v Symon* [1908] 1 KB 302. See FCR r 10.28.

58 Corporations Act s 601CX.

59 *Logan v Bank of Scotland* [1904] 2 KB 495.

60 *Okura & Co Ltd v Forbacka Jernwerks Aktiebolag* [1914] 1 KB 715 at 722.

jurisdiction.[61] The test for whether a foreign corporation is substantially present within a jurisdiction takes into account considerations such as:

- whether an agent or officer of the company has been operating within the jurisdiction;
- for how long a period of time they have been in operation;
- whether their operation has been continuous or periodic;[62] and
- whether the company has carried on its business from the same address or the same location.

A company is not present in a jurisdiction if it not carrying on a business there.[63] The company will not be carrying on a business merely because the agent is present in the jurisdiction, or if the agent lacks authority to conduct the company's business. A company that lacks such a sufficient connection with the jurisdiction cannot be effectively served through its agent. Neither can an agent unauthorised to receive service accept service on the company's behalf.[64]

In *Commonwealth Bank of Australia v White*[65] service on a foreign corporation with a London-registered head office was sought to be effected through its agent operating in Sydney. The validity of service was upheld on the basis of the company's substantial presence within the jurisdiction. The court explained that the company's substantial connection with the jurisdiction was established by the fact that the company had registered an Australian company, operating under control of the parent company through its agent from an office in Sydney, to represent and promote the parent company's commercial presence in Australia and to seek opportunities to do business within Australia.[66] By contrast, in *Vogel v R & A Kohnstamm*[67] an agent operating an office in Israel had introduced an English seller to an Israeli buyer. However, the seller contracted directly with the buyer. The seller was held to have no presence in Israel.

Other activities which have been held not to constitute a substantial presence in a jurisdiction include:

- merely selling goods from one country to another;[68]

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61 *La Bourgogne* [1899] AC 431; *Spicer v International Paper Co of New York* (1904) 21 WN (NSW) 136.

62 *Tycoon Holdings Ltd v Trencor Jetco Inc* (1992) 34 FCR 31 at 38–39 (isolated acts do not count).

63 *Ex parte Iskra* [1963] NSWR 1593; *Amalgamated Wireless (A/asia) Ltd v McDonnell Douglas Corporation* (1987) 16 FCR 238; *Tycoon Holdings Ltd v Trencor Jetco Inc* (1992) 34 FCR 31 at 38–39.

64 *The Lalandia* [1933] P 56; *The Holstein* [1936] 2 All ER 1660; *Glanville v JB Lippincott Co* (1900) 17 WN (NSW) 74; *Rudd v John Griffiths Cycle Co Ltd* (1897) 23 VLR 350.

65 *Commonwealth Bank of Australia v White* [1999] 2 VR 681.

66 *Commonwealth Bank of Australia v White* [1999] 2 VR 681, especially at 691–692.

67 *Vogel v R & A Kohnstamm Ltd* [1973] QB 133. Discussed and approved in *Adams v Cape Industries plc* [1990] 1 Ch 433 at 521–522.

68 *Foster v Driscoll* [1929] 1 KB 470 (CA).

- having a system of travelling salesman active in the country where process is sought to be served;[69] and
- advertising into a country in order to achieve sales therein.[70]

Partners, partnerships and business name

[3.90] Rule 17.01 provides that partners may sue or be sued in the company name.[71] An originating process brought against a partner in the firm's name under r 17.01 may, by r 17.03(1), be served on:

(a) any one or more of the partners; or

(b) any person at the principal place of business of the partnership within Victoria who appears to have control or management of the partnership business there.

Partners sued in the partnership name can be served either personally by service on at least one of the partners,[72] or through a person at the partnership's registered office.[73] The partner or the person at the principal place of business need only be temporarily within the jurisdiction to constitute effective service on the partnership.[74] Service on a limited partnership registered under s 54 of the *Partnership Act 1958* (Vic) is effected by being left at or being sent by post to the partnership's registered office.[75] If service on the partnership is effected through its manager, the manager must be served personally.[76] A notice setting out the capacity in which the person is served (as a partner, a manager, or both) is to be provided to the defendant along with the originating process.

Rule 17.03(2) provides that the originating process served under r 17.03(1) is "duly served on the partners whether or not any partner is out of Victoria". Effective service on the partnership through its manager does not therefore depend on the partner's presence within the jurisdiction.[77] Partners may be outside the jurisdiction but still be effectively served at the time the manager is served. The plaintiff is not obliged to obtain the leave of the court or to adhere to the procedural requirements for service

69 *Littauer Glove Corporation v FW Millington (1920) Ltd* (1928) 44 TLR 746, discussed and approved in *Adams v Cape Industries plc* [1990] 1 Ch 433 at 520–521.

70 *Lucasfilm Ltd v Ainsworth* [2009] EWCA Civ 1328 at [192] (involving the use of a website to target sales in a foreign country).

71 Rule 17.01.

72 *Marsden v Kingswell Watts* [1992] 2 All ER 239 (personal service on a partner must comply with the rules of service under O 6 as if the partner were a personal defendant).

73 *Baillie v Goodwin & Co* (1886) 33 Ch D 604; *Barnett Bros Timber Pty Ltd v Delany Metals* [1976] VR 37 at 42 per Harris J.

74 *Pollexfen & Co v Sibson & Co* (1886) 16 QBD 792; *Lysaght Ltd v Clark & Co* [1891] 1 QB 552; *Worcester City and County Banking Co v Firbank, Pauling & Co* [1894] 1 QB 784; *Hobbs v Australian Press Assn* [1933] 1 KB 1.

75 *Partnership Act 1958* (Vic), s 77.

76 Rule 6.02(1).

77 *Hobbs v Australian Press Assn* [1933] 1 KB 1.

outside jurisdiction.[78] The partners served by service effected on the manager of a partnership include those partners who were partners at the time of issuance of the writ, including any who were outside the State.

If a partnership has changed since the initiating process was issued, for example, by being partially or completely dissolved, or restructured so that it now has additional partners, those persons whom the plaintiff intends to make liable will have to be served personally.[79] A plaintiff who knows that a partnership has been dissolved cannot use the dissolved partnership's address to effect service, but is required to serve the former partners.

Where service is not effected personally on the partner it is to be effected at "the principal place of business". Where a partnership has multiple places of business the plaintiff must determine which one of these is its principal place of business. In *Barnett Bros Timber v Delany Metals*[80] Harris J rejected the respondent's submission that the words of the rule were to be understood as referring to "a principal place" of business. His Honour interpreted the wording of the rule literally as signifying that service could only be effected in one place and that "Where there is more than one place, the person serving the writ has, at his peril, to determine what is the principal place."[81]

Agents

[3.100] A principal who is outside the jurisdiction of the court may be served through an agent under the conditions stipulated in r 6.13. Rule 6.13 provides that the plaintiff may seek and must be granted leave to serve the agent if the proceeding on which process is sought to be served relates to or arises out of a contract which was entered into in Victoria on behalf of a principal who was resident or carrying on a business in Victoria, by an agent who was resident in or carrying on the principal's business in Victoria. Whether the agent had the authority to or was properly charged with carrying on the principal's business is not a matter to be determined before leave will be granted.

Rule 6.13 provides a mode of service on a foreign principal through an agent acting in Victoria as an alternative to service of an originating

78 Rule 17.03.

79 Rule 17.03(3).

80 *Barnett Bros Timber Pty Ltd v Delany Metals* [1976] VR 37.

81 *Barnett Bros Timber Pty Ltd v Delany Metals* [1976] VR 37 at 42 per Harris J. Cairns observes that "[t]here is … little direct guidance on what constitutes the principal place of business. It is submitted that it should be the place where the chief managerial functions of the firm are performed. If there are several places of business the plaintiff must select the principal place." B Cairns, *Australian Civil Procedure* (10th ed, Thomson Reuters, 2014), [4.50].

process under O 7.[82] The court has discretion to grant leave to serve the foreign defendant through its agent only when it would be neither practicable nor effective to serve them by the ordinary means of effecting service outside jurisdiction,[83] and not merely because the principal has entered into a contract in the Victorian jurisdiction through an agent resident in Victoria.[84] The making of the order is justified only where the plaintiff can prove the existence of special circumstances.

The affidavit in support of the application to serve a foreign principal through a local agent must not only state that the plaintiff has fulfilled the conditions of r 6.13, it should also depose facts enabling the judge to determine whether or not they may properly exercise their discretion in this case. The affidavit will therefore explain the circumstances of entering into the contract, and detail the difficulty the plaintiff faces in using the normal processes to serve the defendant outside the jurisdiction. Factors which may justify the making of the order include the character of the agent. A principal with regular agents doing business and operating within the jurisdiction may be served through them when delay and inconvenience might attend attempts to serve the principal in a foreign jurisdiction, whereas it would be improper for a court to grant leave to serve an agent whom the principal has merely used to enter into a one-off, or irregular, transaction.

The time for the defendant's appearance is fixed when the order for service on the agent is made.[85] Ordinarily, appearance is returnable in the time fixed by r 8.04(b)[86] and it runs from the time of service on the agent. However, because the order is justified under the particular facts of the case, circumstances such as the principal's residence and place of business and the ease with which the agent can communicate with the principal, may have to be allowed for when setting the time limit for appearance.

Service on particular defendants

[3.110] Rule 6.04 provides that personal service of a document may be effected by serving the document in accordance with r 6.03. In the case of the Supreme Court service on a corporation may be effected

(i) on the mayor, chairman, president or other head officer of the corporation; or

82 See r 7.01(l)(f)(ii). The rule reproduces O 9 r 7 of the *Rules of the Supreme Court 1957* (Vic), but with the additional requirement, taken from O 10 r 2(2) of the *Civil Procedure Rules 1998* in England, that the order authorising service of the originating process on the defendant's agent must limit a time for appearance.

83 DL Bailey and JK Arthur, *Civil Procedure Victoria* (LexisNexis, subscription service), [I 6.13.5].

84 See the memorandum setting out the practice under the equivalent rule in England: from (1920) 150 LT Jo 338.

85 Rule 6.13(2)(a).

86 See also *Neville v National Fire & Marine Insurance Co* (1881) 1 QLJ 23; *Russell Wilkins & Co Ltd v Peck & Co* [1908] St R Qd 134.

(ii) on the town clerk, clerk, treasurer, manager, secretary or other similar officer of the corporation… .

And, in the case of the County Court,[87] service on a corporation may be effected by service upon

(i) on the mayor, chairman, president or other head officer of the corporation; or

(ii) on the town clerk, clerk, treasurer, manager, secretary or other similar officer of the corporation;

(iii) if provision is made by or under any Act for service on a corporation by serving the document in accordance with that provision… .

Service on a minor may be effected by service upon the "minor, on a parent or guardian of the minor, and, if there is none, on the person with whom the minor resides or in whose care the minor is".

Process is served upon a "handicapped" person as defined in r 15.01 by serving

(i) the person who, in accordance with Rule 15.03(2), would be entitled to be litigation guardian in any proceeding to which the handicapped person was party; or

(ii) if there is no such person, the person with whom the handicapped person resides or in whose care the handicapped person is… .[88]

Where in a proceeding in the Supreme Court service is sought to be effected on the Crown in right of the Commonwealth or the Commonwealth the process is to be served on the Commonwealth Attorney-General or a person appointed by the Attorney-General to receive service of process in accordance with s 63 of the *Judiciary Act 1903* (Cth).[89] In a proceeding in the County Court service upon the Crown in right of the Commonwealth or the Commonwealth is to be effected by service upon "the Secretary to the Attorney-General's Department, or any person authorised under section 55E(4) of the Judiciary Act 1903 of the Commonwealth to act in the name of the Australian Government Solicitor". If the Crown in right of Victoria or the State of Victoria is sought to be served, service is effected upon the Victorian Government Solicitor.[90]

Person under disability

[3.120] Rule 15.01 defines a person under a disability as being either a minor or a handicapped person. Further, it defines "handicapped person" to mean "a person who is incapable by reason of injury, disease, senility, illness or physical or mental infirmity of managing his or her affairs in relation to the proceeding".

87 *County Court Civil Procedure Rules 2008* (Vic), r 6.03.

88 Rule 6.04(c).

89 Rule 6.04(d).

90 Rule 6.04(e).

Rule 6.04(b) provides that personal service of a document on a minor is to be made on "a parent or guardian of the minor," but if the minor has neither parent nor guardian service is on "the person with whom the minor resides or in whose care the minor is". Where the requirements are met, a minor may be served an originating process by substituted service.[91]

Rule 6.04(c) prescribes that personal service of a document on a handicapped person as defined in r 15.01 is to be made on either their litigation guardian, or the person with whom they reside, or who is caring for them.

A person accepting service on behalf of a person under a disability should be informed that the document, by being left with them, effects service on the minor or the handicapped person. The affidavit of service should depose that the relevant person was so informed.[92]

Rule 6.05(1), (2): Motor vehicle personal injuries

[3.130] Circumstances where the plaintiff claims damages in respect of death or bodily injury caused by or arising out of the use of a motor car attract the application of r 6.05.[93] The rule provides

> **6.05 Motor car death or bodily injury**
>
> (1) In any proceeding in which the plaintiff claims damages in respect of death or bodily injury caused by or arising out of the use of a motor car, originating process shall not be taken to have been served on the defendant unless a copy of the originating process is served on the defendant in accordance with these Rules and also on the Transport Accident Commission.
>
> (2) Where in a proceeding to which paragraph (1) applies a copy of the originating process has been duly served on the defendant but not on the Transport Accident Commission, the Court, notwithstanding paragraph (1), may order that the originating process be taken to have been served on the defendant.

Rule 6.05(1) provides that service on the defendant is only complete when the Transport Accident Commission has also been served the originating process.[94] The plaintiff is not required to serve the Transport Accident Commission a statement of claim under r 6.05(1) with the writ, but may

91 *Ross v O'Callaghan* (1863) 2 W & W (E) 156; *Harrison v Harrison* (1892) 13 LR (NSW) Eq 151.

92 *Re Williams; Ex parte Official Assignee* (1907) 7 SR (NSW) 422.

93 Paragraph (1) of r 6.05 is taken from O 9 r 8A of the *Rules of the Supreme Court 1957* (Vic) (inserted by SR 308 of 1977).

94 *Transport Accident Act 1986* (Vic), s 130 provides that service on the Commission of process in a proceeding is effected by lodging the document at the office of the Commission with a person employed in the administration of the Act and authorised in writing by the Commission to accept service of documents on behalf of the Commission. The office of the Commission is located at 222 Exhibition Street, Melbourne, and the Commission has authorised the following officers for the purpose of s 130: the General Manager, Claims; the Manager, Common Law; and the Solicitor to the Commission. The Commission advises that a person wishing to serve originating process on the

instead serve an indorsement of claim.[95] Rule 14.02, however, requires a plaintiff who, in accordance with r 5.04, has served the defendant an indorsement that is not a statement of claim with the writ, to serve a statement of claim on the defendant within 30 days of the defendant entering an appearance. A plaintiff may be relieved by the court of the consequences of not serving an originating process on the Transport Accident Commission, but only if the defendant has been properly served.

Proof of service: r 6.17

[3.140] The plaintiff is required to file an affidavit proving service.[96] The purpose of the affidavit of service is to prove that personal service was properly effected in compliance with the rules. Rule 6.17[97] requires the affidavit to state the relevant facts of service: the identity of the person who served the document,[98] when[99] and where[100] they served the document, and the means by which they identified the person served.[101] Rule 6.08 provides that if a person served identifies themselves or the office they hold by means of a statement, evidence that the person served made such a statement is proof of their identity or that they hold such office. Without the rule evidence of this kind would otherwise be inadmissible as hearsay if relied upon as a statement as to the truth of its content.[102] The affidavit of service also requires a sealed copy of the written document to be exhibited with the affidavit[103] and, further, if the documents were filed electronically,[104] depending on the jurisdiction,

Commission should attend the Level 10 counter at the Commission office and ask to see one of the above officers. To avoid delay, it might be desirable to make an appointment by telephone with an officer in advance. The Solicitor to the Commission has advised that as an alternative to the procedure for service of originating process under s 130 of the *Transport Accident Act 1986*, if the process is posted addressed to the Solicitor to the Commission at GPO Box 735F, Melbourne 3001, the Solicitor will write to the solicitors for the plaintiff admitting servicing on the date the Solicitor received the document.

95 Rule 5.04 requires every writ to contain an indorsement of claim which may be either a statement of claim, or sufficiently particularised notice of the claims to which the plaintiff seeks a remedy in the proceeding.

96 Rule 21.01(3)(b).

97 *Service and Execution of Process Act 1992* (Cth), s 11 ("SEPA"), which for the purpose of the Act prescribes the mode of proof of service of a document served in another part of Australia, is to the same effect as r 6.17.

98 Rule 6.17(1)(a).

99 Rule 6.17(1)(b).

100 Rule 6.17(1)(c).

101 Rule 6.17(1)(d).

102 See *Re Williams; Ex parte Whatmore's Sports Centre* (1965) 7 FLR 101.

103 Rule 6.17(3).

104 In accordance with O 28 Pt 2.

exhibit either only a copy of the notice confirming filing,[105] or both the filing confirmation notice and a copy of the originating process.[106]

A plaintiff seeking judgment in default of appearance is required to file a sealed copy of the documents exhibited to the affidavit proving service. Exhibiting a photocopy instead of a sealed copy is not in compliance with the rule. An affidavit exhibiting a photocopy is an irregularity, and the basis for setting aside a judgment in default of appearance obtained by the plaintiff on the basis of the affidavit.[107] Because judgment in default of appearance provides final relief, it is insufficient to prove the affidavit of service by information and belief. The affidavit of service must be proved on the basis of knowledge.[108]

Service on defendant in other State

[3.150] A plaintiff serving a defendant outside Victoria but within Australia must file, in accordance with s 16 of the *Service and Execution of Process Act 1992* (Cth), the notices prescribed by the rules regulating court procedure to the originating process or a copy of the process. A plaintiff seeking judgment in default of appearance must prove that the prescribed notice was filed with the originating process served by exhibiting a copy of the notice to the affidavit of service.

ORDINARY SERVICE

[3.160] In general, personal service is only required for the originating process and, thereafter, documents may be effectively served by other means provided under the rules of ordinary service. Rule 6.07 provides that documents may be served by leaving[109] them at, or posting[110] them to, the person's proper address, leaving them in the solicitor's document exchange,[111] transmitting them to the solicitor by facsimile,[112] or serving them in compliance with the requirements of other statutes.[113] A person's proper address is the address provided by that person for the purpose of serving all subsequent documents in the proceeding subsequent to the plaintiff's originating process,[114] and the defendant's notice of

105 Rule 6.17(4) for Supreme Court.

106 *County Court Civil Procedure Rules 2008* (Vic), r 6.17(4) for County Court.

107 *Sargent v Veneris* (unreported; VSC; Beach J; No 1303/1995; 20 December 1995).

108 See *Elders Finance Ltd v Invaway Pty Ltd* [1991] 2 Qd R 398.

109 Rule 6.07(1)(a).

110 Rule 6.07(1)(b).

111 Rule 6.07(1)(d). Document exchange is defined for the purposes of the rule at r 6.07(6).

112 Rule 6.07(1)(e). The rule now contains an express note referring to the provisions of the *Electronic Transactions (Victoria) Act 2000* (Vic) permitting electronic service, including by facsimile and email, consistent with that Act.

113 Rule 6.07(1)(c).

114 Rule 6.09.

appearance[115] (unless the rules provide specifically for personal service). This address is usually the party's solicitor's address where the party is represented by a solicitor, but is otherwise the litigant's personal address where they appear in person, or their agent's address. If service is effected by the plaintiff interstate through SEPA they must provide an address within Australia which will be an address for service under the Act.[116]

Where a person lacks a proper address at the time service is to be effected documents may be served at the person's last known address,[117] or the firm's last address where the person is sued or suing in the name of a partnership or firm,[118] or a corporation's registered office or principal place of business.[119] Where no person resides at a person's address for service, service can be effected by filing the document into court.[120]

The day of service for posted documents is presumed to be the day the documents would have arrived at the postal address in the ordinary course of the post.[121] The presumption is rebutted by evidence proving that delivery was not effective. This might include evidence that the mail was returned to the serving party, or that the serving party otherwise knew that the document was not effectively delivered.[122] Documents delivered to a document exchange are presumed to have been delivered on the next day or on a Monday when the delivery was Friday.

Failure to state an address for service

[3.170] Parties may be sanctioned for failing to provide, or providing false or misleading, or incomplete, addresses.[123] If a plaintiff by these means attempts to avoid an order for costs they will be subject to an order to pay security for costs into court.[124] Where the defendant's address on

115 Rule 8.06; for the corresponding rules in other jurisdictions see: ACT r 50 (plaintiff), r 101 (defendant); FCR r 8.01 (plaintiff), r 5.02 (defendant); NSW r 4.5; NT r 6.5; Qld r 17 (plaintiff), r 29 (respondent to application), r 140 (defendant to claim); SA r 59; Tas r 128 (plaintiff), r 159 (defendant); WA O 6 rr 7, 8 (plaintiff), O 12 r 2 (defendant). Some jurisdictions have specific requirements for address for service: FCR Pt 11; Qld r 17; SA r 58.

116 In New South Wales an address for service given under SEPA is a valid address for service: NSW r 4.5.

117 Rule 6.07(2)(a).

118 Rule 6.07(2)(b).

119 Rule 6.07(2)(c).

120 Where the jurisdiction is the Supreme Court (r 6.07(3)), or where the jurisdiction is the County Court, by leaving a copy at the address and filing a copy in court: *County Court Civil Procedure Rules 2008* (Vic), r 6.07(3).

121 Rule 6.07(5)(a).

122 *Re Gasbourne Pty Ltd* [1984] VR 801.

123 See B Cairns, *Australian Civil Procedure* (10th ed, Thomson Reuters, 2014), [2.1000]–[2.1070].

124 Vic r 62.02; see also ACT r 1091; NSW r 42.21; NT r 62.02; Qld r 671; Tas r 828.

the notice of appearance is "not genuine" the court may order that appearance be set aside and the plaintiff continue as if appearance had not been filed.[125]

A document for which personal service is not required to be served upon a party in default of appearance may be posted to the public notice board of the court registry.[126]

Informal service

[3.180] A party may be informally served when a document for any reason has not been properly served under the rules but nevertheless comes to the attention of the party intended to be served. The day of effective service is taken to be the day the intended recipient noticed the document. Informal service may have to be confirmed by court order.[127]

EXCEPTIONS TO PERSONAL SERVICE

Rule 6.10: Substituted service

[3.190] Substituted service is an exception to personal service. It is only available where personal service would otherwise be permitted but under the circumstances cannot be effected.[128] The application for substituted service is an *ex parte* application before the court. The court will only order substituted service where it has jurisdiction to order personal service but recognises the difficulty of executing it.[129] Substituted service will not be ordered so as to effect service of an originating process indirectly on a party who cannot be served personally.[130] For example, direct personal service is not permitted in proceedings against foreign sovereigns and ambassadors.[131] Therefore, substituted service cannot be

125 Vic r 8.06(4); see also NT r 8.06; Tas r 160; WA O 12 r 2; SEPA s 18; but not the Australian Capital Territory, New South Wales, Western Australia or South Australia.

126 Vic r 6.12; see also ACT r 6421; FCR r 10.25; NSW r 10.16; NT r 6.11; Tas r 146; WA O 72 r 83.

127 Vic r 6.11; see also ACT r 6461; FCR r 10.23; NSW r 10.14; NT r 6.10; Qld r 117; SA r 69.

128 The English decisions on the point have been exhaustively discussed by the High Court of Australia in *Laurie v Carroll* (1958) 98 CLR 310. In *Laurie v Carroll* the High Court disapproved of the only decision which might support the continued application of the practice of the Court of Chancery in relation to substituted service. The High Court held that the practice of the Court of Chancery described in *Hope v Hope* (1854) 4 De GM & G 328; 43 ER 534 had been superseded.

129 *Fry v Moore* (1889) 23 QBD 395; *Jay v Budd* [1898] 1 QB 12; *Laurie v Carroll* (1958) 98 CLR 310 at 325.

130 *Laurie v Carroll* (1958) 98 CLR 310 at 327: an order for substituted service was set aside because when it was made the defendant had already left the jurisdiction and the cause of action alleged was not such as came within the rules for service outside the jurisdiction, and there was therefore no rule of law by which process could be served. See also *Australian Securities and Investments Commission v Sweeney (No 2)* (2001) 38 ACSR 743.

131 *Stewart v Bank of England* [1876] WN 263; *Mighell v Sultan of Johore* [1894] 1 QB 149.

ordered to effect service.[132] Nor could substituted service be ordered for a writ the period of service for which had expired, when no application had been made to renew it.[133]

The requirements of jurisdiction cannot be avoided by an order for substituted service,[134] whether the person the subject of service is within the jurisdiction of a Victorian court, or outside Australia but does not satisfy the conditions for the rules of service outside the jurisdiction. The defendant in *Laurie v Carroll* had left the jurisdiction and fell outside the rules permitting service outside the jurisdiction. The court is not thereby prevented from ordering substituted service on the defendant's agent within the jurisdiction, despite them having no authority in relation to the litigation, if they can reasonably be expected to notify the defendant of the proceedings initiated and pending against them.[135] The validity of substituted service was not dependent on the defendant being within the jurisdiction.[136] Thus, the court may always order substituted service of the originating process whether the defendant is outside Victoria at the time the order is made, or was at the time of the commencement of the proceeding.[137]

In *Hope v Hope*[138] substituted service on the defendant's agent in England was upheld as valid service by Lord Cransworth LC because the agent could be expected to notify the defendant of the proceedings, and not

132 *Mighell v Sultan of Johore* [1894] 1 QB 149.

133 *Bernstein v Jackson* [1982] 1 WLR 1082.

134 Under the established theory of jurisdiction a Court of Chancery could only order service against a defendant who was present in England, and could only order substituted service if the defendant were present in England at the time the writ was issued. However, courts had inherent jurisdiction to regulate their own procedure. The common law principles of jurisdiction also govern the availability of orders for substituted service. Substituted service was available when the defendant had no usual place of residence within England and could not be served personally. The Court of Chancery could order substituted service in such cases and in such manner as it thought fit: *Improvement of Jurisdiction of Equity Act 1852 (15 & 16 Vict c 86)*, s 5 (which did not alter the prevailing practice under the court's inherent jurisdiction); *Hope v Hope* (1854) 4 De GM & G 328; 43 ER 534 at 341 (De GM & G).

135 See *Daniell Chancery Practice* (4th ed, 1867), Vol 1, p 404ff and cases there cited.

136 *Davidson v Marchioness of Hastings* (1838) 2 Keen 509; *Hope v Hope* (1854) 4 De GM & G 328; 43 ER 534.

137 It was not possible under the previous rules regimes (the *Rules of the Supreme Court 1884* (Vic) and *Rules of the Supreme Court 1957* (Vic)) to make an order for substituted service within Victoria if the defendant was out of the jurisdiction when the plaintiff's writ was issued. The defendant could only be commanded to appear before the court in accordance with the words of the writ if they were present in Victoria on the date of the writ's issuance. And if the defendant was not in Victoria on that date and unable to be served personally substituted service could not be ordered. Rule 6.10(3) overcomes the previous difficulty of the defendant's presence in the jurisdiction at either the date of the making of the order or the issuance of the writ. Nor does an originating process any longer contain the Royal command to appear. See *Laurie v Carroll* (1958) 98 CLR 310; *Myerson v Martin* [1979] 1 WLR 1390; *Joye v Sheahan* (1996) 62 FCR 417.

138 *Hope v Hope* (1854) 4 De GM & G 328; 43 ER 534.

because the agent was authorised to accept service on behalf of the defendant in the pending litigation. His Lordship observed that Chancery courts and the common law courts acted on different principles. The Court of Chancery's jurisdiction to order service did not depend on the defendant's being within the territorial jurisdiction of the court. He held:[139]

> The object of service is of course only to give notice to the party on which it is made, so that he may be made aware of and may be able to resist that which is sought against him…. If, for instance, where an adult Englishman contracts for the purchase of an estate and goes out of the jurisdiction, nobody can doubt that I may decree specific performance, but of course the Court can have no control over the purchaser, if it has no means of reaching him.

The possibility of substituted service varies between jurisdictions. In some jurisdictions substituted service is permitted by the rules in respect of documents for which personal service is required. The rules determine the document for which substituted service is permitted. In the main it is restricted to the originating process, since most other documents are served at an address for service or by filing them at a registry. Other jurisdictions permit substituted service of any document. An order for substituted service of originating process is not affected by SEPA.[140]

Defendant out of Victoria

[3.200] The validity of substituted service does not depend on the defendant being physically present within the jurisdiction,[141] as long as the court has jurisdiction over the cause of action and the nature of the cause of action permits the service of originating process outside the jurisdiction. Substituted service may be ordered when it is not practicable[142] to serve a defendant who is either outside Victoria but still within Australia pursuant to SEPA, or when the defendant is outside Australia and the claim falls within one of the heads of service referred to in r 7.01(1).[143]

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139 *Hope v Hope* (1854) 4 De GM & G 328; 43 ER 534 at 342, 345–346 (De GM & G).

140 SEPA s 8(1).

141 *Davidson v Marchioness of Hastings* (1838) 2 Keen 509.

142 *Western Suburban & Notting Hill Permanent Benefit Building Society v Rucklidge* [1905] 2 Ch 472; *Ditton v Bornemann* (1886) 3 TLR 3; *Rosenbaum v Rosenbaum* [1926] VLR 280. As to the position in Victoria under the *Rules of the Supreme Court 1884* (Vic) with respect to substituted service within the jurisdiction of a writ issued for service out see cases decided under the *Rules of the Supreme Court 1884* (Vic): *McColl v Peacock* [1924] VLR 102; *Flower v Foy* (1888) 10 ALT 109; *Moubray v Riordan* (1889) 15 VLR 354; *Bank of Australasia v Tuplin* (1894) 15 ALT 225; *Buckley & Nunn v Slade* (1897) 19 ALT 115; *Kelsey v Caselberg* [1909] VLR 347.

143 *Australian Securities and Investments Commission v Sweeney (No 2)* (2001) 38 ACSR 743; *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2007] FCA 124 at [8]–[14]; *Rosenbaum v Rosenbaum* [1926] VLR 280.

An order for substituted service may specify either the event[144] whereby, or the time[145] when, service will be taken to have been effected. The order for substituted service may be made whether the defendant is to be served outside Victoria, or was out of Victoria at the commencement of the proceeding.[146]

Substituted service of a writ issued in Victoria under the *Service and Execution of Process Act 1901* (Cth) was ordered against an agent for an English company which carried on business through that agent in New South Wales in *Stubbs v J & J Lonsdale & Co*.[147]

A plaintiff seeking an order for substituted service within Australia against a defendant corporation not incorporated under Australian law, and never present within the jurisdiction, was unsuccessful because they had not first attempted service outside the jurisdiction in *Mondial Trading v Interocean Marine Transport*.[148]

In an appropriate case a court may order substituted service either inside or outside Australia of a claim falling under one of the heads of service at r 7.01(1) against a defendant not within Australia where the originating process cannot practicably be served outside Australia.[149]

Grounds for substituted service

Rationale

[3.210] In general, service is ordered using the method best able to achieve its purpose: to bring to the defendant's attention the existence of proceedings initiated against them, and to prompt the defendant to take appropriate steps in response. In general this will be satisfied by personal service. However, the rules allow for employing other than the prescribed means of effecting service, either within or outside the jurisdiction,[150]

144 Rule 6.10(2)(a).

145 Rule 6.10(2)(b).

146 Rule 6.10(3).

147 *Stubbs v J & J Lonsdale & Co Ltd* [1915] VLR 448.

148 *Mondial Trading Pty Ltd v Interocean Marine Transport Inc* (1985) 60 ALJR 277. See also *Ricegrowers' Co-operative Ltd v ABC Containerline NV* (1996) 138 ALR 480 (FCA).

149 See *Mondial Trading Pty Ltd v Interocean Marine Transport Inc* (1985) 60 ALJR 277; *Ricegrowers' Co-operative Ltd v ABC Containerline NV* (1996) 138 ALR 480 (FCA); *Takapana Investments Pty Ltd v Teco Information Systems Co Ltd* (1998) 82 FCR 25; *Swan Brewery Co Ltd v Atlee* [1998] FCA 277; *Immerman v London Pie Co Pty Ltd* [2000] FCA 97 at [17]; *Australian Securities and Investments Commission v Sweeney (No 2)* (2001) 38 ACSR 743; *Gate Gourmet Australia Pty Ltd (in liq) v Gate Gourmet AG* [2002] NSWSC 727; *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2007] FCA 124.

150 An order may be made for posting of the writ to the defendant at addresses within and outside Victoria: *Western Suburban & Notting Hill Permanent Benefit Building Society v Rucklidge* [1905] 2 Ch 472; *Trubner v Trubner* (1899) 15 PD 24. Under the previous practice substituted service within Victoria could be ordered notwithstanding that the writ was not in the form prescribed for service within Victoria (*Ford v Sheppard* (1885) 53 LT 564; *De Bernales v Bennett* (1894) 10 TLR 419), provided it was a case in which the

when the method of notice is immaterial, and it is likely to be the best means of notifying the defendant. Substituted service is one of the modes of service that a plaintiff may rely upon other than those prescribed by the rules.[151] The aim of substituted service is to achieve what personal service would have achieved (that is, notice) in cases where personal methods of service prove impracticable.

Rule 6.10 provides

6.10 Substituted service

(1) Where for any reason it is impracticable to serve a document in the manner required by these Rules, the Court may order that, instead of service, such steps be taken as the Court specifies for the purpose of bringing the document to the notice of the person to be served.

(2) Where the Court makes an order under paragraph (1), the Court may order that the document be taken to have been served—

(a) on the happening of any specified event; or

(b) on the expiry of any specified time.

(3) The Court may make an order under paragraph (1) notwithstanding that the person to be served—

(a) is out of Victoria; or

(b) was out of Victoria when the proceeding commenced.

In a proceeding against a minor service of the originating process may be effected by substituted service.[152]

The two limbs of the test for substituted service

[3.220] When substituted service will be ordered

The test developed by the court under O 9 r 2 of the *Rules of the Supreme Court 1884* (Vic) was that to obtain an order for substituted service, the plaintiff was required to satisfy two requirements. First, the plaintiff was to demonstrate that, at the date of the application for substituted service, actual personal service was practically impossible to effect.[153] Secondly, the plaintiff was required to propose a method of substituted service which would with reasonable probability — but not necessarily certainty

writ could properly have been served personally on the defendant out of Victoria under either O 11 of the *Rules of the Supreme Court 1884* (Vic) or the *Service and Execution of Process Act 1901* (Cth): *Myerson v Martin* [1979] 1 WLR 1390.

151 Other circumstances include where it is shown that the document has come to the knowledge of the person to be served (r 6.11) or, if the person to be served is a party, the party has waived the irregularity constituted by the failure to follow the correct procedure as, for instance, where the defendant, notwithstanding defective service of originating process, files an unconditional appearance.

152 *Ross v O'Callaghan* (1863) 2 W & W (E) 156 (substituted service could not be effected upon the infant's trustees who, as trustees, were not agents to whom authority was given to accept service); *Harrison v Harrison* (1892) 13 LR (NSW) Eq 151.

153 See *Porter v Freudenberg* [1915] 1 KB 857 decided under *Rules of the Supreme Court 1884* (Vic).

— bring the originating process to the notice of the defendant,[154] in the sense that the defendant would know of the proceedings being brought against them.[155] The rules provide that a court will not order substituted service unless the plaintiff demonstrates that, first, actual service is practically impossible under the circumstances, and that the proposed method is reasonably calculated to bring the proceedings to the attention of the defendant.[156]

[3.230] Element One: Practical impossibility

In *Porter v Freudenberg*[157] the defendant was an alien enemy resident in an enemy foreign jurisdiction. The defendant carried on business within the jurisdiction through an agent. The plaintiff obtained leave to issue a writ concurrently upon the principal, and the agent, and to substitute personal service of the writ with service of the notice of the writ on the defendant's agent within the jurisdiction.

In *Amos Removals and Storage v Small*[158] the defendants were committee members of a union against whom the plaintiff sought an injunction in relation to an action taken against an alleged conspiracy to interfere with a contract. The plaintiff sought to substitute actual service for service on the solicitor acting for some of the litigants in other litigation, and who was being paid by all of the defendants. The court made the order on the basis that personal service was practically impossible primarily because service would otherwise have to be effected within a short time upon 19 defendants dispersed across a wide geographical area. The number of defendants and their location were not in themselves significant considerations, but added weight to the brevity of the time for service.

In *Munkarra v Fischer*[159] the plaintiff was refused an order for substituted service. The plaintiff sued the defendant for damages in relation to personal injuries sustained when struck by the defendant's motorcycle. The plaintiff was unable to locate the defendant. The defendant's motorcycle had been insured and registered in Western Australia. The plaintiff's solicitors made numerous enquiries to locate the defendant. Their actions included

- causing enquiries to be conducted by a field officer of the North Australia Legal Service;

154 *Foxe v Brown* (1984) 59 ALJR 186.

155 See *Porter v Freudenberg* [1915] 1 KB 857; *Hilaire v Harvie* (1950) 68 WN (NSW) 61; *London Discount and Mortgage Bank v Daish* (1890) 16 VLR 325; *Zinc Corporation Ltd v Hirsch* [1916] VLR 550; *Re a Debtor* [1937] Ch 137; *Re De Cespedes* [1937] 2 All ER 572; *Re a Debtor* [1939] 3 All ER 429; *Grice v Grice* [1930] St R Qd 261; *Bank of Australasia v Tuplin* (1894) 15 ALT 225; *Deverall v Grant Advertising Inc* [1955] Ch 111; *Abbey National plc v Frost* [1998] 2 All ER 321.

156 This view was accepted in *O'Neil v Acott* (1988) 93 FLR 432.

157 *Porter v Freudenberg* [1915] 1 KB 857.

158 *Amos Removals and Storage Pty Ltd v Small* [1981] 2 NSWLR 525.

159 *Munkarra v Fischer* (1981) 5 NTR 3.

- requesting that enquiries be made in Perth by the Aboriginal Legal Service;
- placing newspaper advertisements in the Northern Territory and Western Australia;
- searching the electoral rolls of the Northern Territory, Western Australia and the Commonwealth;
- searching telephone directories;
- searching the Northern Territory Motor Vehicle Registry; and
- searching the Clerk of Court in Darwin for any prosecutions involving the defendant.

The court was not satisfied that the plaintiff's solicitors' actions were exhaustive or sufficient. It refused the application for substituted service on the basis that the plaintiff had not conducted enquiries in other Australian States and Territories, nor drivers' licence searches in other States and Territories, nor enquired at the German embassy or clubs as to whether the defendant held a drivers' licence.

In determining whether service is impracticable, the court is concerned with whether the prescribed form of service will be effective in the circumstances.[160] The plaintiff must lead evidence demonstrating the impracticability of personal service, and not merely that the prompt service will be difficult to achieve.[161] For the purposes of r 6.10 service is practicable if it can be effected in the manner prescribed by the rules.[162] The standard of the test is reasonableness, and the relevant time the time of the application. The enquiry to be made is whether or not a reasonable effort made at the time substituted service is being applied for (regardless of actions taken prior to the application) would suffice to serve the writ personally upon, and thereby bring the proceeding to the attention of, the defendant.[163]

The plaintiff cannot argue that service would be impracticable because it would be futile.[164] Service was held not to be impracticable for the purposes of r 6.10 on a plaintiff's application for substituted service on the last day available for service of the writ because the writ could be personally served the following day.[165] However, if service would be so

160 *Paragon Group Ltd v Burnell* [1991] 2 All ER 388.

161 See *Kendell v Sweeney* [2002] QSC 404.

162 *Paragon Group Ltd v Burnell* [1991] 2 All ER 388.

163 *Foxe v Brown* (1984) 59 ALJR 186. See also *O'Neil v Acott* (1988) 93 FLR 432.

164 *Paragon Group Ltd v Burnell* [1991] 2 All ER 388.

165 *Paragon Group Ltd v Burnell* [1991] 2 All ER 388. For discussion of the meaning of the words "impractical" and "impracticable" in the context of a rule of court authorising the making of an order for substituted service see *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2007] FCA 124 at [8]–[14]. Not only technical definitions but context and purpose were essential considerations to determining the meaning borne

futile as to be unwarranted it may be demonstrably impracticable.[166] The need to adhere to the procedure for serving an originating process in a foreign jurisdiction on a defendant resident outside Australia does not make service impracticable for the purpose of justifying an order to effect substituted service on the defendant in Australia.[167] Substituted service will not be ordered where credible evidence suggests that the defendant has died,[168] or where a period of years has passed since the defendant was last heard from.[169] However, substituted service can be justified where there is reason for believing that the defendant is avoiding contacting and communicating with others to evade service,[170] and investigations as to the defendant's location suggest that the method of substituted service to be employed would be effective.[171]

[3.240] Element Two: The plaintiff's proposed method of service

The High Court reversed a decision of the Supreme Court of Queensland permitting substituted service of a writ on a defendant whose whereabouts had been unknown for 45 years.[172] The court reasoned that it was improper to order service in circumstances where it was highly unlikely to achieve the objects of service, that is, notifying the defendant of proceedings against them so that they can take the steps necessary to protect their interests. Given the facts of the case it was not reasonable to suppose that the originating process would come to the defendant's attention. Similarly, it was held not appropriate to substitute the insurer for service on the defendant when the defendant in a motor vehicle accident was not able to be located.[173]

Methods of substituted service

[3.250] The court will order substituted service in a manner that is reasonably likely to notify the defendant of the proceedings. Whether the

by the word "impractical" in *Federal Court Rules 1979* (Cth), O 7 r 9, and distinguishing it if necessary from "impracticable". It was held that service was impractical where it was not "possible or feasible" (at [14]), or not "sensible and realistic in the circumstances" (at [13]).

166 *Ricegrowers' Co-operative Ltd v ABC Containerline NV* (1996) 138 ALR 480 (FCA); *Takapana Investments Pty Ltd v Teco Information Systems Co Ltd* (1998) 82 FCR 25; 153 ALR 377 at 378 (FCA); *Australian Securities and Investments Commission v Sweeney (No 2)* (2001) 38 ACSR 743.

167 *Ricegrowers' Co-operative Ltd v ABC Containerline NV* (1996) 138 ALR 480 (FCA). See also *Mondial Trading Pty Ltd v Interocean Marine Transport Inc* (1985) 60 ALJR 277.

168 *Simpson v Young* (1922) 39 WN (NSW) 126; *Haymarket Permanent Land, Building and Investment Co Ltd v Smith* (1923) 40 WN (NSW) 87; compare *Tredwell v Riley* (1909) 26 WN (NSW) 130.

169 *Rossiter v Robinson* (1893) 9 WN (NSW) 180; *Union Trustee Co of Australia v Carr* [1942] QWN 18; *O'Kane v Mildenhall* [1955] QWN 47.

170 *Howse v Campbell* (1881) 7 VLR (E) 145.

171 *Groves, McVitty & Co v Barkas* (1898) 4 ALR 106.

172 *Miscamble v Phillips* [1936] St R Qd 136.

173 *Chappell v Coyle* (1985) 2 NSWLR 73.

method proposed by the plaintiff is likely to bring proceedings to the defendant's attention depends on the circumstances of the case. The most common method is to leave the document with a person who knows where the defendant is and can reasonably be expected to deliver the documents, or notice of the proceedings, to them. Examples of this approach include leaving the document with a solicitor who has previously represented, and who remains in communication with, the defendant;[174] leaving the document with an agent authorised to accept service on behalf of the principal;[175] or leaving the document with the defendant's spouse.[176] Authority is divided as to whether leaving documents with an insurer achieves the objective of bringing proceedings to the defendant's notice. Substituted service on the insurer has been disallowed in some cases precisely because it would fail to notify the defendant.[177] In other cases where the court has issued an order to serve the insurer service has functioned to engage the insurer as a defendant in the proceedings rather than to inform the defendant of the proceedings against them.[178]

If no other person is able to be served on the defendant's behalf the court may order other modes of service.[179] For example, the originating process may be served by post to the most appropriate address which may, in the circumstances of the case, be either the defendant's home or business address.[180] Substituted service may also be able to be effected through email if it meets the notification objective of service. In *Permanent Custodians v Massey*[181] the court refused the plaintiff application to serve the defendant at either an email address supplied by the defendant, or either of the email addresses provided by a solicitor who purported to act for the defendant, as unlikely to bring proceedings to the defendant's attention, because it was not satisfied that either were able to be contacted at these addresses, or that the solicitor continued to act for the defendant.[182]

An application for substituted service is brought *ex parte* supported by an affidavit, or affidavits, exhibiting a sealed copy of the originating process,

174 *Dymond v Croft* (1876) 3 Ch D 512.

175 *Montgomery Jones & Co v Liebenthal & Co* [1898] 1 QB 487.

176 See *Bank of Whitehaven v Thompson* [1877] WN 45; *Mullows v Bannister* [1882] WN 183.

177 *Chappell v Coyle* (1985) 2 NSWLR 73.

178 *Lawford v Hosth* (1974) 5 ALR 57; *Nichols v Thiel* (1983) 74 FLR 420; *Munkarra v Fischer* (1981) 5 NTR 3; *Hunt v Molk* (1976) 11 ALR 288; approved on appeal from the decision of a master in *Centralian Industries Pty Ltd v Johnston* [1997] 1 VR 118.

179 In New South Wales substituted service for an act of recovery of land may be effected by affixing the originating process conspicuously to some part of the land: NSW r 10.15.

180 *Bradvica v Radulovic* [1975] VR 434 at 439–440.

181 See *Permanent Custodians Limited v Massey* [2009] QSC 4 at [12].

182 In *Permanent Custodians Limited v Massey* [2009] QSC 4 at [14], Wilson J also observed that in the circumstances other methods of substituted service ought to have been proposed.

and providing detailed information of the actions and steps taken to serve the defendant personally. The affidavit or affidavits will provide information sufficient to support the two limbs of the test in *Porter v Freudenberg*.[183] That is, it will demonstrate that it is practically impossible to effect personal service on the defendant by providing the name of the person who attempted to effect service; the location where service was attempted; the date, day and time that the attempt was or attempts were made; and the means by which the person to be served was identified. The affidavit will also provide detailed information about the method of service proposed to be substituted for personal service sufficient to enable the court to determine that the method to be used in the place of personal service will bring the proceedings to the notice of the defendant. The effect of substituted service is to serve the defendant personally. If the defendant fails to enter an appearance to the service the plaintiff may apply for a default judgment.[184]

SERVICE OUT OF JURISDICTION

Rule 7.01: Service out of jurisdiction

Service and Execution of Process Act 1992 (Cth)

Service outside a State or Territory but within Australia: Interstate service

[3.260] Service out of jurisdiction is contemplated by the cross-vesting laws. The service of an originating process outside an Australian State or Territory but within Australia is governed by SEPA. SEPA confers wide *in personam* jurisdiction upon State and Territory courts[185] over defendants outside the jurisdiction of those courts who have been served the proceedings in accordance with its provisions.[186] Section 12 provides that service of process under SEPA both has the same effect, and initiates the same proceedings as if the originating process had been served in the jurisdiction where process was issued. Section 15 enables a process issued in one State to be served in any other State,[187] and provides for the method of service on individuals,[188] registered corporations,[189] bodies corporate,[190] and bodies politic.[191] Section 130 provides that service enabled by SEPA is not to be limited by any inconsistent State laws governing the location where service may be effected. SEPA therefore

183 *Porter v Freudenberg* [1915] 1 KB 857.

184 *Grice v Grice* [1930] St R Qd 261; *Rosing v Ben Shemesh* [1960] VR 173.

185 *Kontis v Barlin* (1993) 115 ACTR 11.

186 Dixon CJ, Williams and Webb JJ in *Laurie v Carroll* (1958) 98 CLR 310.

187 SEPA s 15(1).

188 SEPA s 15(2): in accordance with the requirement of service in the place of issue.

189 SEPA s 15(3): in accordance with s 9.

190 SEPA s 15(4): in accordance with s 10.

191 SEPA s 15(5).

prevails and State and Territory rules of court[192] do not limit service of process *ex juris* within Australia.[193] To the extent that they purport to apply to proceedings served in another State or Territory they are inconsistent with the Commonwealth Act and no longer limit service *ex juris* within Australia.

There is no requirement under SEPA for the plaintiff to establish a connection between the State where proceedings were issued and the State where service is intended to be effected. Under s 20 a person served may apply for a stay of proceedings to the court which issued the initiating proceeding, and that court may order a stay of proceedings if the court of another State having jurisdiction is able to determine all the questions in dispute in the proceeding, and is the appropriate court to determine the matter.[194] In making an order to stay proceedings and in order to facilitate the determination by minimising the delay and expense of doing so, the court may impose conditions which it considers just and appropriate.[195] Section 20 has no application where a proceeding is pending in a State Supreme Court. Proceedings cannot be validly stayed by a court in a State where proceedings were not initiated on the basis that the State in which proceedings were initiated is not an appropriate forum for the matter to be heard.[196]

Unlike service outside Australia the types of proceedings for which SEPA provides interstate service are not limited to particular heads, nor are they required to fall within stipulated classifications. If service is effected under SEPA a plaintiff is not required to seek leave of the court to take a step in the proceeding if the defendant fails to enter an appearance.

[3.270] Method of service

Initiating process[197] issued in a State or Territory may be validly served under SEPA in another State or Territory without leave of the court.[198] The service of the initiating process on a defendant in another State is effected in the same way as originating process would be served in the State where proceedings had been issued.[199]

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192 For example, Pt 7 of the *Uniform Civil Procedure Rules 1999* (Qld), and its predecessor provision O 98 of the *Rules of the Supreme Court 1991* (Qld), where, if a proceeding was outside the State of Issue, leave was required to proceed to judgment in default of appearance.

193 A number of rules have been held to be inconsistent with SEPA s 130: see *Citibank Ltd v Nobes* (1993) 15 Qld Lawyer Reps 9; *Conners v Acheron* [1995] 1 Qd R 504; *Swanson v Harley* (1995) 125 FLR 182.

194 SEPA s 20(3). A determination under this section must be made taking into account the factors set out in s 20(4).

195 SEPA s 20(5).

196 SEPA s 21.

197 SEPA refers to the initiating process rather than to the originating process.

198 SEPA s 15(1).

199 SEPA s 15(2).

[3.280] Effect of service

Service under SEPA has the same effect and may give rise to the same proceedings as service in place of issue.[200] For service to be effective the plaintiff must have attached to the initiating process a copy of the prescribed notice which sets out the defendant's rights,[201] and details of the proceeding such as which court the originating process was issued from, and the time by when the person served must enter a notice of their intention to defend the proceedings. The defendant is required to enter an appearance within either 21 days, or the time within which an appearance would have been required to be entered if the initiating process had been served in the place in which it had been issued, whichever is longest.[202] In effect the defendant has 28 days to enter an appearance.

Service is effected by various means depending on the identity of the defendant. Service on individuals is effected by the means that would make service valid in the place proceedings were issued. Service on the Crown, whether Commonwealth or State, is effected in compliance with the laws enabling the Crown to be sued or served with process.[203] Service on companies or registered bodies is effected under SEPA rather than the Corporations Act.[204] Service is effected by leaving or posting it to the company's registered office, or by service upon two directors resident in Australia, or by sending it to the last registered address of the liquidator or official manager of the company that had been registered under the Corporations Act.[205]

Section 10 of SEPA governs service on a body corporate that is neither a company nor a registered body. It provides that service must be sent to or left at the place provided for by the laws of the State in which service is to be effected, and if there is no such provision in State law initiating process is to be left at or sent by post to the body corporate's principal office or principal place of business.

Rule 7.01(1)(a) – (n): Service outside Victoria and Australia

Service outside of Australia

[3.290] Order 7 allows service of an originating process on a defendant outside Australia. In general, the court will only have jurisdiction if the plaintiff is able to establish a nexus between the defendant, or the facts of

200 SEPA s 12.

201 SEPA s 16.

202 SEPA s 17(1)(a).

203 SEPA s 15.

204 SEPA s 9(9) specifically states that Corporations Act ss 109X(1), (2) and 601CX do not apply to a process order or document that is served under SEPA.

205 SEPA s 9.

the case, and the State.[206] Under the Victorian rules the originating process may be served outside Australia without the plaintiff needing to obtain leave of the court.[207]

Rule 7.01 provides the specific heads of claim for which service outside of Australia may be ordered. Service outside Australia will be effected only if the cause of action for which the plaintiff serves an originating process upon the defendant, or causes of action, if the plaintiff serves in respect of more than one cause of action, falls within one or more of the enumerated heads under the rules. The enumerated heads of service are:

(1) Originating process may be served out of Australia without order of the Court where—

(a) the whole subject matter of the proceeding is land situate within Victoria (with or without rents or profits) or the perpetuation of testimony relating to land so situate;

(b) any act, deed, will, contract, obligation or liability affecting land situate within Victoria is sought to be construed, rectified, set aside or enforced in the proceeding;

(c) any relief is sought against a person domiciled or ordinarily resident within Victoria;

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206 Order 7 was amended by *Supreme Court (Chapter I Amendment No 29) Rules 1993* (Vic), r 8 so as to restrict its operation to service out of Australia. This was in response to SEPA s 8(4)(a), which provides that the Act applies to the exclusion of a law of a State with respect to the service or execution of process in another State of process of that State that is process to which the Act applies. Order 7 replaced O 11 of the *Rules of the Supreme Court 1884* (Vic). Order 7 made several changes to the former practice for service out of Victoria under the rules of Chapter I. The more important are: (a) the abolition of the requirement that the plaintiff obtain the leave of the court before serving originating process outside Victoria; (b) a broadening of the grounds on which service out is authorised in tort claims and claims against multiple defendants; (c) in the case of service outside Australia, the abolition of the requirement of service of notice of originating process rather than the originating process itself.

207 Vic r 7.01; see also ACT r 6501; NSW r 11.2; NT r 7.01; Qld r 124; SA r 40; Tas r 147A. Leave must be sought to serve a writ (WA O 10 r 1), or an originating motion (WA O 10 r 7), outside the court's jurisdiction in Western Australia. Leave must be given in a "proper" case: WA O 10 r 4. In general, leave is necessary to serve an originating process in a foreign country in the Federal Court. However, service may be effective if the court confirms it, or the respondent files an address for service without making an application under FCR r 13.01 to set aside the originating process. The Federal Court may give leave for service outside jurisdiction if: the court has jurisdiction in the proceeding; the proceeding is of a kind mentioned in FCR r 10.42 (the claims where service outside the jurisdiction is permissible); and the party seeking leave has a *prima facie* case for relief. See *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at [3] per Black CJ and Finkelstein J. If the court has not granted leave to serve it can only confirm the service if these conditions are satisfied: service was authorised under a convention; or permitted under the laws of the foreign country: FCR r 10.43. FCR r 10.42 identifies the "kinds of" proceedings where service outside of jurisdiction may be effected. The originating application may be served if the proceeding "consists of or includes" one or more of those kinds of proceedings. The crucial question is whether the plaintiff has a *prima facie* case for the relief sought in the proceeding. Under FCR r 10.43 the plaintiff must demonstrate a *prima facie* case for relief in "all or any" of the grounds of relief sought. The court in *Bray v F Hoffmann-La Roche Ltd* (2003) 130 FCR 317 found that a *prima facie* case did not have to be made for all the causes of action. Service outside the jurisdiction is at the court's discretion.

(d) the proceeding is-

(i) for the administration of the estate of a person who died domiciled within Victoria; or

(ii) is for any relief or remedy which might be obtained in any such proceeding;

(e) the proceeding is for the execution, as to property situate within Victoria, of the trusts of a written instrument of which the person to be served is a trustee and which ought to be executed according to the law of Victoria;

(f) the proceeding is one brought to enforce, rescind, dissolve, rectify, annul or otherwise affect a contract, or to recover damages or other relief in respect of the breach of a contract, and the contract—

(i) was made within Victoria;

(ii) was made by or through an agent carrying on business or residing within Victoria on behalf of a principal carrying on business or residing out of Victoria; or

(iii) is governed by the law of Victoria;

(g) the proceeding is brought in respect of a breach committed within Victoria of a contract wherever made, even though that breach was preceded or accompanied by a breach out of Victoria that rendered impossible the performance of that part of the contract which ought to have been performed within Victoria;

(h) the proceeding is founded on a contract the parties to which have agreed that the Court shall have jurisdiction to entertain a proceeding in respect of the contract;

(i) the proceeding is founded on a tort committed within Victoria;

(j) the proceeding is brought in respect of damage suffered wholly or partly in Victoria and caused by a tortious act or omission wherever occurring;

(k) an injunction is sought ordering the defendant to do or refrain from doing anything within Victoria, whether or not damages are also claimed in respect of a failure to do or the doing of that thing;

(l) the proceeding is properly brought against a person duly served within or out of Victoria and another person out of Australia is a necessary or proper party to the proceeding;

(m) the proceeding is either brought by a mortgagee of property situate within Victoria (other than land) and seeks the sale of the property, the foreclosure of the mortgage or delivery by the mortgagor of possession of the property or brought by a mortgagor of property so situate (other than land) and seeks redemption of the mortgage, reconveyance of the property or delivery by the mortgagee of possession of the property, but does not seek, except so far as permissible under any other paragraph of this Rule, any personal judgment or order for the payment of any moneys due under the mortgage;

(n) the proceeding is brought under the Civil Aviation (Carriers' Liability) Act 1959 of the Commonwealth.

If the defendant fails to enter an appearance, or file a corresponding document, the court has discretion conferred by the rules to set aside service, or withhold from the plaintiff liberty to proceed, notwithstanding that the plaintiff's claim falls within the heads for which service in a foreign jurisdiction may be justifiably ordered.[208] The plaintiff cannot

208 *Agar v Hyde* (2000) 201 CLR 552 at 575.

enter a default judgment, or take any further step to prosecute the proceedings, without first applying to the court for leave to proceed.[209]

The High Court in *Agar v Hyde*[210] held that the plaintiff is authorised to serve the defendant if they have alleged a cause of action falling within one of the heads for service specified in the rules. By r 7.04 an onus is placed on the plaintiff to demonstrate to the court that it is strongly arguable that each cause of action falls under one or more of the heads of service at r 7.01.[211] Rule 7.04 requires the plaintiff to "satisfy" the court that the substance of the cause of action is such as to justify service outside Australia.

The various heads of damage are entirely independent of each other.[212] Therefore service out of the jurisdiction will only be permitted if the entire cause of action alleged against the defendant falls entirely within one, or another, of the enumerated heads of action. Therefore a cause of action that falls entirely outside the rules cannot be served in conjunction with,[213] or added by amendment to,[214] a claim that falls squarely within the types of claims for which service out of jurisdiction is permitted. For the purpose of service out of jurisdiction under r 7.01, a cause of action is not permitted to be partially but incompletely accommodated under one head, while the remaining part is contained within another. In other jurisdictions service may be effective only for that part of the cause of action which falls within the rules, and ineffective for that part that does not.[215]

Rule 7.01(1)(a): Land situated in Victoria

[3.300] Rule 7.01(1)(a) provides grounds for service out of Australia for disputes involving land situated within Victoria.[216] The land must be the subject matter of the proceeding in the sense that the claim being prosecuted involves either title to or possession of the land.[217] The rule is subject to strict interpretation. The cause of action must have the capacity

209 Vic r 7.04; see also ACT r 6508; NSW r 11.4; NT r 7.04; Tas r 147B; in Queensland the court must set aside service that was not authorised by the rules.

210 *Agar v Hyde* (2000) 201 CLR 552.

211 *Williams v Society of Lloyd's* [1994] 1 VR 274 the defendant applied under r 8.08 for service to be set aside.

212 *Matthews v Kuwait Bechtel Corporation* [1959] 2 QB 57.

213 *Quinlan v Safe International Forsakrings AB* (2006) 14 ANZ Insurance Cases 61-693 at [25].

214 *Earthworks and Quarries Ltd v FT Eastment & Sons Pty Ltd* [1966] VR 24.

215 *Tycoon Holdings Ltd v Trencor Jetco Inc* (1992) 34 FCR 31 at 34–35.

216 Vic r 7.01(1)(a); see also ACT r 6501(1)(b) and (s); FCR r 10.42 (item 21); NSW Sch 6 cl (j); NT r 7.01(1)(a); WA O 10 r 1(1)(a). The old *Service and Execution of Process Act 1901* (Cth) was wider in that it covered "land or other property" situated within the jurisdiction. In *Lyndsay Edmonds & Assocs Pty Ltd v Quest Sales Pty Ltd* (1979) 60 FLR 349 it was held that copyright is personal property which exists throughout Australia, and so was "other property" within the jurisdiction.

217 See *Victoria v Hansen* [1960] VR 582 at 585.

to directly and immediately affect the title,[218] and not merely indirectly or potentially effect title. This head of service out of jurisdiction is not applicable where the plaintiff is seeking to enforce a personal entitlement.[219]

Land is not the subject of the dispute if the claim merely concerns property located within the State. The determination of the matter must affect or be capable of affecting a party's claim to title,[220] or right to possession, to fall within this head of service out of jurisdiction. An example of how land may be the subject of a dispute justifying service out of Australia is where the owner or occupant of land is sued for amounts payable with respect to the land which, if judgment is given in favour of the plaintiff, the property may be charged with until the judgment is satisfied by the sale of the land forcing possession or title to be relinquished. A dispute without such consequences and effects, on the other hand, will not provide a basis for service outside jurisdiction.

It has been held that neither an action for breach of covenant to repair (which may affect the right of entry or re-entry),[221] nor an action to recover rent[222] (which could affect the right to possession), nor a claim under an insurance policy,[223] nor an action for the payment of a royalty on the oil extracted from an oil field in the Bass Strait[224] fall within the rule.

Perpetuation of testimony

[3.310] Despite the procedure being effectively redundant, in Victoria r 7.01(1)(a) provides that a proceeding may be initiated and service outside Australia effected to perpetuate testimony.[225] In a proceeding for the perpetuation of testimony evidence is recorded for future use where it is feared that a witness may not survive, or be available, to provide the evidence when the action to establish a right or a claim conditional upon the occurrence of a future event is brought on. The purpose of issuing the originating process in these cases is to seek to obtain facts from witnesses. The proceedings are entirely pre-suit and the matter is not set down for

218 *Agnew v Usher* (1884) 14 QBD 78.

219 *Agnew v Usher* (1884) 14 QBD 78.

220 Thus, a claim for duties payable in respect of land is not within the rule. See *Victoria v Hansen* [1960] VR 582 at 585; *Re Fowles* [1936] VLR 96 (a decision under *Service and Execution of Process Act 1901* (Cth), s 11(1)(a)(1)). See also *Clare County Council v Wilson* [1913] 47 ILTR 34.

221 *Tassell v Hallen* [1892] 1 QB 321.

222 *Agnew v Usher* (1884) 14 QBD 78.

223 *Muusers v State Government Insurance Office (Qld)* [1980] 2 NSWLR 73.

224 *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725.

225 See also ACT r 6501(1)(b)(ii); FCR 10.42 (item 22); NSW Sch 6 cl (k); NT r 7.01(1)(a); Tas r 147A(1)(j); WA O 10 r 1(1)(a).

trial. Prior to the commencement of a civil action a deposition to perpetuate evidence may be taken by the lawyer examining a witness before an examiner.

The originating process for an action for the perpetuation of testimony may be served outside the jurisdiction if the claim initiating process concerns property within the jurisdiction.

Rule 7.01(1)(b): Documents affecting property located in the jurisdiction

[3.320] Rule 7.01(1)(b) provides that service upon a foreign jurisdiction is permissible wherever "any act, deed, will, contract, obligation or liability affecting land situate within Victoria is sought to be construed, rectified, set aside or enforced in the proceeding". The Victorian rule expressly applies only to real property.[226] The claim is not one "affecting" land within Victoria if it is merely a claim "in relation to" land situated in Victoria. The application of the rule is only attracted if the claim for relief produces a direct effect on the land.[227]

In *Official Solicitor v Stype Investments (Jersey)*[228] under a declaration of trust Stype Investments (a Jersey resident company) declared that on the conveyance of an estate to them they would hold the property in it as a bare nominee for the testator, who remained the beneficial owner, accounting to the owner for proceeds of rent and profits from sale of the land. The internal revenue service sought to enforce an obligation of the trustee to pay taxes due from the sale of the land situated in England after the testator's death.

In *Muusers v State Government Insurance Office (Qld)*[229] a prime mover had been damaged in an accident in New South Wales. The insurer who was incorporated in Queensland refused to accept liability for the damage. The plaintiff commenced an action in New South Wales and sought leave to serve process on the insurer. The court denied the application for service out of the State reasoning that the insurance policy did not constitute a liability affecting the insured prime mover in New South Wales.

Slander of title claims do not fall within r 7.01(1)(b).[230] The breach of a covenant to repair within a lease giving rise to acclaim against the

226 The rules of the Federal Court, New South Wales and Queensland apply to both real and personal property.

227 *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725; *Victoria v Hansen* [1960] VR 582; *Muusers v State Government Insurance Office (Qld)* [1980] 2 NSWLR 73.

228 *Official Solicitor v Stype Investments (Jersey) Ltd* [1983] 1 WLR 214.

229 *Muusers v State Government Insurance Office (Qld)* [1980] 2 NSWLR 73.

230 *Casey v Arnott* (1876) 2 CPD 24; *Bree v Marescaux* (1881) 7 QBD 434. In Victoria only statements disputing the ownership of real property likely to adversely affect the value of the property needs be considered, whereas in other jurisdictions the disputed title may relate to real or personal property.

assignees of the lease fell within r 7.01(1)(b).[231] A claim for instalments of the price due under a contract of sale of land situated within the jurisdiction is within r 7.01(1)(b),[232] as is a claim for selling land in breach of the terms of the trust under which the defendants hold the land,[233] and a proceeding in relation to a mortgage of land situated in Victoria.[234]

Rule 7.01(1)(c): Defendant domiciled or ordinarily resident within Victoria

[3.330] Rule 7.01(1)(c) allows service of an originating process out of Australia when relief is claimed, on any cause of action whether arising within or outside Victoria,[235] "against a person domiciled or ordinarily resident within Victoria", but who is temporarily absent from it.[236]

For the purposes of r 7.01(1)(c) a "person" may be a natural person or a corporation.[237] A person is "domiciled" within Victoria if they have a fixed place of residence in Victoria, and

- do not currently intend to move from the jurisdiction; and
- have no plans to move from the jurisdiction; and
- are not in the process of moving from the jurisdiction.[238]

A foreign corporation may be "ordinarily resident within Victoria" for the purposes of r 7.01(1)(c).[239] A foreign corporation resident within Victoria may be served in accordance with r 6.04. Otherwise r 7.01(1)(c) entitles the plaintiff to pursue service outside Australia and to serve the foreign corporation in the country in which they are incorporated.[240]

231 *Tassell v Hallen* [1892] 1 QB 321. See also *Agnew v Usher* (1884) 14 QBD 78; *Kaye v Sutherland* (1887) 20 QBD 147.

232 See *Johnson v Christie* [1935] QWN 44.

233 *Attorney General v Draper's Co* [1894] 1 IR 185.

234 See *Rhind v Clarke* (1880) 1 ALT 179; *Bank of Victoria Ltd v Robertson* (1897) 23 VLR 3.

235 *Lenders v Anderson* (1883) 12 QBD 50; *Hadad v Bruce* (1892) 8 TLR 409.

236 In the Federal Court the rule covers companies which trade or are incorporated inside the jurisdiction.

237 *Williams v United States and Australasia Steamship Co* (1908) 25 WN (NSW) 43; *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725 at 739–740; *Interpretation of Legislation Act 1984* (Vic), s 38, definition of "person".

238 See *Re Craignish; Craignish v Hewitt* [1892] 3 Ch 180; *Spurway v Spurway* [1894] 1 IR 385; *Drexel v Drexel* [1916] 1 Ch 251.

239 *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725.

240 *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725.

Rule 7.01(1)(d): Administration of estates

[3.340] Rule 7.01(1)(d) permits service out of the jurisdiction in a proceeding for the administration of an estate of a person who died domiciled within Victoria, or where the plaintiff is seeking a remedy in relation to a proceeding for the estate's administration.[241]

The rule is strictly applied, and adherence must be complete.[242] The proceeding must meet the precondition that the person died while domiciled within Victoria,[243] and estate property must be situated within Victoria.[244]

Rule 7.01(1)(e): Execution of trusts

[3.350] Rule 7.01(1)(e) permits service of originating process outside the jurisdiction when service is to be effected on the trustee of a written trust in a proceeding for the execution of a trust, the subject of which is property situated within Victoria, in accordance with Victorian law.[245] The trust property need not be situated entirely within the jurisdiction for service to be authorised, as long as part of the property is in Victoria.[246]

Winter v Winter determines the relevant time for the property the subject of the trust to be within the jurisdiction as the time when the plaintiff applies to the court for leave to serve the originating process outside the jurisdiction, or when service is effected, or at the latest when an application to set aside the writ is made.[247] However, in *Official Solicitor v Stype Investments (Jersey)*[248] Whitford J opined that a more suitable time would be the day that the cause of action had accrued, and this his Honour would have so ordered had not *Winter v Winter* been otherwise decided.[249]

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241 For a case of service out of Victoria in an administration suit under *Judicature Act 1883* (Vic), s 59, see *Bell v Kemp* (1889) 15 VLR 525.

242 *Re Eager; Eager v Johnstone* (1882) 22 Ch D 86.

243 *Wood v Middleton* [1897] 1 Ch 151.

244 *Winter v Winter* [1894] 1 Ch 421.

245 Vic r 7.01(1)(e); see also ACT r 6501(1)(f); FCR r 10.42 (item 7); NSW Sch 6 cl (p); NT r 7.01(1)(e); Qld r 124(1)(f); SA r 40(1)(g); Tas r 147A(1)(q); WA O 10 r 1(1)(d). In some jurisdictions a wider right to serve outside jurisdiction permits service out of a proceeding to execute a trust that is governed by the law of the forum.

246 *Official Solicitor v Stype Investments (Jersey) Ltd* [1983] 1 WLR 214.

247 *Winter v Winter* [1894] 1 Ch 421; decided under the former English *Rules of the Supreme Court 1883*, O 11 r 1(d). In England see *Re Kerr's Settlement Trusts* [1963] Ch 553.

248 *Official Solicitor v Stype Investments (Jersey) Ltd* [1983] 1 WLR 214; [1983] 1 All ER 629 at 639.

249 *Official Solicitor v Stype Investments (Jersey) Ltd* [1983] 1 WLR 214; [1983] 1 All ER 629 at 639.

Rule 7.01(1)(f): Breach of contract made within jurisdiction

[3.360] Originating process may be served on a defendant out of Australia under r 7.01(1)(f), (g) and (h) if any one of five situations arise in relation to contract. Rule 7.01(1)(f) provides for service outside the jurisdiction if:

> (f) the proceeding is one brought to enforce, rescind, dissolve, rectify, annul or otherwise affect a contract, or to recover damages or other relief in respect of the breach of a contract, and the contract—
>
> (i) was made within Victoria;
>
> (ii) was made by or through an agent carrying on business or residing within Victoria on behalf of a principal carrying on business or residing out of Victoria; or
>
> (iii) is governed by the law of Victoria… .

Under r 7.01(1)(f) service is permitted if the proceeding has been brought in relation to a contract having a nexus with Victoria in the sense that it was made within Victoria, or made by a resident agent representing a foreign principal, or governed by Victorian law.

Rule 7.01(1)(g) provides that

> (g) the proceeding is brought in respect of a breach committed within Victoria of a contract wherever made, even though that breach was preceded or accompanied by a breach out of Victoria that rendered impossible the performance of that part of the contract which ought to have been performed within Victoria… .

The originating process may be served outside Victoria in relation to a contract made in any jurisdiction if the contract was breached within Victoria, regardless of whether a prior breach in another jurisdiction rendered it impossible to perform the contract within Victoria.

In Victoria service out is permitted if there is an agreement between the parties giving Victorian courts jurisdiction in relation to proceedings arising from the contract. Rule 7.01(1)(h) provides for service in another jurisdiction when:

> (h) the proceeding is founded on a contract the parties to which have agreed that the Court shall have jurisdiction to entertain a proceeding in respect of the contract… .

The five situations enumerated in r 7.01(1)(f), (g) and (h) are disjunctive, and operate in the alternative. A plaintiff is entitled to serve process on a defendant if their claim is captured by any of the identified situations.[250] Further, claims are not required to be founded exclusively on contract. Claims may arise under both contracts and trusts.[251]

The term "contract" does not bear the same meaning as in contract law. It is more widely construed, and is applied more extensively, so as to include

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250 See *Wansborough Paper Co Ltd v Laughland* [1920] WN 344.

251 *Official Solicitor v Stype Investments (Jersey) Ltd* [1983] 1 WLR 214.

> implied, constructive or fictitious contracts, without any consensual element … cases where assumpsit or an indebitatus assumpsit count would have been available at common law … (and) an action on a foreign judgment, an action on an account stated, an action for money had and received may be treated as an action upon a contract.[252]

In *Rousou's Trustee v Rousou*[253] a bankrupt gave money to his children. An action for money had and received that lay against the children was an action upon a contract entitling the plaintiff to serve process out of jurisdiction. For the purposes of service out of jurisdiction under the rules an action in *quantum meruit* has been held to be an action in *indebitatus assumpsit* and therefore in contract.[254] If one party is liable under a statute to pay money to another the obligation is considered contractual[255] and the requirements for service out under a contract are satisfied.[256] Being statutorily obligated to pay rates or land taxes may also be considered contractual.[257]

The following have been held to be claims in respect of the breach of a contract for the purpose of the provisions relating to service out of Victoria: money due upon an account stated;[258] and money due under a judgment.[259] The liability may arise under a statute of another State.[260] A claim to recover stamp duty on an instrument of transfer of stock units in a Victorian company was not within s 11(1)(a)(2) of the former *Service and Execution of Process Act 1901* (Cth) as the stock units are not the subject of the claim.[261]

Rule 7.01(1)(f) explicitly refers to claims which seek to enforce, rescind, dissolve, rectify, annul, or otherwise affect a contract, or to recover damages, or which seek other relief in respect of the breach of a contract. The reference to proceedings which "otherwise affect" (r 7.01(1)(f)) a contract is to be widely construed to encompass both practical and legal

252 *Wilson Electric Transformer Co Pty Ltd v State Electricity Commission (NSW)* [1968] VR 330 at 332 per Adam J. See also *Gilchrist v Dean* [1960] VR 266 at 271; *Gosper v Sawyer* (1985) 160 CLR 548.

253 *Rousou's Trustee v Rousou* [1955] 1 WLR 545.

254 *Earthworks and Quarries Ltd v FT Eastment & Sons Pty Ltd* [1966] VR 24; see also *McFee Engineering Pty Ltd v CBS Constructions Pty Ltd* (1980) 44 FLR 340; *Schweitzer v Kronen Verwaltungs GmbH* [1998] VSC 190.

255 *Victoria v Hansen* [1960] VR 582.

256 *Belyando Shire Council v Rivers* [1908] QWN 17 (municipal rates); *Chenoweth v Summers* [1941] ALR (CN) 364 (income tax); *Victoria v Hansen* [1960] VR 582 (stamp duty). See also *Gilchrist v Dean* [1960] VR 266 at 271.

257 *Chenoweth v Summers* [1941] ALR (CN) 364; *Victoria v Hansen* [1960] VR 582.

258 *Halliday v Ryan* [1938] ALR 200.

259 *Adcock v Aarons* (1903) 5 WALR 140; *Nominal Defendant v Motor Vehicle Insurance Trust of Western Australia* [1983] 3 NSWLR 309; see also *Nominal Defendant v Bagot's Executor and Trustee Co Ltd* [1971] SASR 346.

260 *Nominal Defendant v Motor Vehicle Insurance Trust (WA)* (1982) 45 ALR 697.

261 *Victoria v Hansen* [1960] VR 582.

effects.[262] The breadth of the language of the provisions is such as to catch an extensive range of circumstances in which service out will be permitted under the rules,[263] as long as the relief sought affects a contract. Claims may therefore be brought in respect of a breach of contract between other parties, or one party to a contract may seek a remedy against a third party, because other parties and third parties may affect a contract within the meaning of these rules. However, the plaintiff must demonstrate the existence of a contract between themselves and the defendant. It is not sufficient that the plaintiff is in a contractual relation with a third party.

A claim otherwise affecting contract cannot be brought under this rule if the plaintiff has sought declaratory relief denying the existence of the contract.[264] However, the rules are so formulated that a plaintiff applying for a declaration that a contract, because it has been frustrated, repudiated or on some other basis, should be discharged, is making a claim that will "otherwise affect" a contract.[265]

If a contract is governed by the law of Victoria and a cheque is provided in relation to that contract, a claim in relation to the cheque so provided may be captured by r 7.01(1)(f)(iii) as a claim affecting a contract governed by the law of Victoria.[266]

Matters held not to be claims otherwise affecting a contract include

- one tortfeasor seeking a contribution from another on the basis of a statutory provision supporting the right to do so the basis of which was held to be an equitable, not a contractual, right;[267]
- an employer seeking to recover an indemnity from an alleged tortfeasor which claim was held to substantively tortious, and not an action in recovery of damages for contractual breach;[268] and
- an action seeking the variation or avoidance of a trust deed.[269]

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262 *Tana v Baxter* (1986) 160 CLR 572.

263 *Nominal Defendant v Motor Vehicle Insurance Trust of Western Australia* [1983] 3 NSWLR 309; *Tana v Baxter* (1986) 160 CLR 572.

264 *Finnish Marine Insurance Co Ltd v Protective National Insurance Co* [1990] 1 QB 1078.

265 *BP Exploration Co (Libya) Ltd v Hunt* [1976] 1 WLR 788.

266 See *EF Hutton & Co (London) Ltd v Moffarij* [1989] 2 All ER 633; [1989] 1 WLR 488.

267 *Gilchrist v Dean* [1960] VR 266 at 271. The basis of the right has been held to be the equitable right to contribution between trustees guilty of a breach of trust and not the claim on statutes held to arise under contract.

268 *Wilson Electric Transformer Co Pty Ltd v State Electricity Commission (NSW)* [1968] VR 330, the employer's claim being brought under the former *Workers Compensation Act 1958* (Vic), s 62.

269 *Gosper v Sawyer* (1985) 160 CLR 548. However, according to Mason and Deane JJ, an application to vary a trust established and governed under a contract might, in a proper case, be viewed as affecting a contract.

Rule 7.01(1) is not engaged by the appointment of a company director — such an appointment giving rise to a fiduciary rather than contractual relationship.[270]

A plaintiff may serve an originating process in a foreign jurisdiction if the claim is in relation to a contract that was made within Victoria,[271] and the plaintiff presents a strong arguable case that it was so made.[272] While the determination that the contract was made within Victoria applies the classical principles of contract law, in some circumstances difficulties in determining whether the contract was made within Victoria may arise. This is especially so if the agreement upon which the claim is raised is not contained squarely and completely within a single document but is written and oral, with the written part being distributed amongst several documents of different types, and the oral part being the result of multiple conversations. The matter may be resolved by identifying Victoria as the place where the last act necessary to form the agreement occurred.

In determining whether service out of jurisdiction is required for the purpose of r 7.01(1)(f) determining where the contract was made is central. The general rules of contract formation apply, in particular that the contract is made where the acceptance of the offer communicated by the offeree is received by the offeror,[273] including cases where the parties — although separated in space — are able to communicate by instantaneous means such as radio, telex, telephone or fax.[274] The acceptance of an offer for the formation of a contract in Victoria provides

270 *Newtherapeutics Ltd v Katz* [1991] Ch 226; [1991] 2 All ER 151 at 174.

271 Rule 7.01(1)(f).

272 *WA Dewhurst & Co Pty Ltd v Cawrse* [1960] VR 278 at 281–282. A strong arguable case requires the case to be more than *prima facie*.

273 *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34. It follows that the contract is made when acceptance of an offer is communicated to the offeror: *Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93 at 111.

274 See *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34, approving *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327: the English company sent a telex offer to the defendant's company in Holland who accepted by telex message sent from Holland and received in London. The Court of Appeal rejected the defendant's contention that the contract was made in Holland and the English courts had no jurisdiction over the contract, reasoning that communication by telex constituted negotiation in each other's presence so that the contract was made in London which was where the acceptance was received. So service out of jurisdiction could be affected under the rules. See also *Mendelson-Zeller Co Inc v T & C Providores Pty Ltd* [1981] 1 NSWLR 366; *Leach Nominees Pty Ltd v Walter Wright Pty Ltd* [1986] WAR 244 (acceptance by telex where the telex used by the offeree to communicate acceptance of the offer was a public facility); *Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd* (1996) 68 FCR 539. See also *BP Exploration Co (Libya) Ltd v Hunt* [1976] 1 WLR 788 at 797–798.

the basis of service out of jurisdiction.[275] In the case of a contract formed by a party incurring a statutory obligation to pay money the place of formation is where the act obliging the payment occurred.[276]

Rule 7.01(1)(f)(ii): Contract made by agent in jurisdiction

[3.370] In Victoria service out is allowed under r 7.01(1)(f)(ii) when the contract "was made by or through an agent carrying on business or residing within Victoria on behalf of a principal carrying on business or residing out of Victoria".[277] The rule only applies where the principal carrying on business or residing out of Victoria is the defendant, it does not apply where the principal is the plaintiff.[278]

To be captured by the rule the contract need not therefore have been "made by" the agent on behalf of the foreign principal, as long as the contract arises "through" the agent within Victoria.[279] Nor is it necessary

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275 The postal acceptance rule is only effective if it is to be inferred that the offeror contemplated and intended that the offer might be so accepted. See *Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93 at 111; *Nunin Holdings Pty Ltd v Tullamarine Estates Pty Ltd* [1994] 1 VR 74. In *HC Sleigh Ltd v Barry Clarke & Co Ltd* [1954] SASR 49 service out of the jurisdiction was upheld on the ground that the contract was within either the equivalent in South Australia of subpara (i) or subpara (ii) of r 7.01(1)(f). In *HC Sleigh Ltd v Barry Clarke & Co Ltd* the plaintiff in South Australia sent to the defendant an order setting out the details of offer and acceptance, and the defendant in Scotland sent to the plaintiff a confirmatory sale note. The court held the contract was made in South Australia and allowed service out of jurisdiction. In *Elders IXL Ltd v Lindgren Pty Ltd* (1987) 79 ALR 411 a case under *Federal Court Rules 1979* (Cth), O 8 r 1(a), service out of the jurisdiction was not allowed as the contract in question was neither made within, nor designed to be performed within, the Commonwealth. The customary relationship between an insured, underwriters and Lloyd's brokers is that the broker is the agent of the insured and not of the underwriter. Accordingly, where brokers in New South Wales on behalf of the plaintiff engaged a Lloyd's broker to go into the Lloyd's market to obtain insurance with London underwriters, it was held that the contract of insurance with the underwriters was not made in New South Wales: see *Hartogen Energy Ltd v Cowley* (1990) 6 ANZ Insurance Cases 61-001 (NSWSC).

276 See *Victoria v Hansen* [1960] VR 582 at 587. For cases of a contract held to have been made within Victoria for the purpose of r 7.01(1)(f)(i), see *Lewis Construction Co Pty Ltd v M Tichauer Société Anonyme* [1966] VR 341; *Deer Park Engineering Pty Ltd v Townsville Harbour Board* [1975] VR 338. For a case of a contract of employment held to have been made within the jurisdiction see *Chicago Bridge and Iron Constructors Pty Ltd v Sarvandis* (1986) 44 SASR 418.

277 This paragraph should be read with r 6.13. Both provisions deal with service of originating process in a claim arising out of a contract made by the plaintiff with an agent acting in Victoria on behalf of a foreign principal, the defendant. See *M & B Distributors Pty Ltd v Mitsubishi Nippon Heavy Industries Ltd* (unreported; VSC; Adam J; 27 March 1962). Rule 6.13 allows the plaintiff, by leave of the court, to serve the defendant with originating process by serving the process on the agent in Victoria. Rule 7.01(1)(f)(ii) provides that the plaintiff may serve the originating process on the defendant out of Australia.

278 *Union International Insurance Co Ltd v Jubilee Insurance Co Ltd* [1991] 1 WLR 415.

279 *The Metamorphosis* [1953] 1 WLR 543; *M & B Distributors Pty Ltd v Mitsubishi Nippon Heavy Industries Ltd* (unreported; VSC; Adam J; 27 March 1962).

to comply with the provision that the agent have authority to enter into a contract on behalf of the foreign principal,[280] or that the principal executes the contract outside Victoria, as long as the agent and the principal are in an agency relationship when the agent is dealing with the plaintiff.[281] Facilitating, or arranging for the execution of, a contract within Victoria executed by the principal is sufficient to satisfy the rule.[282]

The relevant time for the agent to have been the agent of the principal is at the time that the contract was made by or through the agent. That is to say, when the relevant dealing with the plaintiff took place. It does not fall within the rules governing service out of jurisdiction for the person to subsequently assume the position of the principal's agent.[283]

Rule 7.01(1)(f)(iii): Contract governed by law of Victoria

[3.380] Under r 7.01(1)(f)(iii) a proceeding may be served outside Victoria if it is in respect of a contract governed by the law of Victoria. The proper law of the contract is the law the parties have chosen. A contract is governed by the law of Victoria if the contract by its express terms evinces the parties' intention to so provide, or if that intention can be inferred from a construction of the contract's terms in the context of the circumstances of the case.[284] Courts will respect the parties' express choice of law[285] and will not in normal circumstances override it.[286] The proper law of the contract may be that of a forum other than Victoria even if it has no substantial connection with the contract, whilst Victoria does.

If parties fail to express any intention as to what the proper law of the contract will be, the court selects the law to govern the contract. The court will look to the law with which the contract has the closest, real and most

280 *National Mortgage and Agency Co of New Zealand Ltd v Gosselin* (1922) 38 TLR 832; applied in *HC Sleigh Ltd v Barry Clarke & Co Ltd* [1954] SASR 49. "It is clear that the words 'by or through an agent' contemplate cases in which, although the agent did not make the contract, nevertheless the contract when made could be said to have been made through the efforts and intervention of the agent": *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725 at 747 per Murray J. See also *Commonwealth Bank of Australia v White* [1999] 2 VR 681.

281 *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725.

282 *HC Sleigh Ltd v Barry Clarke & Co Ltd* [1954] SASR 49; *Commonwealth Bank of Australia v White* [1999] 2 VR 681 at 694–695.

283 *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725; *Commonwealth Bank of Australia v White* [1999] 2 VR 681. See also *Williams v Society of Lloyd's* [1994] 1 VR 274 at 307–308.

284 *Weckstrom v Hyson* [1966] VR 277 at 282. A contract may be governed by Victorian law even though it was not formed, breached, or to be performed in Victoria.

285 *Lewis Construction Co Pty Ltd v M Tichauer Société Anonyme* [1966] VR 341; *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725.

286 See *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725 at 747–748.

substantial connection.[287] A contract that does not provide a choice of law, but provides for a forum for the resolution of the dispute indicates thereby that the forum law is intended to be the proper law of the contract.[288] A contract providing that its terms "shall be interpreted and applied" in accordance with the law of Victoria[289] similarly identified Victorian law as the proper law of the contract.

In *Attock Cement v Romanian Bank for Foreign Trade*[290] a performance bond given in respect of a building contract expressed no intention as to the law by which it was to be governed. The proper law of the building contract was, on its terms, English law. The plaintiff brought an action on the performance bond under English law arguing that by implication it was governed by the same law as the contract. The court held the implication to be unjustified since the performance bond was a separate transaction to the building contract which did not provide the proper law for other transactions. The performance bond had a closer and more substantial connection with a jurisdiction other than England on the basis that payment was to be made in that other jurisdiction.

The contract is properly governed by the law prevailing at the time the contract was entered into by the parties. The parties cannot decide at the time of formation that the law governing the contract will depend on an uncertain future event,[291] or on a post-contractual decision of the parties.[292]

Rule 7.01(1)(g): Breach of contract inside jurisdiction

[3.390] Rule 7.01(1)(g) provides that a breach of contract within Victoria will permit a plaintiff to serve a defendant outside Victoria regardless of where the contract was made, even if the performance of the contract within Victoria was rendered impossible by a preceding or concurrent breach outside Victoria.[293] The test for service requires an

287 *Bonython v Commonwealth* (1950) 81 CLR 486; *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572; *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd* (1989) 18 NSWLR 172 at 180. See also *Weckstrom v Hyson* [1966] VR 277; *Lewis Construction Co Pty Ltd v M Tichauer Société Anonyme* [1966] VR 341.

288 *NV Kwik Hoo Tong Handel Maatschappij v James Finlay & Co Ltd* [1927] AC 604; *Lewis Construction Co Pty Ltd v M Tichauer Société Anonyme* [1966] VR 341 at 346; *Armadora Occidental SA v Horace Mann Insurance Co* [1977] 1 WLR 1098.

289 See *Vita Food Products Inc v Unus Shipping Co Ltd (in liq)* [1939] AC 277 at 298; *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725 at 748.

290 *Attock Cement Co Ltd v Romanian Bank for Foreign Trade* [1989] 1 WLR 1147.

291 *Armar Shipping Co Ltd v Caisse Algerienne d'Assurance et de Reassurance (The Armar)* [1981] 1 WLR 207.

292 *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1983] 1 All ER 873.

293 Rule 7.01(1)(g) corresponds to *Service and Execution of Process Act 1901* (Cth), s 11(1)(c). The predecessor to r 7.01(1)(g), O 11 r 1(e) of the *Rules of the Supreme Court 1884* (Vic), in its original form did not permit service out of Victoria if there had occurred outside Victoria a breach of the contract which rendered impossible performance of the part of

enquiry into whether a contract was breached within Victoria which the court approaches as three separate questions.[294] First, the court examines whether there is evidence demonstrating that a contract existed;[295] secondly, and only if a contract is demonstrated to exist, the court asks whether it was breached;[296] and, thirdly, if the contract was breached, it determines whether the breach occurred within Victoria.[297]

Determining where the breach occurred depends on the construction of the facts alleged to constitute the breach in the context of the contract as a whole. For service out of jurisdiction for a breach of contract inside the jurisdiction the obligation breached must be one required to be performed within the jurisdiction. If it was possible under the contract for the defendant to have performed the contract outside the jurisdiction the plaintiff cannot base service on a breach of contract occurring within the jurisdiction.[298]

A contract may be breached by a party either not performing a required obligation, or acting in a way contrary to their obligations. The location of the breach may depend on whether the act constituting the breach was a non-performance in the former sense, or a wrongful act in the latter. A breach based on a wrongful act occurs in the jurisdiction where the act was performed. In the case of *Safran v Chani* the breach was constituted by posting a letter and occurred in the jurisdiction where the letter was posted.[299]

In *South Adelaide Football Club v Fitzroy Football Club (No 1)*,[300] the plaintiff alleged breach of contract against two defendants in South Australia, and the tort of inducement of those breaches of contract in South Australia against a third defendant incorporated in Victoria. The claim against the third defendant was held to have fallen within the meaning of s 11(1)(c) of the former *Service and Execution of Process Act 1901* (Cth) of a claim in respect of contractual breaches occurring in South Australia.

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the contract which ought to have been performed within Victoria: *Johnson v Taylor Bros & Co Ltd* [1920] AC 144. The rule was amended in Victoria in 1959 to overcome this limitation. See *Malik v Narodni Banka Ceskoslovenska* [1946] 2 All ER 663; *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725 at 748. After *Johnson v Taylor Bros* the rules were widened in most jurisdictions to cover breaches which take place inside the jurisdiction as a consequence of an act which occurred outside the jurisdiction. *Oppenheimer v Louis Rosenthal & Co AG* [1937] 1 All ER 23.

294 *Malik v Narodni Banka Ceskoslovenska* [1946] 2 All ER 663.

295 *M'Stephens v Carnegie* (1880) 49 LJ Ch 397; *Hughes v Oxenham* [1913] 1 Ch 254.

296 *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725 at 749.

297 *Hemelryk v William Lyall Shipbuilding Co Ltd* [1921] AC 698 at 701; *Crozier, Stephens & Co v Auerbach* [1908] 2 KB 161; *Malik v Narodni Banka Ceskoslovenska* [1946] 2 All ER 663.

298 *Cuban Atlantic Sugar Sales Corporation v Compania de Vapores San Elefterio Lda* [1960] 1 QB 187; *BP Australia Ltd v Wales* [1982] Qd R 386.

299 *Safran v Chani* [1970] 1 NSWR 70; see also *Martin v Stout* [1925] AC 359.

300 *South Adelaide Football Club Inc v Fitzroy Football Club (No 1)* (1988) 49 SASR 380.

Failing to perform an obligation at the time that obligation was required to be performed within the jurisdiction constitutes a breach within the jurisdiction. Failing to make a payment in Queensland on a crane manufactured in Victoria was a breach in Queensland where the obligation was required, but failed, to be performed.[301] Similarly, a defendant was able to be served in Sweden after having failed to pay a premium due under an insurance policy in Australia.[302]

An agent's failure to perform an obligation outside the jurisdiction cannot be imputed to the principal as a breach of contract within the jurisdiction.[303] A contract which does not specify where an obligation for the benefit of a party within the jurisdiction is to be performed is to be performed within the jurisdiction.[304] But if the agreement requires the obligation to be performed outside the jurisdiction the failure to do so constitutes a breach of contract within the jurisdiction.[305]

Rule 7.01(1)(h): Agreement to submit to jurisdiction

[3.400] Under r 7.01(1)(h)[306] in Victoria service out is permitted only on the basis of a contract containing a term under which the parties agree to submit to jurisdiction in disputes over the contract.[307]

Submission to jurisdiction

[3.410] In Victoria rr 6.14 and 7.01(1)(h) permit service on a party who submits to jurisdiction.[308]

Rule 7.01(1)(i): Tort committed within jurisdiction

[3.420] Rule 7.01(1)(i) provides that service out of Australia of an originating process may be effected in proceedings to recover damages

301 *Deer Park Engineering Pty Ltd v Townsville Harbour Board* [1975] VR 338.

302 *Quinlan v Safe International Forsakrings AB* (2006) 14 ANZ Insurance Cases 61-693.

303 *Gosman v Ockerby* [1908] VLR 298.

304 *International Corp v Besser Manufacturing Co* [1950] 1 KB 488. In the case the obligation was the payment of a debt.

305 *Comber v Leyland and Bullins* [1898] AC 524: regarding the payment of a debt.

306 Rule 7.01(1)(h) is based on O 11 r 1(e) of the *Rules of the Supreme Court 1884* (Vic), which dealt with the validation of service, either within or out of Victoria, which had been effected in a particular way as stipulated by the parties in their contract. This subject is now covered by r 6.14. Apart from r 6.14 parties may by agreement substitute a special mode of service for that established by the rules.

307 See similarly restrictive rules in NT r 7.01(1)(h); Qld r 124(1)(i); WA O 10 r 2. However, the corresponding rule in other jurisdictions is drafted less restrictively, permitting service outside jurisdiction where the parties have agreed to the forum's jurisdiction: see ACT r 6501(1)(r); FCR r 10.42 (item 19); NSW Sch 6 cl (h); Qld r 124(1)(r); SA r 40(1)(l); Tas r 147A(1)(f).

308 See also FCR r 10.42 (item 19); NSW Sch 6, cl (h); NT rr 6.13, 7.01(1)(h); SA r 40(1)(l); Tas r 147A(1)(f); WA O 10 r 2.

arising out of a tort committed within Victoria.[309] The rule operates when the cause of action arises within Victoria.[310] The requirement that the tort was committed within Victoria requires an examination and determination of where the tort occurred. The focus of the court's enquiry is the defendant's act and not the consequences for the plaintiff of those acts.[311] Moreover, the act constituting the tort depends on the interpretation of the act or series of acts characterised as tortious.[312]

Difficulties may arise where certain acts occurred within Victoria and others elsewhere, and where the harmful consequences of actions arise in a different place and after the passage of time. Dangerous products, for example, may have been manufactured in one place, purchased in another, and injury from their use sustained in yet another. In all cases the defendant's wrongdoing must have occurred within the jurisdiction.[313] That is to say, the act asserted as constituting the defendant's negligence must have taken place within Victoria, otherwise no relevant tort was committed for the purposes of the rule.[314] An act may be a positive act or an omission or failure to act, such as a failure to provide a warning about an unsafe product.[315]

That the defendant's wrongful act occurred within Victoria is a requirement for service out of Australia for all torts. The misleading or deceptive conduct complained about as either in breach of s 18 of the *Australian Consumer Law* or *Fair Trading Act 1999* (Vic), ss 9 – 11 must have occurred within Victoria even if the loss is occasioned in another jurisdiction. Breaches of Commonwealth and State statutory duties must occur within Victoria.[316] Where a fraudulent or negligent

309 *Commonwealth Bank of Australia v White* [1999] 2 VR 681; where breaches of a statutory duty under the *Corporations Law* causing financial loss were properly to be regarded as tort. Compare *Williams v Society of Lloyd's* [1994] 1 VR 274 at 311–312, in relation to the words "tortious act or omission" in r 7.01(1)(j).

310 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 567, referring to *Jackson v Spittall* (1870) LR 5 CP 542; *Distillers Co (Biochemicals) Ltd v Thompson* [1971] 1 NSWLR 83. See also *Delco Australia Pty Ltd v Equipment Enterprises Inc (t/as Kukla Trenchers)* (2000) 100 FCR 385; compare *Traxon Industries Pty Ltd v Emerson Electric Co* (2006) 230 ALR 297 (misleading or deceptive conduct contrary to *Trade Practices Act 1974* (Cth), s 52).

311 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 567; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

312 See *Amaca Pty Ltd v Frost* (2006) 67 NSWLR 635.

313 See *George Monro Ltd v American Cyanamid and Chemical Corporation* [1944] KB 432; *Lewis Construction Co Pty Ltd v M Tichauer Société Anonyme* [1966] VR 341; *Buttigeig v Universal Terminal and Stevedoring Corporation* [1972] VR 626; *MacGregor v Application Des Gaz* [1976] Qd R 175; *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258.

314 Rule 7.01(1)(i) is the equivalent of O 11 r 1(e) of the *Rules of the Supreme Court 1884* (Vic).

315 See *Distillers Co (Biochemicals) Ltd v Thompson* [1971] 1 NSWLR 83; *Castree v ER Squibb & Sons Ltd* [1980] 1 WLR 1248; *D'Ath v TNT Aust Pty Ltd* [1992] 1 Qd R 369.

316 See *Commonwealth Bank of Australia v White* [1999] 2 VR 681; involving allegations of breaches of statutory duty causing financial loss. The defendant was not able to

misrepresentation is alleged to have been communicated over a telephone, a telex, or other transmitting device, the tort occurs in the place where the representation is received and acted on, not the place from which the transmission originated.[317]

Similarly, a defamatory statement is published, and the tort of defamation occurs, where the statement is heard or read.[318] If defamatory material is uploaded onto an internet site and stored on a server outside Victoria, the defamatory publication may nevertheless occur in Victoria if it is downloaded in Victoria and damages the plaintiff's reputation in Victoria.[319] In *Dow Jones v Gutnick*[320] the plaintiff alleged that he suffered, and restricted his claim to, damage to his reputation in Victoria arising from the publication of defamatory statements in Victoria. The New York City resident defendants had uploaded the statements onto servers located in New Jersey intending them to be accessible through an internet connection from any place in the world by any of approximately 550,000 subscribers, of which about 300 were in Victoria. Restricting the claim, for the purposes of service under the rule, to damages arising in Victoria from publication occurring only in Victoria located the tort within Victoria, and conferred jurisdiction to hear and determine the matter upon the Supreme Court. Under the rule the originating process could be served on the foreign defendant in the foreign jurisdiction.[321]

As to the place of the commission of a tort, in *Voth v Manildra Flour Mills* the New South Wales-based plaintiff alleged that the Missouri-resident defendant committed the tort of negligent misstatement in failing to draw the plaintiff's attention to the fact that State withholding tax was payable in respect of a business venture in Missouri, while providing the plaintiff

establish that it was strongly arguable that the contract was made by or through an agent carrying on business in Victoria (required by r 7.01(1)(f)(ii)), or that the alleged negligent misrepresentations (required by r 7.01(i)) were made in Victoria. However, the defendant was able to establish that it was strongly arguable that torts founding claims in misleading or deceptive conduct (in breach of *Trade Practices Act 1974* (Cth), s 52 and *Fair Trading Act 1985* (Vic), s 11), the contravention of s 81 of the *Companies Act 1961* (Vic) and s 170 of the *Companies (Victoria) Code* (required by r 7.01(i)), and the losses suffered as a consequence of those breaches (required by r 7.01(j)), occurred in Victoria.

317 *Diamond v Bank of London & Montreal Ltd* [1979] QB 333. See also *Commonwealth Bank of Australia v White* [1999] 2 VR 681 (misleading or deceptive conduct in breach of *Trade Practices Act 1974* (Cth), s 52 and *Fair Trading Act 1985* (Vic), s 11).

318 *Bata v Bata* [1948] WN 366; *Jenner v Sun Oil Co Ltd* [1952] 2 DLR 526 (HC (Ont)); *Berezovsky v Michaels* [2000] 1 WLR 1004 (HL).

319 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

320 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

321 Although the first case involving an online publication to reach an ultimate appellate court, *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 was an entirely orthodox application of principles which had been applied in earlier contexts, including notably by the English Court of Appeal in *Chadha v Dow Jones & Co Inc* [1999] EWCA Civ 1415, and by the House of Lords in *Berezovsky v Michaels* [2000] 1 WLR 1004.

with professional accounting services.[322] The issue that arose for the court to resolve was whether the cause of action had arisen in New South Wales or in Missouri. A majority of the High Court[323] distinguished negligent acts from negligent omissions and identified the tort, if there was one, strictly to be constituted by the latter. However, the court identified the failure to draw attention (an omission) to the requirement to pay withholding tax with a statement (a positive act) that withholding tax was not required to be paid.[324] The complaint was directed at the provision of the accountancy services which act had occurred entirely within Missouri even if the decisions made, and actions taken, based on the advice, occurred in Australia. The cause of complaint was based on an act in Missouri by which the tort was committed in Missouri, so that liability was to be determined by Missouri law.[325]

A tort occurs wherever the acts determined to constitute the tortious breach occurred. A tort was not committed within the jurisdiction of Victoria when a crane negligently manufactured in France caused damage as a result of operational failure in Melbourne, because the act causing the damage occurred in France.[326] On the other hand, a New South Wales resident was permitted to serve an originating process out of jurisdiction in a personal injury claim on the basis that he suffered damage in New South Wales, despite a motor vehicle accident occurring in New Caledonia resulting from a faulty vehicle design in France.[327]

Problems with the application of the test arise where the act constituting the breach and the consequent damage occur a long time apart, and the act causes damage in a place other than where the act occurred. Wide separation in time and place was evident in *Amaca v Frost*.[328] The plaintiff alleged having contracted asbestos-related diseases in New Zealand resulting from his handling of asbestos products negligently manufactured by the defendant in New South Wales and brought an action in that jurisdiction for the tortious breach committed there. The court held that the defendant's manufacturing process was not negligent. No breach therefore occurred in the production of asbestos in New South Wales.

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322 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

323 Mason CJ, Deane, Dawson, Toohey and Gaudron JJ; Brennan J dissenting.

324 See *L Shaddock & Assocs Pty Ltd v Parramatta City Council (No 1)* (1981) 150 CLR 225.

325 The dissenting judge (Brennan J) found that the alleged negligence was initiated in Missouri but completed in New South Wales, that the principal damage occurred in New South Wales, and New South Wales was not clearly an inappropriate forum.

326 *Lewis Construction Co Pty Ltd v M Tichauer Société Anonyme* [1966] VR 341.

327 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491. See also *Challenor v Douglas* [1983] 2 NSWLR 405; *Flaherty v Girgis* (1987) 162 CLR 574. As to what acts must have occurred in Victoria in order that the tort of conspiracy is committed in Victoria for the purpose of r 7.01(1)(i) see *Enzacor Technology Pty Ltd v Thomas Ko Sai Ying* [1993] VSC 121.

328 *Amaca Pty Ltd v Frost* (2006) 67 NSWLR 635.

Instead they found that because the plaintiff suffered the damage because of the dangerous nature of asbestos, the damage and the tort occurred in New Zealand.[329]

Rule 7.01(1)(j): Damages occurred within jurisdiction

[3.430] Rule 7.01(1)(j) permits service outside Victoria where a tortious act, wherever it occurred, resulted in damages sustained either entirely or partially within the jurisdiction.[330]

"Damage"

[3.440] Rule 7.01(1)(j) differs from r 7.01(1)(i) in not restricting service out of Australia to claims arising from torts occurring within Victoria. The focus of r 7.01(1)(j) is not where the act or omission occurred, but the requirement that the consequential damages were either entirely or partially suffered in Victoria.[331]

The reference to "damage" in r 7.01(1)(j) is not an element of the cause of action necessary to found a claim. Rule 7.01(1)(j) assumes a completed cause of action, being the defendant's tortious acts or omissions, with "damage" being the disadvantage, detriment or loss suffered by the

329 *Amaca Pty Ltd v Frost* (2006) 67 NSWLR 635 at [45].

330 Vic r 7.01(1)(i); see also ACT r 6501(1)(l)(ii); FCR r 10.42 (item 5); NSW Sch 6 cl (e); NT r 7.01(1)(k); Qld r 124(1)(l); SA r 40(1)(f)(ii); Tas r 147A(1)(d); jurisdictions which now have a rule similar to r 7.01(1)(j) include New South Wales (NSW Pt 10 r 1(1)(e)), England (*Rules of the Supreme Court 1883*, O 11 r 1(f)), and Ontario (*Rules of Civil Procedure* (ONT), r 17.02(h)). Under *Rules of the Supreme Court 1884* (Vic), O 11 r 1(e) (now r 7.01(1)(i)) was the only provision allowing for service out of Victoria in a claim in tort. All other jurisdictions have a similar provision: Vic r 7.01(1)(i); ACT r 6501(1)(l)(i); FCR r 10.42 (item 4); NSW Sch 6 cl (d); NT r 7.01(1)(j); Qld r 124(1)(k); SA r 40(1)(f)(i); Tas r 147A(1)(c); WA O 10 r 1(k). The circumstances in which service out of Victoria is permitted under r 7.01(1)(i) and (j) are dealt with by a single rule in England. Only England has a single rule dealing with what is covered by r 7.01(1)(i) and (j) in Victoria. As to the rule in England, see *Metal und Rohstoff v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391. Rule 7.01(1)(j) had no counterpart in the former *Service and Execution of Process Act 1901* (Cth). However, there was an equivalent of r 7.01(1)(i), namely, s 11(1)(d), which provided for service out of the jurisdiction where "any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was done or is to be done or is situate within that State or part". Section 11(1)(d) was taken to provide for service out of the jurisdiction in claims based on a tort. It did not apply to a claim for damages in respect of a breach of contract: *Ansett Transport Industries (Operations) Pty Ltd v Alenia Aeritalia & Selenia SpA* (1991) 105 FLR 169 (ACTSC). As in the case of what is now r 7.01(1)(i), the Commonwealth provision had no application unless the act of the defendant which gave rise to the cause of action occurred within the jurisdiction: see *Hall v Australian Capital Territory Electricity Authority* [1980] 2 NSWLR 26; *David Syme & Co Ltd v Grey* (1992) 38 FCR 303. The act must have been an essential part of the cause of action upon which the claim was based, and not merely a background circumstance: *South Adelaide Football Club Inc v Fitzroy Football Club (No 1)* (1988) 49 SASR 380.

331 See *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 607, 621.

plaintiff.[332] A disadvantage or detriment suffered within Victoria as a result of an injury sustained outside Victoria falls within the rule.[333] A Victorian resident injured by the defendant's negligent actions in New Zealand, sustains damage in Victoria for the purposes of r 7.01(1)(a) if they cannot work at their employment, and must pay for the treatment of the injuries, in Victoria.[334]

A claim for contribution for, or indemnity from, liability between defendants for damage entirely or partially sustained in Victoria, resulting from a tortious act occurring anywhere, is captured by r 7.01(1)(j).[335] A notice on a third party in respect of a claim for contribution or indemnity may be served without leave under certain circumstances,[336] or otherwise by order of the court.[337]

An employer's obligation to pay compensation to an injured employee under the *Accident Compensation Act 1985* (Vic) constitutes relevant damage for the purposes of r 7.01(1)(a). The proceeding initiated by the employer under s 138 of the *Accident Compensation Act 1985* for indemnity for those payments is a suit arising from a tortious act or omission for which it can serve process out of jurisdiction.[338]

Service out of jurisdiction is not permitted when the proceeding is a claim for damages pursuant to a breach of s 18 of the *Australian Consumer Law*, or *Fair Trading Act 1999* (Vic), ss 9 – 11. Neither are tortious acts nor omissions for the purposes of r 7.01(1)(j).[339]

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332 *Darrell Lea Chocolate Shops Pty Ltd v Spanish-Polish Shipping Co Inc (The Katowice II)* (1990) 25 NSWLR 568. It includes consequential damage whether by way of bodily injury or financial or economic loss: *Challenor v Douglas* [1983] 2 NSWLR 405 at 409.

333 See *Darrell Lea Chocolate Shops Pty Ltd v Spanish-Polish Shipping Co Inc (The Katowice II)* (1990) 25 NSWLR 568. For a case of damage partly suffered in Victoria for deceit committed out of Australia, see *Williams v Society of Lloyd's* [1994] 1 VR 274.

334 See *Brix-Neilsen v Oceaneering Australia Pty Ltd* [1982] 2 NSWLR 173; *Challenor v Douglas* [1983] 2 NSWLR 405; *Flaherty v Girgis* (1987) 162 CLR 574.

335 *Australian Mutual Provident Society v GEC Diesels Australia Ltd* [1989] VR 407.

336 Rule 7.07(2). See *Australian Mutual Provident Society v GEC Diesels Australia Ltd* [1989] VR 407.

337 Rule 7.07(3).

338 *Victorian WorkCover Authority v Orientstar Shipping Corporation* [2004] VSCA 237. A statutory claim for a contribution between tortfeasors did not constitute damages for the purpose of the rule in *Baldry v Jackson* [1977] 1 NSWLR 494. The case was decided under the express terms of s 11(1)(d) of the *Service and Execution of Process Act 1901* (Cth) (the former Commonwealth Act). The subsection applied to a claim against an interstate compulsory personal injury insurer where the plaintiff was injured within the jurisdiction through the negligent driving of the insured and, the insured having died, the plaintiff was entitled under statute to recover damages from the insurer: see *Hodge v Club Motor Insurance Agency Pty Ltd* (1974) 7 SASR 86; compare *Nominal Defendant v Motor Vehicle Insurance Trust of Western Australia* [1983] 3 NSWLR 309.

339 *Williams v Society of Lloyd's* [1994] 1 VR 274. For another view as to whether the breach constitutes a tort, see *Commonwealth Bank of Australia v White* [1999] 2 VR 681.

In *Oceanic Sun Line Special Shipping v Fay*[340] McHugh J said that the operation of a rule equivalent to r 7.01(1)(j)[341] should not *prima facie* be confined because "another jurisdiction was more appropriate for the hearing of the action." In *Voth v Manildra Flour Mills*[342] the High Court held that where legislation permits service out of jurisdiction, the court should not grant leave for the plaintiff to serve the defendant unless the plaintiff is able to demonstrate that it is a case of an appropriate kind for service out of jurisdiction, and that proceedings are unlikely to be stayed on the grounds of *forum non conveniens*.

Rule 7.01(1)(k): Injunction

[3.450] Rule 7.01(1)(k) permits the plaintiff to serve process outside jurisdiction where the act sought to be compelled or restrained by the injunction is one within Victoria. Service does not require damages to be claimed with respect to the subject matter of the injunction.[343] The act that the injunction is to restrain, and for which service out of Australia is proper, is an act of the defendant within Victoria.[344] Service of the injunction out of Australia is not proper for that act if it is done in a jurisdiction other than Victoria.[345] An injunction served by a rugby league club on a rugby league player to prevent the player breaching his contract and joining a foreign rugby union club was held to be properly served under the equivalent rule in New South Wales. The subject matter of the injunction was an action within the jurisdiction.[346]

Whether an application for an injunction satisfies the substantive legal requirements for its issuance is an entirely separate question, and is considered separately, from the question of whether service of the

340 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197.

341 In relation to a submission that New South Wales was *forum non conveniens*; Vic r 7.01(1)(j) corresponds to Pt 10 r 1A(1)(e) of the *Supreme Court Rules 1970* (NSW) (see now *Uniform Civil Procedure Rules 2005* (NSW), Sch 6 para (e)). For cases of service out of Australia under NSW Pt 10 r 1A(1)(e), see *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *Darrell Lea Chocolate Shops Pty Ltd v Spanish-Polish Shipping Co Inc (The Katowice II)* (1990) 25 NSWLR 568; *Fullford v Pearson* [2004] NSWSC 150.

342 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ; Toohey J dissenting.

343 Vic r 7.01(1)(k); see also ACT r 6501(1)(o); FCR r 10.42 (item 23); NSW Sch 6 cl (n); NT r 7.01(1)(m); Qld r 124(1)(o); Tas r 147A(1)(o); WA O 10 r 1(1)(f). Rule 7.01(1)(k) is taken from O 11 r 1(1)(b) of the *Rules of the Supreme Court 1883*, in England. It replaces O 11 r 1(f) of the *Rules of the Supreme Court 1884* (Vic). The equivalent provision in the former *Service and Execution of Process Act 1901* (Cth) was s 11(1)(d).

344 *Kinahan v Kinahan* (1890) 45 Ch D 78; *Morocco Bound Syndicate Ltd v Harris* [1895] 1 Ch 534.

345 See *Re De Penny; De Penny v Christie* [1891] 2 Ch 63 at 68; *Reynolds v Coleman* (1887) 36 Ch D 453 at 460.

346 *Bulldogs Rugby League Club Ltd v Williams* [2008] NSWSC 822.

injunction in a foreign jurisdiction is justified.[347] Service is justified if the plaintiff meets the conditions of the regulation, whereas a court always has discretion to order an injunctive remedy, and will consider all the circumstances of the case in deciding whether to exercise its discretion.

The court will consider the likelihood of the injunction being effective before it will issue the injunction.[348] If the injunction is unlikely to be practically enforced the court will refuse to issue it.[349] For example, a court will not issue an injunction to restrain behaviour, acts or conduct that is unlikely to be repeated.[350] The efficacy of the injunction must be a reasonable prospect.[351] Efficacy need not be an immediate prospect, and the injunction may be issued if it can be enforced when circumstances change, such as the defendant being present in the jurisdiction.[352]

The injunction sought to be served outside Australia must form part of the relief that the plaintiff claims,[353] although it need not constitute the entirety of the relief sought.[354] A *Mareva* injunction in isolation has been held not to attract the operation of r 7.01(1)(k). The case must then fall within the rule by some other means.[355] The application for the injunction cannot be made *mala fides* merely in order to effect service upon a defendant outside Victoria. The case itself must fall within the rule, and will not be drawn into the ambit of the rule by an application for an injunction.[356] The application for an injunction will be refused unless it is essential to the cause of action, and has its effect within Victoria.[357]

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347 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at [14]–[16].

348 Under *Rules of the Supreme Court 1884* (Vic) a writ could not be served out of Victoria except by leave.

349 *Watson & Sons v Daily Record Ltd* [1907] 1 KB 853; *Marshall v Marshall* (1888) 38 Ch D 330; *Kinahan v Kinahan* (1890) 45 Ch D 78 at 84.

350 *De Bernales v New York Herald* [1893] 2 QB 97; *Watson & Sons v Daily Record Ltd* [1907] 1 KB 853.

351 Similar considerations also apply in the Federal Court of Australia where originating process cannot be served out of Australia except by leave: see *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at [14].

352 *Tozier v Hawkins* (1885) 15 QBD 680; *Re Burland's Trade Mark; Burland v Broxburn Oil Co* (1889) 41 Ch D 542.

353 *Rosler v Hilbery* [1925] Ch 250; *Siskina (cargo owners) v Distos Compania Naviera SA* [1979] AC 210.

354 *Lisbon Berlyn (Transvaal) Goldfields Co v Heddle* (1885) 52 LT 796.

355 *Siskina (cargo owners) v Distos Compania Naviera SA* [1979] AC 210; *Mercedes Benz AG v Leiduck* [1996] 1 AC 284. See also *Deputy Commissioner of Taxation v Ahern* [1986] 2 Qd R 342.

356 *De Bernales v New York Herald* [1893] 2 QB 97.

357 *Siskina (cargo owners) v Distos Compania Naviera SA* [1979] AC 210; *Deputy Commissioner of Taxation v Ahern* [1986] 2 Qd R 342.

Rule 7.01(1)(l): Necessary or proper party

[3.460] Rule 7.01(1)(l) allows service out of Australia on a foreign defendant who is a necessary or proper party to a proceeding against another defendant upon whom service has already been properly effected either within or outside Victoria.[358] The rule operates when the other defendant is served an originating process before the proper or necessary party, either in a part of Australia other than Victoria under SEPA, or outside Australia under O 7.

Rule 7.01(1)(l) operates more broadly than, and independently of, any other part of r 7.01(1). The other defendant may be served purely by the operation of this paragraph when it would not be possible to serve a lone defendant under any other.[359]

The test for determining whether the defendant may be served outside the jurisdiction is that, under the rules permitting joinder,[360] the defendant to be served in a foreign jurisdiction would be properly joined to the first defendant in the proceedings if they were within the jurisdiction of the court.[361] The requirement under the paragraph is disjunctive, and a defendant who is, in relation to their status under the rules governing joinder, a "proper" party is not required to also be a "necessary" party.[362] Joinder may be proper even if the other defendant is sued in the alternative.[363]

However, r 7.01(1)(l) does not provide a ground for service of a third party notice on a third party out of Australia.[364] A third party whose joinder is authorised under O 11 may not be a necessary or proper party to the proceeding for the purpose of r 7.01(1)(l),[365] because a third party is

358 Vic r 7.01(1)(l); see also ACT r 6501(1)(p); FCR r 10.42 (item 20); NSW Sch 6 cl (i); NT r 7.01(1)(n); Qld r 124(1)(p); SA r 40(1)(c); Tas r 147A(1)(g); WA O 10 r 1(h). The Tasmanian rule does not expressly state that the person to be served outside Australia must be a necessary and proper party to the proceeding.

359 See *Croft v King* [1893] 1 QB 419; *Williams v Cartwright* [1895] 1 QB 142 at 148; *Duc d'Aumale* [1903] P 18; *Coppin v Tobler Bros Canberra Marine Centre Pty Ltd* [1980] 1 NSWLR 183.

360 Rule 9.02.

361 *Eversure Textiles Manufacturing Co Ltd v Webb* [1978] Qd R 347; *Maclain Watson & Co Private Ltd v Chen* [1983] 1 NSWLR 163; *Coppin v Tobler Bros Canberra Marine Centre Pty Ltd* [1980] 1 NSWLR 183; *Westpac Banking Corporation v Commonwealth Steel Co Ltd* [1983] 1 NSWLR 735. See also *Massey v Heynes & Co* (1888) 21 QBD 330 at 335, 338; *Witted v Galbraith* [1893] 1 QB 577; *Williams v Cartwright* [1895] 1 QB 142 at 145; *KW Thomas (Melbourne) Pty Ltd v Groves* [1958] VR 189; *Richardson v Tiver* [1960] VR 578.

362 *Massey v Heynes & Co* (1888) 21 QBD 330.

363 *Massey v Heynes & Co* (1888) 21 QBD 330. See also *Seymour v Seymour* [1888] WN 17.

364 *Shantou Hesheng Commercial Development Co v P & O Swire Containers Ltd* [1999] 3 VR 478 at 479; *Fujitsu Australia Ltd v Dewar Electronics Pty Ltd* [2001] VSC 222; *Needham v May* [2004] VSC 227.

365 *Speller & Co v Bristol Steam Navigation Co* (1884) 13 QBD 96.

not a necessary or proper party to the relevant proceeding, being that between the plaintiff and the defendant.

It is not proper to use r 7.01(1)(l) to provide the basis for service against a party outside Australia, by serving an unfounded originating process on a party within the jurisdiction. The action brought against the party within the jurisdiction must have a substantive basis and some prospect of success.[366]

Rule 7.01(1)(m): Mortgaged property situated in Victoria

[3.470] Rule 7.01(1)(m)[367] permits a plaintiff to serve a defendant outside Australia on a claim arising from the mortgage of personal property within Victoria.[368] Service may be in respect of a proceeding brought by either the mortgagee or the mortgagor.

The mortgagee may seek the sale of the property, the foreclosure of the mortgage, or the mortgagor to deliver possession of the property. The mortgagor may seek an equity of redemption, a reconveyance of the property, or the mortgagee to deliver possession of the property.

Rule 7.01(1)(n): Civil Aviation (Carriers' Liability) Act 1959 (Cth)

[3.480] In Victoria r 7.01(1)(n) provides for service of the originating process outside the jurisdiction where a foreign defendant is sued under the *Civil Aviation (Carriers' Liability) Act 1959* (Cth).[369] The Act incorporates the *Convention for the Unification of Certain Rules Relating to International Carriage by Air* ("Warsaw Convention")[370] into Australian domestic law which gives the court jurisdiction over the carrier.

Rule 7.02: Indorsement on originating process

[3.490]

7.02 Indorsement on originating process

(1) Originating process served on any defendant out of Australia in accordance with this Order shall, at the time of service on that defendant, contain an indorsement stating the facts and the particular paragraph of Rule 7.01 relied upon in support of such service.

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366 *Coppin v Tobler Bros Canberra Marine Centre Pty Ltd* [1980] 1 NSWLR 183; *Rosler v Hilbery* [1925] Ch 250.

367 Rule 7.01(1)(m) takes the place of O 11 r 1(h) of the *Rules of the Supreme Court 1884* (Vic). For a case of service under the earlier rule, see *Assignment, Mortgage and Finance Co Pty Ltd v Brasier* [1946] ALR (CN) 574. See also *Deutsche National Bank v Paul* [1898] 1 Ch 283; *Hughes v Oxenham* [1913] 1 Ch 254.

368 The rule is not operative in all jurisdictions: see also NT r 7.01(1)(p); SA r 40(1)(a); WA O 10 r 1(1)(j).

369 See also ACT r 6501(1)(q); NT r 7.01(1)(q); Qld r 124(1)(q); WA O 10 r 1(1).

370 *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, opened for signature 12 October 1929, 137 LNTS 11 (entered into force 13 February 1933).

(1.1) The indorsement under paragraph (1) shall be distinct from the indorsement of claim on the originating process, but any fact in support of service out of Australia which is a fact alleged by the indorsement of claim may be incorporated by specific reference in the indorsement under paragraph (1).

(2) If the originating process does not contain the indorsement referred to in paragraph (1) at the time it is filed, the plaintiff, in accordance with paragraph (3), may amend the originating process to include the indorsement.

(3) The originating process shall be taken to be amended upon the filing by the plaintiff of a copy of the originating process with the indorsement included.

(4) Upon the filing of an amended copy of originating process under paragraph (3) or at any later time, the Prothonotary, on the request of the plaintiff, shall seal a sufficient number of copies of the originating process as amended for service and proof of service.

(4) [County Court only[371]] Upon the filing of an amended copy of originating process under paragraph (3) or at any later time, the Registrar on the request of the plaintiff shall seal a sufficient number of copies of the originating process as amended for service and proof of service.

An originating process must be indorsed in the manner prescribed in r 7.02(1). The indorsement must be contained in the originating process. It is to state which provision of r 7.01 is relied upon for service on the defendant out of Australia. The time for indorsement is when the originating process is served on the defendant pursuant to r 7.01. An originating process which does not contain the indorsement when filed may be amended so as to include it pursuant to r 7.02(2), (3).

The indorsement satisfies the objective of service by giving the defendant notice of the grounds of the plaintiff's entitlement to serve the originating process in a foreign jurisdiction. It does so by stating the particular paragraph in r 7.01 pursuant to which the plaintiff serves process, and stating the facts relied upon by the plaintiff as bringing the case within the paragraph.

The indorsement of the originating process under 7.02(1) is distinct from the indorsement of claim on the originating process made pursuant to r 5.04(1). However, r 7.02(1.1) provides that a fact alleged in the indorsement of claim which supports service out of Australia may be incorporated into the indorsement required by r 7.01(1) by being referred to specifically.

Being required by r 7.02 to inform the defendant of the facts the plaintiff relies upon to serve originating process pursuant to r 7.01(1) enables the defendant to apply to the court to set aside service on the basis that the claim is not contained within any of the paragraphs in r 7.01(1).[372] The

371 *County Court Civil Procedure Rules 2008* (Vic), r 7.02(4).

372 See *Whinnen v Cussons (International) Ltd* (unreported; VSC; Beach J; No 5904/1997; 24 February 1998); *Schweitzer v Kronen Verwaltungs GmbH* [1998] VSC 190; *Fujitsu Australia Ltd v Dewar Electronics Pty Ltd* [2001] VSC 222; *Victorian WorkCover Authority v Orientstar Shipping Corporation* [2003] VSC 311.

defendant may also object to service of the originating process on the basis that it was not at the time of service indorsed in the manner required under r 7.02(1).[373]

A defective indorsement served with the writ cannot thereafter be rectified by amendment.[374] Even so, the court may, pursuant to r 2.04 and in the interest of doing justice in the case, dispense with any compliance with the rules either before or after the time by which compliance is required.[375]

Rule 7.02 is concerned entirely with the service of and indorsement on the writ. After the writ is served the rule no longer operates in relation to the plaintiff's claim. If an amendment to the claim varies the cause of action by inclusion or removal the rule does not require the indorsement on the writ to be amended.[376]

The originating process, and a copy of the originating process sealed with the court seal,[377] may or may not both be indorsed. The copy will contain the indorsement if pursuant to r 7.02(1) the originating process was indorsed when it was filed, but neither will be indorsed if the plaintiff did not intend to serve the defendant out of Australia at the time the process was filed. The plaintiff may not intend to serve a defendant out of Australia if at the time the process is filed they are of the belief that the defendant was within the jurisdiction of the court. The plaintiff may subsequently be informed that the defendant is out of Australia, or be required to add a defendant who is not in Australia. To serve the defendant out of Australia the plaintiff may amend the originating process to include the indorsement.[378]

Rule 7.03: Mode of service outside Australia

[3.500] In general, service of originating process on a defendant out of Australia pursuant to r 7.03 is ordinarily effected personally, in compliance with the requirements of service on a defendant within the jurisdiction. However, personal service may be dispensed with, and it will suffice that service was undertaken in conformity with the law for service of originating process of the country where service of process on the defendant is to be effected.[379]

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373 See, for example, *Transfield Philippines Inc v Pacific Hydro Ltd* [2006] VSC 175.

374 *Whinnen v Cussons (International) Ltd* (unreported; VSC; Beach J; No 5904/1997; 24 February 1998); *Fujitsu Australia Ltd v Dewar Electronics Pty Ltd* [2001] VSC 222.

375 *Fujitsu Australia Ltd v Dewar Electronics Pty Ltd* [2001] VSC 222; *Schib Packaging Srl v Emrich Industries Pty Ltd* (2005) 12 VR 268; *Transfield Philippines Inc v Pacific Hydro Ltd* [2006] VSC 175.

376 *Gutnick v Dow Jones & Co Inc* [2001] VSC 305.

377 Rule 5.11(3).

378 Rule 7.02(2) – (4).

379 See *Richard Crookes Constructions (Qld) Pty Ltd v Wendell* [1990] 1 Qd R 392 at 397 (mode of service sufficient in New Zealand although not in Queensland).

However, to be effective service need not be both personal and compliant with local laws. Effecting service in accordance with the laws of the country where the defendant is to be served is an alternative to personal service. Therefore, personal service in the foreign jurisdiction will constitute proper service, regardless of whether or not it accords with that country's laws for service.[380]

The originating process may be served on the defendant in a foreign jurisdiction either by the plaintiff, or the plaintiff's agent.

If originating process is to be served pursuant to a Convention[381] in a Convention Country[382] service is governed by Pt 2 of O 7, and is effected through official channels in that country.

Rules 7.05(1) – (3), 8.09: defendant may have proceedings stayed or set aside under r 8.09

[3.510] Rule 7.05 provides

(1) The Court may make an order of a kind referred to in Rule 8.09 on application by a party served with originating process out of Australia.

(2) Without limiting paragraph (1), the Court may make an order under this Rule on the ground—

(a) that service out of Australia is not authorised by these Rules; or

(b) that Victoria is not a convenient forum for the trial of the proceeding.

(3) The Court may make an order under this Rule—

(a) before an application is made under Rule 7.04; or

(b) before an order of the Court is made on such an application.

Setting aside writ or originating motion

[3.520] Rule 8.09 provides

8.09 Setting aside writ or originating motion

380 *Williams v Lips-Heerlen BV* (unreported; NSWSC; Giles J; No 17209/1990; 1 November 1991); *Victorian WorkCover Authority v Orientstar Shipping Corporation* [2003] VSC 311. For examination of whether personal service in another country is made in a manner that contravenes the law of that country, see *Channar Mining Pty Ltd v CMIEC (Channar) Pty Ltd* [2003] WASC 253 (service of the notice of the writ properly effected under O 10 r 10 of the *Rules of the Supreme Court 1971* (WA) by facsimile in the People's Republic of China did not contravene Arts 262 and 263 of Ch 29 of the *Civil Procedure Law* of the People's Republic of China or other domestic law of the People's Republic of China, whereas service of the writ would have been in contravention of those laws).

381 Rule 1.13 defines "Convention" to mean "a Convention with a foreign country, made with or made and extended to the Commonwealth of Australia or the State of Victoria, with respect to legal proceedings in civil or criminal matters". Rule 1.13 specifically excludes the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention)* which is dealt with separately under O 80.

382 Rule 1.13 defines "Convention Country" to mean "a foreign country to which a Convention applies". Rule 1.13 specifically excludes the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention)* which is dealt with separately under O 80.

> Notwithstanding Rule 8.08, the Court, on application made by the defendant before filing an appearance, whether conditional or not, may exercise its jurisdiction to—
>
> (a) set aside a writ or originating motion or its service;
>
> (b) make an order under Rule 46.08;
>
> (c) stay a proceeding… .

Scope of rule

[3.530] A defendant may file a conditional appearance pursuant to r 8.08. The conditional appearance may be filed to challenge the court's jurisdiction over the matter, or to object to the validity of the originating process, or the service of process, or to have proceedings stayed. Alternatively, the defendant may pursuant to r 8.09 before filing an appearance apply to the court to have the originating process or its service set aside, the proceeding stayed, or, pursuant to r 8.09(b) and in the terms of r 46.08, have an order made on an application in the person's absence, or without their knowledge, set aside or varied.[383]

An application under r 8.09 may afford the defendant strategic advantages since it is effective regardless of the type of appearance the defendant files. Under r 8.08(3) a conditional appearance has the effect of an unconditional appearance unless the court orders otherwise on application by the defendant. In other words, the defendant may submit to jurisdiction despite filing a conditional appearance, whereas it is arguable that an application under r 8.09 does not involve any act upon which the defendant's submission to the jurisdiction of the court can be constructed, or from which it can be inferred.

Because an application under r 8.09 does not involve filing an appearance, the defendant may avoid defending the claim filed against them on its merits. The defendant may instead apply to the court to prevent the commencement, or continuance, of proceedings. For example, the defendant may challenge an order enforcing a default judgment against their assets in the foreign jurisdiction on the basis that the judgment should not be recognised in that country.[384] Challenging the enforcement of a foreign judgment in a foreign court is less likely to succeed if the defendant has submitted to the jurisdiction of the Victorian court. Even if the defendant had filed a conditional appearance, pursuant to r 8.08, the challenge to the court's jurisdiction depends on the court ordering that it does not have the effect of an unconditional appearance.

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383 The reference in r 8.09(b) to an order under r 46.08 is a reference to an order setting aside an order made without notice, for instance, an order under r 5.12 for renewal of originating process or under r 7.06 for service of process out of Australia.

384 For a reference to this principle, see *Re Siromath Pty Ltd (No 3)* (1991) 25 NSWLR 25 (where the court ordered an anti-suit injunction to restrain proceedings in a foreign court); *Pendal Nominees Pty Ltd v M & A Investments Pty Ltd* (1989) 18 NSWLR 383 at 387–388.

Application

[3.540] The defendant's application under r 8.09 is made by summons on notice to the plaintiff, using the same procedure as a defendant would under r 8.08 after having filed a conditional appearance. The application should be heard before the time in which appearance may be entered expires because a judgment in default of appearance may be entered despite the pending application remaining unheard.

Rule 7.06

[3.550] Rule 7.06 provides[385] for the service out of jurisdiction of originating process in specified instances, originating motions in proceedings under statutes, and summons, notices or orders in a proceeding.

7.06 Service of other process by leave

The Court, by order, may allow service out of Australia of the following—

(a) originating process in a proceeding in relation to—
  (i) the wardship, custody, management or welfare of a minor; or
  (ii) the custody, management or welfare of a person who is incapable of managing that person's affairs;

(b) an originating motion in a proceeding brought under any Act;

(c) any summons, order or notice in any proceeding.

The court may under r 7.06(a) grant leave for the service of originating process out of Australia in relation to minors or handicapped persons. Under r 7.06(c) the court may allow an interlocutory process to be served out of Australia.[386]

Counterclaims and third party notices

[3.560] Rule 7.07 provides for counterclaim against a plaintiff and a joined defendant not already a party to the proceeding,[387] under r 10.03, and a third party notice filed under O 11, to be served outside Australia.[388] Rule 7.07(2) provides that the counterclaim or third party notice may be served without leave if an originating process containing the claim made in them could be served without needing to apply for a court order under r 7.01. Otherwise, under r 7.07(3) the court may make an order for the service of the counterclaim or third party notice out of Australia.

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385 See ACT r 6501(1)(x); FCR 10.42 (Item 11); NSW Sch 6, cl (v); Qld r 124(1)(w); Tas r 147A(1)(u).

386 See also ACT r 6504; FCR r 10.44; NSW r 11.5; NT r 7.06; Qld r 127; WA O 10 r 7.

387 Thus remedying the gap in *Gilchrist v Dean* [1960] VR 266, where leave to serve a third party notice was refused because the third party was not a necessary or proper party to the existing or principal action between the plaintiff and the defendant. The operative question was whether a writ of summons of a claim between the defendant and the third party would be capable of being served out of jurisdiction under the provisions of O 11 r 1.

388 See also ACT r 6502; NT r 7.07; Qld r 128; WA O 10 r 7.

Jurisdiction where agent served

[3.570] Rule 6.14[389] provides that parties may agree either prior or subsequent to the proceedings having commenced on the manner and the place of service of an originating or other process. The place may be within or outside Victoria. If service is affected in accordance with the agreement it will be considered sufficient service in the sense that it will trigger the court's jurisdiction without any further action or leave of the court being required.

The issue was explored in *Howard v National Bank of New Zealand*.[390] The respondents opposed confirmation of service without leave effected by the applicant on the National Bank of New Zealand and several of its officers under O 8 r 2(4) of the *Federal Court Rules 1979* (Cth). The question before the court was whether service pursuant to an agreement between parties providing for a mode of service either within or outside Australia different from that in the rules was effective. Drummond J held that O 7 r 14 was the court's formal recognition of the legitimacy of parties providing for consensual service outside the rules unless expressly prohibited by the rules. Because O 7 r 14 provides that "service in accordance with the agreement shall be sufficient service on the respondent" the court's jurisdiction to adjudicate the cause of action is enlivened by process being served in terms of the agreement. Moreover, O 7 r 14 is not limited to formal agreements making specific provision for serving originating or other forms of process, but extends to making service on the respondent proper even if pursuant to an ad hoc or informal agreement between the parties.

Drummond J held that there was no basis for reading O 7 r 14 as if it were implicitly qualified by a requirement to obtain leave to serve process under O 8. Specifically, O 8 r 1(f), while drafted in broad terms as requiring the court's leave to serve, or confirm service against, a defendant who has voluntarily submitted to jurisdiction, would not be applicable even if O 7 r 14 constituted a regime governing such voluntary submission, since r 1(f) only applies where the court's jurisdiction is not complete despite the foreign respondent's voluntary submission, and leave to serve must still be obtained.[391]

O 7 r 14 provides for a consensual procedure for serving respondents in or outside Australia, and thereby establishes the court's jurisdiction over the plaintiff's action, and the defendant *in personam* within the meaning of *Laurie v Carroll*,[392] regardless of whether the agreement to receive service inside or outside Australia is formal or informal, as long as service is effected in accordance with the agreement.

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389 See also ACT r 6463; FCR r 10.28; NSW r 10.6; NT r 6.13; Qld r 119; SA r 65.

390 *Howard v National Bank of New Zealand Ltd* (2002) 121 FCR 366.

391 *Howard v National Bank of New Zealand Ltd* (2002) 121 FCR 366 at 369–371.

392 *Laurie v Carroll* (1958) 98 CLR 310.

Hague Service Convention

[3.580] The *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention)* ("the Convention") is the means by which the civil procedure rules implement service outside Australia,[393] among signatory countries, of the documents constituting a civil proceeding. Article 5 of the Convention requires each signatory state to create a Central Authority charged with receiving and implementing requests from foreign signatory countries to serve process upon parties within the states' borders.

Article 5 explains how the Central Authority is to effect service:

> The Central Authority of the State addressed-shall itself serve the document or shall arrange to have it served by an appropriate agency, either:
>
> a) by a method prescribed by its internal law for service of documents in domestic actions upon persons who are within its territory, or
>
> b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed. Subject to sub-paragraph (b) of the first paragraph of this article, the document may always be served b delivery to an addressee who accepts it voluntarily.

In Australia, judicial documents may be served through either of two channels. The first channel — the Central Authority — is constituted by the Commonwealth Attorney-General's Department. It has responsibility for

- receiving requests for service from foreign courts or authorities;
- arranging for the service of documents;
- returning a certificate of service or non-service to the requesting authority; and
- informing a requesting country where it considers that a request does not comply with the Convention or where compliance with the request would infringe Australia's sovereignty or security.

As a second channel, the Convention also makes provision for signatory countries to nominate "additional authorities" to receive and execute requests for service. The Australian States and Territories have nominated their respective Supreme Courts to undertake this role. The State of Queensland, has, however, nominated its Department of Justice.

The Convention provides for service of an originating process by lodging these documents at the court registry: a request for service, an originating process and a summary of the document, and an undertaking to pay the cost of foreign service.[394] In some cases the documents may be required to be translated into the language of the country in which service is to be

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393 *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention)* opened for signature 15 November 1965, 658 UNTS 163 (entered into force 10 February 1969).

394 Vic r 80.04; see also ACT r 6553; FCR r 10.64; NSW r 11.4; NT r 7A.04; Qld r 130D; SA r 41D; Tas r 970D; WA O 11A r 4.

effected. Translation is organised by the registry in cases where service is to be effected through Convention institutions.[395]

Once the Central Authority effects service it is required to forward to the applicant a certificate of service stating that the document was served, and detailing the method, place, and date of service, and to whom the document was delivered.[396] The certificate of service is presumptive proof of its contents, rebuttable by a defendant on the presentation of evidence challenging effective service and the probative authority of the certificate.[397] In the case of a document that could not be served the certificate is returned stating the reasons service was not able to be effected, all costs being borne by the applicant.

Article 1 of the Convention provides that the Convention shall apply in all civil and commercial cases where there is occasion to transmit documents abroad, and limits the application of the Convention to those cases where the defendant's address is known. The Convention's supremacy clause provides that the Convention supersedes all other State and Commonwealth methods of service in foreign jurisdictions, whilst simultaneously preserving certain prior methods. Article 8 provides that states shall have the freedom to serve their own nationals absolutely through consular channels, and makes service on others subject to any objections states may have to service within their own borders. Article 19 permits the applicant to utilise any method of service available under the domestic law of the country in which service is to be effected. By Art 9 the Convention evinces that it does not intend to affect the present system of letters rogatory.

Article 10 provides:

> Provided the State of destination does not object, the present Convention shall not interfere with
>
> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad.
>
> (b) the freedom of judicial officers, officials or other competent persons of the State or origin to effect service of judicial documents directly through judicial officers, officials or other competent persons of the State of destination.
>
> (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

The breadth of the limitations in Art 10 on the scope of the Convention suggest that unless the state in which service is intended to be effected

395 Vic r 80.05; see also ACT r 6554; FCR r 10.65; NSW r 11.5; NT r 7A.05; Qld r 130E; SA r 41E; Tas r 970E; WA O 11A r 5.

396 Vic r 80.06; see also ACT r 6555; FCR r 10.66; NSW r 11.6; NT r 7A.06; Qld r 130F; SA r 41F; Tas r 970F; WA O 11A r 6.

397 Vic r 80.08; ACT r 6557; FCR r 10.68; NSW r 11.8; NT r 7A.08; Qld r 130H; SA r 41H; Tas r 970H; WA O 11A r 8.

objects the applicant may effect service using most of the previous methods of service — except those which Art 1 renders unenforceable.

Article 19 of the Convention states:

> To the extent that the internal law of a Contracting State permits methods of transmission, other than those provided for in the preceding Articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Under the Victorian rules of civil procedure a party bringing a proceeding in a Victorian court against a foreign defendant may effect service of process directly within the overseas jurisdiction inconsistently with Art 10 of the Convention, and without engaging the Central Authority as required by Art 5 of the Convention. Under Art 19 the Convention permits other methods of service consistent with the internal laws of the foreign jurisdiction. However, as between foreign jurisdictions there is little consistency regarding methods of service, with some, such as Switzerland, being strongly resistant to foreign lawyers serving process inside their jurisdiction, others, such as the United Kingdom, being relatively permissive with respect to service, and still others are silent with respect to the service of process by foreign parties.

In practice many jurisdictions may not observe the requirement of a strict adherence to service rules within their jurisdiction. Nevertheless, service in accordance with the law of the foreign jurisdiction must be proved. Further, judgment rendered in Victorian courts may be void if service in the foreign jurisdiction was effected in an unauthorised manner. Moreover, because it has not passed through the Central Authority, service effected through a lawyer based in the foreign jurisdiction cannot be upheld under Art 5. Regardless of the fact that a person competent to effect service in a foreign jurisdiction may be authorised by Art 10(c) of the Convention to do so, the validity of any actual service is tested in relation to domestic as opposed to Convention law.

The laws detailing who qualifies as a person competent to serve process vary considerably amongst states.

It is arguable that service effected by the system of notification *au parquet* is still valid under the Convention, unless the state where service is to be effected raises objections. The method involves serving a foreign plaintiff by serving the originating process on a local foreign official, at which point the time available to the defendant to enter an appearance would begin to run. The expectation was that the local official would notify the defendant. However, the failure to do so would not upset the effectiveness of service. A defendant may therefore be subject to a default judgment without having had adequate notice of the proceedings against him.

It is debatable when, or if, *au parquet* service would be permitted under Art 1 of the Convention. This is because it is unclear whether the words of the Article, that "there is occasion to transmit a judicial or extra-judicial document abroad", provide for *au parquet* proceedings. On the one hand

the reference to an "occasion" has been read as permissive of the current working practices of lawyers and officials, whereas, on the other hand, the availability of an alternative method for effecting service against a defendant in a foreign jurisdiction suggests that there is no "occasion" for *au parquet* service.

Article 15 of the Convention, which regulates default judgments, provides that courts will only enter default judgment against defendants under the Convention once satisfied of the regularity of the plaintiff's means of effecting service.[398] Article 15 states in its first paragraph that:

> Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that -
>
> (a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or
>
> (b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention, and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Article 15 is designed to prevent applicants entering default judgment without having provided the defendant with sufficient notification to defend the matter commenced against them. The defendant must either be served process in accordance with the laws of the defendant's domestic jurisdiction,[399] or receive actual notice of the proceedings initiated against them.[400]

Apart from those already invalidated elsewhere under the Convention, Art 15 does not further invalidate methods of service. Nevertheless, the Convention appears to be highly restricted on its surface in not covering corporations. Article 15(b) operates only in relation to individual defendants, and not as against corporations and partnerships, in that the reference to "residence" in Art 15(b) is to individuals' place of residence, not corporations' place of business or registered office, despite corporations being capable by law of being resident in a Convention jurisdiction.[401]

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398 Vic r 80.10; see also ACT r 6559; FCR r 10.70; NSW r 11.10; NT r 7A.10; Qld r 130J; SA r 41J; Tas r 970J; WA O 11A r 10.

399 Article 15(a).

400 Article 15(b).

401 The French text of the Convention which is of equal authority with the English arguably makes "residence" more clearly mean "dwelling or lodging": "ou bien que l'acte a été effectivement remis au défendeur au à sa demeure selon un autre procédé prévu par la présente Convention." "Demeure" specifically refers to a dwelling or lodging.

Setting aside service

[3.590] Under r 7.05 the defendant served with originating process outside Australia may apply to have service set aside, or the proceedings stayed.[402] The court may order that service be set aside because it was not authorised under the rules, if it was not effected as required under the rules. It is not necessary to enter conditional appearance to apply for the order setting aside service under r 7.05. The application for the order must be made under r 7.05(3)(b) before judgment is entered or, as provided by r 7.05(3)(a), before the plaintiff applies for an order to proceed in the prosecution of the claim on default of the defendant entering appearance under r 7.04.

At the application for the order to set aside service the court considers the matter *de novo*, and is able to consider evidence that goes to the issue of whether the order for service in a foreign jurisdiction should have been made, albeit on this occasion with the benefit of material and argument put before it by both parties.[403]

An order challenging substituted service may be pursued in the same manner as an order challenging the propriety of service.[404]

Victoria not a convenient forum

[3.600] Rule 7.05(2)(b) provides that the court may make an order in any proceeding that Victoria is not a convenient for the trial of the proceeding. Australian courts also have a discretion to decline jurisdiction even in cases in which they have jurisdiction. In Australia the test for whether a court is not a convenient forum for hearing the matter in international litigation is whether the court is a clearly inappropriate forum. To determine whether it will be a convenient forum or not the court must consider

- the circumstances of the case, including factors such as the parties' places of residence or business;
- convenience and expense, including the location of evidence;
- the governing law; and
- the existence of "legitimate" personal and juridical advantages.

It has generally proved very difficult for defendants to persuade the court that it is a clearly inappropriate forum. In matters such as international personal injuries disputes, statistics reveal that very few defendants have

402 Vic r 7.05; see also ACT r 40; FCR r 13.01; NSW r 11.7; NT r 7.05; Qld r 126; WA O 12 r 7. In the Australian Capital Territory (ACT r 6461), Federal Court (FCR r 10.23), New South Wales (NSW r 10.14) and Queensland (Qld r 117) the court has no power to confirm invalid service. In South Australia (SA r 69) the court could allow presumptive service.

403 *Hartwell Trent (Australia) Pty Ltd v Tefal Société Anonyme* [1968] VR 3.

404 *Bradvica v Radulovic* [1975] VR 434.

been successful in doing so.[405] The bias in favour of plaintiffs in personal injury matters may be supported by strong reasons in relation to the very substantial physical[406] and financial[407] impediments plaintiffs would face in conducting litigation in foreign jurisdictions. The Australian test for *forum non conveniens* may encourage forum shopping since it gives weight to the (indistinctly defined) legitimate advantages a court may confer upon a plaintiff.

In *Oceanic Sun Line Special Shipping v Fay*[408] Dr Fay was seriously injured while taking part in trap shooting during a cruise of the Greek Islands on board the defendant's vessel which was then sailing in Greek waters. The cruise ticket had been booked and purchased in Sydney through the defendant's agent, but was collected in Athens by presenting an exchange order which Dr Fay had received from Oceanic's agent in Sydney. Although the ticket included a clause stating that disputes were to be heard in the courts of Athens, Dr Fay initiated proceedings against the defendants in the Supreme Court of New South Wales in Sydney, where the ticket was booked, paid for, and the exchange order issued. The defendant unsuccessfully applied for a stay of proceedings, and subsequently unsuccessfully appealed the decision to the Full Court and the High Court. By a 3:2 majority the High Court, determining whether the New South Wales Supreme Court should hear the matter, held that it could do so because the ticket had not expressly excluded the jurisdiction of the Australian courts.[409]

In *Eagle v Delta Haze*[410] the plaintiff (Eagle), a Victorian legal practitioner resident and having his sole place of business in Victoria, sought an order that he be at liberty to proceed in his suit against the defendant (Delta Haze), a Nevada corporation with its main or sole place of business in California, for breach of a licence agreement and marketing agreement, seeking a declaration, injunctions, moneys due and accounts. Delta Haze had itself sought an order that the service effected against it be set aside or the proceedings stayed.

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405 The Australian superior courts did not decline jurisdiction in any international personal injuries case between 1991 and 2001. Defendants enjoy more success in non-personal injuries cases but the courts declined jurisdiction in only 28.6% of those cases.

406 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at [170]. *Fullford v Pearson* [2004] NSWSC 150; *Teare v British Nuclear Fuels plc* (unreported; VSC; Harper J; 20 October 1993).

407 *Placer (PNG) Pty Ltd v Anderson* [1997] QCA 74 (18 April 1997).

408 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197.

409 The decision is broadly acknowledged to have been unsatisfactory because the grounds for the decision differed considerably amongst the justices, offering State courts only ambiguous principles in dealing with similar matters, and gave rise to a determination to provide guidance and certainty on the matter of jurisdiction in international litigation in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

410 *Eagle v Delta Haze Corporation* [2000] VSC 513.

The plaintiff argued that the breaches had occurred in Victoria and were contained in a letter from the defendant's lawyers purporting to terminate the agreements. The defendants entered a conditional appearance and thereafter filed an affidavit, arguing that the termination had occurred in California where the letter was posted.

Meanwhile Delta Haze commenced an action against Eagle in California.

The plaintiff relied on two arguments. First, that despite the contracts having been made in California, it was an implied term of the contract that the plaintiff be paid in Victoria, and the breaches, being the non-payments due to the plaintiff under the two agreements, occurred in Victoria, justifying service outside jurisdiction under r 7.01(1)(g). Secondly, that although the tortious acts causing loss of royalty payment under various sub-publishing agreements were committed outside Victoria, the damage was suffered either wholly or partly in Victoria. The plaintiff therefore relied on r 7.01(1)(j) to serve process outside Australia.

The court also examined the circumstances of the case in consideration of the jurisdictional nexus. Examining the licence agreement executed in Nevada the judge noted the choice-of-law clause as providing for the laws of the State of New York as the governing law of the contract, that the agreement related to the entirety of the defendant's business in Australia, the base payment and bonus payments due to the plaintiff for sales within Australia, the defendant providing the plaintiff with a credit card, and the defendant providing the plaintiff travel expenses for travel outside Australia. The marketing agreement was to be governed by the laws of the Cayman Islands

The judge held that it was necessary to imply that Victoria was where payment was to occur in order to give business efficacy to the agreement, because no other place was the required place either expressly or by implication, and because the implication could not be excluded.[411] There was a "strong arguable case" that the jurisdictional nexus was thereby established.[412] There was, however, no good arguable case that the plaintiff had suffered damage in Victoria for the non-payment of royalties.

Inappropriate forum

[3.610] The court held that in determining whether Victoria was an appropriate forum for hearing the matter it was guided first, by the general discretion it was entitled to exercise under r 7.05(1) which could take into account, but was not restricted to, the factors set out in r 7.05(2), and, secondly, that the test in r 7.05(2)(b) "that Victoria is not a convenient forum", was less restrictive than the test stated in *Voth v Manildra Flour Mills* that the court should consider whether Victoria was a "clearly inappropriate forum".

411 *Eagle v Delta Haze Corporation* [2000] VSC 513 at [25].

412 *Eagle v Delta Haze Corporation* [2000] VSC 513 at [26], [24] ("a good arguable case").

In *Voth v Manildra Flour Mills*[413] the High Court majority made a number of observations regarding the application of tests to determine the venue for the hearing of the matter. First, it distinguished the "clearly inappropriate forum" test and the "more appropriate forum" test, but conceded that they would probably produce the same outcome in most cases. Secondly, the critical difference between the tests is likely to arise only where a foreign tribunal is identified as the more appropriate forum, but the local tribunal is not a clearly inappropriate tribunal. The court when applying the "clearly inappropriate forum" test gives primary consideration to the advantages and disadvantages of continuing proceedings in the forum selected by the litigant. However, when it applies the "more appropriate forum" test the court is required to compare the two possible forums. Nevertheless, even when applying the former test, the court will compare the relative appropriateness of the available jurisdictions. Whether relief is available in one forum but not in another is relevant to determining if a forum is either inappropriate or more appropriate. A judgment as to appropriateness is not concerned with the difference between the procedural laws, legal systems, or judicial administrators of the two forums.

In relation to the corresponding rule in New South Wales[414] the High Court said that it was appropriate when the court was considering its discretion to decline to exercise its jurisdiction that the generality of the terms in which the rule was cast not be artificially limited by a prescription of the grounds it should consider. The court could therefore turn its mind to "any of a number of features of the proceeding, the claims made in it, or the parties in it"[415] in determining whether and how to apply the rule.

In its submission that Victoria was a clearly inappropriate forum for the trial of the matter, the defendant presented evidence, and the court accepted, that

1. The dispute and the issues raised in it were practically unconnected with Victoria, and that the only substantial connection with the jurisdiction was the fact that the plaintiff's residence and place of business were located in Victoria.
2. The plaintiff and the defendant established and developed their business relationship almost entirely in California.
3. Most of the plaintiff's work for the defendant was carried out in the United States, predominantly in California.
4. California was the location for the parties' person-to-person dealings.
5. The licence agreement was to be constructed, and the standard of care to be applied in the dispute regarding the royalties payable to the plaintiff were to be determined, under New York law. The licence

413 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 558.

414 NSW Pt 10 r 6A.

415 *Agar v Hyde* (2000) 201 CLR 552 at [55].

agreement was governed by New York law and the determination of whether it was void would be decided under that law.

6. The agreements between the parties involved copyrighted music owned by the defendant whose place of business was in California.
7. The witnesses to be called were largely resident in California.
8. A proceeding already on foot in California would enable all the issues in the dispute to be fully ventilated.

The court therefore concluded that Victoria was either a clearly inappropriate forum, or not a convenient forum for the purposes of r 7.05(2)(b). On the evidence California was clearly the appropriate forum for the dispute to be heard.

Although inconvenience is likely to be experienced by any party ordered to litigate outside their home jurisdiction, there was no unfairness to the plaintiff in requiring that the matter be heard in California. It would, however, have been unfair to the defendant to require them to conduct their case in Victoria given the lack of a substantial connection between the matters in dispute between the parties and the jurisdiction.

In *Dow Jones v Gutnick*[416] the plaintiff sued a publisher whose registered place of business was New York City for an article published on a subscription website uploaded onto a server in the State of New Jersey. The suit was restricted to damages resulting from all instances of publication of the article in Victoria. The High Court in a thoroughly orthodox application of the "clearly inappropriate forum" test held Victoria to have jurisdiction to hear the matter. Given that the plaintiff was a Victorian businessman suing in relation to publication occurring exclusively in Victoria, the Supreme Court of Victoria was not an inconvenient forum for hearing the matter. The High Court rejected the argument that the advent of global internet publication required it to develop a new approach to jurisdictional matters in international private law contexts.

In *Voth v Manildra Flour Mills*[417] the question that arose was which test was to be applied under Australian law when a party sought to stay proceedings that had been commenced in a local forum. Honan Investment Pty Ltd ("Honan") was the holding company of Manildra Flour Mills ("MFM"). Both Honan and MFM were incorporated under the law of New South Wales. Honan was also the parent company of Manildra Milling Corporation ("MMC"), which was incorporated under the law of Kansas. Voth was a practising accountant in Missouri. It was alleged that Voth provided negligent advice concerning withholding tax to MMC. The advice affected MFM which became indebted to MMC for withholding tax payable but not charged by MMC for the period 1976–1983 due to Voth's negligent advice. In 1984 the United States Inland Revenue Service sought back-payment of taxes and a penalty for

416 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

417 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

non-payment. Honan and MFM brought proceedings for negligence against Voth in the Supreme Court of New South Wales. Voth's application to have the proceedings stayed on the basis that the New South Wales Supreme Court was not the appropriate forum for the hearing was denied by the Supreme Court and the Court of Appeal. The High Court granted Voth leave to appeal.

One of the issues to be resolved was the location of the alleged tortious act of the defendant which gave the plaintiff a cause of action against the defendant. The court found that the allegation against the defendant was one of negligent omission, specifically Voth's failure to advise MMC and the Manildra Group of its obligation to pay withholding tax on MMC's payments to MFM. To locate the tort it was necessary to determine where the omission assumed significance. As the omission became tortious on the basis of the significance of the defendant's obligation to provide those services in a dutiful manner, the place of the breach was Missouri, where the act was initiated and completed, and not New South Wales where the representation regarding the requirement to pay withholding tax was received and acted upon.

Oceanic Sun had created uncertainty because each of the judges in the majority adopted differing tests to determine if the Australian court was an appropriate jurisdiction.[418] *Voth v Manildra* presented the court with an opportunity to provide clarity. The majority held that the test to be applied in Australia was whether the Australian forum was clearly inappropriate, and not whether the foreign forum was more appropriate.[419] Although all five majority judges adopted this test they were divided in their findings. Four majority judges (Mason CJ, Deane, Dawson, Gaudron JJ) concluded on the basis of applying the test that New South Wales was a clearly inappropriate forum, while Brennan J, applying the same test, found that it was not. Toohey J, applying the doctrine of *forum non conveniens*, found that Missouri was a more appropriate forum.

Mason CJ, Deane, Dawson, Gaudron JJ adopted the form of the test for ordering a stay of proceedings on the basis that the chosen forum was clearly inappropriate presented by Deane J in *Oceanic Sun*. A forum is clearly inappropriate if to continue proceedings in that court would be oppressive or vexatious.[420] The court is unlikely to stay proceedings unless an appropriate foreign forum is available to hear the dispute. The onus is on the defendant to prove that given the circumstances of the case

418 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197.

419 Five judges in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ) agreed that the "clearly inappropriate forum" test should be adopted in Australia. However, Brennan J (as he then was) accepted the majority's test only for the sake of unity. One judge (Toohey J) insisted that the *forum non conveniens* doctrine should be the test in Australia.

420 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 489 per Mason CJ, Deane, Dawson, Gaudron JJ.

continuation in the selected forum would be "unfairly burdensome, prejudicial or damaging" or cause "unjustified trouble or harassment"[421] to them, and that the plaintiff may bring suit in another forum in which the defendant may be made liable. The court's power to stay proceedings is discretionary and involves assigning weight to, and balancing, all the relevant facts and circumstances of the case. In the process the court assesses the connection to the competing forums of the parties, the claim, and the facts of the case, whether either party is likely to be personally or juridically advantaged by a continuation or a stay of proceedings, and the relative merits of continuing the matter in the selected forum, and shifting the matter to an available competing forum.[422]

Mason CJ, Deane, Dawson, Toohey and Gaudron JJ held that the alleged tort was an act committed entirely within Missouri which fell to Missouri law to determine, that New South Wales was a completely inappropriate forum for its determination, and that the proceeding in that State be stayed.[423]

421 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 247. The assessment of whether continuation in a forum is vexatious or oppressive is an objective assessment of the proceeding, not a judgment of the plaintiff's conduct: at 266 per Gaudron J.

422 See *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 247–248 referring to the discussion of Lord Goff in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 477–478 (as lending "valuable assistance").

423 The dissenting judge (Brennan J) found that the alleged negligence was initiated in Missouri but completed in New South Wales, that the principal damage occurred in New South Wales, and New South Wales was not clearly an inappropriate forum. Toohey J agreed that the proceedings in New South Wales be stayed but on the ground that Missouri was the more appropriate forum.

4 Appearance

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[4.10] The defendant's appearance is in general terms governed by O 8 of the rules,[1] which provides that the defendant must file an appearance[2] in any proceeding commenced by writ or originating motion[3] prior to taking any step in the proceeding. The defendant must file an appearance into court either in person or by a solicitor. The appearance is then served upon the plaintiff's solicitor.[4] Order 8 prescribes the time for appearance, and a procedure for filing appearance, and provides for the defendant to enter a conditional appearance where the defendant intends to object to the court's jurisdiction, or to the validity of the originating process, or the service of the process. Filing an appearance in the time permitted under the rules represents the defendant's intention to contest the claim, and prevents the plaintiff taking any further procedural step without notifying the defendant. Therefore, where a defendant has entered either a conditional or an unconditional appearance the plaintiff may not seek to enter a default judgment against the defendant without notice to the

1 Order 8 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) is the general provision for appearance. Rules in other Orders deal with particular aspects of appearance, namely, appearance by a person not joined originally as a defendant, appearance by particular kinds of defendant and appearance in particular situations. The rules are as follows: (1) appearance by a person becoming a defendant on assignment, transmission or devolution of liability from the original defendant (r 9.09(4)); (2) appearance by a person added or substituted as a defendant under r 9.06 or r 9.08 (r 9.11(3)); (3) appearance by a person joined as a defendant by counterclaim (r 10.04(4)); (4) appearance by a third party (r 11.08); (5) appearance where defendant is a person under disability (r 15.02) and judgment in default of appearance in such a case (r 15.04); (6) appearance in a proceeding against partners sued in the firm name (rr 17.04 – 17.06); and (7) appearance by a non-party served with notice of judgment before attending, taking of account or making an inquiry under the judgment: r 59.05.

2 Under the new rules an appearance is "filed" not "entered". "Entered" was the term used in the previous rules. In the new scheme "entered" is reserved for the entry of judgment in default of appearance or pleading or pursuant to a self-executing order.

3 Rule 8.01.

4 Rule 8.06. The document known as an appearance in Victoria is known as a notice of intention to respond in the Australian Capital Territory (*Court Procedures Rules 2006* (ACT), rr 100 – 111 and Form 2.8), and a notice of intention to defend in Queensland: *Uniform Civil Procedure Rules 1999* (Qld), rr 134 – 144 and Form 6.

defendant.[5] The defendant's appearance being filed, the plaintiff is no longer obliged to prove service of process.[6]

Rule 8.01 prescribes that an appearance is required in all types of proceedings in Victoria.[7] Rules 8.08 and 8.09 provide the only grounds for the defendant to take a step in the proceedings without filing an appearance; generally, an appearance must be filed before the defendant is able to take any further procedural step.[8] By filing an unconditional appearance the defendant represents their submission to the jurisdiction of the court.[9] However, a conditional appearance has the effect of an unconditional appearance unless the court orders otherwise on application by the defendant.[10] In Victoria the defendant may, under r 8.09, apply to the court to have the proceedings stayed or set aside for want of jurisdiction or on other grounds prior to filing an appearance.[11]

Filing an appearance has significant consequences in the conduct of the proceeding. An appearance once filed cannot be withdrawn without leave

5 *Alexander Korda Film Productions Ltd v Columbia Pictures Corporation Ltd* [1946] 1 Ch 336; [1946] 2 All ER 424 at 426 per Romer J. In that case, the defendant sought to have a writ set aside on the grounds that its name was Columbia Pictures Incorporated and not Columbia Pictures Corporation Limited as appeared on the writ. The court refused, holding the writ to be only formally defective and not thereby invalidated if the defendant was in no doubt that it was the person the plaintiff intended to sue. The usual practice is for the plaintiff to then amend the originating process. See also *Pearlman (Veneers) SA (Pty) Ltd v Bartels* [1954] 1 WLR 1457, wherein Lord Denning said of the defendant's claim that there was no such person as the defendant against whom judgment had been entered that it "sounds very ill in the mouth of the defendant".

6 *Wilkinson v Barking Corporation* [1948] 1 KB 721 at 725 per Asquith J (CA); *Colbert v Tocumwal Trading Co Pty Ltd* [1964] VR 820 at 826 per Scholl J (VSCFC); *Coe v Queensland Mines Ltd* (1975) 5 ACTR 53; 24 FLR 459 at 466 per Connor J.

7 Also ACT r 100; NSW r 6.9; NT r 8.01; Tas r 154. In South Australia the rules do not provide for appearance but the defendant files either a defence within 14 days of service, or a notification of address for service: SA r 59. For the Federal Court see B Cairns, *Australian Civil Procedure* (10th ed, Thomson Reuters, 2014), [5.12].

8 Vic r 8.02; see also ACT r 100; NSW r 6.1; NT r 8.02; Qld r 135; Tas r 154.

9 Unconditional appearance also cures a misnomer. A defendant who is misnamed in an originating process should enter an appearance in the correct name, stating in the memorandum of appearance that the defendant was sued in the wrong name: *Healey v Ballarat East Bowling Club* [1961] VR 206. The plaintiff named the club on the writ which, as an unincorporated association under the laws then prevailing, could not be guilty of negligence and therefore could not be sued, although its members could. The failure to name the members and provide their addresses as required by the rules was treated as a mere irregularity and the application for the writ to be set aside refused. In *Alexander Korda Film Productions Ltd v Columbia Pictures Corporation Ltd* [1946] 1 Ch 336, where the defendant was sued in the wrong name, Romer J said that the onus was on the defendant to draw the plaintiff's attention to the error, and that the proper approach was that the defendant appear in their own name and state in the memorandum that they were being sued in the wrong name.

10 Rule 8.08(3).

11 Vic r 8.02; also NT r 8.09.

of the court.[12] Because, in general, filing an unconditional appearance indicates that the defendant waives any irregularity on the part of the plaintiff, appearance will validate the service even of an expired writ which the plaintiff has not renewed.[13] However, the court cannot be conferred with jurisdiction by means of the defendant's filing of an appearance where it does not in the circumstances have jurisdiction over the defendant or the matter.

APPEARANCE BEFORE TAKING STEP

[4.20] In general, filing an appearance is a precondition to the defendant taking any step in a proceeding.[14] Rule 8.02 provides that

> Except as provided by Rule 8.08 or 8.09 or by leave of the Court, a defendant shall not take any step in a proceeding unless the defendant has first filed an appearance.[15]

The general rule is subject to certain qualifications. First, prior to filing an appearance a defendant may by summons apply under r 8.09 to stay a proceeding by objecting to the court's jurisdiction, or by applying to the court to set aside an originating process for being invalid or invalidly served.[16] Secondly, a defendant may apply to have a default judgment entered against them set aside in proceedings commenced by writ. Application to set aside default judgments may be filed in a number of circumstances, for example:

- where the defendant has failed to file an appearance within time;[17] or
- where the defendant has failed to serve a defence before the time limited for doing so;[18] or
- in proceedings against multiple defendants not being a proceeding for the recovery of land, where judgment has been entered against another joint defendant and the plaintiff proceeds against the defendant;[19] or

12 Nor can the parties by consent confer jurisdiction on a court where none exists, or power upon the court to make orders which the court lacks power to make: *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 163 (where the court had power under s 80(1) of the *Trade Practices Act 1974* (Cth) to make certain types of restraining orders where conduct contravened Pt IV of the Act, but did not have power to make those orders in relation to conduct which did not necessarily constitute a contravention of that Part of the Act).

13 *Rothmans of Pall Mall (Overseas) Ltd v Saudi Arabian Airlines Corporation* [1981] QB 368; [1980] 3 All ER 359 at 364 per Mustill J.

14 See *Flatau v Best* (1897) 13 WN (NSW) 147; *Tucker v Walker* [1920] VLR 385.

15 Rule 8.02 is modelled on NSW Pt 11 r 2. See also ACT r 100; FCR r 11.06; NSW r 6.1; NT r 8.02; Qld r 135; Tas r 154.

16 An application before appearance under r 8.09 is an alternative to an application after filing a conditional appearance under r 8.08.

17 Rule 21.07, referring to r 21.01.

18 Rule 21.07, referring to r 21.02.

19 Rule 21.07, referring to r 21.05.

- where the defendant has not attended the hearing of an application by the plaintiff for summary judgment on the ground that the whole or part of the defence has no real prospect of success;[20] or
- where a party has failed to do an act required, or take a necessary step under the rules, or comply with an order[21] for want of prosecution and judgment pursuant to a self-executing order.

Thirdly, under r 5.09, where the proceeding for recovery of a debt only comes to an end if the defendant pays the debt, and any costs claimed, before the time required for entering an appearance.

MODE OF FILING APPEARANCE

How appearance filed

[4.30] Rule 8.05 provides that appearance is effected by filing a notice of appearance in Form 8A,[22] or in proceedings commenced by filing an originating process under RedCrest under O 28A, by filing an appearance in accordance with r 28A.04 and a notice of appearance in Form 8AB.[23] The defendant serves in accordance with r 6.07(1) a sealed copy of the notice for service on the plaintiff.[24] The rule now expressly notes that the *Electronic Transactions (Victoria) Act 2000* (Vic) provides for service to be effected by electronic modes of transmission including email and facsimile. Where multiple defendants file an appearance by the same solicitor all the defendants' names should be included in the same notice of appearance.[25] Appearance is not invalidated by the defendant's failure to serve a notice upon the plaintiff and the plaintiff is not entitled to thereby obtain judgment for what is an irregularity on the part of the defendant.[26] Rather, the plaintiff may obtain an order for costs against the defendant for costs incurred resulting from the failure to serve the copy of notice.[27] A typical example of costs thrown away by the plaintiff due to the defendant's failure to serve the copy of notice is that the absence of

20 Rule 22.15 on an application under s 61 of the *Civil Procedure Act 2010* (Vic).

21 Rule 24.06. Also, in one situation the rules allow a non-party to apply to set aside a judgment. Where judgment is given for the administration of the estate of a deceased person, the execution of a trust or the sale of property, and the court directs service of notice of the judgment on a person interested who is not a party, the court may, on the application of that person, set aside or vary the judgment: r 59.05(6).

22 Rule 8.05(1). In its original form, and until amended in 1994, r 8.05(1) provided that the filing of an appearance consisted of two steps: the filing of notice of appearance and the service on the plaintiff on the same day of a sealed copy of the notice.

23 Rule 8.05(1.1).

24 Rule 8.05(3). Service on the plaintiff is not, strictly speaking, an aspect of the filing of appearance.

25 This was the practice under *Rules of the Supreme Court 1884* (Vic), O 12 r 9.

26 *Lyman v Franklin* (1889) 15 VLR 2. See also *North Melbourne Building Society v Vrendenberg* (1885) 7 ALT 38; *Alliance Acceptance Co Ltd v Makas* (1976) 12 ACTR 19.

27 Rule 8.05(4).

notification may lead the plaintiff to believe that appearance has not been filed, and result in the plaintiff seeking a default judgment.

Proof of appearance

[4.40] The defendant may prove appearance by producing a sealed copy notice of appearance. In *Doughty v Counsel*,[28] Holroyd J, referring with approval to his Honour's own earlier decision in *Bank of Van Diemen's Land v Ivey*,[29] held that producing the duplicate memorandum of appearance was sufficient to satisfy the court as to the defendant's having appeared. His Honour distinguished *McNamara v Clarton*[30] in which, like *Doughty* and *Ivey*, the plaintiff applied for final judgment. In *McNamara v Clarton* Webb J had dismissed the application as seeking the same relief as a previous application which had been dismissed with costs against the plaintiff on the basis that the affidavit in support had failed to allege the defendant's appearance on the writ of summons. In that case, Holroyd J noted in *Doughty*, the duplicate memorandum of appearance had not been tendered.

PRESERVING THE RIGHT TO OBJECT TO JURISDICTION, VALIDITY OF PROCESS OR SERVICE

[4.50] Rules 8.08 and 8.09[31] provide the defendant with alternative means of challenging the court's jurisdiction in respect of the matter, the validity of the originating process or the regularity of its service. A

28 *Doughty v Counsel* (1892) 18 VLR 70 (on the plaintiff's application for leave seeking final judgment the defendants sought dismissal of the application on the grounds that the plaintiff's affidavit in support of the application had not alleged that the defendants had entered appearance to the writ of summons).

29 *Bank of Van Diemen's Land v Ivey* (1892) 13 ALT 180.

30 *McNamara v Clarton* (1891) 17 VLR 24, although not referred to in submissions.

31 The rules are related. "**Rule 8.09 Setting aside writ or originating motion**: 8.09 Notwithstanding Rule 8.08, the Court, on application made by the defendant before filing an appearance, whether conditional or not, may exercise its jurisdiction to—(a) set aside a writ or originating motion or its service; (b) make an order under Rule 46.08; (c) stay a proceeding." It establishes an alternative procedure to that of conditional appearance under r 8.08 in the case of a challenge to the jurisdiction of the court or to the validity of originating process or its service or of application to the court to stay a proceeding. Under r 8.09 the court may on application made before appearance make an order to set aside originating process or its service, or set aside an order of the kind mentioned above, or to stay a proceeding. Rule 8.09(b) refers to an order under r 46.08. This is a reference to an order setting aside an order made without notice. Examples include an order made under r 5.12 for the renewal of an originating process, or an order under r 7.06 for service of process out of Australia. Application without appearance is advantageous to the defendant in that they would, on the failure of an application, mount a reasonable argument that they have taken no action that could be regarded as constituting a submission to the jurisdiction of the court. A defendant may approach the matter in this way if their intention is not to defend the action against them on its merits but to prevent any default judgment entered against them from being recognised, and enforced against their assets, in a foreign country. See *Re Siromath Pty Ltd (No 3)* (1991) 25 NSWLR 25; *Pendal Nominees Pty Ltd v M & A Investments Pty Ltd* (1989) 18 NSWLR 383 at 387–388 for cases referring to this principle. Judgments may be recognised and enforced

defendant who invokes the rules will not be viewed as having submitted to the court's jurisdiction, or as having waived any objection they may have to the procedure. The defendant may raise their objection without filing either a conditional or unconditional appearance, or object after having filed a conditional appearance. Regardless of whether the defendant takes the first or second approach they must apply to the court to raise the objection, and notify the plaintiff of the objection by means of a summons seeking an order to set aside the originating process of its service, or an order to stay the proceeding, whichever is appropriate in the particular case.

CONDITIONAL APPEARANCE

[4.60] Under r 8.08 a defendant may file a conditional appearance in Form 8B, or where the proceeding was commenced in RedCrest under O 28A in Form 8AC.[32] in accordance with the requirements of an ordinary appearance.[33] By filing a conditional appearance the defendant, without submitting to the court's jurisdiction, or waiving their entitlement to raise a procedural objection with respect to an irregularity in the plaintiff's proceeding,[34] reserves the right to challenge the jurisdiction of the court, the validity of the originating process, or the validity of the service of process.[35] The defendant may then apply to the court for the appropriate order either to stay the proceeding or set aside the originating process or its service.[36] An irregular proceeding may only be invalidated by the

if the defendant had submitted to the jurisdiction of the Supreme Court of Victoria. In the case of an application following conditional appearance filed under r 8.08, the appearance has effect as an unconditional appearance unless the court otherwise orders.

32 Rule 8.08(2). Rule 8.08(2)(b) referring to the RedCrest electronic filing system is new. Rule 8.09 grants the court jurisdiction to set aside an originating process or its service, or upon the application made before appearance is governed by r 8.09.

33 *Nelson v Pastorino & Co* (1883) 49 LT 564.

34 Vic r 8.08; see also ACT r 111; NT r 8.08; Qld r 144; Tas r 168; WA O 12 r 6. *Van Heyningen v Netherlands-Indies Government* [1949] St R Qd 54.

35 Some rules have a prescribed form: Vic Form 8B or Form 8AC; see also NT Form 8B; Tas Form 15. In South Australia objection to jurisdiction is alleged in the defence as a preliminary issue: SA r 100.

36 The relevant rule, r 8.08, modifies the previous practice, which was not governed by rules of court. Formerly, a defendant could enter a conditional appearance only by leave. The court, on granting leave, would direct the defendant to apply to the court for appropriate relief within a certain time on notice to the plaintiff. See, for instance, *Harvey v Dougherty* (1887) 56 LT 322; *Wainwright & Son Pty Ltd v Gibson* [1921] VLR 8; *Collins v Hudson* [1953] VLR 396; *Carroll v Laurie* [1959] VR 275. If within the time limited the defendant did not apply to the court the appearance would stand as unconditional. See *Murfin v Ashbridge* [1941] 1 All ER 231; *Harris v Taylor* [1915] 2 KB 580; *Mayers & Co v Johnson & Co* [1905] QWN 39; *Re Roche; Allen v Helton* [1939] QWN 25; *Topel v Bates* [1955] QWN 62; *Rutile Sands Ltd v Metal Trades (Australasia) Pty Ltd* [1958] QWN 43; *Roy v Dahl* [1959] Qd R 332; *Van Heyningen v Netherlands-Indies Government* [1949] St R Qd 54; *Capewell v Seltino Pty Ltd* [1986] 2 Qd R 2 at 15.

court setting it aside.[37] The procedural advantage for the defendant over an application under r 8.09 is that the defendant's rights are preserved and the plaintiff is barred from entering a judgment in default.

By comparison, if the time limit for appearance expires while an application under r 8.09 is pending the plaintiff may enter a default judgment.[38] This encourages the defendant to bring on the application under r 8.09 for hearing before the time for appearance expires in order to avoid the plaintiff's entitlement to enter a judgment in default of appearance.[39] Further, prompt action on behalf of the defendant is also required on filing a conditional appearance under r 8.08 because it will otherwise stand as an unconditional appearance unless the court on application from the defendant orders otherwise.[40] The application must be made by summons within 14 days of the conditional appearance being filed.[41] The requirement is satisfied under r 46.02(2)[42] by filing the summons within 14 days of the conditional appearance being filed.

The defendant may seek leave of the court to correct a mistake in filing an unconditional instead of a conditional appearance,[43] as long as the appearance was made conditional prior to the notice of appearance being served on the plaintiff.[44] A person who has been sued under r 17.06[45] as a partner does not apply to appear under objection under r 8.08.

Despite filing a conditional appearance the defendant continues to be required to serve a defence within the time prescribed by r 14.04. If the plaintiff has filed a statement of claim on the writ the defendant will have 30 days to serve a defence.[46] If the application under r 8.08 is not heard before the time for filing the defence the plaintiff may enter a judgment in default of defence. To circumvent this the defendant may obtain an extension of time for serving the defence by consent from the plaintiff or

37 Vic r 2.01; see also ACT r 1450; *Federal Court of Australia Act 1976* (Cth), s 51; *Civil Procedure Act 2005* (NSW), s 63; NT r 2.01; Qld r 371; SA r 12; Tas r 13; WA O 2 r 1.

38 In those circumstances, however, it is fairly certain that the court would set aside the judgment under r 21.07 in the exercise of discretion.

39 The application is made on notice to the plaintiff by summons. The procedure in relation to the application is the same as that under r 8.08 subsequent to the filing of a conditional appearance.

40 Rule 8.08(3). As to filing a conditional appearance, see further *Murfin v Ashbridge* [1941] 1 All ER 231.

41 Rule 8.08(4).

42 Rule 46.02(2) which provides that an application by summons is made when the summons is filed.

43 *Glassford, Cook & Co Pty Ltd v William Higson & Co* (1899) 25 VLR 177.

44 See also *Liff v Peasley* [1980] 1 WLR 781; 1 All ER 623 at 640. In *Firth v John Mowlem & Co Ltd* [1978] 1 WLR 1184, the defendant was given leave to withdraw the unconditional appearance.

45 See r 17.06(4).

46 Rule 14.04(a).

by order of the court.[47] Otherwise the defendant may serve a defence under protest, notifying the plaintiff that it is filed without waiving the objection based on the conditional appearance, or otherwise prejudicing their right to object to the court's jurisdiction, the validity of the originating process or its service.[48] The danger of serving an ordinary defence is precisely that it may waive the objection raised by filing the conditional appearance.

Filing a conditional appearance objecting to the court's jurisdiction may not be effective unless the court has the authority to set aside the originating process or the service of process. If, for example, the court stays proceedings in response to the defendant's objection to service under the former *Service and Execution of Process Act 1901* (Cth) it is nevertheless not authorised under the Act to set aside the originating process or its service. Because under r 8.08(3) the defendant's conditional appearance will be treated as an unconditional appearance unless on the basis of the argument mounted in the defendant's application the court orders otherwise, the defendant will continue to be considered as having entered an unconditional appearance submitting to jurisdiction despite the court's ruling upholding the defendant's objection to service of process.[49]

Where the court is authorised to order the setting aside of the originating process or its service following the successful application by the defendant pursuant to filing a conditional appearance, it would be inconsistent with the court's finding that it lacked jurisdiction in the matter for the conditional appearance to have effect as an unconditional appearance. An application made under a conditional appearance for an order setting aside originating process and its service should therefore also petition the court to make an order with respect to appearance consistent with its finding that it lacked jurisdiction in the matter,[50] and setting aside the defendant's appearance.

The defendant does not submit to the jurisdiction of the court by raising an objection without first filing an appearance, and the objection

47 See r 3.02.

48 See *Sykes v Povey Corporation* (unreported; VSC; Tadgell J; 8 April 1988) at 7, a case of appearance under protest. The applicant in the proceeding had filed and served an appearance and in an accompanying letter to the respondent's solicitors referred to the foreign jurisdiction clause in the agreement between them and their intention to rely on it seeking the respondent's consent to stay proceedings, which was refused. The respondent's submission that the applicant having filed an unconditional appearance waived any irregularity with respect to jurisdiction was said to be "technically right" by Tadgell J. However, his Honour concluded that, in the circumstances of the applicant's solicitors having received instructions and communicating their intention to stay proceedings, the applicant's had not substantially waived the irregularity.

49 See *McM v C (No 2)* [1980] 1 NSWLR 27 at 38–40; *Lee v Johnson Taylor & Co Pty Ltd* [1990] WAR 381 at 383.

50 See *The Alambie Wine Co Pty Ltd v Austflavor Pty Ltd* (unreported; VSC; Hedigan J; No F 4088; 1 November 1993).

subsequently fails. The defendant, not having entered an appearance, cannot be held to have submitted to the court's jurisdiction. Rule 8.08 provides that, unless the court otherwise orders, a conditional appearance has effect as an unconditional appearance.[51] The appearance remains an unconditional appearance if the defendant intends to defend the proceedings on the merits of the case. The court may set aside appearance where the defendant intends to withdraw and allow the plaintiff to proceed unimpeded to default judgment.

Application

[4.70] A defendant making an application following the filing of a conditional appearance does so by serving a summons on the plaintiff within 14 days of the appearance being filed.[52] The summons is supported by an affidavit. The summons sets out the grounds on which the objection is made: either the grounds objecting to jurisdiction, or the grounds on which the defendant maintains that service has been irregularly effected. The affidavit provides evidence in support of the statement setting out the grounds in the summons.[53] If the defendant's application succeeds the court may:

- stay proceedings;
- set aside the originating process; or
- set aside service of process, or other order in relation to the originating process including ordering its substituted service or the renewal of a stale originating process.

APPEARANCE UNDER PROTEST

[4.80] The defendant may attend court under protest in order to challenge the jurisdiction of the court or the validity of the originating process, and at the same time maintain their right to argue their case in defence. The failure of the defendant's challenge and their withdrawal from the proceedings is not a submission to jurisdiction, nor does it constitute a waiver of any objection they might have to the proceedings. In some circumstances withdrawal from the case may confer a strategic advantage. For example, when a defendant whose objection to service in a foreign jurisdiction under one of the heads of service at r 7.01 fails, the plaintiff may enter a default judgment after the defendant withdraws from the action. Where the defendant has no assets in Victoria, the plaintiff may be forced to enforce the judgment in a foreign jurisdiction which refuses to recognise the judgment of the Victorian court on the basis that originating process was not served upon the defendant in

51 *Reid Murray Development Queensland (Pty) Ltd v Lynwood Holdings Pty Ltd* [1964] QWN 1: whether a conditional appearance was an appearance within the meaning of the former *Service and Execution of Process Act 1901* (Cth), s 11.

52 In *Keevers v O'Neill* [1977] 1 NSWLR 587 the defendant was refused leave to apply out of time, having allowed 14 months to elapse after filing a conditional appearance.

53 See *Baillie v Goodwin & Co* (1886) 33 Ch D 604 at 608.

Victoria, or because the defendant did not submit to the jurisdiction of the Victorian court by filing only a conditional appearance.[54]

UNCONDITIONAL APPEARANCE AS SUBMISSION TO JURISDICTION

[4.90] By filing an unconditional appearance the defendant submits to the court's jurisdiction to hear and determine the proceeding,[55] and waives any objection to procedural irregularities that may otherwise affect the originating process or its service.[56] The defendant's filing unconditional appearance also relieves the plaintiff of the requirement to prove service. Submitting to the court's jurisdiction will not, however, confer jurisdiction on the court where it has no other basis for it.[57] The jurisdiction to which the defendant submits in entering an unconditional appearance is the court's inherent jurisdiction to determine whether or not it has jurisdiction to hear and determine the matter brought before it.[58] The defendant is not submitting to the jurisdiction to determine the claim.[59] The court's determination whether or not it has jurisdiction to hear and determine the proceeding is based exclusively on law and is entirely insensitive to the parties' desires, and if it lacks jurisdiction it must disclaim the matter.[60]

In *Thomson Australian Holdings v Trade Practices Commission* the court held that the consent of the parties to the court's jurisdiction could not confer on the court jurisdiction absent a statutory basis for it.[61] In that case the Trade Practices Commission alleged that the defendants were unlawfully offering liquor for sale at predetermined prices in contravention of the s 45 of the *Trade Practices Act 1974* (Cth). The defendants both gave undertakings to the Commission to refrain, and consented to injunctions to prevent them, from continuing to make the offers. The plaintiff was the publisher of the liquor price guide. The plaintiff sought and was granted leave to intervene in the case. It argued that the court's orders exceeded its jurisdiction, and that it could neither impose injunctions, nor accept

54 Example adapted from DL Bailey and JK Arthur, *Civil Procedure in Victoria* (LexisNexis, subscription service).

55 *Perkins v Williams* (1900) 17 WN (NSW) 135; *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad* (1976) 136 CLR 529 at 539.

56 *Forbes v Smith* (1855) 10 Exch 717; *Granowski v Shaw* (1896) 7 QLJ 18 (service out of the jurisdiction); *Oulton v Radcliffe* (1874) LR 9 CP 189 (appearance pursuant to solicitor's undertaking); *Re Orr Ewing* (1882) 22 Ch D 456; *Moore v Gamgee* (1890) 25 QBD 244; *The Dupleix* [1912] P 8; *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad* (1976) 136 CLR 529 at 539; *Robinson v Kuwait Liaison Office* (1997) 73 IR 33; 145 ALR 68 at 75 (AIRC); *News Corporation Ltd v Lenfest Communications Inc* (1996) 40 NSWLR 250 at 254.

57 See *Colbert v Tocumwal Trading Co Pty Ltd* [1964] VR 820 at 826.

58 See *Canada Trust Co v Stolzenberg (No 1)* [1997] 1 WLR 1582 at 1588.

59 See *Wilkinson v Barking Corporation* [1948] 1 KB 721 at 725 per Asquith LJ.

60 See *Rothmans of Pall Mall (Overseas) Ltd v Saudi Arabian Airlines Corporation* [1981] QB 368.

61 *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 163.

undertakings, to regulate conduct captured by s 45 by affecting activities that were not within the reach of s 45.[62]

Despite filing an unconditional appearance submitting to jurisdiction and waiving objections to the content and service of the originating process the defendant may apply to the court to exercise its discretion to set aside originating process or stay proceedings on other grounds.[63] A foreign defendant responding to a claim against it by filing an unconditional appearance submits to the court's jurisdiction for the purpose of determining that claim. It does not submit generally to the jurisdiction of the court for the purpose of determining all or any other claims that the plaintiff may bring on. This includes a claim brought by the plaintiff against the defendant by amendment of the claim to which the defendant had submitted.[64] Nor has a foreign plaintiff who has brought a claim against a defendant submitted to a cross-claim raised by the defendant.[65]

UNCONDITIONAL APPEARANCE AS WAIVER OF IRREGULARITY

[4.100] A defendant who files an unconditional appearance waives any failure of the plaintiff to comply with the rules governing the originating process or service.[66] The non-compliance waived by unconditional appearance may be one that is evident in the process itself (such as service of a stale writ[67]) or an irregularity in the originating process of which the defendant has knowledge,[68] or when any order commencing

62 *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 163. In the same way the court cannot accept an undertaking prescribing conduct that the court has no capacity to command or compel. An undertaking is given in lieu of an injunction and it is governed by the same principles: at 165.

63 See *Maronis Holdings Ltd v Nippon Credit Australia Ltd* (2000) 175 ALR 36 at 40.

64 See *National Commercial Bank v Wimborne* (1979) 11 NSWLR 156; *Marlborough Harbour Board v Charter Travel Co Ltd* (1989) 18 NSWLR 223.

65 See *National Commercial Bank v Wimborne* (1979) 11 NSWLR 156; *Marlborough Harbour Board v Charter Travel Co Ltd* (1989) 18 NSWLR 223.

66 *Re Chittenden* [1970] 1 WLR 1618; *Western National Bank of the City of New York v Perez, Triana & Co* [1891] 1 QB 304; *Perkins v Williams* (1900) 17 WN (NSW) 135; *Sheldon v Brown Bayley's Steel Works Ltd* [1953] 2 QB 393 (expired writ not renewed for service); *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad* (1976) 136 CLR 529 at 539, or arising from the absence of service of originating process: *Green v Bradyll* (1856) 1 H & N 69; 156 ER 1121 (the court refused to set a proceeding aside where the defendant's solicitor had previously entered an appearance despite the plaintiff being unaware of the appearance being entered). See also *News Corporation Ltd v Lenfest Communications Inc* (1996) 40 NSWLR 250 at 254.

67 *Sheldon v Brown Bayley's Steel Works Ltd* [1953] 2 QB 393; *Re Chittenden* [1970] 1 WLR 1618.

68 *Mulckern v Doerk* (1884) 53 LJQB 526 (an appearance to a writ is a "fresh step" within the meaning of *Rules of the Supreme Court 1883*, O 70 r 2 in England); *Healey v Ballarat East Bowling Club* [1961] VR 206 (defendants were not named properly nor were their addresses given).

the proceeding has been irregularly issued.[69] In *Healey v Ballarat East Bowling Club*,[70] in a suit for personal injuries sustained on the defendant's premises, the defendants waived the irregularities on the face of the writ served upon them which named the president, secretary and members of the club (which included the plaintiff) as defendants without further specifics of identity, or addresses.

In the Federal Court formal defects or irregularities do not invalidate process unless, in the court's opinion, the defect or irregularity has caused a "substantial injustice" and the court is unable to remedy the injustice by an order of its own making.[71]

The defendant may, in a practice known as an appearance under protest, file an unconditional appearance having the same effect as a conditional appearance by clearly indicating at the time of filing that in filing the unconditional appearance they do not waive their objection to the court's jurisdiction, the originating process or its service.[72]

In *Sykes v Povey Corporation*[73] the defendant delivered a letter along with a copy of the notice of unconditional appearance served on the plaintiff. The letter stated the defendant's intention to rely on a clause in the deed on which the plaintiff's claim was based that disputes were subject to foreign jurisdiction, and, on that basis, sought the plaintiff's consent to a stay of proceedings. The court held that the defendant had not, by entering an unconditional appearance, waived any rights they had to rely on the foreign jurisdiction clause in the deed.

WAIVER OTHER THAN BY UNCONDITIONAL APPEARANCE

[4.110] In general, defendants intending to challenge the court's jurisdiction should do no more than challenge jurisdiction and avoid procedural steps lest they be taken to have thereby waived objection. The principle has, however, been interpreted as giving defendants some room to manoeuvre. In *Rein v Stein* Cave J said that

69 *Bayne v Slack* (1857) 3 CBNS 363; *Edwards v Warden* (1874) LE 9 Ch App 495.

70 *Healey v Ballarat East Bowling Club* [1961] VR 206.

71 *Federal Court of Australia Act 1976* (Cth), s 51.

72 See *Mayer v Claretie* (1890) 7 TLR 40; *Firth v De las Rivas* [1893] 1 QB 768; *Hadley & Co v Henry* (1896) 21 VLR 646; *Glassford, Cook & Co Pty Ltd v William Higson & Co* (1899) 25 VLR 177; *Webb v Webb (No 2)* (1901) 18 WN (NSW) 221; *Mutch v Dalley* [1923] St R Qd 138; *Port Huon Fruitgrowers Co-op Assoc Ltd v Samuel Larkinson Ltd* (1923) 20 Tas LR 1; *Larsen v The Ship Nieuw Holland* [1957] St R Qd 605 (where it was said that there was no distinction in effect between a conditional appearance and an appearance under protest); *Trade Practices Commission v Gillette Co (No 2)* (1993) 45 FCR 466; 118 ALR 280 at 283 (FCA). In *Friedman v Kemp's Nurseries Ltd* [1954] VLR 336, O'Bryan J, without deciding whether the order would be effective, gave the defendant leave to enter an appearance under protest.

73 *Sykes v Povey Corporation* (unreported; VSC; Tadgell J; 8 April 1988).

> In order to establish waiver, you must show that the party alleged to have waived his objection has taken some step which is only necessary or useful if the objection has actually been waived, or if the objection has never been entertained at all.[74]

In *Colbert v Tocumwal Trading*[75] Scholl J, reflecting on the authority of *Lindgran v Lindgran*,[76] said that it laid down the principle that waiver is only established when it can be properly inferred that, in defending the case, the defendant intended not to rely on an objection to the validity of the service of the proceedings being brought against him.[77]

A defendant does not therefore waive their right to object to the court's jurisdiction simply by taking a step beyond what was open to or necessary for them to take in raising their objection. The defendant's conduct will only amount to waiver if it is inconsistent with maintaining an objection to jurisdiction, or if the defendant does not also object to being under the court's jurisdiction.[78] Defendants who have dealt with the merits of the case, for example, have not been held on that basis to have submitted to the jurisdiction of the court.[79] In *Lindgran v Lindgran*[80] the defendant, whose objection to the validity of service of a summons in a maintenance action effected under the *Service and Execution of Process Act 1992* (Cth) was dismissed by the magistrate, contested the maintenance application on its merits, but did not thereby submit to the court's jurisdiction because they clearly indicated their intention to protest the court's jurisdiction. Defendants who have allowed judgment in default of their appearance to be entered against them have been held to have not submitted to the court's jurisdiction on the basis that not appearing is indistinguishable from appearing and challenging the court's jurisdiction.[81] Nor did a defendant who consented to an adjournment before objecting to jurisdiction on the basis of defective service of process

74 *Rein v Stein* [1892] 1 QB 753 per Cave J.

75 *Colbert v Tocumwal Trading Co Pty Ltd* [1964] VR 820 at 826, with respect to an objection to service of originating process effected pursuant to the former *Service and Execution of Process Act 1901* (Cth).

76 *Lindgran v Lindgran* [1956] VLR 215.

77 Defendants have, for example, been held to stricter tests than those set forth in *Rein v Stein* [1892] 1 QB 753 and *Colbert v Tocumwal Trading Co Pty Ltd* [1964] VR 820. See, for example, the Full Court in the Victorian case of *Morton v Hampson* [1962] VR 364; see also *Holloway v Cooke Pty Ltd* [1963] VR 229 and the English cases referred to therein.

78 *Laurie v Carroll* (1958) 98 CLR 310 at 335–336.

79 *Zwillinger v Schulof* [1963] VR 407 at 413.

80 *Lindgran v Lindgran* [1956] VLR 215 at 219–220.

81 *Re Dulles' Settlement (No 2)* [1951] Ch 842; *Williams & Glyn's Bank plc v Astro Dinamico Cia Naviera SA* [1984] 1 WLR 438.

waive their objection.[82] Similarly, a party knowing that a proceeding is affected by irregularity is not waiving that irregularity where they manifestly intend not to do so.[83]

Where service has been effected upon a foreign defendant the court has jurisdiction to stay proceedings in order to prevent an abuse of process.[84] A foreign defendant is not submitting to the jurisdiction of the court by applying for a stay of proceedings pending the decision of litigation in a foreign jurisdiction if they have challenged the jurisdiction of the court over proceedings.[85] Nor is a defendant attending a foreign forum to dispute its jurisdiction over proceedings submitting to jurisdiction.[86]

The position of the defendant who enters a conditional appearance and unsuccessfully applies to have service set aside[87] is subject to two approaches. On one approach, the failure of the application may be taken as meaning that the defendant has submitted to the court's jurisdiction, which it now exercises over the defendant.[88] On the other hand, a defendant disputing the court's jurisdiction may be said not to be submitting to it if it files a conditional appearance.[89] Rule 8.08 overcomes these discrepant positions by providing that a conditional appearance has effect as an unconditional appearance unless on application by the defendant the court orders otherwise.[90]

WHO CAN FILE AN APPEARANCE

[4.120] In general, only a defendant is permitted to file an appearance. The few permissible exceptions occur

- in admiralty actions *in rem* where persons with a proprietary interest in the ship, such as the owner of the vessel, may enter appearances and become defendants to the claim;[91]
- where a person in possession of land and having an interest in it, or a tenant, may enter appearance in actions for recovery of land;[92]

82 *Hadley & Co v Henry* (1896) 21 VLR 646 at 649.

83 *Hadley & Co v Henry* (1896) 21 VLR 646 at 649. See also *Brickfield Properties Ltd v Newton* [1971] 1 WLR 862.

84 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 502–503.

85 *Williams & Glyn's Bank plc v Astro Dinamico Cia Naviera SA* [1984] 1 WLR 438.

86 See *Henry v Geopresco International Ltd* [1976] 1 QB 726.

87 *Harris v Taylor* [1915] 2 KB 580.

88 *Henry v Geopresco International Ltd* [1976] 1 QB 726; [1975] 2 All ER 702 at 748.

89 *Re Dulles Settlement (No 2)* [1951] Ch 842 at 850 per Denning LJ.

90 In New South Wales the defendant applies to set aside service without entering an appearance: NSW r 12.11. See also ACT r 111; NT r 8.08; Qld r 144; Tas r 168; Vic r 8.08; WA O 12 r 6. See also ACT r 111; NT rr 7.05, 8.09; Qld r 144; Tas r 165; Vic rr 7.05, 8.09; WA O 12 rr 6, 7.

91 *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad* (1976) 136 CLR 529 at 539.

92 ACT r 151; NSW r 6.8; Qld r 143; Tas r 165; WA O 12 r 8.

- in an ejectment action against a tenant where the landlord strictly defined, or broadly defined to include anyone who can claim an interest in the land including the mortgagee[93] or devisee in trust,[94] may file an appearance and defence and become a defendant in order to protect interests in the land not vested in the tenant.

In *Johnsen v Duks*[95] proceedings were brought to eject a husband and wife in possession by a vendor of property claiming rescission of the contract of sale. Service of the summons was regularly effected upon the wife but not the husband. The process server left the summons at the house with the wife but the husband was only notified when the wife handed him the summons. A judgment in default against the husband was set aside on the basis of irregularity of service, while judgment against the wife was set aside without regard for the merits of the case.

Rule 8.03 provides that a defendant may file an appearance either by a solicitor, or in person.[96] Specifically, it states that

(1) Except as provided in Rule 15.02, a defendant may file an appearance by a solicitor or in person.

(2) A corporation may file an appearance by any person duly authorised by it to so act.

Defendant files an appearance through a solicitor or in person

[4.130] If the defendant is a corporation it may file an appearance by a solicitor, or by an officer of the corporation.[97] Partners, whether sued personally or in the name of a partnership, enter appearance in their own name. Only one partner need be served, however, if more than one is served time runs from the time the last was served. Partners who were not individually served may enter an appearance. In circumstances where a partnership is served at its principal place of business through the firm's manager, the partners file an appearance and not the manager, unless the manager is also a partner of the firm.

However, all further steps in the proceedings continue in the name of the firm.[98] In commencing action against a partnership the plaintiff need serve only one of the firm's partners. Where multiple partners are served, the time available for appearance runs from the time the last partner was served. Partners may enter an appearance even if the plaintiff did not effect service individually on them.

Where multiple partners have been served individually it is sufficient for one partner only to file an appearance to prevent the plaintiff entering a

93 *Doe d Tilyard v Cooper* (1800) 8 Term Rep 645; 101 ER 1594.

94 *Lovelock d Norris v Dancaster* (1790) 4 Term Rep 122; 100 ER 928.

95 *Johnsen v Duks* [1963] NSWR 730.

96 Rule 8.03(1).

97 Rule 8.03(2).

98 Vic r 17.04; ACT r 108; FCR r 11.04; NT r 17.04; Qld r 85; Tas r 311; WA O 71 r 5.

default judgment against the firm.[99] Unless a partner seeks leave of the court they expose themselves to personal liability by filing an appearance.

A conditional appearance being filed by a partner does not prevent the plaintiff effecting service on the firm and obtaining a default judgment even where an unconditional appearance has not been filed. A defendant denying liability as a partner should enter a conditional appearance denying they were a partner.[100]

A defendant denying liability on the basis that they were not a partner of the firm at the time the cause of action accrued[101] must do so as a defence at trial. The rules do not provide for partners who have been served to file a conditional appearance challenging jurisdiction on the basis that they were not partners at the relevant time.

Each of the defences raised by individual partners is a defence, not of the individual partner, but of the firm itself,[102] and may be used by all partners,[103] so that the plaintiff must supervene over each defence to successfully prosecute the claim against the defendant firm.

The exception to the provision under the rules that defendants may file an appearance either personally or by a solicitor is that persons under a disability and corporations are not able to file appearances personally. A person under a disability as defined in r 15.01 must file an appearance by a litigation guardian (or guardian *ad litem*)[104] who shall act by a solicitor.[105] Corporations file appearances through duly authorised persons.[106] In general, a corporation is unable to take any step other than appearance without the representation of a solicitor or counsel instructed by a solicitor,[107] but the rules are otherwise silent about attending before the court to address argument. Nevertheless, the court in its inherent jurisdiction to control its own proceedings may permit any person to address it if it considers that person as being a proper person to attend and address the court.

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99 *Adam v Townsend* (1884) 14 QBD 103; *Lysaght Ltd v Clark & Co* [1891] 1 QB 552.

100 Vic r 17.06; see also NT r 17.06; Qld r 86; Tas r 311; WA O 71 r 7.

101 Vic r 17.06; see also NT r 17.06; Qld r 86; Tas r 311; WA O 71 r 7.

102 *Ellis v Wadeson* [1899] 1 QB 714.

103 *Pirie v Richardson* [1927] 1 KB 448.

104 Rule 15.02.

105 Rule 15.02(3).

106 Rule 8.03(2).

107 See r 1.17 (of which r 1.17(2)(a) now refers to filing "with the Prothonotary" rather than "in the Prothonotary's Office"); *Hubbard Assn of Scientologists International v Anderson* [1972] VR 340; *Hubbard Assn of Scientologists International v Anderson (No 2)* [1972] VR 577; *Equitable Life Assurance Society v Cutter* (1887) 4 WN (NSW) 60; *Re London County Council & London Tramways Co* (1897) 13 TLR 254; *Charles P Kinnell & Co Ltd v Harding Wace & Co* [1918] 1 KB 405; *Bay Marine Pty Ltd v Clayton Country Properties Pty Ltd* (1986) 8 NSWLR 104; see also *Access Services Group Pty Ltd v McLoughlin* [2006] NSWSC 532. Rule 8.03(2) is taken from O 12 r 1(2) of the *Rules of the Supreme Court 1965* in England.

If the defendant does not give notice of appearance, then only a legally qualified person or a person authorised by the defendant if they are filing a notice prepared by the defendant, may do so.[108] Arguably, the defendant filing an appearance prevents a default judgment being entered against them.[109] However, the court lacks the power to authorise a person to file an appearance on behalf of a defendant *sui juris*,[110] although it has the power to vacate appearances which have been entered without the defendant's authorisation. The court may vacate an appearance entered without having been authorised by the defendant.[111]

ADDRESS FOR SERVICE OF DEFENDANT

[4.140] Rule 8.06 provides that where the defendant appears by solicitor the notice of appearance is required to state the defendant's address, the name of the solicitor's firm, and the solicitor's business address within Victoria. Where the solicitor is an agent the notice of appearance must state the principal's name, the name of the principal firm, and the principal's business address. Regardless of whether or not the solicitor is an agent, the solicitor's business address is the defendant's address for service.[112]

A defendant appearing in person must provide their address within Victoria on the notice of appearance in accordance with r 8.06(1)(b). If the defendant's address is not within Victoria the defendant must provide an address for service within Victoria. The defendant's address within Victoria on the notice of appearance supplied under r 8.06(1)(b) is the defendant's address for service.[113]

Rule 8.06(3) provides that where service has been effected under the *Service and Execution of Process Act 1992* (Cth) the address stated on the notice of appearance is the address for service. The address stated on the notice is the address for service regardless of the operation of paras (1) and (2) of r 8.06. The defendant is permitted to state an address for service outside Victoria because s 18(1) of the *Service and Execution of Process Act 1992* requires the defendant to provide an address within Australia, not within Victoria, for service.

If the address stated by the defendant on the notice of appearance is not genuine the appearance may be set aside by the court, and the plaintiff will be allowed to continue the proceeding as if the defendant had not

108 *Re Ainsworth* [1905] 2 KB 103, but such a person, if authorised to do so by the defendant, may file in the court a notice prepared by the defendant: *Oake v Moorecroft* (1869) LR 5 QB 76.

109 *Alliance Acceptance Co Ltd v Makas* (1976) 12 ACTR 19.

110 *Llewellyn v Carrickford* [1970] 1 WLR 1124.

111 *von Armin v Federal Republic of Germany* (2002) 125 FCR 324 at 326.

112 Rule 8.06(2)(a).

113 Rule 8.06(2)(b).

filed an appearance.[114] To properly file an appearance the defendant files a memorandum in the prescribed Form 8A to be served at the plaintiff's address for service, or in Form 8AB where proceedings have been commenced in RedCrest under O 28A.[115] The form determines the details required to be entered including the address for service of the defendant, the defendant's solicitor's (and where relevant, the solicitor's agent's) name, address, telephone number, facsimile number, and document exchange box number if they have one.[116]

If the originating process has been filed electronically using the Victorian Supreme Court's RedCrest system under O 28A notice of appearance is subject to fewer requirements. An appearance is filed in accordance with O 28.04, and the notice of appearance is in Form 8AB.[117]

The rules prescribe the details required to be set out on the notice of appearance. While rules vary between jurisdictions, in general they require the defendant to provide

- their address for service;
- the name, address, telephone number and facsimile number of the defendant's solicitor, and their document exchange box number;
- if the solicitor is represented by an agent, the same details for the solicitor's agent are to be provided.[118]

EMPLOYMENT OF SOLICITOR AFTER APPEARANCE IN PERSON

[4.150] A solicitor appointed by a defendant after the defendant has filed an appearance in person is required to immediately file and serve a notice of appointment on the other parties.[119]

UNAUTHORISED APPEARANCE BY SOLICITOR

[4.160] Appearance may be set aside if it is filed by a solicitor without the authority of the defendant.[120]

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114 Rule 8.06(4).

115 Rule 8.05; r 8.05(2), (3) and (4) do not apply to filing proceedings in RedCrest: r 8.05(1.1)(b).

116 Vic Form 8A; see also ACT r 101 Form 2.8; FCR r 11.01; NSW Form 4; NT Form 8A; Qld Form 7; SA r 59; Tas Form 14; WA Form 6.

117 Rule 8.05(1.1).

118 Vic Form 8A; see also ACT r 101 Form 2.8; FCR r 11.01; NSW Form 4; NT Form 8A; Qld Form 7; SA r 59; Tas Form 14; WA Form 6.

119 Rule 20.02. See also *Adams v Adams* (1885) 7 ALT 82; *Liebmann v Foote* (1895) 1 ALR 16.

120 *Re Gray* (1891) 65 LT 743; *Yonge v Toynbee* [1910] 1 KB 215; *Porter v Fraser* (1912) 29 TLR 91; *The Neptune* [1919] P 17.

TIME FOR APPEARANCE

[4.180] The time limit for filing an appearance is set out in the rules.[121] Rule 8.04 provides

> **8.04 Time for appearance**
>
> Unless the Court otherwise orders, the time stated in the writ or originating motion for the defendant to file an appearance shall be—
>
> (a) where the originating process is to be served in Victoria, not less than 10 days after service;
>
> (b) where the originating process is to be served out of Victoria and in another part of Australia, 21 days after service;
>
> (c) where the originating process is to be served in Papua New Guinea, not less than 28 days after service;
>
> (d) where the originating process is to be served in New Zealand under Part 2 of the *Trans-Tasman Proceedings Act 2010* of the Commonwealth—
>
> (i) 30 working days (within the meaning of that Act) after service; or
>
> (ii) if a shorter or longer period has been fixed by the Court under section 13(1)(b) of that Act, the period so fixed;
>
> (e) in any other case, not less than 42 days after service.

During these time periods the plaintiff may take no further step in the proceeding. After the time period has expired if the defendant has entered no appearance the plaintiff may enter a default judgment under the rules.

If an originating process requires an appearance to be entered the rules require it to show the time limited for the entry of such appearance and, if it does not so show, the originating process is irregular.[122]

In a proceeding commenced by writ or originating motion, r 8.04 provides strict time limits within which the defendant is to file an appearance, unless the court orders otherwise.[123] The originating process must state a time for appearance which is at least the time specifically permitted on the basis of the location the defendant is served. By r 8.04 the time allowed the defendant to file an appearance will depend on the jurisdiction in which process is to be served. The plaintiff to proceedings issued in a Victorian court must state:

- to a defendant served in Victoria that they have up to 10 days after service to respond;
- to a defendant served in another State or Territory of Australia that they have 21 days;
- to a defendant served in Papua New Guinea that they have 28 days;
- to a defendant served in New Zealand under the *Trans-Tasman Proceedings Act 2010* (Cth) either 30 days, or a greater or lesser period as ordered by the court as empowered by the Act; and

121 Or filing a notice of address for service as the case may be depending on the jurisdiction.

122 *McArthur v Herald & Weekly Times Ltd* [1957] QWN 16.

123 Or filing a notice of address for service as the case may be depending on the jurisdiction.

- to a defendant located anywhere else that they have will have 42 days to respond.

Rule 8.04 fixes a time for the defendant to file an appearance whether they are served within Victoria, in another State or Territory in Australia, or outside Australia. The defendant must file an appearance not more than 21 days after service under the *Service and Execution of Process Act 1992* (Cth). If service out of Australia is permitted under O 7 because the claim falls within r 7.01(1) the plaintiff may serve process on the defendant without leave of the court and fix a time for appearance under r 7.01(1)(c) and (d). The rules now determine the time for appearance which was once fixed by the court under a scheme in which leave of the court was required to serve process out of Australia.[124]

An originating process is required to show the time fixed by the rules, depending on where the defendant is served, within which the defendant may file an appearance. It is an irregularity for an originating process to fail to show the time for appearance.[125] It is permissible for an originating process to allow the defendant more time to file an appearance than is prescribed by the rule.[126] If an originating process allows a time for appearance other than the time specified by the rules in the particular circumstances it cannot be a time less than is required by the rules. An originating process fixing a time less than that prescribed by the rules is irregular. The irregularity may be cured by amending, and where required re-serving, the originating process.[127]

During these periods of time between the service of the originating process and the defendant's filing of a notice of appearance the plaintiff may take no further procedural step. If, after the expiry of the time granted the defendant to file an appearance, no appearance has been filed, the plaintiff may seek, depending on what the rules permit, a default judgment or other order.[128]

Appearance before or after judgment

[4.190] Rule 8.07 provides that a defendant may enter an appearance at any time, even after the time specified in the originating process.

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124 Leave was required to serve the originating process out of Victoria under the corresponding O 11 of the *Rules of the Supreme Court 1884* (Vic). O 11 of those Rules applied to service anywhere out of Victoria, and was not restricted to another Australian State or Territory. If the court granted leave it fixed the time within which the defendant was required to appear. Leave no longer being required, the court is not relied upon to fix the time for appearance, which is determined by the rules.

125 *McArthur v Herald & Weekly Times Ltd* [1957] QWN 16.

126 *Pringle v Musgrove* (1903) 20 WN (NSW) 280. See also *Brooks & Co v Smith* (1903) 20 WN (NSW) 77.

127 See *Fadelli Transport Industries Pty Ltd v Timor Transport Pty Ltd* (1986) 39 NTR 10 at 13; *Commonwealth Bank of Australia v Buffett* (1993) 114 ALR 245 (NISC).

128 *Lazarus v Stutchbury* (1886) 7 LR (NSW) 328.

Late appearance

[4.200]

8.07 Late appearance

(1) A defendant may file an appearance at any time, but after judgment an appearance shall not be filed without the leave of the Court.

(2) A defendant who files an appearance after the time for appearance stated in the writ or originating motion shall, unless the Court otherwise orders, have the same time for serving a defence or for any other purpose as if the defendant had filed an appearance on the last day so stated.

Time for entering an appearance starts to run from the day service is effected upon the defendant.[129] Rule 8.07 provides that the defendant may file an appearance at any time. Prior to judgment the defendant may not, however, take a step in the proceeding until they file an appearance. The exception is that the defendant may take action to set aside the originating process or the service of the process.

The time given on the originating process for entering an appearance becomes relevant when the plaintiff seeks to obtain judgment in default of appearance,[130] or to take another step in the proceeding. At that point it becomes necessary to determine if sufficient time was given to the defendant to enter an appearance.[131]

An appearance may be filed after a default judgment has been signed only with leave of the court.[132] The defendant will seek to set aside a judgment entered in default of appearance by an application under r 21.07 invoking the court's power to set aside or vary any judgment made in accordance with O 21. The plaintiff is notified of the application by summons.[133]

If a default judgment is given or entered prior to expiration of the time allowed for entering an appearance it is irregular and may be set aside. Setting aside such a default judgment is not dependent on whether a defendant has a defence.[134]

In accordance with r 8.07 an appearance may be filed after the time stated in the originating process for so doing. A late appearance cannot be ignored, and a plaintiff is unable to sign a default judgment once

129 *Lazarus v Stutchbury* (1886) 7 LR (NSW) 328; *Trow v Ind Coope (West Midlands) Ltd* [1967] 2 QB 899.

130 Rule 8.07(1); *Re Thomas; Davies v Thomas* [1940] 4 All ER 145; *Carroll v Laurie* [1959] VR 275 at 276.

131 *Caroll v Laurie* [1959] VR 275 at 276; *Fadelli Transport Industries Pty Ltd v Timor Transport Pty Ltd* (1986) 39 NTR 10 at 13.

132 Vic r 8.07(1); see also NT r 8.07; WA O 12 r 5; see further, *Stern v Friedman* [1953] 1 WLR 969; *Reid Murray Development Queensland (Pty) Ltd v Lynwood Holdings Pty Ltd* [1964] QWN 1.

133 *Stern v Friedman* [1953] 1 WLR 969. See also *Reid Murray Development Queensland (Pty) Ltd v Lynwood Holdings Pty Ltd* [1964] QWN 1.

134 *Daly v Silley* [1960] VR 353.

appearance is entered.[135] If appearance is filed after the time stated on the originating process the defendant faces a penalty in that if the plaintiff has served a statement of claim with the originating process, the time within which the defendant must serve the defence runs from the last day allowed for filing an appearance on the originating process, and not from the day appearance was entered.[136] A defendant requiring additional time to serve a defence must obtain the plaintiff's consent, or an order of the court by application under r 3.02.

Time for defence

[4.210] The defendant must file an appearance before filing a defence.[137] Rule 14.04(a) provides that calculating the time for serving a defence where appearance is filed late requires that the defendant be taken as having appeared on the last day of time limited for appearance.[138] A defendant requiring additional time to serve a defence obtains it either by consent of the plaintiff or by seeking a court order under r 3.02.

Appearance when office closed or on vacation

[4.220] For the purpose of calculating the time for appearance the defendant may file an appearance the next day after the last day available for service if the court is closed on the last available day.[139] The days of the court's summer recess are also not included in the calculation of time for appearance. The period from 24 December of the previous year to 9 January of the following year inclusive are therefore excluded unless the court makes an order to the contrary.[140]

APPEARANCE BEFORE SERVICE OF WRIT: APPEARING GRATIS

[4.230] A defendant is at liberty to appear *gratis*.[141] Appearing *gratis* means that a defendant files an appearance before the plaintiff has effected service of an originating process[142] and waives the requirement of

135 *Harrison's Timber Pty Ltd v Haster* (1974) 3 ACTR 1.

136 *Harrison's Timber Pty Ltd v Haster* (1974) 3 ACTR 1; 22 FLR 258 at 259. Under r 14.04(a) the time for serving a defence is calculated on the basis of the day of filing an appearance as 30 days from the day appearance was filed: r 8.07(2). See *Lloyd v Dixon* [1952] VLR 434.

137 *Flatau v Best* (1897) 13 WN (NSW) 147.

138 Rule 8.07(2). See *Lloyd v Dixon* [1952] VLR 434.

139 Rule 3.01(5).

140 Rule 3.04(1).

141 *Fell v Christ's College* (1787) 2 Bro CC 279; 29 ER 153; *Pioneer Concrete (North Coast) Pty Ltd v Bennett* [1972] Qd R 544; *Farley & Lewers (Qld) Pty Ltd v Fitzgerald* [1983] 1 Qd R 231; *Pike v Michael Nairn & Co Ltd* [1960] Ch 553 at 560.

142 *Pioneer Concrete (North Coast) Pty Ltd v Bennett* [1972] Qd R 544; *Farley & Lewers (Qld) Pty Ltd v Fitzgerald* [1983] 1 Qd R 231; *Pike v Michael Nairn & Co Ltd* [1960] Ch 553 at 560.

service.[143] When a defendant appears *gratis* the date of service is taken to be the date that appearance was filed.

WAIVER: BEFORE TAKING FRESH STEP

[4.240] The concept of waiver prevents a party who has become aware of an irregularity in proceedings to take a further step in the litigation, and subsequently rely on the irregularity to have the proceedings set aside. The basis for considering the irregularity as having been waived is that to do otherwise would be unfair to the party responsible for the irregularity, catching them by surprise after the other party had foregone any objection to the irregularity and continued with the proceeding despite it.[144] On the other hand, courts are hesitant to infer that defendants have impliedly submitted to the jurisdiction,[145] for example, due to an error on the part of the defendant's legal representative.[146]

Establishing waiver requires demonstrating that the party alleged to have waived the objection has taken a step which is incompatible with intending to, maintaining, or relying on an objection to the irregularity.[147] The party alleging waiver must show that the step taken by the party allegedly waiving their objection to an irregularity is a "step which is only necessary or useful if the objection has been actually waived, or if the objection has never been entertained at all".[148] In *National Commercial Bank v Wimborne*[149] Holland J said that to establish that a party has waived an objection the "facts must show a voluntary act unequivocally evincing an intention to abandon or not assert a right."

If, on the other hand, it can be demonstrated that the party did not intend to waive the objection then the objection to the irregularity will not have been waived.[150] The intention would be demonstrated by the party taking a step to object to an irregularity. In *Rein v Stein*[151] a party applying to inspect documents referred to in an affidavit upon which an order for service out of jurisdiction was made did not thereby waive their objection. In *Emeris v Woodward*[152] the defendant objected to the plaintiff's attempt

143 *Green v Bradyll* (1856) 1 H & N 69; 156 ER 1121.

144 *Brickfield Properties Ltd v Newton* [1971] 1 WLR 862; [1971] 3 All ER 328 at 339–340 per Edmund Davies LJ. See also *Rust v Barnes* [1980] 2 NSWLR 726 at 741.

145 *Laurie v Carroll* (1958) 98 CLR 310 at 334–336; *Williams v Society of Lloyd's* [1994] 1 VR 274 at 294; *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90 at 97, 98.

146 But see *Astro Exito Navegacion SA v WT Hsu (The Messianiki Tolmi)* [1984] 1 Lloyd's Rep 266.

147 *Lindgran v Lindgran* [1956] VLR 215 at 220.

148 *Rein v Stein* [1892] 1 QB 753; (1892) 66 LT 469 at 471 per Cave J.

149 *National Commercial Bank v Wimborne* (1979) 11 NSWLR 156 at 176.

150 *Hadley & Co v Henry* (1896) 21 VLR 646 at 649; *Brickfield Properties Ltd v Newton* [1971] 1 WLR 862.

151 *Rein v Stein* [1892] 1 QB 753.

152 *Emeris v Woodward* (1889) 43 Ch D 185.

to seek an order without initiating an action. Nevertheless, the defendant filed affidavits answering the plaintiff's witnesses, and cross-examining them. It was held that the defendant had not waived his objection to the plaintiff's attempt to seek relief by summons. The defendant was required by the plaintiff's actions in leading evidence through witnesses to protect himself by filing evidence answering the plaintiff's, and establishing his own position.[153]

Examples of steps which have been held to amount to a waiver of objection include:

- appearance by consent and the filing of affidavits in opposition to an application for an injunction;[154]
- filing an unconditional appearance;[155]
- arguing the merits of the case on the hearing of the objection;[156]
- unconditional attendance at trial notwithstanding a plea of no jurisdiction in the defence;[157]
- application to set aside an order for substituted service and judgment thereon accompanied by a request for a statement of claim;[158]
- applying for an order that the plaintiff deliver a statement of claim after objecting that a default judgment was entered upon irregular service of the writ;[159]
- application for an extension of time for appearance and for security for costs;[160]
- application to set aside the writ for irregularity precluded by a previous unsuccessful application for security for costs;[161]
- application for adjournment of a trial and for leave to serve and answer interrogatories;[162]
- applying for the adjournment of the hearing of an application the summons for which was defective in form;[163]

153 As to whether filing an affidavit is the taking of a step in a proceeding, see *Zalinoff v Hammond* [1898] 2 Ch 92.

154 *Boyle v Sacker* (1888) 39 Ch D 249.

155 *Re Orr Ewing* (1882) 22 Ch D 456; *Tozier v Hawkins* (1885) 15 QBD 680 at 680; *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad* (1976) 136 CLR 529 at 539; *AGC (Advances) Ltd v Cohns Manufacturing* (unreported; VSC; McDonald J; CLF No 3438; 6 September 1991).

156 *Boyle v Sacker* (1888) 39 Ch D 249.

157 *Peyton, Dowling & Co v Houlder Bros* (1890) 16 VLR 812.

158 *Fry v Moore* (1889) 23 QBD 395; see *Capewell v Seltino Pty Ltd* [1986] 2 Qd R 2 at 15.

159 *Fry v Moore* (1889) 23 QBD 395.

160 *White v Hardwick* (1922) 23 SR (NSW) 6.

161 *The Assunta* [1902] P 150; see also *White v Hardwick* (1922) 23 SR (NSW) 6.

162 *Kingstone Tyre Agency Pty Ltd v Blackmore* [1970] VR 625; participating in the hearing on questions relating to the merits of the plaintiff's claim: *McM v C (No 2)* [1980] 1 NSWLR 27 at 40.

163 *Kingstone Tyre Agency Pty Ltd v Blackmore* [1970] VR 625.

- attending a hearing and disputing the facts alleged in an affidavit objected to as irregular;[164]
- taking out an appointment to tax the costs of a discontinuance after objecting that the discontinuance was irregular;[165]
- applying for discovery after objecting that a memorandum of the close of pleadings was filed prematurely:[166]
- completing a certificate of readiness for trial;[167]
- an objection to jurisdiction waived by failure to raise objection in opposition to an application for a *Mareva* order.[168]

Applying for leave to serve originating process out of the jurisdiction was held to be a step in procedure in *Black v Dawson*.[169]

Examples of what has been held *not* to constitute waiver have included:

- obtaining an order to inspect documents annexed to affidavits on which an order for service out of the jurisdiction was granted;[170]
- an attempt to have interim injunction discharged on an application to set aside service of the writ made before appearance;[171]
- an indication by the defendant's solicitors to the plaintiff of expectation of receipt of instructions to accept service of a writ and proposing that, on that basis, proceedings should be directed to them;[172]
- an application for particulars of a statement of claim pending hearing of a summons under r 8.09 to have service of writ set aside;[173]
- an application to dismiss proceedings for want of prosecution pending hearing of an objection of want of jurisdiction.[174]

A defendant who files ordinary service normally indicates thereby that they waived the right to object to the validity of the originating process or the validity of service. A defendant who wishes to raise the relevant objection should apply to do so prior to entering an appearance, or make an application to challenge the process or its service after filing an

164 *Treherne v Dale* (1884) 27 Ch D 66.

165 *Paterson v Clarton* (1885) 7 ALT 15.

166 *Russell v McLeod* (1897) 23 VLR 532.

167 *Orbell v Bundaleer Lodge Nursing Home Pty Ltd* [1988] 1 Qd R 152 at 154.

168 *Pico Holdings Inc v Dominion Capital Pty Ltd* [2001] VSC 333.

169 *Black v Dawson* [1895] 1 QB 848.

170 *Rein v Stein* [1892] 1 QB 753, answering interrogatories in an action transferred from the County Court: *Wood v Middleton* [1897] 1 Ch 151.

171 *Laurie v Carroll* (1958) 98 CLR 310 at 335.

172 *Carmel Exporters (Sales) Ltd v Sea-Land Services Inc* [1981] 1 WLR 1068.

173 *Williams v Society of Lloyd's* [1994] 1 VR 274 at 292–294.

174 *Schweitzer v Kronen Verwaltungs GmbH* (unreported; VSC; Chernov J; No 10444/1993; 24 June 1997).

unconditional appearance.[175] Filing an unconditional appearance will not confer jurisdiction on a court which lacks jurisdiction under statute.[176]

APPEARANCE TO AMENDED WRIT

[4.250] A defendant is not required to file a fresh appearance to a writ amended after appearance has been filed, and a motion may be made after amendment.[177] Minor defects on a writ will probably not invalidate service.[178]

DEFENDANT SUED IN WRONG NAME

[4.260] If the writ served on the defendant has been issued in the wrong name the defendant should appear conditionally, stating the error in the name on the notice of appearance[179] and obliging the plaintiff to amend the writ accordingly. The writ constitutes an irregularity, and were the defendant to file a notice of appearance in response to it without notifying the plaintiff of the naming error they would be waiving the irregularity.[180]

AMENDMENT OR WITHDRAWAL OF APPEARANCE

[4.270] Rule 25.01[181] provides that

> A party who has filed an appearance in a proceeding may withdraw the appearance at any time with the leave of the Court.

An appearance filed irregularly may be amended, or an appearance filed mistakenly may be withdrawn, by the defendant at any time after having obtained leave of the court.[182] Only the defendant has standing to make

175 Under r 8.08; see the notes under rr 8.08, 8.09.

176 See *Beugelaar v City of Springvale* [1969] VR 3 (an action brought in the Supreme Court without prior leave as required by *Local Government Act 1958* (Vic), s 882).

177 *Paxton v Baird* [1893] 1 QB 139; *Hanmer v Clifton* [1894] 1 QB 238.

178 *Hanmer v Clifton* [1894] 1 QB 238 at 239–240 (where it was held that the indorsement on the writ in an action for the recovery of land by a landlord against a tenant whose term had expired and which bore the date of the lease, the mode of devolution of the lessee's interest, but not the length of the term, was good in that it provided the defendants with sufficient information).

179 *Alexander Korda Film Productions Ltd v Columbia Pictures Corporation Ltd* [1946] 1 Ch 336.

180 See *Healey v Ballarat East Bowling Club* [1961] VR 206.

181 Order 25 replaced *Rules of the Supreme Court 1884* (Vic), O 26. While new it substantively adopts the former practice. The rule is based upon *Rules of the Supreme Court 1962*, O 21 r 1 in England.

182 *Glassford, Cook & Co Pty Ltd v William Higson & Co* (1899) 25 VLR 177. For an appearance filed by mistake see r 25.01. See *Menzie v Rodriques* (1814) 1 Price 92; 145 ER 1340; *Sambroke v Hayes* (1835) 4 LJ (NS) Ch 175 (the court will not cancel an appearance on the application solely of a solicitor who mistakenly entered an appearance for a party for whom they are not authorised to act). Rule 25.01 is based on the former practice by which an appearance entered by mistake could be set aside: *Somportex Ltd v Philadelphia Chewing Gum Corporation* [1968] 3 All ER 26.

the application for amendment or withdrawal. The defendant's solicitor cannot make a personal application to the court and the court will not issue an order unless the defendant is present at, or has notice of, the application.[183]

Where the defendant has served the notice of appearance on the plaintiff, the application for amendment is made either on notice to the plaintiff by summons, or *ex parte*. Where notice of appearance has been served it can only be withdrawn with the leave of the court.[184] The defendant in *Somportex Ltd v Philadelphia Chewing Gum*[185] was refused leave to withdraw their conditional appearance on the ground that it had not been filed by mistake. In *Pico Holdings v Dominion Capital*[186] it was held that the defendant had submitted to jurisdiction by entering an appearance and they were refused leave to withdraw the appearance in order to raise the objection. The defendant in *Firth v John Mowlem & Co*[187] was found to have mistakenly entered an unconditional appearance and was granted leave to withdraw it in order to enter a conditional appearance.[188]

Under O 25 discontinuance is distinguished from withdrawal: discontinuance referring to the whole,[189] and withdrawal to a part of a proceeding.[190] In a proceeding commenced by writ leave of the court is not required if discontinuance or withdrawal occurs before the close of pleadings, but thereafter either leave or the consent of all parties is required.[191] A proceeding not commenced by writ requires either the court's leave or the parties' consent in all cases.[192] Defendants discontinue or partially withdraw counterclaims in the same way a plaintiff discontinues or withdraws part of a proceeding commenced by writ.[193] Third party notices may be discontinued or withdrawn in part by obtaining the court's leave or the third party's consent.[194] The reference to "any part of a proceeding" in O 25 is a reference to any particular claim in

183 *Place v Williams* [1969] VR 703.

184 Rule 25.01. See *Menzie v Rodriques* (1814) 1 Price 92; 145 ER 1340; *Sambroke v Hayes* (1835) 4 LJ (NS) Ch 175. Rule 25.01 is based on the former practice by which an appearance entered by mistake could be set aside: *Somportex Ltd v Philadelphia Chewing Gum Corporation* [1968] 3 All ER 26.

185 *Somportex Ltd v Philadelphia Chewing Gum Corporation* [1968] 3 All ER 26.

186 *Pico Holdings Inc v Dominion Capital Pty Ltd* [2001] VSC 333.

187 *Firth v John Mowlem & Co Ltd* [1978] 1 WLR 1184.

188 See also *Glassford, Cook & Co Pty Ltd v William Higson & Co* (1899) 25 VLR 177 (leave granted); *MEC Import Sales Pty Ltd v Iozzelli* (unreported; VSCCA; No 4618/1994; 5 July 1995) (dismissal of appeal against refusal to allow withdrawal of appearance where nature of error not explained).

189 Rule 25.02(2).

190 Rule 25.02(4).

191 Rule 25.02(2).

192 Rule 25.03.

193 Rule 25.02(3).

194 Rule 25.02(6).

a proceeding.[195] A plaintiff voluntarily discontinues or terminates a claim (in the sense of a cause of action[196]) in a proceeding; a defendant voluntarily discontinues or terminates a counterclaim in a proceeding;[197] and a third party voluntarily discontinues or terminates a claim by third party notice[198] in a proceeding. By withdrawing, however, a party voluntarily abandons only part of a claim (in the sense of one or some of several asserted causes of action), counterclaim, or claim under third party notice, or defence to a claim or counterclaim.[199] The withdrawal of an appearance is a separate matter but also dealt with under O 25.[200]

The other party must be notified of the extent of any discontinuance or withdrawal made without leave of the court by filing and serving a notice of discontinuance or withdrawal,[201] so that a party is not deprived of the benefit of an admission or other matter without the court's leave or the other party's consent.[202]

195 The corresponding expression in the English rules is "particular claim in an action".

196 "Claim", in this instance, has no reference to the type of relief sought and no bearing on the abandonment by the plaintiff of any form of relief which they originally sought, as where a plaintiff claims specific performance as an alternative to damages and then elects to seek damages only. A plaintiff is free to elect what relief to pursue, the only requirement being that when the matter comes on for hearing they should make it clear what remedy they want. They are under no duty to give prior notice of their election. See *Morley London Developments Pty Ltd v Rightside Properties Ltd* (1973) 117 SJ 876, a decision of the Court of Appeal on *Rules of the Supreme Court 1965*, O 21 r 2 in England. See also rr 25.06 and 25.07, which connect "withdrawal" and "cause of action". Compare *Metropolitan Permanent Building Society v McClymont* [1983] 1 Qd R 160.

197 Rule 25.02(3).

198 Rule 25.02(6), subject to r 25.02(2).

199 Rule 25.03.

200 Rule 25.01.

201 Rule 25.04.

202 Rule 25.02(4), (5).

5 Discovery and Interrogatories

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PURPOSES OF DISCOVERY

[5.10] Truth-seeking is the cornerstone of the modern discovery process.[1] It is assisted by discovery to achieve three interrelated purposes:

1. refining the issues on which the trial will focus, so that only the evidence related to matters at the heart of the dispute is produced at trial;
2. ascertaining whether evidence to be used at trial exists (for example, in what form and in whose possession) so that it may be produced at trial; and
3. obtaining the evidence to be used at trial.

In this way discovery is central to the rational nature of the modern trial in which decision-making is founded upon evidence.

EQUITABLE ORIGINS OF DISCOVERY

[5.20] Discovery has its roots in the Chancery and ecclesiastical courts of England.[2] Modern pre-trial discovery represents a generalisation of equitable procedures in all courts and cases. Equity's discovery was based on the equity court's command over the defendant's conscience, and originated in the procedure of the Chancellor compelling the defendant to appear before him in person to answer under oath each sentence of the petitioner's bill, and the questions attached to it. The purpose of the Chancellor exercising his power to compel disclosure was to inform the decision-maker rather than to provide information to litigants to enable them to plan their cases. The current relevance of the equitable roots of discovery is that, just as equity emerged to provide for lapses in the substantive common law,[3] so too does it provide the principles for proceeding when the rules of discovery are silent on, or fail to expressly provide for, a matter.[4] In the case of a conflict, equity prevails.[5]

THE PRINCIPLES OF MODERN DISCOVERY

[5.30] One of the principal means of obtaining the objectives of modern civil procedure and modern justice is to take a broad and liberal approach to discovery. The expansive philosophy of discovery stems from equity. The rules governing discovery are driven by an ethos of disclosure,

1 C Cameron and J Liberman, "Destruction of Documents before Proceedings Commence: What is a Court to Do?" (2003) 27 *Melbourne University Law Review* 1 at 6.

2 F Maitland, *Equity and the Forms of Action at Common Law: Two Courses of Lectures* (A Chaytor and W Whittaker ed, 1920).

3 F Maitland, *Equity and the Forms of Action at Common Law: Two Courses of Lectures* (A Chaytor and W Whittaker ed, 1920), pp 18–19.

4 *Bolckow, Vaughan & Co v Fisher* (1882) 10 QBD 161, and *Supreme Court Rules 1970* (NSW), Pt 1 r 14. This is expressly recognised in *Civil Procedure Act 2010* (Vic), s 54. See also *Wilson v Church* (1878) 9 Ch D 552 at 554–556 per Jessell J (equitable principles continue to rule discovery unless abrogated expressly by statute or regulation).

5 *Attorney-General v Gaskill* (1882) 20 Ch D 519 at 526, 528, 530.

imposing a duty on parties to a suit to reveal relevant information and documents so that all information (except privileged information) pertaining to the issues to be resolved at trial can be obtained.

PHILOSOPHY AND PRACTICE

[5.40] While modern civil procedure is driven by a philosophy of mandatory response rather than focused inquest the rules still require the discovering party to formulate specific requests, such as naming the person who is to disclose the information and identifying the information to be disclosed. The disclosing party is not required to be any more forthcoming than to respond precisely to a closely specified request by a discovering party, nor are they required to concede relevant information, or to identify the witnesses in possession of information or other sources of information. Obtaining documents through discovery requires the discovering party to designate categories of documents to be provided, since the disclosing party is required to produce only specifically identified documents. Obtaining admissions through interrogatories requires the matters to be conceded to be stated with particularity, since the disclosing party is required to answer only relevant questions.

DOCUMENT DISCOVERY

[5.50] Given the increasing production of and greater reliance on documentation in modern bureaucratic and managerial societies, the resolution of disputes is likely to hinge on documentary evidence and the truth-seeking function of the litigation process, which centres on documentary discovery. When defendants are large institutions or powerful corporations with extensive mechanisms for generating, collating and storing information, an obvious "information asymmetry" exists between them and the private plaintiff which discovery can redress by forcing disclosure of relevant documentation.[6]

Documentary discovery provides information which is important in itself and which suggests avenues of inquiry regarding relevant witnesses, and further information that may be required. Access to documentation is therefore likely to be the most important aspect of discovery for a discovering party, and a disclosing party's greatest concern — and it is unsurprising to note that it triggers the most pre-trial argument. It is also the source of some of the widespread cynicism that surrounds trial techniques, based on a suspicion that parties engage in practices that wilfully and deliberately bury, lose and destroy evidence.[7]

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6 A Carter, "Discovery in the Age of Email" (ACLA Spotlight on Litigation Seminar, 12 March 2003), p 8 citing P Spender, "McCabe: Unresolved Questions about Truth and Justice" (2004) 12 *Torts Law Journal* 1.

7 See the literature on the spoliation of evidence. For example, J Kinsler and A Keyes MacIver, "Demystifying Spoliation of Evidence" (1999) 34 *Tort and Insurance Law Journal* 761 at 761; see also *Mills v Central Sydney Area Health Service* [2002] NSWSC 728; *Waterfield v Callander* [2012] FMCAfam 568.

LAW OF DISCOVERY

[5.60] Section 54 of the *Civil Procedure Act 2010* (Vic) ("the Act") provides that the rules of court govern civil proceedings unless a court orders otherwise. Section 55 of the Act provides that in the interest of achieving the objective of litigation "[a] court may make any order or give any directions in relation to discovery that it considers necessary or appropriate."[8]

Discovery is the compulsory disclosure to a party before trial of information relating to questions to be determined in the proceeding which may assist the party to establish their claim or defence. The *Supreme Court (General Civil Procedure) Rules 2015* (Vic) define discovery as the "discovery and inspection of documents and discovery by written interrogatories or oral examination".[9] The processes of discovery recognised by the rules are:

- the discovery and inspection of documents;[10]
- the issuing and answering of interrogatories;[11]
- oral examination;[12] and
- medical examination and the serving of hospital and medical records.[13]

While discovery is the procedure which satisfies the requirement to base the court's decision on accurate information, it is also a potentially costly and time-consuming procedure. The court is therefore authorised to make orders with respect to relieving a party from providing discovery at all,[14] limiting discovery to particular classes of documents or issues,[15] or staging the process so that discovery is effected on the basis of a party's need in the circumstances of the case.[16] In the interest of achieving accuracy in a practicable manner discovery obligations may be expanded[17] or include a particular way of indexing or arranging the information required.[18] The court has discretion to defer discovery if the determination of a question or issue is better resolved prior to discovery being made, or is a precondition to a party's right of discovery.

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8 *Civil Procedure Act 2010* (Vic), s 55(1).

9 Rule 1.13(1). Legislative references in this chapter are to these rules unless otherwise specified.

10 Order 29.

11 Order 30.

12 Order 31.

13 Order 33.

14 *Civil Procedure Act 2010* (Vic), s 55(b).

15 *Civil Procedure Act 2010* (Vic), s 55(c).

16 *Civil Procedure Act 2010* (Vic), s 55(d).

17 *Civil Procedure Act 2010* (Vic), s 55(f).

18 *Civil Procedure Act 2010* (Vic), s 55(g).

"Make discovery of documents"

[5.70] Where the rules refer to a party having to "make discovery of documents" they mean that the party is to make an affidavit of documents in compliance with the rules, file it into court, and serve a copy on the party, or other person, entitled to make discovery.[19] The affidavit of documents identifies documents which relate to the question at issue in the proceedings, as identified by the pleadings which are currently or have formerly been in the party's possession, custody or power.[20] The documents must be made available for the other party to inspect, and those documents identified by the other party must be produced at trial, unless an objection to their inspection and production is raised on the basis of privilege.

Relevance and matters in question

[5.80] In Victoria, r 29.01.1 provides that discovery applies to documents a party relies on or that advance or damage either parties' case. A document which the party seeking discovery already has in their possession is not subject to disclosure by the discovering party.[21]

A party's obligation on discovery may be expanded by the court.[22] The restriction on discovery being possible only between parties to an existing proceeding no longer obtains. Discovery is not restricted to a proceeding that has been commenced. It can now be used, in either one of two forms, by an applicant who requires information to determine whether or not to commence a proceeding:

- first, when the applicant who has a cause of action uses discovery to identify the defendant against whom process should be commenced;[23] and
- secondly, when the applicant who has identified a defendant uses discovery to determine a cause of action in order to obtain a remedy against that person.[24]

Discovery may also be used against a non-party to a suit in certain circumstances. Rules 32.03 and 32.05 may be used, or adapted for use, after the commencement of proceeding to determine whether to add a party.[25] Further, a party may obtain discovery from a non-party prior to the hearing rather than issuing a subpoena for the production of documents into court at trial.[26]

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19 Rule 1.13(1).

20 See *Australian Dairy Corporation v Murray Goulburn Co-op Co Ltd* [1990] VR 355 at 373.

21 Rule 29.01.1.

22 *Civil Procedure Act 2010* (Vic), s 55; r 29.05.2.

23 Rule 32.03.

24 Rule 32.05.

25 Rules 32.04, 32.06.

26 Rule 32.07.

Possession, custody or power

[5.90] In Victoria r 29.01 provides that a document in a party's possession, custody or power must be included in the party's affidavit of discovered documents, and produced for inspection, subject to claims of privilege.[27]

Rule 29.01(2) provides that "[i]n this Order 'possession' means possession, custody or power." The rules provide that a party is in possession of a document if they are the owners of the document; a party has custody of a document if they physically hold the document; and a party has power over documents if they can assert an immediate right of possession against another person having custody,[28] including where that person is a corporation, in circumstances where the party has control of the document, even if the document is a possession of the corporation.[29] A corporation document comes into a company officer's custody at the time the officer prepares or signs it.[30]

The right to possession is a present or past right, not a future right. Discovery does not place parties under an obligation to obtain power over documents.[31] The power over documents must be a right of possession and not one of mere access.[32]

Searching for documents

[5.100] A party giving discovery in Victoria must carry out a reasonable search to determine the existence of discoverable documents. What is reasonable depends on the circumstances of the case and will include, without being restricted to:

- a consideration of factors such as the issues in dispute in the proceedings;
- the complexity of the proceedings;
- the number of documents to be discovered;
- the relevance of the document to determining an issue in dispute in the proceeding; and

27 Vic r 29.01; see also ACT r 605; FCR Sch 1 (which defines control as possession, custody or power); *Civil Procedure Act 2005* (NSW), s 3; NT r 29.01; SA r 136; Tas r 382; WA O 26 r 1.

28 *Turner v Davies* [1981] 2 NSWLR 324; *Roux v Australian Broadcasting Commission* [1992] 2 VR 577; *Douglas-Hill v Parke-Davis Pty Ltd* (1990) 54 SASR 346; *Linfa Pty Ltd v Citibank Ltd* [1995] 1 VR 643 at 646–648.

29 *B v B* [1978] 3 WLR 624; *Linfa Pty Ltd v Citibank Ltd* [1995] 1 VR 643 at 646–648.

30 *Roux v Australian Broadcasting Commission* [1992] 2 VR 577.

31 *Lonrho Ltd v Shell Petroleum Co Ltd* [1980] QB 358; *Douglas-Hill v Parke-Davis Pty Ltd* (1990) 54 SASR 346.

32 See *Psalidis v Norwich Union Life Australia Ltd* (2009) 29 VR 123 per Cavanough J where the *Health Records Act 2001* (Vic) gave patients access to their records but discovery was not ordered because this did not bring the records within the patient's possession, custody or power.

- the convenience and the cost of locating and retrieving any document.[33]

A discovering party must disclose whether they have omitted to search for any particular document, or any class of documents, and the reasons for not doing so.[34] The obligation to discover material will not be easily displaced where the material is substantial in the sense that it may be relevant to answering a question raised in the proceedings regardless of the time, expense and effort involve in making discovery.[35]

What is a document?

[5.110] A party receiving service of a notice of discovery must discover "all documents which are or have been in his possession relating to any question raised by the pleadings."[36] Order 29 refers to "documents". "[A]ny written thing capable of being evidence is properly described as a document and it is immaterial on what the writing may be inscribed."[37] A tape recording has been held to be a document.[38] In *Grant v Southwestern and County Properties*[39] Walton J, who held that tape recordings of evidence or information are documents, stated that

> The mere interposition of necessity of an instrument for deciphering the information cannot make any difference in principle. A litigant who keeps all his documents in microdot form could not avoid discovery because in order to read the information extremely powerful microscopes, or other sophisticated instruments would be required. Nor again if he kept them by means of microfilm which could [not] be read without the aid of a projector.[40]

On similar reasoning a film was held to be a document and able to be subpoenaed in *Senior v Holdsworth*[41] and a computer database constituting part of a company's business records was discoverable as a document in *Derby & Co v Weldon (No 9)*.[42]

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33 Rule 29.01.1.

34 Rule 29.04.

35 See *NT Power Generation Pty Ltd v Power and Water Authority* [1999] FCA 1623 in relation to the discovery of emails; see also *Slick v Westpac Banking Corporation (No 2)* [2006] FCA 1712.

36 Rule 29.02(1).

37 *R v Daye* [1908] 2 KB 333 at 340 per Darling J. See also *R v Hunt* (1820) 3 B & Ald 566; 106 ER 768 (flags and banners).

38 *Cassidy v Engwirda Constructions Co* [1967] QWN 16; *Grant v Southwestern and County Properties Ltd* [1975] 1 Ch 185; *Nagan v Holloway* [1996] 1 Qd R 607.

39 See *Grant v Southwestern and County Properties Ltd* [1975] 1 Ch 185 expressly rejecting *Beneficial Finance Corporation Co Ltd v Conway* [1970] VR 321; for later cases not following *Beneficial Finance Corporation Co Ltd v Conway* see also *Nagan v Holloway* [1996] 1 Qd R 607; *R v Matthews* [1972] VR 3 at 12; *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582 at 594.

40 *Grant v Southwestern and County Properties Ltd* [1975] 1 Ch 185 at 197.

41 *Senior v Holdsworth* [1976] QB 23.

42 *Derby & Co Ltd v Weldon (No 9)* [1991] 1 WLR 652.

The *Interpretation of Legislation Act 1984* (Vic) now defines "document" to mean

> **38 Definitions**
>
> In all Acts and subordinate instruments, unless the contrary intention appears—
>
> "document" includes, in addition to a document in writing—
>
> (a) any book, map, graph or drawing;
>
> (b) any photograph;
>
> (c) any label, marking or other writing which identifies or describes anything of which it forms part, or to which it is attached by any means whatsoever;
>
> (d) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom;
>
> (e) any film (including a microfilm), negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and
>
> (f) anything whatsoever on which is marked any words, figures, letters or symbols which are capable of carrying a definite meaning to persons conversant with them.

With respect to documents embodied in forms from which the information may be reproduced (that is, documents within category (d) or (e)), the court may direct that the embodied information be made available to the discovering party.[43] Discovery may also be made of documents which consist of or contain electronic data capable of being transferred or exchanged for the purpose of effecting discovery.[44] Emails are also documents subject to discovery. However, inspection of electronic documents may require the expert inspection of the entire database on which they were created, transmitted and received,[45] subject to undertakings protecting personal, privileged or confidential information.[46]

Solicitor's duty

[5.120] A solicitor has a professional responsibility to ensure that a client gives complete discovery. To this end the solicitor must be personally satisfied with the adequacy of the list of documents.[47] If to the

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43 See r 29.12. Material of that description constitutes a document for the purpose of discovery in the Federal Court of Australia. See *Sony Music Entertainment (Australasia) Ltd v University of Tasmania* (2003) 129 FCR 472.

44 See Supreme Court of Victoria Practice Notes, Practice Note No 1 of 2007, *Guidelines for the Use of Technology in any Civil Litigation Matter*. The procedure of discovery of electronic data is discussed in *Kennedy Taylor (Vic) Pty Ltd v Grocon Pty Ltd* [2002] VSC 32.

45 *Automotive Dealer Administration Services Pty Ltd v Kulik* [2010] VSC 293.

46 *Sony Music Entertainment (Australasia) Ltd v University of Tasmania* (2003) 129 FCR 472.

47 *Ferguson v Mackanness Produce Pty Ltd* [1970] 2 NSWR 66 at 68; *Rockwell Machine Tool Co Pty Ltd v EP Barrus (Concessionnaires) Ltd* [1968] 2 All ER 98 at 99; *Wood v Martins Bank Ltd* [1959] 1 QB 55; *Preston v Harbour Pacific Underwriting Management Pty Ltd* [2008] NSWCA 216 at [40]–[44] per Handley AJA.

solicitor's knowledge a party insists on delivering a misleading list of documents the solicitor should withdraw from the case.[48]

Description of documents

[5.130] The list of documents must distinguish the documents that are presently in the party's possession from those that the party no longer possesses. Privileged documents must be listed, including the grounds upon which each was declared privileged.

A document must be described in the list with enough particularity for it to be obvious from the description that it is located in the proper place in the affidavit or list. A party should be able to determine from the list whether to inspect the document and whether a claim for privilege is properly made.[49]

The nature and ground of a claim for privilege from inspection must be set out in the affidavit or list. Facts giving rise to the privilege have to be set out. Broad assertions that a document is privileged or that it is protected by legal professional privilege are insufficient. The facts creating the particular head of privilege must be stated.[50]

Challenging affidavit of documents

[5.140] Following equitable principles, by delivering a list of documents a party swears thereby that it is conclusive as to its contents,[51] the documents' relevance,[52] and as to the grounds of privilege claimed.[53] Verification by affidavit is not required. The conclusiveness of the list of discovered documents could not be challenged by a contending affidavit without putting the court in a position of conducting a trial between oaths, which it has not been prepared to do in the past.

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48 *Myers v Elman* [1940] AC 282.

49 *City Mutual Life Assurance Society Ltd v Taylor* (1914) 31 WN (NSW) 135; *Lyon Rolling Mills Pty Ltd v Noyes Bros (Melbourne) Pty Ltd* [1915] VLR 383; *Kadlunga Proprietors v Electricity Trust of South Australia* (1983) 39 SASR 410; *Re McGorm; Ex parte Co-op Building Society of South Australia* (1989) 20 FCR 387; *JN Taylor Holdings Ltd (in liq) v Bond* (1991) 57 SASR 21; *Braegrove Pty Ltd v Bendeich* [1993] 2 Qd R 239; *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 2)* [1999] 1 Qd R 163; *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 5)* [2010] FCA 932.

50 *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs and Excise (No 1)* [1972] 2 QB 192; *Birmingham & Midland Motor Omnibus Co Ltd v London & Northwestern Railway Co* [1913] 3 KB 850 at 860; *JN Taylor Holdings Ltd (in liq) v Bond* (1991) 57 SASR 21; *Braegrove Pty Ltd v Bendeich* [1993] 2 Qd R 239.

51 *Freuhauf Finance Corporation Pty Ltd v Zurich Australian Insurance Ltd* (1990) 20 NSWLR 359; *Officine Meccaniche Toschi SpA v Cosco Holdings Pty Ltd* [1992] 2 Qd R 418; *Duke Group (in liq) v Pilmer* (1993) 60 SASR 29.

52 *Mulley v Manifold* (1959) 103 CLR 341; *John Allan Ltd v Keegan* [1968] WAR 125; *Hooker Corporation Ltd v Commonwealth* (1985) 61 ACTR 37.

53 *Allen v City Bank of Sydney* (1902) 2 SR (NSW) (Eq) 143; *Lyell v Kennedy (No 3)* (1884) 27 Ch D 1 at 19; *Re Bunarba Pastoral Co Pty Ltd* (1958) 58 SR (NSW) 23.

Courts have modified this principle in an attempt to alleviate its potential for abuse. A challenging argumentative affidavit may be lodged when a party has provided obviously misleading discovery.[54] It must be apparent from the pleadings, the documents referred to, the affidavit of documents, or from other admissions that there are reasonable grounds for suspecting that discovery is incomplete, or that the discovering party's misconception of the case left discovery incomplete.[55]

In Victoria, if the test is satisfied, the discovering party may cross-examine the discovering party on the deposed affidavit.[56] If the test is satisfied the court may order the party to satisfy its disclosure obligations by providing a further and better affidavit of documents.[57]

Discovery of particular document

[5.150] An order of the discovery of particular documents may be made when, on the evidence, or in the circumstances of the case, or because of another document filed in the case, it is apparent that a discovering party is in possession of a particular document, or a class of documents, relevant to a material issue in the case. The applicant deposes an affidavit stating their belief that the discovering party's disclosure omitted a particular, or a particular class of, documents, and the facts founding the belief. The court's decision to order further discovery is discretionary.[58] The court may order further discovery limited by the terms of the application, but cannot make an order in general terms that the discovering party deliver a better affidavit of discovered documents.[59] The production and inspection of documents under an order for particular discovery is undertaken in the same manner as original discovery.

Parties liable to give discovery

[5.160] The scope of discovery in Victoria, as in most jurisdictions, is between parties, identified as parties giving discovery and parties to whom discovery is given. The party giving discovery is a party who has, or has had, discoverable documents in their possession.[60] Discovery is

54 *Jones v Monte Video Gas Co* (1880) 5 QBD 556.

55 *British Assoc of Glass Bottle Manufacturers v Nettlefold* [1912] AC 709; accepted by the High Court in *Mulley v Manifold* (1959) 103 CLR 341.

56 *Civil Procedure Act 2010* (Vic), s 57.

57 *British Assoc of Glass Bottle Manufacturers v Nettlefold* [1912] AC 709; accepted by the High Court in *Mulley v Manifold* (1959) 103 CLR 341. Provided for in ACT r 606; FCR r 20.22; see also SA r 145.

58 *Australian Broadcasting Commission v Parish* (1981) 48 FLR 292.

59 *Mulley v Manifold* (1959) 103 CLR 341; *Officine Meccaniche Toschi SpA v Cosco Holdings Pty Ltd* [1992] 2 Qd R 418. In Queensland the court may order the party in apparent possession of a document to depose an affidavit as to whether they have, or to explain why they do not have, the document: Qld r 223.

60 Rule 29.01.1.

between parties between whom pleadings have closed.[61] Discovery is therefore not made between co-plaintiffs, or co-defendants between whom contribution is not being sought.[62]

Pleadings therefore, understandably, determine discovery, the point of which is to assist in the resolution of a matter or matters in issue between parties.[63] There can be no discovery where the pleadings fail to bring an issue or issues to light.[64] A party seeking discovery on another against whom no cause of action lies commits an abuse of process. A plaintiff's motive in joining a party merely to discover material is not impeached if a cause of action can be alleged against the party. In *Nicholls v McLeay*[65] the plaintiff was permitted to join a television station as defendant to gain access to a tape containing allegedly defamatory material because the cause of action could also be alleged against the station.

Inspecting documents (Victoria)

[5.170] The inspection of documents is effected by serving a notice to produce on the other party who then has seven days to respond and within seven days make documents available at a designated location, during certain hours, for a certain period of time.[66] The disclosing party must make available all documents except those for which privilege is claimed, and which are not in their possession, custody or power.[67] If a document is mentioned in pleadings a party may inspect it prior to the close of pleadings.[68] Inspection does not extend to having the document forensically examined.[69] A party to whom documents are produced may make copies of the documents including by photocopying them. The party discovering the documents must either permit the documents to be copied as agreed or provide the party with the photocopies.[70]

The court has broad power to address a default in discovery. The court may order any act to be performed as the case requires where a party fails to discover documents, fails to provide inspection at all or in a reasonable

61 Rule 29.02.

62 Compare Tas r 386, where "any" party may give discovery to any "other" party.

63 *Buxton & Lysaught Pty Ltd v Buxton* [1977] 1 NSWLR 285.

64 *Birchal v Birch Crisp & Co* [1913] 2 Ch 375.

65 *Nicholls v McLeay* (1971) 1 SASR 442.

66 Vic r 29.09; see also ACT r 620; FCR r 20.31; NSW r 21.5; NT r 29.09; SA r 140; Tas r 390; WA O 26 r 8.

67 Rule 29.10.

68 *Quilter v Heatley* (1883) 23 Ch D 42; *Rafidain Bank v Agom Universal Sugar Trading Co Ltd* [1987] 1 WLR 1606; *Mantaray Pty Ltd v Brookfield Breeding Co Pty Ltd* [1992] 1 Qd R 91; *Robinson v Adshead (No 1)* (1994) 12 WAR 574; *Lilypond Constructions Pty Ltd v Homann* [2006] 1 Qd R 411.

69 *Mantaray Pty Ltd v Brookfield Breeding Co Pty Ltd* [1992] 1 Qd R 91 at 97. An inspection is taken as an admission of the document's authenticity unless the inspecting party files a notice disputing it in ACT r 622; FCR r 20.05; NSW r 17.5; Tas r 398; WA O 30 r 4.

70 Rule 29.09.

way, or objects to or prevents the copying of a document.[71] The court may restrict inspection where certain types of documents are discovered. This may occur, for example, when inspection is to be made of commercially sensitive or confidential information, or documents are to be viewed by a business competitor in a manner constituting an abuse of process or contempt of court.

The restrictions a court may impose include an order that the information is to be limited to the solicitors, counsel and any expert witnesses involved in the case.[72] It is unrealistic and dangerous for the disclosing party to expect competitors to be adequately bound by an undertaking to use the information acquired through discovery solely for the purpose of conducting the litigation.[73] It is unrealistic because the party receiving the information can never relinquish it, and so cannot restrict it to the proceedings on foot; and it is dangerous because the disclosing party has permanently relinquished confidentiality. Consequently, imposing restrictions on the information to be inspected and the persons inspecting it is the only effective means of dealing with the problem.[74]

SUPPLEMENTARY DISCOVERY AND CONTINUING OBLIGATION TO GIVE DISCOVERY

[5.180] The rules impose a continuing obligation to make discovery. In Victoria, the obligation as to supplementary discovery applies to documents which a party obtains possession of after having made the affidavit of discoverable documents.[75] A document in the party's possession when discovery is made but which is improperly excluded from the affidavit of documents is not the subject of supplementary discovery. As the rules require all documents in the party's possession to be discovered, the failure to discover the document is remedied by a supplementary affidavit. A party cannot make discovery of a relevant document they do not possess, but they can make supplementary discovery of it when they come into possession of it. However, the rules do not impose an obligation on a party to make discovery of a document not in existence when the affidavit was made.[76] The rules did not impose an obligation to discover film taken of the plaintiff after discovery was

71 Rule 29.11. In New South Wales this includes dismissing a proceeding and striking out a defence: NSW r 23.9.

72 *Magellan Petroleum Australia Ltd v Sagasco Amadeus Pty Ltd* [1994] 2 Qd R 37.

73 *Mobil Oil Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34 at 38

74 *Hotrox Charcoal Company v Gebauer Nominees Pty Ltd* [2002] WASCA 293.

75 Vic r 29.15; see also ACT r 611; FCR r 20.20; NSW r 21.6; NT r 29.16; Qld r 211; SA r 136; WA O 26 r 2A.

76 *TNT Management Pty Ltd v Trade Practices Commission* (1983) 47 ALR 693 at 696–699, 708–711

given in a personal injuries action because it was a document that came into existence after the affidavit was made.[77]

USE OF DOCUMENTS PRODUCED FOR INSPECTION

[5.190] Discovered documents are made available and can only be used for the conduct of the proceeding for which they were discovered.[78] This restriction on their use applies to all documents, not only those for which privilege is claimed.[79] The prohibition on their use is not limited to the parties to the litigation but includes any person having knowledge that the material was disclosed in discovery,[80] including a solicitor.[81] Answers to interrogatories are similarly restricted.[82]

The restriction on the use of documents serves the public interest of ensuring that a complete disclosure of documents is made. The restriction also reflects a concern that the possibility of their being used for other, unconnected purposes would have a restrictive effect on resolution of the issues raised in litigation.[83]

The basis of the restrictive obligation is an implied undertaking imposed by law on the parties and persons aware of the disclosure of the documents protecting the privacy and confidentiality of the disclosing party, so that private and confidential information is not disclosed beyond what is required to do justice in the case.[84] It is not necessary for persons bound by the undertaking to have knowledge of the undertaking imposed upon them or any other person. The basis of their obligation is the knowledge that documents were produced in the course of a court action.[85]

The only way in which a party can use material obtained on discovery in another action is by applying to the court to be relieved of the undertaking.[86] Not all uses of discovered documents for purposes unconnected with the proceedings breach the implied undertaking. It has

77 *Lanzon v State Transport Authority* (1985) 38 SASR 321; *Cooke v Australian National Railways Commission* (1985) 39 SASR 146.

78 *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] QB 613; see ACT r 673; NSW r 21.7.

79 *Akins v Abigroup Ltd* (1998) 43 NSWLR 539 at 549; *Bell Group Ltd (in liq) v Westpac Banking Corporation* (1998) 86 FCR 215 at 220–221.

80 *Hearne v Street* (2008) 235 CLR 125 at 161 per Hayne, Heydon, Crennan JJ.

81 *Home Office v Harman* [1983] AC 280.

82 *Hearne v Street* (2008) 235 CLR 125 at 154–155.

83 *Attorney-General v Times Newspapers Ltd* [1974] AC 273.

84 *Hearne v Street* (2008) 235 CLR 125 at 158–159 per Hayne, Heydon, Crennan JJ. See also *Home Office v Harman* [1983] AC 280.

85 *Kimberly Mineral Holdings Ltd v McEwan* [1980] 1 NSWLR 210; *Central Queensland Cement Pty Ltd v Hardy* [1989] 2 Qd R 509; *Ainsworth v Hanrahan* (1991) 25 NSWLR 155.

86 *Sofilas v Cable Sands (WA) Pty Ltd* (1993) 9 WAR 196 (an expert was not granted leave to publish his report).

been permissible to use discovered documents to commence actions against other parties when those documents disclose those persons' involvement in the facts founding the cause of action.[87] It is also appropriate to use documents produced on discovery to obtain further documents and information from another person when discovery reveals that the disclosing party is no longer in possession of those documents and information.[88] Such uses of discovered documents have been justified on the basis that a proceeding should aim to resolve all issues in dispute without creating further proceedings.[89] However, discovered documents cannot be used by a plaintiff to commence a new litigation founded on a different cause of action based on information disclosed in those documents.[90] A party who breaches this undertaking commits contempt of court.[91] A court may further impose restrictions on inspection and other conditions.[92]

STATUTORY DEMAND TO PRODUCE DOCUMENTS

[5.200] Whether the implied undertaking to use discovered documents only for the purpose of conducting the litigation in the course of which they are disclosed is breached by compliance with a statutory demand from a regulatory body to produce discovered documents has been resolved in favour of yielding to the demand. That is the resolution fashioned by the New South Wales Court of Appeal in *Australian Securities Commission v Ampolex*.[93] A clearly expressed demand in a statute overrides the party's implied undertaking to the court. Thus the party need not fear being held in contempt if it does not obtain release from its obligation because it does not need to seek leave of the court.[94]

87 *Sybron Corporation v Barclays Bank plc* [1985] Ch 299 at 328.

88 *Wilden Pump and Engineering Co v Fusfeld* [1985] FSR 159.

89 *Allstate Life Insurance Co v Australian and New Zealand Banking Group Ltd* (1995) 57 FCR 360, also accepting the reasoning in *Wilden Pump and Engineering Co v Fusfeld* [1985] FSR 159 at 378–379.

90 *Riddick v Thames Board Mills Ltd* [1977] QB 881. Compare *Sony Corporation v Time Electronics* [1981] 1 WLR 1293.

91 See ACT r 673; NSW r 21.7.

92 *Church of Scientology of California v Department of Health and Social Security* [1979] 1 WLR 723; *McIvor v Southern Health and Social Services Board* [1978] 1 WLR 757; *Kanthal Australia Pty Ltd v Minister for Industry, Technology and Commerce* (1987) 14 FCR 90.

93 *Australian Securities Commission v Ampolex Ltd* (1995) 38 NSWLR 504.

94 Compare *Green v FP Special Assets Ltd* [1992] 1 Qd R 1.

Failure to deliver list of documents

[5.210] A party who fails to deliver an affidavit or list of documents after a request to do so may be ordered by the court to give discovery.[95] If a further default ensues the court may dismiss the proceeding or strike out the defence.[96]

DISCOVERY FROM A NON-PARTY

[5.220] Discovery is a procedure occurring between parties to the litigation, unless the rules provide for disclosure from a non-party.[97] In Victoria, non-parties to a proceeding may be required to make discovery of relevant documents to a party to the proceeding if they appear to be in possession, or are likely to have been in possession, of a document relevant to a question in issue in the proceeding.[98] The party seeking discovery must apply to the court, specifying the documents or class of documents in respect of which discovery is sought, to have the non-party serve an affidavit of documents in their possession and make the documents in their possession to which they do not object on the grounds of privilege available for inspection. These documents are inspected in the same manner as other non-privileged documents.[99] This procedure may be useful where a creditor contemplating action against company directors seeks inspection of the records of a wound up company in the possession of a liquidator.[100] The non-party may be awarded costs for the time and inconvenience of searching and preparing documents for disclosure.[101]

On occasion, courts grant leave to effect discovery through a subpoena when the justice of the case demands that the documents be produced prior to the trial, and it does not inconvenience the party effecting discovery.[102] The issuing of a subpoena has, however, only been used in jurisdictions lacking procedural mechanisms for the production of documents from strangers to the litigation. It has been held that the procedure is, in general, inappropriate where the rules already provide a mechanism for obtaining documents from a non-party.[103] Nor do subpoenas operate in the same way or achieve the same ends as

95 Rule 29.11.

96 Rule 24.02.

97 *Australian Consolidated Press Ltd v Bond* (1982) 61 FLR 91; *Matuska v Ali* (1987) 71 ACTR 23; *Nathan v MJF Constructions* [1986] VR 75.

98 Vic r 32.07; see also FCR r 20.23; NSW r 5.4; NT r 32.08.

99 Vic r 32.09; FCR r 20.24; NSW r 5.5; NT r 32.09.

100 See *Re MMC Pty Ltd (in liq)* (1992) 6 ACSR 741 (VSC).

101 See r 32.11; see *Conrock Ltd v CSR Ltd* (1990) 96 ALR 690 (FCA) for an order for costs.

102 *Lucas Industries Ltd v Hewitt* (1978) 45 FLR 174; *Greyhound Australia Pty Ltd v Deluxe Coaches Pty Ltd* (1986) 11 FCR 592 at 596; *Alliance Petroleum Australia NL v Australian Gas Light Co* (1983) 34 SASR 215 at 238; *O'Sullivan v Herdmans Ltd* [1987] 1 WLR 1047.

103 *Leighton Contractors Pty Ltd v Western Metals Resources Ltd* [2001] 1 Qd R 261.

discovery. The production of material by subpoena takes place at the trial while production of material by discovery occurs prior to the trial.

Further, production by subpoena is production to the court, not to the party, and the party cannot inspect the material except by consent of the producing party, or by leave of the court.[104] However, the production of documents pursuant to an order made under r 32.07 is to the applicant, and no other party may by right inspect the documents.[105] Copies of the documents received by the applicant are privileged from discovery to another party.[106] Production of any document disclosed at discovery can be sought at trial by subpoena.[107]

Discretion

[5.230] In general, a party may as a matter of right seek discovery of documents from another party. The court has discretion in responding to an application for an order seeking discovery from a stranger.[108] It will approach making such an order cautiously because the non-party is unconnected to the litigation except for its possession of documents which may bolster the applicant's case or undermine the opposing party's case. It is, of course, a condition of the ordering of discovery that the non-party is or likely to be in possession of the relevant documents.[109] The court must also be satisfied that the stranger to the proceeding will not be joined as a party to the litigation at a later stage.[110] In applying for the order applicants are required to not merely show that the conditions as set out in r 32.07 have been satisfied, but that discovery is necessary.[111] Necessity is established by demonstrating that:

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104 See *Burchard v MacFarlane* [1891] 2 QB 241 at 247–248; *Commissioner for Railways v Small* (1938) 38 SR (NSW) 564 at 574; *O'Born v Commissioner for Government Transport* (1959) 77 WN (NSW) 81; *McAuliffe v McAuliffe* (1973) 4 ACTR 9; *Cooper v Bech (No 1)* (1975) 12 SASR 147; *Matuska v Ali* (1987) 71 ACTR 23.

105 Compare ACT r 662, under which other parties to the action are entitled to inspect any document referred to in a notice for non-party inspection before production to determine whether to object to production.

106 See *Matuska v Ali* (1987) 71 ACTR 23 at 28.

107 See *Gerard Industries Pty Ltd v Wee* (1986) 43 SASR 562 at 564. Alternatively, the party requiring production can obtain an order for production under r 40.12.

108 See *Russell Kumar & Sons Pty Ltd (in liq) v Bienstein* (unreported; VSC; Murphy J; No 12786/1990; 2 August 1991); *Ensee Holdings Pty Ltd v BWN Industries Pty Ltd* (unreported; VSC; Batt J; No 5949/1994; 23 June 1994).

109 *Hall v Alice Springs Veterinary Clinic Pty Ltd* (1982) 17 NTR 13; *Rossi Pty Ltd v Ballymore Tower Pty Ltd* [1984] 2 Qd R 167.

110 See *Gerard Industries Pty Ltd v Wee* (1986) 43 SASR 562. Compare discovery under rr 32.03 and 32.05.

111 *Keviris Pty Ltd v Capital Building Society* (unreported; VSC; Kaye J; No 6566/1986; 9 February 1988), Kaye J at 8 adopting the comment from Williams, *Supreme Court Civil Procedure Victoria* (1987, Sydney, Butterworths), p 222.

- first, the discovered material will assist in resolving an issue between parties to the proceeding[112] because its contents either advances the applicant's case or damages the opposing party's case;
- secondly, the person in possession of the documents has refused to allow the applicant to inspect them;
- thirdly, the applicant has exhausted all other available means of obtaining the document[113] and there is no other available means of obtaining either the document or the information contained in the document; and
- fourthly, waiting until trial to obtain the document or the information contained therein would diminish the document's value to the applicant.[114] However, the party is not required to show that their case cannot be prepared without the document. In *O'Sullivan v Herdmans*[115] permitting the production of documents prior to trial would promote settlement, or assist both parties' preparation for trial, whereas a refusal would result in one party's preparation only being capable of completion subsequent to the commencement of the trial. In either case the interests of justice are served.[116]

Further, each case is to be assessed by the court in the light of its own facts and the court's discretion is to be exercised in the context of the relevant circumstances of the particular case.[117]

That the document is relevant should be demonstrated from the pleadings.[118] A document that provides information about any part of the case relates to a question in the proceeding for the purpose of r 32.07.[119] The applicant must present evidence demonstrating the existence of a relevant document or class of documents without necessarily identifying

112 *Gerard Industries Pty Ltd v Wee* (1986) 43 SASR 562 at 565; *Dover Fisheries Pty Ltd v Bottrill Research Pty Ltd* [1995] AIPC 91-158 (SASC).

113 *Williams Aviation Pty Ltd v Santos Ltd* (1985) 40 SASR 272 at 276; *Dover Fisheries Pty Ltd v Botterill Research Pty Ltd* [1995] AIPC 91–158; Qld r 243.

114 See also *Biztole Developments Pty Ltd v McLean* (unreported; VSC; Batt J; No 5949/1994; 23 June 1994); *Ensee Holdings Pty Ltd v BWN Industries Pty Ltd* (unreported; VSC; Batt J; No 5949/1994; 23 June 1994).

115 *O'Sullivan v Herdmans Ltd* [1987] 1 WLR 1047; [1987] 3 All ER 129 at 136 per Lord Mackay in relation to a rule in Northern Ireland similar to r 32.07.

116 See also *Lurgi (Aust) Pty Ltd v Gratz* (unreported; VSC; Hansen; No 6456/1995; 14 December 1995).

117 *Lurgi (Aust) Pty Ltd v Gratz* (unreported; VSC; Hansen J; No 6456/1995; 14 December 1995) per Hansen J, adopting the test of Kaye J in *Keviris Pty Ltd v Capital Building Society* (unreported; VSC; Kaye J; No 6566/1986; 9 February 1988); Hansen J in *Lurgi (Aust) Pty Ltd v Gratz* was adopted in *Harpley Nominees Pty Ltd v Melbourne City Link Authority* [2001] VSC 149.

118 *Casley-Smith v District Council of Stirling* (1989) 51 SASR 447.

119 *Russell Kumar & Sons Pty Ltd (in liq) v Bienstein* (unreported; VSC; Murphy J; No 12786/1990; 2 August 1991), p 2 per Murphy J.

any specific document, and that the person from whom the discovery is sought has or is likely to have the documents or class of documents in their possession.[120]

What the documents contain or might reasonably be expected to contain, and their relationship to a question or questions at issue, must be made explicit to the court for the order to be properly made.[121] The court's order should then specify or describe the documents or, where appropriate, class of documents,[122] to which the discovery relates with sufficient particularity to enable the person to determine whether any of the documents are in their possession.

In executing an order made under r 32.07 a non-party should not be required to assess the relevance of a document. Questions of the relevance of documents are to be resolved on the hearing of the application. The order should be clear and free of questions of relevance, although a question relating to the interpretation of the operation of the order may arise if it refers to a document as "relating to" a particular issue.[123]

The ability of the non-party to identify and gather the relevant documentation is a factor in assessing the reasonableness of the request.[124] An order providing access to documents on a speculative basis, such as discovering documents relating to any question between the parties, in the hope of finding evidence that may be used at trial is to be strenuously avoided. It would be oppressive to require the person to disclose documents which are not identified and which are described only as being relevant to the questions in dispute.[125] The person making discovery requires the protection of the court because that person is unable to determine the relevance of documents to a question between the parties at trial. The application in *Hall v Alice Springs Veterinary Clinic*[126] failed because the plaintiff was not able to provide details of the documents for which they sought disclosure. The non-party was only able to identify the document by reference to the indorsement on the writ.[127]

120 See *Ansett Industries Ltd v Commonwealth* (unreported; VSC; Marks J; No 268/1987; 3 April 1987).

121 See *Ansett Industries Ltd v Commonwealth* (unreported; VSC; Marks J; No 268/1987; 3 April 1987).

122 *Ensee Holdings Pty Ltd v BWN Industries Pty Ltd* (unreported; VSC; Batt J; No 5949/1994; 23 June 1994), p 17, referring to the orders made in *Keviris Pty Ltd v Capital Building Society* (unreported; VSC; Kaye J; No 6566/1986; 9 February 1988), and *Russell Kumar & Sons Pty Ltd (in liq) v Bienstein* (unreported; VSC; Murphy J; No 12786/1990; 2 August 1991).

123 *Ensee Holdings Pty Ltd v BWN Industries Pty Ltd* (unreported; VSC; Batt J; No 5949/1994; 23 June 1994).

124 *Lucas Industries Ltd v Hewitt* (1978) 45 FLR 174.

125 See *Matuska v Ali* (1987) 71 ACTR 23 at 27.

126 *Hall v Alice Springs Veterinary Clinic Pty Ltd* (1982) 17 NTR 13.

127 See also *Rossi Pty Ltd v Ballymore Tower Pty Ltd* [1984] 2 Qd R 167 where the applicant failed to demonstrate that the documents were relevant or necessary.

The test for discovery by a non-party is in fact substantially the same as the test for discovery between parties,[128] in the sense that it is based on assessment of whether discovery is required to assist the fair and complete determination of issues at trial, including a consideration of the effect that disclosure of information has on minimising the costs of the administration of justice.[129] Permitting discovery for a collateral purpose such as providing a business competitor with access to confidential information, or to fish for evidence, would thwart the purposes of discovery.

In *Russell Kumar & Sons (in liq) v Bienstein*[130] Murphy J said that, irrespective of the possibility of fishing, r 32.07 should be interpreted as favouring discovery. In *Conrock v CSR*[131] the prospect of disclosing confidential information was safeguarded by a direction that discovery be restricted to the applicant's solicitors and counsel and that they not reveal the information so acquired until further order.

The court ought not to refuse to make an order for discovery of documents where the person from whom discovery is sought does not object to producing the documents and no party to the proceeding has an objection that would bar their production to the court under a subpoena.[132]

An application for an order for discovery under r 32.07 is properly made after the pleadings are closed. Only then are the matters in dispute settled, and the questions to which discovery relate ascertainable. Notice of an application under r 32.07 must be given to all parties.[133]

Scope of discovery

[5.240] Discovery by a stranger to the proceeding is limited by the scope of discovery between parties, in that a non-party will not be required to disclose any document which would not be required to be disclosed if the document were in the possession of the other party, and is obliged to disclose any document which a party would be required to disclose were it in the party's possession.[134] However, a non-party may object to the production of documents on grounds of privilege which a party could not claim, such as that they may face a penalty or forfeiture,

128 *Casley-Smith v District Council of Stirling* (1989) 51 SASR 447; *Ensee Holdings Pty Ltd v BWN Industries Pty Ltd* (unreported; VSC; Batt J; No 5949/1994; 23 June 1994).

129 In *Ansett Industries Ltd v Commonwealth* (unreported; VSC; Marks J; No 268/1987; 3 April 1987) per Marks J.

130 *Russell Kumar & Sons Pty Ltd (in liq) v Bienstein* (unreported; VSC; Murphy J; No 12786/1990; 2 August 1991), p 7.

131 *Conrock Ltd v CSR Ltd* (1990) 96 ALR 690 (FCA).

132 See *O'Sullivan v Herdmans Ltd* [1987] 1 WLR 1047; [1987] 3 All ER 129 at 136.

133 Rule 32.08(2).

134 See *Stirling District Council v Casley-Smith* (1988) 50 SASR 297 at 305.

or that the documents are protected by legal professional privilege or the privilege against self-incrimination.[135]

Instances

[5.250] In *Stirling District Council v Casey-Smith*[136] the defendant, in a claim for damages for bodily injury, obtained an order for discovery from a hospital of the records of the hospital relating to the treatment of the plaintiff while a patient in the hospital.

Procedures for ordering discovery under r 32.07 have been incorporated into legislation. For example, s 47 of the *Commercial Arbitration Act 1984* (Vic) empowers the court in arbitration proceedings to order discovery against a person not a party to the arbitration proceedings under r 32.07.[137] What is now s 592 of the *Corporations Act 2001* (Cth), which governs proceedings against directors of a company that has been or is in the course of being wound up, empowers the court under r 32.07 to order the liquidator of the company to make discovery of company documents bearing upon its solvency at relevant times.[138] A party to a proceeding can seek discovery of a document held by a non-party that relates to any issue in the proceeding to determine if the party has a right of relief against that non-party.

In *Canada Trust v Stolzenberg (No 1)*,[139] the plaintiff who had served the defendant in a foreign country obtained an order for discovery against a non-party relating to the question of jurisdiction raised on the defendant's application to set aside service. Discovery was ordered against a third party telephone company for records in *Curkovic v Primelife Corporation*[140] to identify the person who had sent faxes using a fictitious name.

Default

[5.260] Courts have inherent jurisdiction to, or may under the rules, make an order remedying a party's failure to make discovery or to answer interrogatories.

Section 56 of the *Civil Procedure Act 2010* (Vic) provides that a court is empowered to order sanctions against a party for:

(a) a failure to comply with discovery obligations; or

(b) a failure to comply with any order or direction of the court in relation to discovery; or

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135 *Casley-Smith v District Council of Stirling* (1989) 51 SASR 447.

136 *Stirling District Council v Casley-Smith* (1988) 50 SASR 297.

137 *Matthew Hall Mechanical & Electrical Engineers Pty Ltd v Forrest Hill Plumbing Services Pty Ltd* (unreported; VSC; Southwell J; No 12859/1991; 19 December 1991).

138 See *Re MMC Pty Ltd (in liq)* (1992) 6 ACSR 741; *National Australia Bank Ltd v Pathway Investments Pty Ltd* (2012) 265 FLR 247.

139 *Canada Trust Co v Stolzenberg (No 1)* [1997] 1 WLR 1582.

140 *Curkovic v Primelife Corporation Ltd* [2001] VSC 8.

(c) conduct intended to delay, frustrate or avoid discovery of discoverable documents.

The sanctions a court may impose include initiating proceedings for contempt of court, adjourning proceedings and awarding costs orders against responsible parties including legal practitioners, preventing a party from progressing the proceeding, prohibiting or limiting the use of certain documents, and dismissing either the claim or the defence.[141]

Section 59 of the Act provides that the court's powers are in addition to its powers under the rules, and that its powers under the rules are unaffected by the Act. Under the rules, if a party fails to comply with an order to discover documents or answer interrogatories, the court may dismiss the plaintiff's proceedings, or strike out the defence and enter judgment against the defendant.[142] The court's power under r 24.02 is without prejudice to the court's inherent jurisdiction to dismiss a proceeding and enter a judgment under r 24.05. A default judgment entered under r 24.02 may be set aside under r 24.06 without thereby estopping the plaintiff from instituting new proceedings.[143]

Rule 29.12.1 provides that the party seeking discovery may serve a notice of default on a party who fails to make required discovery with which the defaulting party has seven days to comply. Thereafter the court may dismiss the proceeding or strike out the defence. A party failing to either give discovery or answer interrogatories is liable to face committal for contempt of court.[144] A court's power to dismiss proceedings and strike out defences is discretionary. It is exercised when the party's default is the result of wilful disregard of the order they are under.[145] Where a party has provided only incomplete discovery the court may order a new trial.[146]

Destruction of documents

[5.270] The court's role as a fact finder, and its ability to ensure a fair trial and to do justice between the parties, is dependent on the production of evidence through the discovery process. The proper response to the loss or destruction of evidence is therefore central to the court's capacity to ensure procedural rules are observed so as to ensure fairness. The case

141 *Civil Procedure Act 2010* (Vic), s 56(2).

142 Rule 24.02.

143 *Exell v Exell* [1984] VR 1.

144 See Vic r 30.10 (interrogatories); see also ACT r 670; NT r 29.14 (discovery), r 30.10 (interrogatories); Qld r 225 (disclosure of documents), r 237 (interrogatories); Tas r 393 (discovery of documents), r 411 (interrogatories); WA O 26 r 15 (discovery), O 27 r 8 (interrogatories).

145 *Treiguts v Tweedley* [1959] VR 544; *Mosser v PGH Ceramics Pty Ltd* (1964) 82 WN (Pt 1) (NSW) 147; *Haigh v Haigh* (1885) 31 Ch D 478; *Kennedy v Lyell* [1882] WN 137; *Freeman v Rabinov* [1981] VR 539.

146 *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134.

of *British American Tobacco Australia Services v Cowell*[147] was characterised by bitter disputes involving the defendant's obligations on discovery.[148] The plaintiff submitted that the defendant was not compliant with their discovery obligations because they failed to provide adequate details about lost or destroyed documents.[149]

The plaintiff applied that the defence be struck out on the basis that the defendant's destruction of documents severely impeded the plaintiff's ability to conduct their case, and any prospect of a fair trial.[150]

Eames J made the order the plaintiff sought based on the defendant's subversion of discovery, with the intention of deliberately undermining the prospect of a fair trial.[151] The defendant appealed successfully.[152] The Victorian Court of Appeal held that any claim that the defendant breached an obligation to preserve evidence in anticipation of litigation, rather than when litigation was on foot, should have been based on an attempt to pervert the course of justice, or contempt of court.[153] Further, the trial judge's remedy of striking out the defence, whilst available and appropriate in extreme cases, was disproportionate in the circumstances, and should have been restricted to striking out parts of the defence.[154]

The Court of Appeal suggested that defects in discovery could have been remedied by ordering further affidavits of discovery explaining how the documents were lost or destroyed, and by drawing adverse inferences.[155] The plaintiff appealed to the High Court on the basis of the broad principle of fairness of trial, which the High Court denied.[156] The adverse inference or spoliation inference is a deduction of guilt from the conduct of the spoliator.[157]

147 *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524.

148 *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524 at [198]–[199], [240]–[241].

149 *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524 at [5].

150 *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73.

151 *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73.

152 *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524.

153 *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524 at [136], [175].

154 *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524 at [191].

155 *Cowell v British American Tobacco Australia Services Ltd* [2003] HCATrans 384 (3 October 2003) at [70].

156 *Cowell v British American Tobacco Australia Services Ltd* [2003] HCATrans 384 (3 October 2003) per Gleeson CJ.

157 The principle in Roman law was *omnia praesumuntur contra spoliatorem* ("all things are presumed against a despoiler"). See S Marzen and L Solum, "Introduction to the Law of Destruction of Evidence" in J Gorelick, S Marzen and L Solum, *Destruction of Evidence* (John Wiley, New York, 1989), p 5.

The court instructs the jury to infer that the evidence was destroyed or lost because it was damaging to the spoliator.[158] Eames J had considered the effect of adverse inferences an inadequate remedy since the defendant may calculate the existence of the evidence to be more damaging than the adverse inference.[159]

The *Evidence (Miscellaneous Provisions) Act 1958* (Vic) deals with situations where evidence is unavailable. Section 89A defines unavailability:

> **89A Meaning of unavailability of document**
>
> For the purposes of this Division, a document is unavailable in a civil proceeding if—
>
> (a) the document is, or has been but is no longer, in the possession, custody or power of a party to the civil proceeding; and
>
> (b) the document has been destroyed, disposed of, lost, concealed or rendered illegible, undecipherable or incapable of identification (whether before or after the commencement of the proceeding).

If the unavailability of an original document or a copy of the document is likely to render a civil proceeding unfair to a party, the court may ensure fairness by making any order it considers necessary[160] including:[161]

(a) that an adverse inference will be drawn from the unavailability of the document;

(b) that a fact in issue between the parties be presumed to be true in the absence of evidence to the contrary;

(c) that certain evidence not be adduced;

(d) that all or part of a defence or statement of claim be struck out;

(e) that the evidential burden of proof be reversed in relation to a fact in issue.

Further, in Victoria, ss 253 – 255 of the *Crimes Act 1958* (Vic) were inserted by the *Crimes (Document Destruction) Act 2006* (Vic), creating a new offence of document destruction in the context of legal proceedings generally, including civil proceedings. The offence applies to things which can constitute evidence, including all types of documents, and encompasses emails. It applies to both individuals and corporations. For the purposes of the offence a legal proceeding is one that has either commenced, or which "may be" commenced. Anticipated litigation need not be probable. It sufficies if there is a real possibility that litigation may commence.

Section 254 provides that a person commits an offence if they know that a document is or is reasonably likely to be required in evidence, and, with the intention of preventing the document being used in a legal proceeding, they either destroy or conceal it, or render it illegible, undecipherable or incapable of being identified, or they expressly, tacitly or implicitly authorise another person to do the same. Section 254 also

158 J Judge, "Comment: Reconsidering Spoliation: Common-sense Alternatives to the Spoliation Tort" [2001] *Wisconsin Law Review* 441 at 444.

159 *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73 at [376].

160 *Evidence (Miscellaneous Provisions) Act 1958* (Vic), s 89B(1).

161 *Evidence (Miscellaneous Provisions) Act 1958* (Vic), s 89B(2).

creates corporate criminal responsibility if that conduct is engaged in by, or where knowledge of that conduct can be attributed to, a company through its board or through an associate whether a company officer, employee, or agent. It is a defence under s 254 for the company to have exercised "due diligence" to prevent the contravention.[162]

Under the s 56 of the *Civil Procedure Act 2010* (Vic), the court may make any appropriate order or give any direction wherever a party has failed to comply with discovery obligations or any order or direction related to discovery, or has acted in such a way as to delay, frustrate or avoid discovery. The inherent jurisdiction is buttressed by the "administration of justice powers" — the powers conferred by statute upon the courts for the administration of justice.[163]

Discovery before suit: Discovery to identify a defendant

The case: Norwich Pharmacal Co v Customs and Excise Commissioners

[5.280] To overcome the restrictions of the common law, equity was able to obtain written statements from those incapable of testifying at trial. A written statement would not be obtained from a "mere witness" because their testimony would be taken at trial. The equitable jurisdiction of discovery was revived in *Norwich Pharmacal v Customs and Excise Commissioners*,[164] giving courts power to compel a person to disclose information capable of identifying an otherwise unidentified defendant.

In *Norwich Pharmacal* the applicant was the owner and exclusive licensee of a patent for a chemical compound, furazolidone. Although the applicant knew that goods using unlicensed furazolidone were entering the United Kingdom, when they set out to bring an action for patent infringement they could not determine the identity of the importers. The respondent's records revealed they had collected import duties from persons importing consignments of the goods. In proceedings initiated against the respondent, the applicant sought relief in the form of orders for disclosing the names and addresses of the importers of the unlicensed furazolidone, the quantity imported by each importer and any other relevant documentation. The respondent resisted production, claiming that their records contained confidential information the disclosure of which would be against the public interest. The respondent ultimately appealed to the House of Lords from a judge's decision to grant the order for disclosure.

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162 *Crimes Act 1958* (Vic), s 254 does not define "due diligence".

163 For example, *Supreme Court Act 1970* (NSW), s 23: "The Court shall have all jurisdiction which may be necessary for the administration of justice in NSW"; and *Supreme Court Act 1933* (ACT), s 20: "The court has the following jurisdiction: (a) all original and appellate jurisdiction that is necessary to administer justice in the Territory; (b) jurisdiction conferred by a Commonwealth Act or a law of the Territory."

164 *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 ("*Norwich Pharmacal*").

The House of Lords found that where a third party had become involved in unlawful conduct, they were under a duty to assist the person suffering damage by giving them full information relating to and disclosing the identity of the wrongdoers. If the third party bears expense in assisting compliance with an order, the person seeking assistance is bound to reimburse those expenses. Such expenses, however, would be reflected in an award of damages against the ultimate tortfeasors, and this would be recovered after the final hearing.

The House of Lords allowed the appeal and granted the order for discovery. Lord Reid in the leading judgment, explaining the "mere witness" rule, held that generally "information cannot be obtained by discovery from the person who will in due course be compellable to give that information either by oral testimony as a witness or on subpoena *duces tecum*".[165]

A court would not order discovery against a mere witness, or a party against whom no reasonable cause of action existed. An order for discovery was not available against a person who had no other connection with the wrong other than being a spectator (for example, a bystander to a road accident who happened to note the licence plate number of the car), had information about the identity of a wrongdoer, or had some other document relating to it in their possession.

However, an order may be made against a person against whom discovery of information is sought if that person, through no fault of their own, becomes involved, either voluntarily or in the course of carrying out their duty, in the tortious acts of others so they can be said to have facilitated the wrongdoing, regardless of whether the person involved incurred any other minor liability, and whether or not proceedings were brought against them. However inadvertent the facilitation by the third party, by operating as a facilitator they are no longer a mere witness to the event. By such facilitation the third party was involved, no matter how innocently, in the circumstances giving rise to the event. Although that person may incur no personal liability in relation to the events they facilitate, they may come under a duty to assist the person who has been wronged by giving them full information relating to and disclosing the identity of the wrongdoers.

A "person" may refer to an authority,[166] an individual, a corporate body,[167] or a partnership.[168] The kind of information that can be discovered is the kind of information discoverable as between litigants subject to claims of privilege.

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165 *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133; [1973] 3 WLR 164 at 174 per Lord Reid.

166 *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133; [1973] 3 WLR 164 at 174 per Lord Reid.

167 *RCA Corporation v Reddingtons Rare Records* [1974] 1 WLR 145.

168 *Upmann v Elkan* (1871) LR 7 Ch App 130.

Applying these propositions, the defendants in *Norwich Pharmacal* (that is, the Commissioners of Customs and Excise), as intermediaries, were not mere bystanders; without their conduct, the infringement could never have been committed. Therefore, as intermediaries, they were required to assist the plaintiff in this case. In the circumstances, the public interest lay in granting the order sought. Lord Reid and Lord Cross of Chelsea stated that a party concerned about the propriety of making such disclosures was entitled to require the matter to be submitted to the court at the expense of the person seeking the disclosure.

Norwich Pharmacal order

[5.290] The claimant must exhaust all the available means of identifying the defendant before resorting to an application for a *Norwich Pharmacal* order. The court must be satisfied that the claimant genuinely intends to commence proceedings, but would be unable to do so for want of a named defendant without the order. In *Norwich Pharmacal* itself[169] the House of Lords reasoned that the claimant's action would be frustrated without the order for disclosure of the defendant's identity being made. The claims for which applications for the disclosure of information may be made include torts, breaches of contract, and breaches involving the misuse or disclosure of confidential information. The *Norwich Pharmacal* jurisdiction is of general application and is not restricted to the plaintiff's claims but extends to claims such as joint tortfeasors seeking disclosure from other joint tortfeasors.

Norwich Pharmacal applications may brought in conjunction with other applications for relief, such as injunctions, where the court is convinced they are warranted. Such applications will be granted *ex parte* against the person from which disclosure of the relevant information is sought.

Application of the Norwich Pharmacal order

[5.300] The *Norwich Pharmacal* order may be used to compel third parties to disclose information in addition to the identity of parties, such as, in *Norwich Pharmacal* itself,[170] the quantities of the goods being imported. Indeed subsequent cases indicate the breadth of application of the *Norwich Pharmacal* order which has been applied to any discoverable information not subject to privilege, including financial information from financial institutions such as information about bank accounts and financial documents,[171] and names and addresses of parties other than the defendant.[172]

For example, the order has been used by a plaintiff to obtain the name of an informant who had provided a journalist with information

169 *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133.

170 *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133.

171 *Bankers Trust Co v Shapira* [1980] 1 WLR 1274.

172 *Upmann v Elkan* (1871) LR 7 Ch App 130; *RCA Corporation v Reddingtons Rare Records* [1974] 1 WLR 145.

communicated in breach of confidence.[173] It has also been used to obtain the name of the author of defamatory statements from a person whose public comments suggested they knew the identity of the author.[174] However, in *Roberts v Jump Knitwear*[175] (a copyright infringement case), an application for an order for discovery of the names and addresses of customers was declined because they were not wrongdoers and the plaintiff did not have a cause of action against them.

In *Loose v Williamson*[176] the plaintiff sought a *Norwich Pharmacal* order to establish the identity of the defendant and other persons engaged in poaching from his fishery. The defendant objected that the order was sought on a speculative basis to discover information on which to found a cause of action, and that it was not discovery in the pursuit of information related to a question at issue between the parties. Goulding J held that application for the order was not restricted to any particular property right such as the intellectual property rights in the eponymous case, and granted the order on the basis of the imminent peril of damage faced by the fishery and the absence of any harm to the defendant's case in releasing the information.

In *British Steel v Granada Television*,[177] the plaintiff sought the order to identify employees whom it believed had provided Granada Television with confidential documents which it had then telecast. The purpose of identifying the employees was to dismiss them for breaching their duty of confidentiality to their employer. The plaintiff brought an action for delivery up of the documents against the defendant, and additionally an application against the defendant seeking disclosure of information as to how it had obtained the documents. The defendant submitted that the information was privileged on the basis that there was a public interest in journalists and the media not disclosing their sources. The House of Lords held that the *Norwich Pharmacal* jurisdiction could be exercised in favour of the plaintiff. The immunity claimed by the media was defeated by the need for disclosure in order to do justice in the case. The House of Lords pointed out that the order for relief was discretionary. The plaintiff had to show grounds for an exercise of the discretion in their favour — that the grievance outweighed the need for confidentiality to be observed. In the circumstances of the case Granada could not object to disclosure on the basis that it was innocently involved in the employee's tortious breach.

A plaintiff can invoke the equitable jurisdiction to obtain information about persons whose wrongdoing the defendant assisted. In *Harrington v*

173 *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1.

174 *Re Pyne* [1997] 1 Qd R 326.

175 *Roberts v Jump Knitwear Ltd* [1981] FSR 527.

176 *Loose v Williamson* [1978] 1 WLR 639.

177 *British Steel Corporation v Granada Television Ltd* [1981] AC 1096; see also *P v T Ltd* [1997] 1 WLR 1309.

Polytechnic of North London,[178] the plaintiff obtained a *Norwich Pharmacal* order against certain named staff of the polytechnic to supply the names and addresses of students who picketed against and prevented the plaintiff attending classes. The order was appealed on the grounds that the staff were mere witnesses and not parties to the action, and that the order offended public policy in undermining the relationship between staff and students. The Court of Appeal rejected the appeal on the basis that the staff were both agents of the polytechnic and as such the knowledge they possessed was the principal's knowledge,[179] and, moreover, they were to be regarded as servants of a corporation, not mere witnesses, and obliged to provide discovery on the corporation's behalf.[180]

Status of the Norwich Pharmacal order in light of r 32.03

[5.310] Scope of the rule

The equitable procedure of the *Norwich Pharmacal* order may not exist at all where the rules are intended as a code.[181] In *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* Gummow J observed:

> In each case in which the old equity jurisdiction is invoked, there will be the threshold issue of whether the rules of procedure relating to discovery in the particular court in question operate as a code on the subject and exclude the further operation of that traditional jurisdiction. Section 45 of the *Equity Act 1901* (NSW) expressly preserved that jurisdiction.[182]

Without deciding finally on this issue Gummow J offered some guidance, stating that equitable remedies would not be ordered if a legal or statutory remedy is available[183] and that the availability of legislation such as the *Freedom of Information Act 1982* (Cth) could be a material factor.[184]

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178 *Harrington v Polytechnic of North London* [1984] 1 WLR 1293.

179 *Harrington v Polytechnic of North London* [1984] 1 WLR 1293 at 1300.

180 *Harrington v Polytechnic of North London* [1984] 1 WLR 1293 at 1300, citing Lord Eldon LC in *Dummer v Chippenham Corporation* (1807) 14 Ves Jun 245; 33 ER 515 for this proposition.

181 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 445–446. In New South Wales the equitable procedure is expressly preserved: NSW r 1.4.

182 See *Heimann v Commonwealth* (1935) 54 CLR 126 at 132–133 per Evatt J; and see, generally, *Skinner v Commissioner for Railways* (1937) 37 SR (NSW) 261 at 263–264 per Jordan CJ.

183 See *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 440 per Gummow J. Gummow J cited *Pressed Steel Car Co v Union Pacific Railroad Co* 240 F 135 (1917) at 136 per Learned Hand J for this proposition.

184 Further, if the procedure is still available, the question has been asked: does it extend beyond the discovery of the identity of a prospective defendant to discovery of other essential facts to establish a cause of action, for example, dates and quantities of importation in a proceeding for patent infringement? D L Bailey and JK Arthur, *Civil Procedure Victoria* (LexisNexis, subscription service), Vol 1, guide card "Rules—Chapter 1", [I 32.03.20].

A person who seeks the grant of relief by the court in respect of a cause of action must identify the person against whom the cause of action exists. In a proceeding to enforce the right to relief that person must be defendant; a proceeding naming the wrong defendant will fail.

The rules of court in Victoria permit discovery as a means of identifying a defendant. Rule 32.03 was introduced to assist a person who has a cause of action but who, after making reasonable inquiries, is unable to identify the person against whom the cause of action exists sufficiently to commence a proceeding in which the person to be identified would be a defendant. In the rules the person whose identity is sought to be established is called "the person concerned".

Rule 32.03 provides that the court may order a particular person who knows or is likely to know facts, or has or is likely to have or has had or is likely to have had possession of any document or thing, tending to assist in ascertaining the identity of the person concerned, to state what they know on oral examination or to give discovery of the document or to produce the thing or, if the document or thing is no longer in their possession, to state their belief as to what has become of it.[185] If the court orders an oral examination it may order relevant documents or other things to be produced at the examination.[186] However, privileged material is protected from disclosure under the rule.[187]

It is implicit, although not expressed, in r 32.03 that the applicant will not succeed in obtaining an order unless they demonstrate a reasonable basis for believing that they are pursuing a remediable cause of action against the person whose identity is to be established.[188] The applicant need not make out a *prima facie* case for relief.[189] However, a reasonable belief is more than a suspicion or a hope.[190] The applicant must have "some prospect" of achieving a remedy and a belief that there is a "real prospect" a remedy exists.[191] In *Allphones Retail v Australian Competition and Consumer Commission*[192] orders for identity discovery were refused under the *Federal Court Rules 1979* (Cth) where the claim for breach of statutory duty and equitable duty were virtually hopeless, and the prospective action was "merely speculative". The plaintiff's cause of

185 See also ACT r 650; FCR r 7.22; NSW r 5.2; NT r 32.03; Tas r 403C; WA O 26A r 3. Compare SA r 4.

186 *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1 at 10–11.

187 Vic r 32.05; see also ACT r 650; FCR r 7.23; NSW r 5.3; NT r 32.05; SA r 32; Tas r 403E; WA O 26A r 4.

188 Compare r 32.05.

189 Compare *Taylor v Osborne* [1973] 1 NSWLR 52 which was decided under a different rule requiring a *prima facie* case to be made out.

190 *McCracken v Stockdale* (unreported; VSC; Beach J; No 9148/1994; 27 March 1995).

191 *Allphones Retail Pty Ltd v Australian Competition and Consumer Commission* (2009) 259 ALR 354 at [54].

192 *Allphones Retail Pty Ltd v Australian Competition and Consumer Commission* (2009) 259 ALR 354.

action was held to be speculative in *Exley v Wyong Shire Council*[193] where a plumber sought the names of people who had brought complaints against his workmanship in order to found an action in defamation.[194] In *Stewart v Miller*[195] the applicant, an entertainer, was successful in demonstrating a real prospect of success in an action for breach of duty by the managers of a booking agency who had mixed receipts from ticket sales with trust moneys.

The scope of the discovery under r 32.03 can only be wide enough to ascertain the identity of the defendant to enable the commencement of a proceeding.[196] It cannot be invoked to ascertain the whereabouts of the person against whom a proceeding has been commenced in order that originating process may be served on the person.[197] Nor can it be used by the applicant to determine which member or members of a group to sue.[198] The procedure may be used to identify a group of prospective defendants if there is sufficient evidence against each of them.[199] It may also be used to join a party to a proceeding.[200]

A person ordered to give discovery assists in ascertaining the identity of the person concerned if the disclosed information directly establishes the identity of the defendant, or assists the applicant to establish that identity.[201] Establishing the identity of the person may involve revealing the existence of a person previously unknown to the applicant, or providing information that enables the attribution of an act or omission to a known person sufficient to base a claim for relief against that person.

[5.320] Reasonable inquiries

The court will not make an order under r 32.03 unless the applicant has previously conducted reasonable enquiries to establish the identity of the person concerned.[202] What is a reasonable enquiry depends on the circumstances of the case. In most cases an order for discovery will not be

193 *Exley v Wyong Shire Council* (unreported; NSWSC; Allen M; 10 December 1976).

194 See also *Barton v Osborne* [1975] ACLD 69 where an applicant failed in his application for discovery on a prospective defamation action when he had not sustained damages.

195 *Stewart v Miller* [1979] 2 NSWLR 128.

196 *Lynx Engineering Consultants Pty Ltd v ANI Corporation Ltd (No 2)* (2007) 163 FCR 372.

197 *Survival and Industrial Equipment (Newcastle) Pty Ltd (t/as SIE Liferaft Servicing) v Owners of Vessel Alley Cat* (1992) 36 FCR 129. See also *Ricegrowers' Co-operative Ltd v ABC Containerline NV* (1996) 138 ALR 480 (FCA); *Village Building Co Ltd v Airservices Australia (No 2)* [2008] FCA 1285.

198 *Taylor v Osborne* [1973] 1 NSWLR 52 failed when a plaintiff injured by a soft drink bottle used the application to determine which one of the prospective defendants — drink manufacturer, bottle manufacturer, or product supplier — to sue.

199 *G Breschi & Son Pty Ltd v AFT Ltd* [1988] VR 109.

200 Vic r 32.04; see also ACT r 650; NT r 32.04; Tas r 403D.

201 See *Taylor v Osborne* [1973] 1 NSWLR 52 at 56.

202 Rule 32.03(1).

made unless a respondent refuses a request to supply information.[203] In the circumstances of some cases the enquiry made of the respondent may in itself constitute "reasonable enquiries" for the purposes of r 32.03(1). In *Compass Airlines v ANOP Research Services*[204] it was held that no further enquiries were necessary and discovery was granted. In *Roads and Traffic Authority (NSW) v Australian National Car Parks*[205] it was held that electing not to use freedom of information legislation to obtain the information sought did not make an application for an order for discovery under the rule unreasonable in the circumstances.

Mode of discovery

[5.330] The form of the order for discovery under r 32.03 is a matter for the exercise of discretion in each case.[206] As well as making discovery of the documents in relation to the question, the court may direct that the respondent attend court to be orally examined on the question of the identity of the person against whom a proceeding ought to be commenced.[207] Where an examination is ordered, the court may direct the respondent to produce on the examination any document or thing in their possession relating to the question of identity.[208] It may direct that the examination be held before an associate judge.[209] If the respondent is a corporation, an appropriate officer must attend before the court to be examined, or make discovery of documents, or produce a document or thing.[210]

If discovery is sufficient to enable the applicant to ascertain the identity of the person to sue, the court may limit the order accordingly. The order may also be limited if oral examination is otherwise unwarranted in the circumstances. In *G Breschi & Son v AFT Ltd*[211] oral examination of the officers of the companies involved was not allowed because it was likely to be extensive and time-consuming, and overlap considerably with the main proceeding.

Preliminary discovery from a prospective defendant

[5.340] In Victoria r 32.05 provides:

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203 See *Stewart v Miller* [1979] 2 NSWLR 128 at 143; *G Breschi & Son Pty Ltd v AFT Ltd* [1988] VR 109 at 111.

204 *Compass Airlines Pty Ltd v ANOP Research Services Pty Ltd* (unreported; VSC; Beach J; No 3272/1990; 26 April 1991).

205 *Roads and Traffic Authority (NSW) v Australian National Car Parks Pty Ltd* (2007) 47 MVR 502.

206 *G Breschi & Son Pty Ltd v AFT Ltd* [1988] VR 109 at 114.

207 Rule 32.03(2).

208 Rule 32.03(3)(a).

209 Rule 32.03(3)(b).

210 Rule 32.03(2), (3).

211 *G Breschi & Son Pty Ltd v AFT Ltd* [1988] VR 109.

32.05 Discovery from prospective defendant

Where—

(a) there is reasonable cause to believe that the applicant has or may have the right to obtain relief in the Court from a person whose description the applicant has ascertained;

(b) after making all reasonable inquiries, the applicant has not sufficient information to enable the applicant to decide whether to commence a proceeding in the Court to obtain that relief; and

(c) there is reasonable cause to believe that that person has or is likely to have or has had or is likely to have had in that person's possession any document relating to the question whether the applicant has the right to obtain the relief and that inspection of the document by the applicant would assist the applicant to make the decision—

the Court may order that that person shall make discovery to the applicant of any document of the kind described in paragraph (c).

The application of the rule assists the plaintiff in deciding whether or not to institute proceedings by ordering discovery on a prospective defendant.

The purpose of r 32.05 is to enable a person to determine whether or not they have a cause of action against an identified prospective defendant. Rule 32.05 is used when the identity of the prospective defendant is known, but where the applicant has a good cause of action against them is in doubt.[212] It enables the person to make an informed decision on that question before a proceeding is commenced, rather than have to wait to commence a proceeding and then use the ordinary process of discovery before making the decision.[213] If there are several respondents to an application under r 32.05, discovery by one respondent will show whether the applicant has a cause of action against that respondent. But the discovery might also show that the applicant has a cause of action against another respondent, and, further, might identify that respondent. In the latter situation, r 32.05 would help determine the question of which of several possible defendants is liable, something which cannot be done under r 32.03.[214]

Reasonable cause for belief as to right to relief

[5.350] The first requirement of r 32.05, as stated in r 32.05(a), is that there is reasonable cause to believe that the applicant has or may have the right to obtain relief in the court from the person from whom discovery is sought. Whether there is a reasonable cause to believe is established by evidence[215] and determined objectively.[216] The subjective belief of the

212 The procedure is derived from the procedure for preliminary discovery established in England by *Administration of Justice Act 1969* (UK), s 21(1) and *Administration of Justice Act 1970* (UK), s 31, now *Supreme Court Act 1981* (UK), s 33(2).

213 See *United Energy Ltd v Energy Risk Management Pty Ltd* [1998] VSC 133.

214 See *G Breschi & Son Pty Ltd v AFT Ltd* [1988] VR 109 at 111.

215 *Interwest Hotels Pty Ltd v Commonwealth Bank of Aust* (unreported; VSC; O'Bryan J; No 12771/1990; 12 February 1991).

applicant in the existence of reasonable cause is not sufficient.[217] A flimsy foundation for the required belief cannot constitute reasonable cause within the meaning of the rule.[218] A hunch or suspicion is not sufficient.[219] If reasonable cause to believe in the existence of a right to relief is not shown, discovery will not be granted merely to enable the applicant to find out what happened.[220]

Reasonable cause for the belief that the applicant may have the right to obtain relief is sufficient, and it is not necessary for the court to come to an affirmative conclusion that the applicant is likely to succeed.[221] An order will be refused if the claim is bound to fail[222] as where, for instance, it is plain beyond argument that a proposed limitation defence must succeed.[223]

"Belief" requires more than mere assertion and more than suspicion or conjecture. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition. Thus it is not sufficient to point to a mere possibility. The evidence must incline the mind towards the matter or fact in question. If there is no reasonable cause to believe that one of the necessary elements of a potential cause of action exists, that would dispose of the application insofar as it is based on that cause of action.[224] There must be some tangible support for the right to obtain relief that takes the existence of the alleged right beyond mere "belief" or "assertion" by the applicant.[225]

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216 See *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1 at [39]; *Quanta Software International Pty Ltd v Computer Management Services Pty Ltd* (2000) 175 ALR 536 at [28]; *St George Bank Ltd v Rabo Australia Ltd* (2004) 211 ALR 147; *Benchmark Certification Pty Ltd v Standards Australia International Ltd* (2004) 212 ALR 464; *Glencore International AG v Selwyn Mines Ltd* (2005) 223 ALR 238.

217 *Ni-Tech Pty Ltd v Parker* [1998] AIPC 91-411 (FCA).

218 *Scarletti Pty Ltd v Millwood Printing Co Pty Ltd* (unreported; VSC; Phillips CJ, Crockett and Southwell JJ; No 8500/1993, 28 July 1994).

219 *XX v Pan Macmillan Australia Pty Ltd* (unreported; VSC; Beach J; No 4758/1995; 16 March 1995); *Chelmaness Pty Ltd (in liq) v Adroyal Ltd* (unreported; VSC; Beach J; No 4690/1995; 4 April 1995).

220 *Interwest Hotels Pty Ltd v Commonwealth Bank of Aust* (unreported; VSC; O'Bryan J; No 12771/1990; 12 February 1991).

221 *WR Pateman Pty Ltd v Walker Corporation Pty Ltd* [1990] ATPR 41-016; *Paxus Services Ltd v People Bank Pty Ltd* (1990) 99 ALR 728 (FCA); *Pacific Dunlop Ltd v Australian Rubber Gloves Pty Ltd* (1992) 23 IPR 456 (FCA); *Scarletti Pty Ltd v Millwood Printing Co Pty Ltd* (unreported; VSC; Phillips CJ, Crockett and Southwell JJ; No 8500/1993, 28 July 1994); *Panasonic Australia Pty Ltd v Ngage Pty Ltd* (2006) 69 IPR 595 at [27]; *Morton v Nylex Ltd* [2007] NSWSC 562.

222 *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957.

223 *Harris v Newcastle Health Authority* [1989] 1 WLR 96.

224 *John Holland Services Pty Ltd v Terranora Group Management Pty Ltd* [2004] FCA 679 at [13], [14], [17] and [73], referred to in *St George Bank Ltd v Rabo Australia Ltd* (2004) 211 ALR 147 at [26].

225 *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1 at [39]; *Glencore International AG v Selwyn Mines Ltd* (2005) 223 ALR 238.

Where the putative cause of action has several elements, although uncertainty as to only one element may be compatible with the requirement that there be reasonable cause to believe that the applicant may have the right to obtain relief, uncertainty as to a number of such elements may be sufficient to undermine the reasonableness of the cause to believe that there may be a right to relief.[226]

Although the rule is not satisfied if the applicant is already able to decide whether to commence a proceeding, it is not necessarily rendered inapplicable by the fact that the applicant has evidence which establishes a *prima facie* case. That is made clear by the reference in r 32.05(a) to the existence of "reasonable cause to believe that the applicant has … the right to obtain relief". It would impose an artificial constraint on the rule to exclude, *a priori*, all cases in which the insufficiency of the information possessed by the applicant to enable a decision to be made whether to litigate was due to a matter which could be raised by the respondent in answer to defeat the *prima facie* case.[227]

No sufficient information after inquiry

[5.360] The applicant for preliminary discovery, after making all reasonable inquiries, must not have sufficient information to enable them to decide whether to commence a proceeding against the person from whom the discovery is sought. An applicant who already believes that there is a cause of action cannot obtain discovery in order to verify that belief or otherwise to ascertain the strength of the case for the right to relief.[228]

The question is not whether the applicant has sufficient information to decide if a cause of action is available against the prospective respondent but whether the applicant has sufficient information to make a decision whether to commence proceedings in the court.[229] Accordingly, an applicant for preliminary discovery may be entitled to discovery in order to determine what defences are available to the respondent and the possible strength of those defences, or to determine the extent of the respondent's breach and the likely quantum of any damages award.[230]

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226 See *Glowatzky v Insultech Group Pty Ltd* (1997) 39 IPR 215 at 224 (FCA); *Benchmark Certification Pty Ltd v Standards Australia International Ltd* (2004) 212 ALR 464 at [17].

227 *Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd* [1996] FCA 391. See also *Lubrizol Corporation Inc v Woolworths Ltd* (1997) 39 IPR 375 (FCA); *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1 at [39].

228 See *Gibson v ANZ Banking Group Ltd* [1999] FCA 1327.

229 *Quanta Software International Pty Ltd v Computer Management Services Pty Ltd* (2000) 175 ALR 536 at 543; *Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd* [1996] FCA 391; *St George Bank Ltd v Rabo Australia Ltd* (2004) 211 ALR 147 at [26]; *Morton v Nylex Ltd* [2007] NSWSC 562 at [33].

230 *St George Bank Ltd v Rabo Australia Ltd* (2004) 211 ALR 147, referring to *CGU Insurance Ltd v Malaysia International Shipping Corporation Berhad* (2001) 187 ALR 279 at 285; *Quanta Software International Pty Ltd v Computer Management Services Pty Ltd* (2000) 175

The words "all reasonable inquiries" prescribe an objective standard, and it is not a question of whether the applicant genuinely feels unable, because of lack of information, to decide to commence proceedings.[231] The applicant must disclose what information they already have relevant to making a decision whether to commence a proceeding in the court, and identify what information is lacking.[232] The applicant is required to have made reasonable inquiries to obtain sufficient information to enable them to decide whether to commence a proceeding in the court to obtain relief from the respondent.[233]

In *CGU Insurance Ltd v Malaysia International Shipping*[234] Tamblin J, in relation to the corresponding rule in the *Federal Court Rules 1979* (Cth), O 15A r 6, said:

> The provision does not contemplate an order where some reasonable inquiries have been made but rather where all reasonable inquiries have been made. It appears to contemplate a reasonable exhaustion of alternative sources of information and, in any particular case, involves a pragmatic balancing of considerations. The power of the court arises after the applicant has made all reasonable inquiries and finds that there is insufficient information to enable a decision to be made.

The procedure cannot be used to determine whether there is a cause of action against a third party.[235] The existence of an agreement between the prospective plaintiff and the prospective defendant by which the subject dispute between the parties is required to be submitted to arbitration is not of itself a bar to obtaining relief under r 32.05.[236] The rule is designed to permit a search for information before a proceeding is commenced; by its terms it is not available once a proceeding has commenced.[237] Rule 32.05 cannot be used to mount a fishing expedition. Each of the elements prescribed in the rule must be established,[238] and the application

ALR 536; *Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd* [1996] FCA 391 at 24–26; *Airservices Australia v Transfield Pty Ltd* (1999) 92 FCR 200 at 202–203; *Telstra Corporation Ltd v Minister for Broadband, Communications and the Digital Economy* (2008) 166 FCR 64.

231 *CGU Insurance Ltd v Malaysia International Shipping Corporation Berhad* (2001) 187 ALR 279 at [23], referring to *Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd* [1996] FCA 391; *Western Bulk Carriers (Australia) Pty Ltd v Cosco Bulk Carrier Co Ltd* [2002] FCA 1520 at [17]; *Lynx Engineering Consultants Pty Ltd v ANI Corporation Ltd* [2007] FCA 578.

232 *Morton v Nylex Ltd* [2007] NSWSC 562 at [33].

233 Rule 32.05(b), compare r 32.03(1). See *Paxus Services Ltd v People Bank Pty Ltd* (1990) 99 ALR 728 (FCA); *Pacific Dunlop Ltd v Australian Rubber Gloves Pty Ltd* (1992) 23 IPR 456 (FCA).

234 *Pacific Dunlop Ltd v Australian Rubber Gloves Pty Ltd* (1992) 23 IPR 456 (FCA) at [25].

235 *Glencore International AG v Selwyn Mines Ltd* (2005) 223 ALR 238; *Morton v Nylex Ltd* [2007] NSWSC 562 at [27].

236 *Timoney Technology Ltd v ADI Ltd* [2007] VSC 402.

237 *Ezzy v Commonwealth Bank of Australia* (unreported; NTSC; Martin CJ; No 214/1994; 27 February 1995).

238 *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1 at 11; *Benchmark Certification Pty Ltd v Standards Australia International Ltd* (2004) 212 ALR 464.

must satisfy certain conditions.[239] First, the applicant must reasonably believe they have a right to relief. The test for the right to relief is objective. Secondly, the court will require more of the applicant than to merely assert their right, but will not expect them to establish a *prima face* case for relief. Thirdly, discovery may be ordered even if the applicant has evidence to establish a *prima facie* case but not enough to commence litigation. Lastly, discovery is permitted only prior to the institution of proceedings. Preliminary discovery cannot itself be used to remedy deficiencies in the satisfaction of those elements.[240]

The rule applies where an applicant believes that they have or may have the right to obtain relief in the court from another person who is identified but has insufficient evidentiary material to be satisfied that they have or may have that right. The applicant is entitled to have access to documents which furnish some evidentiary material in support of the claim sought to be made.[241] The rule is not satisfied if the applicant is already able to decide whether to commence a proceeding[242] as, for instance, where the applicant had in fact decided to commence a proceeding,[243] or was satisfied that it had a cause of action[244] or was seeking discovery simply to determine whether it should enforce its right to relief by a proceeding in the court rather than follow some other course.[245] However, it is consistent with the objective of preliminary discovery being to assist a plaintiff to decide whether or not to take action for it to be used to assess the strength of the defence.[246]

Also, if the applicant already believes that there is a cause of action, discovery is not available to enable the applicant to verify that belief or otherwise ascertain the strength of the case for the right to relief.[247] "In my view, the gist of the Rule is directed to know not whether the case is a strong one or a weak one, not whether it is incidentally supported or what the full range of other material is, but whether the applicant has sufficient information to enable that applicant to decide whether to

239 *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1 at 11–12.

240 *Airservices Australia v Transfield Pty Ltd* (1999) 92 FCR 200 at 202–203. See also *St George Bank Ltd v Rabo Australia Ltd* (2004) 211 ALR 147; *Beston Parks Management Pty Ltd v Sexton* [2008] VSC 392; *Apache Northwest Pty Ltd v Newcrest Mining Ltd* (2009) 182 FCR 124.

241 *Lubrizol Corporation Inc v Woolworths Ltd* (1997) 39 IPR 375 at 379 (FCA).

242 *Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd* [1996] FCA 391.

243 *Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd* [1996] FCA 391.

244 *Prosnow International Pty Ltd v Polar Technologies Pty Ltd* (1997) 39 IPR 369 (FCA).

245 *Compass Airlines Pty Ltd v ANOP Research Services Pty Ltd* (unreported; VSC; Beach J; No 3272/1990; 26 April 1991).

246 *Hatfield v TCN Channel Nine Pty Ltd* (2010) 77 NSWLR 506 at [47]–[52] per McCall JA.

247 *Gibson v ANZ Banking Group Ltd* (unreported; VSC; Gobbo J; No 10670/1991; 30 August 1991).

commence a proceeding".[248] The rule cannot be used to obtain material to verify a cause of action which the applicant already knows it has.[249] The applicant must be seeking to determine whether a right to obtain relief exists, not simply the strength of a right to obtain relief which is believed to exist, that is, to determine the likelihood of success in a proceeding to obtain the relief.[250]

In *Optiver Australia v Tibra Trading*[251] the plaintiff was able to plead the statement of claim. Nevertheless, the Full Federal Court[252] ordered preliminary discovery. The court held that even where a person has a reasonable cause to believe that they may have a right to relief, nevertheless that person may still require information to determine whether the cost and risk of litigation is worthwhile. There was no warrant in the *Federal Court Rules 1979* (Cth) for reading into them an "impermissible gloss" that no right to preliminary discovery exists once a person can make out a "bare pleadable case". Preliminary discovery can inform a decision whether or not to commence a proceeding. The plaintiff in *Optiver* suspected that a number of employees were using copied software in breach of their employment contracts to establish and operate a rival business. Although the plaintiff lacked sufficient evidence to proceed to trial an email sent from one the firm's computers supported their suspicions. In *Beston Parks Management v Sexton*[253] Hollingworth J was not satisfied that the applicants had sufficient information upon which to decide whether to commence a proceeding against the respondents nor could a statement of claim be properly drawn on the material currently available to the applicants.[254]

It is not sufficient that the applicant genuinely feels unable, because of lack of information, to decide whether to commence a proceeding. It must be shown as an objective fact that the applicant lacks "sufficient information to enable him to decide whether to commence a proceeding".[255] Further, whether the applicant has information which is "sufficient" imports an element of reasonableness, that is, of "reasonable sufficiency". It raises the question whether it is reasonable that the

248 *Gibson v ANZ Banking Group Ltd* (unreported; VSC; Gobbo J; No 10670/1991; 30 August 1991) per Gobbo J. See also *Hemley v Medical Indemnity Protection Society* [2000] VSC 496.

249 *Mercantile Mutual Insurance (Australia) Ltd v Household Financial Services Ltd* (unreported, VSCCA; Winneke J Hayne JA and Ashley AJA; No 5967/1994; 22 May 1997). See also *Schmidt v Won* [1998] 3 VR 435; *Dyer v Hunter* [1999] VSC 531.

250 See *Petrolite Pty Ltd v Hong Kong Bank Ltd* (unreported; VSC; Cummins J; No 13747/1991; 10 February 1992).

251 *Optiver Australia Pty Ltd v Tibra Trading Pty Ltd* (2007) 247 ALD 199.

252 Overruling Tamberlin J at first instance.

253 *Beston Parks Management Pty Ltd v Sexton* [2008] VSC 392.

254 *Beston Parks Management Pty Ltd v Sexton* [2008] VSC 392 at [87].

255 *Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd* [1996] FCA 391.

applicant be required to make its decision whether to litigate without having the information which is sought on the discovery.[256]

Whether an applicant lacks "sufficient information to enable him to decide whether to commence a proceeding" involves an objective test[257] and the existence and content of legal advice obtained by the applicant has no bearing on the question of whether the test has been made out.[258]

In the terms of the rule, the relevant question is whether the applicant has sufficient information to enable a decision to be made whether to commence a proceeding in the court. The question is not whether the information is sufficient to enable the applicant to decide whether it has a cause of action. Accordingly, information that relates only to quantum is not necessarily outside the scope of the rule. In a copyright action, for instance, the extent of the infringement that might be revealed on discovery could well be material to a decision whether to commence a proceeding in respect of the infringement.[259]

Rule 32.05 does not enable an applicant for discovery to have made available every document which would assist in deciding whether to litigate. Rule 32.05(b) contemplates that after making all reasonable inquiries, the applicant has come up against a problem, namely, that it lacks a piece or pieces of information reasonably necessary to enable it to decide whether to commence a proceeding.[260]

The applicant should, with some particularity, describe the nature of the cause of action sought to be advanced and identify the documents or classes of documents the discovery of which was said to be necessary in order to enable them to determine the question whether to commence a proceeding.[261] There must be some basis for establishing the existence of a cause of action beyond a mere allegation, suspicion or assertion.[262]

Rule 32.05 confers a discretion on the court. If the conditions in the rule are satisfied, the court may nevertheless in the exercise of discretion

256 *Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd* [1996] FCA 391. See also *Glowatzky v Insultech Group Pty Ltd* (1997) 39 IPR 215 at 220 (FCA); *Quanta Software International Pty Ltd v Computer Management Services Pty Ltd* (2000) 175 ALR 536 at [33].

257 *Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd* [1996] FCA 391.

258 *Beston Parks Management Pty Ltd v Sexton* [2008] VSC 392. See also *Australian Football League v Stadium Operations Ltd* [2009] VSC 264.

259 See *Quanta Software International Pty Ltd v Computer Management Services Pty Ltd* (2000) 175 ALR 536 at [33].

260 *Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd* [1996] FCA 391. See also *Bilbarin Holdings Pty Ltd v NRMA Insurance Ltd* [1997] ACTSC 126; *CGU Insurance Ltd v Malaysia International Shipping Corporation Berhad* (2001) 187 ALR 279 at [23].

261 *Clime Investment Holdings Ltd v Pilley* (unreported; VSC; Vincent J; No 8325/1997; 26 May 1998).

262 *Waller v Waller* [2009] WASCA 61.

refuse to make an order.[263] However, an order ought not to be refused for the reason only that it is possible that any proceeding brought subsequently in the court would be stayed on the ground that Victoria is clearly an inappropriate forum according to the test in *Voth v Manildra Flour Mills*.[264]

Illustrations

[5.370] The following situations show the value of discovery under r 32.05:

- on the question whether a hospital had been negligent in the treatment administered to a patient, discovery of the records of the hospital relating to the treatment;[265]
- on a claim to enforce a contract for the sale of land signed by a person other than the party to be charged, any document by which the party authorised the person to sign, as required by *Instruments Act 1958* (Vic), s 127,[266] where the applicant had been entitled to purchase property owned by the respondent under a first right of refusal clause in a lease, and the question was on what terms the respondent had sold the land to a third party, discovery of the contract of sale between the respondent and third party;[267]
- where the respondent was believed to have taken confidential computer disk information and placed it in its own database, an order that the respondent place floppy disks containing the information in a sealed envelope and give the envelope to the court;[268]
- in a proceeding for infringement of copyright in literary works, discovery of the documentary material.[269]

In *Clime Investment Holdings v Pilley*[270] discovery under r 32.05 was sought against 11 respondents as prospective co-defendants to a proceeding in the court. It was held that the rule did not authorise the grant of discovery on a global basis, that is, against the respondents generally, and that the applicant was required to show in respect of the respondents individually what cause of action was proposed against each respondent and what relevant documents or classes of documents were or were likely

263 *Glowatzky v Insultech Group Pty Ltd* (1997) 39 IPR 215 at 220 (FCA); *Wyeth v Department of Health and Ageing* (2009) 255 ALR 352 at [47]–[67].

264 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538. See *Schmidt v Won* [1998] 3 VR 435.

265 *Dunning v United Liverpool Hospitals' Board of Governors* [1973] 1 WLR 586; *Smith v Hutt Street Private Hospital Pty Ltd* (1990) 53 SASR 382.

266 *G Breschi & Son Pty Ltd v AFT Ltd* [1988] VR 109 at 113.

267 *WR Pateman Pty Ltd v Walker Corporation Pty Ltd* [1990] ATPR 41-016.

268 *Paxus Services Ltd v People Bank Pty Ltd* (1990) 99 ALR 728.

269 *Aitken v Neville Jeffress Pidler Pty Ltd* (1991) 33 FCR 418; 22 IPR 605 at 609 (CA).

270 *Clime Investment Holdings Ltd v Pilley* (unreported; VSC; Vincent J; No 8325/1997; 26 May 1998).

to be in the possession of that respondent. As the applicant could not meet this requirement, discovery was refused.

Fishing expedition

[5.380] The procedure under r 32.05 represents a significant change in the practice relating to discovery. A plaintiff may use discovery to support the cause of action pleaded but not to find out whether there is a cause of action to plead. Discovery for the latter purpose amounts to a fishing expedition, and will not be permitted. It has been said that the phrase "a fishing expedition" means "that a person who has no evidence that there are a particular kind of fish in a pool desires to be at liberty to drag it for the purpose of finding out whether there are any there or not".[271]

Unless rules of court provide otherwise, a person cannot before commencing a proceeding obtain discovery from the person who would be a defendant in order to ascertain whether the proceeding is likely to succeed.[272] Nor can the defendant in an existing proceeding be required to give discovery to enable the plaintiff to determine whether there is a good cause of action. The applicant must have grounds for believing — and not merely suspect or speculate about whether — they have a right to relief. It is not required that the plaintiff demonstrate a complete cause of action.

In *Modbury Hospital v O'Loughlin*[273] a plaintiff contemplating action for medical negligence sought, and the court ordered, discovery of hospital records and x-rays. These items were to be given to an expert in whose opinion the plaintiff's statements, assuming they were correct and supported by the evidence, suggested she had been inappropriately advised and treated.[274]

INTERROGATORIES

[5.390] Interrogatories supplement discovery of documents in seeking admissions of facts. They are a series of written questions designed to obtain admissions to assist the case of the interrogating party or damage the case of the party under interrogation.

Answers to interrogatories can be tendered at trial to prove the admissions they contain.

In Victoria parties may administer interrogatories to each other without leave of the court after the close of pleadings, but before pleadings close

271 *Associated Dominions Assurance Society Pty Ltd v John Fairfax & Sons Pty Ltd* (1955) 72 WN (NSW) 250 at 254 per Owen J.

272 See *Cummings v 2KY Broadcasters Pty Ltd* [1981] 1 NSWLR 246.

273 *Modbury Hospital v O'Loughlin* (1988) 49 SASR 452.

274 See also *Smith v Hutt Street Private Hospital Pty Ltd* (1990) 53 SASR 382.

interrogatories can only be administered with leave.[275] However, interrogatories in industrial and motor vehicle accident claims are permissible only with the court's leave. The rule in Victoria limits the administration of interrogatories to one set. Further interrogatories are allowed only with the court's leave.[276]

Scope of order

[5.400] Order 30 provides for discovery by interrogatories which are a mode of examination before trial of one party by another in relation to any question between those parties in the proceeding. Interrogatories are in writing and they are answered by affidavit, that is, by providing written answers on oath. Examination by interrogatories is one of the several processes by which a party to a proceeding may obtain discovery of another party. The other processes are:

- discovery and inspection of documents;[277]
- oral examination;[278] and
- in a proceeding for damages for bodily injury, medical examination of the plaintiff and the service of hospital and medical reports.[279]

Oral examination under O 31 requires the consent of the party to be examined.[280] The examination may take place in addition to or in place of examination by interrogatories. Discovery by interrogatories is limited to the parties to a proceeding. It is not available on preliminary discovery or discovery from a non-party under O 32.

There are three kinds of discovery under O 32:

1. discovery to identify a defendant;[281]
2. discovery from a prospective defendant;[282] and
3. discovery from a non-party.[283]

In each case discovery is by discovery of documents, except that on discovery to identify a defendant discovery may also be by oral examination. A proceeding under r 32.03 or r 32.05 is one brought specifically to obtain discovery, and is not a proceeding of the ordinary

275 Vic r 30.02; see also ACT r 630; and NT r 30.02; but compare New South Wales which allows interrogatories only with leave and when interrogatories are necessary (NSW r 22.1); Queensland only allows a party to deliver 30 questions, more requires leave of the court (Qld rr 229, 230).

276 Rule 30.02.

277 Order 29.

278 Order 31.

279 Order 33.

280 Rule 31.02(2).

281 Rule 32.03.

282 Rule 32.05.

283 Rule 32.07.

kind between a plaintiff and a defendant.[284] Discovery from a non-party under r 32.07 is obtained by a party to an existing proceeding.

Order 30 is more detailed and comprehensive than the rules of Ch I, O 31 of the relating to interrogatories.[285] The Order is a partial codification of the previous law and practice, and with respect to the sources from which a party is required to answer interrogatories, it partly changes the previous law and practice.

Interrogatories must be answered within the time stipulated by the rules.[286] Answers to Interrogatories are subject to an implied undertaking that they will be used only for the litigation for which they are given.[287] Unauthorised disclosure in breach of the undertaking for purposes beyond the present litigation constitutes a civil contempt of court.[288]

To what interrogatories must relate

[5.410] Interrogatories must relate to a question in the proceeding between the interrogating party and the party being interrogated. In the context of interrogatories in a proceeding in which pleadings are served, "question" means any question, issue or matter of fact for determination by the court raised by the pleadings.[289] The pleadings include any particulars. For this purpose "question" is not confined to a fact directly in dispute but extends to any fact the existence or non-existence of which is relevant to the existence or non-existence of a fact directly in dispute. A party may be interrogated as to anything which can fairly be said to be material to advance the case of the interrogating party or to destroy the case of the party being interrogated.[290]

284 See r 4.03(2).

285 *Rules of the Supreme Court 1884* (Vic), O 31 rr 1 – 11.

286 Rule 30.04(b): 42 days.

287 *Ainsworth v Hanrahan* (1991) 25 NSWLR 155 at 167.

288 The court's power to deal with contempt is at *Supreme Court (General Civil Procedure) Rules 2005* (Vic), O 75. On the concept of contempt see *Witham v Holloway* (1995) 183 CLR 525 at 530 per Brennan, Deane, Toohey and Gaudron JJ.

289 See the definition of "question" in r 1.13(1).

290 *Plymouth Mutual Co-op and Industrial Society Ltd v Traders' Publishing Assoc Ltd* [1906] 1 KB 403 at 416. See also *Saunders v Jones* (1877) 7 Ch D 435; *Wainman v Hansen* (1884) 6 ALT 24; *Marriott v Chamberlain* (1886) 17 QBD 154 at 163; *Hooton v Dalby* [1907] 2 KB 18 at 21; *Potter's Sulphide Ore Treatment Ltd v Sulphide Corporation Ltd* (1911) 13 CLR 101 at 111; *Australian Blue Metal Ltd v Hughes* [1960] NSWR 673; *Cumming v Matheson* (1970) 92 WN (NSW) 339; *Sharpe v Smail* (1975) 49 ALJR 130 at 133; *Barbarian Motor Cycle Club Inc v Koithan* (1984) 35 SASR 481. In New South Wales, under *Supreme Court Rules 1970* (NSW), Pt 24 r 1 (see now *Uniform Civil Procedure Rules 2005* (NSW), r 22.2(a)), one party may interrogate another "relating to any matter in question" between them. The expression "relating to any matter in question" is interpreted as widely as possible with due regard to propriety: *Seidler v John Fairfax & Sons Ltd* [1983] 2 NSWLR 390.

Interrogatory must relate to a question in the proceeding

[5.420] Rule 30.02(1) provides that, subject to the other paragraphs of the rule, any party may serve interrogatories on another party relating to any question between them in the proceeding. An interrogatory relates to a question if it has some association or connection with the question.[291] Thus, anything material may be asked, and "the right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue".[292] However, evidence and witnesses' names are not material facts, so interrogatories to illicit the names of witnesses are not permitted (unless those names are a material fact), nor are interrogatories about the opposing parties' evidence. In *Potter's Sulphide Ore Treatment v Sulphide Corporation*[293] Griffith CJ considered that the seeking of admissions as to facts relevant to facts in issue was "the very object of interrogatories". This may include interrogation in a proceeding as to an apparently inconsistent stance pleaded by the party being interrogated in litigation involving the same subject matter in another court.[294]

An interrogatory the answer to which could not fairly be said to assist the interrogating party either to maintain their own case or to destroy the case of the party being interrogated will not be permitted, notwithstanding that the question might properly be put during oral examination of the party at trial.[295] An example of this is an interrogatory directed at impeaching the credit of the party being interrogated. An interrogatory that does not relate to any question in the proceeding is not a proper interrogatory, and the party being interrogated is entitled to object to answering it. It is a ground of objection which is recognised in r 30.07(1)(a).

To illustrate the principle that the right to interrogate extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue, Myers J in *American Flange and*

291 See *Seidler v John Fairfax & Sons Ltd* [1983] 2 NSWLR 390, a decision under a rule of court allowing a party to interrogate another "relating to any matter in question" between them.

292 *Marriott v Chamberlain* (1886) 17 QBD 154 at 163 per Lord Esher MR, Bowen LJ agreeing. See also *Nash v Layton* [1911] 2 Ch 71 at 76, 83; *Osram Lamp Works Ltd v Gabriel Lamp Co* [1914] 2 Ch 129 at 130; *Leviston v Narracan Shire* (1905) 11 ALR 298; *Australian Blue Metal Ltd v Hughes* [1960] NSWR 673; *Sharpe v Smail* (1975) 49 ALJR 130 at 133.

293 *Potter's Sulphide Ore Treatment Ltd v Sulphide Corporation Ltd* (1911) 13 CLR 101 at 109–110.

294 *Rapid Metal Developments (Australia) Pty Ltd v Anderson Formrite Pty Ltd (No 2)* [2008] WASC 204.

295 See *Plymouth Mutual Co-op and Industrial Society Ltd v Traders' Publishing Assoc Ltd* [1906] 1 KB 403 at 416; *Potter's Sulphide Ore Treatment Ltd v Sulphide Corporation Ltd* (1911) 13 CLR 101 at 111.

Manufacturing v Rheem (Australia) (No 2)[296] referred to the case of a defendant sued for a debt, who pleads that the plaintiff at the time of the loan was an unregistered moneylender. The question to which an interrogatory to the plaintiff must relate is whether they were an unregistered moneylender — that is, a person carrying on the business of moneylending despite not being registered to do so — and it would be permissible for the defendant to interrogate the plaintiff by asking whether they did, at the time, carry on the business of moneylending, the fact directly in issue. The defendant could also ask the plaintiff whether the plaintiff had made loans to a specified number of persons. That would be to interrogate as to facts the existence of which would be relevant to the existence of the fact in issue because proof of a sufficient number of moneylending transactions might establish that the plaintiff was carrying on the business of moneylending.[297] In *Cumming v Matheson*[298] the defendants denied an allegation that they were not in possession of certain information until the plaintiff gave it to them. The plaintiff sought to interrogate the defendants, not as to the fact of awareness of the information, the question in dispute, but as to facts the existence or non-existence of which were relevant to the existence or non-existence of the question in dispute. Hope J, relying on *Marriott v Chamberlain*[299] and *Australian Blue Metal v Hughes*,[300] held that the interrogatories were proper.

A more restrictive approach to interrogatories was evident in *Kennedy v Dodson*.[301] There the court considered that the only legitimate use of interrogatories was to obtain the admission of facts that the interrogating party has the onus of proving. Interrogatories that are merely indirectly relevant should be excluded. Whether there is a substantial difference between the broader and more restrictive view was discussed in *Tiver v Tiver*.[302] In *Tiver v Tiver*[303] the Full Court of South Australia held that in determining whether interrogatories are permissible, the paramount consideration must be the relevance of the inquiry to the questions in dispute, and whether the information sought to be obtained by the question is strictly relevant to those questions, and materially important for the purpose of establishing the interrogating party's case. Interrogatories about mere evidence are inadmissible, as they did not relate to material facts.

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296 *American Flange and Manufacturing Co Inc v Rheem (Australia) Pty Ltd (No 2)* [1965] NSWR 193 at 195.

297 See also *Nash v Layton* [1911] 2 Ch 71.

298 *Cumming v Matheson* (1970) 92 WN (NSW) 339.

299 *Marriott v Chamberlain* (1886) 17 QBD 154.

300 *Australian Blue Metal Ltd v Hughes* [1960] NSWR 673.

301 *Kennedy v Dodson* [1895] 1 Ch 334.

302 *Tiver v Tiver* [1969] SASR 40.

303 *Tiver v Tiver* [1969] SASR 40 at 50.

There should be a limit on the party's right to seek an admission. This limit should be set at what is in question in the pleadings. There is wide discretion for the court to decide what is relevant. Interrogatories which go merely to the credibility of the party being interrogated ought not to be allowed, nor should those where the object is only to establish facts which, if proved, will not of themselves prove the material questions apparent on the pleadings, or provide a link in the chain of evidence necessary to establish the case disclosed by the pleadings.[304]

In a defamation proceeding against a newspaper, it is proper for the plaintiff to interrogate as to whether the defendant received any correspondence relating to the matter complained of after its publication from anyone other than the plaintiff. That correspondence relates to a question in the proceeding, namely, the effect of the publication of the matter complained of upon readers of the newspaper, and it may advance the plaintiff's case by disclosing the identity of a reader who as a result of reading the publication has thought less of the plaintiff.[305]

Interrogatories may be used to obtain admissions regarding facts the plaintiff may be required to prove to sustain their claim. In *Dunbar v Perc*[306] a wife brought a claim resulting from an accident in which her husband died. Since she was not present at the accident she was unable to give evidence in relation to it but was permitted by the court to seek admissions from the defendant to support her case. Similarly, in *Wisniewski v Tolley*[307] a child bringing an action regarding an injury sustained whilst riding a bicycle, and about which the child had little memory, was permitted by the court to interrogate the defendant.

Statements in pleadings

[5.430] A party may interrogate another party to establish the factual basis of assertions in their own pleadings[308] which they are obliged to prove, but not about facts asserted in the opposing party's pleadings which they must prove.[309]

Further and better particulars

[5.440] While a party cannot interrogate the opposing party about a statement made in the opposing party's pleadings, interrogatories may in some circumstances be permitted to seek more specific information where the allegations contained in the pleadings lack particularity.[310]

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304 See also *Barbarian Motor Cycle Club Inc v Koithan* (1984) 35 SASR 481 at 484.

305 *Hansen v Border Morning Mail Pty Ltd* (1987) 9 NSWLR 44 at 58.

306 *Dunbar v Perc* [1956] VLR 583.

307 *Wisniewski v Tolley* (1967) 10 FLR 157.

308 *Attorney-General v Gaskill* (1882) 20 Ch D 519.

309 *Hooton v Dalby* [1907] 2 KB 18.

310 *Wisniewski v Tolley* (1967) 10 FLR 157.

Documents

[5.450] A party may be permitted to seek information about a document, but may not seek to ascertain a document's contents through interrogatories. Information about a document which is not information about what the document contains extends to information as to the document's execution,[311] or information as to whether a document had been received by a party or person.[312]

Answers to interrogatories

[5.460] In those jurisdictions where the rules provide, interrogatories are answered in the form provided by the rules. Victoria does not have such a rule.

Knowledge, information and belief

[5.470] The answers that a party provides to interrogatories are to be based on the party's knowledge, information or belief, and parties being interrogated are further obliged to make reasonable enquiries to obtain information that would enable them to answer questions in interrogatories.

If information is held by another person, such as an agent or employee, to which knowledge the party as principal or employer has a legal right, the interrogated person is to obtain that information, or so much of it as they have a right to, and provide an answer to the interrogatory on the basis of the information provided. In this context, obtaining information stops short of agents' or employees' knowledge derived beyond their duties as agents or employees.[313]

The shipowners in *Bolckow, Vaughn & Co v Fisher*[314] were directed by the court to obtain information about the circumstances surrounding the sinking of a ship with loss of cargo. The information was to be obtained from the master and crew of the vessel, to whose knowledge the shipowners had a legal right. However, the defendant in *Hawkes v Schubach*,[315] who was being sued for negligently allowing his nephew to handle his gun, did *not* have a legal right to his nephew's knowledge of the circumstances surrounding the accident in which the plaintiff was injured, and about which he (the defendant) had no personal knowledge. Thus the defendant could not be ordered to obtain that information from his nephew.

311 *Lyell v Kennedy (No 4)* (1884) 33 WR 44.

312 *King v Commercial Bank of Australia Ltd* [1920] VLR 218.

313 *Commissioner for Railways v South Queensland Transport Pty Ltd* [1950] QWN 45.

314 *Bolckow, Vaughan & Co v Fisher* (1882) 10 QBD 161.

315 *Hawkes v Schubach* [1953] VLR 468.

Inquiries

[5.480] It is reasonable to expect a party to undertake certain enquiries to answer interrogatories; and it may be inadequate for a party to make no enquiry in relation to interrogations.[316] A party need not undertake enquiries which are so unreasonable[317] as to amount to oppression to obtain information to answer an interrogatory.[318] However, the fact that it was necessary to undertake an inquiry does not in itself amount to oppression.

Belief

[5.490] A party is not obliged to furnish information it does not believe to be correct, but must describe the enquiries it undertook and the basis for its belief.[319]

Further and better answers

[5.500] In Victoria r 30.09 provides that a court may order a party to answer an interrogatory, or to require it to provide further and better answers, if it determines that the response to the interrogatory is insufficient, without considering its correctness.[320]

Use of answers at trial

[5.510] In Victoria r 30.11 provides that an answer to an interrogatory may be tendered as evidence at trial in full or in part as proof of the admission it contains. The answer is, however, merely evidence. It may be contradicted or explained at the trial by the party who answered the interrogatory.[321]

Parties liable to be interrogated

[5.520] In Victoria r 30.02 provides that interrogatories are between parties. In particular, opposing parties serve interrogatories on each other. Co-defendants interrogate each other where an issue is to be resolved between them.

OBJECTIONS

Objection to answering interrogatories

[5.530] Objections which may be raised to the discovery of documents may also be raised to answering interrogatories. Interrogated parties

316 *Sharpe v Smail* (1975) 49 ALJR 130.

317 ACT r 634 (reasonable enquiries must be undertaken).

318 *Sroka v Gorbal* (1980) 25 SASR 356.

319 *Adams v Dickeson* [1974] VR 77. But compare, for example, ACT r 634.

320 *Lyell v Kennedy (No 2)* (1883) 9 App Cas 81; *Lyell v Kennedy (No 3)* (1884) 27 Ch D 1; *Lyell v Kennedy (No 4)* (1884) 33 WR 44.

321 *Gannon v Gannon* (1971) 125 CLR 629; *Kabadanis v Panagiotou* (1980) 47 FLR 221.

object to answering on various grounds asserting privilege, or a right against self-incrimination, or because it would entail a forfeiture or the imposition of a penalty. A party challenging the propriety of the assertion of privilege may apply to the court for an order for the production of the document, or for the interrogated party to provide further, better and more specific information in response to the interrogatories.

Objections to producing documents

[5.540] In Victoria r 30.07 maintains a party's privilege against producing a document for inspection.[322] Rule 30.07(2) provides:

> (2) Without limiting paragraph (1)(a), an interrogatory that does not relate to a question includes an interrogatory the sole purpose of which is to—
>
> (a) impeach the credit of the party interrogated;
>
> (b) enable the interrogating party to ascertain whether he has a claim or defence other than that which he has raised in the proceeding;
>
> (c) enable the interrogating party to ascertain the evidence by which the party interrogated intends to prove the person's case, including the identity of witnesses.

Documents are privileged if they neither impeach the party's own case nor support the opponent's case, or if they are related only to the discovering party's case.

Legal professional privilege

[5.550] Legal professional privilege is a rule of substantive law,[323] not merely a rule of evidence.[324]

It protects information shared confidentially between a client and a legal practitioner from forced disclosure.

The test for whether a communication between a client and their lawyer is subject to legal professional privilege, and therefore not liable to be disclosed, is whether the communication was created for the dominant purpose of obtaining or furnishing confidential legal advice or services, or

322 This reflects the common law privilege: see *Attorney-General v Emerson* (1882) 10 QBD 191; *Brookes v Prescott* [1948] 2 KB 133 at 140; the privilege has been abolished in the Australian Capital Territory (*Evidence Act 1971* (ACT), s 95), Federal Court (FCR r 20.19) and Queensland (*Evidence Act 1977* (Qld), s 14).

323 *Baker v Campbell* (1983) 153 CLR 52 — where a majority of the High Court upheld the common law right of privilege against the statutory power to search and seize under a warrant, against the minority who reasoned that the words of the statute abrogated the right; privileged information was protected from disclosure despite being specifically identified in a search warrant obtained and exercised under a warrant; see also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 in which the High Court decided that *Trade Practices Act 1974* (Cth), s 155 authorised the production of documents to the Australian Competition and Consumer Commission but did not abrogate the privilege; and *Victoria v Davies* (2003) 6 VR 245 at 260–261, Batt JA holding that only compelling words in a statute would displace the privilege.

324 As held in *O'Reilly v Commissioners of State Bank of Victoria* (1983) 153 CLR 1.

documents which have been prepared for litigation currently under way, or in anticipation of future litigation.[325]

It is sufficient for the communication between client and lawyer to be confidential, regardless of the reasons for it, or the preparation of the document to be for the purpose of existing or future litigation for it to attract the privilege. The communication must have been with an admitted legal practitioner,[326] and will not be privileged if the person communicated with another professional person who merely holds a law degree.[327]

Information shared with a party with whom the party able to claim the privilege has a common interest attracts the privilege on the basis of that common interest.[328]

However, documents created or obtained by experts in order to prepare an expert report will not be subject to the privilege.[329]

Legal advice privilege

[5.560] Confidentiality furnishes the basis for the privilege enjoyed by a lawyer's advice to a client, regardless of whether or not litigation is anticipated, so non-confidential communication between a lawyer and a client does not attract privilege.[330] Not all communication between a lawyer and a client, and not all information in a lawyer's possession in relation to a client, is confidential. Entries in trust account ledgers[331] and solicitors' accounts[332] have been held to be discoverable where they were not prepared for the purpose of providing confidential legal advice.

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325 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; 77 ALJR 40 at 42–43. A departure from *Grant v Downs* (1976) 135 CLR 674, the High Court adopted the sole purpose test, Barwick CJ dissenting; this was confirmed in *Waterford v Commonwealth* (1987) 163 CLR 54. But in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 the High Court adopted the dominant purpose test. In *Waugh v British Railways Board* [1980] AC 521, the House of Lords affirmed the dominant purpose test; compare *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] AC 405, where the House of Lords applied the narrower test of privilege in relation to communications the sole purpose of which was its preparation for current or anticipated litigation.

326 See *Waterford v Commonwealth* (1987) 163 CLR 54.

327 *Glengallen Investments Pty Ltd v Arthur Andersen* [2002] 1 Qd R 233 at 244–247 per Williams JA (advice obtained from an accountant who graduated with a law degree but did not practise law).

328 *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275 at 279–280.

329 *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141.

330 *Z v New South Wales Crime Commission* (2007) 231 CLR 75.

331 *Packer v Deputy Commissioner of Taxation* [1985] 1 Qd R 275.

332 *Allen Allen & Hemsley v Deputy Commissioner of Taxation (Cth)* (1989) 20 FCR 576.

Discovery was permitted of non-confidential information a third party provided to a solicitor in relation to the administration of the solicitor's client's estate.[333] Information is not confidential, and so is discoverable:

- if the reason it is provided to a solicitor is to pass it on to another person;[334]
- where a solicitor receives it while not acting in a professional capacity;[335]
- where it consists of a solicitor's file note recording a conversation with the opposing party prior to the institution of proceedings;[336] or
- where a client is seeking instruction from their solicitor in contemplation of committing a crime or carrying out a fraud.[337]

Confidentiality may be the hallmark of many relationships other than that between lawyer and client. Indeed, a duty of confidentiality may arise wherever a relationship imports an explicit or implicit "ethical, moral or social obligation".[338] However, Department of Education files containing witness statements regarding a schoolyard accident, retained in the event of litigation, but not made in the context of prospective litigation, were not protected by privilege because they were neither expressly nor implicitly confidential.[339] Documents not in the form of legal advice provided to the Australian Competition and Consumer Commission and intended to convince it to exercise its investigative powers in pursuit of anti-competitive practices were not confidential and therefore not privileged.[340]

Litigation privilege

[5.570] A communication between client and lawyer made for the dominant purpose of actual or anticipated litigation is privileged. Therefore, certain communications prior to the instigation of proceedings are immune from discovery.[341] Litigation is anticipated even if the elements which constitute the cause of action are incomplete.[342] Anticipation is assessed objectively, not subjectively. To anticipate litigation there must be more than a "mere possibility" of suit. There must

333 *Wheeler v Le Marchant* (1881) 17 Ch D 675; see also *Minter v Priest* [1930] AC 558.

334 *Conlon v Conlons Ltd* [1952] 2 All ER 462; *Telebooth Pty Ltd v Telstra Corporation Ltd* [1994] 1 VR 337.

335 *Cook v Leonard* [1954] VLR 591.

336 *Raunio v Hills* (2001) 116 FCR 518.

337 *Varawa v Howard Smith & Co Ltd* (1910) 10 CLR 382.

338 *New South Wales v Jackson* [2007] NSWCA 279 at [41] per Giles JA.

339 *New South Wales v Jackson* [2007] NSWCA 279.

340 *Seven Network Ltd v News Ltd* (2005) 144 FCR 379.

341 *Visy Industries Holdings Pty Ltd v Australian Competition and Consumer Commission* (2007) 161 FCR 122 at 143–144.

342 *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] AC 405.

be a "real prospect" that the client will be sued. A real prospect means a probable likelihood.[343] If a litigant is a corporation the relevant anticipation is that of the corporate officer.[344] Loss assessors' reports have been not discoverable when commissioned on a reasonable apprehension of ensuing litigation.[345] A communication between a litigation party and a person who is not a lawyer, made in the context of actual or anticipated litigation, is also privileged and not discoverable.

Case management regimes utilised by courts may come into conflict with litigation privilege parties may wish to apply to proofs of evidence. In *Australian Competition and Consumer Commission v Cadbury Schweppes*[346] the Full Federal Court held that final witness statements, intended to be filed into court and served on the opposing party, could not be confidential and did not attract the privilege, while draft statements and working papers, being confidential and not intended to be served, did attract the privilege. However, in *State Bank of South Australia v Smoothdale (No 2) Ltd*[347] the South Australian Full Court explained that statements of evidence were prepared confidentially and were therefore privileged, but that parties waived confidentiality to the extent required to comply with a court order directing them to exchange evidence.

Communication between a lawyer and a third party witness, including witness statements, draft witness statements and working papers, has been held to be privileged regardless of whether it is confidential, if its purpose is to advance the party's case.[348] The issue of whether non-confidential communications could be privileged arose in *Public Transport Authority (WA) v Leighton Contractors*[349] where it was questioned by McLure JA observing High Court authority limiting privilege to confidential communications.[350]

In line with this view, s 119 of the *Evidence Act 1995* (Cth) provides:

> **119 Litigation**
>
> (1) Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:
>
> (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or

343 *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 332 at 341 per Batt JA.

344 *Visy Industries Holdings Pty Ltd v Australian Competition and Consumer Commission* (2007) 161 FCR 122 at 144 per Lander J.

345 *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 332.

346 *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* (2009) 174 FCR 547 at 556–558, 562–563.

347 *State Bank of South Australia v Smoothdale (No 2) Ltd* (1995) 64 SASR 224.

348 *Southern Equities Corporation Ltd v West Australian Government Holdings Ltd* (1993) 10 WAR 1 at 21–22 per Seaman J.

349 *Public Transport Authority (WA) v Leighton Contractors Pty Ltd* (2007) 34 WAR 279.

350 *Public Transport Authority (WA) v Leighton Contractors Pty Ltd* (2007) 34 WAR 279 at [22].

(b) the contents of a confidential document (whether delivered or not) that was prepared;

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

Section 120 states that an unrepresented party's communications are also privileged if they were made for the purpose of conducting the litigation.

Copies of documents

[5.580] Whether a copy of an unprivileged original document is privileged depends on the reason for producing the copy. Privilege attaches to a copy produced for the dominant purpose of obtaining legal advice regarding actual or anticipated litigation.[351] That is, the focus of the test is on the communication between the lawyer and the client, rather than the document itself.

[5.590] Waiver of legal professional privilege

Waiver consists of any conduct by a person holding privilege which is either expressly or implicitly inconsistent with the maintenance of the confidentiality of the communication in question.[352]

Privilege waived by disclosure constitutes effective waiver if the disclosure is voluntary,[353] or if the disclosure is intentional on the part of the client but not the lawyer.[354] Privilege is waived by involuntary disclosure if it would be unfair to withhold privileged information after the inadvertent disclosure of other privileged, or non-privileged, information (for example, because the undisclosed information would throw a different light on the meaning of the disclosed information),[355] but not otherwise. Inadvertent disclosure does not waive privilege.[356]

Privilege is waived if the legal advice over which privilege is sought becomes a fact in issue in the proceedings, such as where a client sought legal advice with respect to the propriety of entering a mortgage and claimed in the proceeding not to know that entering a mortgage involved a breach of the terms of the mortgagor's trust,[357] or where a client sought

351 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 543–544 per Gaudron J, 552 per McHugh J, 571 per Gummow J.

352 *Mann v Carnell* (1999) 201 CLR 1 at 13; *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529.

353 *Goldberg v Ng* (1994) 33 NSWLR 639.

354 *Anderson v Bank of British Columbia* (1876) 2 Ch D 644.

355 *Attorney-General (NT) v Maurice* (1986) 161 CLR 475; *Watkins v Queensland* [2008] 1 Qd R 564.

356 *HongKong Bank of Australia Ltd v Murphy* [1993] 2 VR 419 at 441.

357 *HongKong Bank of Australia Ltd v Murphy* [1993] 2 VR 419 at 441.

advice from her solicitor on entering a compromise with her bank then alleged that the solicitor entered a compromise without authority.[358]

Privilege in related proceedings may be affected by limited waiver in one of those proceedings. In *Goldberg v Ng*[359] a solicitor sought payment from his client for legal services, and instructed a solicitor to instigate legal proceedings to recover the fees, making witness statements for the purpose. The client alleged he had paid the solicitor $100,000, for which the solicitor had not accounted. The Law Society of New South Wales brought an action in professional misconduct against the solicitor in respect of the alleged payment. The solicitor provided the Law Society with copies of the statements he had made in instructing his solicitor, commenting that in doing so he did not thereby waive legal professional privilege in the documents. In the proceedings against the client for payment of fees the client sought disclosure of the documents provided to the Law Society over which the solicitor claimed to have maintained privilege. The High Court observed that, generally, where disputes involved the same or closely related matters waiver in one constitutes waiver in all others.[360] The court held that providing the documents to the Law Society constituted a partial waiver of privilege. The unfairness to the client consisted of depriving him of statements over which privilege had been waived in the misconduct proceeding, which were the same statements the solicitor would rely on in his dispute with his client.

There is limited waiver of privilege to the extent specified where information is specifically disclosed for a limited purpose.[361] Where common interest privilege applied disclosure to the person with the common interest does not waive privilege.[362] Whether the privilege has been maintained will depend on the circumstances and the nature of the disclosure.

Waiver does not necessarily result from disclosing the conclusion, substance or effect of the advice. However, it may follow where it is inconsistent to disclose one part while maintaining privilege over another part of the advice.[363] The High Court held that it was inconsistent for the Governor to claim privilege over the legal advice he received regarding a murderer's petition for mercy, whilst maintaining that the decision to refuse the petition was based on advice.

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358 *Benecke v National Australia Bank* (1993) 35 NSWLR 110.

359 *Goldberg v Ng* (1995) 185 CLR 83.

360 *Goldberg v Ng* (1995) 185 CLR 83 at [21] per Deane, Dawson and Gaudron JJ.

361 *Woollahra Municipal Council v Westpac Banking Corporation* (1994) 33 NSWLR 529; *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275 at 283–285.

362 *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275 at 283–285.

363 *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 298–299 per Gleeson CJ, Gummow, Heydon and Kiefel JJ.

Communicating legal advice to third parties may not waive privilege. In *Tarong Energy v South Burnett Regional Council*[364] a council briefed an expert to prepare a report and included a legal opinion it had obtained in the brief. The council was entitled to disclose the report without disclosing the legal opinion.

Using legally privileged information

[5.600] A party coming into possession of privileged information is not prevented by virtue of its being privileged from using it, although the disclosure does not affect its privileged status.[365]

Because improperly disclosed privileged information remains confidential, equity may restrain its use by means of an injunction based on the public policy to respect legal professional privilege subject to the established exceptions.

Incrimination

[5.610] In Victoria s 128 of the *Evidence Act 2008* (Vic) recognises a privilege against self-incrimination in civil proceedings.[366] This relieves parties of any obligation to act where to do so would directly reveal incriminatory material, or indirectly reveal the existence of incriminatory evidence.[367] In discovery this means that parties may claim the privilege with respect to disclosing that a document exists or is in their possession, or making it available for inspection, or responding to interrogatories. The privilege does not extend to corporations.[368]

In general, parties must claim the privilege with respect to particular documents identified in a served affidavit of documents and are rarely relieved from the obligation of serving the affidavit[369] In *Griffin v Sogelease Australia*[370] a husband facing prosecution for fraud with his co-defendant wife obtained from her, and retained in his custody, all relevant documents and, on the basis of the privilege against self-incrimination, was neither obliged to disclose them nor serve an affidavit of documents.

The party claiming the privilege against self-incrimination cannot merely swear that answering a question or disclosing information will incriminate

364 *Tarong Energy Corporation Ltd v South Burnett Regional Council* [2010] 1 Qd R 575.

365 *Cowell v British American Tobacco Australia Services Ltd* (2002) 7 VR 524 at [32]–[34].

366 See also *Reid v Howard* (1995) 184 CLR 1; *Sorby v Commonwealth* (1983) 152 CLR 281 at 288 per Gibbs CJ, 309 per Mason, Wilson, Dawson JJ, 311 per Murphy J, 318 per Brennan J.

367 *Griffin v Sogelease Australia Ltd* (2003) 57 NSWLR 257.

368 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477. In Victoria this is recognised in the *Evidence Act 2008* (Vic), s 187; see also the Australian Capital Territory (*Evidence Act 2011* (ACT)), Federal Court (*Evidence Act 1995* (Cth), s 187), New South Wales (*Evidence Act 1995* (NSW), s 187) and Tasmania (*Evidence Act 2001* (Tas), s 187).

369 *Microsoft Corporation v CX Computer Pty Ltd* (2002) 116 FCR 372 at 382–389.

370 *Griffin v Sogelease Australia Ltd* (2003) 57 NSWLR 257.

them, but a reasonable basis for the apprehension of incrimination and prosecution must be demonstrated to the court so that the court is able to assess the risk of prosecution faced by the party.[371] In *Microsoft v CX Computer*[372] the privilege was not properly founded because the production of documents in civil proceedings which had already been seized by the Australian Federal Police and were providing the basis for a prosecution would not further incriminate the party.

While it is not necessary to establish that prosecution is probable, it must be demonstrated that the party faces the possibility of prosecution for a substantial rather than minor offence. In *Rank Film Distributors Ltd v Video Information Centre (a firm)*[373] the claim for the privilege was held to have no basis because the offence was merely a summary offence against the *Copyright Act 1956* (UK).

On the other hand, in *Navair Pty Ltd v Transport Workers' Union of Australia*[374] the prospect of answers to interrogatories exposing the defendant to prosecution for conspiracy under the *Trade Practices Act 1974* (Cth) supported the privilege claim.

Civil litigation is impeded in direct proportion to the seriousness of the offence and the possibility of prosecution which shields a defendant from disclosing the existence of, or delivering material which might identify, wrongdoing. The House of Lords has fashioned orders to avoid the obstruction of civil prosecution. For example, a court may order the disclosure of materials but restrict their use in criminal proceedings, except for a prosecution for the fraudulence of the materials.[375] In Australia, however, such orders have not been approved. The privilege against self-incrimination remains an absolute principle of substantive law which cannot be displaced except by legislative intervention. In *Reid v Howard*[376] the High Court stated that neither a court's inherent power, nor a statutory provision to the effect that the court has been granted jurisdiction to administer justice, can be used to prevent the progress of criminal prosecutions, and therefore that form of order cannot compel a party to make disclosures incriminating themselves. In some jurisdictions, but not Victoria, courts may issue indemnity certificates in relation to

371 *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass Co (1934) Ltd* [1939] 2 KB 395 at 403–404; *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 847; *Korp v Egg & Egg Pulp Marketing Board* [1964] VR 563; *Castlemaine Perkins Ltd v Queen Street Hotels Pty Ltd (No 2)* [1969] Qd R 397.

372 *Microsoft Corporation v CX Computer Pty Ltd* (2002) 116 FCR 372.

373 *Rank Film Distributors Ltd v Video Information Centre (a firm)* [1982] AC 380.

374 *Navair Pty Ltd v Transport Workers' Union of Australia* (1981) 52 FLR 177 at 193–194.

375 *AT & T Istel Ltd v Tully* [1993] AC 45 (the Crown Prosecution Service agreed not to use materials disclosed in an action for misappropriation of funds which revealed a fraud on the part of the defendant).

376 *Reid v Howard* (1995) 184 CLR 1.

disclosed material so that it may be disclosed at trial but not in other proceedings, unless it is in an action against its falsity.[377]

Forfeitures and penalties

[5.620] A plaintiff may bring either an action specifically claiming a forfeiture or penalty as a remedy, or an action for another remedy in the course of which the evidence they seek to be disclosed may expose a defendant to a forfeiture or penalty. A person is not required to provide evidence to support the enforcement of either a penalty or a forfeiture, either by way of disclosure of information, or through answers to interrogatories.[378]

Where the proceeding is brought to extract a penalty or forfeiture the defendant is not required to draft an affidavit of evidence or answer interrogatories. In *Rich v Australian Securities and Investments Commission*[379] a defendant, against whom the prosecuting Commission sought a penalty in the form of an order banning them from managing a corporation, was not required to make discovery of documents. Where the proceeding has the effect of exposing the defendant to a penalty or forfeiture incidentally to another proceeding, the defendant is required to claim the privilege in the affidavit of discovered documents or by objecting to answering interrogatories.[380]

Without resolving the issue the High Court, in contrasting decisions, has both: assumed that corporations may claim a privilege against penalties;[381] and doubted that a corporation facing a civil penalty may claim the privilege.[382]

Oppression

[5.630] The court's inherent jurisdiction to prevent oppression extends to discovery. The discovery of documents and interrogatories should be appropriate to the requirements of the litigation, and not require

377 Australian Capital Territory (*Evidence Act 2011* (ACT)), Federal Court (*Evidence Act 1995* (Cth), s 128); New South Wales (*Evidence Act 1995* (NSW), s 128); Tasmania (*Evidence Act 2001* (Tas), s 128); Western Australia (*Evidence Act 1906* (WA), s 11). In Tasmania and Western Australia indemnity certificates may be used with respect to interrogatories. In the Australian Capital Territory (*Evidence Act 2011* (ACT), s 187), Federal Court (*Evidence Act 1995* (Cth), s 187), New South Wales (*Evidence Act 1995* (NSW), s 187) and Tasmania (*Evidence Act 2001* (Tas), s 187) indemnity certificates may not be issued to bodies corporate.

378 *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 142. This is recognised in Tasmania: Tas r 383. However, it was not a permissible ground for withholding evidence in the Australian Capital Territory under the now repealed *Evidence Act 1971* (ACT), s 95. See now *Evidence Act 2011* (ACT).

379 *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129.

380 *Egg & Egg Pulp Marketing Board v KH Korp Tocumal Trading Co Pty Ltd* [1963] VR 378.

381 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

382 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 522, and 547–548 per Brennan J.

unreasonable efforts on the part of the defendant to obtain the information or answer the questions. Courts have refused overly wide requests for discovery of documents, such as all of the company's financial records,[383] and struck out interrogatories in which a small number of admissible interrogatories were interspersed amongst large numbers of inadmissible ones.[384] The onus of showing that a request is oppressive rests with the party asserting it. Oppressiveness is tested by asking whether the requests are reasonably required for the purpose of properly conducting the litigation.

Because oppressiveness is characterised by an absence of reasonable requirement, discovery or interrogation for a purpose collateral to the litigation is by its nature oppressive.[385]

A party seeking the disclosure of commercial information may be acting oppressively if its purpose is solely to obtain that information, but not if the information is required to conduct the litigation. However, such disclosures are closely examined by the court to avoid a rival party obtaining commercially confidential or sensitive information.[386]

Public interest

[5.640] Information connected with government is not disclosable under the public interest privilege.[387] The connection required under the privilege is extensive and is not confined to information about government, or its inner workings. It extends to information obtained by bodies carrying out statutory duties in the course of executing those functions.[388] Material is not subject to public interest privilege if it has been published or disclosed, or if the applicant has possession of it.[389]

Whether government information is to be disclosed or privileged in the public interest is a decision not of the Minister with overall responsibility for the information but of the court.[390] The decision is made in light of all the circumstances of the case, and includes a consideration of the

383 *Attorney-General v North Metropolitan Tramways Co* [1892] 3 Ch 70.

384 *Alexander v Fitzpatrick* [1981] Qd R 359.

385 *White & Co v Credit Reform Assoc and Credit Index Ltd* [1905] 1 KB 653.

386 *Mobil Oil Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34.

387 *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171; *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] AC 405 at 433; *Nielson v Laugharne* [1981] QB 736 at 747–748.

388 *Law Institute of Victoria v Irving* [1990] VR 429 at 435–438 where the Law Institute was carrying out statutory duties in relation to the discipline of solicitors; but not in relation to medical records in *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22 where the hospital was not carrying out such duties in treating patients.

389 *Victoria v Brazel* (2008) 9 VR 553; 181 A Crim R 562 at [54].

390 *Sankey v Whitlam* (1978) 142 CLR 1. Compare the position in England which had previously allowed the Minister to determine the status of the information prior to *Conway v Rimmer* [1968] AC 910.

Minister's opinion.[391] Courts must balance the frequently conflicting interests of privileging information which is confidential and related to the operations of government, with the public interest of ensuring the litigation is conducted fairly in relation to all parties. This assessment is made only after the litigant demonstrates a genuine need to obtain the information for the purpose of conducting the litigation. The litigant must overcome the threshold requirement that the information is capable of assisting their case. When the court is convinced of the possibility of the information's relevance it determines whether it will order disclosure, based on a balancing of the interests of confidentiality against the interests of disclosure.[392]

Courts will consider whether ordering disclosure will interfere with the functioning of the public service. Information the disclosure of which may compromise national or public safety will be exempted from production.[393] Courts also consider the importance that confidentiality plays in the provision of information. Police informers, for example, furnish information on the assurance that its confidentiality will be maintained. While the assessment of whether a document attracts the public interest privilege is made in the individual circumstances and contexts of each case, certain classes of privileged documents have been established.[394] Cabinet documents, for example, have been held to be exempt from production.[395]

Without prejudice communications

[5.650] The admissions contained in without prejudice communications made in settlement negotiations are exempt from disclosure and production.[396] Documents produced for the purpose of achieving a settlement, and documents otherwise associated with settlement discussions, are also privileged against production for inspection,[397] although their existence should be disclosed in the affidavit of documents in the parties' possession. The privilege protecting without prejudice

391 *Bruce v Waldron* [1963] VR 3; *Robinson v State of South Australia (No 2)* [1931] AC 704.

392 *Australian Securities and Investments Commission v P Dawson Nominees Pty Ltd* (2008) 169 FCR 227 at 233–234.

393 See *Watson v AWB Ltd (No 2)* (2009) 259 ALR 524 concerning the disclosure of information held by the Office of National Assessments.

394 *Victoria v Brazel* (2008) 9 VR 553; 181 A Crim R 562 at [44]–[47].

395 *Lanyon Pty Ltd v Commonwealth* (1973) 129 CLR 650. See also *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090.

396 *Evidence Act 2008* (Vic), s 131 (that the admissions are inadmissible as evidence); with respect to discovery see *Glengallen Investments Pty Ltd v Arthur Andersen* [2002] 1 Qd R 233 at 249; for the public policy behind the privilege see *Field v Commissioner for Railways (NSW)* (1957) 99 CLR 285 at 291.

397 *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280; *Austotel Management Pty Ltd v Jamieson* (1995) 57 FCR 411 at 416–419.

admissions in a dispute between certain parties applies equally to associated disputes when one or more of those parties becomes involved.[398]

OBJECTIONS TO ANSWERING INTERROGATORIES

Rules and inherent jurisdiction

[5.660] Objections may be raised to answering interrogatories on the basis set out by the rules, or on the basis of the court's inherent jurisdiction. In Victoria r 30.07[399] provides that the answering party shall answer each interrogatory, but may refuse to respond to the extent that:

(a) the interrogatory does not relate to any question between the party and the interrogating party;

(b) the interrogatory is unclear or vague or is too wide;

(c) the interrogatory is oppressive;

(d) the interrogatory requires the party to express an opinion which the party is not qualified to give;

(e) privilege.

Scandalous

[5.670] An interrogatory which is not concerned with matters in dispute and is designed to undermine another party's character is considered scandalous and does not require a response.

However, a question which is relevant to matters in dispute, even if it has the effect of denouncing another party's character, must be answered, unless objection can be made out on other grounds.[400]

Unnecessary and irrelevant

[5.680] To be relevant and require a response an interrogatory must be about a matter in issue.

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398 *Village/Nine Network Restaurants & Bars Pty Ltd v Mercantile Mutual Custodians Pty Ltd* [2001] 1 Qd R 276.

399 See also ACT r 631; NT r 30.07; Tas r 410; WA O 27 r 5. In South Australia a party may refuse any interrogatory if an objection could be taken to the question at trial: SA r 151. In the Australian Capital Territory additional grounds for objecting to an interrogatory include that it is unnecessary, unnecessarily long, wordy, uncertain, inquires into evidence, or inquires about privileged material: ACT r 631. The only grounds for objection in New South Wales are that the interrogatory is irrelevant, vexatious or oppressive, or relates to privileged material: NSW r 22.2. The only grounds for objection in Queensland are that the interrogatory is not about a matter in question, is not reasonably necessary, and another method of proof is readily available, is vexatious or oppressive, or relates to a privileged matter: Qld r 233.

400 *Fisher v Owen* (1878) 8 Ch D 645 at 653.

The purpose for asking an interrogatory must be related to the proceeding, and must not be for a collateral or other purpose.[401]

Evidence, credit, cross-examination

[5.690] Interrogatories will be found not to relate to a matter in issue, and so will be inadmissible, if they are being used to obtain evidence from the other party, seek disclosure of the other party's witness or witnesses,[402] or cross-examine the party being interrogated.[403]

However, parties are required to answer interrogatories which are valid on other grounds (such as that the information sought is a material fact in the case), even if the response discloses the identity of witnesses, or results in the party being interrogated obtaining evidence.[404]

Contents of documents

[5.700] Interrogatories must not enquire about the contents of documents. The rules of evidence require original documents to be produced to prove their contents. The contents of documents may be the subject of interrogatories if the originals have been lost or destroyed, making secondary evidence of the documents' contents admissible at trial.[405] Then interrogatories regarding contents may take the same form as questions permissible at trial.[406] Interrogatories seeking to determine the meaning of a document are not admissible, unless the point of the question is to clarify the meaning of, for example, obscure symbols or unclear expressions.[407]

Conversations

[5.710] Only interrogatories regarding material facts at issue are admissible. Therefore an interrogatory regarding a conversation will be admissible when the existence of the conversation itself, or the content of the conversation, is a fact in issue.[408] Interrogatories about a conversation which attempt to adduce evidence or the identity of witnesses are not admissible.[409]

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401 *Plymouth Mutual Co-op and Industrial Society Ltd v Traders Publishing Assoc Ltd* [1906] 1 KB 403.

402 *Cumming v Matheson* (1970) 92 WN (NSW) 339.

403 *Dunbar v Perc* [1956] VLR 583 at 590; *Tiver v Tiver* [1969] SASR 40; *Allhusen v Labouchere* [1878] 3 QBD 654.

404 *Fischer v City Hotels Pty Ltd* (1970) 92 WN (NSW) 322.

405 *Winterbottom v Vardon & Sons Ltd* [1921] SASR 364.

406 *Giasoumi v Hutton* [1977] VR 294.

407 *M & S Constructions Pty Ltd v Skewes* (1981) 34 SASR 406 at 412–415.

408 *Attorney-General v Gaskill* (1882) 20 Ch D 519 at 527; *West v Conway* (1923) 23 SR (NSW) 344; *Permanent Finance Corporation Ltd v Europacific (Plant Hire) Pty Ltd* [1970] QWN 45.

409 *Fischer v City Hotels Pty Ltd* (1970) 92 WN (NSW) 322; *Cumming v Matheson* (1970) 92 WN (NSW) 339.

Fishing interrogatories

[5.720] Interrogatories must relate to genuine matters of fact in issue.[410] However, when a party makes an unfounded claim and uses interrogatories to attempt to support it, or to find an alternative ground on which to proceed, they are said to be "fishing". Fishing may be conducted in relation to a claim or a defence. Fishing interrogatories are conducted merely in order to expose the contents of a party's files without a basis for believing the files to contain relevant information.[411] A company which sought evidence through interrogatories to demonstrate that the chairman of the Trade Practices Commission lacked the necessary belief to issue a notice under s 155 of the *Trade Practices Act 1974* (Cth) requesting information from the company of potential breaches of the Act, was held to be fishing in that it had no basis for the assertion that the requirements of the provision had not been met.[412]

Interrogatories not bona fide

[5.730] Interrogatories must be issued for the purpose of conducting the litigation, and if they are conducted for another, collateral purpose, such as for the purpose of founding another litigation,[413] no response is required.

Interrogatories based on assumptions of facts in dispute

[5.740] Parties ought to answer interrogatories which relate to a matter in dispute. However, if an interrogatory assumes that a disputed material fact is admitted it is arguably inadmissible.[414] It is also arguable that the interrogatory requires an answer unless to do so would be unfair to the interrogated party.[415]

Interrogatories based on expert knowledge and opinion

[5.750] Parties are required to respond to interrogatories which relate to material facts. An interrogatory requiring an unqualified party to express an opinion is not one seeking to solicit an admission of a material fact.[416] Equally, an interrogatory requiring a party to provide an answer based on expert opinion is not admissible. An interrogatory may,

410 *Petchem Ltd v BF Goodrich Chemical Ltd* [1982] VR 485.

411 *Associated Dominions Assurance Society Pty Ltd v John Fairfax & Sons Pty Ltd* (1955) 72 WN (NSW) 250 at 254.

412 *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 175.

413 *Edmondson v Birch & Co Ltd* [1905] 2 KB 523.

414 *Konings v Naylor* [1964] Qd R 235.

415 *Thiess v TCN Channel Nine Pty Ltd (No 3)* [1992] 1 Qd R 587.

416 *American Flange and Manufacturing Co Inc v Rheem (Australia) Pty Ltd (No 2)* [1965] NSWR 193; *Rofe v Kevorkian* [1936] 2 All ER 1334.

however, ask a party to base their answers on their technical expertise as long as it does not require them to express an opinion.[417]

Oral discovery in Victoria

[5.760] In Victoria r 31.02 provides that interrogatories may be substituted with oral examination.[418] A party entitled by leave of the court to serve interrogatories on the other party in relation to a question in issue between the parties may substitute oral examination under oath for interrogatories in relation to that question, either with the consent of the other party or by order of the court. The court will make such an order if oral examination would be more cost effective than interrogatories in relation to the question, or such an order would confer advantages on both parties, or because it is only the failure to agree to an examiner that has prevented the oral examination.

The examination is conducted before an examiner[419] who does not have a judicial function but who presides over the examination, administers an oath or takes an affirmation, and orders adjournments when required.[420] The examiner is appointed by agreement[421] but if there is no agreement the party being examined is deemed to have refused the examination.

In some circumstances the court may order an examination[422] and appoint a qualified examiner.[423] The examiner determines the time and place of the examination[424] which must be attended by the examining party and the party being examined,[425] and may be attended by their counsel and solicitors.[426] A party who fails to attend an examination may be ordered by the court to attend.[427] Corporations may be orally examined under the same order relating to the examination of parties by examining one person who is either an officer of the company, or a person on whom the party being examined and examining party agree.[428] The examination is recorded in a deposition.[429] The deposition also records

417 *Kadlunga v Electricty Trust of South Australia* (1987) 43 SASR 313.

418 See also NT r 31.02.

419 Rule 31.06(1).

420 Rule 31.09 ("Powers of examiner").

421 Rule 31.06(1).

422 Rule 31.07(4), see also r 31.13.

423 Rule 31.03(10).

424 Rule 31.07(1).

425 Rule 31.07(2).

426 Rule 31.07(3).

427 Rule 31.07(4).

428 Rules 31.03, 31.08.

429 Rule 31.10(1).

proceedings with respect to objections to questions.[430] The examiner authenticates the deposition, and gives notices of the authentication to the parties.[431]

The questioning of a party conducted by another party or their legal representative takes the form of examination-in-chief.[432] A party may object to answering a question on the same basis as objecting to answering an interrogatory, but otherwise must answer all questions put to them. The party being examined may be ordered by the Associate Judge, on the application of the examining party, to answer a question or questions before the examiner.[433] A party answers questions on the same basis as answering interrogatories, that is, from that party's knowledge, information, or belief, and, where necessary, having made reasonable enquires. The examiner's power to adjourn the examination[434] may be exercised for the purpose of enabling a party being examined to make enquires in response to a question. A party's answer to a question includes answers to questions made on their behalf by their counsel or solicitor.

The costs of an oral examination are costs in the proceeding, and the examining party pays the cost of the examiner.[435] This is said to act as a restraint on the use of oral examination as a substitute to interrogatories. Another restraint is the fact that oral examination proceeds only on the consent of the party being examined, and the party's refusal obviates examination unless ordered by the court under particular conditions.[436]

Inspection or preservation of property

[5.770] By r 37.01 the court may make an order for the inspection, detention, custody or preservation of any property, whether or not in the possession, custody or power of a party. Rule 37.01 is expressed in general terms.[437] Nonetheless, the property to which the rule applies must in

430 Rule 31.10(2).

431 Rule 31.10(3).

432 Rule 31.11(2).

433 Rule 31.13(2).

434 Rule 31.09(b).

435 Rule 31.14.

436 On the problems of traditional interrogatories in civil litigation see R Cranston, IR Scott and P Pullen, *Delays and Efficiency in Civil Litigation* (Australian Institute of Judicial Administration, 1985), pp 85, 87; B Cairns, *The Use of Discovery and Interrogatories in Civil Litigation* (Australian Institute of Judicial Administration, 1990), pp 22–25, 31–38, 47–50.

437 The rule does not employ the limiting words of Ch I, O 50 r 3 of the *Rules of the Supreme Court 1884* (Vic) but is presumed to refer to property relating to a question in the proceeding, including property that may be adduced as evidence in a proceeding. The reference in the former rule was to any property or thing constituting the subject of the cause or as to which any question arose therein. Thus, in a case where the judgment would be in respect of the disposition of certain property its preservation was sought

some way relate to a question in the proceeding.[438] The rule extends to property that constitutes evidence on any question in the proceeding. Thus, an order may be made for the inspection, detention, custody or preservation of, for example, a tape recording of proceedings before a tribunal out of which the claim arises,[439] or a document establishing the title of a party to the property in dispute.[440]

Third party

[5.780] The rule provides that an order may be made in relation to property in the possession, custody or power of a person not a party.[441] An order has been made under this rule in respect of documents held by a firm of solicitors under a solicitor's lien where the circumstances justified inspection of the documents in respect of a costs dispute between several groups of defendants who had once been together represented by the firm of solicitors.[442]

Inspection of process

[5.790] In the case of inspection under O 37, "property" is not limited to physical things. A method of manufacture or other process is included, and the court may give a party authority to observe a process and for that purpose to enter any land on which the process is carried out.[443]

Mode of inspection

[5.800] A party seeking an order for the inspection of property may be allowed to observe, photograph, take a sample (even though the sample

since its destruction would undermine any judgment in relation to the property. However, money resulting from the conversion of the property could not be the subject of an order under the rule that it be paid into court or that it be given in security for payment. See *Pizzey Properties Pty Ltd v Edelstein* [1977] VR 161; *Wentworth v Rogers (No 8)* (1986) 7 NSWLR 207.

438 "Property" in r 37.01 includes a document: compare r 37.02(1). If the inspection rather than the detention, custody or preservation of a document is sought it may be more appropriate to use other procedures such as discovery of documents under either O 29 where the document is in the possession of another party, or under r 32.07, where the document is in the possession of a non-party. See *Hyland v AGC (Wholesale) Pty Ltd* [1983] 1 VR 222; *Nathan v MJF Constructions* [1986] VR 75.

439 *Vowell v Shire of Hastings* [1970] VR 764.

440 *Hyland v AGC (Wholesale) Pty Ltd* [1983] 1 VR 222.

441 Chapter I, O 50 r 3 of the *Rules of the Supreme Court 1884* (Vic) did not expressly confer this power on the court. It is unlikely that the court could order the inspection of property in the possession of a third party where the third party had not agreed to the inspection. See *Penfold v Pearlberg* [1955] 1 WLR 1068; *Hyland v AGC (Wholesale) Pty Ltd* [1983] 1 VR 222; *Douihech v Findlay* [1990] 1 WLR 269 (joinder as defendant solely for the purpose of obtaining inspection not permitted); *Thiess v TCN Channel Nine Pty Ltd (No 2)* [1992] 1 Qd R 237; compare *Nathan v MJF Constructions* [1986] VR 75; *Scanlon v American Cigarette Co (Overseas) Pty Ltd [No 1]* [1987] VR 261 at 275.

442 See *Nicholson v Knaggs (No 2 application, solicitors lien)* [2009] VSC 187.

443 See r 37.01(2); compare *Tudor Accumulator Co Ltd v China Mutual Steam Navigation Co Ltd* [1930] WN 200.

might be destroyed in the analysis[444]), submit a document to an expert for testing if its authenticity is doubted,[445] or conduct an experiment on the property.[446] In making the order the court will take a number of factors into consideration including whether the person taking the sample, conducting the experiment, or inspecting the property, will be subjected to danger.[447]

Self-incrimination

[5.810] Privilege against self-incrimination can only be claimed for the inspection of property if the property is a document but not otherwise, and it is not a ground for resisting an order for taking a sample.[448]

Preservation of property

[5.820] Order 37 does not affect the power of the court to grant an injunction.[449] Rule 37.01(1) applies to every case in which, as between the parties, there is something that ought to be done for the security of the property.[450] An order under this rule for the preservation of property in the possession of a party, where the property is the subject of the dispute, has the same effect as an interlocutory injunction in those terms.

The power to act to preserve the subject of the litigation should not be accorded a narrow operation.[451] The court will make an order in whatever form is necessary to preserve the property until the questions raised in the proceeding can be decided. However, the court may be reluctant to make an order in a form which involves consequences beyond the achievement of the purpose of preservation and which cannot be reversed. In *Johnson v Tobacco Leaf Marketing Board*[452] in an application made under O 50 r 3 of the *Rules of the Supreme Court 1884* (Vic) the plaintiff sought an order that the defendant preserve the balance of certain unsold tobacco leaf that had been delivered until the trial in a method stipulated by the plaintiff. The method of preservation proposed by the plaintiffs (called "proctor drying") would have the effect of the

444 *Rutile Mining Development Pty Ltd v Australian Oil Exploration Ltd* [1960] Qd R 480.

445 *Re Saxton (dec'd)* [1962] 1 WLR 968.

446 Rule 37.01(2)(d).

447 *Central Queensland Speleological Society v Central Queensland Cement Pty Ltd (No 2)* [1989] 2 Qd R 537.

448 See *Central Queensland Speleological Society v Central Queensland Cement Pty Ltd (No 2)* [1989] 2 Qd R 537.

449 See r 37.07.

450 *Chaplin v Barnett* (1912) 28 TLR 256.

451 See *Johnson v Tobacco Leaf Marketing Board* [1967] VR 427 at 430, referring to the formulation as to the operation of *Rules of the Supreme Court 1884* (Vic), O 50 r 3 of Hood J in *Campbell v Brownlees* (1901) 26 VLR 609 at 611 as correct in not requiring a determination of the merits but as unduly narrow as to the circumstances in which it might be exercised.

452 *Johnson v Tobacco Leaf Marketing Board* [1967] VR 427.

subject matter being "impressed permanently with the character of tobacco leaf which was no longer green leaf." The court refused to make an order in a form that would go beyond the preservation of the property until the hearing of the cause and the issues involved therein be determined. The orders sought would be irreversible and in effect be a grant of final relief in favour of the plaintiff without the plaintiff first making out a *prima facie* case for the principal relief claimed,[453] as it would have had to apply for an interlocutory mandatory order. The plaintiffs had not discharged the burden of showing that the defendant would not be prejudiced by the order.

In *Jimenez Holdings Property No 8 v Flood*[454] the ownership of a valuable motor vehicle which had been disassembled was in question, the component parts being at different locations and not adequately insured. An order was made that an independent person, one experienced in the care and maintenance of motor vehicles of the same kind, have custody of the parts pending the trial of the proceeding, the plaintiff having undertaken to insure the vehicle at its full value and to bear the cost.

Property in court

[5.830] Under r 37.01(1) the court may order that property the subject of the proceeding be brought into court pending the trial.[455] An order will not be made when the other party denies that they have the property.[456]

The court has inherent jurisdiction to take charge of a document or other property material to the proceeding which comes into its hands when the interests of justice so require.[457]

Procedure

[5.840] An application for an order under r 37.01 is made by summons supported by affidavit evidence.[458] Notice of the application must be given to all parties to the proceeding and to any person not a party who would be affected by the order if it is made.[459] On the application the court may make an order for the costs and expenses of any person not a party who attends the hearing of the application pursuant to notice.[460] Also, if the court makes an order that will affect that person, it may

453 See also *Simsek v Macphee* (1982) 148 CLR 636; 40 ALR 61 at 65.

454 *Jimenez Holdings Property No 8 Pty Ltd v Flood* (unreported; VSC; Southwell J; No 1205/1985; 4 May 1989).

455 *Velati v Braham* (1877) 46 LJCP 415; *Redpath v Zachner* (1893) 9 TLR 538 (jewellery); *Campbell v Brownlees* (1901) 26 VLR 609 (banknotes).

456 *Moss v Rich* (1906) 8 WALR 40 (the property was money).

457 See *Beck v Value Capital Ltd* [1975] 1 WLR 1; *Simsek v Macphee* (1982) 148 CLR 636; 40 ALR 61 at 65.

458 Rule 37.03(1), (5).

459 Rule 37.03(1).

460 Rule 37.01(3)(a).

require the party obtaining the order to pay any costs and expenses of that person in complying with the order.[461] Further, it may require the party to give security for those costs and expenses.[462]

461 Rule 37.01(3)(b).

462 Rule 37.01(4).

6 Joinder of Parties and Claims

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JOINDER OF PARTIES

Introduction: general principles

[6.10] The legislation governing civil procedure is designed to avoid multiplicity of proceedings and inconsistency of results. In order to facilitate the final resolution of a dispute, the court should have before it all parties whose presence is proper and necessary to enable the court to adjudicate effectually and completely on all matters in dispute. The proper parties to a proceeding are determined by the substantive law. A plaintiff can only bring suit against a defendant once the cause of action on which they intend to proceed has accrued, or they are entitled to sue for some other reason.[1] Because the causes of action and defences raised in pleadings are only effective against proper parties to the proceeding a plaintiff who has wrongly identified the defendant has failed to plead a cause of action. Further, as proceedings develop, it may become necessary to join other parties as either plaintiffs or defendants, or to substitute one or some parties for others. The rules permitting parties to be added or substituted for other parties cure the proceeding of the otherwise fatal error of naming the wrong defendant, or of failing to name other necessary parties, by adding or substituting the correct and necessary parties, and reconstituting the proceedings.

Permissive joinder: r 9.02(a)

[6.20] Rule 9.02 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) provides:[2]

> **9.02 Permissive joinder of parties**
>
> Two or more persons may be joined as plaintiffs or defendants in any proceeding—
>
> (a) where—

1 *Campbell v Pye* (1954) 54 SR (NSW) 308; *Baldry v Jackson* [1976] 2 NSWLR 415; *Gertsch v Roberts* (1993) 35 NSWLR 631.

2 See also ACT r 211; FCR r 9.02; NSW r 6.19; NT r 9.02; Qld r 65; SA r 73; Tas r 179; WA O 18 r 4.

(i) if separate proceedings were brought by or against each of them, some common question of law or fact would arise in all the proceedings; and

(ii) all rights to relief claimed in the proceeding (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions; or

(b) where the Court, before or after the joinder, gives leave to do so.

Rule 9.02 applies to the joinder of claims and parties by the plaintiff.[3] The circumstances in which co-plaintiffs may join in the same proceeding are where separate proceedings would involve common questions of law or fact, and all of the rights to relief claimed by the parties are in respect of or arise out of the same transaction or event, or series of transactions or events. Otherwise parties may be joined if the court grants leave to do so.[4]

The conditions in r 9.02(a) are cumulative.[5] The rule permits, once the conditions are satisfied, the joinder of claims by plaintiffs separately against the same defendant, or defendants, and the joinder of claims by the same plaintiff against different defendants. If the conditions of r 9.02(a) are not satisfied, r 9.02(b) may enable joinder.[6] The court's interest in resolving all matters in dispute in the same proceeding means that it may join parties necessary to effecting that resolution, or dismiss those who are superfluous to, and who have been misjoined in, that resolution, as long as this can be done without causing an injustice or prejudice to the parties.

The requirement that plaintiffs' claims are in respect of or arise out of the same transaction or series of transactions[7] means that two or more persons cannot join as plaintiffs against the same defendant unless the co-plaintiff is a party to the transaction between the plaintiff and the defendant. The requirement will not be satisfied where each co-plaintiff's claim arises out of a separate transaction between plaintiff and defendant.[8] A plaintiff claiming relief to which any other person is jointly liable must join the other party as a plaintiff. A person who does not consent to being joined as a plaintiff will be joined as a defendant.[9]

Payne v Young[10] concerned an action for recovery of inspection fees paid under protest by each of seven abattoir owners to eight separate

3 *Walker v Commonwealth Trading Bank of Australia* (1985) 3 NSWLR 496 at 503.

4 Leave may be given in the Australian Capital Territory, Federal Court, New South Wales, Northern Territory, South Australia, Victoria and Western Australia.

5 See *CE Heath Casualty & General Insurance Ltd v Pyramid Building Society (in liq)* [1997] 2 VR 256 at 292.

6 See *Beamer Pty Ltd v Star Lodge Supported Residential Services Pty Ltd (No 1)* [2004] VSC 390 at [23].

7 Rule 9.02(a)(ii).

8 *Payne v Young* (1980) 145 CLR 609; *Marino v Esanda Ltd* [1986] VR 735 (a decision under the *Supreme Court Act 1986* (Vic), s 62(1C), now repealed); *Dean-Willcocks v Air Transit International Pty Ltd* (2002) 55 NSWLR 64.

9 Rule 9.03(1)(b).

10 *Payne v Young* (1980) 145 CLR 609 ("*Payne v Young*").

defendants, and a declaration that the fees had been levied under regulations that were invalid because they imposed an excise to be paid to the Crown and a local rural authority. The defendant applied for all the plaintiffs except one to be struck out. The defendant argued that the plaintiffs' joinder was improper as the transaction in which each had engaged did not give rise to a common question of law or fact, and because each plaintiff's right to relief did not arise out of the same transaction or series of transactions. The High Court held that the defendants could not be joined in the one proceeding[11] because the moneys were paid in a series of independent transactions by different plaintiffs to different authorities.[12] The majority held that the word "same" qualified both "transaction" and "series of transactions".[13]

While the validity of the regulations concerned and affected all the plaintiffs, it could not properly form the basis of their joinder as co-plaintiffs in the action. Only commonalities in the payment transaction could justify joinder on a claim for repayment. Here the necessary commonalities were lacking because each plaintiff had entered a transaction unrelated to the other plaintiffs' transactions. Each, therefore, had a separate cause of action against a different inspecting authority,[14] and the relief each claimed was therefore not one that was in respect of, or arose out of, the same particular transaction or series of transactions.[15]

An application for joinder of persons as respondents for the purpose of making claims against other respondents for damages has been refused under O 6 r 2(a) of the *Federal Court Rules 1979* (Cth), where the applicants had not engaged in one transaction or one series of transactions but in separate transactions peculiar to the respective applicants,[16] and under O 6 r 2(b), where the exercise of discretion was not warranted because granting leave would not achieve the ends of making litigation more convenient or practicable.[17]

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11 Per Barwick, Stephen and Mason JJ; Murphy J dissenting.

12 See also *Marino v Esanda Ltd* [1986] VR 735 at 740 per Tadgell J; *Bishop v Bridgelands Securities* (1990) 25 FCR 311 at 313–314 per Wilcox J; *North Pine Pty Ltd v Jezer Construction Group Pty Ltd* [1997] 2 Qd R 253 at 262 per Helman J.

13 *High Court Rules 1952* (Cth), O 16 r 1, equivalent to FCR O 6 r 2(a)(ii).

14 Murphy J dissented, interpreting the rule to provide for joinder whenever co-plaintiffs had entered into a group of similar transactions regardless of whether there were several defendants with no connection to each other: *Payne v Young* (1980) 145 CLR 609 at 621–622.

15 *Payne v Young* (1980) 145 CLR 609 at 618 per Mason J (with whom Stephen J agreed).

16 See *Payne v Young* (1980) 145 CLR 609; *Bishop v Bridgelands Securities* (1990) 25 FCR 311 (individual depositors alleging similar misrepresentations by an investment company — joinder under *Federal Court Rules 1979* (Cth), O 6 r 2(b)); *Thai Silk Co Ltd v Aser Nominees Pty Ltd* (unreported; FCA; Hill J; 31 May 1989).

17 *Trade Practices Commission v Queensland Aggregates Pty Ltd* (1981) 51 FLR 356.

Payne v Young was adopted in *Bishop v Bridgelands Securities*.[18] In that case the plaintiff sought to join 114 other plaintiffs under r 2 in an action alleging that the defendant, Bridgelands Securities Ltd, had contravened s 52 of the *Trade Practices Act 1974* (Cth) by representing to each of the plaintiff and the 114 others that money invested by them would be deposited with Estate Mortgage Trust Ltd when in fact it was deposited with Estate Mortgage Financial Services Pty Ltd. This representation allegedly in contravention of s 52 of the *Trade Practices Act 1974* (Cth) was made in identical terms to each plaintiff, being contained within the same letter a copy of which was received by each of them. The court considered that the rule laid down in *Payne v Young* that rights to relief be in respect of or arise out of the same transaction or series of transactions was strict, and would not permit joinder in the instant case under r 2(a). Although each plaintiff's claim was in substance the same, each arose out of a transaction between the plaintiff and the defendant to which no other plaintiff was a party, and therefore did not arise out of the same transaction or the same series of transactions involving the plaintiffs and the defendant.[19]

As Sackville J said when considering the subsection in *Cheque One v Cheque Exchange (Australia) (in liq)*:[20]

> Joinder is not authorised when the relief claimed is in respect of, or arises out of, two or more different series of transactions, when the participation of each individual plaintiff is limited to participation in one series of transactions, the other plaintiffs not participating in that series.

Different causes of action may be joined provided they arise out of the same transaction or series of transactions. Different plaintiffs do not therefore require the whole of their transactions to be involved in the proceeding.[21] Plaintiffs may have different causes of action joined as long as they arise out of the same transaction or series of transactions. Therefore any matter relevant to or connected with the disputed transaction falls within the scope of the rule as long as co-plaintiffs in the proceeding each have a question in common with the others arising from the transaction.

---

18 *Bishop v Bridgelands Securities* (1990) 25 FCR 311. The case was considered under the Federal Court rule which is in substance identical to r 9.02.

19 *Payne v Young* (1980) 145 CLR 609 at 618 per Mason J (see too per Barwick CJ at 614–615, Stephen J at 615 and Aickin J at 611 (whose decision at first instance was affirmed)); see also *Marino v Esanda Ltd* [1986] VR 735, (a decision under *Supreme Court Act 1986* (Vic), s 62(1C), now repealed); *Dean-Willcocks v Air Transit International Pty Ltd* (2002) 55 NSWLR 64; see also *Banque des Marchand de Moscou v Midlands Bank Ltd* [1939] 2 All ER 364.

20 *Cheque One Pty Ltd v Cheque Exchange (Australia) Pty Limited (in liq)* [2002] ATPR 41-881 (where his Honour discussed the authorities including *Payne v Young* (1981) 145 CLR 609 and quoted from the decision of Mason J at 618).

21 *Cameron v National Mutual Life Association of Australasia Ltd (No 2)* [1992] 1 Qd R 133.

There was no common question in *Dean-Willcocks v Air Transit International*[22] where it was alleged only that preferential payments had been made to the companies sought to be joined as defendants by the liquidator. The court held that the transactions did not arise out of the same transaction or series of transactions.[23]

It is not required that the transaction be based in contract for joinder to be effective. However, the co-plaintiffs must have suffered damage as a result of the defendant's actions or breach to be joined.[24] Arguably, a defendant may commit a tort enabling all persons affected by it to join as co-plaintiffs. Such was the case in *Bendir v Anson*[25] where the definition of a transaction embraced two existing buildings having their access to light obstructed by a building under construction. Lord Wright MR admitted joinder of the affected buildings.

Joinder by leave: r 9.02(b)

[6.30] In *Glenwood Management Group v Mayo*,[26] Young CJ said that r 9.02(b):

> … gives the court a wide discretion which is not to be cut down by restrictive interpretation. If, for example, only one of the two criteria in paragraph (a) were satisfied, that might be a case in which it was appropriate for the court in some circumstances to grant leave to join.

The discretion under r 9.02(b) is exercised as an alternative to r 9.02(a). When the conditions in r 9.02(a) cannot be met the discretion in r 9.02(b) is invoked to ensure that the interests of justice in all the circumstances of the case are exercised.[27]

Under r 9.02(b), the court may authorise joinder in circumstances where the conditions for joinder under r 9.02(a) are not satisfied. Joinder of the

22 *Dean-Willcocks v Air Transit International Pty Ltd* (2002) 55 NSWLR 64.

23 *Dean-Willcocks v Air Transit International Pty Ltd* (2002) 55 NSWLR 64 at 70–71.

24 *Cameron v National Mutual Life Association of Australasia Ltd (No 2)* [1992] 1 Qd R 133 at 142–143 per Bryan J.

25 *Bendir v Anson* [1936] 3 All ER 326.

26 *Glenwood Management Group Pty Ltd v Mayo* (unreported; VSC; Young CJ; No 8421/90; 14 August 1990) at 4. Neither criterion in r 9.02(a) was satisfied in that case, and Young CJ considered it inappropriate as a matter of convenience to grant leave under r 9.02(b).

27 See *A & J Partitions Pty Ltd v Jolly* (unreported; VSC; Beach J; No 2010/1993; 5 February 1993) granting leave to join plaintiffs under r 9.02(b); see also *Meadow Gem Pty Ltd v ANZ Executors and Trustee Co Ltd* (unreported; VSC; Hedigan J; No F3968; 25 August 1993); *Newman v Hold Pty Ltd* [2001] VSC 282 (involving 193 plaintiffs and five defendants in two proceedings arising out of investment schemes); *Snowy Mountains Organic Dairy Products Pty Ltd v Australian Broadcasting Corporation* [2006] VSC 138 (where the plaintiff sued several defendants in respect of separate defamatory statements); *Commonwealth Bank of Australia v Peto (No 2)* (2006) 152 FCR 362. On an application for leave to join a party under r 9.02(b) the court must consider whether joinder other than in accordance with r 9.02(a) would cause unfairness to the party joined: see *Hagan v Bank of Melbourne Ltd* [1994] 2 Qd R 507.

claims of one plaintiff against a defendant with those of another plaintiff against another defendant may be permitted, notwithstanding that they did not arise out of the same transaction or series of transactions, and whether or not, as plaintiffs, they claim the same relief or sue upon the same cause of action, and whether or not, as defendants, they are sued upon the same or substantially the same cause of action.[28] Leave may be sought, for example, when claims do not arise out of the same transaction or series of transactions, but groups of persons have a sufficiently strong identity of interest to be joined as parties,[29] or where the claim of the first plaintiff against the first defendant did not arise out of the same transaction or series of transactions as the claim of a second plaintiff against a second defendant, although both involved a common question of law.[30]

In *Bishop v Bridgelands Securities*[31] Wilcox J considered the court's discretion under r 2(b) to give leave for two or more persons to be joined. His Honour considered that the provision corresponding to r 9.02(b) in the *Federal Court Rules 1979* (Cth), O 6 r 2(b), was inserted to allow joinder in cases not within r 9.02(a) where the court thought this to be desirable. Leave was given to 114 persons to join as plaintiffs in separate claims against the same defendants. The claims involved common questions of law and fact but did not arise out of the same transaction for the purpose of r 9.02(a)(ii). The claim of each plaintiff arose out of a transaction with the defendants that was separate from the transaction between each of the other plaintiffs and the defendants. Wilcox J concluded that in all the circumstances joinder of the 114 claimants as plaintiffs in a single proceeding was more convenient than 114 separate proceedings. On the question of the nature of the discretion of the court under r 9.02(b), his Honour said:[32]

> As the discretion conferred by sub-rule (b) is, in terms, unconfined, it would be inappropriate to specify circumstances in which it might be applied. Everything must depend on the facts of the particular case. But it is appropriate to consider what principles ought to guide the exercise of such a discretion. The basic principle, as it seems to me, is that the court should take whatever course seems to be most conducive to a just resolution of the

28 *Zentahope Pty Ltd v Bellotti* (unreported; VSCA; Fullagar, Brooking and Tadgell JJ; No 3474/1989; 2 March 1992).

29 *Zentahope Pty Ltd v Bellotti* (unreported; VSCA; Fullagar, Brooking and Tadgell JJ; No 3474/1989; 2 March 1992) per Tadgell J.

30 See *Glenwood Management Group Pty Ltd v Mayo* (unreported; VSC; Young CJ; No 8421/90; 14 August 1990). In *Payne v Young* (1980) 145 CLR 609 joinder was permitted under O 16 r 1 of the *High Court Rules 1952* (Cth). That rule is equivalent to O 16 r 1 of the *Rules of the Supreme Court 1884* (Vic). Order 16 rr 1, 4 and 7 of the *Rules of the Supreme Court 1884* (Vic) were replaced by r 9.02(a) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic). The sources of the new r 9.02(b) are *Supreme Court Rules 1970* (NSW), Pt 8 r 2(a) in New South Wales (now *Uniform Civil Procedure Rules 2005* (NSW), r 6.19(1)), and *Federal Court Rules 1979* (Cth), O 6 r 2(b).

31 *Bishop v Bridgelands Securities* (1990) 25 FCR 311 (FCA).

32 *Bishop v Bridgelands Securities* (1990) 25 FCR 311 at 314.

> disputes between the parties, but having regard to the desirability of limiting, so far as practicable, the costs and delay of the litigation. Considerations of costs and delay may often support the grant of leave under sub-rule (b); but, in my opinion, leave ought not to be granted unless the court is affirmatively satisfied that joinder is unlikely to result in unfairness to any party. Secondly, regard must be had to practical matters. For example, it would normally be inappropriate to grant leave for the joinder of applicants who were represented by different solicitors. There must be a single solicitor, or firm of solicitors, who is accountable for the conduct of the proceeding on the applicant's side of the case. Similarly, although all applicants might propose to rely upon some common, or similar facts, there may be such differences between the evidence intended to be relied upon in support of the claims of particular applicants as to make it inexpedient to join the claims. The discrete material may overbear that which is common to all the claims. Again, there may be cases, in which the sheer number of the claims, if joinder is permitted, will impose an undue burden on the respondent; although it seems to me unlikely that this will be so except in cases where separate evidence is proposed to be adduced in support of individual claims.

The court is also concerned with the most efficient use of the parties' and the court's resources.[33] The court's concern is to ensure that proceedings are manageable, and that any unnecessary delay or prejudice or other inconvenience to the parties, is avoided. Then separate trials are necessary.[34] Accordingly, if the management of the proceedings is likely to become overly complex or the prosecution of the matter is likely to encounter significant delay because of the number of the persons joined as plaintiffs or defendants, the court may limit the number of persons joined.[35]

Representation

[6.40] It is normal practice that joint plaintiffs are represented by the same solicitor and the same counsel. If, for some reason, the plaintiff's interests or their strategies for conducting the action, conflict, they may require different legal representation. This may be resolved by the severance of the plaintiffs, and joining one of the conflicting plaintiffs or groups of plaintiffs as defendants to the action. The separate representation of joint plaintiffs[36] is at the discretion of the court but it is problematic. The source of the difficulty is that the conduct of the litigation in the adversarial system is based on party autonomy, that is, the freedom of the plaintiffs to prosecute the case as they see fit within the rules. Proceeding without a plaintiff's consent to joinder, or otherwise misjoining a plaintiff, is not a simple irregularity that can be waived. The court will strike out

33 *Carter v Commissioner of Taxation* (2001) 109 FCR 215 at [23].

34 Rule 9.04(a).

35 See r 9.04(b); *Prisoners A–XX Inclusive v New South Wales* (1995) 38 NSWLR 622.

36 *Goold and Porter Pty Ltd v Housing Commission* [1974] VR 102.

unauthorised proceedings.[37] Where a proceeding is improperly constituted the proceeding will not be able to proceed until the defect is rectified.[38]

MANDATORY JOINDER

[6.50] Rule 9.03 provides:

9.03 Joinder of necessary parties

(1) Except by order of the Court or as provided by or under any Act, where the plaintiff claims any relief to which any other person is entitled jointly with the plaintiff—

(a) all persons so entitled shall be parties to the proceeding; and

(b) any person who does not consent to being joined as a plaintiff shall be made a defendant.

(2) Where the plaintiff claims relief against a defendant who is liable jointly with some other person and also liable severally, that other person need not be made a defendant to the proceeding.

(3) Where persons are liable jointly, but not severally, under a contract, and the plaintiff in respect of that contract claims against some but not all of those persons, the Court may stay the proceeding until the other persons so liable are added as defendants.

(4) The Court may make an order under paragraph (1) before or after the non-joinder.

Rule 9.03 is engaged when claims are enforced by or against several persons jointly. Rules governing the joinder of necessary parties are strictly observed.[39] A proceeding is not properly constituted unless all joint contractors are joined in a proceeding.[40] The court may stay proceedings or the defendant may raise a defence until the plaintiff has joined all the contractors as defendants.[41] Joint contractors who refuse to be added as plaintiffs may be added as defendants.[42] Having all the contracting parties before the court enables the questions in dispute, including claims and counterclaims,[43] to be adjudicated in the same proceeding.[44]

37 *Australian Workers Union v Bowen* (1946) 72 CLR 575.

38 *Cameron v Hogan* (1934) 51 CLR 358.

39 See *Grovenor v Permanent Trustee Co of NSW Ltd* (1966) 40 ALJR 329.

40 *Australian Securities Ltd v Western Australian Insurance Co Ltd* (1929) 29 SR (NSW) 571.

41 Rule 9.03(3) gives effect to the former practice. See *Kendall v Hamilton* (1879) 4 App Cas 504; *Pilley v Robinson* (1887) 20 QBD 155; *Greig v Hutchinson* (1889) 11 ALT 53; *Mais v Reid* (1899) 25 VLR 70; *Yunghanns v Yunghanns* [1999] VSC 254. Lying behind this principle is that a breach of a joint contract gives rise to only one cause of action. So that no rights are lost by the entry of judgment in respect of only some of the contracting parties, all of the joint contactors must be parties to the proceeding: *Kendall v Hamilton*.

42 *Cullen v Knowles and Birks* [1898] 2 QB 380; *Johnson v Stephens and Carter Ltd* [1923] 2 KB 857.

43 Except in New South Wales and Queensland.

44 Once judgment is entered no further litigation can be entertained. In New South Wales (*Civil Procedure Act 2005* (NSW), s 95) and Queensland (*Property Law Act 1974* (Qld), s 54) judgment against a joint contractor does not discharge the others.

JOINING DEFENDANTS

[6.60] The principles governing the joining of plaintiffs applies equally to the joining of defendants. In Victoria r 9.02 provides that defendants may be joined in the same proceeding if the claim against each defendant arises out of the same transaction or series of transactions, and there is a common question of law or fact between the plaintiff and the defendants.[45] The common question of law or fact is both the condition,[46] and the limiting requirement, for joining defendants.[47]

The rules also provide the court with discretion to give parties leave to join multiple defendants.[48] The court in *Guilfoyle v Bean*[49] defined the parties' rights of joinder broadly. The discretion the court has over joining parties, including defendants, is a power to order that a party or parties be severed from a proceeding if joining them will cause delay, or cause the possibility of a fair trial to be prejudiced.[50]

Defendants alternately liable

[6.70] The causes of action may be joint, several or alternative. Defendants liable in the alternative may be sued in a single proceeding despite the plaintiff raising different causes of action against them. Pursuing alternately liable defendants is an instance of the joinder of different claims in the one proceeding. In joining alternately liable defendants the plaintiff faces the prospect that gaining judgment against one precludes judgment against the others.

The plaintiff does not elect which defendant to sue by initiating the proceeding. Rather, in suing defendants in the alternative, the plaintiff will be put to an election as to which party they will gain judgment against. The election is constituted by the decision as to which of the alternate defendants the plaintiff will seek judgment to be entered against.[51] The recorded judgment precludes further proceeding. The plaintiff must therefore decide which party they will proceed against as the entry of a judgment against an alternate defendant is irrevocable and, unlike a joint defendant, exclusive of other defendants.

45 Rule 9.02; in some jurisdictions the wording of the rule refers to "event(s)" in addition to "transaction(s)".

46 *Richardson v Trautwein* (1942) 65 CLR 585 at 593 per Starke J.

47 *Birtles v Commonwealth* [1960] VLR 247.

48 Rule 9.02.

49 *Guilfoyle v Bean* [1926] VLR 498.

50 *Birtles v Commonwealth* [1960] VLR 247 at 249.

51 *Petersen v Moloney* (1951) 84 CLR 91 at 102.

Joint and concurrent tortfeasors

[6.80] Damage may be caused by torts committed by two or more tortfeasors. Multiple tortfeasors may be categorised as either:[52]

1. Joint tortfeasors: two or more persons responsible for either
   (a) the same wrongful act causing the same damaging effect on the plaintiff;
   (b) different wrongful acts which combine to cause the same damaging effect on the plaintiff; or
2. Several (that is, separate or independent) tortfeasors: two or more persons responsible for separate wrongful acts causing different damage to the plaintiff.[53]

Examples of joint tortfeasors are principals and agents when the agent commits a tort in the process of carrying out their duty to the principal within the scope of their authority, or a master and servant when the servant commits a tort in the course of their employment with the master.[54] In *Baxter v Obacelo*[55] an employee solicitor and a principal solicitor were jointly negligent when the employee solicitor negligently handled a transaction for the principal solicitor's client.[56] In *Ross v Meggitt Overseas*[57] four successive employers who had each exposed an employee who contracted asbestosis to unacceptably high concentrations of asbestos dust during the period of his employment with them were sued as concurrent tortfeasors. In *Thompson v Australian Capital Television*[58] Channel 7 rebroadcast in the Australian Capital Territory material that Channel 9 produced in Sydney. Some of the material was defamatory. The High Court held that Channel 7 and Channel 9 were joint tortfeasors.

The difference between torts jointly committed, and torts concurrently committed is that joint tortfeasors have all engaged in the same wrongful act, which act has caused the same damage,[59] whereas concurrent tortfeasors commit individual torts (that is, acts or omissions) resulting

52 See Glanville Williams, *Joint Torts and Contributory Negligence* (Stevens and Sons, 1951), p 1 who used the term "concurrent tortfeasors" to refer to both classifications; RP Balkin and JLR Davis, *Law of Torts* (4th ed, 2009), pp 815–817; M Jones, A Dugdale, M Simpson, *Clerk and Lindsell on Torts* (20th ed, Sweet & Maxwell, 2010), pp 273–280. See also *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635 at 646–647 per Gleeson CJ and Callinan J defining concurrent tortfeasors as "persons whose acts concur to produce the same damage."

53 *Newcrest Mining Ltd v Thornton* (2012) 248 CLR 555 at [72] referring to "several tortfeasors" as "several concurrent tortfeasors" per Crennan and Kiefel JJ.

54 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 580–581.

55 *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635.

56 See also *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448.

57 *Ross v Meggitt Overseas Ltd* (1999) 18 NSWCCR 324.

58 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574.

59 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 646.

either jointly or individually in the same damage to the plaintiff.[60] Where a plaintiff is suing for a tort that has been jointly or concurrently committed by multiple tortfeasors all defendants should be joined so that all matters are before the court in the same proceeding.[61] At common law the liability of joint tortfeasors was joint and several. A plaintiff could sue joint tortfeasors separately, in independent actions, for the full amount of the loss. Or the plaintiff could sue all the joint tortfeasors in the same action.[62]

In Victoria all jointly liable defendants must be joined as parties.[63] Several concurrent tortfeasors, on the other hand, cannot be joined as defendants in the one action because they are severally liable "on separate causes of action."[64]

One corollary of the principle that a plaintiff had only one cause of action against a number of joint tortfeasors was that, where an action was brought against two or more joint tortfeasors, only one judgment for one sum of damages could be given in favour of the plaintiff.[65] Another corollary, sometimes referred to as the rule in *Brinsmead v Harrison*,[66] was that the single cause of action resulting from the joint commission of a tort merged in the first judgment which the plaintiff obtained in respect of it.

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60 *Wrongs Act 1958* (Vic), s 24AH; see also *Civil Law (Wrongs) Act 2002* (ACT), s 107D; *Civil Liability Act 2002* (NSW), s 34; *Proportionate Liability Act* (NT), s 6; *Civil Liability Act 2003* (Qld), s 30; *Civil Liability Act 2002* (Tas), s 43B; *Civil Liability Act 2002* (WA), s 5AI.

61 The rule in *Brinsmead v Harrison* (1872) LR 7 CP 547, that a plaintiff who suffered damage from a tort committed jointly by several defendants had only one cause of action (which merged in the first judgment recovered) has been abolished. See *Wrongs Act 1958* (Vic), s 24; see also B Cairns, *Australian Civil Procedure* (10th ed, Thomson Reuters, 2014), [9.60], n 17.

62 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 603–604 per Gummow J; *Bryanston Finance Ltd v de Vries (No 1)* [1975] QB 703 at 730 per Lord Diplock.

63 Compare ACT r 214; SA r 73; Tas r 177 where the plaintiff may join all the defendants against whom the plaintiff alleges a joint, several or alternative liability. In other jurisdictions, the plaintiff is not compelled to join all defendants and may pursue them independently in separate actions. However, the court may stay proceedings if a plaintiff fails to join a material party: see Vic r 9.03; see also ACT r 214; FCR r 9.04; NSW r 6.21; NT r 9.03; Qld r 64. In South Australia the plaintiff has to apply to the court for directions: SA r 73.

64 *Sadler v Great Western Railway Co* [1896] AC 450 at 454 per Lord Halsbury LC. The difference between action and cause of action was significant. A person suffering injury as a result of the wrongdoing of joint tortfeasors had only one cause of action: *Wah Tat Bank Ltd v Chan* [1975] AC 507 at 515. Such a person might bring one action (that is, proceeding), or more than one action. In the case of several concurrent tortfeasors, there was a separate cause of action against each, and if a plaintiff desired to sue more than one, it was necessary to commence separate actions.

65 See *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 454 per Gibbs CJ; [1985] HCA 12 (considering the effect of *Civil Liability Act 2002* (NSW), s 5 in a case where one of two joint tortfeasors was liable for exemplary damages, but the other was not so liable).

66 *Brinsmead v Harrison* (1872) LR 7 CP 547.

A plaintiff who recovered action against any one joint tortfeasor was "barred from subsequently recovering judgment against any other joint tortfeasor responsible for that tort whether in an action commenced before, at the same time as, or after the action in which a final judgment had already been recovered."[67]

In the case of joint or concurrent torts, tortfeasors are not discharged by reason that judgment has been entered against one tortfeasor. However, the plaintiff's capacity to recover against various tortfeasors is affected by judgment being entered against a particular tortfeasor. First, the assessment of damages will be limited to the amount recovered against the tortfeasor in the first judgment. Secondly, the plaintiff is not permitted to recover further if the plaintiff's claim is satiated by the judgment entered against the first tortfeasor, or in the case of the plaintiff settling their claim in full against one tortfeasor.

Where, however, the plaintiff has settled with one tortfeasor for only a part of the damages they claim they may still proceed against other tortfeasors in pursuit of the remainder of the entire claim.[68] The court may enter separate judgments against separate defendants for a claimed amount in the case of concurrent tortfeasors.[69] Separate judgment may be entered for different amounts against individual concurrent tortfeasors, for example, where one tortfeasor only is liable for exemplary damages.[70]

A plaintiff is barred from being doubly compensated. So in the case of joint tortfeasors, the plaintiff cannot recover damages against both. If the plaintiff enforces the payment of the amount of damages as assessed by the court they are not entitled to additional payment.[71] Similarly, where

67 *Wah Tat Bank Ltd v Chan* [1975] AC 507 at 515. The Privy Council in this case described the rule as "highly technical and unsatisfactory" and cited as its only possible justification what was said about it by Blackburn J in *Brinsmead v Harrison* (1872) LR 7 CP 547 at 553: "Is it for the general interest that, having once established and made certain his right by having obtained a judgment against one of several joint wrongdoers, a plaintiff should be allowed to bring a multiplicity of actions in respect of the same wrong? I apprehend it is not; and that, having established his right against one, the recovery in that action is a bar to any further proceedings against the others." The rule was considered in England by the Law Revision Committee (Great Britain, Law Revision Committee, *Third Interim Report* (1934) which concluded that the rationales for the rule in *Brinsmead v Harrison* were that it "prevented multiplicity of actions and that a second jury might award different damages from the first" (at 7 [11])). The rule in *Brimstead v Harrison* was circumvented by techniques such as the Tomlin form of order whereby settlement agreement was made and recorded without judgment being entered. The Privy Council observed in *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439 that the Tomlin form of order did not alleviate the inconvenience and injustice resulting from the common law rule. A discussion of the Report and the legislation is to be found in *James Hardie v Seltsam* (1998) 196 CLR 53, which recommended legislation which took effect as s 6(1) of the *Law Reform (Married Women and Tortfeasors) Act 1935* (UK).

68 See *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635.

69 *Ross v Meggitt Overseas Ltd* (1999) 18 NSWCCR 324.

70 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448.

71 *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635.

the plaintiff settles for the payment of the full amount of their claim with one joint tortfeasor, the plaintiff releases other tortfeasors from any liability with respect to the claim.[72] A plaintiff who decides not to join defendants but to sue them separately will have damages assessed as against each tortfeasor at the lowest amount for which they may be held liable.[73]

Defendants jointly, and jointly and severally liable

[6.90] The problems of proceeding against joint tortfeasors are surmounted by proceeding against plaintiffs who are jointly and severally liable. The plaintiff may join defendants who are jointly and severally liable, or take action against one whilst preserving their right to proceed against other parties who may be liable.[74]

Proportionate liability

[6.100] A plaintiff who alleges that they have suffered economic loss or property damage resulting from the actions of two or more tortfeasors, the breach of contract of two or more defendants, or the misleading and deceptive conduct of two or more parties, may have an apportionable claim.[75] Concurrent wrongdoers may, by leave of the court, be made joint defendants in a proceeding for an apportionable claim.[76] An apportionable claim is one in which the liability of multiple defendants is proportionate.[77] A defendant whose actions have concurrently contributed to the plaintiff's loss is liable only for the proportion of damage they have caused[78] and no further claim for damages, contribution, or indemnification with respect

72 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574.

73 *Cassell & Co Ltd v Broome* [1972] AC 1027.

74 For statutory enactments regulating joint liability see B Cairns, *Australian Civil Procedure* (10th ed, Thomson Reuters, 2014), [9.70].

75 The *Competition and Consumer Act 2010* (Cth) institutes proportionate liability for a claim for damages for economic loss or damage to property resulting from misleading or deceptive conduct or conduct that is likely to mislead or deceive in breach of *Australian Consumer Law*, s 18. A claim of this nature is an apportionable claim under *Competition and Consumer Act 2010* (Cth), s 87CB.

76 *Competition and Consumer Act 2010* (Cth), s 87CH. For the scheme as it operates in South Australia see B Cairns, *Australian Civil Procedure* (10th ed, Thomson Reuters, 2014), [9.90].

77 *Wrongs Act 1958* (Vic), s 24AF; see also *Civil Law (Wrongs) Act 2002* (ACT), s 107B; *Civil Liability Act 2002* (NSW), s 34; *Proportionate Liability Act* (NT), s 4; *Civil Liability Act 2003* (Qld), s 28; *Civil Liability Act 2002* (Tas), s 43A; *Civil Liability Act 2002* (WA), s 5AI. Proportionate liability does not apply to claims outside this designation. In particular, it does not apply to personal injury or consumer claims.

78 *Wrongs Act 1958* (Vic), s 24AI; see also *Civil Law (Wrongs) Act 2002* (ACT), s 107F; *Civil Liability Act 2002* (NSW), s 35; *Proportionate Liability Act* (NT), s 13; *Civil Liability Act 2003* (Qld), s 31; *Civil Liability Act 2002* (Tas), s 43B; *Civil Liability Act 2002* (WA), s 5AK.

to the same claim can be compelled against the defendant.[79] The plaintiff is free to sue other wrongdoers but damages are limited to the recovery of the amount of their actual losses.[80]

It follows that, because no single concurrent wrongdoer is entirely responsible for the plaintiff's loss, and joint and several liability does not form part of an apportionable claim, the plaintiff in an apportionable claim must sue all concurrent wrongdoers either in a single joint proceeding, or in several discrete proceedings, to recover their loss in full. The most effective course of action is to join concurrent wrongdoers as co-defendants in a single proceeding.

Proportionate liability illustrated

[6.110] An order to join a defendant to whom fault was apportionable was sought in *Boral Resources (Vic) v Robak Engineering and Construction*[81] by a concrete supplier under s 131 of the *Building Act 1993* (Vic)[82] which abolished joint and several liability in building disputes and replaced it with proportionate liability. The supplier was sued by the head contractor who had subcontracted concrete work to a subcontractor with whom the supplier entered a contract to supply concrete. The head contractor sued for losses incurred when concrete work was demolished and replaced because it had been undertaken using concrete that failed to meet specifications. Joining the subcontractor as co-defendant under the new regime mean that the court would give judgment in proportion to each defendant's liability. When the liability had been joint and several the court would give judgment against a single defendant who would then seek contribution from others.

In *Commonwealth Bank of Australia v Witherow*[83] the defendant was a guarantor for a bank overdraft in favour of the debtor company. The defendant sought to join as a proportionately liable co-defendant an accountant on whose incorrect advice regarding the company's financial position he had relied to make the decision to provide the guarantee. The court rejected the defendant's argument on the basis that the claim was for a specific sum on the breach of the contract of guarantee, not a claim

79 *Competition and Consumer Act 2010* (Cth), s 87CF. *Wrongs Act 1958* (Vic), s 24AJ; see also *Civil Law (Wrongs) Act 2002* (ACT), s 107H; *Civil Liability Act 2002* (NSW), s 36; *Proportionate Liability Act* (NT), s 15; *Civil Liability Act 2003* (Qld), s 32A; *Civil Liability Act 2002* (Tas), s 43C; *Civil Liability Act 2002* (WA), s 5AL.

80 *Competition and Consumer Act 2010* (Cth), s 87CG. *Wrongs Act 1958* (Vic), s 24AK; see also *Civil Law (Wrongs) Act 2002* (ACT), s 107I; *Civil Liability Act 2002* (NSW), s 37; *Proportionate Liability Act* (NT), s 16; *Civil Liability Act 2003* (Qld), s 32B; *Civil Liability Act 2002* (Tas), s 43E; *Civil Liability Act 2002* (WA), s 5AM.

81 *Boral Resources (Vic) Pty Ltd v Robak Engineering and Construction Pty Ltd* [1999] 2 VR 507.

82 This section was subsequently repealed by the *Wrongs and Limitations of Actions (Insurance Reform) Act 2003* (Vic), s 17.

83 *Commonwealth Bank of Australia v Witherow* [2006] VSCA 45.

for damages based on a breach of the defendant's duty of care, such as the defendant may have had against the accountant. The claim was therefore not apportionable.

Plaintiff in doubt as to correct defendant

[6.120] All parties *prima facie* liable to provide a remedy to the plaintiff should be joined when the plaintiff is in doubt as to who bears primary liability, or where proposed defendants accuse each other of bearing primary or sole responsibility for the losses suffered by the plaintiff. Where doubt as to whether the defendant has been correctly identified from the outset of proceedings persists, others may be joined as proceedings take their course.[84] An innocent but properly joined defendant will only be dismissed from proceedings at the end of the case.[85] On the other hand, a defendant who was wrongly joined may by interlocutory application seek to be dismissed from proceedings.[86]

Costs where defendants joined

[6.130] A costs order is available against the defendant who has been incorrectly joined. By way of a *Bullock* order the unsuccessful defendant pays the costs of the successful defendant and the plaintiff. The *Bullock* order will only be made where the issue of which of the multiple defendants is liable to the plaintiff arises.[87] Alternatively, by way of a *Sanderson* order, the unsuccessful defendant pays the costs of the plaintiff inclusive of the costs paid by the plaintiff to the successful defendant.[88] The court's power in awarding an order for costs is discretionary, and is guided by the reasonableness of the plaintiff's actions in joining the successful, and other, defendants.

Removal of party

[6.140] Provided the joinder of parties is otherwise proper the proceeding is not undermined by the misjoinder of any person as a party.[89] A person may apply to be removed as a party if it is their contention that their joinder was improper. The court may order that a person joined who is not a necessary or proper party to the proceeding be removed from proceedings.[90] A person is not a proper party for the proceeding for the purposes of r 9.02(a) if the conditions of joinder are not satisfied. A person is a proper party if the effectual and complete

84 *Bennetts & Co v McIllwraith & Co* [1896] 2 QB 464.

85 *Hummerstone v Leary* [1921] 2 KB 664.

86 *Bullock v London General Omnibus Co* [1907] 1 KB 264 at 270 per Collins MR.

87 *Hong v A & R Brown Ltd* [1948] 1 KB 515; *Steppke v National Capital Development Commission* (1978) 21 ACTR 23.

88 *Bullock v London General Omnibus Co* [1907] 1 KB 264; *Johnsons Tyne Foundry Pty Ltd v Maffra Shire* (1948) 77 CLR 544 at 572.

89 Rule 9.05.

90 Under r 9.06(a).

determination of all the questions in the proceeding[91] necessitates their presence before the court. A person objecting to their being joined as a party may have their claim assessed on the same basis: namely, whether their presence before the court was necessary to the complete adjudication of all matters in the proceeding.[92] If the court is unable to determine the correctness of a person's joinder because to do so would require an assessment of facts which have not and cannot be examined, the court may decline an application for removal.[93] Such would be the case where the application to declare joinder improper is made at an interlocutory stage.

JOINDER OF CLAIMS

[6.150] A single proceeding instigated by a single plaintiff may entertain several causes of action.[94] Joining parties may incidentally join multiple causes of action. However, the joinder of causes of action is procedurally distinct from the joinder of parties, subsequent to the proper constitution of proceedings through the identification of parties, and governed by a separate regime of rules.

In *Smith v Foley*[95] the court held that causes of action may only be joined if they were related by a common question of law or fact. This interpretation of the rules limits the number or types of causes of action that may be joined in a single proceeding, even though a literal interpretation of the rules does not support a restrictive reading, and suggests that any number or type of causes of action may be joined.[96] In *Smith v Foley* the slander against which the plaintiff mounted proceedings consisted of several unconnected statements which the court held could not, under the rules, be joined in a single proceeding. According to Madden CJ the rules for joinder of claims were to be interpreted subject to the rules for the joinder of parties, to the extent that parties were joined subject to their being a common question of law or fact between them. While the wording of the rules does not require a restrictive interpretation the narrower, pragmatic approach assists the management of proceedings by enabling the disposal of connected causes of action.

Where a single defendant is sued by multiple plaintiffs multiple causes of action pursued separately by individual plaintiffs against the defendant may be joined in the same originating process, along with a common claim against the defendant, thereby uniting the several separate claims against the same defendant.

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91 As provided by r 9.06(b)(i).

92 *National Companies and Securities Commission v Monsoon Nominees Pty Ltd* (1990) 9 ACLC 66 at 92.

93 See *Lotus Development Corporation v Mayne Nickless Ltd* (1991) 100 ALR 167 (FCA).

94 Rule 9.01; see also B Cairns, *Australian Civil Procedure* (10th ed, Thomson Reuters, 2014), [9.130], n 31.

95 *Smith v Foley* [1912] VLR 314.

96 Although Qld r 60 imposes a limitation.

One of the problems that arises in considering whether causes of action are to be joined is fundamental since it relates to the very definition of a cause of action. The cause of action has been variously defined in terms of the plaintiff's right, in terms of pleaded facts, and in terms bridging these two approaches. It may be considered to be:

- the right the plaintiff has to seek and obtain the court's assistance in achieving a remedy;
- the facts which show the plaintiff has cause for judicial action;
- the facts which show the plaintiff's right and the wrongdoer's delict;
- the facts giving rise to legal relations and founding an enforceable right;
- the unlawful transgression of a right; or
- the wrong itself committed by the defendant.[97]

Little wonder that it has been stated that the meaning of "cause of action" is sensitive to the context in which it is used.[98]

ADDITION, SUBSTITUTION AND REMOVAL OF PARTIES

[6.160] Plaintiffs or defendants may be added or removed where this becomes necessary after the commencement of a proceeding because their presence is requisite to the court's complete and effective adjudication of all matters in dispute. A party who does not consent to being joined as plaintiff may be joined as a defendant. In Victoria r 9.06 provides for adding, substituting or removing parties to a proceeding:[99]

> **9.06 Addition, removal, substitution of party**
>
> At any stage of a proceeding the Court may order that—
>
> (a) any person who is not a proper or necessary party, whether or not that person was one originally, cease to be a party;
>
> (b) any of the following persons be added as a party—
>
> (i) a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all questions in the proceeding are effectually and completely determined and adjudicated upon; or
>
> (ii) a person between whom and any party to the proceeding there may exist a question arising out of, or relating to, or connected with, any claim in the proceeding which it is just and convenient to determine as between that person and that party as well as between the parties to the proceeding;

97 See McCaskill, "Actions and Causes of Action" (1925) 34 *Yale Law Journal* 614; SA Harris, "What is a Cause of Action?" (1928) 26(6) *California Law Review* 459.

98 *Hughes v Australian Blue Metal Ltd* [1964-5] NSWR 938 at 944–947. For the purposes of joining causes of action the definition in *Read v Brown* (1888) 22 QBD 128 at 131 is accepted.

99 Rule 9.06; all jurisdictions have general rules to the same effect; see also B Cairns, *Australian Civil Procedure* (10th ed, Thomson Reuters, 2014), [9.170], n 35. Note the wide remit of SA r 27.05.

(c) a person to whom paragraph (b) applies be substituted for one to whom paragraph (a) applies.

Rule 9.06(b)(i) and (ii) describe the circumstances under which an existing party, or a person sought to be made a party, may apply to add a person as a party. A person is "a person who ought to have been joined" for purposes of r 9.06(b)(i) if a court would, upon an application from a co-defendant, stay proceedings until they were joined.

The court is also authorised to add a party under r 9.06(b)(i) if they are a person "whose presence before the Court is necessary to ensure that all questions in the proceeding are effectually and completely determined and adjudicated upon". The basis of joinder is therefore the policy objective of achieving finality and avoiding a multiplicity of proceedings. The court is therefore not required to stay proceedings until they have joined the person as a party.

The court has a wider power to add a party under r 9.06(b)(ii). The question to be determined must be an already existing question ("there may exist").[100] It may arise out of, relate to, or connect with[101] a claim in the proceeding, but need not be the same as a question between the original parties. Finally, the determination of the question must be capable of being determined in a just and convenient manner in all the circumstances of the case in proceedings addressing the question or questions on which the proceedings were commenced. Thus, the rule gives the court jurisdiction where it is justified to add a person as a defendant against whom the plaintiff does not have a cause of action.[102] It may not be just or convenient to add a party if there is delay in making the application, and if adding a person as a party would prejudice an existing party and they could not be compensated by an order for adjournment, or an award of costs, or in any other manner within the court's jurisdiction to provide.[103]

The rule by which parties are added should be construed to ensure that the proceeding is able to completely determine related matters.[104] Where

100 *Spelling Goldberg Productions Inc v BPC Publishing Ltd* [1981] RPC 283.

101 See Batt JA in *Boral Resources (Vic) Pty Ltd v Robak Engineering and Construction Pty Ltd* [1999] 2 VR 507 at 513–514.

102 *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231, decided under *Rules of the Supreme Court 1965* (UK), O 15 r 6(2)(b)(i) and (ii), to which Vic r 9.06(b)(i) and (ii) correspond; compare *Walker v Commonwealth Trading Bank of Australia* (1985) 3 NSWLR 496.

103 See, for instance, *Carborundum Realty Pty Ltd v RAIA Archicentre Pty Ltd* (unreported; VSC; Harper J; No F8708/1991; 2 June 1992), where at trial the plaintiff was not permitted to add a third party as defendant. In Queensland, the basis for allowing the addition of another person as party is wider than that under r 9.06(b) in Victoria. Under *Uniform Civil Procedure Rules 1999* (Qld), r 69(1)(b)(i), the court may add "a person whose presence before the court would be desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceeding". See *Macquarie Bank Ltd v Lin* [2002] 2 Qd R 188.

104 *Universal Music Australia Pty Ltd v Cooper* [2004] FCA 78 at [6] per Tamberlin J.

a proceeding would directly affect a party's rights or obligations with respect to any other party, either because the subject matter of the proceeding, or because the court may make an order which, bears directly on those rights or obligations, the party should be added to the proceeding.[105] However, a person is not a necessary party to the proceeding, and should not be joined, if their rights and liabilities are only indirectly affected, or are affected merely as a consequence of an order that may be made, such as being financially affected by a judgment. An example of proceedings or orders having a direct effect on persons' rights includes an effect on real or personal proprietary rights in which all persons with an interest in the relevant property are proper and necessary parties to the proceeding.[106]

In *Macquarie Bank v Lin*[107] a defendant guarantor partially secured a primary debt in the form of a bank loan with land he allegedly held on trust for his plaintiff parents. The plaintiffs made application for a declaration that the land was subject to the trust. A finding by the court that the land was subject to the trust would frustrate the contract of guarantee. The bank had therefore to be joined as defendant to properly determine the plaintiff's application. The bank's addition was based on the material effect the court's determination would have on their interests.

The application of the principle for adding parties to ensure that a proceeding is completely determined is a matter for the court's discretion exercised in the particular circumstances of the case. Defendants are not to be added to proceedings merely because it is convenient for them to be joined. In *Interchase Corporation (in liq) v FAI General Insurance*[108] the plaintiff sought to add the insurer as co-defendant in order to seek a declaration that a judgment in favour of the plaintiff was to be satisfied by the insurer. The Queensland Court of Appeal found it unnecessary to add the insurer, reasoning that the presence of the plaintiff and defendant as parties was sufficient to determine the issues between them. The court also found that the insurer's interest would be only consequentially and therefore remotely affected if a judgment given in the plaintiff's favour caused them to claim under the professional indemnity policy. The court contrasted the circumstances of the instant case with the case of an insurer, such as a third party insurer in a personal injury action, who would be obliged by statute to conduct the defence and satisfy any judgment in favour of the plaintiff.

Plaintiffs may apply to join defendants so that claims may be argued in the alternative to those presented in, or arising from, the pleadings. For example, in *Qantas Airways v AF Little Pty Ltd*[109] the plaintiff alleged

105 *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 523–525.

106 See *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410.

107 *Macquarie Bank Ltd v Lin* [2002] 2 Qd R 188.

108 *Interchase Corporation Ltd (in liq) v FAI General Insurance Co Ltd* [2000] 2 Qd R 301.

109 *Qantas Airways Ltd v AF Little Pty Ltd* [1981] 2 NSWLR 34.

losses were suffered because of faulty building designs. The court permitted an application to join the builder to the architect as defendant, enabling the plaintiff to raise claims of tortious and contractual breach. The case illustrates a point in the construction and application of the rules of joinder. On a plaintiff's application to join a defendant, the rules' reference to "all matters in dispute in the proceedings" is not to be restrictively read as referring to matters contained in, or which emerge from, the existing pleadings.[110] Rather, it should be read broadly to include matters merely relevant to the issues between the original parties.[111] A defendant's application to join a co-defendant despite the plaintiff's opposition will only be approved if it is necessary for the co-defendant to become a party in order for the court to completely adjudicate the issues between the existing parties.

In *United States Tobacco Co v Minister for Consumer Affairs*[112] the appellant appealed a decision of the respondent declaring smokeless tobacco product unsafe. The court allowed an application by the Australian Federation of Consumer Organisations to be joined as a party to the appeal, on the basis that it had sufficient interest in the appeal to be joined as a respondent.[113] In *Re Great Eastern Cleaning Services*[114] a company applied to be restored to the register of companies. It was possible for the court to determine the company's application without requiring the presence of other parties. However, viewed more comprehensively, the company's restoration would have numerous effects on other persons as well as the company. For example the company's tax liability, which was a matter before the court, would be affected. The Commissioner of Taxation's presence was therefore necessary to ensure the complete and effective determination of all matters in dispute before the court. In *Cameron v National Mutual Life Association of Australasia Ltd (No 2)*[115] the plaintiffs brought an action in their own name and on behalf of other unnamed proprietors of apartment units, alleging that the faulty construction of a block of units was the reason water entered the building. The rules permitted a plaintiff to commence an action on behalf of all interested persons regardless of whether they were named or unnamed[116] such that both sets of plaintiffs brought the action.[117]

110 *Qantas Airways Ltd v AF Little Pty Ltd* [1981] 2 NSWLR 34 at 38.

111 *Birtles v Commonwealth* [1960] VLR 247 at 252.

112 *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520.

113 *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520 at 530–531.

114 *Re Great Eastern Cleaning Services Pty Ltd* [1978] 2 NSWLR 278.

115 *Cameron v National Mutual Life Association of Australasia Ltd (No 2)* [1992] 1 Qd R 133.

116 *Rules of the Supreme Court 1900* (Qld), O 3 r 10.

117 *Moon v Atherton* [1972] 2 QB 435. The court applied the decision of the Court of Appeal in England in *Moon v Atherton*. There a class member was submitted as a plaintiff when the representative plaintiff discontinued the claim. The new plaintiff, in her capacity as a class member, was a party and therefore entitled to be substituted as the plaintiff.

Leave to add plaintiffs

[6.170] In Victoria the court may give leave for plaintiffs to be added to an existing proceeding.[118] In deciding whether to grant leave to add a plaintiff the court considers whether doing so will cause a party to suffer inconvenience, hardship, unfairness or injustice,[119] in the particular circumstances of each case.[120] These considerations are to be balanced against the necessity of adding a plaintiff in order to effectively resolve all the issues in dispute. The benefits of cost effectiveness and efficiency of joining a plaintiff are not decisive if the court cannot be "affirmatively satisfied" that another party will not be unfairly affected by doing so. Defendants may be unfairly treated if additional plaintiffs add onerously to their ability to meet the case being made against them. This may especially be true where plaintiffs bring discrete claims in addition to common ones. The number of discrete claims may so outweigh common matters that joinder is not indicated for case management reasons of cost effectiveness and efficiency.

Adding a plaintiff on plaintiff's application

[6.180] A plaintiff may add a co-plaintiff to a proceeding by application to the court. In the interests of fully and finally determining all matters in dispute, the addition of a party is at the discretion of the court in most jurisdictions. The principal consideration in the exercise of the court's discretion is whether joinder will assist in the complete and effective adjudication of all matters in dispute,[121] and not whether a party is properly joined.

It is possible in some circumstances for a plaintiff who lacks a cause of action against a defendant to join a plaintiff having a cause of action. It was permitted under the rules in the case of *Hughes v Pump House Hotel Co Ltd (No 2)*[122] for a plaintiff commencing an action after the assignment of his debt to join as a co-plaintiff the assignee of the debt. The court considering the application does not make its decision on the basis of an examination of the co-plaintiff's entitlement to sue, since that is properly a

118 Also in the Federal Court, New South Wales, Northern Territory, Queensland and South Australia. See *SZ v Minister for Immigration and Multicultural Affairs* (2000) 172 ALR 172; *Trade Practices Commission v Westco Motors (Distributors) Pty Ltd* (1981) 58 FLR 384.

119 *Bishop v Bridgelands Securities* (1990) 25 FCR 311; *Hagan v Bank of Melbourne Ltd* [1994] 2 Qd R 507.

120 *Dean-Willcocks v Air Transit International Pty Ltd* (2002) 55 NSWLR 64 at 72–73.

121 The rules in the Australian Capital Territory and Tasmania may limit the court's discretion to order that a plaintiff be added to an existing proceeding where the plaintiff ought to have been joined whose presence is necessary for the court to adjudicate on all matters in dispute. See *Alomes v Piggott, Wood & Baker (a firm)* (2000) 9 Tas R 412.

122 *Hughes v Pump House Hotel Co Ltd (No 2)* [1902] 2 KB 485; see also *Catta Pty Ltd v Alan Hilder Pty Ltd* [2003] TasSC 127 where the added co-plainiff was the director of original plaintiff.

matter for trial, and not required by the rules. Accordingly, the applicant need only satisfy the court that joining the co-plaintiff falls within the rules.

Adding plaintiff on defendant's application

[6.190] A defendant's application to add a plaintiff may plead that the proceedings as constituted are lacking, that the additional plaintiff is necessary to completely constitute them and enable the court's complete adjudication of all the issues. The court will then stay proceedings until the plaintiff adds the co-plaintiff. The plaintiff's objection is by means of interlocutory application prior to trial.[123]

Adding defendant on plaintiff's application

[6.200] The plaintiff may apply for additional defendants to be joined to the proceedings to enable the court to finally determine all the issues to be adjudicated. It is not always possible for the plaintiff to identify the parties against whom they should take action from the commencement of proceedings. The defence may indicate that an additional defendant is necessary to constitute proceedings. The additional defendant will be a party who could have been named as a defendant in the original proceeding. When, in *Black v Houghton*,[124] the defendant denied making defamatory statements attributed to him in a newspaper story, the court granted the plaintiff's application to have the publisher of the newspaper joined as co-defendant.

The plaintiff must demonstrate that they have a *prima facie* case against the proposed defendant.[125] A defendant who is able to show that they would obtain a summary judgment against the plaintiff by whom they have been added demonstrates thereby that the plaintiff's joinder has not been properly effected.[126]

The court would not order joinder on the plaintiff's application to join the plaintiff's solicitors as co-defendants in *Birtles v Commonwealth*.[127] The solicitors had afforded the defendants a defence. Each of the defendants maintained the action for personal injury was statute barred, and that the plaintiff failed to serve notice on them of the claim against them within six months, as prescribed by statute. The court ordered separate trials. While separate trials against different defendants courted the prospect of courts delivering different judgments with respect to the same sets of facts,[128] the risk was ameliorated by the court ordering the solicitors not to dispute the relevant findings of fact in the trial of the first defendant.

123 *Cameron v Hogan* (1934) 51 CLR 358.

124 *Black v Houghton* [1968] Qd R 179.

125 *Sharp v McGivney* [1951] VLR 143 at 145.

126 *Universal Music Australia Pty Ltd v Cooper* [2004] FCA 78 at [6]–[8] per Tamberlin J.

127 *Birtles v Commonwealth* [1960] VLR 247.

128 *Birtles v Commonwealth* [1960] VLR 247.

In *Vandervell Trustees v White*[129] a testator paid dividends on shares to trustees which the executors of the deceased estate sued the trustees for after the testator's death. The Inland Revenue Commissioners also claimed tax was payable on the dividends. The plaintiff's application to add the Inland Revenue Commissioners was denied. The House of Lords recognised that the questions raised by both the plaintiff and Inland Revenue Commissioners were to be answered by determining the date on which the shares vested in the estate and the date on which they vested in the trustees. However, the Inland Revenue Commissioners was not a necessary party to the proceeding between the plaintiff and the trustees as the complete determination of all the issues between them could be resolved without the presence of the Inland Revenue Commissioners.

Adding defendant on defendant's application

[6.210] Because adding a defendant on a defendant's application requires the plaintiff to proceed against a party not of their choosing, the court approaches with caution an application of this nature from the defendant.

In *Boral Resources (Vic) v Robak Engineering and Construction*[130] r 9.06 of the Victorian rules had to be construed.[131] The plaintiff's contention was that a defendant's application to add a co-defendant should not be entertained over the plaintiff's objection. On a literal construction of r 9.06 joinder does not depend on the plaintiff's agreement and is not defeated by their resistance. The court may add a co-defendant if they are connected to the proceedings by a common question of law or fact, their presence is required to resolve all issues in dispute, and their joinder is not inconvenient, unfair or unjust.

It is not necessarily an injustice to the plaintiff to add a defendant against whom the plaintiff did not initially choose to proceed. The crux of the matter is to ensure that the court is able to determine all the questions before it. Nevertheless, it may be unfair or unjust in some cases to force a plaintiff to sue a party in addition to the original defendant. The court's determination of the defendant's application must be based on the circumstances of the particular case, and may include consideration of what effect joinder or non-joinder may have on the existing defendant's interests.[132]

In *Walker v Commonwealth Trading Bank of Australia*[133] the court refused an application to add another defendant. A company in liquidation repaid money to the bank under a loan agreement secured by a mortgage over

129 *Vandervell Trustees Ltd v White* [1971] AC 912.

130 *Boral Resources (Vic) Pty Ltd v Robak Engineering and Construction Pty Ltd* [1999] 2 VR 507.

131 ACT r 220; FCR r 9.05; NSW r 6.24; Qld r 69; SA r 74; Tas r 184; WA O 18 r 6.

132 *Boral Resources (Vic) Pty Ltd v Robak Engineering and Construction Pty Ltd* [1999] 2 VR 507 at 525–526 per Chernov JA.

133 *Walker v Commonwealth Trading Bank of Australia* (1985) 3 NSWLR 496.

property and a guarantee. The liquidator sought to have those payments declared void as being preferences payments. If the bank's application to join the mortgagors and guarantors as defendants were to succeed those parties' liabilities would be affected. The court held their addition to be unnecessary to resolving the issue of whether the company's payments to the bank were preferences.

On the other hand, in *Re Multi-Tech Services (in liq); Heard v Commonwealth Trading Bank of Australasia*[134] an application to join a guarantor as co-defendant succeeded because the decision as to whether payments to a bank were to be set aside as preferences would affect the debtor's liability to the bank as creditor and therefore the guarantor's liability on the guarantee.

It was sufficient justification to join an insurer as respondent to an appeal in *Finlay v Littler*[135] that they were statutorily liable to satisfy any judgment in favour of the plaintiff. The liability of third party insurers to satisfy judgments in favour of plaintiffs was also sufficient to join them as co-defendants in the two personal injury claims of *Bradvica v Radulovic*[136] and *Foxe v Brown*.[137]

Requirements for adding a party

[6.220] The procedure for the addition of a party in a claim or counterclaim is governed by r 9.07 which provides:

> **9.07 Procedure for addition of party**
>
> (1) A person shall not be added as a plaintiff without that person's consent signified in writing or in such other manner as the Court orders.
>
> (2) Unless the Court otherwise orders, an application by a person for an order adding the person as a party shall be supported by an affidavit showing the person's interest in the questions in the proceeding or the question to be determined as between that person and any party to the proceeding.
>
> (3) Without limiting Rule 9.06(b), where a person not a party to a proceeding for the recovery of land is in possession by himself or herself or by a tenant of the whole or any part of the land, the Court may order that the person be added as a defendant.

The addition of a party requires their written consent or that their consent be obtained in a manner ordered by the court.[138] Except by leave of the court a defendant cannot join an additional person as co-plaintiff to a counterclaim.

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134 *Re Multi-Tech Services Pty Ltd (in liq); Heard v Commonwealth Trading Bank of Australasia* (1982) 30 SASR 218.

135 *Finlay v Littler* [1992] 2 VR 181.

136 *Bradvica v Radulovic* [1975] VR 434.

137 *Foxe v Brown* (1984) 59 ALJR 186.

138 Rule 9.07(1). See also *Wootton v Joel* [1920] WN 28; *Greater Perth Real Estate Co Ltd v Johnson* (1930) 32 WALR 99; *IceTV v Ross* [2008] NSWSC 898.

Limitation periods

[6.230] A proceeding against an added or substituted defendant commences at a time designated under the rules. For the purposes of limitation periods the addition of a plaintiff does not relate back to the commencement of the proceeding.[139] The rules ensure that the addition or substitution of the party takes effect prospectively. The added or substituted defendant must be shown on the originating process. This requires the amendment of the originating process filed with the court. In accordance with r 9.11 the proceeding against the defendant who has been substituted or added to the process commences when the amendment is affected.[140] Joined plaintiffs are in this respect in the same position as joined defendants.

Defendants may not be added or substituted outside the limitation period. A person sought to be added beyond that period may raise limitation as a defence.[141] Nor will courts add defendants in defiance of a statutory bar on the cause of action.[142] The court in *Philip Morris Ltd v Bridge Shipping*[143] rejected a submission that it was vested with the power to do so under its general powers to give directions under r 1.1.

Intervention

[6.240] The court has jurisdiction to join a non-party interventer as a party to a proceeding solely on the basis, and within the scope, of the rules[144] governing the defendant's application to add a co-defendant.[145] In *Levy v Victoria*[146] Brennan CJ identified the source of the jurisdiction as the court's power to hear and determine a proceeding. Therefore, in exercising the jurisdiction the court must apply the principles of natural justice, such as ensuring that parties with a right to are heard, and that parties' rights are protected where they have not yet been heard. Non-parties may intervene where a judicial decision is likely to affect

139 *Cockerill v Westpac Banking Corporation* (1991) 32 FCR 36.

140 Or when the order adding the defendant is made, depending on the rules. See Vic r 9.11(3)(a); see also ACT r 242; FCR r 8.22 (originating application) and r 15.16 (cross-claim); NSW r 6.28; NT r 9.11; Qld r 74; Tas r 184; WA O 18 r 8.

141 *Ketteman v Hansel Properties Ltd* [1987] AC 189.

142 *Philip Morris Ltd v Bridge Shipping Pty Ltd* [1994] 2 VR 1 at 11–14. For adding a party outside the limitation period in Queensland see B Cairns, *Australian Civil Procedure* (10th ed, Thomson Reuters, 2014), [9.240].

143 *Philip Morris Ltd v Bridge Shipping Pty Ltd* [1994] 2 VR 1.

144 *Re Great Eastern Cleaning Services Pty Ltd* [1978] 2 NSWLR 278. The rules for joining parties provide the only source of jurisdiction for a non-party to intervene in a proceeding. For intervention in the Federal Court and South Australia see B Cairns, *Australian Civil Procedure* (10th ed, Thomson Reuters, 2014), [9.260].

145 *Corporate Affairs Commission v Bradley; Commonwealth (Intervener)* [1974] 1 NSWLR 391. There is no inherent power for the court to allow an intervener to become a party beyond the scope the rules laid out for defendants to be added.

146 *Levy v Victoria* (1997) 189 CLR 579 at 600–601.

their rights and interests. Such would be the case in a dispute involving a trust where a decision against a trustee would in turn bind the beneficiary.

Death or bankruptcy of parties

[6.250] Not all causes of action will survive the death of a party. Litigation does not cease even with the death of the plaintiff if the plaintiff is survived by the cause of action as a matter of substantive law. Otherwise litigation will cease. Under the rules of procedure the assignment, creation or devolution of an interest connected with the litigation does not halt proceedings.[147] Where the action survives the rules provide for the substitution of a living party for the deceased, or the reconstitution of the proceeding in a way made necessary by the party's death, or the assignment, creation or devolution of an interest.

A proceeding commenced with a joint co-plaintiff survives the plaintiff's death even if the cause of action is one that does not survive.[148] The litigation therefore does not abate. In the case of severally liable joint defendants the death of the joint defendant does not affect the continuation of the proceeding between survivors.[149] Again, the court reconstitutes proceedings between survivors. However, a proceeding constituted by one plaintiff or defendant abates upon the death of a party unless it is able to be reconstituted.[150]

Upon any party becoming bankrupt their proprietary rights and obligations, including their involvement in legal proceedings, vests in the trustee in bankruptcy. The trustee in bankruptcy may continue or discontinue most proceedings, which are stayed until the trustee decides.[151] However, bankruptcy does not impede proceedings for personal injuries suffered by the bankrupt or a member of their family. A jointly liable bankrupt does not have to be joined by a plaintiff as a party to the proceeding.[152] If during the period of bankruptcy the bankrupt acquires a cause of action only the trustee may initiate proceedings by means of intervention. If the only defendant becomes bankrupt the plaintiff cannot continue the action without the court's leave.[153]

Assignment or devolution of an interest

[6.260] The assignment, creation or devolution of an interest in property involved in the proceeding does not abate the proceeding. The

147 Vic r 9.09; see also ACT r 231; FCR r 9.09; NSW r 6.30; NT r 9.09; Qld r 72; SA r 76; Tas r 182; WA O 18 r 7.

148 *Re Shephard; Atkins v Shephard* (1889) 43 Ch D 131.

149 *Ex Parte Welsh* (1878) 4 VLR (L) 52.

150 *Eldridge v Burgess* (1878) 7 Ch D 411.

151 Under the *Bankruptcy Act 1966* (Cth), s 60.

152 *Bankruptcy Act 1966* (Cth), s 62.

153 *Bankruptcy Act 1966* (Cth), s 58.

assignee is simply joined as a party. In *Robinson v Unicos Property Corporation*[154] the defendant's failure to assign a lease agreement concluded between plaintiff and defendant to a third party to whom the defendant had sold a commercial development project resulted in lost profits to the plaintiffs. The plaintiff had entered the contract as partners in a real estate agency subsequent to which, but prior to the instigation of proceedings, one partner died and was replaced by another in the firm. The plaintiff successfully applied for the new partner to be joined to the proceedings as a person to whom the benefit of the contract had been assigned by changes in the partnership, and whose interests in the subject matter of the proceeding would be affected.

Removing a party

[6.270] The court may remove a party if the party was improperly or unnecessarily joined, or is no longer a necessary or proper party.[155]

REPRESENTATIVE PROCEEDINGS

[6.280] Representative proceedings are frequently the most practical course to take for large numbers of persons with the same interest. A plaintiff or a defendant may represent parties with the same interest where there are too many parties to proceed individually.

In Victoria r 18.02 provides:[156]

> **18.02 Proceeding by or against representative**
>
> A proceeding may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more persons having the same interest as representing some or all of them.

To properly constitute representative proceedings the jurisdictional threshold must be overcome, namely, that persons have the same interest in the proceeding.

However, the rules provide that the courts have discretion to order that proceedings commenced on a representative basis continue on another basis.[157]

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154 *Robinson v Unicos Property Corporation Ltd* [1962] 1 WLR 520.

155 Vic r 9.06; see also ACT r 230; FCR r 9.08; NSW r 6.29; NT r 9.06; Qld r 69; SA r 74; Tas r 184; WA O 18 r 6.

156 See also ACT r 266; FCR r 9.21; NT r 18.02; Qld r 75; SA r 80; Tas r 335; WA O 18 r 12.

157 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at 408 per Gleeson CJ, 447 per Kirby J. A representative proceeding in this form does not apply in New South Wales.

Discovery to identify class members

[6.290] The representative plaintiff may make application for the discovery of the defendant in order to ascertain the identity of the members of the class on whose behalf the proceeding is brought.[158]

Unity of interests

[6.300] Representative proceedings only meet the jurisdictional threshold when numerous persons have the same interest. The requirement that represented persons have a unity of interest both among themselves, and with the representative party, is essential.[159] Lord Macnaghten in *Duke of Bedford v Ellis* stated the necessary conditions of unity.[160] First, the parties must have a common interest; secondly, they must have a common grievance; and thirdly, all represented parties must benefit from the remedy sought.[161]

In *Marks & Co v Knight Steamship Co*[162] cargo owners were held not to have a common interest as shippers when a ship carrying their cargo was sunk by a Russian naval vessel because, although the same wrongful action caused their common complaint, they were shippers to diverse destinations, making it necessary to examine each of their claims separately. The shippers failed to show that they had a common interest.

In *Smith v Cardiff Corporation*[163] the defendant proposed rent increases which varied in accordance with tenants' finances. The tenants' representative action seeking an injunction and a declaration that the proposal was *ultra vires* was dismissed on the reasoning that the tenants had diverse, not common, interests, and not all would benefit by the relief sought. While the lower-income tenants would have an interest in upholding the scheme those on a higher income would oppose it.

Nor could a common interest be identified in *Minister for Industrial Development (Qld) v Taubenfeld*,[164] a case involving protestors in occupation

158 See *Fostif Pty Ltd v Campbells Cash and Carry Pty Ltd* (2005) 63 NSWLR 203.

159 *Duke of Bedford v Ellis* [1901] AC 1 at 8 per Lord Macnaghten. In allowing representation the rules follow the rules adopted in Chancery before the *Judicature Act 1873* (UK) ("the Judicature Act"). Usually the court requires the presence of all parties who have an interest in the proceeding. If they are too numerous the practice is relaxed. It has been said that the practice of requiring the presence of all interested parties was originally a rule of convenience. As such it could be relaxed for the sake of convenience. This is still very much the rationale of the rule.

160 *Duke of Bedford v Ellis* [1901] AC 1 at 8; see also *Prudential Assurance Company Ltd v Newman Industries Ltd* [1981] Ch 229 at 244–255; *Clark v University of Melbourne* [1978] VR 457 at 475–479; *Amos Removals and Storage Pty Ltd v Small* [1981] 2 NSWLR 525; *Marino v Esanda Ltd* [1986] VR 735.

161 *Smith v Cardiff Corporation* [1954] 1 QB 210.

162 *Marks & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021.

163 *Smith v Cardiff Corporation* [1954] 1 QB 210.

164 *Minister for Industrial Development (Qld) v Taubenfeld* [2003] 2 Qd R 655.

of an industrial site. The defendant was sued in his representative capacity as representing "all protestors in occupation". The court found that the groups comprising the protestors had fluctuating memberships, defeating the possibility of commonality.[165]

The decision in John v Rees

[6.310] In *John v Rees*[166] the defendant argued that representative proceedings were not appropriate in circumstances where the plaintiff sued a faction of the British Labour Party personally, and as representing the members of the party branch minus the defendants, in a dispute over the control of common property and the election of branch officers. The court held that the plaintiff justifiably constituted the proceedings. The represented parties had a common interest in the subject matter of the dispute — the party branch's assets and administration — and in having the dispute determined. In all the circumstances the final and effective resolution of all the matters in dispute in the proceeding would best be achieved by a representative proceeding. Branch members who did not wish to be represented as plaintiffs could become defendants, and the defendants would put their case at the hearing.

The court in *John v Rees* gives wide scope for the operation of representative proceedings to ventilate all issues that exist between represented persons of divergent views. The decision appears not to apply the criteria in *Duke of Bedford v Ellis*[167] requiring the represented parties to have common interests and grievances. It constitutes representative proceedings despite the represented parties' interests not converging.[168]

The common interest requirement was interpreted broadly by the High Court in *Carnie v Esanda Finance Corporation*.[169] The plaintiff appellants were farmers and borrowers from Esanda Finance Corporation Ltd in a loan agreement governed by the *Credit Act 1984* (NSW). They sought to constitute representative proceedings on behalf of themselves and all other borrowers who had executed variation agreements extending time for repayments, entered into when the plaintiffs fell behind in their repayments. The *Credit Act 1984* required the defendant to disclose credit charges, which they failed to do. The plaintiffs sought all parties who had entered similar agreements with the defendant, and claimed relief for all

165 *Minister for Industrial Development (Qld) v Taubenfeld* [2003] 2 Qd R 655 at 659–660 per Mackenzie J.

166 *John v Rees* [1970] Ch 345.

167 *Duke of Bedford v Ellis* [1901] AC 1.

168 *Cameron v Hogan* (1934) 51 CLR 358. The contrary argument is that those bodies have no legal existence and the relationship between them and their members cannot give rise to legally enforceable rights.

169 *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398.

represented persons by way of a declaration that the variation agreements breached the *Credit Act 1984* and were void, and that the parties were not liable for credit charges.

The defendant's challenge to the plaintiffs' representative action was dismissed by the High Court, which found the representative proceedings appropriate in the circumstances. Although the borrowers all contracted separately with the defendant, and had different causes of action against the defendant, their interest in determining the validity of the variation agreement under the *Credit Act 1984* was the same interest. Even if the represented parties have different causes of action against the defendant they will have the same interest where they have a common interest in a substantial question of law or fact in dispute.[170] The common interest consideration continues to limit the scope of representative proceedings.

In *Trustees of The Roman Catholic Church v Ellis*[171] Mason P questioned whether the existence of a common interest in a question of law or fact amongst the represented parties was the basis for constituting representative proceedings. His Honour maintained that to properly constitute representative proceedings represented defendants were absolutely required to have identical defences if they were to be said to have a common interest,[172] and that different defences suggested the lack of such an interest.

Under the rules, the commencement of representative proceedings requires "numerous persons" to have the same interest in the proceeding. The High Court in *Campbells Cash and Carry v Fostif* determined this to mean that the numerous persons must constitute a class, and that proceedings may only commence when that class is ascertained, or if it is ascertainable.[173] In that case a tobacco wholesaler sold tobacco to retailers at a price inclusive of State taxes which it collected and, from time to time, remitted to taxation authorities. When the State tax was declared an unlawful excise by the High Court a retailer commenced a representative proceeding to recoup any collected but unremitted tax payments from the wholesaler.

The plaintiff commenced the representative action, issuing a writ naming himself and referring to numerous unnamed persons as plaintiffs in the matter. Those persons were retailers who had completed and returned opt-in forms to the plaintiff's solicitor and were to be identified subsequent to the commencement of proceedings. The question before the

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170 *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398 at 427. McHugh J expressed the idea of a common interest most usefully when he said that the plaintiff and represented persons have the same interest when they have a community of interest in the determination of any substantial question of law or fact.

171 *Trustees of The Roman Catholic Church v Ellis* (2007) 70 NSWLR 565.

172 *Trustees of The Roman Catholic Church v Ellis* (2007) 70 NSWLR 565 at [73]–[74].

173 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at 421, 423 per Gummow, Hayne and Crennan JJ, 472 per Callinan and Heydon JJ.

High Court was whether the procedure adopted by the plaintiff conformed to the rules requiring numerous persons to have the same interest in the proceeding. The High Court held that this question could only be answered by considering the circumstances that pertained in any particular case.[174] Considering the procedure adopted by the representative plaintiff, whereby opt-in notices were inspected only after proceedings had been initiated, the High Court held that, while there was no general requirement for each member of the class to be identified and their consent granted, no class of persons having the same interest in the proceeding existed at the commencement of the proceeding and therefore the plaintiff had not commenced a representative proceeding.[175] It is therefore established that representative proceedings can only be commenced once the class of persons with a common cause of action is precisely known.[176]

Representation orders

[6.320] In representative proceedings involving a class of plaintiffs or defendants it is imperative to ensure representation of all the interests in the dispute. Persons who may be affected by a judgment are only bound by it when brought before the court in properly constituted proceedings. A plaintiff does not require a formal representation order from a court to sue as a representative plaintiff,[177] or to sue the defendant as a representative defendant.[178] However, in a proceeding against a representative defendant without a representation order made under the rules, the judgment is effective only against the defendant named on the record of proceedings. Other parties are not bound by the judgment.

Unincorporated associations

[6.330] Representative proceedings against unincorporated associations face several strategic obstacles. First, the voluntary nature of the association between the members constitutes these associations, such that the association does not in itself possess a legal identity which either enters a relationship with its members, or can sue and be sued. Any issue that a member may have with the association is therefore non-justiciable. Such was the High Court's determination in *Cameron v Hogan*[179] where it

174 *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at 421.

175 *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at 423. The position in *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398 was different. There the class was identifiable when the proceeding commenced. The borrowers were not asked to opt in and be individually bound by the proceeding. The class consisted of the borrowers who signed variation credit agreements.

176 *Barker v Allanson* [1937] 1 KB 463 at 473. This is reinforced by the consideration that judgment against a representative is judgment against the whole class included in the representation.

177 *Templeton (Registrar of Titles (Vic)) v Leviathan Pty Ltd* (1921) 30 CLR 34.

178 *Trustees, Executors and Agency Co Ltd v Urquhart* (1896) 21 VLR 713.

179 *Cameron v Hogan* (1934) 51 CLR 358. See also *Tydeman v Roberts* [1985] 2 Qd R 144.

held that a member of a political party could not seek an injunction and damages against executive officers as representative defendants of the party.

A second challenge faced by potential plaintiffs is that proceedings must be constituted so as to reflect the fact that the association is a joint contract between all of its members, who are therefore also jointly liable. The plaintiff's joint contract of association with all other association members requires him or her to represent all members in the proceeding. The same joint contract makes all members jointly liable so that the representative plaintiff will also be a represented defendant in the proceeding.

In *Banfield v Wells-Eicke*[180] three members of the unincorporated association that was the St Kilda Cricket Club initiated representative proceedings against the St Kilda Football Club (also an unincorporated association) seeking an injunction to prevent it breaching an agreement to play its home games at the cricket club's ground. The court held that the cricket club members could not have a common interest and ordered the writ set aside. Plaintiffs who sue as representatives of an unincorporated association must have the same interest. However, the members of the association on whose behalf the plaintiffs sued could not have the same interest when membership of the association altered after the date of the execution of the contract.

In *Carlton Cricket and Football Social Club v Joseph*[181] the plaintiff sought an injunction to prevent the defendant unincorporated association — the Fitzroy Football Club — breaching a contract to play some of its games at the plaintiff's ground. Representative proceedings require the defendant to have a common interest. The court held there was no agreement between the parties that could be breached since the plaintiff had entered a purported contract with the members of the defendant, one which was subject to periodic fluctuation and therefore lacked the common interest necessary to found representative proceedings.[182]

It is possible to initiate representative proceedings in tort against unincorporated associations as long as each member's common participation in, and individual liability for, the tort can be demonstrated. In *Trustees of The Roman Catholic Church v Ellis*[183] the plaintiff sued the Roman Catholic Church alleging that he had been molested by a parish priest as a child. The plaintiff joined the Archbishop of Sydney as representative co-defendant. The court held that the Archbishop as an individual member of the Church, and all other members, lacked the necessary common interest that would connect them to the substance of the complaint. Neither the Archbishop nor Church members had participated in, controlled, or were responsible for the priest's offences.

180 *Banfield v Wells-Eicke* [1970] VR 481.

181 *Carlton Cricket and Football Social Club v Joseph* [1970] VR 487.

182 See also *Amey v Fifer* [1971] 1 NSWLR 685; *Roche v Sherrington* [1982] 1 WLR 599.

183 *Trustees of The Roman Catholic Church v Ellis* (2007) 70 NSWLR 565 at 579–586.

The lack of individual connection to the subject matter of the complaint undermined the Archbishop's capacity as a representative defendant representing the Church members.

In contrast, the 800 members of a union were able to be represented by the representative defendant union management committee since all had participated in tortious industrial action ordered by the union. The union members therefore constituted a class with a common interest by virtue of their individual actions connecting them to the tort.[184]

Interests of classes under instruments

[6.340] Rule 16.01 provides that in certain proceedings involving estates, trusts, or the construction of instruments (including statutes), the court may appoint a representative person or persons where the class is not, or is not readily, ascertainable, or the person constituting the class cannot be found, or if the class can be ascertained and its members found, if it appears to the court in all the circumstances of the case, including the size of the estate, or the holdings of the trust, the complexity of the issue, and the expense involved in ascertaining or finding the class members, that a representative should be appointed.[185]

Trustees, executors and administrators

[6.350] The personal representatives of trust and estates may sue and be sued, but where the entity is not represented it may not bring proceedings. An intestate estate, for example, may only initiate proceedings after letters of administration have been granted. Otherwise a proceeding is improperly constituted and it will be struck out.[186] Where a will exists the executor may sue or be sued before probate is granted.[187] In actions involving trusts or estates it is not necessary to join the respective beneficiaries as separate parties because their interests are sufficiently represented by the trustee or representative.[188] As long as the interests of the respective beneficiaries are not adverse to the interests of the trustee, executor or administrator they are represented by the trustee, executor or administrator. This does not preclude beneficiaries being joined as parties in their own right if so ordered by the court, such as where the proceeding involves a conflict of interest between beneficiary and trustee,[189] or could adversely affect the interest of a beneficiary.[190] If a

184 *Amos Removals and Storage Pty Ltd v Small* [1981] 2 NSWLR 525.

185 Vic r 16.01; see also ACT r 259; FCR r 9.23; NSW r 7.6; NT r 16.01; SA r 84; Tas r 303; WA O 18 r 13. Queensland does not have a corresponding rule.

186 *Minister for Interior v RT Co Pty Ltd* (1962) 107 CLR 1.

187 *Nagel v Hough* (1927) 27 SR (NSW) 418; *Meyappa Chetty v Supramanian Chetty* [1916] 1 AC 603.

188 *Cardigan v Curzon Howe* [1901] 2 Ch 479.

189 *Re Smith; Ex parte London & North Western Railway Co and Midland Railway Co* (1888) 40 Ch D 386; *May v Newton* (1887) 34 Ch D 347; *Watters v May Bros Ltd* [1932] SASR 418; *Government Insurance Office v Johnson* [1981] 2 NSWLR 617.

beneficiary wishes to challenge a transaction entered into by a trustee the beneficiary may take action in their name for restoration of the trust.[191]

CLASS ACTIONS

[6.360] The legislation creating group proceedings in Australia at the federal level is Pt IVA of the *Federal Court of Australia Act 1976* (Cth) which was enacted in 1992. Class actions in Victoria are governed by Pt 4A of the *Supreme Court Act 1986* (Vic).[192] The objectives of the federal legislation were to "enhance access to justice, reduce the costs of proceedings and promote efficiency in the use of court resources".[193] Under the federal legislation class actions must comply with requirements for commencing proceedings,[194] requirements governing pleadings,[195] and requirements for discontinuing actions.[196]

Section 33C is the strict threshold for the commencement of class actions.[197] Section 33C provides:

> (1) Subject to this Part, where:
>
> (a) seven or more persons have claims against the same person; and
>
> (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
>
> (c) the claims of all those persons give rise to a substantial common issue of law or fact a proceeding may be commenced by one or more of those persons as representing some or all of them.

The threshold requirement is met and a class action is properly constituted when the plaintiff in the originating process demonstrates that seven or more claimants have claims arising out of the same, similar or related circumstances against the same respondent, those circumstances giving rise to substantially the same common issue of law or fact. The requirement that claims must be against the same person requires each applicant and all members of the group to have a claim against all respondents. Each claimant must seek the same relief, in the sense that

190 *James v Gard* (1887) 13 VLR 908 at 912.

191 *Re De Leeuw; Jakens v Central Advance Discount Corporation Ltd* [1922] 2 Ch 540.

192 See also *Federal Court of Australia Act 1976* (Cth), Pt IVA and *Civil Procedure Act 2005* (NSW), Pt 10. A class action cannot be taken in the Federal Court if the court has jurisdiction solely under the cross-vesting laws: *Federal Court of Australia Act 1976*, s 33G.

193 Second reading speech.

194 *Federal Court of Australia Act 1976* (Cth), s 33C.

195 *Federal Court of Australia Act 1976* (Cth), s 33H.

196 *Federal Court of Australia Act 1976* (Cth), s 33N.

197 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 266; *Hunter Valley Community Investments Pty Ltd v Bell* (2001) 46 ATR 375.

each claim is for, or includes, the same relief; however, it is immaterial that in a damages claim individual damages assessments may ultimately be required.[198]

Both the requirement that claims arise out of the "same, similar or related circumstances", and that they involve a "substantial common issue of law or fact", have been interpreted liberally. What is required is that the circumstances of the separate acts are at least related. The claims are not required to be identical, nor are they required to ultimately succeed, nor need the applicant or group members seek the same relief. A group proceeding may be initiated with respect to separate contracts or transactions, or other acts or omissions, between the individual claimants and the defendant or defendants.

The court may make any order for the conduct of a group proceeding that is appropriate or necessary to ensure that justice is done, but the group procedure does not confer any new jurisdiction.[199]

Common interest

[6.370] Section 33C(1)[200] of the *Federal Court of Australia Act 1976* (Cth) provides that members of a proposed group must demonstrate that they have claims arising out of "the same, similar, or related circumstances" which give rise to a common question of law or fact. In *Zhang v Minister for Immigration, Local Government and Ethnic Affairs*[201] French J held that the common interest that would properly constitute a group proceeding required the circumstances of each claimant to be related in the sense that they were either the same, similar or related circumstances. His Honour considered the words "same", "similar" and "related" in the Act to indicate a progressively greater distance between the claimant's circumstances until, when it could not be said that the circumstances were "related", they were too remote to found group proceedings. The threshold for eligibility for membership in a group is therefore that claims arise from related circumstances. In the instant case French J found that the Minister denying a group of refugee claimants an oral hearing prior to making a decision a sufficient connection between them to found a representative proceeding claiming they had been denied natural justice.

In *Finance Sector Union of Australia v Commonwealth Bank of Australia*[202] the group consisted of the respondent and 71 employees. The respondent

198 *Supreme Court Act 1986* (Vic), s 33C.

199 At least this is true of the Federal Court. Federal Court jurisdiction is conferred by other statutes. The representative proceeding machinery only creates new procedures and gives the court new powers for exercising jurisdiction: *Poignand v NZI Securities Australia Ltd* (1992) 37 FCR 363 at 363; *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 258; *Glass v New South Wales* (1994) 52 FCR 336.

200 *Supreme Court Act 1986* (Vic), s 33C(1).

201 *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384 at 404–405.

202 *Finance Sector Union of Australia v Commonwealth Bank of Australia* (1999) 94 FCR 179.

alleged breaches of an industrial award, and breaches of contracts of employment. The Full Federal Court recognised that a proceeding may be grouped if the claims are in respect of or arise out of the same, similar, or related circumstances. The court held that the threshold for group proceedings is not missed simply because some of the issues in the proceedings are not common to all the members of the group. Group members need not be seeking the same relief for a group proceeding to be properly constituted.[203]

Only the circumstances of each individual case will reveal whether the particular case has the required degree of commonality of issues or law or fact for the parties to proceed as a group. In the Federal Court proceeding, Spender J found issues which were not common as between the parties, and issues of reliance properly confined to individual group members. The High Court recognised that when the group members' interests were sufficiently diverse the group members may be ordered to proceed individually.[204] However, it held that in this case all the claims were based on the accuracy of the representations as to the resale value and profitability of the land, the vendor's compliance with any statutory requirements, and answers to other associated questions.

Requirement of "substantial common issue"

[6.380] Compliance of the pleadings in class actions with s 33H of the legislation requires them, in addition to complying with all the usual requirements for pleadings, to describe the group, and specify the common questions between them. One of the low statutory thresholds for commencing proceedings is the identification of a substantial common issue of law or fact.[205] The requirement that proceedings involve a common issue of fact or law requires that the factual and legal issues between the parties are not discrete,[206] nor merely historical in nature. However, it is "not necessary to show that litigation of the common issue would be likely to resolve wholly, or to any significant degree, the claims of all the group members."[207]

The requirement that the issue be substantial is met if it is "real or of substance" and not merely trivial.[208] The High Court's liberal approach is

203 *Supreme Court Act 1986* (Vic), s 33C(2)(a)(iv).

204 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 267–268.

205 *Supreme Court Act 1986* (Vic), s 33C.

206 *Soverina Pty Ltd v Natwest Australia Bank Ltd* (1993) 40 FCR 452.

207 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 268, adopting the view of Foster J (dissenting) in the decision of the Full Court of the Federal Court in *Silkfield Pty Ltd v Wong* (1998) 90 FCR 152 at [23], [30]; see also Sackville J in *Hunter Valley Community Investments Pty Ltd v Bell* (2001) 46 ATR 375 at [59]–[60].

208 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 267.

consistent with earlier authorities.[209] That is to say the issue may be a real or substantial legal issue regardless of the size, significance or consequences of the litigation.[210] The High Court considered the purpose of Pt IVA of the *Federal Court of Australia Act 1976* (Cth) in the context of preceding representative action regimes and concluded that this approach was consistent with the purpose of the enactment of Pt IVA, which created the new representative proceedings to enhance, not restrict, access to justice.[211] The approach was suitable in *Wong v Silkfield*[212] where the defendant vendors allegedly made misleading statements to numerous, individual purchasers of home units.

The proceeding was properly commenced as a group proceeding because the alleged misleading nature of the statement was a substantial issue. The decision in *Wong v Silkfield* means Australian courts have adopted a liberal approach giving "substantial" a wide meaning. Substantiality does not require the issue in common between the represented parties to be the central, or even a major, issue in the proceedings. It merely requires the issue not to be trivial or superficial.

The court further considered whether it was necessary to show at the commencement of a group proceeding that the common issue would provide the basis for the resolution of all represented parties' claims.[213] It held that it was sufficient for proceedings to be grouped that the allegation of misleading representation was common between the parties, even if the misleading statement did not provide a basis for final relief for all group members.

It is possible, under s 33N, for properly constituted group proceedings to be discontinued as group proceedings because subsequent developments indicate that separate proceedings are appropriate.[214] However, s 33C(1) and s 33N are considered at different stages of the litigation. Section 33C(1) is considered at the commencement of proceedings, while s 33N is only applicable at a later stage, such as after the close of pleadings. It is not

209 See *Johnson Tiles Pty Ltd v Esso Australia Ltd (No 2)* [1999] ATPR 41-698 (FC); *Wong v Silkfield* [1998] ATPR 41-613 per Spender J; *Milfull v Terranora Lakes Country Club Ltd* [1998] ATPR 41-642 per Keifel J; *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd* (1998) 84 FCR 512; *Schanka v Employment National (Administration) Pty Ltd* (1998) 86 IR 283; *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] ATPR 41-679 per Merkel J; *Ryan v Great Lakes Council* (1999) 102 LGERA 123; *Jonsandi Transport Pty Ltd v Paccar Australia Pty Ltd (No 2)* [1999] FCA 1788 at [7]. As to the narrower view not adopted by the High Court, see *Connell v Nevada Financial Group Pty Ltd* (1996) 139 ALR 723; *Silkfield Pty Ltd v Wong* (1998) 90 FCR 152.

210 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255.

211 "Clearly this group procedure is not intended to narrow access beyond the restrictions on the traditional representative proceeding involving numerous parties under consideration in *Carnie v Esanda Finance*": *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 267–268.

212 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255.

213 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 268.

214 *Supreme Court Act 1986* (Vic), s 33N.

appropriate to consider how a case might develop when deciding whether the conditions for commencing group proceedings have been met.[215]

To meet the requirements of s 33C(1) the common question must be apparent from the applicant's pleadings and other documents wherein the group's claims are made. They cannot be conjectural, hypothetical or potential claims which may or may not be pleaded.[216] However, it is not relevant to an assessment of whether the common question has been made out for the purposes of s 33C(1) to consider if the issues raised at the commencement of proceedings "will remain at the close of pleadings, and whether the evidence which will be led in each case might differ in some respects".[217]

"[A]s representing some or all of them"

[6.390] Section 33C(1)(c) provides that if

> (c) the claims of all those persons give rise to a substantial common issue of law or fact a proceeding may be commenced by one or more of those persons as representing some or all of them.

Section 33C(1) does not expressly permit the representative party to commence a proceeding on behalf of less than all of the potential members of the group. The Full Federal Court in *Multiplex* held that the words "as representing some or all of them" in s 33C(1) permitted a representative party to commence a proceeding on behalf of less than all of the potential members of the group.[218] The Full Federal Court in *Philip Morris* and *Bray* interpreted the section strictly as requiring that each applicant must have a claim against all respondents.[219] The court in *Philip Morris* opined that "[a] statement of claim that … does not plead claims on behalf of all applicants and group members against all respondents"

215 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275 at 277–278 per Lindgren J, 289–294 per Jacobsen J.

216 *Hunter Valley Community Investments Pty Ltd v Bell* (2001) 46 ATR 375 at [65].

217 *Bright v Femcare Ltd* (2002) 195 ALR 574 at [126] per Kiefel J (Lindgren and Finkelstein JJ concurring). There were not sufficient common questions in *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487 but the decision may be regarded as turning on the particular pleadings in that case. See, for comparison, the decision in *Nixon v Philip Morris (Australia) Ltd* (1999) 95 FCR 453; *King v GIO Australia Holdings Ltd* (2000) 100 FCR 209 at [51]; *Bright v Femcare Ltd* (2001) 188 ALR 633.

218 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275 at [10], [11], [74], [110].

219 *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487 at [126] ("s 33C(1)(a) requires every applicant and represented party to have a claim against the one respondent or, if there is more than one, against all respondents"), [128] ("the pleading must make claims on behalf of the applicant and each member of the represented class against the same respondent or, if more than one, against all respondents. It is not permissible in a representative proceeding to plead a claim on behalf of some group members against one respondent and a separate claim on behalf of other group members against another respondent."), [141]; *Bray v F Hoffmann-La Roche Ltd* (2003) 130 FCR 317 at [246]–[248].

suffers from a "fatal deficiency".[220] The court in *Bray* felt bound by the rules of statutory construction to adopt a strict textualist approach. It did, however, recognise that its interpretation failed to promote the purpose of the legislation: providing access to justice to people who would otherwise be prevented from litigating for social and economic reasons, and avoiding multiple proceedings.[221] Nevertheless, litigation may have to be structured so that different representative parties become involved for the purpose of representing different groups of plaintiffs.

Whether the words "some or all" in s 33C(1)(c) may be interpreted to mean that different representative parties may represent different group members without either or any representative party representing all of the group awaits authoritative adjudication, but it would not be inconsistent with *Multiplex*, *Philip Morris* or *Bray*, nor does there appear to be any reason why, as a matter of logic, they may not. Part IVA of the *Federal Court of Australia Act 1976* (Cth) provides that seven or more parties may be represented when their claims are connected by related circumstances even when the claims arise from different transactions, agreements, acts or omissions, and when the parties seek different remedies. Claims relating to only some group members may therefore be dealt with by subgroups.

This approach is warranted because related circumstances may, and frequently do, affect a number of parties, and give rise to different breaches requiring different remedies. Breaches of implied terms under ss 54 and 55 of the *Australian Consumer Law* often involve misleading and deceptive conduct and therefore accompany breaches of s 18. Because a representative party is required to have sufficient interest in the claim to bring a proceeding on their own behalf a representative with a claim for misleading and deceptive conduct, but with an interest in the contract, would not have standing to represent all parties. Further, parties may seek different remedies and therefore seek to be represented by a different party. For example, where misleading and deceptive conduct has caused damage parties may claim for their losses, whereas parties who foresee possible future damage may seek injunctive relief.

In Victoria, class actions may be brought in damages claims but not in relation to the administration of a deceased estate, or to property held in trust.[222] The restrictions imposed on representative actions do not apply to class actions. Representative proceedings commenced under O 18 may not be reconstituted as group proceedings.[223] The proceedings are of different types, are categorically different, and operate under different

220 *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487 at [160].

221 *Bray v F Hoffmann-La Roche Ltd* (2003) 130 FCR 317 at [248].

222 They may also be brought in the Federal Court, New South Wales, and South Australia and take a common form in each jurisdiction.

223 *Supreme Court Act 1986* (Vic), s 33B.

conditions.[224] However, the Act does not appear to prevent the court from making an order that a proceeding commenced as an individual proceeding continue as a group proceeding.[225] A proceeding which was not commenced as a representative proceeding can, by amending the pleadings, be transformed into one.[226] This is because s 33C only applies once the proceeding is commenced or constituted as a representative proceeding.

What constitutes a class or group

[6.400] Section 33C is not to be narrowly construed.[227] A litigant who complies with the three commencement criteria may bring a proceeding on behalf of "all or some" of the claimants. The motives that may lie behind the manner in which the litigant constitutes proceedings have no bearing on whether proceedings have been validly constituted. The manner in which the group is defined is at the representative plaintiff's discretion, and extends to defining the group so that only some claims are included, and others are not, while only some claimants are represented, and others are not.

Because proceedings need not be brought on behalf of every person whose claim satisfies the three commencement prerequisites, plaintiffs have discretion to exclude certain potential claimants from proceedings. The selection criteria for group membership may be unrelated to the nature of the claims, and may be based on other considerations such as place of residence, age or gender, provided the selection did not constitute an abuse of process. In *Multiplex Funds Management v P Dawson Nominees*[228] an investor alleged that the representations made by the appellant about the profitability of its business were misleading and caused investors losses. The investor sued personally, and brought a group proceeding. The representative plaintiff defined the group using three criteria, including requiring plaintiffs to have entered into a litigation funding agreement with an identified litigation funder. That limiting condition on group membership did not prevent proceedings complying with statutory requirements for constituting a valid group.[229]

Although it is not necessary under s 33H to name or specify the number of class members, the representative plaintiff is required to identify the

224 As the High Court noted in *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398, a traditional representative action is not a class action.

225 *Finance Sector Union of Australia v Commonwealth Bank of Australia* (1999) 89 FCR 417.

226 *Finance Sector Union of Australia v Commonwealth Bank of Australia* (1999) 89 FCR 417 per O'Connor J; applied in *Sreika v Cardinal Financial Securities Ltd* [2000] FCA 1647 at [11].

227 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275 at [4]–[5] per Lindgren J, [93] per Jacobsen J (French J concurring).

228 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275.

229 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275 at 278–279, 282 per Lindgren J, 291 per Jacobson J.

class members, or provide a description that is sufficiently clear so as to enable persons to determine whether they are the class members to whom the proceeding relates.

By s 33K, the class representative may apply, and the court may grant leave, to alter the description of the group by amending the originating process. Affected persons excluded from the group may initiate independent proceedings. Parties may also opt out if they decide against being a member of the group.[230]

Narrowing the class

[6.410] Because consent is not required for a person to be a group member[231] they will be group members by definition unless they opt out.[232] Opting-out mechanisms enable parties to identify those not who are not parties to a proceeding — they do not disclose those who are members of the class of litigants. In practice, representative litigants may choose to exclude potential claimants from the class for strategic reasons. For example, although the size of the group of affected individuals may be large, an action may be brought by constituting a smaller group enabling affected individuals to recover their losses without assuming the burdens, costs and risks associated with representing a much larger group of similarly affected individuals.

Difficulties in conducting proceedings may in particular be encountered if each group member is required to prove their entitlement to relief, or the cause of action requires each member to satisfy the elements constitutive of the action individually. For example, misleading and deceptive conduct requires that each member establish their reliance on the misleading representation. Similarly, establishing liability for personal injury and product liability torts requires causation to be proved in each individual case. In such cases actions restricted to a smaller number of claimants encounter fewer difficulties of proof and quantification of losses, and are easier, and less costly, to conduct, and settle, than claims for a larger membership.

The number of potential claimants may be narrowed either by exclusion, or by distinction. If narrowed by exclusion the class of claimants is first described as consisting of all potential claimants, from which certain classes of claimants are excluded. If narrowed by distinction, the represented group is described as a specific category within a much larger class of persons affected by the respondent's conduct. The first approach

230 *Supreme Court Act 1986* (Vic), s 33J.

231 *Federal Court of Australia Act 1976* (Cth), s 33E(1), subject to the limited exception in s 33E(2).

232 *Federal Court of Australia Act 1976* (Cth), s 33J provides a process for group members to opt out of the proceeding.

was taken in the Federal Court proceeding of *Gold Coast City Council v Pioneer Concrete (Qld)*.[233] The representative class was said to comprise:

> all persons (natural or corporate) who directly or indirectly acquired for value pre-mix concrete ("product") originally manufactured and/or supplied by one or more of the respondents in the geographical area encompassed by the present territorial unit of the local government of the Council for the City of The Gold Coast (the "market") between the period from June 1989 to July 1994 inclusive (the "cartel period") but excluding:
>
> (a) persons who have acquired concrete from an end consumer solely by reason of the acquisition of land on which a concrete structure had, prior to such acquisition, been erected; and
>
> (b) persons who acquired quantities of product totalling in aggregate less than 1,000 cubic meters during the period from June 1989 to July 1994 inclusive; and
>
> (c) persons who were able to pass on to other customers in the chain of commerce all product costs incurred.[234]

The case was subsequently discontinued as a class proceeding on the basis of the court's finding that the class representative had not been able to establish the existence of at least seven class members who were interested in recovering losses, suffered as a result of the defendant's conduct, by means of a class action.

The second approach is illustrated in the case of *Bray v F Hoffmann-La Roche*.[235] The plaintiff alleged international price fixing and market sharing in relation to vitamin products manufactured and sold by the respondents or their subsidiaries. Bray sought damages on behalf, and represented the class, of

> persons who between 5 March 1992 and 5 July 1999 purchased in Australia all or some of vitamins A, B1, B2, B5 (Pantothenic Acid), B6, B9 (folic acid), B12, C, E, Beta Carotene, Canthaxanthin, Astaxanthin … either directly or indirectly by way of the purchase of foods, beverages, vitamin pills or capsules or other products which contained one or more class vitamins supplied by one or more of the respondents.[236]

The plaintiff subsequent to the commencement of proceedings amended the statement of claim in part to more narrowly define the group members as the

> manufacturers, distributors and suppliers of those vitamins or pre-mix or other health or nutrition products or food which contain the vitamins, and producers of livestock who purchased stock feed containing vitamins, provided those group members expended at least $2,000 in respect of the relevant products.[237]

The amendments were not questioned by the court in either case, and were indeed actively encouraged in *Bray v F Hoffmann-La Roche* even

233 *Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd* (1998) 99 LGERA 263.

234 *Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd* (1998) 99 LGERA 263 at 265.

235 *Bray v F Hoffmann-La Roche Ltd* [2003] FCAFC 153.

236 *Bray v F Hoffmann-La Roche Ltd* [2003] FCA 1505 at [2].

237 *Bray v F Hoffmann-La Roche Ltd* [2003] FCA 1505 at [9] per Merkel J.

though most of the original class members were excluded from the proceedings as a result of the amendment.[238]

The court may grant the representative party leave to amend the group description in the application to persons whose cause of action accrued after the proceedings commenced, but whose cause of action would have included them in the original proceedings. The extension of the group description may cause the court to adjust the opt-out date for potential claimants.[239]

Closing the class

[6.420] Because of the uncertainty of knowing who is a member of a class of litigants unless they opt out, a practice has developed in representative proceedings of courts closing the class. Under that practice group members must opt out or register to participate in a proceeding by a certain date. A person who neither registers nor opts out continues as a group member, with the effect, however, that they are precluded from sharing in the benefit of any order or judgment in favour of the applicant and group members, and lose their right to sue the respondent with respect to any rights arising from the applicant's claims in the class action.

In Victoria s 33ZG of the *Supreme Court Act 1986* (Vic) expressly grants the court jurisdiction to make an order under s 33ZF specifying a date for group members to "take a step" after which time they will not be entitled to any relief, payment or benefit arising from the proceeding. Section 33ZF also grants the court a general power to "make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding." Section 33ZG does not limit the generality of s 33ZF. In *Pathway Investments v National Australia Bank*,[240] Pagone J made an order "pursuant to ss 33ZF and/or 33ZG" for group members to complete and deliver a registration form if they desired to receive the benefit of the

238 The description of the represented group was subsequently severely restricted in response to Merkel J's criticisms of the untenable breadth of the original description of the class: "Every man, woman and child who has been in this country between 1992 and 1999; every person who is engaged in the food chain, the supply of every food and animal product; is a plaintiff, a group member. I can't conceive of how that could ever be tried …. there are some areas where there will be losses that are seriously claimed. By all means, they should be singled out, but not everyone in the food chain in this country …. Is there any authority anywhere in the world that says that the class should be drawn so widely that [any person] who may have some kind of claim, no matter how small, no matter how nebulous and no matter how difficult to prove, ought to be included in the class?" (*Bray v F Hoffmann-La Roche Ltd* (Transcript of Proceedings; Federal Court of Australia; Merkel J; 23 October 2003), at 187, 189, 196, as cited in V Morabito, "Class Actions Instituted Only for the Benefit of the Clients of the Represnetative's Solicitors" (2007) 29 *Sydney Law Review* 5 at 16).

239 *Supreme Court Act 1986* (Vic), s 33K.

240 *Pathway Investments Pty Ltd v National Australia Bank Ltd (No 2)* (VSC; Proceeding No SCI 2010/06249; Order 24 August 2012), [6].

settlement of proceedings. In *Rowe v Grünenthal GmbH*,[241] Beach J made similar orders "[p]ursuant to s 33ZF" for "any group member who wishes to pursue a claim for compensation".[242]

The Federal Court has no express power under the *Federal Court of Australia Act 1976* (Cth) to close the class. Authority establishes, however, that s 33ZF empowering the court "of its own motion or on application by a party or a group member, [to] make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding" permits it to make "an order fixing a date by which claimants must identify themselves".[243] In *Vlachos v Centro Properties*[244] orders were made pursuant to ss 33J and 33ZF fixing a date by which group members were to either opt out of the proceeding, or register to be entitled to compensation, and pursuant to s 33ZF providing a specified date for claimants to notify the court of their decision by delivering completed registration forms, with the effect that after the specified date group members who had neither opted out nor registered would be bound by the decision of the proceeding, and barred from proceeding separately on the same issues against the respondents.

Every group member against every defendant

[6.430] Group proceedings are properly constituted only when all members of the plaintiff group have claims against, in the case of a single defendant, the defendant, or, in the case of several defendants, each and all of the defendants. This is achieved in the application commencing the group proceeding by setting out the identity and the number of group members, and the nature of the claims being made, and the relief claimed, on their behalf.[245] The question as to whether, where a claim is raised against several respondents, every group member must have a claim

241 *Rowe v Grünenthal GmbH* (VSC; Proceeding No SCI 2011/3527; Order 18 July 2012), [5].

242 See also *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 2)* [2003] VSC 212.

243 *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1 at 4. See also *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2002] FCA 1560 at [5]–[6], [15]; *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 2)* [2003] VSC 212 at [65]; *Thomas v Powercor Australia Ltd* [2011] VSC 614 at [34]; *Perry v Powercor Australia Ltd* [2012] VSC 113 at [32]; *Johnstone v HIH Ltd* [2004] FCA 190 at [103]–[104]. *Federal Court of Australia Act 1976* (Cth), s 33ZG, which captures the court's residual powers under that Act, and the court's implied powers, may also provide it with the authority to make such orders. Orders of this kind have been made in a number of class actions in the Federal Court at various stages of the proceedings. See, for example, *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1; *Courtney v Medtel Pty Ltd (No 4)* [2004] FCA 1233; *Lopez v Star World Enterprises Pty Ltd* [1999] ATPR 41-678; *Scott and Taws v Oz Minerals Ltd* (FCA; Proceeding No (P)NSD 1433/2010; Order 22 October 2010 and 23 November 2010); *Vlachos v Centro Properties Ltd* (FCA; Proceeding No (P)VID 366/2008; Order 17 December 2008); *Watson v AWB Ltd* (FCA; Proceeding No (P)NSD 2020/2007; Order 26 March 2009).

244 *Vlachos v Centro Properties Ltd* (FCA; Proceeding No (P)VID 366/2008; Order 17 December 2008) per Ryan J.

245 *Supreme Court Act 1986* (Vic), s 33H. See also *Tropical Shine Holdings Ltd (t/as KC Country) v Lake Gesture Pty Ltd* (1993) 45 FCR 457.

against every respondent[246] has been resolved by interpreting the requirement in s 33C(1)(a) that group members have "claims against the same person" as meaning that each applicant and all group members must have a claim against all respondents.[247] The claims, however, need not be identical,[248] nor need group members be in search of the same relief,[249] nor need the claims be ultimately successful against all respondents.[250]

The statement of claim in *Philip Morris (Australia) v Nixon*[251] was struck out by the Full Federal Court because it failed to show a cause of action by every group member against every defendant.[252] The representative plaintiff brought a proceeding against three tobacco companies, alleging that their conduct caused group members to either commence or continue smoking, and that that they promoted smoking as safe, despite each of the companies being in possession and having knowledge of evidence that smoking endangered health. The Full Court held that the pleadings were deficient for alleging that the conduct of one tobacco company caused the plaintiff to use the products of another.

The court observed that for a statement of claim to allege that each group member has a cause of action against each defendant may require the court to permit a generality in the pleadings, so that the purpose of the legislation governing representative proceedings is not defeated by an unnecessary demand for precision to satisfy the threshold requirements

246 See *Symington v Hoechst Schering Agrevo Pty Ltd* (1997) 78 FCR 164; and *Ryan v Great Lakes Council* (1997) 78 FCR 309. In *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487 initially it appeared that the applicant conceded that every group member did have to make a claim against every respondent. The Full Court so held. In *Bray v F Hoffmann-La Roche Ltd* (2003) 130 FCR 317, the correctness of *Philip Morris (Australia) Ltd v Nixon* was fully argued. Carr J (at [123]–[126]) and Finkelstein J (at [242]) concluded that *Nixon* on this point was clearly wrong. Branson J (at [200]) did "not exclude the possibility" that *Nixon* was wrong but considered that it should be followed until overruled by the High Court. However, Finkelstein J (with whom Carr J agreed) in *Bray* disputed the first requirements, and argued that it was not necessary for every group member to have claims against all respondents as this would require a proliferation of proceedings: at [243]–[248]. The tension between *Nixon* and *Bray* was initially resolved by treating *Bray* as *obiter* on this point. This was itself questionable, since the point had not actually been argued in *Nixon* and was no more or less central to the outcome than it was in *Bray*, whereas in *Bray* it had been fully argued and the court addressed it specifically and at length. The better and more recent view is that the holdings in *Bray* were not *obiter* and that *Bray* has been overruled: *McBride v Monzie Pty Ltd* (2007) 164 FCR 559 at [4]–[7] per Finkelstein J.

247 *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487 at 520–521 per Sackville J (with whom Spender and Hill JJ agreed).

248 *King v GIO Australia Holdings Ltd* (2000) 100 FCR 209 at 222–223.

249 *Federal Court of Australia Act 1976* (Cth), s 33C(2)(iv); and *Smith v University of Ballarat* (2006) 150 IR 371 at [32].

250 *King v GIO Australia Holdings Ltd* (2000) 100 FCR 209 at [7].

251 *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487.

252 *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487 at 523–524.

for commencement.[253] This is consistent with the view that "[t]he word 'claim' has been described as 'encompass(ing) everything that might lawfully be brought before the court for a remedy'",[254] and that "it is a word of wide meaning and is not limited to a cause of action"[255] — views that were apparently indorsed by the majority in *Bray v F Hoffmann-La Roche*.[256] Nevertheless, group proceedings are still subject to the rules ordinarily governing pleadings,[257] so that the defendant must be provided with a sufficiently detailed claim to be able to meet the case alleged against it.[258]

"Claims"

[6.440] It has been held that the word "claims" in s 33C(1)(a) encompasses five "tolerably clear" requirements:

1. The claims must be claims recognised by law.
2. They need not be confined to claims for relief "as of right", since s 33C(2)(a)(i) shows a claim for discretionary equitable relief can qualify.
3. "Claims" have an existence independent of, and antecedent to, the commencement of the proceeding, since it is only if seven or more persons have claims against the same person that a proceeding under Pt IVA may be commenced by one or more of them.
4. "Claims" are different to a "right" or "entitlement" to relief, being matters which cannot be known until a final hearing.
5. It is not required that the persons who have claims be aware of, or have asserted, the claims.[259]

In *Bray v F Hoffmann-La Roche* the court indorsed a broad approach to the notion of claims. In that case the question arose as to whether persons

253 *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487 at 515.

254 See *Finance Sector Union of Australia v Commonwealth Bank of Australia* (1999) 94 FCR 179 at 187 and the discussion in an earlier judgment in this matter at *King v GIO Australia Holdings Ltd* (2000) 100 FCR 209 at 221–223.

255 *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2002] FCA 1560 at [10] per Moore J.

256 *Bray v F Hoffmann-La Roche Ltd* (2003) 130 FCR 317 at [245] per Finkelstein J: "The better view, in my opinion, is that the word ['claim'] means, in this present context, the facts which give rise to the action as well as to the legal basis of the action. That is, s 33C is concerned to establish that the action be sufficiently collective in nature so as to warrant it being brought as a representative or class action. For an action to be 'collective in nature' I mean that it involves claims which are closely connected either by reference to the underlying facts (inevitably there will be differences) or to the underlying legal principles (where there might also be differences) that are raised by the facts." See also the judgment of Carr J at [119].

257 *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487 at 515.

258 *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487 at 515–516.

259 *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd* (1998) 84 FCR 512 at [33].

who petitioned the court to make orders for declaratory and injunctive relief in the public interest against a respondent or respondents under ss 80 and 163A of the *Trade Practices Act 1974* (Cth) "have claims"[260] for the purposes of s 33C. The representative litigant was a consumer who alleged that the defendant companies had colluded as part of a cartel to fix the price of raw vitamins. The group comprised consumers, and other members who had purchased the vitamins to manufacture their own products. For Carr J this was sufficient to constitute a "claim" for the purposes of Pt IVA.[261] Finkelstein J held that the approach to "claims" should not be narrow.[262]

Whether s 33C(1)(a) be satisfied if different group members have different claims against the defendants was considered in *King v GIO Australia Holdings*.[263] Moore J held that a group was properly constituted if each member of the group had a claim against the defendant,[264] regardless of whether the group members sought diverse forms of relief against the respondent or respondents, or whether the relief each sought was based on different conduct as long as it arose from the same, similar or related circumstances and gave rise to a substantial common issue of law or fact.

The representative plaintiff alleged on behalf of all shareholders that in negotiations for a company takeover risks known to the defendant company directors and financial advisers, which enabled the offeror to acquire the company at a lower price than originally offered, were not disclosed to the plaintiffs, and that such non-disclosure was misleading and deceptive in contravention of the *Australian Securities Commission Act 1989* (Cth), the *Trade Practices Act 1974* (Cth), and the *Corporations Law*.[265] The defendants argued that the statement of claim did not meet the requirements for a group proceeding because not all plaintiffs relied on the representations of all of the defendants. Moore J held that the basis of the claim was that each plaintiff maintained claims against each

260 *Federal Court of Australia Act 1976* (Cth), s 33C(1).

261 *Bray v F Hoffmann-La Roche Ltd* (2003) 130 FCR 317 at [119]. Branson J noted that she had decided *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250 without the benefit of a contradictor. Her Honour held (at [210]) that "persons who seek to invoke the same power in the court to make an order under the TPA in the public interest against a respondent or respondents are not 'persons [who] have claims' against that respondent or those respondents of the kind required by s 33C(1)".

262 *Bray v F Hoffmann-La Roche Ltd* (2003) 130 FCR 317 at [243]–[245]. Although his Honour concluded (at [249]) that the applicant's pleading did not conform with *Federal Court of Australia Act 1976* (Cth), s 33C, this appears to be a reference to general pleadings deficiencies: if his Honour had concluded that a "public interest" claim was not sufficient, then simply amending the pleadings would not have resolved that applicant's problems. It appears, therefore, that Finkelstein J concurred in substance with Carr J.

263 *King v GIO Australia Holdings Ltd* (2000) 100 FCR 209.

264 *King v GIO Australia Holdings Ltd* (2000) 100 FCR 209 at 221–223.

265 *King v GIO Australia Holdings Ltd* (2000) 100 FCR 209 at 215.

defendant because the defendant had made misleading representations to the plaintiffs, and that raising the question of reliance did not displace the claim as expressed.[266]

Group proceedings may be commenced even if they involve particular claims for different forms of relief by group members. In *Finance Sector Union of Australia v Commonwealth Bank of Australia*[267] the applicant claimed the payment of penalties under s 178 of the *Workplace Relations Act 1996* (Cth), and to enforce the industrial award in a group proceeding. The respondent contended that commencing a group proceeding to obtain a penalty did not fall within the provision of s 33C(2).[268] The Full Federal Court rejected the respondent's submission. It held that s 33C(2) did not limit the relief available in a group proceeding. A plaintiff could claim penalties under the Act while maintaining a representative proceeding to enforce an industrial award.[269] The decision clarifies that there is no objection under the provision to constitute group proceedings involving particular claims for different relief.[270]

Relationship between ss 33H and 33C(1)

[6.450] Section 33H(1) of the *Federal Court of Australia Act 1976* (Cth) provides that the originating application, statement of claim or affidavit filed in support of the application must (a) describe or otherwise identify the group members either by name or characteristic; (b) specify the nature of the claims and the relief claimed by the applicant on its own behalf and on behalf of the group members; and (c) specify the common questions of law or fact which are said to arise in the action. Section 33H(2) states that

> (2) In describing or otherwise identifying group members for the purposes of subsection (1), it is not necessary to name, or specify the number of, the group members.

The requirement that, under s 33C(1), at least seven persons must share the relevant common question, filters out cases with fewer than seven claimants that are inappropriate for bringing as Pt IVA proceedings. The applicant is not required to satisfy the court as to the number of respondents who share the claim. They must, however, at an appropriate time (possibly even at an advanced stage of the proceeding)[271] demonstrate that their claim will be shared with at least six other claimants given its nature and substance.

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266 *King v GIO Australia Holdings Ltd* (2000) 100 FCR 209 at 224.

267 *Finance Sector Union of Australia v Commonwealth Bank of Australia* (1999) 94 FCR 179.

268 The equivalent section in Victoria is *Supreme Court Act 1986* (Vic), s 33C(2).

269 The Full Court rejected the doubts expressed by Lindgren J in *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd* (1998) 84 FCR 512.

270 *Finance Sector Union of Australia v Commonwealth Bank of Australia* (1999) 94 FCR 179 at 186.

271 *Symington v Hoechst Schering Agrevo Pty Ltd* (1997) 78 FCR 164; *Nixon v Philip Morris (Australia) Ltd* (1999) 95 FCR 453; 165 ALR 515 at 528.

Discontinuance

[6.460] Section 33N of the *Federal Court of Australia Act 1976* (Cth) deals with the discontinuance of a Pt IV Class Action. It provides that:

> (1) The Court may, on application by the respondent or of its own motion, order that a proceeding no longer continue under this Part where it is satisfied that it is in the interests of justice to do so because:
>
> (a) the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or
>
> (b) all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; or
>
> (c) the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
>
> (d) it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.

The High Court in *Wong v Silkfield* observed that s 33N was one of the "safeguards" on class actions operating in Pt IVA.[272] Consequently, proceedings may satisfy the requirements in s 33C but still be discontinued pursuant to s 33N on one of the bases listed.

Sections 33Q, 33R and 33S

Determination of issues where not all issues are common

[6.470] Section 33Q provides that the court may order that a subgroup of group members be established:[273]

> (1) If it appears to the Court that determination of the issue or issues common to all group members will not finally determine the claims of all group members, the Court may give directions in relation to the determination of the remaining issues.
>
> (2) In the case of issues common to the claims of some only of the group members, the directions given by the Court may include directions establishing a sub-group consisting of those group members and appointing a person to be the sub-group representative party on behalf of the sub-group members.
>
> (3) Where the Court appoints a person other than the representative party to be a sub-group representative party, that person, and not the representative party, is liable for costs associated with the determination of the issue or issues common to the sub-group members.

Section 33Q(2) is not a provision limiting the court's discretion to make orders with respect to group proceedings. The orders available under s 33Q include, but are not limited to, the establishment of subgroups.

Section 33R extends s 33Q in permitting an order to be made to fragment the proceedings, such that if an individual group member may appear in

272 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at [25]. The court also referred to the operation of *Federal Court of Australia Act 1976* (Cth), s 33T under which the court may substitute another group member for the representative party; or s 33R under which it might appear only the group member to whom the claim relates to appear.

273 *Supreme Court Act 1986* (Vic), s 33Q.

the proceeding, to determine a non-common issue. The resolution of non-common issues follows the resolution of common issues.

Proceeding must be valid

[6.480] In *Ryan v Great Lakes Council* the court said that s 33Q (and s 33R) are "available in a properly-constituted proceeding. They assume the existence of a valid representative proceeding; they do not cure any deficiency of standing that may exist [in which case] no opportunity for subgrouping or the separate hearing of a group member's claim will arise".[274] Standing is the subject of s 33D(2) which assumes that the representative party is a person with standing to bring an individual claim against the respondent (shared by at least six others) in order to utilise Pt IVA procedures against the respondent. The representative claimant continues to have standing to conduct the group proceeding even if their claim against the respondent ceases.[275]

Applicant also subgroup representative

[6.490] Section 33Q(3) provides that the court may appoint a person other than the representative party to be a subgroup representative party, and when it does so that person is liable for costs associated with the subgroup, not the representative party. Thus s 33Q(3) is an exception to the general rule established by s 43(1A) that a court may not make costs orders against group members in representative proceedings.[276]

The principal applicant can also be the subgroup representative, indeed s 33Q(3) appears to contemplate that this will be the norm. In such a case the party acts in three capacities: on his or her own behalf, on behalf of the main group, and on behalf of the subgroup.[277]

Subgroup less than seven persons

[6.500] Under s 33Q subgroups need only be groups of two or more members having a particular question in common with each other but not with other group members.[278]

Subgroup "proceeding"

[6.510] For the purposes of s 33N,[279] a subgroup proceeding is not a separate proceeding from the main proceeding, but is dependent on it.

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274 *Ryan v Great Lakes Council* (1997) 78 FCR 309.

275 *Supreme Court Act 1986* (Vic), s 33D.

276 *Federal Court of Australia Act 1976* (Cth), s 43(1A)(a).

277 See, for example, *Community and Public Sector Union v Crown in Right of Victoria* (1999) 90 IR 4.

278 Australian Law Reform Commission, *Report No 46* (AGPS 1988), [171].

279 *Community and Public Sector Union v Crown in Right of Victoria* (1999) 90 IR 4.

The purpose of an order constituting a subgroup is to ensure the complete determination of the issues raised in the representative proceedings.[280]

Section 33R provides:

(1) In giving directions under section 33Q, the Court may permit an individual group member to appear in the proceeding for the purpose of determining an issue that relates only to the claims of that member.

(2) In such a case, the individual group member, and not the representative party, is liable for costs associated with the determination of the issue.

Section 33R generally

Introduction

[6.520] Section 33R supports the view that, absent the section, group members' rights of audience are limited.

Hearing of individual issues

[6.530] Section 33R provides that "[an] individual group member [may] appear in the proceeding for the purpose of determining an issue that relates only to the claims of that member." Using s 33R, representative proceedings can be fragmented into mini-trials, wherein issues particular to an individual remaining unresolved after the determination of common issues can be heard and decided.

Mini-trials were successfully utilised in *McMullin v ICI Australia Operations*.[281] Representative proceedings under Pt IVA had been initiated against ICI Australia Operations and its related companies by the McMullins, who were representing several hundred claimants. The claimant group consisted of farmers, graziers, and abattoirs who alleged that they suffered losses resulting from the contamination of beef cattle with chlorfluazuron when they were fed a cotton waste that had been treated with the insecticide, Helix. The 20-day trial on liability was restricted to common issues arising from the applicants' claims, and one further week was set aside to hear the numerous cross-claims. The damages claims arising from the case had no common elements. The majority were mediated and settled. The remaining damages claims were

280 *Ryan v Great Lakes Council* (1997) 78 FCR 309 (as quoted, [34,880.15] per Wilcox J).

281 *McMullin v ICI Australia Operations Pty Ltd* (unreported; FCA; Wilcox J; No 305/1995; 27 November 1995). Wilcox J concluded about the technique: "In the end, 499 separate claims were disposed of. I understand the total payout was near $100m. In terms of court time, it seems to me this represents a good advertisement for the procedure." Cited in V Morabito, "Corporate Accountability, Third Parties and Class Actions" (Monash Working Paper No 3, October 2006), p 7.

heard and disposed of by the either the presiding judge or the judicial registrar, with a right of review by the trial judge.[282]

The court has power to make an order that applicants proceed in individual actions.[283] If group members chose to file separate applications after the common issues had been resolved they would be issue estopped from basing their proceedings on causes of action pleaded in the case in which the common issues were litigated.[284] Only specifically individual questions could be put in issue.[285] A finding on a particular issue in the earlier case would prevent a contention to the contrary in the later action. The claimant in the later case could raise a different cause of action — but a group member is always at liberty to bring a separate action on this different basis.[286]

It is practical and effective to fragment proceedings into mini-trials so that separate decisions can be given for the subgroups. These separate smaller hearings on questions not in issue in the representative proceeding avoid duplication and expense. Courts may direct that costs are borne by the individual group members,[287] with the effect of dissuading unmeritorious claims, but may equally cause meritorious claims to be abandoned.[288]

Directions relating to commencement of further proceedings

[6.540] Section 33S provides:

> Where an issue cannot properly or conveniently be dealt with under section 33Q or 33R, the Court may:
>
> (a) if the issue concerns only the claim of a particular member—give directions relating to the commencement and conduct of a separate proceeding by that member; or
>
> (b) if the issue is common to the claims of all members of a sub-group—give directions relating to the commencement and conduct of a representative proceeding in relation to the claims of those members.

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282 See, for example, *McMullin v ICI Australia Operations Pty Ltd* [1996] FCA 991 (under the heading "Directions for March/April Hearing"); *McMullin v ICI Australia Operations Pty Ltd* (unreported; FCA; Wilcox J; No 1408/1998; 2 November 1998). See also V Morabito, "Corporate Accountability, Third Parties and Class Actions" (Monash Working Paper No 3, October 2006), p 7.

283 *Supreme Court Act 1986* (Vic), s 33N.

284 See *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384 at 402–403, 405 per French J.

285 *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384.

286 *Nixon v Philip Morris (Australia) Ltd* (1999) 95 FCR 453; see also *King v GIO Australia Holdings Ltd* (2000) 100 FCR 209 at [44]–[45], citing *Nixon v Philip Morris (Australia) Ltd* at [100]–[101]; and on appeal *King v GIO Australia Holdings Ltd* [2000] FCA 1543 at [11]; applied in *Petrusevski v Bulldogs Rugby League Ltd* [2003] FCA 61 at [24] per Sackville J.

287 *Federal Court of Australia Act 1976* (Cth), s 33R(2).

288 *Ryan v Great Lakes Council* (1998) 155 ALR 447. It has been suggested that the costs of separate proceedings should be estimated on the assumption that all group members pursue their claims and that, if the group members are successful, costs will then follow the event against the respondent anyway.

The intent of s 33S(a) is attended by considerable uncertainty. In its application it appears to refer to two situations. First, where a separate proceeding is required after the determination of the common issues to determine individual issues not properly or conveniently addressed within the scope of the main proceeding. That is, it is inappropriate to position the individual issues within the operation of s 33Q or s 33R.

Notably, the types of "proceeding" contemplated in s 33S(a) are not the same as that contemplated in s 33S(b). Section 33S(a) refers to "a separate proceeding" while section 33S(b) uses the term "representative proceeding". Section 33S(a) therefore apparently adopts the meaning of proceeding in s 4 of the *Federal Court of Australia Act 1976* (Cth). It appears then that it is not intended that the proceeding in s 33S(a) is a representative proceeding — in which case s 33S(b) applies. Moreover, a mini-trial is not a "separate" proceeding from the main proceeding.[289]

The second situation to which s 33S applies is where it may assist if it is inappropriate for some reason to make orders under either s 33L (an order either continuing or discontinuing proceedings under Pt IVA where there are fewer than seven group members), s 33M (discontinuance or stay of proceedings because of the inconvenience to the respondent of identifying and paying judgment amounts to group members), or s 33N (discontinuance of proceedings as representative proceedings where it is in the interests of justice to do so) although there is reason to do so, and neither s 33Q nor s 33R are appropriate. The likelihood of applying s 33S is low given the flexibility with which ss 33Q and 33R can be applied, and the operation of s 33ZF of the *Federal Court of Australia Act 1976*, which confers on the court the power to do whatever is appropriate or necessary to ensure that justice is done in the proceeding.[290]

289 Refer to the discussion in *Community and Public Sector Union v Crown in Right of Victoria* (1999) 90 IR 4; confusingly, however, the Explanatory Memorandum (29256/91 Cat No 91-4204-4) contemplated that the power under *Federal Court of Australia Act 1976* (Cth), s 33S could be used to create subsidiary or separate representative proceedings. It is not clear that this was confined to the power in s 33S(b).

290 See the series of decisions in *McMullin v ICI Australia Operations Pty Ltd* [1996] FCA 1802 and subsequent proceeding; *Ryan v Great Lakes Council* (1997) 78 FCR 309; and, subsequently, *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] ATPR 41-679 (and subsequent proceedings).

7 Pleadings

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[7.05] A number of attempts have been made to formulate a clear, comprehensive and perspicacious definition of pleadings. Blackstone encapsulated pleadings as being "the mutual altercations between the plaintiff and the defendant."[1] The definition is considered generally deficient in that:

- it misrepresents pleadings as the substance at issue rather than as the means by which the resolution of the issues between the parties is conducted;
- Blackstone's approach characterises pleadings as a plurality of processes rather than as a single coherent process; and
- although pithy, it fails to identify the purpose of pleadings.[2]

Chitty has said that pleadings are "the statement, in a logical and legal form, of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defence … the formal mode of alleging that on the record, which would be the support of the action or the defence of the party in evidence" — but that formulation is inadequate for not referring to denials, which equally form a part of pleadings. Stephen's definition of pleadings as "the allegation of fact, mutually made on either side, by which the court receives information of the nature of the controversy" equally ignores the place of denials in pleadings. Gould identifies pleadings as consisting of "those formal allegations and denials which are offered on one side for the purpose of maintaining the suit, and on the other for the purpose of defeating it; and which, generally speaking, are predicated only of matter of fact." Neither Stephen nor Gould distinguish evidentiary facts, with which pleadings deal, from the material facts, which they are required to avoid.[3]

In the common law system the parties develop and define the issues in contention between them by means of an exchange of formal written statements in advance of a hearing.[4] Pleadings are technical legal documents containing the contentions of each party in relation to the facts in dispute between them in a litigation, and which are served on the opposing parties and filed into court. The common law system of pleading developed from a purely oral (*ore tenus* or *viva voce*) system (the *parol*) presented in court by legal counsel and recorded in writing by court clerks or prothonotaries,[5] into a predominantly written procedure, during the 15th and 16th centuries.[6] As writing displaced oral pleadings the common forms of action were being established with their well

1 *Blackstone's Commentaries*, Vol 4, Ch 20, "Of Pleadings".

2 See GL Phillips, *An Exposition of the Principles of Pleading Under the Codes of Civil Procedure* (Callaghan and Co, Chicago, 1896), p 10.

3 See GL Phillips, *An Exposition of the Principles of Pleading Under the Codes of Civil Procedure* (Callaghan and Co, Chicago, 1896), pp 10–11.

4 See HR Gibson, "The Philosophy of Pleading" (1893) 2(5) *Yale Law Journal* 181.

5 HR Gibson, "The Philosophy of Pleading" (1893) 2(5) *Yale Law Journal* 181.

6 A Goodhard and H Hanbury (eds), *W Holdsworth: A History of English Law* (1965), pp 639–656.

documented restrictions and limitations. The emergence of written forms of pleading created systemic difficulties. To succeed the plaintiff was required to initiate the matter with the correct form of action. Thereafter the plaintiff and defendant engaged in exchanges of pleadings for the purpose of isolating and presenting a single issue to be either determined by a judge or tried before a jury.[7] The common law system developed highly elaborate verbal formulations — known as "colour" — for the purpose of presenting any (even the simplest) matter before the court, which, for their ornateness, characteristically had little connection to the facts constituting the issue in dispute,[8] and failed to inform the defendant of the case they were required to meet at trial. Because discovery was either not available or highly restricted, it was not until the trial that defendants were notified of the liability they were alleged to bear, the basis for it, and the remedy sought against them. Plaintiffs failed as frequently because lawyers representing them had not mastered the technicalities of pleading rather than because they failed to discharge their evidentiary burden. One of the consequences of common law pleading practice was the decreasing frequency with which cases were decided on their merits.[9] The beginnings of the liberalisation of pleading practice occurred amidst popular and widespread discontent in the 19th century under the Judicature Acts which abandoned the formal system and simplified the process of pleading.[10]

OBJECT OF PLEADINGS

[7.10] Proceedings commenced by writ involve the exchange of pleadings between parties. Pleadings include the plaintiff's statement of claim served on the defendant, and the defence served by the defendant on the plaintiff. The pleadings are included in the court's record of the proceedings after being filed into court. They serve the dual purpose of, first, notification to the parties, and, secondly, defining the issues in the proceedings. The pleadings contain the information the parties require to understand the claim being mounted or the defence being raised against them so as to enable them to adequately prepare for the case presented by the other party at trial. They identify, both to the parties and to the court, the matters in dispute between the parties and the nature of the case each side will seek to prove. The matters the parties are disputing should also

7 For a description of this ritual see A Harding, *The Law Courts of Medieval England* (1973), pp 78–79. The trial itself has been described as "an afterthought to the pleading process": R Palmer, *The County Courts of Medieval England* (1982), p 90; see also A Harding, *The Law Courts of Medieval England* (1973), p 78 ("Cases were often decided by the pleading contest rather than by jury of the other methods of trial.")

8 On the growth of legal fictions see Sutherland, "Legal Reasoning in the Fourteenth Century: the Invention of "Colour" in Pleading" in MS Arnold et al (eds), *On the Laws and Customs of England: Essays in Honour of Samuel E Thorne* (University of North Carolina Press, 1981), p 182.

9 F James and G Hazard, *Civil Procedure* (3rd ed, 1985), s 3.11, pp 153–154.

10 See generally A Goodhard and H Hanbury (eds), *W Holdsworth: A History of English Law* (1965) describing the *Judicature Act 1873* (UK), which simplified pleading in England.

be the matters which are legally in dispute.[11] Pleadings serve the further purposes of enabling the court to determine cases on their merits, thereby providing a formal basis for judgment. They also separate questions of fact and questions of law. They further provide litigants with a plea of *res judicata* if and when the same issues are reagitated.[12]

The High Court in *Dare v Pulham*[13] referred to pleadings' numerous functions and the principles applicable to pleading, stating:[14]

> Pleadings and particulars have a number of functions: they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it … they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial … and they give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court. Apart from cases where the parties choose to disregard the pleadings and to fight the case on issues chosen at the trial, the relief which may be granted to a party must be founded in the pleadings …

In the statement of claim the plaintiff alleges those facts which, if proven, would produce a judgment in their favour and an order for the relief or remedy sought. The defendant, through the defence, must respond to each and every allegation of fact contained in the plaintiff's statement of claim. The defendant responds in one of four ways: either admitting to or being taken to have admitted to an allegation; denying that allegation;[15] or responding in admission and avoidance. To respond in admission and avoidance is to admit what the plaintiff alleges but at the same time to submit a contrary allegation of fact in answer which, if proven, would constitute a defence to the defendant's admission. An allegation to which the defendant does not admit is taken as an admission of the fact contained in it.

The principal purpose of the statement of claim is, in accordance with the rules of natural justice, to inform the defendant of the claim against them and the case they will be expected to meet at trial. The issues in dispute at trial and the questions on which the court will be required to decide are finally defined once a defence is filed in answer to the statement of claim. The exchange of pleadings is essential at an early stage in proceedings to guide processes of discovery, and other interlocutory procedures, towards focused and productive efforts.[16] Once the parties have completed the

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11 BJ Shipman, *Handbook of Common Law Pleading* (West Publishing Company, 3rd ed, 1923), pp 8–11.

12 The emphasis on the function of and purposes served by pleadings has shifted historically: see CE Clark, "History, Systems and Functions of Pleading" (1925) 11 *Virginia Law Review* 517.

13 *Dare v Pulham* (1982) 148 CLR 658 at 664.

14 *Dare v Pulham* (1982) 148 CLR 658 at 664.

15 A specific denial of an allegation is known as a traverse.

16 *Multigroup Distribution Services Pty Ltd v TNT Australia Pty Ltd* [1996] ATPR 41-522 at 42,769 per Burchett J (FCA).

exchange of pleadings, the admitted facts are identified and do not form part of the matters in dispute. Only the facts denied or not admitted are at issue, such that the court will receive evidence from a party intending to prove them in order to decide which version of the facts to accept, while no evidence will be received in relation to admitted facts.[17]

Notice of the case a party will be expected to address at trial is a fundamental requirement of the procedural fairness achieved through the pleadings process. In order for a party to be notified the case will have to be set out in the pleadings with sufficient particularity.[18] A further element of procedural fairness is that the parties are confined to, and relief is only given for, the issues raised in the pleadings.[19]

In addressing the notice function of pleadings Allsop J in *White v Overland*[20] said that:

> [i]n the efficient and proper conduct of civil litigation, even civil litigation hard fought between parties, it should always be recognised that in the propounding of issues for trial the parties should take steps to ensure that all relevant parties to the dispute are cognisant of what the issues are. Any practice of quietly leaving footprints in correspondence or directions hearings to be uncovered some time later in an attempt to reveal that a matter was always in issue should be discouraged firmly. Even if something has been said, where it is evident, or indeed suspected, that the other side is proceeding on the basis of a misconception or has not appreciated something, as a general rule, efficiency, common sense and an appreciation of the costs and resources (both public and private) likely to be wasted by confusion in litigation will mandate that a party through his or her representative ensure that the other is not proceeding on a misconception or that the other does appreciate something that has been said. Litigation is not a game. It is a costly and stressful, though necessary, evil.[21]

The role of pleadings was the subject of comparable views in the observations of Harper J in *Downer Connect v McConnell Dowell Constructors (Aust)*,[22] where his Honour also referred to the crucial role pleadings play in putting the questions or determination in the proceedings before the court:[23]

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17 *Pioneer Plastic Containers Ltd v Commissioner of Customs and Excise* [1967] Ch 597.

18 *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1985) 7 FCR 109 at 114; *Charlie Carter Pty Ltd v Shop, Distributive and Allied Employees' Association of Western Australia* (1987) 13 FCR 413 at 417–418; *Pancontinental Mining Ltd v Posgold Investments Pty Ltd* (1994) 121 ALR 405 at 413 (FCA); *Multigroup Distribution Services Pty Ltd v TNT Australia Pty Ltd* [1996] ATPR 41-522 at 42,679 (FCA); *Queensland v Pioneer Concrete (Qld) Pty Ltd* (1999) ATPR 41-691.

19 See *Gould v Mount Oxide Mines Ltd (in liq)* (1916) 22 CLR 490 at 517; *Banque Commerciale SA (en liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286–287.

20 *White v Overland* [2001] FCA 1333 at [4].

21 See also *Nowlan v Marson Transport Pty Ltd* (2001) 53 NSWLR 116 at [28]; *Pacific National (ACT) Ltd v Queensland Rail* (2005) 215 ALR 544 at [46]–[51].

22 *Downer Connect Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2008] VSC 77.

23 *Downer Connect Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2008] VSC 77 at [1]–[4].

> Litigation is sometimes conducted to judgment with barely a glance at the pleadings. It remains generally true that good pleadings are an important, and often crucial, element in the civil justice system. When well-drawn, as they always should be, they form the touchstone by which the issues are identified and the relevance of the evidence assessed. Consistently with this, one of their primary purposes is to reveal to the opposite party how the party pleading puts its case. On reading a well-drawn statement of claim, the defendant to whom it is directed will be able to say: "These are the material facts that will be the subject of the plaintiff's evidence. They tell a coherent, comprehensible story; and, to the extent that any additional evidence is to be called that might cause me to be taken by surprise, here is that evidence outlined in the particulars." A complaint that the pleadings do not achieve this end is often met with the response that the opposite party knows very well, from documents and perhaps other sources, what the case against it is. This is no answer at all, at least unless the relevant documents are properly incorporated into the pleading. It is, as a general proposition, true to say that each pleading should be sufficient in itself. And although an element in an adversarial process, pleadings are themselves intended to be the opposite of adversarial, at least to the extent that they must, if they are to perform one of their proper functions, inform the opposite party of the case that party will have to meet at trial.
>
> But pleadings have another important audience: the Judge or Magistrate. In most cases, the opposite party will have the assistance of some knowledge of the factual background — some knowledge, in other words, of the facts against which the pleadings can be assessed. The tribunal of fact will never be in that position. The pleadings must therefore be drawn so as to allow the impartial and uninformed reader to know what the case is about. This end cannot be achieved unless the pleadings form a coherent narrative, of material fact, with the necessary detail included as particulars. They must be drawn with a careful eye to the evidence that will necessarily be called if the case is to be made out. If the party pleading does not have that evidence, then the case ought not go to trial. Indeed, it is generally true to say that it ought not to proceed beyond the point at which the party pleading appreciates, perhaps because the very act of pleading reveals it, that there is and will remain a gap in the evidence upon which the cause of action or defence is based and without which that cause of action or defence will fail.

The right of the party to determine how to frame their case at trial is subject to the requirement that it properly notify other parties of the claim or the defence, but otherwise, as a matter of general practice, the court will not dictate a preference as to the form or substance of the pleading.[24]

24 See *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical & Electrical Engineers Pty Ltd* [1994] 2 VR 386 at 406; *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* (1996) 8 VR 681 at [18]; *Gunns Ltd v Marr* [2005] VSC 251 at [57]; *Gunns Ltd v Marr (No 2)* [2006] VSC 329 at [8].

In modern litigation pleadings are assessed in relation to their matter and not their form. Thus, as Mansfield J said in *BWK Elders Australia v Westgate Wool Co (No 2)*,[25] referring to von Doussa J's judgment in *Beach Petroleum NL v Johnson*:[26]

> The Court's focus has been upon ensuring the case is identified with clarity, so that the opposing party knows the case to be met and the issues for trial are identified. The focus upon case management, to ensure the efficient and fair conduct of proceedings, has also led to the emphasis on technical pleadings rules being diverted to an emphasis upon ensuring that, in substance the objectives of pleadings, as discussed for example by the High Court in *Banque Commerciale SA en Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279; 92 ALR 53 at 286 (CLR), 58 (ALR) per Mason CJ and Gaudron J, are fulfilled.[27]

The court is principally concerned with whether a cause of action has been materially, not formally, made out. Beaumont J in *Pancontinental Mining v Posgold Investments*[28] said in relation to the purpose of pleadings that:

> Under the modern system of pleading, the question is not whether the facts pleaded are in themselves sufficient to give rise to a cause of action. Rather, the question is whether it would be open to the applicant upon the pleadings to prove facts at the trial which would constitute a cause of action.

Case management, or judge-managed lists, have not undermined the centrality of pleadings to litigation proceedings.[29] While pleadings are still required to comply with the rules of court, it appears that courts are less likely than they once were to strike out non-compliant pleadings, even where they appear to fail to fulfil the purpose of pleadings, if particulars or affidavit material are able to remedy defective pleadings by providing the necessary facts to support the allegations raised in the pleadings.[30] The rules of court developed in a legal environment in which case management was not the norm, and they have yet to fully respond to the development of case management and pre-trial directions. As long as pleadings meet the requirements of defining the issues in controversy at trial, disclosing the cause of action or the defence, and notifying parties of the nature of the case they will be asked to meet at trial, arguing the technicalities and details of any particular pleadings' conformity with the

25 *BWK Elders Australia Pty Ltd v Westgate Wool Co Pty Ltd (No 2)* [2002] ATPR 41-860 at [19], [20].

26 *Beach Petroleum NL v Johnson* (1991) 105 ALR 456 at 466, a case in which "the strict distinction between material facts and particulars has not been rigidly adhered to, and technical objections raised to pleadings on the ground of alleged want of form are not so enthusiastically received."

27 *BWK Elders Australia Pty Ltd v Westgate Wool Co Pty Ltd (No 2)* [2002] ATPR 41-860 at [19], [20] per Mansfield J.

28 *Pancontinental Mining Ltd v Posgold Investments Pty Ltd* (1994) 121 ALR 405 at 414.

29 See *Mitanis v Pioneer Concrete (Vic) Pty Ltd* [1997] ATPR 41-591 (FCA).

30 *Queensland v Pioneer Concrete (Qld) Pty Ltd* [1999] ATPR 41-691. See also *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 569; *McKellar v Container Terminal Management Services Ltd* (1999) 165 ALR 409 at 417–421.

rules has been met with resistance by the courts. Instead courts reserve time for disputing the merits and adequacy of pleadings to disputes which draw attention to faults serious enough to affect a party's adequate preparation for trial.[31]

Davies J in *Nescor Industries Group v Miba*[32] said that the inadequacy of the expression in or drafting of pleadings, while not uncommon, did not displace the obligation on the judge to decide the case in accordance with the law. In that case the court considered an appeal from a judgment founded on a breach of s 52 of the *Trade Practices Act 1974* (Cth) and s 11 of the *Fair Trading Act 1985* (Vic) for conduct that was misleading and deceptive or likely to mislead or deceive in relation to information provided as to the takings of a franchise business in negotiations for the sale and purchase of the franchise, when the statement of claim had not alleged the breach, nor pleaded the conduct necessary to provide a basis for pleading a breach of the statute. The trial judge approached the issue having regard to all the relevant facts and circumstances without limiting his approach to the manner in which the issue had been framed in the pleadings.[33]

Even pleadings drafted on the basis of a misconception of the law required the judge to correct the error, and assure that litigation proceeded on a sound legal basis — even if it meant the trial had to be conducted by departing from the insistence on a strict construction of the pleadings. The matter had been pleaded in a manner consistent with the pleading of a cause of action in common law breach of warranty and fraudulent misrepresentation whereas a breach of statute required a particularisation of the relevant conduct said to constitute the breach. Asked to determine an appeal against a magistrate's decision to strike out pleadings that failed to comply strictly with the rules, his Honour identified the purposes fulfilled by pleadings. They operated first, to define the matters in dispute[34] so as to guide processes of discovery, interrogatories, and the determination of admissibility of evidence; secondly, to disclose to the parties what facts they would be required to prove at trial in order to avoid surprise at trial and preserve the interests of natural justice;[35] thirdly, to raise the questions to be determined by the

31 See *Barclay Mowlem Construction Ltd v Dampier Port Authority* (2006) 33 WAR 82 at [4]–[8] per Martin CJ.

32 *Nescor Industries Group Pty Ltd v Miba Pty Ltd* (1997) 150 ALR 633 at 639–640 (FCA).

33 Following the approach as stated by Black CJ in *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 32.

34 Citing *Water Board v Moustakas* (1988) 180 CLR 491 at 497 per Mason CJ, Wilson, Brennan and Dawson JJ; see also *Thorp v Holdsworth* (1876) 3 Ch D 637 at 639; *Banque Commerciale SA (en liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279.

35 Citing *Banque Commerciale SA (en liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286–287 per Mason CJ and Gaudron J: see also *Bruce v Odhams Press Ltd* [1936] 1 KB 697 at 712.

court in arriving at its decision.[36] Pleadings also provide a record of the matters that have been raised for determination at trial if *res judicata* or issue estoppel were raised to bar subsequent actions.[37]

Pleadings impose on parties a disciplined concentration on the law so that only those facts material to a cause of action or defence are raised, and the litigation efficiently ventilates only matters which are in dispute.[38]

This view that the purpose of pleadings was to identify the issues that were really in dispute between the parties was affirmed in *Banque Commerciale v Akhil Holdings*[39] by the High Court:

> The function of pleadings is to state with sufficient clarity the case that must be met: *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (In liq)* ((1916) 22 CLR 490, at p 517), per Isaacs and Rich JJ. In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. The rule that, in general, relief is confined to that available on the pleadings secures a party's right to this basic requirement of procedural fairness. Accordingly, the circumstances in which a case may be decided on a basis different from that disclosed by the pleadings are limited to those in which the parties have deliberately chosen some different basis for the determination of their respective rights and liabilities. See, eg, *Browne v Dunn* (1893) 6 R, at p 76; *Mount Oxide Mines* (1916) 22 CLR, 517 – 518.
>
> Ordinarily, the question whether the parties have chosen some issue different from that disclosed in the pleadings as the basis for the determination of their respective rights and liabilities is to be answered by inference from the way in which the trial was conducted. It may be that, in a clear case, mere acquiescence by one party in a course adopted by the other will be sufficient to ground such an inference …

A pedantic insistence on pleadings' technical conformity with the rules deprives it of its role of providing a basis for procedural fairness.[40]

THE PURPOSE OF PLEADINGS AND PARTICULARS

The issues purpose

[7.20] Pleadings function to identify the issues between the parties. It is the resolution of the issues which determines the outcomes of the proceedings in that an issue resolved in favour of the plaintiff provides

36 Citing *Banque Commerciale SA (en liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286–287 per Mason CJ and Gaudron J, referring to *Browne v Dunn* (1893) 6 R 67 (HL); *Gould v Mount Oxide Mines Ltd (in liq)* (1916) 22 CLR 490 at 517–518. The same passage to the same effect was cited by RD Nicholson J.

37 *Hoystead v Commissioner of Taxation* [1926] AC 155; *Blair v Curran* (1939) 62 CLR 464; *Khan v Golechha International Ltd* [1980] 1 WLR 1482. See generally *Williams v Australian Telecommunications Commission* (1988) 52 SASR 215.

38 See the comments about pleadings in *Banque Commerciale SA (en liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286.

39 *Banque Commerciale SA (en liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279.

40 *Greek Herald Pty Ltd v Nikolopoulos* (2002) 54 NSWLR 165 at [18] per Mason P.

them with a right to a remedy, whereas an issue resolved in favour of the defendant constitutes a defence in itself.[41] The purpose of pleadings is to identify and inform the parties of the "real point" of a trial and to secure "definite issues" to be contested at that trial.[42]

The issues raised in pleadings commit the parties to disputing only what is raised and require them to seek leave of the court if they intend to raise issues at trial which have not clearly formed part of the pleadings at their close. In *Banque Commerciale v Akhil Holdings*[43] the plaintiff brought an action alleging breach of trust under the *Trustee Act 1925* (NSW) after the limitation period. Claims could be pursued despite the statute barring of the action for fraudulent breach of trust. However, the plaintiff failed to raise the issue of fraud in the pleadings. Fraud was therefore not in issue between the parties at trial, and the action fell outside the limitation period.

Provided other parties are not prejudiced by the amendment, pleadings may be amended if parties raise new issues at trial that are not part of the pleadings to ensure compliance between pleadings and the trial issues.[44]

The notice purpose

[7.30] The pleadings apprise a party of the opposing party's case. The pleadings, including particulars, must be sufficiently detailed to enable the opposite party to identify the case the other side will put, and which they will have therefore to meet, at trial.[45] The pleadings must therefore be sufficient to serve the purpose of notification.[46] Sufficient notice is fair notice.[47]

THE BINDING EFFECT OF PLEADINGS

[7.40] Although pleadings are said to be binding, and as a general rule *are* binding, the modern pleadings system is neither rigidly formulaic, nor is it mechanically imposed. Pleadings define the issues between the parties and notify them of the case they are required to meet, and the issues as defined enable rulings upon the admissibility of evidence on the basis of relevance. Cases are determined by evidence and not by the pleadings. Therefore where the conduct of proceedings is not reflected in

41 *R v Judges of District Court Holden at Brisbane; Ex Parte Kruger Enterprises* [1982] Qd R 623 at 626–627 per McPherson J.

42 *Thorp v Holdsworth* (1876) 3 Ch D 637 at 639.

43 *Banque Commerciale SA (en liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279.

44 *New South Wales v Thomas* [2004] NSWCA 52 at [16] per Handley JA.

45 *Bruce v Odhams Press Ltd* [1936] 1 KB 697 at 712 per Scott LJ.

46 *Supreme Court (General Civil Procedure) Rules 2015* (Vic), r 13.10. Legislative references throughout this chapter are to these rules unless otherwise specified.

47 *Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218 at 238 per Lord Normand.

the pleadings they are to be amended in order to do so. However, proceedings are not invalidated by the failure to amend pleadings.[48]

The case as pleaded and particularised is in general binding on the parties. Whether a party should be held to or permitted to deviate from the pleadings at trial is a matter for the court to decide. Because rules are not ends in themselves but serve the purpose of justice and fairness,[49] whether a case is appropriate to accommodate the parties' deviation must be assessed in the circumstances. If in the circumstances it would be just to permit a party to lead evidence outside what was alleged in the pleadings and particulars that may be allowed. If, however, it would not be just, the case is to be conducted on the basis of the pleadings and particulars as litigated.[50] On the one hand, if a claim or defence is not allowed to be argued, the court will not be deciding the case on its merits, or on the basis of the real issues in question as defined by the parties. If on the other hand a claim or defence of which the other side has not had notice is permitted, it would do an injustice to that party, and may in fact be introduced to enable the claim or defence to succeed.

Problematically, it is unsatisfactory for the court either to decide the case without it being presented as fully as possible with all the available relevant admissible evidence, or to permit one side to introduce an argument by surprise and thereby undermine the opposing side's case. Where evidence sought to be led at trial falls outside the particulars of the case the trial judge must determine the unfairness inflicted upon the other party by the absence or insufficiency of notice.[51]

The court in its inherent jurisdiction may order that pleadings be amended on appeal.[52] That inherent power is only ever rarely exercised, and the court will only do so if the application is supported by evidence.

If a party in a proceeding proceeds by cross-claim but the proceeding has not been brought on in a form in which cross-claims can be put, the court nevertheless has discretion to hear and decide the cross-claim if the proceeding in substance is such that a cross-claim can be raised and determined.[53]

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48 *Dare v Pulham* (1982) 148 CLR 658 at 664; *Water Board v Moustakas* (1988) 180 CLR 491; 77 ALR 193 at 197; *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666 at 668; *Maloney v Commissioner for Railways (NSW)* (1978) 52 ALJR 292 at 294.

49 *Union Bank of Australia v Harrison, Jones & Devlin Ltd* (1910) 11 CLR 492 at 504 per Griffith CJ; *Aravas v Metropolitan Water, Sewerage & Drainage Board* [1970] 3 NSWR 174 per Dawson J; *GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710; *Noye v Gwilliam* [2006] WASC 183 at [35]–[36].

50 *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99 at 110.

51 *Vlasic v Federal Capital Press of Australia Pty Ltd* (1976) 9 ACTR 1 at 6 per Blackburn J.

52 *New South Wales v Thomas* [2004] NSWCA 52.

53 *New South Wales v Thomas* [2004] NSWCA 52. The appellants relied also on *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666; and *Dare v Pulham* (1982) 148 CLR 658.

The trial judge has discretion to admit the evidence as long as the other party is compensated for any prejudice it has suffered thereby, and may require the particulars to be amended, or restrict the party leading the evidence to the issues raised in the particulars.[54] If a party does not appear at trial the judge must base a decision whether to allow an amendment to the pleadings, so as to adhere to the evidence presented at trial, on the circumstances of the particular case. The court considers and weighs in the balance the prejudice suffered by a party[55] if the opposing party is granted leave to lead new evidence at trial, against the non-appearing party's declaration by their absence that they have freely foregone the right to be heard in relation to procedural matters at trial.

The remedy sought by the plaintiff, however, must not exceed the remedy claimed. A plaintiff cannot be granted an amendment to the remedy sought at trial against a party who has not appeared at trial. The party who has not appeared at trial has only relinquished their right to be heard with respect to the specific claim, and not to an altered claim for relief against them.[56] The amendment to particulars may occur after evidence has been led in the trial.[57] A plaintiff who fails to amend particulars in accordance with the evidence that has emerged at trial may still seek a verdict on the cause of action established on the evidence.[58]

In *Banque Commerciale v Akhil Holdings*,[59] despite not having alleged fraud expressly in the pleadings, the plaintiff argued at trial a fraudulent breach of trust which was not statute barred. The plaintiff submitted that it had alleged fraud, albeit without particularising it, in reply to the co-defendant, and that the particulars in the plaintiff's pleadings were sufficient for the Court of Appeal of New South Wales to find fraud in issue in the trial. The High Court found that as the fraud was not alleged against the defendant, judgment could not be given against the defendant, and on that basis fraud could not be considered as being in issue, such that the action was statute barred.

In *Queensland v JL Holdings*[60] the plaintiff property developer sought endorsement of a contract by the Minister for Lands in a new government, the Minister in the previous government having approved the draft agreement. The plaintiff alleged that the new Minister was duty-bound to execute a contract which the previous Minister had

54 *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99 at 110; *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666; 9 ALR 437 at 446 (HC); *Ainsworth v Burden* [2005] NSWCA 174 (CA) at [52].

55 See *Re Robinson's Settlement; Gant v Hobbs* [1912] 1 Ch 717 at 728 per Buckley LJ.

56 *Stone v Smith* (1887) 35 Ch D 188; *Barker v Furlong* [1891] 2 Ch 172; *Gee v Bell* (1887) 35 Ch D 160; *Kingdon v Kirk* (1887) 37 Ch D 141; *Jamaica Railway Co v Colonial Bank* [1905] 1 Ch 677 at 691.

57 *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99 at 111, 112, 127.

58 *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666 at 668.

59 *Banque Commerciale SA (en liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279.

60 *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146.

approved in draft form. The respondent sought leave to amend its defence after discovering differences between the draft and executed lease once the trial date had been set down, but the Federal Court refused its application, finding that the amendment would so complicate proceedings as to require a vacation of the trial. On appeal the High Court held that the defence should be amended to give the appellant a defence to the claim.

In *Banque Commerciale v Akhil Holdings*[61] the plaintiff was precluded from putting a cause of action before the court, whereas in *Queensland v JL Holdings*[62] the defendant was given leave to file an amended defence after the close of pleadings. Whether pleadings have a binding force is open to argument, and even limiting concepts such as the justice and fairness of the case in the circumstances can prove hard to predict with any certainty. Clearly, however, the court cannot allow unlimited leeway for a party to depart from the pleadings and particulars. The question of the extent to which the court will permit deviation from the pleadings was faced in *Leotta v Public Transport Commission (NSW)*.[63]

The respondent Public Transport Commission operated a train from which a passenger (the appellant Leotta's husband) had a fatal fall. The appellant was awarded compensation under the *Compensation to Relatives Act 1867* (NSW). She received $48,000 after claiming she suffered financial loss as a result of her husband's death. The pleadings originally raised a cause of action in negligence against the respondent for the way it managed and controlled the train's operation, in particular for starting the train before the deceased was securely aboard. However, the appellant became aware of evidence during the trial that the respondent opened the doors of a moving train to admit the deceased, who fell when the doors closed on him, and argued negligence based on these particulars at trial. The knowledge of the guard on the platform who had observed the events involving the deceased was not directly in evidence, and could not be inferred from the evidence presented.

The respondent Commission successfully appealed the judgment on the verdict to the Court of Appeal, who reversed the decision that had been made in favour of the appellant Leotta. Leotta then appealed to the High Court. The majority found for Leotta, holding that the rules permitted that pleadings be amended for the purpose of determining all the issues in the case. The trial judge should permit amendments to the pleadings to reflect the emergence of evidence supporting a cause of action to be argued at trial different in its material facts from the cause of action in the pleadings:

> If in the cause of action upon which the plaintiff sued there had emerged at the conclusion of the evidence facts which, if accepted, established that cause of

61 *Banque Commerciale SA (en liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279.

62 *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146.

63 *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666.

> action, then it was the duty of the trial judge to leave the issue of negligence to the jury. The pleadings should have been amended in order to make the facts alleged and the particulars of negligence precisely conform to the evidence which had emerged. Part 20, r 1(2) of the New South Wales Supreme Court Rules provides that all necessary amendments shall be made for the purpose of determining the real questions raised by or otherwise depending on the proceedings. Now, and for many years past, a plaintiff does not fail by being refused leave to amend or through failure formally to apply for amendment, where the evidence has disclosed a case in the cause of action fit to be determined by the tribunal of fact. Particularly is this so when the action finally determines the rights of the parties in the cause of action.[64]

In dissent Barwick CJ, who would permit amendments to pleadings during the course of a trial if it did not unfairly prejudice the defendant, would not allow the plaintiff to formulate a new claim the evidentiary basis of which the defendant had not had an opportunity to examine and test. The authority of *Leotta* would therefore permit an amendment at any stage of proceedings — even to a party seeking to amend a statement of claim or defence having deliberately not pleaded a cause of action or defence — to enable the real matters in controversy to be addressed, provided that the amendment can be effected without injustice to the other party.[65] The decision or prior intention not to plead a claim or defence does not itself absolutely bar a party from applying to amend the pleading to raise the cause of action or defence, or the court from granting leave, and this is so even if the application to amend is made after the verdict.[66]

In *Re Robinson's Settlement; Gant v Hobbs* — a leading case on whether the effect of the operation of O 18 r 8 of the *Rules of the Supreme Court 1883* (UK) is to oblige a party to plead legal principles in defence, reply or subsequent pleadings — Buckley LJ observed that the procedural rule

> applies to all cases of grounds of defence or reply which if not raised would be likely to take the opposite party by surprise or raise issues of fact out of the pleadings. The effect of the rule is, I think, for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the court to prove. If he does not do that the court will deal with it in one of two ways. It may say that it is not open to him, that he has not raised it and will not be allowed to rely on it; or it may give him leave to amend by raising it, and protect the other party if necessary by letting the case stand over. The rule is not one that excludes from the consideration of the court the relevant

64 In *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666; 9 ALR 437 at 446 per Stephen, Mason and Jacobs JJ citing *Supreme Court Rules 1970* (NSW), Pt 20 r 1(2) and applying *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99.

65 *Cropper v Smith* (1884) 26 Ch D 700 cited in *Clough v Frog* (1974) 48 ALJR 481; and see *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666.

66 In which case the right to amend will be governed by the principles expounded in cases such as *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418; and *Coulton v Holcombe* (1986) 162 CLR 1.

> subject-matter for decision simply on the ground that it is not pleaded. It leaves the party in mercy and the court will deal with him as is just.[67]

The court is primarily concerned with the pleading of the material facts and even then a party may rely on those facts despite not having, or having only insufficiently, pleaded them if to do so would not surprise or mislead the opposing party. In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd*[68] the failure to specifically plead estoppel did not prevent the court considering the issue because sufficient materials facts were pleaded to establish it. As far as the Malaysian Court of Appeal was concerned authority enabled them to conclude that the term did not constitute a "special formula" requiring express statement.[69] The court further stated that even where material facts required to establish a cause of action are not referred to in the pleadings it may permit argument in relation to the issue if to do so would not prejudice the opposing party.[70]

In *Water Board v Moustakas*[71] the High Court held that in order to determine whether a point had been taken at trial it was necessary to examine the conduct of the proceedings. Only the conduct of the trial, not the pleadings and particulars, reveals if evidence has been presented which is beyond what was pleaded and particularised, especially if a particular is ambiguous. Mason CJ, Wilson, Brennan and Dawson JJ said:[72]

> In *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666 at 668 a case having been submitted to the jury which was factually different from that alleged in the pleadings and particulars, Stephen, Mason and Jacobs JJ observed that the pleadings should have been amended in order to make the facts alleged and the particulars of negligence precisely conform to the evidence. The failure to apply for the amendment in that case was held not to be fatal. But in *Maloney v Commissioner for Railways (NSW)* (1978) 52 ALJR 291 at 294 Jacobs J with whom the other members of the Court agreed, pointed out that the conclusion in *Leotta* was reached only upon the presupposition that the new issue or new way of particularising the existing issue had emerged at the trial and had been litigated.

In *Dare v Pulham*[73] the plaintiff claimed for a personal injury and was required under O 19 r 5A of the *Rules of the Supreme Court 1957* (Vic) as

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67 *Re Robinson's Settlement; Gant v Hobbs* [1912] 1 Ch 717 at 728. See also *Price v Richardson* [1927] 1 KB 448 at 453.

68 *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at 341.

69 Applying *Laws Holdings Pty Ltd v Short* (1972) 46 ALJR 563 at 571. Also see *Richland Trade & Development Sdn Bhd v United Malayan Banking Corp Bhd* [1996] 4 MLJ 233 at 246.

70 *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at 342. Also see *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Seiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308 at 320.

71 *Water Board v Moustakas* (1988) 180 CLR 491.

72 *Water Board v Moustakas* (1988) 180 CLR 491 at 497.

73 *Dare v Pulham* (1982) 148 CLR 658 at 664.

they then were to state particulars of loss of earnings and loss of earning capacity, and the amount claimed, in the pleadings. The plaintiff complied with the requirements, but at trial led evidence of losses substantially above the amount stated in particulars. The jury gave a verdict for losses in accordance with the trial evidence rather than the pleaded particulars and the Full Court of the Supreme Court set aside the jury's award on the basis of the divergence of the evidence from the particulars. The plaintiff appealed to the High Court. The High Court said:[74]

> Pleadings and particulars have a number of functions: they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it (*Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (In liq)* (1916) 22 CLR 490 at 517; [1916] HCA 81); they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial (*Miller v Cameron* (1936) 54 CLR 572 at 576–7; [1936] ALR 301 at 302–3); and they give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court. Apart from cases where the parties choose to disregard the pleadings and to fight the case on issues chosen at the trial, the relief which may be granted to a party must be founded on the pleadings (*Gould and Birbeck and Bacon* (1916) 22 CLR 490 at 517–8; [1916] HCA 81; *Sri Mahant Govind Rao v Sita Ram Kesho* (1898) LR 25 Ind App 195 at 207). But where there is no departure during the trial from the pleaded cause of action, a disconformity between the evidence and particulars earlier furnished will not disentitle a party to a verdict based upon the evidence. Particulars may be amended after the evidence in a trial has closed (*Mummery v Irvings Pty Ltd* (1956) 96 CLR 99 at 111, 112 and 127; [1956] ALR 795 at 802), though a failure to amend particulars to accord precisely with the facts which have emerged in the course of evidence does not necessarily preclude a plaintiff from seeking a verdict on the cause of action alleged in reliance upon the facts actually established by the evidence: *Leotta v Public Transport Commission (NSW)* (1976) 9 ALR 437 at 446; 50 ALJR 666 at 668.

The rule did not impose a duty on the plaintiff to limit the damages claimed to the amount stated, it only required the plaintiff to give more particulars than they had previously done so. Leading evidence of damages different from that in the pleadings permitted the plaintiff to seek an award based on the evidence if the cause of action was unchanged at trial.[75] The court also noted that the evidence led at trial was of the same nature as that pleaded: namely, loss of earnings and loss of earning capacity.

In reliance upon *Leotta v Public Transport Commission (NSW)*[76] the appellants submitted that their legal interpretation of the pleaded facts was not binding on them. The same facts pleaded for one cause of action can therefore be used to plead a different cause of action. In *Leotta* Stephen, Mason and Jacobs JJ held that an amendment should have been

74 *Dare v Pulham* (1982) 148 CLR 658 at [6] per Murphy, Wilson, Brennan, Deane and Dawson JJ.

75 *Dare v Pulham* (1982) 148 CLR 658 at 665–666.

76 *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666; and *Dare v Pulham* (1982) 148 CLR 658.

permitted "to make the facts alleged and the particulars of negligence precisely conform to the evidence which had emerged".[77] Where the evidence discloses a cause of action the failure to apply for, or be granted leave to make, an amendment will not defeat the claim. An amendment should be permitted where to do so would merely effect a conformity of the pleading with the evidence and not raise a new issue to be determined.[78] Procedural fairness is a material consideration in the determination of whether it was not open to a party to make the case it intended to on the basis of its particularised pleadings supported by evidence.

In *Banque Commerciale v Akhil Holdings*[79] the court recognised exceptions to the general rule that the case is to be confined by the pleadings. Dawson J observed that the dynamic and evolving nature of long matters, and the degree of complexity involved, means that facts might emerge that are not contained in the pleadings. In order to determine the real matters in dispute between the parties, plaintiffs may move to amend pleadings, and the judge determine whether the amendment is permissible by weighing the extent to which the amendment is necessary to determine the real issues between the parties, and the prejudice to either party of permitting or not permitting the amendment. However, the failure to make such an application is not fatal to a party's claim.[80]

The court in *Banque Commerciale v Akhil Holdings* referred to *Gould v Mount Oxide Mines*[81] in which Isaacs and Rich JJ said:[82]

> Undoubtedly, as a general rule of fair play, and one resting on the fundamental principle that no man ought to be put to loss without having a proper opportunity of meeting the case against him, pleadings should state with sufficient clearness the case of the party whose averments they are. That is their function. Their function is discharged when the case is presented with reasonable clearness. Any want of clearness can be cured by amendment or particulars. But pleadings are only a means to an end, and if the parties in fighting their legal battles choose to restrict them, or to enlarge them, or to disregard them and meet each other on issues fairly fought out, it is impossible for either of them to hark back to the pleadings and treat them as governing the area of contest … There are qualifications, no doubt, and each case must depend for the proper application of the principle upon its own facts. It has been laid down by the Privy Council that "As a rule relief not founded on the pleadings should not be granted." "But in this case" (said their Lordships) "the

77 *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666 at 668.

78 *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666 at 668–669.

79 *Banque Commerciale SA (en liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 293.

80 *Banque Commerciale SA (en liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 293, citing *Dare v Pulham* (1982) 148 CLR 658 at 664; *Water Board v Moustakas* (1988) 180 CLR 491; 62 ALJR 209 at 211; *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666 at 668; *Maloney v Commissioner for Railways (NSW)* (1978) 52 ALJR 292 at 294. Compare *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666 at 668.

81 *Gould v Mount Oxide Mines Ltd (in liq)* (1916) 22 CLR 490.

82 *Gould v Mount Oxide Mines Ltd (in liq)* (1916) 22 CLR 490 at 517–518.

> substantial matters which constitute the title of all the parties are touched, though obscurely, in the issues; they have been fully put in evidence, and they have formed the main subject of discussion and decision in all three Courts. The High Court are right in treating the case as not within the rule".[83]

Pleadings are binding on the litigants and the judge because the pleadings define the case that the parties intend to rely upon at trial.[84] Nevertheless, in practical terms matters evolve over time and the issues at trial may depart from those defined prior to the trial. It is therefore a well-established rule that "where the parties choose to disregard the pleadings and to fight the case on issues chosen at the trial"[85] proceedings are exempted from the pleadings which confine them. In *Dare v Pulham*[86] the court held that a party might still put a case and be entitled to a judgment on it even though the evidence does not conform to the pleaded particulars. Further, the party may still be entitled to a verdict on the cause of action raised in the pleadings and the evidence that emerged in the course of the trial even if they have not applied for amendment after the close of evidence.[87]

In *Commonwealth v Verwayen*[88] the High Court said that in some circumstances a defendant may lose a right to rely upon a defence by waiver by choosing not rely upon a defence that was open to it to plead,[89] or may be precluded by election from raising a particular defence to a claim.[90] The case involved an action for damages for injuries suffered by Verwayen while serving the Commonwealth. In its defence the Commonwealth failed to dispute that it had acted negligently or that it

83 See *Sri Mahant Govind Rao v Sita Ram Kesho* (1898) 25 Ind App 195 at 207.

84 *Banque Commerciale SA (en liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 85.

85 *Dare v Pulham* (1982) 148 CLR 658 at 664; and *Banque Commerciale SA (en liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 287.

86 *Dare v Pulham* (1982) 148 CLR 658; 44 ALR 117 at 121.

87 Arguably the interpretation of the rules of pleading avoids the ambiguity of the statement of Ajaib Singh J in *Chong Kok Hwa v Taisho Marine & Fire Insurance Co Ltd* [1977] 1 MLJ 244 at 247 who, commenting on a defence of waiver which had not been specifically pleaded, said that "a particular defence which is required to be specifically pleaded but is not done with sufficient definiteness may be otherwise discernible from the tenor and language used and thus entitled to be considered as a plea in defence. *However, it must not all be left to the imagination. There must be some outward appearance of at least a semblance of such a plea* [emphasis added]".

88 *Commonwealth v Verwayen* (1990) 170 CLR 394.

89 *Commonwealth v Verwayen* (1990) 170 CLR 394; 64 ALJR 540 at 572, 573 per Toohey J (that there was waiver which was not able to be withdrawn); and 577–579 per Gaudron J (that both the combat exercise defence and the defence that the action was statute barred were capable of being waived). Brennan J (dissenting) at 551–553 said that the limitation defence was amenable to waiver but had not been waived.

90 *Commonwealth v Verwayen* (1990) 170 CLR 394; 64 ALJR 540 per Deane and Dawson JJ. Mason CJ (dissenting) at 543, 544 said that the Commonwealth had not elected not to rely on a defence, in the sense that it had not intentionally abandoned its right to rely on it, and that it was not required to elect to plead its defence or defences at a certain point in time.

owed the plaintiff a duty of care, nor did it plead the available defence that the action was barred under the *Limitation of Actions Act 1958* (Vic), s 5. When the Commonwealth was given leave to amend its defence it sought to deny that it had acted negligently and that it owed Verwayen a duty of care, and to rely on the fact that the action had been commenced outside the time available for the action under statute. In a 4:3 majority decision the High Court held that the defendant had either waived, or elected not to rely on, its right to dispute its liability to the plaintiff.[91]

CONTENT OF PLEADING

[7.50] In the Federal Court case *Multigroup Distribution Services v TNT Australia*[92] Burchett J observed that

> The primary function of (a statement of claim) is to tell the defending party what the claim is he has to meet. That is a matter of elementary and natural justice; the claim cannot be answered until it is known. When a sufficient defence has been filed to a sufficient statement of claim, a further function will generally have been performed — that of defining the question or questions for decision. This definition is required … from an early stage, or else discovery and other interlocutory procedures are likely to prove misdirected, wasteful and unproductive.[93]

Order 13 governs the content of all pleadings. Rule 13.02 provides

> **13.02 Content of pleading**
>
> (1) Every pleading shall—
>
> (a) contain in a summary form a statement of all the material facts on which the party relies, but not the evidence by which those facts are to be proved;
>
> (b) where any claim, defence or answer of the party arises by or under any Act, identify the specific provision relied on;
>
> (c) state specifically any relief or remedy claimed.
>
> (2) A party may by that party's pleading—
>
> (a) raise a point of law;
>
> (b) plead a conclusion of law if the material facts supporting the conclusion are pleaded.[94]

The manner of pleading facts is governed by r 13.02(1)(a). The statement of claim is a summary of the case to be proved and while it states all the

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91 Mason CJ, Brennan and McHugh JJ dissenting.

92 *Multigroup Distribution Services Pty Ltd v TNT Australia Pty Ltd* [1996] ATPR 41-522 at 42,769.

93 *Multigroup Distribution Services Pty Ltd v TNT Australia Pty Ltd* [1996] ATPR 41-522 at 42,769 per Burchett J (FCA).

94 Rule 13.02(1)(a), part of r 13.02(1)(c), and r 13.02(2)(a), were taken from the *Rules of the Supreme Court 1884* (Vic): r 13.02(1)(a) reproduces O 19 r 4 of those Rules (other than the prescription that only the material facts be stated), the requirement in r 13.02(1)(c) that a pleading state specifically any relief or remedy claimed is taken from O 3 r 3 and O 20 r 3, and r 13.02(2)(a) is based on O 25 r 2. The remainder of r 13.02 represents a codification of the practice under the *Rules of the Supreme Court 1884* (Vic).

material facts[95] it does *not* provide the evidence by which those facts are to be proved. The rule also governs the form of other affirmative claims such as a defendant's counterclaim. A pleading may plead a conclusion of law if it provides the material facts which support that conclusion.[96] A pleading may be struck out or amended if it fails to disclose all of the material facts supporting the claim.[97]

Order 13 deals with facts required to be specifically pleaded. For the purposes of O 13 a counterclaim is to be treated as if it were a statement of claim; and a defence to a counterclaim is to be treated like a defence.[98] In a recovery action, a plaintiff in a claim to recover possession of land must plead more than simply that the defendant is in possession.[99] In pleading a defence to a claim or counterclaim the defendant must specifically deny an alleged fact.[100] A pleading cannot merely join an issue.[101] Denial is not sufficient if the party intends to prove facts different from those alleged. Those facts must be specifically pleaded.[102] A defendant is not required to plead denial in relation to damages.[103] A party must specifically plead a fact, or a matter, which reveals the claim or the defence to be unfounded. However, a defendant may plead a money claim as a defence to the plaintiff's money claim.[104] A party must also plead specifically facts which would surprise the other party if not otherwise revealed,[105] or give rise to questions of fact which had not previously arisen in the pleadings.[106]

The facts alleged in a pleading are not true allegations, since they are still to be proved by evidence.[107] However, a pleaded fact accepted by the opposing party is established for the purposes of the proceeding, and there is no need to lead evidence to prove it. On the other hand, a party

95 See *Bruce v Odhams Press Ltd* [1936] 1 KB 697 at 712; *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1985) 7 FCR 109 at 112–114; *Mitanis v Pioneer Concrete (Vic) Pty Ltd* [1997] ATPR 41-591.

96 Rule 13.02(2)(b). See *Kernel Holdings Pty Ltd v Rothmans of Pall Mall (Aust) Pty Ltd* (unreported; FCA; French J; No WA G83/91; 3 September 1991), p 7; *BWK Elders Australia Pty Ltd v Westgate Wool Co Pty Ltd (No 2)* [2002] ATPR 41-860.

97 Rule 23.02.

98 Rule 13.15.

99 Rule 13.07(2)(b).

100 Rule 13.12(1). Denial may also be by necessary implication, or in response to a specific allegation a party may state that it is not admitted.

101 Rule 13.13(1).

102 Rule 13.12(2).

103 Rule 13.12(3).

104 Rule 13.14.

105 Rule 13.07(1)(b).

106 Rule 13.07(1)(c).

107 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 85–87 per Mason CJ and Brennan J; 98 per Gaudron and McHugh JJ.

who pleads a fact but fails to prove it by evidence has not misrepresented the status of the fact to the other party.[108]

Because pleadings allege assertions rather than truths plaintiffs are tempted to state a claim in the widest possible terms to raise the greatest possible number of causes of action against the defendant, and the defendant is able to deny a claim's allegations in an equally broad way. Rather than encouraging a precise definition of the issues the pleadings potentially obscure the real basis of the dispute between the parties. In an attempt to address this issue the *Civil Procedure Act 2010* (Vic) at s 42 requires a legal practitioner to file a Proper Basis Certificate.[109] In particular, where facts are alleged the practitioner certifies the proper basis of each

- alleged fact;[110]
- denial;[111] and
- non-admission.[112]

Pleading facts

[7.60] Pleadings allege material facts to establish a legal cause of action,[113] giving rise to the plaintiff's right to obtain a remedy.[114] The court is not bound to return a finding consistent with the party's claim that the alleged facts constitute a pleaded cause of action. The court is instead obliged to deliver a judgment consistent with the law. It will therefore provide a plaintiff with a remedy as long as the facts disclose a case for relief. In *Konskier v B Goodman Ltd*[115] a building sustained damage prior to it being sold. The new owner of the building sued the owner of the adjacent building, claiming that the negligent demolition of the adjacent building caused the damage. The court found the new owner was not owed a duty of care and was unable to succeed on the negligence claim, but had alleged facts which established a trespass on which he was able to succeed and obtain relief. Before the court can find in the plaintiff's favour the plaintiff must have argued a cause of action, even if the court ultimately provides relief on the basis of another cause of action consistent with the law.

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108 *Spies v Commonwealth Bank of Australia* (1991) 24 NSWLR 691.

109 See also FCR r 16.02; SA r 217; NSW parties verify pleadings by affidavit, and see also r 14.22; Qld r 166: a party cannot plead a denial or non-admission unless accompanied by an explanation for the belief in the untruth of the allegation or why no admission can be made.

110 *Civil Procedure Act 2010* (Vic), s 42(1A)(a).

111 *Civil Procedure Act 2010* (Vic), s 42(1A)(b).

112 *Civil Procedure Act 2010* (Vic), s 42(1A)(c).

113 *Australian Automotive Repairers' Assn (Political Action Committee) Inc v NRMA Insurance Ltd* [2002] FCA 1568 at [13]–[15].

114 *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234 at 245 per Wilson J.

115 *Konskier v B Goodman Ltd* [1928] 1 KB 421.

How the facts should be stated

[7.70] Material facts are to be stated with precision and brevity,[116] arranged chronologically, and divided into separate consecutively numbered paragraphs.[117] Where alternative claims are relied upon the facts establishing each claim should be pleaded separately.[118] Dates, amounts, quantities, and other uses of numbers are to be expressed in figures, not words.[119] Conclusions of law may also be pleaded.[120]

In a summary form

[7.80] Material facts are to be pleaded in summary form.[121] The overriding requirement of pleadings is clarity; they should only be as brief as is consistent with clearly and precisely stating the case the party opposing is to meet.[122] Pleadings are rarely (but may, under the court's inherent jurisdiction,[123] be) struck out merely for being prolix. In general, prolixity in pleading will not be determinative if the pleading states the material facts unambiguously.[124] Ambiguity in pleading may be read against the party whose pleadings are ambiguously expressed.[125]

In *Ashmore v Corporation of Lloyd's*,[126] Lord Templeman assessed the duty of counsel in drafting pleadings as the basis for presenting legal argument:

> The parties and particularly their legal advisers in any litigation are under a duty to co-operate with the court by chronological, brief and consistent pleadings which define the issues and leave the judge to draw his own conclusions about the merits when he hears the case. It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner … there has been a tendency in some cases for legal advisers, pressed by their clients, to make every point conceivable and inconceivable without judgment or discrimination.

In *Liberty Financial v Scott (No 3)*[127] Harper J made similar observations when stating that:

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116 *Askew v North Eastern Railway Co* [1875] WN 238; *Davy v Garrett* (1878) 7 Ch D 473.

117 Rule 13.01(2).

118 *Kenny v Sholl* (1905) 7 WALR 197.

119 Rule 27.04.

120 See *Kirby v Sanderson Motors Pty Ltd* (2002) 54 NSWLR 135 at 142–143 per Hodgson JA, giving as examples duty of care, fiduciary duty, trust and contract.

121 Rule 13.02(1)(a).

122 *Askew v North Eastern Railway Co* [1875] WN 238; *Davy v Garrett* (1878) 7 Ch D 473.

123 *Hill v Hart-Davis* (1884) 26 Ch D 470.

124 *Davy v Garrett* (1878) 7 Ch D 473; *Heap v Marris* (1877) 2 QBD 630; *Knowles v Roberts* (1888) 38 Ch D 263.

125 See *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125 at 135.

126 *Ashmore v Corporation of Lloyd's* [1992] 1 WLR 446; [1992] 2 All ER 486 at 493.

127 *Liberty Financial Ltd v Scott (No 3)* [2005] VSC 363 at [96].

> Those who draw pleadings in complicated cases have especial responsibilities. Where senior counsel are engaged, they must exercise the authority of their office to ensure that the litigation is kept within manageable bounds. Neither parties nor courts have unlimited resources. It is of equal importance that litigation not be used merely as a means of oppression; and all unnecessarily oppressive steps should be eschewed. Clients who would have counsel act in ways that conflict with counsel's duty to the court must be told that the latter duty is paramount. Such clients must also be told that instructions, obedience to which would result in a breach of that duty, do not bind and will not be followed.

All the material facts

[7.90] A party must plead all the material facts. This requires a party to plead all the facts necessary to pleading a complete cause of action,[128] or a complete defence.[129] The pleadings must disclose to the opposing party what the cause of action or defence is, not merely what it may be.[130]

Further, the pleadings system is premised on the requirement that parties are provided with sufficient notice so that they are not taken by surprise at trial. Pleadings must therefore allege facts sufficient to enable the party to comprehend the claim, or the defence, that is raised against them, and what they must do to meet that claim, or defence, at trial. A medical practitioner, to whom it was open to raise a defence to a negligence claim under s 50 of the *Civil Liability Act 2002* (NSW) if they acted in a manner consistent with what professional peers would consider proper, failed to plead the statute and was precluded from relying on it at trial.[131] Pleadings contribute to questions of law as well as to facts. A party's obligation to state all the material facts enables the opposing party to assess the legal coherence, cogency, and completeness of the claim or defence.[132]

The material facts which constitute the cause of action, or defence, and trigger the defendant's liability, or constitute a defence, must be

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128 The *Judicature Act 1883* (Vic) abolished the forms of action, but the name of a form of action is still used to identify a cause of action. It is "used as a convenient and succinct description of a particular category of factual situation which entitles one person to obtain from the court a remedy against another person": *Letang v Cooper* [1965] 1 QB 232 at 243 per Diplock LJ. See also *Harris v Gas & Fuel Corporation (Vic)* [1975] VR 619 at 627.

129 *Townsend v Parton* (1882) 45 LT 755; *Phillips v Phillips* (1878) 4 QBD 127; *Bostock v Edgar* (1899) 24 VLR 677; *Kenny v Sholl* (1905) 7 WALR 197; *Bruce v Odhams Press Ltd* [1936] 1 KB 697; *Rubenstein v Truth & Sportsman Ltd* [1960] VR 473.

130 *West Rand Central Gold Mining Co Ltd v The King* [1905] 2 KB 391 at 399; *Salaman v Secretary of State for India* [1906] 1 KB 613 at 632; *Ritz Hotel Ltd v Charles of the Ritz Ltd (No 20)* (1988) 14 NSWLR 124.

131 *Phillips v Phillips* (1878) 4 QBD 127; *Pledge & Sons v Pomfret* (1905) 74 LJ Ch 357; *Rubenstein v Truth & Sportsman Ltd* [1960] VR 473. In *Sydney South West Area Health Service v MD* (2009) 260 ALR 702.

132 *Phillips v Phillips* (1878) 4 QBD 127.

specifically alleged.[133] The pleading should state all of the facts which together constitute the party's case in such a way that the claimant, by proving the stated facts or persuading the defendant to admit them, will be entitled to the remedy sought in the pleading.[134] As a general rule, a party is not given leave to prove facts which that party's pleadings fail to allege against the objections of the opposing party.[135] Although unpleaded facts may not be led at trial, in practice they may be alleged if the opposing party consents,[136] or if the court grants leave and any prejudice or unfairness to the opposing party can be compensated.[137]

In *New South Wales v Thomas*[138] the plaintiffs sued the New South Wales government for the nervous shock they suffered as a result of the death of a family member in custody. The plaintiff pleaded a claim on the basis of s 4 of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW). This claim was not sustainable but the facts alleged in the claim enabled the court to return a favourable verdict on the basis of a common law nervous shock claim.

A pleading must contain all the material allegations. The party must support all allegations of fact and alleged matters by stating in the pleading the necessary particulars to those facts and matters.[139] However, it is not the function of particulars to supply material facts that have been omitted from the statement of claim. Omitted statements of fact will not be read into particulars. A statement of claim which fails to state all the material facts should be struck out, albeit with liberty to amend. The appropriate order is one which precludes the giving of further particulars.[140]

The respondent's application to strike out a statement of claim succeeded in *Trade Practices Commission v David Jones (Australia)*.[141] The court agreed that the statement pleaded a conclusion of law without alleging material facts. The plaintiff alleged as a specific breach of s 45 of the *Trade Practices Act 1974* (Cth), that the respondent fixed, controlled and maintained

133 *Air Link Pty Ltd v Paterson* [2002] NSWCA 85 followed in *Agtrack (NT) Pty Ltd (t/as Spring Air) v Hatfield* (2003) 7 VR 63; 174 FLR 395 at 402–409 per Ormiston J.

134 *Ayers v Hanson* [1912] WN 193.

135 *Ayers v Hanson* [1912] WN 193; *The Hardwick* (1883) 9 PD 32; *Hyman v Van den Bergh* [1908] 1 Ch 167 at 169, 171.

136 *Miller v Cameron* (1936) 54 CLR 572.

137 *Dare v Pulham* (1982) 148 CLR 658.

138 *New South Wales v Thomas* [2004] NSWCA 52.

139 Rule 13.10(1).

140 *Bruce v Odhams Press Ltd* [1936] 1 KB 697: the court would not permit the plaintiff to cure deficient pleadings by supplying particulars, holding that the pleadings must contain all the material allegations; *Rubenstein v Truth & Sportsman Ltd* [1960] VR 473. With respect to the failure to plead material facts identified in *Rubenstein*, see *Sent v Jet Corporation of Australia Pty Ltd* (1984) 2 FCR 201.

141 *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1985) 7 FCR 109.

prices contrary to the express terms of the provision. The facts constituting the breach were pleaded in the particulars, but allegations of material fact were not made.

The lack, whether partial or complete, of material facts in the pleadings cannot be remedied by the particulars. Particulars are not substitutes for unpleaded facts. They may, however, supplement facts when those facts are not pleaded with sufficient particularity.

The absence of a material allegation of fact in the statement of claim cannot be made good by an inference drawn from the heading of the writ.[142]

A matter going to costs alone is not to be pleaded because it is not a material fact as provided by r 13.02(1)(a).[143]

Only the material facts

[7.100] The previous rules expressly required that the pleadings were to contain only material facts.[144] While it remains the case that the only facts that should be stated in the pleadings are material facts, the requirement under the new rules is that a statement will not be struck from a pleading if it does not delay the hearing of, or cause embarrassment to, the hearing of a matter[145] Unnecessary, irrelevant or immaterial facts having the potential to prejudice procedural fairness or embarrass the proceeding are likely to be struck out.[146] Nevertheless, immaterial facts are surplus to the requirements of the cause of action or the defence and the failure to prove them does not disentitle the pleader to a judgment in their favour if an allegation of all the material facts necessary to constitute a cause of action or defence has been made, and they are proved by evidence.[147]A party will not be given leave to amend a pleading in order to include immaterial facts.[148]

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142 *Bostock v Edgar* (1899) 24 VLR 677.

143 *Ricketts v Fraser* (1886) 8 ALT 21; *Sundercombe v Stubb* (1889) 15 VLR 509.

144 See O 19 r 4.

145 *Knowles v Roberts* (1888) 38 Ch D 263 at 271; *Tomkinson v South Eastern Railway Co (No 2)* (1887) 57 LT 358; *Wallace St Arnaud Gold Mining Co v Lord Nelson Gold Mining Co* (1897) 3 ALR 212; *Heffernan v Hayes* (1899) 25 VLR 156.

146 *Smith v Musgrove* (1885) 11 VLR 440; *Ricketts v Fraser* (1886) 8 ALT 21; *Davy v Garrett* (1878) 7 Ch D 473; *Rassam v Budge* [1893] 1 QB 571; *Murray v Epsom Local Board* [1897] 1 Ch 35; *Florins v Bank of Victoria Ltd* (1891) 17 VLR 183; *McNaughton v Chirnside* (1897) 3 ALR 257; *Heffernan v Hayes* (1899) 25 VLR 156; *Daily Mail Newspaper Co Ltd v Ellis* (1922) 39 WN (NSW) 119; *East-West Airlines (Operations) Ltd v Commonwealth* (1983) 57 ALJR 783.

147 See *Ron Hodgson (Trading) Pty Ltd v Belvedere Motors (Hurstville) Pty Ltd* [1971] 1 NSWLR 472 at 477; *Sanpine v Koompahtoo Local Aboriginal Land Council* [2005] NSWSC 365 at [170]–[186].

148 See *Slaveski v Victoria* [2010] VSC 200.

Facts, not evidence

[7.110] Facts pleading requires that only facts are pleaded while pleadings should avoid stating conclusions of law or providing evidence. Rule 13.02(1)(a) requires that pleadings only contain "all the material facts on which the party relies", and distinguishes between those facts and prohibits the pleading of "the evidence by which those facts are to be proved."[149] While a distinction between material facts and evidence is clearly drawn under the rule,[150] in practice the difference may be maintained only with difficulty. Evidentiary facts are those facts that can only be used in pleadings to establish material facts, and are not themselves material facts.[151] Pleadings should not contain the evidence by which the material facts are to be proved.[152] Distinguishing material facts from evidence when drafting pleadings can be fraught with difficulty.[153] It may depend on the context of the facts of the case, the level of detail of the fact provided, or the manner of description of the fact. The same fact may constitute a particular, a material fact, or evidence. Nevertheless, the analytical distinction is clear and necessary to the pleadings system. Material facts are relevant to the cause of action, while facts which trigger the claim or found the defence are evidentiary.

In *Williams v Wilcox*[154] Denman CJ said in relation to the distinction between facts and evidence:

> It is an elementary rule in pleading, that, when a state of facts is relied on, it is enough to allege it simply, without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation … It is true that the mode of pleading does not disclose to the defendant the case on which the plaintiff relies: but, to object to it on this ground, is to misconceive one object of pleading, and to forget another: the certainty or particularity of pleading is directed, not to the disclosure of the case of a party, but to informing the court, the jury, and the opponent of the specific proposition for which he contends, and a scarcely less important object is the bringing the parties to issue on a single and certain point, avoiding that prolixity and uncertainty which would very probably arise from stating all the steps which lead up to that point.

Examples of evidence as opposed to material facts include a request for particulars regarding directors paying dividends out of company capital in a case of misfeasance. Because establishing misfeasance required

149 *Phillips v Phillips* (1878) 4 QBD 127 at 133 per Brett LJ.

150 Rule 13.02(1)(a).

151 *East-West Airlines (Operations) Ltd v Commonwealth* (1983) 57 ALJR 783; *Research in Motion Ltd v Samsung Electronics Australia Pty Ltd* (2009) 176 FCR 66; *Phillips v Phillips* (1878) 4 QBD 127 at 133 per Brett LJ.

152 *Blake v Albion Life Assurance Society* (1876) 45 LJQB 663; *Williamson v London & North Western Railway Co* (1879) 12 Ch D 787; *Merchants' & Manufacturers' Insurance Co Ltd v Davies* [1938] 1 KB 196.

153 See *Davy v Garrett* (1878) 7 Ch D 473; *Phillips v Phillips* (1878) 4 QBD 127; *Bruce v Odhams Press Ltd* [1936] 1 KB 697; *Re Dependable Upholstery Ltd* [1936] 3 All ER 741.

154 *Williams v Wilcox* (1838) 8 Ad & El 314; 112 ER 857 at 331–332; 863.

showing that the company directors had made such payments, the request amounted to one for evidence, not material facts.[155]

The rules prohibit the pleading of evidence so that pleadings do not suffer from unnecessary prolixity, and to ensure the greatest degree of certainty in the pleading process. In *Davy v Garrett*[156] the plaintiff claimed that trustees had breached their duty by acquiring a creditor's property at an undervalue, but without alleging that fact in the statement of claim. The plaintiff instead set out in full correspondence between the trustees and creditors. The correspondence was evidence of the basis of the claim that was to be made out. The defendant, therefore, had no specific notice of the case raised against it and only evidence from which to infer the case it was to meet.

The corollary to the prohibition against pleading evidence is that parties receive no notice as to evidence which may take them by surprise and leave them unprepared at trial.[157]

Parties may plead their own admissions, but not another party's admissions.[158] However, another party's admission that is a material fact in a case may be pleaded.[159]

Facts and law

[7.120] Under the rules the parties are only required to state the facts upon which they rely to prove their claim or their defence. Neither the plaintiff nor the defendant is required to make a statement as to the legal effect of the facts relied upon in their pleadings.[160] The court's decision and judgment are based on the legal consequences that follow from the facts pleaded and proved at trial.

Pleadings are sufficient where the facts alleged reveal a cause of action, or a defence, without the cause of action or the defence having to be identified.[161] In *Castles v Freidman*[162] the court held that the defendant could receive the benefit of a defence available under the *Money Lenders and Infants Loans Act 1905* (NSW) despite not having specifically alleged the statute because the applicability of the statutory defence could be inferred from the material facts that had been alleged. Once the court has decided on the facts established at trial a party may argue for the

155 *Re Dependable Upholstery Ltd* [1936] 3 All ER 741; see also *Merchants' & Manufacturers' Insurance Co Ltd v Davies* [1938] 1 KB 196.

156 *Davy v Garrett* (1878) 7 Ch D 473.

157 JIH Jacob and IS Goldrein, *Pleadings Principles and Practice* (8th ed, Sweet & Maxwell, 1990), pp 50–51.

158 *Davy v Garrett* (1878) 7 Ch D 473; *Askew v North Eastern Railway Co* [1875] WN 238.

159 See also *Kleinberger v Norris* (1937) 183 LT Jo 107 (claim on an account stated).

160 *Konskier v B Goodman Ltd* [1928] 1 KB 421 at 427. See also *Elliott v Barnes* (1951) 51 SR (NSW) 179; *Williams v Milotin* (1957) 97 CLR 465.

161 *Karsales (Harrow) Ltd v Wallis* [1956] 2 All ER 866 at 869.

162 *Castles v Freidman* (1910) 11 CLR 580.

appropriate legal conclusion the court should derive from them.[163] Where a defendant lessor argued that a plaintiff lessee bringing an action in breach of covenant for quiet enjoyment could not claim punitive damages, the court inferred a claim in trespass against the landlord from the pleaded facts, despite trespass not having been expressly alleged.[164] The court determines the cause of action as a question of law based on its findings of fact.[165]

In *Fisher Firearms (Wholesale) v Mariner*[166] the plaintiff brought a claim for loss of dependency at common law where damages were not available for wrongful death, rather than under s 19 of the *Wrongs Act 1936* (SA) where damages were available. Further, the *Magistrates Court Civil Rules 1992* (SA) required the statute to be specifically pleaded. The defendant submitted that no cause of action had been disclosed when the plaintiff failed to expressly plead the statutory provision. The court held that the expressed claim for loss of dependency established the statutory cause of action.[167]

A party who has pleaded a legal conclusion — even if it has done so inaccurately or incompletely[168] — may nevertheless present argument before the court of an alternative conclusion from that alleged in the pleading.[169]

The distinction between law and fact may be difficult to determine. A test was formulated in *Neptune Oil Co v Fowler*:[170] an allegation of law is established by answering questions of law while an allegation of fact is established by answering questions of fact. In *Middlesex County Council v Nathan*[171] the plaintiff, who was legally obliged to establish and maintain a hospital, alleged as a fact that the defendant was "legally liable to maintain (the patient)" who had been admitted to the hospital. The alleged liability was, however, a submission in law, and the plaintiff had submitted no facts from which the defendant's liability could be inferred. The truth of the plaintiff's allegation depended on establishing it in law, not in fact. The plaintiff was unable to succeed because their claim was substantially based on the defendant's liability.

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163 *Drane v Evangelou* [1978] 1 WLR 455; *Creedon v Measey Investments Pty Ltd* (1988) 91 FLR 318.

164 *Drane v Evangelou* [1978] 1 WLR 455.

165 See *Konskier v B Goodman Ltd* [1928] 1 KB 421.

166 *Fisher Firearms (Wholesale) Pty Ltd v Mariner* [2003] SASC 413.

167 But compare *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1985) 7 FCR 109.

168 *Karsales (Harrow) Ltd v Wallis* [1956] 2 All ER 866 at 869.

169 *Re Vandervell's Trusts (No 2)* [1974] Ch 269; *Hancock Family Memorial Foundation Ltd v Belle Rosa Holdings Pty Ltd* (1992) 8 WAR 435.

170 *Neptune Oil Co Pty Ltd v Fowler* [1964] NSWR 251 at 257.

171 *Middlesex County Council v Nathan* [1937] 2 KB 272.

Parties are prohibited from pleading conclusions of law without also pleading the material factual foundation for them. Rule 13.02(2)(b) provides that

> (2) A party may, by that party's pleading—
>
> (a) raise a point of law;
>
> (b) plead a conclusion of law if the material facts supporting the conclusion are pleaded.

Under the rule, a party may plead a legal conclusion as long as the pleading also alleges the material facts to support it.[172] Where the distinction between fact and law is incapable of being decided, convenience or necessity may require a party to plead both. Ormiston JA said in *Agtrack (NT) (t/as Spring Air) v Hatfield*,[173] referring to r 13.02(2)(b), that it permitted a conclusion of law to be pleaded, and that complex pleadings may properly contain allegations of the legal consequences of facts where they aided the court's understanding of the material facts.[174] Where a pleading is better able to be understood by identifying a cause of action or defence they should be asserted. Specific statutory provisions being relied upon,[175] or the relationship between facts and particular causes of action or questions of law,[176] should be identified in the pleadings if doing so would make them clearer and more precise.

Pleading a point of law

[7.130] Pleadings may not allege matters of law as material facts. However, a matter of law may be required to be raised in pleadings as a special matter,[177] or it may be permitted to be raised.[178] Pleading a point of law under r 13.02(2)(a) is to be distinguished from pleading a legal conclusion from a material fact under r 13.02(2)(b). A party pleads a point of law when they allege a legal conclusion as the product of alleged facts. A party pleads a conclusion of law as a material fact when they simply allege a legal conclusion, such as that a party breached a contract or their fiduciary obligations as a company director, causing the plaintiff to suffer damages. Where a point of law is to be pleaded it should be pleaded clearly, and separately.

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172 See *Famous Players Canada Corporation Ltd v JJ Turner & Sons Ltd* [1948] OWN 221 (Ont SC).

173 *Agtrack (NT) Pty Ltd (t/as Spring Air) v Hatfield* (2003) 7 VR 63.

174 As to pleading that a particular law is invalid, see *Hodges v New South Wales* (1988) 62 ALJR 190.

175 Rule 13.02(1)(b).

176 *Kirby v Sanderson Motors Pty Ltd* (2002) 54 NSWLR 135. Kirby dealt with a rule of court that enjoins a plaintiff not to take the defendant by surprise. The rule has no counterpart in Victoria. However, in the case of any pleading subsequent to the statement of claim, see r 13.07(1)(b).

177 Rule 13.07.

178 Rule 13.02(2).

A matter of law that is a substantive issue in the proceeding should be pleaded as a special matter. If the basis of a claim or defence is a statute, and the statutory provision is material to the cause of action or the defence, the specific provision of the Act must be identified in the pleading,[179] and the facts demonstrating that the case falls under the provision are required to be pleaded. A necessary fact is one that must be proved to establish the claim or defence. If it is not pleaded it cannot be proved. However, a point of law can be raised at trial and not pleaded if it is not material to the plaintiff's claim or the defence.

As long as sufficient material facts have been alleged, a pleading may be amended to overcome the failure to refer specifically to the provision of the relevant Act on which the cause of action relies.[180] However, at trial the court may prohibit a party from raising a point of law omitted from the pleadings if it would surprise or cause prejudice to the other party.[181] Facts required to be proved must be pleaded, and facts relied upon to ground a cause of action or defence must be proved. Therefore, a defendant may plead that a plaintiff's statement of claim has failed, on the basis of the facts alleged and relied upon disclose a cause of action in law.

Where a point of law has been raised on the pleadings the judge decides upon it at trial, either before taking evidence (if it involves only a question of law) or after taking evidence (where the question can only be answered based on findings of fact). A pleaded point of law, like any other pleaded fact, notifies the other party of the nature of the case it is to meet at trial. A pleaded point of law may be resolved as a preliminary determination early in the trial.

Facts in the alternative

[7.140] Material facts may be alleged in the alternative, and a plaintiff's claim to relief may be founded on alternative or inconsistent facts,[182] as long as the plaintiff clearly pleads the inconsistent or alternative allegations of fact.[183] The alternative causes of action and remedies sought, and the specific facts on which they rely, should be alleged

179 Rule 13.02(1)(b). Where s 79 of the *Judiciary Act 1903* (Cth) applies, "Act" in r 13.02(1)(b) includes a federal statute. *Agtrack (NT) Pty Ltd (t/as Spring Air) v Hatfield* (2005) 223 CLR 251 at [39] (*Civil Aviation (Carriers' Liability) Act 1959* (Cth), Pt IV).

180 See *Agtrack (NT) Pty Ltd (t/as Spring Air) v Hatfield* (2005) 223 CLR 251 at [40].

181 *Banque Commerciale SA (en liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279; *Sydney South West Area Health Service v MD* (2009) 260 ALR 702.

182 Rule 13.09(1). See also *Phillips v Phillips* (1878) 4 QBD 127; *Child v Stenning* (1877) 5 Ch D 695; *Bagot v Easton* (1877) 7 Ch D 1; *Evans v Buck* (1876) 4 Ch D 432; *Chadwick v Bridge* (1951) 83 CLR 314; compare *Peninsular & Oriental Steam Navigation Co v Britnell* (1892) 18 VLR 580.

183 Rule 13.09(1). See also *Re Morgan* (1887) 35 Ch D 492; *Re Smith; Rigg v Hughes* (1884) 9 PD 68; *Delfino v Trevis [No 2]* [1963] NSWR 194.

distinctly and separately.[184] A party must not plead inconsistent facts one or other of which it knows to be false as the basis of an alternative cause of action.[185]

In *Delfino v Trevis [No 2]*[186] the plaintiff relied on different, inconsistent rights in the alternative. The plaintiff both alleged that under a foreign judgment the defendant was judgment debtor to him, and sued the same party in the same cause of action on which the plaintiff had received the foreign judgment. The plaintiff thereby relied on different, inconsistent rights in the alternative. In *Chapman v Luminis*[187] the plaintiffs were assignees of a right of action but joined the assignor by amendment of their writ, in case the assignment on which they sued proved invalid and could only be exercised by right by the assignor.

Defendants may also raise alternative and inconsistent defences.[188] For example, the defendant may, in defence, deny the existence of an alleged agreement and, in counterclaim, assert that if any such agreement as that alleged were proved it was breached by the plaintiff.[189]

The rule against departure prohibits a party from alleging facts or making claims in a pleading which depart from facts or claims alleged in their previous pleadings.[190] Parties may only properly depart from facts or allegations in a previous pleading by amending it to plead the inconsistent fact or claim in the alternative.[191] The rule does not govern the relationship between a defence and counterclaim, both of which may properly contain inconsistent allegations of fact and defences.[192]

The principle that a party cannot "approbate and reprobate" (or blow hot and cold) restricts a party's freedom to plead entirely inconsistent cases in the alternative.[193] It prohibits a plaintiff, having obtained summary judgment against a defendant, from alleging facts inconsistent with their

184 *Davy v Garrett* (1878) 7 Ch D 473 at 489.

185 *Brailsford v Tobie* (1888) 10 ALT 194. See also *Issitch v Worrell* (2000) 172 ALR 586 at 594; *JC Decaux Australia Pty Ltd v Adshel Street Furniture Pty Ltd* (2000) 178 ALR 339 at 343; *Sea Culture International Pty Ltd v Scoles* (1991) 32 FCR 275 at 279–280.

186 *Delfino v Trevis [No 2]* [1963] NSWR 194.

187 *Chapman v Luminis Pty Ltd* (1998) 86 FCR 513 at 522.

188 *Re Morgan* (1887) 35 Ch D 492; *Coote v Ford* [1899] 2 Ch 93 at 106; *Berdan v Greenwood* (1878) 3 Ex D 251; *Buyolich v Vrenderberg* (1887) 9 ALT 1; *Coldwell v Hehir* (1889) 11 ALT 57; *Moloney v Moloney* (1904) 20 WN (NSW) 267.

189 *Peninsular & Oriental Steam Navigation Co v Britnell* (1892) 18 VLR 580.

190 Rule 13.09(2) (the rule against departure).

191 Rule 13.09(3).

192 *Northern Territory Housing Commission v Territory Bricks Pty Ltd* (1983) 71 FLR 273. See *Peninsular & Oriental Steam Navigation Co v Britnell* (1892) 18 VLR 580.

193 H Broom, *A Selection of Legal Maxims* (T & JW Johnson, 2nd ed, 1850), p 119. The maxim *allegans contraria non est audiendas* refers to the principle of equitable estoppel that conflicting allegations cannot be maintained at the same time with respect to the same transaction. See *Pickard v Sears* (1837) 6 Ad & E 469. See further *Freeman v Cooke* (1848) 2 Exch 654; 154 ER 652.

own claim in defence to a counterclaim which is in material terms identical to the plaintiff's claim.[194] A summary judgment given to the plaintiff on the basis of the claim must be given to the defendant for the counterclaim that is in fact materially identical. Lord Browne-Wilkinson VC referred in this respect to "a principle of law of general application that … a man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance."[195]

It is an abuse of process for a party to allege facts in pleadings inconsistent with facts alleged in pleadings in other proceedings. In *Sea Culture International v Scoles*[196] an abuse of process was alleged by the corporation making allegations in pleadings presented in the Western Australian Industrial Relations Commission, which were inconsistent with pleadings in Federal Court proceedings. The court held that to prevent the waste of judicial resources which occurs where proceedings are diverted away from determining genuine matters in dispute or otherwise stray from the purpose of the legal system, and to maintain confidence in and respect for the authority of the courts, it had power to stay or dismiss proceedings. French J said that although factual inconsistencies may be resolved by presenting the appropriate evidence, the abuse of process to which he referred may arise "[i]f a party in litigation in this Court makes a formal and public allegation by way of its pleading which is inconsistent with a formal and public allegation in another forum".[197]

Pleading special matters

[7.150] The approach to the pleading of special matters varies amongst jurisdictions. In general, special matters that would surprise the opposing party are to be expressly alleged for the issues to be brought to the party's notice. In Victoria, matters which must be pleaded arise only subsequently to the statement of claim. Thereafter pleading points which must be expressly raised are

- allegations that a claim or defence (including the plaintiff's defence to a counterclaim) are not maintainable;
- those which would take a party by surprise;[198] or

194 *Express Newspapers plc v News (UK) Ltd* [1990] 1 WLR 1320.

195 *Express Newspapers plc v News (UK) Ltd* [1990] 1 WLR 1320 at 1329.

196 *Sea Culture International Pty Ltd v Scoles* (1991) 32 FCR 275.

197 *Sea Culture International Pty Ltd v Scoles* (1991) 32 FCR 275 at 279.

198 Rule 13.07(1)(b).

- those which raise questions of fact which have not arisen in previous pleadings.[199]

Special matters may be either matters of fact or matters of law.[200] Therefore, the fundamental rule of pleading that only material facts are to be pleaded is qualified by the requirement that special matters of law must be specifically alleged. A special matter is an affirmative case pleaded either by the defendant in opposition to the statement of claim, or the plaintiff as defendant to a counterclaim, and it specifically pleads the insufficiency of the case raised by the opposing party. A simple traverse is not a special matter needing to be pleaded because it simply denies the pleading it opposes; whereas a special plea accepts the factual allegations of the opposing pleading but makes further allegations that reframe the significance of the matters alleged by the opposing party. Therefore, if the party wishes to put a case beyond merely denying the opposing case by simple traversal, it must specifically plead that case. The party putting the affirmative pleading assumes the onus of proving what is alleged.

In *O'Brien v Komesaroff*[201] the defendant pleaded a simple denial of the plaintiff's allegation that the defendant was infringing the plaintiff's copyright by using forms in his practice developed by the plaintiff. The defendant sought in the High Court to establish an affirmative case for which the simple traverse was insufficient. He sought not merely to deny the claim in copyright, but to positively argue that any copyright the plaintiff may have held in the material had devolved onto the partnership by virtue of his being a partner, resulting from the effect of s 24 of the *Partnership Act 1958* (Vic) and s 196 of the *Copyright Act 1968* (Cth). However, the case could not be raised because it lacked a foundation in the defence, where the defendant had not alleged it.[202]

Matters and facts arising after commencement of a proceeding

[7.160] If matters or facts arise after the commencement of a proceeding the rules may nonetheless permit them to be pleaded. In Victoria a party may plead any fact or matter which arises either before or after

199 Vic r 13.07(1)(c); see FCR r 16.08; NT r 13.07; Qld r 150; Tas r 251; and WA O 29 r 9; see also ACT r 406 (the content and form of pleadings) and r 407 (matters to be specifically pleaded); NSW r 14.14; and Qld r 150 (pleadings at all stages must raise matters if express pleading is required for the opposing party to be properly notified). In SA r 100 special defences must be expressly stated.

200 *Nicolson v Colonial Mutual Insurance Co* (1887) 13 VLR 58; *Independent Automatic Sales Ltd v Knowles & Foster* [1962] 1 WLR 974; but compare *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1913] 3 KB 422 at 425 that matters of law are not included amongst special matters.

201 *O'Brien v Komesaroff* (1982) 150 CLR 310.

202 See also *Davie v New Merton Board Mills Ltd* [1956] 1 WLR 233n; *Sydney South West Area Health Service v MD* (2009) 260 ALR 702.

proceedings have commenced.[203] Some matters will naturally arise only after proceedings have commenced. A compromise was reached in an action in *Scott v English*[204] and the trial adjourned; but when the defendant failed to comply with the terms of the compromise the plaintiff relisted the matter. The defendant argued the compromise barred the plaintiff's attempt to sue on the original claim and was given leave to raise the compromise in his defence.

While the reference to "matter" gives the rule a wide scope it does not extend to pleading a new cause of action as a matter. In *Baldry v Jackson*[205] the plaintiff sought contribution in a matter prior to incurring liability for it, and subsequently had damages awarded against him in a separate proceeding for personal injuries. The plaintiff sought to amend the first statement of claim for contribution in order to allege the judgment in the second proceeding, and was adjudged to have added a cause of action arising after the commencement of proceedings. The Court of Appeal held that pleading a new cause of action does not fall within the ambit of pleading a new "matter" as the plaintiff alleged.[206] Where facts arose after the commencement of proceedings the party will be barred from pleading a cause of action based on them.[207]

The general rule against pleading subsequent matters in proceedings which have already commenced has no role to play in counterclaims which are an independent action of the defendant against the plaintiff. The rules of pleadings apply to counterclaims when alleging matters that have arisen subsequently to the commencement of proceedings.[208]

Adding claim for procedural or evidentiary advantage

[7.170] Provided the claim is genuinely made, a claim made in a statement of claim is not an abuse of process merely because it confers a procedural or evidentiary advantage on the plaintiff. However, it is an abuse of process if a false claim is included because it would, if accepted, confer those advantages which are not available through true claims made elsewhere in the pleading.[209]

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203 Vic r 13.08; ACT r 413; FCR r 16.02 ("facts" subsequently arising may be pleaded); NSW r 14.17; NT r 13.08 ("facts" subsequently arising may be pleaded); SA r 105 (refers to "events" arising after proceedings have commenced); Tas r 252 (pleading matters after commencement of proceedings is available only to the defendant); WA O 20 r 10; there is no corresponding rule in Qld. In the ACT and SA a cause of action that has arisen subsequently may be pleaded if no unfairness is caused to the defendant.

204 *Scott v English* [1947] VLR 445.

205 *Baldry v Jackson* [1976] 2 NSWLR 415.

206 *Baldry v Jackson* [1976] 2 NSWLR 415 at 418–419 per Samuels JA.

207 *Whirlpool (Australia) Pty Ltd v Discount Electrical Centre (Australia) Pty Ltd* [1999] FCA 912, applying *Baldry v Jackson* [1976] 2 NSWLR 415.

208 *Ing L Benini & Co Pty Ltd v Employers' Federation Insurance Ltd* [1931] VLR 315.

209 See *Westpac Banking Corporation v Northern Metals Pty Ltd* (1989) 14 IPR 499; [1989] ATPR 40-953 at 50,414.

Instances of material facts — contract

[7.180] The existence of a contract may be alleged as a fact. If the agreement is in writing it is sufficient to state its effect: the terms of the contract are not required to be specifically alleged. However, if the words of the terms of the contract are material facts they must be stated in the pleading.[210] If it is alleged that a contract contains an implied term, either that term is to be stated by being directly pleaded, or, it must be alleged that the implied term necessarily formed part of the contract by setting out sufficient circumstances to demonstrate its existence by necessary implication.[211]

Breach of contract should not be alleged unless factually grounded instructions to that effect have been given. Absent those instructions, it is improper to allege general breach of contract in the pleading process in the hope of flushing out a material basis for it during discovery, or mediation. Unfounded allegations of breach of contract are an abuse of process.[212]

Instances of material facts — damages

[7.190] Any damages the plaintiff claims in relief are to be claimed separately in the statement of claim, even though the court may make an award of damages despite the plaintiff omitting to claim them.[213] If the plaintiff claims unliquidated damages an exact amount claimed need not be stated. The plaintiff may claim them in a general manner.[214] Allegations having no connection with the measure of damages are to be struck out.[215] Damages claims in relation to allegations of distinct causes of action against several defendants should be separately pleaded.[216]

Matters relevant to increasing or diminishing amount of damages

[7.200] Different approaches have been taken as to whether facts that are alleged only in relation to the effect they have on increasing or decreasing the quantum of damages, without further connection to the cause of action or defence, are properly pleaded. The approach to the question in England on the authority of *Millington v Loring*[217] is that facts to be relied on at trial may be pleaded. In that case the facts went to the

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210 Rule 13.03.

211 *Hooker Corporation Ltd v Commonwealth* (1986) 65 ACTR 32. As to pleading a term to be implied from a contract in writing, see *Upton v Chipman* (1892) 13 ALT 239; *Burton v Karbowsky* (1914) 14 SR (NSW) 373.

212 See *Pizzey Noble Pty Ltd v Fowles* [1994] 1 VR 371 at 375.

213 *London Chatham & Dover Railway Co v South Eastern Railway Co* [1892] 1 Ch 120.

214 *London & Northern Bank Ltd v George Newnes Ltd* (1900) 16 TLR 433.

215 *Bourke v New South Wales* (1989) 22 FCR 378; [1989] ATPR 40-924 at 49,998.

216 *Rubenstein v Truth & Sportsman Ltd* [1960] VR 473 at 479.

217 *Millington v Loring* (1880) 6 QBD 190; and *Whitney v Moignard* (1890) 24 QBD 630.

question of aggravated damages and were not required or relied upon to establish the plaintiff's cause of action.

The rule in Victoria on the authority of *Wood v Earl of Durham*[218] is that the defendant was not permitted to plead facts in mitigation of damages in an action for defamation.[219] *Wood v Earl of Durham*[220] was overruled by the House of Lords, which held in *Plato Films v Speidel*[221] that the facts of a plaintiff's disreputable character could be pleaded by the defendant to a defamation action seeking to mitigate damages. Fullagar J in *Australia and New Zealand Banking Group v Hunter BNZ Finance*[222] refused to accept the breadth of the submission that defendants are not required to plead facts that relate only to the amount of damages. His Honour found that in some cases parties are obliged to plead facts relevant solely to the quantum of damages. For instance, if in a defence the defendant had denied facts pleaded in the plaintiff's statement of claim those facts could not in turn provide the basis for a defence of mitigation of damages.

The pleading of matters that relate only to damages is consistent with the function of pleadings as providing notice of the case a party is to meet at trial. The rule expressly provides for the specific inclusion of a claim for exemplary damages in pleadings.[223]

PARTICULARS

The function of particulars

[7.210] The function of particulars is the same as that of pleadings — that is:

- to ensure procedural fairness by stating a case with sufficient clarity to notify a party of the case their opponent is seeking to prove at trial,[224] although not the means by which they seek to prove it;[225]
- to enable the opposing party to acquire the evidence to present their case[226] at trial without being surprised;[227]

218 *Wood v Earl of Durham* (1888) 21 QBD 501.

219 *Heffernan v Hayes* (1899) 25 VLR 156; *Wilson v Dun's Gazette Ltd* [1912] VLR 342.

220 *Wood v Earl of Durham* (1888) 21 QBD 501.

221 *Plato Films Ltd v Speidel* [1961] AC 1090.

222 *Australia and New Zealand Banking Group Ltd v Hunter BNZ Finance Ltd* [1991] 2 VR 407 at 415.

223 Rule 13.07(3).

224 *Wilson v Dun's Gazette Ltd* [1912] VLR 342 at 346 per Madden CJ.

225 *Duke & Son v Wisden & Co* (1897) 77 LT 67 at 68 per Lindley LJ; *GW Young & Co Ltd v Scottish Union and National Insurance Co* (1907) 24 TLR 73 at 74; *Aga Khan v Times Publishing Co* [1924] 1 KB 675; *R v Associated Northern Collieries* (1910) 11 CLR 738; *McAndrew v Gray* (1920) 20 SR (NSW) 635; *Philliponi v Leithead* (1958) 59 SR (NSW) 352; 76 WN (NSW) 150.

226 *National Starch Co v Robert Harper & Co Pty Ltd* [1906] VLR 8; *Lemon & Co Pty Ltd v Moran & Cato Pty Ltd* [1921] VLR 240; *Bruce v Odhams Press Ltd* [1936] 1 KB 697; *Wilson v Wilson* (1951) 69 WN (NSW) 358.

- to delimit the general nature of the pleading of facts[228] and by so doing state the issues to which discovery of evidence by the parties is to relate,[229] and on which the court is required to decide;[230] and
- by ensuring fair and open litigation and trial between the parties, reduce the costs associated with legal proceedings.[231]

McClemens J in *Pilato v Metropolitan Water Sewerage & Drainage Board*[232] said that:

> Pleadings define the issues in general terms. Particulars control the generality of pleadings and restrict the evidence to be led by the parties at the trial and give the other party such information as may enable him to know what case he will be met with at the trial and prevent surprise.

In *Esso Petroleum Co v Southport Corporation*[233] Lord Radcliffe commented on the value of particulars:

> It seems to me that it is the purpose of such particulars (certain further and better particulars of the statement of claim) that they should help to define the issues and to indicate to the party who asks for them how much of the range of his possible evidence will be relevant and how much irrelevant to those issues. Proper use of them shortens the hearing and reduces costs. But if an appellate court is to treat reliance on them as pedantry or mere formalism, I do not see what part they have to play in our trial system.

Particulars, similarly to pleadings, are not deterministic of the case presented at trial in the sense that where the evidence presented at the hearing of the matter departs from the particulars parties are entitled to a decision based on the case argued on the evidence.[234] Particulars may be amended after all of the evidence has been presented in order to conform

227 *Spedding v Fitzpatrick* (1888) 38 Ch D 410; *Newport Dry Dock Co v Paynter* (1886) 34 Ch D 88; *Weinberger v Inglis* [1918] 1 Ch 133; *R v Associated Northern Collieries* (1910) 11 CLR 738; *Miller v Miller Auto Body Co Ltd* (1922) 39 WN (NSW) 201; *Philliponi v Leithead* (1958) 59 SR (NSW) 352; 76 WN (NSW) 150; *Zanardo v Ford Motor Co of Australia Ltd* [1964] VR 769.

228 *Saunders v Jones* (1877) 7 Ch D 435; *Miller v Cameron* (1936) 54 CLR 572.

229 *Yorkshire Provident Life Assurance Co v Gilbert* [1895] 2 QB 148; *Zanardo v Ford Motor Co of Australia Ltd* [1964] VR 769; *Bailey v Commissioner of Taxation (Cth)* (1977) 136 CLR 214.

230 *Banque Commerciale SA (en liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286.

231 *Supreme Court Practice 1970 (The White Book)* (Sweet & Maxwell, 1969), para 18/12/2, quoted with approval by Edmund Davies LJ in *Astrovlanis Compania Naviera SA v Linard* [1972] 2 QB 611 at 620.

232 *Pilato v Metropolitan Water, Sewerage & Drainage Board* (1959) 76 WN (NSW) 364 at 365 per McClemens J.

233 *Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218 at 241 per Lord Radcliffe, cited in *Re Brisbane Meat Agencies Pty Ltd* [1963] Qd R 525 at 530. See also *Sullivan v Mackellar County Council* [1963] NSWR 410; *Zanardo v Ford Motor Co of Australia Ltd* [1964] VR 769; *Pulham v Dare* [1982] VR 648 at 653.

234 *Dare v Pulham* (1982) 148 CLR 658 at 664.

with the facts established by the evidence presented at trial.[235] However, a party may receive a verdict based on the evidence even where the particulars remain unamended.[236]

Rule 13.10[237] provides:

13.10 Particulars of pleading

(1) Every pleading shall contain the necessary particulars of any fact or matter pleaded.

(2) Without limiting paragraph (1), particulars shall be given if they are necessary—

(a) to enable the opposite party to plead;

(b) to define the questions for trial; or

(c) to avoid surprise at trial.

(3) Without limiting paragraph (1), every pleading shall contain particulars of any—

(a) misrepresentation, fraud, breach of trust, wilful default or undue influence which is alleged; or

(b) disorder or disability of the mind, malice, fraudulent intention or other condition of the mind, including knowledge or notice which is alleged.

(4) The pleading of a party who claims damages for bodily injury shall state—

(a) particulars, with dates and amounts, of all earnings lost in consequence of the injury complained of;

(b) particulars of any loss of earning capacity resulting from the injury;

(c) the date of the party's birth;

(d) the name and address of each of the party's employers commencing from the day being 12 months before the party sustained the injury, the time of commencement and the duration of each employment and the total net amount, after deduction of tax, that was earned in each employment.

(5) In a proceeding for libel the indorsement of claim on the writ or, if that indorsement does not constitute a statement of claim, the statement of claim shall state sufficient particulars to identify the publication in respect of which the proceeding is commenced.

(6) Particulars of debt, damages or expenses which exceed three folios shall be set out in a separate document referred to in the pleading and the pleading shall state whether the document –

(a) has already been served and, if so, when; or

(b) is to be served with the pleading.

The rule requires the pleading to contain all the necessary particulars of all allegations. Particulars are said to be necessary if their pleading is required to enable the party's opponent to plead, to define the issues that are to be raised for determination at trial, and so as not to be surprised at

235 *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99 at 111, 112, 127.

236 *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666 at 668.

237 Rule 13.10 replaces O 19 rr 5A – 8 of the *Supreme Court (General Civil Procedure) Rules 1996* (Vic). Rule 13.10(3), which is taken from O 18 r 12(1) of the *Civil Procedure Rules 1998* (UK) in England, changes the previous practice with respect to particulars of condition of mind.

trial.[238] Courts may order one party to provide another party with particulars or further and better particulars,[239] although parties are to initially seek particulars and further and better particulars from each other by letter.[240]

There are no grounds for a summary judgment in favour of the defendant if the plaintiff fails to plead particulars. The statement of claim is struck out and leave is given for the plaintiff to serve another statement of claim with sufficient particulars in its place, or the court orders the plaintiff to supply particulars to the defendant.[241] In general, even if a factual allegation pleaded in support of a claim altogether lacks particulars a party may lead evidence to prove the fact at trial. It falls within the court's inherent jurisdiction to exercise a discretion to decide whether or not the evidence may be introduced, or whether the evidence led at trial should be limited to proving only the facts about which particulars were provided in the pleadings.[242]

There is no rule as to how much particularity a party is required to give, and it remains a matter of practicality and common sense in relation to the circumstances of the case, the type of proceeding, and the nature of the matter.[243] In *British Airways Pension Trustees v Sir Robert McAlpine & Sons*,[244] Saville LJ, while recognising the notice function of particulars, and the need to avoid surprise at trial, warned against "a tendency … to seek particularisation even when it is not really required." Recognising the potential for interlocutory proceedings over particulars to deteriorate into an expensive "game" to the detriment of litigants in terms of costs and delay, his Lordship reiterated that they are not "an end in themselves, but a means to the end, and that end is to give to each party a fair hearing."[245]

238 Rule 13.10(2). Paragraph (2) is new.

239 Rule 13.11(1).

240 Rule 13.11(3).

241 See *Rogers v Legal Services Commission (SA)* (1995) 64 SASR 572 at 588.

242 See *Douglas v John Fairfax & Sons Ltd* [1983] 3 NSWLR 126 at 133.

243 In *Cressett v Mytton* (1792) 1 Ves Jun 449 at 450 Lord Thurlow LC referred to "the good sense of the thing"; cited in *American Flange & Manufacturing Co Inc v Rheem (Aust) Pty Ltd* [1963] NSWR 1121 at 1126. See also *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* (1994) 72 BLR 26 at 34; *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* (1996) 8 VR 681 at [19], referring to *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* (1994) 72 BLR 26.

244 *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* (1994) 72 BLR 26 at 34.

245 *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* (1994) 72 BLR 26 at 34.

Particulars are not to be used as a way of completing a statement of claim that is incomplete because it fails to plead a material fact.[246] The proper course of action in these circumstances is not to order particulars because to do so will not remedy a defective statement of claim (that is, one that offends the rule requiring that the statement of claim state all the material facts).[247] A statement of claim that is deficient in this way is properly struck out with leave given to amend it. Nevertheless, while parties are not entitled to amend pleadings by providing particulars of material facts,[248] by consent of the parties the court may order that particulars be given rather than the statement of claim be struck out.[249]

In complex matters pleadings distinguishing between material facts and particulars may be neither possible nor practical, and narrative pleadings which do not rigidly distinguish between material facts and particulars may be better suited and better able to disclose the nature of the parties' cases to the court and to each other.[250] In *Beach Petroleum v Johnson*[251] von Doussa J observed that in matters involving complex facts it may be difficult to strictly separate and designate allegations as material facts or particulars. In that case a party brought an application that a pleading be struck out as deficient for failing to allege all the necessary material facts. The court held the pleading deficient but curable by amendment allowing the party to plead particulars as facts.

In *Australian Automotive Repairers' Assn (Political Action Committee) v NRMA Insurance*[252] Lindgren J maintained the conceptual and functional distinction between material facts, particulars and evidence. Although the distinction between material facts and particulars may in certain circumstance be blurred, they do not serve entirely the same purposes. Material facts and particulars both serve the notice function of pleadings in informing the opposing party of the case they are to meet at trial; but

246 *Bruce v Odhams Press Ltd* [1936] 1 KB 697; *Pinson v Lloyd's and National Provincial Foreign Bank Ltd* [1941] 2 KB 72; *Rubenstein v Truth & Sportsman Ltd* [1960] VR 473; *H 1976 Nominees Pty Ltd v Galli* (1979) 40 FLR 242 (FCA); *Mitanis v Pioneer Concrete (Vic) Pty Ltd* [1997] ATPR 41-591 (FCA).

247 *Rubenstein v Truth & Sportsman Ltd* [1960] VR 473 at 476 per Adam J, referring with approval to the statement of Scott LJ in *Bruce v Odhams Press Ltd* [1936] 1 KB 697 at 713 that in strictness particulars cannot cure a bad statement of claim. That proposition is still good law notwithstanding that "pleading" is defined as including particulars, which was not the case when *Rubenstein* was decided: *Hongkong Bank of Australia Ltd v BPTC Ltd (in liq)* [1995] Aust Torts Reports 81-358 (VSC). See also *Bank of Melbourne Ltd v FAI General Insurance Co Ltd (No 1)* (unreported; VSC; Hedigan J; No F4041; 7 March 1994).

248 *Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd* (1985) 2 NSWLR 340 at 351; *Campbell v Metway Leasing Ltd* [1998] ATPR 41-630 at 40,919.

249 *Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd* (1985) 2 NSWLR 340.

250 *Queensland v Pioneer Concrete (Qld) Pty Ltd* [1999] ATPR 41-691 at [12] per Drummond J, citing von Doussa J in *Beach Petroleum NL v Johnson* (1991) 105 ALR 456 at 466 (FCA).

251 *Beach Petroleum NL v Johnson* (1991) 105 ALR 456 at 466 (FCA).

252 *Australian Automotive Repairers' Assn (Political Action Committee) Inc v NRMA Insurance Ltd* [2002] FCA 1568 at [14]–[17].

only material facts provide, once the pleadings are settled, the issues the court is required to determine at trial. The material facts of the case allow a party to ascertain the legal character of the particulars to be proved by evidence.[253] That distinction explains why opponents are only required to plead to material facts, and why particulars cannot be used to overcome the deficiencies in material facts for the purposes of requiring a party to plead. Particulars are informative about but not constitutive of material facts. His Honour stated that:[254]

> Notwithstanding the well-established distinction between material facts and particulars to which I have referred, a less strict view may be taken of that distinction now than was taken previously; cf *Beach Petroleum NL v Johnson* (1991) 105 ALR 456 at 466. According to this view, the particulars contained in a statement of claim may be taken into account for the purpose of determining whether the statement of claim amounts to a statement of all the material facts. But even this more flexible view of pleading does not countenance the omission of material facts from the statement of claim regarded as a whole. Accordingly, if the Pleading, regarded as a whole, does not contain a clear statement of all the material facts on which AR [the applicant] relies, it is no answer to suggest that NRMA [the respondent] can request AR [the applicant] to supply particulars.

If, on a holistic view of the statement of claim, it is deficient in stating all the material allegations of fact in a case, the particulars cannot be used to provide what is missing in the pleading. It remains the case that despite the remarks found in authorities regarding the indistinctness of facts and particulars in certain cases the purpose of particulars is not to compensate for the absence of necessary factual allegations.[255]

"Pleading" as defined by r 1.13(1) "includes an indorsement of claim on a writ which constitutes a statement of claim, and includes particulars of any pleading." As a matter of practice material facts are not to be stated as particulars. However, because of the inclusion of particulars in the definition of pleadings material facts stated only in the particulars are stated in the pleading, and the fact that they are only found there is not sufficient ground to strike out a paragraph in the pleading that would, were it not for the particulars, otherwise not allege facts.[256]

It was practice in the Building Cases List, and remains so in the Technology, Engineering and Construction List ("TEC List") which replaced it, to allow pleadings to state allegations of fact through particulars or schedules to pleadings.[257] Matters in the TEC List tend to

253 *Sims v Wran* [1984] 1 NSWLR 317. See also *Master Butchers Ltd v Commissioner of Taxation (Cth)* [1974] 1 NSWLR 350 at 359.

254 *Australian Automotive Repairers' Assn (Political Action Committee) Inc v NRMA Insurance Ltd* [2002] FCA 1568 at [17].

255 *Gunns Ltd v Marr* [2005] VSC 251 at [18].

256 *Agtrack (NT) Pty Ltd (t/as Spring Air) v Hatfield* (2003) 7 VR 63 at [14].

257 *Supreme Court (Chapter II Amendment No 1) Rules 2009* (Vic), r 1 amending *Supreme Court Act 1986* (Vic).

be of a highly technical and specialised nature, and tend to be alleged in a very detailed manner, making them particularly suitable to being stated in the particulars.[258]

Particulars disclosing evidence

[7.220] The role of particulars in procedural fairness is to apprise the party of the case they are required to meet at trial. So that opposing parties are not surprised at trial parties may be required to particularise their pleadings in such a way and to such an extent that they reveal evidence either in detail or only generally,[259] and may require the disclosure of witness identities.[260] If a person's identity is a material fact it must be alleged in the pleadings even if that person may be called to testify at trial.[261] A party will not, however, be permitted to request particulars only to obtain evidence (including the identity of witnesses[262]) which the other party intends to use at trial to prove their case, or to obtain facts to use in the construction of their own case.[263]

Knowledge of particulars sought

[7.230] The state of knowledge of the party seeking particulars does not affect the way that the purpose of pleadings is achieved — those purposes being to notify the parties of the case against them so as to enable them to prepare to meet it, and to define the issues in dispute. The obligation of a party to supply particulars is not affected by the fact that the party applying for them knows the true facts of the case. A party may not refuse to supply particulars merely because the party applying for the particulars already has knowledge of the facts.

The facts of the case do not of themselves disclose the legal character of the case an opponent will bring at trial.[264] The case a party faces is based on the opposing party's allegation of the facts, not on the party's knowledge of the facts.[265] Where it is established,[266] or it can be inferred

258 See *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* (1996) 8 VR 681 at [8].

259 *Sims v Wran* [1984] 1 NSWLR 317.

260 *National Starch Co v Robert Harper & Co Pty Ltd* [1906] VLR 8; *Zierenberg v Labouchere* [1893] 2 QB 183 at 187, 188; *Bishop v Bishop* [1901] P 325; *Wootton v Sievier* [1913] 3 KB 499.

261 *Perpetual Trustees of Australia Ltd v Brenton* (1985) 35 NTR 44.

262 *Aga Khan v Times Publishing Co* [1924] 1 KB 675; *R v Associated Northern Collieries* (1910) 11 CLR 738; *Miller v Miller Auto Body Co Ltd* (1922) 39 WN (NSW) 201; *Turner v Dalgety & Co Ltd* (1952) 69 WN (NSW) 228.

263 *Commercial Bank of Australia Ltd v Thomson* [1964–65] NSWR 410 at 415.

264 *Palmos v Georgeson* [1961] Qd R 186.

265 *Whelan v John Fairfax & Sons Ltd* (1988) 12 NSWLR 148 at 154.

266 *Lawson v Perpetual Trustee Co Ltd* (1959) 76 WN (NSW) 367; *Keshi Pty Ltd v Firefly Press (Australia) Pty Ltd* (2008) 246 ALR 166 at [30].

with certainty,[267] that a party knows what facts the other part relies on the court may order that particulars not be served.

Privilege from discovery no bar

[7.240] A party is still required to give particulars of a transaction that is contained in a document privileged from production.[268] Similarly, r 30.05(2) states that a party is entitled through interrogatories to require an opposing party to provide answers based on their belief regarding a fact or a matter that was informed by a communication which is privileged from production,[269] provided the interrogatories refer to a factual or material allegation in the opposing party's pleading.

Postponing particulars

[7.250] The delivery of particulars may be deferred if the particulars sought comprise information in the exclusive possession of the other party and the information may be elicited by an order for discovery. Then the delivery of particulars may be deferred until after discovery. In *Millar v Harper*[270] Bowen LJ ordered the defendant to give discovery before the plaintiff delivered particulars in circumstances where the executors of an estate sought possession of land from the deceased's husband in order to deal with it in accordance with the terms of the will. *Egg & Egg Pulp Marketing Board v KH Korp Tocumal Trading Co*[271] also involved the deferral of the delivery of particulars until after the defendant's discovery, where the court ordered discovery of information regarding the sale of eggs in a case in which the plaintiff alleged that the sale contravened a specific statute, and information regarding sales was in the exclusive possession of the defendant.

Binding effect of particulars

[7.260] A party may not without leave refer to matters not included in the particulars of the pleadings.[272] Because particulars notify a party of the issues to be determined at trial, they indicate the evidence that will be relevant and admissible, and therefore the preparations a party must make. It would surprise a defendant if a plaintiff departed from the particulars and adduced evidence that sought to prove the cause of action

267 *Gunns Ltd v Marr (No 2)* [2006] VSC 329 at [12]–[14].

268 *Milbank v Milbank* [1900] 1 Ch 376; *Sachs v Spielman* (1887) 37 Ch D 295.

269 Rule 30.05(2) has effect notwithstanding r 30.05(1)(d) which provides that the interrogated party may claim a privilege against answering questions on the basis of belief where the information on which the belief is founded was contained in privileged communications.

270 *Millar v Harper* (1888) 38 Ch D 110.

271 *Egg & Egg Pulp Marketing Board v KH Korp Tocumal Trading Co Pty Ltd* [1963] VR 378.

272 *Phillips v Phillips* (1878) 4 QBD 127 at 133; *Woolley v Broad* [1892] 2 QB 317; *Zierenberg v Labouchere* [1893] 2 QB 183.

in a manner different from that particularised. The strict approach may not be adhered to if the particulars do not conform with the issues raised for determination at trial.

While particulars control the facts required to be proved to establish the cause of action they have no substantive effect on the cause of action on which the plaintiff sues.[273] In *Mummery v Irvings*[274] the plaintiff was struck by a piece of timber located on the defendant's premises, the blow having resulted from the defendant's foreman's operation of machinery. The plaintiff sued for negligence, holding the defendant to the duty of care owed to him as an invitee on the premises. However, the plaintiff was unable to establish this particular duty of care and he sought to amend the statement of claim to plead general negligence on the part of the foreman, but was denied leave by the court because the duty of care owed under general negligence differed from what was owed to an invitee. The first duty is based on the defendant's occupation of the premises, while the second is based on the relationship between the parties. The plaintiff was unsuccessful because in showing a breach of duty based on his relationship with the defendant he had not shown a breach by the defendant in the defendant's capacity as an occupier of the premises where the incident took place.[275]

Evidence which discloses a new cause of action is to be distinguished from evidence which provides new particulars under the cause of action on which the pleading is based.[276] The plaintiff in his statement of claim pleaded the defendant's negligence in failing to provide a safe system of work. At trial, however, the plaintiff led evidence to prove that the defendant was vicariously liable for its employees' negligent performance of their work duties. The High Court held that the plaintiff was entitled to judgment. Both on the pleadings and at trial the plaintiff argued that the employer breached its duty of care to its employees. Given the principle that particulars do not alter the cause of action, it was not material to the plaintiff's right to judgment if the pleadings on the one hand and the evidence led at trial on the other, demonstrated negligence differently. Nor could the defendant claim surprise, given that the plaintiff both on the pleadings and at trial sought to establish the duty of care the defendant owed to its employees, and the evidence led at trial did not deviate from the pleadings in this regard.

The distinction between evidence establishing a new cause of action and evidence introducing new particulars assumes considerable significance

273 *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99 at 110; *Philliponi v Leithead* (1958) 59 SR (NSW) 352; *Katsilis v Broken Hill Pty Co Ltd* (1977) 52 ALJR 189. See also *Doonan v Beacham* (1953) 87 CLR 346.

274 *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99 at 110.

275 *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99 at 110–111.

276 See *Doonan v Beacham* (1953) 87 CLR 346; *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99; *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666; *Katsilis v Broken Hill Pty Co Ltd* (1977) 52 ALJR 189.

in a jury trial. If the pleadings have not been amended then the introduction of a new cause of action is grounds for setting aside the verdict, whereas evidence of particulars introduced without amendment will not disturb the verdict unless it can be shown on evidence that the opposing party was prejudiced by its introduction. In the latter instance, the trial will be deemed to have proceeded as if all the necessary amendment had been made. In *Leotta v Public Transport Commission (NSW)*[277] the court gave the plaintiff leave to amend the pleadings to reflect the facts led at trial, facts which were not alleged in the pleadings. The defendant had not objected to the discrepancy between the pleadings and the evidence presented at trial during the course of proceedings. In *Maloney v Commissioner for Railways (NSW)*[278] the basis upon which the plaintiff sought judgment at trial was on facts that had not been alleged or particularised in the pleadings. The pleadings failed to serve the purposes of providing notice or defining the matters in issue between the parties. That the defendant was taken by surprise was held to be an incurable injustice, and judgment was given in favour of the defendant.

Particulars define and thereby limit the facts to be proved at trial. Plaintiffs and defendants are entitled to the court's judgment in their favour if they prove, respectively, their cause of action, or defence. A court may still deliver judgment in favour of the plaintiff if they find the defendant liable for a breach other than the one the plaintiff pleaded and particularised. A plaintiff is not disentitled to judgment where a defendant proves that the plaintiff's loss was caused in a way that was not pleaded and particularised by the plaintiff. A party is entitled to a verdict justified by the evidence even where the evidence is inconsistent with the particulars, and the party has not moved to amend the particulars to make them consistent with the evidence, but at trial has argued their pleaded cause of action.[279] As a rule it is not open to an unsuccessful plaintiff to ground an appeal on a case not argued at the trial, even though it was arguable on the evidence available.[280]

It is not uncommon for a party to have no knowledge of facts prior to trial which — had those facts been known — could have been used to allege a cause of action or defence not particularised on the pleadings produced for trial. When new facts emerge at trial parties are entitled to apply to amend particulars to introduce those facts to support their cause of action or defence. The only basis for the court refusing applications of this kind is that irreparable prejudice will be suffered by the opposing party. Otherwise the application will be granted, along with an appropriate

277 *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666.

278 *Maloney v Commissioner for Railways (NSW)* (1978) 52 ALJR 292.

279 See *Dare v Pulham* (1982) 148 CLR 658; *Miller v Cameron* (1936) 54 CLR 572; *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666; *Reiter v Publishing & Broadcasting Ltd* [1983] 3 NSWLR 137 (note) at 137–138; *Banque Commerciale SA (en liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279.

280 *Water Board v Moustakas* (1988) 180 CLR 491.

order for adjournment, or costs in favour of the opposing party.[281] Parties are not entitled to apply to amend their pleading to introduce a new cause of action or defence.[282]

The concept of procedural fairness provides that parties are to be prevented from departing from the particulars they have raised on the pleadings, so that opposing parties are not surprised at trial in the sense of having to meet a case about which they had no knowledge. The question to be answered when a party seeks to depart from, and rely on evidence inconsistent with, the pleaded particulars, is whether it is unjust to permit them to do so because the case they pleaded, and the case they now seek to prove on the evidence would surprise, embarrass, or prejudice their opponent.[283]

Amendment of particulars

[7.270] Order 36 governs the withdrawal, addition to, or amendment of, particulars and provides that a party may without leave of the court change the particulars once before the close of pleadings,[284] but at any stage during the proceeding or after the close of evidence, may do so only by applying on summons for leave from the court, or acquiring all other parties' consent to the change.[285] The procedure is useful in personal injuries suits which require constant revision of the particulars for special damages, pain and suffering, and the plaintiff's medical condition, even up to the conclusion of the trial. A writ or other process may be amended with the leave of the Prothonotary or the court prior to its being served on the opposing party.[286]

Particulars part of pleading

[7.280] The rules define "pleadings" to include particulars.[287] So particulars, whether part of the original pleading or given in response to a request or order for particulars, are incorporated into the pleading. Therefore the particulars are subject to being struck out under the same

281 *Zanardo v Ford Motor Co of Australia Ltd* [1964] VR 769 at 771 per Hudson J.

282 See *Lewis v Sydney Flour Pty Ltd* (1955) 56 SR (NSW) 189.

283 *Vlasic v Federal Capital Press of Australia Pty Ltd* (1976) 9 ACTR 1 at 6. See also *Krahe v TCN Channel Nine Pty Ltd* (1986) 4 NSWLR 536 at 543.

284 Rule 36.04(1)(a).

285 Rule 36.04(1)(b). See *Clarapede & Co v Commercial Union Assn* (1883) 32 WR 262 (at any stage during the proceeding); *Dare v Pulham* (1982) 148 CLR 658 at 664 (after the close of evidence). On the application for leave of the court see *Yorkshire Provident Life Assurance Co v Gilbert* [1895] 2 QB 148; *Spedding v Fitzpatrick* (1888) 38 Ch D 410; *Woolley v Broad* [1892] 2 QB 317; *Cropper v Smith* (1884) 26 Ch D 700.

286 Rule 36.03.

287 Rule 1.13(1).

rules as the pleadings.[288] If under r 4.07(1)(a) an affidavit filed in a proceeding commenced by originating motion but which should have been commenced by writ is ordered to stand as a pleading, the court may order particulars of facts or matters alleged in the affidavit.

Pleading to particulars

[7.290] Parties are required and should plead to material facts stated in the pleadings, and not to particulars. Particulars are not required to be, and should not be, admitted, not admitted, or denied.[289] By not pleading to particularised matters a party neither admits those matters, nor asserts whether or not they are relevant to a claim or a defence.[290] This is because the pleadings, and not the particulars, state the material facts;[291] and omissions of material facts from the pleadings are not supplied by particulars. Particulars are provided so that the party receiving them is not prejudiced by being surprised at trial.[292]

How given

[7.300] Particulars may be either included in the pleading, or served separately. If they are to be served separately the pleadings must contain a reference to the separate particulars document and the means by which the particulars will be served. The decision whether or not to set out the particulars in the pleadings normally depends on how extensive they are. If they are of a manageable length they may be incorporated into the pleadings, otherwise they will require a separate document to which the pleadings refer. The pleadings should also state whether the document containing the particulars has already been served, in which case it should include details of when service took place; otherwise the pleadings should state that the particulars are being served with the

288 By r 1.13(1). *Davey v Bentinck* [1893] 1 QB 185; *Searle v Mirror Newspapers Ltd* [1974] 1 NSWLR 180; *Minchin v Adamson* (1975) 10 SASR 119. See also *United Telephone Co v Smith* (1889) 61 LT 617; *Arnold v Bottomley* [1908] 2 KB 151 at 155; *Cass v Fitzgerald* [1884] WN 18.

289 *Pinson v Lloyd's and National Provincial Foreign Bank Ltd* [1941] 2 KB 72; *BP Australia Ltd v Brant* [1981] Qd R 164 at 169–171; *Chapple v Electrical Trades Union* [1961] 1 WLR 1290; *Turner v Bulletin Newspaper Co Pty Ltd* (1974) 131 CLR 69; 3 ALR 491 at 500.

290 *Turner v Bulletin Newspaper Co Pty Ltd* (1974) 131 CLR 69.

291 Vic r 13.02(1)(a); ACT r 406; FCR r 16.02; NSW r 14.7; NT r 13.02; Qld r 149; SA rr 98, 99; Tas r 227; WA O 20 r 8.

292 *Chapple v Electrical Trades Union* [1961] 1 WLR 1290. In the Building Cases List and presumably in the TEC List that replaced it the practice is to permit pleaders, in the appropriate case, to set out in particulars or in schedules matters which might in other circumstances be more properly included in the body of a pleading, and to require other parties to respond to those particulars. See *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* (1996) 8 VR 681 at [8]. As to the distinction between the information that may be obtained by particulars and that which can only be obtained by interrogatories, see *GW Young & Co Ltd v Scottish Union and National Insurance Co* (1907) 24 TLR 73; *Hall v Bryce* (1890) 6 TLR 344.

pleadings.[293] In some cases it may be appropriate to provide particulars in a form other than words. For example, where appropriate they can be in visual, diagrammatic or schematic form.[294]

Order for particulars

[7.310] Rule 13.11 provides:

> **13.11 Order for particulars**
>
> (1) The Court may order a party to serve on any other party particulars or further and better particulars of any fact or matter stated in the party's pleading or in an affidavit filed on that party's behalf ordered to stand as a pleading.
>
> (2) The Court shall not make an order under paragraph (1) before service of the defence unless the order is necessary or desirable—
>
> (a) to enable the defendant to plead; or
>
> (b) for some other special reason.
>
> (3) The Court may refuse to make an order under paragraph (1) if the party applying for the order did not first apply by letter for the particulars the party requires.

As provided in r 13.11(3) a court may not order particulars to be served unless the party seeking leave has first applied by letter to their opponent requesting the required particulars.[295] The court will make an order for a party to furnish adequate particulars where only insubstantial particulars have been provided.[296] Although the rules do not limit the time for requesting particulars, in practice they should be made when the need for them arises. It is also accepted practice for a party not to refuse a reasonable request for particulars.

A request for particulars does not affect the time for the conduct of pleadings.[297] The court in Victoria will not order particulars to be delivered before the defence is served unless the particulars are necessary to plead the defence.[298] If a court orders particulars to be delivered time for the party receiving the particulars runs from when the particulars are delivered.

Orders for particulars specify what the party is to deliver. The party may be ordered to deliver the best particulars available with leave to amend them prior to the trial, or to deliver particulars prior to discovery and

293 Rule 13.10(6). See also *Hollibone v Colonial Pine Milling Co Ltd* (1914) 14 SR (NSW) 467.

294 *Tarbox v St Pancras Borough Council* [1952] 1 All ER 1306 (the particulars were a plan).

295 See also ACT r 6742; NT r 13.11; Qld r 444; Tas r 253; WA O 20 r 13.

296 Vic r 13.11; ACT r 434; FCR r 16.45; NSW r 15.10; NT r 13.11; Qld r 161; SA r 102; Tas r 253; WA O 20 r 13.

297 *Bruce v Odhams Press Ltd* [1936] 1 KB 697; *Monk v Redwing Aircraft Co Ltd* [1942] 1 KB 182; *Cyril Leonard & Co v Simo Securities Trust Ltd* [1972] 1 WLR 80; ACT r 434; Tas r 253; WA O 20 r 13.

298 Vic r 13.11(2)(a) (other reasons may apply: r 13.11(2)(b)); see also NT r 13.11.

supplement them after.[299] Particulars are in practice usually accompanied by a self-executing order that either the proceeding, or the defence, be struck out if the corresponding party fails to comply.[300] The court may also impose limitations on future pleadings for a party's failure to serve appropriate particulars. Such orders are better and more frequently made as requiring leave of the court, so as to enable the court's discretion to operate, and for the court to interpret the conditions appropriately.[301] Strike-out on a non-self-executing order is unlikely to arise on the initial default but may be given for further defaults, or the court may make another appropriate order, such as that evidence not be led at trial for any allegation for which particulars have not been furnished.

Particulars before or after discovery

[7.320] In general, the court will not make an order to serve particulars under r 13.11(1) prior to the defendant serving their defence unless the defendant is unable to plead without them,[302] or on the basis of other special reasons.[303] In some instances the defendant is able to plead to the material facts without requiring particulars of those facts. They may, for example, be able to deny an allegation that they are liable to the plaintiff even without the particulars of damages claimed.[304] In such cases the defendant serves a defence in which they deny the plaintiff's allegations, after which they apply for particulars of the facts in the statement of claim.

On occasion a party may lack the evidence from which to draw the facts to particularise the material facts on which their claim rests because the evidence is in the possession of, or known only to, or ought to be known to, the opposing party. Then the facts may be particularised after discovery of the relevant evidence from the opposing party.[305] Where a distinct case of fraud is alleged (but not on a mere suspicion or suggestion[306]) discovery will be permitted to properly draft and present a particularised pleading even if it requires some disclosure of the opposing

299 *Cyril Leonard & Co v Simo Securities Trust Ltd* [1972] 1 WLR 80.

300 *Davey v Bentinck* [1893] 1 QB 185; *Nixon v W Phelan & Son Pty Ltd* [1959] VR 83; *Turner v Bulletin Newspaper Co Pty Ltd* (1974) 131 CLR 69.

301 *Turner v Bulletin Newspaper Co Pty Ltd* (1974) 131 CLR 69 at 74 per Barwick CJ.

302 Rule 13.11(2)(a).

303 Rule 13.11(2)(b).

304 See *Blackie v Osmaston* (1884) 28 Ch D 119; *Sharer v Wallace* [1950] 2 All ER 463.

305 *Millar v Harper* (1888) 38 Ch D 110; *Waynes Merthyr Co v Radford* [1896] 1 Ch 29; *Maxim Nordenfelt Guns & Ammunition Co v Nordenfelt* [1893] 3 Ch 122; *Edelston v Russell* (1888) 57 LT 92; *Ross v Blakes Motors Ltd* [1951] 2 All ER 689; *Egg & Egg Pulp Marketing Board v KH Korp Tocumal Trading Co Pty Ltd* [1963] VR 378; *Race Relations Board v London Borough of Ealing (No 2)* [1978] 1 All ER 497; *Jingellic Minerals NL v Abigroup Ltd* (1992) 7 WAR 566; *Trade Practices Commission v CC (NSW) Pty Ltd (No 4)* (1995) 58 FCR 426 (FCA).

306 *Derby Bank v Lumsden* (1870) LR 5 CP 107.

party's evidence.[307] Access to the plaintiff's evidence in the hope of "fishing out" a defence is not permitted as a means of particularising a pleading. A defence of justification to a libel action does not entitle a defendant to discovery of the defendant's evidence in order to produce such a justification, but must first sufficiently and precisely particularise the facts relied upon in defence.[308]

Whether a party should serve particulars after discovery is completed is a matter the court is entitled to decide on the basis of its discretion, having regard to all the circumstances of the particular case.[309] In *Buckley v McKenzie*[310] the defendant applied prior to discovery for an order that the plaintiff, who brought a suit as the executor of the deceased estate, disclose the contents of a conversation which he relied upon to provide the particulars of a verbal agreement with the deceased. The court exercised its discretion to refuse to make the order which the plaintiff claimed had been made between the defendant and the deceased.

A defendant who raises as a defence that a payment sued for has been made is not entitled to refuse to give particulars of the payment merely because those particulars are in their opponent's records and those records are not accessible to them. The defendant must apply for discovery to enable them to obtain the documents which will enable them to particularise their defence.[311]

Types of particulars

Condition

[7.330] Where an allegation of fact is made in a pleading that an agreement was subject to an express condition, particulars of that condition may be ordered.[312] Plaintiffs may allege that contracts contain provisions which form the gist of the cause of action and on which they base their entitlements but are in fact not furnished. Examples may include alleged clauses in purchase agreements in which vendors found the right to terminate an agreement and attach the sold property in the

307 See *Whyte v Ahrens* (1884) 26 Ch D 717; *Leitch v Abbott* (1886) 31 Ch D 374; see also *Arab Monetary Fund v Hashim (No 2)* [1990] 1 All ER 673, where it was alleged that a non-fiduciary is liable as a constructive trustee.

308 *Arnold v Bottomley* [1908] 2 KB 151. Similarly, in a proceeding for wrongful dismissal the defendant may not allege unparticularised breaches of duty in the hope of "fishing out" a case on discovery which may justify a dismissal which on the facts known to him at the time was unjustifiable: *Cyril Leonard & Co v Simo Securities Trust Ltd* [1972] 1 WLR 1280. See also *Zierenberg v Labouchere* [1893] 2 QB 183; *Goldschmidt v Constable & Co* [1937] 4 All ER 293.

309 *Waynes Merthyr Co v Radford* [1896] 1 Ch 29.

310 *Buckley v McKenzie* (1898) 4 ALR 229.

311 *Waxman v Groth* (1888) 10 ALT 13.

312 *Abbs v Matheson* (1898) 104 LT Jo 268 (where particulars of an alleged express condition were ordered).

event of a default of payment.[313] Founding the termination in a breach of contract rather than in a claim under common law undermines the foundation of the claim.

Condition of mind

[7.340] If an allegation is made of a persons' condition or state of mind the material fact alleging that condition or state must be particularised.[314] Where the condition of mind is necessary to the cause of action and is, by reason of its being insufficiently particularised, not adequately alleged, the cause of action remains incomplete,[315] and the opposing party may have the pleading struck out. Where a party alleges that a person suffers from a mental disorder or disability, or alleges "malice (or) fraudulent intention",[316] or an allegation is made of "misrepresentation, fraud, breach of trust, wilful default or undue influence",[317] or that a person had knowledge of some fact, or was on notice with regard to some fact,[318] the allegation must be accompanied by particulars.

Unlike in Victoria, under the *Uniform Civil Procedure Rules 2005* (NSW) ("UCPR"), "condition of mind" expressly excludes knowledge.[319] In *Banks v Alphatise*,[320] a case decided under the UCPR, Brereton J, while acknowledging that knowledge is a material fact to be distinctly alleged, doubted that the facts from which actual knowledge are to be inferred are material facts to be pleaded.[321] As a matter of logic, actual knowledge need not be particularly pleaded because the facts from which it is to be

313 *ABSA Bank Ltd v Havenga* (21558/10) [2010] ZAGPPHC 147; 2010 (5) SA 533 (GNP) (10 August 2010) (the problem arising from the generation of individual finance contracts for distinct products from the same template); *Standard Bank SA Ltd v Mnyipiza* (468/2014) [2015] ZAECMHC 55 (14 May 2015); *Standard Bank SA Ltd v Mbane* (58/2015) [2015] ZAECMHC 53 (23 April 2015).

314 Under the *Rules of the Supreme Court 1884* (Vic) particulars of the material facts alleging knowledge may be ordered. Rule 13.10(3)(b) replaces O 19 rr 22 and 23 and makes a material change. Under the *Rules of the Supreme Court 1884* (Vic) a party was entitled to plead a condition of mind as a fact without giving particulars. See *Burgess v Beethoven Electric Equipment Ltd* [1943] 1 KB 96; *Cresta Holdings Ltd v Karlin* [1959] 1 WLR 1050; *Webster v Peninsula Estates Pty Ltd* [1969] QWN 29. Although in the case of notice, particulars could be ordered where the form or the precise terms of the notice or the circumstances from which notice was to be inferred was material: O 19 r 23; *Cresta Holdings Ltd v Karlin* [1959] 1 WLR 1050.

315 Rule 13.10(1).

316 Rule 13.10(3)(b).

317 Rule 13.10(3)(a).

318 Rule 13.10(3)(b).

319 UCPR, r 15.4(2).

320 *Banks v Alphatise Pty Ltd* [2014] NSWSC 1437.

321 *Banks v Alphatise Pty Ltd* [2014] NSWSC 1437 at [7]. In *Davis v Halliday Financial Management Pty Ltd* [2014] NSWSC 1371 Kunc J observed that in some cases the bare allegation of knowledge will satisfy the pleading if "[t]he circumstances of the case … make it obvious how it can be said that a defendant had actual knowledge".

inferred are already known to the defendant.[322] Further, the purpose of pleadings is not to present evidence, and pleading facts from which knowledge is to be inferred is "to do nothing more than plead evidence, not material facts."[323] However, it is necessary to particularise facts from which constructive knowledge is to be inferred, because an allegation of constructive knowledge is not merely an allegation of a state of mind, but of circumstances and facts from which the actual knowledge the party lacked could have been directly perceived or inferred.[324]

In the Victorian case of *Freehouse v Middletons, Moore & Bevins*[325] Beach J said that although r 13.02(1)(a) requires that pleadings contain only the material facts and not the evidence proving them, full particulars of an allegation of fact that a party had knowledge must be given if there is any prospect that a party against whom the allegation of knowledge is made would otherwise be surprised at trial.[326] Orders for particulars have been issued in cases where parties have alleged that their opponents could not have reasonably expected a certain event to occur.[327] Particulars of an allegation of intention will be ordered. In *Feeney v Rix*[328] an order for particulars to be delivered was made from a party who alleged in a pleading the fact that they had not intended payments made to the opposing party as a gift.[329] Allegations of notice should bear particulars of how they were given and of the time they were given.[330] A plaintiff in a defamation hearing must plead particulars proving that the defendant's comments were motivated by express malice in reply to a defence of fair comment or privilege.[331]

In *Western Australian Capital Investment Co v Commissioner of Taxation*[332] five applicants appealed successfully against a decision to refuse an order for particulars against the respondent. The question in this case was whether particulars needed to be given where the condition of mind of

322 *Banks v Alphatise Pty Ltd* [2014] NSWSC 1437 at [17].

323 *Banks v Alphatise Pty Ltd* [2014] NSWSC 1437 at [12], referring to the decision of the Court of Appeal in *Burgess v Beethoven Electric Equipment Ltd* [1943] 1 KB 96.

324 *Fox v H Wood (Harrow) Ltd* [1963] 2 QB 601 at 604 per Diplock LJ (Danckwerts and Ormerod LJJ agreeing).

325 *Freehouse Pty Ltd v Middletons, Moore & Bevins* [2001] VSC 156.

326 See *Montclare v Metlife Insurance Ltd* (2009) 29 VR 20.

327 *Lyons v Kern Konstructions (Townsville) Pty Ltd* (1983) 70 FLR 135.

328 *Feeney v Rix* [1968] Ch 693.

329 *Feeney v Rix* [1968] Ch 693.

330 *Cresta Holdings Ltd v Karlin* [1959] 1 WLR 1050.

331 See r 13.10(3)(b); *Duffield v Arts Council of South Australia Inc* (1981) 27 SASR 540. See *Smith v Lewis* (1917) 33 TLR 195 where it was questioned whether particulars of express malice were required to be given in reply; compare O 82 r 3(3) of the *Rules of the Supreme Court 1883* (UK).

332 See *Western Australian Capital Investment Co Ltd v Commissioner of Taxation (Cth)* (1989) 23 FCR 388.

the Commissioner is an element of the validity of the assessment.[333] The Commissioner's right to serve a notice against the applicants was premised on the Commissioner forming the appropriate opinion under s 18(1)(b) of the *Taxation (Unpaid Company Tax) Assessment Act 1982* (Cth). The applicants could not pursue their statutory right to contest the respondent's assertion that an opinion had been formed without particulars of the allegation of fact of the opinion. While some particulars had been given more were requested but had been refused on the ground that there was no basis for believing the respondent's opinion had not been formed, and that providing further particulars would involve the respondent in pleading evidence. The court ordered that the applicants were entitled to particulars[334] with respect to the formation of the Commissioner's opinion which would enable them know the basis of the tax assessment.[335]

Consideration

[7.350] If the statement of claim makes an allegation of the existence of an agreement entered into by the parties, the plaintiff must give the defendant particulars of the consideration for that agreement.[336] Consideration is a "necessary particular" for establishing the existence of an alleged contract.[337]

Contract

[7.360] If the statement of claim alleges the existence of a contract or agreement as a fact the particulars of the contract or agreement must be given. The particulars are to include:

- the date of formation of the agreement;
- whether it was a written or oral agreement, or partly written and partly oral; and
- whether its terms were express or implied, or included both express written and implied terms.[338]

Proving the terms of an oral contract may be difficult. Where the terms of an oral contract are disputed the court must be satisfied that the

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333 *Bailey v Commissioner of Taxation (Cth)* (1977) 136 CLR 214 at 226; *Duggan v Commissioner of Taxation (Cth)* (1972) 129 CLR 365.

334 Citing the leading judgment of Aickin J in *Bailey v Commissioner of Taxation (Cth)* (1977) 136 CLR 214 at 230, who said that the general rule is that the debtor is entitled to the "fullest particulars necessary to enable him to appraise the case which he has to disprove".

335 *Bailey v Commissioner of Taxation (Cth)* (1977) 136 CLR 214 at 227 per Aickin J (leading judgment); 217 per Barwick CJ.

336 *Cooke v Rickman* [1911] 2 KB 1125 at 1130.

337 Rule 13.10(1).

338 *Turquand v Fearon* (1879) 48 LJQB 703; *Abbs v Matheson* (1898) 104 LT Jo 268; *Smith v West* [1876] WN 55; *Cuttance v Thompson* (1888) 10 ALT 40; *Coldwell v Hehir* (1889) 11 ALT 57; *Lorenzen v Bowden* (1892) 8 WN (NSW) 101; *O'Day v Reid & Co Ltd* (1898) 24 VLR 67.

conversation relied upon occurred in the terms relied upon and that what was said was capable of meeting the requirements of a legally binding agreement; and, further, it will take into consideration the nature and consequences of the terms to be proved.[339] In *Commonwealth Bank of Australia v Serobian* Hammerschlag J said that an oral contract will not be established by "inexact proofs, indefinite testimony, or indirect inferences."[340] Nevertheless, in seeking reasonable satisfaction of the precise terms of an oral agreement the court takes a different approach to the particulars presented in relation to those terms compared to that it adopts in determining what precisely was agreed in a written contract.[341] A party attempting to prove the content of a disputed term may succeed if the evidence led at trial is substantially consistent with the term as particularised in the pleadings, even if it varies in its language from the pleaded particulars. The terms of oral contracts are not determined in the same way as those of written contracts.

Contributory negligence

[7.370] A defendant pleading a defence of contributory negligence must allege and provide particulars of how the damage was contributed to by the actions or omissions of the plaintiff.[342] If contributory negligence is not pleaded with sufficient particularity the court may be prevented from making a finding.[343] Under the UCPR "[a] defendant who relies on contributory negligence must plead specifically the contributory negligence."[344] The requirement to plead specifically emphasises the precision with reference to acts or omissions constituting the negligence, and the standard of harm,[345] that is to be attained by a pleading of contributory negligence.

A generalised pleading that

> The plaintiff:
>
> (a) Failed to take any proper care in and about the performance of his work;
>
> (b) Failed to take any steps to avoid the consequence of any act or omission of the defendant relied upon by him;
>
> (c) Failed to take proper precautions for his own safety in the performance of his work.[346]

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339 *Commonwealth Bank of Australia v Serobian* [2009] NSWSC 302 at [362] per Hammerschlag J.

340 *Commonwealth Bank of Australia v Serobian* [2009] NSWSC 302 at [362].

341 *LJ Hooker Ltd v Dominion Factors Pty Ltd* [1963] NSWR 573 per Walsh J.

342 *Gracie v President of the Shire of Tullaroop* (1886) 7 ALT 117; 12 VLR 664. *Thompson v Melbourne Tramways & Omnibus Co Ltd* (1886) 7 ALT 146.

343 *Fookes v Slaytor* [1978] 1 WLR 1293 (CA).

344 *Uniform Civil Procedure Rules 2005* (NSW), r 14.16.

345 See *Wrongs Act 1958* (Vic), s 62. See also *Civil Liability Act 2002* (NSW), s 5R.

346 *Campton v Centennial Newstan Pty Ltd (No 2)* [2014] NSWSC 177 at [35].

may be struck out, since it fails to allege with the appropriate degree of particularity, and so fails to notify the defendant of the case they are required to meet at trial.

A more extreme example of failure to provide particulars of contributory negligence appears in *Zanardo v Ford Motor Co of Australia*, where the pleading was struck out on application.[347] The defendant denied negligence and pleaded contributory negligence as a defence to a claim for damages for personal injuries suffered by an employee. At paragraph 5(d) of the defence the defendant gave particulars of the plaintiff's alleged contributory negligence in the following terms:

> The defendant will further rely on such facts in proof of the contributory negligence alleged herein as are in the knowledge of the plaintiff but not of the defendant but appear in the evidence of the plaintiff and his witnesses at the hearing of the action.

Hudson J found that the particulars as stated failed to limit the generality of the pleadings, define the issues to be determined at the hearing, or apprise the plaintiff of the case they were to answer at the trial. His Honour's view was that the particulars given, rather than define the issues to be tried, suggested that the issues might in fact be expanded beyond those stated in the pleadings. The offensive paragraph was duly struck out.

Credits

[7.380] If the plaintiff credits the defendant with a certain amount in the statement of claim, and sues for the balance, the plaintiff cannot endorse the writ for a lump sum, but must provide particulars of the items composing the credit.[348] The broad principle at work here is the procedural fairness to be accorded the parties, in that the defendant is entitled to know the case brought against them in order to inform themselves how to properly state their own case at trial. In *Godden v Corsten*[349] the plaintiff built a cottage for the defendant and sued for the balance of the money the defendant agreed to pay for the plaintiff's work. On the writ of summons of the endorsed claim the plaintiff gave an account showing that credit had been given to the defendant for two items, but he did not provide particulars for those items. While the defendant was entitled to claim payment or set-off for the items already credited, he could not do so, and avoid embarrassment at trial, in the absence of particulars from the plaintiff regarding those items, lest he claim items for which credit had already been given.

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347 *Zanardo v Ford Motor Co of Australia Ltd* [1964] VR 769.

348 *Godden v Corsten* (1879) 5 CPD 17. See also *Phillips v Phillips* (1878) 4 QBD 127 (in a claim for a lump sum particulars of the items comprising the lump sum must be supplied); *Gunn v Tucker* (1891) 5 TLR 280 (particulars of a claim for money paid must reveal when each item was paid for and to whom payment was made).

349 *Godden v Corsten* (1879) 5 CPD 17.

Damages

[7.390] Pleadings should only contain facts notifying the defendant of the cause of action and of the case they are required to meet at trial. Strictly speaking, then, allegations related only to the measure of damages do not form part of the pleadings. Particulars are not normally ordered when a claim is made solely for general damages.[350] As general damages flow naturally and consequentially from the act alleged to constitute the wrong giving rise to the right to claim loss, an allegation of the wrongful act suffices.[351] It has been said that particulars may be ordered where general damages are claimed.[352] Ordinarily, however, particulars of general damages are refused.[353] In *Heffernan v Hayes*[354] the defendant pleaded drunkenness purely for the purpose of mitigating damages in reply to the plaintiff's claim for defamation, and the defence was struck out as containing an allegation that was only relevant to the quantum of damages, and not a defence to the cause of action. In stark contrast to *Heffernan v Hayes*[355] the House of Lords in *Plato Films v Speidel*[356] permitted facts of the plaintiff's reputation to be pleaded by the defendant as relevant to the mitigation of damages.

A plaintiff who is claiming compensation for damage that is not the natural and immediate consequences of a wrongful action which is the subject of the statement of claim must specifically notify the defendant by pleading that such damages will be claimed. The plaintiff must also provide particulars of the exact quantum of such damages sought and make the facts on which the calculation was based available to the defendant. Such notice demonstrates to the defendant the case they are to meet in court and provides a basis for making a payment into court.[357] The requirement of precise calculation depends on the particular facts of each case[358] and includes, for example, notifying the defendant in an action for damages for personal injury[359] of likely future losses beyond those which flow immediately and naturally from the wrongful act.[360]

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350 *London & Northern Bank Ltd v George Newnes Ltd* (1900) 16 TLR 433.

351 *Halsbury's Laws of England* (4th ed), vol 11, [386].

352 *Mavroyeni v Erle* [1970] VR 769, where the court was prepared to consider but not decide whether they could order particulars in such circumstances.

353 Particulars of general damages were refused in *Mavroyeni v Erle* [1970] VR 769, and in *Bligh v Router* [1968] QWN 9. They were ordered in *Berno Bros Pty Ltd v Touche Ross Services Pty Ltd* (1993) 3 NTLR 140.

354 *Heffernan v Hayes* (1899) 25 VLR 156.

355 *Heffernan v Hayes* (1899) 25 VLR 156.

356 *Plato Films Ltd v Speidel* [1961] AC 1090.

357 Offer of compromise under O 26.

358 *Perestrello e Companhia Lda v United Paint Co Ltd* [1969] 1 WLR 570.

359 *Domsalla v Barr* [1969] 1 WLR 630.

360 See also *Dare v Pulham* (1982) 148 CLR 658 at 664.

A specific claim is also required for exemplary damages and the party seeking those damages must also plead the facts on which they are relying.[361] When aggravated damages are claimed that should be pleaded in order to avoid surprising the defendant at trial.[362]

Special damages

[7.400] Special damages must be claimed with complete particulars of the nature and extent of the damages, including the dates events occurred, and the specific items of damage.[363] The particulars of damage inform the defendant of the nature of the claim and the damages sought and enable the defendant to make a payment into court.[364] Unpleaded special damages cannot be recovered.[365]

Special damages — loss of customers

[7.410] The loss of a business's specific customers is a type of special damage which must be pleaded and proved in order to be recovered.[366] This is done by the plaintiff providing the customers' names and addresses.[367] A plaintiff is nevertheless able to prove a general loss of business without providing such customer information,[368] although the same evidence may be tendered to prove general damages as would satisfy a claim for special damages.[369]

Special damages — loss of salary/wrongful dismissal

[7.420] There is abundant authority for the proposition that damages resulting from loss of salary in a wrongful dismissal claim is a claim for special damages requiring particulars of damage to be specifically pleaded.[370]

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361 Rule 13.07(3).

362 *PJ Holdings Australia Pty Ltd v Hughes* [1980] Qd R 83.

363 *Ratcliffe v Evans* [1892] 2 QB 524; *Watson v North Metropolitan Tramways Co* (1886) 3 TLR 273; *Monk v Redwing Aircraft Co Ltd* [1942] 1 KB 182; *Dudley v Webb* (1888) 14 VLR 122; *Lachaume v Broughton* (1903) 3 SR (NSW) 475; *Illawarra Coke Co Ltd v Leplastrier* (1917) 34 WN (NSW) 23.

364 Now offer of compromise: O 26. *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd* [1951] 1 All ER 873 at 875. See also *Mills v Harris* [1963] WAR 145 at 147–148.

365 *Ilkiw v Samuels* [1963] 1 WLR 991.

366 *Miles v Commercial Banking Co of Sydney* (1904) 1 CLR 470.

367 *Watson v North Metropolitan Tramways Co* (1886) 3 TLR 273.

368 *Ratcliffe v Evans* [1892] 2 QB 524; *Riding v Smith* (1876) 1 Ex D 91; *Evans v Harries* (1856) 1 H & N 251. But see *Bickel v John Fairfax & Sons Ltd* [1981] 2 NSWLR 474.

369 *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225.

370 *Monk v Redwing Aircraft Co Ltd* [1942] 1 KB 182; *Hayward v Pullinger & Partners Ltd* [1950] 1 All ER 581; *Phipps v Orthodox Unit Trusts Ltd* [1958] 1 QB 314. See also *Wallace v United Grain Growers Ltd* [1997] 3 SCR 701 (special damages recognised but not awarded).

Duty of care — particulars of negligence

[7.430] The facts to be stated in an action for negligence are those "upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged".[371] "Negligence" as such need not be pleaded because the word as it appears in the reference to an "action for negligence" merely denotes that a duty of care to another has been breached. As a result, so long as the facts in the statement of claim allege the existence and the breach of that duty, the failure to use the word is of no material consequence.[372]

Breach of duty — particulars of negligence

[7.440] An allegation of negligence requires particulars to be given of the ways in which the defendant was said to be negligent.[373] For example, an allegation that the defendant was driving while under the influence of alcohol is one which is required to be particularised.[374] A defendant is entitled to the particulars of the extent and nature of the bodily injuries for which a plaintiff is claiming damages. The defendant is equally entitled to particulars of the plaintiff's occupation, wages at the time the injury was alleged to have occurred, and the period during which the plaintiff was unable to work because of the injury.[375] Further, r 13.10(4) provides that the plaintiff is required to provide particulars of their loss of earnings[376] and earning capacity.[377]

Traverse

[7.450] A defendant who merely traverses or denies an allegation is not in general required to provide particulars, regardless of whether the plaintiff has made a negative allegation which needs to be proved for the plaintiff's case to succeed.[378] A denial of a negative allegation inevitably

371 *Gautret v Egerton* (1867) LR 2 CP 371 per Willes J, cited in *West Rand Central Gold Mining Co Ltd v The King* [1905] 2 KB 391 at 400.

372 *Fullarton v North Melbourne Electric Tramway & Lighting Co Ltd* (1916) 21 CLR 181 at 190 per Griffith CJ.

373 *Watson v North Metropolitan Tramways Co* (1886) 3 TLR 273; *Sneddon v Moro* [1958] Qd R 494; *Turner v Dalgety & Co Ltd* (1952) 69 WN (NSW) 228 at 229; *McCormack v Gilchrist, Watt & Sanderson Pty Ltd* [1962] NSWR 462.

374 *Roe v Robert McGregor & Sons Ltd* [1968] 1 WLR 925; [1968] 2 All ER 636 at 641. For a criticism of a statement that the plaintiff relied upon "all the provisions of the Highway Code applicable" see *Wells v Weeks* [1965] 1 WLR 45.

375 *Lawson v Ryan* (1939) 56 WN (NSW) 68. See also *Hodge v Commonwealth* (1944) 61 WN (NSW) 36; *Ivkovic v Australian Iron & Steel Ltd* [1964] NSWR 144.

376 Rule 13.10(4)(a).

377 Rule 13.10(4)(b).

378 *Weinberger v Inglis* [1918] 1 Ch 133; *Stapeley v Annetts* [1970] 1 WLR 20 (unless it involves an affirmative allegation: *MacLulich v MacLulich* [1920] P 439). See also *Herman v King* [1938] VLR 135; *Dwyer v National Trustees, Executors & Agency Co of Australasia*

implies some affirmation.[379] However, a traverse will not require the provision of particulars from a party who denies an allegation, unless the positive allegation introduced by the denial exceeds the implied affirmation so as to be regarded as pregnant with an affirmative Particulars of a traverse should be given where its "real" nature is in doubt.[380]

Matters not required to be pleaded

Conditions precedent

[7.460] A ondition precedent need not be pleaded because although a cause of action cannot exist without the condition being fulfilled the condition does not form part of the cause of action. Rather, it is the plaintiff's entitlement to sue the defendant that requires the condition to be fulfilled. The rules provide that an allegation of a condition precedent necessary to the claim or the defence is implied in the pleading.[381] It follows that the pleading is not defeasible, and this is solely on the basis that it fails to allege a condition precedent.

In *Gates v WA & RJ Jacobs*[382] the plaintiff lessor, consequent to breaches of a covenant, sought to repossess land from the defendant lessee. However, the plaintiff failed to allege in the statement of claim the notices issued prior to the issuance of the writ against the defendant. On that basis the defendant sought to have the statement of claim struck out, arguing that the notices were so integral to the cause of action, failure to allege them was tantamount to failing to plead a cause of action. The court disagreed, holding that the issuing of a notice prior to serving a writ for repossession to be a condition precedent which was necessarily pleaded by implication. In *Strauss v Rothfield*[383] the court held that alleging a termination of the tenancy on one of the three grounds permitted under the *National Security (Landlord and Tenant) Regulations 1941* (Cth) was a condition precedent that did not need to be stated in the claim. On the other hand, where the failure to perform a condition precedent forms part of the cause of action or defence it is a fact in issue, and must be specifically raised in the pleading.

Ltd [1939] VLR 96; *Pinson v Lloyd's and National Provincial Foreign Bank Ltd* [1941] 2 KB 72; *Duke's Court Estates Ltd v Associated British Engineering Ltd* [1948] 1 Ch 458; *Inland Revenue Commissioner v Jackson* [1960] 3 All ER 31; *Chapple v Electrical Trades Union* [1961] 1 WLR 1290.

379 *Pinson v Lloyd's and National Provincial Foreign Bank Ltd* [1941] 2 KB 72; *Duke's Court Estates Ltd v Associated British Engineering Ltd* [1948] 1 Ch 458; *Chapple v Electrical Trades Union* [1961] 1 WLR 1290.

380 *Johnston v Sewell* [1962] QWN 36.

381 Vic r 13.05. See also ACT r 412; FCR r 16.05; NSW r 14.11; NT r 13.05; Qld r 153; SA r 98; Tas r 236; WA O 20 r 8.

382 *Gates v WA & RJ Jacobs Ltd* [1920] 1 Ch 567.

383 *Strauss v Rothfield* [1945] VLR 263.

A condition precedent closely related to the cause of action should be pleaded as a material fact. The principle of pleading that conditions precedent are impliedly asserted does not extend to material facts forming part of the cause of action. In that case the pleadings enforce the normal principle requiring all material facts to be alleged even if they are conditions precedent. If the right to sue depends on the condition precedent its performance must be pleaded as a material fact,[384] whereas the defendant would specifically plead the plaintiff's failure to perform the condition precedent.

In *Australian National Airlines Commission v Robinson*[385] the defendant employer claimed that the employee had been dismissed because of the employee's participation in union strike action, and when seeking reinstatement, they were not willing and ready to perform their employment contract, a condition precedent of the employee's right to sue. By raising the plaintiff's failure to perform a condition precedent the defendant puts the performance of the condition in issue, and burdens the plaintiff with the onus of proving its performance.[386]

If the plaintiff's contention is that they were justified in not performing the condition precedent the pleadings must allege the facts which by which the plaintiff justifies the non-performance. If the statement of claim alleges no facts in relation to the condition precedent the pleadings impliedly allege the performance of the condition precedent. If the plaintiff in reply asserts the performance of the condition precedent, having alleged facts that justified its non-performance in the statement of claim, the plaintiff's pleadings are inconsistent with respect to the condition precedent and the reply is liable to being struck out.[387]

Judicial notice

[7.470] When a court takes judicial notice of a matter the pleadings need not allege that matter. Very well known facts raise the presumption that the court will take notice of them.[388] So too will matters of law, unless foreign law is being pleaded. Nevertheless, despite the court's notice, it may be necessary to allege facts connecting the matter of which the judicial notice is taken to the cause of action.

Presumptions

[7.480] If a presumption of fact favours a particular party, or if the other side bears the burden of proving a fact, and the party has not

384 The difficulty of applying the test in this form is discussed in *Zuk v Miller* [1957] SASR 25 at 37–38.

385 *Australian National Airlines Commission v Robinson* [1977] VR 87.

386 *Australian National Airlines Commission v Robinson* [1977] VR 87 at 91. *Bank of New South Wales v Laing* (1953) 54 SR (NSW) 76; [1954] AC 135; *Body Corporate Strata Plan No 4303 v Albion Insurance Co Ltd* [1982] VR 699.

387 *White v Derwent & Tamar Insurance Co* (1888) 14 VLR 642.

388 *Holland v Jones* (1917) 23 CLR 149 at 153.

denied the existence of the fact, that party is not required to allege the fact.[389] Despite the operation of the presumption the material facts on which the presumption is based are required to be alleged.[390]

Rules of pleadings

Documents and conversations

[7.490] Documents or conversations whose contents are material need not be set out in full. The effect of the document or conversation must be alleged, and the terms or contents having that effect set out.[391] If the wording of the document or conversation is in issue those disputed parts of the document or conversation must be set out.[392]

Implied contracts or relations

[7.500] Rule 13.06 provides that if the allegation that a relation or contract has arisen between persons is to be implied from letters or conversations, or from circumstances, the contract or relation may be alleged as a fact, and the letters, conversations, or circumstances may be set out generally without providing them in detail. The same letters, conversations and circumstances may give rise to other contracts or relationships pleaded in the alternative.

Malice, intent, knowledge or notice

[7.510] Rule 13.10 provides that all pleadings contain the particulars of pleaded facts or matters that are necessary to satisfy the objectives of pleadings,[393] and further that where the pleading alleges "misrepresentation, fraud, breach of trust, wilful default or undue influence"[394] or "disorder or disability of the mind, malice, fraudulent intention or other condition of the mind, including knowledge or notice"[395] their particulars shall be pleaded.[396] Of course, even outside the rule, allegations of these kinds must be properly pleaded and fully particularised if they are to be proven at trial.[397]

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389 Vic r 13.04; see also ACT r 409; FCR r 16.03; NSW r 14.10; NT r 13.04; Qld r 151; Tas r 227; WA O 20 r 8. There is no corresponding rule in SA.

390 *Bennett v Chemical Construction (GB) Ltd* [1971] 1 WLR 1571.

391 *Carrick v Armstrong* [1969] Qd R 185.

392 Vic r 13.03; see also ACT r 411; FCR r 16.04; NSW r 14.9; NT r 13.03; Qld r 152 (applying to both spoken and written words); SA r 98; Tas r 234; WA O 20 r 8.

393 Rule 13.10(1).

394 Rule 13.10(3)(a).

395 Rule 13.10(3)(b).

396 See also FCR r 16.42; NSW rr 15.3, 15.4; NT r 13.10; Qld r 150; WA O 20 r 13. In Tas r 238 malice, fraudulent intention, knowledge or other condition of mind may be alleged as a fact without providing further facts of circumstances. In the ACT r 416, and Tas r 240, notice of a fact, matter or thing must be pleaded as a fact.

397 *Ritter v North Side Enterprises Pty Ltd* (1975) 132 CLR 301; *Banque Commerciale SA (en liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279.

When pleading a condition of mind, including a disorder or disability, malice, fraud or knowledge, the Federal Court in *Lyons v Kern Konstructions (Townsville)*[398] ordered the plaintiff to provide the defendant with particulars of allegations which the defendant identified as conditions of mind. Alleging misleading representations with respect to the profitability of a business the subject of a sale to the plaintiff, and the expectation of achieving that result, the defendant sought the facts which the plaintiff alleged made the representations misleading, and particulars of the defendant's expectations.

STRIKING OUT PLEADINGS

Enforcing the rules of pleading

[7.520] The courts possess a power under the rules[399] to strike out a pleading, an indorsement of claims, or a part thereof which

(a) does not disclose a cause of action or defence;

(b) is scandalous, frivolous or vexatious;

(c) may prejudice, embarrass or delay the fair trial of the proceeding; or

(d) is otherwise an abuse of the process of the Court—

The court's jurisdiction to strike out a pleading is based on the court's power to compel parties to comply with the rules of pleading.[400] The rules of pleading are designed to notify parties of the case they are to meet by requiring the opposing party to clearly, comprehensibly, and comprehensively state their case. If pleadings do not clearly state the issues between the parties the court may order them to be struck out as non-compliant.[401] However, a defective pleading may not be struck out if it sufficiently sets out matters such that all the questions in dispute between the parties can be effectively disposed of, and, without prejudicing the opposing party, its deficiencies can be rectified by ordering particulars, or by permitting the pleading to be amended and served again on the opposing party.[402]

Striking out a pleading does not dispose of the proceeding. If the struck-out pleading is not rectified and served the party may seek judgment in default of a pleading. Where a party considers a pleading to be defective it should apply for both the pleading to be struck out and

398 *Lyons v Kern Konstructions (Townsville) Pty Ltd* (1983) 70 FLR 135.

399 Vic r 23.02; ACT r 425; FCR r 16.21; NSW r 14.28; NT r 23.02; Qld r 171; SA r 104; Tas r 258 (but not in relation to a failure to disclose a reasonable cause of action or a defence, or where the proceeding is an abuse of process); WA O 20 r 19.

400 *Chapman v Australian Broadcasting Corporation* (2000) 77 SASR 181.

401 *Madden v Kirkegard Ellwood & Partners* [1975] Qd R 363; *Inglis v Moore* (1979) 46 FLR 3; *Davy v Garrett* (1878) 7 Ch D 473; *Coe v Commonwealth* (1978) 52 ALJR 334, affirmed *Coe v Commonwealth* (1979) 53 ALJR 403 (whether a reasonable cause of action was disclosed).

402 *Noye v Gwilliam* [2006] WASC 183 at [35]–[36].

summary judgment. The court may not give judgment if the pleading, although defective, "supports a reasonable cause of action".[403] Instead the court may direct that the pleading's defects be made good, perhaps by supplemental particulars.

The principles of case management may be relevant to the decision to strike out pleadings.[404] The requirements of efficient justice and the recognition of the prejudice caused by delay are important determinants in deciding whether pleadings ought to be struck out. Case management also imports discretion into the court's handling of the proceeding, including the decision regarding the adequacy or otherwise of pleadings. The court has more options at its disposal than the power to strike out a pleading, including supplementing defects with particulars or other facts.[405]

In *Meckiff v Simpson*[406] the Full Court held that the mere fact that the conduct of the trial would be demanding on the defendant did not offend the rules of pleading such that an application to strike out the statement of claim could be maintained. The defendant objected to defamation proceedings being brought in Victoria, other Australian States and the United Kingdom because those proceedings would cause it prejudice and embarrassment, and delay a fair trial. Difficulties the defendant claimed it would face included dealing with the different laws of each jurisdiction, and the differences in admissibility of evidence. The Full Court held that the case did not fall within the reasons available to a court for striking out pleadings, such as failure to disclose a cause of action, or being so unintelligible the opposing party could not understand the case against it.

The High Court in *Turner v Bulleting Newspaper Co*[407] ruled that a court's power to strike out pleadings that are embarrassing, prejudicial or would cause delay to proceedings does not authorise it to enter judgment. In that case the court issued a self-executing order that the plaintiff file and serve a statement of claim within a time limit which, if not observed, would result in proceedings against the defendant being dismissed under the order.

Rather than a self-executing order dismissing proceedings in case of default, the court may strike out all or part of a pleading, or order that an amended pleading be filed and served on the opposing party, and that the parties proceed in accordance with the rules. If, however, a defective pleading whose rectification has been ordered is not delivered, the party has defaulted and the opposing party may enter judgment against them.

403 *Roadshow Films Pty Ltd v iiNet Ltd* (2009) 81 IPR 99 at [17] per Cowdrey J.

404 *Noye v Gwilliam* [2006] WASC 183.

405 *Queensland v Pioneer Concrete (Qld) Pty Ltd* [1999] ATPR 41-691 at [18]–[22] per Drummond J.

406 *Meckiff v Simpson* [1968] VR 62.

407 *Turner v Bulletin Newspaper Co Pty Ltd* (1974) 131 CLR 69.

Scandalous pleadings

[7.530] Pleading an irrelevant and offensive, indecent, or prejudicial allegation is scandalous. A scandalous pleading may be struck out. However, for a pleading to be scandalous the allegation must be irrelevant; whereas a relevant allegation cannot be scandalous.[408] Alleging misconduct on the part of a defendant unrelated to the cause of action has been held scandalous and grounds for striking out a statement of claim.[409] Examples include alleging the husband's assault of a woman in an action for rectifying a marriage settlement;[410] and alleging that the defendant normally conducted business dishonestly, despite such an allegation being irrelevant to the plaintiff's cause of action.[411] The underwriter of a marine insurance policy claimed that the defendant concealed material facts. The defendant denied the allegation and in the reply to the defence the underwriter pleaded that he would no longer claim that the defendant concealed material facts. The defendant succeeded on an application that the pleading in the statement of claim was scandalous. The pleading continued to raise the issue that the defendant had concealed facts from the plaintiff, even after the allegation had been denied and shown not to be relevant to the cause of action. The allegation was being used here merely to cast suspicion on the defendant's conduct.

Pleadings which prejudice, embarrass and delay trial

[7.540] The purpose of pleadings is to define the issues which the parties intend to prove and on which they disagree. Where one party's pleading lacks the clarity required to try the cause of action, or alleges irrelevant or false facts, it will be defective in the sense that it prejudices, embarrasses and delays the trial, and is liable to be struck out.[412] In *Knowles v Roberts*,[413] the plaintiff sought enforcement of a compromise settled in an earlier proceeding. The statement of claim alleged certain facts regarding the defendant's rights and liabilities, the effect of which was to relitigate the issue for determination in the original proceeding. The court held the allegations to be unnecessary and embarrassing and struck them out. Bowen LJ observed:

> It seems to me that the rule that the Court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary

408 *Fisher v Owen* (1878) 8 Ch D 645; *Christie v Christie* (1873) LR 8 Ch App 499 at 503.

409 *Cashin v Craddock* (1876) 3 Ch D 376.

410 *Coyle v Cuming* (1879) 40 LT 455.

411 *Blake v Albion Life Assurance Society* (1876) 45 LJQB 663.

412 *Rassam v Budge* [1893] 1 QB 571; *Girando v Padbury* (1919) 22 WALR 7; *Trade Practices Commission v George Weston Foods Pty Ltd* (1979) 39 FLR 182 at 184–186.

413 *Knowles v Roberts* (1888) 38 Ch D 263.

and it tends to prejudice, embarrass, and delay the trial of the action, it then becomes a pleading which is beyond his right.

A defendant was pleading scandalously in pleading a simple denial to the allegation of money owed to the plaintiff. The defence failed to specifically identify which fact was denied: that is, whether the defendant denied the fact that money was lent, or the fact of the amount lent.[414]

Admission and denials

[7.550] Rule 13.12 governs the manner in which the party answering allegations made in an opposing party's pleadings is to admit or deny the alleged facts:[415]

13.12 Admission and denials

(1) Except as provided in paragraph (3), every allegation of fact in any pleading shall be taken to be admitted unless it is denied specifically or by necessary implication or is stated to be not admitted in the pleading of the opposite party, or unless a joinder of issue under Rule 13.13 operates as a denial of it, and a general denial of the allegations, or a general statement that they are not admitted, shall not be sufficient.

(2) Where the party pleading intends to prove facts which are different to those pleaded by the opposite party, it shall not be sufficient for the party merely to deny or not to admit the facts so pleaded, but the party shall plead the facts the party intends to prove.

(3) Any allegation that a party has suffered damage and any allegation as to the amount of damages shall be taken to be denied unless specifically admitted.

Under the rule all parties are required to plead to every material and immaterial allegation in the other party's pleading either by denying the allegation, admitting the allegation, or not admitting to the allegation, so that none of the alleged facts may be taken to be impliedly admitted.[416]

The objective of r 13.12 — and of r 13.13 which deals with denial by joinder of issue — is to ensure parties identify the real facts that are at issue between them. Only facts denied specifically, or by necessary implication, or specifically not admitted, stand as not admitted. A fact will also be admitted unless it is denied by joinder of issues under r 13.13.[417]

The rules of pleading[418] exist to define the issues at the heart of a dispute between parties. Pleadings so general as to be evasive are prohibited

414 *Gordon v Gordon* [1948] VLR 57.

415 Rule 13.12(2) is modelled on r 25.07(3) of the *Rules of Civil Procedure* in Ontario. Rule 13.12(1) and (3) are taken from O 18 r 13 of the *Civil Procedure Rules 1998* (UK).

416 *Hasse v Eicke* (1885) 6 ALT 190. See also *Virtue v Young* (1885) 6 ALT 204.

417 Rule 13.12(1).

418 Rather than the applicable rules of court in Victoria and in most States. Some jurisdictions discourage evasive and generalised pleadings through the rules, although the effectiveness of these rules has been questioned: ACT r 448 and Qld r 167 apply costs penalties to parties who make unreasonable denials and non-admissions.

because they fail to define the issues being disputed.[419] Similarly, non-genuine denials and non-admissions undermine a dispute's grounding in reality and that allegations are in need of proof. If a traverse is evasive it is not specific. When a paragraph in a statement of claim makes one allegation but that allegation is composed of several facts, a defence in relation to that allegation that denies each and every allegation is prohibited for being a general denial.[420]

TRAVERSES

Denials

[7.560] Parties replying to allegations must reply specifically to each of the allegations made against them in the pleadings. A defendant must specifically deny or not admit each of the allegations contained in the plaintiff's statement of claim, and a plaintiff's reply to a defence must specifically respond to allegations raised there.

The putting of facts in issue is equally effective whether it is achieved by denials or by non-admissions.[421] A statement of denial may be used if the defendant has personal knowledge of the fact alleged while a non-admission should be used when the defendant lacks direct knowledge of the allegation.[422]

In Victoria the denial of an allegation must be founded on a proper basis in law and fact. Section 42 of the *Civil Procedure Act 2010* (Vic) provides:

> (1A) In the case of a civil proceeding which involves allegations of fact, a legal practitioner making a proper basis certification must certify that on the factual and legal material available—
>
> (a) each allegation of fact in the document has a proper basis;
>
> (b) each denial in the document has a proper basis;
>
> (c) there is a proper basis for each non-admission in the document.

The proper basis of the defendant's denial is knowledge of the facts. The proper basis of a non-admission is a lack of knowledge, and therefore being unable to aver the truth or otherwise of an allegation of fact.

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419 See *Charles Steele & Co Pty Ltd v Middows Bros & Linton Ltd* [1929] VLR 74; *Rules of the Supreme Court 1957* (Vic), O 20 r 14(3) and *Civil Procedure Victoria* (Butterworths, 1986), Vol 1, [13.12.45].

420 See *Charles Steele & Co Pty Ltd v Middows Bros & Linton Ltd* [1929] VLR 74.

421 *Hall v London & North-Western Railway Co* (1877) 35 LT 848.

422 In jurisdictions where the defence must be verified by affidavit, this distinction is necessary because of the form of the affidavit prescribed. See *Uniform Civil Procedure Rules 2005* (NSW), r 14.23.

Specific denials

[7.570] A defendant (including a defendant to a counterclaim[423]) must plead to each and every allegation of fact in a statement of claim.[424] A denial or non-admission must unambiguously show which facts alleged in the statement of claim it puts in issue.[425] The denial in a defence of an assertion in a statement of claim "as alleged" was held to be evasive by Jessell MR for failing to allege further facts, such as terms the defendant claimed were concluded but not alleged by the plaintiff's statement of claim.

Ambiguity is read against the defendant as an admission unless the defendant suffers a legal disability.[426] A defendant who leaves an allegation in a statement of claim unanswered may be impliedly admitting the fact alleged.[427] In some jurisdictions a defendant does not impliedly admit the facts of a statement of claim by not submitting a defence and puts the plaintiff to the proof of their allegations at trial.[428] In Victoria some authority exists for the contrasting view that an admission is implied in the absence of a defence.[429] Nevertheless, in Victoria a denial may be effected by necessary implication, not solely expressly.[430]

The rules permit the plaintiff to deny generally the allegations in a defence not accompanied by a counterclaim, putting all the facts in it in issue.[431] However, a reply that merely joins issue is unnecessary since all allegations are impliedly denied by operation of rr 13.13(2) and 14.08(a) if a reply is not served in the time permitted. Further allegations contained in the last pleading when pleadings close are also denied by implication under r 13.13.[432]

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423 Rule 13.15; *Benbow v Low* (1880) 13 Ch D 553.

424 *Byrd v Nunn* (1877) 7 Ch D 284 at 287–288.

425 *Thorp v Holdsworth* (1876) 3 Ch D 637; *Charles Steele & Co Pty Ltd v Middows Bros & Linton Ltd* [1929] VLR 74; *Gordon v Gordon* [1948] VLR 57.

426 Rule 13.12.

427 *MY Distributors Pty Ltd v Omaq Pty Ltd* (1992) 36 FCR 578.

428 See *MY Distributors Pty Ltd v Omaq Pty Ltd* (1992) 36 FCR 578, the opinion of the Full Federal Court.

429 *Parkville Court Pty Ltd v Salvaris* [1975] VR 393. See also similar approaches taken in NT (*Wickham v Tracey* (1985) 83 FLR 327); and Qld (*Watson Specialised Tooling Pty Ltd v Stevens* [1991] 1 Qd R 85 at 93).

430 Rule 13.12(1).

431 Under *Rules of the Supreme Court 1884* (Vic), O 19 r 17 (*Williamson v London & North Western Railway Co* (1879) 12 Ch D 787; *Reynolds v Taylor* (1886) 8 ALT 13); under O 23 r 1 a reply merely joining issue was not allowed.

432 See also ACT r 482; FCR r 16.11; NSW r 14.27; NT r 13.13; Tas rr 228, 257; WA O 20 r 13.

Denials and non-admissions must be specific — a general denial or statement not admitting the alleged facts is insufficient.[433] In keeping with the requirement that pleadings be kept short and avoid unnecessary complexity, clarity and specificity in denial can be achieved with brevity. A denial of each and every allegation is sufficiently specific (albeit formulaic), and achieves the requirement that every allegation of the claim is answered. A blanket denial of this kind to a statement of claim's distinct allegations of fact is unproblematic. It denies each distinct allegation unambiguously and generally achieves the aim of pleadings: avoiding surprise to the other party, and defining the issues in dispute.

However, a blanket denial of numerous distinct facts amounting to a single allegation is evasive and liable to be struck out. If, for example, a plaintiff alleges several facts constituting an agreement, the blanket denial would be ambiguous since it would be uncertain whether the denial meant the defendant intended that there was no agreement at all, or one or more of the terms as pleaded was incorrect.[434] So the denial of the allegation "as alleged" in *Thorp v Holdsworth*[435] is ambiguous in that it may deny the fact of a partnership having been entered into at all, or on the particular terms as set out by the plaintiff. If the defendant simply denies the plaintiff's allegation of an agreement he puts into issue that there was any agreement at all. If the defendant wishes to deny that the agreement was as set out in the plaintiff's pleading the defendant must plead that if the agreement was made the plaintiff pleaded the terms incorrectly, or set out how he disagrees with the correctness of terms as set out by the plaintiff.[436]

In Victoria a party intending to prove facts different from those alleged in the plaintiff's claim must plead those different facts.[437] A simple denial does not plead a fact: it cannot therefore be particularised,[438] nor does it permit the defendant to raise facts at trial in support of facts countering the plaintiff's allegations, and is restricted to a contradiction of the plaintiff's claim.[439] Denying or not admitting the plaintiff's allegations bars the defendant from raising the alternative version at trial.[440] For example, the defendant must clearly and specifically deny the allegation by the plaintiff that the defendant refused to perform an act required to be performed under a contract, or admit it and in the defence provide facts

433 Rule 13.12(1). *Thorp v Holdsworth* (1876) 3 Ch D 637; *Hall v London & North-Western Railway Co* (1877) 35 LT 848; *Harris v Gamble* (1878) 7 Ch D 877; *Rutter v Tregent* (1879) 12 Ch D 758.

434 *Charles Steele & Co Pty Ltd v Middows Bros & Linton Ltd* [1929] VLR 74.

435 *Thorp v Holdsworth* (1876) 3 Ch D 637.

436 *Gordon v Gordon* [1948] VLR 57. See also *Gagen v Bodycote* [1957] QWN 31.

437 Vic r 13.12(2); see also ACT r 443; NT r 13.12; Qld r 150; SA r 100; Tas r 250.

438 *Pinson v Lloyd's and National Provincial Foreign Bank Ltd* [1941] 2 KB 72 at 80–84.

439 *Davie v New Merton Board Mills Ltd* [1956] 1 WLR 233n.

440 *Rupcic v AW Baulderstone Pty Ltd* (1987) 46 SASR 99.

showing why the refusal was justified.[441] In denying receiving a specific sum of money the defendant must not merely deny receiving the specified amount, but also specifically plead a denial to receiving any part of it, or deny receiving the particular sum but admit the amount he did receive.[442]

Simple denials may be held to be evasive in relation to both complex and negative allegations.[443] An allegation is complex if the circumstances giving rise to an allegation are pleaded as facts in conjunction with the allegation. A simple denial of a complex allegation is evasive.[444] A plaintiff claiming the breach of a contract for the sale of goods may plead, along with the facts that constitute the allegation, the facts that goods were purchased and delivered under the contract for a price, and the facts thereof. The defendant must therefore specifically deny the facts constituting the formation of the contract, or the receipt of the goods.

Negative allegations arise frequently because the allegation of the defendant's default is commonly expressed as their failure to act in a particular way. Denials of negative allegations may conceal positive assertions. The double negative of the denied negative allegation may produce a "negative pregnant": a denial pregnant with, and able to give birth at trial to, a positive allegation. For example, a denial that a defendant acted without authority may suggest that the defendant acted *with* authority, and not that the conduct never took place at all.[445]

441 *Hibburd v Warden* (1866) 5 SCR (NSW) 192.

442 See *Rules of the Supreme Court 1884* (Vic), O 19 r 17.

443 Some rules make specific reference to particular cases where a simple traverse would be evasive: see *Court Procedures Rules 2006* (ACT), rr 442 (debts and liquidated damages), 443 (claims for motor vehicle or employment deaths and personal injuries), 444 (actions on bills of exchange and other instruments), 445 (denial of representative capacity or partnership constitution); and *Supreme Court Rules 2000* (Tas), r 232(2) (debts and liquidated demands in money). There are no equivalent provisions in the other jurisdictions. There are no equivalent provisions in the *High Court Rules 2004* (Cth) for actions commenced on or after 1 January 2005. The *High Court Rules 1952* (Cth) (repealed) — the *Supreme Court (General Civil Procedure) Rules 1996* (Vic) — applied to actions commenced prior to 1 January 2005. The *Rules of the Supreme Court 1884* (Vic) referred specifically to cases where a simple traverse was inadequate: O 22 rr 1 (debts and liquidated demands in money), 2 (actions on bills of exchange, promissory notes or cheques), 3 (actions under *High Court Rules 1952* (Cth) (repealed), O 13 r 1(1)(a), (b)). The court or a Justice may order that the former Rules apply under *High Court Rules 2004* (Cth), rr 1.03.3, 1.03.4.

444 See *Thorp v Holdsworth* (1876) 3 Ch D 637 at 641 per Jessel MR (applied in *Woodbridge Foam Corporation v AFCO Automotive Foam Components Pty Ltd* (2002) 58 IPR 56); *Charles Steele & Co Pty Ltd v Middows Bros & Linton Ltd* [1929] VLR 74 at 79 per Irvine CJ; *Gordon v Gordon* [1948] VLR 57 at 58 per O'Bryan J. See *Supreme Court (General Civil Procedure) Rules 1996* (Vic), O 19 r 17; *Charles Steele & Co Pty Ltd v Middows Bros & Linton Ltd*.

445 *Pinson v Lloyd's and National Provincial Foreign Bank Ltd* [1941] 2 KB 72 (CA) at 79–80 per Goddard LJ (a denial that the defendant "effected sales without authorisation" carried with it the suggestion that the defendant was to argue that it had indeed effected sales, but with some form of authority).

However, a denial of a negative allegation is not in all cases pregnant with a positive allegation. In this regard a bare denial that merely puts in issue a positive allegation avoids the pregnant negative, and is to be contrasted with the negative denial that produces it.[446] Whether a denial of a negative pleading produces an unambiguous denial, a pregnant negative, or is ambiguous as to whether it has produced a positive assertion or not is a matter for construction in the context of the pleadings, and "from the nature of the case or from the admission of counsel or otherwise."[447]

The cure for the party producing a negative pregnant is for the court to order the party to produce further and better particulars of the positive allegations implied in the traverse.[448] The mere denial of an affirmative allegation, however, leaves nothing to be particularised.[449] In *Pinson v Lloyd's and National Provincial Foreign Bank*[450] the defendants in relation to the breaches alleged against them denied "that they failed to act with reasonable skill and care … that they failed to carry out the plaintiff's instructions", and that they had "made purchases or sales without having been authorised by the plaintiff to do so". The plaintiff contended that the final denial produced the positive assertion that the defendants acted with authority, about which the plaintiff sought particulars of the authority the defendants asserted they had.

A defendant proposing to prove different facts than those alleged by the opposing party at trial cannot rely on a bare denial, but must allege those facts they intend to prove in the defence.[451] In this way the defendant is prevented from covertly preparing an affirmative case under the guise of a mere denial,[452] and catching the other party by surprise contrary to the requirements of r 13.07(1)(b). Thus the pleadings achieve their purpose of adequately defining the issues in dispute between the parties. Facts pleaded in accordance with r 13.12(2), unlike facts pleaded in confession and avoidance, do not impose a burden of proof on the party pleading them.

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446 *Pinson v Lloyd's and National Provincial Foreign Bank Ltd* [1941] 2 KB 72; [1941] 2 All ER 636 at 644 per Stable J.

447 *Pinson v Lloyd's and National Provincial Foreign Bank Ltd* [1941] 2 KB 72; [1941] 2 All ER 636 at 641–642 per Goddard LJ.

448 *Pinson v Lloyd's and National Provincial Foreign Bank Ltd* [1941] 2 KB 72; [1941] 2 All ER 636 at 641–642 per Goddard LJ. *Chapple v Electrical Trades Union* [1961] 1 WLR 1290; *La Radiotechnique v Weinbaum* [1928] Ch 1; *Howard v Borneman; Ryan v Borneman* [1972] 2 All ER 867.

449 *Pinson v Lloyd's and National Provincial Foreign Bank Ltd* [1941] 2 KB 72; [1941] 2 All ER 636 at 644.

450 *Pinson v Lloyd's and National Provincial Foreign Bank Ltd* [1941] 2 KB 72 at 77–78.

451 Rule 13.12(2).

452 The practice was condemned by the Winn Committee in England as "a blot on our procedure": Great Britain, *Report of Committee on Personal Injuries Litigation* (Cmnd 369, 1968), [266].

In Victoria, a statement of claim alleging damages and quantifying the amount of damages is in effect denied, and remains a fact in issue, unless the defendant specifically admits it.[453]

Admissions

[7.580] Either party may admit any fact alleged in the other party's pleadings.[454] The aim of admissions is to assist the objective of pleadings by restricting the proceeding to the facts that are genuinely in dispute between the parties. Some jurisdictions impose a penalty on unreasonable denials in pleadings in order to encourage the parties to focus on defining the genuinely contentious issues.[455] Once a party has admitted an allegation in the other party's pleadings for the other party's benefit it may only withdraw the admission by application to and leave of the court,[456] notwithstanding that the party's admission is to an allegation contained in a defence to a counterclaim which the plaintiff has subsequently withdrawn, or an admission to an allegation in a defence which the defendant has subsequently withdrawn.[457]

Confession and avoidance

[7.590] A defendant may plead confession and avoidance in a defence to a statement of claim, and a plaintiff may plead it in the reply or the defence to a counterclaim. A defendant may wish to admit the correctness of a plaintiff's allegations of fact, but dispute the legal significance of those facts. In such circumstances the defendant may choose to confess and avoid the allegation. This may occur, for example, where the plaintiff pleads facts constituting an agreement for the sale of land, which the defendant claims is void for its not being reduced to writing. The admission of the facts is a plea in confession, but the defendant avoids liability by alleging further facts that reframe the significance of the admitted facts in the light of the defendant's interpretation of the applicable law. Confession and avoidance is often pleaded as a denial and a pleading of facts which excuse the defendant from liability. A party alleging facts in avoidance bears the burden of proof of proving those facts at trial.

CLOSE OF PLEADINGS

[7.600] In Victoria pleadings close 30 days after the service of the defence, or 30 days after any pleading served or ordered after the service

453 Vic r 13.12(3); ACT r 441; NSW r 14.26; NT r 13.12.

454 The rules so provide in ACT r 490; Qld r 187; Tas r 402; WA O 30 r 1. The rules do not so provide in Victoria, but the principle still holds.

455 ACT r 448; Qld r 167.

456 Vic r 25.02(5); FCR r 26.11; NSW r 12.6; NT r 25.02; Qld r 187; SA r 103; WA O 30 r 1.

457 Rule 25.02(4).

of the defence.[458] The rules in Victoria provide for a joinder of all the issues in the last pleading served between the parties.[459] Therefore, if the plaintiff does not reply to the defence all the allegations in the defences are denied. If the plaintiff files and serves a reply all of its allegations are in issue.

458 Rule 14.08.

459 Vic r 13.13; see also ACT r 482; FCR r 16.11; NSW r 14.27; NT r 13.13; Tas r 228; WA O 20 r 15. But compare Qld r 168, whereby r 165 applies to the last pleadings which are said to be subject to a non-admission.

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THE TRIAL

[8.10] A proceeding commenced by writ in Victoria progresses to trial[1] at which evidence is adduced by the examination-in-chief and cross-examination of witnesses, and by means of which the court determines the rights and obligations of the parties by resolving disputed issues of fact and law, and providing or denying the relief sought by the plaintiff.

Mode of trial

[8.20] Together rr 47.02 and 47.04 constitute a code determining the mode of trial of a proceeding.[2] By means of these rules a trial is conducted either before a judge alone, or a judge with a jury of six people.[3] In the normal course of proceedings the trial is conducted before a judge alone without a jury.[4] A trial before a jury must be specifically applied for.[5] The court will empanel a jury only after a party's successful application. Most jurisdictions, but not Victoria, provide that trials for personal injuries

1 *Supreme Court (General Civil Procedure) Rules 2015* (Vic), r 48.01. Legislative references throughout this chapter are to these rules unless otherwise specified. See also ACT r 33 (proceeding commenced by an originating claim); FCR r 5.04 (court directs pleadings in direction); NSW r 29.4 (proceeding commenced by statement of claim); NT r 48.01 (proceeding commenced by writ); Qld r 471 (proceeding commenced by claim); SA r 120(1) (in an action); Tas r 88 (proceeding commenced by writ); WA (proceeding commenced otherwise than by an originating summons): see O 33 (entry for trial), O 58 r 1 (proceedings to be commenced by originating summons).

2 *Jenkins v Bushby* [1891] 1 Ch 484 at 489–490 per Lindley LJ.

3 See *Juries Act 2000* (Vic), ss 22, 23; Vic r 47.02(4). The ACT and SA are exceptions to the general phenomenon that a party may choose a trial by jury as of right or on application to the court.

4 Trial without a jury is the normal mode of trial, which also was the case under the *Rules of the Supreme Court 1884* (Vic), Ch I. See *Altmann v Dunning* [1995] 2 VR 1.

5 *Jenkins v Bushby* [1891] 1 Ch 484 at 492 laid down the principle followed in Victoria in *Walker v Walbran* [1917] VLR 231 that where the right to a trial by jury existed under the Judicature Acts this rights persisted, but where there was no right under the *Judicature Act 1883* (Vic) to a trial by jury the *Rules of the Supreme Court 1906* (Vic) (under which the case was decided, although Cussen J opined that the case would not produce a different judgment under the *Rules of the Supreme Court 1916* (Vic)) in Victoria did not create such rights. Therefore, "… where it is desired to have a trial with a jury this must be asked for, even in cases where formerly it would follow as a matter of course, trial without a jury being now the normal mode of trial": *Walker v Walbran* [1917] VLR 231 at 234 per Cussen J. The previous rules of court dealing with the mode of trial made a distinction between causes or matters within the cognisance of the court in its equitable jurisdiction prior to the commencement of the *Judicature Act 1883* (Vic) (*Rules of the Supreme Court 1884* (Vic), O 36 r 3) and other causes or matters: *Rules of the Supreme Court 1884* (Vic), O 36 rr 2, 6. Trial in an equity matter was by judge alone unless the court otherwise ordered: *Rules of the Supreme Court 1884* (Vic), O 36 r 3. Speaking broadly, subject to any order of the court to the contrary, any other cause or matter would be tried with a jury if the plaintiff in the writ signified a desire for that mode of trial or, where the cause or matter was slander, libel, false imprisonment, malicious prosecution, seduction or for damages for or arising out of bodily injury, the defendant by written notice after the last appearance signified a desire for trial with a jury: *Rules of the Supreme Court 1884* (Vic), O 36 rr 2, 6.

arising from motor vehicle accidents will be before a judge sitting alone.[6] Where a party does not select a mode of trial in the originating process or the pleadings, and does not apply to the court for a jury trial, trial is conducted before a judge sitting alone.[7]

A mode of trial is fixed in accordance with whether it falls within, or lies outside, r 47.02(1). A proceeding of the kind referred to in r 47.02(1) is conducted before a jury provided either the plaintiff (in the writ) or defendant (by written notice to the plaintiff) signifies their desire to have it so tried (r 47.02(1)(a)) and the party pays the jury fees.[8] Rule 47.02(1) refers to "a proceeding commenced by writ which is founded on contract (including contract implied by law) or on tort (including a proceeding for damages for breach of statutory duty)".[9] Despite a party signifying a desire for a trial by jury, a court may order,[10] having regard to all the circumstances of the case, that such a trial is not desirable.[11] Under the rule whether a trial should be conducted without a jury is entirely within

6 *Motor Vehicles Act* (NT), s 78; *Motor Accident Insurance Act 1994* (Qld), s 56; *Motor Vehicles Act 1959* (SA), s 130; *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas), s 22. In Qld a jury is not allowed in any proceeding for personal injury including medical negligence and industrial accidents: *Civil Liability Act 2003* (Qld), s 73; *Personal Injuries Proceedings Act 2002* (Qld), s 58; *Workers Compensation and Rehabilitation Act 2003* (Qld), s 390.

7 Vic r 47.02; *Supreme Court Act 1970* (NSW), s 85; *Juries Act* (NT), s 7; *Supreme Court of Queensland Act 1991* (Qld), s 56; Tas r 556; WA O 32 r 3; *Federal Court of Australia Act 1976* (Cth), s 40. The ACT and SA do not permit a jury trial in civil proceedings.

8 Rule 47.03. Jury fees are paid by the plaintiff at the time a proceeding is set down for trial: r 47.03(1). However, if trial is to be with a jury in consequence of the defendant having signified in accordance with r 47.02(1) that he or she desires to have a jury trial, the defendant must pay the amount of the proper jury fees to the plaintiff: r 47.03(1). In most jurisdictions the court has discretion to order a trial with or without a jury on application being made to it: Vic r 47.02; *Supreme Court Act 1970* (NSW), s 85; *Juries Act* (NT), s 7; Qld r 47; Tas r 556; *Supreme Court Act 1935* (WA), s 42; a jury trial of a civil proceeding is not permitted in the ACT: *Supreme Court Act 1933* (ACT), s 22.

9 Rule 47.02(1) is modelled on *Rules of the Supreme Court 1884* (Vic), O 36 r 2. However, in contrast to the earlier rule, it does not identify specific causes of action but instead refers generally to claims in contract and tort. The rule follows the language of *Limitation of Actions Act 1958* (Vic), s 5(1)(a). A claim by the Accident Compensation Commission for indemnity under s 138 of the *Accident Compensation Act 1985* (Vic) is not founded on contract or on tort within r 47.02(1), and accordingly the parties have no right to trial with a jury: *Accident Compensation Commission v Haynes* [1992] 1 VR 691. Under *Rules of the Supreme Court 1884* (Vic), O 36 r 3 the parties were not entitled to trial with a jury in a cause or matter within the cognisance of the court in its equitable jurisdiction previously to the commencement of the *Judicature Act 1883* (Vic). Determining whether the rule applied was sometimes a difficult question (see the cases referred to in the notes to O 36 r 3 in NJ Williams, *Supreme Court Practice Victoria* (Butterworths, 1973)). The present rules relating to the mode of trial make no reference to the equitable jurisdiction of the court.

10 Rule 47.02(3).

11 See *North v Jamieson* [1908] VLR 533. Formerly, the power of the court to order trial without a jury after a party had signified the desire for trial with a jury was more restricted. An order could be made if the action required any prolonged examination of documents or accounts, or any scientific or local investigation which could not conveniently be made with a jury: see *Rules of the Supreme Court 1884* (Vic), O 36 r 5.

the court's discretion. In exercising its discretion the court does not take the convenience to the parties of either mode of trial into account. Rather it aims to ensure that justice is properly and efficiently administered.[12]

Proceedings falling outside r 47.02(1), such as proceedings commenced by originating motion, are conducted before a judge alone subject to the court ordering otherwise.[13] A plaintiff is taken to desire a trial without a jury[14] unless they signify their desire for a jury trial by indorsing the writ with a statement indicating that requirement in accordance with r 5.08(1). If the plaintiff desires or is, otherwise by operation of r 5.08(2), taken to desire, a trial without a jury the defendant may nevertheless signify their desire for, and secure, a jury trial by sending the plaintiff (and the prothonotary) written notice within 10 days after the last appearance.[15] The applicant seeking a mode of trial other than the mode determined by the rules, such as seeking to dispense with a jury trial, bears the onus of persuading the court.[16]

When jury trial is not selected by either party in the manner provided for in r 47.02(1), the trial proceeds without a jury by application of r 47.02(2), unless the court makes a contrary order.[17] In *Darrell Lea (Vic) v Union Assurance Society of Australia*[18] the plaintiff applied for a trial before a jury. Lush J considered factors relevant to ordering a jury trial, including the advantage sought by the plaintiff in bringing suit against an insurance company before a jury, but refused to consider the fact that a trial might take a long time as sufficient reason to refuse a jury trial.[19] A defendant

12 See *Wilson v Burridge* [1955] VLR 433 at 435; see also *Maroubra Rugby League Football Club Inc v Malo* (2007) 69 NSWLR 496 that at least in NSW the proper understanding of s 85 of the *Supreme Court Act 1970* (NSW) is that a trial is by judge sitting alone unless, in the interests of justice, the court directs a jury trial. According to Lindley LJ in *Jenkins v Bushby* [1891] 1 Ch 484 at 490, *Rules of the Supreme Court 1884* (Vic), O 36 r 5 merely preserved the old practice of the common law courts. See also *Beta Construction Ltd v Channel Four Television Co Ltd* [1990] 2 All ER 1012 at 1020. But the court had no power or discretion to order trial without a jury merely because in its opinion it was not suitable to be tried with a jury: *Bysouth v Shire of Blackburn and Mitcham (No 1)* [1928] VLR 451.

13 Rule 47.02(2).

14 Rule 5.08(2).

15 Rule 47.02(1).

16 *Darrell Lea (Vic) Pty Ltd v Union Assurance Society of Australia Ltd* [1969] VR 401; *Comcare v John Holland Rail Pty Ltd* (2010) 189 FCR 173; *Insurance Commissioner v Australian Associated Motor Insurers Ltd (No 1)* (1982) 65 FLR 172 at 181–184; *Ra v Nationwide News Pty Ltd* (2009) 182 FCR 148.

17 See *Adams v Australian Broadcasting Commission* [1989] VSC 450, where an order for trial with a jury was made in a libel claim.

18 *Darrell Lea (Vic) Pty Ltd v Union Assurance Society of Australia Ltd* [1969] VR 401.

19 For further proceedings on appeal, see *Darrell Lea (Vic) Pty Ltd v Union Assurance Society of Australia Ltd* [1969] VR 401 at 406; see also *Victoria v Psaila* [1999] VSCA 193.

who under r 47.02(1) is entitled to a jury trial will not be denied it on the basis that such a trial will take longer and cost more than a trial before a judge alone.[20]

Even if the plaintiff indorses a trial to be without a jury in the writ the court may make a direction of its own motion for the mode of trial to be with a jury.[21] The plaintiff in *Verwayen v Commonwealth*[22] endorsed the writ for a jury trial in an action commenced prior to the coming into operation of the new r 47.02(3). The court held that it would be improper, even if it was appropriate, for it to exercise its entitlement to move for trial by judge alone under the new rules and refused to do so.

Where a jury trial has been either elected by a party or ordered by a court, a pending proceeding will not be transferred to the Magistrates Court under the *Courts (Case Transfer) Act 1991* (Vic).[23]

Court may order trial without jury despite party's signification of trial with jury

[8.30] Despite the plaintiff or the defendant signifying their desire for the trial to be conducted before a jury,[24] the court nevertheless retains the power to order a trial without a jury,[25] and for proceedings to be heard before a judge alone if, in the court's opinion, it should in all the circumstances not be tried before a jury.[26] A trial that has been commenced with a jury may be continued before a judge alone with all the evidence adduced to that point before the judge if in the court's opinion it is necessary to discharge the jury.[27]

A party desiring a jury trial is only reluctantly deprived of that entitlement if there is good cause for doing so. However, a jury trial is denied if it is desired only to satisfy the party's personal interest or preference.[28] Under the *Rules of the Supreme Court 1884* (Vic),[29] trial without a jury may be ordered for a broad range of circumstances if the court determined that the interests of justice required the order to be

20 As to an order for trial with a jury in a claim for damages for malicious prosecution, see *Cropper v Chief Constable of the South Yorkshire Police* [1990] 2 All ER 1005.

21 See *Wragge v Downard* [1938] VLR 353, decided under *Rules of the Supreme Court 1884* (Vic), O 36 r 7(a).

22 *Verwayen v Commonwealth* [1988] VR 203.

23 *Courts (Case Transfer) Act 1991* (Vic), ss 8(3), 16(2). Sections 8(3) and 16(2) of the Act are to the opposite effect of *Incorporated Nominal Defendant (Vic) v Manev* [1989] VR 870, decided under *Magistrates' Court Act 1971* (Vic), s 50(2A) and (2B), now repealed.

24 Rule 47.02(1).

25 Vic r 47.02; Qld r 474.

26 Rule 47.02(3).

27 Rule 47.02(3).

28 *Maroubra Rugby League Football Club Inc v Malo* (2007) 69 NSWLR 496.

29 *Rules of the Supreme Court 1884* (Vic), O 36 r 5.

made. The words "in all the circumstances" are not restrictive. A court should refuse a trial by jury on the basis that it is necessary to ensure that justice may be done.[30]

The purpose of the rule is to provide the court with the flexibility it requires to conduct proceedings in a manner appropriate to the circumstances and in order to do justice in the case. The rule should, therefore, be interpreted as liberally as the ordinary meaning of the words will bear in order to arm the court with the full scope of the remedial powers envisaged by the rule.[31] In *Victoria v Psaila*[32] the judge decided to conduct the trial without a jury despite the defendant exercising their right under r 47.02(1) seeking a jury trial, and objecting to the decision. Judgment was entered for the plaintiff. The defendant succeeded on appeal to have the judgment set aside, and the matter to be retried before a jury.

The cases decided under O 36 r 5 of the *Rules of the Supreme Court 1884* (Vic) remain applicable to a consideration of when a judge might exercise discretion to dispense with a jury trial under r 47.02(3).[33] Instances of a jury trial being refused include where the court determined that such a mode of trial was not suited to the matter to be tried, or on the basis that the matter would not be fairly or properly tried before a jury,[34] or that the issues were too complex for the jury to assess and determine,[35] even if the proceeding would otherwise be a proper one to be tried before a jury.[36] The presentation of some matters, or the inspection of some evidence, such as a site, may only be inconveniently done if the proceeding is conducted before a jury. Some matters may justify the displacement of a jury trial to ensure that justice is attained. For example, those that involve the consideration of complex documents or expert evidence, or complex

30 *Wilson v Burridge* [1955] VLR 433.

31 *Pezzimenti v Seamer* [1995] 2 VR 32 at 38 per Brooking J, referring to *Patton v Buchanan Borehole Collieries Pty Ltd* (1993) 178 CLR 14 at 17, 27–28. See also *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1 at [489].

32 *Victoria v Psaila* [1999] VSCA 193.

33 In the County Court, *County Court Civil Procedure Rules 2008* (Vic), r 47.02(3) is not *ultra vires* as being inconsistent with ss 65 and 67 of the *County Court Act 1958* (Vic): *Pezzimenti v Seamer* [1995] 2 VR 32.

34 *Borg v Australian Consolidated Press Ltd* [1964] VR 129. See also *Darrell Lea (Vic) Pty Ltd v Union Assurance Society of Australia Ltd* [1969] VR 401; *Nicholl v Federal Capital Press of Australia Pty Ltd* (1990) 101 FLR 356 at 361 (ACTSC).

35 *Acir v Frosster Pty Ltd* [2009] VSC 173; *French v Herald & Weekly Times Pty Ltd* (2010) 27 VR 140 (complex defences raised in defamation proceeding). Where a case requires a prolonged examination of documents or accounts or requires a local or scientific examination that cannot be conveniently undertaken with a jury there is a discretion in some jurisdictions for the court to order a trial without a jury Qld r 474; Tas r 558; *Supreme Court Act 1935* (WA), s 42. This recognises that certain investigations are such that the procedures of a jury trial are too clumsy for the proper presentation of the issues.

36 *Pezzimenti v Seamer* [1995] 2 VR 32.

damages assessments.[37] In other instances the court may express concern about the prospect of selecting a jury from amongst the population of a small town to determine notorious, or scandalous matters affecting that population.

In *Gunns v Marr (No 5)*[38] Forrest J emphasised that the court has unfettered discretion to take into account all necessary considerations to order a trial without a jury if required for ensuring that justice is achieved. Factors relevant to dispensing with a jury trial regardless of the parties' significations include:

- the complexity of the factual matters to be put before the jury for their consideration;
- the complexity of the legal issue to be put before the jury for their consideration, or the preponderance of legal issues to be put before the jury;
- where the jury will be expected to determine complex issues of liability such as distinguishing between and delivering verdicts on multiple causes of action and multiple defendants;
- whether the jury will be expected to undertake an assessment of damages where such an assessment is inherently complex;
- the duration of the trial, although the fact that a trial is long does not militate against the use of the jury; and
- the stage which the trial or proceeding has reached.

In *Gunns v Marr (No 5)* the court ordered that the trial be conducted before a judge alone. The court held that the overriding problem of proceeding before a jury was the fact that the jury would be expected to deliberate upon 60 separate questions emerging from five distinct factual scenarios

In *Trevor Roller Shutter Service v Crowe*[39] the Court of Appeal in Victoria considered the factors relevant to deciding whether a trial should proceed before a jury. The Court of Appeal observed that a court would determine application for jury trials on a case-by-case basis having regard to the particular circumstances of the case. While a trial before a judge without a jury may be more cost effective and speedier, these are not in themselves determinative factors, and the party's *prima facie* right to a trial by jury should not be summarily dismissed. Besides, the prospect of a shorter and less costly trial before a judge may be offset by the parties being encouraged to settle at the prospect of an unpredictable jury verdict.

Neither a trial before a jury nor a trial by judge alone is inherently more just or satisfactory than the other.[40] When the court in its discretion determines the mode of trial it is not thereby indicating that either will

37 *Altmann v Dunning* [1995] 2 VR 1.

38 *Gunns Ltd v Marr (No 5)* [2009] VSC 284 at [9].

39 *Trevor Roller Shutter Service Pty Ltd v Crowe* (2011) 31 VR 249 at [36]–[44].

40 *Darrell Lea (Vic) Pty Ltd v Union Assurance Society of Australia Ltd* [1969] VR 401 at 405.

produce a more just outcome. There can therefore be no miscarriage of justice even if the court exercises its discretion on the wrong basis. The parties cannot be aggrieved, nor a new trial warranted.[41]

If after the commencement of a trial by jury a judge properly exercises discretion by ordering the trial to resume before a judge alone has been subject to divergent authority. The New South Wales Court of Appeal was of the opinion in *G & J Shopfittings and Refrigeration v Lombard insurance Co (Aust)*[42] that the court's discretion to conduct a trial without a jury had to be exercised prior to the commencement of the trial. A jury once empanelled could not be discharged until it delivered its verdict without thereby bringing the trial to an end. The party's right to a trial by jury is undermined if an empanelled jury is not permitted to deliver judgment. Discharging a jury is therefore not undertaken lightly and should be done only when it becomes incapable of fulfilling its duties. On the other hand, in *Altmann v Dunning*,[43] the Victorian Court of Appeal read the discretion conferred on the court to determine whether a trial was to be conducted before a jury as unrestricted to being exercised to a time prior to the trial's commencement. The trial judge had dismissed the jury because of the complexity of the damages assessment in this case. The Court of Appeal upheld the decision.

Jury trial at common law

[8.40] The mode of trial at common law before the *Judicature Act 1883* (Vic) was by jury.[44] Juries were essential to proceedings in assisting the judge by deciding disputed questions of fact. As such trial by jury was not open to either party to dispense with. Neither plaintiff nor defendant

41 See *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 353 at 356; *Strasberg v Westfield Ltd* (2002) 56 NSWLR 47; *Spiteri v Visyboard Pty Ltd* [2005] VSCA 132 at [52].

42 *G & J Shopfittings and Refrigeration Pty Ltd (in liq) v Lombard insurance Co (Aust) Ltd* (1989) 16 NSWLR 363.

43 *Altmann v Dunning* [1995] 2 VR 1.

44 The right to a jury which existed at common law had its foundation in the practice and procedure of the courts of Queen's Bench, Common Pleas and Exchequer, by whose jurisdiction the common law jurisdiction of the Supreme Court was once defined. The jurisdiction of the Supreme Court is now defined by reference to the power and authority which it had immediately before the commencement of the *Supreme Court Act 1986* (Vic). See *Naughton v Colonial Provident, Life & General Assurance Co Ltd* [1928] VLR 533 at 538; *Constitution Act 1975* (Vic), s 85(2) (previously *Supreme Court Act 1958* (Vic), s 15(1)). Section 85(2) of the *Constitution Act 1975* (Vic) was repealed by the *Supreme Court Act 1986* (Vic), s 132(d). "Trial by jury, except in the very limited classes of cases assigned to the Chancery Court, is an essential principle of our law. It has been the bulwark of liberty, the shield of the poor from the oppression of the rich and powerful. Anyone who knows the history of our law knows that many of the liberties of the subject were originally established and are maintained by the verdicts of juries in civil cases … the right now taken away is expressly established as part of the American Constitution.": *Ford v Blurton* (1922) 38 TLR 801 at 805 per Atkin LJ, quoted in *Nicholl v Federal Capital Press of Australia Pty Ltd* (1990) 101 FLR 356 at 359 (ACTSC).

could opt for trial without a jury.[45] In certain exceptional circumstances a trial without a jury might be conceded, if the parties consented,[46] provided appropriate stringent safeguards of the court's and the party's right to jury trial were preserved.[47]

Suits for equitable relief were considered unsuitable for determination by a jury, and were determined by a judge alone in accordance with the procedure of the Courts of Chancery.[48] The Judicature Act's administrative fusion of law and equity did not affect the distinction between common law and equitable modes of trial. In *Walker v Walbran*[49] Cussen J observed: "wherever there was before the *Judicature Acts* a right to trial by jury, such right still exists, and where there was none before there is none under the rules, although power is given to the court to direct a trial by jury if in its opinion that mode of trial ought to be adopted".

Deciding between the two modes of trial requires a primary identification of the nature of the issues in dispute. If a plaintiff's claim is in substance equitable, the proceeding is in equity, and the trial is before a judge alone. Even if a plaintiff is claiming common law relief at trial, if a court of equity would have granted substantially the same relief, they may be claiming equitable relief, and the proceeding regarded as a suit in equity, for the purpose of determining the proper mode of the trial. A suit combining equitable and common law claims is in equity if the equitable claim is predominant over the common law claims.[50]

Johnson v McInerney[51] provides two principles for determining whether a plaintiff is claiming common relief. The plaintiff seeking to avoid a contract to sell certain property to a solicitor who was managing it on her behalf on terms favourable to the solicitor sought a declaration that the contract was void; or, in the alternative, claimed damages for losses consequent to negligent advice. The writ was indorsed for trial by judge and jury. The defendant resisted this by applying for trial before a judge alone. The court held that the claim for equitable relief was the primary claim, and the claim for negligence subsidiary, entitling the defendant to trial before a judge.

If prior to the enactment of the Judicature Act the relief sought would have been determined by the court in its equitable jurisdiction the nature of the suit is in equity for the purpose of determining the mode of trial.

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45 *Wragge v Downard* [1938] VLR 353.

46 *Jenkins v Bushby* [1891] 1 Ch 484 at 492.

47 See *Wragge v Downard* [1938] VLR 353 at 355.

48 In some jurisdictions an associate judge or a master conducts certain trials: ACT r 6200; *Supreme Court Rules 1970* (NSW), Pt 60 r 1A, Sch D; Tas r 561. Arguably in WA O 60 r 1B is wide enough to permit a master to hear a trial if the parties consent.

49 *Walker v Walbran* [1917] VLR 231 at 234 per Cussen J.

50 *Johnson v McInerney* [1953] VLR 343 at 346.

51 *Johnson v McInerney* [1953] VLR 343.

The mode of trial is determined by the nature of the originating process,[52] rather than by the defence or counterclaim. The court will look to the substance of the claim. A substantive cause of action in a common law claim will not disentitle the defendant of their right to a jury trial merely by the addition of an equitable ground of relief.[53] Similarly, a substantially equitable claim framed to secure common law relief does not secure the plaintiff a right to a jury trial. Nor may a defendant seek a trial by judge alone by raising an equitable defence or counterclaim.

In *Hay v Dalgety & Co*[54] the mortgagor claimed damages for breach of covenant against a mortgagee for improperly exercising their power of sale, although the breach would normally entitle the mortgagor to equitable relief in the form of an account. The claim being, in substance, one that courts of equity would have determined prior to the Judicature Act the trial was properly before a judge alone.[55] Formulating the action as a breach of covenant did not entitle the mortgagor to a jury trial.

In determining whether a proceeding is in substance in equity or at common law courts look to whether the nature of the relief sought is equitable or a common law form of relief. The substance of the claim then follows the form of relief and the mode of trial is determined accordingly.[56]

Jury trial in claim for equitable relief

[8.50] It is appropriate to commence a proceeding by writ in cases where a party seeks an equitable remedy in a matter in which disputed facts will require to be tried necessitating the exchange of pleadings and the discovery of evidence.[57] Nevertheless, r 47.02(1) is not applicable and trial with a jury can only be obtained, except by leave[58] of the court, unless the claim is founded on contract or tort.

While jury trials are as a general rule not appropriate for determining suits in equity[59] the court nevertheless has discretion to submit a claim for equitable relief to a trial before a jury. The reason suits in equity are not put before juries is that the function of the jury as the trier of fact is not as centrally important in equity where final determination of the issues is more likely to be based on an interpretation and application of equitable

52 *Ryan v Ray* [1951] VLR 328; *Victoria Golf Links Estate Pty Ltd v Howell* [1930] VLR 41; *Stafford Winfield Cook & Partners Ltd v Winfield* [1981] 1 WLR 458.

53 *Kerrison v Lovell* [1915] VLR 145; *Dayton v Western Australia Insurance Co Ltd* [1924] VLR 153; *Walker v Walbran* [1917] VLR 231 at 236 per Cussen J.

54 *Hay v Dalgety & Co Ltd* (1907) 4 CLR 913.

55 See also *Walker v Walbran* [1917] VLR 231; *Naughton v Colonial Provident, Life & General Assurance Co Ltd* [1928] VLR 533.

56 *McPherson v Melbourne & Metropolitan Board of Works* [1930] VLR 122.

57 Rules 4.04, 4.06.

58 Rule 47.02(2).

59 *Jenyns v Public Curator* (1953) 90 CLR 113.

principles, questions of law and construction of documents, than determinations of fact. Therefore the onus was on the applicant for equitable relief to satisfy the court that the matter was exceptional in being suitable to be put to a jury in that the outcome of the case would be based upon the determination of a simple factual issue.[60]

A claim in equity is most appropriately submitted to a jury trial where settling questions of fact would prove decisive in resolving the matter. A jury trial may be appropriate, then, to assess facts necessary to establishing the existence of instruments or states of affairs central to equitable disputes, such as constructive trusts based on witnesses' accounts where the credibility of the witness may be at issue. Nevertheless factual disputes in equity are normally resolved by enquiries made, and facts collected and assessed by a master or registrar in chambers rather than before a jury.[61] The two questions of whether a deed had been obtained by fraud, or by undue influence, were ordered to be put to a jury in *Lind v Lind*[62] despite Hodges J stating that the matter in general was not suitable for a jury trial. An applicant seeking an order for a jury trial of an action for improper conduct was refused in *Johnson v McInerney*[63] for reasons, amongst others, that he was not the party subject to the allegations. The High Court has also observed[64] that it would be anomalous and inappropriate to put an action in which a party sought equitable remedies to set aside a gift or other disposition of property before a jury.[65] Where a plaintiff may fashion a cause of action either in equity or at common law and chooses the former the court may not make an order for the trial to be heard before a jury.[66]

Default judgment on failure to appear at trial

Party not attending trial

[8.60] Either or both parties may be absent from the trial. If a party is absent when the trial of a proceeding is called on r 49.02 provides that the court may order that the trial

60 *Boyle v Basan* (1886) 8 ALT 62.

61 Under *Rules of the Supreme Court 1884* (Vic), O 36 r 3 causes or matters within the cognisance of the court in its equitable jurisdiction previously to the commencement of the *Judicature Act 1883* (Vic) were required to be tried by a judge without a jury unless it was otherwise ordered. Cases on whether trial should be with a jury decided under O 36 r 3 afford some guide for the exercise by the court of the authority conferred by r 47.02(2) to order trial with a jury in a proceeding claiming equitable relief.

62 *Lind v Lind* [1910] VLR 302.

63 *Johnson v McInerney* [1953] VLR 343 per Smith J.

64 *Jenyns v Public Curator* (1953) 90 CLR 113.

65 Orders for trial with a jury were refused in *Barker v Henty* (1903) 29 VLR 293; *McPherson v Melbourne & Metropolitan Board of Works* [1930] VLR 122; *Blaubaum v Hart* [1934] VLR 172.

66 *Barker v Henty* (1903) 29 VLR 293.

- not proceed unless the proceeding is again set down;[67]
- proceed with the trial generally; or
- proceed in so far as it concerns claims for relief;[68]

or it may adjourn the trial.[69] Rule 49.02 is wide enough to enable the court to give judgment.[70] If a court gives judgment against the absent party it may, under r 49.02(2), set aside or vary that judgment, order or verdict against the party as long as the affected party makes an application to the court within 14 days after the trial.[71] The withdrawal of a party's counsel from a case during the trial is treated as the non-attendance of the party with the court conducting proceedings on that basis.[72]

Defendant absent

[8.70] The absence of the defendant from the trial entitles the plaintiff to the relief claimed in the statement of claim as long as the plaintiff proves its case to the required standard on the evidence sufficient to obtain judgment. The plaintiff is not entitled to relief that is not established by the pleadings.[73] In *Stone v Smith*[74] the plaintiff, who had entered a contract to purchase leaseholds, sued and obtained judgment for specific performance of the contract, but was not entitled to rescind the contract.[75] In *Barker v Furlong*[76] the vendor of sold goods sued for their value and obtained judgment in that amount despite proving by evidence that the goods were worth more than the sum claimed.[77] In *Kingdon v Kirk*[78] an agreement for the sale of land contained a term whereby the purchaser would forfeit the deposit and the vendor would be entitled to resell the land if the purchaser failed to comply with any of

67 Rule 49.02(1)(a).

68 Rule 49.02(1)(b).

69 Rule 49.02(1)(c).

70 Rule 49.02 corresponds to O 36 rr 22, 23, 24 and 27 of the *Rules of the Supreme Court 1884* (Vic). Order 36 r 22 provided that if the defendant failed to appear, the plaintiff could prove their claim, and O 36 r 23 provided that if the plaintiff did not appear, the defendant was entitled to judgment dismissing the action, and if they had a counterclaim, they could prove it. Order 36 r 24 dealt with the case where neither party appeared. Order 36 r 27 provided for the setting aside of judgment. The present rule states simply that if a party is absent the court may proceed with the trial generally or so far as concerns any claim for relief in the proceeding. The rule is wide enough to authorise the court to give the judgment which under O 36 r 22 or r 23 it was specifically authorised to give.

71 Rule 49.02(3).

72 *Crotty v Clarke* (1896) 22 VLR 594 at 602; *Linprint Pty Ltd v Hexham Textiles Pty Ltd* (1991) 23 NSWLR 508. Compare *Flohr v McMahon; Ex parte McMahon* [1956] St R Qd 253.

73 See *Stone v Smith* (1887) 35 Ch D 188.

74 *Stone v Smith* (1887) 35 Ch D 188.

75 *Stone v Smith* (1887) 35 Ch D 188.

76 *Barker v Furlong* [1891] 2 Ch 172 at 179.

77 *Barker v Furlong* [1891] 2 Ch 172 at 179.

78 *Kingdon v Kirk* (1887) 37 Ch D 141.

the conditions of sale. The vendor sued for specific performance of the agreement, but obtained instead the relief pleaded in the alternative: a declaration entitling him to the forfeited deposit and the right to resell the land.[79]

A plaintiff seeking a form of relief at trial not included in the statement of claim cannot be granted that relief without the statement of claim being amended to include it, and notice of the amended pleading being served on the defendant, to avoid the injustice on the absent defendant of proceeding without notice.[80]

The absence of the defendant does not alter the nature of the trial. However, any counterclaim served by the defendant will be dismissed.[81] The defendant's absence does not represent that issues other than those raised in the pleadings are to be determined at trial.[82] Nevertheless, if another party at trial adduces evidence further to those upon which the pleadings are founded the plaintiff has the right to rely on that evidence.[83]

Plaintiff absent

[8.80] If the defendant appears at trial in the absence of the plaintiff, provided that defendant has not pleaded a counterclaim, the court should dismiss the proceeding and make an order for the plaintiff to pay the defendant's costs.[84] On the other hand, a defendant who has served the counterclaim on the plaintiff must, to obtain judgment, adduce evidence sufficient to prove it. Similarly to the plaintiff, in the defendant's absence the defendant may rely on evidence that another party has adduced at the trial.[85]

79 Compare *Noden v Mason* [1926] VLR 41.

80 *Banque Commerciale SA (en liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 288–289.

81 See *Linprint Pty Ltd v Hexham Textiles Pty Ltd* (1991) 23 NSWLR 508.

82 *Banque Commerciale SA (en liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 303–304.

83 See *Seventy-Sixth Emotion Pty Ltd v Australia and New Zealand Banking Group Ltd* [1992] VSC 236.

84 *Armour v Bate* [1891] 2 QB 233.

85 See *Seventy-Sixth Emotion Pty Ltd v Australia and New Zealand Banking Group Ltd* [1992] VSC 236.

Effect of judgment of dismissal on non-attendance of plaintiff

[8.90] The effect of a judgment dismissing a proceeding for want of the plaintiff's attendance, or dismissing a counterclaim for the defendant's failure to attend at trial,[86] is the same as if the judgment had dismissed the proceedings on the merits. The judgment bars new proceedings on the same cause of action.[87]

Setting aside judgment where party not attending trial

[8.100] The proper course of action for the court to take when a party is absent from trial is to set aside the judgment.[88] The party's absence is not grounds for appeal, but for an application to set aside judgment.[89] The application is made where possible to the trial judge[90] within 14 days of the end of the trial,[91] unless the period is extended under r 3.02.[92] A non-attending party's application to set aside the judgment may be refused if the party was absent by choice and without reasonable excuse having had notice of the date of the trial.[93] If a party's capacity to decide whether to attend a trial when required is disturbed by a psychiatric or mental condition the party may have sufficient grounds for setting aside the judgment.[94] A party who is unsuccessful in having a trial judgment set aside appeals to the Court of Appeal.[95]

Court's considerations

[8.110] The court has "an inherent and unfettered, though judicial," discretion to refuse an application made under r 49.02(2) to set aside a regularly entered judgment or verdict.[96] In the exercise of that discretion the court necessarily considers "(a) whether any useful purpose would be

86 *Linprint Pty Ltd v Hexham Textiles Pty Ltd* (1991) 23 NSWLR 508. See further as to a default judgment as giving rise to an estoppel *per rem judicatum*, *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993; [1964] 1 All ER 300 at 305–306 (PC).

87 See *Re Orrell Colliery & Fire-Brick Co* (1879) 12 Ch D 681 at 682; *Armour v Bate* [1891] 2 QB 233 at 235; *Re South American & Mexican Co; Ex parte Bank of England* [1895] 1 Ch 37 at 45; *Crotty v Clarke* (1896) 22 VLR 594 at 602.

88 Rule 49.02(2).

89 *Vint v Hudspith* (1885) 29 Ch D 322; *Crotty v Clarke* (1896) 22 VLR 594 at 606; *Adams v Cronin* (unreported; VCA; Winneke ACJ Phillips and Hayne JJA; No 7631/94; 6 September 1996).

90 *Schafer v Blyth* [1920] 3 KB 140; *Brygel v Stoneham* [1997] VSC 122.

91 Rule 49.02(3).

92 *Crotty v Clarke* (1896) 22 VLR 594 at 606; *Midland Bank Trust Co Ltd v Green (No 3)* [1979] Ch 496 at 503–504.

93 *Conrea Nominees Pty Ltd v Doherty* [1992] VSC 310; *Adams v Cronin* (unreported; VCA; Winneke ACJ Phillips and Hayne JJA; No 7631/94; 6 September 1996). See also *Brygel v Stoneham* [1997] VSC 122.

94 See *Brygel v Stoneham* [1997] VSC 122; *Vimplane Pty Ltd v Cirss* [2005] VSC 45.

95 See *Brown v Fraser* (1896) 22 VLR 337; *Re Edward's Will Trusts* [1982] Ch 30.

96 *Vacuum Oil Co Pty Ltd v Stockdale* (1942) 42 SR (NSW) 239 at 243 per Jordan CJ.

served by setting aside the judgment, and (b) how it came about that the applicant found himself bound by a judgment regularly obtained".[97]

The Court of Appeal in *Shocked v Goldschmidt*[98] distinguished a judgment entered at trial in default of appearance or defence, from a judgment given at trial, because the defendant did not attend. If a judgment is given in default of appearance or default of defence the court's considers whether or not the defendant can make out an arguable defence. In general the court will not set aside a judgment obtained in the defendant's absence unless the defendant is able to depose by affidavit that they have a *prima facie* arguable defence.[99]

On the other hand, in a judgment given because of the defendant's non-attendance at trial the reasons for non-attendance are the principal consideration, in particular whether the defendant's absence was the result of a deliberate choice or accident or mistake. In *Re Barraclough (dec'd)*[100] the plaintiff obtained judgment against an absent and unrepresented defendant. The defendant did not attend the trial as a result of having made a decision on advice not to attend, and having arranged with the plaintiff that the plaintiff would not claim costs against the defendant if the defendant withdrew from the proceeding.[101] The court refused to set aside the judgment obtained by the plaintiff.[102]

In making the order to set aside a judgment under r 49.02(2) the court may impose such terms or conditions as it thinks fit.[103] In *Passmore v Minahan*[104] the plaintiff did not appear at the trial and a judgment given dismissing the proceeding was set aside on the condition that the plaintiff

97 *Vacuum Oil Co Pty Ltd v Stockdale* (1942) 42 SR (NSW) 239 at 243 per Jordan CJ. In *Rosing v Ben Shemesh* [1960] VR 173 the Full Court referred to the matters which should be considered by a judge on the hearing of an application by a defendant to have set aside a judgment given against them at a trial from which they were absent. As to setting aside a judgment given at trial upon the non-appearance of a party, see also *Vacuum Oil Co Pty Ltd v Stockdale* (1942) 42 SR (NSW) 239; *Surfers Paradise International Convention Centre Pty Ltd v National Mutual Life Assn of Australasia Ltd* [1984] 2 Qd R 447. For reference to *Rosing v Ben Shemesh* [1960] VR 173, on an application for such setting aside, see *Brygel v Stoneham* [1997] VSC 122.

98 *Shocked v Goldschmidt* [1998] 1 All ER 372.

99 See *Rosing v Ben Shemesh* [1960] VR 173, where it was held that the general rule requiring an affidavit showing a defence on the merits does not apply where the application to set aside a judgment is made under this rule. Compare *Seymour v Holm* [1961] Qd R 214.

100 *Re Barraclough (dec'd)* [1969] P 1.

101 See also *Shocked v Goldschmidt* [1998] 1 All ER 372 (party electing not to apply for an adjournment, and having no real prospects of success on a retrial). Compare *Midland Bank Trust Co Ltd v Green (No 3)* [1979] Ch 496.

102 Where it was held that the court had jurisdiction to set aside judgment even though the applicant had chosen not to attend the trial, made the application to set aside out of time, and was in contempt of court when she made it. Compare *Wilkins v Bedford* (1876) 35 LT 622 where an application that was made six months after judgment was refused on the ground of delay.

103 Rule 1.14(1)(b).

104 *Passmore v Minahan* (1887) 13 VLR 262.

pay the costs of the trial.[105] In *Donaldson v Donaldson*[106] the plaintiff's wife succeeded in seeking a decree *nisi* dissolving her marriage with the plaintiff in divorce proceedings of which the plaintiff claimed to have no knowledge. An application to set aside the order for the decree succeeded on the basis that the plaintiff provide security for costs to be filed into court within seven days. The order restoring the proceedings in *Cudworth v Hayward*[107] was subject to the judgment being allowed to stand unless the defaulting party paid the other party's solicitor–client costs. An order setting aside judgment was conditional upon the applicant purging their contempt of court in *Midland Bank Trust v Green (No 3)*.[108]

Separate issues

[8.120] Where a proceeding involves different questions of fact the court may under r 47.04 order different modes of trial for each question, or order the determination of some of the issues before it prior to the determination of others.[109] The issue in question cannot, however, be an interlocutory issue. The court only reluctantly employs this power,[110] but nevertheless recognises circumstances where the separate determination of issues by different modes of trial may be appropriate. These include situations where the trial involves separate heads of liability, or different approaches to the assessment of damages, in relation to each of the issues raised for determination, as long as the issue to be determined is relevant to the question of whether a party is entitled to relief, or to how much relief they are entitled.[111] A clear distinction between the issues is an absolute precondition to ordering separate trials.

While issues of law and fact are normally determined at the same time during a proceeding, it may be necessary in some circumstances to separate proceedings in order to establish agreed facts, and the facts in dispute, so as to precisely determine the question at issue, and upon which the court will make a legal determination at trial.[112] The application of case management principles[113] indicates that where the issues to be determined at trial are likely to be reduced (or the prospect of settlement is increased) a separate proceeding is appropriate. However, if

105 See also *Cockle v Joyce* (1877) 7 Ch D 56; *Burgoine v Taylor* (1878) 9 Ch D 1; *Foakes v Miller* (1900) 108 LT Jo 346; *Brygel v Stoneham* [1997] VSC 122.

106 *Donaldson v Donaldson* [1933] QWN 16.

107 *Cudworth v Hayward* (1896) 75 LT 456.

108 *Midland Bank Trust Co Ltd v Green (No 3)* [1979] Ch 496.

109 The court has this power in most jurisdictions: Vic r 47.04; ACT r 1521; FCR r 30.01; *Civil Procedure Act 2005* (NSW), s 62; NT r 47.04; Qld r 483; SA r 211; Tas r 559; WA O 32 rr 5 and 6.

110 *Evans Deakin Industries Ltd v Commonwealth* [1983] 1 Qd R 40.

111 *Burns Philp & Co Ltd v Bhagat* [1993] 1 VR 203.

112 *Reading Australia Pty Ltd v Australian Mutual Provident Society* (1999) 217 ALR 495 at [7].

113 *Olbers v Commonwealth (No 3)* [2003] FCA 651 at [8]; see also *AWB Ltd v Cole (No 2)* (2006) 233 ALR 453 at [26]–[39].

a separate determination is likely to produce issues of fact to be contested, require the determination of issues to be raised and resolved at trial, or extend the time of the proceeding, it is inappropriate for a court to order separate proceedings.[114]

In *O'Neill v Mann*[115] the question as to whether an allegedly defamatory letter was privileged against being produced in evidence was treated as a separate issue for determination on the result of which the possibility of a trial depended. In *George Wimpey & Co v Territory Enterprises*[116] the plaintiff could only succeed on a breach of warranty claim if the contract could be construed as including that the defendant provided such a warranty. The question of construction was ordered to be heard as a separate and prior[117] issue because, if it could not be established, the expense of a trial on the breach of warranty, and the question of the quantum of damages (from which it was sufficiently distinct) could be avoided.

Referees

[8.130] The court's jurisdiction to appoint a referee will determine the scope of the referee's authority to determine all or part of an issue.[118] The court has the power under r 50.01 to appoint a referee or an assessor to report on an issue that has arisen in a proceeding,[119] or give the referee or

114 *Olbers v Commonwealth (No 3)* [2003] FCA 651 at [8].

115 *O'Neill v Mann* (1994) 49 FCR 370.

116 *George Wimpey & Co Ltd v Territory Enterprises Pty Ltd* [1966] VR 312.

117 See also *Tag Pacific Ltd v McSweeny* (1992) 34 FCR 438 where the Full Court split liability and assessment of damages.

118 *Astor Properties Pty Ltd v L'Union Des Assurances De Paris* (1989) 17 NSWLR 483; *Nicholls v Stamer* [1980] VR 479 at 486–494. Stephen J pointed out in *Buckley v Bennell Design & Constructions Pty Ltd* (1978) 140 CLR 1 at 15–16 that the rules that permit the court to refer specific issues to a referee for report are based on a corresponding procedure to that in the *Judicature Act 1884* which continued in force in England. In England until prior to the enactment of the *Common Law Procedure Act 1854* issues of fact in a proceeding before the common law court had to be submitted to the jury. The *Common Law Procedure Act 1854* adopted similar but more limited procedures to that of the Court of Chancery. The common law courts' procedural limitations led parties to appoint arbitrators, which also proved unsatisfactory, until the situation was remedied by the Judicature Act which created the Office of the Official Referee. The court was conferred with power to either: (1) refer all or part of a cause to the Office and to adopt its report wholly or partially, enabling a party to enforce the report as a judgment; or (2) order that any question or issue of fact be tried before the official referee either by consent of the parties, or without consent where the reference required prolonged examination of documents or accounts, or scientific investigations, or local investigations. The official referee's report was equivalent to a jury verdict. See E Fay, *Official Referee's Business* (2nd ed, 1988), pp 9–22; M Reynolds, "Of Civil Procedure and Settlement" (2010) 29 *Civil Justice Quarterly* 194.

119 Vic r 50.01; ACT r 1531; *Federal Court of Australia Act 1976* (Cth), s 54A; NSW r 20.14; *Supreme Court Act* (NT), s 26; Qld r 501; *Supreme Court Act 1955* (SA), s 66; Tas r 574; *Supreme Court Act 1935* (WA), s 56; see *Cape v Maidment* (1991) 98 ACTR 1; *Leighton Contractors (SA) Pty Ltd v Hazama Corporation (Australia) Pty Ltd* (1991) 56 SASR 47.

assessor authority to determine all, or a part, of the proceeding.[120] In Victoria the rules authorise the courts to refer a "question" to a referee. In so doing the question may be defined as an issue of fact or law, or an issue of fact and law. Further, the question may be one that is raised on the pleadings, or may arise from an agreement between the parties, or in some other manner.[121] The usual proceeding is for the question to be referred to be defined by the parties and ordered by the court to be referred to the referee.

Courts usually refer particular issues and questions to a referee for determination. The determination of technical facts, or the examination of complex, specialised documents are appropriate questions for a reference to be made to a referee. The reference to a referee is also appropriate if it spares the court the expense and inconvenience of conducting an investigation likely to delay a hearing.[122]

Questions appropriate to be referred to a referee for determination have included:

- the damage sustained by, and the cost of restoration on a reinstatement basis of, insured premises;[123]
- the design and construction of a squash centre;[124]
- the examination of a complex trust account;[125]
- whether electrical accumulators were damaged by a particular concentration of sulphuric acid.[126]

Once the court receives the report it may either accept or reject it, but the court's judgment is its own decision, unless the court has properly referred the whole proceeding to the referee. The court must accept the referee's report for it to have binding effect.[127] Once the court accepts the report its contents are accepted as findings of fact. This status of the report may be contested by a party challenging either the correctness of the method by which the referee has arrived at the report's findings, or the correctness of the findings themselves.

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120 Vic r 50.01; ACT r 1531; FCR r 28.61; *Uniform Civil Procedure Rules 2005* (NSW), Div 3 (References to referees); *Supreme Court Rules 2000* (Tas), Div 5 (References out of Court); *Supreme Court Act* (NT), s 27, 29; *Supreme Court Act 1955* (SA), s 66 (arbitrator); *Supreme Court Act 1935* (WA), s 51; in Qld *Supreme Court Act 1955* (Qld), s 256 is equivocal as to whether a proceeding can be referred to a referee for final determination.

121 Vic r 1.14; see also NSW r 20.13. It is submitted that the court would apply the term in the same way in the jurisdiction where the rules do not have a similar definition.

122 *Park Rail Developments Pty Ltd v RJ Pearce Assocs Pty Ltd* (1987) 8 NSWLR 123.

123 *Astor Properties Pty Ltd v L'Union Des Assurances De Paris* (1989) 17 NSWLR 483.

124 *Park Rail Developments Pty Ltd v RJ Pearce Assocs Pty Ltd* (1987) 8 NSWLR 123.

125 *Cape v Maidment* (1991) 98 ACTR 1.

126 *Chloride Batteries Australia Ltd v Glendale Chemical Products Pty Ltd* (1988) 17 NSWLR 60 (the subject of an assessor's report).

127 *Najjar v Haines* (1991) 25 NSWLR 224 at 246.

The jurisdiction of the court to make a reference either of a specific question or the whole of a proceeding to a referee for report or final determination means that there is no absolute right of parties to have the matters in dispute between them resolved by a court or judge.[128] Neither are parties required to consent to issues or questions being referred.[129] The court will, however, authorise a reference without consent in order to avoid the unduly lengthy examination of documents, or where a local or scientific examination would be too inconvenient to conduct using normal processes, or if the dispute requires an investigation of financial accounts.[130] Indeed the court may refer a question or issue to a referee despite a party's opposition to the reference.

In *Park Rail Developments v RJ Pearce Assocs*[131] Smart J held that the rules do not require the parties' consent for the court to make a reference. The jurisdiction to refer matters is not qualified by the need for the consent of all parties, and is not based on the preferences of any particular (opposing) party.[132] Further, a party's opposition to the making of a reference is only a relevant consideration for the court to take into account in the exercise of its discretion.[133] Other relevant matters that a court may take into account include:

- the nature of the issues;
- whether what is sought is a determination, an enquiry or a report, and whether it is appropriate to put the issues to a referee;
- whether an appropriate referee is available;
- whether a referee is able to reach a determination in a more timely fashion than the court;
- if the court's determination is likely to involve delay, the degree to which and the nature of any prejudice any party may suffer;

128 *Super Pty Ltd v SJP Formwork (Aust) Pty Ltd* (1992) 29 NSWLR 549 at 558 per Gleeson CJ, 566 per Mahoney JA.

129 In some jurisdictions a reference, whether of a whole proceeding or a question in a proceeding, cannot be made so as to defeat a right to trial by jury. The court's statutory authority to make the reference determines whether a reference can be made where there is a right to a jury trial. The court has only a qualified jurisdiction to refer a question or an entire proceeding to a referee for final determination in that the authorisation requires the consent of all parties. The parties must be competent to provide the authorisation, and legally disabled parties cannot provide the necessary consent.

130 *Xuereb v Viola* (1989) 18 NSWLR 453 at 455 (for the terms of reference made in that case).

131 *Park Rail Developments Pty Ltd v RJ Pearce Assocs Pty Ltd* (1987) 8 NSWLR 123.

132 *Park Rail Developments Pty Ltd v RJ Pearce Assocs Pty Ltd* (1987) 8 NSWLR 123 at 129.

133 The defendant in this case relied on authorities relating to reference to arbitration against a party's opposition: *Honeywell Pty Ltd v Austral Motors Holdings Ltd* [1980] Qd R 355; *AT & NR Taylor & Sons Pty Ltd v Brival Pty Ltd* [1982] VR 762; *Tylors (Australia) Ltd v Macgroarty* [1928] St R Qd 170.

- the cost, or the potential cost saving, of referring the question to the referee.[134]

Procedure before referee

[8.140] The court may give the referee any direction necessary to produce the report.[135] The court normally drafts the reference to the referee very widely, directing them to do or cause to be done anything necessary to produce the report and, depending on the instruction from the court, submit it to the court or provide a final determination. The referee may be directed to make any necessary inquiries by any means, and authorised to direct the parties to produce documents or to provide evidence by other means. It is normal practice for the referee to direct parties to provide written statements which are subject to cross-examination.

Evidence is taken before a referee in the same way as it is given before a judge at trial. In Victoria the rules provide that the referee has the same authority as a court to compel the discovery of documents and interrogatories and compel by subpoena that evidence be taken, witnesses be compelled to appear and documents be produced. There is no specific provision for whether the rules of evidence apply to the taking of evidence. By contrast, the Federal Court Rules provide that a referee is not bound by the rules of evidence.[136] It has been suggested that in the absence of a specific contrary provision proceedings before a referee are governed by the rules of evidence.[137]

Taking of evidence

[8.150] While proceedings before a referee are relatively informal they are nevertheless subject to the rules of natural justice[138] by virtue of the fact that a report that is accepted by the court[139] will have a bearing on the determination of the parties' rights.

Doing fairness to the parties is a matter of the facts and circumstances of each particular case. In general parties have a right to respond to the allegations that have been made against them; but, at the same time, proceedings are subject to limitations. Parties do not necessarily have the right to respond to the production of further material, or the raising of

134 *Park Rail Developments Pty Ltd v RJ Pearce Assocs Pty Ltd* (1987) 8 NSWLR 123 at 130.

135 Vic r 50.02; ACT r 1531; FCR r 28.65; NSW r 20.20; NT r 50.02; Qld r 502; SA r 222; Tas r 574; WA O 35 r 3; the NSW rule was discussed in *Xuereb v Viola* (1989) 18 NSWLR 453 at 465–467; in the ACT the referee conducts the reference as an arbitration under the *Commercial Arbitration Act 1986* (ACT) unless the court otherwise directs: ACT r 1534.

136 A referee in a proceeding before the Federal Court is not bound by the rules of evidence: FCR r 28.65.

137 B Cairns, *Australian Civil Procedure* (9th ed, Lawbook Co., 2011), [16.90].

138 *Xuereb v Viola* (1989) 18 NSWLR 453; see also *Najjar v Haines* (1991) 25 NSWLR 224 at 261–262 per Rogers AJA.

139 *Xuereb v Viola* (1989) 18 NSWLR 453 at 472.

fresh allegations. Instead of a process involving the parties in continuing allegation and response, a referee with technical expertise may assess the materials and draw conclusions.

Natural justice requires the issues to which the parties must respond to be defined. It is therefore incumbent upon the referee to state reasons in their report enabling the court to ascertain that the report is the product of an appropriate consideration and analysis of the established facts.[140] The court is able to so ascertain as long as the referee explains their reasoning, but does not require the referee to examine each piece of evidence in detail.

There must be no question of actual or perceived bias in the referee's report. In *Najjar v Haines*[141] a referee undertook an inquiry and produced a report for the court in an action taken by a contractor against the Department of Public Works in New South Wales. The report, which favoured the Department, was accepted by the court which returned a finding for the Department and against the contractor. The referee failed to declare his business dealings with the Department through a construction company of which he was the principal. When those undisclosed past and present dealings were discovered by the contractor the court set aside judgment on the basis that the court had accepted a report in circumstances where an objective observer would perceive the referee's impartiality to be affected by their dealings with one of the parties, even if there had been no actual bias.

Given the powers of the referee to call witnesses and conduct tests, a referee's actions should be free of actual or perceived favouritism to one party or another and adhere closely to the requirements of natural justice. The referee may not enter a closed private discourse with either party.[142] The referee is required to ensure that the evidence he or she obtains from one party is available to all parties.[143] Parties are notified of the witnesses to be called and the tests to be conducted so that they may respond in accordance with natural justice.

Referee's report

[8.160] Courts appoint referees to report specifically on the questions put to them and to provide reasons for their conclusions.[144] Referees may submit questions to the court if issues arise during the course of their inquiry. It is for the court in the exercise of its discretion to decide what to do with a report that is submitted to it. The report submitted to the court may, in the course of the court handing down judgment, be

140 *Xuereb v Viola* (1989) 18 NSWLR 453 at 468–469.

141 *Najjar v Haines* (1991) 25 NSWLR 224.

142 *Xuereb v Viola* (1989) 18 NSWLR 453 at 470.

143 *Xuereb v Viola* (1989) 18 NSWLR 453 at 469.

144 Vic r 50.01; ACT r 1536; FCR r 28.66; NSW r 20.23; NT r 50.01; Qld r 501; Tas r 574; WA O 335 r 6.

- adopted (as providing the factual bases of the court's decision);
- remitted to the referee with inquiries to provide further explanation, or for other reasons; or
- rejected (on the basis of inadequacy).[145]

Questions may arise with respect to the status of referee's reports. Such questions may include, for example, whether facts ought to be determined by referees' reports, or whether parties' rights include having facts judicially determined; and, whether matters supposedly settled by the acceptance of the referee's report may be redetermined by the court. Such questions raise the issue of the value of the court's putting an enquiry to a referee and seeking a report in circumstances where parties have provided the referee with evidence.[146]

Courts will accept referees' reports that are demonstrably the product of rigorous scientific analysis,[147] and to which parties have had the opportunity to provide evidence. Referees' reports will not be accepted when this opportunity was not available to the party. In law the crucial determinant of the acceptance of the referee's report is whether natural justice has been observed. On the other hand, parties to disputes in equity are entitled to have the court determine the facts.[148] The court in *Chloride Batteries Australia v Glendale Chemical Products*[149] accepted a report over the opposition of a party because its approach was logical, and conformed to the requirements of natural justice. However, in *Xuereb v Viola*[150] the court rejected a report which provided inconsistent answers, which were, furthermore, unsupported by reasons.

The Victorian Court of Appeal in *Wenco Industries v WW Industries*[151] set out the factors to be considered[152] in determining whether a referee's report was to be adopted:

> (a) First, in exercising the power conferred by r 50.04 to adopt the report of a special referee, the Court has a wide power which is to be exercised "as the interests of justice require". This broad mandate should not be the subject of restrictions laid down in advance of judges exercising it. Subject to what follows, it is undesirable to attempt closely to confine the manner in which the discretion is to be exercised.

145 Vic r 50.04; ACT r 1537; *Federal Court of Australia Act 1976* (Cth), s 54A; NSW r 20.24; NT r 50.03; Qld r 505; Tas r 575; WA O 35 rr 8, 9.

146 *Skinner & Edwards (Builders) Pty Ltd v Australian Telecommunications Corporation* (1992) 27 NSWLR 567.

147 *Chloride Batteries Australia Ltd v Glendale Chemical Products Pty Ltd* (1988) 17 NSWLR 60 at 67 per Cole J.

148 *Hoogerdyk v Condon* (1990) 22 NSWLR 171.

149 *Chloride Batteries Australia Ltd v Glendale Chemical Products Pty Ltd* (1988) 17 NSWLR 60.

150 *Xuereb v Viola* (1989) 18 NSWLR 453.

151 *Wenco Industrial Pty Ltd v WW Industries Pty Ltd* (2009) 25 VR 119 at [17] (footnotes omitted).

152 Having regard to the fact that the rules differ between jurisdictions: see *Wenco Industrial Pty Ltd v WW Industries Pty Ltd* (2009) 25 VR 119 at n 17.

(b) Secondly, the purpose of rules 50.01 and 50.04 is to provide, where the interests of justice so require, a form of partial resolution of disputes alternative to orthodox litigation. Further, that purpose would be frustrated if the reference were to be treated as "some kind of warm-up for the real contest".

(c) Thirdly, insofar as the subject matter of dissatisfaction with a report is a question of law, or the application of legal standards to established facts, a proper exercise of discretion requires the judge to consider and determine that matter afresh.

(d) Fourthly, where a report shows a thorough, analytical and scientific approach to the assessment of the subject matter of the reference, the Court would have a disposition towards acceptance of the report, for to do otherwise would be to negate both the purpose and the facility of referring complex technical issues to independent experts for inquiry and report.

(e) Fifthly, if the referee's report reveals some error of principle, absence or excess of jurisdiction, patent misapprehension of the evidence or perversity or manifest unreasonableness in fact finding, that would ordinarily be a reason for rejection. In this context, patent misapprehension of the evidence refers to a lack of understanding of the evidence as distinct from the according to particular aspects of it different weight; and perversity or manifest unreasonableness mean a conclusion that no reasonable tribunal of fact could have reached. The test denoted by these phrases is more stringent than "unsafe and unsatisfactory".

(f) Sixthly, generally, the referee's findings of fact should not be re-agitated in the Court. The Court will not reconsider disputed questions of fact where there is factual material sufficient to entitle the referee to reach the conclusions he or she did, particularly where the disputed questions are in a technical area in which the referee enjoys an appropriate expertise. Thus, the Court will not ordinarily interfere with findings of fact by a referee where the referee has based his or her findings upon a choice between conflicting evidence.

(g) Seventhly, the purpose of r 50.01 and r 50.04 would be frustrated if the Court were required to reconsider disputed questions of fact in circumstances where it is conceded that there was material on which the conclusions could be based.

(h) Eighthly, the Court is entitled to consider the futility and cost of re-litigating an issue determined by the referee where the parties have had ample opportunity to place before the referee such evidence and submissions as they desire.

(i) Ninthly, even if it were shown that the Court might have reached a different conclusion in some respect from that of the referee, it would not ordinarily be (in the absence of any of the matters referred to in sub para (e) above) a proper exercise of the discretion conferred by r 50.04 to allow matters agitated before the referee to be re-explored so as to lead to qualification or rejection of the report.

The court's power to accept or reject a referee's report is as broad as required to ensure that the interests of justice are served in the particular case. When a question is referred to a referee the expected outcome is that the report, if accepted, will resolve the particular question, which will not be recontested in the proceedings. The report will not be conclusive if it is unsatisfactory for not having applied an appropriate legal standard, or because a question of law is raised about it. Then the judge is required to reconsider the matter *de novo*. The court should accept a report that

provides an expert answer on a complex and technical matter if the report has treated the matter exhaustively, and has adopted an analytical and scientific methodology. A report may, however, be rejected on the grounds that it has fundamentally erred, misunderstood the evidence, returned manifestly unreasonable findings, or that it has strayed beyond its reporting power in providing answers it was not required to provide, or answers that are not merely expert opinion but encroach on the judge's or jury's function. A referee's report should nonetheless not be rejected merely because it was open to the court to conclude otherwise, if there was sufficient factual basis for the referee's conclusion. In circumstances where parties had the opportunity to provide material to the referee the court may justifiably take into account the cost of litigating a question answered by the report in deciding whether to accept a referee's report.

The New South Wales Court of Appeal in *Super v SJP Formwork (Aust)*[153] decided that as a general rule a referee's report should accepted. Further, parties may not have matters raised before the referee reconsidered by the court as a matter of right both because no such right is provided to the parties under the rules, and because it would conflict with the court's discretion in the manner in which it deals with the report.[154] Referees' reports are accepted or rejected at the court's discretion on the basis of the operation of the rules and its objectives, and the broader legal standards applicable to the report, or the report's factual findings. The court's discretion is not otherwise confined.

The rules provide that the objective of the reference procedure is to do justice by partially resolving disputes outside the litigation process; and it would therefore defeat the purpose of the rules not to respect the finality of the referee's report. That is not to say, however, that the report should be accepted if it is flawed in principle, has failed to properly understand or analyse the evidence, or purports to deliver findings beyond its jurisdiction: each constitutes a ground for rejection.[155] A judgment may be set aside if it is based on a report which breaches the rules of natural justice.[156]

So, a complaint based on the report's or the facts' conformity with law will require the court to reconsider the matter. But otherwise the court will consider, when exercising its discretion, factors such as the basis of the claim and the cause of action, and how long and complex the proceedings before the referee are likely to be in deciding whether or not to have the matter redetermined. When the court applies legal standards

153 *Super Pty Ltd v SJP Formwork (Aust) Pty Ltd* (1992) 29 NSWLR 549.

154 *Super Pty Ltd v SJP Formwork (Aust) Pty Ltd* (1992) 29 NSWLR 549 per Gleeson CJ.

155 *Super Pty Ltd v SJP Formwork (Aust) Pty Ltd* (1992) 29 NSWLR 549 at 562–563; *Hoogerdyk v Condon* (1990) 22 NSWLR 171; *Watson v Lazarevic* (1972) 22 NSWLR 159; and *Bermria Pty Ltd v Homebush Abattoir Corporation* (1991) 22 NSWLR 600 followed the equity practice that a dissatisfied party is always entitled to a rehearing before a judge.

156 *Najjar v Haines* (1991) 25 NSWLR 224 (the Court of Appeal setting aside the judgment).

to determine whether the report ought to be accepted, it must consider any errors of law made by the referee, and whether the errors have been corrected.[157]

Special case

[8.170] Where a court considers it useful to decide any question it may order a separate trial of the question.[158] The court may make an order for a question or different questions[159] to be tried at any stage either before, during or after the trial of the proceeding, and how questions are to be stated,[160] and the mode in which the question or questions will be tried.[161] The question may arise as an issue in the pleadings of the parties, or may arise in any other manner. It may be raised by a party, or by a non-party having a sufficient interest in the proceedings.[162] The Victorian rules define a question to mean "any question, issue or matter for determination by the Court, whether of fact or law or of fact and law".[163] If, in determining the question or questions the subject of the special case, the proceeding is thereby in substance disposed of, or, a trial of the proceeding is rendered unnecessary, the court may either make an order dismissing the proceeding, deliver judgment on the proceeding, or make any other order as it sees fit.[164]

Stating a special case

[8.180] The court is not in a position to make a determination on facts when hearing a special case, and bases its response to a special case on the ultimate facts[165] put before it. The question for the court must not depend on the presentation of evidence to be comprehensible, but must be stated in such a way as to be intelligible and answerable without reference to evidentiary facts. While the court must base its decision on the facts without drawing inferences from them, it may nevertheless rely on the implications of the facts. The crucial distinction is that implications are drawn from the facts themselves but inferences are supplementary to

157 *Homebush Abattoir Coproration v Bermria Pty Ltd* (1991) 22 NSWLR 605 at 609 (NSWCA).

158 Rule 47.04.

159 Rule 47.04(b).

160 Rule 47.04(a).

161 Rule 47.04(b).

162 Rule 1.13 (Definitions).

163 Vic r 1.13 (Definitions). For the definition of a "question" where it is defined in other jurisdictions see NSW r 28.1; NT r 1.09; Qld r 482.

164 Vic r 47.05; ACT r 1523; FCR r 30.02; NSW r 28.4; NT r 47.05; Qld r 485. In Tasmania (r 568) and WA (O 31 r 6) the court cannot give final judgment in a proceeding in giving its opinion on a special case. In those jurisdictions the court may give judgment for the payment of money or damages if the parties entered into an agreement that one party would pay money or damages to the other before the court gives its opinion.

165 *R v Rigby* (1956) 100 CLR 146 at 150–152; see also *Industrial Equity Ltd v Commissioner for Corporate Affairs (Vic)* [1990] VR 780 at 783 per Crockett, Fullagar and Nathan JJ.

them. An inference is a statement further to the facts and in furtherance of the facts. It is a conclusive statement with a foundation in evidence.[166]

PROCEEDINGS AT TRIAL

[8.190] Civil proceedings may either be determined before a judge sitting alone, or a trial conducted before a judge and jury. In the former the judge determines both facts and law, treating issues of law and fact as separate issues. In a jury trial the jury is responsible for findings of fact supported by the admissible evidence, while the judge determines the court's judgment based on the facts as a matter of law. The judge's determination of questions of law during a trial controls the admissibility of evidence, the strength of the evidence and whether it discharges the plaintiff's evidentiary burden sufficient to support a verdict.

The party bearing the burden of proof opens proceedings, addressing the court on the controversial issues raised by the matter, and what and how they intend to argue in support of their contentions. Evidence is then called. Normally evidence enters court by the examination-in-chief, cross-examination and re-examination of witnesses unless by court order witness evidence can be tendered through affidavits.

Once that party has presented its case, the opposing party may choose to present evidence, or not, or to make a submission that it has no case to answer. If the opposing party chooses not to adduce evidence, the opening party addresses the court in closing by summarising its evidence and making submissions, followed by the opposing party's submissions. The case is then decided on the evidence adduced by the opening party.

If the opposing party decides to present evidence it addresses the court in opening, calls evidence, and makes its closing address to the court before the opening party. The rules of some jurisdictions provide for this sequence of events; while the rules of most jurisdictions empower the court to allow proceedings to run in different order depending on the numbers of parties and claims involved.[167]

A party making a no case to answer submission has normally waived their right to call evidence,[168] although the court is not required to make an order in that form. If a party decides to make a submission that it has no case to answer it submits to the court thereby that the party to whom it is opposed has not made out a *prima facie* case to the requisite standard of proof that would require the party to present evidence. The opposing

166 See *Re Turner* [1942] St R Qd 223; *Re Brodribb* [1942] St R Qd 263; see also *Hall v Busst* (1960) 104 CLR 206. The general procedure in the Federal Court is discussed in *Town v Australian Telecommunications Commission* (1983) 67 FLR 48.

167 Vic r 49.01; ACT r 1508; NSW r 29.6; NT r 49.01; Tas r 569; WA O 34 r 5.

168 *Hanlon v Wadlow Ltd* [1961] SASR 94 at 99 per Reed J.

party has the right of final reply. The court decides the case on the evidence presented regardless of whether it decides in favour of or against the submission.[169]

Procedural fairness

[8.200] Procedural fairness is central to the integrity of the trial process. The trial process must adhere strictly to procedural fairness in order to ensure that the court makes its decision only if all parties have had the opportunity to present their case to the court, and to ensure that the public's perception of the fairness of the process is well founded.[170] Procedures likely to produce unfairness are to be scrupulously avoided, such as:

- evidence taken without the knowledge or in the absence of another party; or
- the court's refusal to accept or consider a party's argument or submission relevant to an issue;[171] or
- a decision of the court, whether interim or final, based upon a point which a party was deprived of the opportunity of addressing at the proceeding;[172] or
- a judicial direction denying or limiting a party's opportunity to cross-examine a witness on evidence which the judge states will not form part of the court's considerations in arriving at its decision but which later proves crucial to or influential in the decision.[173]

The procedural unfairness will only void the trial if it results in injustice. The party who alleges that the trial was invalidated by the procedural unfairness must be able to show that the procedure deprived them of an opportunity which fairness required they be given.[174]

Unrepresented litigants

[8.210] Litigants have a right to appear at trial representing themselves without a lawyer.[175] Despite the entitlement to self-represented appearance, litigants may suffer both strategic disadvantage, and disadvantage producing unfairness, as a result. Judges presiding over trials including self-represented litigants are confronted with a problem.

169 *Residues Treatment & Trading Co Ltd v Southern Resources Ltd* (1989) 52 SASR 54; *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers* (1992) 38 FCR 458; *Cahill v Construction, Forestry, Mining and Energy Union (No 2)* (2008) 170 FCR 357.

170 Trial is a public process: *The Food Improvers Pty Ltd v BGR Corporation Pty Ltd (No 2)* (2006) 155 FCR 216 at 220–223 per Rares J.

171 *Seltsam Pty Ltd v Ghaleh* [2005] NSWCA 208 at [4]–[7] per Mason P.

172 *Duong v Tran* [2010] NSWCA 280 at [54]–[56] per Giles JA; *Chaina v Alvaro Homes Pty Ltd* [2008] NSWCA 353.

173 *Stead v State Government Insurance Commission* (1986) 161 CLR 141.

174 *CSR Ltd v Eddy* (2008) 70 NSWLR 725 at [38]–[42] per Basten JA.

175 *Cachia v Hanes* (1994) 179 CLR 403 at 415. Representation cannot normally be shared between a litigant and a lawyer: *Malouf v Malouf* (2006) 65 NSWLR 449.

Judges must ensure the court remains an impartial and neutral arbitrator between the parties, and that the public perceives this to be the case. At the same time a fair trial may only be able to be ensured by counteracting any disadvantage to the self-represented party, albeit without thereby advantaging that party at the expense of the represented litigant.[176]

On the one hand, the judge is tasked with ensuring that procedural fairness is afforded to the unrepresented party by ensuring that the party's case is fully aired before the court at trial. On the other hand, the judge must not improperly assist or advocate on behalf of the party, or otherwise become involved in a confusion of the roles of judge and counsel.[177] A self-represented litigant may expect a judge to provide them with the information they require regarding the substantive legal issues, and procedural matters, to enable them to make appropriate decisions as to how to conduct their own trial, but may not anticipate any further assistance such as advice on how to proceed.[178]

In determining the approach to take to self-represented litigants, judges are to assess what degree of knowledge litigants have of the their legal and procedural rights, the advocacy skills they possess to act on those rights, and therefore the assistance the party requires in the circumstances of the case.[179]

Calling evidence

[8.220] The usual mode of presenting evidence in court at a civil trial is through the examination and cross-examination of witnesses. The court may, however, give directions prior to trial enabling alternative forms of evidence-taking. For example, despite the court's historical and philosophical preference for presenting evidence through oral testimony, it may accept affidavits or written witness statements instead of, or as well as, oral testimony. Similarly, courts may dispense with the requirement for witnesses to be present in court and order that evidence be given by video link.[180]

The doctrine of party autonomy in the adversarial trial process entitles parties to decide whether or not to call witnesses, and which witnesses to call. The court's role as an impartial adjudicator militates against its calling witnesses, lest it become embroiled in the contest and confuse its

176 *Kenny v Ritter* [2009] SASC 139 at [18] per Gray and Layton JJ.

177 *Dietrich v The Queen* (1992) 177 CLR 292 at 302 per Mason CJ and McHugh J.

178 *Kenny v Ritter* [2009] SASC 139 at [18] per Gray and Layton JJ; *Tomasevic v Travaglini* (2007) 17 VR 100.

179 *Kenny v Ritter* [2009] SASC 139 at [23].

180 *Evidence (Miscellaneous Provisions) Act 1958* (Vic), s 42E; ACT r 1401; FCR r 5.04 (court directions); NSW r 31.3; NT r 48.26; Qld r 367; *Evidence Act 1929* (SA), s 59IQ; WA O 29 r 2; *Campaign Master (UK) Ltd v Forty Two International Pty Ltd (No 3)* (2009) 181 FCR 152.

role with that of the parties.[181] The judge's power to call a witness was discussed in *Titheradge v The King*.[182] In that case the High Court accepted the observations of the English Court of Appeal in *Re Enoch and Zaretzky, Bock & Co's Arbitration*[183] that the court in limited circumstances may call a witness. In particular a judge may call a witness with the parties' consent in circumstances where a party is reluctant to call a witness whose credibility, were the witness not theirs, they would challenge.[184] The High Court in *Titheradge v The King*[185] stressed that a judge would only call a witness in exceptional circumstances, and where all parties had consented.[186]

Similarly, in *Clark Equipment Credit of Australia v Como Factors*[187] the court held that a referee, having the delegated authority of the judge of the court appointing him, was not entitled to call evidence when conducting a reference.[188] In *Huang v University of New South Wales (No 3)*[189] the Federal Court heard an appeal from the Federal Magistrates Court. The appellant submitted that the magistrate had acted in an unauthorised manner by admitting an affidavit into evidence which neither party had tendered, and the admission of which the appellant had objected to at trial. Rares J set aside the judgment on the basis that a bias on the part of the court could be reasonably apprehended from the affidavit's admission into evidence in this manner.[190]

The cases do not develop a settled principle. However, the situation in Victoria is governed by statute.[191] In Victoria the court may order a person who is present at a hearing and who is compellable as a witness to

181 *Huang v University of New South Wales (No 3)* (2006) 154 FCR 16 at 22 per Rares J; in *Titheradge v The King* (1917) 24 CLR 107 at 117 Barton J said that bringing the court into the contest between the parties is a "grave irregularity"; see also *Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd* (1988) 14 NSWLR 552 at 567 per Powell J

182 *Titheradge v The King* (1917) 24 CLR 107.

183 *Re Enoch and Zaretzky, Bock & Co's Arbitration* [1910] 1 KB 327.

184 *Re Enoch and Zaretzky, Bock & Co's Arbitration* [1910] 1 KB 327 at 333 per Fletch Moulton LJ, 337 per Farwell LJ.

185 *Titheradge v The King* (1917) 24 CLR 107.

186 *Titheradge v The King* (1917) 24 CLR 107 at 114 per Barton J, 118 per Isaacs and Rich JJ. Dawson J made similar observations in *Whitehorn v The Queen* (1983) 152 CLR 657 at 681. The other members of the court found it unnecessary to discuss the power of a judge to call a witness.

187 *Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd* (1988) 14 NSWLR 552.

188 *Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd* (1988) 14 NSWLR 552 at 567 per Powell J, accepting the position as stated in *Re Enoch and Zaretzky, Bock & Co's Arbitration* [1910] 1 KB 327.

189 *Huang v University of New South Wales (No 3)* (2006) 154 FCR 16.

190 *Huang v University of New South Wales (No 3)* (2006) 154 FCR 16 at 23–35.

191 *Evidence Act 2008* (Vic), s 36; see also ACT and Federal Court: *Evidence Act 1995* (Cth), s 36; *Evidence Act 1995* (NSW), s 36; *Evidence Act 2001* (Tas), s 36. For an example of the application of the power see *Commonwealth v Davis Samuel Pty Ltd (No 4)* (2008) 221 FLR

give evidence, or to produce documents, or to produce things, regardless of whether or not they have been duly served with a subpoena or other process.[192]

Right to begin

[8.230] Generally, as a matter of practice rather than law,[193] the party on whom the burden of proof lies on the pleadings has the right to open the trial, and to address the court last.[194] While normally the onus of proving the case is on the plaintiff it may be on the defendant,[195] for example, where the defendant pleads in confession and avoidance having admitted the plaintiff's allegations, or where it pleads a counterclaim having admitted the plaintiff's allegations. However, the plaintiff's right to begin is preserved where the only issue is the quantum of damages.

The court will not, however, arm the defendant with the right of opening and last address in cases where it has made admissions to allegations for the sole purpose of assuming the right to open. The plaintiff retains the right as long as it bears some onus of proof. In *Portelli v Port Waratah Stevedoring*[196] Lowe J ruled in favour of the plaintiff's right to open in circumstances where the defendant denied allegations of negligence in pleadings but admitted them, and further raised allegations of contributory negligence, at trial. The ruling was based on the plaintiff's onus of proof on the question of apportionment of damages if the defendant proved its allegations of contributory negligence.[197] The party who refers a point of law to the court has the right to open the argument and to reply to the opposing party's arguments.[198]

151 at [26]–[35]; similar provisions in WA are expressed passively: *Evidence Act 1906* (WA), s 15. A person who is present at a proceeding is "compellable" to give evidence. In Qld, r 391 authorises the court to exercise its own initiative to call a witness.

192 The person so ordered is subject to the same penalties as a person who had been served a subpoena or other process: r 66.06 (natural person), r 66.07 (corporation).

193 *Brown v Lethbridge* (1876) 14 SCR (NSW) 315.

194 *Brown v Lethbridge* (1876) 14 SCR (NSW) 315 at 321.

195 With civil juries being no longer common the right to begin is no longer regarded as of vital importance. In jury trials the last word was historically regarded as valuable because the other party had no opportunity to qualify or contradict it.

196 *Portelli v Port Waratah Stevedoring Co Pty Ltd* [1959] VR 195.

197 *Portelli v Port Waratah Stevedoring Co Pty Ltd* [1959] VR 195 at 195–196. The defendant in a case such as *Portelli* could secure the right to begin only by admitting the amount of damages the plaintiff claims. Since it is not usual for the plaintiff to nominate the amount claimed as general damages in tort actions the defendant could practically never obtain the right to begin. *Uniform Civil Procedure Rules 1999* (Qld), r 155 makes it easier for the defendant to secure the right to begin, since the plaintiff must plead the amount and nature of the damages claimed.

198 *Potter v Broken Hill Pty Co Ltd* [1905] VLR 612.

Addresses

[8.240] The function of the opening address is in general to present the nature of the case, the evidence sought to be adduced and any point of law necessary to the case. In any trial, although more so if the trial is before a jury than before a judge alone, care should be taken to avoid reference to irrelevancies. Reference to matters such as a payment of money into court, or an offer settlement or compromise made under the rules, or an offer of settlement made on a without prejudice basis, is strictly prohibited.

The court will not exclude relevant evidence that arises during the proceedings merely because it was not specifically referred to in address, as long as it is within the pleadings, and conforms to the general nature of the opening address.[199] Relevant admissible evidence that comes before the court at trial must be considered if it is to arrive at its decision properly. Nevertheless, the absence of a reference to evidence and other matters in opening addresses, and their subsequent introduction, should only occur if unavoidable. Departures from addresses may justifiably be the subject of grave criticism from the opposing party, and, if sufficiently serious, cause the court to discharge the jury with the costs to be borne by the party departing from their opening address, or subject the party to any specific limitation of the issues at trial that it referred to in address.

Control over content of addresses

[8.250] A party's address to the court must bear on the questions the court is being asked to deliberate and decide, and, where there is a jury, the verdict they are asked to consider and return. However, where damages are pursued, and a jury is asked to return a verdict on damages, questions arise as to what constitutes appropriate practice: that is, whether the address should refer to possible amounts, or a range of amounts, which the jury may return as a verdict.

Because the jury is to assess the damage suffered by the plaintiff, anything that may prejudice the jury's consideration and assessment of the plaintiff's loss would be an irregularity. For that reason it has been suggested that an address should not to refer either to the amount of damages, or possibly even to a range of damages, indorsed on the originating process.[200] Conflicting approaches have been taken by various courts. For example, a jury was permitted to be addressed as to a verdict figure in *Buchanan v Byrne*[201] whereas the courts in *Goodfellow v Melbourne*

199 As the Full Court pointed out in *Valeriani v Gibson* [1963] NSWR 1430 at 1454–6, an opening address is to give a general notion of what will be proved in evidence.

200 *Fairbairn v Cummins* (1960) 104 CLR 666.

201 *Buchanan v Byrne* [1970] VR 330 where the opposite view has also been strongly expressed.

& Metropolitan Tramways Board[202] and in *Sawyer v O'Brien*[203] strongly opposed the practice. In *Marsh v Suleyman*[204] the Full Court in Victoria held that in address to the jury either a single amount, or a range of figures, but not the amount of the claim indorsed on the writ, may be properly referred to. Where the trial is before a judge alone, who is in possession of the pleadings of the parties and therefore the originating process, considerations of what is proper with respect to an address on a verdict amount is irrelevant.

A further potential prejudicial effect may arise from referring to or suggesting the source of funds from which the plaintiff's damages award may be paid. Whether the judgment is to be paid by the defendant, the defendant's insurer, the nominal defendant or as worker's compensation is an irrelevant consideration and should not form part of the address, because a jury may be predisposed to favouring the plaintiff if the payment is not to be met by the defendant. The court has discretion, but is not required, to discharge a jury if a party inadvertently addresses the jury on the source funding the claim. Irrelevancies mentioned before a jury are handled by means of a warning to the jury not to give that factor undue weight in their deliberations.[205] The ubiquity of some forms of insurance such as personal injury cover is so pervasively known[206] that juries are likely to assume that it is the source of the money to be paid the plaintiff and discharge is unjustified in the circumstances. The court normally takes an approach that falls short of discharge,[207] such as warning the jury to give no consideration to the defendant's being insured.

While juries are no longer routinely dismissed on the basis of the mere mention of insurance, some remarks may warrant their discharge. In *Smout v Smout*[208] the Full Court considered references to a plaintiff's personal injury claim as an attempt to defraud an insurer based on the plaintiff's attitude that it was appropriate to profit from insurance and a warning that the claim if it succeeded would cause insurance premiums to rise sufficient basis to dismiss the jury. However, neither the generality of insurance, nor the probably justifiable assumption on the part of the juror that the defendant is insured, permit the fact of insurance to be deliberately or inadvertently mentioned in address. The rule predates compulsory third party insurance,[209] and the reasons for disallowance

202 *Goodfellow v Melbourne & Metropolitan Tramways Board* [1970] VR 326 where the opposite view has also been strongly expressed.

203 *Sawyer v O'Brien* [1970] VR 333.

204 *Marsh v Suleyman* [1983] 1 VR 483.

205 *Fitzpatrick v Walter E Cooper Pty Ltd* (1935) 54 CLR 200.

206 *Wellington v Lake George Mines Pty Ltd* (1962) 62 SR (NSW) 326.

207 *Grinham v Davies* [1929] 2 KB 249.

208 *Smout v Smout* [1989] VR 845.

209 *King v Wilkinson* (1957) 57 SR (NSW) 444.

relevant at the time remain applicable: the fact of insurance may prejudice a jury's finding in favour of the plaintiff, and cause them to return an excessive damages award.

Further, the fundamental rule that irrelevant matters are not to be introduced into a trial is transgressed by the reference to the fact of insurance. Insurance may therefore only be mentioned when it is relevant, and, when the fact of insurance is relevant, its relevance as a fact is to be proved by the evidence[210] a party proposes to call or that has been led at trial.[211] An appeal court will not, however, order the retrial of a matter in which the fact of insurance was mentioned in address unless it is convinced of a probable miscarriage of justice resulting from it. Even if counsel referred to the existence of the defendant's insurance or made other potentially prejudicial remarks in addressing the jury the jury should only be discharged if that is the only means of ensuring a fair trial.[212]

In *Vozza v Tooth & Co*[213] the plaintiff was employed to remove bottles from the defendant's machine using gloves supplied by the defendant. The plaintiff sustained an injury when removing a bottle that broke and penetrated the glove, cutting the plaintiff's hand. The plaintiff sued the defendant in a personal injuries claim. The court ruled that the only issue to be put to the jury was whether the defendant had supplied the plaintiff with appropriate gloves for the task at which he was employed. Despite the court's direction the plaintiff's counsel submitted to the jury that the defendant ought to have installed a mechanical device to remove the bottles from the machine as a means of providing a safe system of work. The court ordered a retrial, finding that the plaintiff's remarks would prejudice the jury against the defendant.

A court should discharge a jury that has had irrelevant or inadmissible matters addressed to it in order to prejudice it against the other party, and such that it is probable that a fair trial cannot be conducted.[214] Where counsel have made improper remarks in address to a jury, a party should object to those remarks at the earliest opportunity, or risk losing their right to have the matter retried if they fail to do so.[215] A court may refuse to order a retrial on the basis that an improper course of action by the opposing party was allowed to continue without objection.

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210 *Smout v Smout* [1989] VR 845 at 848.

211 *Harridge v Frost* [1932] St R Qd 328; *Tringali v Stewardson Stubbs & Collett Ltd* [1966] 1 NSWR 354.

212 *Kelly v Carey* (1961) 35 ALJR 258.

213 *Vozza v Tooth & Co Ltd* [1963] NSWR 1675.

214 *Coniglio v Compressed Yeast Co (NSW) Pty Ltd* [1964-5] NSWR 667.

215 *Fitzpatrick v Walter E Cooper Pty Ltd* (1935) 54 CLR 200; *Miller v Cameron* (1936) 54 CLR 572.

DEFAULT JUDGMENT ON FAILURE TO APPEAR AT TRIAL

Defendant's absence

[8.260] The delivery of a default judgment differs depending on whether the defendant fails to attend the trial, or fails to file an appearance or deliver pleadings. In the former circumstance, the burden of proof being on the plaintiff, the plaintiff may commence proceedings and prove the case.[216] In the latter, judgment for the remedy sought on the statement of claim is entered for the plaintiff at the court registry. The alternative is for the court to make an order setting down the trial for another time.

The extent to which the plaintiff must discharge the onus of proving the case depends to a large extent on the state of the pleadings. If the pleadings suffice for judgment to be given to the plaintiff there is no onus on the plaintiff to further prove their case. The pleadings may admit facts sufficient to prove the case for the plaintiff. If, and to the extent that, facts are not expressly admitted, or are impliedly admitted, the plaintiff must lead evidence to prove the relevant facts. The claim in a proceeding by default is limited by the pleadings, and the plaintiff is not able to claim relief other than what is set out in the statement of claim.[217] When the plaintiff pleads claims in the alternative judgment is given for the alternative that is most effectively pleaded.[218]

The extent to which the plaintiff is required to prove their case when the defendant fails to attend the hearing was at issue before the Full Federal Court in *MY Distributors v Omaq*.[219] At a directions hearing the court directed the respondent to file and serve a defence, which they did not do. Further the respondent did not attend the hearing, whereupon the applicant elected to present evidence to prove the case for their claim for damages flowing from breaches of the *Trade Practices Act 1974* (Cth), and breach of contract.

The court found that the applicant was unable to prove the respondent to be a corporation within the meaning of the Trade Practices Act, and the claim was thereby dismissed. The applicant appealed to the Full Court. The Full Court's decision turned on the construction of the rules. The applicant submitted that the effect of the operation of O 11 r 13 of the *Federal Court Rules 1979* (Cth)[220] was that by not filing a defence the defendant impliedly admitted that allegations in the statement of claim.

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216 Vic r 49.02; ACT r 1505; FCR r 30.21; NSW r 29.7; NT r 49.02; Qld r 476; SA r 234; Tas r 570; WA O 34 r 2. A counterclaim made by the defendant is dismissed on the defendant's failure to attend the trial: *Linprint Pty Ltd v Hexham Textiles Pty Ltd* (1991) 23 NSWLR 508.

217 *Stone v Smith* (1887) 35 Ch D 188.

218 *Noden v Mason* [1926] VLR 41.

219 *MY Distributors Pty Ltd v Omaq Pty Ltd* (1992) 36 FCR 578.

220 FCR r 16.07.

The Full Court held that this construction of the rules was incorrect. Allegations in a statement of claim are only impliedly admitted when a defence that is filed and served fails to plead those facts. But when no defence is filed and served it does not follow that all the facts alleged by the plaintiff are admitted. On this construction of the rules the applicant was required to prove the pleaded case.

The court made further reference to summary proceedings available to a plaintiff where a defendant fails to file and serve a defence. The applicant in this case may have applied, on a motion supported by affidavit and served upon the respondent,[221] for a judgment in default of the defendant's pleading, or the defendant's failure to comply with the directions made at the directions hearing to file and serve a defence in time. The court's observations in *MY Distributors v Omaq*[222] suggest that an application for a judgment on motion[223] is the strongest option open to the plaintiff.

Plaintiff's absence

[8.270] The absence of the plaintiff at trial entitles the defendant to a dismissal of the plaintiff's claim and judgment in the defendant's favour. If the defendant has filed a counterclaim it is proved in the same way as the plaintiff's claim is proved when the defendant fails to attend the trial.[224] That is, the onus is on the defendant to present evidence to the court proving the facts on which the counterclaim is based. The effect of the default judgment in favour of the defendant is to prevent the matters raised in the claim from being litigated in other proceedings.[225] *Res judicata* will, however, be avoided if the judgment given is set aside. Costs orders in matters in which default judgment is given for the defendant on the plaintiff's absence are normally given against the plaintiff.

SETTING ASIDE DEFAULT JUDGMENT GIVEN AT TRIAL

[8.280] A court may at its discretion set aside a judgment given in the absence of a party,[226] whether it was a default judgment entered at trial

221 The court may order an adjournment to allow this procedure to be completed: *MY Distributors Pty Ltd v Omaq Pty Ltd* (1992) 36 FCR 578 at 581.

222 *MY Distributors Pty Ltd v Omaq Pty Ltd* (1992) 36 FCR 578.

223 Vic r 21.04; ACT r 1126; FCR r 5.23; NSW r 16.10; NT r 21.04; Qld r 658; SA r 228; Tas r 353; WA O 22 r 7.

224 Vic r 49.02; ACT r 1505; FCR r 30.21; NSW r 29.7; NT r 49.02; Qld r 476; SA r 228; Tas r 570; WA O 34 r 2.

225 *Re Orrell Colliery & Fire-Brick Co* (1879) 12 Ch D 681. However, a default judgment is strictly construed in deciding what estoppels it creates so as to bar subsequent proceedings. In *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 the Privy Council held that a default judgment creates an estoppel in respect of a defence which was necessarily and with complete precision taken to be decided by it.

226 Vic r 49.02; ACT r 1505; FCR r 30.21; NSW r 36.16; NT r 49.02; Qld r 476; SA r 230; Tas r 570; WA O 34 r 3.

for the party's failure to attend, or at the registry for the party's failure to file and serve an appearance or defence.

The court bases the exercise of its discretion on two factors. First it enquires into what reasons, if any, prevented a party from appearing; and, secondly, it looks at whether the application to have the judgment set aside and order a new trial[227] was undertaken promptly or was delayed.[228] If the application was delayed, the court ascertains what prejudice, if any, the delay caused to the other party or parties, or to third parties having an interest in the case. If prejudice resulted from the time taken to apply to set aside the default judgment and order a new trial, the further question is whether an order for costs will adequately compensate the affected party.

The application must serve a purpose, and the court will not make a futile order. It will not, therefore, set aside a default judgment where the applicant has failed to show that there is a case to be argued on the merits,[229] although an application is not dismissed merely because the applicant's case is weak.[230] However, a judgment will not be set aside where the applicant's case is clearly hopeless and a new trial will serve no useful purpose.[231]

ADJOURNING TRIAL

[8.290] In general a trial should be heard at the time for which it is listed. A court has both jurisdiction under the rules,[232] and inherent power, to adjourn a trial.[233] The court may exercise its jurisdiction at its absolute discretion. Rule 49.03 provides that "[t]he Court may adjourn a trial on such terms as it thinks fit." The factors it takes into account when deciding whether or not to adjourn a trial are the interests of justice in the particular case, and what inconvenience may be caused to either or both parties. The decision whether or not to adjourn is sensitive to the circumstances of the case and is not amenable to further generalisation.[234]

An order for adjournment will only be made if compelling reasons for doing so are put before the court. The plaintiff's *prima facie* right to have

227 *Surfers Paradise International Convention Centre Pty Ltd v National Mutual Life Assn of Australasia Ltd* [1984] 2 Qd R 447; *Rosing v Ben Shemesh* [1960] VR 173.

228 *Surfers Paradise International Convention Centre Pty Ltd v National Mutual Life Assn of Australasia Ltd* [1984] 2 Qd R 447; *Rosing v Ben Shemesh* [1960] VR 173.

229 *Magnate Projects Pty Ltd v Youma Constructions (No 2) Pty Ltd* [2005] NSWCA 331 at [48]–[52] per Hodgson JA.

230 *Rosing v Ben Shemesh* [1960] VR 173 at 176.

231 *Vacuum Oil Co Pty Ltd v Stockdale* (1942) 42 SR (NSW) 239 at 243 per Jordan CJ.

232 Vic r 49.03; ACT r 1506; *Civil Procedure Act 2005* (NSW), s 66; NT r 49.03; Qld r 477; Tas r 571; WA O 34 r 4. The *Federal Court Rules 2011* (Cth) do not contain an equivalent provision.

233 *Hinckley and South Leicestershire Permanent Benefit Building Society v Freeman* [1941] Ch 32.

234 *EG & H Nominees Pty Ltd v General Mutual Insurance Co Ltd (in liq)* (1976) 50 ALJR 460.

an adjudication upon the claim made as soon as possible may be displaced by a defendant demonstrating that an adjournment of the trial is necessary in order to avoid even possible prejudice.[235] The effect of the adjournment on both parties is decisive. The court will be concerned, in ordering a trial to be stood over, to do justice between the parties.[236] If one party will suffer injustice unless the matter is adjourned then the order for adjournment may be made,[237] unless the adjournment will result in injustice to the other party.[238] Parties have a *prima facie* right to be present for the hearing of their matter, and to present their own case.[239]

An adjournment will not be granted to allow a party time to prepare its case,[240] although where a party is caught by surprise at trial, or an unforeseeable happenstance emerges at trial, or a material witness is absent, the adjournment may be justified.[241] A court will not exercise its discretion in favour of adjournment if the effect of such an order would be to stay a proceeding indefinitely, or if it results in the court's arbitrary refusal to exercise its jurisdiction over, and in hearing and determining, a matter.[242]

The point was made in *Matheson v Matheson*[243] by Herring CJ:

> [T]here are adjournments and adjournments. In the ordinary course of events cases are adjourned from day to day, and sometimes it is necessary to put them over for longer periods or to the next sittings of the court in a particular place. But the indefinite adjournment of proceedings may amount to much more than a mere postponement; it may amount to a refusal to hear and determine the

235 *Jordan v Smart* [1961] NSWR 735.

236 See *Hinckley and South Leicestershire Permanent Benefit Building Society v Freeman* [1941] Ch 32. "The principle is that it is a matter for the discretion of the trial judge whether or not to grant an adjournment. Like all discretions it must be exercised judicially and not according to whim or fancy. Primarily a case should be heard when it comes into the list for hearing. When a case has been specially fixed for hearing at a date some months in the future then it cannot be said when both parties are present with their witnesses that a judge is wrong in law in exercising his discretion to refuse an adjournment at the request of one of the parties unless to refuse an adjournment would prejudice that party to a point that he has been denied justice". *Watson v Watson* [1968] 2 NSWR 647 at 652 per Holmes JA. See also *Walker v Walker* [1967] 1 WLR 327.

237 *Myers v Myers* [1969] WAR 19; *Sydney City Council v Ke-Su Investments Pty Ltd* (1985) 1 NSWLR 246 at 250.

238 *Myers v Myers* [1969] WAR 19.

239 *Taylor v Taylor* (1979) 143 CLR 1 at 15–16; *Clarey v Permanent Trustee Co Ltd* [2005] VSCA 128 at [42].

240 *Coopers Brewery Ltd v Panfida Foods Ltd* (1992) 26 NSWLR 738.

241 *Earp Woodcock Beveridge & Co Ltd v Gordon* (1927) 44 WN (NSW) 123; *Lees v Smith* (1918) 35 WN (NSW) 53.

242 *Matheson v Matheson* [1952] VLR 27; *Robertson v Cilia* [1956] 1 WLR 1502.

243 *Matheson v Matheson* [1952] VLR 27 at 30.

> particular application before the court, and in these circumstances the adjournment may become a mere disguise for a refusal to exercise a jurisdiction committed to the court.[244]

A party which has been refused an adjournment may appeal the decision. The party may seek either of, first, if the hearing has not commenced, an order for adjournment refused by the trial judge; or a new trial if the hearing has concluded and the result went against the appellant. An application for retrial of the issue would be based on the ground that the erroneous refusal of an adjournment prevented the matter being heard and decided on the merits.

Adjournment by consent

[8.300] Parties may adjourn the trial by consent unless the judge of the list in which the trial has been set down has made a contrary order.[245]

Discretion

[8.310] An adjournment is granted at the trial judge's discretion. Appeal courts are therefore reluctant to intervene in decisions granting or refusing an adjournment unless one of the parties has suffered an injustice as a result of the decision, or the principle upon which the decision was based constituted an error.[246]

It is fundamental to the principle of doing justice between the parties to ensure that each has an equal and adequate opportunity to argue their

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244 See also *Lee v Saint* [1958] VR 126; *Howard v Pacholli* [1973] VR 833; *Sydney City Council v Ke-Su Investments Pty Ltd* (1985) 1 NSWLR 246; *Remm Construction (SA) Pty Ltd v Allco Newsteel Pty Ltd* (1992) 57 SASR 180. The reference to the adjournment from day to day: according to Barry J in *R v Spencer* (1872) 4 AJR 58 the term "adjournment" has two meanings — one legal and the other popular. An adjournment in a legal sense is the putting-off of the trial to another time and another place. The use of the word in the popular sense is exemplified by what takes place in court each evening when the crier announces that the court has adjourned until the following morning. The announcement is made to intimate that the jurors, witnesses and other persons engaged may go to their homes and return at the hour named. See also *Matheson v Matheson* [1952] VLR 27 at 30. For other discussion of the different contexts in which the words "adjourn" and "adjournment" are used, see *Griffiths v Boral Resources (Qld) Pty Ltd* (2006) 154 FCR 554 at [51]–[59].

245 See *Re Walsh* (1891) 7 WN (NSW) 116. As to the adjournment by consent of the hearing of an appeal which raised an important public question see *Sydney City Council v Ke-Su Investments Pty Ltd* (1985) 1 NSWLR 246. A decision refusing to adjourn a trial is interlocutory: *Crotty v Clarke* (1897) 3 ALR (CN) 2.

246 *Conroy v Conroy* (1917) 17 SR (NSW) 680; *Maxwell v Keun* [1928] 1 KB 645 at 653; *R v Foster; Ex parte Isaacs* [1941] VLR 77 at 88; *Squire v Rogers* (1979) 39 FLR 106 (FCA); *Bloch v Bloch* (1981) 180 CLR 390; 55 ALJR 701 at 703; *Bates v McDonald* (1985) 2 NSWLR 89; *GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710; *Sali v SPC Ltd* (1993) 67 ALJR 841 (refusal to adjourn hearing of appeal); *Scott v Handley* [1999] FCA 404; *El Hajje v Chief Executive Officer of Customs* (2003) 180 FLR 224.

case and challenge the opposition's case.[247] A party may suffer an injustice sufficient to justify an appellate court interfering with the judge's discretion if they are, by virtue of being denied an adjournment, prevented from adequately presenting their claim or raising their defence at trial.[248]

To succeed the appellant must demonstrate that the refusal of the adjournment deprived the appellant of the opportunity of putting a legally arguable proposition before the court which may have altered the court's ultimate decision.[249]

Applicable principles

[8.320] Case management and the efficient operation of the listing system are important considerations in the decision whether or not to grant an adjournment. For the system to operate effectively cases should be heard at the time for which they are listed.[250] When the case has been listed in a closely managed specialist list the fact that adjournments may adversely affect the claims being made by other litigants in other cases in the list is a factor in the decision regarding adjournment of a particular case.[251]

In *Boyle v Ford Motor Co* Lord Donaldson MR distinguished between avoidable and unavoidable delays.[252] While the court must exercise "rigorous control" over listed cases it must only do so to the extent necessary to advert avoidable delays, whereas, where injustice would result were an adjournment not granted the delay in hearing the case is unavoidable. Even if the adjournment is required because of the

247 *Grusauskas v Deputy Commissioner of Taxation* (2005) 58 ATR 479 at [12], referring to *Gas & Fuel Corporation (Vic) v Wood Hall Ltd* [1978] VR 385 at 404.

248 *Maxwell v Keun* [1928] 1 KB 645; *Sullivan v Department of Transport* (1978) 20 ALR 323 at 342–343 (FCA); *McColl v Lehmann* [1987] VR 503 at 506; *Humphrey v Wills* [1989] VR 439; *Grusauskas v Deputy Commissioner of Taxation* (2005) 58 ATR 479 (litigant in person needing time to obtain representation).

249 *Opeka Pty Ltd v Mackie Group Pty Ltd* [2003] VSC 183 at [35].

250 See *Squire v Rogers* (1979) 39 FLR 106 (FCA); *Dawson v Deputy Commissioner of Taxation* (1984) 71 FLR 364 (SASC).

251 In *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, the High Court critically reviewed *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146, in light of rules changes and changed attitudes to case management principles, confining its application to its particular facts and the rules of court then in application. See also *GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710; *Apex Pallet Hire Pty Ltd v Brambles Holdings Ltd* [1988] VSC 143, quoted in *Coopers Brewery Ltd v Panfida Foods Ltd* (1992) 26 NSWLR 738 at 744. See also *Sali v SPC Ltd* (1993) 67 ALJR 841 (refusal to adjourn hearing of appeal); *Regal Life Insurance Ltd v Pacific Financial Resources Pty Ltd* [1994] VSC 703; *Grant's Patch Mining Ltd v CRA Ltd* [1996] VSC 426.

252 *Boyle v Ford Motor Co Ltd* [1992] 1 WLR 476; [1992] 2 All ER 228 at 233–234.

applicant's default, if justice would be "impeded or … defeated" without an adjournment the matter can be addressed by an order for costs against the applicant.[253]

Despite the importance of the efficient administration of the court system, case management cannot usurp justice, and the ability of a party to effectively present their claim or defence, as the paramount consideration in deciding whether to grant or refuse and adjournment.[254] The court's discretion granting an adjournment will not be exercised to enable a party to amend a pleading at trial. Further factors for the court to consider include:

- whether the applicant seeks an adjournment as a result of their own default;
- the reason that the applicant seeks the adjournment; as well as
- any injustice that may be occasioned to the other party to the proceeding, and other parties in other litigation before the court.[255]

Where the applicant for an adjournment is at fault it is appropriate that an order of costs be made against them.

Time for application

[8.330] The applicant must be able to demonstrate that they have "some strong and good reason" for seeking the adjournment.[256] In some cases applications have been refused where the applicant has failed to meet pre-trial deadlines, and otherwise sought the adjournment to overcome inadequate trial preparation. In *JGM Nominees v Caveat Finance*[257] an adjournment was refused where an applicant failed to file affidavits as ordered, failed to subpoena witnesses prior to trial without explaining why, and applied for an adjournment on the first day of the trial in order to undertake those tasks.

The character of the parties to the litigation, and the nature of the litigation, may also have to be taken into account. Where government moves to compulsorily acquire land from a private individual who seeks

253 *Boyle v Ford Motor Co Ltd* [1992] 1 WLR 476; [1992] 2 All ER 228 at 233–234.

254 *Smith v Gannawarra Shire Council* (2002) 4 VR 344 at 353, referring to *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 at 155. See also *Erhard v Bhatia* [2002] NSWCA 388.

255 See *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

256 As to the vacation of a hearing date, see further *Bomanite Pty Ltd v Slatex Corporation Australia Pty Ltd* (1991) 32 FCR 379; 104 ALR 165 at 177–178; *Apex Pallet Hire Pty Ltd v Brambles Holdings Ltd* [1988] VSC 143, quoted in *Coopers Brewery Ltd v Panfida Foods Ltd* (1992) 26 NSWLR 738 at 744. For the view that an award of costs may not be adequate compensation for delay occasioned by an adjournment, see *GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710 at 716 per Samuels JA; *Bomanite Pty Ltd v Slatex Corporation Australia Pty Ltd* (1991) 32 FCR 379; 104 ALR 165 at 177–178.

257 *JGM Nominees Pty Ltd v Caveat Finance Pty Ltd (in liq)* [2009] VSC 604. In considering an adjournment, regard should now also be had to the principles of case management identified in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

an adjournment the court must accord the applicant procedural fairness, taking into account that they find themselves in a non-commercial and non-consensual relationship. In *Roads Corporation (Vic) v Love*[258] the court refused to grant an applicant facing financial difficulties an indefinite adjournment which would indefinitely postpone the trial inflicting injustice on the other party, but did grant an adjournment of several weeks.

Grounds for application

[8.340] Applicants frequently seek adjournments on the ground that a material witness is absent. To succeed the applicant must demonstrate that they have done everything reasonably possible to ensure the witness' attendance at trial, and that the witness' absence is not due to any fault of theirs.[259] In general, an application for adjournment may be granted on the grounds that a material witness is unable to attend at trial due to illness.[260] A party who without fault on their part is caught by surprise at trial will not be required to proceed if to do so will prejudice them.[261]

The successful applicant will normally be ordered to pay the other party's costs thrown away.[262]

Instances

[8.350] Examples of successful appeals against a trial judge's refusal to grant an adjournment include *Petrovic v Taara Formwork (Canberra)*.[263] In that case the plaintiff sought an adjournment when their only witness, and only means of adducing evidence, was unable to attend court for good reason late on a Friday afternoon, requiring them to close their case. On appeal a retrial was ordered.[264] It was held on appeal in *Carryer v*

258 *Roads Corporation (Vic) v Love* [2009] VSC 628.

259 See *Ord v Ord* [1923] 2 KB 432 at 439; *Biro v Lloyd* [1964-5] NSWR 1059 at 1062.

260 *Biro v Lloyd* [1964-5] NSWR 1059 at 1062. See also *Albon v Naza Motor Trading Sdn Bhd (No 5)* [2008] 1 WLR 2380. As to an adjournment on account of the absence through illness of a party, see further *R v Foster; Ex parte Isaacs* [1941] VLR 77; *Dick v Piller* [1943] 1 KB 497.

261 *Biro v Lloyd* [1964-5] NSWR 1059 at 1062. See also *Albon v Naza Motor Trading Sdn Bhd (No 5)* [2008] 1 WLR 2380. As to an adjournment on account of the absence through illness of a party, see further *R v Foster; Ex parte Isaacs* [1941] VLR 77; *Dick v Piller* [1943] 1 KB 497.

262 See *Ord v Ord* [1923] 2 KB 432 at 439. Compare *Earp Woodcock Beveridge & Co Ltd v Gordon* (1927) 44 WN (NSW) 123, where Harvey CJ in Eq considered that an adjournment necessitated by the absence through illness of a witness was due to an act of God and made no order as to costs.

263 *Petrovic v Taara Formwork (Canberra) Pty Ltd* (1982) 62 FLR 451.

264 For a successful appeal by the executor in testator's family maintenance proceedings against a refusal to grant the executor's application for an adjournment, see *Vasiljev v Public Trustee* [1974] 2 NSWLR 497. An appeal against the refusal of the judge at the trial to grant an adjournment was upheld in *Collier-Garland Properties Pty Ltd v Northern Transport Co Pty Ltd* [1964-5] NSWR 1414.

Kelly[265] to be an error of law for a trial judge to refuse the adjournment of a case for half an hour in order to enable one of the parties' counsel to attend. Litigants who encounter difficulties giving litigation instructions because they require medical treatment cannot assume that a trial will be adjourned until they can do so. In *Newjur v Pangas*[266] Bryson J would make allowances so that infirm litigants were not treated unjustly, but would not exempt them entirely from the responsibility of making arrangements as required to properly instruct their lawyers, including having the lawyers attend on them to seek instruction, or getting the necessary assistance to adequately prepare their case.

An adjournment may be justified in cases where a self-represented or unrepresented litigant is unable to present evidence because they lack an understanding of the procedural rules as long as it promotes the interests of justice and does not work an injustice on the other party that cannot be remedied by an order for costs.[267]

The parties in *Lees v Smith*[268] consented to a trial being adjourned to accommodate the defendant who was required to undertaker military service outside the State. The court made an order for evidence to be taken provisionally (*de bene esse*) and that the trial be adjourned until such time as the defendant was able to give evidence in person. A plaintiff who is required at trial to rebut a defence that was not reasonably foreseeable may be granted an adjournment by the court to produce witnesses in preparing to argue that rebuttal if, without the adjournment, they would lose the opportunity to rebut.[269] In *McColl v Lehmann*[270] the magistrate's decision to refuse an adjournment to a defendant in a criminal trial to obtain evidence material to the defence under freedom of information was held on appeal to be an error. In *Humphrey v Wills*[271] the defendant was refused an adjournment because he had no intention of giving evidence. The appeal court held the reason for denial to be irrelevant and therefore that the ensuring trial was unfair.

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265 *Carryer v Kelly* (1969) 90 WN (Pt 1) (NSW) 566.

266 *Newjur Pty Ltd v Pangas* (1997) 140 FLR 194 at 196.

267 *Titan v Babic* (1994) 49 FCR 546. For a case of denial of adjournment to a plaintiff acting in person held on appeal to be erroneous, see *Scott v Handley* [1999] FCA 404. As to whether a plaintiff should be granted an adjournment on the ground that he has another cause of action arising out of the same subject matter against other persons and, if that claim is successful, it will not be necessary to proceed against the defendant, see *Bird & Co Ltd v Arnfield* (1926) 43 WN (NSW) 29. See also *Pacheco de Cespedes v McCandlish* (1935) 79 Sol Jo 964. As to the adjournment of the second of two actions in respect of two similar libels, where it is said that there will be an appeal from the judgment in the first, see *Hobbs v CT Tinling & Co Ltd* [1929] 2 KB 1.

268 *Lees v Smith* (1918) 35 WN (NSW) 53.

269 *Bishop v Stone* (1880) 6 VLR (L) 98.

270 *McColl v Lehmann* [1987] VR 503.

271 *Humphrey v Wills* [1989] VR 439.

Adjournment pending appeal in related proceeding

[8.360] The defendant in the hearing of a bankruptcy petition in *Ahern v DCT (Qld)*[272] sought, but was refused, an adjournment pending the result of an appeal against the judgment on which the petition was based. The court held the refusal to be in error given the consequentiality of a decision upholding the appeal which was said to be sound and arguable. In *Ataxtin v Gordon Pacific Developments*[273] a party appealing against the judgment to which a petition winding up a company was subject sought and was refused an adjournment of the petition.[274]

Change of law

[8.370] The court should apply the prevailing law without speculating as to what the law will be in the future.[275] For that reason, it is not a ground for adjournment that an imminent change in the law either by legislation[276] or by reason of a decision of the High Court[277] will alter the rights of the parties. For the same reason the trial should be heard on the date for which it is listed, and the judgment given in due course, and not earlier in order to avoid any change in the law.[278] Proceedings in *Humphris v Harbour Radio*[279] were adjourned because it was anticipated that legislative changes would validate cross-vesting legislation after the High Court had decided that the vesting of federal courts with State jurisdiction was constitutionally invalid in *Re Wakim; Ex parte McNally*.[280]

272 *Ahern v Deputy Commissioner of Taxation (Qld)* (1987) 76 ALR 137 (FCA).

273 *Ataxtin Pty Ltd v Gordon Pacific Developments Pty Ltd* (1991) 29 FCR 564 (FCA).

274 As to the adjournment of a petition to wind up a company to allow the company to negative the existence of the debt the foundation of the petition, see *EG & H Nominees Pty Ltd v General Mutual Insurance Co Ltd (in liq)* (1976) 50 ALJR 460.

275 See *Ramsay v Aberfoyle Manufacturing Co (Aust) Pty Ltd* (1935) 54 CLR 230 at 253; *Willow Wren Canal Carrying Co Ltd v British Transport Commission* [1956] 1 WLR 213 at 215–216; *Attorney-General (NT) v Minister for Aboriginal Affairs* (1987) 16 FCR 267; 73 ALR 33 at 50–53.

276 See *R v Whiteway; Ex parte Stephenson* [1961] VR 168; *Sydney City Council v Ke-Su Investments Pty Ltd* (1985) 1 NSWLR 246; *Meggitt Overseas Ltd v Grdovic* (1998) 43 NSWLR 527; *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2004) 205 ALR 582; compare *Re Minister for Minerals and Energy; Ex parte Wingate Holdings Pty Ltd* [1987] WAR 190.

277 *Geelong Football Club Ltd v Clifford* [2002] VSCA 212.

278 *Jupp v Computer Power Group Ltd (No 2)* (1994) 54 IR 248 (FCA).

279 *Humphris v Harbour Radio Pty Ltd* (1999) 32 ACSR 537 per Byrne J.

280 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

VENUE OF TRIAL

Place and mode of trial

[8.380] The rules fix a venue for the trial.[281] Rule 5.08 deals with the place and mode of trial.[282] It provides:

(1) A writ shall be indorsed with a statement of the place and mode of trial desired.

(2) If the writ is not indorsed with a statement as to the place of trial, the plaintiff shall be taken to desire trial in Melbourne, and, if the writ is not indorsed with a statement as to the mode of trial, the plaintiff shall be taken to desire trial without a jury.

(3) The plaintiff may indorse an originating motion with a statement of the place of trial desired, and, if the originating motion is not so indorsed, the plaintiff shall be taken to desire trial in Melbourne.

Order 47 governs the place and mode of trial of a proceeding and is to be read together with O 48 (Fixing a date For Trial) and O 49 (Trial). Order 47 provides:

47.01 Place of trial

Unless the Court otherwise orders, the place of trial of a proceeding shall be determined in accordance with Rule 5.08.

Place of trial

[8.390] The plaintiff is entitled to select the place of trial, subject to any order of the court to the contrary, by indorsing the writ or originating process with a statement of the place of trial. The form of the writ (Form 5A) provides for the plaintiff to indorse it with the place of the trial, and the mode of the trial. Forms 5B, 5C and 5E of the originating motion provide for a statement as to the place of trial only. If the writ or originating motion is not indorsed with a preferred venue the plaintiff is

281 Vic r 47.01; FCR r 2.02; NSW r 29.3; NT r 47.01; Qld r 47; SA r 122; Tas r 554; WA O 32 r 1. Under the common law in England, when an indictment or action was to be tried by assize, inquest or other form of jury, the court required the sheriff to summon a jury for the neighbourhood of the place where the cause of action or indictment arose. In other words, a verdict could be obtained only from persons resident in that locality. From this procedure arose the use of the term "venue" for the district named in the margin or stated in the body of the pleading, as that from which the jurors should be summoned. Civil actions came to be classed as local or transitory according to whether or not they had to be brought in the district in which the cause of action arose. See *Encyclopedia of the Laws of England* (1st ed), vol 12, pp 449–450. In Victoria the position at common law was altered by *Judicature Act 1874* (Vic), s 3, which subsequently became *Supreme Court Act 1958* (Vic), s 56. The latter section was repealed by the *Abolition of Bailiwicks Act 1968* (Vic), s 3. After 1968, *Rules of the Supreme Court 1884* (Vic), O 36 r 1 was the only statutory provision in relation to venue. The rule provided that there should be no local venue for the trial of any action, except where otherwise provided by statute, and then continued to the same effect as the present rr 5.08 and 47.01. The reference in O 36 r 1 to venue is not reproduced in the present rules.

282 It corresponds to *Rules of the Supreme Court 1884* (Vic), O 36 rr 1, 2.

taken to have desired the trial to be held at Melbourne.[283] Even where the plaintiff indorses the originating process with a preferred venue the court may order that it be changed.[284]

Change of place of trial

[8.400] The law presumes, subject to evidence being led to displace the presumption, that the proper place of the trial is the *locus delicti*, and that other relevant factors such as the witnesses' residence should be taken into consideration.[285] Courts will only move the trial from the place indorsed on the writ or originating summons by the plaintiff if not to do so would result in injustice, or if a move is indicated on the balance of convenience.[286] The factors that courts have taken into account as proper considerations when assessing whether to move a trial from a location indorsed by the plaintiff include:

- the cause of action and the type of litigation involved;
- where parties and witnesses reside;
- the possibility of prejudice or injustice resulting to one or both of the parties, including the prospect of jeopardising the fairness of the trial;
- any delay to which the proceedings may be subject; and
- where the balance of convenience lies having regard to all the circumstances of the case.[287]

While the plaintiff is entitled to state a preferred venue for trial they are not to do so with total disregard for the inconvenience it may cause the defendant. However, what will be of genuine inconvenience to the defendant has changed over time, and earlier authorities which had regard to the difficult and time-consuming nature of travelling long distances must be considered in the light of current conditions. The court in *Leversha v Wrangham*[288] — a breach of promise case — refused to make

283 Rules 5.08, 47.01. The court is held at such places as the Governor-in-Council directs: *Supreme Court Act 1986* (Vic), s 6(1). However, subject to the rules, the court may sit and act at any time and place: s 7. The places appointed for sittings of the court outside Melbourne are Ballarat, Bendigo, Geelong, Hamilton, Horsham, Mildura, Sale, Shepparton, Wangaratta and Warrnambool.

284 Rule 47.01.

285 *Cherry v Colton* (1868) 2 SALR 17; *O'Brien v Scott* (1900) 6 ALR (CN) 45; *O'Donoghue v Oliphant* (1901) 18 WN (NSW) 117; *Mitchell v Forrester* (1928) 28 SR (NSW) 519; *Egan v Barrier Branch of the Amalgamated Miners' Assn of Broken Hill* (1916) 34 WN (NSW) 13; *Kings Cross Whisper Pty Ltd v O'Neil* [1968] 2 NSWR 289 at 290. Local cases should be heard locally: *Hansen v Border Morning Mail Pty Ltd* (1987) 9 NSWLR 44 at 46.

286 *Wilson v Syme* (1880) 6 VLR (L) 200; *Mahnke v Schmidt* (1889) 15 VLR 364n; *Leversha v Wrangham* (1889) 15 VLR 363; *Hobler v Francis* [1911] St R Qd 17; *Cording v Trembath* [1921] VLR 163; *Ryan v Harrison* [1957] VR 210; *Lehtonen v Australian Iron & Steel Pty Ltd* [1963] NSWR 323. *National Mutual Holdings Pty Ltd v Sentry Corporation* (1988) 19 FCR 155.

287 *Parnell v McLaughlin Ltd* [1919] St R Qd 145; *Hansen v Border Morning Mail Pty Ltd* (1987) 9 NSWLR 44; *Mahnke v Schmidt* (1889) 15 VLR 364n.

288 *Leversha v Wrangham* (1889) 15 VLR 363.

an order that the place of trial be moved for the mere reason of the considerable additional expense the parties incurred in paying for counsel to travel from Melbourne to Sandhurst to attend the case.[289]

A party seeking an order to change a trial venue must do so *bona fide* or their request will be refused.[290] Grounds for changing the place of trial include the defendant and witnesses being resident near where they are seeking to move the trial,[291] especially if that place is the *locus deliciti*,[292] although the fact that it is the defendant's preferred venue will not in itself provide sufficient grounds for a change of venue.[293] As a matter of convenience trials dealing with causes of action arising in regional or rural centres where all or most of the witnesses reside should be heard locally by the court on circuit. The court must, however, consider whether a fair and impartial trial can be conducted at the place endorsed by the plaintiff in the originating process. If the trial is to be conducted before a jury, the court will order a change of place of trial for the reason that it will not be possible to empanel an objective jury, and conduct a fair and impartial trial, at the place where the cause of action arose.[294]

If the proceedings have aroused local controversy, and it is probable that the population from which the jury is likely to be selected is tainted by prejudice in the sense of having formed a strong view on the matter, and therefore incapable of giving impartial consideration to, or basing their conclusions purely upon, the evidence, the court may order a change of venue.[295] The party seeking the order must adduce evidence supporting the view that an objective jury is not to be found in the vicinity has a strong foundation.[296] The criterion for selecting a new venue is that a suitable jury can be selected there. A transfer of a trial will be ordered not only if an objective jury cannot be selected in fact, but also to avert an unfair trial if it would appear to a reasonable person knowing what issues

289 See also *O'Brien v Scott* (1900) 6 ALR (CN) 45.

290 *Australasian Sheep Dip Co Ltd v Kramer* (1903) 20 WN (NSW) 234. For change of place of trial of a proceeding in the Federal Court, see *Cycles & Wheelman Pty Ltd v Beltech Corporation Ltd* (1988) 80 ALR 279 (FCA); *National Mutual Holdings Pty Ltd v Sentry Corporation* (1988) 19 FCR 155.

291 *Wilson v Syme* (1880) 6 VLR (L) 200.

292 *Australian Joint Stock Bank v Hockey* (1903) 20 WN (NSW) 32; *Permewan, Wright & Co Ltd v Pearce* (1903) 20 WN (NSW) 202.

293 *Parnell v McLaughlin Ltd* [1919] St R Qd 145.

294 *MacDonald v Tully* (1879) 1 QLJ (Supp) 21.

295 *McGrath v Clark* [1913] VLR 441. See also *O'Brien v Scott* (1900) 6 ALR (CN) 45; *Mowle v Elliott* (1937) 54 WN (NSW) 104.

296 *Ryan v Harrison* [1957] VR 210. See also *McCaull v Clarke* (1868) 2 SALR 204; *Hennessey v Badgery* (1884) 1 WN (NSW) 34; *Rundle v Bell* (1963) 80 WN (NSW) 563.

a jury would be called upon to decide that a fair trial could obviously not be conducted,[297] such as where parties and jurors are all resident in the same location as the venue.

The court does not consider the balance of convenience when deciding whether to change the trial venue because of the difficulty of selecting an appropriate jury. There need to be compelling reasons to convince a court that it would not be possible to empanel an impartial jury at the place where the cause of action arose, necessitating a change of venue.[298]

Where the trial has concluded without the jury agreeing an order for a change of venue may be made provided strong, arguable grounds exist.[299] A defendant may apply for a change of venue even if the parties had previously agreed to the place of trial.[300] An order for the change of a trial venue may be made to ensure that relevant evidence is put before the court, as in *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark*.[301] After the taking of evidence at one location, the trial was adjourned to a different location to take the evidence of a frail and elderly material witness. A change of trial venue was ordered in *Budge v Britten*[302] to enable a jury to view material evidence.

REOPENING OF A CASE

Civil Cases

General

[8.410] At any stage during a trial, or after the conclusion of a trial, a court may at its discretion make an order allowing a party to reopen its case to admit fresh evidence. The court may exercise its discretion to permit the plaintiff to reopen their case if the defendant has not opened their case and the new evidence the plaintiff desires to tender is ready for tendering, and had only not been tendered by the plaintiff prior to closing their case inadvertently because of accident, mistake, or lack of foresight.[303] The court's discretion to permit either the plaintiff or the defendant to reopen the case will not be exercised to strengthen evidence

- if the witness the party proposes to call was available earlier; or
- if the need to reopen the case to introduce the fresh evidence was avoidable by the party being sufficiently diligent; or

297 See *Cording v Trembath* [1921] VLR 163; *R v Cattell* [1968] 1 NSWR 156; *Kings Cross Whisper Pty Ltd v O'Neil* [1968] 2 NSWR 289; *Hansen v Border Morning Mail Pty Ltd* (1987) 9 NSWLR 44 at 53.

298 *Ryan v Harrison* [1957] VR 210; *Rundle v Bell* (1963) 80 WN (NSW) 563.

299 *Paterson v Luke* (1884) 6 ALT 140.

300 *Angas v Tremaine* (1908) 25 WN (NSW) 43.

301 *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark* [1973] Ch 323.

302 *Budge v Britten* (1902) 19 WN (NSW) 240.

303 See *Kench v Bailey* (1926) 26 SR (NSW) 268; *Henning v Lynch* [1974] 2 NSWLR 254 at 259 (both criminal prosecutions).

- if the evidence to be tendered was withheld as a result of deliberate choice on the part of counsel.

The court may, however, exercise its discretion to reopen a case

- where the evidence suffers from some technical defect;
- to overcome a slip or omission due to counsel's inadvertence;
- to clarify a material issue which was the subject of evidence but was not explicitly pleaded;
- to permit a defendant to discharge an onus of proof;
- to properly present a defence mentioned in address but not referred to in the proceedings; and
- where a witness was not called whom a party justifiably formed a belief would be called.

In exercising its discretion the court may properly consider whether the evidence, if admissible, would materially affect the outcome of the trial.

The court has discretion to permit a party to reopen its case to admit fresh evidence after the presentation of evidence has closed. The discretion to allow a party to reopen its case to admit fresh evidence after the conclusion of the trial and before the delivery of judgment will only be exercised in limited circumstances.[304] The court applies a test similar to that for the admission of fresh evidence on appeal:[305] The application must demonstrate that the evidence is so material to the proper consideration of the matter that not to include it would on the balance of probabilities result in injustice

- because the evidence, if accepted, would affect the result of the trial;
- as long as the reopening of the case and the late introduction of the evidence would not prejudice the other side in a manner that could not be compensated; and
- provided the failure to introduce the evidence earlier was not due to the applicant's failure to act with reasonable diligence.[306]

In *Watson v Metropolitan (Perth) Passenger Transport Trust*[307] Wolff CJ considered the question of the nature of the test to be applied by the court in deciding whether to reopen a case after the closing of the trial but before judgment has been entered. Wolff CJ formulated a test essentially the same as that applicable after the entry of judgment, where the applicant sought to introduce fresh evidence in support of an appeal.

304 The learned trial judge referred to the authorities concerning the grant of leave to reopen a case as being apparently "few in number".

305 *Jesseron Holdings Pty Ltd v Middle East Trading Consultants Pty Ltd (No 2)* (1994) 122 ALR 717 (FCA) (fresh evidence was admitted after reasons for judgment). For application by the plaintiff to reopen the case to recall a witness to adduce evidence in rebuttal as to the existence of a collateral fact, see *Goldsmith v Sandilands* (2002) 190 ALR 370.

306 See *Watson v Metropolitan (Perth) Passenger Transport Trust* [1965] WAR 88 at 89; *Murray v Figge* (1974) 4 ALR 612 (NTSC); *Re Australasian Meat Industry Employees' Union (WA Branch); Ex parte Ferguson* (1986) 67 ALR 491 at 493 (FCA).

307 *Watson v Metropolitan (Perth) Passenger Transport Trust* [1965] WAR 88 at 89.

However, Wolff CJ also recognised that some authorities had sanctioned wider discretions than the one he adopted.

In *Gordon v MacGregor*[308] Griffith CJ warned that:

> it is a very dangerous thing after the close of the evidence to allow an amendment to raise a point founded on some oral statement of a witness, which may be perfectly complete so far as it is relevant to the issues which are being tried, but which if it were given with reference to entirely different issues would be incomplete. It is like allowing a party to raise a new case on appeal when the court has not all the materials before it.

A more liberal approach was adopted by the Full Federal Court in *Londish v Gulf Pacific*.[309] The court observed that Wolff CJ's test did not distinguish between reopening a case before or after judgment had been delivered — but equally that the matter in *Watson v Metropolitan (Perth) Passenger Transport Trust* was not dependent on making that qualification. In *Londish v Gulf Pacific* the court stated that where a party applies for a case to be reopened prior to judgment being delivered the test to be applied is the same as is applied when leave is sought to amend pleadings during proceedings. That is, the court considers whether the amendment is required to ensure that justice is done in the case, taking into account any prejudice that the other party may experience.

An applicant's leave to reopen a case is not granted on the basis that the court may reach a different decision on appeal, but on the basis that the applicant raises a possible error in law requiring the appeal court's consideration. In *Smith v New South Wales Bar Assn*[310] the High Court considered the factors to which a court must have regard in deciding whether to reopen a case to admit fresh evidence in either of two circumstances. First, if the hearing is complete[311] the court should primarily have regard to the embarrassment or prejudice to which the other party may be exposed, and which could not be cured by an order for costs or an adjournment.[312] The discretion should be exercised in the same manner in which a judge decides in considering whether or not to permit pleadings to be amended.[313] Pleadings may be amended after the close of evidence and before verdict or judgment if it is, and to the extent that it is, required to decide the real matters in dispute between the

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308 *Gordon v MacGregor* (1909) 8 CLR 316 at 321.

309 *Londish v Gulf Pacific Pty Ltd* (1993) 45 FCR 128 at 139.

310 *Smith v New South Wales Bar Assn* (1992) 176 CLR 256 at 266–267.

311 As, for example, in *Watson v Metropolitan (Perth) Passenger Transport Trust* [1965] WAR 88; *Murray v Figge* (1974) 4 ALR 612.

312 *Joyce v Government Insurance Office (NSW)* reported in *Ritchie's Supreme Court Procedure, New South Wales* (looseleaf service, Butterworths, 1984), Vol 2, pp 8551–2 per Sheppard J.

313 *Joyce v Government Insurance Office (NSW)* reported in *Ritchie's Supreme Court Procedure, New South Wales* (looseleaf service, Butterworths, 1984), Vol 2, pp 8551–2; *Celestino v Celestino* [1990] FCA 449 at p 7 of the transcript; *Joyce v Government Insurance Office (NSW)* approved by the HCA in *Clough v Frog* (1974) 48 ALJR 481.

parties,[314] and insofar as it can be achieved without injustice being done to the other party.[315] If the amendment raises new facts emerging from the evidence presented at trial which the opposing party had an opportunity to litigate,[316] the applicant should be given leave to introduce fresh evidence in proceedings if the only opposition that the other party can raise is that to do so will delay proceedings and increase costs.

Secondly, if the reasons for judgment have been delivered after the completion of the hearing[317] in considering whether to exercise its discretion to reopen the case to admit fresh evidence, the court should be guided by the same rules as apply to the admission of fresh evidence at an appeal.[318] The High Court in *Queensland v JL Holdings*[319] referred to the Federal Court decision of *Clough v Frog*.[320] In that case the refusal of an application to amend pleadings by adding a new defence to two actions made two days prior to the hearing to an action instigated five years earlier was reversed, even though the judgment was discretionary. The court stated:

> As the defence, if established, would be a complete answer in either action, the amendments sought should have been allowed unless it appeared that injustice would thereby have been occasioned to the respondent, there being nothing to suggest fraud or improper concealment of the defence on the part of the appellants. With the exception of the suggestion of prejudice arising in respect of the loss of the possible claim against the nominal defendant, the matters relied upon by the respondent in opposition to the amendment sought go at the most to delay and irregularity only, matters which are relevant to costs but do not constitute injustice to the respondent in the sense in which that expression is used.[321]

314 See *National Australia Bank Ltd v Nobile* (1988) 100 ALR 227 at 235–236 per Davies J, referring to *Cropper v Smith* (1884) 26 Ch D 700 at 710–711 per Bowen LJ. See also *Caruso Australia Pty Ltd v Portec Australia Pty Ltd* [1986] FCA 40.

315 Bowen LJ in *Cropper v Smith* (1884) 26 Ch D 700 at 710–711.

316 See *Loutfi v C Czarnikow Ltd* [1952] 2 All ER 823; *Lewis v Sydney Flour Pty Ltd* (1955) 56 SR (NSW) 189 at 192 (refusal of amendment after three days of trial before jury that would have necessitated reopening the case and recalling every witness); *Burnham v City of Mordialloc* [1956] VLR 239 (refusal of amendment to raise a new defence after the case had been fought on written material in evidence where the plaintiff might have called oral evidence if the defence was raised originally).

317 As, for example, in *Watson v Metropolitan (Perth) Passenger Transport Trust* [1965] WAR 88; *Murray v Figge* (1974) 4 ALR 612.

318 This statement of principle was approved by the High Court in *Clough v Frog* (1974) 48 ALJR 481.

319 *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146.

320 *Clough v Frog* (1974) 48 ALJR 481.

321 *Clough v Frog* (1974) 48 ALJR 481; 4 ALR 615 at 618 per McTiernan ACJ, Menzies, Gibbs and Mason JJ.

An appeal against a decision to permit a late amendment to pleadings was dismissed in *National Australia Bank v Nobile*,[322] Davies J stating:

> It was a ground of appeal that the issue as to misrepresentation was raised at a late stage in the hearing of the proceedings and that an amendment to the pleadings to rely upon it was permitted at the close of the evidence. In my opinion, the amendment was properly allowed. The factual evidence had already been given by all relevant witnesses who, on that point, were in substantial agreement. It would have been unjust to exclude reliance upon it. Pleadings are intended to enhance the achievement of justice, not to hinder it. Unless good reason appears to the contrary, an amendment should be made to raise the real issues between the parties.

Muirhead J in *Caruso Australia v Portec Australia*[323] said that the power of the court to permit amendment should be liberally interpreted:

> The powers of this court to amend pursuant to O 13, r 2 are more than wide, they tend to be remedial in that "all necessary amendments shall be made for the purpose of determining the real questions raised by or otherwise depending on the proceedings, or of correcting any defect or error in any proceeding, or of avoiding multiplicity of proceedings". Consideration of the authorities indicates that an amendment should only be refused where bad faith is demonstrated or where the consequential injury or prejudice to the other party is incapable of remedy. And this reasoning applies to amendments sought during trial or on the eve of trial.

Lord Griffiths in *Ketteman v Hansel Properties*[324] said that permitting an amendment to be made "no matter how late it was made [or] for what reason" provided costs would compensate the other party was too extreme and antagonistic to the legitimate expectations of parties, and the interest the community has in the finality of judgment and in controlling the costs of litigation. In this case the defendant applied during final argument to amend their defence to plead that the claim was brought outside the statutory limitation period. Nevertheless, Lord Griffith confirmed that the granting of an amendment was finally a matter at the discretion of the trial judge, to be exercised in accordance with the judge's assessment of how the interests of justice will best be served in the particular case.

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322 *National Australia Bank Ltd v Nobile* (1988) 100 ALR 227 at 235–236, also citing *Cropper v Smith* (1884) 26 Ch D 700 at 710–711 per Bowen LJ.

323 *Re Caruso Australia Pty Ltd* [1986] FCA 23. These statements of principle concerning the power to allow amendments are supported in this court by the terms of *Federal Court Rules 1979* (Cth), O 13 r 2, subrr (1) and (2) of which provide: "(1) The Court may, at any stage of any proceeding, on application by any party or of its own motion, order that any document in the proceeding be amended, or that any party have leave to amend any document in the proceeding, in either case in such manner as the Court thinks fit. (2) All necessary amendments shall be made for the purpose of determining the real questions raised by or otherwise depending on the proceeding, or of correcting any defect or error in any proceeding, or of avoiding multiplicity of proceedings." That an amendment involves the withdrawal of an admission is no bar to the application of O 13 r 2: *H Clark (Doncaster) Ltd v Wilkinson* [1965] 1 Ch 694.

324 *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220.

Leave to amend may be sought in circumstances where the applicant is not responsible for the need to make an amendment, and where the applicant's error, carelessness or incompetence has required them to seek the court's indulgence. The latter is not a bar to the court granting leave to amend. Indeed the rule operates remedially to correct errors or mistakes provided injustice to the other party is avoided.[325] That being the case the rule granting leave to amend operates to assist parties seeking the court's assistance through no or little fault of their own, or which result from another party's fraud, or other improper conduct, which has misled the applicant. Moreover, where one party has received the court's indulgence, the court may as a matter of fairness grant a countervailing indulgence to the other side.

Sheppard J in *Commissioner of Taxation v Brambles Holdings*[326] adopted Lord Griffiths' views in referring to an application to amend pleadings in circumstances where a party's legal advisers had done "careless work". Leave to amend may also be sought where the party applying for the amendment was in the circumstances either not entirely, or only partly, responsible for the late application, for example, by the misleading conduct or representation of the opposing party. According to Sheppard J, leave to apply for an amendment may even be justified in cases of a change of counsel.[327]

A court's discretionary judgment against an application to amend is appellable, but an appellate court will not set aside discretionary judgments simply on the basis that they would have arrived at a different conclusion. Discretionary judgments will, however, be set aside on the grounds of error either "in point of legal principle" or on "a misapprehension of fact".[328] A further relevant consideration in determining whether grounds for appeal exist is the trial judge's failure to give "weight" or "sufficient weight" to relevant considerations as a ground of appeal.[329] Such considerations include the extent to which the respondent is responsible for circumstances arising at trial occasioning the applicant's leave to amend, such as their failure to discharge their discovery obligations and discover relevant documents; or making misleading, false and deceptive statements in pleadings, and affidavits, which in effect deprived a party of their opportunity to be properly heard and to defend the case alleged against them.[330]

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325 Bowen LJ in *Cropper v Smith* (1884) 26 Ch D 700 at 710–711; *Clough v Frog* (1974) 48 ALJR 481, the joint judgment of McTiernan ACJ, Menzies, Gibbs and Mason JJ (at 482).

326 *Commissioner of Taxation v Brambles Holdings Ltd* (1991) 28 FCR 451.

327 *Commissioner of Taxation v Brambles Holdings Ltd* (1991) 28 FCR 451; 99 ALR 523 at 529.

328 *Lovell v Lovell* (1950) 81 CLR 513 at 532–534 per Kitto J.

329 *Lovell v Lovell* (1950) 81 CLR 513 at 532–534 per Kitto J.

330 *National Australia Bank Ltd v Nobile* (1988) 100 ALR 227 per Davies J. See also *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134.

Once a matter is reopened the relevant considerations are different from those relevant to the decision to reopen a case. A witness may, in certain jurisdictions, be recalled to give evidence where the witness was not cross-examined on the evidence led by another party provided the evidence admitted either contradicts the witness' evidence given in chief, or the witness would have been able to give evidence regarding the matter during examination-in-chief. The judge may recall a witness, although the more usual course of action is for the judge to direct a party to use its best endeavours to recall witnesses in order to cross-examine them on relevant matters.

Considerations

[8.420] The court has power to reopen a case after a judgment has been delivered, but prior to the order being entered, which it will only exercise in very narrowly defined circumstances.[331] Judgments will not generally be re-examined unless obtained by fraud. The doctrine of *res judicata* prevents an issue or cause of action that has been determined in a proceeding from being raised in a subsequent proceeding. Parties are precluded from subsequently litigating matters that could have been presented and argued in previous proceedings. Courts will not normally exercise a power to reopen a case generally, but rather restrict its review of the case to an examination of the particular error or omission identified as requiring the case to be reopened.

Discretion to permit reopening of a party's case

The test: Finality of judgments and orders

[8.430] A cause of action merges in the judgment entered as the decision on the suit which consumes and creates in the place of the cause of action parties' rights and obligations as determined by the judgment. The interest the public has in ensuring that litigation is conclusively determined means that, the cause of action having been consumed by the judgment, the parties have no recourse to it for the purpose of relitigating, and the court cannot rehear the subject matter of the proceedings determined by the judgment.

If, however, the plaintiff brings suit in a different capacity from that which they brought it in the first proceeding no estoppel arises barring their right of action.

Nor is a party estopped from relitigating the same subject in order to obtain a remedy which was not available to them in the first hearing; but the failure to seek a remedy available in an earlier proceeding will not permit relitigation of the cause of action. A judgment entered in proceedings tainted by fraudulent evidence, or where new evidence becomes available, may be set aside.

331 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1.

VERDICT AND JUDGMENT

[8.440] Overwhelmingly, proceedings are concluded by the court pronouncing judgment. Very infrequently proceedings are adjourned for parties to seek leave to apply for a judgment on motion.[332] The court bases the judgment it delivers on the court record: that is, on the pleadings and the facts as agreed, and as established by means of the trial. Rule 59.01 provides:

> **59.01 General relief**
>
> The Court may, at any stage of a proceeding, on the application of any party, give such judgment or make such order as the case requires notwithstanding that the judgment or order had not been sought in the originating process or other document of the party in the proceeding.

Uses of terms "judgment" and "order"

[8.460] In *Legal Practitioners Complaints Committee v A Practitioner*[333] King CJ observed:

> There is no completely satisfying definition of either "judgment" or "order" and no exhaustively definitive way of distinguishing between judicial acts which should be characterised as judgments and judicial acts which should be characterised as orders.[334]

The rules refer to judicial decisions as both "judgments" and "orders" and, although some rules appear to prefer one or other term, others use

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332 Vic r 59.01; ACT r 1605; NSW r 36; NT r 59.01; Qld r 658; SA r 240; Tas r 573; WA O 34 r 8.

333 *Legal Practitioners Complaints Committee v A Practitioner* (1987) 46 SASR 126 at 127.

334 For reference to this observation, see *Formfile Infosoft Pty Ltd v Fastfile Pty Ltd* [2003] VSC 56. As to the absence in the cases discriminating between judgment and order of any light upon the precise meaning of "order" itself, see *Barton v Walker* [1979] 2 NSWLR 740 at 747. Also, the court may "order" that a party be at liberty to enter "judgment": see r 22.10 (leave to enter judgment for debt once the amount ascertained). Further, on appeal the Court of Appeal "may order that the judgment, or the verdict and judgment, be set aside, and that there be a new trial": see r 64.37(1). A judgment is "given" or the court "gives" judgment, and an order is "made" or the court "makes" an order. "Judgment given" means a judgment given by the court at the trial of a proceeding or on the hearing of an application in a proceeding, and "order made" means an order made by the court at the trial of a proceeding or on the hearing of an application in a proceeding: r 1.13(1). In some cases, a party may "enter" judgment, as where the defendant has defaulted in filing an appearance or serving a defence. The distinction between a judgment and other forms of decisions or orders has been considered in a number of statutory contexts. An order dismissing an application to postpone the hearing of a case has been held to be a "judgment or order". The refusal by a court or judge to make an order may be an "appealable order". A bankruptcy notice can be founded on a final judgment obtained in an action where a previously existing liability of the defendant to the plaintiff can be ascertained or established.

the terms as inclusive of each other.[335] The rules preserve the inherent distinction between judgments and orders to be found under the rules according to the *Judicature Act 1883* (Vic). Judgments or orders are both operative judicial acts.[336] Judgments are distinguished from orders in that the term "judgment" is reserved for the final determination, subject to appeal, of a proceeding the equivalent of what formerly would have been an action at law. The judgment is the judicial decision of the court which finally disposes of the questions in dispute and determines the rights and liabilities of the parties to the litigation in a binding manner.[337] Decrees are final judgments in most jurisdictions, even if the declaration is not made as a direction.[338]

Judgments and orders both constitute judicial decisions. Orders encompass all judicial decisions so that, when orders have several components including judgments, the final decision of the court may be regarded as a type of order, as may any other of its components.[339] A judgment concludes a proceeding, whereas other final or interlocutory judicial determinations are orders.[340] Rulings on, and determinations of, questions during the course of a hearing are not judgments.[341]

FINAL AND INTERLOCUTORY ORDERS

[8.470] The effect of the distinction between final and interlocutory orders is that the unsuccessful party of an interlocutory application may

335 See, for instance, rr 63.01 ("*order* includes judgment"), 66.01 ("*judgment* includes order"), 67.01 ("*judgment* includes order"), 68.01 ("*judgment* includes order"), 69.01 ("*judgment* includes order"), 71.01 ("*judgment* includes an order"), 72.01 ("*judgment* includes an order"), 73.01 ("*judgment* means a judgment or order …"), 76.01 ("*judgment* includes order").

336 See *Driclad Pty Ltd v Commissioner of Taxation (Cth)* (1968) 121 CLR 45 at 64 per Barwick CJ; *Legal Practitioners Complaints Committee v A Practitioner* (1987) 46 SASR 126 at 137; *Keramianakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268 (order following jury findings).

337 *Keramaniakis v Regional Publishers Pty Ltd* (2009) 237 CLR 237 at 282 per French CJ. The dismissal of a proceeding involves a rejection of a claimed entitlement to relief and to that extent determines rights and liabilities in the proceeding.

338 See *Ho v Grigor* (2006) 151 FCR 236 at [54] (direction that a proceeding outcome be dependent on the outcome of another proceeding not an order).

339 See *Transport Accident Commission v Hoffman* [1989] VR 197.

340 *Onslow v Commissioners of Inland Revenue* (1890) 25 QBD 465; *Opie v Opie* (1951) 84 CLR 362. Today the difference between judgment and order has no other practical significance. With respect to both the time for appealing against a decision and the mode of enforcement of a decision, a judgment and an order are the same. In the case of appeal, a relevant distinction is not between a judgment or order, but between a judgment or order in an interlocutory application and any other judgment or order. There is no appeal to the Court of Appeal from a judgment or order in an interlocutory application without leave: see *Supreme Court Act 1986* (Vic), s 17A(4)(b) (at [263]); *Legal Practitioners Complaints Committee v A Practitioner* (1987) 46 SASR 126 at 127, 130, 136.

341 For instance, as to an adjournment, the time and place of hearing, or the admissibility of evidence, see *Legal Practitioners Complaints Committee v A Practitioner* (1987) 46 SASR 126 at 127.

make a new application of the kind that was rejected, without having to apply to set aside or vary the order delivered by the court. However, the categorisation of orders as final or interlocutory is not always clear or straightforward.[342] In Australia the High Court has settled that the test for determining if an order is final or interlocutory is whether the legal effect of the order is to determine the rights and obligations of the parties in relation to the main issue in dispute between then. If the order is ancillary, or if an applicant may (even only theoretically) reapply for the making of the order it is considered interlocutory.[343]

Reasons for judgment

[8.480] While the term "reasons for judgment" is frequently used synonymously with the term "judgment" itself, a judgment or order is distinct from its reasons, the latter being merely the means by which a particular decision was reached.[344] A judgment takes effect not through its reasons but through the making of a formal order. The judgment is the operative judicial act determinative of the parties' rights and obligations and binding upon them. As the delivery of the reasons does not embody the effectiveness of the judgment, a judge may validly alter their final determination during the delivery of reasons. The decision of the court is enforceable by the successful party, or can be appealed by the unsuccessful party, as distinct from the reasons for judgment from which no appeal lies. An appeal does not lie from a determination that is not incorporated in a judgment unless the determination was made by the court with the intention to finally dispose of either the entire litigation, or some question at issue in the litigation.[345]

342 In *Carr v Finance Corporation of Australia Ltd* (1981) 147 CLR 246 Gibbs CJ said: "The question whether a judgment is final or interlocutory for the purpose of the rules relating to appeals is one productive of much difficulty", and as observed by Kirby P in *Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd [No 2]* (1990) 21 NSWLR 200 "no golden thread of logic runs through the cases".

343 Some examples of orders which might appear at first blush to be final, but have been held to be interlocutory include: an order staying, striking out or dismissing a proceeding on the ground that it is scandalous, frivolous, vexatious or an abuse of process, or because it discloses no reasonable cause of action; a guillotine order dismissing a suit if no amendment is made to the statement of claim within a specified period; an order refusing an extension of time in which to sue; an order refusing to set aside a default judgment obtained on the failure of the defendant to file or deliver a defence. On the other hand, it has been held that a judgment of non-suit is a final judgment, notwithstanding that it leaves the plaintiff at liberty to bring another action for the same cause.

344 *Driclad Pty Ltd v Commissioner of Taxation (Cth)* (1968) 121 CLR 45.

345 *Landsal Pty Ltd (in liq) v REI Building Society* (1993) 41 FCR 421; 113 ALR 643 at 651–653, referring to *Driclad Pty Ltd v Commissioner of Taxation (Cth)* (1968) 121 CLR 45; *Town v Australian Telecommunications Commission* (1983) 67 FLR 48; *Ah Toy v Registrar of Companies (NT)* (1985) 10 FCR 280. See also *Camberwell City Council v Camberwell Shopping Centre Pty Ltd* [1994] 1 VR 163 per Fullagar J (dissenting); *Rojo Building Pty Ltd v Jillcris Pty Ltd* [2007] NSWCA 68 at [17].

It is permissible to examine the reasons for judgment when a court is required to construe a judgment that is either unclear or ambiguous. The court's construction must not replace that decision with its preferred judgment. Construction is based on what can be determined of the court's intended decision from its reasons. To properly arrive at the court's intention the decision may have to be understood in the broader context of the parties' pleadings.[346] However, the stricter view that limits the reference to extrinsic materials to permit the construction of ambiguous judgments only is preferred by some authorities.[347]

GENERAL VERDICT AND SPECIAL VERDICT

[8.490] Jury trials alone are characterised by a dual decision-making process consisting of the delivery of a verdict by a jury on the one hand, and the making of a judicial determination on the other. A verdict is not a decision of the court, whether a judgment or order, but a decision of the jury.[348] Where the judge sits alone as the trier of both fact and law verdicts are not usually formally delivered. Instead the judge states findings of fact in the reasons for judgment, and judgment is pronounced in the process of delivering reasons for judgment.

Juries may deliver either a special or general verdict.

Special verdict

[8.500] A special verdict is a specific answer to a specific question of fact put to a jury. In answering the question the jury does not return a finding of liability as it would in delivering a general verdict.[349] Examples[350] of special verdicts include the jury's determination as to the existence of jurisdiction as a matter of fact, or its determination regarding the quantum of damages in cases of defamation[351] or personal injury.[352]

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346 See *Gordon v Gonda* [1955] 1 WLR 885; [1955] 2 All ER 762 at 765, 768; *Kwikspan Purlin System Pty Ltd v Commissioner of Taxation (Cth)* (1987) 93 FLR 263 (context on appeal included notice of appeal); *Australian Energy Ltd v Lennard Oil NL (No 2)* [1988] 2 Qd R 230; *Yates Property Corporation Pty Ltd v Boland* (1998) 89 FCR 78; *Polyaire Pty Ltd v K-Aire Pty Ltd (No 4)* (2007) 147 LSJS 65; *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Ltd* [2008] 2 Qd R 323 (nature of application to tribunal, affidavits made in support and submissions made at the hearing (as recorded in the transcript) perused).

347 See Young CJ in Eq writing extrajudicially in (1998) 72 ALJ 117, referred to in *Owston Nominees No 2 Pty Ltd v Branir Pty Ltd* (2003) 129 FCR 558 at [34]; *Athens v Randwick City Council* (2005) 64 NSWLR 58 at 78–79.

348 *R v Snow* (1915) 20 CLR 315.

349 *Otis Elevators Pty Ltd v Zitis* (1986) 5 NSWLR 171.

350 In criminal trial examples include the sanity of an accused: *Re Bromage* [1991] 1 Qd R 1.

351 *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749.

352 *Mourani v Jeldi Manufacturing Pty Ltd* (1983) 155 CLR 695n.

Statute now empowers judges to require juries to answer specific questions of fact without the consent of the parties.[353] A special verdict is a jury's statement only as to its findings on the material facts, and not its pronouncement as to which party should succeed. When the jury delivers an answer to those questions the court's decision on the law is bound by the jury's findings of fact.[354] The court then decides which party is entitled to succeed as a matter of law based on the facts as found by the jury, and enters the appropriate verdict.

The special verdict states that the jury finds in accordance with the verdict of the court, and that, if the court finds in favour of the plaintiff, so does the jury, and assesses the damages to which the plaintiff is entitled.[355] The assessment of damages is made even if the defendant succeeds at trial so that the plaintiff need not seek a retrial on the question of quantum of damages if it appeals successfully.

The findings of fact in a special verdict are incorporated into the record of proceedings.

General verdict

[8.510] The jury returns a general verdict when it applies the law as stated by the judge in his or her address to them to the facts and delivers a finding as to the general issue of the liability of the defendant in a civil trial. A general verdict therefore finds in favour of one party, without the intercession of the court to produce the verdict. Where the jury finds for the plaintiff it also assesses the damages to which the plaintiff is entitled.[356]

The jury does not make a statement as to its findings of fact when it returns a general verdict, so those findings do not form a part of the record of proceedings.

If the judge in a civil trial puts questions to, and receives answers from, a jury, the answers to those questions are just that, and do not constitute either a general verdict, or, in themselves, a special verdict. The answers, however, have several functions. They provide the foundation for the jury's subsequent general verdict, or for the jury to direct the court to enter a verdict by returning a special verdict.[357] If the jury is to retire to consider its general verdict questions must be put to it beforehand since

353 For example, *Supreme Court Act 1970* (NSW), s 90. At common law, a trial judge could not require a jury to answer specific questions of fact without the consent of the parties: *McDonnell & East Ltd v McGregor* (1936) 56 CLR 50.

354 *McDonnell & East Ltd v McGregor* (1936) 56 CLR 50.

355 *Russell v Victorian Railways Commissioners* [1948] VLR 118.

356 *Otis Elevators Pty Ltd v Zitis* (1986) 5 NSWLR 171 at 197.

357 *Edmund Weil Inc v Russell* (1936) 56 CLR 34 at 46–47 per Dixon and Evatt JJ; *McDonnell & East Ltd v McGregor* (1936) 56 CLR 50 at 55–56. See also *Supreme Court Act 1970* (NSW), s 90 which obliges the jury to answer any question the judge poses.

no further questions can be put to the jury,[358] enquiry can be made into the basis of their decision, after a general verdict has been returned.[359]

In a trial before a jury a verdict must be entered before judgment can be entered, otherwise judgment cannot be entered.[360] When questions are left to the jury the court enters a verdict which the facts justify as a matter of law with the express or implied consent of the parties.[361] The judge may direct the jury to return a general verdict in favour of a specified party. However, the process may be expedited by omitting the direction. Provided the parties agree the judge need not, after the jury has answered questions, direct the jury to find a particular general verdict.[362]

A party is entitled to object to a jury returning a special verdict and demand that it return a general verdict. However, the jury is entitled to determine the nature of the verdict it returns,[363] and the judge is required to instruct the jury of their entitlement.[364] In *Russell v Victorian Railways Commissioners*[365] the court considered the parties' right to a general verdict, and the jury's right to decide the type of verdict it would return. In the opinion of O'Bryan J, only in certain exceptional circumstances were parties not entitled to receive a general verdict from a jury. Those circumstances were:

- where statute confers a right on a jury to return a special verdict;
- where the parties have given their consent to obtaining a verdict that is not a general verdict; and
- where without seeking the parties' consent the judge has put particular questions for answering to the jury.

The jury's right to determine the verdict it returns means it may deliver a general verdict, without providing answers, even where it has been asked to answer specific questions put to it by the judge and return a special verdict.[366] If the parties do not agree to accept a special verdict returned by the jury the judge must direct it to return a general verdict. A jury has not returned a verdict, nor can judgment be entered, when it merely answers questions of fact after it has been directed to return a general verdict.

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358 *Mourani v Jeldi Manufacturing Pty Ltd* (1983) 155 CLR 695n; *Otis Elevators Pty Ptd v Zitis* (1986) 5 NSWLR 171 at 201–202.

359 *Arnold v Jeffreys* [1914] 1 KB 512.

360 *Russell v Victorian Railways Commissioners* [1948] VLR 118 at 128 per Gavan Duffy J; *Phillips v Ellinson Bros Pty Ltd* (1941) 65 CLR 221 at 228–229; *Otis Elevators Pty Ptd v Zitis* (1986) 5 NSWLR 171 at 197.

361 *Otis Elevators Pty Ptd v Zitis* (1986) 5 NSWLR 171 at 197–198.

362 *McDonnell & East Ltd v McGregor* (1936) 36 CLR 50 at 53–56 per Dixon J; *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 759; *Anderson v Ntzounas* [1988] VR 748.

363 *Cunningham v Ryan* (1919) 27 CLR 294.

364 But in *Supreme Court Act 1970* (NSW), s 90 obliges the jury to answer any questions the judge poses: see *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 761.

365 *Russell v Victorian Railways Commissioners* [1948] VLR 118 at 132.

366 *Bradbury v NZ Loan & Mercantile Agency Co Ltd* (1926) 27 SR (NSW) 15.

A party may lose the right to receive a general verdict from the jury. A party seeking a general verdict must reserve leave to move for one prior to the return of the jury's findings in case the jury merely returns answers to specific questions of fact, or risk losing the right to do so after the jury has returned its findings on facts.

A party or party's counsel which has approved of issues of fact being put to the jury may be deprived of their entitlement to a general verdict unless they object to the judge entering a verdict based on the jury's factual findings.

Unless the party's objection is express it will impliedly have consented to the verdict's entry.[367]

Judgment notwithstanding verdict — non obstante veredicto

[8.520] Whether a judge is empowered to enter a judgment contrary to, or in the absence of, a jury's verdict, is controversial. In *Phillips v Ellinson Bros*[368] Rich J identified the judge's power to give judgment as a procedural power under the rules of court.[369] His Honour held that the judgment given must — so as not to undermine the right to trial by jury[370] — be consistent with the jury's verdict. McTiernan J agreed with Rich J[371] that the judgment must be consistent with the verdict if the institution of trial by jury is not to be compromised by the judge assuming, or interfering with, the jury's role as fact finder. Rich J considered the only exception to be when the parties, prior to a verdict being returned, had reserved leave for the unsuccessful party to move for judgment notwithstanding the jury's verdict (judgment *non obstante veredicto*), in which case the parties have expressly or impliedly authorised the judge to enter a verdict in place of the jury's. If leave had not been reserved and a contrary judgment entered the unsuccessful party's only recourse was an application for a new trial made to the Full Court. By contrast, Starke and Williams JJ were of the view that where the jury returned a verdict inconsistent with the evidence, the judge was entitled to enter a proper judgment contrary to the jury's finding.[372]

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367 *McDonnell & East Ltd v McGregor* (1936) 36 CLR 50 at 56 per Dixon J; *Vlahos v Easywear (Aust) Pty Ltd* [1974] VR 155; *Anderson v Ntzounas* [1988] VR 748 at 750.

368 *Phillips v Ellinson Bros Pty Ltd* (1941) 65 CLR 221.

369 Vic r 59.01; ACT r 1605; NSW r 36.1; NT r 59.01; Qld r 658; SA r 240; Tas r 573; WA O 34 r 8.

370 *Phillips v Ellinson Bros Pty Ltd* (1941) 65 CLR 221 at 229–230.

371 *Phillips v Ellinson Bros Pty Ltd* (1941) 65 CLR 221 at 240–241.

372 *Phillips v Ellinson Bros Pty Ltd* (1941) 65 CLR 221 at 232, 252. Williams J applied the view expressed by the Court of Appeal in *Skeate v Slaters Ltd* [1914] 2 KB 429 that "A judge who at the conclusion of the plaintiff's case has ruled that there is some evidence for the jury is entitled at the conclusion of the whole case to reconsider his ruling and to enter judgment for the defendant if he then is of opinion that the plaintiff's evidence fails to disclose any cause of action against the defendant".

Judgment may be entered for the defendant where the jury has found for a plaintiff who has failed to discharge the burden of proof on the evidence, there being no evidence supporting a cause of action against the defendant, and no claim in law to be put to the jury.[373] But if there is some substantial evidence supporting the jury's verdict in favour of the plaintiff, even if the weight of the evidence in the judge's opinion favours the defendant, judgment cannot be given for the defendant at trial.

The Full Court in *Humphrey v Collier*[374] addressed the divergent opinions of the court in *Phillips v Ellinson Bros*. Gavan Duffy J[375] considered the differing views. His Honour concluded that Rich and McTiernan JJ were of the view that it was proper for the judge to direct the jury to return a verdict in favour of the defendant when the plaintiff's case was not supported by any evidence. A verdict is essential to the delivery of a judgment unless the parties consent to the judge providing a judgment in the absence of a verdict. Further, a judgment may be delivered contrary to the verdict with the parties' consent when the parties have sought leave for such a judgment prior to the return of the verdict.

In Williams and Starke JJ's opinion the judge was empowered by the Victorian Supreme Court Rules,[376] independently of parties' consent, and regardless of whether or not they had reserved leave,[377] to give judgment for the defendant without having to obtain a verdict from the jury, or after a verdict had been obtained, when no evidence was adduced in support of the plaintiff's case.

In describing the position in the Victorian courts, Gavan Duffy J's view was that:[378]

> In our courts it has been the practice of some judges, at any rate, to enter judgment without taking a verdict or to give leave to move after verdict for judgment when either course was thought desirable irrespective of any consent and I think such a practice is justified by the Supreme Court Act 1928 and the Supreme Court Rules, and in the absence of any authority binding on us to the contrary should be followed.[379]

The issue before the court of appeal

[8.530] Whether a court may reject a jury's verdict if it is not justified on the evidence presented on the basis that leave to do so has been

373 See also *Gibbs, Bright & Co v Rowan* (1887) 13 VLR 621; *Grinsted v Hadrill* [1953] 1 WLR 696.

374 *Humphrey v Collier* [1946] VLR 391.

375 *Humphrey v Collier* [1946] VLR 391 at 406, Herring CJ concurring.

376 Vic r 59.01; ACT r 1605; NSW r 36.1; NT r 59.01; Qld r 658; SA r 240; Tas r 573; WA O 34 r 8.

377 *Humphrey v Collier* [1946] VLR 391 at 406.

378 *Humphrey v Collier* [1946] VLR 391 at 408.

379 The situation is different in NSW in that the judge has the right under *Supreme Court Act 1970* (NSW), s 90 to leave questions to the jury which they are then require to answer: see *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 756–764.

implicitly reserved, or because the judge is empowered to do so, has been subject to several approaches by the courts.

The question of whether the judge had jurisdiction on the defendant's application to enter judgment notwithstanding the verdict (*non obstante veredicto*) arose in *Sayers v Perrin (No 2)*.[380] The plaintiff submitted that the consent of both parties was required before the court's jurisdiction to consider the motion was triggered, and it did not consent, whereas the defendant argued that the court had jurisdiction independent of the parties' consent. Wanstall J held that the judge had jurisdiction to deliver judgment independently of the parties' consent. Therefore the judge was empowered by the rules to give judgment for the defendant when the evidence failed to support the plaintiff's case to the requisite standard, and to give judgment notwithstanding the jury's verdict when the evidence justified it.

In *Siweck v Lambourn*[381] Dean J was of the opinion that a judge had impliedly reserved leave to reject a jury's verdict returned in favour of a case unsupported by evidence. In the jury trial of *Popovic v Herald & Weekly Times*[382] the plaintiff reserved leave prior to the delivery of the verdict to apply for judgment notwithstanding the jury's verdict in the defendant's favour. Bongiorno J had not left the assessment of damages in the defamation proceedings to the jury. The defendant applied for an order empanelling a new jury to determine damages. However, Bongiorno J determined that he and not the jury would make the damages assessment.

Relationship between verdict and pleadings

[8.540] If a finding is returned on a matter that was not pleaded at trial it does not form any part of the verdict.[383] If more than one cause of action is raised in the pleadings, then the jury must return a separate verdict for each. In some circumstances the jury will be unable to return separate verdicts and will return a general verdict because it is unable to separate causes of action, such as the claim in libel on the one hand and slander on the other.[384]

To avoid the prospect of a new trial, the jury must, generally, return separate verdicts for each of multiple defences to a single cause of action raised by the defendant. The plaintiff is entitled to a new trial if the jury bases a general verdict on a defence which is not supported by any evidence, which is likely to occur where there is no evidence for one or

380 *Sayers v Perrin (No 2)* [1966] Qd R 74.

381 *Siweck v Lambourn* [1964] VR 337 at 338.

382 *Popovic v Herald & Weekly Times Ltd* [2002] VSC 174, affirmed in *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1.

383 *Kenny v Sholl* (1905) 7 WALR 197.

384 As was brought, for example, by the plaintiff in *Weber v Birkett* [1925] 2 KB 152.

more of the many defences raised at trial.[385] The generality that separate verdicts are required for multiple claims or defences is modified by the facts surrounding each case.[386]

While a new trial may be ordered when some claims lack sufficient supporting evidence,[387] a new trial was not ordered upon the return of a general verdict in *Grigg v Consolidated Press*.[388] The plaintiff pleaded three causes of action, and by direction sought a verdict on two of these. The Full Court refused to order a new trial because the issues on which the plaintiff by direction sought verdicts were of only minor importance at trial, and sufficient evidence had been adduced to support the general verdict.

JUDGMENT AND ENTRY OF JUDGMENT

[8.550] It is useful to distinguish between the delivery of a judgment which finally determines the rights and obligations of parties, and an order determining rights such as seeking extra time to take procedural steps on an interlocutory application.[389] A judgment is delivered either by the judge at the trial's conclusion, or by the parties seeking leave to apply to the court for judgment.[390] A judge sitting alone pronounces judgment in the process of delivering reasons for judgment. Where, however, a jury delivers a verdict the party the verdict favours applies for judgment.

Once a jury returns its verdict the plaintiff may elect either to move for judgment or to seek another order. The court, in turn, is empowered under the rules with a discretion either to deliver judgment immediately, adjourn the case for further consideration, or leave the parties to move for judgment.[391] If the court does not immediately give judgment it may, in determining whether or not to deliver judgment in accordance with the verdict, consider circumstances arising subsequent to the verdict (but prior to the entry of judgment). Any intervening facts, whether disputed or undisputed, are determined by the court, and not by the jury returning another verdict.[392]

The advantage of election is evident in *Turner v Manier (No 1)*.[393] Where a plaintiff sued an employer for damages in respect of personal injuries and

385 *Cutts v Buckley* (1933) 49 CLR 189. The plaintiff sued for fraudulent misrepresentation and for breach of warranty.

386 *Grigg v Consolidated Press Ltd* (1945) 45 SR (NSW) 247 at 252 per Jordan CJ.

387 *Cutts v Buckley* (1933) 49 CLR 189.

388 *Grigg v Consolidated Press Ltd* (1945) 45 SR (NSW) 247.

389 See *Ho v Grigor* (2006) 151 FCR 236 at 248–249 per French, Stone and Besanko JJ.

390 Vic r 59.01; ACT r 1605; FCR r 39.33; NSW rr 36.1 and 36.2; NT r 59.01; Qld r 658; SA r 240; Tas r 573; WA O 34 r 8.

391 Gillard J explained two relevant factors in *Antoniadis v Ramsay Surgical Ltd* [1972] VR 323.

392 *Turner v Manier (No 2)* [1958] VR 358.

393 *Turner v Manier (No 1)* [1958] VR 350.

received a verdict for an amount less than he was entitled to under the *Workers Compensation Act 1951* (Vic) he refused to move for judgment in his favour and sought an adjournment of the judgment until after the determination of the compensation proceeding against his employer in respect of the same injuries. The court adjourned the proceeding so as not to prejudice the plaintiff's right to obtain the compensation award. After the plaintiff was paid the award he moved for judgment in his favour entitling him to his costs up to and including the date of the verdict, but was required to pay the defendant's costs thereafter. In *Antoniadis v Ramsay Surgical*[394] on the other hand, the court could properly enter judgment in accordance with the jury's verdict because to do so would not prejudice the plaintiff's right to seek worker's compensation.

Application for judgment

[8.560] A party should apply for judgment if a court is required to exercise its discretion in determining the judgment it will deliver. Examples of situations in which an application is required include where:

- final or interlocutory judgment cannot be entered under the rules against a defendant who has not filed a notice of defence or an appearance;
- facts are admitted on the pleadings;
- the court has answers to questions of fact;
- the plaintiff may apply for the defence to be struck out.

However, a party does not have to move for judgment if

- a default final or interlocutory judgment may be made by the court;
- the plaintiff's application to enter summary judgment is granted; and
- the judgment is given at the trial.

FINALITY OF JUDGMENT: "PRONOUNCING" AND "ENTERING" JUDGMENT

[8.570] The policy of finality of litigation[395] requires judgments or orders to be entered into the court records so that litigation can be formally concluded.[396] In a court of record the court's judgments and orders are "perfected" by being "entered"[397] (or "authenticated") — that is, sealed and formally recorded[398] — in the court records,[399] whereas in other courts judgment is perfected through its pronouncement.

394 *Antoniadis v Ramsay Surgical Ltd* [1972] VR 323.

395 *Bailey v Marinoff* (1971) 125 CLR 529 at 539 per Gibb J.

396 See *Holtby v Hodgson* (1889) 24 QBD 103 at 107; *Antoniadis v Ramsay Surgical Ltd* [1972] VR 323; *Trippe Ltd v Henderson Investments Pty Ltd* (1990) 101 FLR 261.

397 *R v Billington* [1980] VR 625.

398 Vic r 60.02; ACT r 1601; FCR r 39.32; NSW r 36.11; NT r 60.02; Qld r 661; SA r 241; Tas r 813; WA O 42 r 1. *Deputy Commissioner of Taxation v Meredith (No 2)* (2008) 75 NSWLR 462; *Hancock v Arnold (No 2)* [2009] NSWCA 19.

399 See *Bailey v Marinoff* (1971) 125 CLR 529 at 530 per Barwick CJ.

The distinction between pronouncing and perfecting[400] judgment stems from the tradition of determining parties' rights by entering the judgment on the court rolls or records[401] subsequent to their pronouncement. The parties' respective rights were determined only once the judgment was "made up".[402] A judgment that is pronounced and still not entered is "inchoate and incomplete" because it has "not yet passed from the control of the judge who pronounced it".[403] The judge's control over a case is continuing until the judgment becomes effective through the performance of the order.[404] Only such formal completion renders the judgment *res judicata*. Similarly, proceedings are part heard and subject to completion by being heard by a permanent judge or an acting judge, provided orders remain unsealed.

At the time of delivering judgment a judge is not yet *functus officio*.[405] A judgment that has been pronounced but not entered is not a final judgment for the purpose of *res judicata* because it is open to alteration upon a reconsideration of the case prior to being recorded.[406] A judgment is provisionally effective from the time it is pronounced[407] in the sense that it is open to being recalled by the judge but otherwise stands as a subsisting order.[408] The judge is not able to exercise broad powers of review but is restricted to doing so on sufficient grounds only.

Judgments take effect "from the moment when the judge has pronounced judgment"[409] and not from the day they are entered into the court record. Judgments are normally dated from the day they are pronounced in court by the judge rather than the date of formal entry. Nevertheless, a rarely used jurisdiction to order that a judgment take effect from a date other than that of pronouncement is available to the court. Sufficient grounds

400 *Holtby v Hodgson* (1889) 24 QBD 103 at 107; *Driver v Driver* [1950] SASR 8 at 10; *Antoniadis v Ramsay Surgical Ltd* [1972] VR 323; *Trippe Ltd v Henderson Investments Pty Ltd* (1990) 101 FLR 261; *In the Marriage of Moore* (1996) 125 FLR 420; *Holtby v Hodgson* at 107 per Lord Esher MR.

401 See Blackstone, *Commentaries on the Laws of England* (1st ed, 1765–1769), Vol 3, pp 389–395.

402 *King v Birch* (1842) 3 QB 425; 114 ER 569 at 431; 572; *Phillips v Birch* (1842) 4 Man & G 403; 134 ER 165.

403 *Driver v Driver* [1950] SASR 8 at 10 per Napier CJ.

404 *Re Harrison's Share Under A Settlement* [1955] 1 Ch 260.

405 *Cheeseman v Bowaters United Kingdom Paper Mills Ltd* [1971] 1 WLR 1773.

406 For purposes of the doctrine of *res judicata*, the effect of giving judgment is said to be that "the cause of action in respect of which it was given is merged in the judgment and its place is taken by the rights created by the judgment". *Halsbury's Laws of England* (4th ed), Vol 26, [551]; *Commonwealth v Precision Pools Pty Ltd* (1994) 53 FCR 183 at 191.

407 *Vitous v Tuohill* [1964] VR 624.

408 *Re Harrison's Share Under A Settlement* [1955] 1 Ch 260 at 276 per Jenkins LJ.

409 *Holtby v Hodgson* (1889) 24 QBD 103 at 106 per Lord Esher MR.

for ordering that a judgment take effect from an earlier or later date[410] may arise when a party dies after all the evidence has been presented but prior to judgment being delivered.[411]

SETTING ASIDE JUDGMENT WHERE FRAUD OR NEW EVIDENCE

"Finality of judgment"

Amending and reviewing judgments: Setting aside judgment

[8.580] An authenticated order or judgment may not in general be reviewed, reheard, varied or set aside by the court.[412] The rules do, however, vest power in the courts, on application by the affected party, to set aside or vary particular categories of judgments or orders.[413] Rule 21.07 provides:

> The Court may set aside or vary any judgment entered or given in accordance with this Order.

Exceptions to general rule

Interlocutory order

[8.590] If facts which come to light after an interlocutory order has been made showing that following the terms of the order strictly will prejudice one of the parties the court may order that the substance of the order be carried out using an alternative method.[414] The direction may be given by the judge who made the original order, or, if necessary, another judge.[415] The Federal Court Rules expressly provide for an interlocutory order that has been entered to be varied or set aside.[416] In the group proceedings brought in *McMullin v ICI Aust Operations*[417] the Federal

410 Vic r 59.02; ACT r 1605; FCR r 39.01; NSW r 36.04; NT r 59.02; Qld r 660; SA r 226; Tas r 807; WA O 42 r 2.

411 *Bonsor v Musicians Union* [1954] Ch 479.

412 See *Grierson v The King* (1938) 60 CLR 431 at 436; *Texas Co (Australasia) Ltd v Commissioner of Taxation (Cth)* (1940) 63 CLR 382 at 457; *Bailey v Marinoff* (1971) 125 CLR 529 at 530; *Palmdale Insurance Ltd (in liq) v L Grollo & Co Pty Ltd* [1987] VR 113; *Logwon Pty Ltd v Warringah Shire Council* (1993) 33 NSWLR 13; *Burrell v The Queen* (2008) 238 CLR 218. In a criminal matter, the court has power to recall or alter an order or judgment pronounced by it before it has passed into record: *R v Rumpf* [1988] VR 466.

413 *TJM Products Pty Ltd v A & P Tyres Pty Ltd* (1987) 17 FCR 390.

414 *Prestney v Colchester Corporation* (1883) 24 Ch D 376 at 385. See also *Woods v Sheriff of Queensland* (1895) 6 QLJ 163 at 164–165; *Fritz v Hobson* (1880) 14 Ch D 542 at 561; *Penrice v Williams* (1883) 23 Ch D 353; *Ainsworth v Wilding* [1896] 1 Ch 673 at 677; *Lewis v Daily Telegraph Ltd (No 2)* [1964] 2 QB 601 at 614–615; *Hutchinson v Nominal Defendant* [1972] 1 NSWLR 443.

415 *Woods v Sheriff of Queensland* (1895) 6 QLJ 163; *Hutchinson v Nominal Defendant* [1972] 1 NSWLR 443.

416 See FCR O 35 r 7(2)(c).

417 *McMullin v ICI Australia Operations Pty Ltd* (1999) 169 ALR 227.

Court heard further argument on the issue of liability it had determined in an interlocutory order after the High Court had subsequently ruled on a relevant matter.

Default judgment

[8.600] The general rule does not apply in cases, for example, of a judgment given in default of appearance at trial, or in default of defence, or in default of a pleading, which may be set aside or varied by the court under the rules by the party against whom judgment was given.[418]

Consent to set aside judgment

[8.610] Judgments may be set aside or varied by the court on the consent of the parties.[419] But, equally, a court may decline to make a consent order if to do so would injure the rights of a third party,[420] or for any other reason by virtue of its inherent jurisdiction to control its own proceedings. Further, a consent order may be set aside by an order obtained by consent.[421] The Federal Court Rules expressly provides for the making of an order to set aside or vary an order on the consent of the party whom the order favours.[422]

Order ex parte

[8.620] The court both under the rules and by virtue of its inherent jurisdiction may vary or set aside an order made *ex parte*,[423] on the application of the party against whom the order was properly made without notice.[424] In *McNamara v Cameron*[425] Higinbotham CJ said:

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418 See r 21.02 (judgment in default of appearance or defence); r 22.15 (summary judgment against party not attending hearing of application); r 49.02 (judgment where party absent at trial). See also *Permanent Trustee Co (Canberra) Ltd (Executor Estate of Andrews) v Stocks & Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45 at 47.

419 *Ivanhoe Gold Corporation Ltd v Symonds* (1906) 4 CLR 642 at 670; *Re Melbourne Carnivals Pty Ltd (No 2)* [1926] VLR 294; *Permanent Trustee Co (Canberra) Ltd (Executor Estate of Andrews) v Stocks & Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45; *Tolmie Nominees Pty Ltd v Dextrone Pty Ltd* [1993] VSC 419.

420 *Munster v Cox* (1885) 10 App Cas 680, 691; *The Bellcairn* (1885) 10 PD 161; *Hammond v Schofield* [1891] 1 QB 453; *Permanent Trustee Co (Canberra) Ltd (Executor Estate of Andrews) v Stocks & Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45 at 49; *Tolmie Nominees Pty Ltd v Dextrone Pty Ltd* [1993] VSC 419.

421 *VTAG v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 141 FCR 291.

422 See FCR O 35 r 7(2)(f). See also *Telstra Corporation Ltd v Minister for Broadband, Communications and the Digital Economy* (2008) 166 FCR 64.

423 As to which in Victoria, see r 46.08(b), for instance, an order extending the period of validity for service of originating process.

424 See *McNamara v Cameron* (1890) 16 VLR 108; *Woods v Sheriff of Queensland* (1895) 6 QLJ 163 at 164; *Owners of the SS Kalibia v Wilson* (1910) 11 CLR 689 at 694; *Zinc Corporation Ltd v Hirsch* [1916] VLR 550; *Farrell v Delaney* (1952) 52 SR (NSW) 236; *Birtles v Commonwealth* [1960] VLR 247 at 253; *Re Reid Murray Acceptance Ltd* [1964] VR 82 at 89; *Bailey v Marinoff* (1971) 125 CLR 529 at 540; *Hardie Rubber Co Pty Ltd v General Tire &*

> Where a party comes before a judge to deal with the question whether proceedings *ex parte* in character should not be set aside, he has the same right of relying upon the grounds and of urging the arguments which he would have been entitled to urge and rely upon if the original proceeding had been by summons and not *ex parte*.

The case is *a fortiori* where notice was required to be given, but the person affected by the order had no notice.[426]

It has been held that an order that may properly be obtained *ex parte* may be set aside or varied by the court that made it if evidence demonstrates that it made an erroneous judgment, or because the judgment was tainted by the non-disclosure of material evidence. The judgment cannot, however, be impugned on the basis of the manner in which the court interpreted the available evidence.[427] A court may not, however, vary or set aside a judgment which was obtained from it in the absence of its jurisdiction over the matter.[428] Where the evidence is unable to satisfy these requirements the *ex parte* decision may only be set aside on appeal.[429]

In some restricted circumstances, the court may exercise an inherent jurisdiction to set aside both final orders, and consent orders. Similarly, a court may set aside judgments and orders, such as:

- a judgment given against a party who has failed to attend at the hearing of an application for summary judgment under O 22;[430]
- an order dismissing a proceeding for want of prosecution;[431]
- a judgment given on a party defaulting to do or take a step which they were required to do or take under an order of the court;[432]
- an order made against a person on an application either made on notice, or not so made, to that person which they did not attend;[433]

Rubber Co (1973) 129 CLR 521 at 527; *Day v Bate* (1979) 41 FLR 222 (VSC); *Janson v Attorney-General (Vic)* [1982] VR 263 at 265; *Re Gasbourne Pty Ltd* [1984] VR 801 at 859; *Commissioner for Corporate Affairs (Vic) v X* [1987] VR 460 at 462; *Innes v Commissioner of Taxation* (1988) 20 FCR 161 (FCA).

425 *McNamara v Cameron* (1890) 16 VLR 108 at 110.

426 *Re Reid Murray Acceptance Ltd* [1964] VR 82 at 90.

427 See also *Garling v Laska* (1981) 51 FLR 49; *Cook v Dodds* (1985) 40 SASR 79; *Bell Group NV (in liq) v Aspinall* (1998) 19 WAR 561.

428 *Re Reid Murray Acceptance Ltd* [1964] VR 82 at 90; *Commissioner of Corporate Affairs (Vic) v X* [1987] VR 460 at 462; *Cook v Dodds* (1985) 40 SASR 79 at 80.

429 *Re Reid Murray Acceptance Ltd* [1964] VR 82 per Adam J on the authority *Farrell v Delaney* (1952) 52 SR (NSW) 236.

430 Rule 22.15.

431 Rule 24.06(a).

432 Rule 24.06(b).

433 Rule 46.08.

- a judgment, verdict or order obtained during the party's absence from the proceeding.[434]

Under s 6 of the *Instruments Act 1958* (Vic) a court may, where it is reasonable to do so, set aside a judgment entered in default under s 4, and stay or set aside its execution, to give the defendant leave to appear and defend in the proceeding. Section 6 may be invoked where a plaintiff has obtained judgment under s 4 because the time for applying for leave to appear and defend the matter under s 5 had elapsed.[435] However, a defendant's application for a judgment to be set aside in this way may be barred for laches,[436] so the application should not be delayed.[437]

General rule as to amendment of judgment

[8.630] An authenticated judgment cannot generally be reviewed, varied or set aside by the court that pronounced it if it is a true expression of the court's intention[438] either by the court that made it or in an application brought in a separate proceeding.[439] If a judgment or order is made in error a party must apply to have it set aside on appeal.[440] The principle also applies to judgments given on appeal, although in certain circumstances an appellate court may be able to vary or set aside its own orders or judgments if it is the only way to avert an injustice.[441]

The policy of finality of judgment is premised on the public's interest in seeing litigation coming to a conclusion after the matter has been decided at a full hearing.[442] The existence of an appellate jurisdiction is the recognition of the possibility of error in judgment and the need to remedy

434 Rule 49.02(2).

435 *Noonan v Townsend* (1894) 20 VLR 341; *Kay's Leasing Corporation Pty Ltd v Burgess* [1961] VR 703.

436 *Osborne & Co v Anderson* [1905] VLR 427.

437 The court in *Greig & Murray & Co Ltd v Hutchinson* (1889) 15 VLR 706 set aside judgment on the grounds of *res judicata*.

438 *Bailey v Marinoff* (1971) 125 CLR 529 at 539. See also *Re St Nazaire Co* (1879) 12 Ch D 88; *Cohen v Lintz* (1884) 10 VLR (E) 222; *Gordon v Garrett* (1888) 5 WN (NSW) 44; *Preston Banking Co v William Allsup & Sons* [1895] 1 Ch 141; *Woods v Sheriff of Queensland* (1895) 6 QLJ 163 at 164, 165; *Ivanhoe Gold Corporation Ltd v Symonds* (1906) 4 CLR 642 at 670; *Carroll v Price* [1960] VR 651 at 657–658; *Vitous v Tuohill* [1964] VR 624 at 631; *Pollard v Incorporated Nominal Defendant* [1972] VR 955 at 961; *Eastman v The Queen* (2008) 166 FCR 579.

439 *Charles Bright & Co Ltd v Sellar* [1904] 1 KB 6.

440 *Re St Nazaire Co* (1879) 12 Ch D 88; *Re Suffield & Watts; Ex parte Brown* (1888) 20 QBD 693 at 697, 698; *Ivanhoe Gold Corporation Ltd v Symonds* (1906) 4 CLR 642 at 670; *Vitous v Tuohill* [1964] VR 624 at 631; *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd* (1993) 45 FCR 224 at 235–236; *Commissioner of Water Resources v Federated Engine Drivers' & Firemen's Assn of Australasia (Qld Branch)* [1988] 2 Qd R 385 at 389.

441 The general rule applies to criminal proceedings. See *Jones v The Queen* (1989) 166 CLR 409; *Pantorno v The Queen* (1989) 166 CLR 466; *R v Lapa (No 2)* (1995) 80 A Crim R 398 (NSWCCA); *Eastman v The Queen* (2008) 166 FCR 579.

442 *Bailey v Marinoff* (1971) 125 CLR 529 at 539 per Gibbs J.

the injustice that might arise.[443] The unsatisfied party is entitled to seek leave to appeal an unsatisfactory judgment in a higher court, or otherwise have the judgment set aside in a court of first instance, albeit only in highly confined circumstances.[444]

Finality of judgment encourages a complete ventilation of the relevant issues at trial, and opposes withholding argument to be used subsequently as a vehicle to disturb the judgment in a new proceeding. The power of the court to set aside a judgment in its equitable jurisdiction is not a method for unsuccessful parties to employ to relitigate claims. The narrow grounds upon which judgment may be set aside in new proceedings are when, after the trial, it is discovered that the judgment was procured by fraud, or new evidence comes to light. However, as Mason CJ observed in *Autodesk Inc v Dyason (No 2)*[445] a successful party should not be divested of the benefit of the judgment merely because, through no fault of their own, evidence was not available to be presented at trial. The strictness of the rule against setting aside an authenticated judgment may be relaxed if the order is not final but interlocutory or procedural.[446] However, if the party gives an undertaking to the court which is incorporated into the final order the undertaking can only be set aside on appeal.[447]

Exceptions to the general rule

[8.640] The rule against amending an authenticated judgment except for a clerical error of commission or omission otherwise than on appeal is subject to three categories of exception:[448]

> [T]hose which are founded upon the inherent jurisdiction of the court to ensure that its procedures do not effect injustice; those which are authorised by

443 *Kewside Pty Ltd v Warman International Ltd* [1990] ATPR 41-012 at 51,236 per French J (FCA). See also *Spooner v Spooner* (1954) 73 WN (NSW) 353 at 354; *Coppins v Helmers*; *Brambles Constructions Pty Ltd (Third Party)* [1969] 2 NSWR 279 at 281; *Permanent Trustee Co (Canberra) Ltd (Executor Estate of Andrews) v Stocks & Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45 at 47; *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd* (1993) 45 FCR 224 at 235–236.

444 For the distinction between an appeal and an action to set aside a judgment see *Monroe Schneider Assocs (Inc) v No 1 Raberem Pty Ltd (No 2)* (1992) 37 FCR 234 at 237–240; *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 540.

445 *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300.

446 See *Mullins v Howell* (1879) 11 Ch D 763 at 766, and *Wilkshire v Commonwealth* (1976) 9 ALR 325 at 330 (ACTSC), referred to in *Booth v Ward* (2007) 17 VR 195 at [39].

447 *Stena Sealink Ltd v Sea Containers Ltd* (1995) 39 NSWLR 677.

448 *Permanent Trustee Co (Canberra) Ltd (Executor Estate of Andrews) v Stocks & Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45 at 47 per Brennan J.

> statute; and those which override the general rule in order to give relief where the judgment is obtained by fraud or by an agreement which is void or voidable.[449]

Courts have resisted limiting the scope of their inherent jurisdiction to vary their own orders by avoiding terms that describe the reach of the jurisdiction.[450] Obtaining a judgment by fraud is the basis for setting the judgment aside[451] in a separate proceeding.[452] The source of the jurisdiction to set aside judgments obtained by fraud is equity:

> The Court of Chancery also had had jurisdiction to enjoin, by a species of common injunction, the enforcement of judgments fraudulently obtained, including those recovered in the common law courts, or to oblige the holder of such a judgment to enter satisfaction of it upon the judgment roll of the common law court. The exercise of this jurisdiction involved the institution of a separate proceeding.[453]

A consent judgment obtained by fraud is impeached in a separate proceeding.[454]

In order that the policy of finality of judgment is not compromised, and so as not to overburden courts with reviewing first instance decisions,

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449 As to whether in a case within the third category a separate proceeding is necessary. For further examination of the exceptions to the general rule, see *Owston Nominees No 2 Pty Ltd v Branir Pty Ltd* (2003) 129 FCR 558.

450 See *Thynne (Marchioness of Bath) v Thynne (Marquess of Bath)* [1955] P 272 at 313; *Meier v Meier* [1948] P 89 at 95; *Ex parte Herman; Re Mathieson* [1961] NSWR 1145 at 1147–8; *Booth v Ward* (2007) 17 VR 195 at [39].

451 *Cole v Langford* [1898] 2 QB 36; *Hip Foong Hong v H Neotia & Co* [1918] AC 888 at 894; *Goldring v National Mutual Life Assn of Australasia Ltd* (1916) 22 CLR 336 at 339; *Spooner v Spooner* (1954) 73 WN (NSW) 353; *Snowy Mountains Hydro-Electric Authority v Cicic* [1964-5] NSWR 231 (subornation of perjury by party of witness); *McDonald v McDonald* (1965) 113 CLR 529; *Nicholls v Carpenter* [1974] 1 NSWLR 369. In the Federal Court of Australia, the rules of court provide expressly for the varying or setting aside of a judgment obtained by fraud. See FCR O 35 r 7(2)(b). An independent proceeding by the other party to set aside the judgment is the preferable procedure to follow: *Hip Foong Hong v H Neotia & Co*; *Jonesco v Beard* [1930] AC 298 at 301; *Cabassi v Ferrando* (1940) 64 CLR 130 at 147; *Stern v Friedman* [1953] 1 WLR 969; *Snowy Mountains Hydro-Electric Authority v Cicic*; *McDonald v McDonald* at 533; *Permanent Trustee Co (Canberra) Ltd (Executor Estate of Andrews) v Stocks & Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45 at 48; *Monroe Schneider Assocs (Inc) v No 1 Raberem Pty Ltd (No 2)* (1992) 37 FCR 234; 109 ALR 137 at 141 (FCA).

452 *Charles Bright & Co Ltd v Sellar* [1904] 1 KB 6; *Spooner v Spooner* (1954) 73 WN (NSW) 353.

453 *DJL v The Central Authority* (2000) 201 CLR 226 per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

454 *Spies v Commonwealth Bank of Australia* (1991) 24 NSWLR 691; *Tresize v National Australia Bank Ltd* (2005) 220 ALR 706; *Cameron v Qantas Airways Ltd* [2008] NSWCA 275. Compare *Tuckett v Blake* (1888) 14 VLR 264, holding that the court had power to set aside or vary an order in which it was tricked into making, or which was made on a consent fraudulently obtained.

Kirby P[455] in *Wentworth v Rogers (No 5)*,[456] formulated a stringent test for ordering the setting aside of an obtained judgment and ordering a new trial when fraud is alleged:

> The (challenging party) must establish that the case is based on newly discovered facts; that the facts are material and such as to make it reasonably probable that the case will succeed; that they go to mere allegations of perjury … and that the opposing party who took advantage of the judgment is shown, by admissible evidence, to have been responsible for the fraud in such a way as to render it inequitable that such party should take the benefit of the judgment.[457]

In that case the unsuccessful plaintiff alleged that the verdict and judgment was tainted by the defendant's fraud. Kirby P held that for the court to set aside a judgment on the basis that it was procured by fraud certain matters had to be established:[458]

> First, the essence of the action is fraud and particulars of the fraud claimed must be exactly given and the allegations established by the strict proof which such a charge requires…
>
> Secondly, it must be shown, by the party asserting that a judgment was procured by fraud, that there has been a new discovery of something material in the sense that fresh facts have been found which, by themselves or in combination with previously known facts, would provide a reason for setting aside the judgment.
>
> Thirdly, mere suspicion of fraud raised by fresh facts later discovered will not be sufficient to secure relief… The claimant must establish that the new facts are so evidenced and so material that it is reasonably probable that the action will succeed…
>
> Fourthly, although perjury by the successful party or a witness or witnesses may, if later discovered, warrant the setting aside of a judgment on the ground that it was procured by fraud and although there may be exceptional cases where such proof of perjury would suffice, without more to warrant relief of this kind, the mere allegation or even the proof of perjury will not normally be sufficient to attract such drastic and exceptional relief as the setting aside of a judgment.
>
> Fifthly, it must be shown by admissible evidence that the successful party was responsible for the fraud which taints the judgment under challenge…
>
> Sixthly, the burden of establishing the components necessary to warrant the drastic step of setting aside a judgment allegedly affected by fraud or other relevant taint, lies on the party impugning the judgment. It is for that party to establish the fraud and to do so clearly.

An unsuccessful party seeking to impeach a judgment obtained by fraud must allege only the fraud either in a separate proceeding, or in the same proceeding in which judgment was obtained. Obtaining a judgment by fraud can also be the subject of an appeal from the judgment in the action.

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455 See also *Spies v Commonwealth Bank of Australia* (1991) 24 NSWLR 691.

456 *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 538 (Hope and Samuels JJA agreeing).

457 *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 539.

458 *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 538–539.

The action is required to be a properly particularised substantive claim in fraud. The substance of the fraud should be pleaded as a substantive allegation, not as particulars to a more general allegation,[459] the particulars of which disclosed new facts sufficiently material either in themselves or in conjunction with the facts at trial to justify the setting aside of the judgment.[460] The standard of proof required to be met was that of *Briginshaw v Briginshaw*.[461] The applicant must demonstrate that the new facts would require the judgment to be set aside, and that the respondent was responsible for the fraud.

If the trial has been properly and justly conducted in accordance with procedural rules the fresh evidence adduced must be of a highly probative nature. Barwick CJ in *McDonald v McDonald*[462] formulated the test as requiring that the evidence produced in the new proceedings "will in all probability be decisive of the issues between the parties".[463]

A judgment will not normally be set aside nor a new proceeding opened on the sole basis of an allegation that a witness has perjured themselves. It is not uncommon that parties' evidence will conflict in contested litigation, and it is possible for parties to have been mistaken and to have misled the court. Pincus JA in *Carter v Rosedale Sawmill*,[464] however, refused to draw an absolute distinction between obtaining a judgment by perjury and by other fraudulent behaviour. Referring to the illogical basis of the distinction and the impracticability of applying it his Honour observed that "one can hardly conceive of a judgment obtained in a contested hearing being obtained by fraud where the fraud does not involve perjury."

Whether it is required to be shown that the new facts were not discoverable at trial is subject to divided authority. In England the cases of *Owens Bank v Etoile Commerciale*,[465] *Owens Bank v Bracco and Bracco Industria Chimica*[466] and *Monroe Schneider Assocs (Inc) v No 1 Raberem (No 2)*[467] required a party to show that the evidence could not with due diligence have been obtained before judgment was entered. However, that

459 *Monroe Schneider Assocs (Inc) v No 1 Raberem Pty Ltd (No 2)* (1992) 37 FCR 234 at 236–237.

460 *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 538.

461 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

462 *McDonald v McDonald* (1965) 113 CLR 529.

463 The requirements of r 668(1)(b) of the *Uniform Civil Procedure Rules 1999* (Qld) appear to be more rigorous in that they require of the facts presented that they "would have entitled the person against whom the order is made to an order or decision in the person's favour or to a different order." There may however be no substantial difference between them.

464 *Carter v Rosedale Sawmill* [1995] QCA 441 (3 October 1995).

465 *Owens Bank Ltd v Etoile Commerciale SA* [1995] 1 WLR 44.

466 *Owens Bank Ltd v Bracco and Bracco Industria Chimica SpA* [1994] 1 All ER 336.

467 *Monroe Schneider Assocs (Inc) v No 1 Raberem Pty Ltd (No 2)* (1992) 37 FCR 234.

approach was rejected by the High Court in *McDonald v McDonald*[468] in which Barwick CJ (with whom Kitto J agreed) and Menzies J were of the opinion that where fraud was the ground for setting aside judgment due diligence was not additionally required. Handley JA in *Toubia v Schwenke*[469] reviewing both cases adopted the approach of Menzies J for the reason that:

> Contributory negligence is not a defence to an action for fraud whether the relief claimed is rescission or damages. As Brennan CJ said in *Gould v Vaggelas* (1995) 157 CLR 215 at 252: "A knave does not escape liability because he is dealing with a fool".

The law in England and Australia is not therefore the same.

The test that is applicable when the judgment is appealed on the basis of fraud may differ from the test applied when fraud is the basis for commencing separate proceedings in order to impeach a judgment obtained by fraud. In *Carter v Rosedale Sawmill*[470] Pincus JA referred to the judgments in *McDonald v McDonald*[471] as authority that while in the latter case the claimant is required to prove that the opposing party obtained the judgment by fraud, proof was not required in an appeal on the basis of a judgment obtained by fraud.

There have been a number of substantially consistent formulations of the test for setting aside judgments procured by fraud. In *Council of the City of Greater Wollongong Corporation v Cowan*[472] Dixon CJ, with whom Williams, Webb, Kitto and Taylor JJ agreed, said that

> It must be reasonably clear that if the evidence had been available at the first trial and had been adduced, an opposite result would have been produced or, if it is not reasonably clear that it would have been produced, it must have been so highly likely as to make it unreasonable to suppose the contrary. Again, reasonable diligence must have been exercised to procure the evidence which the defeated party failed to adduce at the first trial.

Pincus JA in *Carter v Rosedale Sawmill*,[473] referring to *Commonwealth Bank of Australia v Quade*,[474] said that the test was that "…it is reasonably clear that the fresh evidence would have produced an opposite verdict."

The same test may not be applied as strictly in irregularly conducted trials (compared with those that have been regularly conducted) where the decision to set aside a judgment must further take into consideration the public interest in the court's inherent jurisdiction to preserve the integrity of its processes. In such cases courts must for the integrity of its

468 *McDonald v McDonald* (1965) 113 CLR 529.

469 *Toubia v Schwenke* (2002) 54 NSWLR 46.

470 *Carter v Rosedale Sawmill* [1995] QCA 441 (3 October 1995).

471 *McDonald v McDonald* (1965) 113 CLR 529.

472 *Council of the City of Greater Wollongong Corporation v Cowan* (1995) 93 CLR 435 at 444.

473 *Carter v Rosedale Sawmill* [1995] QCA 441 (3 October 1995).

474 *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134.

processes discourage parties from believing that they may proceed without complying with their obligations.

In *Commonwealth Bank of Australia v Quade* the successful litigant was found to have derogated from its discovery obligations when documents materialised after judgment was pronounced. The court said that the case was not merely one of fresh evidence coming to light after judgment had been entered. Rather the failure to comply with the order for discovery made it an instance of malpractice. It was not, therefore, just in the circumstances to require the party seeking to set aside the judgment to discharge the onerous burden of demonstrating that to a very high degree of probability the outcome would have been different if the evidence had been discovered, which it had unfairly had to assume. Further, requiring the unsuccessful litigant to satisfy the exacting standard regarding the probative value of the evidence that had come to light would "…be likely to ensure to the successful party the spoils of his own default and thereby encourage, rather than to penalize, failure to comply with pre-trial orders and procedural requirements."[475]

In the words of the court:[476]

> Such a stringent rule in that ordinary class of case is supported by considerations of both justice and public interest. Considerations of justice support it in that it would be unfair to the successful party if he were to be deprived of a verdict obtained after a trial on the merits and be subjected to the expense, inconvenience and uncertainty of a further trial merely because some relevant evidence had, without fault on his part, been unavailable to the unsuccessful party at the time of the trial. Considerations of public interest support it in that it is desirable in the public interest that there be finality in litigation in other than the truly exceptional case. If all that was necessary to procure the setting aside of a regularly obtained verdict was that the unsuccessful party show that fresh evidence which might have affected the outcome of the trial has become available after the trial, the verdicts of the courts would be of a provisional character only, being subject to the discovery of further relevant evidence.[477]

The unsuccessful party in cases of malpractice needs to show more than the mere hypothetical possibility that the evidence may have affected the outcome. There must be a real possibility that the introduction of the excluded evidence would have altered the outcome.

The court in *Quade* did not formulate a rule for determining whether to order a new trial when the successful party's misconduct resulted in relevant evidence failing to be disclosed at trial, but observed that the decision had to be based on doing justice in the particular case, having regard to what degree the successful party's conduct was culpable, the extent to which the unsuccessful party had failed to exercise diligence,

475 *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at [7].

476 *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at [6].

477 See also *McDonald v McDonald* (1965) 113 CLR 529 at 533 per Barwick CJ.

and whether there was a real possibility of a different result had the successful party complied with the rules and made a full disclosure.

Reopening a judgment or an order before it is perfected

[8.650] Prior to the authentication of a judgment or an order, the issuing court may, in reconsideration of its decision, withdraw or vary it.[478] The power the court has to review its own orders and judgments is exercised judicially.[479] The extent to which the court may review its decision depends upon the kind of error or omission that has been made. The review may involve the court calling further evidence.[480] The court's power to vary its decisions does not extend to decisions which are in final form but for being formally recorded, and which may be appealed.[481]

Judges have the power to correct errors of expression and ambiguities.[482] In *Autodesk Inc v Dyason (No 2)*[483] the High Court affirmed that the court has jurisdiction to recall a final judgment prior to its being formally authenticated if at the time the court gave judgment it misapprehended either the facts or the law in the case, or if it is necessary in order to do justice in the case.[484] The review cannot have been necessitated by either the fault of, or be due to the negligence of, the party moving for the judgment to be recalled.

The power to review a judgment is a jurisdiction exercised only in very circumscribed circumstances, and requires the court to balance the interest the public has in seeing litigation come to completion, against the irreparable or uncompensatable damage that might be done to a party if the court does not recall the judgment to remedy the accident or

478 *Re St Nazaire Co* (1879) 12 Ch D 88 at 91; *Re Suffield & Watts; Ex parte Brown* (1888) 20 QBD 693 at 697, 698; *Re Crown Bank* (1890) 44 Ch D 634; *Re Spencer* (1892) 18 VLR 280; *Shepherd v Robinson* [1919] 1 KB 474; *Millensted v Grosvenor House (Park Lane) Ltd* [1937] 1 KB 717; *Texas Co (Australasia) Ltd v Commissioner of Taxation (Cth)* (1940) 63 CLR 382 at 457; *Harvey v Phillips* (1956) 95 CLR 235 at 242; *Arnett v Holloway* [1960] VR 22 at 28–29; *Carroll v Price* [1960] VR 651 at 657–658; *Permanent Trustee Co (Canberra) Ltd (Executor Estate of Andrews) v Stocks & Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45 at 47–48; *R v Billington* [1980] VR 625 at 628; *R v Cripps; Ex parte Muldoon* [1984] QB 686; *Norman v Norman* (1992) 6 WAR 372; *Hoad v Nationwide News Pty Ltd* (1997) 37 IPR 407 (WASC). The position is the same in criminal proceedings: see *R v Lapa (No 2)* (1995) 80 A Crim R 398 (NSWCCA). In the Federal Court, the general rule is recognised in FCR O 35 r 7(1), which states that the court may vary or set aside a judgment or order before it has been entered.

479 *Yenald Nominees Pty Ltd v Como Investments Pty Ltd* [1996] ATPR 41-508 (FCA).

480 *Smith v New South Wales Bar Assn* (1992) 176 CLR 256 at 265–267. See also *Charlesworth v Relay Roads Ltd (in liq)* [2000] 1 WLR 230.

481 *B v Commissioner of Taxation (Cth)* (1998) 40 ATR 65 (FCA).

482 *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (No 2)* (1998) 29 ACSR 290.

483 *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300.

484 *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 at 302 per Mason CJ, 308 per Brennan J, 322 per Gaudron J.

oversight.[485] Judgments will not be recalled in order to permit a party to argue their case afresh,[486] or to either represent a matter which the court has already deliberated and decided upon or present a matter not put before the court at the original hearing.[487]

The existence of grounds for reopening a judgment does not result in its being recalled automatically if there are more appropriate ways of dealing with the judgment, such as by way of appeal.[488] In some jurisdictions, the rules allow an order which has yet to be authenticated to be varied or set aside either before it is entered into the court record, or before seven days have expired since the making of the order.[489] The rule does not permit the case to be reopened to permit the relitigation of issues which have been considered and settled by the court, but is reserved to be applied in exceptional circumstances to correct errors, or omissions, or to ensure the order properly addresses the issues agitated by the parties in the proceedings.

The court is *functus officio* once it has entered the judgment into the court record.[490] Having no further judicial tasks to perform in relation to the proceedings, the court's role comes to an end.[491] It serves the purpose of finality of judgment to prohibit the court from recalling and reconsidering an authenticated judgment which accurately expresses the court's intention.[492] The restriction on the court reconsidering an authenticated judgment is alleviated by the slip rule, which confers a jurisdiction on the court to correct clerical errors and accidental slips and omissions of its own or its officers' making at any time, without appeal.[493] Rule 36.07 provides:

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485 *De L v Director General, Department of Community Services (NSW)* (1997) 190 CLR 207 at 215.

486 *Smith v New South Wales Bar Assn* (1992) 176 CLR 256 at 265.

487 *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 at 303.

488 *Smith v New South Wales Bar Assn* (1992) 176 CLR 256 at 267.

489 *Uniform Civil Procedure Rules 1999* (Qld), r 667(1)(b).

490 *Burrell v The Queen* (2008) 238 CLR 218.

491 *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 289 per Gaudron J. With the exception of a jurisdiction in the House of Lords declared by it in 1675 to determine appeals from inferior courts as delegate of the Sovereign, there was no appeal procedure at common law before the *Judicature Act 1873* (UK). *South Australian Land Mortgage and Agency Co Ltd v The King* (1922) 30 CLR 523 at 553 per Isaacs J. For further discussion of the position at common law see *CDJ v VAJ* (1998) 197 CLR 172; 72 ALJR 1548 at 1562–3 per McHugh, Gummow and Callinan JJ. The Court of Chancery had appellate power to reopen and rehear cases after the decree had been entered: *DJL v The Central Authority* (2000) 201 CLR 226 at [34] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; see *Harrison v Schipp* (2002) 54 NSWLR 612 (21 June 2002) at [141] per Giles JA.

492 *DJL v The Central Authority* (2000) 201 CLR 226; *Ainsworth v Wilding* [1896] 1 Ch 673; *Margiotta v Michielan* (1981) 26 SASR 356; *TM Burke Estates Pty Ltd v Noosa Shire Council* (2001) 113 LGERA 368 at 380–383 per McMurdo P and Thomas JA.

493 Vic r 36.07; ACT r 6906; FCR r 39.05; NSW r 36.17; NT r 36.07; Qld r 338; SA r 242; Tas r 435; WA O 21 r 10.

> The Court may at any time correct a clerical mistake in a judgment or an order or an error arising in a judgment or an order from any accidental slip or omission.

McHugh JA in *Storey & Keers v Johnstone*[494] said that the test to be applied was that which Lord Herschell formulated in *Hatton v Harris*:[495]

> I cannot doubt that the correction would at once have been made if the matter had been drawn to the attention of the judge who made the decree.

An error may be rectified under the slip rule if the error is beyond doubt and the task required to correct it is purely mechanical, in the sense that it does not require "the exercise of an independent discretion or is a matter upon which a real difference of opinion might exist".[496] The slip rule cannot however be used to enable a judge to reconsider an issue that has been decided.[497]

The slip rule can be used only to correct accidental errors not requiring any exercise of discretion, such as where:

- the wrong name or description of a party has been entered or the party is dead or does not exist;
- the order for costs requires correction;
- counsel has inadvertently not asked for costs or interest;
- calculations of damages awards require correcting;
- parties had not agreed on quantum but a mistaken belief that they had done so was recorded;
- the calculation of interest requires correcting;
- the award of interest was inadvertently omitted.

The slip rule may only be invoked where the party can demonstrate that the judgment entered by the court does not convey the intention it had when it was pronounced. If the judgment as entered expresses the view of the court the slip rule does not provide a jurisdiction for amending it. An authenticated judgment can only be recalled on the basis that the judgment as expressed does not convey the court's intention. The slip rules does not necessarily apply where a party has failed to a bring matter to the court's attention out of neglect, ignorance, or a failure to take proper care, as opposed to its inadvertently not coming before the court. The High Court in *L Shaddock & Assocs v Paramatta City Council (No 2)*[498] found inadvertence to have caused counsel's failure to apply for pre-trial interest in the period between the appealed decision being handed down at trial and the decision of the High Court upholding the appeal. The slip rule enabled the court to order interest in favour of the successful

494 *Storey & Keers Pty Ltd v Johnstone* (1987) 9 NSWLR 446.

495 *Hatton v Harris* [1892] AC 547; see also *L Shaddock & Assocs Pty Ltd v Parramatta City Council (No 2)* (1982) 151 CLR 590.

496 *Storey & Keers Pty Ltd v Johnstone* (1987) 9 NSWLR 446 at 453.

497 *R v Cripps; Ex parte Muldoon* [1984] QB 686 per Donaldson MR.

498 *L Shaddock & Assocs Pty Ltd v Parramatta City Council (No 2)* (1982) 151 CLR 590.

appellant calculated up to the date of the appeal decision. In *Hanave Pty Ltd v LFOT Pty Ltd*[499] the Full Federal Court refused to order pre-trial interest under the slip rule. The reason the solicitor had not applied for the interest was because they were ignorant of their entitlement, not because they inadvertently neglected to apply for it.

In *Arnett v Holloway*[500] the plaintiff was awarded a judgment in the Supreme Court. The Rules of the Court had been recently amended so that a special order apart from the judgment itself was required to recover costs on the Supreme Court scale. No such application for costs at scale was made because counsel was not aware of the recent amendment. The trial judge was also unaware of the amendment. Adam J held that the trial judge's order correctly expressed his intention not to make the costs order. The slip rule did not operate to interpose an intention the court would have expressed but for its misapprehension as to the law.[501] It was not by error that the judge failed to make the appropriate costs order. The Full Court of Appeal heard argument from the appellant that the slip rule applied where the judge was unable to consider relevant matters because a slip or omission had failed to bring them to his attention. It heard argument from the respondent that the slip rule only applied when the judge failed to express the intention they bore at the time of pronouncing judgment. Adam J's judgment was criticised by the Full Court as being "unduly narrow and artificial". It was appropriate to take a broader view of the slip rule as including the judge's intention to make a costs order at the Supreme Court scale, and not to restrict its application to the intention of the judge at the time judgment was expressed.[502]

Gallop J in *Symes v Commonwealth*[503] applied an extended version of the slip rule. The slip rule was held to apply to cases in which the court's intention would have differed were it not for the accidental slip or omission, including those caused by counsel's failure to bring a relevant circumstance to the court's attention.[504] Where the court has made an ambiguous or uncertain order it may apply the slip rule to rectify the order so that it conforms with its intention as it recalls them to have been at the time the order was made.[505] Although the Magistrates Court lacks statutory power to rectify errors caused by accidental mistakes or omissions, errors entered onto the court record may be subsequently

499 *Hanave Pty Ltd v LFOT Pty Ltd* (2004) 136 FCR 566.

500 *Arnett v Holloway* [1960] VR 22.

501 *Arnett v Holloway* [1960] VR 22 at 28.

502 *Preston Banking Co v William Allsup & Sons* [1895] 1 Ch 141; *Oxley v Link* [1914] 2 KB 734; *AE Terry's Motors Ltd v Rinder (No 2)* [1948] SASR 303.

503 *Symes v Commonwealth* (1987) 89 FLR 356.

504 *Production Spray Painting & Panel Beating Pty Ltd v Newnham (No 2)* (1991) 27 NSWLR 659.

505 *Gagarimabu v BHP Billiton Ltd* [2003] VSC 416.

corrected by exercise of its inherent jurisdiction.[506] Courts have discretion under the rule to refuse to correct errors "if something has intervened which would render it inexpedient or inequitable that it be made".[507]

Inherent jurisdiction to correct mistake or error

[8.660] A court has inherent jurisdiction, quite apart from the slip rule,[508] to rectify judgments which do not record its intentions prior to their being authenticated[509] and order the necessary amendments.[510] It was the High Court's view in *Smith v New South Wales Bar Assn*[511] that courts have a wide common law jurisdiction to review judgments and orders prior to their being authenticated, that, for reasons of policy, is rarely used.

Revisions of reasons for judgment are permissible as long as they do not amount to substantive alterations.[512] Parties may review a judgment and, if they identify errors requiring correction, have the court order a reopening prior to the decision entering the court records. The nature of the error determines the scope of the order for reopening.[513] Parties may also, at this stage, refer the court to substantive issues neglected in the judgment. The court will not, however, reconsider questions settled at trial.[514]

A superior court has inherent jurisdiction to control its own processes. Whether that jurisdiction extends to varying decisions that have been duly authenticated has been subject to debate. In *Thynne v Thynne*[515] Morris LJ, considering a court's power to vary perfected orders, said that they formed a part of the court's "necessary powers" which it would be

506 *Kelly v Von Einem* (1995) 84 A Crim R 37 (VSC) at [53] per O'Bryan J. In the Federal Court, the rules of court provide expressly for the varying or setting aside of an order which does not reflect the intention of the court. See FCR O 35 r 7(2)(e).

507 *L Shaddock & Assocs Pty Ltd v Parramatta City Council (No 2)* (1982) 151 CLR 590 at 597.

508 *Newmont Yandal Operations Pty Ltd v The J Aron Corporation* (2007) 70 NSWLR 411 at [80].

509 *Harvey v Phillips* (1956) 95 CLR 235; *Carroll v Price* [1960] VR 651; *Bailey v Marinoff* (1971) 125 CLR 529; *Pollard v Incorporated Nominal Defendant* [1972] VR 955; *R v Industrial Court of South Australia; Ex Parte General Motors-Holden's Pty Ltd (No 2)* (1975) 10 SASR 582; *DJL v The Central Authority* (2000) 201 CLR 226.

510 *Burrell v The Queen* (2008) 238 CLR 218; *Ivanhoe Gold Corporation Ltd v Symonds* (1906) 4 CLR 642; *Ex parte Herman; Re Mathieson* [1961] NSWR 1145; *Coppins v Helmers; Brambles Constructions Pty Ltd (Third Party)* [1969] 2 NSWR 279; *Gikas v Papanayiotou* [1977] 2 NSWLR 944.

511 *Smith v New South Wales Bar Assn* (1992) 176 CLR 256.

512 *Todorovic v Moussa* (2001) 53 NSWLR 463 at 466–469 per Beazley JA; *Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd* (2001) 4 VR 28.

513 *Smith v New South Wales Bar Assn* (1992) 176 CLR 256 at 265; see also *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300.

514 *Burrell v The Queen* (2008) 238 CLR 218 at [19]–[21] per Gummow ACJ, Hayne, Heydon, Crennan, Kiefel JJ.

515 *Thynne (Marchioness of Bath) v Thynne (Marquess of Bath)* [1955] P 272.

undesirable to circumscribe. In *Bailey v Marinoff*[516] Gibbs J in a dissenting judgment said that the nature of the inherent jurisdiction was undefined but that it would be exercised only in exceptional cases where uncorrected errors would work irremediable injustice. In his Honour's view a court could vary orders:

- to ensure that its intentions were given effect,[517] although it may not alter "the operative and substantial part" of the judgment in doing so;
- to review an *ex parte* order made against a party not at fault on the basis of natural justice or procedural fairness;[518]
- to account for altered circumstances requiring the making of a supplemental order after judgment has been entered;[519] and
- to consider an application for a time extension after time for complying with a guillotine dismissing the action had expired.

The inherent jurisdiction of the court empowers it to rectify judgments in cases not covered by r 36.07 (the slip rule).[520] For example, the court's inherent jurisdiction empowers the court to rectify even an authenticated judgment which, although it accurately expresses the court's intention, has unintended, unforeseen and undesired consequences.[521] In *Newmont Yandal Operations v The J Aron Corporation* the plaintiff brought two proceedings (in 2003 and 2004) against the defendant. At first instance Austin J ordered the determination of separate questions in the 2004 proceedings; however, the order as entered had the unintended effect of dismissing the proceedings and giving judgment for the defendant. The plaintiffs argued that both r 36.17 of the *Uniform Civil Procedure Rules 2005* (NSW), and the court's inherent jurisdiction, empowered it to vary an order it had made. Austin J said that his intention was not to estop the plaintiff from proceeding by affording the defendant an opportunity to raise *res judicata*. The test to be applied in the circumstances was not whether the order was proper but whether it reflected the court's intention.

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516 *Bailey v Marinoff* (1971) 125 CLR 529.

517 See *Uniform Civil Procedure Rules 1999* (Qld), rr 338 and 667 which are to the same effect.

518 See *Uniform Civil Procedure Rules 1999* (Qld), r 667(2)(a) which provides that a court may set aside an order at any time if the order was made in the absence of a party.

519 Citing *Prestney v Colchester Corporation* (1883) 24 Ch D 376, although that case does not appear to support this as a separate head of inherent power available to bring about a variation of a final order. In that case, after an order had been made for production of documents for inspection in the office of solicitors in London, it appeared more convenient that production of the documents should be made in Colchester, and an order to that effect was made, which had the effect of varying the previous order. However, the first order was clearly interlocutory, and this was expressly recognised in the judgment of Cotton LJ.

520 *Newmont Yandal Operations Pty Ltd v The J Aron Corporation* (2007) 70 NSWLR 411.

521 *Newmont Yandal Operations Pty Ltd v The J Aron Corporation* (2007) 70 NSWLR 411 at [58]–[64].

The Court of Appeal in *Newmont Yandal Operations v The J Aron Corporation*[522] interpreted the language of the slip rule more broadly, saying that the references to "error" and "correct" had to be understood in relation to the court's overarching objective. An order may therefore need to be made to correct a judgment so that it either effects the intention of the judge at the time of pronouncing judgment, or avoids a consequence which the court neither intended nor foresaw at the time the judgment was announced.[523] Where the judgment correctly states the court's intention, but the error results from the court's incorrect reasoning, rectification is properly pursued through avenues of appeal, not by means of the slip rule.[524]

The slip rule and the inherent jurisdiction to correct judgments are to be contrasted with appeals. While the first two amend inaccurate judgments, a party's only recourse against erroneous judgments which accurately reflect the court's intention is to appeal the court's decision to a higher court. The High Court of Australia has inherent jurisdiction to vary its own perfected orders if they would cause serious injustice unless corrected. However, the public interest in the finality of litigation means that this jurisdiction would be used sparingly.

Whether a State or federal intermediate court of appeal may have an inherent jurisdiction to correct decisions has been the subject of consideration. It has been held that the Court of Appeal in England may, in exceptional circumstances and having regard to the finality of judgment, on the basis of its inherent powers to preserve the integrity of its processes, reopen a matter to set aside its own orders if to do so would circumvent serious injustice.[525] Authority suggests that there is no obstacle to a court of civil appeal reopening an appeal even after an order of the court has been perfected.[526] The jurisdiction must, however, "be exercised with great caution"[527] having regard to the difference between relatively straightforward cases where the judgment is only pronounced,

522 *Newmont Yandal Operations Pty Ltd v The J Aron Corporation* (2007) 70 NSWLR 411.

523 *Newmont Yandal Operations Pty Ltd v The J Aron Corporation* (2007) 70 NSWLR 411 at [166].

524 *Bailey v Marinoff* (1971) 125 CLR 529; *Hall v Harris* (1900) 25 VLR 455 at 459–460 per Madden CJ.

525 *Taylor v Lawrence* [2002] 3 WLR 640, adopting the approach of Diplock LJ in *Bremer Vulcan Schiffbau und Maschinenfabrik v South India Shipping Corporation* [1981] AC 909 at 977 that any court must have inherent power to do what is necessary "in order to maintain its character as a court of justice" and that public confidence in the administration of justice made it necessary to reopen a case where significant injustice would result otherwise. See also N Andrews, *English Civil Procedure, Fundamentals of the New Civil Justice System* (Oxford University Press, 2003), p 962.

526 It does not, however, appear to be the law in Australia that intermediate courts of appeal have inherent jurisdiction to vary their own orders. For exceptional views see the dissenting judgments of Gibbs J in *Bailey v Marinoff* (1971) 125 CLR 529, and Kirby J in *DJL v The Central Authority* (2000) 201 CLR 226.

527 *Metwally v University of Wollongong* (1985) 59 ALJR 481.

and the judgment is obtained by some "mistake or misprision",[528] and more difficult assessments wherein the court must weigh the merits of reopening the case against "what might otherwise be irremediable injustice against the public interest in maintaining the finality of litigation",[529] in which case a rehearing would be justified only in "quite exceptional"[530] circumstances.

A matter may also be reopened in an intermediate court even if application has been made for special leave to appeal to the High Court. The application itself is contingent upon the court granting leave, only at which point is the court's jurisdiction engaged and proceedings *inter partes* arise.[531] The High Court in *Pantorno v The Queen*[532] said that a court's jurisdiction was not exhausted "once the judgment had been perfected", and cautioned that the formal distinction between "pronouncement" and "perfection" was "entirely inappropriate" when serious matters such as procuring a judgment by fraud in civil proceedings had been raised.

AMENDMENT OF JUDGMENT OR ORDER

Altering reasons for judgment

[8.670] Reasons delivered by a judge *ex tempore* may, and should, be rectified if they do not express the court's intention at the time they were announced either because they lack the clarity to state that intention, or because an accidental mistake or omission has caused them to say something they could not have intended. The slip rule permits even extensive revision in these circumstances, as long as neither the reasons nor the orders for which they provide the foundation are not substantively altered.[533]

528 *State Rail Authority (NSW) v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 per Mason and Wilson JJ.

529 *Metwally v University of Wollongong* (1985) 59 ALJR 481. See *State Rail Authority (NSW) v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 at 38.

530 *State Rail Authority (NSW) v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 per Mason and Wilson JJ.

531 *Collins v The Queen* (1975) 133 CLR 120 at 122–123 per Barwick CJ, Stephen, Mason and Jacobs JJ; *Eastman v Director of Public Prosecutions (ACT)* (unreported; HCA; McHugh J; 4 September 2002) cited in *Milat v The Queen* (2004) 78 ALJR 672 at [26] per McHugh J.

532 *Pantorno v The Queen* (1989) 166 CLR 466.

533 *Bromley v Bromley* [1964] 3 All ER 226 at 228; *Bromley v Bromley (No 2)* [1965] P 111 at 116; *Bar-Mordecai v Rotman* [2000] NSWCA 123 at [193]. See also *Kwan v Kang* [2003] NSWCA 336 at [66]. For discussion whether a judge has power to alter their published reasons for judgment, whether before or after the judgment is authenticated, see *Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd* (2001) 4 VR 28 at 47–48; *Brew v Followmont Transport Pty Ltd* [2005] 2 Qd R 354. For a case where amended reasons were provided to explain why the original reasons referred to an affidavit not in evidence and the effect of the affidavit see *Orleans Investments Pty Ltd v MindShare Communications Ltd* (2009) 254 ALR 81.

Supplemental order

[8.680] In certain circumstances an authenticated order or judgment may be supplemented, for example, where subsequent circumstances make a supplemental order necessary. However, an order will not be supplemented so as to alter an original order or judgment which properly expresses the intention of the court in substance. So the jurisdiction to make a supplemental order does not extend to circumstances where the original order is incorrect, provided it expresses the court's intention.[534] Where the original order expresses the court's intention it can only be set aside on appeal.

An order may be supplemented so as to make the original order operative, for example, where the enforcement of the original order requires such supplementation.[535] This may require an interlocutory order to be undertaken or enforced in a manner other than originally stipulated by the authenticated order. A supplemental order may be made to determine a question which was not put before the court for consideration in the proceedings from which the authenticated order was made.[536] A supplementary order may be made to ensure that justice is done in the particular case.

Consent judgment by mistake

[8.690] Once a judgment obtained by all parties' consent has been authenticated it cannot, without the consent of all the parties, be set aside on the ground that one of the parties' consent was mistakenly given.[537] If the parties do not provide the necessary consent another proceeding may

534 *Preston Banking Co v William Allsup & Sons* [1895] 1 Ch 141 at 143–144 per Lord Lindley LJ, quoted in *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd* (1993) 45 FCR 224 at 234–235.

535 As, for instance, in the case of an order for specific performance. See *Hall v Burnell* [1911] 2 Ch 551 (order for rescission and forfeiture of deposit on non-compliance with order); *Ford-Hunt v Raghbir Singh* [1973] 1 WLR 738; *Easton v Brown* [1981] 3 All ER 278 (order for inquiry as to damages on late compliance with order); *Cowan v Cavanagh* [1978] VR 665 (order for damages the nature and extent of the liability for which was not known at time of original order); *Remington Products Australia Pty Ltd v Energizer Australia Pty Ltd* (2008) 246 ALR 113 (order in aid of enforcement of injunction). See also *Re Scowby; Scowby v Scowby* [1897] 1 Ch 741 (order that party entitled to costs under original order not be paid the costs except on certain conditions); *McKenna v Richey* [1950] VLR 360; *Universal Homes Ltd v Kloet* [1976] 1 NZLR 246; *Neylon v Dickens* [1987] 1 NZLR 402. An original order was supplemented to make it operable in *Martino v Mostler* (1988) 92 FLR 88 at [50] by the court applying the slip rule.

536 For instance, an order that the costs of the proceeding which a party was ordered to pay be paid by a person not a party. In the Federal Court, FCR O 35 r 7(4) refers to the power of the court to vary or terminate the operation of an order by a supplementary order.

537 *Permanent Trustee Co (Canberra) Ltd (Executor Estate of Andrews) v Stocks & Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45.

be required to have the decision set aside.[538] Sheller JA in *Logwon v Warringah Shire Council*[539] doubted whether the initiation of fresh proceedings was necessary rather than convenient.[540] In his Honour's view a superior court can set aside an order consented to by mistake by a party in a proceeding before it, by exercising its inherent jurisdiction to ensure the integrity of the court's processes, and the administration of justice, provided it was not prevented by an express statutory limitation on that jurisdiction from doing so. An interlocutory or other procedural order mistakenly consented to by a party may be set aside by the court in whose proceeding the order was obtained.[541]

If the agreement of the parties in a proceeding was obtained by a party's consent being induced by a mistake, a court may in another proceeding set aside the judgment. The nature of the mistake must be such that the agreement forming the basis of the judgment was by virtue of the mistake void, or capable of being avoided by the mistaken party, or entitled the mistaken party to seek a remedy in equity against its enforcement.[542] However, a party is not entitled to have an order or judgment obtained with its consent set aside on the basis that it was ignorant about a fact which would have caused it not to provide consent had it possessed that knowledge.[543]

A judgment or order obtained by consent induced by fraud is properly set aside in a separate proceeding.[544] Justice requires that consent orders or a consent judgment may be set aside if facts arise subsequent to the order or judgment being made which reveal it to have been obtained by fraud.[545]

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538 *Ainsworth v Wilding* [1896] 1 Ch 673; *Wilding v Sanderson* [1897] 2 Ch 534; *Kinch v Walcott* [1929] AC 482 at 493; *Permanent Trustee Co (Canberra) Ltd (Executor Estate of Andrews) v Stocks & Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45; *Span v Starwell Pty Ltd* [1984] 1 Qd R 29 at 35. See also *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 505, 511; *Chamberlain v DCT* (1991) 28 FCR 21.

539 *Logwon Pty Ltd v Warringah Shire Council* (1993) 33 NSWLR 13 at 30 (with whose judgment Kirby P and Powell JA concurred).

540 See also *McVey v St Vincent's Hospital (Melbourne) Ltd* [2005] VSCA 233 at [48]; *Paolacci v Capital Finance Australia Ltd* [2009] VSC 31 at [35]–[40].

541 See *Mullins v Howell* (1879) 11 Ch D 763 at 766; and *Wilkshire v Commonwealth* (1976) 9 ALR 325 at 330 (ACTSC), referred to in *Booth v Ward* (2007) 17 VR 195 at [39].

542 See *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273; *Wilding v Sanderson* [1897] 2 Ch 534; *Kinch v Walcott* [1929] AC 482; *Thorne v Smith* [1947] KB 307; *Harvey v Phillips* (1956) 95 CLR 235 at 242–244; *Rayner v Rayner* [1968] QWN 42; *Taylor v Johnson* (1983) 151 CLR 422 at 432; *Span v Starwell Pty Ltd* [1984] 1 Qd R 29; *Cielo v MG Kailis Gulf Fisheries Pty Ltd* (1991) 104 FLR 189 (NTSC).

543 *R v Shire of Marong; Ex rel Filcock* (1903) 29 VLR 355. See also *Easyfind (NSW) Pty Ltd v Paterson* (1987) 11 NSWLR 98; *McDonald v Mackay Hospitals Board* (unreported; QSC; Demack J; No 94/89; 6 December 1995).

544 *Spies v Commonwealth Bank of Australia* (1991) 24 NSWLR 691; *Tresize v National Australia Bank Ltd* (2005) 220 ALR 706; *Cameron v Qantas Airways Ltd* [2008] NSWCA 275.

545 In Queensland, *Rules of the Supreme Court 1900* (Qld), O 45 r 1 provides that when facts arise after the giving of a judgment or making of an order which entitle the person

Where the consent order or judgment obtained by mistake is yet to be authenticated the court making the order or judgment has greater scope for intervention. The court has inherent jurisdiction to prevent injustice arising from the abuse of its processes,[546] and may set aside the order or judgment in the same proceeding.[547] A party was not held to amendments made to a statement of claim on the basis of counsel's mistake as to the nature of the amendments required by the court ordering the amendment.[548]

Judgment void

[8.700] Judgments obtained in proceedings the failings of which rendered them null and void may be set aside in the exercise of the court's inherent jurisdiction.[549] Orders or judgments which are nullities as opposed to irregularities may include those obtained against a non-existent person,[550] or orders made without notice because, for example, service was not effected.[551]

against whom the judgment was given, or the order made, to be relieved from it, the court may grant appropriate relief. This also applies to a judgment or order by consent. In South Australia, the *Supreme Court Civil Rules 2006* (SA), r 242(1), (2) provides that the court may vary or set aside a judgment or order at any time if the justice of the case so requires.

546 See *Permanent Trustee Co (Canberra) Ltd (Executor Estate of Andrews) v Stocks & Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45 at 48; *Cielo v MG Kailis Gulf Fisheries Pty Ltd* (1991) 104 FLR 189.

547 See *Holt v Jesse* (1876) 3 Ch D 177; *Hickman v Berens* [1895] 2 Ch 638 at 646; *Neale v Gordon Lennox* [1902] AC 465; *Shepherd v Robinson* [1919] 1 KB 474; *R v Shire of Marong; Ex rel Filcock* (1903) 29 VLR 355 at 363; *Berriman v Pipeline Engineering Pty Ltd* (1989) 52 SASR 324; *Cielo v MG Kailis Gulf Fisheries Pty Ltd* (1991) 104 FLR 189 (NTSC).

548 *Meadow Gem Pty Ltd v ANZ Executors & Trustee Co Ltd* [1994] VSC 616.

549 *Craig v Kanssen* [1943] KB 256; *Cameron v Cole* (1944) 68 CLR 571 at 589; *Permanent Trustee Co (Canberra) Ltd (Executor Estate of Andrews) v Stocks & Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45 at 48. See also *R v Cripps; Ex parte Muldoon* [1984] QB 686 at 695.

550 *Burr v Anglo-French Banking Corp Ltd* (1933) 149 LT 282; *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289 at 296.

551 *Craig v Kanssen* [1943] 1 KB 256; *Cameron v Cole* (1944) 68 CLR 571.

9 Amendment

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NON-COMPLIANCE

[9.10] For a party, the rules of procedure are the principal source of the steps required to be taken in a proceeding, including how and when those steps are to be taken. Outside the rules, the practice of the court further regulates steps in proceedings. Order 2[1] of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) governs the consequences of a party's failure to take a step, or their failure to do so in a manner determined by the rules.

Rule 2.01 provides:

> **2.01 Effect of non-compliance**
>
> (1) A failure to comply with these Rules is an irregularity and does not render a proceeding or any step taken, or any document, judgment or order in the proceeding a nullity.
>
> (2) Subject to Rules 2.02 and 2.03, where there has been a failure to comply with these Rules, the Court may—
>
> (a) set aside the proceeding, either wholly or in part;
>
> (b) set aside any step taken in the proceeding, or any document, judgment or order in the proceeding;
>
> (c) exercise its powers under these Rules to allow amendments and to make orders dealing with the proceeding generally.

Nullity-irregularity distinction

[9.20] Under the *Rules of the Supreme Court 1884* (Vic)[2] only the court could direct that proceedings were void if the parties failed to take a step or took a step that was not compliant with the requirements under the rules. The court might give directions that, on the basis of the irregularity, proceedings should be set aside either entirely or partially, or order that an amendment be made to effect compliance, or otherwise exercise its discretion to regulate proceedings.

An order made under O 70 r 1 of the *Rules of the Supreme Court 1884* (Vic) required a court to determine whether the effect of the non-compliance rendered the step a nullity, or merely an irregularity. The significance of the distinction lay in the fact that the rules could only make remedial orders effecting irregularities. An irregular proceeding was merely voidable, and was voided only by a court order setting the proceeding aside, whereas a non-compliance amounting to a nullity would render the proceeding void. A voidable proceeding may be amended by the party, or corrected by court order, or waived by the party's opponent.[3] A court,

1 Note that legislative references in this chapter are to the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) unless otherwise specified. O 2 replaced O 70 of the *Rules of the Supreme Court 1884* (Vic). Order 2 is based on O 2 of the *Rules of the Supreme Court 1965* (UK) in England and s 81 of the *Supreme Court Act 1970* (NSW) and Pt 1 r 12 of the *Supreme Court Rules 1970* (NSW). Section 81 of the *Supreme Court Act 1970* (NSW) covers non-compliance with the *Supreme Court Act 1970* (NSW) as well as non-compliance with the rules of court. Order 2 and its counterpart in England apply only to the latter.

2 *Rules of the Supreme Court 1884* (Vic), O 70 r 1.

3 See *Plowman v Palmer* (1914) 18 CLR 339 at 348; *Prior v Hannaford* [1970] VR 772.

however, cannot amend a void proceeding,[4] nor could the opposing party waive the failing by taking a fresh step in the proceeding.

In *MacFoy v United Africa Co*[5] Lord Denning MR distinguished between a void and an irregular act, saying:

> If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. It is automatically null and void without more ado though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse … But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside, and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it.

If the court gave judgment or made an order on the basis of a void proceeding consequent on a party's non-compliant step it could in the exercise of its inherent jurisdiction set the same aside as of right.[6]

Difficulties with distinction between nullity and irregularity

[9.30] The difficulty of distinguishing between nullity and irregularity made the rule[7] difficult to apply in practice.[8] There was little authority defining the nature of a nullity despite numerous decisions that drew both on the distinction and the classification of particular missteps.[9] In *Plowman v Palmer*[10] Isaacs J explained that a step would amount to more than mere non-compliance with the rules if it were "entirely forbidden or excluded by the rules" or were a proceeding that "is not permitted at all at the time it is taken". His Honour stated that the court's jurisdiction to waive an irregularly obtained order was an incident of the fact that the non-compliance was an irregularity. On the other hand, it would not be a mere irregularity if the court had no jurisdiction to make the order, as opposed to making an order obtained without following the correct procedure. The judicial inquiry would therefore look to whether the court had "jurisdiction … to do the act impeached, even though prior precautions for the protection of a party, or other formalities, are directed;

4 See, for instance, *Prior v Hannaford* [1970] VR 772 at 777.

5 *MacFoy v United Africa Co Ltd* [1962] AC 152 at 160.

6 *Anlaby v Praetorius* (1888) 20 QBD 764; *Craig v Kanssen* [1943] KB 256.

7 *Rules of the Supreme Court 1884* (Vic), O 70 r 1.

8 See *Craig v Kanssen* [1943] KB 256 at 258; *Fry v Moore* (1889) 23 QBD 395 at 398; *Pontin v Wood* [1962] 1 QB 594 at 610; *Sydney Cove Redevelopment Authority v Maniaci* [1972] 1 NSWLR 453 at 457.

9 *Kingstone Tyre Agency Pty Ltd v Blackmore* [1970] VR 625 at 636 per McInerney J.

10 *Plowman v Palmer* (1914) 18 CLR 339 at 347.

or is the act complained of, in the circumstances entirely unprovided for or prohibited at the time the act is done?"[11]

In *Re Pritchard (dec'd)*[12] Upjohn LJ, reviewing the relevant authorities, identified three classes of nullity, being:

> (i) proceedings which ought to have been served but which have never come to the notice of the defendant at all …; (ii) proceedings which have never started at all owing to some fundamental defect in issuing the proceedings; (iii) proceedings which appear to be duly issued but fail to comply with a statutory requirement.

Lord Denning MR in dissent in that case was only prepared to recognise one true form of null proceeding that arose when a sole plaintiff or defendant was either dead, or non-existent. Lord Denning said: "The only true cases of nullity that I have found are when a sole plaintiff or a sole defendant is dead or non-existent and I would like to see the word 'nullity' confined to those cases in the future." A nullity arises when the irregularity is so fundamental that it creates an unconditional right in the party to have the judgment set aside *ex debito justitiae*.[13] While acceptable as a general proposition, the consequences of an order made pursuant to a fundamental irregularity have been held to depend on the position of the court in the system. A superior court decision even if *ultra vires* is only capable of being set aside, and is valid otherwise.[14]

In Australia in *Cameron v Cole*[15] Rich J reviewed Lord Greene MR's distinction in *Craig v Kanssen* between a nullity and an irregularity. His Honour noted that Lord Greene's formulation was made in the context of a superior court decision so that its unrelieved abstraction was without consequence, but proposed instead that the applicable distinction to be considered by a superior court as opposed to an inferior court was that between irregularities so fundamental that they gave rise to a right unconditionally to have proceedings set aside, and non-fundamental

11 Starke J in *Posner v Collector for Inter-State Destitute Persons (Vic)* (1946) 74 CLR 461 also recognised a distinction between an order which a court has no jurisdiction to make and an order which, though within jurisdiction, has been made without the prescribed procedure being followed. The distinction was made in Chitty, *Archbold's Practice* (14th ed), referred to in *Gregory v Murphy* [1906] VLR 71 at 75, and *Beugelaar v City of Springvale* [1969] VR 3 at 7.

12 *Re Pritchard (dec'd)* [1963] Ch 502 at 523–524.

13 *Craig v Kanssen* [1943] KB 256 per Lord Greene MR; See also *Sydney Cove Redevelopment Authority v Maniaci* [1972] 1 NSWLR 453 at 458; *Posner v Collector for Inter-State Destitute Persons (Vic)* (1946) 74 CLR 461 at 477. For more recent examination of the distinction between nullity and irregularity in the context of a proceeding naming as defendant a person who was dead when the proceeding commenced, see *Deveigne v Askar* (2007) 69 NSWLR 327.

14 Baron Martin advising the House of Lords in *Scott v Bennett* (1871) LR 5 HL 234 at 245.

15 *Cameron v Cole* (1944) 68 CLR 571.

irregularities regarding which the court may exercise its discretion as to whether or not they are to be set aside.[16]

Instances of void proceedings

[9.40] In *Re Pritchard (dec'd)*[17] the court held the defect to be incurable, the originating process to constitute a nullity, and the proceedings void and incapable of being remedied under the previous O 70 r 2 of the *Rules of the Supreme Court 1884* (Vic). In that case an originating summons had been issued from a local court that should have been sealed for service in the Royal Courts of Justice. The rules at that time gave the court no power to remedy null proceedings therefore, the summons being a nullity, the proceedings which it initiated were incurably void.[18] The court would not allow an amendment substituting the name of a deceased's persons' representative on the writ initiating an action in the name of a deceased person.[19] In Victoria, under r 2.01(1) there is no relevance in the distinction between an irregularity and a nullity in relation to non-compliance with the rules, because commencing an action against a named dead person is not an failure of compliance with the rules.[20] However, r 9.08(3) provides:

> (3) A proceeding commenced naming as defendant a person who was dead when the proceeding commenced shall, if the cause of action survives and no grant of representation had been made at the time the proceeding commenced, be taken to have been commenced against the estate of the deceased in accordance with paragraph (1).

Rule 9.08(1) states:

> (1) Where a cause of action survives against the estate of a deceased person, a person wishing to obtain a judgment in respect of that cause of action may, if no grant of representation has been made, bring a proceeding against the estate of the deceased

Only r 9.08(3) prevents a proceeding against a dead person from being a nullity where r 2.01 would not assist.

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16 Upjohn LJ reviewed the case law and said: "I do not think that the earlier cases or the later dicta upon them prevent me from saying that, in my judgment, the law when properly understood is that Ord 70 applies to all defects in procedure unless it can be said that the defect is fundamental to the proceedings. A fundamental defect will make it a nullity. The court should not readily treat a defect as fundamental and so a nullity, and should be anxious to bring the matter within the umbrella of Ord 70 when justice can be done as a matter of discretion, still bearing in mind that many cases must be decided in favour of the party entitled to the complain of the defect *ex debito justitiae*. Lord Denning in *MacFoy* pointed out that a useful test was whether the defect could be waived."

17 *Re Pritchard (dec'd)* [1963] Ch 502.

18 *Rules of the Supreme Court 1884* (Vic), O 70 r 1.

19 *Clay v Oxford* (1866) LR 2 Ex 54; *Tetlow v Orela Ltd* [1920] 2 Ch 24. As to striking out a sole plaintiff and substituting another, see *La Banca Nazionale Sede di Torino v Hamburger* (1852) 2 H & C 330; *Coombs v Bristol and Exeter Railway Co* (1858) 3 H & N 510; *Podmore v Schmidt* (1864) 17 CBNS 725.

20 *Dawson (Bradford) Ltd v Dove* [1971] 1 QB 330.

Historically, proceedings were a nullity for having been instigated against a non-existent defendant which had ceased to exist as a juristic person before the date of the writ.[21] The facts of the case of *Lazard Bros & Co v Midland Bank Ltd*[22] were that in October 1930 Lazard Bros obtained leave under the *Rules of the Supreme Court 1883* (UK) to issue and serve a writ by notice on the Banque Industrielle de Moscou (a corporation which had been established by an Act of the Russian Tsar) at its Moscow address for the payment of a debt. Having obtained judgment in default of appearance against the Banque Industrielle de Moscou Lazard Bros then obtained a garnishee order *nisi* against Midland Bank Ltd which was indebted for £362,396 and 15 shillings to the Banque Industrielle de Moscou, thereby triggering the hearing of the matter of the indebtedness as between the banks. Evidence was led that the Midland Bank Ltd had owed the Banque Industrielle de Moscou the money prior to the Bolshevik revolution of October 1917 and that the Banque Industrielle de Moscou owed money to Lazard Bros. By the time Lazard Bros initiated proceedings in October 1930 the Banque Industrielle de Moscou had ceased to exist because of the effect of certain Russian Government decrees and departmental orders issued between October 1917 and 3 August 1921 which either nationalised or liquidated all private banking corporations. English Courts recognised the governing authority in Russia retroactively from October 1917 as being the Soviet State.[23] The writ had arrived at the address of the Commercial and Industrial Bank of the Soviet Republic which had no connection with the former bank which at the material time of the writ was non-existent. The court held that the proceedings were a nullity and ordered the judgment and garnishee orders were to be set aside.

Actions commenced in the Supreme Court without prior leave under the *Local Government Act 1958* (Vic) were considered a nullity incapable of being revived. In *Beugelaar v City of Springvale*[24] the plaintiff brought proceedings against the City of Springvale in respect of personal injuries sustained in a motor vehicle accident in the relevant municipality in the Supreme Court of Victoria. The *Local Government Act 1958* ("the Local Government Act") provided that the action "may … be brought in the County Court … (and) shall not be brought in the Supreme Court."[25] Starke J interpreted the words "shall not be brought" as meaning that no action could be commenced in the Supreme Court. Under the Local Government Act the Supreme Court could grant leave to the plaintiff to commence or transfer proceedings to the Supreme Court. His Honour interpreted the grant as subject to a condition precedent that the plaintiff

21 *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289; *Re Kilkenny Engineering Pty Ltd (in liq)* (1976) 13 SASR 258.

22 *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289.

23 *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 3 KB 532.

24 *Beugelaar v City of Springvale* [1969] VR 3.

25 *Local Government Act 1958* (Vic), s 882(1).

had not already brought the action. The plaintiff's action against the City of Springvale, having already commenced, was dismissed.

A judgment entered in default of appearance where the defendant had not been served with the writ has been held to be an incurable nullity. In *Craig v Kanssen*[26] an order was made in favour of a plaintiff who had failed to serve process as required. The Court of Appeal decided that the court was entitled in the exercise of its inherent jurisdiction to set the order aside as a nullity without the need for appeal. An order made against a party who should have received service of process was not merely a voidable irregularity but void. According to Lord Greene MR an order made against an unnotified defendant who had thereby lost the opportunity to appear and argue their case was "affected by a fundamental vice".

A proceeding is void where an order is made on the hearing of a summons reinstated after being struck out, and notice of the reinstatement was not given to the party against whom the order was made. In *Guss v R Sollner Pty Ltd*[27] Guss, the defendant in the original proceeding, applied for an order to set aside a decision and an award of costs in the plaintiff's favour, and for a rehearing of the matter, after 12 months, at which point the plaintiff in enforcement of the order served a bankruptcy notice on the defendant. The plaintiff (Sollner Pty Ltd) had failed to appear at the hearing of a civil matter which was consequently struck out and costs ordered in favour of Guss. The plaintiff did not apply to set aside the striking out order and reinstate the matter — which application by having to be served would have put the defendant on notice. Instead, the matter was subsequently moved to Sandringham and heard without being reinstated, or the defendant notified, where an order with costs was made for the plaintiff. The plaintiff then applied for and was granted an order striking out the original order.

The magistrate refused the application, but on appeal the magistrate's dismissal of the application was set aside on the basis that the magistrate had erred in failing to consider whether the judgment for the plaintiff had been regularly obtained, or the defendant had waived the irregularity, and an order made that the matter be reheard. The defendant had been denied natural justice by not being notified of a matter which was heard unreinstated, and was prejudiced by not being given an opportunity to

26 *Craig v Kanssen* [1943] KB 256; *Posner v Collector for Inter-State Destitute Persons (Vic)* (1946) 74 CLR 461 at 489; *Chettiar v Chettiar (No 2)* [1962] 2 All ER 238 at 244; *Re Pritchard (dec'd)* [1963] Ch 502; *Re Zagoridis; Ex parte Q'Plas Group Pty Ltd* (1990) 27 FCR 108; compare *Nicholson v Edwards* (1888) 10 ALT 43; *Crawford v Fisher* (1907) 24 WN (NSW) 102.

27 *Guss v R Sollner Pty Ltd* (unreported; VSC; Smith J; No 12377/90; 9 July 1991).

raise an arguable defence. The irregularity of the case rendered the proceedings a nullity (which could not be waived[28]) and the judgment void.

Non-compliance an irregularity only

[9.50] In *Re Pritchard (dec'd)*[29] the English Court of Appeal held that a proceeding initiated in the wrong registry of the High Court was null and void on that basis. An amendment to the rules in 1964 overcame the Court of Appeal decision.[30] That new rule provided the basis for the Victorian r 2.01(1).[31] It abolished the distinction between a nullity and an irregularity where parties were not compliant with the procedural rules, and rendered failures of this type irregularities only, thus preserving proceedings from being declared nullities.[32]

The effect of r 2.01(1) is not to eradicate the concept of void proceedings. The concept is preserved, and courts may hold proceedings void, for example, if proceedings are commenced contrary to a statutory prohibition, or are commenced in a manner not meeting statutory requirements.[33] Nor will r 2.01(1) operate to save a proceeding from being a nullity where it was commenced against a non-existent or dead person, unless in circumstances where r 9.08(3) applies.[34] While r 2.01 makes a

28 In the judgment of Mr V Luppino in *BDO Chartered Accountants and Advisers v Diamon & Zikos Investments Pty Ltd* [2006] NTMC 067 it was said (at [11]): "As Mr Clift pointed out, correctly in my view, a party cannot waive a nullity per *Beugelaar v City of Springvale* [1969] VR 3 and *About Holdings Pty Ltd v Bellbird Enterprises Pty Ltd* (1996) 17 WAR 309. Proceedings that are a nullity in the context described are a nullity *ab initio* per *Mann v The Territory News (No 3)*. As a result anything that occurs thereafter cannot be cured either by consent or amendment and it therefore logically follows that it cannot be the subject of an estoppel."

29 *Re Pritchard (dec'd)* [1963] Ch 502 (Lord Denning MR dissenting).

30 See *Harkness v Bell's Asbestos & Engineering Ltd* [1967] 2 QB 729 per Lord Denning MR; *Metroinvest Anstalt v Commercial Union Assurance Co plc* [1985] 2 All ER 318 at 322. The relevant rule of court in England at the time was the same as *Rules of the Supreme Court 1884* (Vic), O 70 r 1.

31 In New South Wales, the provision corresponding to r 2.01, s 81 of the *Supreme Court Act 1970* (NSW), applies to non-compliance with both the Supreme Court Act and the rules of court. See *Australian Coastal Shipping Commission v Curtis Cruising Pty Ltd* (1989) 17 NSWLR 734 at 750–751.

32 *Harkness v Bell's Asbestos & Engineering Ltd* [1967] 2 QB 729; *Rust v Barnes* [1980] 2 NSWLR 726 at 741; *Marriner v Smorgon* [1989] VR 485 at 489.

33 See, for instance, *Beugelaar v City of Springvale* [1969] VR 3. See also *Perez v Transfield (Qld) Pty Ltd* [1979] Qd R 444.

34 In *Bank of America National Trust and Savings Assn v Christmas* [1994] 1 All ER 401 the equivalent to r 2.01 in England was held subject to other rules restricting amendments that may be made to claims, and the joinder of parties, outside the limitation period.

non-compliance an irregularity only, it does not spare the irregularity from being a matter of substance potentially warranting that a step taken in the proceedings be set aside.[35]

In *Smart v Stuart* Angel J observed that defective writs may in certain circumstances be recognised as nullities, but advised against declaring, as "altogether inappropriate", even inoperative documents, such as those neither able to be amended nor capable of operating without such amendment, nullities.[36] Documents that are formally compliant with the rules of court and that have been sealed and issued at the court registry are not later to be made void.

A proceeding initiated in a court having jurisdiction to hear the proceeding should not, unless in exceptional circumstances, be declared void. Even where the pleadings fail to comply with the rules the court has jurisdiction both inherently and under the rules of court to set aside a proceeding, or a step in the proceeding, or to order an amendment, or make other appropriate orders. In the High Court's decision in *Bridge Shipping Pty Ltd v Grand Shipping*[37] r 36.01(4) was held to be a remedial rule to be given the widest possible construction[38] and applicable in cases of misnomer, clerical error and misdescription, and where the plaintiff, intending to sue a person identified by a particular description, was mistaken as to the name of the person who answered that description.

Dealing with irregularity

[9.60] Where a proceeding is irregular for failing to comply with the rules, r 2.01(2) confers a wide discretion on the court to make orders with respect to the irregularity as appropriate to do justice in the particular case.[39] The rule empowers the court to set the proceeding aside, or to overcome the irregularity by making an appropriate order, including but not limited to ordering a complete or partial amendment to the procedure or a procedural step, or a document, or a judgment or order given.

In exercising its discretion in the interests of justice it is appropriate for the court to consider the prejudicial effect, if any, on the other party of allowing a party to make an amendment;[40] and, whether other rules apart

35 *Black Creek Deer Farm Pty Ltd v ANZ Banking Group Ltd* (unreported; VSC; Beach J; No 7701/94; 31 July 1995) (defective affidavit in support of application for summary judgment).

36 *Smart v Stuart* (1992) 2 NTLR 43; 83 NTR 1 at 7.

37 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231.

38 McHugh J, with whom Brennan and Dean JJ agreed, *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at 260–261. Reference might also be made to the decision of the Court of Appeal in *Smart v Stuart* (unreported; VSCA; 2 April 1992), especially the reasons of Mildren J.

39 *Hubbard Assn of Scientologists International v Anderson (No 2)* [1972] VR 577 at 580. See also *MacFoy v United Africa Co Ltd* [1962] AC 152.

40 *Smalley v Robey & Co Ltd* [1962] 1 QB 577; [1962] 1 All ER 133 at 135; *Metroinvest Anstalt v Commercial Union Assurance Co plc* [1985] 2 All ER 318.

from those permitting amendment to be made would act to confer a benefit on the non-compliant party which are contraindicated by the interests of justice given the facts of the case.[41] The more severe the prejudice to the other party the more the court will have to inform itself through evidence that the purposes and requirements of the rule not complied with were nevertheless achieved, albeit in a non-compliant form.[42]

In appropriate cases the court may, depending on what is necessary to do justice in the case, disregard an irregularity, or order that the irregularity be disregarded, without a prior order that it be corrected.[43] The court may exercise its power under r 2.01(2)(c) to order an amendment in the case of non-compliance even after judgment has been entered.[44]

Rule 2.01 confers a power on the court to deal with non-compliance with the rules in addition to its power to dispense with compliance with the rules' requirements under r 2.04.[45] A breach of the rules need not be declared by the court to constitute non-compliance. Non-compliance with the rules is and remains an irregularity until, under r 2.01(2) or r 2.04, the court has dealt with it, or the other party has waived the need for compliance. An unwaived breach that the court has not dealt with under the rules is an irregularity.[46]

By r 2.01(2), the court's power to set aside proceedings or parts of proceedings, or order an amendment, is subject to rr 2.02[47] and 2.03.[48] Merely commencing proceedings using the wrong process will not determine the setting aside of the proceeding or the originating motion or writ by which it was commenced.[49] Rule 4.07(1) provides that a proceeding which ought, in accordance with the procedural rules or under statute, or as a matter of convenience in the court's opinion, to have commenced by writ but which was initiated by originating motion may be subject to a court order that proceedings continue as if they had been commenced by writ. Proceedings, steps in a proceeding, documents,

41 *Metroinvest Anstalt v Commercial Union Assurance Co plc* [1985] 2 All ER 318.

42 *Clifford v Middleton* [1974] VR 737 at 741. For example, in the context of a committal proceeding where the proceeding involves the liberty of the subject.

43 *ANZ Banking Group Ltd v Kostovski* (unreported; VSC; Chernov J; No 5511/97; 2 July 1997), referring to *Metroinvest Anstalt v Commercial Union Assurance Co plc* [1985] 2 All ER 318.

44 *Singh v Atombrook Ltd* [1989] 1 WLR 810.

45 *Alice Springs Abattoirs Pty Ltd v Northern Territory* (1996) 111 NTR 9; see also *Rust v Barnes* [1980] 2 NSWLR 726 at 740.

46 See *Metroinvest Anstalt v Commercial Union Assurance Co plc* [1985] 2 All ER 318.

47 This rule is taken from O 2 r 1(3) of the *Rules of the Supreme Court 1965* (UK) and s 81(2) of the *Supreme Court Act 1970* (NSW).

48 Rule 2.03 reproduces the substance of *Supreme Court (General Civil Procedure) Rules 1996* (Vic), O 70 r 2. The rule is taken from s 81(3) of the *Supreme Court Act 1970* (NSW), which in turn is based on O 2 r 2(1) of the *Rules of the Supreme Court 1965* (UK).

49 Rule 2.01(2).

judgments, or orders will not be set aside by order of the court merely because a party has not complied with r 2.01, unless the applicant seeks the order within a reasonable time of having become aware of the irregularity and without having waived any objection to the irregularity by taking a fresh step in proceedings.

Mode of correcting irregularity

[9.70] An unremediable non-compliance with the rules of procedure committed by a party does not require that the court set proceedings aside if it is able to make an order capable of safeguarding the other party's interests. In *Hubbard Assn of Scientologists International v Anderson (No 2)*[50] after the issuing of the writ in the name of a company was not undertaken by a solicitor, and the time for compliance had expired, rather than set aside the writ the court ordered that the proceeding be stayed to allow the company to appoint a solicitor.

A number of approaches may be taken to deal with an irregularity arising from non-compliance with the rules. For example, the court may adjourn the hearing of a summons not served in proper time,[51] or served without the proper material in support.[52] In *Roberts v British Bank of Australasia*[53] a summons returnable on Monday 17 August, was served on Thursday 13 August, and the affidavit in support was not served until Saturday, 15 August, failing to give the defendant the two clear days required under the rules to consider and respond to the summons. The court held that this amounted to an irregularity which did not void the proceedings and was remedied by an adjournment to give the defendant the time under the rules and costs of the day's proceedings.

A prematurely entered default judgment may be set aside. In *Anlaby v Praetorius*[54] the Court of Appeal upheld an application against the court below refusing to set aside a judgment which the plaintiff had entered prematurely and irregularly. The judgment having been obtained entirely outside the rules the defendant was entitled to have it set aside *ex debito justitiae*. It is not a matter of non-compliance with the rules or of acting irregularly with respect to, but still under, certain rules. The matter does not come within the rules and the decision is to be made without reference to the rules. The proceedings were void and the plaintiff had no right to obtain a judgment.[55]

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50 *Hubbard Assn of Scientologists International v Anderson (No 2)* [1972] VR 577.

51 *Roberts v British Bank of Australasia* (1891) 17 VLR 355.

52 *Tunstall Brick & Pottery Co v Mercantile Bank of Australia Ltd* (1892) 18 VLR 59; *Trustees Executors & Agency Co Ltd v Wilson* [1940] VLR 413.

53 *Roberts v British Bank of Australasia* (1891) 17 VLR 355.

54 *Anlaby v Praetorius* (1888) 20 QBD 764; *Daly v Silley* [1960] VR 353.

55 *Anlaby v Praetorius* (1888) 20 QBD 764 at 769 per Fry LJ.

Courts may also set aside,[56] or amend,[57] a default judgment entered for more than what is due.

Application to set aside

[9.80] Under the *Rules of the Supreme Court 1884* (Vic)[58] that party applying to have a proceeding set aside for irregularity was required to state the grounds on which they objected to the proceedings in the summons. That is now not a requirement under the new rules. However, procedural fairness suggests that a party whose proceeding is sought to be impugned should be adequately notified of the grounds on which the objection is taken. A statement of the grounds of objection is therefore required in practice either on the summons, or in a supporting affidavit.[59]

Within a reasonable time

[9.90] Although an application may be made at any time they should be made without undue delay in order to avoid the court's refusing them in its discretion.[60] In some cases an objection on the grounds of irregularity, if made after considerable delay, may be refused for being made too late. For example, applying for service of a writ *ex juris* 14 months after the writ had been served was held to have been made after too long a time.[61] An objection made to the improper cause of action made at trial was held to have been made too late. In *Re Derbon; Derbon v Collis*[62] the court held that where the plaintiff has improperly joined several causes of action in one writ the defendant should as soon as possible after filing the statement of defence apply to the court for an order to amend or set aside the writ. The court will base its decision on the justice of the case having regard to all the relevant circumstances.[63] However, should the defendant take a step in the action they will be taken to have waived the right to object to the irregularity, and put it beyond objection, such that it will no longer play a part in the court's consideration of the plaintiff's case. A positive act constituting waiver on the part of the defendant may include filing a defence, or moving an application before the court. The party's position will then be compromised, and they will be unable to maintain the right to object which by their actions had been disposed of or disregarded.[64]

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56 *Bolt & Nut Co (Tipton) Ltd v Rowlands Nicholls & Co Ltd* [1964] 2 QB 10.

57 *Muir v Jenks* [1913] 2 KB 412; see also *Building Guarantee & Discount Co Ltd v Dolejsi* [1967] VR 764.

58 *Rules of the Supreme Court 1884* (Vic), O 70 r 3.

59 See *Abraham v Della Ca (No 2)* (1897) 23 VLR 454; *Re Sanders* (1919) 147 LT Jo 212.

60 See, for example, *Reynolds v Coleman* (1887) 36 Ch D 453; *Singh v Atombrook Ltd* [1989] 1 WLR 810.

61 *Reynolds v Coleman* (1887) 36 Ch D 453.

62 *Re Derbon; Derbon v Collis* (1888) 58 LT 519.

63 *Lloyd v Great Western Dairies Co* [1907] 2 KB 727.

64 *Re Derbon; Derbon v Collis* (1888) 58 LT 519.

An action instituted after judgment was given is irregular. In *Charles P Kinnell & Co v Harding Wace & Co*[65] the defendant appealed a default judgment of the County Court in Surrey in favour of the plaintiff company on the grounds that the plaintiff appeared not through a solicitor but an ordinary company agent. The plaintiff had been incorporated under the *Companies (Consolidation) Act 1908* (UK). Neither the propriety of the agent's appointment nor their authority was disputed.[66] The issue raised on appeal was whether the trial judge had acted correctly in permitting the agent to appear in place of the corporate plaintiff at trial. It is a common law doctrine and a well-established rule of practice that a juristic person cannot appear in court proceedings except as a legal practitioner. However, s 72 of the *County Court Act 1888* (UK) which made it "lawful for … any other person" to appear and act on behalf of "any party to an action or matter" rendered the common law doctrine inapplicable in proceedings before the County Court.[67]

In *Alice Springs Abattoirs v Northern Territory*[68] on the hearing of an application to set aside an appellant's summons, defence and counterclaim on the basis that they had not been filed by a solicitor, and for an order that the appellant "take no further step in this proceeding except by a solicitor", Kearney J referring to *Charles P Kinnell & Co v Harding Wace & Co*,[69] said:

> I consider that any court, in exercising its inherent power to control its own proceedings, may allow itself to be addressed by any one it considers a proper person to be permitted audience in the circumstances; this includes hearing a lay person on behalf of a corporation, though such person generally should be a director, officer or regular employee of the corporation and the matter in issue should be of such a nature that the court does not consider it requires the assistance of a legal practitioner in order to resolve it.[70]

There had been unreasonable delay in waiting until four months after service to object to the sufficiency of an indorsement of claim on a writ. In *Pontin v Wood*[71] the issue was whether a defective writ issued just prior to the expiration of the relevant limitation period was able to be set aside because a procedural defect had not been remedied within the limitation period. The defect in the writ consisted of it being endorsed merely with the words "the plaintiffs' claim is for damages for personal injuries". The judge at trial decided the writ was null and void, and not curable by serving an effective statement of claim within the limitation period. On

65 *Charles P Kinnell & Co Ltd v Harding Wace & Co* [1918] 1 KB 405.

66 *Companies (Consolidation) Act 1908* (UK), s 76.

67 *Charles P Kinnell & Co Ltd v Harding Wace & Co* [1918] 1 KB 405 at 413 per Warrington LJ (Swinfen Eady LJ concurring).

68 *Alice Springs Abattoirs Pty Ltd v Northern Territory* (1996) 111 NTR 9.

69 *Charles P Kinnell & Co Ltd v Harding Wace & Co* [1918] 1 KB 405 at 413.

70 *Alice Springs Abattoirs Pty Ltd v Northern Territory* (1996) 111 NTR 9 at [11] (citations omitted).

71 *Pontin v Wood* [1962] 1 QB 594.

appeal the court applied the distinction between an irregularity and a nullity available under the new rules, and held the writ defective and irregular but not null and void, and capable of being cured by the plaintiff serving a proper statement of claim after the limitation period had expired.

Edmund Davies LJ dismissed the respondent's submission that to permit the appellant to deliver the statement of claim would deprive the defendant of a rightful defence that had accrued to it. His Lordship distinguished the authorities provided in support of the submission as cases in which a party not able to act as of right sought leave for an order that would be detrimental to the other party,[72] whereas in the instant case the party could as of right take the necessary step to overcome the defective proceeding. The endorsement was defective for not sufficiently particularising the cause of action, and particulars could be supplied by the filing of further pleadings not requiring the leave of the court.

Holroyd Pearce LJ distinguished between cases in which the court's intervention in allowing substantive amendments such as adding causes of action to a statement of claim would deny a defendant a statutory defence, and those where *bona fide* applicants solicited the court's assistance under the rules' provisions in curing merely technical defects to propel an action commenced prior to the expiration of any limitation period. His Lordship quoted Bowen LJ to the effect that "it is not possible for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in litigation."[73] Courts did, however, recognise that in some cases proceedings may be so defective as to put them beyond the remedial capacity of the rules. Faults rendering it impossible for a court to determine a controversy between parties on the substantive merits were incurable because they undermined the possibility of a proper hearing to which all parties had a right.[74]

On the other hand, application was made within a reasonable time in *Elsum v Jameson*.[75] A defendant objected to the sufficiency of the indorsement of claim on the writ after service and before appearance. The

72 *Weldon v Neal* (1887) 19 QBD 394; *Marshall v London Passenger Transport Board* [1936] 3 All ER 83; and *Batting v London Passenger Transport Board* [1941] 1 All ER 228.

73 *Pontin v Wood* [1962] 1 QB 594 at 609 per Holroyd Pearce LJ, citing Bowen LJ. See also Lord Denning MR in *Harkness v Bell's Asbestos & Engineering Ltd* [1967] 2 QB 729 at 735–736 (citations omitted): "Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice. It can at last be asserted that 'it is not possible for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation. That could not be said in 1963: see *In re Pritchard, dec'd*. But it can be in 1966. The new rule does it.'"

74 See *Charlesworth v Focusmulti Ltd* (UKCA; 15 March 1993; transcript 1993 0228 CA; 17 February 1993). Otherwise the new rules were said to be an "all embracing principle": *Associated Leisure (Phonographic Equipment Co) Ltd v Associated Newspapers Ltd* [1970] 2 QB 450 at 457 per Edmund Davies LJ, codifying procedural laws.

75 *Elsum v Jameson* [1974] VR 529 at 533.

defendant appealed the Master's order dismissing the defendant's application that the writ be set aside and ordering that a statement of claim be filed and served within 14 days. The basis of the defendant's applications had been that the writ was not a statement sufficient to notify the defendant of the nature of the claim against him, the cause of action, and the relief or remedy sought, as required under O 3 r 1 of the then *Rules of the Supreme Court 1957* (Vic). The terms of the writ delivered by the plaintiff were: "The plaintiff's claim is for damages arising out of a motor car accident that occurred on or about 12 December 1963 on Burwood Highway, Vermont, as a result of which the plaintiff suffered loss and damage." Pursuant to O 3 r 1 as it was at the time the defendant applied to set aside the writ prior to appearance.

The Full Court of the Supreme Court held that the language of O 3 r 1 required that the writ contain "a statement sufficient to give notice of the nature of the claim and the cause thereof and of the relief or remedy required in the action". It further held that the endorsement was non-compliant because, while the plaintiff identified damages in relief, neither the nature nor the cause of the claim were sufficiently stated. The non-compliance of the writ with O 3 r 1 was an irregularity which the court could deal with by an order to set aside, amend, or otherwise (for example, by delivery of a statement of claim). The writ had been issued within the limitation period for the action, and the subsequent expiry of that period could be overcome by allowing the plaintiff to amend the endorsement or to file and serve a statement of claim. In the Full Court's view the writ was so defective as to make an order for amendment inappropriate. Further, the writ having been issued within the prescribed period under s 5(6) of the *Limitation of Actions Act 1958* (Vic),[76] but having been endorsed without notice to the defendant requiring a pleading a statement of claim could not be delivered without leave of the court, which would deprive the defendant of the legitimate defence that the statutory period for an action claiming damages for personal injuries had expired.[77]

The Full Court held that the Master ought to have made an order limiting delivery of a statement of claim to causes the limitation period of which had not expired, but as the Master had not so limited the order the defendant's appeal was upheld.

In *Costain Australia Ltd v Dennehy*[78] a plaintiff applied to have set aside an order granting the defendant leave to appear and defend a proceeding three months after the order had been made. The defendant was served a writ under the *Instruments Act 1958* (Vic) on 17 February 1983 and eight days later on Friday 25 February 1983 at approximately 4.45 pm applied to King J to appear and defend the action, which was granted.

76 *Limitation of Actions Act 1958* (Vic), s 5(6) was subsequently repealed.

77 The position was that considered in, and the court's decision followed, *Hill v Luton Corporation* [1951] 2 KB 387 at 391.

78 *Costain Australia Ltd v Dennehy* [1983] 2 VR 353.

Immediately after leave was granted, the Prothonotary's office being closed, the defendant's solicitors filed a handwritten appearance with the judge's associate, and informed the associate that he would deliver a typewritten version of it to him on Monday, 28 February, which he did. However, earlier that same day, while the appearance was with the associate but had not yet been placed on the file, the plaintiff's solicitors entered judgment in default of appearance. On 7 March the defendant applied to have the judgment set aside for irregularity, and on 9 May the plaintiff applied to have King J's order set aside.

Under s 4 of the *Instruments Act 1958* judgment may be signed unless the defendant obtained leave to appear and defend within eight days "inclusive of the day of service". Although s 5 does not expressly contain the words "inclusive of the day of service" it has been held to do so implicitly.[79] In *Noonan v Townsend*[80] appearance could not be entered on 14 June on a writ served on 6 June. By 25 February it was too late to obtain leave to appear, and to enter an appearance.

The court proceeded, without argument being led under the section of the Instruments Act, on the basis that the application for the defendant was brought under O 70 r 2 of the *Rules of the Supreme Court 1884* (Vic), allowing the court to set aside a proceeding for irregularity if made within a reasonable time. Thus King J's orders were set aside.

Before taking fresh step

[9.100] A party that becomes aware of another party's irregularity but nevertheless takes a fresh step in the proceedings has thereby waived its right to apply to have the proceedings set aside for that irregularity. A party may only apply to set proceedings aside on the basis of irregularity subject to the condition that they have not themselves taken a fresh step in the proceedings subsequent to having become aware of the irregularity. It would be unfair on the other party to surprise it by seeking to rely on an irregularity, having appeared to waive it earlier in proceedings.[81]

Therefore, for a party to establish that the opposing party has waived the right to object to an irregularity they must demonstrate that the opposing party took a step which would only have been necessary or useful to it had they actually waived the objection, or if they had never considered objecting, to the irregularity.[82] The party objecting must by evidence demonstrate that it is reasonable to infer that the opposing party's words

79 *Gerschel v Wilson* (1891) 12 ALT 146.

80 *Noonan v Townsend* (1894) 20 VLR 341; compare *Gerschel v Wilson* (1891) 12 ALT 146 and *Lazarus v Stutchbury* (1886) 7 LR (NSW) 328.

81 *Brickfield Properties Ltd v Newton* [1971] 1 WLR 862; [1971] 3 All ER 328 at 339–340 per Edmund Davies LJ. See also *Rust v Barnes* [1980] 2 NSWLR 726 at 741.

82 *Rein v Stein* [1892] 1 QB 753; (1892) 66 LT 469 at 471 per Cave J.

or conduct constituted a waiver of their intention to rely on any objection they might have to the irregularity.[83]

A party will not have waived its right to object to an irregularity where it is demonstrable that its intention is not to waive the irregularity.[84] A fresh step where it is a step to raise an objection to an irregularity is not a step in waiver of the right of objection. It does not, for example, constitute waiver for a party seeking to object to service out of jurisdiction to make an application for the inspection of the documents referred to in an affidavit relied upon by the other party in seeking an order for service.[85]

In *Emeris v Woodward*[86] a defendant objected to a plaintiff seeking to obtain a remedy from a judge on a summons in a chambers proceedings. The defendant stated that the plaintiff was required to proceed by initiating an action. The defendant in argument filed affidavits supporting his objection, and in answer to the plaintiff's evidence, and conducted cross-examination of the plaintiff's witnesses. The court held that the defendant had not waived his objection as his actions were necessary to protect his position and furnish evidence in response to the plaintiff's.[87]

Steps taken to have amounted to a waiver of objection have included the filing of an unconditional appearance whereby the defendant waives any irregularity in the proceedings up to the time appearance was entered, and submits to the court's jurisdiction to grant the plaintiff a remedy as against the defendant.[88] A defendant who, knowing of the existence of the irregularity, takes steps to defend the case by arguing it on its merits waives any irregularity in the way proceedings were instituted or process served thereby.[89] The defendant has taken steps that should only be taken to advance valid proceedings. A defendant pleads the merits of the case if, for example, they dispute liability, and they may submit to jurisdiction by seeking a stay of proceedings (being an implicit acknowledgment of the court's jurisdiction).[90]

The defendant must take the earliest opportunity to raise any objections, and may make an application to contest jurisdiction before entering either

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83 *Lindgran v Lindgran* [1956] VLR 215 at 220.

84 *Hadley & Co v Henry* (1896) 21 VLR 646 at 649; *Brickfield Properties Ltd v Newton* [1971] 1 WLR 862.

85 *Rein v Stein* [1892] 1 QB 753; (1892) 66 LT 469 at 471.

86 *Emeris v Woodward* (1889) 43 Ch D 185.

87 See *Zalinoff v Hammond* [1898] 2 Ch 92 (as to whether filing an affidavit is the taking of a step in a proceeding).

88 *Re Orr Ewing* (1882) 22 Ch D 456; *Tozier v Hawkins* (1885) 15 QBD 680 at 680; *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad* (1976) 136 CLR 529 at 539; *AGC (Advances) Ltd v Cohns Manufacturing* (unreported; VSC; McDonald J; CLF No 3438; 6 September 1991). See also *Fry v Moore* (1889) 23 QBD 395 (CA) if without appearing he takes a step in the action.

89 *Boyle v Sacker* (1888) 39 Ch D 249 (CA) and *Fry v Moore* (1889) 23 QBD 395 (CA).

90 *Astro Exito Navegacion SA v WT Hsu (The Messianiki Tolmi)* [1984] 1 Lloyd's Rep 266 (CA).

a conditional or unconditional appearance. If the defendant does not object at all, or in a timely enough fashion, the application of case management principles suggests that subsequent objections should not be permitted.[91]

It has been said that "[a] person cannot approbate and reprobate, so that if a person becomes aware of an irregularity of service and then subsequently takes a further step in the action which could be only useful if the service had been good, the said irregularity is waived".[92] A party cannot therefore deny that they have waived the right to object to an irregularity if they protest that the writ was irregularly served, submit that a default judgment was thereafter entered upon it, and subsequently apply for an order for the plaintiff to deliver a statement of claim.[93]

A party waives the right to object to an irregularity when they obtain an order for discovery knowing that the other party had, in prematurely filing a memorandum for a close of pleadings, committed an irregularity. In *Russell v McLeod*[94] the plaintiff filed the memorandum for the close of pleadings on 13 November 1897 after replying — but not by joining issue — to the defendant's counterclaim on 12 November. On 15 November the defendant delivered a rejoinder to the plaintiff's reply to the counterclaim, and, on the same day, the prothonotary issued a notice of trial. On 16 November the plaintiff's solicitors notified the defendant's solicitors that they had filed the memorandum of closure of pleadings. The defendant subsequently applied for and obtained an order for discovery of documents on 23 November.

The defendant submitted that only the plaintiff had the right to file the memorandum and not until the pleadings on the claim and on any counterclaim had closed.[95] The plaintiff claimed that any irregularity had been waived by the defendant applying for and obtaining the order for discovery with the full knowledge of the irregularly obtained memorandum.[96] The court held that the defendant had waived the

91 *Boyle v Sacker* (1888) 39 Ch D 249 at 252; *Pringle v Hales* [1925] 1 KB 573 at 581, 583.

92 *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd* [1995] 3 MLJ 472 at 480 per Peh Swee Chin FCJ (the second defendant applied for leave to file and appearance and a statement of defence thereby waiving the issue of irregular service); see also *Fry v Moore* (1889) 23 QBD 395 (CA); *Rein v Stein* [1892] 1 QB 753; *Boyle v Sacker* (1888) 39 Ch D 249.

93 *Fry v Moore* (1889) 23 QBD 395 (CA).

94 *Russell v McLeod* (1897) 23 VLR 532.

95 Citing *Freehold Investment & Banking Co of Australasia Ltd v Thompson* (1884) 6 ALT 126. Referring to *McMillan v Wood* (1896) 21 VLR 661; *Peck v Land Mortgage Bank* (1885) 6 ALT 268. The latter case was a decision upon the special words of *Rules of the Supreme Court 1884* (Vic), O 31 r 12 under which an application for an order for discovery of documents was held not to be a proceeding, a proceeding being a step forward in the action, whereas an application for discovery of documents was a lateral step and not a step forward.

96 Referring to *Rules of the Supreme Court 1884* (Vic), O 70 r 2; citing *Chappell v North* [1891] 2 QB 252; *Bartlett v Ford's Hotel Co* [1895] 1 QB 850; *Ives & Barker v Williams* [1894] 2 Ch 478.

irregularity by taking a step in the proceedings within the meaning of r 2 of O 70 of the *Rules of the Supreme Court 1884* (Vic). The defendant had both actual notice that pleadings had closed by notice from the plaintiff's solicitors, and constructive notice on the basis of knowing that the prothonotary could not issue the notice of trial unless pleadings had been closed.

Other steps resulting in the waiver to contest jurisdiction have included attacking the plaintiff's pleadings,[97] requests for particulars,[98] and motions for security for costs.[99] A failed application for security for costs precluded successfully applying to set aside a writ on the grounds of irregularity.[100] Appearing and answering affidavits may constitute waivers of irregularities. Attending a hearing and disputing the allegations in an affidavit supporting a motion for attachment preclude waiving its irregularity.[101] Counsel appearing on a rule for attachment and consenting to an adjournment has been held to constitute a waiver of personal service.[102] However, objections to irregularities in proceedings are not waived by appearing or answering affidavits where cases concern the liberty of the subject.[103] In *Hampden v Wallis* an order for discovery not endorsed by a memorandum under the rules warning of the failure to comply that was served upon a party on whose behalf the solicitor then issued a summons did not waive the right to object to the failure to endorse the order for discovery, although it did waive any right to object to being notified of what he had been ordered to do and the time in which to do it.[104]

What constitutes a step taken in a proceeding is assessed by the court on the facts of each case. Steps have been found to have been taken, for example, where an application was made

- for service of an originating process *ex juris*;[105] or
- for an adjournment of a hearing of an application the summons for which was formally defective;[106] or

97 *Alimport v Victoria Transport Ltd* [1977] 2 SCR 858.

98 *Fry v Moore* (1889) 23 QBD 395.

99 *Lhoneux, Limon & Co v Hong Kong & Shanghai Banking Corp* (1886) 33 Ch D 446.

100 *The Assunta* [1902] P 150; see also *White v Hardwick* (1922) 23 SR (NSW) 6.

101 *Treherne v Dale* (1884) 27 Ch D 66.

102 *Ex parte Alcock* (1875) 1 CPD 68.

103 *Taylor v Boe* (1893) 68 LT 213, and in *Mander v Falcke* [1891] 3 Ch 488.

104 *Hampden v Wallis* (1884) 26 Ch D 746.

105 *Black v Dawson* [1895] 1 QB 848 (an application for leave is made *ex parte*, and, if granted, the defendant upon being served may apply by summons at chambers to set aside the order and service. Both applications must be made to a judge, and in either case an appeal from his decision lies to the Court of Appeal, if leave to appeal be obtained).

106 *Kingstone Tyre Agency Pty Ltd v Blackmore* [1970] VR 625.

- seeking to tax the costs of a discontinuance which had been objected to as irregular;[107] or
- to complete a certificate of readiness for trial.[108]

In general, a defendant by filing an ordinary appearance in response to an originating process or its service waives his or her right to object to the validity of either and cannot obtain an order to have them set aside. Therefore a defendant intending to seek an order setting aside an originating process or its service should apply for that order prior to appearing, or apply for an order to have them set aside after appearing conditionally under r 8.08.[109] The defendant does not by filing an unconditional appearance thereby confer jurisdiction on a court which lacks it.[110] Proceedings which are merely irregular must be distinguished from those which are null and void. Waiver can render an irregular step in the former proceeding effective, whereas a null proceeding is non-existent.

Determination of all questions in proceeding

[9.110] Rule 1.14(1)(a) provides:

> (1) In exercising any power under these Rules the Court—
>
> (a) shall endeavour to ensure that all questions in the proceeding are effectively, completely, promptly and economically determined;
>
> (b) may give any direction or impose any term or condition it thinks fit.
>
> (2) The Court may exercise any power under these Rules
>
> (a) of its own motion, or
>
> (b) on the application of a party or of any person who has a sufficient interest.

Rule 1.14 achieves similar effects to other procedural rules. Section 29(2) of the *Supreme Court Act 1986* (Vic) provides that any court exercising civil jurisdiction in Victoria, must as fully as is possible when exercising its jurisdiction, and subject to the provisions of other legislation, ensure that all the disputed matters raised by parties to an action before it are determined completely and finally, and avoid a multiplicity of proceedings in relation to those matters.[111] Rule 34.01 provides that a court may at any stage of a proceeding make a direction that proceedings be conducted in a

107 *Paterson v Clarton* (1885) 7 ALT 15.

108 *Orbell v Bundaleer Lodge Nursing Home Pty Ltd* [1988] 1 Qd R 152 at 154.

109 The *Supreme Court (General Civil Procedure) Rules 2015* (Vic) provide for an application for conditional appearance for an originating process commenced under r 8.08 to be made in Form 8AC. A conditional appearance has the effect of an unconditional appearance unless the court otherwise orders on application by the defendant (see r 8.08(3)) within 14 days of filing a conditional appearance: see r 8.08(4).

110 See *Beugelaar v City of Springvale* [1969] VR 3 (action brought in the Supreme Court without prior leave as required by *Local Government Act 1958* (Vic), s 882).

111 See the notes under *Supreme Court Act 1986* (Vic), s 29.

manner which in the opinion of the court is best suited to the complete, prompt and economical determination of the matter before it.[112]

Rule 1.14 reflects the case management principles that now operate in all courts which combine with an overriding concern for the just resolution of disputes between parties, and the objective of using court resources to resolve disputes efficiently and cost-effectively, taking into account the way in, and the extent to, which delays may affect other litigants awaiting trial.[113]

The purpose of r 1.14 is to impose on the court the need to achieve the principle of effective, complete, efficient and cost-effective resolution of the matters in controversy between parties both in relation to the way it exercises its power, and establishes its jurisdiction.[114] With respect to issues that arise regarding whether the court has power to act, r 1.14 guides the construction of rules in a manner that promotes a broader interpretation of the court's entitlement. For example, in relation to the court's jurisdiction to discharge a jury, r 1.14 acts together with O 47 to enable the court to do so at any time.[115] Further, in relation to the court's power to order the inspection of documents on discovery pursuant to O 29, r 1.14 acts to direct a party or impose appropriate terms and conditions on discovery.[116] The court has similarly broad power to enter a judgment notwithstanding the jury's verdict without requiring the opposing party's consent,[117] or to make an order for the amendment of a pleading.[118]

Court acting of its own motion

[9.120] The court may act on its own motion to make an order or orders under the rules,[119] such as pleadings' compliance with the rules.[120] The court is not required to make an order only in response to a party's

112 The language of r 34.01 is reproduced in Ch II of the Rules, namely, in r 2.04(3) in relation to a proceeding in the Commercial List, and r 3.04(3) in relation to one in the Building Cases List.

113 For a detailed discussion of an analogous rule in the *Court Procedures Rules 2006* (ACT), see *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; see also *Re AWB Ltd (No 7)* [2009] VSC 413; *Equuscorp Pty Ltd v Acehand Pty Ltd* [2010] VSC 89; *Hodgson v Amcor Ltd* [2010] VSC 204 at [101]–[103].

114 *Altmann v Dunning* [1995] 2 VR 1 at [15].

115 *Altmann v Dunning* [1995] 2 VR 1.

116 *Linfa Pty Ltd v Citibank Ltd* [1995] 1 VR 643 at 648, referring to *CE Heath Underwriting & Insurance (Aust) Pty Ltd v Fabric and Apparel Industries Pty Ltd* (unreported; VSC; Marks J; 28 November 1989).

117 *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1.

118 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

119 Rule 1.14(2).

120 *Ireland v Chapman* (1877) 3 VLR (L) 242.

application. In exercising a power under the rules, the court is not limited by, or required to consider, the desires of the parties.[121]

A court may of its own motion direct that a trial be conducted with a jury regardless of the plaintiff having endorsed the form of the trial upon the writ as by a judge alone. In *Wragge v Downard*[122] Wragge commenced a Supreme Court action against Downard, Tetlow (allegedly Downard's employee) and Sinclair for £3,000 for personal injuries sustained while a passenger in a motor van driven by Tetlow when it collided with a motor truck driven by Sinclair. Both drivers denied negligence and explained in their defence that the other driver had manoeuvred their vehicle incorrectly in trying to avoid the accident. Martin J was unable to decide which of the two versions of events to accept. His Honour ordered certain issues to be determined by a jury and meanwhile entered judgment for the defendant.

The judge's order was appealed, leave was given for the appeal to be heard, and the appeal was dismissed by Mann CJ of the Court of Appeal (McFarlane J concurring). The appellant's main argument was that the judge's discretion under the rules to order a form of trial contrary to that endorsed by the plaintiff could not be exercised at as late a stage in the hearing as Martin J had exercised it: that is when the hearing of the matter had concluded. Mann CJ found that no such conditions had been imposed by the rules. Order 36 r 5 of the *Rules of the Supreme Court 1884* (Vic) simply entitled the judge to direct trial without a jury on the judge's own motion and even in opposition to the parties' desires. The fact that the judge had found it impossible to satisfactorily conclude on the evidence did not suggest a failure to properly exercise his discretion in ordering a jury, but described difficulties which he believed a jury would resolve. The appeal court appreciated the inconvenience of an order of the kind being made at a later stage in the trial, but found it justified in principle and that there was no legal basis to oppose it, although it expressed the belief that for practical reasons it was unlikely that orders of this kind would generally inconvenience litigants.[123]

The court may order that a trial continue before a judge alone after having commenced before a judge and jury.[124] *Wilson v Burridge* raised as an issue whether a judge was empowered by O 36 r 5 of the *Rules of the Supreme Court 1884* (Vic) to order a trial without a jury after the writ had been endorsed for trial by jury of his own motion. The two plaintiffs claimed damages for personal injuries sustained by them in a motor vehicle accident between a car driven by one of the plaintiffs in which the other

121 *Jacobson v Ross* [1995] 1 VR 337 at 341. See also *Najjar v Haines* (1991) 25 NSWLR 224 at 245.

122 *Wragge v Downard* [1938] VLR 353.

123 Indeed in the Chief Justice's view the case was "rare, if not unique, in Victoria" and unique in his own experience. The need to make an order of the kind was rare, and he was untroubled by the precedent set by his ruling.

124 *Mayhead v Hydraulic Hoist Co Ltd* [1931] 2 KB 424; *Wilson v Burridge* [1955] VLR 433.

was a passenger and a car driven by the defendant. Rule 5 provided that "the Court or a Judge could direct a trial without a jury of any cause, matter or issue requiring any prolonged examination of documents or accounts or any scientific or local investigation which cannot, in their or his opinion, conveniently be made with a jury."

The Court of Appeal in its decision cited with approval the English Court of Appeal decision, *Mayhead v Hydraulic Hoist Co*,[125] and an unreported judgment of 1954 of Lowe J, *Neville v Shire of Dandenong*.[126] In both cases the trial judge directed that the trial be conducted before a judge alone, and in neither case had the jury been empanelled, nor the hearing, nor proceedings involving a jury, begun. In *Mayhead's* case Horridge J at trial ordered the trial to dispense with a jury because the nature of the evidence would involve scientific investigations which could only with great inconvenience be conducted before a jury. In *Wilson v Burridge* Scholl J raised the same question after the close of the cross-examination of a witness for the plaintiff. Ultimately Scholl J decided not to discharge the jury at that stage of the proceeding, but affirmed that the court had jurisdiction of its own motion and without either parties' application to dispense with a jury at any stage of a proceeding.

In his reasons Scholl J made the following points. First, that O 36 r 5 of the *Rules of the Supreme Court 1884* (Vic) conferred upon the court a general jurisdiction to administer justice properly and efficiently and the power conferred under the rule did not cease once the trial was under way, or at any other stage. Indeed it would be inappropriate to construct a beneficial power otherwise than as broadly as possible. The power can be exercised at any stage that material is placed before the court justifying its engagement, and, as a matter of practicality, that material may not be available or presented until a very advanced stage of the hearing. Secondly, that the facts of the case brought them within the scope of the rule relating to scientific investigations which could not conveniently be made with a jury. Scholl J referred in particular to the "difficult scientific examinations or investigations" of brain injuries sustained by one of the plaintiffs and two child passengers in the vehicle. The rule did not operate to exclude the jury from investigating expert evidence *per se*, but came into operation if in the judge's opinion the expert evidence involved questions of "unusual difficulty". In this case unusually difficult problems arose for consideration by the jury which by operation of r 5 provided the foundation for the judge to order the jury be dismissed and the trial continue before a judge alone. Nevertheless, a judge was conferred with discretion under the rule to consider all the circumstances of the case required to do justice between the parties, and decided that it would more greatly inconvenience the parties to discharge, rather than to retain and proceed with, the jury.

125 *Mayhead v Hydraulic Hoist Co Ltd* [1931] 2 KB 424.

126 *Neville v Shire of Dandenong* (unreported; Lowe J; 1954).

A court may also act of its own motion in ordering the trial of a preliminary question.[127] An appeal against a judge's order to determine a question in a proceeding as a preliminary question succeeded in the Appeal Division of the Victorian Supreme Court. The Court of Appeal found that the question ought not to have been determined by the judge, but left to be answered at trial. A judge determined a question about whether moneys paid and received were to be treated as trust property as a preliminary question. There was no dispute that r 47.04 established the court's jurisdiction to order a question in a proceeding to be tried at any stage of the proceeding, and to give directions as to the particulars of the question to be answered. The appeal was based on the plaintiff's and defendant's objection to the judge's answer to the question, although the appellant sought to impugn it on its merits, whereas the respondent objected to the question being determined preliminarily, and that the judge erred in deciding to answer the question.

The Appeal Court took divergent approaches. Brooking J held that the judge, in not taking separately the questions whether an issue should be determined, and how it should be determined, had confused the preliminary issue of whether the question ought to be determined, with its determination, and failed to lay a sufficiently certain factual foundation for answering the substantive question. The advantage in separating the questions lay in ensuring that the first question was sufficiently particularised to enable the judge to identify the evidence necessary to satisfactorily answer the second substantive question. Smith J concluded that no injustice was able to be demonstrated as following from the trial judge's approach. Having examined the facts and the applicable law, it was understandable and desirable that the judge formulated an approach which included rather than isolated the substantive question. The trial judge's approach was both more efficient, and enabled him to answer the question in a logical sequence having regard to the available evidence.

Judgment rests on the appeal court finding that it was not possible for the judge to determine the question. A question is not fit for preliminary determination and ought not to be answered if the facts required to answer it cannot be ascertained because they are contested, or have not been admitted, or cannot be determined judicially, or are incomplete in that they do not constitute all the facts necessary for the determination of the question, or for some other reason. Where these conditions are not met the judge should decline to make a preliminary determination of the issue and leave the question to be answered at trial. In Smith J's view the difficulty of ascertaining whether there were sufficient common ground facts on which to base the question did not preclude the question from being asked because the question was sufficiently narrowly drafted by the trial judge. It would not therefore lead, as JD Phillips J feared, to a further "voyage of discovery" in search of adequate evidence. Smith J also considered the issue from the point of view of the administration of

127 *Jacobson v Ross* [1995] 1 VR 337.

justice. In Smith J's view while the trial of separate issues needs to be approached cautiously a judge will sometimes be required to take risks, bearing in mind the difficulties, in order to manage the quantum of litigation passing through court:[128]

> This is not to say, however, that great care is not needed in dealing with the trial of separate questions and issues. We have, I think, all experienced some or all of the dangers and risks inherent in such a course. The difficulties include:
>
> - the need to formulate the question with precision;
> - if it is proposed to proceed on the basis of agreed or assumed facts, the need to ensure that all relevant facts are stated and stated with precision. Neither task is helped where the pleadings are not satisfactory. If evidence is taken:
> - problems may arise for the judge continuing with the matter or any related matter if he or she has made an adverse finding about the credibility of a witness;
> - there is the risk of the hearing expanding beyond its anticipated length because of the desire on the part of the parties to lead evidence on facts relevant to the issues but not foreseen.
>
> An underlying concern is that trying a preliminary issue may adversely affect the prospects of settlement of the litigation: see also *Tilling v Whiteman* [1980] AC 1.
>
> Difficult judgments have to be made. At times risks will have to be taken if the court is to handle the increasing percentage of lengthy civil matters which are coming before it.

The judge properly undertook to answer the question as a preliminary matter in order to facilitate a restriction of the issues to be determined at a potentially long and complex trial by identifying the trust property as a preliminary issue.[129]

> Courts are now expected to take an active role in the management of long and complex litigation and this requires trial judges to respond positively to reasonable proposals from parties which may expedite such litigation. It is also important that when such attempts are reviewed by the Full Court, the Full Court should not fetter unnecessarily the powers and discretions of trial judges. It is also important that, within proper limits, it should support such attempts at case management. I note that stronger sentiments have been expressed by the House of Lords in *Ashmore v Corporation of Lloyd's* [1992] 1 WLR 446.
>
> The current climate is very different from that which prevailed at the time of *Dunstan v Simmie and Co Pty Ltd* [1978] VicRp 62; [1978] VR 669. There is a need for a degree of innovation and flexibility if courts are to meet the legitimate expectations of litigants that come before it, particularly those in long cases. I note that the Court of Appeal in New South Wales has viewed its equivalent of R47.04 as a rule contemplating a "high degree of flexibility". It relied upon the language of the New South Wales rule which stated that the decision that has been separated can be determined "before, at or after any trial or further trial": *American Home Assurance Co v Ampol Refineries Ltd* (1987) 10 NSWLR 13 at 18.

128 *Jacobson v Ross* [1995] 1 VR 337 at 352.

129 *Jacobson v Ross* [1995] 1 VR 337 at 352.

A court may of its own motion or on the application of a party or non-party to a proceeding strike irrelevant, vexatious and scandalous material from an affidavit.[130] Order 38 r 11 of the *Rules of the Supreme Court 1884* (Vic) conferred on the court a power to strike scandalous and irrelevant material from an affidavit on the application of a party or a non-party to the action. The plaintiff's solicitor applied to strike a scandalous and irrelevant paragraph from the defendant's solicitor's affidavit. It was opposed on the basis that the applicant was not a party to proceedings. The court held that it had a general jurisdiction to remove matters irrelevant for it to determine at trial from its record on motion of a party, a person not a party, or its own motion.[131] The paragraph was scandalous and vexatious in doubting the *bona fides* of the solicitor's action in the commencing proceedings, and raised an allegation not material to questions in controversy between the parties, with the effect that it was personally and professionally detrimental to the plaintiff's solicitor.[132]

A court may also refer a question to a special referee under r 50.01 to either decide or provide an opinion on it.[133] A question can only be referred to arbitration with the consent of all parties.[134]

Person with sufficient interest

[9.130] Rule 1.14(2) provides that, as well as exercising any of the powers a court may have under the rules of its own motion, "any person who has a sufficient interest" in a proceeding, albeit not a party to it, may make an application seeking that the court exercise any of its powers under the rules.[135] Similarly, any order which "affects a person" may be varied or set aside by a court whether or not an application for the order

130 *Cracknall v Janson* (1879) 11 Ch D 1 at 13. See also *Warner v Warner* [1881] WN 69; *MacPherson v Kerr; Ex parte Lewis* (1893) 19 VLR 23.

131 Citing *Cracknall v Janson* (1879) 11 Ch D 1 at 13 per Fry J.

132 Hodges J, however, would not award costs against the defendant's solicitor on the basis that the stricken part of the affidavit responded to a provocative paragraph in the plaintiff's affidavit, alleging conspiracy between the defendant and her solicitor which should itself have been the subject of an application to strike out.

133 *Najjar v Haines* (1991) 25 NSWLR 224 at 245.

134 Rule 50.08(1). In the County Court, a question can be referred to arbitration with or without the consent of the parties: *County Court Act 1958* (Vic), s 47A. See the notes under r 50.08 of Ch I of the *County Court Civil Procedure Rules 2008* (Vic).

135 Rule 1.14(2). Rule 1.14(2) gives the court wider authority than existed under the former rules to exercise its powers under the rules on the application of a person not a party. Previous limitations on the authority of the court, such as those expressed in *Bradvica v Radulovic* [1975] VR 434, no longer apply in so far as their reasoning was based upon the wording of the former rules: *Delmo v Merrigal Pty Ltd* (unreported; VSC; Murphy J; No 3416/1987; 29 April 1988). It was held in *Bradvica v Radulovic* that the incorporated nominal defendant, not being a party, had no standing to apply to have set aside a judgment obtained upon the failure of the defendant (the driver of an unregistered and uninsured motor vehicle) to enter an appearance.

was made on notice to that person.[136] What constitutes a sufficient interest is not confined by the wording of r 1.14. A proprietary interest has been held to be sufficient. Where a contract for the sale of land was ordered to be specifically performed a person with an interest or estate in that land had sufficient interest to entitle them to make an application under r 1.14(2) for the judgment to be set aside.[137]

However, any interest may come within the operation of the rule. By analogy with persons having standing in disputes involving the infringement of public rights, any legal or equitable interest a person may have the interference with which a court recognises would provide that person with a basis to seek a remedy by way of declaration or injunction is sufficient.[138] Philip Morris Ltd, as defendant to a negligence suit, had sufficient interest to apply to have an order granting a person who had been declared a vexatious litigant under s 21 of the *Supreme Court Act 1986* (Vic) leave to initiate proceedings against the company set aside, having received no notice of the plaintiff's leave application.[139] A person the subject of a subpoena, not being a party to proceedings, may have sufficient interest under r 1.14(2) to entitle it to apply under r 42.07 to have it wholly or partially set aside.[140]

A non-party to proceedings may apply to the court to exercise its inherent jurisdiction, or to make an order under r 27.07,[141] to strike out the scandalous, irrelevant, or oppressive content of any document, or to remove it from the file if it has been filed.[142] Instances of a person not party to a proceeding whose interest was directly and substantively affected by an order of the court included a prospective tenant of a dwelling house affected by an order for possession in favour of a protected person,[143] and a judgment debtor[144] or a competing claimant to the debt[145] in garnishee proceedings. In each case the persons were persons aggrieved in relation to an order made in a proceeding to which

136 In the County Court, a party who requires a judgment or order to be authenticated must draw up the form of the judgment or order (*County Court Civil Procedure Rules 2008* (Vic), r 60A.07(1)), and "party" includes any person having a sufficient interest: r 60A.01.

137 *Delmo v Merrigal Pty Ltd* (unreported; VSC; Murphy J; No 3416/1987; 29 April 1988).

138 *Collie v Merlaw Nominees Pty Ltd* [2003] VSC 424.

139 *Attorney-General (Vic) v Lindsey* [2005] VSC 53.

140 *Quaere*, whether in such case application may be made by a party. Compare *Botany Bay Instrument & Control Pty Ltd v Stewart* [1984] 3 NSWLR 98 (right to apply), and *Wran v Australian Broadcasting Commission* [1984] 3 NSWLR 241; *Re ACI International Ltd* (1986) 11 ACLR 240 (VSC) (no right to apply); and see *Compsyd Pty Ltd v Streamline Travel Service Pty Ltd* (1987) 10 NSWLR 648.

141 See *Rossage v Rossage* [1960] 1 WLR 249; *Re J (an infant)* [1960] 1 WLR 253.

142 *Cracknall v Janson* (1879) 11 Ch D 1 at 13; *MacPherson v Kerr; Ex parte Lewis* (1893) 19 VLR 23.

143 *Dentry v Stott* [1947] VLR 462.

144 *Hetherington v Driscoll* (1891) 17 VLR 356.

145 *Hunt v Balfour* [1928] VLR 488.

they were not a party. An agent authorised to bring proceedings as complainant could in some circumstances be a person aggrieved.[146]

Some assistance may be had from decisions made under the former s 88(1) of the *Magistrates' Court Act 1971* (Vic)[147] which provided that "any person who feels aggrieved" by an order was able to appeal it on a question of law to the Supreme Court. Further, it was held that in some circumstances the description may be satisfied by a person not a party to proceedings if they could demonstrate that they were "a person … really and directly interested in proceedings", and if the court refused that person a hearing they would become a "person aggrieved".[148] In *Dentry v Stott*,[149] Dentry applied for a warrant authorising and requiring delivery of possession of a dwelling house to him as a protected person and on the grounds that it was shortly to be unoccupied, which the owner Stott did not contest, and the court ordered. Stott had let the house to Murray. Stott failed in an application made under s 66 of the *Justices Act 1928* (Vic) to have the order set aside or the matter reheard. Murray as a person aggrieved by the court's decision obtained an order *nisi* reviewing the court's decision on the basis that the magistrate erred in refusing to set the order aside, and further erred in holding that it was not open to him to consider any other persons' interests but those of the parties, Dentry and Stott.

"Unless the court otherwise orders"

[9.140] A rule of court which provides that a party may or must take a procedural step "unless the court otherwise orders"[150] confers the widest possible discretion upon the court subject only to principles applicable to the interpretation and operation of any judicial discretion.[151] It is not appropriate to view the application of the discretion and the considerations taken into account in any particular case as limiting or determining its application or otherwise confining its flexibility in

146 *Purbrick v Rybar* [1951] VLR 275. See also *Forti v Tsakistaras* (unreported; VSC; Smith J; No 12598/1990; 18 June 1991).

147 Compare s 109(1) of the *Magistrates' Court Act 1989* (Vic) which provides that a party to a civil proceeding in the Magistrates' Court may appeal to the Supreme Court, on a question of law, from a final order of the court in that proceeding. An appeal may not be brought by a person not a party, for example, by a non-party against whom an order for costs is made: see *Forti v Tsakistaras* (unreported; VSC; Smith J; No 12598/1990; 18 June 1991).

148 *Dentry v Stott* [1947] VLR 462 ("person aggrieved" within the meaning of s 150 of the *Justices Act 1928* (Vic)); *Johnstone v Hicks* [1948] VLR 213.

149 *Dentry v Stott* [1947] VLR 462.

150 The words "order" and "direct" are virtually interchangeable. No distinction can sensibly be drawn between an order that something be done and a direction to the same effect: *Benson v Benson* [1941] P 90 at 97, referred to in *Guss v Magistrates' Court (Vic)* [1998] 2 VR 113 at 121. See also *Rome v Punjab National Bank* [1989] 2 Lloyd's Rep 424 at 428.

151 See *Re Steane's (Bournemouth) Ltd* [1950] 1 All ER 21 at 25; *Re Terene Pty Ltd (in liq)* (1992) 7 ACSR 309.

subsequent cases. There being no statutory guidance as to how the court is to exercise its discretion, as Vaisey J said in *Re Steane's (Bournemouth) Ltd*, "it is at large and controlled only by the general principles which apply to every kind of judicial discretion".[152] That is to say, the court's discretion is to be exercised only with reason, and in order to do justice in the particular case, and not arbitrarily.[153]

Duty of lawyer to know rules

[9.150] The rules of procedure are designed and interpreted to promote the just and efficient conduct of litigation, and to prevent as far as possible litigants needlessly incurring costs. Lawyers are under an obligation to either know or acquire knowledge of, and to observe, the procedural rules regulating the conduct of litigation. Nor is a solicitor spared the obligation of knowing and observing procedural rules merely because they have instructed counsel to conduct the litigation.[154] Lawyers are to bear any costs incurred as a result of their failing to observe the rules.[155]

AMENDMENT

[9.160] The amendment of a document in a proceeding is governed by O 36 of the Rules. Rule 36.01 provides:

(1) For the purpose of—

(a) determining the real question in controversy between the parties to any proceeding; or

(b) correcting any defect or error in any proceeding; or

(c) avoiding multiplicity of proceedings—

the Court may, at any stage order that any document in the proceeding be amended or that any party have leave to amend any document in the proceeding.

(2) In this Order ***document*** includes—

(a) originating process,

(b) an indorsement of claim on originating process; and

(c) a pleading.

(3) An indorsement of claim or pleading may be amended under paragraph (1) notwithstanding that the effect is to add or substitute a cause of action arising after the commencement of the proceeding.

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152 *Re Steane's (Bournemouth) Ltd* [1950] 1 All ER 21 at 25; cited with approval in Australia in *Re Atlas Truck Services Pty Ltd* (1974) 24 FLR 220; *Re Selmar Pty Ltd* [1978] VR 531 in which Starke J (at 534) called the court's discretion "an unfettered judicial discretion"; *Re Tellsa Furniture Pty Ltd* (1985) 9 ACLR 869; *Thomas v Commonwealth Bank of Australia* (1994) 35 NSWLR 335.

153 *Sharp v Wakefield* [1891] AC 173 at 179; *Re Steane's (Bournemouth) Ltd* [1950] 1 All ER 21 at 25 ("the court is free to act according to the judge's opinion of what would be fair and just in each case.")

154 *Endresz v Whitehouse* (1995) 83 A Crim R 138 (VCA).

155 See *Riv-Oland Marble Co (Vic) Pty Ltd v Settef SpA* (1989) 63 ALJR 519 (solicitor not observing rules on application for special leave to appeal). As to the power to order that the lawyer for a party pay costs, see r 63.23 and notes.

(4) A mistake in the name of a party may be corrected under paragraph (1), whether or not the effect is to substitute another person as a party.

(5) Where an order to correct a mistake in the name of a party has the effect of substituting another person as a party, the proceeding shall be taken to have commenced with respect to that person on the day the proceeding commenced.

(6) Notwithstanding the expiry of any relevant limitation period after the day a proceeding is commenced, the Court may make an order under paragraph (1) where it is satisfied that any other party to the proceeding would not by reason of the order be prejudiced in the conduct of that party's claim or defence in a way that could not be fairly met by an adjournment, an award of costs or otherwise.

(7) For the purpose of paragraph (6) ***any other party to the proceeding*** includes a person who is substituted as a party by virtue of an order made to correct a mistake in the name of a party.

(8) Paragraph (6), with any necessary modification, applies to an application under Rule 14.03(2).

(9) Paragraph (1) shall not apply to the amendment of a judgment or an order.

Scope of order

[9.170] Rule 36.01 states the general power of the court as to amendment. Rule 36.07 provides for amendment of a judgment or order to correct a clerical mistake or an error arising from an accidental slip or omission. Rule 36.01 applies to any other document. Under r 36.01 the court is authorised to order an amendment even if the limitation period for the action commenced under the proceedings has expired after the initiation of proceedings.[156]

Judgment and party document compared

[9.180] Order 36 distinguishes between documents which parties have prepared under the rules for use in the litigation,[157] and those authenticated under r 60.02 which formally document and constitute the court's judgment or orders. The amendment of these respective documents requires different considerations, and the application of different principles. In general the rules do not allow for an amendment of authenticated judgments or orders, which must be corrected on appeal or, in limited circumstances, by the court exercising its inherent jurisdiction or its power under r 36.07 to correct errors of a clerical nature, or those resulting from a slip or omission.

Parties' documents such as a statement of claim, defence, particulars, third party notices and notices of appeal, which form part of the pleadings or otherwise state a plaintiff's or defendant's position, may be amended. However, parties do not have an unlimited right to amend documents, and in some instances may not be able to amend documents. A statement which a party has sworn to be true and which constitutes

156 Compare *Rules of the Supreme Court 1965* (UK), O 28 rr 1, 12 from which r 36.01 derives.

157 See O 27.

facts in the proceedings cannot be amended. Affidavits and answers to interrogatories are therefore not open to being amended.

An "amendment" does not fundamentally alter the nature of a document, such that a new document emerges as a result of the amendment. The amendment is an alteration or alterations made to an existing document which itself continues to exist and have effect as from the date it first came into existence.[158]

Amendment of party document

[9.190] Most amendments to a document are made by the party who created it having obtained leave of the court, or with the other party's consent. However, some party documents may be amended by the court of its own motion. Prior to the close of pleadings a party may amend a pleading once without leave of the court.[159] Parties initiate amendments to documents they have themselves prepared for a variety of reasons. These include correcting mistaken material facts such a party's name, or description, or other claims; and to notify the other party that they are deviating from the position they originally assumed in their claim or defence by supplementing or substituting the original facts with new ones. An appellant may amend an appeal to introduce new grounds of appeal. Pleadings may be amended at trial to make them consistent with the evidence presented at trial, and the real issues raised to be determined by the court.

Parties may also be required to amend their own documents: for example, in response to a court order to amend a non-compliant document the other party not having waived its right to object to the non-compliance; or where the party is forced to amend and reserve a statement of claim which originally failed to raise a claim in law, or a defence not disclosing the basis on which the defendant would resist the claim. A party seeking to have a proceeding determined summarily must demonstrate that the statement of claim or defence fails as a matter of substance. It is not sufficient to show that the claim or defence is a defective statement of the other party's position.

General power of amendment

[9.200] The court has the power under r 36.01(1) to order the amendment of, or to grant leave to a party to amend, any document in a proceeding, at any stage in a proceeding, so that the real questions in dispute between the parties can be determined, any error can be corrected, or defect remedied, and multiple proceedings averted. The court in exercising its power under r 36.01(1) has discretion to give the parties directions, or to impose terms or conditions as it sees fit.[160]

158 *Agtrack (NT) Pty Ltd (t/as Spring Air) v Hatfield* (2003) 7 VR 63 at [39].

159 Rule 36.03(a).

160 See r 1.14(1)(a).

The rule of construction the court now adopts in interpreting the powers available to it under a general rule (of which r 36.01 is an example) is to read the words of the rule as providing the court with as ample a power as is reasonably required in the context.[161] The court's power to order amendment is broad enough for it to determine when it is just in the circumstances of the case to order an amendment to be made where the matter could not be litigated but for the amendment.

Rule 36.01(1) may be used to amend a pleading to enable the real questions in dispute between the parties to be litigated. The rule defines "question" to mean "any question, issue or matter for determination by the court, whether of fact or law or of fact and law, raised by the pleadings or otherwise at any stage of a proceeding by the court, by any party or by any person not a party who has a sufficient interest".[162]

A question being a matter for determination raised by a party or a person with sufficient interest, a court cannot determine the rightfulness of a plaintiff's claim, or of a defence, that has not been raised by them in the pleadings, or by some other means, without their consent. A question is a "real question in controversy" if the disposition of the rights and obligations of all the parties to the litigation requires the court to determine it alone or in conjunction with other questions. A real question may not arise on the pleadings but during proceedings, and replace or supplement questions raised in the pleadings, by substituting or adding grounds of claim or defence. Where a real question in controversy over which the court has jurisdiction arises during the proceedings but has not been pleaded, the parties may apply to, or the court of its own motion may, amend the pleadings to reflect the fact that the question arose and was at issue before the court from evidence presented or argument made at trial.[163]

A party granted leave to amend a pleading must do so within 21 days from the date the order was made, or within the time provided by the order. The order granting leave has effect when the amendment is made, and ceases to have effect if the amendment is not made.[164] If a court, rather than granting a party leave to amend, orders an amendment to a pleading, the order is effective from the date it is made.[165]

The court's power to order amendment under r 36.01(1) in order to determine the real questions in controversy between the parties, correct defects or errors and avoid multiple proceedings, does not apply to the

161 In contrast, the earlier approach was to leave the rules, rather than the discretion of the court, to determine whether or not particular causes of action should be litigated: *McInnes v Wingecarribee Shire Council* (1987) 10 NSWLR 660 at 668.

162 See the definition in r 1.13.

163 See further Batt JA in *Etna v Arif* [1999] 2 VR 353 at 362–367.

164 See r 36.02.

165 See *Australian Coastal Shipping Commission v Curtis Cruising Pty Ltd* (1989) 17 NSWLR 734 at 744.

amendment of the court's judgments or orders.[166] The correction of a clerical mistake or an error caused by an accidental slip or omission is dealt with separately under r 36.07. The only power a court has to amend the court record is to ensure that it is consistent with the facts of the case, and not to introduce changes which depart from the facts and are therefore false.[167]

A court orders the amendment of pleadings in order for the real questions in controversy between the parties to be determined so that justice may be done in the context of the case. Where a party applies for leave to amend a document so that it can put its claim or defence on a different basis at trial[168] the real questions for determination must already be at issue before the court.[169]

The court's powers of amendment do not extend to curing null proceedings such as those commenced against dead or non-existent persons or entities. The court can only add or substitute parties to a proceeding which exists, not to one that is void.[170]

Time from which amendment operates

[9.210] An amended document is considered to have contained the amendment from the date the document was created, and the amendment operates from the date borne on the face of the document. As Glass JA said in *Baldry v Jackson* "[An] amendment, duly made, takes effect, not from the date when the amendment is made, but from the date of the original document which it amends".[171] When an amendment is made to a claim indorsed on the writ the amended writ assumes the place of the original action, and the claim indorsed on the amended writ becomes the original claim.[172]

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166 Rule 36.01(9). As to amendment of a judgment or order, see r 36.07.

167 *Wilks v Australian Trust Co* (1869) 6 WW & a'B (L) 78 (refusal to amend declaration by inserting date of writ as subsequent to grant of letters of administration to plaintiff).

168 See *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [14] per French CJ.

169 See *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [71].

170 *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India* [1996] 1 All ER 1017.

171 *Baldry v Jackson* [1976] 2 NSWLR 415 at 419 per Glass JA, referring to *Sneade v Wotherton Barytes & Lead Mining Co Ltd* [1904] 1 KB 295 and *Warner v Sampson* [1959] 1 QB 297. See also *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166 at 174–175, 183; *Mitchell v Harris Engineering Co Ltd* [1967] 2 QB 703 at 718; *Adam v Shiavon* [1985] 1 Qd R 1; *Webster Ltd v Roberts* [1989] Tas R 37; *Lynch v Keddell (No 2)* [1990] 1 Qd R 10 at 17; *Wenpac Pty Ltd v Allied Westralian Finance Ltd* (1994) 123 FLR 1 at 39, 59 (WASC); *Anglo Irish Beef Processors International v Federated Stevedores Geelong* [1997] 2 VR 676 at 680; *Rodgers v Commissioner of Taxation* (1998) 88 FCR 61; 158 ALR 220 at 223 (FCA).

172 See *Sneade v Wotherton Barytes & Lead Mining Co Ltd* [1904] 1 KB 295 at 297 per Collins MR.

The plaintiff in *Nesnah Nominees v Blackwell*[173] obtained an order allowing it to amend a statement of claim to raise a cause of action that had expired by reason of statutory limitation, on the basis that the defendant had not proved that it would be prejudiced by the amendment.[174] The defendant applied without success to the court that in allowing the amendment it should order that it take effect from the date leave was granted, which was refused. The court held that it had no power to demur from the principles inherent in s 34 of the *Limitation of Actions Act 1958* (Vic), and r 36.01(6) under which the plaintiff had successfully applied that a document, once amended, took effect from the date the original document had been created.

For an amended document to be effective from the date the original document came into existence the amendment cannot be one that adds or substitutes a defendant to the proceeding. The amendment must have been made to a document in a proceeding between the original parties to the litigation. The date on which a party is joined to proceedings is determined by the rules of court.[175] Rule 9.11(3)(a) provides that the commencement of proceedings against a defendant added or substituted by an order made under r 9.06 is the date the filed originating process is amended in accordance with r 9.11(1) or (2), and does not relate back to the date of the writ.

As a matter of practice plaintiffs will not be given leave to add or substitute defendants if the claim against the joined defendant is statute barred. The rule prevents the court making a futile order to join a defendant with an absolute defence. The rule is not based on any unfairness to a joined defendant being denied the benefit of an accrued defence by relating the action back to the date of the original writ.[176]

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173 *Nesnah Nominees Pty Ltd v Blackwell* (unreported; VSC; Eames J; No 90; 10 November 1998).

174 The reason in the past for resisting an amendment to introduce a cause of action that had become time-barred under a limitation statute since the date of the writ was that to grant the amendment would allow the new claim to speak from the commencement of the proceeding: see *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166 at 175.

175 See *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 200; *Fernance v Nominal Defendant* (1989) 17 NSWLR 710 at 718, 731–733; *Lynch v Keddell (No 2)* [1990] 1 Qd R 10 at 17.

176 *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 200; *Fernance v Nominal Defendant* (1989) 17 NSWLR 710 at 718, 731–733; *Lynch v Keddell (No 2)* [1990] 1 Qd R 10 at 17. Rule 9.11(3)(a) in effect provides that the addition or substitution does not relate back to the date of the writ. In Queensland, the rules give the court power to order that proceedings against a new defendant be taken to have commenced at a time prior to the defendant being added as a party. In *Australia and New Zealand Banking Group Ltd v Larcos* (1987) 13 NSWLR 286 an order was made that an amendment to a cross-claim raising a new cause of action against the plaintiff take effect, not from the date of the cross-claim, but from the day after the date on which legislation the source of the new cause of action came into operation.

Appeal from order as to amendment

[9.220] The decision whether or not to grant leave to amend is an interlocutory order. It is a matter of discretion for the court which may be appealed only by leave, and only on the basis that the principles the court applied in exercising its discretion were the wrong ones, or that its decision is manifestly incorrect.[177] As a rule, any appeal should be made after a trial of the substantive issues, unless a suspension of the trial can be justified on the basis that special compelling reasons require the hearing of an appeal on the interlocutory question.[178] An appeal court will not interfere with a court's decision not to allow an amendment if the other side might possibly be prejudiced by the amendment being granted.[179] Grounds for the appeal court's intervention in a court's discretion with respect to amendment include the imposition of unreasonable terms,[180] or injustice arising from the refusal to make orders as to costs.[181]

Particulars of pleading

[9.230] Rule 1.13(1) defines pleadings to include particulars of pleading.[182]

Amendment without leave

[9.240] A party may amend a pleading once before the close of pleadings without leave of the court,[183] and pay the costs associated with the amendment unless the court orders otherwise.[184] Within 21 days of the amended pleading being served the other party may apply to the court that the amendment be disallowed, or that only parts of it be allowed.[185] An amendment will be disallowed if the content of the amendment would have caused the original pleading to be struck out or to require amendment under r 23.02 had it appeared there.[186]

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177 See, for instance, *Hunt v Rice & Son Ltd* [1937] 3 All ER 715 (CA); *GL Baker Ltd v Medway Building and Supplies Ltd* [1958] 1 WLR 1216; *Clough v Frog* (1974) 48 ALJR 481; *Atkinson v Fitzwalter* [1987] 1 WLR 201; *Londish v Gulf Pacific Pty Ltd* (1993) 45 FCR 128. See also *Beoco Ltd v Alfa Laval Co Ltd* [1995] QB 137; *Mullett v Gabriel* (1989) 52 SASR 330.

178 *Robertson v Barnes* (1997) 6 NTLR 160 (NTSC).

179 *Baume v Commonwealth* (1906) 4 CLR 97. See also *Lewis v Sydney Flour Pty Ltd* (1955) 56 SR (NSW) 189 at 192; *Jacazlow Pty Ltd v Amberley Autos Pty Ltd* [1992] ATPR 41-177 (VSC).

180 *Kilpatrick v Huddart Parker & Co Ltd* (1896) 22 VLR 369.

181 *Shannon v Lee Chun* (1912) 15 CLR 257.

182 See the definition of "pleading" in r 1.13(1); *Woolley v Broad* [1892] 2 QB 317; *Milbank v Milbank* [1900] 1 Ch 376 at 385; *Vail v Gilmour* (1885) 6 ALT 168.

183 See r 36.04(1)(a).

184 Rule 63.17(1).

185 Rule 36.04(2).

186 See *Machado v Fontes* [1897] 2 QB 231.

Pleadings may not be amended after pleadings have closed unless the court orders otherwise or the all parties give their consent.[187] Rule 14.08 provides that pleadings are closed if 30 days after the service of a defence if no other pleading is served or ordered, and where pleadings are served or ordered after the service of the defence, 30 days after they are served. However, the court is empowered to order that pleadings be amended at any time.[188]

Application for leave to amend

[9.250] A party should not hesitate to apply for leave to amend a pleading once the need for amendment has materialised. The grant of leave to amend in the face of the other party's resistance is more readily given prior to trial or prior to the trial date being set down than it is once trial has commenced. If leave is granted it is usually conditional upon the party seeking the amendment paying the other party's costs associated with the application and the amendment.[189]

If the application to amend a pleading is interlocutory the applicant is not normally required to file an affidavit in support of the application.[190] But an affidavit may be required if the case involves difficulties, or the application is made after considerable delay, or *mala fides* is suspected to have occasioned the application to amend the pleading. If an application to amend a pleading is particularly late the applicant in order to succeed will be required to satisfactorily explain the delay, and persuade the court that the wasted costs and the waste of court time should not bar the making of the amendment, or be refused.[191]

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187 Rule 36.04(1)(b); *Dale v Nelson* (1899) 24 VLR 937.

188 See rr 36.01(1), 36.04(1)(a).

189 See *Horton v Jones (No 2)* (1939) 39 SR (NSW) 305 at 310; *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220 (where a contrast was drawn between an amendment before a trial begins and one sought at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different ground); *Easton v Ford Motor Co Ltd* [1993] 1 WLR 1511.

190 See *Cargill v Bower* (1878) 10 Ch D 502; *Chesterfield and Boythorpe Colliery & Co v Black* (1877) 26 WR 207; *Conybeare v Lewis* (1880) 13 Ch D 469.

191 See *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; see also *Equuscorp Pty Ltd v Acehand Pty Ltd* [2010] VSC 89 (a case where amendment was allowed, multiple defendants involved, and certain claims determined at trial in respect of two defendants); *Candibon Pty Ltd v Madden* [2010] VSC 44 (late amendment not allowed); *Miljus v CSR Ltd (No 2)* [2010] NSWSC 598 (amendment at trial not allowed, proceeding on foot for six years, represented by experienced counsel, and the case was case managed). In the Commercial Court, amendment of a pleading may be made by consent before the proceeding is set down for trial otherwise leave is required; refer to Commercial List Practice Note 2004 (the Green Book), [1.7(e)]. The practice followed is that, except where an amendment is formal, an affidavit must be filed explaining the delay or other reason for amendment and a draft of the proposed amended pleading or amendments must be exhibited. See *Geelong Building Society (in*

Order for leave to amend — Notice of amendment

[9.260] The applicant for leave to amend a pleading should provide the court and the other party to the proceeding with the precise terms of the proposed amendment in writing so that the court is properly informed, and the other party properly notified, for what the approval is being sought.[192] A court will not normally make an order in the form that a party be given leave to amend a pleading[193] without first having provided precise details of the intended amendment. Where a party has not provided those details amendments which would have been disallowed had the party provided notice will not be permitted on an application without notice.[194]

Costs of amendment

[9.270] A party who, under r 36.03(1)(a), amends a pleading without the leave of the court must pay the costs of and occasioned by the amendment, unless the court otherwise orders.[195]

In general a court will only give a party leave to amend provided the party applying for leave pay the costs of the application and the costs incurred by the other party resulting from the amendment.[196] The order as to costs will be drafted to avoid prejudice to the other party.[197] The party who has amended the pleadings will also be ordered to pay the costs associated with the evidence and the parts of the pleadings which the amendment has rendered irrelevant.[198] However, if a party's opposition to an application to amend pleadings is unreasonable it may ordered to pay the costs of the application, and the costs of the amendment may be made costs in the cause. The costs of an amendment may be reserved for the trial judge to award.[199]

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liq) v Encel [1996] 1 VR 594 at 609, referring to *Guide to Commercial List Practice*, para B.3.07. See also *EFM Pty Ltd v New Zealand Steel (Aust) Pty Ltd (No 2)* [2000] VSC 290 at [23]. Generally, the principles to be applied are as under r 36.01; see *Re AWB Ltd (No 7)* [2009] VSC 413.

192 See *Hyams v Stuart King (a firm)* [1908] 2 KB 696 at 724; *Derrick v Williams* [1939] 2 All ER 559 at 562; *J Leavey & Co Ltd v George H Hirst & Co Ltd* [1944] KB 24 at 27; *Busch v Stevens* [1963] 1 QB 1. See, however, *GL Baker Ltd v Medway Building and Supplies Ltd* [1958] 1 WLR 1216.

193 See *Hyams v Stuart King (a firm)* [1908] 2 KB 696 at 724; *Busch v Stevens* [1963] 1 QB 1.

194 *Busch v Stevens* [1963] 1 QB 1.

195 Rule 63.17. In *Jacobs v Schmaltz* (1890) 62 LT 121 the plaintiff was given leave to amend at the trial the terms of payment of all the costs to the date of trial. See also *Dobson v Shire of Ferntree Gully* (1891) 17 VLR 606.

196 See r 63.17.

197 *Kurtz v Spence* (1887) 36 Ch D 770; *Shannon v Lee Chun* (1912) 15 CLR 257 (adjournment of trial but without an award of costs).

198 See *Preston Corp v Fullwood Local Board (No 2)* (1885) 34 WR 196; *Re Trufort; Trafford v Blanc* (1887) 36 Ch D 600.

199 See, for example, *Roe v Davies* (1876) 2 Ch D 729 at 735; *Bromell v Robertson* (1886) 12 VLR 560; *Public Trustee v Nash* (1920) 38 WN (NSW) 142.

If a party seeking leave to amend accepts the conditions imposed by the trial judge on the grant of leave that party is not entitled to subsequently submit in contention against the conditions attached to the order that the conditions imposed are unreasonable or excessive restraints on the applicant.[200]

Subsequent costs of the proceeding are ordered without reference to the amendment even if the amendment raises the points on which the costs order is decided and the costs incurred.[201] With respect to the entitlement to costs it is irrelevant that the defendant would have succeeded but for the point raised by the plaintiff through amendment, and the court will not as a rule in that case award costs against the plaintiff up to the time the plaintiff amended the statement of claim.[202]

Making the amendment to a pleading

[9.280] The amendment of a pleading is usually undertaken by amending the copy of the pleading filed in court, or by filing the amended pleading, which is then served on all parties to proceedings.[203] Once an amended pleading is filed the copy pleading is indorsed with the statement that there now exists a substitute amended copy of the pleadings in its place.[204] The court record must show the date of the amendment.[205] Where an indorsement of claim constitutes a statement of claim under r 5.04(2) the indorsement is amended by amending the copy writ that was filed into court. The amended writ is served on all parties by serving them with a statement of claim containing the amendment. Personal service of the amended writ is not required.[206]

Time for amendment

Trial

[9.290] Where the pleadings will permit, although they have failed to explicitly raise, a trial to proceed on the basis of a particular cause of action or defence that is open to the parties to contend on the evidence, the court will order the pleadings amended so that the court record formally reflects what the parties regarded the issues in dispute between

200 *Kilpatrick v Huddart Parker & Co Ltd* (1896) 22 VLR 369.

201 *Nottage v Jackson* (1883) 11 QBD 627 at 638.

202 *Pricom Pty Ltd v Sgarioto* (unreported; VSC; Eames J; No 12926/90; 24 April 1995), referring to *Beoco Ltd v Alfa Laval Co Ltd* [1995] QB 137.

203 Rule 36.05(1).

204 Rule 36.05(2).

205 See r 36.05(3). It is a responsibility of the prothonotary.

206 See *Jamaica Railway Co v Colonial Bank* [1905] 1 Ch 677. As to pleading to the amended pleading, see r 36.06.

the parties to be at trial.[207] New facts introduced through amended pleadings are to be supported by evidence, and the other party must be afforded the opportunity to contest the facts.[208] The amendment to the pleadings may be permitted to be made after the presentation of all the evidence but prior to the delivery of the verdict or judgment.

Courts have refused to permit amendment to pleadings after a jury trial had been conducted for three days because to do so would require every witness to be recalled, and the case to bereopened.[209] In *Gordon v MacGregor*[210] the court refused the defendant leave to raise a new defence through amendment after the close of evidence in a case where the evidence was entirely documentary, and the plaintiff might have contested the new defence with oral evidence if notified of it. In that case Griffith CJ said:

> [I]t is a very dangerous thing after the close of the evidence to allow an amendment to raise a point founded on some oral statement of a witness, which may be perfectly complete so far as it is relevant to the issues which are being tried, but which if it were given with reference to entirely different issues would be incomplete. It is like allowing a party to raise a new case on appeal when the court has not all the materials before it.

In *Perestrello e Companhia v United Paint Co*[211] the plaintiff sued the defendant for breach of contract. The monetary compensation the plaintiff sought in the statement of claim was for expenses incurred in expectation of the defendant's performance of the agreement. The plaintiff did not claim damages for loss of profits. Despite foreshadowing the application to amend the claim to seek lost profits prior to trial, the court refused to grant the plaintiff leave to amend.

Nearing the end of the trial in an action for negligence in *Ralph v Strutton*[212] the plaintiff applied for leave to amend the statement of claim to add particulars. Certain evidence had been led at trial which was consistent with but not necessarily relevant to the case the additional particulars raised. The court refused to grant leave to amend the statement of claim because the proposed amendment did not raise an issue which was in dispute and raised to be determined at trial, and would involve the defendant calling further evidence to contest if introduced.

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207 *Robertson v Balmain New Ferry Co Ltd* (1906) 4 CLR 379 at 392. See also *Baker's Creek Consolidated Gold Mining Co v Hack* (1894) 15 LR (NSW) Eq 207 at 212; *Lanzer v Patterson* (2007) 18 VR 442; see also discussion in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [14], [69]–[71].

208 See *Loutfi v C Czarnikow Ltd* [1952] 2 All ER 823; *Lewis v Sydney Flour Pty Ltd* (1955) 56 SR (NSW) 189 at 192.

209 *Burnham v City of Mordialloc* [1956] VLR 239.

210 *Gordon v MacGregor* (1909) 8 CLR 316 at 321.

211 *Perestrello e Companhia Lda v United Paint Co Ltd* [1969] 1 WLR 570.

212 *Ralph v Strutton* [1969] Qd R 348.

In *Waghorn v George Wimpey & Co*[213] the case the plaintiff pleaded in their statement of claim and presented in their evidence departed completely from the judge's findings as to how the accident in which the plaintiff had sustained personal injuries occurred. The plaintiff's contention was that they had slipped on a bank whereas the evidence clearly proved they had slipped on a path. The plaintiff's pleaded allegations were therefore irrelevant to a determination of the questions in dispute at trial, and the plaintiff could not succeed. The plaintiff had not sought leave to amend the statement of claim but contended before the court that the facts represented a variant of the matters alleged in the claim, and were not new, separate and distinct facts amounting to a new cause of action. The court held that the mistaken case presented by the plaintiff so radically departed from the facts that it had burdened the defendant with preparing and presenting their case, and conducting the trial, differently from how they would have had the true facts been alleged in the pleadings in the first place.

The defendant in the action for libel, *Associated Leisure Ltd (Phonographic Equipment Co) v Associated Newspapers*,[214] sought leave to plead justification as a defence by amendment of its pleading. The application to amend was made late in the proceedings but was nevertheless granted because the defendant was obliged not to raise the defence until it had sufficient evidence to support it. The defendant had not delayed in gathering the evidence, conducting its enquiries with due diligence, and pleading the defence at the earliest possible stage in proceedings.

In *Mercantile Mutual Insurance (Aust) v Farrington*[215] the court held that to permit the plaintiff to raise a new claim by amendment would unfairly prejudice the defendant and denied the plaintiff leave. The plaintiff sought to raise a ground of claim to which the defendant had originally provided a defence. The defendant abandoned the defence in response to the plaintiff's case as pleaded and argued at trial and could not now practically resume that original defence.[216]

After jury verdict

[9.300] Pleadings may be amended even after the jury has delivered its verdict. The quantum of damages claimed in pleadings may be amended

213 *Waghorn v George Wimpey & Co Ltd* [1969] 1 WLR 1764.

214 *Associated Leisure (Phonographic Equipment Co) Ltd v Associated Newspapers Ltd* [1970] 2 QB 450.

215 *Mercantile Mutual Insurance (Aust) Ltd v Farrington* (1996) 44 NSWLR 634.

216 For cases of refusal, on the ground of prejudice to the defendant, to allow the plaintiff at trial to claim damages on a new cause of action in an amount substantially greater than what was claimed originally, see *National Australia Bank Ltd v Maher* [1999] 3 VR 589; *EFM Pty Ltd v New Zealand Steel (Aust) Pty Ltd (No 2)* [2000] VSC 290. Refusal may also occur at trial if a late amendment would cause unexplained or inexcusable delay, loss of court time and resources and prejudice to the defendant; see *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; *Tinworth v WV Management Pty Ltd* [2009] VSC 552.

after a jury has returned a verdict awarding a greater sum than the plaintiff sought in the statement of claim.[217] The plaintiff's entitlement to the jury's award requires the amendment to the pleadings to be made.[218]

After judgment or on appeal

[9.310] The amendment to the pleadings may be made after the judgment is delivered,[219] or on appeal. In general an appellate court will only permit amendments to pleadings that reflect the fact that certain issues arose and were litigated at trial,[220] and will not allow amendment to introduce novel issues which the appellant raises for the purpose of basing the appeal on them.[221] If the appeal court decides in favour of a retrial of the matter the pleadings may be amended when the court makes the order.[222]

When an amendment is required

[9.320] The rules, strictly interpreted, provide that when a trial is conducted on the pleadings the court should determine the issues on the basis of the facts contained in the pleadings. If questions of fact other than those raised on the pleadings arise the court should not determine those questions unless placed on the court record, in which case they are introduced onto the court record by amendment.[223] In practice, however, if a party leads evidence for the purpose of proving a fact they have not pleaded, the court is entitled to find the matter proved by the evidence for either the plaintiff or defendant as the case may be, as long as the fact so introduced did not meet with objection from the opposing party. On the relationship between the pleadings and the case presented at trial, Isaacs and Rich JJ said in *Gould v Mount Oxide Mines (in liq)*:[224]

> [P]leadings are only a means to an end, and if the parties in fighting their legal battle choose to restrict them, or to enlarge them, or to disregard them and

217 See *Wyatt v Rosherville Gardens Co* (1886) 2 TLR 282; *Modera v Modera* (1893) 10 TLR 69; *Willacy v Kildea* (1929) 46 WN (NSW) 186; *Mills v Mills* (1947) 65 WN (NSW) 115. See also *The Dictator* [1892] P 64.

218 *Chattell v Daily Mail Publishing Co* (1901) 18 TLR 165; *Mills v Mills* (1947) 65 WN (NSW) 115.

219 *Midland Bank Trust Co Ltd v Green (No 2)* [1979] 1 WLR 460; *Singh v Atombrook Ltd* [1989] 1 WLR 810; *FF Seeley Nominees Pty Ltd v El Ar Initiations (UK) Ltd (No 2)* (1990) 55 SASR 314; *Arball Pty Ltd v Liu* (unreported; VSC; McDonald J; Folio No 3347; 4 May 1992).

220 *Introvigne v Commonwealth* (1980) 48 FLR 161 at 169 (FCA). See also *Bell v Lever Bros Ltd* [1932] AC 161 at 216; *Maloney v Commissioner for Railways (NSW)* (1978) 52 ALJR 292 at 294.

221 *Wentworth v Attorney-General (NSW)* (1984) 154 CLR 518; 56 ALR 233 at 238.

222 *Ferguson v Thompson* (1881) 3 ALT 15 (new trial after disagreement of jury); *Hunt v Rice & Son Ltd* [1937] 3 All ER 715; 53 TLR 931 (CA).

223 See *Blay v Pollard & Morris* [1930] 1 KB 628 at 634; *Bell v Lever Bros Ltd* [1932] AC 161 at 216; *Bagnall v National Tobacco Corporation of Australia Ltd* (1934) 34 SR (NSW) 421 at 425. For an example of the court amending a pleading of its own motion, see *Ireland v Chapman* (1877) 3 VLR (L) 242.

224 *Gould v Mount Oxide Mines Ltd (in liq)* (1916) 22 CLR 490 at 517.

> meet each other on issues fairly fought out, it is impossible for either of them to hark back to the pleadings and treat them as governing the area of contest.[225]

Similarly, Dawson J said that: "Special procedures apart, cases are determined on the evidence, not the pleadings".

An agreement between the parties at trial to contest the real matters in dispute between them regardless of the pleadings means the amendment required to be made are deemed to have been made.[226]

Where it is open on the evidence presented at trial for the court to find in favour of the plaintiff, the court should order the amendment of, or give leave to the plaintiff to amend, the statement of claim to clearly plead the cause of action on which the plaintiff is entitled to judgment,[227] as long as the original pleadings provide evidentiary support for the new cause of action. In *Mummery v Irvings Pty Ltd*, for example, the plaintiff was injured in the defendant's sawmill when, upon entering, he was struck on the face by timber which flew from a machine operated by the defendant's foreman. The plaintiff claimed damages for personal injury on the basis that the defendant owed him a duty of care as an invitee onto the premises. The plaintiff's action based on s 59(1)(a) of the *Factories and Shops Act 1928* (Vic) failed. The court permitted the plaintiff to plead as a cause of action that the defendant was vicariously liable for the employee's negligent operation of the machine because evidence supporting the plea had arisen.

Proceedings are not rendered invalid by any failure to amend pleadings to be consistent with the evidence led at trial, and the issue which the evidence thereby puts in dispute.[228] In *Wong v Mura*[229] a judgment of the District Court of New South Wales was set aside by the Court of Appeal on the basis that the trial judge erred in disregarding both the original and amended pleadings altogether, and determining the matter entirely on the evidence presented at trial. Priestley AJA said that pleadings are prepared in compliance with the rules of pleading in inferior and superior courts to enable parties to understand the case against them and the evidence they will be required to prepare for trial so that ambush and

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225 See *Hoad v Swan* (1920) 28 CLR 258 at 262; *Bagnall v National Tobacco Corporation of Australia Ltd* (1934) 34 SR (NSW) 421 at 425; *Banque Commerciale SA (en liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279.

226 See also *Bagnall v National Tobacco Corporation of Australia Ltd* (1934) 34 SR (NSW) 421; *Miller v Cameron* (1936) 54 CLR 572 at 576–577; *Dare v Pulham* (1982) 148 CLR 658 at 664; *Banque Commerciale SA (en liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 297.

227 See *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99 at 111–112.

228 *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666 at 668; *Maloney v Commissioner for Railways (NSW)* (1978) 52 ALJR 292 at 294; *Water Board v Moustakas* (1988) 180 CLR 491; 77 ALR 193 at 197; *Banque Commerciale SA (en liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 297.

229 See *Wong v Mura* [2001] NSWCA 366, referred to in *Donis v Donis* (2007) 19 VR 577 at [61].

surprise are to the greatest extent possible eliminated from proceedings.[230] If parties litigate unpleaded matters at trial the court should order an amendment to the pleadings to reflect the claims actually made, and the issues the court was required to determine, at trial.[231]

If pleadings need to be amended to make them consistent with the issues raised on evidence at trial, and no party applies for leave to amend the pleadings, either the court should amend them on its own motion or order that the parties amend them.[232] If a party intends to adduce evidence at trial on an issue not contained in or emerging from the pleadings it should seek an amendment of the pleadings so as to conform with the evidence. Without an amendment the court will not admit the evidence if the other side objects.

When amendment permitted

[9.330] The court exercises its discretion in determining whether to permit a pleading to be amended. The court commences with the fundamental assumption that amendment should be permitted to be made in order to enable the real questions in controversy between the parties to be decided.[233] In the exercise of its discretion, the court balances relevant factors with the aim that justice is done in accordance with the facts of each particular case.[234]

In general amendments will be permitted to be introduced regardless of how late a stage in the proceedings the application is made if any prejudice that might be done to the opposing party can be compensated for by such means as an award of costs, and adjournment, or some other order such as for a new hearing date to be brought on expeditiously.[235] To avoid prejudice to the other side will normally require the party seeking the amendment to disclose both the nature of the new ground of claim or defence, and to provide at least a general outline of the evidence they

230 *Wong v Mura* [2001] NSWCA 366 at [3].

231 *Wong v Mura* [2001] NSWCA 366 at [4].

232 See *Ireland v Chapman* (1877) 3 VLR (L) 242; *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666 at 668. For a contrary view, see *Laws Holdings Pty Ltd v Short* (1972) 46 ALJR 563 at 571 per Gibbs J.

233 For examination of the expression "real question in controversy" in r 36.01(1), *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 212; *Commonwealth v Verwayen* (1990) 170 CLR 394 at 456; *Mehta v Commonwealth Bank of Australia* [1990] ATPR 41-026; *Commonwealth Bank of Australia v Mehta* (1991) 23 NSWLR 84 at 106–107; *Londish v Gulf Pacific Pty Ltd* (1993) 45 FCR 128 at 140–142; *Beoco Ltd v Alfa Laval Co Ltd* [1995] QB 137. See also *Dwyer v O'Mullen* (1887) 13 VLR 933 at 939, 940; *Shannon v Lee Chun* (1912) 15 CLR 257 at 265; *Horton v Jones (No 2)* (1939) 39 SR (NSW) 305 at 310; *GL Baker Ltd v Medway Building and Supplies Ltd* [1958] 1 WLR 1216 at 1231; *Campbell v Metway Leasing Ltd* [1998] ATPR 41-630 at 40,920; *Re AWB Ltd (No 7)* [2009] VSC 413.

234 *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220. See also *Londish v Gulf Pacific Pty Ltd* (1993) 45 FCR 128 at 142.

235 *Commonwealth v Verwayen* (1990) 170 CLR 394 at 456, 464, 482; *Howarth v Adey* [1996] 2 VR 535 at 542; *Hodgson v Amcor Ltd* [2010] VSC 204 at [89]–[113]; *Mehta v Commonwealth*

intend to adduce to establish the same.[236] It is relevant to a court's assessment of whether the other side will be prejudiced by the late amendment to consider whether the additional cause of action or defence requires the parties to make further discovery or to engage in more interlocutory steps, or to take other procedural steps, prior to trial.[237]

In general when entertaining the application for a later amendment the court will hear the other side's opposition to the application, to what prejudice it says the amendment will cause, and whether such prejudice can be compensated for by an award of costs or adjournment. In most cases the court's concern to adjudicate on all matters in dispute between the parties in order to achieve the objective of procedural rules,[238] and to avoid a multiplicity of proceedings,[239] will cause it to permit the party to amend pleadings to introduce claims, defences, or other points which, under a strict interpretation of the rules, should have been pleaded from the outset.[240]

In assessing whether to grant leave for a party to introduce a late amendment courts will consider, in addition to the prejudice caused, and the extent to which terms may be imposed on an order for late amendment to adequately compensate for it, case management principles, and whether the late amendment will adversely affect the court's capacity to utilise its resources in relation to other litigants in the court system, the negative impact of the late amendment on other litigants including the additional stresses of delays in having their matters heard, and the reasons a party has for seeking the late amendment.[241] Parties may be permitted to introduce late amendments if those amendments will enable the court to deal with critical facts in the proceedings, if the party did not unnecessarily delay in applying for the amendment after becoming aware of the facts which its seeks a late amendment to plead, and if other parties, and not the amending party alone, were responsible for the facts

Bank of Australia [1990] ATPR 41-026; *Commonwealth Bank of Australia v Mehta* (1991) 23 NSWLR 84 at 106–107. The fact that the application to amend was made at a late stage was relevant only on the question of whether any prejudice an amendment would cause could be overcome.

236 *Perkins v Nationwide News Pty Ltd* (1992) 106 FLR 368 at 372 (ACTSC).

237 See *Candibon Pty Ltd v Madden* [2010] VSC 44.

238 Rule 36.01(1)(a).

239 Rule 36.01(1)(c). *Shannon v Lee Chun* (1912) 15 CLR 257; compare *Beoco Ltd v Alfa Laval Co Ltd* [1995] QB 137 (plaintiff permitted to add alternative claim which it could not have brought in a separate proceeding because of the doctrine that, save in exceptional circumstances, parties will not be allowed to reopen matters previously the subject of litigation between them).

240 *Freehill Hollingdale & Page (a firm) v Development Ventures Pty Ltd* [2004] VSCA 174 at [22] per Hansen AJA. In addition to these considerations, those referred to in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, must now be taken into account.

241 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

coming to light late in the proceedings.[242] Eighteen years after a motor vehicle accident the defendant was given leave to plead contributory negligence in defence to a personal injury claim amendment in *North Australian Aboriginal Legal Aid Service v Liddle*.[243]

Error or mistake of party

[9.340] If any prejudice caused to the other side by the late amendment can be compensated for the fact that the party seeks the amendment to overcome an error or mistake in their pleadings will not prevent them being granted leave to make the amendment as long as there is no suggestion of fraud or *mala fides* in their application.[244] The court will first consider whether or not the application is made *bona fide* before, and as a condition of whether, it will consider the potential prejudicial effect of any amendment.[245] One hundred days into the trial of *Duke Group Ltd (in liq) v Arthur Young (No 12)*, and after the court had ruled on the proper basis for the calculation of damage, the plaintiff was granted leave to amend the quantum of the damages claimed.[246]

Amendment causing prejudice

[9.350] A party will not be permitted to raise as a source of prejudice to it that allowing the applying party's leave to amend would stand in the way of its successful claim or defence at trial if the hearing were conducted on the basis of pleadings in their original unamended form.[247]

An award of costs, an adjournment, and other compensation will not be able to meet every form of prejudice occasioned by late amendment. A defendant who could have availed themselves of a defence that the action, had it been raised in the original pleadings, would have been statute barred, will be deprived of a valid defence if the plaintiff can avoid the limitation period through amendment. Although it was once the norm to consider adjournment and the payment of costs as sufficient compensation for the prejudice caused by a late amendment, the list of factors the court must take into consideration is now more extensive, and in the exercise of its discretion the court must ensure that it achieves justice in the particular case. In relation to the need for the judge to do

242 *Hodgson v Amcor Ltd* [2010] VSC 204.

243 *North Australian Aboriginal Legal Aid Service Inc v Liddle* (1994) 118 FLR 109 (NTSC).

244 See *Tildesley v Harper* (1878) 10 Ch D 393 at 396; *Cropper v Smith* (1884) 26 Ch D 700 at 710–711; *Sweetnam v Jacobs* (1891) 17 VLR 501; *McLeod v Henty* (1900) 25 VLR 648 at 654; *Shannon v Lee Chun* (1912) 15 CLR 257; *Bomanite Pty Ltd v Slatex Corporation Australia Pty Ltd* (1991) 32 FCR 379 at 391 per French J ("the procedural requirements attending the preparation and conduct of litigation must be sufficiently flexible to make reasonable allowance for human error"); *Londish v Gulf Pacific Pty Ltd* (1993) 45 FCR 128 at 141–142.

245 *Brooks v Wyatt* (1994) 99 NTR 12 at 20.

246 *Duke Group Ltd (in liq) v Arthur Young (No 12)* (1991) 5 ACSR 91 (SASC).

247 *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 203. See also *Etna v Arif* [1999] 2 VR 353 at 368.

justice on the facts of the case, Lord Griffiths in *Ketteman v Hansel Properties*[248] — an action for damages caused by the latent defect in the construction of a building — said that:

> … justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other … Another factor … is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall upon their own heads rather than by allowing an amendment at a very late stage of the proceedings.

Lord Griffiths' remarks on the adequacy of costs awards to compensate for the prejudice caused by amendment has been recognised, and generalised to take into account all the factors relevant to an application for amendment.[249] It is, for example, relevant to consider the real expenses that accrue to a party as a result of the other party's amendment,[250] and the stresses experienced by litigants whose proceedings have been delayed by adjournment.[251] The experiences of different kinds of litigants must be considered. Government and corporate entities on the other hand may not experience the personal strain felt by

248 *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220.

249 See *Commonwealth v Verwayen* (1990) 170 CLR 394 at 456–457, 461–462, 464–465, 482, 498; *Mehta v Commonwealth Bank of Australia* [1990] ATPR 41-026; and *Commonwealth Bank of Australia v Mehta* (1991) 23 NSWLR 84 at 106–107; *GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710; *Commissioner of Taxation v Brambles Holdings Ltd* (1991) 28 FCR 451 at 456–457; *Bomanite Pty Ltd v Slatex Corporation Australia Pty Ltd* (1991) 32 FCR 379; *Perkins v Nationwide News Pty Ltd* (1992) 106 FLR 368; *Ting v Blanche* (1993) 118 ALR 543 (FCA); *Brooks v Wyatt* (1994) 99 NTR 12; *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; *Re AWB Ltd (No 7)* [2009] VSC 413.

250 See *J & H Manktelow Pty Ltd v Alloway Grazing Pty Ltd* [1975] 1 NSWLR 385 at 391 (reference to effect of inflation); *Mehta v Commonwealth Bank of Australia* [1990] ATPR 41-026; *GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710 710 at 716 per Samuels JA ("the emollient effect of an order for costs as a panacea may now be consigned to the Aladdin's cave … rejected as one of the fairy tales in which we no longer believe"); *Hobartville Stud Pty Ltd v Union Insurance Co Ltd* (1991) 25 NSWLR 358 at 362; *Bomanite Pty Ltd v Slatex Corporation Australia Pty Ltd* (1991) 32 FCR 379 at 392; *Howarth v Adey* [1996] 2 VR 535 at 551–552 (amending party impecunious).

251 See *Sweetnam v Jacobs* (1891) 17 VLR 501 at 501 per A'Beckett J (the saying that costs is the panacea which heals every sore in litigation "may be true with respect to the litigant's advisers, but must often be untrue with respect to the litigant himself"); *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220; *Commonwealth v Verwayen* (1990) 170 CLR 394 at 461–462, 464–465, 482; *Perkins v Nationwide News Pty Ltd* (1992) 106 FLR 368 (ACTSC).

individual litigants such that adjournment and an award of costs in their favour may be adequate compensation when another party applies to amend pleadings.[252]

Case management

[9.360] The context in which courts consider applications for an amendment to pleadings includes

- the public interest in the finality of litigation;
- the requirement for courts to consider the efficient and effective administration of justice in controlled lists where the conduct of litigation is subject to strict timetabling;
- case management[253] principles compelling courts to avoid as far as possible and to the extent that justice will allow the effect of undue delay on court lists; and[254]
- the inconvenience and prejudicial effect delay will have on other litigants awaiting a time when the court is at liberty to hear their matter.[255]

Although the decision in *Queensland v JL Holdings*[256] decided that the timing of an application will never stand in the way of an application to amend pleadings to include a claim or defence that was reasonably

252 See *Ketteman v Hansel Properties Ltd* [1987] AC 189; *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 at 155.

253 A central feature of which is a pre-trial conference: *United Motors Retail Ltd v Australian Guarantee Corporation Ltd* (1991) 58 SASR 156. See also *Tony Sadler Pty Ltd v McLeod Nominees Pty Ltd* (1994) 13 WAR 323. Compare *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 (the authority of which has been reviewed by the High Court in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175). The rules and practices of the court must be used in aid of doing justice to the parties rather than become an inflexible barrier to its achievement: *Howarth v Adey* [1996] 2 VR 535 at 544. See also *Southern Equity Holdings v Phoenix Manufacturing Services Pty Ltd* (1996) 65 SASR 563; *Cohen v McWilliam* (1995) 38 NSWLR 476; *Macquarie Bank Ltd v National Mutual Life Assn of Australia Ltd* (1996) 40 NSWLR 543.

254 *Ting v Blanche* (1993) 118 ALR 543 at 551 (FCA) (refusal of amendment to pleadings after close of evidence and submissions virtually completed which would have required evidence to be reopened).

255 See *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220; *Commonwealth v Verwayen* (1990) 170 CLR 394 at 482; *GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710 at 716; *Commissioner of Taxation v Brambles Holdings Ltd* (1991) 28 FCR 451 at 456–457; *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175. "The public interest … has become an increasingly significant element in the application of judicial resources. Inefficiencies in their use arising from lost and wasted time can never be compensated by costs": *Bomanite Pty Ltd v Slatex Corporation Australia Pty Ltd* (1991) 32 FCR 379 at 392 per French J, referring to *Dawson v Deputy Commissioner of Taxation* (1984) 71 FLR 364 at 366 (SASC); *United Motors Retail Ltd v Australian Guarantee Corporation Ltd* (1991) 58 SASR 156 at 158 per King CJ ("a party is entitled to his day in court but not to somebody else's day in court"); *Perkins v Nationwide News Pty Ltd* (1992) 106 FLR 368 (ACTSC); *Sali v SPC Ltd* (1993) 67 ALJR 841 at 849.

256 *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146.

arguable,[257] the amendment of court rules in a number of jurisdictions since that case was decided emphasises the pre-eminence of case management principles.[258]

In *Gale v Superdrug Stores*[259] the majority of the English Court of Appeal, deciding prior to the *Civil Procedure Rules 1998* (UK)[260] entering operation, on an application to withdraw an admission,[261] held that leave to withdraw would be granted provided the order to do so could overcome any prejudice to the other side (who was required to produce evidence of any specific prejudice claimed would befall them), and provided the application was not in bad faith. The rules governing amendment prior to the *Civil Procedure Rules 1998* (UK) were more permissive. The rule was interpreted broadly in keeping with its remedial function.[262] It was therefore not required to show that the proposed amendment was either "necessary" or even that it "better identified" the issues in controversy between the parties. While the proposed amendment may be refused on

257 *Wiltrading (WA) Pty Ltd v Lumley General Insurance Ltd* (2005) 30 WAR 290 at [91]. See also *Karuah Local Aboriginal Land Council v Mymurra Pty Ltd (No 2)* [2008] NSWSC 700.

258 See discussion in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [97], [133]. See also *Re AWB Ltd (No 7)* [2009] VSC 413; *Tinworth v WV Management Pty Ltd* [2009] VSC 552; *Hodgson v Amcor Ltd* [2010] VSC 204. In Western Australia, rules of court now incorporate case management principles. See *Rules of the Supreme Court 1971* (WA), O 1 r 4A. For reference to the relevance in Western Australia now of the observations of Dawson, Gaudron and McHugh JJ in *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 at 154, concerning the role of case management in the exercise of the discretion to allow an amendment of pleadings, see *Silverstone Holdings Pty Ltd (as trustee for Devereux Property Trust) v American Home Assurance Co* (1997) 18 WAR 516 at 530–531; *Hancock Family Memorial Foundation Ltd v Fieldhouse* (2005) 30 WAR 398 at [95]; *Wiltrading (WA) Pty Ltd v Lumley General Insurance Ltd* (2005) 30 WAR 290; *Aon Risk Services Australia Ltd v Australian National University*. In New South Wales, the relevance of *Queensland v JL Holdings Pty Ltd* is now similar to the position in Western Australia. The authority of the decision is now qualified by the requirement of *Civil Procedure Act 2005* (NSW), s 56(2) that the court must seek to give effect to the overriding purpose of the rules of procedure, which is "to facilitate the just, quick and cheap resolution of the real issues in the proceedings". See *Dennis v Australian Broadcasting Corporation* [2008] NSWCA 37 at [28]–[29]; *Karuah Local Aboriginal Land Council v Mymurra Pty Ltd (No 2)* [2008] NSWSC 700; *Rayscan Management Pty Ltd v Moodliar* [2008] NSWSC 857; *Hans Pet Constructions Pty Ltd v Cassar* [2009] NSWCA 230; for comment on *Dennis v Australian Broadcasting Corporation*, in the context of a rule of court in terms similar to the statute in New South Wales, see *Balnaves v Smith* [2008] QSC 150.

259 *Gale v Superdrug Stores plc* [1996] 1 WLR 1089.

260 The *Civil Procedure Rules 1998* (UK) came into force on 26 April 1999.

261 The principles governing amendment to pleadings were also applicable to the withdrawal of admissions: see *Cropper v Smith* (1884) 26 Ch D 700; *Clarapede & Co v Commercial Union Assn* (1883) 32 WR 262; *Shoe Machinery Co v Cutlan* [1896] 1 Ch 108.

262 *Cropper v Smith* (1884) 26 Ch D 700 at 710–711; *Tildesley v Harper* (1878) 10 Ch D 393 at 397; *Kurtz v Spence* (1887) 36 Ch D 770 at 774; *The Alert* [1891-4] All ER 1275 at 1278; *Wright Stephenson & Co Ltd v Copeland* [1964] NZLR 673; *Makin v IAC* [2001] VUCA 17; CAC 14 of 2001.

the ground that it clearly did not better identify the questions in dispute between the parties it was usually sufficient that the applicant considered the proposal to have that effect.

In Lord Millett LJ's view the applicant could succeed by expressing to the court their desire to amend pleadings or withdraw admissions without need for justification.[263] However, the introduction of the *Civil Procedure Rules 1998* (UK) altered the environment in which applications to amend pleadings were decided. It was on that basis that the dissenting views of Thorpe LJ in *Gale v Superdrug Stores* were judicially approved. The court observed that modern case management principles required courts to take "a more disciplinary approach to adversarial manoeuvring" including the need for the amending party to provide a sufficient explanation for the alteration of their approach.[264]

The defendant in *Gale* applied for leave to withdraw an admission of liability provided two years earlier during the parties' argument on the quantum of damages. Lord Millett LJ had said[265]

> Litigation is slow, cumbersome, beset by technicalities, and expensive. From time to time laudable attempts are made to simplify it, speed it up and make it less expensive. Such endeavours are once again in fashion. But the process is a difficult one which is often frustrated by the overriding need to ensure that justice is not sacrificed. It is easy to dispense injustice quickly and cheaply, but it is better to do justice even if it takes a little longer and costs a little more …

His Lordship expressed obvious resistance to any attempt to reject the principles upon which classic cases[266] of amendment of pleadings had been decided on the untested presumption that their age meant that they were unable to meet the requirements of the modern administration of justice: "On the contrary, I believe that they represent a fundamental assessment of the functions of a court of justice which has a universal and timeless validity."

In *Geelong Building Society (in liq) v Encel*[267] Tadgell J said:

> The case was heard in the commercial list. As is well known, that list is dedicated to the prompt, efficient and economical resolution of commercial disputes. Consistently with that philosophy applications to amend pleadings, once they are put in proper shape for a trial, are discouraged and are very sparingly allowed, especially after the trial has begun. The reasons for that attitude are manifest and notorious. Compromise of cases in the commercial list is necessarily encouraged and, without a healthy rate of settlements, the

263 *Gale v Superdrug Stores plc* [1996] 1 WLR 1089 at 1100.

264 Lord Bingham CJ, as he then was, found "very persuasive force" in Thorpe LJ's views: see *Sollitt v DJ Broady Ltd* (unreported; UKCA; 23 February 2000); see also Seagroatt J in *Li Fat Mui v Able Engineering* [1998] 1 HKC 469 at 472.

265 *Gale v Superdrug Stores plc* [1996] 1 WLR 1089; [1996] 3 All ER 468 at 477 per Millett LJ.

266 Cases such as *Cropper v Smith* (1884) 26 Ch D 700 at 710–711 and *Clarapede & Co v Commercial Union Assn* (1883) 32 WR 262 at 263.

267 *Geelong Building Society (in liq) v Encel* [1996] 1 VR 594 at 608. The case was heard by the Commercial List, now the Commercial Court.

List could not function. Of course, no undue pressure is exerted in order to achieve settlements but the incentive to achieve them is not to be undervalued or undermined.[268]

Burden of persuasion where prejudice alleged

[9.370] If an application to amend a pleading is resisted by the opposing party on the ground that amendment would cause it prejudice the applicant must persuade the court to permit the amendment by demonstrating that the need to make the amendment is greater than any injustice that might be caused to the party contesting the amendment.[269]

Whether new claim or defence arguable

[9.380] The success or otherwise of a ground of claim or defence is a matter to be decided at trial.[270] Courts do not therefore determine whether an amendment will be allowed on the basis of its prospect of success at trial. An amendment that raises an arguable ground of claim or defence satisfies the grounds for permitting the amendment. The court will not, however, allow futile amendments. An amendment is futile if it is bad in law[271] and if, had it been included in the original pleading, it would have been struck out.[272] Courts will estop amendments upon which parties have by conduct or representation precluded their own reliance.[273] Unnecessary counterclaims will not be permitted.[274] An amendment the purpose of which is to support or replace a claim which as originally pleaded was unsupported, but which does not support it, or is unsupported, will be refused.[275]

If part of a pleading has been struck out for being bad in law it may be restored if at some time after being struck out an appellate court affirms

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268 See also *EFM Pty Ltd v New Zealand Steel (Aust) Pty Ltd (No 2)* [2000] VSC 290. The same approach is now taken in the Causes List. See *Klein Way Pty Ltd v Seajarra Pty Ltd* [2000] VSC 136.

269 *Moore v TWT Ltd* (1991) 105 FLR 350 (ACTSC); *Hancock Shipping Co Ltd v Kawasaki Heavy Industries Ltd* [1992] 1 WLR 1025; *McKenzie v Commonwealth* [2001] VSC 361; *Burk v Commonwealth (No 3)* [2004] VSC 210.

270 *Abela v Giew* (1964) 81 WN (Pt 1) (NSW) 344; *Hall v National & General Insurance Co Ltd* [1967] VR 355 at 367; *Commonwealth v Verwayen* (1990) 170 CLR 394 at 456; *Woodhead Australia (SA) Pty Ltd v Paspalis Group of Companies* (1991) 103 FLR 122 (NTSC).

271 *Commonwealth v Verwayen* (1990) 170 CLR 394 at 456. See also *Central Queensland Meat Co v Gallop* (1892) 8 TLR 225; *Machado v Fontes* [1897] 2 QB 231; *Bevan v Barnett* (1897) 13 TLR 310; *Simpson v Union Bank of Australia Ltd* (1912) 14 WALR 18; *Ward v Lewis* [1955] 1 WLR 9; *Abela v Giew* (1964) 81 WN (Pt 1) (NSW) 344 at 345; *Gimson v Victorian WorkCover Authority* [1995] 1 VR 209; *Brooks v Wyatt* (1994) 99 NTR 12.

272 *Horton v Jones (No 2)* (1939) 39 SR (NSW) 305 at 310 per Jordan CJ. See also *Abela v Giew* (1964) 81 WN (Pt 1) (NSW) 344.

273 *Morel Bros & Co Ltd v Earl of Westmorland* [1903] 1 KB 64; *Morel Bros & Co Ltd v Earl of Westmorland* [1904] AC 11; *Commonwealth v Verwayen* (1990) 170 CLR 394.

274 *Marshall v Langley* [1889] WN 222.

275 *Jones v Hughes* [1905] 1 Ch 180; *Sinclair v James* [1894] 3 Ch 554; *Litchfield v Dreyfus* [1906] 1 KB 584.

the law such as to make good the pleading.[276] However, where a pleading is entirely or partially struck out for being vexatious leave should not be given to allow a party to amend it if to do so would reproduce, in substance, the same vexatious material.[277]

Embodying amendment of pleading in record

[9.390] The party who successfully applies for leave to amend pleadings at trial is required to ensure that the amendment is formally entered onto the court record, so that the matters litigated and determined in the proceeding are clearly stated.[278]

Statement of claim

Cause of action arising after proceeding commenced

[9.400] A cause of action that has accrued since the commencement of the proceeding may properly be made the subject of amendment to a statement of claim, provided the defendant consents or the court has authority under the rules to permit the amendment. If the amendment is neither consented to nor permitted the cause of action may have to be litigated in new proceedings.[279]

The rule of procedure requiring the entire cause of action to have arisen before the commencement of the proceeding, or the date on the writ, has been varied in Victoria by r 36.01(3)[280] which provides for an indorsement of claim or pleading to be amended, if the purpose of the amendment is to determine the real question in controversy between the parties, or avoid multiple proceedings, even where the amendment adds or substitutes a cause of action that has arisen after the proceedings commenced.[281] If a proceeding is pending and other matters arise which

276 *Kurtz v Spence* (1887) 36 Ch D 770.

277 *Petropoulos v Commissioner for Railways* [1963] NSWR 286.

278 *J Leavey & Co Ltd v George H Hirst & Co Ltd* [1944] KB 24; *Cole v Lejeune* [1951] 2 TLR 308; *Loutfi v C Czarnikow Ltd* [1952] 2 All ER 823. See *Luby v Newcastle-Under-Lyme Corp* [1965] QB 214 for the date a judgment should bear if pleadings have not been formally amended so as to incorporate those amendment a party was given leave to make at trial at the time judgment is delivered.

279 *Eshelby v Federated European Bank Ltd* [1932] 1 KB 254; *Coutts & Co v Duntroon Investment Corporation Ltd* [1958] 1 WLR 116; *Wigan v Edwards* (1973) 47 ALJR 586; *Baldry v Jackson* [1976] 2 NSWLR 415; *Niord Pty Ltd v Adelaide Petroleum NL* (1990) 54 SASR 87; *Water Authority of Western Australia v AIL Holdings Pty Ltd (No 2)* (1992) 10 WAR 233; *Servcorp (Aust) Pty Ltd v Abgarus Pty Ltd* (1995) 38 NSWLR 281.

280 The rule has also been varied in the Northern Territory and Queensland. See *Supreme Court Rules* (NT), r 36.01(3); *Rules of the Supreme Court 1900* (Qld), O 32 r 1(6).

281 The requirement that the entire cause of action came into existence before the proceeding commenced is a rule of procedure and can be varied or abolished by statute or rule of court made under statute. See *Wigan v Edwards* (1973) 47 ALJR 586 at 592–593. A rule of court which allows a plaintiff to plead any matter which has arisen at any time, whether or not before the commencement of the proceeding, does not enable a

would conveniently be dealt with under the claim for the same proceeding the statement of claim should be amended to add those claims to the proceeding.[282]

The rule in Weldon v Neal

[9.410] The so-called rule in *Weldon v Neal*[283] was a rule of practice that an amendment to a pleading was to operate from the date of the amendment. The principle is now provided for either by statute or by the rules of procedure in Victoria, the Federal Court, the Northern Territory, New South Wales, Queensland, South Australia and Western Australia.[284] The provision in the *Limitation of Actions Act 1958* (Vic) applies to proceedings in any court.[285]

Rule 31.01(6) provides

> (6) Notwithstanding the expiry of any relevant limitation period after the day a proceeding is commenced, the Court may make an order under paragraph (1) where it is satisfied that any other party to the proceeding would not by reason of the order be prejudiced in the conduct of that party's claim or defence in a way that could not be fairly met by an adjournment, an award of costs or otherwise.

Section 34(1) of the *Limitation of Actions Act 1958* (Vic) states:

> If a court would, but for the expiry of any relevant period of limitation after the day a proceeding in the court has commenced, allow a party to amend a document in the proceeding, the court must allow the amendment to be made if it is satisfied that no other party to the proceeding would by reason of the amendment be prejudiced in the conduct of that party's claim or defence in a way that could not be met by an adjournment, an award of costs or otherwise.

The Victorian provisions make no explicit reference to the addition or substitution of a cause of action outside the expiry of its limitation period. Instead the court is directed in such a manner that when it exercises its discretion in determining whether a party should be permitted to amend a document after the time that the cause of action has become statute barred it should satisfy itself that the opposing party will not be

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cause of action which has accrued since the date of the writ to be raised by amendment. *Baldry v Jackson* [1976] 2 NSWLR 415 (*Supreme Court Rules 1970* (NSW), Pt 15 r 16); *Niord Pty Ltd v Adelaide Petroleum NL* (1990) 54 SASR 87 (*Supreme Court Rules 1987* (SA), r 46.08); *Water Authority of Western Australia v AIL Holdings Pty Ltd (No 2)* (1992) 10 WAR 233 (*Rules of the Supreme Court 1971* (WA), O 20 r 10).

282 *Cudgen RZ Ltd v Currumbin Minerals Pty Ltd* [1984] 1 Qd R 552.

283 *Weldon v Neal* (1887) 19 QBD 394.

284 See Vic r 36.01(6); *Limitation of Actions Act 1958* (Vic), s 34; FCR O 13 r 2; *Limitation Act* (NT), s 48A; NT r 36.01(6); NSW r 4(1), (5) (see now *Civil Procedure Act 2005* (NSW), s 65(2)(c)); Qld O 32 r 1(2), (5); SA r 53.03(c); WA O 21 r 5(2), (5). The rule in *Weldon v Neal* continues to apply in a proceeding commenced before 1 January 1987. *Limitation of Actions Act 1958* (Vic), s 34(2); r 1.10. See, for instance, *Transport Industries Insurance Co Ltd v Masel* (1994) 8 ANZ Insurance Cases 61-277.

285 As does the provision of the *Limitation Act* (NT). For discussion of the rule of court in the Federal Court of Australia, see *Rodgers v Commissioner of Taxation* (1998) 88 FCR 61.

prejudiced by the grant of leave to make the amendment in a way that an award of costs or an adjournment, or some other method, would not justly compensate.

The combined effect of rr 36.01(8) and 14.03(2) is to entitle the court to permit a plaintiff after the period for the limitation of the action has expired to amend a statement of claim by adding or substituting a cause of action.[286] Rule 36.01(8) provides

> (8) Paragraph (6), with any necessary modification, applies to an application under Rule 14.03(2).

Rule 14.03(2) in turn provides

> (2) The Court may, by order, allow the plaintiff to serve a statement of claim the effect of which will be to add a new cause of action to or substitute a new cause of action for a cause of action disclosed in the writ.

The effect of r 14.03(2) is that the court in granting the plaintiff leave to serve a statement of claim in which a cause of action has been added to or substituted without amendment of the indorsement under r 14.03(1) is to effect the addition or substitution of the cause of action.

Phillips JA examined the relationship between s 34 of the *Limitation of Actions Act 1958* (Vic) and r 36.01(6) in *Anglo Irish Beef Processors International v Federated Stevedores Geelong*.[287] His Honour noted that s 34 was headed "Abrogation of the rule in *Weldon v Neal*" and was introduced into the *Limitation of Actions Act 1958* by the *Supreme Court Act 1986* (Vic).[288] He further noted other similarities between s 34 and r 36.01(6): they had come into force on the same day, and the language and phrasing of the section resembled that of the rule with remarkable closeness, so as to raise the supposition that the intention of Parliament was that they reflect each other either entirely or partially.

Nevertheless, in his Honour's opinion, the provisions differed at the very least in the extent to which they appeared in different contexts. A number of issues arose from the question of the similarities and differences between s 34 and r 36.01(6). The first issue which arose was whether both provisions were similarly confined in their operation. That involved a consideration as to whether s 34 applied to any limitation period no matter whether it was imposed by statute, contract or by some other means, or whether it operated only on a statutory limitation period, or whether it was even further restricted to a limitation period determined

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286 There is no corresponding reference in *Limitation of Actions Act 1958* (Vic), s 34.

287 *Anglo Irish Beef Processors International v Federated Stevedores Geelong* [1997] 2 VR 676; 140 ALR 658 at 661–663.

288 Act No 110 of 1986 which came into force on 1 January 1987. Rule 36.01 was part of the general rewriting of Ch I of the Rules and the new Ch I, entitled the "General Rules of Procedure in Civil Proceedings", was given effect, as from 1 January 1987, by the *Supreme Court (Rules of Procedure) Act 1986* (Vic) (Act No 63 of 1986). *Supreme Court (General Civil Procedure) Rules 2015* (Vic), r 36.01 reproduces the rule (albeit with minor rewording having no substantive effect). The *Supreme Court (General Civil Procedure) Rules 2015* (Vic) came into operation on 23 November 2015.

by Pt 1 of the *Limitation of Actions Act 1958*.[289] If s 34 and r 36.01(6) were interpreted as being confined as suggested it was necessary to consider whether they were operative or inoperative when the statute of limitations was applied in equity by analogy as part of the law of laches, so as to allow any exception permitted either under the law of laches, or on some other basis.[290] A further consideration was whether the expiration of the limitation period barred the right of action as well as the remedy and either s 34 or r 36.01(6) played any role, regardless of whether or not they operated only in relation to statutory time bars.[291] A final consideration was what if any significance was to be attached to the distinction between a "purely procedural" and a "substantive" limitation period, or between a time limit imposed as a condition of the right which is simultaneously created and one which operates in respect of rights otherwise existing.[292]

The Court of Appeal held that s 34 and r 36.01(6) operated on limitation periods imposed by any statutes.[293] In *Lloyd Steel Co (Aust) v Jade Shipping*[294] decided under Pt 20 r 4 of the *Supreme Court Rules 1970* (NSW) — the equivalent provision to the Victorian r 36.01(6) — the court held that the reference to "relevant limitation period" in the rules was a reference to a limitation period that arose either under statute or under contract.[295] Further, *Bridge Shipping v Grand Shipping*[296] was determined in relation to the rules governing the addition or substitution of a new party to the proceeding.[297] In general a party will not be permitted to be added or substituted to the proceedings if a statutory limitation period has expired. However, under the rules the court is now entitled to allow an

289 As, for instance, Batt J considered in *Keller v Bayside City Council* [1996] 1 VR 356 at 375.

290 JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (LexisNexis, 2015), p xxiii. See further JW Brunyate, *Limitation of Actions in Equity* (1932, Stevens & Sons), p 17.

291 Subsequently, in *Agtrack (NT) Pty Ltd (t/as Spring Air) v Hatfield* (2003) 7 VR 63; and *PSL Industries Ltd v Simplot Australia Pty Ltd* (2003) 7 VR 106.

292 See, for example, *Maxwell v Murphy* (1957) 96 CLR 261; *Chang Jeeng v Nuffield (Aust) Pty Ltd* (1959) 101 CLR 629; and *Australian Iron & Steel Ltd v Hoogland* (1962) 108 CLR 471.

293 See also *Air Link Pty Ltd v Paterson (No 2)* (2003) 58 NSWLR 388.

294 *Lloyd Steel Co (Aust) Pty Ltd v Jade Shipping SA* (1985) 1 NSWLR 212.

295 See also *Dyno Wesfarmers Ltd v Knuckey* [2003] NSWCA 375 at [36].

296 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231.

297 *Supreme Court (General Civil Procedure) Rules 2015* (Vic), r 9.06; see also *High Court Rules 2004* (Cth), r 21.05; FCR O 6 rr 8, 9; ACT Div 2.4.2; NT r 9.06; NSW rr 6.24, 6.25, 6.27, 6.29; Qld rr 69, 74; SA r 75; Tas r 184; WA O 18 r 6. In some jurisdictions, the rules also provide for the substitution or addition of a plaintiff where a proceeding has been commenced in the name of the wrong person as plaintiff, or it is doubtful whether it has been commenced in the name of the right plaintiff: ACT rr 218, 221; Qld r 69(2)(a); Tas r 184(1)(c). There are no equivalent provisions in the other jurisdictions. For the view that such rules give partial expression to the inherent jurisdiction of the court to deal with misnomer or misdescription by amendment see *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at 241 per Dawson J. Compare *Bainbridge-Hawker v Minister of State for Trade and Customs* (1958) 99 CLR 521 at 535–536 per Williams J.

amendment even if it should act to add or substitute a party to the proceedings.[298] The court assumed that r 36.01 would act to allow an

298 Vic r 36.01(1), (4), (6), (7); ACT rr 502(4), 503(2); NT r 36.01(1), (4), (6), (7); *Civil Procedure Act 2005* (NSW), s 65(2)(b); Qld r 376(2); SA r 54(6), (7)(b); Tas r 184(1)(c); WA O 21 r 5(1), (2), (3). See also *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231. Although this case involved only the rule in Victoria (in terms identical to the rule in the Northern Territory), the High Court considered that there is no reason why its counterpart in the other jurisdictions should be given a more restricted meaning: at 259 per McHugh J. The rule in New South Wales, Queensland, South Australia and Western Australia is modelled on *Rules of the Supreme Court 1965* (UK), O 20 r 5(3), which removed the injustice caused by decisions such as *Davies v Elsby Bros Ltd* [1961] 1 WLR 170 (CA); and *Mitchell v Harris Engineering Co Ltd* [1967] 2 QB 703 at 718 per Lord Denning MR (CA). See also *Bridge Shipping Pty Ltd v Grand Shipping SA* at 256, 259 per McHugh J. In *Rodriguez v Parker* [1967] 1 QB 116, the plaintiff claimed damages for bodily injury sustained when struck by a motor vehicle alleged to have been driven by RJ Parker, and was allowed to change the name of the defendant to RS Parker, the son of RJ Parker. In *Mitchell v Harris Engineering Co Ltd*, a claim for damages for injury sustained in an industrial accident, the plaintiff was permitted to change the name of the defendant employer from the name of one company, Harris Engineering Co (Leeds) Ltd, to Harris Engineering Co Ltd, another company. In Queensland and Western Australia the rule provides that before allowing the mistake to be corrected, the court must be satisfied that the mistake was genuine and was not misleading or such as to cause any reasonable doubt as to the identity of the party intending to sue or intended to be sued. The position in New South Wales and South Australia differs slightly from the rule in England, Queensland and Western Australia. *Civil Procedure Act 2005* (NSW), s 65(2)(b) does not require that the mistake be genuine and under SA r 54(7)(b) the court need only be satisfied that the mistake was genuine and not intended to mislead. Whether a party was misled or had a reasonable doubt is to be determined subjectively, although the objective nature or quality of the mistake will be an important factor: *Epacris Pty Ltd v Director-General, Department of Natural Resources* (2007) 69 NSWLR 507 at [40]–[41]. The rule in Victoria and the Northern Territory requires that the court be satisfied that any other party to the proceeding, including the person substituted as party by virtue of the order made to correct the mistake in the name of a party, not be prejudiced in the conduct of his or her claim or defence in a way that could not be fairly met by an adjournment, an award of costs or otherwise: Vic r 36.01(4), (6); NT r 36.01(4), (6). The qualification in the rule as to prejudice in the conduct of the claim or defence applies to an amendment of any kind which is allowed by the court notwithstanding that a relevant limitation period has expired since the proceeding commenced: *Bridge Shipping Pty Ltd v Grand Shipping SA* at 240–241, 261 per Dawson and McHugh JJ respectively. Formerly, the court, by analogy, would not allow a mistake in the name of a party which was not a mere misnomer to be corrected outside the limitation period if the effect would be to substitute a party. See, for example, *Davies v Elsby Bros Ltd* [1961] 1 WLR 170 (CA); *Attorney-General (UK) v Sorati* [1969] VR 88; *Hubbard Assn of Scientologists International v Attorney-General (Vic)* [1976] VR 119; *Berno v Green's Steel Constructions Pty Ltd* (1991) 103 FLR 133 (NTSC). The mistake could only be corrected if the court treated the mistake as a mere misnomer. According to one test, a mistake in the name of the defendant might be treated as a misnomer if it could be said that the defendant after reading the writ ought reasonably to have believed that the plaintiff intended to make him or her the defendant, but got the name wrong: *Davies v Elsby Bros Ltd* [1961] 1 WLR 170 (CA). See also *Whittam v WJ Daniel & Co Ltd* [1962] 1 QB 271 (CA); *Harstoff v Allen* [1967] Qd R 211; *J Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1970) 44 ALJR 441; *Metropolitan Oils (Pty) Ltd v Beringer* (1986) 11 FCR 335; *Singh v Atombrook Ltd* [1989] 1 WLR 810 (CA).

amendment overcoming the limitation period imposed by Art III r 6 of the *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading* ("Hague Rules").

This tacit assumption could not necessarily be explained by the concession made in the Full Court that no distinction was to be drawn between a statutory time limit and one fixed by contract,[299] for even a statutory time limit may extinguish the right and not merely bar the remedy.

In *Agtrack (NT) v Hatfield*[300] the plaintiff, Mrs Hatfield, whose husband, Stephen, was killed while on a sightseeing trip operated by Spring Air in the Northern Territory on 14 August 1997, commenced proceedings in the Victorian Supreme Court alleging breach of contract and negligence against the defendant on 22 January 1999. The *Civil Aviation (Carriers' Liability) Act 1959* (Cth) ("the Civil Aviation Act") displaced the operation of Northern Territory law to the extent of its inconsistency with the Civil Aviation Act. The Civil Aviation Act provided that all civil liability for death or injury was to be founded on Pt IV of the Civil Aviation Act, and that no action arose in tort or contract. The Civil Aviation Act limited the period for a right of action to two years from the date of death. The plaintiff's claim did not refer to the Civil Aviation Act, and in a letter dated a matter of days after the expiration of the limitation period the defendant disputed the basis of the plaintiff's action.

In August 2000 the plaintiff by summons filed in the Victorian Supreme Court sought leave to amend her statement of claim to plead the provisions of the Civil Aviation Act. The defendant filed a summons seeking judgment with costs, or that the plaintiff's claim be struck out or permanently stayed. The Supreme Court granted the plaintiff leave, the Court of Appeal dismissed Agtrack's appeal, and the High Court held in favour of Mrs Hatfield. The High Court found that the court had properly exercised its discretion[301] under O 6 to grant the plaintiff leave to amend her statement of claim to plead a statutory cause of action after the plaintiff's statement of claim had not specifically referred to the relevant provisions of the Civil Aviation Act.[302] Order 36 was capable of extending statutory causes of action beyond limitation periods unless they fell within those expressly referred to in Pt 1 of the *Limitation of Actions Act 1958* (Vic) ("Limitation Act"),[303] in which respect there was no

299 *Bridge Shipping Pty Ltd v Grand Shipping SA* [1991] 1 VR 258 at 260.

300 *Agtrack (NT) Pty Ltd (t/as Spring Air) v Hatfield* (2003) 7 VR 63; see also *Air Link Pty Ltd v Paterson* (2005) 223 CLR 283.

301 Applying *McGee v Yeomans* [1977] 1 NSWLR 273.

302 Applying *Patterson v Richards* [1963] VR 179; *Harris v Raggatt* [1965] VR 779.

303 *Agtrack (NT) Pty Ltd (t/as Spring Air) v Hatfield* (2003) 7 VR 63 at [108].

inconsistency between O 36 and s 34 of the Limitation Act.[304] While it is true that a claim extinguished by effect of s 34 of the Limitation Act was incapable of being revived, the plaintiff had pleaded facts sufficient to raise a cause of action under the Limitation Act by making allegations showing the application of Pt IV, and therefore brought the cause of action within the two-year limitation period.

Amendment to correct a mistake in the name of a party

[9.420] All jurisdictions provide by their rules for the correction of mistakes in naming parties the effect of which is to incorrectly commence proceedings by or against those parties. Those corrections to mistakes in the name of a party may be made regardless of whether they result in the addition or substitution of parties to the proceeding.[305] Mistakes as to the name of a party includes cases of misnomer (where the name of a party who should sue or be sued is incorrectly or imprecisely stated),[306] and cases of mistakes are made with respect to the name of a party corresponding to a particular legal description.[307] No error required to be corrected by means of the addition or substitution of parties has occurred where a party is properly identified, but a mistake has been made in relation to their legal rights and obligations in relation to the litigation.[308] Taking action against a company that has dissolved prior to the initiation of proceedings cannot be remedied by seeking leave to amend the pleadings to add or substitute a party other than the company.[309] An examination of the pleadings will be able to determine whether the error is a misnomer, or the party has been named correctly but the error has arisen with respect to their duties or obligations.[310]

The effect of amendment in most jurisdictions is retrospective, enabling the correctly named party to sue or be sued regardless of whether the amendment is introduced after the limitation period of the action has

304 *Agtrack (NT) Pty Ltd (t/as Spring Air) v Hatfield* (2003) 7 VR 63 at [47], [119]–[126]. Applying *Australia and New Zealand Banking Group Ltd v Larcos* (1987) 13 NSWLR 286; distinguishing *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166; doubting *Staples v City & Country Helicopters Pty Ltd* (1994) 119 FLR 291.

305 Vic r 36.01(4); see also *High Court Rules 2004* (Cth), r 21.05 (court may join or remove party at any stage of a proceeding); FCR O 13 r 3(4); ACT r 502(4); NT r 36.01(4); *Civil Procedure Act 2005* (NSW), s 65(2)(b); Qld r 69(2)(a)(iii), (iv); SA r 74(6)(b); Tas r 184(1)(c); WA O 21 r 5(3).

306 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231.

307 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at 260 per McHugh J. Such as the driver of a given car, or the landlord of particular premises.

308 For example, a person who sues the correctly identified owner of a ship when it should sue the carrier will not thereby have misnamed a party: *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231.

309 See *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India* [1996] 1 All ER 1017 at 1026 per Evans LJ (CA).

310 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at 261–262 per McHugh J.

expired.[311] In Victoria leave to amend may be granted even after the limitation period has expired as long as no prejudice will thereby befall the other party that cannot be compensated for by a grant of adjournment and an order for costs.[312] On the other hand, while rules in all jurisdictions allow amendment for the joinder of parties,[313] courts will not permit a party to be joined if to do so would deprive the party of a defence that the action is being brought against them after the expiry of the limitation period.[314] In Victoria the rules relating to the addition of parties date the commencement of proceedings against added parties from the time the pleadings are formally amended.[315] The joined party cannot therefore be denied a defence of limitation of action that has accrued before the amendment was introduced, and indeed the existence

311 Vic r 36.01(5); FCR O 13 r 2(5); NT r 36.01(5); *Civil Procedure Act 2005* (NSW), s 65(3); Qld r 74(4), (5) (proceedings against new defendants commence on filing the amended copy of the originating process, whereby they are made parties but, for limitation purposes, the proceedings are taken to have started when the original proceeding started, unless the court otherwise orders); Tas r 184(6); WA O 21 r 5. There are no equivalent provisions in the other jurisdictions, but rules permitting amendment after the expiry of limitation periods presume that the amendments take effect from the commencement of proceedings.

312 Vic r 36.01(6). The rule is to the same effect in the Northern Territory: NT r 36.01(6). The rules in other jurisdictions are less permissive. For example, in the Australian Capital Territory, amendment will be permitted after the expiration of the limitation period if it is appropriate, if the mistake was genuine, and if the mistake would not have been misleading or likely to cause any reasonable doubt in relation to the identity of the misnamed party: ACT r 503(2). In New South Wales and Western Australia, an order for amendment on the grounds of misnomer may be made if the mistake was not misleading and was not a mistake that was likely to cause reasonable doubt as to the identity of the party: *Civil Procedure Act 2005* (NSW), s 65(2)(b); WA O 21 r 5. In South Australia, amendment on the grounds of misnomer is permitted if the mistake was genuine and not intended to mislead: SA r 54(6)(c), (7).

313 Vic r 9.06; see also *High Court Rules 2004* (Cth), r 21.05.1(b), (c); FCR O 6 r 8; ACT rr 220, 221; NT r 9.06; NSW r 6.32; Qld Ch 3 Pt 1 Divs 2, 3; SA r 74(1); Tas rr 176, 177, 178; WA O 18 r 6.

314 *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 199–200 per Lord Keith (HL); *Fernance v Nominal Defendant* (1989) 17 NSWLR 710; *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at 235–236 per Dawson J; *Philip Morris Ltd v Bridge Shipping Pty Ltd* [1994] 2 VR 1.

315 Vic r 9.11. Similarly in: NT r 9.11; WA O 18 r 8. In Western Australia, the amended writ must be served on the party to be joined before the amendment can take effect. In the Australian Capital Territory and New South Wales, the amendment takes effect on the date the order is made or on any other date specified in the order: ACT r 242; NSW r 6.28. The proceedings involving a joined party are deemed to have begun only on the service of the amended writ and the defence pleading limitation legislation will not be defeated where a defendant has been changed. *Fernance v Nominal Defendant* (1989) 17 NSWLR 710 per Gleeson CJ (applying *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 200) (while the court has a general power to grant leave to amend pleadings pursuant to *Supreme Court Rules 1970* (NSW), Pt 20 (repealed), the court's power to add new parties must be exercised in accordance with Pt 8 (repealed), and the amendment of an originating process by the addition of a party pursuant to Pt 8 (repealed) does not relate back to the date of commencement of the proceedings for the purpose of limitation legislation, unlike an amendment under Pt 20 (repealed)).

of such a defence is grounds for refusing the joinder.[316] However, in some jurisdictions, when justified by the facts and circumstances of the case,[317] courts may deem proceedings against new parties to have been commenced before they were joined as parties.[318]

Change of party under r 9.06 compared

[9.430] The common law rule in *Weldon v Neal* previously permitted the making of amendments to correct any genuine errors as to the identity of the person suing or being sued.[319] In Victoria the rules of court provide that when a court is exercising its general power to order the amendment of any document in a proceeding, a mistake in the name of a party may be corrected even if doing substitutes another person as a party.[320]

316 *Ketteman v Hansel Properties Ltd* [1987] AC 189; *Stout v RA Wenham Builders Pty Ltd* [1980] 1 NSWLR 426; *Drinan v Hickey* (1982) 11 NSWLR 744.

317 *Lynch v Keddell (No 2)* [1990] 1 Qd R 10 (particular "special circumstances" justifying the order were set out in *Lynch v Keddell* [1985] 2 Qd R 103 at 109 per Kelly J, and included the fact that the plaintiff had mistakenly sued the owner rather than the driver of the vehicle and sought to amend the statement of claim to join the driver; the fact that the insurer was still able to process the plaintiff's claim and that the amended pleadings were substantially similar to the original ones); *Grotherr v Maritime Timbers Pty Ltd* [1991] 2 Qd R 128; *Hayward v Darling Downs Aircraft Services Pty Ltd* [1993] 2 Qd R 153; *Fernance v Nominal Defendant* (1989) 17 NSWLR 710 at 721 (the power of a judge who allows an addition of a party to make an order displacing the operation of Qld O 13 r 13 (repealed) is an important difference relevant to its relationship with other rules dealing generally with amendment).

318 In New South Wales, Queensland and Tasmania, legislation or the rules of court allow a plaintiff in an action commenced within the limitation period to join another party to the proceedings after the expiration of the limitation period: *Civil Procedure Act 2005* (NSW), s 65(2); *Uniform Civil Procedure Rules 1999* (Qld), r 69(1), (2) (see also *Limpus v Queensland* [2004] 2 Qd R 161 at 169–171 per Jerrard JA; *Interline Hydrocarbon Inc v Brenzil Pty Ltd* [2006] 2 Qd R 454 at 457–459 per Muir J; *Althaus v Australia Meat Holdings Pty Ltd* [2007] 1 Qd R 493 at 498–500 per Keane JA); *Supreme Court Rules 2000* (Tas), r 184(1). The Australian Capital Territory, New South Wales and Queensland rules allow the court to order that proceedings against a new party be taken to have commenced at a time prior to the defendant being added: ACT r 243; *Civil Procedure Act 2005* (NSW), s 65(3); Qld r 74(5) (when a party is added, the proceedings against that party are deemed to have begun when the proceeding began against the original party, unless otherwise ordered).

319 *Weldon v Neal* (1887) 19 QBD 394. See also *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 per McHugh J; *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166 (CA).

320 Vic r 36.01(4). NT r 36.01(4). Legislation or the rules of court in the Australian Capital Territory, New South Wales and Queensland empower the court to make an order to correct a mistake in the name of a party, whether or not the effect of the amendment is to substitute a new party: ACT r 503(2)(b); *Civil Procedure Act 2005* (NSW), s 65(2)(b). An amendment made pursuant to the rule relates back to the date of filing the statement of claim, unless the court otherwise orders: *Civil Procedure Act 2005* (NSW), s 65(3). Qld r 376(2)(b). The rules of court in South Australia allow the court to grant leave to correct the name of a party and substitute a new party if the court is satisfied that the mistake was genuine: SA r 54(6), (7).

Further, under the rules, an amendment to documents in proceedings may be ordered even if the limitation period for the prosecution of the action has expired.[321]

In general r 9.06 rather than r 36.01 governs changes that effect the substitution of a person as plaintiff or a defendant.[322] Nevertheless, r 36.01 may be used as a means to substitute parties in certain prescribed circumstances. Rule 36.01(4), for example, may achieve the substitution of one person for another as a party in the process of correcting a mistake in the name of a party. The substitution of one person for another as a party to a proceeding cannot be achieved using r 36.01(4) unless the rule is used to amend a mistake in the name of a party on a document.[323]

Rule 36.01(4) cannot be used so as to name a person as a defendant for the ulterior purpose of subsequently substituting another person in the place of that defendant. A party will be permitted to amend only if they satisfy the tripartite requirements of the rule:

- that a mistake exists;
- which is a mistake in the name of a party; and
- that it can be amended without prejudice or injustice to the other party that would not be compensated for by an award of costs or an adjournment, or by some other appropriate order.[324]

Rules 9.06 and 36.01 overlap to some extent. Dawson J in *Bridge Shipping* explained the potential confusion as an historical artefact resulting from both rules originating in O 16 of the former Victorian Rules of Court. His Honour said:[325]

> Although r 2 of O 16 referred only to plaintiffs, it gave partial expression to the inherent jurisdiction of the Court to deal with misnomer or misdescription by amendment, the same principle being applicable in the case of plaintiffs and of defendants: *Alexander Mountain & Co (Suing as Firm) v Rumere Ltd* [1948] 2 KB

321 Vic r 36.01(6); NT r 36.01(6). See also *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at 236–237 per Dawson J (criticising the Queensland line of authorities). Vic r 36.01(4) is a remedial rule and should be given a beneficial interpretation. It is proper to give it the widest interpretation which its language will permit: *Holmes v Permanent Trustee Co of New South Wales Ltd* (1932) 47 CLR 113 at 119. It should be interpreted to cover not only cases of misnomer, clerical error or misdescription but also cases where the plaintiff, intending to sue a person he or she identifies by a particular description, was mistaken as to the name of the person who answers that description.

322 See also *Lynch v Keddell (No 2)* [1990] 1 Qd R 10; *Fernance v Nominal Defendant* (1989) 17 NSWLR 710; *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at 241.

323 The concept of allowing a mistake in the name of a party to be corrected which has the effect of substituting a party was taken from *Supreme Court Rules 1970* (NSW), Pt 20 r 4(3): See now *Civil Procedure Act 2005* (NSW), s 65(2)(b). That rule was modelled on *Rules of the Supreme Court 1965* (UK), O 20 r 5(3). Rules similar to the latter provision exist in Queensland (*Rules of the Supreme Court 1900* (Qld), O 32 r 1(3)), South Australia (*Supreme Court Rules 1987* (SA), r 53.03(a)), and Western Australia (WA O 21 r 5(3)).

324 See *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at 261.

325 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at [10].

> 436. What is important is the distinction between the correction of a misnomer or misdescription, which was something dealt with by r 2 (now reflected in r 36.01), and the addition or substitution of parties for the parties originally joined, which was something dealt with by r 11 (now reflected in rr 9.05, 9.06 and 9.07). The correction of a misnomer or misdescription does not involve the substitution of a new party except in a technical or formal sense, since the party after the correction is the same person as was misnamed or misdescribed. In such a case, at least as a matter of theory, no question of defeating a statute of limitation arises.

As far as Dawson J was concerned O 9 dealt with the addition or substitution of parties in a real sense, while O 36 was restricted to the correction of cases of "misnomer or misdescription" of parties who, after the amendment being made, remained "the same person". Misnomer and misdescription are therefore treated by Dawson J as essentially interchangeable.

The majority in *Bridge Shipping* defined "description" more broadly than did Dawson J who meant to uphold a clear distinction between O 9 and O 36. Nevertheless, Dawson J recognised the difficulty of making any absolute distinction between correcting a misnomer or misdescription and substituting a different party for the party originally joined, observing that "the mere fact that the existing name is an accurate description of an existing person may be decisive" in determining that the case is not one of misnomer.[326]

Bridge Shipping v Grand Shipping

The facts

[9.440] Philip Morris Ltd ("Philip Morris") engaged Bridge Shipping Pty Ltd ("Bridge Shipping") to make arrangements for transporting 32 containers of tobacco from Brazil to Melbourne, and they in turn engaged another company to organise the carriage of the goods. Bridge Shipping had no knowledge of carrier's identity. The *Green Sand* with Philip Morris's cargo on board left Brazil for Melbourne in May 1986. The bills of lading issued by the master of the *Green Sand* on 12 May 1986 in respect of the cargo did not name the carrier. Upon arrival of the Green Sand in Melbourne it was discovered that not all of Philip Morris's containers were on the vessel, and the contents of some of those that were on board had suffered damage.

Philip Morris initiated proceedings by writ dated 8 January 1987, suing Bridge Shipping for damages. Bridge Shipping issued a third party notice on Grand Shipping SA ("Grand Shipping") seeking either contribution or indemnification from them as carrier of the goods. Bridge Shipping had identified Grand Shipping as the carrier by searching Lloyd's Register wherein Grand Shipping was registered as the owner of the vessel *Green Sand*. Grand Shipping served its defence against the third party claim on

326 As to which see *J Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1970) 44 ALJR 441 at 443 per Walsh J (reversal of a finding of misnomer).

Bridge Shipping on 29 September 1987, alleging that Rainbow Line SA ("Rainbow Line") had carriage of Philip Morris's goods, having chartered the *Green Sand* from Grand Shipping in 1984 in Tokyo. The date on which the defence was delivered was outside the expiration of the limitation period within which action could be taken against Rainbow Line.

Bridge Shipping therefore applied under r 36.01(4) to amend the originating process to correct the name of the party so that Rainbow Line was substituted as a party to the proceeding in place of Grand Shipping, bringing the action against Rainbow Line as of the date of the issuance of proceedings. The application was refused by the Master. Bridge Shipping appealed unsuccessfully to a judge of the Supreme Court, and again without success to the Full Court. An appeal from the Full Court decision was heard by the High Court.

The Appeal

[9.450] The subject of the appeal was the meaning of r 36.01(4), which provides that:

> (4) A mistake in the name of a party may be corrected under paragraph (1), whether or not the effect is to substitute another person as a party.

Bridge Shipping's contention was that r 36.01(4) was the rule relevant to their application in that they had made a mistake with respect to the person fitting the description of the carrier of the goods; they had not mistakenly identified the class of legally liable persons against whom to proceed. The High Court commented that the Full Court of the Supreme Court had interpreted r 36.01(4) as applying to a more limited range of mistakes than the one referred to by Bridge Shipping. Crockett J (Kaye and Southwell JJ agreeing) would restrict r 36.01(4) to amending only cases of misnomer, misdescription, typographical or clerical error, and similar matters. Bridge Shipping had not merely misnamed the person it intended to sue. Rather, it had never intended to sue Rainbow Line, and therefore had been wrong as to the identity of the liable party. The rule enabling an amendment to a document on which the mistake made was as to the name of a party would not permit a plaintiff from depriving a party of the immunity from suit which had arisen as a result of the passage of time.

However, McHugh J observed that to raise the accrued defence as a barrier to amendment would admit that the change in the rules introducing O 36 had not affected an alteration from the position the House of Lords took in *Davies v Elsby Bros*:[327] that is, that amendment should not result in a party being deprived of the defence of the expiration of a limitation period for instituting actions against it, unless an amendment adding or substituting a party was no more than a

327 *Davies v Elsby Bros Ltd* [1961] 1 WLR 170.

correction of a misnomer. Comparing the interpretation of the equivalent rule in England[328] his Honour concluded:

> There is no reason why its Australian counterparts should be given a more restricted meaning. Consequently, in so far as cases in Queensland and the judgment of the Full Court of the Supreme Court of Victoria in the present case suggest that such a rule applies only to misnomers and that *Davies* is still a relevant decision, they were wrongly decided and should be overruled.[329]

In considering the scope of r 36.01(4) McHugh J said that the words "whether or not the effect is to substitute another person as a party" in the rule enable a substitution of parties to an action, and imply that the plaintiff's intention to sue the person named on the originating process "does not prevent the subrule applying provided that there was a mistake in the name of the person sued."

The majority's approach to the interpretation of the concluding words of r 36.01(4) was broader than Dawson J's, who interpreted them as having the more limited application of permitting a party to amend a mistaken name even if to do so would, formally, change the identity of a plaintiff or defendant.[330] His Honour limited the substitution of parties to the "formal" consequence of correcting a mistake:[331]

> Although r 36.01(1) derives some of its wording from the old O 16 r 2 – which dealt with actions brought by mistake in the name of the wrong plaintiff – its generality expresses the inherent jurisdiction of the court to amend defects or errors, the jurisdiction of which lay behind the single instance covered by O 16 r 2. It is in that way only that r 36.01(1) deals with amendment of parties. The addition, removal or substitution of parties is dealt with elsewhere, in r 9.06. in providing that the mistake in the name of a party may be corrected whether or not the effect is to substitute another party as a party, r 36.01(4) is intended to serve the limited purpose of avoiding the difficulty where the formal effect of

328 *Rules of the Supreme Court 1965* (UK), O 20 r 5(3).

329 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at 261 for the view that "O 20 r 5(3) of the Rules in England … has no precise counterpart in the wording of r 36.01….": see *Mannin Pty Ltd v Metal Roofing and Cladding Pty Ltd* [1997] NTSC 119 at [21] per Martin CJ. Dawson J, referring to *Evans Construction Co Ltd v Charrington & Co Ltd* [1983] QB 810, accepted "entirely" (at [17]) the approach of Donaldson LJ (at 821–822), but not his Lordship's conclusions which, his Honour maintained, did not follow his approach. Instead he preferred Waller LJ's (dissenting) conclusion (at 816), saying (at [17]): "A mistake in the name of a party is not, to my mind, the same thing as a mistake in the identity of that party. In other words, one may intend to sue the landlord but be mistaken in the belief that X is the landlord. That is not to mistake the name of X, but to mistake the identity of the landlord."

330 His Honour observed that it authorised the amendment of the name of the plaintiff from "Rainbow Spray Irrigation Pty Ltd" to "Rainbow Spray Sales Pty Ltd" in *Rainbow Spray Irrigation Pty Ltd v Hoette* [1963] NSWR 1440; the amendment from "Philips Electrical Pty Ltd" to "Philips Industries Pty Ltd" in *J Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1970) 44 ALJR 441; and "W Daniel & Co (a firm)" to "WJ Daniel & Co Ltd" in *Whittam v WJ Daniel & Co Ltd* [1962] 1 QB 271. Each case, however, would depend on its own facts.

331 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at [14].

> the correction of a misnomer or misdescription is to substitute another person as a party. But it does not otherwise authorise the addition or substitution of a party. That must be done under r 9.06.

In Dawson J's view the subrules of r 36.01 limit the court's inherent jurisdiction, and the concluding words of r 36.01(4) do not amplify the court's jurisdiction under r 36.01. The court's jurisdiction remains limited to a correction of a mistake of name, and does not extend to the substitution of a party "except in a technical or formal sense" which the correction of a misnomer or misdescription may have:[332]

> But the amendment of the parties for which O 36 provides is restricted to an amendment to correct a mistake in the name of a party. True it is that the correction of the mistake may result in the substitution of another person as party, but this is permissible only if it is the result of the correction of an error in the naming of the true party.

Dawson J's interpretation of the rule preserves the distinction between, and separates the approaches to be taken, under rr 9.06 and 36.01:[333]

> It is, as I have endeavoured to explain, the inherent jurisdiction to correct a misnomer or a misdescription which lies behind the relevant paragraphs of r 36.01. Otherwise the addition, removal or substitution of parties is dealt with by r 9.06, with more stringent restrictions [contrast r 9.11(3)(a) with r 36.01(6)] where the amendment is sought after the expiry of a relevant period of limitation.

McHugh and Dawson JJ disagree fundamentally as to what constitutes an error of identity as opposed to an error of name. For McHugh J:[334]

> … a plaintiff may make "a mistake in the name of a party" not only because the plaintiff mistakenly believes that a certain person, whom the plaintiff can otherwise identify, bears a certain name, but also because the plaintiff mistakenly believes that a person who answers a particular description bears a certain name.

And again:[335]

> Thus, a plaintiff may make a mistake in the name of a party because, although intending to sue a particular person whom the plaintiff knows by sight, the plaintiff is mistaken as to that person's name. Equally, the plaintiff may make a mistake "in the name of a party" because, although intending to sue a person whom the plaintiff knows by a particular description, the driver of a certain car, the plaintiff is mistaken as to the name of the person who answers that description.

For McHugh J if a plaintiff intends to sue a person "who answers a particular description" or "whom the plaintiff knows by a particular description" but fails to identify the person of that description correctly the person makes a mistake as to the name of the party within the

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332 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at [15].

333 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at [15].

334 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at [20].

335 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at [20].

meaning of r 36.01(4) by suing a person who does not answer, or lacks that known description, in the same way as he makes a mistake in the name of the party under the rule if he mistakenly attributes a name to a person known to him:[336]

> In both cases, the plaintiff knows the person intended to be sued by reference to some property or properties which is or are peculiar to that person, but is mistaken as to the name of that person. In the first case the properties which identify the person are personal characteristics; in the second case, they are the properties which are of the essence of the description of that person. But for the purpose of subrule (4) that distinction is irrelevant. In both cases the plaintiff was mistaken only as to the name of the person intended to be sued. There is no warrant for treating subrule (4) as dealing only with the case where the properties which identify the party are inherent properties. That is, there is no warrant for treating subrule (4) as dealing only with the case where the plaintiff says: "The person I wish to substitute as a party is that entity which I identified by certain inherent properties peculiar to it but whose name I mistakenly believed was X." The subrule applies equally to the case where the plaintiff says: "The person I wish to substitute as a party is that entity which I identified by reference to certain properties which are true of it and of no one else and whose name I mistakenly believed was X." in both cases, a mistake in the name of a party has occurred and can be seen to have occurred only because the person sued does not have or is not identified by some property or properties which is or are peculiar to the person intended to be sued and to no one else.

For Dawson J, on the other hand, the latter example is not within the scope of r 36.01(4), being an error of identity, not an error as to the name of a party.

McHugh J's approach would have allowed Bridge Shipping to invoke r 36.01(4) to substitute Rainbow Line for Grand Shipping on the basis that its intention was to join as a party the person having the particular "property" unique to it and that it and no one else was the carrier of the goods in question, but in error believed Grand Shipping to have been the carrier of the tobacco rather than Rainbow Line.

Dawson J, however, was of the view that r 36.01(4) does not apply in this situation. Drawing on *Evans Construction Co v Charrington*[337] to highlight the difference between his Honour's and the majority's approach, Dawson J said:

> … that Evans Constructions thought that Charrington was liable because it thought that it was the landlord is not to the point. No doubt a plaintiff ordinarily sues because he believes he has a claim and a defendant is sued because the plaintiff believes he is the person liable. If the claim lies in someone else or if the defendant is not liable but someone else is, that does not convert the mistake into a mistake in the name of the party joined. It is not a question of giving the rule a narrow or a wide construction. Giving the rule its widest

336 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at [20].

337 *Evans Construction Co Ltd v Charrington & Co Ltd* [1983] QB 810.

> construction, the question remains whether there was a mistake in the name, not a mistake in the joinder of a particular party for some other reason.[338]

McHugh J concluded:[339]

> Order 36.01(4) is a remedial rule and should be given beneficial interpretation. It is proper to give it the widest interpretation which its language will permit (*Holmes v Permanent Trustee Co of New South Wales Ltd* (1932) 47 CLR 113 at 119). It should be interpreted to cover not only cases of misnomer, clerical error and misdescription but also cases where the plaintiff, intending to sue a person he or she identifies by a particular description, was mistaken as to the name of the person who answers that description. In my opinion, *Evans v Charrington* and *Lloyd Steel (Aust) Pty Ltd v Jade Shipping SA* (1985) 1 NSWLR 212 were correctly decided.
>
> To give the rule the meaning for which Bridge contends does not mean that a person can sue any person and then at a later time substitute another person for the original defendant. The rule imposes three limitations on a person's right to amend. First, there must be a mistake. Secondly, the mistake must be "in the name of a party". Thirdly, the court may only make the order where it is satisfied that any other party to the proceeding would not by reason of the order be prejudiced in the conduct of his or her claim or defence in a way that could be fairly met by an adjournment, an award of costs or otherwise: O 36.01(6).

As to the case before the court McHugh J decided that Bridge Shipping failed on the facts to bring its application within the scope of r 36.01(4) by not establishing that it had intended to sue the carrier but had mistaken its name:[340]

> The conclusion that Bridge impliedly intended to sue the carrier is inconsistent with the terms of the statement of claim, with the inferences to be drawn from that document, and with the affidavit evidence of Bridge's solicitor seeking to explain the mistake.
>
> If Bridge had intended to sue the carrier and had mistakenly believed that the name of the carrier was Grand, it would follow that Bridge had made a mistake "in the name of a party"
>
> …
>
> The statement of claim in the present case does not indicate that Bridge sued Grand because it believed Grand was the carrier but was mistaken in the name of the carrier. To the contrary, the allegation in par 3 that Grand was "the owner of the vessel" at all material times indicates that Bridge intended to sue Grand because it believed that Grand was the owner of the vessel.

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338 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at [19]. Dawson J illustrated the distinction he drew by reference to *Mitchell v Harris Engineering Co Ltd* [1967] 2 QB 703. In that case the plaintiff's solicitors issued a writ against HE Co (Leeds) Ltd instead of the plaintiff's employer, an associated company, HE Co Ltd, which was served after the limitation period. An application to substitute the name of the employer was held to be "an amendment to correct the name of a party" within *Rules of the Supreme Court 1965* (UK), O 20 r 5(3) since there had been a genuine mistake which did not mislead the true defendant.

339 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at [21].

340 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at [24].

> …
>
> Bridge made no mistake as to description of the party which it wished to sue. It intended to sue the owner and did so. Bridge's mistake was not one of misnomer, clerical error or misdescription. Nor was it one where, intending to sue a person whom it identified by a particular description, it was mistaken as to the name of the person who answered that description.
>
> …
>
> The mistake which Bridge made was that it believed that it had rights against the owner of the vessel. But that was not a mistake "in the name of the party."

In Dawson J's judgment, mistakes as to name are to be distinguished from mistaken descriptions going to identity. Even if Bridge Shipping had established as a fact that it had intended to sue the carrier (and not the owner), but had wrongly identified the carrier as Grand Shipping (instead of Rainbow Line), it could not found the amendment substituting Rainbow Line for Grand Shipping on r 36.01(4), because the basis of the mistake is as to identity, not as to name, and can therefore only be undertaken under r 9.06:[341]

> It may sometimes be difficult to determine whether there is a mistake in the name or a mistake in the identity. When that is so and an amendment is sought under r 36.01, the question can only be resolved by asking whether, in all the circumstances, it can reasonably be said that the party whose name is sought to be amended would remain the same in all but name or description if the amendment were allowed. If so then there is a misnomer or misdescription and the rule applies notwithstanding that, as a matter of formality, the amendment results in the substitution of another entity. If not, and the effect of the amendment would be, not to correct the name of the party, but to alter the identity of the party, then that rule does not apply.
>
> In the present case it is, to my mind, quite clear that there was no mistake made by Bridge Shipping in the name of the third party which it joined. It joined Grand Shipping and intended to join Grand Shipping. It did so because Grand Shipping was the owner of the "Green Sand" and it assumed that the owner was also the carrier. It was wrong in this, but it made no mistake about Grand Shipping's name. Its mistake was in the identity of the carrier. Rule 36.01(1) and (4) were, therefore, not available to Bridge Shipping.

Mistake in the name of a party

[9.460] The meaning of the expression "mistake in the name of a party" which is the gist of the rule has been the subject of considerable debate. The four categories of mistake to which the words relate and the rule applies are:

1. Misnomer, clerical error and misdescription.
2. Mistake as to the name of a particular identified person.
3. Mistake in selection of a person meeting the correct legal description.
4. Mistake in the legal description of the proper party.

341 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at [21].

Misnomer, clerical error, misdescription

[9.470] An error consisting of "misnomer, misdescription, typographical or clerical error (in the name of the party) and the like"[342] may be cured by amendment.[343] The application of r 36.01(4) is not limited to the correction of a misnomer.[344] The court's power of amendment is based in legislation, or the rule giving the court power to amend generally,[345] and the court's inherent jurisdiction.[346] The court's power to allow the correction of misnomer in any document in a proceeding under r 36.01(1) is effected where misspelt names are permitted to be amended to conform to a party's intention to name the proper party to the litigation, as long as issues of party substitution can be unambiguously avoided.[347]

In determining whether to allow the correction of a purported misnomer the court may consider whether the name used in error could refer to an existing person whether natural or corporate.[348] The error is classified a misnomer and the amendment permitted if there is no such person answering to that name.[349] The plaintiff, having omitted "Ltd" from the

342 *Bridge Shipping Pty Ltd v Grand Shipping SA* [1991] 1 VR 258 at 262 per Crockett J.

343 *Hill & Son v Tannerhill* [1944] KB 472 (CA) (the plaintiff, Hill, named irregularly as trading as "Hill and Son"); *Bainbridge-Hawker v Minister of State for Trade and Customs* (1958) 99 CLR 521 at 534–536 per Williams J (right person as plaintiff erroneously described by office held as Minister of State for Trade and Customs instead of being identified by personal name). See also *Centre Refrigeration and Air-Conditioning Services Pty Ltd v Lincoln* (1983) 70 FLR 200 (NTSC). See also *A & M Short Pty Ltd v Prestige Residential Marketing Pty Ltd* (2005) 54 ACSR 760 at 762–765 per Young CJ in Eq. A plaintiff or defendant must sue or be sued in his or her proper name: see *Alexander Mountain & Co v Rumere Ltd* [1948] 2 KB 436 at 441–442 per Cohen LJ (CA). In special circumstances, a plaintiff may be permitted to sue anonymously.

344 The Full Court in *Bridge Shipping Pty Ltd v Grand Shipping SA* [1991] 1 VR 258 overruled in *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231.

345 Vic r 36.01(1); see also *High Court Rules 2004* (Cth), r 3.01.2; FCR O 13 r 2(1); ACT r 502(1); NT r 36.01(1); *Civil Procedure Act 2005* (NSW), s 64(1), (4); Qld r 375; SA rr 54, 55, 57; Tas rr 427(1), 435; WA O 21 rr 5(1), 7(1).

346 *Alexander Mountain & Co v Rumere Ltd* [1948] 2 KB 436 (CA); *Etablissement Baudelot v RS Graham & Co Ltd* [1953] 2 QB 271 (CA); *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at 238 per Dawson J.

347 See *Hill & Son v Tannerhill* [1944] KB 472; *Bainbridge-Hawker v Minister of State for Trade and Customs* (1958) 99 CLR 521 at 534–536.

348 *J Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1970) 44 ALJR 441 at 443 per Walsh J; *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at 240 per Dawson J; *Brandsma & Crockett Pty Ltd v Heindal Pty Ltd* (2002) 26 WAR 323 at 331 per McLure J.

349 *Whittam v WJ Daniel & Co Ltd* [1962] 1 QB 271 ("Ltd" was omitted from the name of the defendant company and there being no other entity in existence to which "WJ Daniel & Co" could refer, the mistake was corrected). See also *Hill & Son v Tannerhill* [1944] KB 472 (CA) (irregular naming of the plaintiff, Hill, as trading as "Hill and Son"); *Alexander Mountain & Co v Rumere Ltd* [1948] 2 KB 436 (name of plaintiff changed to name of widow of Alexander Mountain, the deceased having carried on business as "Alexander Mountain & Co", there being no partnership of that name); *Etablissement Baudelot v RS*

defendant company's name in *Whittam v WJ Daniel & Co*,[350] was granted leave to insert it because the words "WJ Daniel & Co" referred to no extant person.

If, on the other hand, there is in existence a person who bears the name used in error an amendment would not simply correct a mere misnomer, but may substitute the person who bears the correct name as the proper party to the proceeding.[351] In the case of *Rainbow Spray Irrigation v Hoette*[352] two companies named Rainbow Spray Sales Pty Ltd existed. Walsh J stated that if the effect of changing the company's name would have been to substitute one party for another he would not have granted leave for the plaintiff to change its name. Leave was granted on the basis that it corrected "an error in naming the true plaintiff."

In *Vulcan-Hart Corporation v Vulcan Australia*[353] Premark International Inc ("Premark"), a US company, instructed an Australian Patent Attorney, by letter dated 1 October 1992 to apply under s 23 of the *Trade Marks Act 1955* (Cth), on behalf of Vulcan-Hart Corporation ("Vulcan-Hart") a Delaware registered company, to cause the Registrar of Trade Marks to remove trade marks A 133243 and A 1188368 registered to Vulcan Australia Ltd. The Patent Attorney was subsequently informed that he had been incorrectly instructed in that the application ought properly to have been made in the name of Hobart Corporation ("Hobart"), a Delaware-

Graham & Co Ltd [1953] 2 QB 271 (foreign plaintiffs entitled to sue as partners wrongly described as incorporated body); *Vulcan-Hart Corporation v Vulcan Australia Ltd* (1994) 30 IPR 441 (FCA) (the party intended to be named as applicant was Hobart Corporation, the relevant subsidiary company of a parent corporation, but by mistake the name used was Vulcan-Hart Corporation, an entity which had merged into Hobart Corporation. To correct a misnomer, an amendment of the name of the applicant was allowed).

350 *Whittam v WJ Daniel & Co Ltd* [1962] 1 QB 271.

351 *J Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1970) 44 ALJR 441 at 443 per Walsh J (where there are two entities in existence to which the writ could refer, "…it is more difficult to regard the name of one of them, set out in the writ, as being a misnomer, than it would be if there were no other entity in existence than the one to which the writ was intended to refer". Nevertheless, a change in the name of a party from Philips Electrical Industries Pty Ltd, the name of one company, to Philips Electrical Pty Ltd, the name of another company, was held to be the correction of a mere misnomer). See also *Rainbow Spray Irrigation Pty Ltd v Hoette* [1963] NSWR 1440 (the name of the plaintiff was changed to "Rainbow Spray Sales Pty Ltd", the name of another company). Compare *Davies v Elsby Bros Ltd* [1961] 1 WLR 170 (CA) (change in name of defendant from "Elsby Brothers (a firm)" to "Elsby Brothers Ltd", a partnership of the former description being in existence, refused as amounting to a change of party not merely the correction of a misnomer); *Hubbard Assn of Scientologists International v Attorney-General (Vic)* [1976] VR 119 (deletion of "The Attorney-General for" in the description of the defendant with the object of continuing the action against the State of Victoria refused); *Berno v Green's Steel Constructions Pty Ltd* (1991) 103 FLR 133 (NTSC) (amendment to change name of plaintiff from Joe Berno to Berno Brothers Pty Ltd refused).

352 *Rainbow Spray Irrigation Pty Ltd v Hoette* [1963] NSWR 1440.

353 *Vulcan-Hart Corporation v Vulcan Australia Ltd* (1994) 30 IPR 441 (FCA).

registered company, and a wholly owned subsidiary of Premark, into which Vulcan-Hart had merged, and to which all of Vulcan-Hart's trade marks had been assigned.

On 15 July 1994 Jenkinson J ordered in the proceeding between Vulcan-Hart Corporation, applicant, and Vulcan Australia Ltd, respondent, that the applicant file and serve a statement of claim on or before 29 July 1994. On 10 August 1994 the respondent's solicitor moved for the proceeding to be struck out because the applicant had failed to deliver the statement of claim. On 19 August 1994 a statement of claim was filed with Hobart Corporation as applicant, and pleading at paragraph 3 that "on and from 1 July 1990 the business and assets of Vulcan-Hart Corporation were merged with the business and assets of the applicant." The applicant's solicitors applied on 9 September 1994 to amend the name on the s 23 applications to that of Hobart Corporation.

The Federal Court accepted evidence that Hobart Corporation was the surviving corporation, and Vulcan-Hart the non-surviving corporation, under the law of Delaware the effect of which was that the rights, privileges, powers, and property was vested in the survivor while the non-surviving corporation no longer had legal existence and could take no action. The issue before the court was whether the s 23 applications could be amended under O 13 r 2(4) of the *Federal Court Rules 1979* (Cth) empowering the court to amend mistakes in the names of parties, notwithstanding that the effect of the amendment is to substitute another person as a party, or whether the application was a nullity for being made by a non-entity. The court, citing extensively the judgment of Walsh J in *Rainbow Spray Line Irrigation v Hoette* held that Hobart Corporation was the relevant subsidiary of Premark, and that it was clearly a misnomer that the original instructions had mistakenly given the name of Vulcan-Hart, which then appeared on the court documents, allowing the applicant's amendment.

The court's power to correct a misnomer is based both on the procedural rules and on the court's inherent jurisdiction.[354] The court has discretion in deciding whether to permit amendments in the case of misnomer, and will do so only if it is persuaded that the correction to the name of a party will not prejudice the other party.[355]

Mistake as to name of particular identified person

[9.480] Mistakes made in the name of parties to proceedings — whether plaintiffs or defendants[356] — may be corrected regardless of whether in effect the amendment substitutes another person as a party. A

354 See *Alexander Mountain & Co v Rumere Ltd* [1948] 2 KB 436; *Etablissement Baudelot v RS Graham & Co Ltd* [1953] 2 QB 271; *Rainbow Spray Irrigation Pty Ltd v Hoette* [1963] NSWR 1440; *Brandsma & Crockett Pty Ltd v Heindal Pty Ltd* (2002) 26 WAR 323.

355 *Vulcan-Hart Corporation v Vulcan Australia Ltd* (1994) 30 IPR 441 (FCA); *Laing v Victoria* (2005) 144 FCR 462 at 473 per Merkel J.

356 *Smart v Stuart* (1992) 2 NTLR 43 at [1].

mistake in the name of a party is a mistake as to identity, however, and not as to liability.[357] In *Bridge Shipping v Grand Shipping*[358] the High Court said that a mistake in the name of a party may arise either because the plaintiff believes a person whom the plaintiff otherwise correctly identifies bears a particular name, or, as a result of the plaintiff mistakenly believing that a person who corresponds to a particular description has a particular name.

Where a plaintiff identifies a person correctly in all essential details but is mistaken only with respect to that person's name the plaintiff has made a mistake as to the identified person's name. The plaintiff, for example, might believe the person's name to be one thing when it is in fact another, but has otherwise identified the same person correctly.[359] In *Jiminez v Jayform Contracting*[360] the applicant sought leave to amend the name of Jayform Contracting Pty Ltd as defendant on the statement of claim to Jayform Pty Ltd, and to join Jayform Pty Ltd as defendant in lieu of Jayform Contracting Pty Ltd.[361]

Rule 36.01(4) is not engaged. The real question at issue when a party has made a mistake with respect to another party's name is not the substitution in the position of party of one person for another. The amendment in the name of the party is undertaken using r 36.01(1).

The test to be applied is that proposed by Lord Devlin in *Davies v Elsby Bros*:[362]

> The test must be: how would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: "Of course it must mean me, but they have got my name wrong", then there is a case of mere misnomer. If, on the other hand, he would say: "I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries", then it seems to me that one is getting beyond the realm of misnomer.[363]

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357 See *Creedon v Measey Investments Pty Ltd* (1990) 100 FLR 42 at [46] per Asche CJ.

358 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231.

359 See *Jiminez v Jayform Contracting Pty Ltd* [1993] 1 Qd R 610 at 614, referring to *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at 260.

360 *Jiminez v Jayform Contracting Pty Ltd* [1993] 1 Qd R 610.

361 Davies and MacPherson JJA ordered "substitution" of Jayform Pty Ltd for Jayform Contracting Pty Ltd. Strictly it is correct to say that amendment in the case of misnomer still involves a substitution. *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at 238–239 per Dawson J: "The correction of a misnomer or misdescription does not involve the substitution of a new party except in a technical or formal sense, since the party after the correction is the same person as was misnamed or misdescribed. In such a case, at least as a matter of theory, no question of defeating a statute of limitations arises."

362 *Davies v Elsby Bros Ltd* [1961] 1 WLR 170.

363 See also *Whittam v WJ Daniel & Co Ltd* [1962] 1 QB 271; *J Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1970) 44 ALJR 441; *Metropolitan Oils (Pty) Ltd v Beringer* (1986) 11 FCR 335; *Singh v Atombrook Ltd* [1989] 1 WLR 810; *Mass (Aust) Pty Ltd v R & B Crane & Rigging Pty Ltd* (2008) 2 ACTLR 154. Toohey J, in *Metropolitan Oils Pty Ltd v Beringer*,

In *Attorney-General (UK) v Sorati*[364] Menhennitt J propounded a test applicable to both plaintiffs and defendants:

> The proposed plaintiff should not be substituted unless, as from the time of service of the original proceedings, the defendant in fact did or ought reasonably to have proceeded on the basis that the actual plaintiff was in reality the plaintiff proposed to be substituted. Accordingly, for the plaintiff to justify the substitution he must establish … two things, first, that the name of the actual plaintiff was a misnomer or misdescription of the plaintiff proposed to be substituted and, secondly, that from the time of the service of the proceedings the defendant knew or ought reasonably to have known that this was so … The same basic principles are … applicable where the application is to substitute a defendant, but the task of a plaintiff is often easier in such a case, particularly if the defendant proposed to be substituted is the person who has actually been served with the proceedings, because then that person served is likely to ask the question, "Was it me that was meant?"

Mistake in selection of person meeting correct legal description

[9.490] A mistake in the name of a party is made for the purposes of r 36.01(4) when the plaintiff or defendant supplies the correct legal description of the entity or person to be sued, and able to be sued, but has selected the wrong person to fit that description. The order made under r 36.01(4) corrects the name and substitutes the correct person as party to the proceeding.[365] An example is suing the operator (as distinct from the owner) of certain machinery in circumstances where the owner could not legally be made liable and naming Smith defendant when the operator was another person, Brown.

The effect of an order correcting the name of a party which thereby substitutes another person as the party to the proceeding is to deem proceedings to have commenced against the substituted party from the time proceedings were originally initiated.[366] An amendment under r 36.01(4) deprives the substituted party of the defence that the limitation period for a cause of action has expired.[367]

In general courts would not under the former rules permit parties to amend the names of parties if the effect of the amendment would be to substitute one person for another as party after the limitation period for a cause of action had expired. If the writ was capable of referring to two

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commented on this (at 340): "The test is a useful one when the issue is whether there has been a misdescription or misnomer … But I do not think it is determinative of the outcome, particularly where the application to amend is by an applicant. The question, 'Am I being sued by the right person?' may simply not have arisen in the mind of the respondent."

364 *Attorney-General (UK) v Sorati* [1969] VR 88 at 94–95; adopted in *Hubbard Assn of Scientologists International v Attorney-General (Vic)* [1976] VR 119; cited in *Creedon v Measey Investments Pty Ltd* (1990) 100 FLR 42 at [46].

365 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231.

366 Rule 36.01(4).

367 See *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231; *Nikolay Malakhov Shipping Co Ltd v SEAS Sapfor Ltd* (1998) 44 NSWLR 371 at 319.

entities then in existence it was less probable, compared to situations in which no other person bore the name set out on the proceeding, that the name set out in the writ was a misnomer.[368] In *Davies v Elsby Bros* an application to change the name of the defendant from Elsby Brothers (a firm) to Elsby Brothers Ltd was refused because it would substitute one party (Elsby Brothers (a firm) was an existing partnership) for another, and would not simply correct a misnomer.[369] Nor was the plaintiff in *Hubbard Assn of Scientologists International v Attorney-General (Vic)*,[370] who submitted that their intention had been to pursue action against the State of Victoria, granted leave to redescribe the defendant on the writ as "the State of Victoria" by deleting the words "The Attorney-General for" in the description of the defendant.[371] The effect of correction would be to substitute one person for another, and not merely correct a misnomer.

The operation of r 36.01(4) does not require the mistake in the name of a party to be a genuine error, or to not be misleading, or to avoid raising reasonable doubt regarding the identity of the party intending to sue or be sued.[372] The rule may be engaged to substitute a person meeting the

368 *J Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1970) 44 ALJR 441 at 443 per Walsh J (name of defendant changed from Philips Electrical Industries Pty Ltd, the name of one company, to Philips Electrical Pty Ltd, the name of another company).

369 *Davies v Elsby Bros Ltd* [1961] 1 WLR 170.

370 *Hubbard Assn of Scientologists International v Attorney-General (Vic)* [1976] VR 119.

371 See also *Attorney-General (UK) v Sorati* [1969] VR 88; *Berno v Green's Steel Constructions Pty Ltd* (1991) 103 FLR 133 (amendment to change name of plaintiff from Joe Berno to Berno Brothers Pty Ltd refused).

372 In this compare *Rules of the Supreme Court 1965* (UK), O 20 r 5(3) operative in England, on which *Supreme Court Rules 1970* (NSW), Pt 20 r 4(3) was modelled, Queensland (*Rules of the Supreme Court 1900* (Qld), O 32 r 1(3)), South Australia (*Supreme Court Rules 1987* (SA), r 53.03(a)), and Western Australia (WA O 21 r 5(3)). The English rule came into operation in 1964 to remove the injustice caused by decisions such as that in *Davies v Elsby Bros Ltd* [1961] 1 WLR 170. See *Mitchell v Harris Engineering Co Ltd* [1967] 2 QB 703 at 718 per Lord Denning MR. In New South Wales, see now *Civil Procedure Act 2005* (NSW), s 65(2)(b). See also *Epacris Pty Ltd v Director-General, Department of Natural Resources* (2007) 69 NSWLR 507. The rule in England, New South Wales, Queensland, South Australia and Western Australia provides that before an amendment to correct the name of a party that has the effect of substituting a new party is allowed, the court must be satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued. In *Rodriguez v Parker* [1967] 1 QB 116 the plaintiff, who claimed damages for bodily injury sustained when he was struck by a motor vehicle, made RJ Parker defendant as driver of the vehicle. The driver was not RJ Parker but RS Parker, his son. The plaintiff was allowed to change the name of the defendant to RS Parker. Similarly, in *Mitchell v Harris Engineering Co Ltd*, a plaintiff who sought to recover damages from his employer for injury sustained in an industrial accident was permitted to change the name of the defendant from Harris Engineering Co (Leeds) Ltd to Harris Engineering Co Ltd, Harris Engineering Co (Leeds) Ltd and Harris Engineering Co Ltd being associated companies. In *Silverstone Holdings Pty Ltd (as trustee for Devereux Property Trust) v American Home Assurance Co* (1997) 18 WAR 516, a proceeding brought on behalf of a certain trust, the person suing as trustee was wrongly named. An amendment to correct the name of the trustee was allowed which had the effect of substituting another person as plaintiff.

correct legal description as long as the party can be joined without causing them prejudice that cannot be compensated for without an order for an adjournment and an award of costs, or by some other appropriate order ensuring that no injustice is done in the circumstances of the particular case.[373]

In *Royal Women's Hospital v Paull*[374] an application was made to file and serve an amended statement of claim alleging the existence of a trust in terms different from those originally pleaded: in particular, with respect to the identity of the trustee, that the first plaintiff was the trustee of the trust (and not merely a payee of the funds paid to the trust), or alternatively that the trustee consisted of members of the board of management of the first plaintiff, with the effect that three plaintiffs ceased to be parties, while 11 others were to be joined as parties to the proceeding. Harper J said in *obiter dicta* that this was not a case in which an application was made to correct the name of a party, but to substitute known and properly described and named plaintiffs with others because the plaintiffs originally named were not the trustees as required by the action for breach of fiduciary obligation, and therefore not one to which r 36.01 should apply.

However, the court referred to the extended meaning given to "mistake in the name of a party" in *Bridge Shipping*, and held that it was bound by that authority. Harper J would have preferred to follow the Court of Appeal in *Central Insurance Co v Seacalf Shipping Corporation*[375] where it had refused to extend *Evans Construction Co v Charrington & Co*[376] to a case where the applicants were mistaken as to the nature of their rights as plaintiffs, although there was no mistake as to the identity of the plaintiff. Similarly, in the case before him, Harper J believed that r 36.01 should not apply, but for the authority of *Bridge Shipping*, because the applicants were mistaken as to the nature of the rights they had, not as to who they were. However, the extended definition of *Bridge Shipping* operated to interpret the mistake with respect to whether the plaintiff fulfilled the relevant description of "trustee" as a mistake in the name of the parties, and not as to identity.

Therefore the court identified its power under r 36.01 to make the order sought by the plaintiff. However, it exercised its discretion under the same rule to decline to employ the power because to do so would be unfair to the defendant who would be deprived of a defence of the expiry

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373 It was held in *Amcor Ltd v Civil Aviation Administration of China* (unreported; VSC; Harper J; No 10702/90; 19 June 1992) that the person who would be substituted as party upon a mistake in the name of a party being corrected would not suffer prejudice in the relevant sense.

374 *Royal Women's Hospital v Paull* (unreported; VSC; Harper J; No 2087/93; 24 February 1995).

375 *Central Insurance Co Ltd v Seacalf Shipping Corporation ("The Aiolos")* [1983] 2 Lloyd's Rep 25.

376 *Evans Construction Co Ltd v Charrington & Co Ltd* [1983] QB 810.

of a limitation period with respect to the collection of certain fees. It nevertheless made a substitution of plaintiff pursuant to O 9 which took effect from the date of the order, as opposed to a substitution pursuant to O 36 which would take effect from the date of the original writ.

The correctness of the decision may be doubted. As McHugh J (with whom Brennan and Deane JJ agreed) said in *Bridge Shipping*:[377]

> Rule 36.01(4) is a remedial rule and should be given a beneficial interpretation. It is proper to give it the widest interpretation which its language will permit. It should be interpreted to cover not only cases of misnomer, clerical error and misdescription but also cases where the plaintiff, intending to sue a person he or she identifies by a particular description, was mistaken as to the name of the person who answers that description.

The broad construction of r 36.01(4) allows it to be applied to the widest possible range of cases enabled by the language of the provision, covering cases of misnomer, clerical error, and misdescription, and cases in which the party was mistaken as to the name of a person who answered to a particular description where the party's intention had been to sue a person of that description.[378]

In *Jiminez v Jayform Contracting*[379] Mr Jiminez claimed $200,000 damages for personal injury caused by the negligence or breach of statutory duty of the defendant. The plaintiff's claim alleged that the defendant was his employer. However, the plaintiff's writ gave a mistaken name rather than that of his employer. The court granted leave for the plaintiff to change the name of the defendant to that of another company, Jayform Pty Ltd.[380]

Brandsma & Crockett Pty Ltd v Heindal Pty Ltd[381] was an appeal from an order of a Master granting leave to amend the name of the applicant. The plaintiffs by counterclaim commenced proceedings against a company called Brandsma and Crockett Pty Ltd, the service company providing

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377 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at 260–261.

378 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at 260 per McHugh J. See, for example, *Jiminez v Jayform Contracting Pty Ltd* [1993] 1 Qd R 610 (mistake as to the name of the plaintiff's employer, the name of the defendant was changed to Jayform Pty Ltd, the name of another company). See also *Evans Construction Co Ltd v Charrington & Co Ltd* [1983] QB 810 (CA) (wrong person named as landlord in application by tenant for new tenancy); *Lloyd Steel Co (Aust) Pty Ltd v Jade Shipping SA* (1985) 1 NSWLR 212 (wrong person named as carrier of goods).

379 *Jiminez v Jayform Contracting Pty Ltd* [1993] 1 Qd R 610. The application was made under WA O 21 r 5(3), the equivalent provision to the Victorian O 36.

380 See also *National Safety Council of Australia Victorian Division (in liq) v Fordham* (unreported; VSC; McDonald J; No 5195/89; 21 December 1993) (name of fourth party changed from Victorian Chamber of Manufacturers, a corporation, to Australian Chamber of Manufacturers, an organisation of employers registered under the *Conciliation and Arbitration Act 1904* (Cth)); *Howard v WorkCover (Qld)* [2001] 1 Qd R 388 (plaintiff, having mistakenly believed that former employer had ceased to exist, and thus joined work cover authority as defendant, permitted to change name of defendant to that of the employer).

381 *Brandsma & Crockett Pty Ltd v Heindal Pty Ltd* (2002) 26 WAR 323.

administrative services to the practice company, Brandsma & Crockett Pty Ltd, which provided accounting and advisory services to clients. The plaintiff by counterclaim alleged against Brandsma and Crockett Pty Ltd (the service company) professional negligence and misleading and deceptive conduct in the provision of advice in relation to the purchase in November 1994 of a business known as Metro Fruit & Vegies, whereas the advice had been provided by Brandsma & Crockett Pty Ltd (the practice company).

The plaintiff intended to sue an entity — a company that had carried out a particular operation. The plaintiff identified the defendant by the wrong name. The name used was that of another related company. The plaintiff was given leave to make the necessary amendment.[382]

The court held that under the "widest appropriate construction"[383] allowed, the rule by the High Court in *Bridge Shipping*, the matter was one of misnomer, not substitution of parties. The practice company had been misnamed or misdescribed as the service company. The plaintiff had intended to sue an entity, being a company that had carried out a particular operation. The plaintiff identified the defendant by the wrong name. The name used was that of another related company. The respondents had always intended to sue the practice company but had mistakenly identified it by the description of the service company, which they never intended to sue. The plaintiff was given leave to make the necessary amendment.[384]

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382 See also *Seas Sapfor Ltd v Far Eastern Shipping Co* (1996) 39 NSWLR 435 (owner of goods damaged while carried on a vessel under a bill of lading suing carrier who was also the owner of the vessel allowed to correct mistake in name of the person made defendant as owner); *Brandsma & Crockett Pty Ltd v Heindal Pty Ltd* (2002) 26 WAR 323 (plaintiff suing company in negligence for professional advice given permitted to change the name of the defendant to that of another company of similar name); *McDonald v DGJ Group Pty Ltd* [2003] VSC 441 (plaintiff permitted to amend name of defendant to identify correctly the solicitors intended to be sued); *Stiles v Permanent Trustee Australia Ltd* [2005] VSC 86 (plaintiff partners suing in name of partnership permitted to amend so as to sue individually).

383 *Brandsma & Crockett Pty Ltd v Heindal Pty Ltd* (2002) 26 WAR 323 at [8]. Murray J referred to the test propounded by Donaldson LJ in *Evans Construction Co Ltd v Charrington & Co Ltd* [1983] QB 810 at 821: the question might be asked whether the defendant is sued in the mistaken belief that he is the party who was responsible for the matters complained of, or whether it was a person other than the named defendant who was intended to be sued and that person is mistakenly described or named as the defendant

384 See also *Seas Sapfor Ltd v Far Eastern Shipping Co* (1996) 39 NSWLR 435 (owner of goods damaged while carried on a vessel under a bill of lading suing carrier who was also the owner of the vessel allowed to correct mistake in name of the person made defendant as owner); *Brandsma & Crockett Pty Ltd v Heindal Pty Ltd* (2002) 26 WAR 323 (plaintiff suing company in negligence for professional advice given permitted to change the name of the defendant to that of another company of similar name); *McDonald v DGJ*

Mistake in legal description of proper party

[9.500] If the mistake that is made is that a person is selected as a party in accordance with an incorrect description of the party the mistake that is made is not, for the purposes of engaging r 36.01(4), a mistake in the name of the party.[385]

If the correction of the error causes another person to be substituted as a party, the mistake is as to the legal description of the person appropriate to be made a party to proceedings. The governing provision is then not r 36.01(4) but the general rule applicable to cases of the addition, substitution or removal of parties. Therefore if the limitation period for the action to be brought against the person sought to be substituted as a party has expired leave will ordinarily not be granted.[386]

Rule 36.01(4) applies, and there has been a mistake in the name of a party, where the correct legal description of the party against whom a remedy may be sought has been provided, but the person selected to be made

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Group Pty Ltd [2003] VSC 441 (plaintiff permitted to amend name of defendant to identify correctly the solicitors intended to be sued); *Stiles v Permanent Trustee Australia Ltd* [2005] VSC 86 (plaintiff partners suing in name of partnership permitted to amend so as to sue individually).

385 *Central Insurance Co Ltd v Seacalf Shipping Corporation ("The Aiolos")* [1983] 2 Lloyd's Rep 25 (mistake in selecting insurer claiming by subrogation as plaintiff, not the insured); *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 (cargo owner suing owner of ship, not the carrier). See also *Elders International Australia Ltd v Murray Goulburn Co-op Co Ltd* (unreported; VSC; Gobbo J; No 9518/1991; 7 September 1992) (plaintiff who intended to sue defendant as supplier of goods refused leave to correct mistake to substitute another company as having assumed the liabilities of the original defendant); *Tomsimmat & Assocs Pty Ltd v G & R Investments Pty Ltd* (1993) 25 IPR 545 (NSWSC) (in proceedings for breach of copyright in architectural documents, selecting company rather than a director of the company and the person who prepared the documents as plaintiffs not a mistake in the name of a party); *Smith v Nominal Defendant* (unreported; NSWCA; Badgery-Parker J; CA 40724/93; 17 February 1994) (referred to in *Price v Ferris* (1994) 34 NSWLR 704 at 709) (when according to circumstances later discovered only a certain authorised insurer, not the Nominal Defendant, could be made liable, leave refused to amend name of defendant to that of insurer); *Keller v Bayside City Council* [1996] 1 VR 356 (in proceeding against municipal building surveyor, the mistake was not in naming the surveyor correctly but in making the surveyor, not the municipal corporation, respondent); *Archbishop of Perth v AA to JC inclusive* (1995) 18 ACSR 333 (NSWCA) (special leave to the High Court refused: *AA to JC Inclusive v Hickey* (1996) 70 ALJR 385) (amendment to substitute as defendant the Roman Catholic Archbishop of Perth, a statutory corporation, for the present holder of the ecclesiastical office of the Roman Catholic Archbishop of Perth refused, the plaintiff not having made a mistake as to the name or identity of the party intended to be sued, that party being identified by reference to particular characteristics or properties); *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India* [1996] 1 All ER 1017 (where the plaintiff company had been dissolved, leave refused to change name to that of trustee in bankruptcy in whom the company assets were vested).

386 *Lynch v Keddell (No 2)* [1990] 1 Qd R 10 at 13 per Macrossan J (QSCFC); *Fernance v Nominal Defendant* (1989) 17 NSWLR 710 at 723 per Gleeson CJ (CA); *Bridge Shipping Pty Ltd v Grand Shipping SA* [1991] 1 VR 258 at 263 per Crockett J.

party does not fit that description.[387] However, it does not apply where a person has been made a party to proceedings under an incorrect legal description of the person appropriate to be made a party to the proceeding.[388] Then the defendant, not merely the name, is wrong, and there has been no mistake "in the name of the party" for the purpose of r 36.01(4).[389]

387 As McHugh J said in *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at 260–261: "Rule 36.01(4) … should be interpreted to cover not only cases of misnomer, clerical error and misdescription but also cases where the plaintiff, intending to sue a person he or she identifies by a particular description, was mistaken as to the name of the person who answers that description."

388 *Central Insurance Co Ltd v Seacalf Shipping Corporation ("The Aiolos")* [1983] 2 Lloyd's Rep 25; *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231.

389 *Keller v Bayside City Council* [1996] 1 VR 356 at 375. See also *Elders International Australia Ltd v Murray Goulburn Co-op Co Ltd* (unreported; VSC; Gobbo J; No 9518/1991; 7 September 1992) (plaintiff who intended to sue defendant as supplier of goods refused leave to correct mistake to substitute another company as having assumed the liabilities of the original defendant); *Tomsimmat & Assocs Pty Ltd v G & R Investments Pty Ltd* (1993) 25 IPR 545 (NSWSC) (in proceedings for breach of copyright in architectural documents, selecting company and not a director and the person who prepared the documents as plaintiffs not a mistake in the name of a party); *Smith v Nominal Defendant* (unreported; NSWCA; No 40724/93; 17 February 1994), referred to in *Price v Ferris* (1994) 34 NSWLR 704 at 709 (when in the circumstances later discovered only a particular authorised insurer, not the nominal defendant, could be made liable, leave refused to amend name of defendant to that of insurer); *Keller v Bayside City Council* (in proceeding against municipal building surveyor, the mistake was not in naming the surveyor correctly but in making the surveyor, not the municipal corporation, respondent); *Archbishop of Perth v AA to JC inclusive* (1995) 18 ACSR 333 (NSWCA); special leave to the High Court refused *AA to JC Inclusive v Hickey* (1996) 70 ALJR 385 (amendment to substitute as defendant the Roman Catholic Archbishop of Perth, a statutory corporation, for the present holder of the ecclesiastical office of the Roman Catholic Archbishop of Perth refused, the plaintiff not having made a mistake as to the name or identity of the party intended to be sued, that party being identified by reference to particular characteristics or properties); *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India* [1996] 1 All ER 1017 (where the plaintiff company had been dissolved, leave refused to change name to that of trustee in bankruptcy in whom the company assets were vested).

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DEFAULT JUDGMENTS

History

[10.10] The *incunabulum* of default judgment is the equitable decree *pro confesso* dating back to the *Institutes* of the Roman Emperor Justinian.[1] The name of the decree is derived from the adage *contumax pro confesso habetur* ("an absconder may be held to have confessed"). Originally, the law in England only allowed a decree *pro confesso* if the defendant "had appeared but failed to file an answer after a demurrer was overruled."[2] Equity, acting *in personam*, required access to the defendant. Default was restrictively applied because of courts' concerns regarding the "fruitful fanc(ies) … a counsel could invent, suggest, or put into a bill."[3]

The early history of the default judgment involved the evolution of the practice of entering a decree *pro confesso* against the absent defendant. Service in private actions was entirely a matter for the plaintiff. Service could frequently be difficult and possibly dangerous, and plaintiffs' methods included service in churches, or by fixing a writ to the door of the abode where the defendant was residing.[4] The plaintiff's first recourse upon the defendant's failure to appear was to request a sequestration order against the defendant's real and personal property[5] such that the defendant was prevented from entering and using their property.[6] If subsequently the defendant had still not appeared the court would direct the defendant to fulfil the order or be held in contempt.[7] The reasoning

1 See JR Hardin, "Asserting Failure to State a Claim After Default Judgment Under Both the Federal and Tennessee Rules of Civil Procedure" (1999) 30 U Mem L Rev 131 at 134.

2 JR Hardin, "Asserting Failure to State a Claim After Default Judgment Under Both the Federal and Tennessee Rules of Civil Procedure" (1999) 30 U Mem L Rev 131 at 134.

3 *Hawkins v Crook* (1729) 2 P Wms 556; 24 ER 860.

4 JA Guy, *The Cardinal's Court* (Harvester, Sussex, 1977), pp 83–84.

5 JR Hardin, "Asserting Failure to State a Claim After Default Judgment Under Both the Federal and Tennessee Rules of Civil Procedure" (1999) 30 U Mem L Rev 131 at 134.

6 JR Hardin, "Asserting Failure to State a Claim After Default Judgment Under Both the Federal and Tennessee Rules of Civil Procedure" (1999) 30 U Mem L Rev 131 at 134, 135.

7 JR Hardin, "Asserting Failure to State a Claim After Default Judgment Under Both the Federal and Tennessee Rules of Civil Procedure" (1999) 30 U Mem L Rev 131 at 135. Compare the process in the Star Chamber: the practice of a defendant entering a bond

behind the sequestration order barring the defendant from entering or using their property was that it would force the defendant to appear at court so that they could arrange for their property to be released; while the possibility of being held in contempt was an even stronger incentive for the defendant to appear at court to fulfil the original order. The decree *pro confesso* was only available once the defendant had appeared.[8]

As a necessary precursor to the court considering the plaintiff's petition they were required to have, for instance, issued subpoenas, attachments, an attachment with proclamations, a commission of rebellion, a serjeant-at-arms, and a sequestration.[9] By the 1700s the plaintiff was able to proceed in the defendant's absence.[10] However, the old practice was not forgotten as the plaintiff was required to enter a plea on the defendant's behalf. *The Process Act 1732* changed the practice of default judgment by empowering courts to issue an equitable decree *pro confesso* in the event of the defendant failing to appear.[11] The Act provided that, the plaintiff,

> Upon good showing to the court, the court could: first, place and publish the process in the London Gazette; second, publish the process on "some Lord's Day, immediately after divine service, in the parish church of the parish;" and finally, post the process at some public place in the jurisdiction of the court.[12]

The plaintiff having complied with the statutory requirements to publish service of the proceedings, the court could enter a decree *pro confesso*, which, once entered, gave the defendant seven years in which to make an appearance at court. If the defendant did not apply to the court to have the decree set aside within that time the decree was "absolutely confirmed."[13]

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providing surety of remaining within the jurisdiction had, by the 17th century, lapsed (W Hudson, "A Treatise on the Court of Star Chamber" (1792) 2 *Collectanea Juridica* Pt 2, s xv at 159). A writ of attachment could be issued in default of appearance in the time allowable. If that was not effective a proclamation of rebellion was issued (CL Scofield, *A Study of the Court of Star Chamber* (Franklin, New York, 1900), pp 73 n 3, 74 n 1). The appearing defendant then filed a sworn statement in the form of a plea, an answer or a demurrer signed by counsel (Scofield, p 74 n 4; IS Leadam and JF Baldwin (eds), *Select Cases before the King's Council: 1243-1482* (Selden Society, Cambridge, Mass, 1918) cite numerous cases) which, if not provided, could result in the defendant being imprisoned and the plaintiff's bill being considered *pro confesso*.

8 JR Hardin, "Asserting Failure to State a Claim After Default Judgment Under Both the Federal and Tennessee Rules of Civil Procedure" (1999) 30 U Mem L Rev 131 at 135.

9 *Blackstone's Commentaries*, Vol III, p 444; M Hoffman, *Chancery Practice* (2nd ed), Vol I, pp 184–185; JP Holcombe (ed), *Barton's History of a Suit in Equity, from its Commencement to its Final Termination* (Revised and enlarged, Bradley, Cincinnati, 1847), pp 84–92; ER Daniell, *Chancery Practice* (1st ed), Vol I, pp 573ff, 679–680.

10 *Frivolous Arrests Act 1725 (12 Geo 1 c 29)* (ENG); *Process for Small Debts Act 1731 (5 Geo 2 c 27)* (ENG); W Tidd, *Practice of the Court of King's Bench* (9th ed), p 241.

11 *The Process Act 1732 (5 Geo 2 c 25)* (ENG).

12 JR Hardin, "Asserting Failure to State a Claim After Default Judgment Under Both the Federal and Tennessee Rules of Civil Procedure" (1999) 30 U Mem L Rev 131 at 135.

13 JR Hardin, "Asserting Failure to State a Claim After Default Judgment Under Both the Federal and Tennessee Rules of Civil Procedure" (1999) 30 U Mem L Rev 131 at 135.

Default judgment in the modern sense emerged first in the United States' *Federal Equity Rules of 1822*, modelled on *The Process Act 1732*, and in the English common law courts upon the enactment of *Common Law Procedure Act of 1852*.[14] The court in *Thomson v Wooster*[15] explained that

> By our rules a decree *pro confesso* may be had if the defendant, on being served with process, fails to appear within the time required; or if, having appeared, he fails to plead, demur, or answer to the bill within the time limited for that purpose; or if he fails to answer after a former plea, demurrer, or answer is overruled or declared insufficient.

In the United States, then, a decree *pro confesso* could be entered for mere failure to appear after due service. The United States *Federal Equity Rules of 1822* empowered the court, by the decree *pro confesso*, to "decree upon the naked allegations of the complainants' bill, and give the relief proper to the case."[16] The decision against the defendant was "held and had as confessed and convicted legally."[17] The decree therefore overcame the court's original reluctance to grant judgment in default of the defendant's appearance for fear of giving judgment on the basis of the fruitful invention or suggestion that counsel had invested in the bill.[18] The Rules nevertheless distinguished between "distinct and positive" allegations upon which the court could rule, and "defective or vague allegations" requiring further proof.[19] Entry of the decree *pro confesso* placed an absolute bar on the defendant raising a challenge that was not *prima facie* apparent on the bill.[20]

Courts of common law could enter a decree *nil dicit* ("he says nothing"[21]) against a defendant who had failed to file a plea whether or not they had entered an appearance.[22] The defendant could therefore be judged in default without even having filed an appearance.[23] The decree *nil dicit* could also be passed against the defendant who had entered a plea which was subsequently struck out, withdrawn, or abandoned, without another defence being made in its place.[24] The default *nil dicit* enabled the plaintiff

14 *Common Law Procedure Act of 1852 (15 &16 Vict c 76)* (ENG).

15 *Thomson v Wooster* 114 US 104 (1885) at 112.

16 *Williams v Corwin* 1 Hopk Ch 471 (NY Ch 1824) at 476.

17 "King Charles' Letters to the High Commissioners (1637)" in E Hazard, *State Papers*, Vol I, p 428; (Rymer, Vol XX), at 190.

18 *Hawkins v Crook* (1729) 2 P Wms 556; 24 ER 860.

19 *Williams v Corwin* 1 Hopk Ch 471 (NY Ch 1824) at 476.

20 *Federal Equity Rules of 1822* (US), r 10A. CA Wright, AR Miller and MK Kane, *Federal Practice and Procedure* (3rd ed, 1998), § 2681.

21 *Black's Law Dictionary* (9th ed, 2009), p 480.

22 See *Davis v Davis* (1739) 2 Atk 21; 26 ER 410 (Ch) at 23; 412; *Hawkins v Crook* (1729) 2 P Wms 556; 24 ER 860 (Ch) at 558–559; 862.

23 See *Florida v Georgia* 58 US 478 (1854) at 517 per Campbell J, dissenting (citing *Peto v Attorney General* (1827) 1 Y & J 509; 148 ER 772 (Exch) at 509; 772) ("If he fails to appear, it is a *nil dicit*; and if he appears and will not answer, a decree *pro confesso* is taken.").

24 49 CJS Judgments § 253 (2009).

to obtain immediate judgment when the plaintiff sued on a debt, or a liquidated sum, or a certain thing. However, when the suit was for unliquidated damages the plaintiff obtained an interlocutory judgment, and applied for an assessment of damages by a writ of inquiry, and thereafter acquired final judgment.[25]

Policy

[10.20] The procedural rules are designed to encourage diligence in the prosecution and defence of a claim, and to protect those involved from delay and uncertainty as to their rights when unresponsive parties cause the administration of justice to grind to a stop. The efficient resolution of claims is the best means for determining the rights of parties. Therefore the longer a matter proceeds, the longer parties' rights remain uncertain. Under the rules diligent parties are protected from attempts by opposing parties to delay proceedings by failing to respond or act.[26]

The default judgment is central to these aims of procedural fairness. Underpinning the theory of default judgment is the principle that a party's failure to answer at all or within the time permitted under the rules is taken as an admission that the plaintiff has a valid cause of action to which the defendant can mount no defence. The implication of a defendant's inertia is that they thereby consent to having judgment entered against them.[27] If the presumptions are rebutted the default judgment stands as penalty for the party's non-compliance with the rules.[28]

It has long been the view of law that delay is *pro tanto* a denial of justice. The procedural rules aim to eliminate delay by fixing dates for the various steps to be taken in the course of litigation. The plaintiff is thereby afforded relief, if merited, as close as possible to the day the claim was filed. The court's oversight of the procedural rules polices the administration of justice. As Posner J said in *Anilina Fabrique de Colorants v Aakash Chems & Dyestuffs*: "[t]he threat of default is one of the district judges' most important tools for obtaining compliance with litigation schedules."[29]

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25 *Thomson v Wooster* 114 US 104 (1885) at 111 (quoting *Bills Taken Pro Confesso* (1744) 2 Eq Cas Abr 178; 22 ER 152 (Ch) at 179 n 3; 154 n 3). The similarity between the *nil dicit* proceeding and the *pro confesso* proceeding was recognised in the *Federal Rules of Civil Procedure*, the United States Supreme Court having observed that the procedure and practice in equity and that in law were "consonant": *Thomson v Wooster* at 111.

26 *HF Livermore Corp v Aktiengesellschaft Gebruder Loepfe* 432 F2d 689 (DC Cir 1970) at 691; see also AO Glist, "Enforcing Courtesy: Default Judgments and the Civility Movement" (2000) 69 *Fordham Law Review* 757 at 765 ("The mechanism of default fosters efficiency and discourages delay by severely penalizing dilatory or procrastinating conduct.").

27 *Keeler Bros v Yellowstone Valley National Bank* 235 F 270 (D Mont 1916) at 270.

28 *Keeler Bros v Yellowstone Valley National Bank* 235 F 270 (D Mont 1916) at 270.

29 *Anilina Fabrique de Colorants v Aakash Chems & Dyestuffs Inc* 856 F2d 873 (7th Cir 1988) at 882 per Posner J, dissenting.

Courts, in exercising their power, are at times required to balance competing policy objectives. On the one hand, disputes are ideally resolved efficiently, effectively, and for the least possible expense to the parties and public resources. On the other hand, courts prefer to determine disputes on their merits, and ensure that the matter is resolved in accordance with the interests of justice in the light of all the available facts.[30] Courts would prefer, therefore, not to enter default judgment[31] because "In [the] final analysis, a court has the responsibility to do justice between man and man; and general principles cannot justify denial of a party's fair day in court except upon a serious showing of wilful default."[32]

Nevertheless, despite such professed reluctance to determine matters by default, the availability of default judgments and the procedural rules governing them make a judgment on the merits of a case improbable. This is because:

1. A party in default is not entitled to notice that an application for a default judgment has been made in their absence.
2. A default judgment cannot be set aside if the defendant or their agent has been negligent.
3. A direct appeal cannot be taken from a default judgment.

The defendant must first file a motion to vacate and then appeal from the trial court's ruling on that motion.

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30 *Gray v John Jovino Co* 84 FRD 46 (ED Tenn 1979) at 47 (citing W Moore et al, *Moore's Federal Practice* (2nd ed, 1978), Vol 1, [55.10]); see also *Gomes v Williams* 420 F2d 1364 (10th Cir 1970) at 1366 (recognising that the judicial preference for trial on merits "is counterbalanced by considerations of social goals, justice and expediency, a weighing process which lies largely within the domain of the trial judge's discretion"). See *Bankers Mortg Co v United States* 423 F2d 73 (5th Cir 1970) at 77 (indicating that courts must preserve the balance between the "sanctity of final judgments" and the desire that "justice be done in light of all the facts").

31 See, for example, *In re Jones Truck Lines Inc* 63 F3d 685 (8th Cir 1995) at 688 (noting that default judgment should be a "rare judicial act"); *Sun Bank of Ocala v Pelican Homestead & Sav Assn* 874 F2d 274 (5th Cir 1989) at 276 ("Default judgments are a drastic remedy, not favored by the Federal Rules and resorted to by courts only in extreme situations."); *Charlton L Davis & Co PC v Fedder Data Ctr Inc* 556 F2d 308 (5th Cir 1977) at 309 ("Judgments by default are drastic remedies and should only be resorted to in extreme situations."); *Affanato v Merrill Bros* 547 F2d 138 (1st Cir 1977) at 140 ("[D]efault judgment is … a drastic sanction that should be employed only in an extreme situation.")

32 *Gill v Stolow* 240 F2d 669 (2d Cir 1957) at 670. See, for example, *Johnson v Am Nat'l Red Cross* 569 SE2d 242 (Ga Ct App 2002) at 246, affirmed on appeal *Johnson v Am Nat'l Red Cross* 578 SE2d 106 (Ga 2003); *McCain v Dauzat* 791 So 2d 839 (Miss 2001) at 843 ("Default judgments are not favored" and reasonable doubt "should be resolved in favor … [of] hearing the case on its merits."); *Parsons v Consol Gas Supply Corporation* 256 SE 2d 758 (W Va 1979) at 762 ("[W]e have established as a basic policy that cases should be decided on their merits, and consequently default judgments are not favored and a liberal construction should be accorded a Rule 60(b) motion to vacate a default order.").

Principles

[10.30] Proceedings must be prosecuted by parties in the manner and within the time stipulated by the rules. A plaintiff who has properly served an originating process on a defendant who in turn fails to file and serve an appearance or a defence is entitled under the rules to seek default judgment against the defendant. The court has jurisdiction to enter a default judgment without seeking submission from or requiring notice to the defendant. The process may usually be completed and judgment obtained at the court registry without a court appearance. Whereas historically the entry of default judgment was a purely ministerial or administrative act, it now involves the exercise of a delegated judicial power. Accordingly, where once a default judgment was subject to strict compliance with the rules or would constitute a nullity, it now amounts to a mere irregularity.

Where proceedings have been brought for discretionary relief the court registry is not able to enter default judgment. Equitable and other discretions are therefore kept on foot. Default judgment may not be obtained where a party seeks a discretionary remedy. Discretionary remedies may only be awarded by judges exercising judicial discretion. The court awards discretionary relief on application at a hearing having regard to the facts and circumstances of the case, where justice lies in the matter, and the potential prejudicial effect that the grant of relief will have on the respondent. The court must be satisfied that it is proper, weighing these considerations, to grant the relief sought. The plaintiff may, for example, apply to the court for the striking out of a defence where the defendant has fallen into default by not making discovery of documents, or not providing answers to interrogatories, or for failing to execute an order of the court. A defendant may apply for a claim to be struck out for want of prosecution, that is, for the plaintiff's inordinate delay in pursuing a claim, or in taking a necessary step in the proceeding. The party who succeeds in having a claim or defence struck out may enter default judgment, or apply for summary judgment in an interlocutory proceeding.

A default judgment may be entered where the plaintiff's claim is for:

- either a debt or liquidated damages (whether also seeking, or not seeking, interest); or
- unliquidated damages; or
- the recovery of goods; or
- the recovery of land in an action, not including an equitable remedy.

Where equitable or other discretions are part of a claim default judgment does not dispose of them, but they remain on foot. After an interlocutory judgment is entered by default the plaintiff makes an application without notice to the defendant for the damages to be assessed and quantified.

Effect

Judicial decision

[10.40] Questions of law, fact or both fact and law must be adjudicated. That is, they must be the subject of and resolved by a judicial decision.[33] A default judgment is a judicial decision having the same effect as any other judgment given at trial.[34] A default judgment therefore is *res judicata*. A court may, exercising its discretion, set aside its own default judgment. However, unless it is set aside the default judgment acts as a formal order of judgment disposing of the issues raised by, and concluding the matter between, the parties. Where a court refuses to vacate a default judgment, on successfully appealing the court's refusal to exercise its discretion to set aside the default judgment, the appellate decision replaces the former decision and provides *res judicata* between the parties,[35] but where the appellant fails in having the default judgment set aside, the former decision provides *res judicata*.[36]

In *Kok Hoong v Leong Cheong Kweng Mines*[37] Kok Hoong entered into an agreement to hire machinery to Leong Cheong Kweng Mines Ltd ("LCKM"). A few months later, Kok Hoong obtained a default judgment in respect of rent arrears. Kok Hoong later brought a second action to recover further arrears. This time, LCKM argued that the arrangements were void and unenforceable as a result of a failure to comply with Malaya's *Moneylenders and Bills of Sale Ordinances*. Kok Hoong responded that LCKM was estopped by the 1954 judgment from pleading the failure to comply with these Ordinances.

The Privy Council, on appeal from the Supreme Court of Malaya, accepted that a default judgment was capable of giving rise to an estoppel in the nature of a *res judicata*. Lord Radcliffe noted that the default judgment could be characterised in one of two ways. It might be framed as a judgment by consent having the effect of a judgment given at the

33 *Robinson v Robinson* (1603) 5 Co Rep 32b; *Hutt v Morrell* (1849) 3 Exch 240; *Kinnis v Graves* (1898) 67 LJ QB 583; *Bradshaw v McMullin* [1920] 2 IR 412 at 424–425; compare pronouncements that do not purport to be decisions in any sense, or are not judicial decisions: *Re Dingle* (1811) 1 Rose 192; *Obicini v Bligh* (1832) 8 Bing 335; 131 ER 423; *R v Norwich and Wotton Road Trustees* (1836) 5 Ad & El 563; *Brisco v Lomax* (1836) 8 Ad & El 198; *Bancroft v Bancroft* (1864) 3 Sw & Tr 597; 164 ER 1407; *Fracis Times & Co v Carr* (1900) 82 LT 698 (CA); *The European Gateway* [1987] QB 206.

34 Other judicial acts having the same effect include judgment, orders, decrees, sentences, bankruptcy adjudications, judicial declarations, and arbitral awards.

35 *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220; subject matter can be relitigated if the appeal court reverses the decision of a tribunal because it has no jurisdiction: *Cross v Salter* (1790) 3 Term Rep 639; 100 ER 777; *R v St Andrew Holborn* (1796) 6 Term Rep 613; *R v Wick St Lawrence Inhabitants* (1833) 5 B & Ad 526; *R v Drury* (1848) 3 Car & Kir 190; *Conlin v Patterson* [1915] 2 IR 169.

36 *Wishart v Fraser* (1941) 64 CLR 470 (HCA); *R v Marks; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1981) 147 CLR 471 (HCA).

37 *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 (PC).

conclusion of a full trial of the issues in controversy between the parties. However, it might also be seen as "speak(ing) for nothing but the fact a defendant, for unascertained reasons, negligence, ignorance or indifference, has suffered judgment to go against him in the particular suit in question."[38]

Having accepted that a default judgment could found an estoppel similarly to a judgment entered at trial, Lord Radcliffe was of the opinion that it would be inappropriate to approach the application of the *res judicata* of a default judgment as broadly as the principle of issue estoppel established in *Henderson v Henderson*.[39] There it was laid down that it was an abuse of process to permit a trial of issues which should have been litigated in earlier proceedings. A much more restrictive operation of the principle should apply in the case of default judgments.[40]

The appeal centred on carefully examining "what the judgment prayed in aid should be treated as concluding and for what conclusion it is to stand."[41] There may be difficulties in ascertaining what in substance the default judgment had concluded. Lord Radcliffe advised that the matter had to be approached cautiously.[42] It was necessary to identify the substance and particularity of the judgment, and the ratio that it supported, to determine what had indeed been decided and was fundamental to the decision.[43] In short, what must be ascertained about default judgments is "the bare essence of what they most necessarily have decided" in order to identify "what must 'necessarily and with complete precision' have been thereby determined" so that the operation of the estoppel can be accurately circumscribed.[44]

In determining the particular matter decided by a default judgment the court may have regard to the originating process, examine any pleadings in the proceeding, and consider the judgment itself. Only an issue that was clearly pleaded and examined by the court in arriving at its judgment will be estopped in later proceedings.

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38 *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 at 1012 (PC).

39 *Henderson v Henderson* (1843) 3 Hare 100; 67 ER 313. The Privy Council reconsidered it in terms of judicature pleading and procedure, but the danger of preventing parties raising issues from previous determined judgments was recognised before the *Judicature Act 1873* (UK): *Howlett v Tarte* (1861) 10 CB NS 813; 142 ER 673.

40 In *Arnold v National Westminster Bank plc* [1991] 2 AC 93 at 107 Lord Keith of Kinkel had suggested that where the earlier proceedings had resulted in default judgments this might amount to special circumstances which might prevent the rule in *Henderson* from applying.

41 *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 at 1010 (PC).

42 *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 at 1010–1012 (PC).

43 *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 at 1012 (PC) per Viscount Radcliffe.

44 *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 at 1012 (PC), quoting Maugham LC in *New Brunswick Railway Co Ltd v British & French Trust Corporation Ltd* [1939] AC 1 at 21.

Originating process served outside jurisdiction

Introduction

[10.50] A plaintiff may enter a default judgment against a defendant having served originating process in a jurisdiction outside Victoria but within Australia, or outside Australia in default of the defendant filing or serving an appearance or a defence.

Interstate service

[10.60] Section 12 of the *Service and Execution of Process Act 1992* (Cth) ("SEPA") provides that an originating process served under SEPA has the same effect and gives rise to the same proceedings as if the process had been served in the jurisdiction in which it was issued. It follows that where a defendant defaults on an originating process served outside Victoria and within Australia under SEPA the plaintiff may enter default judgment without the need for a hearing on the application unless the applicant or a party objects.[45]

A person served with an originating process under SEPA may apply to the issuing court for an order that proceedings be stayed[46] on the basis that another State has jurisdiction to consider all the matters in dispute, and the interstate court is the more appropriate forum for determining the disputed matters.[47] The issuing court has inherent jurisdiction to:

- determine whether to exercise its jurisdiction to hear the matter;
- exercise its jurisdiction to make an order subjecting the proceeding to conditions for determining the matter in dispute expeditiously and cost effectively having regard to all the circumstances of, and with a view to doing justice in, the particular case;[48] or
- decline jurisdiction entirely.

The court determines the application having regard to the matters set out in s 20(4).

In *Earthworks and Quarries v FT Eastment & Sons*[49] the court held that the grounds for interfering with a plaintiff's choice of venue for trial for a matter falling within s 11(1)(c) had to be definite and clear case of inconvenience. Where the contract does not provide for a supervising jurisdiction the place of trial on a breach of contract where a debt has not been paid requires the court to construe the contract in order to determine

45 SEPA s 20(6).

46 SEPA s 20(2).

47 SEPA s 20(3).

48 SEPA s 20(5).

49 *Earthworks and Quarries Ltd v FT Eastment & Sons Pty Ltd* [1966] VR 24 per Dean J.

where the payment was to have been made.[50] Where contracts do not provide for a venue for adjudication of disputes it is ordinarily presumed that the creditor's principal place of business or residence is the forum.[51]

Service outside Australia

[10.70] Order 7 Pt 2 of the Victorian rules[52] provides for service in:

- a country that is not a signatory to the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention)*; or
- another country as specified by the Attorney-General.

Rule 7.04 provides that the plaintiff may apply for leave to proceed where the defendant is in default of appearance.[53] Rule 7.04 states that

> (1) Where no appearance is filed by a party served with originating process out of Australia, the Court may order that the plaintiff shall be at liberty to proceed if satisfied—
>
> (a) that the subject matter of the proceeding so far as it concerns that party is within Rule 7.01; and
>
> (b) that the originating process was duly served on that party.
>
> (2) An application for an order under paragraph (1) shall be supported by affidavit or other evidence showing the grounds on which the application is made.

The conditions under which liberty to proceed will be granted include that the court has satisfied itself on the application for leave to proceed that the matter falls within one of the heads under which it has jurisdiction in r 7.01 such that service outside Australia was authorised, and that process was properly served on the defendant.[54] Leave may be granted the plaintiff either to enter default judgment or, if the action is one for which a defendant may be served outside Australia, to proceed to a determination of the matter at trial. The plaintiff must prove both that the proceeding was one that they were authorised to bring, and that service was effected on the defendant by affidavit.[55] The court retains discretion to refuse leave to proceed even where the plaintiff has proven

50 *Gosman v Ockerby* [1908] VLR 298 at 305–306; *Earthworks and Quarries Ltd v FT Eastment & Sons Pty Ltd* [1966] VR 24 at 26–27; *Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd* (1996) 68 FCR 539 at 549A–B; M Davies, A Bell and P Brereton, *Nygh's Conflict of Laws in Australia* (8th ed, LexisNexis, 2013), [3.61].

51 *Earthworks and Quarries Ltd v FT Eastment & Sons Pty Ltd* [1966] VR 24 at 26.

52 *Supreme Court (General Civil Procedure) Rules 2015* (Vic). Note that legislative references in this chapter are to these Rules unless otherwise specified.

53 Vic r 7.04; ACT r 6508; NSW r 11.4; NT r 7.04; Tas r 147B; WA O 10 r 1.

54 In the Federal Court the applicant must obtain the court's leave to serve an originating process outside Australia: FCR r 10.43.

55 *Warringah Shire Council v Magnusson* (1932) 49 WN (NSW) 187.

that they have complied with all the provisions regulating external service.[56] It has no discretion to grant the plaintiff leave to proceed where they have not so complied.[57]

Where the Hague Convention[58] applies, default judgment is dealt with under O 80 of the rules. Rule 80.10 provides that in civil proceedings, after a certificate of service of an "initiating process" has been filed and the defendant has either not appeared or filed a notice of address for service the plaintiff may apply for default judgment to be entered. The initiating process must have been properly served in accordance with the law of the Convention country, and the defendant given "sufficient time" to enter an appearance in the proceedings. Sufficient time is 42 days from the date of service as recorded on the certificate of service, or a lesser time fixed by the court.

Rule 80.11 provides that if a certificate of service of initiating process was either not filed, or was filed but states that service was not effected, and the defendant has not appeared or filed a notice of address for service, the court will not give default judgment without satisfying itself that the initiating process was forwarded to the Central authority or an additional authority of the Convention country, and that at least six months, or otherwise an adequate period of time, has passed from the date of forwarding the initiating process, and that all reasonable efforts to obtain a certificate of service and effect service have been made.

The defendant may apply to have a default judgment set aside. In considering the application the court must be satisfied that the defendant, through no fault of their own, did not have knowledge of the initiating process in time to defend the proceedings. The court must also be satisfied that the defendant can make a *prima facie* defence of the proceedings on the merits. The defendant must apply to have default judgment set aside within 12 months of the date of the judgment or, after 12 months have expired, within a reasonable period of time after having acquired knowledge of the default judgment being given.

Default defined

Introduction

[10.80] Default judgments and summary judgments are procedurally different. Default judgments are given where the defendant has not filed and served a defence. A default proceeding to obtain an enforceable default judgment is a summary proceeding.

Whether a party is in default is governed by the rules which identify instances of a party failing to take a procedural step either at all or within the time required. For example:

56 *Earthworks and Quarries Ltd v FT Eastment & Sons Pty Ltd* [1966] VR 24.

57 *Wilson Electric Transformer Co Pty Ltd v State Electricity Commission (NSW)* [1968] VR 330.

58 *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention).*

- a defendant,[59] third party,[60] or defendant by counterclaim[61] may fail to file an appearance or serve a defence;
- a claimant may fail to attend an interpleader hearing;[62] or
- a plaintiff may fail to prosecute a claim expeditiously.[63]

A party may apply for a default judgment once the event giving rise to the right to do so under the rules occurs.

Default judgments are either entered at the court registry, or pursuant to a judicial order. When a defendant who has been served a writ in an action for the recovery of goods or land, or the payment of a debt or damages, does not enter an appearance or file a defence, the plaintiff may enter default judgment at the court registry. In all other matters when the defendant defaults the plaintiff may make an application to the court for judgment.

The expiration of the time as limited under the rules for a step to be taken also entitles a party to enter a default judgment. If, for instance, a defendant files or serves their defence after the time permitted under the rules the plaintiff may proceed to entering or applying for a default judgment. However, the court registry must accept a defence even when it is filed out of time,[64] and a plaintiff cannot sign a default judgment once the defence has been filed or served. Lateness in filing or serving a defence does not therefore in itself preclude a defence of the matter.

Victoria

[10.90] The rules in Victoria[65] provide that where a plaintiff has filed and served a writ a defendant who fails to file an appearance,[66] or serve a defence on the plaintiff[67] in the times prescribed under the rules, will be in default. The defendant's default is the event which entitles the plaintiff to enter a default judgment.

Because pleadings in Victoria are required to be served by one party on the other party or parties, the defendant's failure to deliver a defence to a

59 Rules 21.01 and 21.02.

60 Rule 11.11.

61 Rule 21.06.

62 Rule 12.09.

63 Rule 48.04.

64 *Royds v Sumner-Potts* [2004] QSC 317.

65 See also NT, Tas and WA.

66 Vic r 21.01; NT r 21.01; Tas r 342; WA O 13 r 2 (liquidated demand), r 4 (detinue), r 5 (possession of lands), r 7 (damages).

67 Vic r 21.02; NT r 21.02; Tas r 342; WA O 22 r 2 (liquidated demand), r 3 (unliqidated damages), r 4 (detinue), r 5 (possession of lands).

plaintiff within the time prescribed in the rules entitles the plaintiff to attend at the court registry and sign a default judgment against the defendant.[68]

Default judgment where defence struck out

[10.100] A defendant may have a default judgment entered against them where the defence has been struck out on the basis of non-compliance with the rules, or the failure to carry out an interlocutory order. In *Pollard v Incorporated Nominal Defendant*,[69] for example, the Full Court upheld an appeal against an interlocutory judgment entered by the plaintiff against the defendant who was required, but failed, to deliver sworn answers and interrogatories within seven days subject to the defence being struck out in case they defaulted on the order.[70]

Applicable claims

Debts and liquidated demands

[10.110] A defendant may have a default judgment entered against them for failing to enter an appearance, or file and serve a defence to a plaintiff's writ claiming payment of a debt or liquidated damages against them.[71] The judgment may include interest on the debt or damages, and a claim for costs where these were claimed in the originating process. The plaintiff is not, however, entitled to a final default judgment if the claim is for an unliquidated or unspecified amount. The plaintiff's statement of claim or the indorsement on the originating process is conclusive evidence of whether the claim is liquidated. If the plaintiff's claim is stated or can be accurately determined from the plaintiff's statement of claim or indorsement the claim is liquidated, otherwise it is not. The defendant who applies to set aside the default judgment may admit evidence by affidavit that the plaintiff has not claimed a liquidated sum.

Where a plaintiff obtains a default judgment against a defendant on a claim that the defendant owes the plaintiff a specified debt, or liquidated damages, judgment must be entered for that amount. A judgment will be an irregularity if it is entered for an amount greater than the claimed sum. The court has jurisdiction to set aside or vary a default judgment[72] which

68 *Pollard v Incorporated Nominal Defendant* [1972] VR 955; *Farley & Lewers (Qld) Pty Ltd v Fitzgerald* [1983] 1 Qd R 231. For what is required in serving a defendant see *Dibeek Holdings Pty Ltd v Notaras* (1998) 143 FLR 132.

69 *Pollard v Incorporated Nominal Defendant* [1972] VR 955.

70 The order was self-executing. In *Turner v Bulletin Newspaper Co Pty Ltd* (1974) 131 CLR 69 at 74 Barwick CJ referred to the difficulties presented by such orders. His Honour advised application for judgment in such cases.

71 Vic r 21.03. A claim is liquidated if a formula or scale fixes its amount without recourse to assessment or opinion: *Alexander v Ajax Insurance Co Ltd* [1956] VLR 436 at 445.

72 Vic r 21.07; see also ACT r 1128; FCR r 39.05; NSW r 36.16; NT r 21.07; Qld r 290; SA r 230; Tas r 355; WA O 13 r 10 (judgment in default of appearance), O 22 r 10 (judgment in default of defence).

is further to the limited jurisdiction it has to order amendments to judgments in certain circumstances where the court in its discretion considers it necessary to do justice in the particular case, but not where to do so would be unjust to the defendant.

The power to amend a default judgment is discretionary, whereas the defendant's right to have an irregular default judgment set aside is absolute. Therefore, the court will not order amendment where the plaintiff has only applied for the judgment to be amended in response to the defendant's application to set aside a default judgment entered for an amount exceeding that claimed, as opposed to an amendment moved by the plaintiff independently of the defendant.

In *Building Guarantee & Discount v Dolejsi*[73] the defendant applied to set aside, as an irregularity, the default judgment which the plaintiff obtained for a greater amount than the defendant was indebted. The plaintiff applied to amend the default judgment to reflect the amount the defendant actually owed. The court exercised its discretion in the defendant's favour and set aside the judgment stating that a relevant factor had been that the plaintiff had only sought to amend the default judgment to the sum the defendant in fact owed only as a reaction to the defendant's application for an order to have the judgment set aside.

City Mutual Life Assurance Society v Giannarelli[74] was an appeal against a Master's refusal of the second, third and fourth defendants' application to have a number of judgments in default of appearance set aside, and for each defendant to pay costs. The ground on which the defendants applied was that judgment was irregular for having been entered for an amount higher than the plaintiff's entitlement: that is, judgment had been entered for the sum of the debt plus interest. At issue was whether the plaintiff was entitled to a payment of interest despite the written agreement not providing for it. The writ claimed $11,200 owed as a debt under a mortgage, and interest pursuant to the *Supreme Court Act 1958* (Vic) as amended. The new sections therein referred to were the amended ss 78 and 79, and the new s 79A. Section 79 (and s 79A) contained a reference to "damages in the nature of interest"; and, while s 78 did not expressly so provide, it was interpreted as awarding damages in the nature of interest.[75]

Section 78 applied to "debts or sums certain … recovered in any action"; s 79A to "actions for the recovery of debt or damages". Debt was understood to refer to "a sum of money due from one person to another".[76] An action lies in debt in relation to a liquidated sum, where that sum is either fixed and specified, or able to be calculated with

73 *Building Guarantee & Discount Co Ltd v Dolejsi* [1967] VR 764.

74 *City Mutual Life Assurance Society Ltd v Giannarelli* [1977] VR 463.

75 See *Coane & Grant v Thomas Bent Land Co* (1891) 17 VLR 198.

76 See *Osborn's Concise Law Dictionary* (12th ed, 2013).

certainty.[77] The action in *City Mutual Life Assurance Society v Giannarelli* was clearly a debt, and the recovery of the money lay clearly in an action for debt.[78] The court held that the sums of money sought fell within the operation of s 78, and would also have been provided for by s 79A(1). However, the inclusion of interest required an application to the court for an assessment of the interest payable, which had not been done. While the court would therefore have allowed interest to be recovered, it held that interest was not properly included because it had not assessed the claim for interest. The default judgment was therefore amended on the defendant's application.

An irregular default judgment requires correction.[79] Judgments are irregular where they fail to credit the defendant for any payments made after the originating process was filed and served.[80] The doctrine of *res judicata* prevents a plaintiff who enters a default judgment for a lesser amount than they are due from the defendant from issuing another proceeding on the issue determined by the judgment, without the judgment they have entered having first been set aside. An estoppel operates to prevent the concluded issues being relitigated.

The plaintiff is not, of course, prevented from initiating another set of proceedings if they raise an issue not settled by the first proceeding.

Interest

[10.120] Under the rules default judgments may include the payment of interest only if the agreement between the parties on which the plaintiff sues provides for interest to be paid, or interest is payable as damages under statute. Otherwise a plaintiff cannot include the payment of interest in a default judgment. In the first instance interest may be claimed as a liquidated sum where the agreement between the parties obliges the defendant to pay interest,[81] and that liquidated sum supports the plaintiff's entry of a default judgment.[82]

In the second instance a plaintiff may have a right under statute to enter a judgment for interest. The plaintiff is then claiming interest in the nature of damages accruing between the date of the cause of action and the date of the judgment.[83] Interest to which the plaintiff is entitled under statute is compensatory in that it makes up for the time that the plaintiff has to

77 See JH Koffler and DA Reppy, *Common Law Pleading* (1969), pp 276–277 and 282–284. See also R Sutton, *Personal Actions at Common Law* (1929), pp 47–49; *Young v Queensland Trustees Ltd* (1956) 99 CLR 560.

78 See *Hunt's Case* (1588) Owen 42; 74 ER 886; *Rudder v Price* (1791) 1 Hy Bl 547; 126 ER 314.

79 *Bolt & Nut Co (Tipton) Ltd v Rowlands Nicholls & Co Ltd* [1964] 2 QB 10.

80 *Hughes v Justin* [1894] 1 QB 667.

81 *Philips Industries Holdings Ltd v Debrueys* [1977] Qd R 193.

82 *Bank of Victoria v Perrin* (1892) 18 VLR 137; *Zox v Hughes* (1893) 19 VLR 417.

83 *Supreme Court Act 1986* (Vic), ss 58 – 60.

wait to receive payment from the defendant. Because the statute entitles the plaintiff to the payment of interest it need not be provided for by an agreement between the parties.

In contrast to a contractually agreed amount of interest, interest in the nature of damages is not liquidated damages: first, because the court is required to initially assess the plaintiff's entitlement to them, and secondly and subsequently due to the amount of damages the defendant will pay.[84] Because the court must determine the damages to be paid it cannot be included in a default judgment, unless expressly allowed for under the rules. Interest may be awarded at the hearing of a summons for summary judgment,[85] or on a motion for judgment.[86] The rules also permit statutory interest to be included in a default judgment.

The plaintiff is entitled to interest under statute but it is payable on claims for money whether based on contract or tort only if the defendant is ordered to pay it by the court. Similarly, the court's jurisdiction to award the plaintiff interest as damages is not in itself sufficient to entitle the plaintiff to interest.

In *Hungerfords v Walker*[87] the High Court decided that in certain circumstances the plaintiff may have a right at common law[88] to claim an interest payment as an award of damages to compensate them for the late payment of a debt or damages if, because of the defendant's negligence or breach of contract, the plaintiff was put to expense, or was deprived of an opportunity to use the money profitably. *Hungerfords v Walker*'s extension of the common law position is furthered by the court's discretion to award interest as damages under statute if the plaintiff has applied for it and the court has assessed it.

In *City Mutual Life Assurance Society v Giannarelli*[89] the Master entered a default judgment for the debt sued upon plus statutory interest payable on the debt, without the plaintiff applying for the court to assess interest. The default judgment was amended to disallow interest. The decision entered by default by the court administration performing a merely ministerial act is not an application to the court to exercise its judicial function to assess the payable interest, and adjudicate.[90] Unless provided

84 *Dalgety Futures Pty Ltd v Poretsky* [1980] 2 NSWLR 646.

85 *Melbourne & Metropolitan Board of Works v Bevelon Investments Pty Ltd* [1977] VR 473; see also *ANI Australia Pty Ltd v Hannay* [1981] Qd R 598; *Gardner Steel Ltd v Sheffield Bros (Profiles) Ltd* [1978] 1 WLR 916.

86 *Aro-Allan Veneer Pty Ltd v Public Trustee* (1978) 18 SASR 428.

87 *Hungerfords v Walker* (1989) 171 CLR 125.

88 Originally awards of damages in contract and tort could not compensate the plaintiff for the late payment of a debt or damages: *Page v Newman* (1829) 9 B & C 378; 109 ER 140.

89 *City Mutual Life Assurance Society Ltd v Giannarelli* [1977] VR 463.

90 *Brew v Whitlock (No 3)* [1968] VR 504; *Buronga Truck Sales & Service Pty Ltd v Callipari* [1984] VR 59.

for under the rules[91] or by statute the officers of the court registry do not constitute a court, or make judicial decisions. The entry of default judgment is a ministerial act because even though court officers must examine the affidavit of service, and the form of judgment, to ensure it is regular and complete by law, it involves no exercise of discretion. Once the requirements have been fulfilled the prothonotary is bound to enter default judgment.[92]

In *City Mutual Life Assurance Society v Giannarelli*[93] s 78 of the *Supreme Court Act 1958* (Vic) conferred the power to award interest, and vested it in "the Judge at the hearing" but not in a court officer. Nor did the rules confer power on the prothonotary or any other officer to exercise the power conferred on a judge at the hearing under the amended s 78. Neither the prothonotary nor any other officer of the court fell within the meaning of the words "the Judge at the hearing" in s 78 as amended. Judgment was therefore entered irregularly for the recovery of an amount greater than that to which the plaintiff was legally entitled on a default judgment. The court refused to exercise its discretion to set aside the judgment *ex debito justitiae*,[94] instead ordering the judgment amended in accordance with the plaintiff's application to set it at the amount due on the debt.

In *Brew v Whitlock (No 3)*[95] Brew was awarded judgment on a claim of $31,200. In the writ Brew had included a claim for interest from the date the writ was issued to the date of judgment or payment, under s 78 of the *Supreme Court Act 1958* (Vic), but had not sought to be heard at trial on the issue nor made application in pursuit of the claim on appeal. Brew subsequently applied to the Full Court for amendment of judgment to include the payment of interest on the award of $31,200, which was dismissed. Brew appealed the matter to the High Court, which affirmed the Full Court's decision.

The Full Court observed that the power to order interest payable was conferred by s 78 and vested in "the judge at the hearing" and could only be exercised "upon application".[96] Claiming interest in the statement of

91 See, for example, *Uniform Civil Procedure Rules 1999* (Qld), r 283: the court as constituted by the registrar gives judgment.

92 Under the rules applicable in *City Mutual Life Assurance Society Ltd v Giannarelli* [1977] VR 463, *Rules of the Supreme Court 1884* (Vic), O 41 r 6 provided that an officer, which included the prothonotary, "shall" enter judgment in default once the proper examination had been made and the requirements had been met.

93 *City Mutual Life Assurance Society Ltd v Giannarelli* [1977] VR 463.

94 See *Building Guarantee & Discount Co Ltd v Dolejsi* [1967] VR 764.

95 *Brew v Whitlock (No 3)* [1968] VR 504; and by the High Court on appeal: *Whitlock v Brew* (1968) 118 CLR 445. Brew's claim had been dismissed at the trial before Gillard J, but succeeded in his appeal to the Full Court, which set aside the judgment of Gillard J, and ordered that in lieu thereof there be judgment for Brew on the claim for $31,200.

96 Gowans J, delivering the judgment of the Full Court: *Brew v Whitlock (No 3)* [1968] VR 504 at 505.

claim does not constitute a relevant application because a claim in a pleading may not be pursued or may be pursued on different terms from those pleaded. An application is to be made at the hearing, or may be made prior to judgment being authenticated. The statutory power requires application in order to enable the opposing party to show cause as to why the application should not be granted, or granted on its terms, and because the court may exercise discretion in determining whether interest will be awarded, at what rate, and from which date it will be calculated.

The High Court affirmed the Full Court's decision to dismiss the application on the basis that an appropriate application within the meaning of s 78 had not been made to the court. Kitto J said that the requirement for an order for interest to be made "on application" meant that the application was to be made at the hearing.[97] The statute did not further prescribe a mode of application whether written or oral. His Honour did not, however, distinguish a claim from an application for interest. The statement of claim could then put the application for interest before the court at the hearing without requiring the applicant to present it orally.

Taylor, Menzies and Owen JJ said that the Full Court was correct to find that neither the statement of claim nor the notice of appeal could of themselves contain an application for interest within the meaning of s 78.[98] The words "upon application" were an express reference to the requirement that the party apply to the court at the hearing.[99] An application for interest with respect to debts or liquidated sums had to be made at the hearing after "the recovery" of one or the other by the express terms of s 78(1). The presence of the claim for interest in the statement of claim or notice of appeal could not, therefore, constitute the application for interest.

The cases demonstrate that a plaintiff may include interest when entering a default judgment if the contract on which the plaintiff sues in breach makes provision for the payment of interest, or if statute provides for interest in the nature of damages to be paid, as long as the interest is determined by a judicial assessment, and is not an administrative act. If neither a statement of claim nor an indorsement on a writ show that the plaintiff is entitled to interest it cannot be claimed in the default judgment. In *Philips Industries Holdings v Debrueys*[100] the plaintiff failed to show his entitlement to interest because, although he indorsed the writ for payment of a debt for goods sold, and on the writ stated that "the plaintiff also claims interest", he had not alleged as a fact that interest was

97 *Whitlock v Brew* (1968) 118 CLR 445 at 458.

98 *Whitlock v Brew* (1968) 118 CLR 445 at 463–464.

99 The words appear in ss 78, 79 and 79A which were in terms different from the previous ss 78 and 79 where the words do not appear.

100 *Philips Industries Holdings Ltd v Debrueys* [1977] Qd R 193.

payable under the contract for the sale of goods on which the suit was brought. The plaintiff was awarded judgment only for the debt.

Victoria

[10.130] In Victoria a debt either carries interest, or it does not. In the case of the former the plaintiff enters judgment on the basis of a claim that includes the interest payable on the debt at the rate it carries. In the case of debts not carrying interest, the plaintiff's entitlement is to enter judgment for the debt, and for interest payable on the judgment under s 101 of the *Supreme Court Act 1986* (Vic). The applicable statutory interest rate[101] on the debt is calculated for the period of the date from which proceedings commenced to the date of the judgment.[102]

Possession of land and mesne profits

[10.140] A plaintiff who brings a common law claim for the recovery of land may at the same time bring a claim for the recovery of mesne profits, or arrears in rental payments, or both. The plaintiff who at the same time brings a claim for mesne profits is taken to have brought a claim for the recovery of a debt if the mesne profits claimed are calculated in accordance with the rent payable by the defendant to the plaintiff for the lease of the land. The court may enter a default judgment for repossession of the land and for payment of mesne profits,[103] entitling the plaintiff to issue a writ or a warrant of possession ordering the defendant to vacate possession and for the sheriff to forcibly eject the defendant if they do not do so.

In an ejectment action mesne profits are the moneys owed to a person with an immediate right to the possession of the land by a person occupying land without permission. In *Williams v Tobiasen* Mayo J defined mesne profits in the following terms:

> Mesne profits are the pecuniary benefits deemed to be lost to the person entitled to possession of land, or to rent and profits, by reason of his being wrongly excluded there from. The wrongful occupant is a trespasser, and the remedy rests on that fact. It may be a claim for mesne profits implies a waiver of the trespass, the claimant seeking to recover for use and occupation. The action is based on the claimant's possession, or right to possession, which has been interfered with ….[104]

Mesne profits are calculated based on the rental value of the property over the time which the plaintiff has a right of possession over the land,

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101 *Supreme Court Act 1986* (Vic), s 101.

102 Rule 21.03.

103 Vic r 21.03; see also ACT r 1124; NSW r 16.4; NT r 21.03; Tas r 350; WA O 13 r 5 (default of appearance), O 22 r 5 (default of pleading). Compare SA (no default proceeding); FCR (no equivalent provision); Qld r 286; Tas r 343; WA O 62A r 1: judgment cannot be entered for possession of land by a mortgagee.

104 *Williams v Tobiasen* [1955] SASR 50 at 52.

and during which the defendant is in wrongful occupation.[105] Mesne profits quantify what profits the plaintiff would have made but for the defendant's wrongful possession.

A claim for mesne profits may be liquidated or unliquidated. It is liquidated if the rental is specified on the claim and the rent is used to calculate the profits. In such cases final judgment may be entered in respect of liquidated sums.

If the market value of the lease exceeds the rent the defendant was charged the claim for mesne profits is unliquidated. A higher profit may be claimed and is appropriately assessed in an interlocutory judgment. The judgment as to possession of land brought in conjunction with the money claim is final.

Unliquidated damages

[10.150] The defendant who defaults on a claim for unliquidated damages entitles the plaintiff to enter interlocutory judgment against them for the assessment of damages.[106] The entry of interlocutory judgment at the registry only makes the defendant liable to pay an undetermined amount for the court's assessment. Damages are subsequently assessed by the court at a hearing for the purpose, with both the plaintiff and the defendant being entitled to be represented and to make submissions. The interlocutory judgment becomes final once the court has assessed damages.

If the claim is for liquidated damages the rights and liabilities owed and owing as between the parties is concluded by the entry of default judgment. Judgment may therefore be executed, in contrast to interlocutory judgment, without further assessment or intervention by the court being required. The hallmark of the distinction between an interlocutory as opposed to a final judgment is that the entry of the latter constitutes the final disposition of the rights and obligations of the parties with respect to both the subject matter of a particular application at any stage of the litigation, and the ultimate cause of action of the dispute the litigation was instigated to settle.[107] A judgment for liquidated damages is final, whereas a judgment for unliquidated damages requiring the court's assessment is interlocutory.

The assessment of damages in most courts will be undertaken by a master of the court, or another officer of the court, pursuant to the entry of an interlocutory judgment. In Victoria, damages under a judgment or under

105 *Anderson v Bowles* (1951) 84 CLR 310.

106 Vic r 21.03; ACT r 1122; FCR r 5.25; NSW r 16; NT r 21.03; Qld r 284; SA r 229; Tas r 348; WA O 13 r 7.

107 *Ex Parte Britt* [1987] 1 Qd R 221 at 226; see also *Carr v Finance Corporation of Australia Ltd* (1981) 147 CLR 246; *Carslake v Guardian Assurance Co* (1977) 15 SASR 378; *Tampion v Anderson* (1973) 48 ALJR 11; *Licul v Corney* (1976) 180 CLR 213; *Becker v Marion City Corporation* (1976) 50 ALJR 432; [1977] AC 271.

an order for damages to be assessed, are assessed by an Associate Judge, unless otherwise ordered by the court.[108] The defendant's entitlement to be heard at the hearing for the assessment of damages requires the plaintiff to notify the defendant of the hearing.[109] At the hearing for the assessment of damages the plaintiff is required to prove that the defendant's conduct caused the damages the plaintiff claims.

The right to have the matter heard at trial is not denied the plaintiff by the defendant's failure to enter an appearance or file a defence. The right to trial claimed by the plaintiff in filing an originating process remains their *prima facie* entitlement.[110] The plaintiff may, therefore, rather than enter a default judgment, apply to have the matter set down to be heard by a judge who will, if the application is granted, also assess damages at the same time as the hearing.[111]

The court's assessment of damages is necessary but not sufficient to render the interlocutory judgment final. The interlocutory judgment does not become final with respect to both the quantum of, and liability for, damages until the damages assessed by the court are indorsed or certified. While an interlocutory judgment on which damages are assessed that is entered by the plaintiff cannot be set aside simply on the defendant's application,[112] a writ to execute judgment may in some jurisdictions be liable to being set aside where the assessed interlocutory judgment for damages is not indorsed or certified on the court record.[113]

Detention of goods

[10.160] A defendant who fails to return goods belonging to the plaintiff and to which the plaintiff has a right of immediate possession on the plaintiff's legitimate demand may have an interlocutory default judgment entered against them.[114] Common law actions for detinue

108 Vic r 51.01; see also ACT r 6200; FCR r 3.01; *Supreme Court Rules 1970* (NSW), Pt 60 r 1, Sch D Pt 3 para 1; NT r 51.01; SA r 15; Tas r 586; WA O 13 r 7, O 34 r 18. Qld r 284 (court gives directions for assessing damages).

109 *Walsh v McMichael* [1928] VLR 345; *Producers' Co-operative Distributing Society Ltd v Ace Packing Co Pty Ltd* [1961] VR 85 at 88. Qld r 509; Tas r 585.

110 Vic r 21.03; see also ACT r 1123; NSW r 16.5; NT r 21.03; Qld r 285; SA r 229; Tas r 349; WA O 13 r 4 (default of appearance), O 22 r 4 (default of defence). FCR: no equivalent provision.

111 *Sharp v McGivney* [1951] VLR 143 at 147.

112 *Kimseal Pty Ltd v Kimberley Plastics Pty Ltd* [1964] VR 99.

113 *Gamble v Killingsworth* [1970] VR 161. The continuing validity of this authority depends on the precise terms of the rules of each jurisdiction. In a claim for unliquidated damages in the Federal Court, if the matter is proceeding on pleadings, the court may give judgment for the relief to which the applicant appears to be entitled on the statement of claim. The rules do not require the applicant to sign an interlocutory judgment at the registry: FCR r 5.23.

114 Vic r 21.03; see also ACT r 1123; NSW r 16.5; NT r 21.03; Qld r 285; SA r 229; Tas r 349; WA O 13 r 4 (default of appearance), O 22 r 4 (default of defence). FCR: no equivalent provision.

entitle the defendant to either return the goods in question or pay the value of the goods as assessed by the court. Accordingly, the judgment remains interlocutory, but the common law is modified in that the court may simply order the defendant to restore the goods to the plaintiff, and deny them the choice between that and a payment of the goods' assessed value.[115]

The plaintiff's preference as to return of the goods or a payment of the value of the goods will depend on the facts of the case. Where the goods are part of a commercial exchange between parties the plaintiff may prefer payment of the goods' assessed value, and any damages in compensation for the defendant's unlawful retention of the goods, rather than the goods' return. On the other hand, the special quality of the goods may mean that the plaintiff will only be satisfied by their return. The possible judgment available to an action for detinue were examined by Diplock LJ in *General & Finance Facilities v Cooks Cars (Romford)*.[116] His Lordship, analysing the nature of the remedy, outlined the three forms of judgment that might be given in such an action.

First, the plaintiff is entitled to judgment for the assessed value of the goods, and for any damages resulting from the goods' detention. The remedy is appropriate when the goods are items of commerce. The defendant is entitled to return, and the plaintiff obliged to accept, the goods before judgment, but is not entitled to return the goods in satisfaction of the judgment. Secondly, judgment for the plaintiff may be given either in the form of the return of the goods, or for their assessed value, plus damages to compensate the plaintiff for any losses incurred by the goods' detention. The defendant is then entitled to satisfy either form of the judgment. Where the plaintiff's goods cannot be located the plaintiff may levy a distress on the defendant's goods until they are found, or a writ of *fieri facias* (*fi fa*) for the value at which the goods have been assessed by the court. But where the goods have been destroyed only the latter and not the former is a viable remedy, and the court may order recovery of the goods *in specie*. Finally, the plaintiff may seek judgment that the goods be returned plus damages for their detention, removing from the defendant the option of delivering, or paying the assessed value of, the goods.

The first two forms of judgment require the value of the goods to be assessed before judgment can be made final, whereas no assessment of the goods' value is required under the third form of judgment. The first two forms of judgment are therefore interlocutory, and the third final. Where the plaintiff is entitled to damages these must be separately

115 *General Motors Acceptance Corporation of Australia v Davis* [1971] VR 734.

116 *General & Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 1 WLR 644 at 650. This is applicable in Australia: *General Motors Acceptance Corporation of Australia v Davis* [1971] VR 734 at 739.

assessed from the assessment of the value of the goods so that damages can be paid if the detinue is remedied by the restoration of the goods *in specie*.

Default in other cases

[10.170] The availability of default judgments under the rules depends on whether a claim is brought in equity or common law.[117] A plaintiff may enter a default judgment for a common law claim. The court has discretion to determine whether the plaintiff should be afforded equitable or statutory relief, but no discretion as to whether they should be awarded damages. When a defendant defaults in a proceeding in which the plaintiff has made a claim that is not for damages, or the recovery of debt, or the recovery of property either real or personal, the plaintiff must make an application for judgment, and the court determine whether and what relief to which the plaintiff is entitled.[118] The plaintiff is not required to notify the defendant of their application for judgment.[119]

The court may give judgment for the plaintiff upon the statement of claim, which must contain the facts necessary to establish the plaintiff's right to relief. The allegations contained in the plaintiff's statement of claim are admitted as fact if the defendant has filed no defence.[120] The plaintiff's application must fall within the facts alleged in the statement of claim. Because the rules in Victoria do not provide for the admission of evidence on the hearing of the plaintiff's application[121] evidence is taken not to be admissible.[122] Therefore no evidence can be presented in support of a case at the hearing of the application that is inconsistent with, or diverges from, the allegations raised on the statement of claim.

In *Noden v Mason*[123] the plaintiff was the vendor in a contract for the sale of land seeking specific performance of the contract. The defendant purchaser failed to file and serve either an appearance or a defence. The court granted a decree of specific performance on the vendor's application with which the defendant failed to comply. The plaintiff then applied for a declaration that he was entitled to enter an agreement to sell the land with another purchaser. The court refused to make a declaration on those

117 *Gamble v Killingsworth* [1970] VR 161 at 170 per McInerney J; for examples of default judgments for discretionary remedies see: *Luna Park Sydney Pty Ltd v Bose* [2006] FCA 94; *Hills Industries Ltd v Hualin Pty Ltd* (2009) 82 IPR 513.

118 Vic r 21.04; see also ACT r 1126; FCR r 5.23; NSW r 16.10; NT r 21.04; Qld r 288; SA r 228; Tas r 353; WA O 13 r 8 (default of appearance), O 22 r 7 (default of defence).

119 Rule 21.04(2).

120 *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* (2007) 161 FCR 513 at [42]; *Hadgkiss v Aldin (No 2)* (2007) 169 IR 76.

121 An affidavit in support of an application for judgment is required in the ACT (ACT r 1126) and New South Wales (NSW r 16.3).

122 *Noden v Mason* [1926] VLR 41 at 43; *Young v Thomas* [1892] 2 Ch 134.

123 *Noden v Mason* [1926] VLR 41.

terms. The plaintiff had not alleged the terms of the contract entitling him to a resale in case of a default in his statement of claim.

In *Palmer v Lark*[124] the plaintiff's claim did not allege the facts required to provide for the remedy sought. The plaintiff had claimed interest payable at 5 per cent as a component of the remedy sought. However, the plaintiff did not allege facts or adduce evidence that the parties had agreed to that rate of interest, nor on what basis the claim was asserted. Accordingly, the court awarded interest on the payment of the purchase money at the rate of 4 per cent, which was the common practice.

Although the plaintiff has disclosed a right to a remedy on the statement of claim the grant of relief through final judgment remains at the court's discretion. In exercising that discretion the court may consider factors such as whether the defendant has filed a defence, albeit out of time, which discloses a viable defence. In considering whether to permit a defendant to file and serve a defence after the expiry of time the court will consider any injustice or unfairness that might befall the parties if the defendant were refused.[125]

In *Termijtelen v Van Arkle*[126] the Court of Appeal in New South Wales considered the relationship between the discretionary nature of judgments made on a party's application and admissions. The plaintiff claimed against two defendants, only one of whom appeared at the trial. Despite the court finding in favour of the defendant who had appeared at the hearing, the plaintiff based its application for a decree against the absent defendant on statute permitting allegations against absent parties to be implied as admissions. The plaintiff's application failed both at trial and on appeal. The Court of Appeal refused to make an application in the plaintiff's favour after it was refused relief at trial on the merits. Although admissions may be implied against the absent defendant, the court is not bound by admissions made between parties or in pleadings, and may decline to act on them if, for example, the court doubts the veracity of the allegations. Given that the trial court had found against the plaintiff on the merits on allegations made against the defendant who had appeared at trial, it had ruled against the factual nature of the same allegations made against the absent defendant. The court would not make a declaration on an admission against the absent defendant contrary to the weight of the evidence. Similarly, a court will not make an order or render judgment on facts agreed between parties which it knows to be incorrect, inaccurate or untrue.

PLAINTIFF MAY PROCEED TO TRIAL

[10.180] It has been suggested that in the absence of a defendant's appearance or defence a plaintiff has a choice between entering an

124 *Palmer v Lark* [1945] Ch 182.

125 *Wiedenhofer v Commonwealth* (1970) 122 CLR 172.

126 *Termijtelen v Van Arkle* [1974] 1 NSWLR 525.

interlocutory default judgment and applying for an assessment of damages and a summary judgment, or setting the action down for trial. The English Court of Appeal in *Morse v Frost*[127] permitted a plaintiff to give notice of trial rather than enter a default judgment for the assessment of damages. The Court of Appeal in *Nagy v Co-operative Press*[128] in an action for libel applied *Morse v Frost* where the plaintiff sought damages and an injunction against publication. Cohen LJ constructed the relevant rule[129] by examining its natural language which he read as permissive in meaning. The rule did not oblige the plaintiff to enter a default judgment. The practical reason for the existence of the rule was to provide the plaintiff with an inexpensive means of obtaining the preferred relief. The rule was also necessary to ensure that the plaintiff was not prejudiced by being restricted to seeking a judgment on assessed damages and being deprived of the option of proceeding to trial.[130] In *Keating v Ross*[131] the court, applying *Morse v Frost* and *Nagy v Co-operative Press*, held that the plaintiff who had obtained an order from the court could proceed to final judgment, and was not obliged to enter a default judgment.

In *Grant v Knaresborough Urban District Council*[132] the claimant had been served with a rates demand claiming payments. The demand was *ultra vires* and withdrawn by the defendant who subsequently filed a defence denying the rates notices were invalid. The defendant subsequently also admitted the invalidity of the rates notices, sought leave to withdraw its defence, and informed the court and claimant that they would not be defending the action, entitling the claimant to judgment in default of a defence. However, the claimant proceeded to trial, seeking a declaration which the court made.

The defendant submitted on the question of costs that the claimant ought to have costs up to the time the defence was withdrawn, and any costs associated with filing a default judgment, but ought to pay all further costs such as those of the trial because relief had been available to the claimant on an application for judgment after the defendant had stated that it would not be contesting the action. Astbury J disagreed with the defendant's submission. His Honour held that the claimant was entitled to proceed with the action and seek the remedy he was entitled to: a declaration. He ordered that the defendants pay the full costs, saying that the claimant "was not bound in the circumstances to move for judgment in default of defence if, on such a motion, he could not obtain the relief he

127 *Morse v Frost* [1927] 1 KB 231.

128 *Nagy v Co-operative Press Ltd* [1949] 2 KB 188.

129 *Rules of the Supreme Court 1883* (UK), O 19 r 7.

130 *Nagy v Co-operative Press Ltd* [1949] 2 KB 188 at 193.

131 *Keating v Ross* [1951] ALR (CN) 1052.

132 *Grant v Knaresborough Urban District Council* [1928] 1 Ch 310.

was clearly entitled to."[133] The claimant would not have been entitled to a declaration that the rates demand was illegal without proving that the information the council sought was not necessary under the rating statute. Such relief was not available on a motion for judgment.

The claimant is not deprived of their right to a declaration because the defendants have withdrawn their defence, as long as the declaration continues to serve a purpose which is more than merely theoretical. Nor is there any basis for depriving the claimant of the remedy merely because the defendant has decided not to contest the matter. Declaratory relief will be available if substantial issues were raised at the commencement of proceedings.[134] Moreover, a useful purpose would be served in hearing the case because it involved the public interest as the rates notice which had been ordered by the Minister of Health was to be sent to a significant section of the public.[135] As a general principle, a court does not make declarations on matters relating to public rights by consent or on admissions, unless it is satisfied by evidence.[136]

SETTING ASIDE DEFAULT JUDGMENT

Introduction

[10.190] A court has jurisdiction to set aside or vary a default judgment entered under O 21 on application by either party, including where the application is made by the plaintiff.[137] The rationale on which the court's discretionary power is based was stated by Lord Atkin in *Evans v Bartlam*.[138]

> Where a claim is determined as a consequence of a party's failure to comply with procedural rules, that determination ought not necessarily be determinative. It ought not because the court's primary function is to determine claims on their substantive merits. To ensure that the court has power to comply with that primary purpose it ought therefore have the power to revoke, in appropriate circumstances, judgments entered in default, ie judgments entered on grounds other than substantive ones.

While the reason for the discretion may be well understood, the formation of rules for setting aside or varying default judgments had been conceptually problematic. The rules are required to account for a number of distinctions such as the difference between regular and irregular judgments, arguable and triable issues, and the non-identical "real prospect of success" and "bound to lose" tests, as well as the *ex debito*

133 *Grant v Knaresborough Urban District Council* [1928] 1 Ch 310 at 317; see also *Austin v Wilding* [1969] 1 WLR 67.

134 *Zamir & Woolf: The Declaratory Judgment* (3rd ed, Sweet & Maxwell, 2002), [4.117].

135 *Zamir & Woolf: The Declaratory Judgment* (3rd ed, Sweet & Maxwell, 2002), [4.087].

136 *Termijtelen v Van Arkle* [1974] 1 NSWLR 525.

137 Vic r 21.07; ACT r 1128; FCR r 39.05; NSW r 36.16; NT r 21.07; Qld r 290; SA r 230; Tas r 355; WA O 13 r 10 (default of appearance), O 22 r 10 (default of defence).

138 *Evans v Bartlam* [1937] AC 473 at 480.

justitiae rule. Accounting for and attempting to systematise these distinctions can sometimes obscure the real purpose of the court's discretion to set aside or vary default judgments.

Default judgment entered regularly

[10.200] Where the default judgment was entered regularly the court has discretion to set aside or vary the judgment on whatever terms it thinks fit. The court's discretion is unfettered[139] and it is exercised with the sole objective of doing justice in the particular case.[140] In *Evans v Bartlam*[141] the House of Lords provided principles to guide the exercise of the discretion for setting aside a judgment obtained in default. First,

> The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.[142]

Secondly, the discretion conferred on the judge by the rules of court is unconditional. The court should avoid developing firm rules or guidelines which shackle the unfettered jurisdiction enjoyed by the court under the rules. Discretion is exercised in the context of the facts of the particular case. Factors relevant to the exercise of judicial discretion are not to be made into conditions precedent to the exercise of that discretion.[143] In *Kostokanellis v Allen*[144] the Full Court in Victoria considered the submission that the discretion to set aside default judgment could only be exercised once the defendant had satisfactorily explained the default. While it was proper to have regard to the reasons for the default or delay, it warned against "the adoption of a formula created by erecting what are merely relevant factors into arbitrary principles so as to allow the automatic production of a solution in all but the exceptional case."[145]

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139 *Evans v Bartlam* [1937] AC 473; see also *Cook v DA Manufacturing Co Pty Ltd* [2004] QCA 52 at [16]–[18]; *Cuttle v Brandt* (1947) 64 WN (NSW) 96 at 97 per Herron J.

140 See, for example, *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 at [35], [72], [76] and [99]; *Macquarie Bank Ltd v Beaconsfield* [1992] 2 VR 461 at 466; *Cannan v Reynolds* (1855) 5 El & Bl 301; 119 ER 493 at 305–306.

141 *Evans v Bartlam* [1937] AC 473; *Cook v DA Manufacturing Co Pty Ltd* [2004] QCA 52 at [16]–[18]; *Cuttle v Brandt* (1947) 64 WN (NSW) 96 at 97 per Herron J.

142 *Evans v Bartlam* [1937] AC 473 at 480 per Lord Atkin.

143 *Evans v Bartlam* [1937] AC 473, especially at 479–480 per Lord Atkin, 481 per Lord Russell of Killowen and 488–489 per Lord Wright; and *Kostokanellis v Allen* [1974] VR 596.

144 *Kostokanellis v Allen* [1974] VR 596.

145 *Kostokanellis v Allen* [1974] VR 596 at 605–606. For a later illustration of the refusal to impose restrictions on an unfettered discretion conferred by Parliament, see the decision of the Full Court in *Leighton Contractors Pty Ltd v Kilpatrick Green Pty Ltd* [1992] 2 VR 505.

Thirdly, in exercising its discretion the court's primary concern is to determine whether the defendant has put forward a defence which is *prima facie* arguable or triable so as to justify setting aside the default judgment.[146]

Fourthly, the defendant is not required expressly under the rules to provide a reasonable explanation for any delay in applying to the court to have the judgment set aside,[147] and the applicant will not fail for want of an adequate explanation of the default.[148] In *Cohen v McWilliam* Priestly JA said that delay in and of itself should not trigger the exercise of the discretion to set aside judgment absent prejudice to the parties:

> The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that the parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. Any limitation upon that opportunity will generally be justified only by the necessity to avoid prejudice to the interests of some other party, occasioned by misconduct, in the case, of the party upon whom the limitation is sought to be imposed. The temptation to impose a limitation through motives of professional discipline or general deterrence is readily understandable; but, in our opinion it is an erroneous exercise of the relevant discretion to yield to that temptation.[149]

A defendant having a *prima facie* good defence should not be denied the opportunity to defend the matter even after considerable delay as long as prejudice to the plaintiff can be avoided, or compensated for by an order for costs or by other means.[150] The court must consider whether the affidavits reveal that the defendant would suffer injustice if the judgment were to stand, and at the same time whether it can be set aside without the plaintiff suffering an irreparable injustice.[151]

Nevertheless, the court will consider reasons for delay as a factor relevant to the exercise of its discretion to set aside judgment. It is also normal

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146 This was the test, as originally laid down by the House of Lords in *Evans v Bartlam* [1937] AC 473. However, following the English Court of Appeal's decision in *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc* [1986] 2 Lloyd's Rep 221, the test was subsequently interpreted as requiring the defendant to show that there was a defence which had "a real prospect of success". The "real prospect of success" test was criticised in cases such *The Ruben Martinez Villena (No 1)* [1987] 2 Lloyd's Rep 621, and *Day v Royal Automobile Club Motoring Services Ltd* [1999] 1 WLR 2150.

147 *Rosing v Ben Shemesh* [1960] VR 173; see also *Watson v Anderson* (1976) 13 SASR 329; *Fairclough v Strathmont Haulage Pty Ltd* (1981) 28 SASR 456; *Surfers Paradise International Convention Centre Pty Ltd v National Mutual Life Assn of Australasia Ltd* [1984] 2 Qd R 447; *Macquarie Bank Ltd v Beaconsfield* [1992] 2 VR 461.

148 *Rosing v Ben Shemesh* [1960] VR 173; see also *Watson v Anderson* (1976) 13 SASR 329; *Fairclough v Strathmont Haulage Pty Ltd* (1981) 28 SASR 456; *Surfers Paradise International Convention Centre Pty Ltd v National Mutual Life Assn of Australasia Ltd* [1984] 2 Qd R 447; *Macquarie Bank Ltd v Beaconsfield* [1992] 2 VR 461.

149 *Cohen v McWilliam* (1995) 38 NSWLR 476 at 480–481, quoting with approval from the Full Federal Court decision in *Davies v Pagett* (1986) 10 FCR 226 at 232.

150 See *Atwood v Chichester* (1878) 3 QBD 722; *Rosing v Ben Shemesh* [1960] VR 173; *National Mutual Life Assn of Australasia Ltd v Oasis Development Pty Ltd* [1983] 2 Qd R 441 at 449.

151 *Vacuum Oil Co Pty Ltd v Stockdale* (1942) 42 SR (NSW) 239 at 243–244 per Jordan CJ.

practice for the defendant in an application to set aside default judgment to explain why they did not appear, or file and serve a defence. The effect of a want of explanation will depend on the circumstances of the case. Similarly, the weight to be accorded the explanation for a delay or default will also depend on the circumstances of the case.[152]

In *Evans v Bartlam*[153] the court said that "if merits are shown, the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication". The existence of an arguable defence is not essential: regular default judgments have been set aside where the defendant's default resulted from their solicitor's mistake or of misunderstanding, to which the plaintiff's solicitors may or may not have contributed, or to their having been misled.[154] Nevertheless, a lack of explanation will become a relevant circumstance if it coexists with the prospect of the plaintiff being prejudiced by having judgment set aside. However, an adequate explanation may suffice for setting the default judgment aside.[155]

In *Kostokanellis v Allen*, where the defendant had not appeared at the time judgment was given, the Full Court said that the court could only exercise its discretion if it weighed, on the one hand, the prejudice to the defendant who had demonstrated the existence of a *prima facie* defence reasonably arguable on its merits if it allowed the judgment to stand, and, on the other hand, the prejudice to the plaintiff in setting it aside which action could not be compensated for by an order as to costs.[156]

The existence of a defence on the merits is the most important factor the court takes into consideration when deciding whether or not to exercise its discretion to set aside a default judgment.[157] Concomitantly, no purpose is served in setting aside judgment where the defendant does not have an arguable case. Other factors are countervailing to this

152 *Kostokanellis v Allen* [1974] VR 596 at 605.

153 *Evans v Bartlam* [1937] AC 473 at 489; citing Hope JA in *Adams v Kennick Trading (International) Ltd* (1986) 4 NSWLR 503 at 506–507.

154 *Kostokanellis v Allen* [1974] VR 596 at 605. Compare, for example, *Collins Book Depot Pty Ltd v Bretherton* [1938] VLR 40.

155 *Rosing v Ben Shemesh* [1960] VR 173; see *J & H Manktelow Pty Ltd v Alloway Grazing Pty Ltd* [1975] 1 NSWLR 385 at 391 per Hutley JA (compensating procedural delay by orders for costs); *Hobartville Stud Pty Ltd v Union Insurance Co Ltd* (1991) 25 NSWLR 358 (compensating procedural delay by orders for costs); see further *Taylor v Taylor* (1979) 143 CLR 1.

156 *Kostokanellis v Allen* [1974] VR 596 at 605.

157 *Vacuum Oil Co Pty Ltd v Stockdale* (1942) 42 SR (NSW) 239 at 249 per Jordan CJ (a good defence on the merits); *Lutz v Goers* [1931] SASR 366 at 367 per Napier J (a *bona fide* defence); *Ex parte Vigilant Finance (NSW) Pty Ltd; Re Cameron Smith* [1964] NSWR 1282 at 1286 per Herron CJ (a reasonably clear case on merits); *Cook v DA Manufacturing Co Pty Ltd* [2004] QCA 52 at [19] per Williams JA; see also *Troiani v Alfrost Properties Pty Ltd* [2002] QCA 281; *Yankee Doodles Pty Ltd v Blemvale Pty Ltd* [1999] QSC 134 at [13]; *National Australia Bank Ltd v Singh* [1995] 1 Qd R 377 at 380 per Pincus JA; *Autorent Pty Ltd v Millar Seymour & Co* [2004] Tas SC 2 at 3.

consideration. The court prefers to hear an arguable defence and determine a case on its merits. Parties have been permitted to defend despite a complete lack of explanation for their delay because they have demonstrated having a reasonably arguable defence.[158] Leave to defend may be granted on onerous terms such as the payment of security for costs, or other payments into court.[159] In *McCullough v BBC*[160] Girvan J agreed that a defendant who had demonstrated that the case ought to be judged on its merits because they could put forward a reasonably arguable defence, but said that in arriving at the decision to set aside the default judgment there was no "compelling reason why the Court should be required to form a provisional view of the probable outcome if the judgment were to be set aside" because it would involve the court in a premature assessment of the merits of the parties' respective cases based on limited materials. Although it is not appropriate to conduct a hearing on the affidavits submitted in the application, the court may decide that there is no defence on the merits where the defendant demonstrates a good defence in law but relies on questionable facts.[161]

In *Macquarie Bank v Beaconsfield*[162] the plaintiff sought to set aside a default judgment regularly entered in its favour. The plaintiff bank sought to recover the principal plus statutory interest on a breached credit facility guaranteed by the defendants. In the alternative the plaintiff claimed damages. After the defendants' defaults on the delivery of their defence the plaintiff entered interlocutory judgment for damages to be assessed and costs to be taxed. The defendants then issued a summons to have the judgment set aside on the basis of numerous irregularities, which it subsequently withdrew. The plaintiff's initial application to enter a judgment for the assessment of damages rather than debt was subsequently withdrawn and replaced with an application for a default judgment claiming the debt.

The defendants argued that the plaintiff's claim had merged into the default judgment for damages to be assessed and that the plaintiff could not claim the indebted sum that it had obtained. The court maintained a general jurisdiction to set aside a default judgment on the plaintiff's application, the breadth of which it described in the same terms as Lord Atkins had in *Evans v Bartlam*: "The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been only obtained by a failure to follow any of the

158 *Byron v Southern Star Group Pty Ltd (t/as KGC Magnetic Tapes)* (1995) 123 FLR 352 at 364 per Priestley JA.

159 *Byron v Southern Star Group Pty Ltd (t/as KGC Magnetic Tapes)* (1995) 123 FLR 352 at 364 per Priestley JA.

160 *McCullough v British Broadcasting Corporation* [1996] NI 580.

161 *Watson v Anderson* (1976) 13 SASR 329 at 334–335 per Bray CJ.

162 *Macquarie Bank Ltd v Beaconsfield* [1992] 2 VR 461.

rules of procedure."[163] The rule confers on the court a wide discretion where there has been a failure to comply with procedural rules and orders, and does not restrict a plaintiff's applications by requiring them to show special or unusual circumstances. The application is determined in the same manner as any application to set aside a default judgment: by the court exercising its discretion having regard to the justice of the particular case.

In *Sunray Irrigation Services v Hortulan (in liq)*[164] the plaintiff obtained default judgment against the defendant on the balance due under an agreement between them. After discovering that the defendant was acting as an agent for an undisclosed principal the plaintiff applied to the Master by summons for an order setting aside judgment, because they were barred from proceeding in a claim against the undisclosed principal while the judgment against the agent stood.[165] The principal successfully opposed the application, and the Master refused to set aside the judgment. The plaintiff appealed the Master's decision. The appeal raised the question whether a party could set aside a default judgment in their favour, or was required to have it set aside on appeal, in order to sue the principal.[166] The default judgment which stood in the way of suit against the principal was set aside on appeal.[167] The court had a discretionary and limited jurisdiction to set aside the default judgment before the final judgment is entered.[168]

In *Macquarie Bank v Beaconsfield*[169] the court considered the scope of the court's jurisdiction to set aside judgment under r 21.07 of the *General Rules of Procedure in Civil Proceedings 1986* (Vic), which provides that: "The Court may set aside or vary any judgment entered or given in accordance with this Order." Ormiston J said the rule was cast in the most liberal terms, and there was no basis in the rule, and no reason to restrict the court's jurisdiction to set aside default judgment.

A plaintiff may apply to set aside a default judgment if it is a wrong judgment or if there is good reason for doing so. Judgments entered mistakenly or inadvertently may be set aside on the plaintiff's application.[170] The plaintiff is not precluded from setting aside judgment merely because to do so would deprive a party of a defence against suit

163 *Evans v Bartlam* [1937] AC 473 at 480.

164 *Sunray Irrigation Services Pty Ltd v Hortulan Pty Ltd (in liq)* [1993] 2 VR 40.

165 W Bowstead, *Law of Agency* (15th ed, 1985), p 346.

166 *Buckingham v Trotter* (1901) 1 SR (NSW) 253 at 261 per Darley CJ.

167 That the court has jurisdiction to set aside and remove from the record a judgment against an agent which would, unless set aside, stand in the way of a later suit against the agent's principal, was apparently accepted by the High Court in *Petersen v Moloney* (1951) 84 CLR 91 at 103–104.

168 *Permanent Trustee Co (Canberra) Ltd (Executor Estate of Andrews) v Stocks & Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45; 28 FLR 195 at 198 per Brennan J.

169 *Macquarie Bank Ltd v Beaconsfield* [1992] 2 VR 461 at 465.

170 *Partington v Hawthorne* (1888) 52 JP 807.

by the plaintiff. Further, there are grounds for setting aside the judgment if preventing a plaintiff from doing so deprives a party of a defence.[171]

Other relevant factors that a court must take into account when considering an application to set aside a default judgment include the circumstances in which, and the reasons for which, the default judgment was entered. It follows from the fact that the court, in the exercise of its discretion, must consider any irremediable prejudice to a party of setting aside default judgment, that it will not exercise that discretion pointlessly. A plaintiff who makes the application in order to proceed to the trial of a matter the result of which is unlikely to yield a more favourable remedy to that to which he is already entitled will be denied leave. The court will not accede to the plaintiff's desire merely to prove a matter at trial. Default judgment will be set aside if there exists another matter not the subject of the default judgment.

A direction to set aside a default judgment may be obtained on the defendant's application against the plaintiff where the defendant has either a defence based on facts which can be substantively made out,[172] or a defence on a technical basis.[173] In *Ampol Petroleum (Qld) v Easton*[174] the defendant *prima facie* made out a reasonably arguable defence that some of the conditions on which the plaintiff sued for payment had not been met. The default judgment was set aside on that basis. A technical defence was raised under the regulations governing money-lending in *Term Sales v Joseph*.[175] The plaintiff had sought default judgment despite the regulations providing for external dispute resolution in certain circumstances.

An application to set aside a default judgment is made on summons on affidavit evidence. The affidavits must disclose sufficient facts to enable and warrant the court's discretion to be exercised.[176] For the defendant to make out that they *prima facie* have a reasonably arguable defence the defendant must depose the facts that will be proved at trial.[177] The test the court then applies is that framed by Jordan CJ in *Vacuum Oil Co v Stockdale*:

> The question is whether, upon the material that has been placed before the court there is a real likelihood that it would be unjust to the defendant to allow judgment to stand. If so, it should be set aside on such terms as will minimize the possibility of injustice to the plaintiff. If not, the court should not interfere.[178]

171 *Hammond v Schofield* [1891] 1 QB 453 at 458 per Vaughan Williams J.

172 *Ampol Petroleum (Qld) Pty Ltd v Easton* [1955] QWN 79 (plaintiff sued for money under a contract of guarantee).

173 *Term Sales Pty Ltd v Joseph* (1949) 67 WN (NSW) 44.

174 *Ampol Petroleum (Qld) Pty Ltd v Easton* [1955] QWN 79.

175 *Term Sales Pty Ltd v Joseph* (1949) 67 WN (NSW) 44.

176 *Collins Book Depot Pty Ltd v Bretherton* [1938] VLR 40.

177 *Kertesz v Kessler* [1966] VR 453; *Silk & Textile Printers Ltd v Moore* [1956] St R Qd 496.

178 *Vacuum Oil Co Pty Ltd v Stockdale* (1942) 42 SR (NSW) 239 at 243–244.

Irregularly entered default judgments

[10.210] Historically, irregularly entered judgments which were void were required to be set aside as of right (*ex debito justitiae*). By contrast, courts would only set aside irregularly entered judgments which were merely voidable if they considered it appropriate to do so.[179] However non-conformity with the rules of procedure is a mere irregularity, and not a nullity, so it does not nullify proceedings. The court now has discretion to set aside proceedings, or to direct otherwise, such as that an irregular judgment be amended to render it regular.[180]

Default judgments are regular if they comply strictly with the procedural rules. The *ex debito justitiae* rule may remain relevant in assessing applications to set aside irregular default judgments on the basis that it ensures that it holds the parties' observance of procedural rules to be fundamental. Therefore, defendants may have default judgments entered irregularly set aside *ex debito justitiae* whether or not they *prima facie* demonstrate a reasonably arguable defence.

A defendant is entitled *ex debito justitiae* to set aside an irregular default judgment because such judgments should not remain on the court record.[181] A judgment is irregular if the plaintiff has no right to the judgment, or is granted a remedy in the judgment which is inconsistent with their entitlements under the pleadings.[182] Default judgments entered for insufficient or excessive amounts are irregular.[183]

In *Alexander v Ajax Insurance*[184] the court was required to consider whether a claim under an insurance policy was a claim for liquidated or unliquidated sums. The court recognised that there was significant authority supporting the latter proposition, but that there were strong arguments in favour of the former. In this case a claim was made under an insurance policy for total loss arising from the destruction of a house and its contents as a claim for unliquidated damages. Default judgment was entered for a liquidated sum. Sholl J said that cases of insurance of goods do not resemble cases of indemnification against specified fines.[185] The default judgment was set aside because the claim was in law for an unliquidated sum.

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179 *Anlaby v Praetorius* (1888) 20 QBD 764.

180 *Cusack v De Angelis* [2008] 1 Qd R 344 at [23]–[25] per Muir JA.

181 *RT Co Pty Ltd v Minister of State for the Interior* (1957) 98 CLR 168 at 170 per Dixon CJ.

182 *RT Co Pty Ltd v Minister of State for the Interior* (1957) 98 CLR 168; *Dibeek Holdings Pty Ltd v Notaras* (1998) 143 FLR 132.

183 *Anlaby v Praetorius* (1888) 20 QBD 764 (judgment entered too soon); *Hughes v Justin* [1894] 1 QB 667 (judgment entered for too much); compare *Building Guarantee & Discount Co Ltd v Dolejsi* [1967] VR 764 and the cases cited therein.

184 *Alexander v Ajax Insurance Co Ltd* [1956] VLR 436.

185 *Alexander v Ajax Insurance Co Ltd* [1956] VLR 436 at 448, referring to the decision of *Finn v Gavin* [1905] VLR 93.

In deciding whether judgment was regularly entered the court must consider whether all the interlocutory steps required to enter judgment had been properly adhered to. Because any non-compliance with the rules may render the judgment irregular the factors the court may have to consider cannot be exhaustively listed, nor can a simple test be formulated. The relevant factors will include such things as proper notification to the defendant of proceedings having been commenced against him, what procedural breach the plaintiff committed, and whether it involved *mala fides* or an egregious breach of the rules. Judgments signed in breach of good faith are irregular.[186] Such was the case in *Dibeek Holdings v Notaras*[187] where the court set aside a default judgment because it was entered without the plaintiff having proved to the registrar that the defendant had been in default of defence.

Where judgment has been obtained on an originating process irregularly served it will be set aside for irregularity. In *Thomas Bishop Ltd v Helmville Ltd*[188] the claim form and court papers had been served by post at the wrong address so that the defendant was not notified and did not appear at trial. Orr LJ, in a dissenting judgment, said that the relevant time for determining whether the judgment had been regularly or irregularly obtained was when the judgment was given or signed. If neither the court nor the plaintiff are aware that the originating process has not been delivered it is deemed to have been delivered for the purpose of entering the default judgment. However, it remains open for the defendant to apply to have it set aside.

The defendant in applying to set aside a default judgment is only required to prove the irregularity of the obtained judgment. The court may, in very exceptional circumstances, exercise its discretion to make an order rectifying any irregularity that will validate the irregular judgment.[189]

SUMMARY JUDGMENT FOR THE PLAINTIFF

Grounds for granting or refusing summary judgment

General principles

[10.220] Ordinarily, a plaintiff is prevented from applying for a default judgment by the defendant entering an appearance, or corresponding document. However, even where a defendant enters an appearance and serves a defence there may be little or no merit in the defence to the plaintiff's claim. When the plaintiff demonstrates an arguable claim, and

186 *Daly v Silley* [1960] VR 353; *Australian Musical Distributors Pty Ltd v Whebell* [1969] QWN 40.

187 *Dibeek Holdings Pty Ltd v Notaras* (1998) 143 FLR 132.

188 *Thomas Bishop Ltd v Helmville Ltd* [1972] 2 WLR 149. See also *Nelson v Clearsprings (Management) Ltd* [2007] 1 WLR 962.

189 *City Mutual Life Assurance Society Ltd v Giannarelli* [1977] VR 463.

the defendant demonstrates no or nor credible defence, or is unable to demonstrate an irregularity in the plaintiff's application, the plaintiff may apply for summary judgment.[190] Summary judgment may be given for the plaintiff on affidavit evidence which discloses that there is no issue fit to be tried, and that the plaintiff is being forced to the expense and inconvenience of undertaking preparation for an unnecessary trial which should be avoided.[191]

The court's jurisdiction for handing down summary judgment is restrictive. It is to be exercised with great care, and not at all unless the court comes to the clear conclusion that there is no issue to be tried.[192] A plaintiff who applies for summary judgment must do so in strict compliance with the rules. The plaintiff must show that the defence raised on the pleadings is untenable, and has no prospect of success, and that trial should therefore be avoided.[193] The court will not exercise its power to order summary judgment as long as it sees an issue or conflict either of fact or law which is necessary for it to consider and decide,[194] or a real controversy between the parties requiring resolution.[195]

The plaintiff's application may be successfully opposed by the defendant demonstrating that it has failed to comply strictly with the rules regulating the application procedure. The defendant may also oppose the application by showing that the claim is not amendable to summary disposition. In *Hills v Sklivas*[196] the defendant successfully appealed in the Victorian Appeals Division a summary judgment obtained by the plaintiff in the County Court. The appeal court held that while the defendant had failed to raise a defence the plaintiff sued on a spurious transaction. Applications for summary judgment may also be opposed on the basis that a fact in dispute in the matter as pleaded may give the defendant a defence if it is found in their favour.

Victoria

[10.230] In Victoria summary judgment may be applied for by a plaintiff in relation to any type of proceeding. Rule 22.01 provides that O 22 "applies to all civil proceedings".[197] Prior to the enactment of the

190 *Theseus Exploration NL v Foyster* (1972) 126 CLR 507.

191 *Clarke v Union Bank of Australia Ltd* (1917) 23 CLR 5; *Daimler Co Ltd v Continental Tyre & Rubber Co Ltd* [1916] 2 AC 307; *Caltex Oil (Aust) Pty Ltd v Bawden* [1979] Qd R 62.

192 *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 99.

193 See, generally, *Spellson v George* (1992) 26 NSWLR 666 at 678–679 per Young AJA, with whom Handley JA and Hope AJA agreed.

194 *Sidebottom v Cureton* (1937) 54 WN (NSW) 88.

195 *Bank of New South Wales v Murray* [1963] NSWR 515.

196 *Hills v Sklivas* [1995] 1 VR 599 at 606–607 per Tadgell J, 607 per Ormiston J, 611 per Batt J.

197 Compare r 22.01 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) which limited the scope of the Order "only to a proceeding commenced by writ." Rule 22.02(2) of the 2005 rules excludes the application of the section to proceedings for

Civil Procedure Act 2010 (Vic) the test for summary judgment was the very demanding one of one party showing that the other party's claim or defence was "so clearly untenable" that it ought to be considered "hopeless" or "bound to fail".[198] Section 63(1) of the *Civil Procedure Act 2010* (Vic) provides that the plaintiff may apply for summary judgment, and a court may give summary judgment in a civil proceeding "if satisfied that a claim, a defence or a counterclaim or part of the claim, defence or counterclaim, as the case requires, has no real prospect of success."[199] Section 63 makes the procedure available to defendants in relation to claims, or parts of claims, and to plaintiffs in relation to defences, or parts of defences, and counterclaims, or parts thereof. It also entitles the court to move for summary judgment. Section 65 provides that the court's powers under the *Civil Procedure Act 2010* (Vic) are additional to, and do not derogate from, the powers the court has under the civil procedure rules.[200]

While the *Explanatory Memorandum to the Civil Procedure Bill 2010* recognised that the existing summary judgment procedure was "too restrictive" and explained that the purpose of s 63 was to "liberalis[e] the test for the summary disposal of unmeritorious claims and defences", the Victorian Court of Appeal in *Karam v Palmone Shoes*[201] held that the provisions of the new Civil Procedure Act did not alter or introduce a new or different test for summary procedure applications. The court said that the new legislation merely

> express(ed) more accurately the way in which the rule had been interpreted by the courts. It remains, as the High Court said in *Fancourt v Mercantile Credits Ltd*, that the power to order summary judgment is to be exercised sparingly and not "unless it is clear that there is no real question to be tried".

In *Lysaght Building Solutions v Blanalko Pty Ltd*[202] a question of law was referred to the Court of Appeal by a trial judge. The court was required to determine what test was to be applied in deciding whether summary judgment was to be given pursuant to s 63 of the *Civil Procedure Act 2010* (Vic). The majority of Warren CJ and Nettle JA held that the test was

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"libel, slander, malicious prosecution, false imprisonment or seduction or to a claim based on an allegation of fraud", whereas the restriction has been lifted from the 2015 rules, along with the removal of the restriction limiting the plaintiff to one application under O 22 except by leave of the court: see r 22.02(4). The words "at any time" do not appear in the 2015 rules whereas they are explicitly stated in the 2005 rules. However, the 2015 rules do not restrict when the application may be made and it is suggested that, as in the previous rules, the application may be made "at any time" after the time for filing of a defence has expired.

198 See *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125 per Barwick CJ; *Swain v Hillman* [2001] 1 All ER 91 per Lord Woolf MR.

199 *Civil Procedure Act 2010* (Vic), ss 61 and 63. The court is specifically authorised to withhold summary judgment if it thinks the matter should proceed to trial.

200 *Civil Procedure Act 2010* (Vic), s 65.

201 *Karam v Palmone Shoes Pty Ltd* [2012] VSCA 97.

202 *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27.

whether the respondent's chances of success at trial were "real" rather than "fanciful". Crucially, the court held that this test was more liberal than the test under the previous regime.[203] Further, the statutory test was to be applied without reference the former test whereby the plaintiff must persuade the court that the respondent was "bound to lose" at trial.[204] *Lysaght Building Solutions v Blanalko Pty Ltd* therefore expressly disagreed with and held "incorrect" that aspect of the decision in *Karam v Palmone Shoes* that held there to be no difference between the new statutory and former approaches to the determination of applications for summary judgment. Despite the increased liberality of the new test the majority expressed concerns that "the power to terminate proceedings summarily should be exercised with caution and thus should not be exercised unless it is clear that there is no real question to be tried."[205] Neave JA, on the other hand, emphasised the significant departure represented by the new test, and expressed a countervailing concern "that undue emphasis on the caution with which a court must exercise the power of summary dismissal runs the risk of reinforcing the historical approach to summary dismissal and may result in the legislative liberalisation of the test in s 63 having little impact in practice."[206] It is clearly now law in Victoria that in order for an application for summary judgment to succeed the respondent's case need only be shown to have "no real prospect of success", as opposed to being "bound to fail", and that the conceptual basis of the test is broader and intended to identify a greater number of unmeritorious cases.

Application for summary judgment

[10.240] The burden of proving to the court that it should give summary judgment lies with either the plaintiff[207] or the defendant, as the case may be. The Rules expressly incorporate the explanation of terminology given in s 60 of the *Civil Procedure Act 2010* (Vic), defining the plaintiff as inclusive of a plaintiff by counterclaim, and a defendant as inclusive of a defendant by counterclaim.[208] The plaintiff's application for summary judgment is provided for in Pt 2 of O 22. Part 3 explains the process for the defendant's application for summary judgment. Finally,

203 Referring to a line of Queensland appellate authority to that effect. See *Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq)* [2003] 1 Qd R 259; *Bernstrom v National Australia Bank Ltd* [2003] 1 Qd R 469; *Gray v Morris* [2004] 2 Qd R 118.

204 See, for example, *Faircharm Investments Ltd v Citibank International Plc* [1998] EWCA Civ 171.

205 *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27 per Warren CJ and Nettle JA.

206 *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27 at [41] per Neave JA.

207 *Cordinup Resorts Pty Ltd v Terana Holdings Pty Ltd* (1997) 143 FLR 18.

208 Rule 22.02. This rule is new.

Pt 4 permits third parties to apply for summary judgment against plaintiffs, and for plaintiffs to apply for summary judgment against joined (third and subsequent) parties.[209]

The plaintiff's application for summary judgment in a civil proceeding under s 61 of the Civil Procedure Act is made in accordance with Pt 2 of O 22.[210] Consistent with s 63 of the Civil Procedure Act, r 22.03 makes the test for summary judgment that the defendant has "no real prospect of success", or no real prospect of success except as to the amount of the claim or the relevant part of the claim.[211] The plaintiff's application is to be supported by an affidavit through which it provides evidence of the existence and cogency of its cause of action. The rules require that the plaintiff deposes to the defendant's lack of a real prospect of success in its defence — other than a defence as to the quantum of damages — if the plaintiff has claimed damages in relief.

All evidence at the hearing of the application is admitted through affidavits on which parties may be cross-examined.[212] The plaintiff's cause of action will be made out only if the affidavit deposes to all the evidentiary facts required to establish the material facts of the complete cause of action. The application otherwise fails on the insufficiency of the affidavit in setting out the facts supporting each element of a complete cause of action to sustain the plaintiff's application for summary judgment,[213] and therefore fails to support an application for summary judgment.[214] Summary judgment was refused in *Scott v Public Trustee of Victoria*[215] because the affidavit did not depose a complete cause of action. It was essential to the plaintiff's claim that the defendant was sued as the mortgagor's personal representative but this fact was absent from the defective affidavit.[216]

In *Scott v Public Trustee of Victoria*[217] the plaintiff applied for final judgment in an action for the recovery of principal and interest on moneys advanced to the defendant under a mortgage agreement. The

209 Vic Rule 22.24(1), (2). Rule 22.24 is new.

210 Rule 22.03.

211 Rule 22.03(b)(i) – (ii). Compare *Supreme Court (General Civil Procedure) Rules 2005* (Vic) where the test to be applied was that the defendant had "no defence to the whole or part of a claim included in the writ or statement of claim, or no defence except as to the amount of a claim." Under the 2005 rules the affidavit was to depose "that in the belief of the deponent there is no defence to that claim or part, or no defence except as to the amount claimed."

212 Rule 22.07(1)(a). Similarly, the court may make orders requiring parties to produce documents, or copies of, or extracts from, documents: r 22.07(1)(b).

213 *Roberts v Plant* [1895] 1 QB 597.

214 *Roberts v Plant* [1895] 1 QB 597.

215 *Scott v Public Trustee of Victoria* [1942] VLR 206.

216 See also *Sydney Holdings Pty Ltd v New Holders Pty Ltd* [1938] VLR 217 where the affidavit did not verify the agreement on which the plaintiff sued.

217 *Scott v Public Trustee of Victoria* [1942] VLR 206.

claim was for a liquidated sum. The affidavit in support of the final judgment was deposed in the following terms:

> 1. That I am the abovenamed plaintiff. 2. That the defendant is justly and truly indebted to me in the sum of 3,597l 10s 7d for principal and interest and moneys advanced and owing to me under mortgage No 456460 in the Record Book at the office of the Registrar-General at Melbourne and was so indebted at the commencement of this action. The particulars of the said claim appear by the indorsement on the writ of summons in this action. 3. That I verily believe that there is no defence to this action.[218]

The defendant argued that the plaintiff's affidavit was deficient. The plaintiff had not verified the cause of action by setting out or exhibiting the terms of the mortgage agreement. Neither had the plaintiff, subsequent to amending their statement of claim to allege that the defendant was the administrator of the indebted deceased estate, and personal representative of the deceased mortgagor, verified that allegation in the affidavit. Mann CJ, delivering the judgment of the court,[219] quoted Lopes LJ's statement in *Roberts v Plant* that "the affidavit must sufficiently verify the cause of action – that is to say, it must state such facts as are necessary to establish a good cause of action; it will not be sufficient if it verifies only a portion of the cause of action, leaving out some essential part of it."[220] The Full Court held that the affidavit failed to verify the party against whom the plaintiff raised a cause of action.[221] The plaintiff had no claim against the Public Trustee of Victoria, and had not verified the party against whom it did, so the application for final judgment was refused. The court refused to find, and did not decide on the basis, that the application failed because it had not set out the terms or exhibited the mortgage the subject of the claim. It would not formulate a general rule to the effect that a verifying affidavit must exhibit or set out the contents of a document relied upon by the statement of claim. What is required in an affidavit to verify the essential elements of a cause of action depends on the facts of the particular case.

The affidavit must depose only the facts that are required to support the cause of action, and not aver every fact alleged, in the statement of claim.[222] The affidavit may refer to the pleading by way of verification provided the pleading sets out the cause of action completely.[223]

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218 *Scott v Public Trustee of Victoria* [1942] VLR 206 at 207.

219 *Scott v Public Trustee of Victoria* [1942] VLR 206 at 208 per Mann CJ, Gavan Duffy and Martin JJ.

220 *Roberts v Plant* [1895] 1 QB 597 at 605.

221 Similarly, in *Sydney Holdings Pty Ltd v New Holders Pty Ltd* [1938] VLR 217 the plaintiff's application for summary judgment failed because of an affidavit deficient in that it had not verified the agreement on which the plaintiff sued.

222 *Rourke v Victorian Finance Guarantee & Share Co Ltd (in liq)* (1894) 20 VLR 8; *Evans Deakin & Co Pty Ltd v Kaiser Engineers & Constructors Inc* [1968] Qd R 379.

223 *Sydney Holdings Pty Ltd v New Holders Pty Ltd* [1938] VLR 217 at 219–220; *Suburban Homes Pty Ltd v Ward* [1928] VLR 267.

Only the facts relevant and necessary to ground the cause of action are required to be verified by affidavit.[224] Where the cause of action is completely expressed in the pleading the affidavit may be sufficient if it adequately refers to the pleading.[225] The plaintiff must clearly and expressly depose that there is no real prospect of the defence to the claim succeeding, and their belief that the defendant's defence to the claim has no real prospect of success in the affidavit.[226] When the defendant is the applicant their affidavit must depose their belief that there is no serious question to be tried or realistic prospect of succeeding at trial. The basis upon which the belief is held is not required to be deposed, nor is any advice the deponent may have received that the defendant has no defence,[227] nor an opinion held by the deponent that the defendant has no defence.[228]

Where the jurisdiction permits an affidavit to depose hearsay evidence the deponent must depose that they believe the hearsay evidence.[229] Statements based on belief satisfy the onus on the applicant to only bring an application once they consider that the grounds for doing so have been satisfied. It is an abuse of process to bring a baseless application before the court. In *Harry Smith Car Sales v Claycom Vegetable Supply*[230] Blackburn CJ explained the meaning and significance of the requirement to depose the applicant's belief:

> There is one further remark to be made about this application. The affidavit of the director of the plaintiff includes the words "in my opinion the defendant has no defence to this action". This does not comply with O 15 r 1(1), which requires a statement of belief that there is no defence to the action. The difference is important. The rule requires a form of words which unequivocally implies an actual belief by the deponent into the truth of every fact required to establish that plaintiff's claim, and in the absence of any fact which could ground a defence in fact or law. Such a form of words affords a proper basis for cross-examination. A statement of opinion, on the other hand, is neither unequivocal nor, strictly speaking, relevant.

The deponent's belief must be a real and unequivocal belief that all the facts necessary to sustain a cause of action or a defence are true, and,

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224 *Rourke v Victorian Finance Guarantee & Share Co Ltd (in liq)* (1894) 20 VLR 8; *Evans Deakin & Co Pty Ltd v Kaiser Engineers & Constructors Inc* [1968] Qd R 379.

225 *Sydney Holdings Pty Ltd v New Holders Pty Ltd* [1938] VLR 217 at 219–220; *Suburban Homes Pty Ltd v Ward* [1928] VLR 267.

226 A statement that there is no defence on the merits is not sufficient. *Allen v Helton* [1942] St R Qd 76; see also *Harry Smith Car Sales Pty Ltd v Claycom Vegetable Supply Co Pty Ltd* (1978) 29 ACTR 21 at 23. *Muntz v Elkington* (1891) 17 VLR 23 at 24; *Shaw v Yarranova Pty Ltd* [2005] VSC 94 at [40]; and *Long Leys Co Pty Ltd v Silkdale Pty Ltd* (1991) 5 BPR 11,512 which espoused a less rigorous approach.

227 *Allen v Helton* [1942] St R Qd 76 at 84.

228 *Harry Smith Car Sales Pty Ltd v Claycom Vegetable Supply Co Pty Ltd* (1978) 29 ACTR 21 at 23.

229 *Phillips v Mineral Resources Developments Pty Ltd* [1983] 2 Qd R 138 at 144.

230 *Harry Smith Car Sales Pty Ltd v Claycom Vegetable Supply Co Pty Ltd* (1978) 29 ACTR 21.

when the deponent is the claimant, that the defendant has no defence in fact or law. Only beliefs as to facts unambiguously expressed in affidavit form can be cross-examined. This further explains why it is superfluous to depose as to the advice a deponent has received. A deponent can only depose to what they have actual knowledge of, and the deponent must believe that the facts they depose are true, and further that it is in their belief true that there are no facts on which the defendant may base a defence in fact or law. To depose the opinions of others is to depose hearsay. In *Sydney Holdings v New Holders*[231] Lowe J said:

> It is a condition precedent to the success of the summons under Order XIV that the plaintiff's case should be verified on affidavit made by some person who can swear positively to the facts and verifying the cause of action and the amount claimed.

Where the affidavit supporting an application for summary judgment omits a statement that the deponent believes there is no defence to the claim, Hollingworth J in *Shaw v Yarranova Pty Ltd* said that such an omission is usually "fatal to such an application. However, a failure to comply with s 23.03(1) is an irregularity which can be cured by filing a further affidavit which complies with the rule."[232]

Defendant may show cause

[10.250] In Victoria the rules provide that the defendant may show cause why the application for summary judgment should not succeed in an affidavit.[233] To show cause the defendant deposes statements of fact on the basis of information and belief which demonstrate an arguable defence or raise a substantive dispute which is more appropriately resolved on its merits and not disposed of summarily.[234] It is not sufficient for the defendant simply to deny the facts alleged by the plaintiff. The defendant must disclose the grounds on which the denial is made. It is unnecessary for the defendant to show an absolute defence.

Having heard the application the court may, as provided by r 22.08,

(1) …

(a) dismiss the application;

(b) give such judgment for the plaintiff against the defendant on the claim or the part of the claim to which the application relates as is appropriate, having regard to the nature of the relief or remedy claimed;

(c) give the defendant leave to defend with respect to the claim or the part of the claim to which the application relates either unconditionally or on terms as to giving security, paying money into court, time, the mode of trial or otherwise; or

231 *Sydney Holdings Pty Ltd v New Holders Pty Ltd* [1938] VLR 217.

232 Hollingworth J in *Shaw v Yarranova Pty Ltd* [2005] VSC 94.

233 Vic r 22.06; NT r 22.04; Tas r 359; WA O 14 r 3. There is no corresponding rule in other jurisdictions — the defendant simply files an affidavit.

234 *Cordinup Resorts Pty Ltd v Terana Holdings Pty Ltd* (1997) 143 FLR 18 at 23.

(d) with the consent of all parties, and notwithstanding Rule 77.03(1), dispose of the proceeding finally in a summary manner.

(2) The Court may stay execution of any judgment given under paragraph (1)(b) until after the trial of any other claim or counterclaim which remains outstanding in the proceeding as between the relevant parties.

The court has discretion in the exercise of its power and the order that it makes.[235] Rule 22.08 operates subject to Pt 4.4 of the *Civil Procedure Act 2010* (Vic) which provides that the legislation is additional to and does not derogate from the powers the court has under the rules.[236] The court may make an order entitling the plaintiff to enter final or interlocutory judgment, as befits the justice of the case and taking into consideration the relief or remedy the plaintiff claims. Equally, it may restrain the exercise of its power where the defendant has demonstrated an arguable defence or triable issue on the facts disclosed in the affidavit justifying a hearing on the merits,[237] and grant the defendant leave to defend with or without imposing terms.[238] Before the court makes its decision, and where the defendant has served an affidavit, it may permit the plaintiff to submit an affidavit in reply,[239] and, in an appropriate case, order the examination and cross-examination of deponents, or the production of documents.[240]

Under the rules summary judgment is determined in a completely judicial and deliberative manner. The rules by which a judge reaches a determination in a procedure for the application of summary judgment requires the judge to be satisfied that the plaintiff has a valid claim. The judge must reach this conclusion in the same way and be persuaded to the same extent as would be required at a full hearing of the matter. Extensive argument may have to be presented at the application hearing to satisfactorily demonstrate that a party's case has no real prospect of success. Evidence is examined for the purpose of determining the existence of a serious issue requiring trial, not to make findings of fact.[241] Where questions of law are involved the court must be satisfied that it can make a clear determination of the relevant point of law.[242] The rules only

235 *Melbourne & Metropolitan Board of Works v Bevelon Investments Pty Ltd* [1977] VR 473.

236 *Civil Procedure Act 2010* (Vic), s 65.

237 *Cloverdell Lumber Co Pty Ltd v Abbott* (1924) 34 CLR 122; *Ritter v North Side Enterprises Pty Ltd* (1975) 132 CLR 301; *Commonwealth Dairy Produce Equalisation Committee v Hansen* [1944] St R Qd 95; *Caltex Oil (Aust) Pty Ltd v Bawden* [1979] Qd R 62; *Country Estates Pty Ltd v Leighton Contractors Pty Ltd* (1975) 49 ALJR 173; *General Credits (Finance) Pty Ltd v Grimm* [1978] Qd R 449 at 462–464.

238 Vic r 22.08; ACT r 1146; NT r 22.06; Tas r 359; WA O 14 r 4. In the Federal Court, New South Wales, Queensland and South Australia the court simply gives judgment or dismisses the application. If it dismisses the application the proceeding continues its normal course.

239 Rule 22.06. See *Davis v Spence* (1876) 1 CPD 719; *Girvin v Grepe* (1879) 13 Ch D 174.

240 Rule 22.07.

241 *Wickstead v Browne* (1992) 30 NSWLR 1 at 9.

242 *Silverton Ltd v Harvey* [1975] 1 NSWLR 659 at 665.

provide for certain procedural efficiencies enabling this level of satisfaction to be reached. Leave to enter judgment follows from a judicial order and is a ministerial act requiring no deliberation.

Application of defendant for summary judgment

[10.260] The circumstances under which, and the procedure by which, the application for summary judgment is made by the defendant mirrors that of the plaintiff.[243] The test for the success of the application is, as with the plaintiff, that the plaintiff's claim or that part of the claim to which the application relates, has "no real prospect of success". The defendant — as does any party applying for summary judgment — must support the application with affidavit evidence, and may be cross-examined on their affidavit evidence.

Application by or against joined parties for summary judgment

[10.270] Order 22 Pt 4 permits third parties to apply for summary judgment against plaintiffs, and plaintiffs to apply for summary judgment against joined (third and subsequent) parties.[244] The test that third or subsequent parties must meet is that the plaintiff's claim has no real prospect of success. A party who has joined a third or subsequent party follows the procedure set out in O 22 Pt 2 — the plaintiff procedure in seeking summary judgment against a defendant.[245] A joined party follows the defendant procedure set out in O 22 Pt 3.[246] Rule 22.24(5) empowers the court to order the matter proceed to trial regardless of the test having been satisfied if — in terms identical to s 64 of the *Civil Procedure Act 2010* (Vic) — "the claim should not be disposed of summarily because— (a) it is not in the interests of justice to do so; or (b) the dispute is of such a nature that only a full hearing on the merits is appropriate."

Grounds for granting or refusing summary judgment

General principles

[10.280] The plaintiff is only entitled to summary judgment if they demonstrate a strong arguable case and if the defendant is unable to demonstrate a *prima facie* arguable reasonable defence, or that there has been an irregularity in the application for summary judgment.[247] Summary judgment is refused if the court concludes that there is a serious question which can only be appropriately resolved at a full hearing.[248]

243 With the obvious exception that r 22.08(1)(c) and (2) are not replicated.

244 Rule 22.24(1), (2). Rule 22.24 is new.

245 Rule 22.24(3).

246 Rule 22.24(4).

247 *Theseus Exploration NL v Foyster* (1972) 126 CLR 507.

248 *Clarke v Union Bank of Australia Ltd* (1917) 23 CLR 5; *Daimler Co Ltd v Continental Tyre & Rubber Co Ltd* [1916] 2 AC 307; *Caltex Oil (Aust) Pty Ltd v Bawden* [1979] Qd R 62.

The court proceeds cautiously and will only order summary judgment if it is able to clearly conclude that there is no serious question to be tried.[249]

In considering whether there is a serious question to be tried the court must be convinced by the plaintiff that any defence it intends to rely on has no real prospect of success.[250] The existence of a serious dispute between the parties on a question of fact[251] or credit[252] will defeat the application for summary judgment. The test for denying the defendant a hearing in order to achieve "expeditious finality" was articulated by Barwick CJ in *General Steel Industries v Commissioner for Railways (NSW)*.[253] His Honour the Chief Justice said that "the jurisdiction summarily to terminate an action is to be sparingly employed and is not to be used except in a clear case where the Court is satisfied that it has the requisite material and the necessary assistance from the parties to reach a definite and certain conclusion", and that a defence must be "so obviously untenable that it cannot possibly succeed" or "manifestly groundless".[254]

In *Spellson v George*[255] the Court of Appeal in New South Wales explained the usefulness of the summary judgment mechanism for liberating the court system of unmeritorious claims by disposing of them before they proceed to full trial. Nevertheless expeditious termination, because it prevents litigants having their matter considered at a full hearing, can only be applied cautiously and in clear cases where the plaintiff has demonstrated that there is no real question to be tried.[256] Therefore, cases are summarily disposed of only when it is clearly and demonstrably appropriate to terminate proceedings without the benefit of testing questions of fact or law at a full trial. Summary disposition is therefore denied where there is a serious conflict as to a matter of fact between the

249 *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 99.

250 See *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27. See also, generally, *Spellson v George* (1992) 26 NSWLR 666 at 678–679 per Young AJA, with whom Handley JA and Hope AJA agreed: that the defence must be untenable and has no possibility of succeeding.

251 *Sidebottom v Cureton* (1937) 54 WN (NSW) 88.

252 *Bank of New South Wales v Murray* [1963] NSWR 515.

253 *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125.

254 *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125 at 128–129 per Barwick CJ. See also *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91 per Dixon J; *Theseus Exploration NL v Foyster* (1972) 126 CLR 507 at 514; *Webster v Lampard* (1993) 177 CLR 598 at 602–603; *Cosmos E-C Commerce Pty Ltd v Bidwell & Assocs Pty Ltd* [2005] NSWCA 81 at [37]–[38].

255 *Spellson v George* (1992) 26 NSWLR 666.

256 *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 99.

parties,[257] and where the matter raises issues of credit,[258] even if the court has formed a strong preliminary view about the likely outcome.[259]

While the test in Victoria is now more liberal the court in *Lysaght* took the opportunity to reaffirm the same cautious approach.[260] The cautiousness appropriate to determinations of summary judgment goes hand in hand with the discretion the court has in exercising its power and making orders under the rules, and its power to make orders conditionally and on terms. Even plaintiffs apparently entitled to summary judgment may be denied on the basis of the court's view of what is order appropriate to be made in the circumstances.[261] Suspicious facts and complex points of law may be grounds for discretionarily refusing summary judgment because they provide the basis for the defendant's *prima facie* arguable defence. In *Hills v Sklivas*[262] an application for summary judgment granted by the County Court failed on appeal because, despite the defendant being unable to demonstrate a *prima facie* reasonably arguable defence, the Appeal Division in Victoria harboured suspicions about the facts of the transaction in dispute deposed by the plaintiff. The matter could not be summarily disposed of and required examination at a full hearing. Similarly, a defence may be spurious. Rule 22.08(1)(c) provides that the court may impose conditions or terms on the defendant's leave to defend a claim. The court may require the defendant to give security or pay money into court, or it may impose time limits on the defendant, or order that a certain mode of trial be used for the determination of the issue. Conditions which impose hardship on the defendant are only justified if the court harbours doubts about the defence or considers it dubious.[263]

The circumstances in which an order for summary judgment will be made were examined in *Australian Can Co v Levin & Co*.[264] There a lease contained a term giving the lessee an option to purchase the property subject to the lease "upon observance and performance of the terms of the lease". The plaintiff brought an action for specific performance of the contract for the sale of property. The lessee had breached the lease prior to, but remedied those breaches by, the date for exercising the option. The

257 *Sidebottom v Cureton* (1937) 54 WN (NSW) 88.

258 *Bank of New South Wales v Murray* [1963] NSWR 515.

259 *Spellson v George* (1992) 26 NSWLR 666 at 678 per Young AJA with whom Handley JA and Hope AJA agreed.

260 *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27 at [19], [27], [32], [35](d) per Warren CJ and Nettle JA; but compare Neave JA at [41], suggesting that over-cautiousness may reinforce an approach inconsistent with the overarching purpose of the *Civil Procedure Act 2010* (Vic), s 1(2)(e).

261 *Miles v Bull* [1969] 1 QB 258; *Bank für Gemeinwirtschaft Aktiengesellschaft v City of London Garages Ltd* [1971] 1 WLR 149.

262 *Hills v Sklivas* [1995] 1 VR 599.

263 *Fieldrank Ltd v Stein* [1961] 1 WLR 1287; *Ionian Bank Ltd v Couvreur* [1969] 1 WLR 781; *MV Yorke Motors v Edwards* [1982] 1 WLR 444 (courts should not impose terms the defendant cannot perform).

264 *Australian Can Co Pty Ltd v Levin & Co Pty Ltd* [1947] VLR 332 at 333–334.

court held that there was a completed agreement between the parties giving rise to the option, and that the lessee had met the requirements for purchasing the property under the lease by proving that it had remedied the breaches. The plaintiff applied on summons for, and the court granted, leave to enter final judgment.

The lessor appealed the decision, arguing that it was entitled to defend that matter by meeting all the requirements necessary to be granted leave to defend the matter. The Full Court recognised that the judge, given the wording of O 16 r 1 of the *Rules of the Supreme Court 1884* (Vic), was conferred with discretion whether or not to grant the plaintiff's application for summary judgment. The court reviewed cases which considered whether leave to enter judgment should be granted and concluded that the defendant ought to be granted leave to defend where a real issue of fact or law was required to be raised before a court for consideration and resolution. The court concluded that this was the import of previous cases which had determined that the plaintiff should have judgment where there was "no real substantial question to be tried"[265] but not where there was a "triable issue"[266] to go before the court, or the defendant had "an arguably good defence",[267] or "any plausible ground of defence".[268]

In cases involving the construction of a document, such as the meaning of a term in a lease, which could be fairly disputed[269] — such that the defendant's prospect of convincing the court was, no matter how "problematical", at least "not hopeless" — leave to defend ought to be granted.[270] The judge's discretion is properly exercised in favour of the plaintiff where the judge has been left in no uncertainty requiring further investigation or argument as to the meaning of the term in the lease. The Full Court held that no further consideration was required to determine that the condition precedent had been met by the plaintiff, and that the contract the plaintiff sought to have performed was complete and capable of performance. It therefore dismissed the appeal.

The court has discretion to make an order in accordance with the plaintiff's application for final judgment on summons. Leave to defend is granted where there is a real issue requiring judicial resolution between the parties. Where parties are in contention regarding the consequences of a document a dispute involving the construction of the document should be heard.

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265 *Codd v Delap* (1905) 92 LT 510.

266 *Jacobs v Booth's Distillery* (1901) 85 LT 262.

267 *Clarke v Union Bank of Australia Ltd* (1917) 23 CLR 5.

268 Isaacs J in *Cloverdell Lumber Co Pty Ltd v Abbott* (1924) 34 CLR 122, citing with approval a prior statement of this court in *Daly v Egan* (1886) 12 VLR 81.

269 *Bowles v Caustic Soda etc Syndicate* (1893) 9 TLR 328.

270 *Shurmur v Young* (1888) 5 TLR 155 per Lord Esher.

Victoria

[10.290] In Victoria the *Civil Procedure Act 2010* (Vic) provides that the court may give summary judgment for the plaintiff on the plaintiff's application or the court's own motion[271] if the court is satisfied that the defendant has no real prospect of successfully defending the plaintiff's claim.[272] Summary judgment may be given for the whole or part of the claim.[273] The power to order the entry of summary judgment under s 63 is subject to s 64. A plaintiff may still not enter summary judgment even against a defence with no real prospect of success if the interests of justice demand otherwise, or only a full hearing of the merits of the case at trial would be appropriate in the circumstances.[274]

The *Civil Procedure Act 2010* introduced reforms on the basis of recommendations of the Victorian Law Reform Commission's *Civil Justice Review Report* of March 2008. These reforms were modelled on r 24.2 of the *Civil Procedure Rules 1998* (UK), that is, that the procedure for summary judgment be based on the test of "no real prospect of success".[275] In *Swain v Hillman* Lord Woolf MR said of the effect of r 24.2:

> The words "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or … they direct the court to the need to see whether is a "realistic" as opposed to a "fanciful" prospect of success.[276]

In *Lysaght Building Solutions v Blanalko Pty Ltd*[277] Nettle JA considered whether the Victorian rule introduces the same test applied by Lord Woolf MR, which was as high as that applied by Barwick CJ in *General Steel Industries v Commissioner for Railways (NSW)*,[278] that is, that the case is so clearly untenable that it cannot possibly succeed.

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271 *Civil Procedure Act 2010* (Vic), s 63(2).

272 *Civil Procedure Act 2010* (Vic), s 63(1). See also *Spencer v Commonwealth* (2010) 241 CLR 118 at [18]–[20] per French CJ and Gummow J, summarising the provenance of these provisions; see also Qld r 292; compare the Federal Court (*Federal Court of Australia Act 1976* (Cth), s 31A) and South Australia (SA r 232): whether the defendant has a "reasonable" prospect of defending the plaintiff's claim.

273 *Civil Procedure Act 2010* (Vic), s 63(1).

274 *Civil Procedure Act 2010* (Vic), s 64. The rules of other jurisdictions differ substantially from the Victorian rules and cannot be used as guides to the court ordering entry of summary judgment in Victoria: see *Spencer v Commonwealth* (2010) 241 CLR 118 at [60] per Hayne, Crennan, Kiefel and Bell JJ.

275 See the 1996 *Woolf Report* recommending merger of the procedures for summary judgment, summary determination of a point of law, and the striking out of pleadings disclosing no cause of action and for subjecting them to the common test of "no real prospect of success". Similarly, *Uniform Civil Procedure Rules 1999* (Qld), r 292 is derived from the same British rule.

276 *Swain v Hillman* [2001] 1 All ER 91 at 92.

277 *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27.

278 *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125.

Prior to *Spencer v Commonwealth*, which considered the construction of s 31A of the *Federal Court of Australia Act 1976* (Cth), where the test for summary judgment is expressed as being based on there being "no reasonable prospect of success" the Federal Court interpreted the test in the same way as the test for "no real prospect of success".[279] Indeed, French CJ and Gummow J in the minority in that case continued to interpret s 31A consistently with the British rule from which it derived as requiring the prospect of success to be "realistic" rather than "fanciful".

Nettle JA distinguished the "plain and ordinary meaning of the language" of s 63 of the *Civil Procedure Act 2010* (Vic), on the one hand, from the construction given to it by authority, on the other. In the first place the section means that the test is that laid down by Barwick CJ in *General Steel Industries v Commissioner for Railways (NSW)*[280] — that a matter should be subject to summary disposition if it were "hopeless and bound to fail" because it would not have a real (as compared to fanciful) prospect of success.[281] However, the considerable case law on the "no real prospect of success" test interprets it more liberally, consistently with the aim of the legislature to empower courts to use the summary procedure to remove unmeritorious actions from the court system. The terms of s 63 should, however, continue to be respected. It therefore follows that the "no real prospect of success" test requires an assessment of the respondent's case as bearing a "real" and not "fanciful" prospect of success, but enables summary judgment more liberally than would an interpretation of the test that was required to find a party's case "hopeless" or "bound to fail".[282]

It cannot be that the test in Victoria is to the same effect as r 24.2 of the *Civil Procedure Rules 1998* (UK) if the inclusion of the word "real" requires the respondent to have a better than arguable case,[283] unless by that it is meant that a court still has discretion to make an order against summary determination in appropriate cases despite a plaintiff demonstrating a merely arguable case *prima facie*. The court in *Lysaght* acknowledged the persuasiveness of the line of authority interpreting the effect of r 292 in the *Uniform Civil Procedure Rules 1999* (Qld).[284] In *Gray v Morris*,[285] assessing the "no real prospect of success" test in r 292, Chesterman J said that the test was less stringent than the test for summary judgment in

279 *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27 at [17].

280 *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125.

281 *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27 at [23].

282 *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27 at [29].

283 *International Finance Corporation v Utexafrica Sprl* [2001] CLC 1361; *ED & F Man Liquid Products Ltd v Patel* [2003] QB 1556. See *Civil Procedure (The White Book Service)* (Sweet & Maxwell, 2013), p 678.

284 *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27 at [27].

285 *Gray v Morris* [2004] 2 Qd R 118.

Fancourt v Mercantile Credits[286] which required that for summary judgment to be entered there must be no real question to be tried. The summary judgment procedure in Queensland is reserved for cases where there is no need for a trial.[287] Although Chesterman J was of the view that the "no reasonable prospect of success" test requires a defence to be "hopeless" or "bound to fail",[288] the balance of authority favours a reading which emphasises the greater flexibility and broader base of r 292, consistent with the Federal Court's interpretation of the effect of s 31A of the *Federal Court of Australia Act 1976* (Cth) which interprets the "no reasonable prospect of success" test as not requiring a defence to be "hopeless" or "bound to fail".[289]

In *Spencer v Commonwealth*[290] the High Court affirmed that the test for summary judgment is that given in the terms of s 31A of the *Federal Court of Australia Act 1976* (Cth).[291] In the trial from which the appeal arose the plaintiff (appellant) issued proceedings against the Commonwealth government in the Federal Court on the basis that several pieces of legislation — specifically the *Native Vegetation Conservation Act 1997* (NSW) and the *Native Vegetation Act 2003* (NSW) — had been either given effect to or authorised by the *Natural Resources Management (Financial Assistance) Act 1992* (Cth) and the *Natural Heritage Trust of Australia Act 1997* (Cth). The plaintiff argued that the State legislation had been passed as part of an agreement with the Commonwealth, and that the Commonwealth Acts had been passed as part of a "scheme" or "device"[292] by the federal government to circumvent s 51(xxxi) of the Constitution, and were unconstitutional because they:

- effectively acquired the plaintiff's property other than on just terms, as required by s 51(xxxi) of the Constitution; or
- otherwise authorised agreements between the federal and State governments for the same purpose (that is, acquiring the plaintiff's property other than on just terms).

The acquisition of property resulted from the effect of the legislation, which was to prevent or restrict the clearance of native vegetation, rendering the plaintiff's land commercially unviable.

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286 *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 99.

287 *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 95.

288 *Gray v Morris* [2004] 2 Qd R 118 at [18].

289 *Kowalski v MMAL Staff Superannuation Fund Pty Ltd* (2009) 178 FCR 401 at [25]–[26]. The test in Queensland is now in the terms of the rule.

290 *Spencer v Commonwealth* (2010) 241 CLR 118.

291 *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232; *Bernstrom v National Australia Bank Ltd* [2003] 1 Qd R 469; *Bolton Properties Pty Ltd v JK Investments (Aust) Pty Ltd* [2009] 2 Qd R 202.

292 *Spencer v Commonwealth* (2010) 241 CLR 118 at 120 per French CJ (dealing with the New South Wales Farmers' Association application for joinder as an intervener) and at [7] of the judgment (referring to Spencer's statement of claim at [9.2]).

The trial judge applied s 31A(2) of the *Federal Court of Australia Act 1976* (Cth), granting the Commonwealth's motion that the proceeding be summarily dismissed on the basis that there was no serious question to be tried, or the claimant had no reasonable prospect of success. Leave to appeal was granted by the High Court after the Full Federal Court dismissed an appeal. The appeal concerned the correct approach to the application of s 31A. The court reaffirmed that the power to dismiss a matter summarily can only be exercised by the court with an abundance of caution and in cases in which it is clearly demonstrated that there is no real question to be tried.[293]

According to the High Court the "no reasonable prospect of success" test under s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) does not require the court to determine with certainty and conclusively that a proceeding is "hopeless" or "bound to fail".[294] A proceeding has no reasonable prospect of success if it has no real, or only a fanciful, possibility of succeeding.[295] That conclusion may be drawn about cases in which the pleadings fail to disclose a reasonable cause of action and which cannot be cured by amendment. It also applies to cases in which evidence establishes incontestable facts which undermine entirely a party's claim or defence without the prospect of an amendment being used to rehabilitate the existing case or establish a viable alternative. Further, it includes cases which are frivolous, or vexatious, or an abuse of process.

The test for summary disposition under the court's inherent jurisdiction differs radically from the test under s 31A. The exercise of an inherent jurisdiction to summarily terminate proceedings required "a high degree of certainty about the ultimate outcome of the proceeding".[296] The exercise of the power under s 31A does not require the court to reach a view that the proceeding would certainly fail at trial.[297]

In applying the test courts must interpret the phrase "no reasonable prospect of success" as a whole,[298] and not seek to substitute other equivalent expressions in its place.[299] The phrase cannot be reductively defined, or exhausted by equating it with its application in settled cases[300] under a superseded procedural regime which statute has deliberately

293 *Kowalski v MMAL Staff Superannuation Fund Pty Ltd* (2009) 178 FCR 401 at [24]; and see *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 99.

294 *Spencer v Commonwealth* (2010) 241 CLR 118 at [17].

295 *Spencer v Commonwealth* (2010) 241 CLR 118 at [22].

296 *Agar v Hyde* (2000) 201 CLR 552 at [57]; see also *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at [46].

297 *Spencer v Commonwealth* (2010) 241 CLR 118 at [53], [55]; and see *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62; and *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125.

298 *Spencer v Commonwealth* (2010) 241 CLR 118 at [60].

299 *Spencer v Commonwealth* (2010) 241 CLR 118 at [58], [59].

300 *Spencer v Commonwealth* (2010) 241 CLR 118 at [58].

liberalised in response to contemporary administrative requirements.[301] The court exercises its discretion to summarily dismiss proceedings on a consideration of the facts and law.

Cases involving factual issues capable of being disputed should not be summarily dismissed on the basis of the court's view that the applicant is unlikely to succeed on the facts. More complex factual issues attract even greater caution and the requirement that they be fully examined by the court at trial. In *Spencer* the High Court found that it was not the case as the judge found at first instance and in the light of the decision in *ICM Agriculture v Commonwealth*[302] that the existence of an arrangement between State and federal governments was constitutionally irrelevant.[303] The question of arrangements was a matter subject to the admission of evidence on the point which further interlocutory processes would reveal, and the constitutional question may depend on the resolution of the factual questions.

Where the case involves questions of law an application depending on a proposition at odds with a binding decision of the court has no reasonable prospect of success. However, the mere fact that the argued proposition is at odds with existing authority is not conclusive as to the ultimate outcome: existing authority may be overruled, qualified or further explained. In *Spencer* the plaintiff's application involved complex issues of law and fact regarding whether the schemes to which the New South Wales and federal governments were parties were devices for the purpose of acquiring property other than on just terms.

French CJ and Gummow J concluded that it could not be said that the applicant's case had no reasonable prospect of success. Hayne, Crennan, Kiefel and Bell JJ agreed.[304] Even if it was not a strong case, it was not fanciful.

Prior to *Three Rivers District Council v Bank of England (No 3)*[305] the question of determining whether a claim or defence had a real prospect of success without conducting a "mini-trial"[306] was unsettled. In that case the court distinguished between the criterion to be applied at trial and at an application.[307] The trial assesses the probability of a case, whereas the

301 *Spencer v Commonwealth* (2010) 241 CLR 118 at [60].

302 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140.

303 *Spencer v Commonwealth* (2010) 241 CLR 118 at [48].

304 *Spencer v Commonwealth* (2010) 241 CLR 118 at [36].

305 *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1; [2001] 2 All ER 513 at 540–545.

306 *Swain v Hillman* [2001] 1 All ER 91.

307 *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1; [2001] 2 All ER 513, especially at [94]–[95] per Lord Hope of Craighead; and *ED & F Man Liquid Products Ltd v Patel* [2003] QB 1556 at [9], [10], [11], [52], [53] per Potter LJ.

application merely assesses its reality.[308] A party succeeds at trial by proving that their case is more probable than the opposing party's. An applicant succeeds at an application for summary judgment by demonstrating that the respondent's case lacks reality.[309] The procedure for hearing an application for summary judgment, although judicial and deliberative, is not conducted as a summary trial.[310] The court does not undertake a minute examination of the facts deposed or the documents exhibited in affidavit.[311] It considers the merits of the case or of an issue only to the degree necessary to decide whether the matter has sufficient merit to warrant being heard at a full trial.

Short points of law may be disposed of at a summary judgment application if the court has the evidence it needs to determine the point and the parties have had a reasonable opportunity to present submissions. A matter will not be permitted to proceed to trial merely because there is some prospect of further evidence arising.[312] However, more complex questions of law and fact should be determined at trial where the evidence may be fully considered.[313]

Multiple defendants

[10.300] In cases where the plaintiff has joined multiple defendants obtaining summary judgment against one defendant does not affect the plaintiff's right to proceed to trial against the other defendants.[314] Rule 22.12 provides that a plaintiff having obtained summary judgment under s 63 of the *Civil Procedure Act 2010* (Vic) on a claim or part of a claim against a defendant may continue with the proceeding for any other claim or part of the claim against any other defendant. So, for example, r 22.12 permits the creditor who has obtained summary judgment against a joint and several debtor under s 63 of the Civil Procedure Act, to continue proceedings to judgment or enforcement against any other debtor or debtors, either for the remainder of the claim or for any other

308 *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 per Lord Hobhouse of Woodborough.

309 *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 per Lord Hobhouse of Woodborough.

310 Disposal of an issue under *Civil Procedure Rules 1998* (UK), r 24 does not involve the court in conducting a "mini-trial": *Swain v Hillman* [2001] 1 All ER 91 per Lord Woolf.

311 *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1; [2001] 2 All ER 513 at 540–545 (referring to *Civil Procedure Rules 1998* (UK), r 24).

312 *ICJ Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

313 *Apvodedo NV v Collins* [2008] EWHC 775 (Ch).

314 Vic r 22.12; ACT r 1148; NSW r 13.3; NT r 22.12; Qld r 294; SA r 233; Tas r 363; WA O 14 r 9.

claim.[315] Where, on the other hand, defendants are alternatively liable a judgment obtained against one of them discharges the others with respect to the same liability.[316]

Setting aside summary judgment

[10.310] Given the centrality of citizen's rights and access to the courts, and the possibility that a summary judgment may deprive parties of that right and the opportunity of presenting a claim or defence at trial, the power to grant summary judgment is one the judiciary is to exercise with great caution. The possibility of abuse of the application process, and its potentially stifling effect on the development of the law, was raised by the Victorian Law Reform Commission's *Civil Justice Review Report*.[317] A defendant who has had summary judgment given against them in default of their appearance can only seek to have the judgment set aside on appeal if the rules provide for an appeal against summary judgment. This is because a summary judgment is not a default judgment.[318] In Victoria r 22.15 empowers the court to set aside or vary a summary judgment obtained by an application made in the party's absence under s 61 of the *Civil Procedure Act 2010* (Vic).[319] Appeal against a summary judgment lies to the Court of Appeal.

Where the rules do not specifically permit the court to set aside a summary judgment the court may utilise the rules for the reconsideration for *ex parte* orders to set aside the judgment.

SUMMARILY TERMINATING PROCEEDING OR DEFENCE

[10.320] In Victoria a court may under r 23.01 stay proceedings in general or in relation to any particular claim, and give a judgment in the proceeding in general or in relation to a particular claim, if the proceeding generally, or any claim raised in the proceeding: is scandalous, frivolous or vexatious; or if it represents an abuse of the court's process.[320] Under r 23.02 the court is authorised to order that all or any part of an indorsement of claim on a writ or originating motion, or a pleading, be

315 *Currie v Lee* [1932] VLR 178.

316 *Militz v Bowering-Wood* [1954] SASR 175.

317 Victorian Law Reform Commission, *Civil Justice Review Report* (Report No 14, 2008), p 355, [10.7].

318 Vic r 22.12; see also ACT r 1128; NSW r 13.3; NT r 22.12; Qld r 294; SA r 233; Tas r 363; WA O 14 r 9.

319 Vic r 22.15; ACT r 1155; NSW r 13.6; NT r 22.15; Qld r 302; Tas r 366; WA O 14 r 12.

320 Vic r 23.01(1)(a) and (b). *Supreme Court (General Civil Procedure) Rules 2005* (Vic), r 23.01(1)(a), authorising the court to strike out pleadings that fail to show a reasonable cause of action or defence, and give judgment, has been revoked. See also ACT r 425; NT r 23.01; Tas r 259; WA O 20 r 19, where the court may terminate an action or defence if the pleadings disclose no reasonable cause of action or defence. The court may strike out the statement of claim if it fails to disclose a reasonable cause of action or is frivolous or vexatious: *Federal Court of Australia Act 1976* (Cth), s 31A and FCR r 26.01; NSW r 13.4; Qld r 293; SA r 232.

struck out or amended if it: fails to disclose a cause of action or defence; is scandalous, frivolous or vexatious; prejudices, embarrasses or delays a fair trial; or is an abuse of the court's process. Rule 23.02 does not authorise the courts to give judgment under the rule. Rule 23.02 enables the rectification of a pleading by amendment. Rule 23.01 does not so enable and is therefore directed to incurable (but not by reason of their lacking a foundation) claims and defences.

The strike out procedure in Victoria under r 23.02 is part of the court's jurisdiction to order summary judgment, and enables a claim or defence to be struck out for failing to disclose a cause of action, or a defence, as well as for reasons of the pleading being scandalous, frivolous or vexatious, causing prejudice, embarrassment or delay, or being an abuse of the process of the court. Under s 61 of the *Civil Procedure Act 2010* (Vic) a plaintiff may apply for summary judgment where a defence or part thereof has no real prospect of success, and s 62 entitles a defendant to apply on the ground that a plaintiff's claim or part of that claim has no real prospect of success. In Victoria the powers of summary judgment available to a court under Pt 4.4 of the Act operate "in addition to, and do not derogate from, any powers a court has under rules of court in relation to summary disposal of any civil proceeding."[321]

If a defendant successfully applies to have the plaintiff's statement of claim struck out judgment is not thereby effectively entered for the defendant. The court may order that the statement of claim be amended, keeping the proceeding on foot. An order striking out the defence puts the defendant in default of defence, in response to which the plaintiff may enter default judgment unless the defendant enters an amended defence.

The High Court in *Batistatos v Roads and Traffic Authority of New South Wales*[322] considered the nature of the court's inherent jurisdiction. The court held that, however characterised, courts had inherent jurisdiction. According to the majority[323] courts were undoubtedly invested with inherent jurisdiction, although the nature of the jurisdiction was undetermined, specifically whether it was an aspect of the judicial power with which courts were invested by Ch III of the Constitution.[324] Kirby J in a dissenting judgment considered the inherent jurisdiction of the court to be implied from or in addition to the power granted to courts under the Constitution to perform their functions.[325]

Courts deploy both inherent jurisdiction and powers conferred on them under the rules to regulate litigation, either by removing defective proceedings from courts by ordering them struck out, or by enforcing the

321 *Civil Procedure Act 2010* (Vic), s 65.

322 *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256.

323 *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 per Gleeson CJ, Gummow, Hayne, Crennan JJ.

324 *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at 266.

325 *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at 295–298.

rules of procedure to allow or order the amendment of defective pleadings.[326] The court may give summary judgment if a pleading is struck out for failing to disclose a cause of action or defence, and is incapable of being rectified by amendment. A case with no prospect of success or that is bound to fail should not be permitted to consume court resources.

Both the rules of procedure, and inherent jurisdiction, enable the court to entertain an application for striking out a claim for failing to disclose a cause of action, or a pleading failing to disclose a defence. The burden of proving that the court enter summary judgment is on the applicant proposing to challenge either the plaintiff's statement of claim, or the defence.[327] Application is frequently made for both striking out a pleading and for summary judgment because courts will exercise caution in considering striking out a pleading and deny the application if there is a question of fact, or issue of law, or mixed fact and law, to be resolved between the parties at a proceeding considering the merits of the case. Consequently, strike out applications at the pleading stage will only succeed if the applicant "plain(ly) and obvious(ly)" demonstrates that the respondent's case fails to disclose a cause of action or defence.[328]

The court will not, however, strike out a pleading and order entry of a summary judgment if the pleadings raise a question of fact, or credit, requiring a trial for them to be properly investigated and resolved. In *Spellson v George*[329] the New South Wales Court of Appeal identified grounds for giving judgment where pleadings failed to disclose either a cause of action or a defence. Hopeless litigation should not be permitted to proceed, and should be eliminated at the earliest opportunity. However, a defendant who has raised a defence which if properly pleaded may succeed, ought to be given the opportunity to plead it. A defendant who applies for summary judgment against the plaintiff must demonstrate that the facts on which the plaintiff relies cannot prove the case or cause of action argued.

The inadequacy of a pleading is not be used as the basis for entering a summary judgment against the plaintiff or the defendant if the court perceives that the pleadings may contain an arguable cause of action or defence. The proper approach is for the court to order the pleading to be

326 *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at 268–270 per Gleeson CJ, Gummow Hayne and Crennan JJ.

327 *Brimson v Rocla Concrete Pipes Ltd* [1982] 2 NSWLR 937 per Cross J.

328 In deciding whether to strike out an action or defence at the pleading stage the court applies the principle Lindley LJ stated in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86 at 222. A case should be stuck out on the pleadings only if the defence is "plain and obvious".

329 *Spellson v George* (1992) 26 NSWLR 666 at 678–679.

amended.[330] Where, however, summary judgment bringing the proceedings to an end is the only just outcome in the circumstances, it must be entered.[331] A party must avoid delays when applying to have a pleading struck out and act as soon as possible after being served the pleading. Further, the applicant must identify precisely which part of the pleading is being impugned and the basis on which the court should move to strike it out.[332]

Exercising jurisdiction to strike out

[10.330] In allowing an application to strike out a proceeding the court is summarily bringing to an end a proceeding without the benefit of having the facts presented or the substantive law argued before it. The court ought therefore proceed with an abundance of caution while ensuring that it achieves what is just in the circumstances of the case. Judicial caution is not, however, a principle designed to prevent the court from determining to reject appropriately inadequate claims or defences, thereby alleviating the other party or parties of the cost and inconvenience of preparing for a trial if that is the fairest outcome in the circumstances.

The court applies a balance of convenience test to determine applications to strike out claims or defences. A claim or defence need only have the possibility of succeeding to resist an application to have it struck out.[333] If a pleading discloses a point of law that is *prima facie* arguable it will not be struck out.[334] In determining where the balance of convenience lies the court will not undertake a minute examination of the issues raised in the case nor seek to have presented to it for its consideration matters that would appropriately be raised, admitted and argued at trial as if it were conducting a hearing prior to trial.[335]

Although defective pleadings may be amended, pleadings may be so defective as to sustain an application for striking them out. A claim which raises a cause of action but omits a material fact cannot support a case at trial. Material facts which do not disclose a cause of action and are incapable of being amended so to disclose are struck out and the matter summarily judged. So, too, will pleadings be struck out and summary judgment given where those pleadings allege material facts disclosing a cause of action or defence at law which nevertheless are without hope of

330 *Robson v Scott* [1962] VR 540; *Arbon v Anderson* [1942] 1 All ER 264; *Turner v Bulletin Newspaper Co Pty Ltd* (1974) 131 CLR 69; *Renowden v Hurley* [1951] VLR 13 (the whole statement of claim was struck out with leave to deliver a further statement of claim).

331 *Riches v Director of Public Prosecutions* [1973] 1 WLR 1019 at 1027 per Lawson LJ.

332 *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 3)* [1970] 1 Ch 506 at 538.

333 *Wenlock v Moloney* [1965] 1 WLR 1238; *Home Office v Dorset Yacht Club Co Ltd* [1970] AC 1004; *Roy v Prior* [1971] AC 470.

334 *Dyson v Attorney-General* [1911] 1 KB 410.

335 *Wyatt v Palmer* [1899] 2 QB 106.

succeeding at trial. In *Holding v Jennings*[336] the plaintiff claimed damages for defamation against the defendant, a member of the Legislative Assembly of the Victorian Parliament, contained in a statement in a document prepared for a speech to be, and which was, made on 12 and 13 September 1978. The defendant submitted that parliamentary privilege applied to the statement made and things done by him in parliament, including the preparation and tabling of the document. The plaintiff could not succeed in the action because the absolute privilege of parliament enjoyed by the defendant was a complete defence against the claim. The claim was struck out for disclosing no reasonable cause of action[337] and for being frivolous and vexatious,[338] and the action dismissed because no proceeding was possible.[339]

Frivolous, vexatious and scandalous claims or defences

[10.340] The terms "frivolous", "vexatious" and "scandalous" are not fixed with precise or distinct definitions. The Federal Court in *Pridmore v Magenta Nominees*[340] observed that the terms "vexatious" and "frivolous" have frequently been used interchangeably.[341] It has been said that a claim is "frivolous" when it is so obviously untenable as to be impossible for the plaintiff to succeed.[342] Claims have been held to be "vexatious" which are a sham with no prospect of success.[343] The expression "frivolous, vexatious or not made in good faith" is understood with reference to both objective and subjective elements. The objective component requires an analysis of the merits of the claim. The subjective component considers whether in bringing the claim the plaintiff was motivated by reasons other than the purpose of bringing a valid claim, such as to annoy, oppress or harass the opposing party.[344] The term "abuse of process" has been defined so as to include "instituting or maintaining proceedings that will clearly fail, proceedings unjustifiably oppressive or vexatious in relation to the defendant, and generally any process that gives rise to unfairness."[345]

It is an abuse of process to use the court process in bad faith and for an improper purpose, such as for a vexatious, oppressive or ulterior

336 *Holding v Jennings* [1979] VR 289 at 293.

337 The basis has now been revoked from r 23.01.

338 Under the then *Rules of the Supreme Court 1884* (Vic), O 25 r 4.

339 *Thorne v University of London* [1966] 2 QB 237; *Blackburn v Attorney-General* [1971] 1 WLR 1037; *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86; *Renowden v Hurley* [1951] VLR 13; *Evans v London Hospital Medical College (University of London)* [1981] 1 WLR 184.

340 *Pridmore v Magenta Nominees Pty Ltd* (1999) 161 ALR 458.

341 Citing *The Atlantic Star* [1974] AC 436 at 464–468.

342 *Burton v President of Bairnsdale Shire* (1908) 7 CLR 76 at 92.

343 *Willis v Earl Beauchamp* (1886) 11 PD 59 at 63.

344 *Pridmore v Magenta Nominees Pty Ltd* (1999) 161 ALR 458.

345 *Walton v Gardiner* (1993) 177 CLR 378.

purpose.[346] Even a fully compliant pleading which would not otherwise be struck out may satisfy grounds for striking out as an abuse of process if it misuses the court machinery. Bringing an action for an ulterior motive with the effect of causing prejudice or unfairness to another party may constitute an abuse of process even if in all other respects the party has complied with the rules of procedure.

An abuse of process is grounds for a stay of proceedings, or the striking out of a pleading or a part of a proceeding.[347] What constitutes an abuse of process can only be determined by the particular facts and circumstances of the particular case.[348] Frivolous or vexatious actions are hopeless or impossible claims or defences, and grounds for a stay of proceedings if the continuation of the constituted proceedings would result in an injustice or serious embarrassment to either or both of the parties.[349]

The social and professional context

[10.350] The reasons for and prevalence of frivolous litigation has been explained by reference to social factors, characteristics of the legal system, and the training of lawyers. It has been argued that societies which emphasise substantive individual rights, and with a ready supply of lawyers willing to advocate for those entitlements, and which promote open access to courts as of right, encourage indiscriminate litigation.[350] On the other hand cost structures which penalise losing parties by making them bear the costs of both parties as a general rule provide an economic disincentive for pursuing frivolous litigation.[351] It has also been argued that frivolous claims are promoted in a culture of aggressive advocacy in which lawyers see it as a duty to a client to "urge any permissible construction of the law favourable (sic) to his client, without regard to his professional opinion as to the likelihood that the

346 *Sheetal Investments Ltd v Australia and New Zealand Banking Group Ltd* [2011] FJHC 271; HBC 227.2010 (13 May 2011), referring to *Halsbury's Laws of England* (LexisNexis), Vol 37, [322]; *Timber Resource Management Ltd v Minister for Information* [2011] FJHC 770; HBC 212.2000 (22 November 2011).

347 *Castro v Murray* (1875) 10 Ex 213; *Dawkins v Prince Edward of Saxe Weimar* [1876] 1 QBD 499; *Willis v Earl Beauchamp* (1886) 11 PD 59 at 63 per Brawn LJ.

348 *Beinash v Wixley* [1997] ZASCA 32; 1997 (3) SA 721 at 734D–735A.

349 *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 274; *Ravden v Beeten* 1935 CPD 269 at 275.

350 S Kassin, "An Empirical Study of Rule 11", *Sanctions 1* (Federal Judicial Center, 1985).

351 The contrast is drawn between "English" and "American" costs regimes. The latter are said to make lawsuits "easy to maintain and tolerable to lose": S Kassin, "An Empirical Study of Rule 11", *Sanctions 1* (Federal Judicial Center, 1985); see also PS Figa, "The "American Rule" Has Outlived Its Usefulness; Adopt the "English Rule"" [1986] (20 Oct) *National Law Journal* 13. On the influence of American cost regimes as an incentive to file, maintain, defend and settle suits see FK Zemans, "Fee Shifting and the Implementation of Public Policy" (1984) 47 *Law & Contemporary Problems* 187 at 188–190.

construction will ultimately prevail."[352] Further legal training in the adversarial system requires law students to use facts and legal theories to advocate even questionable positions as long as they do not breach their ethical obligations.[353]

Striking out

[10.360] A statement of claim or defence may be struck out for being scandalous, frivolous or vexatious, or an abuse of the court's process and the court may give judgment in the proceeding generally or in relation to a particular claim.[354] In Victoria, the purpose of the *Vexatious Proceedings Act 2014* (Vic) is to make the handling of vexatious proceedings consistent between all courts and tribunals, in relation to making orders on individuals' right to initiate proceedings whilst at the same time promoting the efficient and effective administration of justice.[355] It is also designed to deter frivolous proceedings, and eliminate them as early as possible from the litigation process, by further arming judges and decision-makers with sanctions that can be levelled against parties who file or pursue frivolous claims. It should also be recognised that courts view motions to strike out pleadings and motions for summary judgment properly used as a means to facilitate the expeditious elimination of unmeritorious claims.

In limited circumstances, the court determines whether to strike out or summarily determine a proceeding on the basis of a *prima facie* defect in the pleading, and not after further investigation.[356] This is determined by the court's ability to evaluate the merits of an action: vague and non-specific claims and defences, for example, which fail to allege or sufficiently allege material facts, leaving courts unable to determine

352 *Model Code of Professional Responsibility* (1981), EC 7-4; see also *Model Code of Professional Responsibility*, Canon 7 ("A lawyer should represent a client zealously within the bounds of the law"); *Model Rules of Professional Conduct* (1983), Rule 1.3 comment ("A lawyer should act with … zeal in advocacy upon the client's behalf.").

353 See *Model Rules of Professional Responsibility* (1983), Rule 3.1 comment. SH Rifkind, "The Lawyer's Role and Responsibility in Modern Society" (1975) 30 *Record* 535 at 535–545, reprinted in S Gillers and N Dorsen, *Regulation of Lawyers: Problems of Law and Ethics* (1985), pp 350, 351.

354 Vic r 23.01; see also ACT r 425; FCR r 25.01; NT r 23.01; Tas r 259; WA O 20 r 19. In Victoria under r 23.02 the court is authorised to merely strike out a defective pleading. Rule 23.01 applies where the claim or defence is scandalous, frivolous or vexatious, or constitutes an abuse of process. In New South Wales (NSW r 13 r 4), the Federal Court (*Federal Court of Australia Act 1976* (Cth), s 31A and FCR r 26.01), Queensland (Qld r 293) and South Australia (SA r 104) the court may strike out the plaintiff's claim if it is frivolous, vexatious or an abuse of process. The plaintiff in these jurisdictions may apply for summary judgment on the basis that the defendant has no defence if the defendant's pleading is similarly defective: *Federal Court of Australia Act 1976* (Cth), s 31A and FCR r 26.01; NSW r 13 r 1; Qld r 292; SA r 232.

355 *Vexatious Proceedings Act 2014* (Vic), s 1.

356 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91, 109; *Brimson v Rocla Concrete Pipes Ltd* [1982] 2 NSWLR 937.

whether parties have the rights, or bear the obligations, claimed. Frivolous claims and defences contain allegations which cannot be considered seriously. A claim or defence which discloses no reasonable or arguable basis in fact or law, or which is not a *bona fide* argument for changing the law as it currently stands, is frivolous.[357] Claims against defendants entitled to absolute immunity, or which are sustained by arguments incapable of being framed in law as it currently exists, or which depend on unrealistic facts, are examples of meritless claims dismissible summarily for being frivolous.

A vexatious pleading or allegation is one which carries a considerable public risk in that it subjects others, whether private parties or public officials, to harassment or to unnecessary inconvenience and expense. "Vexatious" has been defined to mean being without reasonable or probable cause or excuse.[358] The Victorian *Vexatious Proceedings Act 2014* (Vic) defines a vexatious proceeding to include a proceeding that is

- an abuse of the process of a court or tribunal; or
- commenced to harass or annoy, to cause delay or detriment, or for another wrongful purpose; or
- commenced or pursued without reasonable grounds; or
- conducted in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

Vexatious applications are interlocutory applications made for the same reasons. Proceedings instituted vexatiously cannot succeed, or constitute an abuse of court's process in having as their sole purpose only to waste time or cause delay, or use court processes as an oppressive device against opposing parties.[359] A court or tribunal is entitled under the Act to make a vexatious proceeding order staying or dismissing a proceeding, and declaring the litigant vexatious. The statute empowers courts and tribunals to restrict, in the interests of justice, individuals' access to courts and tribunals and their right to litigation.

Frivolous pleadings lack foundation and cannot be considered seriously by the court.[360] *Chaffers v Goldsmid*[361] involved a petition by which a citizen, in accordance with an ancient right and Westminster parliamentary practice, sought to bring a grievance to the notice of Parliament by having it formally presented there by their member. A member of the House of

357 See *Federal Rules of Civil Procedure* (US), r 11. As one commentator has noted, however, "Frivolousness, like madness and obscenity, is more readily recognized than cogently defined.": R Hermann, "Frivolous Criminal Appeals" (1972) 47 *New York University Law Review* 701 at 705.

358 *Black's Law Dictionary* (6th ed, 1990), p 1565.

359 *Dawkins v Prince Edward of Saxe Weimar* [1876] 1 QBD 499; *Remington v Scoles* [1897] 2 Ch 1.

360 *Tampion v Anderson [No 2]* [1973] VR 321.

361 *Chaffers v Goldsmid* [1894] 1 QB 186.

Commons refused to present a constituent's petition.[362] Although Parliament has only rarely refused to receive a petition,[363] the court in *Chaffers v Goldsmid* held that a member of Parliament is not bound by any duty to present the petition, and therefore incurs no liability by refusing to do so. An action at common law was dismissed because the refusal, not being in itself unlawful, was not therefore actionable.[364]

In *Willis v Earl Beauchamp* Bowen LJ said: "I think this action ought to be stayed as being a vexatious action within the meaning attached to that word by the Courts, because it can really lead to no possible good."[365] Proceedings are frivolous or vexatious if an injustice would result from continuing their prosecution, or if one or both of the parties would be embarrassed by their continuance; a matter is vexatious if it has no hope of succeeding,[366] or if the reason for bringing or continuing the action is not *bona fide*.

It is for the applicant to show that the respondent's case lacks foundation, cannot possibly succeed, is only brought to annoy or harass them, or for some other vexatious or frivolous reason. What constitutes an abuse of process sufficient for the court to dispose of the action cannot be defined or circumscribed and is to be ascertained from the facts and circumstances of the particular case.[367] The respondent succeeds, on the other hand, if they are able to demonstrate that their case rests on a real and substantial legal or factual basis, or any possibility that their claim or defence will succeed.[368]

An action will only be dismissed as frivolous or vexatious where there is no possibility that there can be a good cause of action.[369] In *Burton v President of Bairnsdale Shire*[370] the contract on which the plaintiff initiated an action contained an arbitration clause requiring dispute resolution through arbitration prior to litigation. Although the High Court found

362 See CJ Boulton (ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (21st ed, Butterworths, London, 1989), p 103.

363 Only on very rare occasions has the House refused to receive a petition. These include: "disrespectful", VP 08/07/1863, 75; "unjustifiable interference" (calling for prohibition of alcohol on precincts), VP 27/11/1890, 469; "calling for legalised abortion and free birth control and sex education centres", VP 20/04/1971, 23.

364 Nor could the plaintiff make out a good cause of action merely by pleading that the act was done maliciously where malice was not a material component of the alleged offence: *Chaffers v Goldsmid* [1894] 1 QB 186; *Mayor of Bradford v Pickles* [1895] AC 587; *Ajello v Worsley* [1898] 1 Ch 274; *Boots v Grundy* (1900) 82 LT 769.

365 *Willis v Earl Beauchamp* (1886) 11 PD 59 at 63.

366 *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 274; *Ravden v Beeten* 1935 CPD 269 at 275.

367 *Beinash v Wixley* [1997] ZASCA 32; 1997 (3) SA 721 at 734D–735A.

368 *Rajski v Powell* (1987) 11 NSWLR 522.

369 *Bayne v Baillieu* (1908) 6 CLR 382; *Burton v President of Bairnsdale Shire* (1908) 7 CLR 76; *Bayne v Blake* (1909) 9 CLR 366. The court will not deal with objections which may be a matter of substance: *Tyler v Tyler* (1887) 13 VLR 657.

370 *Burton v President of Bairnsdale Shire* (1908) 7 CLR 76.

that on its face the action had little prospect of success, it also held that the Supreme Court had mistakenly upheld an application to have it struck out on the grounds that it was vexatious or frivolous. For an action to be stayed as vexatious under the inherent jurisdiction of the court it must be obviously without foundation. On the balance of convenience the court must assess whether allowing it to proceed would impose hardship on the defendant which might be avoided without concomitant risk of injustice to the plaintiff.[371] The court will not exercise its power to strike out a proceeding for being frivolous or vexatious unless the claim has no real and substantial chance of success.[372] The allegations the plaintiff raised were *prima facie* real questions to be determined at trial. The High Court was therefore not prepared to uphold the Supreme Court's decision to strike out the case for being frivolous or vexatious. The decision to stay the action was made on the basis of the arbitration clause.

The power of a court to finalise a proceeding through striking out and giving summary judgment must be exercised with great care so that efficient and effective justice is not achieved at the expense of injustice. In the words of O'Connor J:

> *Prima facie*, every litigant has a right to have matters of law as well as of fact decided according to the ordinary rules of procedure, which give him full time and opportunity for the presentation of his case to the ordinary tribunals, and the inherent jurisdiction of the Court to protect its process from abuse by depriving a litigant of these rights and summarily disposing of an action that is frivolous or vexatious in point of law will never be exercised unless the plaintiff's claim is so obviously untenable that it cannot possibly succeed.[373]

In *Bretherton v Kaye*[374] Mr Bretherton brought a defamation action against a Victorian Board of Inquiry into allegations of police corruption (the Kaye Police Inquiry (1970)) and counsel assisting the Board, in relation to statements made by the counsel in his opening address to the Board. The action failed in that case on the grounds that the public interest required that such statements should be protected from a defamation action.[375] Gillard J observed that, if counsel were constantly at risk of actions for defamation in inquiries, "cautious counsel could well fail in the performance of the duty of fearlessly pursuing the inquiry for truth".[376]

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371 *Cox v Journeaux (No 2)* (1935) 52 CLR 713. As to inherent jurisdiction to stay vexatious proceedings and to prevent abuse of the court's process, see also *McLaughlin v Fosbery* (1904) 1 CLR 546; *McBride v Commissioner for Railways* (1894) BC 12 Jun 1894.

372 See *Bardsley v Commonwealth* [1927] St R Qd 219; *Bardsley v Commonwealth* [1926] St R Qd 154. As to when an action constitutes an abuse of the procedure of the court, see *Burton v President of Bairnsdale Shire* (1908) 7 CLR 76; *Bayne v Baillieu* (1908) 6 CLR 382.

373 *Burton v President of Bairnsdale Shire* (1908) 7 CLR 76 at 92; see also *Nugent v Aromas Pty Ltd* (1996) 153 QGIG 630.

374 *Bretherton v Kaye* [1971] VR 111.

375 In *Bretherton v Kaye* [1971] VR 111 at 125 the judge indicated that this did not necessarily apply to all proceedings before a board of inquiry.

376 *Bretherton v Kaye* [1971] VR 111 at 124. Subsequently, the *Evidence Act 1958* (Vic) was amended to confer statutory protections similar to those in *Royal Commissions Act 1902*

However, the issues raised in the pleadings were not frivolous or vexatious *simpliciter*. Indeed the judge noted that an investigation involving serious allegations about the character of members of the police, carrying the possibility of being injurious to the characters of the individuals identified in it, should be open to inspection and therefore required a consideration of the allegations pleaded.[377] Nevertheless, the court had available to it mechanisms to prevent frivolous and vexatious claims.

In *Rajski v Powell*[378] the plaintiff sued a judge for a judgment entered against him in another proceeding, alleging that in doing so the judge had acted outside his jurisdiction. The New South Wales Court of Appeal permitted an amendment to the plaintiff's statement of claim to plead that the judge had exceeded his judicial capacity when he entered the judgment against the plaintiff. The plaintiff had an arguable case on the amended statement of claim if evidence could be presented to support it. However, the claim as originally drafted was hopeless and subject to striking out because judicial immunity affords judges complete protection from civil liability when acting in their judicial capacity[379] as long as they act in good faith,[380] but not where the judges knowingly exceed their jurisdiction.[381]

Judges exercise the jurisdiction to strike out claims and defences for frivolousness, vexatiousness or abuse of process on a discretionary basis. In *Attorney General of the Duchy of Lancaster v London & North Western Railway*,[382] Lindley LJ[383] said that the court will not enquire into difficult questions of law or fact in exercising its power to strike out pleadings that are frivolous, vexatious or an abuse of process.[384] A detailed examination of the documents and allegations to assess the reasonableness of the

(Cth), s 7. See s 2(1) of the *Evidence (Boards and Commissions) Act 1971* (Vic), inserting s 21A of the *Evidence Act 1958* (Vic) ("Privileges and immunities in relation to inquiries"). For a fuller discussion, see L Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (1982), pp 309–314.

377 *Bretherton v Kaye* [1971] VR 111 at 125.

378 *Rajski v Powell* (1987) 11 NSWLR 522.

379 *Sirros v Moore* [1975] QB 118. That is to say, when "acting as a judge" (*Sirros v Moore* at 135 per Lord Denning MR), "doing a judicial act" (*Sirros v Moore* at 135 per Lord Denning MR), "acting judicially" (*Sirros v Moore* at 135 per Lord Denning MR), "performing a judicial function" (*Sirros v Moore* at 139 per Buckley LJ), acts done "in the exercise of judicial office" (*Anderson v Gorrie* [1895] 1 QB 668 at 671 per Lord Esher MR) and "acting in a judicial capacity" (*Sirros v Moore* at 148 per Ormond LJ).

380 *Rajski v Powell* (1987) 11 NSWLR 522 at 527.

381 *Moll v Butler* (1985) 4 NSWLR 231; *Rajski v Powell* (1987) 11 NSWLR 522 at 533.

382 *Attorney General of the Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274.

383 As he then was.

384 *Attorney General of the Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274 at 276–277.

party's position is not justified.[385] A claim or defence is reasonable if it appears to have a prospect of success when taking into account only the allegations in the pleadings.[386] Merely because a claim or defence is weak and probably will not succeed does not provide grounds for striking it out if it raises a question that should be answered in court. The only ground for striking out a claim or defence is that it is *prima facie* obviously unsustainable. In Lindley LJ's view "the object of the rule is to stop cases which ought not to be launched — cases which are obviously frivolous or vexatious or obviously unsustainable".[387] In the instant case the pleadings were not struck out as they were not obviously frivolous or vexatious. In fact they raised an important point of law.

Inherent jurisdiction to strike out

[10.370] Litigants do not have and have never had a substantive right to bring or continue proceedings which are an abuse of the process of the court. In *Attorney General v Vernazza* Lord Denning stated, with respect to the inherent power that every court has to prevent an abuse of its machinery and for the expeditious processing of the court's business, that:

> The courts of this country have an inherent power to "prevent the abuse of legal machinery which would occur, if for no possible benefit the defendants are to be dragged through litigation which must be long and expensive", see Willis v Earl Beauchamp (1886) 11 PD 59, 63 by Bowen LJ: and when the courts of this country exercise this power, they are not depriving a man of a vested right. They are only exercising a control over their own procedure. No man, let alone a vexatious litigant, has a vested right to bring or continue proceedings which are an abuse of the process of the court.[388]

Courts, therefore, are possessed of an inherent jurisdiction to control the nuisance of an abuse of process, vexatiousness and frivolousness, or proceedings which on their face fail to show a reasonable cause of action or defence, by staying or dismissing those proceedings summarily. In *Metropolitan Bank v Pooley*[389] Lord Blackburn explained that the court has an inherent right to protect itself from vexatious proceedings either by a

385 *Wenlock v Moloney* [1965] 1 WLR 1238 (because such an approach would assume trial court functions and result in a trial in chambers without the benefit of evidence or cross-examination).

386 *Drummond-Jackson v British Medical Assn* [1970] 1 WLR 688 per Lord Pearson, cited with approval by Rubin J in *Active Timber Agencies Pte Ltd v Allen & Gledhill* [1995] 3 SLR(R) 334.

387 *Attorney General of the Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274 at 277.

388 *Attorney General v Vernazza* [1960] AC 965 at 977; see also *Hudson v Hudson* 1927 AD 259 at 267 per De Villiers JA.

389 *Metropolitan Bank Ltd v Pooley* (1885) 10 AC 210 at 220–221.

claimant or a defendant, and to prevent baseless and unmeritorious proceedings abusing its processes. The proceeding may be stayed or summarily stricken out.[390]

The inherent jurisdiction of the court is part of its general jurisdiction,[391] which arguably the superior courts in England possessed and exercised prior to the *Rules of the Supreme Court 1883* (UK).[392] It has always existed side-by-side with its rule-derived jurisdiction, from which it is distinct. The rules are in fact a modern incarnation of the protection described by Bowen LJ in *Willis v Earl Beauchamp*:[393] that is to say, that "the rules … do not … deprive the court in any way of the inherent power which every court has to prevent the abuse of legal machinery which would occur, if for no possible benefit the defendants are to be dragged through litigation which must be long and expensive."

Indeed, the court's inherent jurisdiction is ministerial in the sense that it controls its own processes by issuing practice directions and it could, even without statutory basis, make formal procedural rules by exercising its inherent jurisdiction. The court has an inherent jurisdiction in addition to the rules to exercise the power necessary to carry out its functions in the administration of justice as required by law. Those functions include, crucially, exercising jurisdiction over the litigation process to ensure that it is used for proper purposes only, to detect and remedy abuses when they occur, and to assert its authority over litigants to ensure compliance with procedure.[394] The range of abusive behaviour is not amendable to complete definition or categorisation. Nevertheless, cases of abuse consistently involve harnessing court processes for oppressive or unjust ends, thereby casting the administration of justice in a disreputable light.[395] In *Batistatos v Roads and Traffic Authority of New South Wales*[396] the plaintiff suffered personal injuries in an accident 40 years prior to initiating a claim in negligence against the defendant. The court held the statement of claim proper, and the action to have been brought within the

390 The High Court by a majority accepted this description of the inherent jurisdiction in *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at 266–268. See also *Castanho v Brown & Root (UK) Ltd* [1981] AC 557; *Packer v Meagher* [1984] 3 NSWLR 486.

391 *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at 266–270.

392 See IH Jacob, "The Inherent Jurisdiction of the Court" [1970] *Current Legal Problems* 23 at 32–33; E Campbell, *Rules of Court: Study of Rule Making Powers and Procedures* (1985), p 37; *Aravas v Metropolitan Water, Sewerage & Drainage Board* [1970] 3 NSWR 174.

393 *Willis v Earl Beauchamp* (1886) 11 PD 59 at 63; the then rule (*Rules of the Supreme Court 1883* (UK), O 25 r 4), was replaced from 1964 by *Rules of the Supreme Court 1964* (UK), O 18 r 19(1). This represented the first revision of the rules and came into effect 1 January 1964. It revised approximately the first half of the rules of procedure. The remainder were revised in 1965 and came into effect 1 October 1966: *Rules of the Supreme Court 1965* (UK).

394 *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at 266.

395 *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at 267.

396 *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256.

relevant limitation period. However, the action was dismissed as an abuse of process. The passage of time prejudiced the defendant's preparation of the case, in particular in finding the evidence it would need to mount its defence.

Even formally compliant proceedings may constitute an abuse of process when subject to thorough examination. What may not be apparent on the pleadings may nevertheless be exposed as frivolous, vexatious or an abuse of process on the evidence. The court is therefore empowered by its inherent jurisdiction to conduct an examination beyond the procedurally proper pleadings in order to determine if the nature of the claim being made is an abuse of process.[397] In *Lawrence v Lord Norreys*[398] the plaintiff brought an action in recovery for possession of an estate. The events on which the claim was based had transpired over 70 years earlier. The plaintiff had previously had an action dismissed for being statute barred, but mounted a second action claiming that by a concealed fraud they had been deprived of their rightful succession to an estate. The court examined affidavit evidence and determined the case to involve "a tissue of improbabilities which ought not to be sent to proof". The court had no doubt that it could in the exercise of its inherent jurisdiction dismiss the proceeding as vexatious and an abuse of process. It could not, however, justifiably strike out the proceedings "merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved." The jurisdiction to strike out proceedings had to be exercised cautiously and was justified only in "very exceptional circumstances" to terminate cases that abused the court's processes, and had no possibility of succeeding.[399]

In *Burton v President of Bairnsdale Shire*[400] the plaintiff instituted proceedings in relation to a contract that contained an arbitration clause. The defendant sought to have proceedings struck out under the court's inherent jurisdiction to strike out proceedings, arguing that the arbitration clause barred litigation, and, on that basis, the proceedings constituted an abuse of process. Barron J held that the proceedings were not so absolutely hopeless so as to justify denying the plaintiff a trial on the matter.[401] Litigation may succeed despite the resolution clause stipulating arbitration. Such clauses did not invariably require arbitration prior to litigation. The proceedings could not, therefore, be considered an abuse of process. O'Connor J held that the plaintiff had made out a *prima facie* arguable case which was not completely undermined by the arbitration

397 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 109.

398 *Lawrence v Lord Norreys* (1890) 15 AC 210; see also *Cox v Journeaux (No 2)* (1935) 52 CLR 713 at 720.

399 *Goodson v Grierson* [1908] 1 KB 761.

400 *Burton v President of Bairnsdale Shire* (1908) 7 CLR 76.

401 *Burton v President of Bairnsdale Shire* (1908) 7 CLR 76 at 88 per Barron J.

clause so as to justify summary dismissal.[402] On the authority of *Bayne v Baillieu*[403] the court decided that it would not be proper to terminate proceedings because of the important and complex questions of fact and law that arose in the case. It decided that the breadth of the arbitration provision in the agreement justified a stay of proceedings.

Courts have exercised the inherent jurisdiction to strike out the whole or part of a proceeding in one of two ways. On the one hand a clearly and obviously hopeless plea without possibility of succeeding, even if otherwise sound in that it makes out an arguable case, should be terminated summarily. On the other hand parties who *prima facie* raise meritorious claims and defences should not be denied an opportunity to advocate them at a full hearing. *Burton v President of Bairnsdale Shire*[404] is an example of the latter, *Dey v Victorian Railways Commissioners*[405] an example of the former.

In *Dey v Victorian Railways Commissioners* the plaintiff was a widow. After the death of her husband she claimed and was awarded workers' compensation on her own and her children's behalf. She subsequently brought an action for common law damages for herself for the same accident under the *Wrongs Act 1928* (Vic). The defendant claimed that the plaintiff's proceedings were frivolous, vexatious and an abuse of process, and sought to have them struck out under the court's inherent jurisdiction. An important and difficult issue of law arose in the proceedings. As pleaded, the trial judge was required to determine whether the widow could claim damages, which involved the court in construing obscure provisions of the *Workers' Compensation Act 1928* (Vic). Under the Act an employer was not liable to pay both compensation and common law damages. The judge in chambers granted the defendant's application to have the action struck out. The plaintiff's appeal lay to the High Court.

Latham CJ held that the case was appropriately terminated. His Honour rejected the plaintiff's argument that a question involving a complex legal issue was not fitting to be summarily dismissed when the complexity of the issue precluded the court from clearly concluding that it lacked merit. He said that if in the court's opinion the plaintiff could not possibly succeed the defendant should not be forced to litigate a futile proceeding. The court's inherent jurisdiction to strike out proceedings was not limited in its application to cases in which the outcome of the litigation is clear from the course of the pleadings and involved no contentious factual issues. When the court found it had reached a particular decision at a hearing which would remain unaffected even by introduction of new facts

402 *Burton v President of Bairnsdale Shire* (1908) 7 CLR 76 at 92 per Barron J.

403 *Bayne v Baillieu* (1908) 6 CLR 382.

404 *Burton v President of Bairnsdale Shire* (1908) 7 CLR 76.

405 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62.

it should exercise its inherent jurisdiction to dismiss the claim.[406] In the opinion of Latham CJ the view expressed in *Hubbuck & Sons v Wilkinson, Heywood and Clark*[407] — that complex and significant questions of law should be determined as preliminary issues and not be struck out on an application for the court to exercise its inherent jurisdiction — was not the appropriate criterion. Rather the test was that if in the court's opinion the case could not succeed it should be struck out.

Dixon J held that an application for summary termination would succeed only in the most clearly appropriate cases. It must be "clear indeed" that the case could not succeed. His Honour affirmed that the inherent jurisdiction should be used cautiously and only in exceptional cases. Complex questions and difficult issues alone could not prevent a court exercising its inherent jurisdiction to strike out proceedings. However, if the proceedings raised genuine disputes the resolution of which would determine the rights of the parties it was not open to the court to terminate them summarily.[408] However, where a case was obviously hopeless it should be terminated. In his Honour's view, because the proceedings raised serious questions for determination the proceedings before the court were not appropriately terminated.[409]

Williams J was not prepared to disturb the chamber judge's ruling. The court in the exercise of its inherent jurisdiction was not restricted by the pleadings and could consider evidence that might be admitted to prove the matter frivolous, vexatious or an abuse of process.[410] The range of opinions in *Dey v Victorian Railways Commissioners* would, on the one hand, broaden the application of the inherent jurisdiction to strike out proceedings (Latham CJ and Williams J), and on the other limit it only to the most clear and obvious cases and continue to deploy it with traditional reluctance (Dixon J).

Since *Dey v Victorian Railways Commissioners* both approaches have found exponents. The defendants in *Cox v Journeaux (No 2)*[411] applied for the striking out of an action on the basis that it was frivolous, vexatious and an abuse of process, and that it failed to disclose a reasonable cause of action. In Dixon J's view only a case that is wholly without substance and

406 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 84–85.

407 *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86.

408 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 101. Following *Burton v President of Bairnsdale Shire* (1908) 7 CLR 76.

409 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 92.

410 McTiernan J did not deal with the procedural question. Without giving reasons Rich J said (at 85) that he did not consider the course taken by the primary judge was appropriate in the circumstances.

411 *Cox v Journeaux (No 2)* (1935) 52 CLR 713.

which would prejudice the defendant if it were to proceed should be struck out. Otherwise litigants should be free to raise reasonably arguable cases for determination at trial.[412]

In *General Steel Industries v Commissioner for Railways (NSW)*[413] the defendants, in an infringement proceeding, rightfully claimed a statutory defence under the *Patents Act 1925* (Cth) permitting them to use the patents in question. The defendants applied to have the proceeding struck out on the basis of both O 26 r 18 of the *High Court Rules 1952* (Cth) and the court's inherent jurisdiction. The plaintiffs could not possibly succeed in their application for an injunction to prevent the defendant's use of the patent. They could only sue for damages. Barwick CJ counselled caution in the use of the jurisdiction and referred to the need for defendants to be shielded from useless proceedings. His Honour the Chief Justice further said:

> I do not think that the exercise of the jurisdiction should be reserved for those cases where argument is unnecessary to evoke the futility of the plaintiff's claim. Argument, perhaps even if of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed.[414]

In direct contrast to Dixon J's view expressed in *Dey v Victorian Railways Commissioners* Barwick CJ opined that it was not correct to restrict the jurisdiction to clear and obvious cases "where argument is unnecessary" but may be used, even in cases shown to be "clearly untenable" by argument. The argument may be used to demonstrate to the court's satisfaction that the case is hopelessly defective in a way that is not apparent or obvious.[415] Latham CJ would permit the court to consider and deliver a judgment on application involving a complex question. If argument reveals the matter to be more straightforward than it at first appears, or uncovers a fatal defect, it should be summarily terminated.[416] On Dixon J's view, however, when a matter involves a complex question that in itself should permit proceedings to continue to trial for a resolution of the issue. Nevertheless, on both approaches the jurisdiction is used cautiously, reluctantly and rarely.[417]

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412 *Cox v Journeaux (No 2)* (1935) 52 CLR 713 at 720–721.

413 *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125, applied in *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 175 and *Hodges v New South Wales* (1988) 62 ALJR 190.

414 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 130.

415 Latham CJ's view in *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 was adopted in *Mathaman v Nabalco Pty Ltd* (1969) 14 FLR 10 at 19 which considered the case as authority for that approach, and in *Inglis v Commonwealth Trading Bank of Australia* (1972) 20 FLR 30.

416 See *Inglis v Commonwealth Trading Bank of Australia* (1972) 20 FLR 30 at 35.

417 See *Inglis v Commonwealth Trading Bank of Australia* (1972) 20 FLR 30 at 35.

In *Mathaman v Nabalco Pty Ltd*[418] the court, reviewing the decision of Latham CJ and Dixon J, considered the conditions under which the jurisdiction to strike out proceedings would be implemented:

> What follows from the approach of Latham CJ and Barwick CJ is that if, in interlocutory proceedings of this kind, the judge (i) bears in mind that the power to dismiss the action in such proceedings is to be used with great caution, and (ii) is satisfied that the question of substance is crucial to the plaintiff's case, and (iii) is satisfied that the question has been sufficiently argued before him, and (iv) on that question comes to a conclusion, contrary to the plaintiff, which is satisfactorily definite and certain, then he should dismiss the action.[419]

Evidence is admissible on an application in Victoria

[10.380] Unless expressly provided by the rules the court does not admit evidence or receive affidavits on the hearing of an application.[420] However, the rules specifically provide that evidence is admissible on affidavit or, where appropriate, orally, on an application under r 23.01 in Victoria.[421] The application is argued and the court considers questions of law only. If pleadings allege facts the decision on the application does not affect the status of those allegations. The allegations are not admitted as facts. In considering an application the court will consider the adequacy of a pleading. The court has inherent jurisdiction to hear argument about a pleadings inadequacy.

JUDGMENT ON ADMISSIONS

[10.390] A party may, at any stage of a proceeding, on the basis of an admission of fact made by the other party (whether a formal admission made in the pleadings, or an informal admission made otherwise than in the proceedings), apply for a judgment or order to be entered to which, based on the admissions, the applicant is entitled. The applicant is entitled to succeed if the admission is sufficiently strong to prove the plaintiff's claim.[422] The party is not required to wait until any other question between the parties has been determined. On an application from the party seeking the judgment or order the court may make any order or give any judgment that it considers just.

Admissions may be of facts, or of whole causes of action or defence, or of facts sufficient to support a cause of action or defence. An admission of a cause of action entitles the party to enter judgment for the admitted cause of action, while an admission on the defence entitles the party on whom

418 *Mathaman v Nabalco Pty Ltd* (1969) 14 FLR 10 at 18.

419 See also *Brimson v Rocla Concrete Pipes Ltd* [1982] 2 NSWLR 937 at 944–949.

420 *Mathaman v Nabalco Pty Ltd* (1969) 14 FLR 10 at 12–13.

421 Vic r 23.04; see also ACT r 425; FCR r 26.01; NSW r 14.28; NT r 23.04; Qld r 295.

422 Vic r 35.04; ACT r 493; FCR r 22.07; NSW r 17.07; NT r 35.04; Qld r 190; SA r 235; Tas r 403; WA O 30 r 3.

the admission has been served to enter judgment. Upon the admission a party applies for the judgment or order to which they are entitled by the admission.

Judgments may be upheld on the basis of formal admissions in pleadings, admissions in answers to interrogatories, admissions on notices to admit facts,[423] and on informal admissions. Arguably, admissions in discovered documents may not entitle a party to apply for judgment because discovered documents do not form part of the proceedings until tendered. Admissions may also be implied from a failure to deliver a defence to a statement of claim or a counterclaim. An admission is only binding against the party making the admission, and an admission in a pleading is not binding in any subsequent action.[424]

As a rule, for summarily disposing of a proceeding a judgment on an admission aims to reduce the cost and inconvenience, enhance the efficiency, and expedite the finalisation of litigation by identifying cases in which the claimant's entitlement to relief has been admitted by the defendant. It would not be consistent with that entitlement or with the systemic aim of making the administration of justice more time efficient and economical to require formal proof of the admitted matters. The decision to enter a judgment on admission is at the court's discretion, but when the case is clear that discretion is properly exercised by avoiding putting the plaintiff to the further unnecessary expense and inconvenience of a hearing. When, on the other hand, a serious question of law or fact arises and is genuinely in dispute between the parties, such that it can only be resolved by being fully considered at trial, judgment on an admission ought not be given.[425]

Under the rules a party's application for a judgment may clearly be based on admissions made in pleadings, but equally a party may apply for judgment on the basis of admissions de hors — the pleadings made either before or after the commencement of proceedings,[426] in other written documents, or otherwise than in writing,[427] such as orally, if properly proved.[428] *In the Matter of the Trade Marks Act and Registered Trade Marks*

423 *Attorney-General v Gaskill* (1882) 20 Ch D 519.

424 *British Thomson-Houston Co Ltd v British Insulated Helsby Cables Ltd* [1924] 1 Ch 203 at 210.

425 *Greig & Murray & Co Ltd v Hutchinson* (1889) 15 VLR 706.

426 *Ellis v Allen* [1914] 1 Ch 904 at 908–909.

427 The words "or otherwise" without the words "in writing" are used in *Civil Procedure Rules 1998* (UK), O 12 r 1. That was in the same terms as the earlier *Rules of the Supreme Court 1965* (UK), O 32 r 6 (now in different terms: *Civil Procedure Rules 1998* (UK), O 27 r 3). Under the earlier rule it had been held that the words "or otherwise" were of general application and not confined to the pleadings.

428 *In re Beeny, Ffrench v Sproston* [1894] 1 Ch 499 at 501; *Premsuk Das v Udairam* AIR 1918 Cal 467; 44 IC 233.

"Certina" and "Certina DS" Barwick CJ applied the equivalent High Court Rule O. 33 r 4 to accept admissions made in correspondence. His Honour said:

> The admissions on which a Justice may be asked to act under the rule are not limited to admissions formally made in the pleadings or in response to a notice given pursuant to O 33 r 3, see Ellis v Allen (1914) 1 Ch 904. The necessary admission may be found in a writing proved to be the defendant's or it may be proved to have been made by the defendant orally.[429]

Where a party admits a fact, or part of a cause or matter, either in their pleadings or by some other means, any other party to the cause or matter may apply to the court for such judgment or order as they are entitled to under those admissions. The applicant is not required to wait for any other question between the parties to be finally determined. The court may enter the judgment or make the order which it thinks is justified upon the application. The application may be made by motion in the action being set down or motion for judgment.[430]

The party making the application is entitled on the judgment to such relief as the defendant's admission will support. The rule is not limited to cases where the plaintiff is required to accept the defendant's whole admission, and the rule would cease to render the practical assistance it is designed to afford the administration of justice if it were.[431] The court may, for example, enter judgment of that part of a claim admitted by the defendant, with liberty to the plaintiff to proceed against the defendant in ordinary suit for the remainder, or, in the case of multiple defendants in a severable claim, that part or those parts pertaining to the admission or admissions of a particular defendant, again with liberty for the plaintiff to pursue the remainder.

Admissions in pleadings may be made formally or informally, such as in letters or other forms of correspondence. In *Ellis v Allen* Sargant J held that the plaintiff was entitled to immediate judgment because they could prove that the defendant had, by way of an admission made by letter that there had been a subletting of property contrary to the covenants in a lease, admitted they had no defence. His Honour said, referring to the relevant rule and contrary to the argument that judgment could only be given on formal admissions in pleadings: "I do not think r6 should be confined as suggested. In my judgment it applies wherever there is a clear admission of facts in the face of which it is impossible for the party making it to succeed."[432] The plaintiff is entitled to judgment on either an express or implied admission as long as the admission is clear and unequivocal. In *In the Matter of the Trade Marks Act and Registered Trade*

429 *In the Matter of the Trade Marks Act 1955-1958 and in the Matter of Registered Trade Marks "Certina" and "Certina DS"* (1970) 44 ALJR 191 at 192–193.

430 *Cook v Heynes* [1884] WN 75.

431 *Tahilram Tarachand v Vassumal Deuma* 23 LW 2C; (1926) MWN 140.

432 *Ellis v Allen* [1914] 1 Ch 904 at 909; see also *In the Matter of the Trade Marks Act 1955-1958 and in the Matter of Registered Trade Marks "Certina" and "Certina DS"* (1970) 44 ALJR 191.

Marks "Certina" and "Certina DS"[433] judgment was entered on admissions made informally by the respondent in correspondence that he was unable to maintain the registration of relevant trade marks. The High Court entered judgment for the appellant on an application. Barwick CJ observed that judgment would only be entered when the applicant had proved their case clearly and unequivocally. Judgments may, obviously, not be entered on admissions made in the course of without prejudice communications.

Admissions in pleadings may be made formally by means of direct statements, such as by express admissions of fact alleged in a plaintiff's statement of claim in a defence, or by answers to interrogatories, or by not denying positive allegations made in a statement of claim or counterclaim — in which case the effect of the rules is to imply an admission from not traversing the alleged fact. In cases of express admissions the adequacy of both the pleaded allegation and the pleaded admission must be assessed. Both are required to be clear and unequivocal for the admission to be sufficiently certain to justify the entry of judgment. Courts will not generally construe unclear pleadings or equivocal admissions against defendants.[434]

In *MY Distributors v Omaq Pty Ltd*[435] the Full Federal Court upheld the decision of a single judge dismissing an application for judgment. The decision was based on the appropriate construction of O 11 r 13 of the *Federal Court Rules 1979* (Cth). The rule provides:

> (1) Subject to sub-rule (3) and to Order 43, rule 7 (which deals with persons under disability), an allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 14 operates as a denial of it.
>
> (2) A traverse may be made either by a specific denial or by a statement of specific non-admissions.
>
> (3) Subject to sub-rule (4), every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be; and a general denial of such allegations, or a general statement of non-admission of them is not a sufficient traverse of them.
>
> (4) Any allegation that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted.

Under the rule a party not admitting or not denying a factual allegation made in the opposing party's pleading is deemed to have admitted the fact. A fact so admitted is not required to be proved. Only a delivered

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433 *In the Matter of the Trade Marks Act 1955-1958 and in the Matter of Registered Trade Marks "Certina" and "Certina DS"* (1970) 44 ALJR 191.

434 *Ash v Hutchinson & Co (Publishers) Ltd* [1936] Ch 489; *Rankine v Garton Sons & Co Ltd* [1979] 2 All ER 1185.

435 *MY Distributors Pty Ltd v Omaq Pty Ltd* (1992) 36 FCR 578.

defence can trigger the operation of the rule and produce implied admissions on the basis of not traversing facts alleged in the statement of claim. If, on the other hand, the defendant does not file a defence to a statement of claim, O 13 r 11, the operation of which attaches to a filed defence, is inoperative, and unable to constitute an admission of the facts alleged in the statement of claim from the absence of a defence.[436] There being no admission of fact, neither was there a basis for an application for a judgment on admissions. The applicant had to prove the case as pleaded.

In *Civil & Civic v Pioneer Concrete (NT)*[437] Asche CJ rendered judgment on a strict construction of r 35.04 of the *Supreme Court Rules* (NT). His Honour noted that the previous r 35.06 in the Northern Territory was in terms equivalent to O 32 r 6 of the *Rules of the Supreme Court 1965* (UK), such that the final two words of the phrase "either in pleadings or otherwise" widened the application of the rule beyond formal admissions in pleadings. The rule so construed had been applied in numerous cases of venerable authority.[438] Asche CJ construed the rule so as to restrict admissions of fact to those made "in a proceeding", based on the wording of the rule:

> Where a party *makes admissions of fact in a proceeding*, whether by his pleading or otherwise, the Court may, on the application of another party, give the judgment or make the order to which the applicant is entitled on those admissions.[439]

His Honour therefore doubted that the rule extended to admissions in documents that were not part of a proceeding, such as documents discovered by a party but prior to their being admitted into evidence. Nor would the rule extend to informal admissions that were not part of a proceeding.

The Victorian r 35.04 is in the same terms as the Northern Territory rule. However, Beach J in *SFJ Pty Ltd v Brady Constructions*[440] disagreed with Asche CJ's construction. The plaintiff's solicitor had applied for and was granted a summary judgment on an admission contained in a letter. The defendant appealed, without denying that the letter contained an admission of liability, on the basis that the entry of judgment was invalid because the admission was not made in a proceeding. His Honour dismissed the appeal. He observed that an admission of liability would entitle the plaintiff to judgment under r 35.04 of the Victorian rules,[441] so that a proceeding would go to trial only on a quantum of damages, because it admits all the facts the plaintiff would otherwise be required to

436 *MY Distributors Pty Ltd v Omaq Pty Ltd* (1992) 36 FCR 578 at [13].

437 *Civil & Civic Pty Ltd v Pioneer Concrete (NT) Pty Ltd* (1991) 1 NTLR 43.

438 *Ellis v Allen* [1914] 1 Ch 904 at 909 per Sargant J.

439 NT r 35.04 (emphasis added).

440 *SFJ Pty Ltd v Brady Constructions Co Pty Ltd* [2001] VSC 487.

441 *SFJ Pty Ltd v Brady Constructions Co Pty Ltd* [2001] VSC 487 at [18]–[22].

prove at trial.[442] His Honour cited as authority the judgment of Barwick CJ in *In the Matter of the Trade Marks Act and Registered Trade Marks "Certina" and "Certina DS"*.[443] Barwick CJ construed a similar rule more liberally than Asche CJ, as reaching beyond formal admissions made in pleadings, or in response to notices to admit, to include any oral or written admission made by the defendant.[444] He also found there to be "no good reason for not construing the words 'in a proceeding' when used in Rule 35.04 as meaning 'in reference to a proceeding, in relation to a proceeding, or with regard to a proceeding'".[445]

Discretion to enter judgment

[10.400] The court has discretion in exercising its jurisdiction to enter judgment on admission. The discretion is guided by the same principles and factors that the court takes into account when considering an application to strike out a proceeding on the basis that it is frivolous, vexatious or an abuse of process.[446] The court also exercises discretion with respect to implied admissions, such as when a plaintiff fails to reply to and defend the defendant's counterclaim. In clear cases judgment is entered with the least possible delay to avoid unnecessary expense and inconvenience.

DISMISSAL FOR WANT OF PROSECUTION

Introduction

[10.410] Mirroring the plaintiff's entitlement to a default judgment, a plaintiff who delays proceeding against a defendant may entitle the defendant to apply for an order dismissing the proceeding on the basis of want of prosecution either under the rules,[447] or the court's inherent jurisdiction. The rules determine the regularity of a proceeding by providing the procedural steps, as well as the sequence, and the time in which, those steps are to be taken. Parties are required to comply with the steps autonomously or in response to orders made by the court. The rules provide sanctions for non-compliance in the form, ultimately, of the striking out of a proceeding for a party's failure to undertake the required step within the time stipulated by the rules or the court order. The complexity of litigation may explain a party's delays but will not excuse

442 *SFJ Pty Ltd v Brady Constructions Co Pty Ltd* [2001] VSC 487 at [14].

443 *In the Matter of the Trade Marks Act 1955-1958 and in the Matter of Registered Trade Marks "Certina" and "Certina DS"* (1970) 44 ALJR 191.

444 *In the Matter of the Trade Marks Act 1955-1958 and in the Matter of Registered Trade Marks "Certina" and "Certina DS"* (1970) 44 ALJR 191 at 192.

445 *SFJ Pty Ltd v Brady Constructions Co Pty Ltd* [2001] VSC 487 at [21].

446 *In the Matter of the Trade Marks Act 1955-1958 and in the Matter of Registered Trade Marks "Certina" and "Certina DS"* (1970) 44 ALJR 191.

447 Vic r 24.01 (failure to serve statement of claim or set proceeding down for trial within time). Compare ACT r 1110; FCR r 22; NSW r 12.7; Qld r 280; SA r 123; WA O 33 r 2.

the failure of a party to undertake a step, or the dilatory prosecution of proceedings. In managed lists courts maintain timetables within which steps are required to be completed and the matter brought to trial.

While the rules are prescriptive with respect to the circumstances under which the court may exercise its discretion to strike out proceedings, the court's inherent jurisdiction allows it to fashion more tailored responses. The court exercising its inherent jurisdiction is not required to limit its discretion to strike out proceedings to those circumstances prescribed by the rules. Nevertheless, whether acting under the rules or its inherent jurisdiction the same principles are applied, and the exercise of discretion involves the court in determining what is required in the particular facts and circumstances of each case.[448]

Inherent jurisdiction

[10.420] The conditions for dismissing a proceeding for want of prosecution were considered in *Birkett v James*. Lord Diplock said that:

> [E]xceptional cases apart, where all that the plaintiff has done has been to let the previous action go to sleep, the court in my opinion would have no power to prevent him starting a fresh action within the limitation period and proceeding with it with all proper diligence notwithstanding that his previous action had been dismissed for want of prosecution.[449]

Lord Diplock did not identify or explain what those "exceptional cases" might be. However, His Lordship established that the proper basis for dismissing a proceeding for want of prosecution existed where the court had satisfied itself that:

(a) the delay or default on the part of the plaintiff in prosecuting his or her claim has been intentional and contumelious;[450] or

(b) there had been inordinate delay on the part of the plaintiff or his legal representative, and that such delay would give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendant either as between himself and the plaintiff or between himself and a third party or, where there are several defendants, between the defendants themselves.[451]

The jurisdiction of the court to exercise its inherent power to dismiss proceedings may be enlivened by the plaintiff's "contumelious disregard" in the observance of the more important steps in the preparation of the action for trial, or disregard of a peremptory order.

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448 *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at 268; *Malterer v Southern Electrical Authority of Queensland* [1974] Qd R 43 at 45–46; *Muto v Faul* [1980] VR 26; *Hytrac Conveyors Ltd v Conveyors International Ltd* [1983] 1 WLR 44.

449 *Birkett v James* [1978] AC 297 at 322. See also at 328 per Lord Salmon and 334 per Lord Edmund-Davies.

450 *Birkett v James* [1978] AC 297 at 318. See also at 331 per Lord Salmon and Lord Edmund-Davies, following *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229.

451 *Birkett v James* [1978] AC 297 at 318. See also at 331 per Lord Salmon and Lord Edmund-Davies.

In determining whether delay has caused prejudice the court will consider the circumstances. While the prejudice a defendant suffers from the delay in prosecution is a significant factor the court considers in determining whether or not to exercise its discretion, delay may not in and of itself justify a dismissal of proceedings without evidence of real prejudice.[452] There will be considerable variation between cases. In some instances even considerable delay will not produce material prejudice, while other cases will be more susceptible even to minimal delay. In *Grovit v Doctor*[453] the House of Lords left undetermined the question of whether the plaintiff's inordinate and inexcusable delay was adequate grounds to dismiss a proceeding for want of prosecution, in which case no inquiry as to any prejudice caused to the defendant by the delay was required. In *Duncan v Lowenthal*[454] the Full Court only required that the defendant showed inordinate and unexplained delay. The court similarly inferred that a 17-year delay had caused prejudice in *McKenna v McKenna*.[455]

The relevant delay the court takes into consideration when deciding to exercise its discretion is in the period of time after the commencement of proceedings. The defendant must demonstrate prejudice since proceedings commenced.[456] However, a solicitor's negligence in the conduct of proceedings is not a consideration relevant to a dismissal for want of prosecution.[457]

The court in exercising its discretion must consider the prejudice and the nature of the prejudice caused by the delay in the particular case. Delay may result in different kinds of prejudice. It may interfere with and compromise the preparation of the defence because of the loss or destruction of evidence, or because the effluxion of time may weaken the reliability of evidence. A further prejudice delay may cause the defendant is the hazard associated with suspending proceedings without bringing them to resolution. Evidence must be presented to establish that evidence has been lost, destroyed, damaged, dissipated or attenuated over time.[458]

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452 *Goldie v Johnston* [1968] VR 651. However, there is authority to the contrary that prejudice can be inferred from the mere fact of delay.

453 *Grovit v Doctor* [1997] 1 WLR 640.

454 *Duncan v Lowenthal* [1969] VR 180. See also *Borg v Muscat* [1972] Qd R 253.

455 *McKenna v McKenna* [1984] VR 665; see also *White v Northern Territory* (1989) 97 FLR 122; but compare *Ulowski v Miller* [1968] SASR 277 where the Full Court in South Australia declined to infer prejudice from the mere fact of delay.

456 *Birkett v James* [1978] AC 297 at 323; 335 per Lord Edmund-Davies.

457 *Birkett v James* [1978] AC 297 at 324; 336 per Lord Edmund-Davies. Lord Salmon would allow a possible negligence claim against a solicitor a small degree of weight: at 330.

458 See N Williams, *Williams' Civil Procedure Victoria* (Butterworths, 2003), [10.09], p 107.

The House of Lords confirmed in *Department of Transport v Chris Smaller (Transport)*[459] that a dismissal for want of prosecution should satisfy the requirements in *Birkett v James*. It stated that the relevant prejudice was not confined to prejudice with respect to the proceedings.[460] *Biss v Lambeth Area Health Authority* was a case of extreme delay and prejudice to the defendant hospital authority in which the court noted the prejudice of "having an action hanging over one's head indefinitely".[461]

Because of the breadth of the court's discretion in dismissing proceedings for want of prosecution it is neither possible nor desirable to lay down certain criteria for the exercise of the power.[462] In *White v Northern Territory*[463] Asche CJ said there were guidelines, but nothing stronger, for exercising the discretion to dismiss for want of prosecution. McPherson JA in *Cooper v Hopgood*[464] suggested that a court should treat as non-exhaustive the factors for determining whether or not to exercise its discretion to dismiss a proceeding for want of prosecution:

> The power so to dismiss is one that is confined to a judicial discretion, and, for that if no other reason, is incapable of being exhaustively defined or delimited in a detailed and binding fashion. *Birkett v James* suggests only some of the factors relevant in exercising the discretion, which include matters such as the duration of the time lapse involved; the cogency of any explanation for delay; the probable impact of procrastination on fading recollection; the death or disappearance of critical witnesses or records; costs already or likely in future to be expended or thrown away; the apparent prospects of success or otherwise at a trial of the action; and the progressively growing problem of effectively hearing and determining questions of fact arising out of events that have taken place many years before. The list is not, and is not intended to be, exhaustive; and it takes no account of another factor that is often likely to be material, which is that ordinary members of the community are entitled to get on with their lives and plan their affairs without having the continuing threat of litigation and its consequences hanging over them. The psychological as well as the commercial effects of such a state of affairs ought not to be underestimated.

It has been doubted whether *Birkett v James* continues to apply.[465] The Court of Appeal disapproved of the principles established in *Birkett v James* in *Cooper v Hopgood*.[466] There the court emphasised the discretionary nature of the jurisdiction to dismiss for want of prosecution. While it recognised the appropriateness of guidelines, the discretion must not be

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459 *Department of Transport v Chris Smaller (Transport) Ltd* [1989] 1 AC 1197; see also *Roebuck v Mungovin* [1994] 2 AC 224 (HL).

460 *Department of Transport v Chris Smaller (Transport) Ltd* [1989] 1 AC 1197 at 1209.

461 *Biss v Lambeth, Southwark & Lewisham Area Health Authority (Teaching)* [1978] 1 WLR 382 at 389 per Lord Denning MR.

462 As was made clear in *Lenijamar Pty Ltd v AGC (Advances) Ltd* (1990) 27 FCR 388 at 402.

463 *White v Northern Territory* (1989) 97 FLR 122 at 127.

464 *Cooper v Hopgood* [1999] 2 Qd R 113 at 124.

465 *Tricon Industries Pty Ltd v Abel Lemon & Co Pty Ltd (No 2)* [1998] 2 Qd R 551 at 555.

466 *Cooper v Hopgood* [1999] 2 Qd R 113.

made subservient to them. Similarly, in *Witten v Lombard Australia*[467] Walsh JA in the New South Wales Court of Appeal said that the court exercises the jurisdiction by considering the facts and circumstances of the particular case. The discretion involved cannot be circumscribed by restrictive rules.[468] Once the court recognises that the jurisdiction is discretionary it decides cases on their circumstances. However, while the *Birkett v James* principles were accepted by the Victorian Court of Appeal in *Spitfire Nominees v Ducco*,[469] the court observed that those principles were not to be considered rigid rules.[470]

Decisions after *Birkett v James* do not impose a requirement of oppressive conduct by the plaintiff, but emphasise the prejudicial effect of the passage of time on the defendant. The prejudicial effect of the passage of time must be so serious as to imperil a fair trial and make it impossible to do justice between the parties.

Rules of Court

Introduction

[10.430] The criteria to be applied in dismissing proceedings for want of prosecution are more specifically set out under the rules. In Victoria r 24.01 provides that a court may dismiss proceedings for want of prosecution when a plaintiff

- in a proceeding where a statement of claim is required to be served fails to do so within the time limit; or
- after the commencement of proceedings fails to file and serve a notice of trial, or fix a trial date in reasonable time, or within the time fixed by the court.

General principles for dismissal for want of prosecution

[10.440] Under the rules the court has an unfettered discretion to dismiss a proceeding for want of prosecution to which concepts of delay, and other guiding factors, are irrelevant. Discretion under the rules operates free of improper qualifications.[471] The rules confer the widest possible general discretion on the court to dismiss proceedings for want of prosecution having regard to all the facts and circumstances of the

467 *Witten v Lombard Australia Pty Ltd* [1968] 2 NSWR 529.

468 *Witten v Lombard Australia Pty Ltd* [1968] 2 NSWR 529; (1968) 88 WN (Pt 1) (NSW) 405 at 412.

469 *Spitfire Nominees Pty Ltd v Ducco* [1998] 1 VR 242 at 246; see also *Latrobe Country Credit Co-Operative Ltd v Smith* [1999] 1 VR 440 at 442; *Bishopsgate Insurance Australia Ltd (in liq) v Deloitte Haskins & Sells* [1999] 3 VR 863.

470 *Spitfire Nominees Pty Ltd v Ducco* [1998] 1 VR 242 at 245.

471 *White v Northern Territory* (1989) 97 FLR 122 at 127–130 per Asche CJ.

particular case.[472] The breadth of the discretion cannot properly be regulated, and so wide a discretion cannot properly be exercised if it were regulated. If the court's discretion were qualified only exceptional cases would enliven its exercise, contrary to the operation and purpose of the rule.

Case flow management

[10.450] In Victoria the Appeal Division in *Bishopsgate Insurance Australia (in liq) v Deloitte Haskins & Sells*[473] held that the court's management of case flow does not interfere with the general application of principles to decisions of dismissal for want of prosecution.[474] It therefore disagreed pointedly with the decision of the Full Federal Court in *Lenijamar Pty Ltd v AGC (Advances)*[475] which identified a discrete rupture between cases prior and subsequent to the introduction of case flow management.[476] The principles applicable to dismissal for want of prosecution have no operation in the Federal Court in the context of case management.

Case flow management in the Federal Court is employed to minimise delay and deliver parties the earliest possible trial dates.[477] Delay is deterred by empowering the court to dismiss proceedings for a failure to comply with a directional order. However, not all non-compliance is sanctioned by dismissal, and the court remains free to respond to the particular circumstances of the case. Nevertheless even unfettered discretion must be implemented appropriately. Thus, even while no strict principles as to the implementation of the discretion are expressly laid down, the court may have regard to the party's attitude to co-operating with the operation of case management.

Victoria, therefore, differs from other jurisdictions where case management operates and which consider it undesirable to lay down principles for the operation of the discretion.

Effect of order for dismissal

[10.460] An order for dismissal terminates proceedings. The order may be worded so as to require a party to take a step within a specified period of time on pain of dismissal. Or, it may be an order having immediate effect when the party is in grievous default and is not given an

472 *Shepperdson v Lewis* [1966] VR 418 at 423. See also *Lenijamar Pty Ltd v AGC (Advances) Ltd* (1990) 27 FCR 388 at 394–396, where the Full Federal Court strongly emphasised the unqualified terms of the rules.

473 *Bishopsgate Insurance Australia Ltd (in liq) v Deloitte Haskins & Sells* [1999] 3 VR 863.

474 *Bishopsgate Insurance Australia Ltd (in liq) v Deloitte Haskins & Sells* [1999] 3 VR 863 at 872.

475 *Lenijamar Pty Ltd v AGC (Advances) Ltd* (1990) 27 FCR 388.

476 *Lenijamar Pty Ltd v AGC (Advances) Ltd* (1990) 27 FCR 388 at 394–396.

477 FCR r 26.01.

opportunity to correct it. Nevertheless, even a dismissed proceeding might be reinstated, unless the time for prosecuting the action had expired. This is so because, unlike a judgment in favour of the defendant, an order for dismissal is not *res judicata*.[478] Under case management regimes currently in operation the reinstatement of proceedings may be subject to a proceeding for abuse of process and subject to being stayed or stricken out. The case management objective of expeditious finality[479] may prevent the instigation of proceedings on the same cause of action.[480]

DETERMINING POINTS OF LAW

Setting down a preliminary issue

[10.470] Parties may plead a point of law so that it can be set down for determination as a preliminary issue prior to the commencement of the trial.[481] If the determination of the preliminary issue is dispositive of all the issues in dispute in the proceeding, the court may give judgment on the proceeding. If the preliminary issue can be judicially determined its determination may contribute to the efficient resolution of the controversial matter in the proceeding.[482] Judicial determination applies law to agreed facts;[483] it cannot, therefore, involve facts required to be determined on the basis of the presentation of evidence at trial. The facts are required to be agreed or established in order for the determination to contribute to the resolution of the dispute.[484] Issues for preliminary determination may be either questions of law, or fact, or of mixed law and fact. A question of law set down as a preliminary issue must arise from a genuine dispute between the parties. Mixed questions must be sufficiently constituted by agreed facts to be capable of being determined.[485]

On a question of law a preliminary issue is separately determined if the point of law arising from that determination is relevant to the relief or the degree of relief claimed by a party. In *Burns Philp & Co v Bhagat*[486] the Appeal Division in Victoria considered whether the court had jurisdiction to order costs against individual litigants in a representative action. The

478 *Hart v Hall & Pickles Ltd* [1969] 1 QB 405.

479 The objective of case management schemes in the Australian jurisdictions and *Uniform Civil Procedure Rules 1999* (Qld), r 5 in Queensland are consonant with this outlook.

480 Such was the opinion of the Court of Appeal in England in *Ashton v Securum Finance Ltd* [2001] Ch 291.

481 Vic r 47.04; ACT r 1521; FCR r 30.01; NSW r 28.2; NT r 47.04; Qld r 483; SA r 211; Tas r 566; WA O 31 r 2.

482 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 357–358 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

483 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359.

484 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355.

485 See also *FAI General Insurance Co Ltd (in liq) v Sherry* (2002) 12 ANZ Insurance Cases 61-561 at [38] per Doyle CJ, and [162] per Bleby J.

486 *Burns Philp & Co Ltd v Bhagat* [1993] 1 VR 203.

court held that determining that question was not an appropriate preliminary issue because it was irrelevant to final relief.

The determination of a preliminary issue is a two-stage process.[487] The court must first determine that the question is appropriate for preliminary determination. Subsequently, it answers the question thus set down. The first step involves the court in the exercise of a discretion as to whether to set down the issue. The breadth of the rule in Victoria is such that a preliminary issue the resolution of which depends on undetermined facts may still be set down for determination. However, determining questions of law before the facts have been fully investigated can generate rather than quell controversy. In general, a court will not determine preliminary questions of law on disputed facts. In cases involving disputed questions of fact the court must direct the parties as to the findings of the necessary facts.[488] Undetermined facts are to be distinguished from incomplete facts which cannot yield an answer on preliminary determination.[489]

A point of law may be set down for preliminary determination at a hearing by either party, either by consent, or with the leave of the court. The court has discretion whether or not to set down the hearing. It will only exercise this discretion if, in the absence of consent, the applicant persuades the court to do so. In exercising its discretion the court considers the convenience, in terms of time and expenditure, to the parties undertaking the hearing of the preliminary issue. While convenience is the primary concern, a determination that answers an issue in dispute will satisfy the requirement of convenience.

In determining the setting down of a preliminary issue the court in *Rogers v Baillieu Bullock Wilkinson Pty Ltd*[490] stipulated that a hearing would only proceed if it provided a decisive answer that would obviate the need for a full hearing on a substantive issue.[491] The court in *Re RGP Constructions (in liq)*[492] formulated a stricter test. Before a preliminary issue for determination would be set down by a court it had to be convinced that in answering the preliminary question the whole matter would be disposed of.[493]

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487 *Jacobson v Ross* [1995] 1 VR 337.

488 *Jacobson v Ross* [1995] 1 VR 337 at 340 per Brooking J; see also *GIO Australia Holdings Ltd v Steffey* (2001) 39 ACSR 545 at [18].

489 *Jacobson v Ross* [1995] 1 VR 337 at 340.

490 *Rogers v Baillieu Bullock Wilkinson Pty Ltd* (1981) 28 SASR 594; see also *Rivers v Rivers* [2002] SASC 197 at [4].

491 *Rogers v Baillieu Bullock Wilkinson Pty Ltd* (1981) 28 SASR 594 at 597.

492 *Re RGP Constructions Pty Ltd (in liq)* (1982) 31 SASR 170.

493 *Re RGP Constructions Pty Ltd (in liq)* (1982) 31 SASR 170 at 172; see also *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] Ch 375.

In *CBS Productions v O'Neill*[494] the test was stated more broadly. Kirby P said that the preliminary issue for determination must be either a controversial issue sufficiently central to the matter for its determination to either enable the court to deliver judgment on the entire matter without trial, or to narrow the dispute between the parties in a substantial sense. However, a decision to set down a preliminary issue for determination must be the exception rather than the norm, and a decision to be made cautiously and on proper and adequate grounds, to avoid the inappropriately early determination of an issue.

The court has unqualified discretion to determine whether it will set down a question for preliminary determination. There can therefore be no prescriptive approach identifying the types of questions and issues appropriate for such determination. The court approaches the setting down of preliminary issues on a case-by-case basis and by assessing where the balance of convenience lies in each case. Nevertheless, an issue the resolution of which is not finally determinative either of the whole or part of a matter is not an appropriate issue for preliminary consideration.

In *Carl Zeiss Stiftung v Herbert Smith & Co*[495] the plaintiff sought a declaration that funds held by the defendant solicitors on trust was property belonging to them. The defendants applied to have determined as a preliminary issue that the moneys held in trust were held to pay for costs and disbursements of the plaintiff in another action in which they acted for the plaintiff. The judge at first instance refused to determine the matter as a preliminary issue and ordered both the matter in which the defendant acted for the plaintiff, and the matter between the plaintiff and the defendant, to be tried before him. The Court of Appeal held the trial judge's approach too restrictive on the question of when to set down the hearing of a preliminary issue.

Under the rules the court is empowered to enter judgment on the preliminary issue if that decision "substantially" disposes of the action. The hypothetical question is one that does not arise from agreed or proved facts, and generates a hypothetical answer.[496] A hypothetical answer does not dispose of an issue or of a proceeding between the parties sufficient to ground an answer of fact or a judgment.[497] Therefore, preliminary issues should not be set down when the answers sought

494 *CBS Productions Pty Ltd v O'Neill* (1985) 1 NSWLR 601 at 606; see also *Wilsmore v Court* [1983] WAR 190 at 194; *FAI General Insurance Co Ltd (in liq) v Sherry* (2002) 12 ANZ Insurance Cases 61-561 at [38].

495 *Carl Zeiss Stiftung v Herbert Smith & Co* [1969] 1 Ch 93.

496 *Hampshire County Council v Shonleigh Nominees Ltd* [1970] 1 WLR 865; *CBS Productions Pty Ltd v O'Neill* (1985) 1 NSWLR 601.

497 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 357.

depend on or relate to disputed facts,[498] and should only be set down when the facts are indisputable.[499] Particular care should be taken when answering questions of law as preliminary issues because of the difficulties of forecasting what facts may be relevant to determining them. Furthermore, because facts can only with great difficulty — and then only ever incompletely — be separated from law,[500] only mixed questions involving indisputable facts are suitable for preliminary determination.[501]

DISCONTINUANCE

[10.480] Proceedings may be discontinued or partially withdrawn by the plaintiff prior to the close of pleadings as of right. At a later stage of the procedure the plaintiff may discontinue or withdraw part of a proceeding by application to the court for an order of discontinuance. The court then makes an order for costs or another order to reflect the effect of the discontinuance on the rights of the parties.

Victoria

[10.490] Under the rules the discontinuance of a proceeding, or the withdrawal of part of a proceeding, differs depending on the type of originating process under which they were commenced. In a proceeding commenced by writ, a plaintiff may before the close of pleadings discontinue the whole proceeding or withdraw part of the proceeding without seeking leave of the court. Discontinuance at a later stage in the proceedings requires leave of the court. Similar conditions apply to a defendant seeking to withdraw all or part of a counterclaim,[502] and to third party proceedings. A proceeding commenced by originating motion is discontinued only on application to and with leave of the court, or by obtaining the consent of all the parties.[503] Discontinuance is given effect by means of a notice of discontinuance.[504]

Effect of discontinuance

[10.500] While discontinuance ends proceedings,[505] proceedings terminated by discontinuance do not deprive the plaintiff of the right to

498 *Noall v Middleton* [1961] VR 285 at 286; *Tooth & Co Ltd v Bryen* (1922) 39 WN (NSW) 152; *Commissioner for Railways v Davis* (1915) 18 WALR 1; *Rogers v Baillieu Bullock Wilkinson Pty Ltd* (1981) 28 SASR 594; *Re RGP Constructions Pty Ltd (in liq)* (1982) 31 SASR 170; *Mayne Nickless Ltd v Multigroup Distribution Services Pty Ltd* (2001) 114 FCR 108 at [26]–[27].

499 *In the Estate of Bercovitz (dec'd); Canning v Enever* [1962] 1 WLR 321.

500 See, for example, *Radstock Cooperative & Industrial Society Ltd v Norton-Radstock Urban District Council* [1968] 1 Ch 605; *Commissioner for Railways v Davis* (1915) 18 WALR 1.

501 *In the Estate of Bercovitz (dec'd); Canning v Enever* [1962] 1 WLR 321.

502 Rule 25.02.

503 Rule 25.03.

504 Rule 25.04.

505 *Cooper v Williams* [1963] 2 QB 567 at 580 per Lord Denning MR.

initiate fresh proceedings on the basis of the same cause of action. This is because a judgment does not result from discontinuance such as to bar the plaintiff from taking action. Once the notice of discontinue is served costs may be assessed and enforced against the plaintiff. New proceedings may be stayed by the court if an unsatisfied costs order is still in place against the plaintiff for the discontinuation of the prior proceedings.[506] However, once the plaintiff has paid the costs order they are free to initiate proceedings. Plaintiffs may not discontinue proceedings during the trial in order merely to avoid a judgment being entered against them.

The plaintiff may be granted leave to discontinue proceedings on the condition that it is restrained from initiating fresh proceedings on the same cause of action as the discontinued proceedings.[507] The court may also stay subsequent proceedings that constitute an abuse of process. A notice of discontinuance will be set aside if the purpose of the discontinuance is to deprive the defendant of a right that would accrue to the defendant if the proceedings continued

In *Castanho v Brown & Root (UK) Ltd*[508] the plaintiff commenced proceedings to recover damages for injuries suffered while in the course of employment, but discontinued the original proceedings initiated in England to bring the same action in Texas which had a more generous damages regime. Before the discontinuance the defendant made admissions as to their liability, and made payments accepted by the plaintiff. The defendants submitted that discontinuance in the circumstances amounted to an abuse of process. The court at first instance set aside the notice of discontinuance. The plaintiff appealed to the House of Lords. It noted that the defendant had admitted liability and made payments to the plaintiff. It also noted that the plaintiff avoided an order for costs and to reimburse payments to the defendant by discontinuing without leave. Had the court granted the plaintiff leave to discontinue it would have imposed conditions on the grant. The House of Lords concluded that, although the plaintiff had initially abused the court's process by filing the discontinuance, it had established its right to bring the action in Texas and on that basis it was proper to discontinue the proceedings in England.

In *Packer v Meagher*[509] the defendant in a defamation action was counsel assisting the Royal Commission. The plaintiff in the action alleged the defendant had been the source of confidential information published about the plaintiff in a newspaper. When the defendant requested particulars of the allegation the plaintiff filed a notice of discontinuance of the proceedings. The defendant sought to have the notice set aside. The

506 Vic r 25.07; see also ACT r 1169; FCR r 26.15; NSW r 12.4; NT r 25.07; Qld r 312; SA r 108; Tas r 380; WA O 283 r 4.

507 *The Ardandhu* (1887) 12 AC 256 at 259.

508 *Castanho v Brown & Root (UK) Ltd* [1981] AC 557; see also *Money Tree Management Services v Deputy Commissioner of Taxation* (2000) 46 ATR 13 at [13]–[14].

509 *Packer v Meagher* [1984] 3 NSWLR 486.

court found that the plaintiff had not brought the proceedings for the purpose of vindicating his reputation but in order to gain information about the Royal Commission's operations. Further proceedings were discontinued so that the plaintiff would not have to provide the defendant with the particulars he sought. If the notice of discontinuance were not set aside the defendant would not have the opportunity afforded by trial of meeting the allegations made against him. The court held the notice of discontinuance an abuse of process and ordered it set aside.

Leave to discontinue

Grounds of exercise of discretion

[10.510] The plaintiff may discontinue proceedings as of right prior to the close of pleadings, and may seek leave of the court to discontinue proceedings thereafter. A plaintiff should not be forced to continue proceedings. So, if discontinuance does not prejudice the defendant in a way that cannot be compensated by an appropriate order the plaintiff's application will in ordinary circumstances be granted. However, the plaintiff's application will be refused if to grant it deprives the defendant of a right that would have accrued to them from proceeding.[510]

If the prejudice to the plaintiff of the refusal of discontinuance outweighs the prejudice to the defendant the court may make an order for discontinuance on terms. The prejudice to the defendant may be able to be addressed by making the discontinuance conditional on an order for costs, or by ordering that the plaintiff bring no fresh proceeding on the discontinued cause of action.[511]

In *Brown v Parker*[512] the plaintiff sued for loss of dependency after her husband's death. An amendment to the law governing the assessment of damages relevant to the plaintiff's claim came into effect after damages had been assessed but prior to the entry of judgment in the case for the plaintiff. The amendment entitled the plaintiff to a higher damages award. The plaintiff applied to discontinue proceedings and reinstate them under the new and more favourable statutory provisions. The court held it just to exercise its discretion in the plaintiff's favour.

In *Trade Practices Commission v Manfal Pty Ltd (No 3)*[513] the Federal Court refused to grant the plaintiff leave to discontinue proceedings it had brought against Manfal Pty Ltd and its company officers and directors as joint respondents after the company went into liquidation. In a negotiated settlement with Manfal Pty Ltd's liquidator the plaintiff agreed to discontinue its action against the company. The remaining joint respondents resisted the application for discontinuance, arguing that their

510 *Covell Matthews & Partners v French Wools Ltd* [1977] 1 WLR 876.

511 *Hess v Labouchere* (1898) 14 TLR 350; *Heimann v Commonwealth* (1940) 58 WN (NSW) 2.

512 *Brown v Parker* [1961] WAR 194.

513 *Trade Practices Commission v Manfal Pty Ltd (No 3)* (1991) 33 FCR 382.

liability for damages would be increased if Manfal Pty Ltd ceased to be a respondent in the action. Lee J's judgment recognised that plaintiffs should not litigate involuntarily, but refused to grant the discontinuance because of the prejudice to the remaining respondents if they lost the right to seek contribution from the company.

Costs

[10.520] A plaintiff may be granted leave to discontinue a proceeding on condition that the plaintiff pay the costs in the proceeding. The decision to impose costs as a condition of the grant of leave is necessarily made without having the benefit of a trial on the merits of the case.[514] Normally the court exercises its discretion as to costs on the basis of matters established at trial. Where no trial is held McHugh J in *Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin*[515] said that the court is guided by assessing the conduct of the parties. An order for costs may be justified where a party has conducted themselves unreasonably. Although the court cannot conduct a theoretical trial to determine appropriate costs orders, it may make orders based on what it concludes about the possible prospects of the parties at trial, imposing costs against the unsuccessful party. If, however, the parties acted reasonably in equal measure it is appropriate for the court to make no order for costs.[516]

The principles for assessing the reasonableness of a party's action were considered by Mackenzie J in *Booth v Helensvale Golf Club*.[517] His Honour held it appropriate to consider how reasonable the plaintiff's actions were in initiating proceedings, and how reasonable the defendant's actions were in defending the actions. Despite the absence of argument on the merits the court may have regard to whether and to what extent the defendant's conduct caused the plaintiff to initiate proceedings. If both parties would prefer a cessation of the litigation the court should make an order for costs which facilitates the termination of proceedings.

A court may order indemnity costs rather than party and party costs against the party who brings an application for discontinuance of proceedings.[518]

Joint plaintiffs

[10.530] Where all joint plaintiffs are required for a joint cause of action to proceed, one of the joint plaintiffs cannot unilaterally apply for

514 *Smith v Airservices Australia* (2005) 146 FCR 37 at 49–50 per Stone J.

515 *Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622.

516 *Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622 at 624–625. See also *Rickus v Motor Trades Assn of Australia Superannuation Fund Pty Ltd* (2010) 265 ALR 112 at [117]–[119] per Jacobsen, Siopis and Foster JJ; *Newcastle Wallsend Coal Co Pty Ltd v Industrial Relations Commission (NSW)* (2006) 153 IR 386 at 391–393 per Tobias JA.

517 *Booth v Helensvale Golf Club Ltd* [1997] 2 Qd R 141 at 142.

518 *Booth v Helensvale Golf Club Ltd* [1997] 2 Qd R 141 at 142.

discontinuance for the purpose of removing themselves from the proceedings. The joint plaintiff can only withdraw from the proceeding by obtaining the consent of all the other joint plaintiffs.[519] Once a joint plaintiff has withdrawn from a joint cause of action it is not properly constituted. Any attempt by the remaining plaintiffs to proceed on that cause of action would fail for being insufficiently constituted. The court may address the failure of the proceeding for lacking proper parties by joining the party applying for discontinuance as a defendant.

Several plaintiffs may apply for a discontinuance of their action without affecting the capacity of other several plaintiffs from maintaining their own separate cause of action against the defendant. The rules provide for one or more several plaintiffs to withdraw from a proceeding by applying for discontinuance of their own proceeding.[520]

519 *Re Matthews; Oates v Mooney* [1905] 2 Ch 460.

520 *King v Sunday Pictorial Newspapers Ltd* (1924) 41 TLR 229.

11 Costs

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JURISDICTION TO AWARD COSTS

[11.10] Courts and tribunals have no power to make orders for costs outside the power that has been conferred upon them by statute for that purpose.[1] The court's jurisdiction to award costs being based entirely on statute, an order for costs must therefore be made strictly within the parameters of the statutory provision.[2]

In Victoria the *Supreme Court Act 1986* (Vic) confers upon the court a discretion as to the award of costs from which the court's jurisdiction to award costs arises by necessary implication.[3] A court lacking the jurisdiction in any particular matter brought before it for litigation nevertheless has jurisdiction at general law to determine its jurisdiction in the matter.[4] A court can therefore determine for itself whether it has jurisdiction to hear parties on the questions of costs of the proceeding.[5] A court's determination of jurisdiction may be final or provisional. However, courts cannot exercise a jurisdiction that they lack, nor can they be conferred a power to award costs in a matter by consent of the parties,

1 *Re Birkman; Ex parte Pickering* (1860) 1 QSCR 14; *Garnett v Bradley* (1878) 3 App Cas 944 at 962 per Lord Blackburn; *Service v Flatau* (1900) 16 WN (NSW) 248 at 249 per Cohen J; *R v Justices of South Brisbane* (1901) 11 QLJ 81 at 83 per Griffith CJ (QSCFC); *Queensland Fish Board v Bunney* [1979] Qd R 301 at 303 per Connolly J (QSCFC); *Martin v Wiggins* [1987] Tas R 188 at 190 per Cox J; *Wyatt v Albert Shire Council* [1987] 1 Qd R 486 at 488 (QSCFC); *Re Feez Ruthming's Bill of Costs* [1989] 1 Qd R 55 at 90 per McPherson J (QSCFC); *Besgrove v Larson* (2001) 22 Qld Lawyer Reps 82; [2001] QDC 144 at [3] per Judge McGill.

2 *Re JJT* (1998) 195 CLR 184 at 200 per Kirby J.

3 Other courts have had the jurisdiction conferred upon them by their founding statutes. For example, the High Court of Australia (*Judiciary Act 1903* (Cth), s 26), the Federal Court of Australia (*Federal Court of Australia Act 1976* (Cth), s 43(1)), the Australian Capital Territory Supreme Court (*Court Procedures Act 2004* (ACT), Sch 1 item 26) and Tasmanian Supreme Court (*Supreme Court Civil Procedure Act 1932* (Tas), s 12(1)) are empowered thereby to award costs in all matters brought before them. The Supreme Court of Queensland is empowered to award costs in all cases lawfully brought before it and not otherwise provided for: *Supreme Court Act 1995* (Qld), s 221.

4 Statutory effect is given to this general law principle in some jurisdictions, expressed to confer jurisdiction on a court to award costs in all matters brought before it including "matters dismissed for want of jurisdiction". *Judiciary Act 1903* (Cth), s 26 (High Court of Australia); *Federal Court of Australia Act 1976* (Cth), s 43(1); *Court Procedures Act 2004* (ACT), Sch 1 item 26; *Supreme Court Civil Procedure Act 1932* (Tas), s 12(1).

5 *Carr v Stringer* (1858) El Bl & El 123; 120 ER 454; *Morse v Australasian Steam Navigation Co* (1870) 9 SCR (NSW) 81; *Re Bombay Civil Fund Act, 1882* (1888) 40 Ch D 288 at 289–290 per Bowen LJ; *Stevens v Barnett* (1900) 17 WN (NSW) 38 at 39 per Stephen J; *Re JH Robertson's Application for Letters Patent* [1930] 1 Ch 186 at 193 per Luxmoore J; *Dennis v Malcolm* [1934] Ch 244 at 253 per Clauson J; *Commissioner of Taxes v Rooney* [1936] SASR 289 at 297 per Richards J (SASCFC); *Re Crittendon* [1958] VR 101 at 103 per Lowe J (VSCFC); *Pezet v Pezet* (1946) 47 SR (NSW) 45 at 51 per Jordan CJ; *Re Avonbank Dairy Co Pty Ltd* [1962] Tas SR 121; *Proust v Blake* (1989) 17 NSWLR 267 at 272 per Samuels JA; *Coffee v Scanlon* (1992) 26 NSWLR 485 at 487–488 per Cahill VP (NSWIC); *Re Magarey Farlam Lawyers Trust Accounts* (2007) 99 SASR 40 at [66] per White J (SASC).

general law or statute, when they lack jurisdiction over the matter, or have purported to exercise a non-existent jurisdiction.[6]

DISCRETION TO AWARD COSTS

[11.20] The statute and rules of the Supreme Court of Victoria confers upon it a discretion to award costs.[7] They also confer upon the court a jurisdiction to determine who will pay costs, and what amount of costs is to be paid.[8] Even without this specific provision it is inherent in the power conferred on the courts to order costs to determine the quantum.[9]

Section 24 of the *Supreme Court Act 1986* (Vic) provides:

> **24 Costs to be in the discretion of Court**
>
> (1) Unless otherwise expressly provided by this or any other Act or by the Rules, the costs of and incidental to all matters in the Court, including the administration of estates and trusts, is in the discretion of the Court and the Court has full power to determine by whom and to what extent the costs are to be paid.
>
> (2) Nothing in this section alters the practice in any criminal proceeding.

Rule 63.02 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic)[10] provides:

> **63.02 General powers of court**
>
> The power and discretion of the court as to **costs** under section 24 of the Act shall be exercised subject to and in accordance with this Order.

Relevantly, r 63.04 provides:

> **63.04 Costs of question or part of proceeding**
>
> (1) The court may make an order for costs in relation to a particular question in or a particular part of a proceeding.
>
> (2) Where the court makes an order under paragraph (1), the court shall by order fix the proportion of the total costs of the proceeding which is attributable to the particular question in or the particular part of the proceeding.

The jurisdiction conferred by s 24 of the Supreme Court Act to determine and allocate costs is expressed as the broadest possible power, and

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6 *Khatri v Price* (1999) 95 FCR 287 at 290 per Katz J; *Murcia & Assocs (a firm) v Grey* (2001) 25 WAR 209 at 216 per Steytler J (WACAFC).

7 Statute or rules of court in all jurisdictions confer upon superior courts a discretion to award costs: *High Court Rules 2004* (Cth), r 50.01; *Federal Court of Australia Act 1976* (Cth), s 43(2); ACT rr 1720, 1721; NT r 63.03; *Civil Procedure Act 2005* (NSW), s 98(1); Qld r 689(1); *Supreme Court Act 1935* (SA), s 40(1); SA r 263; *Supreme Court Civil Procedure Act 1932* (Tas), s 12(2); Tas rr 57(1), 839(d); *Supreme Court Act 1986* (Vic), s 24(1); Vic r 63.02; *Supreme Court Act 1935* (WA), s 37(1); WA O 66 r 1(1).

8 Most jurisdictions provide that the court may determine by whom and to what extent such costs are to be paid: ACT r 1720; NT r 63.03; *Civil Procedure Act 2005* (NSW), s 98(1); *Supreme Court Act 1935* (SA), s 40(1); SA r 263; *Supreme Court Civil Procedure Act 1932* (Tas), s 12(2); Tas r 57; *Supreme Court Act 1986* (Vic), s 24(1); *Supreme Court Act 1935* (WA), s 37(1). There are no equivalent provisions in the other jurisdictions.

9 *Re Cooke* [1997] 1 Qd R 15 at 21 per White J.

10 Legislative references in this chapter are to these rules unless otherwise specified.

discretion.[11] The provision is not one that can therefore be limited by restrictive construction.[12] The discretion is nevertheless guided by principle to ensure that it fulfils the legislative purpose, and to avoid being exercised capriciously or arbitrarily.[13] The guiding principle in the making of a costs order is that "costs follow the event". That is to say, the successful party at trial will have their costs paid by the unsuccessful party. If a costs order does not follow this principle reasons ought to be provided to explain the order that was made.[14] Opinion has been expressed that denying a successful party costs amounts to a denial of justice.[15] Costs orders may be final or interim orders.[16]

THE FUNCTION OF COSTS

[11.30] Costs orders are made on an indemnity basis for the legal expenses incurred by a party to a proceeding. A cost order will not, therefore, be made in favour of an unrepresented litigant to compensate the litigant for the work they have done to prepare for and conduct their own case.[17] A litigant not represented by a lawyer who has been successful in the carriage of their own case is only eligible for out-of-pocket expenses.[18] These expenses do not include the time the litigant, or persons rendering assistance to the litigant, have spent on the litigation. If, however, the litigant can demonstrate that those persons have been engaged in rendering their services on a commercial or quasi-commercial basis the costs of those services may be compensated

11 *McWilliams Wines Pty Ltd v Liaweena (NSW) Pty Ltd* (1993) 32 NSWLR 190 at 192 per Rogers CJ.

12 *Wentworth v Attorney-General (NSW)* (1984) 154 CLR 518 at 527.

13 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 81 per Gaudron and Gummow JJ.

14 *Pepys v London Transport Executive* [1975] 1 WLR 234 at 237–238 per Lord Denning MR, 239 per Roskill LJ, 241 per Sir John Pennycuick; *Hunt v McKay* (unreported; WASCFC; 9140/1991, 7 November 1991), 6 per Seaman J.

15 *Redden v Chapman* (1949) 50 SR (NSW) 24 at 25 per Roper CJ in Eq; *Hunter Development Brokerage Pty Ltd v Cessnock City Council (No 2)* (2006) 68 NSWLR 177 at [50] per Basten JA.

16 *M v W* (2006) 96 SASR 105 at [2] per Bleby J.

17 *Willing v Hollobone* (1972) 3 SASR 532 at 534–535 per Bray CJ (SASCFC); *Kelly v Noumenon Pty Ltd* (1988) 47 SASR 182 at 184–185 per King CJ (SASCFC); *Dalgety Australia Operations Ltd v FF Seeley Nominees Pty Ltd (No 2)* (1988) 49 SASR 75 at 88–92 per Bollen J; *Cachia v Hanes* (1994) 179 CLR 403 at 410–415 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ; *Morton v Official Receiver for the Bankruptcy Division of Victoria* (1996) 68 FCR 360 at 364 per Olney J; *Kowal v Zoccoli* (2002) 4 VR 399 at [8]; *Croker v Federal Commissioner of Taxation* (2002) 124 FCR 286 (same rule applies where the self-represented litigant is a paralegal or solicitor's clerk); *Scott v Northern Territory* (2005) 15 NTLR 158; *Deva v University of Western Sydney* (2008) 175 IR 89 at [82] per Tobias JA. As to the rationale for this rule see GE Dal Pont, *Law of Costs* (2nd ed, LexisNexis Butterworths, Sydney, 2009), pp 184–194.

18 *Willing v Hollobone* (1972) 3 SASR 532 at 533–534 per Bray CJ (SASCFC). This can potentially include witnesses' expenses, in addition to expenses for time actually spent giving evidence in court: *Lawrence v MD Nikolaidis & Co* (2003) 57 NSWLR 355 at [48]–[51] per Hogdson JA.

for by an order for costs. The litigant must prove the nature of those services by admissible evidence.[19] The litigant who conducts their own case without legal representation is entitled to recover the expense of employing an agent through a costs order.[20]

Barristers or solicitors who prepare and conduct their own cases are an exception to the rule that ordinarily denies such litigants a compensatory costs order.[21] The barrier to compensation is lifted because the court is able to make a secure calculation of the costs of the legal practitioner's efforts, which cannot be done in the case of lay persons engaged in legal work.[22] The costs recovered by the self-represented lawyer exclude those items not necessary to the conduct of the litigation, and which would have otherwise been recoverable if the litigant had been represented. So, for example, the self-represented lawyer will not be permitted to recover costs for giving or taking instruction, or for attendance upon himself or herself.[23] The court's approach to the recovery of costs by a self-represented lawyer is a matter of practice rather than law. Costs can

19 See, for example, *Rowan v Cornwall (No 6)* (2002) 220 LSJS 187 at [16] per Debelle J (denying any allowance for the cost of clerical assistance voluntarily provided by friends and relatives of the plaintiff).

20 *Cachia v Hanes* (1991) 23 NSWLR 304 at 321 per Handley JA (affirmed *Cachia v Hanes* (1994) 179 CLR 403).

21 The seminal case is *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872, the principle from which has been applied multiple times in Australia: *Umphelby v Grey* (1898) 24 VLR 979; *Ogier v Norton* (1904) 29 VLR 536 at 538–539 per Madden CJ (VSCFC); *Martin v Armstrong* (1916) 33 WN (NSW) 50 at 51 per the Deputy Prothonotary; *Guss v Veenhuizen* (1976) 136 CLR 47 at 51 per Gibbs ACJ, Jacobs and Aickin JJ; *Hawthorn Cuppaidge & Badgery v Channell* [1992] 2 Qd R 488 at 491 per Ambrose J; *GBT Corporation Pty Ltd v Scott* (1994) 116 FLR 266 at 268 per Higgins J (ACTSC); *Cashman & Partners v Secretary, Department of Human Services and Health* (1995) 61 FCR 301 at 312–313 per Beazley J; *Brott v Almatrah* [1998] 2 VR 83 at 86–87 per Batt J; *S v A Solicitor* (1998) 23 Fam LR 641 at 657 per the Court (FamCAFC) (expressing doubt on the state of the law, although applying "the longstanding principle"); *Lyris v Hatziantoniou* (1998) 24 Fam LR 391; [1999] FLC 92-840 at 85,828 per Steele J; *Lawrence v MD Nikolaidis & Co* (2003) 57 NSWLR 355 at [52], [58] per Hogdson JA (opining that the *Chorley* exception should be applied carefully rather than loosely); *Reid v Hubbard* (2004) 180 FLR 232; *Khera v Jones* [2005] NSWSC 122; *Hartford (Holdings) Pty Ltd v CP (Adelaide) Pty Ltd* (2004) 234 LSJS 66 at [125]–[134] per Doyle CJ (SASCFC).

22 *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 at 877 per Bowen LJ; *Buckland v Watts* [1970] 1 QB 27 at 37–38 per Sir Gordon Willmer.

23 *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 at 875–876 per Brett MR; *Martin v Armstrong* (1916) 33 WN (NSW) 50 at 51 per the Deputy Prothonotary; *Buckland v Watts* [1970] 1 QB 27 at 35 per Danckwerts LJ; *Cachia v Hanes* (1994) 179 CLR 403 at 411 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ; *S v A Solicitor* (1998) 23 Fam LR 641 at 656–657 (FamCAFC); *Brownie Wills v Shrimpton* [1998] 2 NZLR 320 at 327 per Blanchard and Gault JJ (NZCA); *Khan v Lord Chancellor* [2003] 1 WLR 2385 at [59] per Mitchell J.

therefore be shaped so as best to accord with the circumstances of each case, and that best reflects practice within the particular jurisdiction.[24]

TYPES OF COST AWARDS

[11.40] Costs are compensatory rather than punitive. The purpose for awarding costs is to indemnify the successful party against the expense to which legal proceedings have put him or her. Costs are not awarded with the intention of sanctioning the unsuccessful party.[25] The general rule of costs is that costs follow the event, allowing the successful party to recover all the costs of an action regardless of whether the party was not able to establish causes of action in the alternative.[26] Courts have a discretion to make orders with respect to separate issues raised in a pleading, or distinct parts of a pleading.[27] The court in its discretion may also make costs orders that are not in favour of the successful litigant, or which order the successful litigant to pay the unsuccessful litigant's costs. Such orders may be made, for example, where the plaintiff had pursued separate heads of claim but failed to prove one or more of them, or pursued particular issues in its successful claim but failed to establish those issues, despite ultimately succeeding on another separate head of claim.[28] Whether or not the court exercises its discretion to order costs against an ultimately successful plaintiff does not depend on its raising unreasonable issues or claims.[29] However, the court may take into consideration the fact that a plaintiff raised an unreasonable issue or claim.[30] The order for costs may be a single order apportioning costs between parties for a fixed amount rather than numerous orders as to particular costs in the proceeding.[31] The decision regarding apportionment gives greater weight to the parties' relative successes or failures with respect to particular issues, and the time spent arguing those matters relative to the entire proceeding. It also considers the quantum of damages recovered by the plaintiff relative to the amount claimed.

COSTS FOLLOW THE EVENT

[11.50] An order that "costs follow the event" (that is, the costs indemnity rule) reflects the proper exercise of the court's discretion to

24 *Dobree v Hoffman* (1996) 18 WAR 36 (WASCFC) (where the court denied profit costs to a firm of solicitors that acted for one of its partners in litigation in which the partner was a litigant).

25 *Latoudis v Casey* (1990) 170 CLR 534.

26 *McFadzean v Construction Forestry Mining and Energy Union* [2007] VSCA 289.

27 Rule 63.04(1); *Woolf v Burmon* [1940] VLR 111; *Cretazzo v Lombardi* (1975) 13 SASR 4.

28 *McFadzean v Construction Forestry Mining and Energy Union* [2007] VSCA 289.

29 *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608.

30 *Mickelberg v Western Australia* [2007] WASC 140.

31 *Byrns v Davie* [1991] 2 VR 568; *McFadzean v Construction Forestry Mining and Energy Union* [2007] VSCA 289; *Nolan v Nolan* [2004] VSCA 134.

order costs.[32] The order is considered just because its effect is to compensate a party for the expense of pursuing or defending their rights where they were unjustifiably forced to do so by the opposing party.[33] A successful litigant is said to have a reasonable expectation of obtaining an order for costs.[34] The expectation is so well established that an order for costs that does not follow the event may provide grounds for leave to appeal on the issue of costs.

Costs follow the event in order to indemnify parties for their legal costs,[35] and not punish or penalise the opposing party for pursuing or defending the proceedings.[36] Costs are quantified through a taxation or assessment of costs. The basis upon which the taxation or assessment occurs is given by direction of the court. The court may direct an assessment or taxation on a party and party basis, or on an indemnity basis. The assessment of costs on an indemnity basis provides for a higher costs order in favour of the successful party. However, costs are most commonly assessed on a party and party basis.

The "event" to which the rule refers is the final decision in the case. However, a proceeding may be complex and litigants may succeed on some questions, and not others, even if they ultimately succeed. In other words, regardless of the ultimate outcome of the trial, litigants may experience varying degree of success and failure in the proceeding. In the interests of justice and fairness to the parties, this will be reflected in the order for costs. The principle that costs follow the event, however, does not determine the court's unqualified discretion. The rules and s 24(1) of the *Supreme Court Act 1986* (Vic), confer discretion on the court to order a

32 *Garnett v Bradley* (1878) 3 App Cas 944 at 950 per Lord Hatherley, 959 per Lord O'Hagan; *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v Macedonian Orthodox Community Church St Petka Inc (No 2)* [2007] NSWCA 142 at [28] per the Court. The usual costs follow the event rule is reflected in the rules of court in some jurisdictions, notwithstanding the fact that the statutes underpinning those rules or the rules themselves confer upon those courts an unfettered discretion as to costs: ACT r 1721; NT r 63.03; NSW r 42.1; Qld r 689(1); SA r 263(1); WA O 66 r 1(1). There are no equivalent provisions in the other jurisdictions.

33 *Milne v Attorney-General (Tas)* (1956) 95 CLR 460 at 477 (HCAFC); *Vucadinovic v Lombardi* [1967] VR 81 at 87 per Pape J; *Lauchlan v Hartley* [1979] Qd R 305 at 309 per Connolly J; *Humphries v TWT Ltd* (1993) 113 FLR 422 at 423 per Miles CJ (ACTSC); *Russell v Adwan Pty Ltd* (2000) 144 ACTR 1 at 14 per Miles CJ; *Mann v Carnell* (2001) 159 FLR 466 at 467 per Miles CJ.

34 *Donald Campbell & Co Ltd v Pollak* [1927] AC 732 at 811 per Viscount Cave LC; *Scherer v Counting Instruments Ltd* [1986] 1 WLR 615 at 621 per Buckley LJ; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 120 per Kirby J.

35 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 121 per Kirby J; *Hunter Development Brokerage Pty Ltd v Cessnock City Council (No 2)* (2006) 68 NSWLR 177 at [50] per Basten JA.

36 *Latoudis v Casey* (1990) 170 CLR 534 at 543 per Mason CJ, 563 per Toohey J, 567 per McHugh J; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97 per McHugh J; *Port Stephens Council v Sansom* (2007) 156 LGERA 125 per Spigelman CJ.

successful litigant to bear his or her own costs, or otherwise deprive a successful litigant of some of its costs, or even order that it pay some of the unsuccessful litigant's costs.

In *Ritter v Godfrey* Atkin LJ said:

> In the case of a wholly successful defendant, in my opinion, the judge must give the defendant his costs unless there is evidence that the defendant (1) brought about the litigation, or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains.[37]

However, Gobbo J distinguished *Ritter v Godfrey* in *Byrns v Davie*.[38] His Honour said that s 24 of the *Supreme Court Act 1986* (Vic) and O 63 of the *General Rules of Procedure in Civil Proceedings 1986* (Vic) permitted an apportionment of costs even though a defendant was ultimately successful in respect of particular issues or parts of the proceeding which were decided against the defendant. Moreover, an order as to costs may be made with respect to a part of the proceeding despite that part of the proceeding being unrelated to an issue raised in the proceedings, or the cause of action, or the defence. Furthermore, plaintiffs and defendants are to be similarly treated if they have only been partly successful in their claim or defence. Finally, the costs order need not be particularised but may consist of a single global order as to costs.

COSTS OF INTERLOCUTORY APPLICATIONS

[11.60] In Victoria r 63.20[39] provides:

> Where an interlocutory or other application is made in a proceeding and—
>
> (a) no order is made on the application; or
>
> (b) the order made is silent as to costs—
>
> the costs are the parties' costs in the proceeding, unless the Court otherwise orders.

The parties' costs in the proceeding, unless the court orders otherwise, will include:

- reserved costs;
- the cost of an interlocutory application if either no order is made or the order is silent as to costs; and
- costs thrown away by reason of amendment to a pleading, or of and occasioned by amendment to a pleading.

It will also include the costs associated with amendments to a pleading unless there is a court order to the contrary, such as where the party has sought and obtained an order for costs "thrown away" or costs "of and occasioned by" the amendment.

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37 *Ritter v Godfrey* [1920] 2 KB 47 at 60.

38 *Byrns v Davie* [1991] 2 VR 568.

39 See also NT r 63.18.

When the court makes no order as to costs each party must bear their own costs.

Reserved costs

[11.70] Rule 63.22 provides:

> Where by order of the Court the costs of any interlocutory or other application, or of any step in a proceeding, are reserved, the reserved costs are the parties' costs in the proceeding, unless the Court otherwise orders.

Reserved costs are the party's costs in the proceedings, unless otherwise ordered, and not at the discretion of the taxing master. A party wanting to recover the costs of an interlocutory application prior to the termination of proceedings makes an application for an order that the costs of the interlocutory proceeding be taxed forthwith. Rule 63.20.1 provides:

> **Taxation of costs on interlocutory application or hearing**
>
> If an order for costs is made on an interlocutory application or hearing, the party in whose favour the order is made shall not tax those costs until the proceeding in which the order is made is completed, unless the Court orders that the costs may be taxed immediately.

The amended r 63.17 provides that

> Where a pleading is amended (whether with or without leave) the costs of and occasioned by the amendment and the costs of any application for leave to make the amendment are the parties' costs in the proceeding, unless the Court otherwise orders.

As amended the rule no longer imposes an automatic costs penalty against a party who amends a pleading. Amendments to pleadings are costs in the proceeding and recovered by the party who gets a final costs order in its favour unless the court makes orders to the contrary. A party must apply for an order to the relevant effect if it seeks the costs of amendment as costs "thrown away" (that is, wasted as a result of the amendment) or as costs "of and occasioned by" the application (that is, costs arising from the amendment in the future).

Costs thrown away

[11.80] In *Mendicino v Mendicino*[40] the wife in a property settlement proceeding under Pt VII of the *Family Law Act 1975* (Cth) applied to the court for declarations and property orders. On 20 June 2014 the wife filed and served a statement of claim pursuant to an order of 6 June of Kent J to provide the respondents with a statement of facts, causes of action, and the relief being sought. The respondents subsequently sought further and better particulars, and applied to have the applicant's pleading struck out, and prepared and filed submissions in relation to their application to strike out the pleadings based on the pleadings of 20 June. The applicant was directed to serve an amended pleading by 22 August 2014, which was served on 25 August. Having been served the amended pleadings the

40 *Mendicino v Mendicino* [2014] FamCA 692.

respondents decided against pursuing the application to strike out the applicant's amended pleading, and sought an order for costs thrown away against the applicant. In considering whether to make that order Kent J had regard to the factors set out at s 117(2) of the *Family Law Act 1975* (Cth), including: the fact that having been given the opportunity to file and serve a properly pleaded set of facts, causes of action, and bases for relief, the applicant's case was fundamentally flawed, as indicated by the need for amended pleadings; and that the amended pleadings were not served in compliance with the order that they be filed and served by 22 August 2014.[41]

Nevertheless, having regard to the likely outcome of the proceedings, and whether and which party would be likely to be prejudiced by an order to reserve each party's costs of and incidental to the application to strike out the applicant's pleading, Kent J found that it would not be appropriate to make an order for costs thrown away and made instead an order for costs to be reserved.[42]

In *Pioneer Studios v Hills (No 2)*[43] the court set aside a decision of the Workers Compensation Commission on appeal, and remitted the matter for rehearing. The court made a further order that the respondent pay the costs of the appeal. The respondent subsequently filed a notice of motion seeking orders varying the costs order so that each party bear its own costs of the appeal. The appellant had submitted that on the basis of the High Court's decision in *Tasty Chicks v Chief Commissioner of State Revenue (NSW)*[44] that appeals to the court under the *Workplace Injury Management and Workers Compensation Act 1998* (NSW), s 353 were not restricted to points of law. The point was ultimately withdrawn, senior counsel for the respondent having spent over three days researching the point in relation to the High Court decision. The respondent submitted that each party pay its own costs. The respondent was ordered to pay the appellant's costs of the appeal, and the appellant was ordered to pay 25 per cent of the costs of the preparation of the respondent's written submissions.

Costs in any event

[11.90] Where costs of the interlocutory application are to the applicant/opponent in any event then, regardless of which party the outcome favours when the case is finally decided or when the case is settled, the applicant or the opponent is given the costs of the interlocutory proceedings. A party applying to rectify a breach of the rules may be ordered to pay the breaching party's costs in any event. The applicant must pay the costs in the event even if they are ultimately successful at trial, as the liability to pay costs in any event is not

41 *Mendicino v Mendicino* [2014] FamCA 692 at [13].

42 *Mendicino v Mendicino* [2014] FamCA 692 at [16].

43 *Pioneer Studios Pty Ltd v Hills (No 2)* [2013] NSWCA 1.

44 *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2011) 245 CLR 446.

dependent on the outcome of the trial. An order for costs in the event confers no right to tax until the case is finally decided or settled, unless the Registrar expressly states that costs are to be taxed and paid forthwith.[45]

Costs in the cause

[11.100] "Costs in the cause", "costs in the action", and "costs to the successful party in the cause" are synonymous expressions meaning that costs of the interlocutory proceeding follow the result of the trial and are awarded to the party who ultimately succeeds on the question of costs. The costs of the proceedings are quantified as part of the final costs in the action. In Victoria costs in the interlocutory proceeding follow the eventual result of the trial and are made costs in the cause unless the court orders otherwise. The cost of interlocutory applications are made costs in the cause if the application is required to be made under the rules, but not if a party is applying as a result of the opposing party's non-compliance with the procedural rules.[46] Being made costs in the cause the cost of the interlocutory application may not be finally disposed of but remain subject to the discretion of the trial judge.

"Costs in the cause" may be awarded to a specific party (for example, "costs to the plaintiff in the cause" or "defendant's costs in the cause"), or at large. If costs are at large the party who obtains an order for costs in the proceeding includes costs made in the cause, which are then paid by the party bearing the costs of the proceedings. If given to a specific party, then only if that party in whose favour the order is made is later awarded costs in the cause will that party be entitled to the costs of the interlocutory proceeding. The opposing party will not be entitled to costs in the proceeding even if that party succeeds at trial and is awarded costs in the cause. Neither, however, will they be required to pay them.[47] A trial judge has no power to deprive the party who has obtained an order for costs of an interlocutory application, except where they are reserved.

Order silent as to costs

[11.110] If an order is silent as to costs, orders will depend on the nature and result of the application. If the applicant in a contested application succeeds they are entitled to costs as costs in the cause; and the contesting responding party is not entitled to costs as costs in the cause. If the applicant in a contested application fails the opposing respondent will be entitled to costs as costs in the cause, but the

45 R Quick and E Harris, *Quick on Costs* (Thomson Reuters, subscription service), [1.1130].

46 R Quick and E Harris, *Quick on Costs* (Thomson Reuters, subscription service), [1.600], [1.910]–[1.930].

47 R Quick and E Harris, *Quick on Costs* (Thomson Reuters, subscription service), [1.630].

unsuccessful applicant will not be entitled to costs as costs in the cause. If a party makes an unopposed application, both parties' costs are costs in the cause.[48]

Reserved costs

[11.120] The court reserves costs if it cannot determine who should be burdened by them. It orders that costs be reserved until the matter is determined, enabling it to decide who should pay the costs. At that stage the court will have the material necessary to enable it to decide which party bears the costs. Reserved costs can only be dealt with on taxation by an order of the court. Reserved costs cannot be included in a bill of costs issued by a successful party recovering the costs of the whole proceeding.[49] The slip rule may be invoked to amend a judgment so that an order on reserved costs may be included.[50]

Costs against a non-party

[11.130] Making an order against a person that is not a party to a proceeding *prima facie* contravenes the rule that only parties to a proceeding may be made the subject of a costs order.[51] Nevertheless, the breadth of the discretion to order costs under statute has been construed as sufficiently wide to empower courts to order costs against non-parties to a proceeding.[52] As costs orders are made on the exercise of an unqualified discretion courts have not formulated categories of cases in

48 R Quick and E Harris, *Quick on Costs* (Thomson Reuters, subscription service), [1.620].

49 R Quick and E Harris, *Quick on Costs* (Thomson Reuters, subscription service), [1.770], [1.950].

50 R Quick and E Harris, *Quick on Costs* (Thomson Reuters, subscription service), [1.970]. See *Arnett v Holloway* [1960] VR 22.

51 *Vestris v Cashman* (1998) 72 SASR 449 at 468 per Lander J (SASCFC); *Naomi Marble and Granite Pty Ltd v FAI General Insurance Co Ltd (No 2)* [1999] 1 Qd R 518 at 544 per Shepherdson J.

52 This was established, as a general principle, by the House of Lords in *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965, dealing with a statutory provision expressed to empower the court to determine "by whom costs are to be paid". In most Australian jurisdictions, an equivalent provision exists, and has been interpreted as conferring that same power: *Supreme Court Act 1986* (Vic), s 24(1); see *Bischof v Adams* [1992] 2 VR 198 at 201 per Gobbo J; *Burns Philp & Co Ltd v Bhagat* [1993] 1 VR 203 at 220, 223 per Brooking J; *Re Bonlac Foods Ltd* (2001) 37 ACSR 457 at 463 per Warren J; see also ACT r 1703 (specifies when court may make an order against a non-party); *Civil Procedure Act 2005* (NSW), s 98(1)(b) (albeit restricted by the terms of NSW r 42.3); *Clutha Ltd (in liq) v Millar (No 5)* (2002) 43 ACSR 295; *House of Golf Chatswood Pty Ltd v McManus* [2005] NSWSC 1246; see also *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75; *Supreme Court Act 1935* (SA), s 40(1); see *Vestris v Cashman* (1998) 72 SASR 449 at 452 per Olsson J, 462 per Lander J (SASCFC); *Supreme Court Civil Procedure Act 1932* (Tas), s 12(2); see *National Mutual Life Assn of Australasia Ltd v Chris Poulson Insurance Agencies Pty Ltd* (1998) 8 Tas R 123 at 126–127 per Slicer J; *Supreme Court Act 1935* (WA), s 37(1); see *Duskwood Pty Ltd v Bellara Willows Pty Ltd* [2001] WASC 281 at [12] per Steytler J. In *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, the High Court of Australia held that

which such costs orders will be made.[53] Costs orders against persons not a party to the proceeding may only be made when it is necessary for justice to be done in the particular case. Such orders will be justified only in exceptional circumstances.[54] The jurisdiction is exercised reluctantly and only with great caution.[55] Courts will be reluctant to exercise the jurisdiction where the non-party was eligible to have been joined as a party, particularly where a cause of action lay against the non-party.[56] A non-party who is legitimately not joined should be warned about the possibility of a costs order being made against them, enabling them to make an application for joinder. Costs orders may be made for co-defendants to pay the costs of a co-defendant and a plaintiff.[57]

In determining whether to order costs against a non-party to the proceeding the court takes a number of factors into account. A key factor in exercising its discretion is where the court considers the non-party's association with the proceedings, and what role, if any, it played in the costs that were incurred.[58] The non-party and the party on the record must be connected to the conduct of the proceeding. The more closely involved in the proceedings, and the more causative the non-party's conduct was in the costs being incurred, the more likely the court is to make the order against the non-party.[59] Conversely, a non-party without

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even where the statutory provision did not expressly refer to a power to determine "by whom costs are to be paid", the discretion of itself was broad enough to empower the court to make a costs order against a non-party.

53 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 192 per Mason CJ and Deane J; *Bischof v Adams* [1992] 2 VR 198 at 203 per Gobbo J; *Symphony Group Plc v Hodgson* [1994] QB 179 at 192 per Balcombe LJ; *Re Bonlac Foods Ltd* (2001) 37 ACSR 457 at [26] per Warren J; *Commissioner of Stamp Duties v Westleigh Management Services Pty Ltd* (2001) 47 ATR 327 at 330 per Mackenzie J; *Gore v Justice Corporation Pty Ltd* (2002) 119 FCR 429 (FCAFC).

54 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 203 per Dawson J; *Separate Representative v JHE and GAW* (1993) 114 FLR 1; 16 Fam LR 485 at 508 per Nicholson CJ and Fogarty J (FamCAFC); *O'Neill v De Leo* (1993) 2 Tas R 225 at 230 per Green CJ; *Re JJT* (1998) 195 CLR 184 at 189 per Gaudron J; *Flinn v Flinn* [1999] 3 VR 712 at [159]; *Naomi Marble and Granite Pty Ltd v FAI General Insurance Co Ltd (No 2)* [1999] 1 Qd R 518 at 544 per Shepherdson J.

55 *In the Marriage of McAlpin* (1993) 114 FLR 452; 16 Fam LR 888 at 896; per Nicholson CJ and Maxwell J (FamCAFC); *Arundel Chiropractic Centre Pty Ltd v DCT* (2001) 47 ATR 1 at [34] per Callinan J.

56 *Symphony Group Plc v Hodgson* [1994] QB 179.

57 *New South Wales Wood Process Ltd v Gorton* (1915) 15 SR (NSW) 454; *Willis v Trotter* (1897) 18 LR (NSW) Eq 155.

58 *Bischof v Adams* [1992] 2 VR 198 at 205 per Gobbo J; *M v D* (1994) 122 FLR 449 at 453 per Murray J (FamCA); *National Mutual Life Assn of Australasia Ltd v Chris Poulson Insurance Agencies Pty Ltd* (1998) 8 Tas R 123 at 135 per Slicer J; *Wentworth v Wentworth* (1999) 46 NSWLR 300 at 310 per Santow J (affirmed *Wentworth v Wentworth* (2000) 52 NSWLR 602); *Re Bonlac Foods Ltd* (2001) 37 ACSR 457 at 463 per Warren J.

59 *Bischof v Adams* [1992] 2 VR 198 at 205 per Gobbo J; *M v D* (1994) 122 FLR 449 at 453 per Murray J (FamCA); *National Mutual Life Assn of Australasia Ltd v Chris Poulson Insurance*

connection to the proceedings will not have costs ordered against them.[60] Costs will be ordered only where the non-party's connections are real and direct, and where the non-party is materially connected to the costs. The causal connection is established by considering whether the non-party funded the proceedings, would benefit from the litigation, or had a direct or indirect financial interest in it.[61] The court also considers whether the non-party's conduct has caused a party unreasonable or unnecessary costs, or has involved the party in unnecessary legal proceedings.[62]

The circumstances in which a non-party may be ordered to pay costs were considered in *Symphony Group v Hodgson*.[63] In that case a number of categories were identified as examples, but the court emphasised that there could be no exhaustive or comprehensive listing.[64] A non-party will satisfy the requirements of connection to the proceedings and causality of costs if it is the effective litigant in the proceedings.[65] Examples include cases in which a corporation is named as the party on the pleadings and court record, but the conduct of the litigation is in fact being controlled by a corporate officer or director,[66] a receiver,[67] or the liquidator[68] of that

Agencies Pty Ltd (1998) 8 Tas R 123 at 135 per Slicer J; *Wentworth v Wentworth* (1999) 46 NSWLR 300 at 310 per Santow J (affirmed *Wentworth v Wentworth* (2000) 52 NSWLR 602); *Re Bonlac Foods Ltd* (2001) 37 ACSR 457 at 463 per Warren J.

60 *Burns Philp & Co Ltd v Bhagat* [1993] 1 VR 203 at 219 per Brooking J; *Wentworth v Wentworth* (1999) 46 NSWLR 300 at 310 per Santow J (affirmed *Wentworth v Wentworth* (2000) 52 NSWLR 602); *Australasian Academy of Natural Medicine Pty Ltd v Walters* (2003) 85 SASR 36 at [23] per Duggan J (SASCFC).

61 *Symphony Group Plc v Hodgson* [1994] QB 179 at 192–193 per Balcombe LJ; *Vestris v Cashman* (1998) 72 SASR 449 at 468 per Lander J (SASCFC); *Nordstern Allgemeine Versicherungs AG v Internav Ltd* [1999] 2 Lloyd's Rep 139 at 156 per Waller LJ.

62 *Health & Life Care Ltd v SA Asset Management Corporation* (1995) 65 SASR 48; 18 ACSR 153 at 163–164 per Doyle CJ (SASCFC); *Re Bonlac Foods Ltd* (2001) 37 ACSR 457 at 463 per Warren J.

63 *Symphony Group Plc v Hodgson* [1994] QB 179.

64 *Symphony Group Plc v Hodgson* [1994] QB 179 at 192 per Balcombe LJ.

65 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 188 per Mason CJ and Deane J, 202 per Dawson J.

66 See, for example, *Naomi Marble and Granite Pty Ltd v FAI General Insurance Co Ltd (No 2)* [1999] 1 Qd R 518 (where the non-party ordered to pay costs was a director of the plaintiff company who had played an active part in the litigation, being a major witness for the plaintiff and having a financial interest in the outcome, and had acted in bad faith by knowingly giving false evidence); *Australasian Academy of Natural Medicine Pty Ltd v Walters* (2003) 85 SASR 36 (SASCFC) (director who funded impecunious company in unsuccessful litigation ordered to pay costs); *Goodwood Recoveries Ltd v Breen* [2006] 1 WLR 2723 (director made liable for the costs of the litigation pursued by his company for his own benefit since they had been caused by his dishonesty). The same principles apply where it is a shareholder who pursues litigation under the cover of the company for his or her own benefit: see, for example, *CIBC Mellon Trust Co v Stolzenberg* [2005] EWCA Civ 628.

67 See, for example, *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 (held that it was just to order costs to be paid by the receivers when it was clearly established that the costs were incurred by the receivers primarily for the benefit of non-parties (the banks) and with their support).

corporation, or an insurer with the rights of subrogation.[69] If a non-party finances or maintains the litigation a costs orders may be made against them.[70] A non-party acting in a representative capacity may also satisfy the requirements of connection and causality. Examples include as a next friend,[71] guardian *ad litem*[72] or a separate representative in family law.[73] Costs may be ordered against a solicitor whose actions amount to misconduct or negligence.[74] The Court of Appeal in England also referred to the case of *Aiden Shipping v Interbulk*,[75] where the ship owner was ordered to pay the costs of the proceeding between the charterer and the sub-charterer. When test cases are conducted in the context of group litigation the plaintiffs in those cases not selected may be ordered to contribute to the cost of the test litigation.[76]

In *Knight v FP Special Assets*[77] liquidators commenced unsuccessful proceedings in the name of the liquidated company and had the costs in those proceedings ordered against them. The liquidators' appeal to the High Court was based on their not being parties on the record to the proceeding, and that the Queensland Court's power under O 91 r 1[78] of the *Rules of the Supreme Court 1900* (Qld) was limited to making orders against parties on the record. The High Court held that the discretion under the rules was sufficiently broad to empower a court to make an order against non-parties to a proceeding on the record, as long as the

68 See, for example, *Bent v Gough* (1992) 36 FCR 204 (where a liquidator who embarked upon proceedings, the success of which depended on several difficult issues of fact and law, without obtaining funds from the promoters or other relevant persons, and which ultimately ended in failure, was ordered to pay costs); *Mead v Watson* (2005) 23 ACLC 718. Compare *Kimtran Pty Ltd v Downie* [2004] 1 Qd R 651 (no order made against liquidators because no finding of misconduct against them). It is likely that New South Wales courts lack the power to make a costs order against a liquidator: *Clutha Ltd (in liq) v Millar (No 5)* (2002) 43 ACSR 295.

69 *WJ Green & Co v Cooper & Oxley Constructions Co Pty Ltd* (1993) 10 WAR 227.

70 *Singh v Observer Ltd* [1989] 2 All ER 751; *Singh v Observer Ltd* [1989] 3 All ER 777n; *Money Tree Management Services Pty Ltd v Deputy Commissioner of Taxation (No 2)* [2000] SASC 63.

71 *NSW Insurance Ministerial Corporation v Abualfoul* (1999) 94 FCR 247.

72 *Australia and New Zealand Banking Group Ltd v Dzienciol* [2001] WASC 305.

73 *Separate Representative v JHE and GAW* (1993) 114 FLR 1; 16 Fam LR 485 at 508 per Nicholson CJ and Fogarty J (FamCAFC); *In the Marriage of Telfer* (1996) 130 FLR 212 per Lindenmayer J.

74 *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd* (1993) 45 FCR 224; *De Sousa v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 41 FCR 544; *Re Garofano; Ex Parte American Express International Inc* (1990) 26 FCR 592; *Ridehalgh v Horsefield* [1994] Ch 205; *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134; *Levick v Commissioner of Taxation* (2000) 102 FCR 155; *Cook v Pasminco Ltd (No 2)* (2000) 107 FCR 44.

75 *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965.

76 *Davies v Eli Lilly & Co* [1987] 1 WLR 1136.

77 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178.

78 Repealed.

discretion was exercised judicially and not arbitrarily or capriciously.[79] The court's discretion to order costs against a non-party was not dependent on the existence of an express power to that effect, but could be exercised on the basis of the general jurisdiction to award costs.[80] Further, the definition of "party" under the rules was extensive, and not restricted to a named party on whom service is affected and is entitled to attend the hearing.

In general costs cannot be ordered against a non-party.[81] The fact that the non-party is a litigation funder is not in itself sufficient to order costs contrary to the rule.[82] The policy reasons for not exposing litigation funders to costs orders is that making them liable to costs on that basis alone would threaten the availability of those funds and bar access to the courts and litigation for worthy cases.[83] The court asks whether the litigation is being conducted in pursuit of the interests of the named party alone, and if the interests of the litigation funder are being advanced.[84] If the litigation funder has funded the litigation merely in pursuit of its own financial interests it may incur a costs liability.[85]

A court considers making an order for costs against the non-party[86] at a hearing in which the non-party may make submissions on the question of the proposed order.[87] In Victoria the rules expressly provide that a party to a proceeding is not entitled to recover the costs of the proceeding from any other party except by order of the court.[88]

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79 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 185 per Mason CJ and Deane J.

80 See *Life Therapeutics Ltd v Bell IXL Investments Ltd (No 2)* (2008) 170 FCR 595. The Federal Court has jurisdiction to order costs in favour of a non-party.

81 *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75.

82 *Oz B & S Pty Ltd v Elders IXL Ltd* (1993) 117 ALR 128; *Re Foster* (1994) 49 FCR 309.

83 *Hamilton v Al Fayed (No 2)* [2003] QB 1175; [2002] 3 All ER 641 at 660 per Simon Brown LJ, 663–666 per Chadwick LJ. Compare the opinion of Hale LJ (All ER) at 666–669.

84 *Chapman v Luminis Pty Ltd (No 7)* [2002] FCA 1098 at [56] per von Doussa J (affirmed on appeal *Kebaro Pty Ltd v Saunders* [2003] FCAFC 5).

85 See, for example, *Gore v Justice Corporation Pty Ltd* (2002) 119 FCR 429 (FCAFC); *Kebaro Pty Ltd v Saunders* [2003] FCAFC 5; *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2005] 1 NZLR 145 (PC).

86 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 203 per Dawson J.

87 *Singh v Observer Ltd* [1989] 2 All ER 751 at 754 per Macpherson J; *Bischof v Adams* [1992] 2 VR 198 at 205 per Gobbo J; *Re Foster* (1994) 49 FCR 309; 121 ALR 494 at 501 per Einfeld J (FCA). Compare *In the Marriage of McAlpin* (1993) 114 FLR 452; 16 Fam LR 888 at 894 per Nicholson CJ and Maxwell J (FamCAFC).

88 Vic r 63.13; ACT r 1760; *Civil Procedure Act 2005* (NSW), s 98; NT r 63.14; Qld r 680. But otherwise it follows from the general principles as to costs. Under the corporations legislation, the court is not prevented from making an order for costs against non-parties in proceedings brought under the legislation: *Consolidated Byrnes Holdings Ltd v Hardel Investments Pty Ltd* (2009) 176 FCR 348 at [314] per Lander J (considering *Corporations Act 2001* (Cth), s 1335(2)).

Orders for costs against legal practitioners

[11.140] The Supreme Court has an inherent jurisdiction to manage their own processes,[89] and a supervisory jurisdiction over officers of the court[90] who are in fact responsible for the conduct of litigation. The court's jurisdiction to award costs extends to making costs orders against lawyers.[91] The exercise of the power reflects a tension between two important but competing public interests: on the one hand, lawyers should not be deterred from fearlessly pursuing the interests of a client; on the other hand, litigants should not suffer loss from the misconduct of litigation by legal representatives avoiding financial prejudice occasioned by unjustifiable litigation.[92] The so-called "wasted costs jurisdiction" wherein barristers or solicitors pay the wasted costs in a proceeding is to be carefully exercised lest one of these two competing interests is wantonly sacrificed to the other.[93] Orders of this kind are only made when the case is clearly appropriate, and at hearings where the lawyer is permitted to make submissions and present arguments.[94]

Personal costs orders

[11.150] Solicitors owe a duty to the court not to commit misconduct or incur needless costs. In *Myers v Elman* the solicitor permitted a defendant to file an incomplete affidavit of documents. Costs were ordered against the solicitor. Viscount Maugham said the rule expressly empowering the court to make such a costs order was a supplement to the court's inherent jurisdiction to supervise officers of the court in exercising control over its own processes.[95] Orders to pay costs may be made against lawyers whose improper or unreasonable actions or failure to act have caused a party to incur costs, or caused unnecessary delay

89 *Myers v Elman* [1940] AC 282 at 289; *In the Marriage of Jachimowicz* (1986) 81 FLR 459 (FamCA); *Re a Solicitor* [1960] VR 617; *Edwards v Edwards* [1958] P 235; [1958] 2 All ER 179 at 186; *Brown v Burdett* (1887) 37 Ch D 207 (CA) (extends not only to solicitor–client costs but also to costs payable from a fund). In addition to the court's inherent power there are two statutory sources of power for the court to award party–party costs against a legal practitioner. These statutory powers extend to the District Court and Local Court, which do not enjoy inherent jurisdiction. *Knaggs v JA Westaway & Sons Pty Ltd* (1996) 40 NSWLR 476 at 485. The Federal Court's power under *Federal Court of Australia Act 1976* (Cth), s 43 to "award costs in all proceedings" was regarded by it as authorising an award of costs against a solicitor in *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd* (1993) 45 FCR 224, relying on *Knight v FP Special Assets Ltd* (1992) 174 CLR 178.

90 *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at [85]–[86].

91 *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at [85]–[86].

92 *Pinebelt Pty Ltd v Bagley* [2000] NSWSC 655 at [28]; *Ridehalgh v Horsefield* [1994] Ch 205; see also *Monitronix Ltd v Michael* (1992) 7 WAR 195.

93 *Ridehalgh v Horsefield* [1994] Ch 205 at 226.

94 *Ridehalgh v Horsefield* [1994] Ch 205 at 228–229.

95 *Myers v Elman* [1940] AC 282 at 289.

resulting in wasted costs, or amount to misconduct or default.[96] Under the rules of court a personal costs order may be made against a lawyer whose actions amount to misconduct or negligence.[97] When exercising its inherent jurisdiction the court must conclude that the lawyer's actions were grossly negligent, or constituted a serious misconduct or dereliction of duty before it is considered proper to order costs awarded against them.[98]

Comments in authoritative cases dealing with the issue of costs awarded against lawyers personally suggest that the rationale for the making of the order is compensatory and not punitive.[99] The jurisdiction is only cautiously engaged[100] and used only in cases which demonstrate clearly that the legal practitioner's conduct or actions warrants the order being made.[101] A court will not exercise its jurisdiction to order costs for a mere error of judgment, or a slip in the conduct of the litigation,[102] nor on the basis that the lawyer's client was ultimately unsuccessful.[103] Courts' reluctance to exercise power in other cases is motivated by:

- the concern that orders of this kind will have grave and far-reaching implications for lawyers;[104]

96 Vic r 63.23; *High Court Rules 2004* (Cth), r 50.05.2; FCR O 62 r 9; ACT r 1753; NT r 63.21; *Civil Procedure Act 2005* (NSW), s 99; Qld r 690; SA r 13(2); Tas r 61; WA O 66 r 5. See *Hillig v Darkinjung Pty Ltd (No 2)* [2008] NSWCA 147 at [52]–[55] per McColl JA; *Kelly v Jowett* (2009) 76 NSWLR 405. See generally GE Dal Pont, *Law of Costs* (2nd ed, LexisNexis Butterworths, Sydney, 2009), pp 811–821.

97 *Myers v Elman* [1940] AC 282.

98 *D v D* [1963] 1 WLR 194; [1963] 1 All ER 602 at 605 per Cairns J; *Jakeman v Jakeman* [1963] 3 All ER 889. The standard of misconduct for ordering costs against a legal practitioner is lower than the standard required to have them struck off the roll of practitioners.

99 *Myers v Elman* [1940] AC 282 at 289 per Viscount Maugham, 319 per Lord Wright; *Edwards v Edwards* [1958] P 235 at 248 per Sachs J; *Mauroux v Soc Com Abel Pereira Da Fonseca SARL* [1972] 1 WLR 962 at 970 per Megarry J; *Weston v Central Criminal Court Courts Administrator* [1977] QB 32 at 45 per Stephenson LJ; *Cassidy v Murray* (1995) 124 FLR 267 at 281–282 (FamCAFC); *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169 at 229 per Goldberg J (FCA) (affirmed *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134 (FCAFC)).

100 *Byrne v Sefton Health Authority* [2002] 1 WLR 775 at 784 per Peter Gibson LJ.

101 *Orchard v South Eastern Electricity Board* [1987] 1 QB 565 at 572 per Sir John Donaldson MR; *De Sousa v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 41 FCR 544 at 547–548 per French J; *Re Dunstan (No 2)* (2000) 112 A Crim R 63; 155 FLR 189 at 194 per Miles CJ.

102 *Myers v Elman* [1940] AC 282 at 319 per Lord Wright; *Edwards v Edwards* [1958] P 235 at 248 per Sachs J; *R & T Thew Ltd v Reeves (No 2)* [1982] QB 1283 at 1287 per Lord Denning MR (conduct of the articled clerk in the case was at most "a mere slip"); *Cassidy v Murray* (1995) 124 FLR 267 at 281 (FamCAFC); *Harley v McDonald* [1999] 3 NZLR 545 at [55] per Tipping J (NZCA) (reversed on appeal on another point *Harley v McDonald* [2001] 2 AC 678 at 706; [2002] 1 NZLR 1 per Lord Hope); *Re P (A Barrister)* [2002] 1 Cr App R 207 at 220 per Kennedy LJ.

103 *Edwards v Edwards* [1958] P 235 at 248 per Sachs J; *De Sousa v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 41 FCR 544 at 548; 114 ALR 708 per French J.

104 *Orchard v South Eastern Electricity Board* [1987] 1 QB 565 at 580 per Dillon LJ.

- the awareness the court has that the details and circumstances of the lawyer's instructions, and the role they may have played in the lawyer's conduct, are not known to it;[105]
- the chilling and inhibitory effect of such orders on vigorous but *bona fide* advocacy and representation;[106] and
- the knowledge that lawyers work under stressful conditions and perform under severe time constraints both generally and particularly (that is, in the midst of the litigation process).[107]

Personal costs orders have been made against lawyers in circumstances where the lawyer has:

1. made unsupported allegations (usually of fraud or misconduct) to the court where those allegations go to the substance of the matter;[108]
2. commenced a proceeding lacking the client's authority to do so, where the lawyer knew or ought to have known that such authority was lacking;[109]
3. pursued a case that is hopeless or has no, or substantially no, chance of success, so as to raise the inference that the proceeding is an abuse of process;[110] or

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105 *Ridehalgh v Horsefield* [1994] Ch 205 at 237 per Sir Thomas Bingham MR; *Levick v Commissioner of Taxation* (2000) 102 FCR 155; 44 ATR 315 at 324 (FCAFC); *Medcalf v Mardell* [2003] 1 AC 120; [2002] 3 WLR 172 at 185 per Lord Bingham, 187–189 per Lord Steyn.

106 *Re Bendeich (No 2)* (1994) 53 FCR 422 at 426–427 per Drummond J; *Ridehalgh v Horsefield* [1994] Ch 205 at 226 per Sir Thomas Bingham MR.

107 *Pinebelt Pty Ltd v Bagley* [2000] NSWSC 655 at [30] per Hamilton J.

108 *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169 at 242, 250 per Goldberg J (FCA) (affirmed *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134 (FCAFC)).

109 *Norton v Cooper* (1856) 3 Sm & G 375; 65 ER 701; *Nelson v Nelson* [1997] 1 WLR 233; [1997] 1 All ER 970 at 976–978 per Waller LJ; *AW & LM Forrest Pty Ltd v Beamish* (1998) 146 FLR 450 at 458–459 per Young J (NSWSC); *Nominal Defendant v Kisse* (2001) 22 Qld Lawyer Reps 110; [2001] QDC 290 at 112 (Qld Lawyer Reps) per Judge McGill.

110 *Edwards v Edwards* [1958] P 235 at 248 per Sachs J; *Davy-Chiesman v Davy-Chiesman* [1984] 2 WLR 291; [1984] Fam 48 at 67 per Dillon LJ; *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169 at 239, 249–250 per Goldberg J (FCA) (affirmed *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134 (FCAFC)); *Levick v Commissioner of Taxation* (2000) 102 FCR 155; 44 ATR 315 at 324–325 (FACFC); *Buckingham Gate International Pty Ltd v Australia and New Zealand Banking Group Ltd* (2000) 35 ACSR 411 at 415 per Santow J; *Campbell v Airport Transfer System Pty Ltd* (2006) 18 NTLR 69.

In New South Wales, there is specific legislation directed at imposing costs consequences on lawyers who pursue civil claims lacking reasonable prospects of success: *Legal Profession Act 2004* (NSW), Pt 3.2 Div 10. See further *Degiorgio v Dunn (No 2)* (2005) 62 NSWLR 284; *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 (considering former *Legal Profession Act 1987* (NSW), Pt 11 Div 5C); *Re Black Stump Enterprises Pty Ltd* [2006] NSWCA 60; *Ex Christmas Islanders Assn Inc v Attorney-General (Cth)* (2006) 233 ALR 97; *Tran v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2006) 228 ALR 727.

4. represented a client in a case where the lawyer's own interests conflict with those of the client, or continued representation once a conflict of that kind has arisen.[111]

A lawyer against whom a costs order is proposed to be made must be afforded natural justice. Therefore the rules[112] provide that before such an order is made the lawyer is to be notified of the allegations they are facing that have prompted the order and, once notified, given a fair opportunity to be heard on the questions raised against them.[113]

The court may exercise its broad discretion to order the apportionment of costs between lawyer and client, or to make them jointly liable for costs.[114]

Costs may be ordered personally against a legal practitioner as a non-party to proceedings where they are in breach of the *Civil Procedure Act 2010* (Vic). The overriding purpose of the Act is the facilitation of the "just, efficient, timely and cost-effective resolution of the real issues in dispute."[115] The overarching obligations contained in Pt 2.3 ss 16 – 27 are central to achieving this objective. The parties must certify that they have read and understood their overarching obligations.[116] The legal practitioner must file a proper basis certification.[117] Proceeding on a proper basis proscribes initiating proceedings that are frivolous, vexatious, or an abuse of process of the court, or that, in the light of the available knowledge, are not properly grounded in either fact or law.[118]

The court is empowered to award costs against the legal practitioner who has contravened an overarching obligation,[119] among which is the obligation to use "reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate".[120] Section 29 of the Act confers on the

111 *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587 at 591 per Thomas J (NZHC); *In the Marriage of Anstis* (1999) 26 Fam LR 548 at 556; [1999] FamCA 842 per Mullane J.

112 ACT r 1753; NT r 63.21(3); *Civil Procedure Act 2005* (NSW), s 99(4); SA r 263; Tas r 61; Vic r 63.23(3); see *Gisborne Shire v King* [1995] 1 VR 103 at 106–107 per Tadgell J (VSCAppDiv); WA O 66 r 5(2). There are no equivalent provisions in the other jurisdictions.

113 *Abraham v Jutsun* [1963] 1 WLR 658; [1963] 2 All ER 402 at 403 per Lord Denning MR, 404 per Pearson LJ; *Orchard v South Eastern Electricity Board* [1987] 1 QB 565 at 572 per Sir John Donaldson MR; *Cassidy v Murray* (1995) 124 FLR 267 at 281 (FamCAFC).

114 See, for example, *Coulter v Rampling* [2005] NSWSC 273.

115 *Civil Procedure Act 2010* (Vic), s 7.

116 *Civil Procedure Act 2010* (Vic), s 41.

117 *Civil Procedure Act 2010* (Vic), s 42.

118 *Civil Procedure Act 2010* (Vic), s 18.

119 *Civil Procedure Act 2010* (Vic), s 29.

120 *Civil Procedure Act 2010* (Vic), s 24.

court a discretion to "make any order it considers appropriate in the interests of justice."[121] The section provides:

29 Court may make certain orders

(1) If a court is satisfied that, on the balance of probabilities, a person has contravened any overarching obligation, the court may make any order it considers appropriate in the interests of justice including, but not limited to—

(a) an order that the person pay some or all of the legal costs or other costs or expenses of any person arising from the contravention of the overarching obligation;

(b) an order that the legal costs or other costs or expenses of any person be payable immediately and be enforceable immediately;

(c) an order that the person compensate any person for any financial loss or other loss which was materially contributed to by the contravention of the overarching obligation, including—

(i) an order for penalty interest in accordance with the penalty interest rate in respect of any delay in the payment of an amount claimed in the civil proceeding; or

(ii) an order for no interest or reduced interest;

(d) an order that the person take any steps specified in the order which are reasonably necessary to remedy any contravention of the overarching obligations by the person;

(e) an order that the person not be permitted to take specified steps in the civil proceeding;

(f) any other order that the court considers to be in the interests of any person who has been prejudicially affected by the contravention of the overarching obligations.

(2) An order under this section may be made—

(a) on the application of—

(i) any party to the civil proceeding; or

(ii) any other person who, in the opinion of the court, has a sufficient interest in the proceeding; or

(b) on the court's own motion.

(3) This section does not limit any other power of a court to make any order, including any order as to costs.

An order against the legal practitioner personally for costs may take into account the practitioner's failure to comply with their overarching obligations under the Act, and so fail to assist the court in achieving the purpose of the legislation at which those obligations are aimed.[122] A practitioner who is in breach of the duty to ensure that proceedings are conducted efficiently and expeditiously may have a personal costs order

121 The principles governing the exercise of the discretion, and the relevant cases, were considered and summarised in *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at [92] and later in *Ideal Waterproofing Pty Ltd v Buildcorp Australia Pty Ltd* [2006] NSWSC 155. *Ideal Waterproofing Pty Ltd v Buildcorp Australia Pty Ltd* [2006] NSWSC 155. See also: *Karwala v Skrzypczak Re Estate of Ratajczak* [2007] NSWSC 931 at [6]–[10]; *Whyked Pty Ltd v Yahoo!7 Pty Ltd* [2008] NSWSC 477 at [12]–[20].

122 *Kendirjian v Ayoub* [2008] NSWCA 194: to further the just, quick and cheap resolution of the real issues in the proceedings.

made against him or her.[123] It has been held that conduct justifying such an order includes an abuse of process,[124] raising untenable defences for the purpose of delay,[125] filing and serving a false affidavit of discovery,[126] repeatedly presenting untenable submissions,[127] and attempting to re-agitate previously decided issues.[128] It has also been held that a legal practitioner's ignorance of the rules may sound in a personal costs order.[129] A legal practitioner may be ordered to pay costs thrown away by reason of the filing of late submissions for which they are personally responsible.[130]

The statutory power under s 29 confirms the court's jurisdiction to exercise control over its own officers[131] where the court is satisfied that the legal practitioner has failed to fulfil his or her duty to the court.[132] The Court of Appeal in *Lemoto v Able Technical*[133] considered the relevant principles to be applied when exercising the power to order legal practitioners to pay the costs of proceedings in which they have represented parties. McColl JA, analysing the English and Australian authorities, outlined the relevant principles. They were that:[134]

(a) The jurisdiction to order a legal practitioner to pay the costs of legal proceedings in respect of which he or she provided legal services must be exercised "with care and discretion and only in clear cases": *Ridehalgh* (at 229), *Re Bendeich* (1994) 53 FCR 422; *Deputy Commissioner of Taxation v Levick* [1999] FCA 1580; (1999) 168 ALR 383 per Hill J at [11]; *Levick v Deputy Commissioner of Taxation* [2000] FCA 674; (2000) 102 FCR 155 at [44]; *Gitsham v Suncorp Metway Insurance Ltd* [2002] QCA 416 at [8] per White J (with whom Davies and Williams JJA agreed); *De Sousa v Minister for Immigration*

123 *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd* (2008) 15 ANZ Insurance Cases 61-780 at [8]; *Araf Capital Funding Pty Ltd v Megaloudis* [2006] NSWSC 1255 at [10]; *Ashmore v Corporation of Lloyd's* [1992] 1 WLR 446.

124 *Cahill v Ekstein* (unreported; NSWSC; Smart J; 5 June 1998) (corresponding to *Civil Procedure Act 2010* (Vic), s 18).

125 *Deputy Commissioner of Taxation v Levick* (1999) ATR 621 at [12]; *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation* (1999) 74 ALJR 68 (corresponding to *Civil Procedure Act 2010* (Vic), s 25).

126 *Myers v Elman* [1940] AC 282 (corresponding to *Civil Procedure Act 2010* (Vic), s 26).

127 *Buckingham Gate International Pty Ltd v Australia and New Zealand Banking Group Ltd* (2000) 35 ACSR 411.

128 *Vasram v AMP Life Ltd* [2002] FCA 1286. See also *Gersten v Minister for Immigration and Multicultural Affairs* [2000] FCA 922; *Kendirjian v Ayoub* [2008] NSWCA 194 at [208]–[216].

129 *Riv-Oland Marble Co (Vic) Pty Ltd v Settef SpA* (1989) 63 ALJR 519.

130 *Whyte v Brosch* (1998) 45 NSWLR 354. See also *Lollis v Loulatzis (No 2)* [2008] VSC 35.

131 *Kelly v Jowett* (2009) 76 NSWLR 405 at [56].

132 See *Kelly v Jowett* (2009) 76 NSWLR 405 at [61]; *Puruse Pty Ltd v Council of the City of Sydney* (2009) 169 LGERA 85 at [45]. It is not to be used for the purposes of a professional negligence claim (*Harley v McDonald* [2001] 2 AC 678 at 703–704).

133 *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300.

134 *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at [92].

(1993) 41 FCR 544; *Money Tree Management Service Pty Ltd v Deputy Commissioner of Taxation (No 3)* [2000] SASC 286;

(b) A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he or she acts for a party who pursues a claim or a defence which is plainly doomed to fail: *Ridehalgh* (at 233); *Medcalf v Mardell* [2002] UKHL 27; [2003] 1 AC 120 at [56] per Lord Hobhouse; *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169 (affirmed on appeal, *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* [1999] FCA 773; (1999) 87 FCR 134); *Levick v Deputy Commissioner of Taxation*; cf *Steindl Nominees Pty Ltd v Laghaifar* [2003] QCA 157; [2003] 2 Qd R 683;

(c) The legal practitioner is not "the judge of the credibility of the witnesses or the validity of the argument": *Tombling v Universal Bulb Co Ltd* [1951] 2 TLR 289 at 297; the legal practitioner is not "the ultimate judge, and if he reasonably decides to believe his client, criticism cannot be directed to him": *Myers v Elman* (at 304, per Lord Atkin); *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* [2001] HCA 26; (2001) 47 ATR 1 at [34] per Callinan J;

(d) A judge considering making a wasted costs order arising out of an advocate's conduct of court proceedings must make full allowance for the exigencies of acting in that environment; only when, with all allowances made, a legal practitioner's conduct of court proceedings is quite plainly unjustifiable can it be appropriate to make a wasted costs order: *Ridehalgh* (at 236, 237);

(e) A legal practitioner against whom a claim for a costs order is made must have full and sufficient notice of the complaint and full and sufficient opportunity of answering it: *Myers v Elman* (at 318); *Orchard v South Eastern Electricity Board* (at 572); *Ridehalgh* (at 229);

(f) Where a legal practitioner's ability to rebut the complaint is hampered by the duty of confidentiality to the client he or she should be given the benefit of the doubt: *Orchard v South Eastern Electricity Board* (at 572); *Ridehalgh* (at 229); in such circumstances "[t]he court should not make an order against a practitioner precluded by legal professional privilege from advancing his full answer to the complaint made against him without satisfying itself that it is in all the circumstances fair to do so": *Medcalf* (at [23] per Lord Bingham);

(g) The procedure to be followed in determining applications for wasted costs must be fair and "as simple and summary as fairness permits … [h]earings should be measured in hours, and not in days or weeks … Judges … must be astute to control what threatens to become a new and costly form of satellite litigation": *Ridehalgh* (at 238 – 239); *Harley v McDonald* [2001] UKPC 18; [2001] 2 AC 678 at 703 [50]; *Medcalf* (at [24]).

What constitutes "serious neglect" or "serious incompetence" has been held to equate to conduct amounting to gross negligence or serious dereliction of duty.[135]

In *Yara Australia v Oswal*[136] leave to appeal from a security for costs order was refused. The Court of Appeal sought submissions on the question

135 *Wentworth v Rogers* [1999] NSWCA 403; *Litmus Australia Pty Ltd v Canty* (2006) 198 FLR 184; although see *Whyked Pty Ltd v Yahoo!7 Pty Ltd* [2008] NSWSC 477.

136 *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302.

whether any overarching obligations had been breached in the conduct of the appeal, in particular whether counsel had provided over-representation by producing unnecessary and excessive material. The court held that the applicant's solicitors had breached s 24 of the Civil Procedure Act requiring solicitors to ensure that costs are reasonable and appropriate. The court ordered the applicant's solicitors to indemnify their clients for 50 per cent of the respondent's costs resulting directly from the unnecessary and excessive content of the application books. However, the court refused to order recovery of 50 per cent of the costs of the application books from the applicants. Determining a breach of the overarching obligations is conducted by objectively evaluating the conduct of the solicitor having regard to the issues and the quantum in dispute in the proceeding. The court observed that under s 29 of the Civil Procedure Act the court had broad powers to sanction both parties and legal practitioners.[137] By contrast with r 63.23 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) which was purely compensatory, the Civil Procedure Act provided the court with punitive power,[138] the reason being that the Act was designed with the objective of shaping the culture of litigation by providing an incentive for parties and legal representatives to practise and seek the just, efficient, timely and cost effective resolution of disputes, or face sanctions for not doing so.[139]

In *Eaton v ISS Catering Services*[140] the plaintiff in a workplace accident claim failed to comply with orders to provide expert reports in a timely fashion. The plaintiff's solicitors, who had agreed with the plaintiff to act on a no-win no-fee basis, had been waiting for the outcome of a mediation to determine whether or not to incur the costs of an expert report. The judge refused three applications by the plaintiff to adjourn the trial, in which the defendant ultimately prevailed. The Court of Appeal dismissed an appeal on the basis that the adjournment should have been allowed. It found that the trial judge's directions with respect to providing the expert evidence was to promote the prospects of mediation in resolving the issue in a timely, just and cost effectives manner consistently with the overarching obligations under the Civil Procedure Act,[141] and that the solicitors breached their overarching obligations in refusing to act in accordance with those directions.[142]

137 *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302 at [17]. The court observed that its powers under the Act were broader than those in any other jurisdiction. The power is also distinct from Vic r 63.23.

138 *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302 at [18].

139 *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302 at [20].

140 *Eaton v ISS Catering Services Pty Ltd* (2013) 42 VR 635.

141 *Eaton v ISS Catering Services Pty Ltd* (2013) 42 VR 635 at [54].

142 *Eaton v ISS Catering Services Pty Ltd* (2013) 42 VR 635 at [55].

Wasted costs

[11.160] The three-stage test[143] applied in the wasted costs jurisdiction involves asking three dependent questions:

(1) Has the legal representative of whom [the] complaint is made acted improperly, unreasonably or negligently?

(2) If so, did such conduct cause the applicant to incur unnecessary costs?

(3) If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs? (If so, the costs to be met must be specified and, in a criminal case, the amount of the costs.)[144]

Causation

[11.170] To determine whether the costs unnecessarily incurred resulted from the solicitor's or barrister's conduct it is necessary to demonstrate that, but for the impugned conduct, the party bringing the claim would not have incurred the costs in question to the extent of those costs.[145]

In *D v H*[146] a husband applied for and obtained a wasted costs order against his wife's legal representative, but subsequently agreed to an ancillary relief the terms of which included paying his wife a lump sum, and an agreement that all costs orders made against his wife were to be set aside. The wasted costs order sought to recover the same amount in costs to which he had waived his rights in the settlement. The court held that the costs were otherwise recoverable but that the husband had wasted his right to them as part of the consent order. H's agreement to forego costs had removed the causal link such that H no longer had a loss to claim.

In *KOO Golden East Mongolia v Bank of Nova Scotia*[147] the defendant bank applied for a wasted costs order against the plaintiff's solicitors. The bank submitted that because it was covered by the immunity conferred by the State Immunity Act — which the solicitors should have known — their conduct in pursuing the litigation had been negligent and unreasonable. The court, however, held the solicitors' conduct neither negligent nor unreasonable, and dismissed the application, reasoning that the law in relation to the bank's liability was complex enough to make it inadequate to simply reduce their pursuit of the claim to being either negligent or

143 The three-stage test is incorporated in Practice Direction 46.8 (Costs – Special Cases: Personal liability of legal representative for costs – wasted costs orders) to *Civil Procedure Rules 1998* (UK), Pt 48: *Civil Procedure Rules 1998* (UK), r 48.7. The explanatory notes in the White Book (*Supreme Court Practice 1999* (Sweet & Maxwell, 1998)) under r 48.7, which was the rule that laid down appropriate procedures in relation to an application for wasted costs suggested that a three-stage test should be applied.

144 *Ridehalgh v Horsefield* [1994] Ch 205 at 231. The first question of the test reflects the wording of *Civil Procedure Rules 1998* (UK), r 63.23(1).

145 *Brown v Bennett* [2002] 1 WLR 713.

146 *D v H* [2008] 2 FLR 824; EWHC 559 (Fam) per Sumner J.

147 *KOO Golden East Mongolia v Bank of Nova Scotia* [2008] EWHC 1120 (QB) per Silber J.

unreasonable. Further, because the bank had suffered no loss the application was fundamentally flawed. The costs sought to be ordered against the solicitors were at the time of judgment to be assessed, for which no bill of costs had been issued, nor had the defendant bank made a demand for payment either at the time of the application or by the time of the hearing.

In *Hedrich v Standard Bank London*[148] the plaintiff had disclosed certain emails stored on a CD ROM only at trial and subsequently discontinued the claim. The defendant bank sought a wasted costs order against the plaintiff's solicitor for negligence in failing to disclose the evidence earlier. The Court of Appeal held that the solicitor had not been negligent. The applicant could not establish causation between the costs it had incurred and the late production of the CD ROM on which the emails were stored. Further, the solicitor had not been negligent in not recognising the relevance of the CD ROM at an earlier stage in proceedings. In another case relating to a solicitor's conduct in disclosure of evidence, *Wright v HSBC Bank*, a wasted costs order was not made against the defendant's solicitor, but the solicitor's conduct in relation to disclosure was criticised, and part of the defendant's costs were disallowed by reference to that conduct, and reduced further where the defendant's solicitor had allowed the claimant in person to proceed on an incorrect basis.[149] In *Re A Barrister (Wasted Costs order No 4 of 1993)*[150] the Court of Appeal held that a wasted costs order was a severe penalty which a judge should not impose for delays without weighing carefully the difficulties of making accurate estimates of time in the midst of the day-to-day demands of legal practice.

Personal circumstances of the professional may be taken into account

[11.180] One of the factors that a judge may consider in deciding whether to make a wasted costs order against a legal practitioner is the effect such an order would have given the practitioner's personal circumstances. The punitive nature of the sanction makes the impact of the order a pertinent consideration in the exercise of the court's discretion. The making of wasted costs orders may be declined in the court's discretion even though the first two requirements have been met if it is apparent that in exercising that discretion the court's decision will have a sufficiently adverse effect on the lawyer.

A wasted costs order was declined in *R (on the application of Hide) v Staffordshire County Council*[151] when the Divisional Court realised that making such an order would bankrupt the lawyer. The court had found that the lawyer's conduct throughout the proceedings had been unreasonable and negligent, that the action was pursued unnecessarily

148 *Hedrich v Standard Bank London Ltd* [2008] EWCA Civ 905.

149 *Wright v HSBC Bank plc* [2006] EWHC 1473 (QB) per Jack J.

150 *Re A Barrister (Wasted Costs order No 4 of 1993)* (1995) The Times (21 April 1995).

151 *R (on the application of Hide) v Staffordshire County Council* [2007] All ER (D) 402 (Civ).

and the cause bound to fail. However, the risk of bankruptcy that arose by making such an order against the lawyer, who was in "very difficult financial circumstances", was so grave as to justify the restraint of the exercise of the court's discretion. The consequence of the sanction was found to be disproportionate to the lawyer's default.

In *Gill v Humanware Europe plc*[152] the Court of Appeal stated that the effect of a wasted costs order on the solicitor's reputation, regardless of the amount of costs involved, was sufficient to justify an appeal against the order so as to protect that reputation.

In *Re Boodhoo (a Solicitor)*[153] a solicitor who had withdrawn from a case on the day of the trial, not having received instructions from his client, had a wasted costs order made against him which was quashed on appeal. The Court of Appeal observed that the solicitor's circumstances were a relevant consideration as to whether the order ought properly be made. Withdrawing from proceedings was not an unreasonable course of action. The client had informed his solicitor that he would not attend the trial, but had not instructed him whether or how to continue acting on his behalf. The solicitor's conclusion that he was unable to represent his client properly in the circumstances, and the withdrawal based on it, were held to be reasonable.

"Improper, unreasonable or negligent"

[11.190] The Court of Appeal in *Ridehalgh v Horsfield*[154] considered the meaning of the terms "improper", "unreasonable", and "negligent" in the context of a wasted costs order under the then new s 51(7) of the *Supreme Court Act 1981* (UK).[155] They concluded that those terms were fixed with certain meaning. The Court of Appeal said:

> "Improper" means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.
>
> "Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an

152 *Gill v Humanware Europe plc* [2010] EWCA Civ 799 at [31].

153 *Re Boodhoo (a Solicitor)* [2007] 4 All ER 762.

154 *Ridehalgh v Horsefield* [1994] Ch 205; [1994] 2 FLR 194.

155 *Saif Ali v Sydney Mitchell & Co (a Firm)* [1980] AC 198 at 232–233.

> unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.

In considering the meaning of the term "negligent" the Court of Appeal rejected an approach which reduced it to a technical definition requiring a legal practitioner to breach a duty owed to a client. The construction of the term was guided by reference to the words "reasonable competence" in preceding regulation, which was not a term of art. The standard the legal practitioner is required to meet before a wasted costs order can be imposed is not as high as the tortious standard. Nor is the duty referred to that which the legal practitioner owes the client. The applicant is entitled to a wasted costs order once it has been shown that the legal practitioner has breached their duty to the court. The court recognised that in most, if not all, situations where wasted costs were incurred by a party as a result of the opposing lawyer's conduct the same lawyer will cause wasted costs to his own client. In that sense they will almost invariably have breached their duty to their own client. However, the Court of Appeal continued: "we are clear that 'negligent' should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession."

As to what is required to be proved in any application for wasted costs the Court of Appeal held that it was not substantially different from what had to be proved to succeed in an action for negligence in tort. The applicant was required to prove conduct on the part of the legal practitioner which constituted "advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well-informed and competent would have given or done or omitted to do"; or errors "such as no reasonably well-informed and competent member of that profession could have made."[156]

The Court of Appeal concluded that the terms "improper", "unreasonable" and "negligent" were overlapping terms which could neither be completely isolated from each other nor self-contained: "We do not read these very familiar expressions in that way. Conduct which is unreasonable may also be improper, and conduct which is negligent will very frequently be (if it is not by definition) unreasonable. We do not think any sharp differentiation between these expressions is useful or necessary or intended."[157]

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156 *Saif Ali v Sydney Mitchell & Co (a Firm)* [1980] AC 198 at 218D, 220D per Lord Diplock (considering the extent of a barrister's immunity from action in negligence and whether it covered pre-trial acts or omissions in civil proceedings).

157 *Ridehalgh v Horsefield* [1994] Ch 205; [1994] 2 FLR 194 at 205 per Sir Thomas Bingham MR, referring to *Saif Ali v Sydney Mitchell & Co (a Firm)* [1980] AC 198 at 218D, 220D per Lord Diplock.

In *Re a Firm of Solicitors (Wasted Costs Order)*[158] the Court of Appeal upheld a wasted costs order against the solicitor whose actions caused a jury to be discharged and a new jury empanelled in its place. A defendant on trial at the Crown Court wished to dismiss his barrister with whose performance he was dissatisfied. Defence counsel suggested that this should be put in writing. When the court adjourned, the solicitor's clerk took a statement from the defendant in the courtroom. The jury walked past the solicitor and defendant when the solicitor was in the process of reading the statement back to the defendant. The jury had to be discharged because it was argued that some of them must have heard the reading of the statement. The judge found that the solicitor taking instructions at a place where he knew the jury was likely to appear and then being oblivious to their appearance constituted negligence.

Hopeless case

[11.200] A legal representative does not act improperly, unreasonably or negligently by presenting a claim or raising a defence that is bound to fail. It is contrary to the interests of justice to bar litigants with hopeless cases from receiving proper legal representation.[159] The cab-rank rule of the barristers' code of conduct prevents them from refusing to accept work from clients, except in certain well defined circumstances.[160] There is no equivalent rule governing solicitors' conduct. However, solicitors respect the public policy promoted by the rule which is not to deny representation to even unmeritorious, or unpopular litigants. They do not, therefore, act as sentries at the court doors selecting to act only in cases which are appropriate to litigate.[161]

Barristers and solicitors advise their clients on the weaknesses of their case and the potential risks of progressing to a hearing, including the possibility of failure. Clients are not bound by the advice they receive and are entitled to initiate proceedings even against advice. The decision to commence a hopeless case cannot therefore be said to rest with legal representatives.

It is not possible, however, for legal representatives to avoid orders being made against them for wasted costs simply by acting in good faith and competently in accordance with the instructions given. Presenting a case under instruction, whether a claim or a defence, which is, in the legal representative's opinion, hopeless, must be distinguished from pursuing proceedings which constitute an abuse of the court's process. If, however,

158 *Re a Firm of Solicitors (Wasted Costs Order)* [1999] All ER (D) 728.

159 *Rondel v Worsley* [1969] 1 AC 191 at 275 B.

160 Australian Bar Association, *Barristers' Conduct Rules*, rr 95, 97 – 98.

161 *Orchard v South Eastern Electricity Board* [1987] 1 QB 565 at 572 per Donaldson MR.

the litigation is for an ulterior, or fraudulent purpose, or involves a disregard or evasion of the rules, it is suitable to impose a wasted costs order.[162]

Legal practitioners are not excused by the instructions they receive from clients from using the court and legal proceedings for ulterior purposes. Lawyers are required to exercise an independent judgment about the issues they present before the court.[163] A personal costs order may be made against a legal representative who presents a case that is bound to fail. The court will not, however, order that the costs be borne by the legal representative if the case is merely likely to fail, but is nevertheless arguable.[164] It is improper for a lawyer to bring a clearly unarguable case to trial. The lawyer must exercise judgment to ensure that the matter is appropriate for consideration by the court on its merits. Therefore, the commencement and continuation of proceedings must be connected with the subject of litigation, the litigation process cannot be used to prosecute a dishonest cause, and the lawyer must observe the procedural rules and not knowingly evade or abuse them. In *Ridehalgh*, the Court of Appeal stated that a lawyer representing a party who pursues a matter that was doomed to fail does not thereby act "improperly, unreasonably or negligently". If, on the other hand, a lawyer assists in matters which constitute an abuse of process they may have acted improperly, unreasonably or negligently.

Barrett J in *Degiorgio v Dunn (No 2)*[165] considered the conduct that would attract the wasted costs orders under s 348 of the *Legal Profession Act 2004* (NSW). His Honour's remarks are therefore to be understood in the context of the constituent components of the relevant provision of the legislation.[166] His Honour[167] confirmed that the wasted costs jurisdiction should not deprive clients with weak or problematic cases of adequate legal representation. Nor should a case, that with the benefit of full argument and consideration is revealed as being weaker than the lawyer had initially assessed it as being, require the lawyer to pay costs personally. He identified a case as "without reasonable prospect of success" if it was "so lacking in merit or substance as to be not fairly arguable" and not "likely to succeed".

McColl JA in *Lemoto* observed that Barrett J's test in *Degiorgio v Dunn (No 2)*[168] was constructed around the requirements of the legislation, which required a consideration of whether the legal practitioner (either a solicitor or barrister) held a reasonable belief that, on the basis of the

162 *Ridehalgh v Horsefield* [1994] Ch 205 at 233–234.

163 *Steindl Nominees Pty Ltd v Laghaifar* [2003] 2 Qd R 683 at 690 per Davies LJ.

164 *Steindl Nominees Pty Ltd v Laghaifar* [2003] 2 Qd R 683 at 689 per Davies LJ.

165 *Degiorgio v Dunn (No 2)* (2005) 62 NSWLR 284.

166 *Legal Profession Act 2004* (NSW), s 198J.

167 *Degiorgio v Dunn (No 2)* (2005) 62 NSWLR 284 at [27]–[28].

168 *Degiorgio v Dunn (No 2)* (2005) 62 NSWLR 284.

provable facts and on a "reasonably arguable view of the law", the prospects of either a claim or a defence were "fairly arguable". A wasted costs order will not usually be made against a barrister who had argued a case lacking any prospect of success. The barrister's duty to the court being paramount their default must be in breach of that duty, including failing to observe procedural rules, avoidably or unnecessarily wasting time, or presenting a case that is an abuse of process.[169] In *Dempsey v Johnstone*[170] the court considered what would satisfy the requirements of a "hopeless case". It identified the appropriate test as involving answering the question whether a reasonably competent legal adviser would have evaluated the chance of success as justifying continuing with proceedings.

In *Mitchells Solicitors*[171] it was held that to sustain the allegation that a legal representative had acted in a hopeless case such as to justify the making of a wasted costs order, the legal representative must be shown to have not only acted improperly, unreasonably, or negligently, but also to have assisted in mounting proceedings constituting either an abuse of process, or a breach of the legal representative's duty to the court.

The Full Federal Court in *Levick v Commissioner of Taxation*[172] held that a wasted costs jurisdiction could not be enlivened simply by the fact that a solicitor had represented a client with a hopeless case. The court must scrutinise the lawyer's conduct and find that it constituted an abuse of process in that it used the process of the court for a collateral purpose, or that the lawyer had undertaken proceedings recklessly in having no regard for the possibility of the case succeeding.[173] The court held that the wasted costs jurisdiction had to be exercised cautiously for to do otherwise might deprive a client with a weak case the opportunity of representation, cause undue interference with the lawyer's vigour in presenting the case, and create a conflict of interest between the client and his or her legal representative.[174] Nevertheless, the court found that the solicitor had raised an unarguable constitutional defence to bankruptcy petitions issued against his client for the ulterior purpose of delaying the making of the sequestration order. In *Flower & Hart (a firm) v White Industries (Qld)*[175] the court found that the legal representative had initiated and pursued lengthy proceedings on the basis of an argument known to lack any possibility of succeeding with the ulterior purpose of

169 *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300; 2 DDCR 592 at 692 per Williams JA.

170 *Dempsey v Johnstone* [2003] EWCA Civ 1134.

171 *Mitchells Solicitors v Funkwerk Information Technologies York Ltd* [2008] PNLR 29.

172 *Levick v Commissioner of Taxation* (2000) 102 FCR 155.

173 *Levick v Commissioner of Taxation* (2000) 102 FCR 155 at 166.

174 *Levick v Commissioner of Taxation* (2000) 102 FCR 155 at 164–165. On the prospect of creating a conflict of interest as a restraint on the wasted costs jurisdiction see also *Re Bendeich (No 2)* (1994) 53 FCR 422 at 426–427.

175 *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134.

delaying a substantial payment of the client due to be paid under a construction contract. The court ordered the firm to pay indemnity costs.

In *Lemoto* the court said that although the power to order a legal practitioner to repay the costs in the proceedings was discretionary,[176] it should not be used so liberally as to interfere with the administration of justice.[177] The court approved of the test established by Barrett J in *Degiorgio v Dunn (No 2)*[178] that no costs order would be imposed where the cause was "fairly arguable", and the making of an order would be restricted to cases where the legal practitioner reasonably believed that the facts and legal arguments they presented to the court "unquestionably fell outside the range of views which could reasonably be entertained"[179] as to justify the commencement of proceedings.[180] The practitioner's obligation was continuous such that maintaining a claim or defence that altered circumstances had rendered hopeless would attract a personal costs order.[181] In *Eurobodalla Shire Council v Wells*[182] the court held that a barrister and solicitor had been "reckless" in continuing to prosecute an appeal.[183] A practitioner who reasonably believes that sufficient material exists to justify joining a defendant on a proper basis has not commenced an action "without reasonable prospect of success" by initiating proceedings.

McColl JA in *Lemoto* was of the opinion that what was reasonably arguable might well admit of legitimate differences of legal opinion.[184] Goldberg J in *White Industries (Qld) v Flower & Hart (a firm)*[185] said that it was not possible to formulate the proposition that the court's jurisdiction to order a legal practitioner to pay the costs of a party was based on the lawyer's commencing or maintaining proceedings either without, or without substantial, prospect of success. McColl JA, reviewing the cases, found the orders to have been made when practitioners had presented obviously unarguable cases, or commenced futile proceedings. French J in

176 *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at [130] and [7].

177 *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at [126].

178 *Degiorgio v Dunn (No 2)* (2005) 62 NSWLR 284.

179 *Medcalf v Mardell* [2003] 1 AC 120 at [40] per Lord Steyn.

180 *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at [132].

181 See *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at [4] where the point was made in relation to *Legal Profession Act 2004* (NSW), s 348. The Court of Appeal went on to lay down processes, to ensure procedural fairness, relating to the manner in which an application is to be made and the notice to be given to the practitioner: *Lemoto* at [151]ff, summarised at [8]–[10].

182 *Eurobodalla Shire Council v Wells* [2006] NSWCA 5. This was a case conducted under *Legal Profession Act 2004* (NSW), s 348.

183 *Eurobodalla Shire Council v Wells* [2006] NSWCA 5 at [31].

184 *Eurobodalla Shire Council v Wells* [2006] NSWCA 5 at [132].

185 *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169.

De Sousa v Minister for Immigration, Local Government and Ethnic Affairs[186] made an order for costs against a solicitor who had applied for judicial review having misunderstood the *Migration Act 1958* (Cth). In *Cook v Pasminco Ltd (No 2)*[187] a solicitor was ordered to pay costs for bringing a class action in the Federal Court when it obviously lacked the jurisdiction. A solicitor who, regardless of having no instructions from a party, commenced and conducted an action in their name was ordered to pay costs personally in *McKewins Hairdressing and Beauty Supplies v Deputy Commissioner of Taxation*.[188] Where an application for a review of a decision of the Refugee Review Tribunal was not assessed as having no reasonable prospect of success it was held that a solicitor had not acted contrary to the requirements of duty by lodging an application for review within the time required, despite the application requiring more thorough investigation subsequently.[189] However, where a barrister made an application for judicial review on dubious grounds, the barrister's conduct attracted an order for indemnity costs.[190]

Abandoning a claim on appeal does not necessarily indicate that the proceedings had been instituted or continued negligently. Parties forced to pursue a claim or defence in circumstances where they consider the opposing party's case is doomed to fail should apply for the matter to be struck out, and not apply for a wasted costs order. In *KOO Golden East Mongolia v Bank of Nova Scotia*[191] the court held that as the claimant's conduct was neither negligent nor unreasonable, and the issues on which the claim was based involved questions the outcome of which could not be foreseen with reasonable certainty, it did not have a basis on which to found an order for wasted costs.

LEGAL COSTS REGIME: VICTORIA

[11.210] The *Supreme Court (Chapter I New Scale of Costs and Other Costs Amendments) Rules 2012* (Vic) provided a new scale of costs for proceedings, and amended O 63 (costs) and the Scale of Costs in the *Supreme Court (General Civil Procedure) Rules 2005* (Vic). The amendments became operative on 1 April 2013. Rule 63.90 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) provided that the amended rules "apply to all things done or required to be done or omitted to be done on or after 1 April 2013 in, or in relation to, any proceeding in the Court, including the Costs Court (including all work and all amendments, applications and

186 *De Sousa v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 41 FCR 544.

187 *Cook v Pasminco Ltd (No 2)* (2000) 107 FCR 44.

188 *McKewins Hairdressing and Beauty Supplies Pty Ltd v Deputy Commissioner of Taxation* (2000) 74 ALJR 1000.

189 *Kumar v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 133 FCR 582 at 589–590 per Mansfield J.

190 *Martinovic v Chief Executive, Queensland Transport* [2005] 1 Qd R 502.

191 *KOO Golden East Mongolia v Bank of Nova Scotia* [2008] QB 717.

orders), regardless of the date of commencement of the proceeding." The costs order therefore refers to when the work was done, not when the action commenced. The work must have been undertaken on or after the commencement date.[192] The transitional provisions were in place until, and apply to cases decided on or after, 1 April 2013 and prior to the coming into operation of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) on 23 November 2015.

In *Jane v Bob Jane Corporation (No 2)*[193] Sifris J said that costs of a successful party for work performed prior to the commencement date was presumptively taxed on the former usual basis. The defendants sought indemnity costs but were awarded costs on a party and party basis up to 31 March 2013, and on the standard basis from 1 April 2013. His Honour considered whether costs should be awarded on a standard basis for the entire proceeding given that part of the proceeding predated 1 April 2013. He held that all work done after 1 April 2013 was to be dealt with on the new scale, and that making an order after that date did not include prior work. His Honour rejected a construction of the rule that it had retrospective effect on the basis of the clear working of the rule, and on the basis that the rule was not simply procedural but affected the rights of parties.

Costs in Victoria are to be taxed on a "standard basis", an "indemnity basis", or another basis as directed by the court. Rule 63.30 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) was substituted by a new rule which provides: "On a taxation on a standard basis, all costs reasonably incurred and of reasonable amount shall be allowed."[194] Rule 63.30.1 provides that all costs are to be allowed except those which have been "unreasonably incurred" or are of an "unreasonable amount". The new usual basis for party and party costs is the standard basis, allowing costs that are "reasonable in amount and reasonably incurred" unless the rules otherwise provide, or a court orders that the costs are taxed on another basis.[195] The court may, for example, order costs on an indemnity basis.[196] As the standard basis is now the rule for taxation of costs, a party seeking a costs order other than on the standard basis requires a specific order to that effect.

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192 Supreme Court of Victoria Practice Notes, Practice Note No 1 of 2013, *The New Scale of Costs and Counsel Fees*.

193 *Jane v Bob Jane Corporation Pty Ltd (No 2)* [2013] VSC 467.

194 The major changes introduced by the new Rules were the abolition of the three bases of costs taxation: solicitor and own client, party and party and indemnity costs. This tripartite categorisation was replaced with a system of standard and indemnity costs, with the "usual basis of taxation" being the standard basis: r 63.31.

195 Changing the basis of the allowance of costs and replacing the former "usual basis" with its default "necessary or proper" test.

196 Supreme Court of Victoria Practice Notes, Practice Note No 1 of 2013, *The New Scale of Costs and Counsel Fees*.

ASSESSMENT OF COSTS

[11.220] Rule 63.07 provides:

> **63.07 Taxed or other costs provision**
>
> (1) Subject to this Order, where by or under these Rules or any order of the Court costs are to be paid to a party, that party shall be entitled to taxed costs.
>
> (2) Where the Court orders that costs be paid to a party, the Court may then or thereafter order that as to the whole or any part of the costs specified in the order, instead of taxed costs, that party shall be entitled to—
>
> (a) a portion specified in the order of taxed costs;
>
> (b) taxed costs from or up to a stage of the proceeding specified in the order;
>
> (c) a gross sum specified in the order instead of taxed costs;
>
> (d) a sum in respect of costs to be determined in such manner as the Court directs.

Under the rule the court may make an order for a "gross sum" (lump sum payment), or specify a stage in the proceedings from which costs will be taxed, or specify a portion of taxed costs to be paid to a party. An order for costs will by default mean standard basis (reasonable) costs, not the lower recovery test of "necessary or proper" (that is, costs on a party and party basis). Parties seeking orders on a different basis will require a specific order to that effect. Unless the court so directs an order for costs is for costs of the whole proceeding.[197]

In Victoria the *Legal Profession Uniform Law Application Act 2014* (Vic)[198] ("Uniform Law") determines a solicitor's entitlement to charge professional fees. The objectives of Div 1 of Pt 4.3 of the Uniform Law are, first, to assist clients to make choices regarding pursuing legal solutions informed by the costs of the various legal actions available as options; secondly, to ensure law practices charge only "fair and reasonable" costs; and, thirdly, to provide a general framework for the assessment of costs.[199] In general Pt 4.3 does not apply to clients who are either a commercial entity, the government, or a third party payer who would be a commercial entity of the government if they were clients of the law practice.[200]

Section 172 of the Uniform Law requires a law practice to charge only legal costs that are "fair and reasonable in all the circumstances". Costs

197 *Smart Company Pty Ltd v Clipsal Australia Pty Ltd* (2008) 249 ALR 388.

198 From 1 July 2015 the *Legal Profession Act 2004* (Vic) was repealed and replaced by the *Legal Profession Uniform Law Application Act 2014* ("Uniform Law"). See also *Legal Profession Act 2006* (ACT); *Legal Profession Act 2004* (NSW); *Legal Profession Act* (NT); *Legal Profession Act 2007* (Qld); *Legal Profession Act 2007* (Tas); *Legal Profession Act 2008* (WA).

199 Uniform Law s 169.

200 Uniform Law s 170; but see the exceptions under ss 181(1), (7) and (8), 182, 183, and 185(3), (4) and (5). See s 170(2) – (4) for the definition of "commercial or government client", and s 171 for the definition of "third party payer".

are fair and reasonable if they are proportionately and reasonably incurred and the amount of costs is proportionate and reasonable. The court, when determining whether legal costs are fair and reasonable, takes into account

- the skill, experience, specialisation and seniority of the lawyer;
- the complexity, novelty or difficulty of the legal and factual issues, and if and to what extent the matter involved the public interest;
- the labour expended and the responsibility required of the lawyer;
- the circumstances of the matter including the urgency, and the time spent on the matter;
- the quality of the work done; and
- the instructions given in the matter.

The existence of a costs agreement entered into by the law practice and client is *prima facie* evidence that costs are reasonable and fair. A law practice is obliged to avoid unnecessarily increasing legal costs by doing payable acts, or causing delay that increases costs.

Clients have a right to enter a negotiated costs agreement[201] with the law practice or a practice retained by the client or on the client's behalf, or with a third party.[202] Section 181 provides for costs agreements conditional on the successful outcome of the matter to which the costs relate,[203] provided that what constitutes a successful outcome is defined under the agreement. Even then, disbursements may be paid regardless of the outcome. Conditional costs agreements must be subject to a cooling off period of five business days and be able to be terminated by the client by notice in writing. The cooling off period does not apply where the costs agreement is made between the law firm and another law firm on the client's behalf.[204]

Conditional costs agreements may involve uplift fees calculated on a basis provided for in the agreement which provides a reasonable estimation of the amount of the uplift fee, or of the range of possible uplift fees and an explanation of the variables to which it is subject. If the conditional costs agreement is made in relation to litigation an uplift fee cannot be provided for unless the law firm has a reasonable belief in the likely success of the litigation, and the uplift is not greater than 25 per cent of the costs payable by the client.

Section 183 prohibits contingency fees where the costs payable to the legal practice are calculated in proportion to the settlement, or award, or the

201 Uniform Law s 179.

202 Uniform Law s 180.

203 Excluding criminal proceedings, or proceedings under the *Family Law Act 1975* (Cth), or proceedings under legislation specified in the Uniform Law: Uniform Law s 181(7)(a) – (c).

204 Uniform Law s 3.4.27(4). Or, under the previous legislation, where the client is described as "sophisticated": *Legal Profession Act 2004* (Vic), s 3.4.27(4A).

value of recovered property. A law firm that has entered a contingency fee agreement is not entitled to any payment and must repay any receipts of payment in relation to service rendered in relation to the agreement.[205]

A costs agreement may be enforced in the same manner as any contract.[206] A costs agreement made under the Uniform Law is subject to the provisions of its Div 1, and is void if it contravenes the provisions of those parts of the Act. Costs are recoverable under a void contract limited to the amount that would have been recovered had the contract been valid and the legal practitioner must repay any excessive payments. A legal practice that has entered a void conditional agreement cannot claim any part, or all, of the uplift fee, and must repay any received.[207] Any unrepaid amounts paid to a law practice under a costs agreements which contravenes the Uniform Law may be recovered in action as a debt. A legal practice that has entered into a prohibited contingency fee agreement may not recover any payment, and must repay any that it has received.[208]

Where a law practice provides clients with a service not related to litigation, orders for costs may be issued based on either: a remuneration calculated on a scale of rates of commission or percentages; a specific sum; a maximum payment; a combination of these approaches; or based on some other method of calculating costs. The basis of the order for costs depends on the types of legal services provided.[209]

Section 3.4.19 provides that legal costs are recoverable

- under a costs agreement or a legal provision; and
- if there is no costs agreement or provision in an applicable law, in accordance with an order or scale of costs; and
- where neither a costs agreement or legal provision, nor a costs scale apply, then on the basis of fair and reasonable value for the provision of those services.

Section 3.4.26 provides for the making of a costs agreement

- between the client and a law practice retained either by the client or by another legal practice on the client's behalf; or
- between law practices where one is retained to provide services to the other on a client's behalf; or
- between the law practice and a third party.

A costs agreement must be written or evidenced in writing. The costs agreement must stipulate that it is an offer to enter a costs agreement, which the client may accept in writing or by other conduct, and by what conduct.

205 Uniform Law s 3.4.31(5).

206 Uniform Law s 184.

207 Uniform Law s 195(3).

208 Uniform Law s 195(4).

209 Uniform Law s 94.

A person with a right to an assessment of a bill of legal costs, or a part thereof, may request an itemised bill of costs within 30 days after the bill becomes payable, and receive an itemised bill, or that part of the bill which they are liable to pay, within 21 days of the request.[210]

A client, third party, the law practice or another law practice may apply for an assessment of the whole or any part of the payable costs, even when those fees have been paid or partly paid, or paid without a bill being issued, either within 12 months of payment, or, where a bill was rendered, within 12 months of its being rendered.[211] The costs assessor may nevertheless assess an application for review made out of time if it is just and fair to do so, unless the applicant is a third party non-commercial and non-government payer who would be a commercial or government client if they had been a client of the practice.[212]

Costs are reviewed by a costs assessor who is required to assess whether the costs are fair and reasonable.[213] In determining the fairness and reasonableness of the costs the costs assessor applies the principles in s 172, and takes into consideration

- the law practice's or any legal practitioner's compliance with the law and Uniform Law;
- the adequacy of the costs disclosure;
- representations as to knowledge or skill made by the law practice or legal practitioner; and
- other relevant matters.

Non-associated third party payers may have the amount on the bill of costs assessed.

If a costs assessor finds that the bill of costs is not fair and reasonable the matter may be referred to the regulatory authority. If the costs assessor considers the costs charged or other matters raised on assessment to constitute unsatisfactory professional conduct or professional misconduct the matter must be referred to a regulatory authority.[214]

The Victorian Civil and Administrative Tribunal (VCAT) has jurisdiction to hear costs disputes involving indexed amounts of not more than $25,000. Applicants must first be informed of their right to apply.[215] VCAT may on the hearing of the dispute make an order for the payment of costs not exceeding $25,000 (indexed amount),[216] depending on what is fair and

210 Uniform Law s 187.

211 Uniform Law s 198.

212 Uniform Law s 198(5).

213 Uniform Law s 199.

214 Uniform Law s 202.

215 Uniform Law s 99(1).

216 Uniform Law s 99(4)(a).

reasonable in the circumstances of the case.[217] In taking into account all the circumstances of a case VCAT may have regard to the law practice's adherence to the law or Uniform Law, the reasonableness of any disclosure made including disclosures of total costs, and what advertisement of skill or costs the law practice made.[218] It may also make a range of supplemental orders including issuing a caution, requiring the legal practitioner: to apologise or redo the work for waived or reduced fees; or to provide compensation.[219] A costs assessment may be reviewed or appealed to the Supreme Court. Where the costs to be assessed exceed $25,000 the jurisdiction for hearing the dispute lies with the Supreme Court sitting as the Costs Court.

The Supreme Court may set aside a costs agreement that is unfair or unreasonable,[220] and in deciding whether or not it is unfair or unreasonable it may have regard to

- any inducement to enter the agreement by fraud or misrepresentation;
- any unsatisfactory professional conduct or misconduct in relation to the agreement;
- the failure of the legal practice to make relevant disclosures;
- the circumstances and conduct of the parties in relation to the making of the agreement, or in relation to the matters to which the agreement relates;
- whether and how the agreement addresses the way in which changed circumstances might foreseeably affect costs in the matter, or billing under the agreement.[221]

If the Supreme Court sets aside a costs agreement it may make an order in relation to the payment of costs which were the subject of the agreement,[222] but not one in excess of the costs that would have been paid if the agreement had not been set aside.[223]

Where the court makes a costs order it must determine the fair and reasonable costs to be imposed in relation to the work done, having regard to the reasonableness of the legal practitioner's conduct, whether it was reasonable to carry out the work, and whether the work was carried out in a reasonable manner.[224] In determining the order for legal costs the court has regard to a range of factors including

- the degree of compliance of the legal practitioner with the *Legal Profession Act 2004* (Vic), regulations or rules;

217 Uniform Law s 99(5).

218 Uniform Law s 200.

219 Uniform Law s 99(4)(b).

220 Uniform Law s 3.4.32(1).

221 Uniform Law s 3.4.32(2)(a) – (g).

222 Uniform Law s 3.4.32(4).

223 Uniform Law s 3.4.32(6).

224 Uniform Law s 3.4.32(5)(b).

- the making of relevant disclosures;
- the representations the legal practice made with respect to its costs and skills;
- the skill and labour expended and the responsibility required in the matter;
- the nature of the retainer and whether the work was carried out within the scope of the retainer;
- the complexity, novelty or difficulty of the matter;
- the quality of the work done;
- where, the circumstances in which, and the time within which, the work was done; and
- any other relevant matters.[225]

The process of recovering costs is governed by O 63. Where costs are to be taxed an application is made to the Costs Court by summons to the prothonotary.[226] The summons is to be served on parties liable to pay the costs not less than 14 days before the hearing day. The applicant files a bill in respect of costs prepared in accordance with r 63.42 along with the summons, which bill is served on the party liable to pay costs. The content of the bill of costs is governed by r 63.42 which requires charges and disbursements set out in separate columns, itemised and totalled at the foot of each page and carried forward to the head of the next page. The items are to be listed in chronological order, numbered, and accompanied by a brief description. A description justifying the allowance is to follow the chronological description. The bill is to disclose hourly rates and any work done by an agent or servant of the solicitor; and set out work that was carried out by a clerk, as well as the costs associated with the work and including the name and position of the clerk. The inclusion or exclusion of particular items is at the discretion of the taxing officer.[227] The discretion is exercised judicially and not arbitrarily, having regard to the factors listed at r 63.48(2). In arriving at a decision whether or not to tax costs the officer may admit evidence, receive relevant documents, and administer oaths to parties. Costs include the costs of taxation.[228]

In Victoria in the case of taxed costs on the standard or indemnity basis the items that a legal practitioner is entitled to put into an account to be paid by a party are regulated.[229] The rules also specify what may be charged for particular items of work. The *Supreme Court (Chapter I New Scale of Costs and Other Costs Amendments) Rules 2012* (Vic) introduces a Scale of Costs based on six-minute units and expressed as hourly rates in Appendix A and categorised according to the type of work done. The

225 Uniform Law s 3.4.32(7)(a) – (j).

226 Rule 63.38.

227 Rule 63.48.

228 Rule 63.36.

229 Vic r 63.34; see also NT r 63.32; Qld r 691; SA r 264.

scale is expressed to be GST exclusive so that legal practitioners who charge their clients on scale add GST to the total sum to be charged.

The first item refers to costs allowable for attendances, travel and waiting. Attendances in the Scale of Costs not based on folios or individual attendance charges, are based on timed charges. Item 1(a) allows $36 per six minutes, being $360 per hour for attendance by a legal practitioner requiring legal skill or knowledge. Item 1(b) allows $27 per six minutes, being $270 per hour for attendance requiring legal skill or knowledge by an employee who is not a legal practitioner. Item 1(c) allows $21 per six minutes, being $210 per hour for attendance not requiring legal skill or knowledge capable of being performed by a clerk.

Item 17 of the scale includes an allowance of an additional amount having regard to the circumstances of the case. Under item 17 additional amounts may be allowed in the Scale of Costs for work requiring skill, care and responsibility in complex matters, or which involve difficult or novel questions, or for the research into and consideration of questions of law or fact, or on the basis of specialised knowledge, skill and responsibility, or where the number of documents is voluminous, or they are of particular importance regardless of their size, or where the matter involves large sums of money or valuable property, or for other relevant matters.

Item 19 in the scale allows costs for counsel's fees. These are set at a maximum of $5,000 per day for junior counsel, and $7,500 per day for senior counsel, for trial including appeal appearances; and $2,500 and $3,750 respectively for other appearances. Rule 63.82 allows for the payment of fees to counsel at scale on a daily basis, or as a lump sum for the length of the proceeding, or on another basis determined by the Costs Court. Where counsel's fee is calculated on a daily rate, a daily fee for the second day includes the time spent in preparation and conferences, as well as the hearing on the day.[230] Hourly maximum allowances are also set at $500 and $750 respectively for junior and senior counsel for preparation, conferences, views, drawing or settling documents, advice and opinion, and other work. In Victoria if a fee is allowed for a solicitor or counsel to draw and settle, or peruse or advise on a document, then no additional fee may be allowed for a conference unless for special reasons it was proper and necessary.[231] In complex and substantial matters two counsel may be reasonable. Those fees should be allowed if the decision was made by a prudent and reasonable litigant who had been properly advised by their solicitor. Counsel are not allowed fees incurred prematurely for briefs for trials that did not occur.[232]

Where costs are taxed pursuant to an order of the Supreme Court, counsel's fees in excess of scale cannot be allowed by the Costs Court unless the Supreme Court otherwise orders. The application is made to

230 Refresher fee. See also Qld r 731; Tas r 863.

231 Rule 63.79.

232 Rule 63.82.

the Supreme Court at the same time that the costs order is sought. Counsel must seek an order for costs exceeding scale (being $7,500 for senior counsel and $5,000 for junior counsel) to be paid by the opposing party. The application for the costs order may be for either a specific sum, or for an order that it is appropriate to seek a sum in excess of scale maximum and for the Costs Court to determine the quantum on a taxation. Either the Supreme Court fixes the rate or the amount by which counsel's fees may exceed scale, or the Costs Court as directed by the Supreme Court does so on a costs assessment or taxation. The Costs Court is not empowered to allow fees in excess of the scale except in restricted circumstances. These include where a Notice of Discontinuance has been issued, or a formal Offer of Compromise has been made and accepted, or where the taxation of costs is made pursuant to a Release on terms, or reviews pursuant to the *Legal Profession Act 2004* (Vic) where the reviews are conducted in accordance with the scale.

The hourly rates actually charged by the individuals who performed the work must be included in the bill. The cost of photocopying is entirely discretionary in the scale, at the discretion of the Costs Court. Guidelines for photocopying will be issued from time to time, and they are not intended to limit the discretion to allow appropriately higher or lower fees. The scale also provides for the redaction, collation, pagination and indexing of documents based on a calculation of a reasonable time taken for each task in the circumstances.

The scale provides for the leaving of messages by email or SMS or other means that are 20 words or fewer. It also provides allowances for redaction and collation, pagination and indexing of documents. Further, the scale includes a charge to receive correspondence by any means and placing a copy of the letter on a file. This includes the printing of emails or facsimiles.

The scale differentiates between the perusal, scanning and examination of documents. Items 11, 12, and 13 of the scale include allowances for review and consideration, delegation and supervision, and research. The scale provides an allowance for solicitors to approve documents drawn by counsel prior to filing and service. Solicitors may apply to the Costs Court for allowances for reviewing and consideration, for delegation and supervision, and for research. Applications are required to be supported by evidence, for example by file notes or other means. In making allowances for such claims the Costs Court has complete discretion. The discretion will, however, be exercised according to the proof provided, and the particulars of the claims made. Claims for research are in general not allowed unless the solicitor has undertaken research on a complex question of substantive, but not of procedural, law.

Fixed fees are provided in relation to corporations short form bills. Additional costs in the way of reasonable disbursements can be allowed.

Review of taxation

[11.230] Where the Costs Judge or, by direction, a judicial registrar, Costs Registrar, Deputy Costs Registrar, Prothonotary or Deputy Prothonotary[233] makes an order as to costs the decision may be reviewed in the first place by being referred back for reconsideration,[234] and, in the second, on appeal. An order of the Costs Court constituted by a Costs Judge may be reconsidered by the same Costs Judge on application by any party within 14 days of the order being made with respect to any item or part of an item, or an amount in respect of an item, in a bill. The Costs Judge may confirm, set aside or vary the taxation, or make any further necessary order, and make another order as required. In reconsidering the taxation the Costs Court may receive further evidence. The Costs Judge provides written reasons for any order made in reconsideration of the taxation. The Costs Judge's reconsideration is with respect to particular items and not the principles employed in the taxation.[235]

The order made upon reconsideration under r 63.56.1(6) or r 63.56.4(7) may be reviewed by a Judge of the Court on an application of any interested party.[236] In the application the party may object to items in the bill and must state both the grounds of objection, and the order that is sought in its place. Unlike reconsideration by the Costs Judge the court does not receive further evidence without order. The party's objection is bound by the terms of the notice. The judge may confirm, set aside or vary the order, or make a further order. It may remit any item in the bill to the Costs Court. An appeal of an order of the Costs Court is not a stay of execution of that order. A costs order under appeal does involve a review of the principle employed in the taxation and the identification of any error by which the Costs Court proceeded. Where the objection raised is as to the Cost Court's exercise of its discretion the court interferes only with great hesitation and in exceptional circumstances.[237]

Costs of taxation

[11.240] Taxing a bill of costs can be expensive. The costs of taxation are borne by the party liable to pay costs. If the bill contains contentious items to which objections — either as to the amount charged, or whether costs were incurred reasonably — are raised the taxation may assume the qualities of a trial over costs. In Victoria the parties may serve an offer of compromise on each other in respect of the amount of the costs to be

233 See r 63.05.

234 Rule 63.56.1.

235 *Sparrow v Hill* (1881) 7 QBD 362.

236 Rule 63.57.

237 *Schweppes' Ltd v Archer* (1934) 34 SR (NSW) 178 at 183–184; *Australian Coal & Shale Employees' Federation v Commonwealth* (1953) 94 CLR 621 at 629; *Higgins v Nicol (No 2)* (1972) 21 FLR 34 at 50–54; *Magna Alloys & Research Pty Ltd v Coffee (No 2)* [1982] VR 97; *Dalgety Australia Operations Ltd v FF Seeley Nominees Pty Ltd (No 2)* (1988) 49 SASR 75.

taxed.[238] If the offer of compromise is greater than the taxed costs the costs of taxation are paid by the party entitled to costs. On the other hand, where the offer of compromise is not greater than the taxed costs the party liable to pays costs pays the costs of taxation. The Costs Court may make orders for the costs of taxation.[239]

Security for costs

[11.250] The purpose of an order for security for costs is to ensure justice between the parties, and in particular to ensure that unsuccessful proceedings do not disadvantage defendants. Under prescribed circumstances the court has jurisdiction to order the plaintiff to pay into court security for the defendant's costs in the proceeding.[240] The court makes an order for security for costs on the application of a defendant. The proceeding against the defendant is stayed until the security is given. The circumstances under which security for costs may be ordered on application are set out in r 62.02:

> **62.02 When security for costs may be ordered**
>
> (1) Where—
>
> (a) the plaintiff is ordinarily resident out of Victoria;
>
> (b) the plaintiff is a corporation or (not being a plaintiff who sues in a representative capacity) sues, not for the plaintiff's own benefit, but for the benefit of some other person, and there is reason to believe that the plaintiff has insufficient assets in Victoria to pay the costs of the defendant if ordered to do so;
>
> (c) a proceeding by the plaintiff in another court for the same claim is pending;
>
> (d) subject to paragraph (2), the address of the plaintiff is not stated or is not stated correctly in the plaintiff's originating process;
>
> (e) the plaintiff has changed his, her or its address after the commencement of the proceeding in order to avoid the consequences of the proceeding;
>
> (f) under any Act the Court may require security for costs—
>
> the Court may, on the application of a defendant, order that the plaintiff give security for the costs of the defendant of the proceeding and that the proceeding as against that defendant be stayed until the security is given.
>
> (2) The Court shall not require a plaintiff to give security by reason only of paragraph (1)(d) if in failing to state the plaintiff's address or to state the plaintiff's correct address the plaintiff acted innocently and without intention to deceive.

The jurisdiction to order security for costs exists both under the rules and as part of the court's inherent jurisdiction. Under the jurisdiction the court has broad discretion as to whether it will order security for costs, and for

238 Rule 63.36(3)(a).

239 Rule 63.36(4).

240 Vic r 62.02. See also ACT r 1901; FCR r 19.01; NSW r 422.21; NT r 62.02; Qld r 670; SA r 194; Tas r 828; WA O 25 r 1.

what amount.[241] The discretion conferred on the court means that it need not impose an order simply because grounds can be established.[242] The list of factors is not exhaustive.[243] The court may take any factor into account without restriction except as to relevance.[244] Factors are weighed according to how intrinsically persuasive they are with respect to making an order for security for costs, and each individual factor is weighed in relation to other factors and the weight accorded to those factors.[245]

How parties are classified for the purposes of security for costs may not be restricted to their formal designations as plaintiff or defendant. A plaintiff may not be required to provide security for costs if they have brought the action in order to protect a right and, although nominally the plaintiff, they are in effect initiating proceedings to defend a legitimate position.[246] In *Willey v Synan*[247] the plaintiff found money on a ship and this money was taken by customs on arrival in Australia. The plaintiff made a claim for the money. Customs notified the plaintiff that to obtain the money he would have to commence a proceeding in recovery or else forfeit the money. The plaintiff commenced a proceeding to recover the money. Customs sought security for costs on the basis that the plaintiff was not ordinarily resident in Australia. Starke J at first instance held that the plaintiff should give security for costs. The plaintiff succeeded on appeal to the High Court which found that the plaintiff was in fact defending his position and security for costs was therefore not appropriate. Latham CJ said:

> In this case the Collector really initiated legal process by giving a notice under sec 207 which would result in the exclusion of any right of the plaintiff unless the plaintiff himself took legal proceedings. If the Collector had not acted under sec 207, it would not have been necessary for the plaintiff, in order to prevent the extinction of his right, to take any proceedings. If, no notice having been given, he took proceedings in conversion or detinue, he would be in the same position as any plaintiff who comes into the jurisdiction to complain of an act which he alleges to be wrongful. But, as the Collector has given him a notice under sec 207, he is, in effect, forced into legal proceedings, not merely to enforce his claim but to prevent his claim from being extinguished. He is therefore really in the position of a defendant.[248]

241 *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189 at 196–198 per Beazley J.

242 *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2012] NSWSC 1026 at [85]–[86].

243 Similarly the list of factors at r 42.21(1A) of the *Uniform Civil Procedure Rules 2005* (NSW) is not treated as exhausting the court's discretion.

244 *Morris v Hanley* [2000] NSWSC 957 at [11]–[21]; *Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd* (1985) 1 NSWLR 114.

245 *Acohs Pty Ltd v Ucorp Pty Ltd* (2006) 155 FCR 181 at [12].

246 *Re Travelodge* (1978) 21 ACTR 17 (a shareholder sued a company to prevent a compulsory acquisition of shares).

247 *Willey v Synan* (1935) 54 CLR 175.

248 *Willey v Synan* (1935) 54 CLR 175 at 180.

Dixon J said:

> It appears to me that the collector is the actor. The notice is a step taken by him directed at obtaining a condemnation. It is a statutory substitute for judicial proceedings by the Crown against the goods. Its effect is to cause the onus of taking proceedings upon the owner or supposed owner.
>
> …
>
> The provisions of the Customs Act, in effect, enable the officers of the Crown to take the preliminary steps by simple notices out of Court so that it is the claimant who must issue process. But when he does issue a writ he does so to protect his supposed ownership. In substance he is not the attacker, actor or person seeking redress.
>
> For these reasons I think he is not liable to give security for the costs of the action.[249]

In *Re Travelodge Australia Ltd*[250] the applicant held stock in a company. The company was the subject of a takeover offer. However, the applicant refused the offer and was therefore defined as a "dissenting offeree" within the meaning of the *Companies Ordinance 1962* (ACT). The statute provided that in such circumstances the applicant could be served with a notice such that if it were so served and the applicant took no further action, the respondent would have been entitled and bound to acquire the applicant's stock. The applicant commenced proceedings under the Ordinance, applying for an order that the provision which would ordinarily permit the respondent to acquire the applicant's stock was inapplicable in the circumstances of the case. The respondent applied unsuccessfully for an order for security for costs. In refusing the application Blackburn CJ, referring to *Willy v Synan*,[251] said:

> There is a clear resemblance to the facts of the case before me. The applicant is a person who invokes a special statutory procedure in order to preserve to himself a right which he considers a valuable one, which by the combined effect of a statute and the actions of the respondent may be taken away from him. The respondent asserts that the applicant is the owner of the stock units and relies on the statute to effect a transfer of those stock units to himself. The case clearly falls within the principle which was applied by the High Court, and illuminated by the judgment of Dixon J, in Willey v Synan.[252]

It has been said that a court has "many and varied" sources of power for its jurisdiction to order a party to provide security for costs or to pay money into court.[253] These include the Supreme Court's inherent

249 *Willey v Synan* (1935) 54 CLR 175 at 185–186.

250 *Re Travelodge* (1978) 21 ACTR 17.

251 *Willey v Synan* (1935) 54 CLR 175.

252 *Re Travelodge* (1978) 21 ACTR 17 at 19–20.

253 *JKB Holdings Pty Ltd v de la Vega* [2013] NSWSC 501 at [11] per Lindsay J, listing the factors at [11]–[13].

jurisdiction,[254] powers conferred upon the court by statute,[255] and examples of money being paid into court in circumstances where no order for security for costs has been made.[256]

The court will not impose security costs on the plaintiff on the basis of their financial weakness alone, unless they are a corporate plaintiff,[257] on the ancient principle that poverty should be "no bar to a litigant".[258] The strength of the plaintiff's case will also be a consideration in the exercise of the court's discretion as courts will be hesitant to order security where the plaintiff has a meritorious case.[259] Nor can a defendant to a claim or to a counterclaim be required to give security for costs.[260]

This general rule is not, however, an absolute rule.[261] In exercising the power to make an order for security for costs the court undertakes to consider and balance certain factors in order to do justice between the parties. These include ensuring that the defendant is adequately and fairly protected, and ensuring that no injustice is done to the impecunious plaintiff such that it would be prevented from undertaking proceedings, or such that it would be prejudiced in conducting its proceedings.[262]

Exercising the discretion to order security: general principles

[11.260] The court is empowered to order security for costs at its discretion. The court will not automatically order security for costs.[263] The court's discretion must be exercised judicially; it cannot be exercised "arbitrarily, capriciously or so as to frustrate the legislative intent".[264] In exercising its discretion the court considers the facts and circumstances of

254 Whether the County Court has an implied power to order security for costs the provisions of the *County Court Civil Procedure Rules 2008* (Vic), r 62 renders this unnecessary.

255 Additionally, where an order for security for costs is sought against a corporate plaintiff, *Corporations Act 2001* (Cth), s 1335 gives power.

256 See also *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 at [34].

257 "The basic rule that a natural person who sues will not be ordered to give security for costs, however poor, is ancient and well established": *Pearson v Naydler* [1977] 1 WLR 899 at 902.

258 The general principle that poverty "is no bar to a litigant": *Cowell v Taylor* (1885) 31 Ch D 34 at 38; *Oshlack v Richmond River Council* (1998) 193 CLR 72 is now set out in r 42.21(1B).

259 *Crozat v Brogden* [1894] 2 QB 30.

260 *Willey v Synan* (1935) 54 CLR 175; *Amalgamated Mining Services Pty Ltd v Warman International Ltd* (1988) 19 FCR 324.

261 *Melville v Craig Nowlan & Assocs Pty Ltd* (2002) 54 NSWLR 82 at 108; *Morris v Hanley* [2000] NSWSC 957 at [11]–[21].

262 *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744 at [47].

263 *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744 at [20], [56]–[57] and [60]–[62].

264 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [22].

the particular case.[265] In *PS Chellaram & Co v China Ocean Shipping Co* McHugh J outlined the principles governing the discretion of the court to order security for costs:

> To make or refuse an order for security for costs involves the exercise of a discretionary judgment. That means that the court exercising the discretion must weigh all the circumstances of the case. The weight to be given to any circumstance depends not only upon its own intrinsic persuasiveness but upon the impact of the other circumstances which have to be weighed. A circumstance which may have very great weight when only two or three circumstances have to be weighed may be of minor significance when many circumstances have to be weighed. However, for over 200 years, the fact that a party, bringing proceedings, is resident out of the jurisdiction and has no assets within the jurisdiction has been seen as a circumstance of great weight in determining whether an order for security for costs should be made. Indeed, for many years the practice has been to order such a party to provide security for costs unless that party can point to other circumstances which overcome the weight of the circumstance that that person is resident out of and has no assets within the jurisdiction.[266]

The principles applying to applications for security for costs were summarised in *Energy Drilling Inc v Petroz NL* by Gummow J as follows:

> The purpose of ordering security for costs against an applicant ordinarily resident outside the jurisdiction is to ensure that a successful respondent will have a fund available within the jurisdiction of this Court against which it can enforce the judgment for costs, so that the respondent does not bear the risk as to the certainty of enforcement in the foreign country and as to the time and complexity of the action there which might be necessary to effect enforcement. On the other hand, the mere circumstance that an applicant is resident outside the jurisdiction does not necessarily invite an exercise of discretion in favour of ordering security, the question being how justice will be best served in the particular case.[267]

In *Oswal v Australia and New Zealand Banking Group*[268] Whelan J heard appeals in two proceedings[269] against an order for security for costs that had been made by Efthim AsJ. The issues on appeal turned on the answer to the question whether the defendants were already sufficiently secured for their costs. The court accepted that the case for ordering security for costs would have been "strong, indeed compelling"[270] absent any consideration of the security the plaintiffs — Radhika Pankaj Oswal and her husband Pankaj Oswal — had already provided, since the Oswals

265 *Merribee Pastoral Industries Pty Ltd v Australia and New Zealand Banking Group Ltd* (1998) 193 CLR 502.

266 *PS Chellaram & Co Ltd v China Ocean Shipping Co* (1991) 102 ALR 321 at 323.

267 *Energy Drilling Inc v Petroz NL* [1989] ATPR 40-954 at 50,422 (citations omitted), referring to *Kent Heating Ltd v Cook-on-Gas Products Pty Ltd* (1984) 59 ALR 277 at 279; *Barton v Minister for Foreign Affairs* (1984) 2 FCR 463; *CBS Records Australia Ltd v Telmak Teleproducts (Aust) Pty Ltd* (1978) 72 ALR 270 at 284–285.

268 *Oswal v Australia and New Zealand Banking Group Ltd* [2012] VSC 356.

269 *Oswal v Australia and New Zealand Banking Group Ltd* [2016] VSC 119.

270 *Oswal v Australia and New Zealand Banking Group Ltd* [2012] VSC 356 at [4].

resided outside Australia in the United Arab Emirates, had no significant unencumbered assets in Australia, and were the subject of large claims by the Australian Taxation Office.

The plaintiffs had entered a number of agreements providing purchasers of stock owned by them, and lenders of funds with warranties and indemnities in relation to numerous matters, including costs that might be incurred in the proceedings. Radhika Oswal had executed a guarantee to reimburse ANZ for its expenses in relation to a guarantee entered by the parties. Both plaintiffs, Mr and Mrs Oswal, signed share mortgages which secured ANZ and any receivers. The share sale deed also contained a large number of representations, warranties and indemnities for the benefit of the parties, Yara and Apache, who were purchasers of the Oswals' shares in Burrup Holdings Ltd and Burrup Fertilisers Pty Ltd.

In arriving at its decision the court considered and compared the plaintiffs' "present debt position" and their present "claims" position with the funds available to the plaintiffs to meet their liabilities to the defendants. Yara and Apache had paid $US582,527,535 for the Oswals' shares. An escrow account contained $US20 million, consisting of $US9.2 million in relation to Mr Oswal's mortgaged shares, and $US10.8 million in relation to Mrs Oswal's mortgaged shares and escrow shares. The share purchase price included holdback payments in favour of Yara for $US5 million, and Apache for the amount of $US15 million. A debt owed to the bank had been substantially repaid, but the bank was still owed $A1.77 million for receivership costs and expenses.

Efthim AsJ ordered security for costs on the basis that the holdback amount was subject to further claims, and that it constituted a contingent fund which could not defeat an order for security for costs. Further, he likened Yara's and Apache's positions to that of an insured defendant and relied on the Court of Appeal decision in *Livingspring Pty Ltd v Kliger Partners*[271] in which the court held that the insured status of the defendant was an irrelevant consideration in an application for security for costs.[272]

On appeal, the plaintiffs submitted that at issue was not the status of the fund as a contingent asset, but only its availability to satisfy claims made against the plaintiffs.[273] The receivers bore the onus of demonstrating, in an application for security for costs, what the quantum of the claim was likely to be by presenting evidence of the claims that would be made against the plaintiffs, thereby giving the court a proper basis for assessing the adequacy of the fund.[274] The plaintiffs also submitted that both Yara and Apache could draw progressively from the escrow amounts in the

271 *Livingspring Pty Ltd v Kliger Partners* (2000) 20 VR 377.

272 *Oswal v Australia and New Zealand Banking Group Ltd* [2012] VSC 356 at [39].

273 *Oswal v Australia and New Zealand Banking Group Ltd* [2012] VSC 356 at [40].

274 *Oswal v Australia and New Zealand Banking Group Ltd* [2012] VSC 356 at [40].

course of proceedings.[275] Further, the plaintiffs contended that neither Yara nor Apache occupied positions analogous to insured defendants because their liability was not insured, but they possessed a right to draw from a fund created by the sale of the plaintiffs' shares.[276]

The defendants submitted that Efthim AsJ's decision and reasoning that weighed the factor of the contingent funds within the jurisdiction available to receivers and others to satisfy claims against the prospect of a costs order being unsatisfiable was correct.[277] Only a defendant's immediately indefeasible right to an asset in the jurisdiction enabled the plaintiff to avoid an order for security for costs on the basis of an asset within the jurisdiction.[278] ANZ and the receivers submitted that the plaintiff's liability to ANZ and the receivers was not secured by the escrowed amount for a number of reasons. First, because neither could have their costs paid from the escrowed amount, since the escrow moneys were exclusively for Yara's and Apache's use during the escrow period, and not available to ANZ and the receivers;[279] secondly, because their entitlements only arose after 24 months; thirdly, because the amount they received was subject to the priority of Yara and Apache, and they were not able to assess the price of escrowed and mortgaged shares until Yara's and Apache's claims were determined; and, finally, because ANZ's outstanding liability could not be met with the interest earned on the moneys in the escrow account.

Whelan J held that security for costs should not have been ordered. His Honour rejected Yara's and Apache's contention that their position was analogous to that of an insured defendant. An insurer is a third party to a dispute, whereas ANZ was directly involved in the dispute. The charged funds in favour of ANZ may have been called upon by Yara and Apache to meet their costs by ANZ's sale of Mrs Oswal's assets secured by rights granted to ANZ.[280] Whelan J rejected the submission that a general principle had been established that security for costs would only be avoided if the defendants had an immediately indefeasible right to the plaintiff's assets in the jurisdiction. He affirmed that any application for security for costs will turn on the particular facts of the case. The authorities cited by the defendants failed to establish the general principle contended for. The authorities cited depended on the particular assets involved in each case and an assessment of whether or not the asset was

275 *Oswal v Australia and New Zealand Banking Group Ltd* [2012] VSC 356 at [41].

276 *Oswal v Australia and New Zealand Banking Group Ltd* [2012] VSC 356 at [41].

277 *Oswal v Australia and New Zealand Banking Group Ltd* [2012] VSC 356 at [43].

278 Relying upon the authority of *James v Nolmont Pty Ltd (subject to a deed of company arrangement)* [2007] FCA 1604 and *Tan Kah Hock v AWP SGT 26 Investment Ltd* [2008] FCA 540.

279 Yara and Apache adopted this submission, describing the funds as "our money": *Oswal v Australia and New Zealand Banking Group Ltd* [2012] VSC 356 at [48].

280 *Oswal v Australia and New Zealand Banking Group Ltd* [2012] VSC 356 at [55].

likely to be available to meet the plaintiff's liability — which, in those cases (involving the receipt of dividends and royalties respectively), it was decided it would not be.[281]

Examining the moneys available to the respective defendants Whelan J found that the plaintiffs' holdback amounts were charged with the payments of costs they were required to make by order of the court in the proceedings. Mr Oswal's beneficial interest in the holdback amount formed part of the share mortgage; while Mrs Oswal's share mortgage secured debts and liabilities payable by her to ANZ, which included costs in the relevant proceedings between the parties. Whelan J concluded that $US20 million was held in an escrow account to satisfy claims made by Yara and Apache which both defendants could draw from immediately and progressively to meet the costs as they were incurred. His Honour found that on the evidence presented only Yara and Apache had claims to the funds. He further found that unclaimed funds from the escrow account at the expiry of the escrow period were to be paid to ANZ which could then be used to satisfy the Oswals' outstanding debt to the bank. Moreover, during the escrow period ANZ would be paid interest from the funds in escrow; and only after all payments to the defendants had been made would the plaintiffs be able to recover moneys from the escrow account.

The sufficiency of the security given for costs was assessed on the basis of the available evidence at the time of the hearing of the application. The defendants had provided security for the costs they were likely to incur as far as that could be ascertained at the time of the hearing of the application.[282] Any change that was likely to occur in relation to new claims being raised, or an increase in costs, had to be demonstrated on the presentation of evidence, which had not occurred.[283] Further, any risk to the defendants borne by the decision could be averted by a further application sustained by evidence as to the inadequacy of the security for costs, including past costs, offered by the plaintiffs.[284]

Oswal v Australia and New Zealand Banking Group Ltd resists attempts to determine applications on the basis of general principles, and confirms that assessments of whether security for costs will be ordered proceeds on a case-by-case basis with the court exercising judicial discretion.

[11.270] A court's discretionary power to order security for costs on an appeal or on an application for appeal is considered absolute and confined only by the requirement that it be exercised judicially.

281 *Oswal v Australia and New Zealand Banking Group Ltd* [2012] VSC 356 at [54].

282 *Oswal v Australia and New Zealand Banking Group Ltd* [2012] VSC 356 at [59].

283 *Oswal v Australia and New Zealand Banking Group Ltd* [2012] VSC 356 at [60].

284 *Oswal v Australia and New Zealand Banking Group Ltd* [2012] VSC 356 at [63].

Nevertheless, the factors relevant to the exercise of the discretion whether to order security for costs have been considered in a number of cases.[285] The relevant factors include:[286]

The plaintiff's prospects of success, or the merits of the proceedings[287]

[11.280] Doing justice between the parties requires the court to assess whether and what prospect of success the plaintiff is likely to enjoy, without, however, prematurely determining the relative strengths of the parties' cases prior to hearing them.[288] The likelihood of an appeal's success is a factor that weighs heavily against the making of an order for security for costs.[289] However, the improbability of its success does not weigh as heavily in favour of making the order. In general a *prima facie* compliant, regular claim which discloses a cause of action should not be excluded. Conversely, where evidence can be presented showing the claim to lack a cause of action, or to involve no arguable questions of law, or to lack any reasonable prospect of success, the court may make an order for security for costs.[290] If no such evidence is presented the matter should be allowed to proceed as *bona fide* and as having a reasonable prospect of success.[291]

The genuineness of the proceedings[292]

[11.290] The court considers whether the proceedings are undertaken for *bona fide* reasons.[293] A relevant factor is whether proceedings are brought for reasons that are not *bona fide*, or are a sham, or otherwise an abuse of process. Examples include an inadequate pleading, or vexatious

285 See *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189; *Tradestock Pty Ltd v TNT (Management) Pty Ltd* (1977) 14 ALR 52; *Wollongong City Council v Legal Business Centre Pty Ltd* [2012] NSWCA 245 at [26]–[35]. New South Wales Law Reform Commission, *Security for Costs and Associated Costs Orders* (Report 137, 2012) led to an amendment to the rules: *Uniform Civil Procedure Rules (Amendment No 61) 2013* (NSW).

286 See New South Wales Law Reform Commission, *Security for Costs and Associated Costs Orders* (Report 137, 2012) which led to amendments to the rules resulting in *Uniform Civil Procedure Rules (Amendment No 61) 2013* (NSW). The factors set out here at [11.280]–[11.400] refer to the provisions of the new amendments, *Uniform Civil Procedure Rules (Amendment No 61) 2013* (NSW), r 42.21(1A).

287 Corresponding to *Uniform Civil Procedure Rules (Amendment No 61) 2013* (NSW), r 42.21(1A)(a).

288 *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 at [39].

289 *Kenyon v Akeroyd* [2007] VSCA 50 at [12]. See also *Timbercorp Finance Pty Ltd (in liq) v Tomes* [2015] VSCA 322 at [8].

290 *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2015] VSCA 169 at [16].

291 *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189 at 197; *Staff Development & Training Centre Pty Ltd v Commonwealth* [2005] FCA 1643 at [12]–[13].

292 Corresponding to *Uniform Civil Procedure Rules (Amendment No 61) 2013* (NSW), r 42.21(1A)(b).

293 *Bhagat v Murphy* [2002] NSWSC 384 at [20]–[21].

claim,[294] particularly one brought by a self-represented plaintiff with "abundant time" to make unrestricted applications.[295]

The impecuniosity of the plaintiff[296]

[11.300] Security for costs is ordered to secure against a risk that an adverse costs order against a party would not be satisfied. Evidence of the plaintiff's financial position engages the court's discretion.[297] The threshold question is whether the unsuccessful plaintiff will be able to pay the defendant's costs, determined on the basis of evidence presented to the court on the question.[298] If the defendant alleges on the basis of credible evidence that the plaintiff is impecunious, the plaintiff must satisfy the court to exercise its discretion in the context of all other relevant factors and not order security for costs, or to make an order for a smaller amount of security than that sought by the defendant.[299]

"Mere impecuniosity" without more will not in itself justify an order for security for costs. The court will make an order for security for costs only after considering impecuniosity in combination with other factors. The order may be made to suit the circumstances and justice of the case. For example, in *Levy v Bablis*[300] the court ordered security to be paid in two tranches. Mere impecuniosity is not a sufficient basis for making an order for security for costs against a natural person.

In *Timbercorp Finance (in liq) v Tomes*[301] the plaintiff brought a debt claim against defaulting borrowers, which included the applicant. The defendant (Tomes) applied for security for costs against the plaintiff (Timbercorp), but failed to demonstrate the existence of a significant risk that a costs order made against the plaintiff would not be paid. In that case the court considered the factors that weighed in favour, and those that weighed against, ordering security for costs. Against ordering security for costs was the fact that the liquidator provided assurances that it would exercise a lien against the corporate plaintiff's assets in favour of the applicant, and that the corporation had at its disposal unsecured funds of $5.3 million to satisfy any costs order in favour of the defendant under

294 *Bhagat v Murphy* [2002] NSWSC 384 at [26].

295 *Lall v 53–55 Hall Street Pty Ltd* [1978] 1 NSWLR 310 at 313–314.

296 Corresponding to *Uniform Civil Procedure Rules (Amendment No 61) 2013* (NSW), r 42.21(1A)(c).

297 *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 at [35]–[36]; *Thalanga Copper Mines Pty Ltd v Brandrill Ltd* [2004] NSWSC 349 at [12]–[13]; *Acohs Pty Ltd v Ucorp Pty Ltd* (2006) 155 FCR 181 at [10]; *Ballard v Brookfield Australia Investments Ltd* [2012] NSWCA 434 at [29]–[41].

298 *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744 at [2], [35] and [60].

299 *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744 at [62] and [65].

300 *Levy v Bablis* [2011] NSWCA 411 at [9], and [11], [13]ff. Particular note should be taken of NSW r 42.21(1B).

301 *Timbercorp Finance Pty Ltd (in liq) v Tomes* [2015] VSCA 322 at [29].

s 556 of the *Corporations Act 2001* (Cth).[302] These factors weighed against the defendant's arguments that the lien could only be exercised to meet the costs of the liquidator personally and was not to the purpose if the costs order were to be made against Timbercorp, and that a company in liquidation posed a higher risk of non-payment than a solvent one. While the status and effect of the liquidator's lien was not fully argued before the court it held that any consequential prejudice to the defendant might be rectified, given the assurances provided by the liquidator "as an officer of the Court",[303] by an order for costs against the liquidator personally that thereby attached the lien to the order.[304]

Whether the plaintiff's impecuniosity is attributable to the defendant[305]

[11.310] The court will take into consideration as a relevant factor whether the defendant's conduct has caused or is one of the reasons the plaintiff is impecunious.[306] In taking into account whether the defendant's actions are the cause, or one of the main causes, of the plaintiff's impecuniosity the strength of the plaintiff's case is not a relevant consideration.[307] Nor should an impecunious party be barred from initiating proceedings in circumstances where the action itself is being pursued for the prospect that it might provide relief from impecuniosity.[308] However, a plaintiff who has put assets beyond the reach of the court cannot argue that their impecuniosity is a relevant consideration.[309]

302 The court also observed that Timbercorp was owed $181 million over which the company's liquidator's exercised a lien for the purpose of meeting reasonable expenses (including the applicant's costs) and which its secured creditors had no claim upon: *Timbercorp Finance Pty Ltd (in liq) v Tomes* [2015] VSCA 322 at [24].

303 *Timbercorp Finance Pty Ltd (in liq) v Tomes* [2015] VSCA 322 at [23].

304 *Timbercorp Finance Pty Ltd (in liq) v Tomes* [2015] VSCA 322 at [28], citing *Re Mendarma Pty Ltd (in liq) (No 2)* (2007) 61 ACSR 601 at [44].

305 Corresponding to *Uniform Civil Procedure Rules (Amendment No 61) 2013* (NSW), r 42.21(1A)(d).

306 Described as the "causation" factor: *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 at [85]–[101].

307 *Dae Boong International Co Pty Ltd v Gray* [2009] NSWCA 11 at [34]; see *Timbercorp Finance Pty Ltd (in liq) v Tomes* [2015] VSCA 322 at [30]–[31] (the court finding that nothing turned on Timbercorp's submission that its debt claim had been necessitated by the actions of defaulting borrowers, including the applicant).

308 *Merribee Pastoral Industries Pty Ltd v Australia and New Zealand Banking Group Ltd* (1998) 193 CLR 502 at [26.4(g)].

309 *Rajski v Computer Manufacture & Design Pty Ltd* [1982] 2 NSWLR 443 at 452. See also NSW r 42.21(1)(f).

Whether the plaintiff is effectively in the position of a defendant[310]

[11.320] It is relevant to consider whether the plaintiff is in fact defending rather than prosecuting their rights.[311] Where it is necessary for a plaintiff to initiate proceedings the court may decline to order security for costs.[312] Whether a plaintiff is in effect in the position of a defendant will depend on the particular facts of each case.[313]

The "stultification" factor[314]

[11.330] A significant factor for the court's consideration is whether the order for security for costs will make it impossible for the plaintiff to initiate their action and prosecute their claim.[315] It may also be a relevant consideration for the court to take into account whether, behind the named litigant, other persons with means are either conducting or controlling the litigation, or have a financial interest in the outcome of the litigation.[316] It may cause oppression to order security for costs, even for a relatively small amount, against a corporate plaintiff without the means to pay. Even when the corporate plaintiff is pursuing a meritorious claim against a financially secure corporate defendant the claim may be disabled by the order for costs.[317] Evidence may have to be presented demonstrating that the order would in reality cause oppression to the corporate plaintiff by demonstrating that persons standing behind the named corporate plaintiff were unable to pay the order for security for which the defendant had applied.[318]

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310 Corresponding to *Uniform Civil Procedure Rules (Amendment No 61) 2013* (NSW), r 42.21(1A)(e).

311 *Amalgamated Mining Services Pty Ltd v Warman International Ltd* (1988) 19 FCR 324; 88 ALR 63 at 67–68.

312 *Hyland v Burbidge* (unreported; NSWSC; 23 October 1992).

313 Compare *Hyland v Burbidge* (unreported; NSWSC; 23 October 1992): the claim that an overseas plaintiff was effectively in the position of a defendant and should not be ordered to provide security was dismissed. However, in *Dee-Tech Pty Ltd v Neddam Holdings Pty Ltd* [2009] NSWSC 1095 at [13]–[15] the court held that the plaintiff's principal claim was a defence to the defendant's claims of forfeiture of a lease and the retaking of possession. The plaintiff was effectively in the position of a defendant, and the application for security dismissed.

314 Corresponding to *Uniform Civil Procedure Rules (Amendment No 61) 2013* (NSW), r 42.21(1A)(f).

315 *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 at [72]; *Staff Development & Training Centre Pty Ltd v Commonwealth* [2005] FCA 1643 at [39].

316 *Acohs Pty Ltd v Ucorp Pty Ltd* (2006) 155 FCR 181 at [49]; *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 5)* [2006] FCA 1672 at [38.8].

317 *Pioneer Park Pty Ltd v Australia and New Zealand Banking Group Ltd* (2007) 65 ACSR 383 at [56] per Basten J.

318 *Odyssey Financial Management Pty Ltd v QBE Insurance (Australia) Ltd* [2012] NSWCA 113 at [17] per McColl JA.

Whether the proceedings involve a matter of public importance[319]

[11.340] An application for security for costs may be denied by the court if the appeal raises matters of public importance. The court may exercise its discretion in refusing to order security for costs if making the order would prevent the plaintiff initiating proceedings the hearing and determination of which would be in the public interest.[320]

In *Timbercorp Finance Pty Ltd (in liq) v Tomes*[321] there were two applications for leave to appeal but only one application for security for costs and no evidence that the other proceeding would not (or be less likely to) continue (thereby airing the issues of public importance) if security were ordered in the application. While the court accepted that case raised matters of public importance it found that it had not been demonstrated that the issues would not be aired.[322]

Whether there has been an admission or a payment into court[323]

[11.350] A factor relevant to the exercise of the court's discretion is whether a prior order had been made and the defendant is seeking a further order for security.[324]

Whether delay by the plaintiff in commencing the proceedings has prejudiced the defendant[325]

[11.360] It is well established that a relevant factor the court may consider in ordering security for costs is the conduct of the parties in the proceedings, in particular how promptly the plaintiff initiated them, and whether there had been any delay causing prejudice to the defendant. Applications for security for costs should be made before an appellant is made to incur significant expenses.[326] A party who succeeds at trial will not normally succeed in an application for security for costs made only after the impecunious unsuccessful party has undergone the trouble and

319 Corresponding to *Uniform Civil Procedure Rules (Amendment No 61) 2013* (NSW), r 42.21(1A)(g).

320 *Smail v Burton; Re Insurance Associates Pty Ltd* [1975] VR 776 at 778, 780; *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2015] VSCA 169 at [14]; *Merribee Pastoral Industries Pty Ltd v Australia and New Zealand Banking Group Ltd* (1998) 193 CLR 502 at [31]; *Soh v Commonwealth* (2006) 231 ALR 425 at [26].

321 *Timbercorp Finance Pty Ltd (in liq) v Tomes* [2015] VSCA 322.

322 *Timbercorp Finance Pty Ltd (in liq) v Tomes* [2015] VSCA 322 at [34].

323 Corresponding to *Uniform Civil Procedure Rules (Amendment No 61) 2013* (NSW), r 42.21(1A)(h).

324 *Welzel v Francis (No 3)* [2011] NSWSC 858; *JKB Holdings Pty Ltd v de la Vega* [2013] NSWSC 501 at [11]–[13].

325 Corresponding to *Uniform Civil Procedure Rules (Amendment No 61) 2013* (NSW), r 42.21(1A)(i).

326 *Smail v Burton; Re Insurance Associates Pty Ltd* [1975] VR 776; *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2015] VSCA 169 at [17]–[18].

expense of preparing its appeal.[327] In *Timbercorp Finance Pty Ltd (in liq) v Tomes*[328] the court held that while the application for an order for security for costs was not promptly made the financial position of the plaintiff was not known for some time so that the applicant's delay did not weigh significantly against making an order for security for costs.[329]

The costs of the proceedings[330]

[11.370] The court may take into account the actual costs of the proceedings. The defendant is required to provide evidence of the costs of preparing the case, including preparing for and conducting the hearing. The court may be more likely to order security where the defendant's legal costs are likely to be substantial.[331]

Proportionality of the security sought compared to the importance and complexity of the issues[332]

[11.380] The court may take into consideration the relationship and in particular the proportionality of security for costs compared with the nature of the claim, in particular the claim's importance and its complexity. If the impecunious plaintiff is claiming a small amount any order for costs may be oppressive, prejudicial or unjust.[333] If the plaintiff's claim is a matter of importance the court may be reluctant to order even a small amount in security,[334] especially where the parties involved have very different means and levels of resources.[335]

The timing of the application for security[336]

[11.390] A party seeking security for costs should do so without undue delay. The court takes delay into account as a relevant consideration in exercising its discretion.[337] Corporate plaintiffs are required have prepared their case thoroughly so as to know their position prior to embarking on

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327 *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2015] VSCA 169 at [18].

328 *Timbercorp Finance Pty Ltd (in liq) v Tomes* [2015] VSCA 322.

329 *Timbercorp Finance Pty Ltd (in liq) v Tomes* [2015] VSCA 322 at [37].

330 Corresponding to *Uniform Civil Procedure Rules (Amendment No 61) 2013* (NSW), r 42.21(1A)(j).

331 See *Western Export Services Inc v Jireh International Pty Ltd* [2008] NSWSC 601 at [82] per Jagot AJ.

332 Corresponding to *Uniform Civil Procedure Rules (Amendment No 61) 2013* (NSW), r 42.21(1A)(k).

333 See *Shackles v Broken Hill Pty Co Ltd* [1996] 2 VR 427 at 432.

334 *Maritime Services Board (NSW) v Citizens Airport Environment Assn Inc* (1992) 83 LGERA 107.

335 *PM Sulcs & Assocs Pty Ltd v Daihatsu Australia Pty Ltd* [2000] NSWSC 826 at [82].

336 Corresponding to *Uniform Civil Procedure Rules (Amendment No 61) 2013* (NSW), r 42.21(1A)(l).

337 *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744 at [68].

litigation, and to prosecute their claims at the commencement of the hearing. In *Buckley v Bennell Design & Construction*[338] the court said that:

> The passage of time is only one item in the list of factors to be taken into account in the balancing exercise: *Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd* (1985) 1 NSWLR 114 at 123 ff; *Thalanga Copper Mines Pty Ltd v Brandrill Ltd* [2004] NSWSC 349 at [25]–[26]; *P M Sulcs & Associates Pty Ltd v Daihatsu Australia Pty Ltd (No 2)* [2000] NSWSC 826. The delay must be weighed not only in terms of prejudice, but also in terms of the factors that have led to the delay: *Acohs Pty Ltd v Ucorp Pty Ltd* (2006) 236 ALR 143 at [61] ff; *Re GAP Constructions Pty Ltd* [2013] NSWSC 822 at [14]–[15] (order for security made notwithstanding the delay).

Ease and convenience (or otherwise) of overseas enforcement[339]

[11.400] The enforcement of orders and judgments in foreign jurisdictions may be problematic and uncertain and should not be a cost imposed on the defendant. Security for costs may therefore be ordered against the plaintiff where the judgment or a component of the judgment may or will be enforced overseas.[340] Foreign enforcement of judgments is not, however, an isolated consideration and is balanced against other factors when considering whether or not to make the order.[341] Nevertheless, it is a highly persuasive consideration and may be sufficient basis for the court to make an order for security for costs,[342] especially where foreign laws make enforcement of a judgment difficult, or there is no agreement between the jurisdictions providing for reciprocal enforcement of judgments.[343] An appellant resident overseas may be sufficient basis for ordering security for costs even if enforcement is unlikely to prove problematic.[344]

[11.410] The list of factors the court takes into consideration is not exhaustive. The court exercises its discretion based on the particular facts

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338 *Buckley v Bennell Design & Construction Pty Ltd* (1974) 1 ACLR 301 at 309.

339 Corresponding to *Uniform Civil Procedure Rules (Amendment No 61) 2013* (NSW), r 42.21(1A)(n) which should be read in conjunction with r 42.21(1A)(m) ("Whether an order for costs is enforceable in Australia") identifying the problem of recovering costs in relation to the enforcement of judgment and orders overseas.

340 *Cheng Xi Shipyard v The Ship "Falcon Trident"* [2006] FCA 759 at [9]; *Gujarat NRE Australia Pty Ltd v Williams* [2006] NSWSC 992 at [29].

341 *Corby v Channel Seven Sydney Pty Ltd* [2008] NSWSC 245.

342 *Shackles v Broken Hill Pty Co Ltd* [1996] 2 VR 427.

343 *Dense Medium Separation Powders Pty Ltd v Gondwana Chemicals Pty Ltd* [2011] NSWCA 84. A list foreign jurisdictions where there is a reciprocal right of enforcement is set out in the *Foreign Judgments Act 1991* (Cth); *Foreign Judgments Regulations 1992* (Cth), Sch 2.

344 Security for costs was ordered where the appellant resided in Papua New Guinea in *Batterham v Makeig (No 2)* [2009] NSWCA 314 at [8] and in *Mothership Music v Flo Rida (aka Tramar Dillard)* [2012] NSWCA 344, where the appellant resided in the United States.

and circumstances of each case.[345] The causes of action for which security for costs is ordered is not restricted. Plaintiffs may also be ordered to pay security for costs in a proceeding for personal injuries.[346]

Security in appeals

Amount and nature of security to be provided

[11.420] Security for costs is not ordered on the basis that it indemnifies a party for its costs.[347] The court has discretion in determining the amount of security the plaintiff is to pay.[348] The court determines the amount of security on the basis of evidence enabling it to estimate the costs the defendant will be able to recover.[349] Evidence is normally presented by a solicitor's or cost assessor's affidavit setting out actual costs, or, in some circumstances, the court may accept an affidavit estimating costs. Where the court is required to determine whether to order security for costs based on factual matters those matters must be proved by affidavit. Such matters may include a plaintiff being resident overseas, or the financial circumstances of a corporate plaintiff.

The court may make any appropriate order for the payment of security for costs to provide the plaintiff with an opportunity to make the payment. It may, for example, order that an initial payment for security be made for preparation of the matter, along with a later payment, or it may order that a security be paid in separate tranches.[350] The form of payment will depend on what is best to provide the defendant with adequate security and, once that is achieved, what will least disadvantage the provider of the security.[351] This may include the payment of funds into court, entering guarantees, providing a charge over property or assets, or

345 This list is non-exhaustive. The court will always take into account factors peculiar to the circumstances of the proceedings: *Equity Access Ltd v Westpac Banking Corporation* [1989] ATPR 40-972. Other relevant factors considered by the courts include: that the parties or some of them are legally aided (see *Webster v Lampard* (1993) 177 CLR 598); that the likely order as to costs, even if successful, may not be in favour of the winning defendant (see *Singer v Berghouse* (1993) 67 ALJR 708 at 709).

346 Despite suggestions to the contrary (*De Groot v The Nominal Defendant* [2004] NSWCA 88 at [29]–[30] per Handley JA); such orders have been made where the plaintiff resides overseas: *Li v NSW* [2013] NSWCA 165 (appeal from order for security for costs dismissed); *Chen v Keddie* [2009] NSWSC 762; *Jennings-Kelly v Gosford City Council* [2012] NSWDC 84.

347 *Brundza v Robbie & Co* (1952) 88 CLR 171 at 175.

348 *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 at [132].

349 See, for example, the evidence adduced in such cases as *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564; *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744; and *Gujarat NRE Australia Pty Ltd v Williams* [2006] NSWSC 1131; *Western Export Services Inc v Jireh International Pty Ltd* [2008] NSWSC 601.

350 *KDL Building Pty Ltd v Mount* [2006] NSWSC 474 at [36]; *Porter v Aalders Auctioneers and Valuers Pty Ltd* [2011] NSWDC 96 at [29]–[30].

351 GE Dal Pont, *Law of Costs* (2nd ed, LexisNexis Butterworths, Sydney, 2009), [29.96].

providing a bank bond.[352] Even where the judgment refers to the payment of funds into court it may take the form of a bank bond or bank deposit. Then, such security is placed in an interest-bearing account in the joint names of the solicitors of either party.[353]

Dismissal of proceedings for failure to provide security

[11.430] Rule 62.04 provides that the plaintiff's claim may be dismissed by the court if they fail to provide the security they have been ordered by the court to give. The court is empowered to dismiss the proceedings in which the order was made.[354] However, if a party is unable to make a payment of the security it may apply for an extension.[355]

Extensions of security for costs applications

[11.440] A plaintiff may make an application for an order that the defendant pay further security at any time during the proceedings.[356] Similarly, parties may apply for a variation or extinguishment of an order for security for costs during the course of proceedings before the court hearing the proceeding, or an appeal court.[357]

LEGAL PRINCIPLES ON INDEMNITY COSTS

[11.450] In *Ugly Tribe Co v Sikola* Harper J said that special circumstances were required to be present to justify the court departing from its usual practice in awarding costs.[358] These included:

(a) the making of an allegation known to be false, being that the opposite party is guilty of fraud;

(b) the making of an irrelevant allegation of fraud;

(c) conduct which causes the loss of time to the court and other parties;

(d) the commencement or continuation of proceedings for an ulterior motive;

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352 *Estates Property Investment Corporation Ltd v Pooley* (1975) 3 ACLR 256. See also New South Wales Law Reform Commission, *Security for Costs and Associated Costs Orders* (Report No 137, 2012), [1.6].

353 *JKB Holdings Pty Ltd v de la Vega* [2013] NSWSC 501 at [12].

354 See also *Uniform Civil Procedure Rules (Amendment No 61) 2013* (NSW), r 42.21(3): *Porter v Gordian Runoff Ltd (No 3)* [2005] NSWCA 377 at [36]. Relevant circumstances to be taken into account are discussed in *Idoport v National Australia Bank Ltd* [2002] NSWCA 271 at [24]ff and [69]ff and in *Lawrence Waterhouse Pty Ltd v Port Stephens Council* [2008] NSWCA 235.

355 *Wollongong City Council v Legal Business Centre Pty Ltd (No 2)* [2012] NSWCA 366 (application for extension dismissed).

356 *Welzel v Francis* [2011] NSWSC 477; *Welzel v Francis (No 2)* [2011] NSWSC 648; *Welzel v Francis (No 3)* [2011] NSWSC 858.

357 *Nicholls v Michael Wilson & Partners Ltd (No 2)* [2013] NSWCA 141 (application for release of security).

358 *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189 at [7].

(e) the commencement or continuation of proceedings in wilful disregard of known facts or clearly established law; and

(f) the failure until after the commencement of the trial, and without explanation, to discover documents the timely discovery of which would have considerably shortened, and very possibly avoided, the trial.

Section 24 of the *Supreme Court Act 1986* (Vic) empowers the court to exercise its absolute and unfettered discretion in making a costs order. The judicial exercise of the discretion ensures that it is made in relation to facts connected with the litigation or a prior stage of the litigation.[359] The practices and principles that have been developed to guide the application of the judicial discretion,[360] principally the practice that successful litigants receive their costs in the proceeding,[361] are not confining rules of application, and ensure that the discretion continues to be unqualified.[362] An order for indemnity costs is made in accordance with the scale. If the intention of the court's order is to order a taxation of costs on the basis of any costs agreement governing costs between the party and the legal representative the order will be required to make specific reference to the agreement.

The general rule is that in adversarial litigation the order of costs of one party to be paid by another is made on a party and party basis. Ordinarily, costs paid on that basis will not offer complete indemnification.[363] For a court to depart from making a costs order on a party and party basis and award costs on an indemnity basis, the circumstances of the case must warrant doing so.

The test for departing from the rule requires the court to consider the particular circumstances of the case and identify factors justifying the making of a costs order other than on the usual basis. In *Andrews v Barnes*[364] the Court of Appeal formulated the test for the warrant of departing from the rule in awarding costs as involving the court in assessing "as and when the justice of the case might so require". In *Preston v Preston*[365] Brandon LJ required the case to have a special or unusual feature before the discretion in ordering costs ought to be exercised to order costs on an indemnity basis. The discretion to award costs other than on the usual basis is exercised only in exceptional

359 *Latoudis v Casey* (1990) 170 CLR 534 at 537; cited with approval *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 86 [34].

360 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 86 [35].

361 *Ritter v Godfrey* [1920] 2 KB 47 at 52; *Milne v Attorney-General (Tas)* (1956) 95 CLR 460 at 477.

362 *Norbis v Norbis* (1986) 161 CLR 513 at 537; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 86 [35].

363 In *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225, Sheppard J of the Federal Court of Australia examined the relevant authorities.

364 *Andrews v Barnes* (1888) LR 39 Ch D 133 (CA).

365 *Preston v Preston* [1981] 3 WLR 619.

circumstances, normally where the losing party's conduct has been unmeritorious or improper. Woodward J in *Fountain Selected Meats (Sales) v International Produce Merchants*[366] said:

> I believe that it is appropriate to consider awarding "solicitor and client" or "indemnity" costs, whenever it appears that an action had been commenced or continued in circumstances where the applicant, properly advised, should have known he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law.

The factors justifying a departure from the order for costs on a party and party basis are not a closed category, nor are they subject to exhaustive definition, but depend on the facts and circumstances of the particular case.[367] The cases suggest that circumstances which may warrant a departure from the making of the usual costs order include:

- knowingly making false, or irrelevant, allegations of fraud;[368]
- where a party's misconduct causes wasteful delays in the court process and to other parties;[369]
- initiating or continuing proceedings where the party has an ulterior motive for doing so;[370]
- conduct amounting to a contempt of court;[371]
- wilfully disregarding the facts or the law in the conduct of the litigation;[372]
- making unfounded allegations or contentions which waste the court's and the parties' time in unnecessary argument and procedure;[373]
- refusing an offer of compromise which in all prudence should have been accepted;[374]
- failing to discover a documents or documents until after the commencement of the hearing in circumstances where discovering

366 *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 at 401, adopting the authority of *Preston v Preston* [1981] 3 WLR 619.

367 As French J said in *Tetijo Holdings Pty Ltd v Keeprite Australia Pty Ltd* [1991] FCA 187; Davies J expressed similar views in *Ragata Developments Pty Ltd v Westpac Banking Corporation* [1993] FCA 72.

368 Both French J in *Tetijo Holdings Pty Ltd v Keeprite Australia Pty Ltd* [1991] FCA 187, and Davies J in *Ragata Developments Pty Ltd v Westpac Banking Corporation* [1993] FCA 72 referred to by Woodward J in *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397, and also by Gummow J in *Thors v Weekes* (1989) 92 ALR 131.

369 *Tetijo Holdings Pty Ltd v Keeprite Australia Pty Ltd* [1991] FCA 187 per French J.

370 *Ragata Developments Pty Ltd v Westpac Banking Corporation* [1993] FCA 72 per Davies J.

371 *EMI Records Ltd v Ian Cameron Wallace Ltd* [1983] Ch 59.

372 Woodward J in *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397, and French J in *J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers (WA) Branch (No 2)* (1993) 46 IR 301.

373 Davies J in *Ragata Developments Pty Ltd v Westpac Banking Corporation* [1993] FCA 72.

374 For example, *Messiter v Hutchinson* (1987) 10 NSWLR 525; *Maitland Hospital v Fisher (No 2)* (1992) 27 NSWLR 721 (CA); *Crisp v Keng* (unreported; NSWCAFC; Kirby P and

> them at the proper time would have resulted either in a trial of a considerably shorter duration, or in an avoidance of a trial altogether.[375]

It must be stressed that these are only instances of past cases in which courts have departed from the usual approach to an order for costs, and that the court must consider whether the characteristics of the particular case will justify the order being made on a basis other than party and party. It is not the purpose of past cases to "establish a set of inflexible guidelines which should thereafter be determinative of the manner in which the Court's discretion is to be exercised [for this] would be to fetter the Court's discretion".[376] Harper J in *Ugly Tribe Co v Sikola*[377] warned against the possibility of a case-by-case approach producing "a wilderness of single instances", or a distinction in the approach of State and federal courts that would encourage forum shopping, or the multiplication of applications for awards of costs on a special basis.

Winneke P recognised the growing divergence between the entrenched practice of ordering costs on a party and party basis, and the reality of the costs of litigation. His Honour referred to the practice as "a compromise between the interests of successful and unsuccessful litigants",[378] and approved of the view of Handley JA in *Cachia v Hanes* that the usual costs order was an "important spur to settlement".[379] The general rule in costs orders is a compromise in the sense that *bona fide* parties should not be discouraged from bringing their claims to court by the threat of being ordered to indemnify the successful party were they to lose the case.

The existence of the relevant circumstances will not, however, necessarily produce an order of costs on an indemnity basis because the court's power in exercising the jurisdiction remains discretionary.[380] The discretion is one that must be exercised judiciously,[381] and not arbitrarily, capriciously or for reasons having no relationship to the conduct of the litigation,[382] or the circumstances of the case as a whole including the parties' conduct prior to the litigation.[383] The court properly exercises its discretion as long as it considers the applicable principles, and has regard to the particular circumstances of the case. Having done so a decision to

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Priestley and Cripps JJA; No CA 40744 of 1992; 27 September 1993) (and an award of costs on an indemnity basis against a contemnor, for example, Megarry V-C in *EMI Records Ltd v Ian Cameron Wallace Ltd* [1983] Ch 59).

375 *National Australia Bank Ltd v Petit-Breuilh (No 2)* [1999] VSC 395.

376 *National Australia Bank Ltd v Petit-Breuilh (No 2)* [1999] VSC 395.

377 *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189.

378 *Spencer v Dowling* (unreported; VCA; Winneke P; 26 July 1996; 7106/1994).

379 *Cachia v Hanes* (1994) 179 CLR 403.

380 *Supreme Court Act 1986* (Vic), s 24.

381 *Donald Campbell & Co Ltd v Pollak* [1927] AC 732; *Cretazzo v Lombardi* (1975) 13 SASR 4.

382 *Cretazzo v Lombardi* (1975) 13 SASR 4.

383 *Oshlack v Richmond River Council* (1998) 193 CLR 72.

make a costs order on the usual basis will nevertheless be correct. If, however, the decision is manifestly wrong in law or unjust it may be appealed.

In *Vink v Tuckwell (No 3)*[384] Vink successfully resisted Tuckwell's application to summarily dismiss proceedings brought by Vink on application. Vink's leave to appeal the costs order made against him was dismissed with costs. The terms of the order on the application were that Vink pay 60 per cent of Tuckwell's costs on an indemnity basis.[385] The Court of Appeal identified no error in the trial judge's decision on costs. The judge had taken into account the relevant legislation, rules of court, and cases which sanction depriving a successful party of some or all of their costs.

Not only had the trial judge not erred in the principles taken into consideration, neither had the trial judge erred in their application. The trial judge's main reason for the apportionment of costs was that approximately 60 per cent of the time for the consideration of Tuckwell's application for summary dismissal of the proceedings was given to considering the evidence Vink sought to rely upon, almost all of which was ruled inadmissible, in circumstances where there existed a previous ruling on the inadmissibility of the same affidavit evidence.[386]

The appeal judge considered the making of the costs order on an indemnity basis against a litigant in person appropriate as an application of the relevant principles based on established authority.[387] The authorities supported the trial judge's conclusion that the costs order against Vink on an indemnity basis was appropriate because he had knowingly made unfounded serious allegations of fraud, misconduct and dishonesty against Tuckwell, and had wasted the court's time by seeking to introduce evidence he knew to be inadmissible.

In *Boral Resources (Vic) v Construction, Forestry, Mining and Energy Union*[388] the plaintiffs sought an order for costs on an indemnity basis in relation to an application to set aside a default judgment pursuant to r 63.20.1.

The court held that the costs of the application to set aside the default judgment are separate and discrete from the costs of the proceeding as a whole.[389] The conduct of the defendant before it made its application to set aside default judgment not relevant to the question of whether costs on an indemnity basis should be ordered in respect of that application.

384 *Vink v Tuckwell (No 3)* (2008) 67 ACSR 547.

385 *Vink v Tuckwell (No 3)* (2008) 67 ACSR 547 at [39].

386 *Vink v Tuckwell (No 3)* (2008) 67 ACSR 547 at [41].

387 *Vink v Tuckwell (No 3)* (2008) 67 ACSR 547 at [42].

388 *Boral Resources (Vic) Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)* [2014] VSC 528.

389 *Boral Resources (Vic) Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)* [2014] VSC 528 at [28].

The defendant's conduct was relevant only to the costs of the proceeding overall, not the costs on the defendant's summons, even if the defendant had been in breach of ss 20 and 25 of the *Civil Procedure Act 2010* (Vic).[390] So, the fact that the defendant had, by refusing or failing to participate in proceedings earlier, putting the plaintiff to the cost and expense of the application to enter default judgment, were not pertinent considerations. The defendants had submitted an argument that was not without substance and which was based on the operation of the rules, and, despite the argument failing, and ultimately being groundless, it could not be known to have been hopeless from the outset.

Commencing the proceeding in the wrong court

[11.460] Rule 63.24 prescribes a costs sanction when proceedings which should have been initiated in an inferior court were commenced in a superior court: for example, where an action is commenced in the Supreme Court of an amount within the jurisdiction of a lower court. The amount of costs recoverable by the plaintiff is reduced.[391] If, in a proceeding for a debt or damages in the Supreme Court, the plaintiff recovers no more than $100,000,[392] and if in a proceeding for libel or slander the plaintiff recovers no more than $50,000,[393] the plaintiff is only entitled to costs the plaintiff would have recovered had the proceeding been brought in the County Court. The plaintiff must also pay the costs the defendant was forced to incur by being required to defend the matter in the Supreme Court rather than the County Court. The plaintiff's payments of the defendant's costs will be limited to the costs recovered by the plaintiff. By r 63.25, r 63.24 applies when the amount in dispute or the value of property the subject of the dispute is not more than $100,000, and to an offer of compromise. The rules are not designed to prohibit proceedings being initiated in a higher court but to ensure that plaintiffs pay particular attention to the available jurisdictions and bring proceedings in the most appropriate court.[394]

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390 *Boral Resources (Vic) Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)* [2014] VSC 528 at [27].

391 The sanctions vary across Australian jurisdictions from total denial of costs to reduction of costs recoverable in the proceeding: FCR O 62 r 36A; ACT r 1725; NT r 63.22; Qld r 698; *Supreme Court Act 1935* (SA), s 40(2); Vic rr 63.24, 63.25; WA O 66 r 17. See also *Ditton v Gallagher* (1992) 110 ACTR 12 (ACTSC); *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd (No 2)* [2007] FCA 878 at [12] per Tracey J. The Tasmanian legislation, instead of propounding a *prima facie* rule denying or reducing costs, confers a general discretion in this context: *Supreme Court Civil Procedure Act 1932* (Tas), s 13. In the High Court of Australia and New South Wales, the matter is addressed pursuant to the court's general discretion as to the award of costs: *High Court Rules 2004* (Cth), r 50.01; *Civil Procedure Act 2005* (NSW), s 98.

392 Rule 63.24(1).

393 Rule 63.24(2).

394 *Saywood v Cross* (1884) 14 QBD 53 at 54 per Mathew J; *O'Doherty v McMahon* [1971] VR 625 at 628 per Menhennitt J (VSCFC); *Ramadan v Moussa* [1984] VR 713 at 721 (VSCFC); *John Fairfax & Sons Ltd v Palmer* (1987) 8 NSWLR 297 at 302, 305 per Kirby P; *Fire & All*

The existence of a rule prescribing a costs sanction ensures a consistent application of the rule across cases.[395] The exercise of judicial discretion to depart from the rule depends on the courts' consideration of a number of relevant factors.[396] These include[397]

1. the amount claimed, and the reasons for this;[398]
2. the amount actually recovered, and the reasons for this;[399]
3. the difficulty of assessing the likely damages awarded;[400]
4. the factual and legal complexity of the case;[401]
5. the nature of the proceedings in question, and how this impacts, if at all, upon the need to proceed in the higher or specialist court;[402]
6. the conduct and attitude of the parties to the litigation;[403] and

Risks Insurance Co Ltd v Rousianos (1989) 19 NSWLR 57 at 70 per Gleeson CJ; *Collier Constructions Pty Ltd v Foskett Pty Ltd* (1992) 33 FCR 591 at 592 per French J; *Ditton v Gallagher* (1992) 110 ACTR 12 at 16 per Gallop J; *Chatley v Northern Territory* [2001] NTSC 89 at [19] per Martin CJ; *West v Nationwide News Pty Ltd (t/as Cumberland Newspaper Group)* [2003] NSWSC 767; *Valimi Pty Ltd v Maniotis* [2003] VSC 357; *Axe Australasia Pty Ltd v Australume Pty Ltd (No 2)* [2006] FCA 844 at [4] per Finkelstein J.

395 *Tuohy v Blackmore* (1977) 20 SASR 161 at 163 per Jacobs J.

396 *Silverblade v Nelson* (1980) 24 SASR 310 at 313 per Cox J.

397 These factors are not relevant in Western Australia in respect of non-tort actions, where the discretion is activated only in circumstances involving an important principle of law or where the complexity of the issues or of the facts justify bringing the action in the Supreme Court: WA O 66 r 17. See also *Supreme Court Civil Procedure Act 1932* (Tas), s 13(2A) (directing the court to take into account all the circumstances of the case, including the sum sought to be recovered, the sum recovered, and any counterclaim, set-off or contributory negligence).

398 *O'Doherty v McMahon* [1971] VR 625; *Symes v Commonwealth* (1987) 89 FLR 356 at 358 per Gallop J (ACTSC).

399 *Scott v Municipal Tramways Trust* [1920] SALR 442 at 451 per Poole J; *Burton v Litton Business Systems Pty Ltd* (1977) 16 SASR 162 at 171 per King J; *Tuohy v Blackmore* (1977) 20 SASR 161 at 164 per Jacobs J; *Vella v Ivanovski* [1984] WAR 8 at 10 per Wickham SPJ (WASCFC); *Neilson Investments (Qld) Pty Ltd v Spud Mulligan's Pty Ltd* [2002] QSC 295.

400 *Burton v Litton Business Systems Pty Ltd* (1977) 16 SASR 162 at 171 per King J; *Tuohy v Blackmore* (1977) 20 SASR 161 at 164 per Jacobs J.

401 *Scott v Municipal Tramways Trust* [1920] SALR 442 at 451 per Poole J; *North Australian Haulage Pty Ltd v Commonwealth* (1970) 15 FLR 487 at 490 per Blackburn J (NTSC); *O'Doherty v McMahon* [1971] VR 625 at 630 per Menhennitt J (VSCFC); *Burton v Litton Business Systems Pty Ltd* (1977) 16 SASR 162 at 171 per King J; *Prior v Lansdowne Press Pty Ltd* [1977] VR 65 at 77 per Gowans J; *Woodger v Federal Capital Press of Australia Pty Ltd* (1992) 107 ACTR 1 at 40 per Miles CJ; *Makryllos v George Laurens (NT) Pty Ltd* (1992) 111 FLR 204 at 216–217 per Kearney J (NTSC); *Australasian Performing Right Assn Ltd v Metro on George Pty Ltd* (2004) 64 IPR 57; *Tu v Pakway Australia Pty Ltd (t/as Pakway Plastics)* (2006) 227 ALR 287 at [23]–[32] per Kenny J.

402 *Fire & All Risks Insurance Co Ltd v Rousianos* (1989) 19 NSWLR 57 at 70 per Gleeson CJ; *Arian v Nguyen* (2001) 33 MVR 37 at 49–50 per Ipp AJA.

403 *Killalea v In Print Publishing Co Ltd* [1966] NZLR 70 at 72 per Woodhouse J (NZSC).

7. the importance of the legal principle involved in the case as a matter of precedent.[404]

It would be inappropriate as a restriction on the court's unqualified discretion were any of these particular factors to be singularly definitive or decisive.[405] The factors interact, and overlap, and carry different weight depending on the other circumstances of the case. While the rules encourage simpler action to be initiated in inferior courts the determination of the appropriate venue for the commencement of proceedings may involve numerous considerations. For example, a matter for a relatively small monetary claim may involve argument on complex matters of law which is more appropriate for a superior court. Where such circumstances prevail the litigant may be allowed full costs.

If the claim is not monetary the claimant cannot be penalised on costs. If the plaintiff has brought the action in the higher court because they have misjudged the size of the claim it is not appropriate to deny them costs or order costs against them.

A party is successful on some issues before the court and unsuccessful in other issues

[11.470] In general costs follow the event and the successful party receives the costs of the action. This is true even if the successful party did not establish some issues such as alternative heads of claim.[406] Although the event in question is the ultimate outcome, the litigation of causes of action and defences frequently involves numerous discrete issues: that is to say, it raises disputed questions of fact or law.[407] The result of the litigation of those questions has a bearing on the final determination. However, it is by no means certain that the ultimately successful party will have succeeded on the majority of those questions. The court may in

404 See, for example, *L'Huillier v Victoria* [1996] 2 VR 465 at 487 per Callaway JA (important public law issues justified prosecution in the Supreme Court).

405 *Scott v Municipal Tramways Trust* [1920] SALR 442 at 450 per Poole J.

406 *Ritter v Godfrey* [1920] 2 KB 47.

407 *Fuller v Municipal Tramways Trust* [1921] SASR 109 at 111 per Poole J; *Shercliff v Engadine Acceptance Corporation Pty Ltd (No 2)* (1982) 3 BPR 9207 at 9208 per Powell J (NSWSC); *Thiess v TCN Channel Nine Pty Ltd (No 5)* [1994] 1 Qd R 156 at 208 (QSCFC). See also WA O 66 r 2(a) (as to which see *Australian Securities and Investments Commission v Emu Brewery Mezzanine Ltd* [2004] WASC 241). The term "issue" is not to be construed as a precise issue in the technical pleading sense, but as any disputed question of fact or law (*Cretazzo v Lombardi* (1975) 13 SASR 4 at 12 per Bray CJ), although it is not to be assimilated to a cause of action, which may involve more than one issue: *Jelbarts Pty Ltd v McDonald* [1919] VLR 478 at 479–480 per Irvine CJ; *Reid, Hewitt & Co v Joseph* [1918] AC 717 at 738 per Lord Finlay LC; *Fuller v Municipal Tramways Trust* at 111 per Poole J; *Windsurfing International Inc v Petit* [1987] AIPC 90-441 at 37,861–2 per Waddell J (NSWSC).

its discretion make separate issues the subject of special awards of costs against the party who was successful in the proceeding.[408]

Rule 63.04 provides:

> **63.04 Costs of question or part of proceeding**
>
> (1) The Court may make an order for costs in relation to a particular question in or a particular part of a proceeding.
>
> (2) Where the Court makes an order under paragraph (1), the Court shall by order fix the proportion of the total costs of the proceeding which is attributable to the particular question in or the particular part of the proceeding.

The rules empower the court to distribute costs on the basis of fairness in the particular case.[409] In order for a court to make an order for costs in relation to a question of a part of a proceeding that question or part must be "particular": that is to say, distinguishable and severable from other questions or parts of the proceeding. The court then makes a determination of costs to be awarded in the same manner it would have employed had those questions or part of the proceeding been brought as distinct actions.[410] A party may be entitled to the costs of a question or part of a proceeding even if they were not ultimately successful in the action and the costs order made under the rule is contrary to the order for general costs in the action.[411]

In the exercise of its discretion the court may decline to order costs in favour of a successful party, or may order the successful party to pay the costs of the unsuccessful party, where the plaintiff failed to establish

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408 *Greeves v Freshwater* (1938) 55 WN (NSW) 113; *Armstrong v Landmark Corporation Ltd* [1967] 1 NSWR 13; *Byrns v Davie* [1991] 2 VR 568; *Spotless Group Ltd v Premier Building and Consulting Pty Ltd* [2008] VSCA 115 at [13]–[16]; *Probiotic Ltd v University of Melbourne* (2008) 166 FCR 30 at 49–50; *Todrell Pty Ltd v Finch* [2008] 2 Qd R 95; *Sydney Ferries v Morton (No 2)* [2010] NSWCA 238.

409 See also ACT r 1704; *Federal Court of Australia Act 1976* (Cth), s 43; NT r 63.05; Qld r 684; SA r 264; Vic r 63.04; WA O 66 rr 1, 2.

410 *Permanent Building Society v Wheeler (No 2)* (1993) 10 WAR 569 at 574 per Anderson J; *NSW Coal Compensation Board v Nardell Colliery Pty Ltd* [2004] NSWCA 35 at [99] per Hodgson JA; *Adamson v Pharmacy Board of Tasmania (No 4)* [2004] TASSC 112.

411 *Dubbo Refrigerating Co v Rutherford* (1898) 14 WN (NSW) 180 at 182 per Darley CJ (NSWSCFC); *Glasson v Barry* (1912) 12 SR (NSW) 716 at 731 per Pring J, 735 per Gordon J (NSWSCFC); *Halligan v Lawson* (1922) 22 SR (NSW) 501 at 511 per Ferguson J; *Storer v Smith's Newspapers Ltd* (1939) 39 SR (NSW) 77 at 80 per Jordan CJ; *Laguillo v Haden Engineering Pty Ltd* [1978] 1 NSWLR 306 at 308 per Reynolds JA; *Hughes v Western Australian Cricket Assn (Inc)* [1986] ATPR 40-748 at 48,136 per Toohey J (FCA); *Latoudis v Casey* (1990) 170 CLR 534 at 568 per McHugh J; *Sheehy v Mitchell Crane Hire Pty Ltd* (1991) 102 ACTR 1; 104 FLR 96 at 106 per Higgins J (ACTSC); *Koninklijke Philips Electronics NV v Remington Products Australia Pty Ltd* (1999) 45 IPR 634 at 639 per Lehane J.

The rules of court in some jurisdictions make equivalent provision: NT r 63.05; Qld r 682; Vic r 63.04; WA O 66 rr 1(3), 2(a). There are no equivalent provisions in the other jurisdictions.

discrete heads of claim, or failed to establish issues which it pursued in its claim, although ultimately succeeding on the basis of another discrete head of claim.[412]

In arriving at a just and equitable outcome courts do not approach the question of costs arithmetically[413] by counting the numbers of successes enjoyed by each party of discrete issues and questions in the proceedings.[414] Approaching the question of costs by considering discrete questions and issues may be misleading for a number of reasons. First, questions and issues, which themselves have been decided differently, frequently overlap.[415] Secondly, even when particular questions and issues can be individualised the time taken to consider them at a hearing, and the costs they have therefore absorbed, may vary considerably. Each issue should therefore be weighted accordingly.[416] A party should only be ordered to pay all the costs of a particular issue when that party has unnecessarily raised and contested a fully distinguishable question of fact or law. If the court cannot so distinguish the issue it will make a general costs order.[417]

In having regard to this question it is not a relevant consideration that the plaintiff argued persuasively and may have succeeded on some of its other heads of claim, nor is it relevant that the plaintiff may have been reasonable in arguing its case on the alternative heads of claim which it pursued.[418]

If neither the plaintiff nor the defendant has completely succeeded in making out their case, the court apportions the costs between the parties, rather than awarding costs on the basis of the distinct issues in the

412 *Hughes v Western Australian Cricket Assn (Inc)* [1986] ATPR 40-748 at 48,136 per Toohey J.

413 *Australian Prudential Regulation Authority v Holloway* (2000) 45 ATR 278 at [52] per Mansfield J (FCA); *Beagle Holdings Pty Ltd v Equus Financial Services Ltd* [2000] WASC 128 at [32] per Templeman J. In *Sanders v Snell (No 2)* (2000) 174 ALR 53, Kirby J went so far as to remark (at [15]) that "unless there are good and exceptional reasons in the particular case to do so", a court will not ordinarily "specify that costs will only be payable in respect of particular issues". This was because "[t]he marginal expense of calculating the costs of arguing particular issues, themes, ideas, facts, cases or arguments will ordinarily be outweighed by the inutility of doing so".

414 *Cretazzo v Lombardi* (1975) 13 SASR 4 at 16 per Jacobs J: not a question of keeping a tally of the "wins and losses".

415 See, for example, *Re Madden as Official Liquidator of Aquanaut Constructions Pty Ltd (in liq)* [2001] NSWSC 1051 at [4] per Hamilton J.

416 *Re Elgindata Ltd (No 2)* [1992] 1 WLR 1207 at 1216 per Nourse LJ; *Abigroup Contractors Pty Ltd v Peninsula Balmain Pty Ltd (No 2)* [2001] NSWSC 1016 at [39], [40] per Barrett J (reversed on appeal on another point *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* (2002) 18 BCL 322).

417 *Re Elgindata Ltd (No 2)* [1992] 1 WLR 1207 at 1216 per Nourse LJ, 1218 per Beldam LJ; *Orrong Strategies Pty Ltd v Village Roadshow Ltd (No 2)* [2007] VSC 205 at [14] per Habersberger J.

418 *Latoudis v Casey* (1990) 170 CLR 534 at 567 per McHugh J.

proceeding.[419] A global approach to the award of costs is justified in complex cases where issues are not easily distinguished. Complex cases include those in which a party pursues several distinct claims, in the alternative, and any particular issue raised may go to all or only some of those claims.[420]

Although the court has an undoubted discretion to vary the costs order which would usually follow the event of a successful claim, on account of the plaintiff having failed to establish discrete heads of claim, Jacobs J in *Cretazzo v Lombardi*[421] advised approaching the matter cautiously. His Honour in that case held:

> I would wish to sound a note of cautious disapproval of applications, which are being made with increasing frequency, to apportion costs according only to the success or failure of one party or the other on the various issues of fact or law, which arise in the course of a trial. ... But trials occur daily in which the party, who in the end is wholly or substantially successful, nevertheless fails along the way on particular issues of fact or law. The ultimate ends of justice may not be served if a party is dissuaded by the risk of costs from canvassing all issues, however doubtful, which might be material to the decision of the case. There are, of course, many factors affecting the exercise of the discretion as to costs in each case, including in particular, the severability of the issues, and no two cases are alike. I wish merely to lend no encouragement to any suggestion that a party against whom the judgment goes ought nevertheless to anticipate a favourable exercise of the judicial discretion as to costs in respect of issues upon which he succeeded, based merely on his success in those particular issues.

The factors a court may take into consideration when determining an award of costs in cases involving distinct and separate particular questions and parts of proceedings include the conduct of the successful litigant, and where there is no question of misconduct or inappropriate behaviour, principles of case management, and where proceedings were

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419 *Cinema Press Ltd v Pictures & Pleasures Ltd* [1945] KB 356 at 363–364 per Lord Goddard (CA); *Cocias v Mount Isa Mines Ltd* [1967] QWN 22; *Re Carter Newell's Bill of Costs* [1996] 2 Qd R 13 at 19 per Dowsett J; *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (No 3)* (1998) 30 ACSR 20 at 24–25 per Young J (NSWSC); *Australian Olympic Committee Inc v Big Fights Inc (No 2)* (2000) 176 ALR 124 at 135 per Lindgren J; *Hart v Australian Federal Police* [2003] FCAFC 134; *Slack-Smith v Director-General of Department of Land and Water Conservation (No 2)* (2003) 129 LGERA 340; *Solowij v Parish of St Michael of The Ukranian Autocephalic Orthodox Church in Adelaide Inc* [2003] SASC 48 at [6], [7] per Williams J; *Atwell v Atwell (No 2)* [2003] TASSC 10 at [15], [16] per Slicer J; *Kimche v Commissioner of Taxation* [2005] FCA 293 at [14]–[18] per Ryan J; *Standard Commodities Pty Ltd v Société Socinter department Centragel* (2005) 54 ACSR 496. The same approach applies in the context of costs in appeals: *Nolan v Nolan* [2004] VSCA 134; *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 3)* [2005] FCAFC 194; *Cleere v Matic Service Pty Ltd (No 2)* [2005] NSWCA 176 at [19], [20].

420 *Ritz Hotel Ltd v Charles of the Ritz Ltd* [1989] AIPC 90-567 at 38,940–1 per McLelland J (NSWSC).

421 *Cretazzo v Lombardi* (1975) 13 SASR 4 at 16.

materially prolonged by an issue raised unsuccessfully, the extent of the prolongation, and the relative importance of the resolution of the issue to the determination of the case.[422]

Costs of a counterclaim: depriving successful party's costs because of its conduct

[11.480] The ordinary order for costs is only rarely departed from,[423] and then only in exceptional circumstances,[424] on a firm legal basis[425] and with good reasons.[426] The court's discretion over the order to pay costs empowers the court to deprive the successful party of its costs, including paying the costs of the unsuccessful party. The successful litigant has no right to costs before they are awarded by the judge's order, although they do have a legitimate reasonable expectation to be awarded costs.[427] In *Ritter v Godfrey* the House of Lords reversed the decision of the trial judge to deprive the successful defendant of their costs on the basis of an offensive letter prior to the commencement of proceedings. The discretion must be exercised judicially and on proper grounds. Only special circumstances would justify depriving the successful litigant of its costs.[428]

It is said that making an order that does not conform to the rule that costs follow the event requires "good cause". A good cause is a reason connected with the case. Whether good cause exists is a question of law.[429] A party who is ultimately successful at trial may be denied all or some of their costs on a number of bases, including:

1. The plaintiff, though successful, has secured only nominal damages.[430]

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422 *BHP Billiton Iron Ore Pty Ltd v National Competition Council (No 2)* [2007] FCA 557 at [23]; *Mickelberg v Western Australia* [2007] WASC 140 at [43], [44] per Newnes J. See also *GT Corporation Pty Ltd v Amare Safety Pty Ltd (No 3)* [2008] VSC 296 at [59]–[64] per Robson J.

423 *Smeaton Hanscomb & Co Ltd v Sassoon I Setty, Son & Co (No 2)* [1953] 1 WLR 1481; [1953] 2 All ER 1588 at 1590 per Devlin J.

424 *Ritter v Godfrey* [1920] 2 KB 47 at 52 per Lord Sterndale MR.

425 *Voyce v Lawrie* [1952] NZLR 984 at 987 per FB Adams J (NZSC).

426 *Berry v British Transport Commission* [1962] 1 QB 306 at 338 per Danckwerts LJ.

427 *Donald Campbell & Co Ltd v Pollak* [1927] AC 732 at 811–812 per Viscount Cave LC.

428 *Ritter v Godfrey* [1920] 2 KB 47 at 52–53 per Lord Sterndale MR; approved in *Donald Campbell & Co Ltd v Pollak* [1927] AC 732 at 811–12 per Viscount Cave LC.

429 *Robertson & Moffat v Belson* [1905] VLR 555 at 562 per Madden CJ (VSCFC).

430 *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd* [1951] 1 All ER 873 at 874 per Devlin J; *Alltrans Express Ltd v CVA Holdings Ltd* [1984] 1 WLR 394; *Grant v Brewarrina Shire Council (No 3)* (2003) 125 LGERA 348 at [4], [25] per Lloyd J; *McDowall v Reynolds* [2004] QCA 245; *JWH Group Pty Ltd v Kimpura Pty Ltd* (2004) 61 IPR 295. It appears that the view that nominal damages are "a mere peg on which to hang costs" (*Beaumont v Greathead* (1846) 2 CB 494; 135 ER 1039 at 499; 1041 per Maule J) does not necessarily reflect modern law.

2. The successful party has obtained relief no more favourable than had already been offered by his or her opponent in settlement of the dispute.[431]

3. The conduct of the successful defendant is what led the plaintiff to sue.[432]

4. The successful party's conduct in the litigation occasioned unnecessary litigation, delay or expense to the unsuccessful party.[433]

5. The successful party has been guilty of misconduct or a wrongful act relating either to the litigation or to the circumstances leading up to it.[434]

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431 In these circumstances the court may deny the successful litigant his or her costs as from the date of the settlement offer: *Jenkins v Hope* [1896] 1 Ch 278. The issue is addressed in detail in the rules of court in most jurisdictions. In Victoria it is addressed at r 26.08; in other jurisdictions see: FCR O 23 r 11; NT r 26.08; NSW rr 42.14, 42.15; Qld r 360; SA rr 33(2), 263(3); Tas r 289; WA O 24A r 10. There are no equivalent provisions in the High Court of Australia and the Australian Capital Territory. Further, in some jurisdictions the rules of court envisage costs consequences in respect of acceptance of a payment into court in satisfaction of a claim: NT r 26.26(5); NSW r 42.22; Tas r 275(2). There are no equivalent provisions in the other jurisdictions.

432 *Ritter v Godfrey* [1920] 2 KB 47 at 53 per Lord Sterndale MR; *Redden v Chapman* (1949) 50 SR (NSW) 24 at 25 per Roper CJ in Eq. See, for example, *Bostock v Ramsey Urban District Council* [1900] 2 QB 616 at 622 per AL Smith LJ, 625 per Vaughan Williams LJ, 627 per Romer LJ; *Scottish Gympie Gold Mines Ltd v Carroll* [1902] St R Qd 311 at 316 per Griffith CJ; *Rowland v Portus* (1906) 6 SR (NSW) 74 at 76 per Walker J (costs allowed to unsuccessful plaintiffs because "the defendant should have 'shown his hand' earlier"); *Pratten v Warringah Shire Council* [1969] 2 NSWR 161 at 168 per Street J; *Mitropoulos v Greek Orthodox Church & Community of Marrickville & District Ltd* (1993) 10 ACSR 134 at 139 per McLelland J (NSWSC); *Yusuf v Minister for Immigration and Multicultural Affairs* [2002] FCA 1582; *Murray v Kingston City Council (No 2)* (2004) 9 VR 249 (no order for costs made where unsuccessful party induced to sue by successful party's misleading rate notice); *Total & Universal Pty Ltd v Kingsway Property Investments (No 2) Pty Ltd* [2007] NSWSC 581 at [30] per Campbell JA.

433 *Ritter v Godfrey* [1920] 2 KB 47 at 60 per Atkin LJ; *In the Marriage of J and P* (1985) 80 FLR 126 at 141 per Treyvaud J (although the wife was successful in defending the action, her refusal to consent to paternity tests caused the husband unnecessary and unreasonable expense, and so costs were ordered against her on a solicitor and client basis, the court also being influenced by the wife's considerable wealth); *Jones v North Australian Aboriginal Legal Aid Service Inc* (1985) 82 FLR 264 at 268 per Kearney J (NTSC); *Schindler Lifts Australia Pty Ltd v Debelak* (1989) 89 ALR 275 at 319–320 per Pincus J (FCA); *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (No 3)* (1998) 30 ACSR 20 at 25 (NSWSC) (where the plaintiff had been substantially successful, but much court time had been wasted due to the plaintiff's attitude to the defendants and his "bull terrier approach" to litigation, Young J ordered that the defendants pay only 50 per cent of the plaintiff's costs); *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 282 at [13] per Allsop J ("in large scale commercial litigation, if parties see fit, in their own interests, to struggle exhaustively on every point, raising perhaps arguable but weak matters upon which they ultimately fail … there may be a price to be paid for the conduct of litigation in that fashion"); *Grey v Mango Pre Paid Calling Cards Pty Ltd* [2005] FCA 362 at [7].

434 *Ritter v Godfrey* [1920] 2 KB 47 at 60–61 per Atkin LJ; *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd* [1951] 1 All ER 873 at 874 per Devlin J; *Tubby Trout Pty Ltd v Sailbay Pty Ltd* [1994] ATPR (Digest) 46-120 at [90].

6. The successful party has made unsustained allegations of fraud.[435]
7. The party succeeds in a case not on any merits of his or her own but, for instance, on a technicality.[436]
8. There is a clear public interest in the determination of the matter in issue.[437]

When the court's discretion is exercised judicially an appellate court cannot reverse the decision even when it would have arrived at a different decision.

Statute may determine how costs are ordered and in so doing displace the usual rule that costs follow the event. For example, a statute may entitle a party to costs, but not require them to pay costs.[438] It may shield an unsuccessful party from paying costs unless the application brought by them was frivolous, vexatious or unjustified.[439] Some statutes require each party to bear their own costs.[440] In Victoria, a court may make an order for costs in relation to a particular question in or a particular part of a proceeding and may declare what percentage of the costs of the proceeding is attributable to that question or part.

Where successful party ordered to pay costs

[11.490] A successful party may in certain exceptional circumstances be ordered to pay some or all of the unsuccessful litigant's costs.[441] The

435 *Ex parte Cooper* (1878) 10 Ch D 313 at 322 (CA); *Toronto General Trusts Corp v Maryfield Rural Municipality* [1946] 1 DLR 90.

436 *Williamson v Bors* (1900) 21 LR (NSW) Eq 302; *Voyce v Lawrie* [1952] NZLR 984.

437 See, for example, *Seeter Pty Ltd v Commonwealth* [2004] FCA 1305; *Minister for Immigration and Multicultural and Indigenous Affairs v VBAO of 2002* [2004] FCA 1581 at [6].

438 Legal aid legislation exempts legally aided persons from liability to pay adverse costs orders in certain circumstances: *Legal Aid Act 1977* (ACT), s 34; *Legal Aid Act* (NT), s 33; *Legal Aid Commission Act 1979* (NSW), s 47(1); *Legal Aid Queensland Act 1997* (Qld), s 32; *Legal Aid Commission Act 1990* (Tas), s 21; *Legal Aid Act 1978* (Vic), s 48; *Legal Aid Commission Act 1976* (WA), s 45. There are no equivalent provisions in South Australia.

439 See, for example, *Workplace Injury Management and Workers Compensation Act 1998* (NSW), s 112(3).

440 See, for example, *Family Law Act 1975* (Cth), s 117(1), (2) (as to which see GE Dal Pont, *Law of Costs* (2nd ed, LexisNexis Butterworths, Sydney, 2009), pp 247–253).

441 *Ottway v Jones* [1955] 1 WLR 706 at 713 per Evershed MR; *Knight v Clifton* [1971] Ch 700 at 713 per Russell LJ; *Cretazzo v Lombardi* (1975) 13 SASR 4 at 12 per Bray CJ; *Trade Practices Commission v Nicholas Enterprises Pty Ltd (No 3)* (1979) 42 FLR 213 at 220 per Fisher J; *Scherer v Counting Instruments Ltd* [1986] 1 WLR 615 at 622 per Buckley LJ; *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129 at 156 per Kaye J (VSCAppDiv). The courts historically held that they had jurisdiction to make such orders only against successful plaintiffs, not against wholly successful defendants, the reason being that it is the plaintiff, not the defendant, who elects to commence the proceedings: *Dicks v Yates* (1881) 18 Ch D 76; *Foster v Great Western Railway Co* (1882) 8 QBD 515; *Eberlein v Eberlein* (1887) 8 LR (NSW) Eq 1; *Hodgkins v District Council of Burnside* (1892) 25 SALR 37 at 38 per Way CJ; *Ex parte Permanent Trustee Co* (1897) 14 WN (NSW) 61; *London Welsh Estates Ltd v Phillip* (1931) 144 LT 643. This dichotomy of

same circumstances as indicate that a court may deprive a successful litigant of their costs are relevant considerations for a court when deciding whether to order the costs of the unsuccessful party to be paid by the successful party. However, those circumstances would generally be more extreme or extensive. Circumstances sufficient to amount to an exceptional case may include where the defendant's conduct has caused proceedings to be commenced, or continued. It may also include circumstances where the defence arises from facts and circumstances about which the defendant knew, but the plaintiff did not and could not have known.[442] The court may order a successful litigant to pay the costs of the unsuccessful litigant if they raise issues or make allegations which are either unreasonable or made on an improper basis, or if their conduct increases the costs of proceedings.[443] Although courts are more tolerant of litigants in person than of represented litigants, they are not precluded from ordering costs against a successful unrepresented litigant for acting unreasonably or improperly in conducting the proceeding.[444]

In *Verna Trading v New India Assurance*[445] the plaintiff had made a claim on an insurance policy covering the loss of goods in transit. The insurer, without providing reasons, denied the claim. The plaintiff sued. The basis for the denial, as the defendant explained during the trial, was that the plaintiff's actions in arranging for the goods to be temporarily stored rather than taking them into immediate possession was in breach of the insurance policy. Judgment was given for the defendant. The order for costs was that the defendant pay the plaintiff's solicitor and own client costs in the proceeding prior to the commencement of trial, and of the first day of the trial. The defendant appealed the decision on the costs. The Appeal Division found that the trial judge had exercised judicial discretion under s 24 of the *Supreme Court Act 1986* (Vic). That the successful defendant's conduct had caused the unsuccessful plaintiff to

approach no longer represents the law; the matter is now not one of jurisdiction but one of discretion: *Re Fisher* [1894] 1 Ch 450; *Knight v Clifton* at 710 per Russell LJ, 715 per Sachs LJ, 724 per Buckley LJ; *GR Vaughan (Holdings) Pty Ltd v Vogt* [2006] NSWCA 263 at [20] per Bryson JA.

442 *Knight v Clifton* [1971] Ch 700 at 718 per Sachs LJ. See, for example, *Re Lei* [2004] FCA 1488; *Jarrad v Santamaria (No 2)* [2007] SADC 31 at [20]–[21] per Nicholson J (plaintiff misled in significantly material respect).

443 *Trade Practices Commission v Nicholas Enterprises Pty Ltd (No 3)* (1979) 42 FLR 213; 28 ALR 201 at 208, 209 per Fisher J; *Re Elgindata Ltd (No 2)* [1992] 1 WLR 1207; [1993] 1 All ER 232 at 237 per Nourse LJ; *Arian v Nguyen* (2001) 33 MVR 37 at 47 per Ipp AJA (NSWCA); *Butcher v Lachlan Elder Realty Pty Ltd* (2002) 55 NSWLR 558 at [89]–[96] per Handley JA.

444 *Heperu Pty Ltd v Morgan Brooks Pty Ltd (No 2)* [2008] NSWSC 80 at [16]–[18] per Palmer J.

445 *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129.

commence proceedings was sufficient for the court to properly exercise its discretion to award costs against the successful litigant.[446]

Costs sanctions may involve a reapportionment of costs between parties where the successful party has unreasonably refused to mediate, or is in breach of the duty to mediate in good faith. In *Capolingua v Phylum Pty Ltd*[447] the defendant's solicitors failed to co-operate during mediation of the matter by refusing to define the issues. The same solicitors subsequently breached the Expedited List Practice Direction to deliver a list of authorities and issues. Co-operation would have resulted in the determination of certain issues as preliminary matters. The plaintiff had a reasonable expectation of success until the issues in dispute were revealed at the trial where the defendant succeeded. The Western Australian Supreme Court refused, on a number of bases (including that the defendant's unreasonable conduct during mediation resulted in a trial taking four days when it should have taken only two), to award costs to the successful defendant. Ipp J said:

> where, at a mediation conference, a party … adopts an obstructive or unco-operative attitude in regard to attempts to narrow the issues, and where it is subsequently shown that, but for such conduct, the issues would probably have been reduced, the extent to which the trial is in consequence unnecessarily extended is a relevant factor when deciding upon an appropriate award for costs.[448]

His Honour referred to the circumstances at mediation as a ground for determining the award of costs where the defendant's behaviour was the cause of the trial being unnecessarily extended.

The conduct of the litigants is a relevant consideration in the court making an order as to costs. A successful defendant whose conduct causes a plaintiff to mistakenly, but with good reason, believe that they have a sustainable cause of action against the defendant may be denied costs or ordered to pay the unsuccessful plaintiff's costs.[449] Plaintiffs may behave sufficiently unreasonably in commencing or continuing proceedings. Where, for example, the defendant either has, or, if given the opportunity, would have, conceded the plaintiff the remedy they pursue, the plaintiff ought either to be denied, or ordered to pay, costs.[450] Where the plaintiff's

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446 See also *Rowland v Portus* (1906) 6 SR (NSW) 74 where the defendant withheld information about the execution of testamentary documents and was ordered the pay the plaintiff's actions out of the estate.

447 *Capolingua v Phylum Pty Ltd* (1991) 5 WAR 137; see also *Deepsilver Pty Ltd v Aquatherm Australia Pty Ltd* (2007) 53 SR (WA) 354, applying *Capolingua*.

448 *Capolingua v Phylum Pty Ltd* (1991) 5 WAR 137 at 337.

449 *Bryant Bros v Thiele* [1923] SASR 393; *Re Green* [1969] WAR 67; *Pratten v Warringah Shire Council* [1969] 2 NSWR 161; *Jennings v Kilahi-Kiss* (1972) 2 SASR 493; *Overbeek v Corporation of Broadmeadows* [1971] VR 353; *Suttons Motors (Temora) Pty Ltd v Hollywood Motors Pty Ltd* [1971] VR 684.

450 *Jenkins v Hope* [1896] 1 Ch 278; *Cutts v Head* [1984] Ch 290.

refusal to consent to an offer of settlement[451] or an interlocutory order to which the other party is obviously entitled,[452] is unreasonable, they may be denied or ordered to pay costs.

In *Nock v Austin*[453] one of the plaintiffs was a solicitor who prepared the disputed will. The same solicitor was also a beneficiary under the will. The plaintiff failed in their duty to ensure that the testator obtained independent legal advice. The plaintiff succeeded but the court ordered the defendant's costs to be paid out of the estate because the court found that the plaintiff's conduct was the reason for the suit on the grant of probate. Isaacs J said that

> where a party having created suspicion in relation to a will under which he benefits is under the burden of clearing away that suspicion, then, as justice requires him to do so in the presence of any person interested should the suspicion be justified, he must, though eventually successful, ordinarily pay the costs of the person whose presence he has made necessary so far as his benefit extends.[454]

Costs may be refused to successful parties who have pursued unnecessarily complicated actions, or where the actions or interlocutory proceedings are frivolous, or where serious claims are raised but not proved.[455]

Joint parties

[11.500] Plaintiffs may join defendants as co-defendants to an action. Some negligence actions involve multiple defendants to each of whom responsibility might be attributable in some degree. Frequently, defendants seek to attribute responsibility to each other. In some cases the immediate facts do not readily yield answers as to fault, and the results of investigations which can only be considered at trial are required to properly determine liability. Costs orders can be fashioned to suit the needs of joint parties and the circumstances of the case. If the parties' roles in the trial or the preparation for hearing differed customised costs order may be appropriate. Where the parties are joint and several and the court's order as to costs is expressed simply as against the parties, they have joint and several liability in meeting the order. Joint and several liability is not a rule of costs. The court may exercise its discretion in ordering costs to determine the order most suitable to the case.[456]

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451 *Obst v Jarrett* [1959] SASR 315; *Hender v Turale* [1959] SASR 180; *Yates v Bulow* [1968] QWN 18; *Cretazzo v Lombardi* (1975) 13 SASR 4; *Taihape Nominees Ltd v Anton Nominees Pty Ltd* [1976] VR 321 (on the rare exercise of the power).

452 *Public Trustee v Nash* (1920) 38 WN (NSW) 142; *Henty v Henty* (1899) 25 VLR 151; *Coote v Gillespie* (1880) 6 VLR (L) 56.

453 *Nock v Austin* (1918) 25 CLR 519.

454 *Nock v Austin* (1918) 25 CLR 519 at 525; see also *In the Estate of Osment; Child v Osment* [1914] P 129 at 134.

455 *Hermann v Charny* [1976] 1 NSWLR 261.

456 *Probiotic Ltd v University of Melbourne* (2008) 166 FCR 30 at 44–46.

If the plaintiff succeeds in proceeding against some but not all joined defendants the court may exercise its discretion to order that successful defendants are paid either by the plaintiff or by other unsuccessful defendants. Because proceedings involving joint parties are usually lengthier, and complex, the costs associated with them are correspondingly higher, and costs orders more onerous.

Forms of order: Bullock orders and Sanderson orders

[11.505] The form of the order is an essential consideration for the successful co-defendant in the light of the financial position of the unsuccessful defendant.

Bullock order

[11.510] *Bullock* orders require the plaintiff to pay the costs of the successful defendant. The plaintiff then adds those costs as a disbursement to its own costs to be paid by the unsuccessful defendant.[457]

Sanderson order

[11.520] Under the *Sanderson* form of order the unsuccessful defendant pays the costs of the successful defendant directly, and also pays the plaintiff's costs.[458]

A *Bullock* order is more effective for a successful defendant when the unsuccessful defendant is impecunious or bankrupt because the plaintiff pays the costs and attempts to recover payment from the unsuccessful co-defendant. However, a *Sanderson* order is more effective for a plaintiff seeking payment of costs in the same circumstances.

The determination as to the form the order should take when costs are to be paid by the unsuccessful defendant is at the discretion of the court. The *Bullock* and *Sanderson* forms of a costs order in proceedings against co-defendants are only the most common, but not the only, means at the court's disposal to fashion a solution for the payment of costs when the joint defendants' liabilities vary.

In *Besterman v British Motor Cab*[459] Vaughn Williams LJ said:

> If, in circumstances of the case, it was the reasonable thing to do, then he was entitled to add as part of the costs of bringing this reasonable action in which he reasonably joined the other person, the costs of that other person who is found not to be at fault. Of course, the fact that there were two persons who upon the face of the transaction might, either of them, have been guilty is what made it reasonable in the plaintiff, when he brought this action, to join both of these defendants, and, as it was part of the reasonable course of the action against a man who, as it turned out, was a wrong defendant, I agree that,

457 *Bullock v London General Omnibus Co* [1907] 1 KB 264.

458 *Sanderson v Blyth Theatre Co* [1903] 2 KB 533.

459 *Besterman v British Motor Cab Co Ltd* [1914] 3 KB 181.

> under the circumstances, he ought to get the reasonable costs in that action in which both defendants were reasonably joined, although only one turned out to be the real defendant.

The reasonableness of the plaintiff's actions in joining a defendant is a question of fact in each case, and the exercise of the court's jurisdiction to fashion the appropriate costs order is a matter of discretion in the circumstances of the case. It is not, therefore, possible to determine reasonableness in accordance with rigid principles.

In *Lackersteen v Jones (No 2)*[460] the court observed that the plaintiff should not by paying the successful defendant's costs thereby be forced to sacrifice the fruits of victory in litigation. It is important to remember, however, that the basis for the order is not an award of damages to the plaintiff but a disposal of costs by the court exercising its discretion.[461] At the same time the joinder of defendants must have been reasonable. The making of the order is in recognition that the unsuccessful defendant's wrongful actions necessitated the joinder of the successful defendant, and joinder was a legitimate cost incurred by the plaintiff in bringing the action, which should be borne by the unsuccessful defendant.[462] Further, the unsuccessful defendant should not of necessity pay the costs of the successful defendant.

The reasonableness of the joinder of co-defendants is grounded in the cause of action against them. Normally the order is made in cases where all parties are joined in a single cause of action. However, identity of causes of action is not a substantive requirement; nevertheless, they must be connected in some way. The order may still be made when separate actions have been commenced amongst several defendants as long as other prerequisites are satisfied.[463] The unsuccessful co-defendant's conduct is examined to justify joinder. In *Lackersteen v Jones (No 2)* the first and second defendants in a suit for wrongful arrest and false imprisonment were police officers. The plaintiff also joined as third defendant their employer. The court held that it was reasonable to join the third defendant because if the actions the subject of the suit comprised the first and second defendants' conduct in the course of employment the third co-defendant would be vicariously liable for the tort. The court therefore made a *Sanderson*-type costs order.

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460 *Lackersteen v Jones (No 2)* (1988) 93 FLR 442; see also *Vucadinovic v Lombardi* [1967] VR 81; *Post v Colbert* (1987) 20 SASR 62; *Steppke v National Capital Development Commission* (1978) 21 ACTR 23.

461 *Sanderson v Blyth Theatre Co* [1903] 2 KB 533 at 539 per Romer LJ.

462 *Gould v Vaggelas* (1985) 157 CLR 215; see also *Thorne v Doug Wade Consultants Pty Ltd* [1985] VR 433 at 496–500; *ACQ v Cook (No 2)* [2008] NSWCA 306 at [29]–[43]; *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304.

463 *Jones v City of Calgary; Jones v Canadian Westinghouse Ltd* (1969) 68 WWR 193 (Alta SC). It should be noted that here the actions were consolidated for trial. As for the situation where actions are not consolidated, see *The Svein Jarl* (1923) 129 LT 255 at 256, where the court held that "if a plaintiff brings separate actions; unless he acts reasonably in so doing, he will not be allowed the costs of two actions" (per the headnote).

The court will also examine how reasonable the plaintiff's actions were in joining the defendants. In particular, if no cause of action was possible without the joined defendants, or the cause would have been threatened by the lack of one or more of them, the plaintiff acted reasonably in ordering joinder. The costs order will then be made against the unsuccessful defendant in the court's discretion.[464] Conversely, an unnecessarily joined unsuccessful co-defendant against whom the plaintiff had no cause of action, will not be ordered to pay the costs of the successful defendant.

The reasonableness of joining a defendant at the commencement of litigation may not be sustained throughout proceedings. In the Canadian case of *Helenius v Price*[465] an action brought against three defendants was discontinued against one of them prior to trial because investigations had revealed the identity of the proper defendant. Under the circumstances, while it had been reasonable to join all three defendants initially, it would have been unreasonable to continue against the third defendant from that point.[466] The court made a *Bullock* order in favour of the successful defendant prior to the commencement of the trial.[467]

Quantum of costs when parties joined

[11.530] In cases where parties are joined legal work frequently overlaps because work may be prepared for several parties. It is essential to ensure that overlapping items are not taxed more than once, and unsuccessful parties are not forced to pay the same costs several times. Co-defendants are entitled to the costs each has incurred. However, the costs awarded for work done by a single solicitor acting for a number of co-defendants may be shared by all of them in suitable proportion. In *Beaumont v Senior & Bull*[468] Lord Alverston CJ explained:

> But in the absence of any agreement between the two defendants as to how the costs of the defence were to be born, it is clear, on the authority of the cases to which we have been referred, that each of the two defendants is liable to their solicitor for half the costs of the defence, and that will be the amount of costs which the plaintiff will have to pay the successful defendant.

Some textbook authors rely on the authority of *Burridge v Bellew*[469] for the correctness of the proposition that retainers with multiple clients are presumed to be several and not joint.[470] In *Burridge v Bellew* a solicitor had

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464 *Johnson's Tyne Foundry Pty Ltd v Maffra Shire* (1948) 77 CLR 544 at 572–573; *Altamura v Victorian Railways Commissioners* [1974] VR 33; *Zachariah v Ajay Investments Pty Ltd (No 2)* (1983) 33 SASR 426.

465 *Helenius v Price* (1967) 60 WWR 569.

466 See also *Union Bus Sales Ltd v Dueck on Broadway Ltd* (1958) 26 WWR 527 at 528.

467 *Helenius v Price* (1967) 60 WWR 569 at 570. See also *Wellington v Odlum* (1971) 19 DLR (3d) 121; (1974) 7 NSR (2d) 1.

468 *Beaumont v Senior & Bull* [1903] 1 KB 282.

469 *Burridge v Bellew* (1875) 32 LT 807.

470 GE Dal Pont, *Law of Costs* (2nd ed, LexisNexis Butterworths, 2009), [2.18].

acted for several parties and sought to recover the entirety of his costs against one who he claimed had agreed to pay all parties' fees, but who in defence submitted to the contrary that the agreement they entered was that he would not be liable in fees at all. The court found against the defendant and ordered that he pay all of the solicitor's fees. Because the defendant had not pleaded in the alternative that he should be required to pay only for the work the solicitor had done on his behalf the court could not return that finding. Nothing in the court's decision suggests that a court would presume either a joint or several retainer in cases where the retainer is silent on the issue. Amphlett B observed:

> …[t]he mere fact that the several defendants appeared by the same solicitor, that they join in putting in the same answer, join in the same affidavits, and attend joint consultations, would not, to my mind, amount to evidence that there was any joint retainer, particularly in cases where the retainers are separate, because it often occurs in Chancery that there are a number of defendants, some having a large interest, some a very small interest, and some, like trustees, having no interest at all in the case. The expense would be enormous if each of those parties were to appear separately by solicitors and counsel. Therefore they appear together, join in the same pleadings and in the same affidavits, attend at the same consultations, and so a vast expense is saved; but no person in the position of a trustee would ever dream of doing that if he were to be held jointly liable for the costs of a suit in which he had no personal interest. Therefore it is that the taxing master looks at the bill and sees with what proportion of the costs the particular defendant ought to be charged.[471]

A solicitor must prove that a party had agreed to pay all of the fees owing from each of the parties to the solicitor.

In *DA Starke Pty Ltd v Yard*[472] Kourakis J said that the authority of *Burridge v Bellew* burdened the solicitor with the onus of proving that the retainer was joint and several. In that case the solicitor sought to recover part of the fees of a retainer pertaining to two clients (Yardoo and Yard) from one (Yard), but the evidentiary burden was not discharged and the basis of an agreement on joint and several liability was not established.

If the proceedings brought by several parties using the same solicitor are not consolidated proceedings each party is entitled to costs on an individual basis.[473]

471 *Burridge v Bellew* (1875) 32 LT 807 at 813–814.

472 *DA Starke Pty Ltd v Yard* [2012] SASC 19.

473 *Carter v Newcastle Wallsend Coal Co* (1909) 9 SR (NSW) 474.

12 Enforcement of Judgments

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[12.10] Judgments may be enforced by a variety of means. Enforcement processes are governed by and stipulated in the rules.[1] In Victoria judgments are enforced by warrants of seizure, sale, possession, delivery, sequestration and attachment.[2] A money judgment may be enforced by:

- the redirection or attachment of debts;
- the garnishment of wages;
- putting charging orders on shares, securities, and interests under a partnership;
- the issuing of stop orders; and
- the appointment of a receiver by way of equitable enforcement.[3]

The office of the sheriff is in essence a means to seize the judgment debtor's movable property and realise its value for the benefit of the judgment creditor. Because sheriffs take instruction from the indorsement in the enforcement process, the information on and details of the indorsement must be accurate to avert the risk of enforcement against the wrong party or property. Where an indorsement has been incorrectly prepared, resulting in the sheriff executing the order for enforcement against the wrong property, the client instructing the solicitor and the solicitor preparing the indorsement commit trespass[4] — against which, however, the sheriff is indemnified.

In Victoria money judgments and non-money judgments are distinguished for the purpose of enforcement orders. Money judgments are enforced under r 66.02 by a number of alternative mechanisms. For example, money judgments may be satisfied:

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1 Note that references in this chapter are to the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) unless otherwise specified. Order 68 governs warrants of execution generally, including: the issuing of a warrant (r 68.04); when leave is required for a warrant to be issued (r 68.02); the duration of a warrant (r 68.05); and the form of the warrant (r 68.08).

2 Vic r 68.01. See also ACT r 2001; *Civil Procedure Act 2005* (NSW), s 102; NT r 68.01; Qld rr 973, 915, 917; *Enforcement of Judgments Act 1991* (SA); Tas r 894; *Civil Judgments Enforcement Act 2004* (WA).

3 Rule 66.02.

4 *Morris v Salberg* (1889) 22 QBD 614.

- by sale of the judgment debtor's assets sufficient to satisfy the debt under warrant of seizure and sale;[5] or
- by an attachment of debts,[6] or earnings;[7] or
- by a charging order imposing a charge over the debtor's financial securities, stocks or shares;[8] or
- by the appointment of a receiver[9] to recover any of the judgment debtor's equitable interests.

Land is recovered under r 66.03 by a warrant of possession. A judgment for the delivery or payment of the goods' assessed value may be enforced by a warrant of delivery.[10] Where a judgment orders an act to be done, and it is not done because the person so ordered has failed to perform the act either deliberately or negligently, or the judgment orders a party to refrain from acting and the order is disobeyed by the party so ordered, the judgment debtor is subject to a committal and sequestration of their property.[11] If the delinquent party is not an individual but is a corporation, committal lies against of one its officers and the sequestration of that officer's property.[12]

Where the judgment is conditional in the sense that its enforcement will ensue only if that condition is not met by the party liable to the judgment, the failure to perform as ordered is deemed an abandonment of the condition and entitles "any other person interested" to enforce the judgment by the steps warranted by the judgment or which might have been taken if the judgment had not been issued.[13] Unless the party under judgment had given an undertaking to perform the condition, the only action available to the other parties is to undertake enforcement procedures on the judgment which requires leave of the court.[14] The undertaking may nevertheless be enforceable.[15]

ASCERTAINING THE DEFENDANT'S ASSETS

[12.20] Order 67 provides a procedure for the examination or production before a court of things or documents pertinent to the

5 Under O 69.

6 Under O 71.

7 Under O 72.

8 Under O 73.

9 Under O 74.

10 Under r 66.04.

11 Under r 66.02(2)(b) where r 66.05 applies; under r 66.03(b) where r 66.05 applies, and subject to r 66.10; and under r 66.04(1)(b) where r 66.05 applies, and subject to r 66.10.

12 Vic r 66.05; see also NT r 66.05; Tas r 867.

13 Vic r 66.13. see also ACT r 2014; FCR r 41.02; NSW r 39.50; NT r 66.13; Qld r 796; Tas r 885; *Civil Judgments Enforcement Regulations 2005* (WA), reg 8 (money judgments only). There is no corresponding provision in South Australia.

14 Vic r 68.02; see also ACT r 2012; NSW r 39.1; NT r 68.02; Qld r 796; Tas r 897; *Civil Judgments Enforcement Regulations 2005* (WA), reg 13.

15 *Talbot v Blindell* [1908] 2 KB 114.

enforcement of a judgment or order.[16] A person entitled to enforce a judgment may apply to the court to compel a person bound by a judgment to attend court to be orally examined, and to produce documents or things in their possession, custody or power relevant to "the material questions".[17] The "material questions" are defined in r 67.01 to include:

- whether the person bound by the judgment is owed debts, and if so what debts are owed them;[18]
- whether the person bound owns property which can be used in satisfaction of the debt;[19] and
- other questions in aid of the satisfaction or enforcement of the judgment.[20]

If the person bound is a corporation, an order may be made for the attendance of an officer or former officer of the corporation.[21]

"The material questions"

[12.30] As defined under r 67.01 material questions are not restricted to the enforcement of judgments for money payments, while r 67.01(a), (permitting questions in relation to the bound person's debts) and r 67.01(b) (permitting questions in relation to property and any other means) both apply to money judgments. Rule 67.01(c), on the other hand, refers to "any questions concerning or in aid of the enforcement or satisfaction of the judgment specified in the order for examination or production." It is thereby unrestricted in scope and applies to any judgment.

Nature of examination

[12.40] The purpose of examining the person bound by the judgment in relation to the material questions is to obtain the disclosure of information regarding debts owed to, and property owned by, the person which can be applied to the satisfaction of the judgment against them. The person questioned must disclose if and what debts they are owed ("whether any and, if so, what debts"), and, if and what property or means they have ("whether the person bound has any and, if so, what other property or means"). The bound person's answers must constitute a description sufficient to enable the creditor to know what the debts,

16 Rule 67.01. A judgment is defined to include an order.

17 Rule 67.02(1)(a).

18 Rule 67.01(a).

19 Rule 67.01(b).

20 Rule 67.01(c).

21 Rule 67.03.

property and means are, and where they are,[22] including whether they are within the jurisdiction of the court.[23]

The person entitled is permitted to ask "any question concerning or in aid of" the objective of enforcing the judgment about the bound person's debt, property, means, or otherwise. The bound person is therefore required to answer questions directed to ascertain the nature and quantity of debts, including identity of the debtor, and whatever other particulars would enable the judgment creditor to satisfy the debt under a garnishee order.[24] The reference to "other … means of satisfying the judgment"[25] has been understood to permit questions to be legitimately directed to either present resources, or to future resources which may become available to satisfy the judgment debt.[26] The person entitled is not permitted to ask and the person bound is not required to answer questions outside the scope of obtaining information for the purpose of enforcement of judgment. There can be no questions for collateral purposes, such as obtaining information which may be useful in proceedings between the judgment creditor and a third party.[27] The person bound is required to answer all questions properly put to them, and can be ordered to do so.[28] The questioning permitted under O 67 is both an examination and a cross-examination. The person undertaking examination is entitled to exercise the full vigour of cross-examination,[29] although they must refrain from any oppressive, unfair or vexatious conduct.[30]

WARRANT OF SEIZURE AND SALE

[12.50] A judgment for the payment of money may be enforced by a warrant of seizure and sale.[31] The warrant of seizure and sale, formerly known as the writ of *fieri facias* (or *fi fa* as it will be known throughout the rest of this chapter), is a new enforcement process under the rules operating in the place of the writ of *fi fa*.[32]

22 See *Watkins v Ross* (1893) 68 LT 423.

23 *Interpool Ltd v Galani* [1988] QB 738.

24 *Republic of Costa Rica v Strousberg* (1880) 16 Ch D 8.

25 Rule 67.01(b).

26 See *McCormack v National Australia Bank Ltd* (1992) 35 FCR 303.

27 *Watkins v Ross* (1893) 68 LT 423; *McCormack v National Australia Bank Ltd* (1992) 35 FCR 303.

28 See *Watkins v Ross* (1893) 68 LT 423 at 424–425.

29 *Republic of Costa Rica v Strousberg* (1880) 16 Ch D 8 at 13.

30 *McCormack v National Australia Bank Ltd* (1992) 35 FCR 303.

31 Rule 66.02(1)(a).

32 Rule 69.02. See *Supreme Court Act 1986* (Vic), s 3(5) ("A judgment in any proceeding must be enforced in accordance with the Chapter I of the Rules of the Supreme Court and not otherwise."). Also discontinued are the writs of *venditioni exponas*, *distringas nuper vice comitem*, and other writs in aid of a writ of *fi fa*: see *Supreme Court (General Civil*

What property may be seized — general

[12.60] At common law, in execution of a writ of *fi fa*, property could not be seized unless it was to go the deceased owner's executor, and the judgment debtor had an interest in the property in their own right, which interest could be sold. Requiring property to descend to the executor meant that freehold interests in land, and the fixtures to such lands, could not be seized, but that leasehold property, and chattels, could. At common law, given that nothing could be taken in execution that could not be sold, the sheriff was powerless to seize money. However, legislation alters the common law position[33] which permitted only the goods and chattels capable of being sold (and therefore not money) of a judgment debtor to be taken under and in execution of a writ of *fi fa*.[34] By virtue of the *Property Law Act 1958* (Vic), s 219 the sheriff or other officer is empowered to "seize and take any money or bank notes and any cheques bills of exchange promissory notes bonds specialties or other securities for money belonging to the person against whose lands and effects such process is sued".[35] Therefore, money and bank notes of the judgment debtor may be paid to the judgment creditor, and the sheriff may sue for the amount secured by the cheques, bills of exchange or securities as they become due. Also, real estate may be taken in execution. Unencumbered land, and leasehold land, may be seized and sold, but mortgaged land may not because the mortgagor ceases to be the legal owner.[36]

A sheriff executing a writ of seizure and sale acts at the risk of being liable to the owner in the tort of conversion if they seize property not belonging

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Procedure) Rules 1996 (Vic), O 43 rr 2, 3. The writ of *venditioni exponas* was a judicial writ addressed to the sheriff, commanding him to expose for sale goods which he had already taken into his hands, to satisfy a judgment creditor: *Jowitt's Dictionary of English Law* (1825). The writ was not a separate process but part of the process of execution by *fi fa*: *Hughes v Rees* (1838) 4 M & W 468; 150 ER 1513. The writ issued to compel the sheriff to sell where he refused to sell or delayed in doing so (*Cameron v Reynolds* (1776) 1 Cowp 403; 98 ER 1154) or to command him to sell at the best price he could if he was unable to sell except at an undervalue: *Slye's Case* (1619) Godb 276; 78 ER 161; *R v Bird* (1679) 2 Show 87; 89 ER 811. The nature of the writ is discussed in *TL & PA Finnegan (Timber) Pty Ltd v Beechey* [1983] 2 VR 215. The writ *distringas nuper vice comitem* issued on a change of sheriff to compel the sheriff who had gone out of office to discharge his duty with respect to goods seized whilst in office. The writ was directed to the sheriff in office to distrain on his predecessor to compel him to sell the goods he had seized (*Clerk v Withers* (1704) 2 Ld Raym 1072; 92 ER 211), or to pay the proceeds of execution to the judgment creditor: *Helbroke v Beaumont* (1579) 21 ER 75. The writ was probably obsolete in Victoria, as *Supreme Court Act 1958* (Vic), s 213 provided for the transfer of partly executed writs and processes of execution from one sheriff to the next.

33 *Property Law Act 1958* (Vic), s 219 is expressed as operating "By virtue of any writ of fieri facias …"

34 *Francis v Nash* (1734) 95 ER 32; *Legg v Evans* (1840) 6 M & W 36; 151 ER 311 at 41 (M & W); *Wood v Wood* (1843) 4 QB 397; 114 ER 948 at 401 (QB); *Pyke v Duncan* [1989] VR 149.

35 See *Johnson v Pickering* [1908] 1 KB 1.

36 See *Property Law Act 1958* (Vic), s 208; *Transfer of Land Act 1958* (Vic), s 52.

to the owner.[37] The seizure and sale of unregistered land therefore represents a risk because the sheriff may only sell whatever title the judgment debtor possesses, but has no means, in those circumstances, of ascertaining the judgment debtor's title. Nor can the sheriff ensure that the purchaser attains vacant possession of land because the sheriff has no right of possession over it. The sheriff is not bound to sue on the seized security unless they are first indemnified against costs by the execution creditor.

The solicitor indorsing the writ of seizure and sale may not specify on the writ what particular goods the sheriff is to seize in execution of the writ. It is the sheriff's duty to identify the goods to be seized. If the sheriff seizes goods belonging to a person other than the debtor the owner of the goods has an action against the sheriff.[38]

Property that may be seized

[12.70] In execution of a warrant of seizure and sale the sheriff or other officer may seize numerous types of properties.

Choses in action

[12.80] In *Hunniford v Horwood*[39] Peck sought to restrain Horwood from directing the sheriff to sell Murdoch's property in execution of a costs order obtained in Hunniford's successful suit in *Horwood v Murdoch*,[40] on the ground that Peck had acquired, as a specialty or security for money, the exclusive right of execution of the orders made against Murdoch. The court held that the new law authorised the sheriff to seize and sell specialties and other securities but only if requested to, and indemnified, by the party suing out the writ of execution.

Dividends

[12.90] In *Evans v Stephen*[41] the court held that the Woodyears — creditors in the estate of Burton, a bankrupt — had an equitable interest in the dividends of Burton's estate, which was properly assigned by deed to Evans, on notice to Stephen, who agreed "to pay Evans the dividends assigned, not as official assignee, but in his individual capacity" and was, on that basis, bound by the deed of assignment and liable to Evans.

37 *Neumann v Bakeaway Ltd* [1983] 2 All ER 935; *Observer Ltd v Gordon* [1983] 2 All ER 945. As to whether the sheriff is entitled to an indemnity from the execution creditor if they have taken the goods on the instructions of the execution creditor, see *Sheffield Corporation v Barclay* [1903] 2 KB 580 at 588.

38 *Smith v Keal* (1882) 9 QBD 340; *Lee v Rumilly* (1891) 7 TLR 303; *Sparrow v Cornell* (1900) 2 WALR 78.

39 *Hunniford v Horwood* (1879) 5 VLR (E) 250.

40 *Horwood v Murdoch* (1879) 5 VLR (L) 435 (judgment obtained by judgment debtor). See also *Property Law Act 1958* (Vic), s 219.

41 *Evans v Stephen* (1882) 3 LR (NSW) L 154 (unpaid dividends in the hands of an official receiver may be seized).

Stephen, under an indemnity, then paid the Woodyears' judgment creditors who had issued attachment orders on Stephen "part of the dividends due to Woodyear in Burton's estate" and promised to pay the balance due to the Woodyears to Evans, who sued Stephen personally in equity for money had and received and sought an account, having paid the Woodyears' creditors with money that belonged to him and not them.

Equitable interest

[12.100] The judgment debtor's equitable interest in property under a will or in land[42] may be seized. In *Re Cox; Perpetual Trustee v Cox*[43] HR Cox Jnr (Cox) was a beneficiary under his father's (Henry Robert Cox) will and a judgment debtor in relation to which judgments writs of *fi fa* were issued. The sheriff had not attempted to sell,[44] nor had Cox's judgment creditors obtained charging orders[45] against,[46] Cox's equitable interest in the estate property, and payment to the trustees of Henry Robert Cox's estate was deferred until the court had determined who of Cox and his judgment creditors was entitled to the income. The *Judgment Creditors' Remedies Act 1901* (NSW), by abandoning the distinction between legal and equitable estates, extended the range of remedies available to judgment creditors. The court applied Faucett J's decision in *Evans v Stephen*[47] wherein an equitable interest bound by a writ of execution registered prior to the assignment of that interest to the assignee, accrued to the assignee, to whom the assignment entitled it. The court rejected the argument, as had the court in *Evans v Stephen*, that an equitable interest in land can only be bound once:

- the interest had been
  - sold or offered for sale by the sheriff under s 10 of the *Judgment Creditors' Remedies Act 1901* (NSW); or
  - seized, and the seizure published under s 14; or
- the judgment creditors obtained charging orders under s 27.[48]

42 *Property Law Act 1958* (Vic), s 208; *Trustees Executors & Agency Co Ltd v Butler* [1905] VLR 650.

43 *Re Cox; Perpetual Trustee Co Ltd v Cox* (1903) 3 SR (NSW) 356.

44 Available under *Judgment Creditors' Remedies Act 1901* (NSW), s 10.

45 Available under *Judgment Creditors' Remedies Act 1901* (NSW), s 27.

46 On the basis of either the writs of *fi fa* or the court's judgments in their favour.

47 *Evans v Stephen* (1882) 3 LR (NSW) L 154.

48 *Deeds Registration Act 1843 (7 Vic No 16)* (NSW), s 21 affected legal interests only. In England, equitable execution of an equitable interest would be granted by the appointment of a receiver, but not in this State, since the judgment creditor could obtain execution at law under *Deeds Registration Act 1843 (7 Vic No 16)* (NSW), ss 10 and 27: *Henry Bull & Co v Murphy* (1900) 21 LR (NSW) Eq 1.

Fixtures

[12.110] If the judgment debtor as a tenant has the right to remove certain fixtures, these may be seized in execution,[49] even though they are subject to an unregistered bill of sale.[50] A strict and ancient principle of property law provided that things attached by a tenant to the soil become part of the landlord's freehold.[51] The tenant had rights at common law to remove fixtures during the term of the lease, or while they remained in upon an excrescence of the term;[52] and the landlord and tenant may enter an agreement whereby the tenant may remove fixtures at the expiry of the term. However, such an agreement would not permit that tenant to remove the fixtures after the lease has expired, nor would the agreement found an action in trover against the landlord for refusing to permit the tenant to remove the fixtures.[53] The decision in *Poole's Case*[54] established the right of tenants to remove trade fixtures and other things essential to their work, manufacture or business, but otherwise adhered to the strict rule that fixtures were not removable. A line of cases stemming from this classic decision provides that the right to remove such fixtures is conditional upon their removal avoiding destruction of, or serious damage to, the demised property.[55] It is now established that fixtures annexed to the freehold for the purpose of conducting trade may be severed and removed by the tenant under this exception.[56]

In *Minshall v Lloyd*[57] Parke B, following and applying the doctrine of *Coombes v Beaumont*[58] in an action in ejectment against the tenant, held that the fixtures in question were not "goods and chattels" as defined by

49 *Poole's Case* (1703) Holt KB 65; 90 ER 934; *Minshall v Lloyd* (1837) 2 M & W 450; 150 ER 834.

50 *Hawtrey v Butlin* (1873) 1 LR 8 QB 290.

51 *Minshall v Lloyd* (1837) 2 M & W 450; 150 ER 834 at 459 (M & W); see also *Mackintosh v Trotter* 3 Id 184; *Overton v Williston* 31 Pa I5.

52 *Minshall v Lloyd* (1837) 2 M & W 450; 150 ER 834 at 459 (M & W).

53 If the plaintiff has any right of action it is not in this form: that is, in the form of action in trover.

54 *Poole's Case* (1703) Holt KB 65; 90 ER 934.

55 *Lawton v Lawton* (1743) 3 Atk 14. Smith, *Leading Cases* (10th ed), p 204.

56 Although other limited exceptions exist they are not as well established, nor as clearly defined, and are more limited.

57 *Minshall v Lloyd* (1837) 2 M & W 450; 150 ER 834 at 459 (M & W).

58 *Coombes v Beaumont* 5 B & Ad 72 per Parke J, following *Horn v Baker* (1919) 9 East 215; see also *Clarke v Crownshaw* 3 B & Ad 804, following the authority of *Horn v Baker*. In *Coombes v Beaumont*, a tenant working a coal mine affixed a steam engine to the property to be used in operations during the term of the lease. The steam engine did not fall within the meaning of "goods and chattels" under the *Bankrupts Act 1825 (6 Geo 4 c 16)* (ENG), s 72 and could not, therefore, be assigned by the tenant as his goods to assignees. As Parke B explained in *Boydell v M'Michael* 1 CM & R 177 while the tenant is entitled to remove fixtures during the term of the lease and the sheriff has a right to seize them in execution of a writ of *fi fa*, in bankruptcy the tenant's "possession (of the real property) is considered as nothing, but the title only is looked to."

the *Bankruptcy Court (England) Act 1831* (ENG) and were not therefore able to be assigned as goods for the purpose of administering the bankruptcy.[59] However, fixtures "are goods and chattels when made such by the tenant's severance, or for the benefit of execution creditors."[60]

Fixtures are not to be considered goods in an *indebitatus* action, but their value once sold can be recovered in an account.[61] A bankrupt may assign trading fixtures as their own property with no action lying against the assignee who subsequently severed and removed the goods by the mortgagee for damage to the property where the mortgage deed did not provide for the conveyance of the goods upon reversion.[62]

In *Hawtrey v Butlin*[63] the Court of Queen's Bench held that the mortgage that conveyed the leasehold of a property and the assignment of fixtures did not assign the fixtures to the tenant absolutely, but only assigned their enjoyment for the term of the demise. The passing of the fictures by express assignment (the mortgage) brought them within the terms of the *Bills of Sale Act 1878* (UK) such that the mortgage could be dealt with under the Act except for the term of the demise.

A sheriff shall have an action against a person in trover and not in trespass[64] if the sheriff seizes either:

- a trader's goods after the trader has become bankrupt but before the fiat is issued; or
- personal chattels which have been properly severed from the land;[65] or
- detached parts of machinery where the main part of the machine is attached to the freehold;[66] or
- an undivided portion of a chattel.

Hire-purchase agreement

[12.120] The judgment debtor's interest in goods the subject of a hire-purchase agreement may be sold in execution[67] unless, however, the terms of the agreement determine the hiring upon the seizure of the goods in execution.[68] In *Wylie v Nisbett*[69] the court held that property in goods subject to time payment agreements did not pass until the full

59 *Minshall v Lloyd* (1837) 2 M & W 450; 150 ER 834 at 459 (M & W) per Parke B.

60 *Minshall v Lloyd* (1837) 2 M & W 450; 150 ER 834 at 459 (M & W) per Parke B.

61 *Hallen v Runer* 1 CM & R 766.

62 *Trappes v Harter* 3 Tyrwh 602 (although doubted by Parke J in *Minshall v Lloyd* (1837) 2 M & W 450; 150 ER 834).

63 *Hawtrey v Butlin* (1873) 1 LR 8 QB 290.

64 *Watson v King* 4 Camp 272.

65 *Minshall v Lloyd* (1837) 2 M & W 450; 150 ER 834.

66 *Davis v Jones* 2 B & A 166.

67 *Wylie v Nisbett* (1895) 21 VLR 7.

68 *Jelks v Hayward* [1905] 2 KB 460; *Moffitt v Seller* (1961) 80 WN (NSW) 378.

69 *Wylie v Nisbett* (1895) 21 VLR 7.

purchase money was paid. The hirer acquires a saleable interest in the goods (subject to the owner's right to be paid the balance and for any repairs) able to be sold under a writ.

Only goods belonging to the execution debtor may be seized and sold. The sheriff's position was clarified in *Jelks v Hayward*.[70] A sheriff may seize and sell a judgment debtor's interest in goods which the judgment debtor did not own but were in the debtor's rightful possession, and in which they had a saleable interest, such as when they were the hirers, or hire-purchasers, of the goods. If, however, it was a term of the hire agreement that it was terminated by the seizure of the goods the debtor could have no seizable interest in the goods.[71]

Judgment debt

[12.130] The sheriff is authorised to seize a judgment obtained by the judgment debtor in another proceeding in enforcement only, but is not authorised to sell the judgment.[72]

Leasehold interest

[12.140] A warrant of seizure and sale affects leasehold interests in land.[73] The judgment debtor is subject to an action in ejectment by the purchaser of a leasehold interest in the subject land.[74] If a sheriff assigns property in execution of a writ of *fi fa* and the assignee is able to enter the property without disturbing the tenant's peaceful possession of the property, the assignee may do so without bringing an action in ejectment against the tenant.[75] However, where a tenant is in possession the sheriff may not eject them in order to give possession to an assignee, except possibly in circumstances where the assignee is themselves the person in possession.[76] An assignment of a lease by a sheriff in execution of a writ of *fi fa* is not a forfeiture of the lessee's interest.[77] The exception is:

- where the lessee voluntarily acts to enable the lease to be taken in execution of the writ;[78] or

70 *Jelks v Hayward* [1905] 2 KB 460.

71 *Jelks v Hayward* [1905] 2 KB 460.

72 *Horwood v Murdoch* (1879) 5 VLR (L) 435.

73 See *Property Law Act 1958* (Vic), s 208; *Transfer of Land Act 1958* (Vic), s 52.

74 *R v Bird* (1679) 2 Show 87; 89 ER 811; *Taylor v Cole* (1789) 3 Term Rep 292; 100 ER 582.

75 See also *Taunton v Costar* 7 TR 437; *Turner v Meymott* 1 Bing 158; *Does d Slatters v Lad* 6 DPC 256.

76 *Taylor v Cole* (1789) 3 Term Rep 292; 100 ER 582; *R v Deane* 2 Show 85; see *Millar v Parnell* 2 March 78; 6 Taunt 670.

77 *Doe v Carter* (1799) 8 Term Rep 300; 101 ER 1400.

78 *Doe v Carter* (1799) 8 Term Rep 300; 101 ER 1400.

- where the lease itself expressly or impliedly depends on the lessee's occupancy of the premises;[79] or
- where there is some form of connivance in the sale on the part of the judgment debtor.[80]

The sheriff, by selling a leasehold interest in the land, does not thereby cause the judgment debtor to forfeit the operation of the lease without there being some form of connivance in the sale on the part of the judgment debtor.[81]

Money

[12.150] Money at common law could not be seized.[82] The statutory provision in *Property Law Act 1958* (Vic), s 219 renders money, bank notes and other securities subject to seizure, in the same way as other chattels were seizable at common law. Money, however, is not required, or subject to being, sold.[83] The money which the sheriff seizes in execution of a writ must be cash which the execution debtor is in the physical possession of, or has under their physical control.[84] The court in *Collingridge v Paxton* held that that s 12 of the *Judgments Act 1838 (1 & 2 Vict c 110)* (UK) put money, bank notes, cheques and other instruments in the same position as goods and chattels seizable in execution of a writ of *fi fa*,[85] except that it need not be sold to satisfy the judgment debt,[86] and that neither seized goods nor money seized became, by virtue of the seizure, the property of the execution creditor.[87] Maule and Williams JJ referred to the

79 An assignment by operation of law, as by the bankruptcy of the lessee, is no forfeiture (*Goring v Warner* 2 Eq Cas Abr 100; *Philpot v Hoare* 2 Atk 219; *Doe v Bevan* Ambl 480 SC 3 M & S 353), unless it be expressly covenanted that the lease shall be forfeited by the bankruptcy of the lessee: *Roe v Galliers* 2 TR 133. See also *Domett v Bedford* 6 TR 684; *Doe v David* 1 Cr M & R 405. In *Doe v Powell* 5 B & C 308 the lessee by deed conveyed all his property to trustees for the benefit of his creditors, and was found bankrupt. It was held that there was no forfeiture because the deed, being an act of bankruptcy and void, did not operate as a valid assignment of the lease, which therefore passed to the assignees.

80 As to whether the execution creditor is entitled to appear and defend in an action for ejectment founded on a sale by the sheriff that is alleged to constitute a breach of a covenant not to assign see *Croft v Lumley* (1855) 24 LJQB 78; *Doe v Carter* (1799) 8 Term Rep 300; 101 ER 1400.

81 See *Croft v Lumley* (1855) 24 LJQB 78; *Doe v Carter* (1799) 8 Term Rep 300; 101 ER 1400.

82 *Collingridge v Paxton* (1851) 11 CB 683; 138 ER 643.

83 See *Johnson v Pickering* [1908] 1 KB 1.

84 *Wood v Wood* (1843) 4 QB 397; 114 ER 948 at 401 (QB); *Collingridge v Paxton* (1851) 11 CB 683; 138 ER 643; *Harrison v Paynter* (1840) 6 M & W 387; 151 ER 462.

85 *Collingridge v Paxton* (1851) 11 CB 683; 138 ER 643 at 687 per Jervis CJ, 688 per Maule J, 688–689 per Williams J, 689 per Talfourd J (concurring).

86 *Collingridge v Paxton* (1851) 11 CB 683; 138 ER 643 at 688 per Maule J. See also *Johnson v Pickering* [1908] 1 KB 1 (money is not required, or subject to be, sold).

87 *Collingridge v Paxton* (1851) 11 CB 683; 138 ER 643 at 687–688 per Jervis CJ, 688 per Maule J. But, although the sheriff may and ought to, if the execution creditor desires it, hand over the money to him, it does not follow that it becomes by the seizure the property of the execution creditor.

inconvenience[88] that would be caused if the effect of the legislation was to put seized goods and seized money in an "anomalous position".[89] Specifically, it would be anomalous to treat the money seized in the present case differently from "ordinary cases" where goods were seized and sold for money collected by the sheriff.[90]

Real estate

[12.160] Land and interests in land, equities of redemption and powers capable of exercise for the benefit of the judgment debtor may be taken in execution.[91]

Securities

[12.170] Section 219 of the *Property Law Act 1958* (Vic) authorises the sheriff to hold bonds, specialities or other securities of the judgment debtor as security for the amount to be levied, and to sue for the recovery of the sums secured thereby, and to pay over the money recovered to the execution creditor, indemnity being given to the sheriff by the execution creditor for costs. The section does not, however, give the sheriff authority to sell the security.[92]

Ship

[12.180] Having a saleable interest in goods does not require the judgment debtor to be the sole unencumbered owner of the goods, and goods which are owned jointly or in common may be seized in execution of a writ of *fi fa*.[93] A ship, being a chattel, is governed by the same rules when being sold as those governing chattels in general[94] and may be seized in execution.[95] In *The James W Elwell* the court said that: "There is

88 *Collingridge v Paxton* (1851) 11 CB 683; 138 ER 643 at 688 per Maule J, 689 per Williams J.

89 *Collingridge v Paxton* (1851) 11 CB 683; 138 ER 643 at 688 per Maule J.

90 *Collingridge v Paxton* (1851) 11 CB 683; 138 ER 643 at 687 per Maule J.

91 *Property Law Act 1958* (Vic), s 208. See also *Transfer of Land Act 1958* (Vic), s 52.

92 *Horwood v Murdoch* (1879) 5 VLR (L) 435.

93 *Halsbury's Laws of England* (4th ed, 1976), Vol 17, para 482.

94 *Behnke v Bede Shipping Co Ltd* [1927] 1 KB 649. While the *Sale of Goods Act 1893* (UK) may apply to vessels special consideration is given to vessels under construction: see C Abbott, *Law of Merchant Ships and Seamen* (14th (Asp) ed, Shaw & Sons, London, 1901), Ch 1. D MacLachlan (G St C Pilcher and OL Bateson (eds)), *A Treatise on the Law of Merchant Shipping* (7th ed, Sweet & Maxwell, London, 1932), Ch 1. The *Bills of Sale Act 1854* (ENG) (which was repealed and re-enacted by the *Bills of Sale Act 1878* (UK)) and the *Merchant Shipping Act 1854* (ENG) do not approach the registration of vessels in the same way and a ship for the purpose of the *Bills of Sale Act 1854* is not necessarily a ship for the purpose of the *Merchant Shipping Act 1854*. The exemption of the registration of an assignment of a "ship or vessel" under the Bills of Sale Act is not confined to ships and vessels requiring registration under the Merchant Shipping Act: *Union Bank of London v Lenanton* (1878) 3 CPD 243; *Gapp v Bond* (1887) 19 QBD 200. Title to a ship does not pass by delivery of a ship: *Hooper v Gumm* (1867) 2 Ch App 282.

95 *Union Bank of London v Lenanton* (1878) 3 CPD 243; *The James W Elwell* [1921] P 351.

no doubt that at common law an undivided share in a chattel can be taken in execution by seizure of the chattel and sale of the share."[96] This is because each of the co-owners, whether joint tenants or tenants in common, is entitled to possession and may sell the goods in question without the consent of the other co-owners. Despite the judgment debtor's interest in the ship being only a share of the total interest in the ship, the ship may be seized as a whole.[97] The debtor's share of the proceeds goes to the satisfaction of the judgment debt, and the other co-owner or co-owners are entitled to claim their share of the moneys realised from the sale of the goods in accordance with their relative interest in the goods. A sheriff may also seize and sell the goods of a judgment debtor subject to and held upon a lien for work done, provided the sheriff pays over the amount owing to the lienor.[98]

Third party's goods

[12.190] A judgment debtor who retains possession of property which has been made the subject of a gift may have that property taken in execution.[99] So, where, by a deed of gift of goods, (A) left to his wife's use for life certain goods which, on her death, remaindered to (A)'s children, the deed could not prevent a creditor from taking the goods in execution of a writ of *fi fa* against (A).[100] But where goods in the judgment debtor's possession are goods sold to another,[101] or goods which another has accepted as satisfaction of a debt,[102] they may not be taken by the sheriff.

The question for determination in *Newman v Cardinal*[103] was whether certain crops were the property of the judgment creditor or of the execution creditor. The judgment creditor and judgment debtor entered an agreement whereby the debt of £155 would be fully discharged by the creditor taking from the debtor a crop of wheat growing at the time the agreement was executed, for which the debtor provided the creditor a receipt for £155. Thereafter, in execution of a writ against the judgment debtor, the sheriff seized the crop when it was ready for harvest, but had not yet been reaped. The court held that the transfer to the judgment creditor was sufficiently valid, despite not being a registered instrument, to resist the seizure of the crops by the execution creditor.

An action in trespass lies against a sheriff whose bailiff has sold, in execution of a writ of *fi fa*, the cut grass of a vendee in possession of a

96 *The James W Elwell* [1921] P 351 per Hill J at 368.

97 *The James W Elwell* [1921] P 351.

98 *Duncan v Garrett* (1824) 1 C & P 169; *Proctor v Nicholson* (1835) 7 C & P 67.

99 *Winchelsea v Maidstone* (1691) 4 Mod Rep 51; 87 ER 257.

100 *Winchelsea v Maidstone* (1691) 4 Mod Rep 51; 87 ER 257. Where A's steward redeemed the goods and A paid the steward the purchase price the goods were thereby new property in A's ownership which the executor could appropriate to the deed of gift.

101 *Tompkinson v Russell* (1821) 9 Price 287; 147 ER 95.

102 *Newman v Cardinal* (1862) 2 F & F 840.

103 *Newman v Cardinal* (1862) 2 F & F 840.

field of grass from which hay was to be produced where the purchaser enters the field and takes a portion of the grass.[104]

What property cannot be seized

[12.200] Not all property can be seized by the sheriff in execution of a warrant of seizure and sale. Case law established that in execution of a writ of *fi fa* incorporeal property such as copyright, stocks and shares is normally exempt. However, the sheriff may seize and sell chattels real, and incorporeal property, such as the rents on land, and annuities, but not choses in action such as debts due to the judgment debtor.[105] The fundamental rule of the common law is that "(n)othing … can be taken in execution, under a writ of fieri facias that cannot be sold."[106] The common law rule was specifically modified by the *Judgments Act 1838 (1 & 2 Vict c 110)* (UK) making certain kinds of property subject to the writ.[107] However, a lien, which is a personal right that continues only as long as it is in the possession of the lienor, is not amenable to sale;[108] nor is a copyright since the copyright holder has no interest that can be seized;[109] nor, for the same reason, is a patent.[110]

A lien

[12.210] In *Legg v Evans*[111] the Court of Exchequer observed that goods of the debtor held as a lien cannot be subject to a sheriff's sale or other means of disposing of the subject matter of the lien, because a lien is an inalienable personal interest in the goods and continues as long as the holder of the lien retains possession of the goods.[112]

Seizure can only be executed against goods in the judgment debtor's possession and only so much of the judgment debtor's interest in the goods as survives the seizure may be sold. When the judgment debtor is a lienor, for example, the goods they retain in their possession in exercising the lien cannot be seized since the lien is only a right coterminous with possession, and which dissipates with dispossession.[113] Goods belonging to a judgment debtor but subject to a lien for work done upon them may be seized and sold by the sheriff, provided they pay over the amount

104 *Tompkinson v Russell* (1821) 9 Price 287; 147 ER 95.

105 *Halsbury's Laws of England* (4th ed, 1976), vol 17, para 473.

106 CJ Edwards, *The Law of Execution upon Judgments and Orders* (1888), p 112.

107 See *Property Law Act 1958* (Vic), s 119. See also *Francis v Nash* (1734) 95 ER 32; *Legg v Evans* (1840) 6 M & W 36; 151 ER 311.

108 *Legg v Evans* (1840) 6 M & W 36; 151 ER 311 at 41; 313 per Parke B.

109 *Re Baldwin; Ex parte Foss* (1858) 2 De G & J 230; 44 ER 977 per Knight Bruce LJ.

110 *Brown v Cooper* (1870) 1 VLR 210 at 211 per Stawell CJ, following *Re Baldwin; Ex parte Foss* (1858) 2 De G & J 230; 44 ER 977.

111 *Legg v Evans* (1840) 6 M & W 36; 151 ER 311.

112 *Legg v Evans* (1840) 6 M & W 36; 151 ER 311; *Houlditch v Desanges* (1818) 2 Stark 337. See also *Deacon v Kingdom* [1931] SASR 271.

113 *Legg v Evans* (1840) 6 M & W 36; 151 ER 311 at 41; 313.

owed to the holder of the lien.[114] However, the judgment debtor's interest in goods leased to them and in their possession may be sold.[115] Goods pledged in pawn may also be seized where the pledgee is the judgment debtor.[116] But if the goods have been pawned, or have been let to another person, they may only be seized and sold once the bailment or term of lease have expired.[117] If, however, the goods are subject to an innkeeper's lien they may be seized, although in that case the sheriff who sells the goods is liable for the amount of the lien.[118] A warrant of seizure and sale executed upon a lessor will not entitle the sheriff to seize goods that have been leased to another.[119] In *Izod v Lamb*,[120] the sheriff returned a *nulla bona* to the judgment creditor, finding no goods of the judgment debtor against which to execute the writ. The judgment debtor's furniture had been leased to, and was in the possession of, a tenant.[121]

A right to sue in a purely personal action[122] and a right to a suit in equity

[12.220] Equitable interests are not able to be sold in execution of writs of *fi fa*.[123] In *Moore v Blake*[124] Moore, the applicant, in response to an action in ejectment, pursuant to the sheriff's sale of Moore's land in execution of a writ of *fi fa*, filed a bill in 1782 which was only prosecuted in 1801, claiming that Blake had purchased land from D'Arcy which was subject to Moore's equitable interest (an unexecuted lease) in the land of which Blake had notice and to which Blake was subject in the same terms as D'Arcy. The House of Lords held the sale of the land to be a nullity because the appellant's equitable interest in the land could not be assigned to a purchaser under a seizure and sale of land in execution of a writ of *fi fa*.

In *Blair v Blair*[125] on 17 March 1897 Tooth & Co, pursuant to a judgment against Mrs Blair for £325, issued a writ of *fi fa* in execution of which on 15 April 1897 the sheriff sold Mrs Blair's right, interest and title to the testator's (her husband's) estate to Tooth & Co for £5 3s. It was submitted for Mrs Blair that, dower not having been assigned, it remained a chose in

114 *Duncan v Garrett* (1824) 1 C & P 169; *Proctor v Nicholson* (1835) 7 C & P 67.

115 *Legg v Evans* (1840) 6 M & W 36; 151 ER 311 at 41; 313 per Parke B; *Jelks v Hayward* [1905] 2 KB 460 at 465.

116 *Re Rollason; Rollason v Rollason* (1887) 34 Ch D 495.

117 *Rogers v Kennay* (1846) 9 QB 592.

118 *Proctor v Nicholson* (1835) 7 C & P 67.

119 *Powlett v Lee* (1852) 19 LT 23. See also *Izod v Lamb* (1830) 1 Cr & J 35.

120 *Izod v Lamb* (1830) 1 Cr & J 35.

121 *Izod v Lamb* (1830) 1 Cr & J 35, followed as authority and applied in *Powlett v Lee* (1852) 19 LT 23. See also *Levasseur v Mason* [1891] 2 QB 73 at 77–78.

122 *Evans v Crosby* (1893) 5 QLJ 95.

123 *Moore v Blake* (1816) 4 Dow 230; 3 ER 1147 at 246–247 (Dow).

124 *Moore v Blake* (1816) 4 Dow 230; 3 ER 1147.

125 *Blair v Blair* (1897) 18 LR (NSW) Eq 47.

action until assigned,[126] and until such assignment she had no estate in the land,[127] nor had the sheriff power to seize and sell the land in execution of the writ.[128] The court held in favour of Mrs Blair that the interests assigned to her under the court's decrees comprised a chose in action which could not by statute[129] be taken in execution of a writ of *fi fa* by the sheriff, so that they did not pass to Tooth & Co.

A copyright[130] and a patent

[12.230] In *Brown v Cooper*[131] the Full Court held that a patent could not be sold in execution of a writ of *fi fa*. Stawell CJ explained that this was because: "Each are given to the person himself, and are not assignable by operation of law, only by express enactment."[132]

A stud horse

[12.240] The sheriff cannot seize and sell the judgment debtor's interest in a stud horse which has been leased to him for a season.[133]

Fixtures which the tenant has wrongly severed

[12.250] In *Farrant v Thompson*[134] the sheriff, in execution of a writ of *fi fa*, seized and sold mill machinery. The mill had been demised to a tenant, who had removed the machinery in violation of his obligations under the lease. The purchaser of the machinery was sued in trover by the mill's owner. The Court of King's Bench upheld the landlord's claim, reasoning that the machinery became the landlord's property when it was severed from the mill.

Tenant's fixtures to which the tenant has renounced rights

[12.260] If a landlord does not want to grant a business or trade tenant's ordinary right to remove fixtures or machinery from demised premises in a lease, they must expressly restrict that right in the plain words of the lease. If the lease uses ambiguous language to try and

126 Relying upon United States authority: *Kent's Commentaries on American Law* (10th ed, 1860), Vo1 IV, p 65.

127 *King v Inhabitants of North Weald Bassett* 2 B & C 724; *Jackson v VandeTheyden* 8 Amer D 378; *Pennington v Yell* 52 Amer D 262; *Carnall v Wilson* 76 Amer D 351.

128 *Advancement of Justice Act 1841 (5 Vic No 9)* (NSW), s 31; *Law Simplification Act 1848 (12 Vic No 1)* (NSW), s 5.

129 *Law Simplification Act 1848 (12 Vic No 1)* (NSW), s 5.

130 *Re Baldwin; Ex parte Foss* (1858) 2 De G & J 230; 44 ER 977.

131 *Brown v Cooper* (1870) 1 VLR 210.

132 *Brown v Cooper* (1870) 1 VLR 210 at 211, following *Re Baldwin; Ex parte Foss* (1858) 2 De G & J 230; 44 ER 977.

133 *Wood v O'Shea* (1893) 10 WN (NSW) 68.

134 *Farrant v Thompson* (1822) 5 B & Ald 825; 106 ER 1392.

achieve this, the tenant's right remains intact.[135] The lease must be considered as a whole, and the *ejusdem generis* rule applied to exclude the possibility that the fixtures constituted erections, improvements or buildings, by having some characteristic in common with those genera of things.[136]

Tenant's fixtures which have passed to the landlord[137] and a cheque not yet delivered to the debtor

[12.270] In *Courtoy v Vincent*[138] Frederick Courtoy obtained judgment against William Courtoy for failing to pay him his equal one-seventh share of £4,000 which he was to receive under the terms of a will, and so he directed the sheriff to execute a writ of *fi fa* against William. The sheriff was unable to discover property standing in the name of William, so Frederick obtained an order restraining the Accountant-General from paying William his next annuity under the same will, and petitioned the court to make either an order directing the sheriff to seize the cheque,[139] or an order such as the court might make were the cheque standing in the name of a trustee of the judgment debtor.[140] The court dismissed the petition, finding that it lacked the power to order the sheriff or direct the Accountant-General as required, because it could not by an order undermine the testator's express purpose in the will. However, the court did continue the order restraining the Accountant-General from parting with the cheque.[141]

Licences held under the Fisheries Act 1968 (Vic) and the Fisheries Act 1952 (Cth)

[12.280] In *Pyke v Duncan*[142] Pyke, a fisherwoman, held licences to dredge for scallops in Victorian and Commonwealth waters which the sheriff seized and proposed to sell in execution of a writ of *fi fa* issued by her judgment creditors. The question that arose was whether the licences were property capable of being seized and sold by the sheriff. Under the *Supreme Court Act 1986* (Vic), s 115(1) the sheriff was empowered to seize only that property permitted by the Act itself, or any other Act, or by the common law. Nathan J concluded that the common law determines what property is, for the purpose of the sheriff executing powers of seizure and sale, subject only to the defined extension under the *Property Law Act 1958*

135 *Dumergue v Rumsey* (1863) 2 H & C 777; 159 ER 322.

136 *Lambourn v McLellan* [1903] 2 Ch 268 at 277 per Vaughan Williams LJ.

137 *Richardson v Ardley* (1869) 38 LJ Ch 508.

138 *Courtoy v Vincent* (1852) 15 Beav 486; 51 ER 626, not following *Watts v Jefferyes* (1851) 3 Mac & G 422; 42 ER 305.

139 Under *Judgments Act 1838 (1 & 2 Vict c 110)* (UK), s 12.

140 Under *Judgments Act 1840 (3 & 4 Vict c 82)* (UK), s 1.

141 *Robinson v Wood* 5 Beav 388.

142 *Pyke v Duncan* [1989] VR 149, not followed in *Davey v Minister for Primary Industries and Energy* (1993) 40 FCR 286.

(Vic), s 219 which extended the execution of *fi fa* specifically to include "money or bank notes and any cheques bills of exchange promissory notes bonds specialties or other securities for money".

Nathan J restricted the breadth of that approach to the proprietorial nature of licences: first, by confining it specifically to the interpretation of the provision of the *Judiciary Act 1903* (Cth), s 35(1)(a)(2), which was not to be taken as defining property generally or under other legislation; and, secondly, by holding licences to be property only if they were readily transferable in a commercial context. Pyke's licence was a personal right, not a proprietorial right, and was therefore not saleable in execution of a sheriff's writ in satisfaction of an order in favour of a judgment creditor.[143] Under the terms of the Act the sheriff could not pass on good title to a *bona fide* purchaser. Nor was the sheriff empowered to transfer the licences into the name of another person, or into their own name. The sheriff was also not able to compel the licence holder to transfer the licences to the sheriff, and the Director was not permitted to assent to such transfer.[144] Nor could the vendor and purchaser of the licences compel the sheriff to give effect to the rights available under the licence.

Goods of the judgment debtor

[12.290] The sheriff must only seize the goods of the judgment debtor. Goods that are in the debtor's possession but are goods of another person cannot be seized.

Goods over which the debtor has given a bill of sale

[12.300] In *Benton v Thornhill*[145] a farmer was indebted to two debtors. He gave to the plaintiff a bill of sale for all the stock (but not the lease) on his farm in satisfaction of the entire debt, but continued to work and reside on the farm. Another creditor obtained judgment and ordered the sheriff execute of the writ of *fi fa* against the farmer. The farmer refused the sheriff entry, showing him the bill of sale in defiance of the judgment creditor's execution upon him. The court held that no grounds existed for granting a new trial against the jury's verdict as *non obstante veredicto*, the jury having properly considered whether the debtor's work and residence negated the plaintiff's acts of possession such that concurrent possession voided the assignment for fraudulence.

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143 Nathan J referred to and distinguished a number of cases. His Honour held that Pyke's fishing licence was unlike the licence to farm poultry in *Duncan v Ridd* [1976] 2 NSWLR 105 (which was found, specifically under the provisions of the *Egg Industry Stabilization Act 1971* (NSW) and the *Partnership Act 1892* (NSW), to form part of the property of the partnership and of the goodwill of the business); *Walsh v Walper* (1901) 3 Ont LR 158 (licence to sell liquor); *Anthoness v Anderson* (1888) 14 VLR 127 (publican's licence); *Jack v Smail* (1905) 2 CLR 684 (grocer's licence); *Burns Philp Trustee Co Ltd v Ironside Investments Pty Ltd* [1984] 1 Qd R 16, following *Jack v Smail*.

144 *Fisheries Act 1968* (Vic), s 14(11).

145 *Benton v Thornhill* (1816) 7 Taunt 149; 129 ER 60; *Scarlett v Hanson* (1883) 12 QBD 213.

The sheriff may not seize property of the judgment debtor in which they have only an equitable interest because the writ of *fi fa* is a form of legal execution.[146]

Goods in which the property has not yet passed to the debtor

[12.310] In *Lanyon v Toogood*[147] the sheriff seized the furnishings and effects in the house upon the execution of a writ of *fi fa* against the lessee, who had entered a further contract for the sale of the house, furnishings and fixtures for £900 "to be paid on completion of a good title". At the time of execution title had not been completed, and the contract was subsequently rescinded. The court found that because the contract was an entire contract for the sale of house and furnishings, the furnishings never vested in the lessee and were therefore not available to satisfy execution of the creditor's writ.

Goods of which the debtor is only a bailee

[12.320] In *Manders v Williams*[148] the plaintiff supplied casks of porter to a customer on terms that, at the plaintiff's option, within six months of supply, either the empty casks be returned or purchased. The empty casks in the customer's possession were seized by the sheriff in execution of a writ of *fi fa*. The plaintiff commenced an action in trover against the sheriff stating that, as the plaintiff had the right to demand the return of the casks as soon as they fell empty, the casks had reverted to the plaintiff's ownership by the time they were seized. The customer was a mere bailee of the casks with a right of possession until they were empty, at which point the plaintiff had the right of possession as the owner of the casks. The court upheld the action in trover and held that the sheriff's sale of the goods was an act of conversion because at the time of the sale the owner was entitled to take possession of the casks. The customer was a mere bailee of the casks with actual possession, holding them as agent for the bailor who had the right of possession. It was therefore open to either of them to sue the sheriff in trover.[149]

Goods which have been sold by the debtor

[12.325] Goods sold by the debtor under an uncompleted contract of sale where they hold the legal title as security for the performance of the contract cannot be seized.[150]

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146 *Scarlett v Hanson* (1883) 12 QBD 213 including, for example, an equity of redemption under a mortgage.

147 *Lanyon v Toogood* (1844) 13 M & W 27; 53 ER 11.

148 *Manders v Williams* (1849) 4 Ex 339.

149 Citing *Rooth v Wilson* (1817) 1 R & Ald 59; *Nicolls v Bastard* (1835) 2 CM & R 659.

150 *Deacon v Kingdom* [1931] SASR 271.

Goods which have been lent to the debtor[151] and goods of which the debtor is a trustee[152]

[12.330] In executing a judgment against the executor or administrator of a deceased estate the sheriff cannot seize the goods of either a testator or an intestate deceased, where those goods are in the possession of the administrator or testator.[153] However, in *Quick v Staines*,[154] an executrix who used the testator's goods as if they were her own goods and then, upon remarrying, treated them as her husband's goods, was estopped from challenging their seizure in execution of a judgment against her husband for his default in the payment of his debts.[155]

In *Colonial Bank of Australasia v Cooper*[156] Mrs Cooper, trustee of all of her husband's property under his will, under the terms of which the property was to be applied to her maintenance and thereafter pass to their children, had judgment obtained against her and her son, John Cooper. The sheriff in execution of a writ of *fi fa* seized goods and chattels, furniture and effects in Mrs Cooper's possession and use, and threatened to sell them. Mrs Cooper then issued and served notice against the seizure. She stated that the goods formed part of the estate of her deceased husband, of whose will she was the administratrix, and that because she was only in possession of them in accordance with and execution of the terms of the trust as administratrix of the estate, they could not be seized. The court observed that it was an established rule of law that the goods of a deceased's estate cannot be used to pay for the personal debts of the executor, and held that Mrs Cooper's interest in the estate under the will was a legal rather than beneficial interest in its assets which, despite their being goods in her possession and control, were not subject to seizure and sale.

In *Horwood v Murdoch*[157] a sheriff executed a writ of *fi fa* by selling Thomas Hunniford's interest and title in land to Horwood and conveying the 104 acres to him by a bill of sale. Horwood sought to repossess the land and so brought an action in ejectment of the tenant, Murdoch. The court held that the legal estate in the land had passed to Horwood, but

151 *Rondeau, Legrand & Co v Marks* [1918] 1 KB 75.

152 *Fenwick v Laycock* (1841) 2 QB 108; 114 ER 43; *Re Morgan; Pillgrem v Pillgrem* (1881) 18 Ch D 93; *Colonial Bank of Australasia v Cooper* (1876) 2 VLR (L) 41; compare *Horwood v Murdoch* (1879) 5 VLR (L) 435, and *Hunniford v Horwood* (1879) 5 VLR (E) 250, where it was held that the bare legal estate of a trustee could be sold in execution.

153 *Farr v Newman* 4 TR 621; *Fenwick v Laycock* (1841) 2 QB 108; 114 ER 43.

154 *Quick v Staines* 1 B & P 293; *Fenwick v Laycock* (1841) 2 QB 108; 114 ER 43.

155 But compare: where a woman with ownership over certain goods, cohabits with, assumes the name of, and passes for the wife of, a judgment debtor, she is not estopped even though she has done no more to demonstrate that the goods in question were hers, and her goods cannot be taken in execution of the judgment against him: *Edwards v Bridges* 2 Stark 396; *Glasspoole v Young* 9 B & C 696; *Keen v Dilke* 4 Exch 388.

156 *Colonial Bank of Australasia v Cooper* (1876) 2 VLR (L) 41.

157 *Horwood v Murdoch* (1879) 5 VLR (L) 435.

directed that a new trial take place. In that subsequent case Horwood relied on various statutory provisions[158] to argue that he had purchased the land without notice of the trust, submitting that he was protected because a trustee may deal with legal property as if it were his own, and that the sheriff's power is akin to that of the trustee's, and that any trust declared by Thomas Hunniford would be fraudulently made and made only in order to defeat the court's judgment. The plaintiff argued that Horwood purchased the land in question with notice of the trust by means of a signed memorandum in place of a lost declaration of trust, and could not avail himself of the defence of being a *bona fide* purchaser for value without notice. Horwood, therefore, acquired only such interest as the sheriff had and could pass on through the mechanism of the sale. The plaintiff submitted that the *New South Wales (Debts) Act 1813 (54 Geo 3 c 15)* (IMP) provided for realty to be dealt with in the same way as personalty — that is, subject to equities.[159] The court held that the trust had been properly declared because s 7 of the *Statute of Frauds 1864* (IMP) only required the instrument to be in writing, and this was satisfied by the signed memorandum; and that the issue of the purchaser's notice of the trust was not on point because the relevant question was whether the purchaser had taken more than the judgment debtor. The sheriff could only sell the trustee's right, title and interest and, as such, through the sale, only the trust estate passed.

Goods in the possession of a pawnbroker

[12.340] The cases dealing with the pledgee's interest in pledged goods are divided between determining that the interest is no more than a personal right conferred by the pledgor as owner of the property to detain and sell the chattel for the benefit of both parties,[160] or a proprietary interest.[161] When the owner of a chattel pledges it to a pawnbroker they neither part with the entire property, nor give title to the pawnee. The pawnee has a special property in the chattel, in the sense that they are entitled to hold onto the chattel upon the terms of the pawn, must not relinquish the chattel once obtained, but may sell it if there is default in the pledge. If the debtor has goods in the possession of a pawnbroker a writ cannot be executed on those goods until the pawnbroker is paid the money secured by the goods.[162] However, the goods held in pledge by a

158 *Fraudulent Conveyances Act 1571 (13 Eliz 1 c 5)* (ENG); *Fraudulent Conveyances Act 1584 (27 Eliz 1 c 4)* (ENG); *Statute of Trusts 1864* (IMP).

159 Lord Lindley, *Partnership* (3rd ed), p 710; *Colonial Bank of Australasia v Cooper* (1876) 2 VLR (L) 41.

160 *The Odessa* [1916] 1 AC 145 at 158–159.

161 *Coggs v Bernard* (1703) 2 Ld Raym 909; 91 ER 817 at 916 (Ld Raym) per Holt CJ, and *Donald v Suckling* (1866) LR 1 QB 585 at 614 per Blackburn J. As to whether the interest is properly called proprietary see H Beale et al, *The Law of Security and Title-Based Financing* (2nd ed, Oxford University Press, 2012) at [5.03]–[5.05].

162 *Coggs v Bernard* (1703) 2 Ld Raym 909; 91 ER 817; *R v Cotton* (1751) Park 112; 145 ER 729.

pawnbroker who is a judgment debtor may be seized by the sheriff who acquires, along with possession of the goods, the right to sell them once the period of redemption has expired, provided the owner of the goods does not come forward to repay the pawnbroker in exchange for removing the security from the goods.[163]

The contract of pawn rests on the same foundation as the contract of bailment in which the bailee takes a right of possession consistent with and limited to the validity of the bailor's title in the goods.

THE CROWN AS JUDGMENT CREDITOR

[12.350] In *R v Cotton*[164] the court held that the goods of a judgment debtor, once seized and in the sheriff's lawful custody, cannot be made subject to the execution of a writ by another judgment creditor. However, where the creditor is the Crown the execution of a judgment against the debtor prevails, even though the goods are in lawful custody.[165] The property seized is not altered until the sheriff has sold the goods in execution of the writ. The prevalence of the King's debt and the priority of its execution against others was expressly stated in the Statute of Henry VIII:[166]

> … that if any suit be commenced or taken, or any process be hereafter awarded for the king, or for the recovery of any of the king's debts, the same suit and process shall be preferred before the suit of any person; and the kind shall have first execution against any defendants of and for his said debts before any other person, so always that the king's said suit be taken and commenced, or process awarded for the said debt at the suit of the king before judgment given for the other person.[167]

However, the right exists independently of the statute[168] on the basis of a general principle that the King's debts have a preferment over all others,[169] despite the rule that goods are bound by the delivery of the writ

163 *Re Rollason; Rollason v Rollason* (1887) 34 Ch D 495.

164 *R v Cotton* (1751) Park 112; 145 ER 729 at 120 (Park) per Lord CB Parker.

165 Numerous cases attest that before sale the goods seized in execution of a writ of *fi fa* delivered to the sheriff by a subject may still be taken by the Crown: *Giles v Grover* 9 Bing 128; see *Attorney-General v Andrews* Hard 23; *Letchmore v Thoroughgood* 3 Mod 236; *Uppom v Summer* Black 1251; 2 Comyn Dig 538 at 1294; 548; *R v Dickenson* Park 262; *R v Sloper* 6 Price 114; *R v Wells* 16 East 278; *Cooper v Chitty* 1 Burr 20; *Stringfellow's Case* Dyer 676; *R v Cotton* (1751) Park 112; 145 ER 729; *Sir Edward Cook's Case* 2 Roll Rep 295; *Petit v Benson* Comb 452; 2 Show 481; *R v Peck* Bunb 8.

166 *Crown Debts Act 1541 (33 Hen 8 c 39)* (ENG), s 74.

167 Process sued out by the Crown against a defendant to recover penalties is within the statutes: *Butler v Butler* 16 East 338; *Attorney-General v Aldersey* 1 East 341n.

168 *Attorney-General v Aldersey* 1 East 341n per Lord CB Skynner.

169 *R v Cotton* (1751) Park 112; 145 ER 729; recognised in *Giles v Grover* (1832) 9 Bing 128; 131 ER 563, where it was held that the goods of a debtor seized under a *fi fa* but not sold might be taken under an extent in chief or in aid: *Grove v Aldridge* (1832) 9 Bing 428.

to the sheriff as against the party and any claim resulting from the party's assignment of the goods, or any representation made by the party or an agent authorised by the party.[170]

If money seized, or the proceeds from the sale of seized goods, or other moneys in execution of the warrant remains in the sheriff's possession, it is not the property of the execution creditor,[171] and may not be seized in execution of any order or warrant against the creditor, unless it is money that has been specifically appropriated and separated by the sheriff for the purpose of satisfying the creditor's own warrant.[172]

THE SALE IN EXECUTION OF A WRIT

Order of sale — sale under warrant of seizure and sale

[12.360] Rule 69.04 provides that "where it appears to the sheriff that property subject to levy under a warrant is more than sufficient to satisfy the amount to be levied, the sheriff shall take or sell so much of the property as appears to the sheriff to be sufficient."[173] The sheriff is not permitted to deliver goods to the judgment creditor.[174] It has been held that a sheriff, having seized and sold in execution of a writ of *fi fa* the goods of the assignees of a defendant bankrupted prior to the writ's execution, is liable in trover for the conversion of the goods.[175] Either the judgment creditor, or the judgment debtor, may purchase the goods when

170 *Payne v Drew* 4 East 523 per Lord Ellenborough. See *Lucas v Nockells* 10 Bing 182 per Littledale J; *Samuel v Duke* 6 DPC 536. See *R v Giles* 8 Price 293; *Attorney-General v Fort* 8 Price 364n; *Bowen v Bramidge* 6 C & P 140.

171 *Wood v Wood* (1843) 4 QB 397; 114 ER 948 at 401 (QB) (the money which the sheriff seizes in execution of a writ must be cash which the execution debtor is in the physical possession of, or has under their physical control); see also *Collingridge v Paxton* (1851) 11 CB 683; 138 ER 643; *Harrison v Paynter* (1840) 6 M & W 387; 151 ER 462.

172 *Wood v Wood* (1843) 4 QB 397; 114 ER 948 at 401 (QB).

173 Vic r 69.04(1); see also NT r 69.05; NSW r 39.6; Tas r 906.

174 *Thomson v Clerk* (1596) Cro Eliz 504; 78 ER 754.

175 The principal cases: *Pritchett v Downe* 3 Camp 131; *Foster v Alanson* 2 TR 479; *Lazarus v Waithman* 5 B Moore 19; *Wyatt v Blaydes* 3 Camp 396; *Liford's Case* 11 Co 51b; *Cooper v Chitty* 1 Burr 20; *Bayly v Bunning* 1 Leving 173; 2 Keble 32 at 33; *Letchmore v Thoroughgood* 3 Mod 236; *Cole v Davies* 1 Ld Raym 724; *Lee v Lopez* 15 East 230; *Smith v Milles* 1 TR 475; *Cary v Crisp* 1 Salk 108; *Perkins v Smith* 1 Wils 328; *Potter v Starkie* 4 Maule & Selw 260; *Wilson v Milner* 2 Camp 452; *Price v Helyar* (1828) 4 Bing 597; 130 ER 898; *Dillon v Langley* 2 Barn & Sdol 131; *Glasspoole v Young* 9 B & C 696; *Thomson v Clerk* (1596) Cro Eliz 504; 78 ER 754; *Balme v Hutton* (1833) 9 Bing 471; *Farrant v Thompson* (1822) 5 B & Ald 825; 106 ER 1392; *Doe v Thorn* (1813) 1 M & S 425; 105 ER 159; *Billon v Hyde* 1 Ves Sen 328; *Langdon v Wallis* Lutw 181; *Waller v Weedale* Noy 107; *Beaty v Sampson* 2 Ventr 93; *Pullen v Pubeck* 1 Ld Raym 346; *Garland v Carlisle* (1833) 2 Cr & M 31.

offered for sale to the public; and the mortgagee may rightfully purchase land sold by the sheriff in execution of a warrant against the property of the judgment debtor.[176]

The debtor may request seized land to be sold prior to other property, but otherwise it is not to be sold under the warrant until other property liable to be sold has been sold,[177] or it appears to the sheriff that it would minimise hardship to the judgment debtor if the land were to be sold first.[178] The court may, however, direct property subject to levy under a warrant to be sold other than in accordance with r 69.04(1) – (3).[179] A sheriff may not undertake the sale of goods or property in execution of the warrant on the judgment debtor's residential premises unless it is impossible to do so at any other place.[180]

If the judgment debtor becomes a bankrupt after the sheriff, executing the terms of a warrant against a judgment debtor, has sold the property to a purchaser in good faith, the purchaser has nonetheless acquired good title as against the trustee of the estate of the bankrupt.[181] This is the case even if the sheriff wrongfully proceeds with the sale of the property after being notified that the judgment debtor had been presented with a creditor's petition.[182] The purchaser of a property sold in execution of a warrant, who has purchased in good faith,[183] acquires good title even if the judgment obtained against the judgment debtor was based on fraud, or constituted an irregularity.[184] However, even a good faith purchaser does not obtain good title if the sheriff sells goods belonging to someone other than the judgment debtor,[185] or the sale was conducted improperly, or

176 *British and Australasian Trust and Loan Co v Johnston* (1889) 3 QLJ 162 (although in this case leave was given by the court).

177 Rule 69.04(3).

178 Vic r 69.04(3); see also ACT r 2212; NT r 69.05(2)(c), (3); NSW r 39.6; *Civil Judgments Enforcement Act 2004* (WA), s 64. There are no equivalent provisions in the other jurisdictions.

179 Rule 69.04(4).

180 *Watson v Murray & Co* [1955] 2 QB 1.

181 *Bankruptcy Act 1966* (Cth), s 118(11).

182 *Bankruptcy Act 1966* (Cth), s 119(8).

183 *Stafford v Kenniff* (1912) 12 SR (NSW) 347 (NSWSCFC) (sale was held to be good even though the purchaser had struck an arrangement with the judgment creditor pursuant to which the latter would pay a further sum to the purchaser following the sale, or repay the purchase money if the title turned out to be bad).

184 Unless the writ of execution is void: *Bushell v Timson* [1934] 2 KB 79.

185 *Jeanes v Wilkins* (1749) 1 Ves Sen 195; 27 ER 978 at 196 (Ves Sen) per Lord Hardwick LC ("the sheriff has a special property … the property being aliened out of the owner"); *Doe d Batten v Murless* (1817) 6 M & S 110; 105 ER 1184; *Doe v Thorn* (1813) 1 M & S 425; 105 ER 159; *Hoe's Case* (1600) 5 Co Rep 89b; 77 ER 191. For the owner's right to recover in such a case see *Farrant v Thompson* (1822) 5 B & Ald 825; 106 ER 1392; *Tancred v Allgood* (1859) 4 H & N 438; 157 ER 910.

was a sham. In such cases the sale may be set aside by application to the Supreme Court exercising its inherent jurisdiction to supervise officers of the court.[186]

Property other than land may be sold by the sheriff in the order the sheriff considers likely to satisfy the warrant as expeditiously and with as little unnecessary expense as possible.[187] The sheriff should also act, subject to the need to execute the warrant, so as to avoid unnecessary or excessive hardship to the judgment debtor and other persons.[188]

The sheriff is obliged to put property for sale under a warrant as early as the interests of the parties permit, at a place best suited to realise the value of the property,[189] either by public auction (which is the most usual) or under private treaty, as the sheriff thinks fit.[190] The sheriff is liable to the creditor for any losses caused by an unreasonable delay in the sale of the property.[191]

At common law the sheriff could sell whatever they seized. There was no relief in equity against a sale on the ground that the seizure of particular property would cause the judgment debtor hardship or inconvenience.[192] The sheriff has a duty in selling the goods of a judgment debtor to realise a fair price for the seized property, and to act reasonably and in the interests of both the judgment creditor and judgment debtor in doing so.[193]

186 *Owen v Daly* [1955] VLR 442 at 449 per Dean J. Compare *Re Hughes* (1850) 1 Legge 659; *Perkins v Willcock* (1871) 2 VR (E) 222. See also *Anderson v Liddell* (1968) 117 CLR 36 at 46 per Barwick CJ (citing *Edge v Kavanagh* (1888) 24 LR Ir 1; *Owen v Daly*) (if a bid bears so little relation to the evident worth of the property offered that in reality it does not constitute a bid at all, its acceptance does not result in a proper sale, and any consequential transfer of the property may be set aside).

187 Rule 69.04(2)(a).

188 Rule 69.04(2)(c).

189 Vic r 69.05(1). In each jurisdiction, the rules vary in detail in their requirements as to time, place, advertisement and manner of sale: compare, for example: Vic O 69; ACT r 2216; NT O 69; NSW rr 39.5 – 39.14; Qld r 832; SA rr 88A.04 (sale of property), 88A.15 (advertisement) (for actions commenced before 4 September 2006); SA r 320 (for actions commenced on or after 4 September 2006); *Civil Judgments Enforcement Act 2004* (WA), ss 66 – 70. Some of the rules expressly provide that sale shall be effected as early as possible, having regard to the interests of the parties: see, for example: Vic r 69.05(1)(a); NT r 69.06(a); NSW r 39.5; Qld r 832(1)(a); Tas r 906(3).

190 Rule 69.05(2); *Hunter BNZ Finance Ltd v Plateau Holdings Pty Ltd* [1985] 2 Qd R 97.

191 *Aireton v Davis* (1833) 9 Bing 740; 131 ER 792; *Jacobs v Humphrey* (1834) 2 C & M 413; *Ayshford v Murray* (1870) 23 LT 470; *Stevens v Young* [1973] 2 NSWLR 750 at 756.

192 *Perkins v Willcock* (1871) 2 VR (E) 222.

193 *Owen v Daly* [1955] VLR 442.

The sale price

Sale at undervalue

[12.370] The sheriff in selling the judgment debtor's property has a duty at common law to act with due diligence, and a duty to realise as good a price in the sale as is reasonable having regard to all the circumstances. The duty is satisfied if the sheriff accepts a fair bid and sells the property or the goods at a price that bears a reasonable relationship to the value of the goods.[194] What constitutes a fair price is a question of fact, taking into account all of the circumstances of the case — it cannot simply be equated to market value. Indeed, at common law, the sheriff is not obliged to obtain a valuation.[195] Nor is the highest bid necessarily fair value for the goods.[196] The sheriff must not sell at an unreasonably low price, and such sales are liable to be set aside, even though a purchaser in good faith and without notice acquires good title.[197] The sale may be set aside where the purchaser is not *bona fide* or is otherwise implicated in the sale of the goods at an undervalue.[198] The sheriff does not have unfettered authority to sell goods at any price even at an auction without reserve, but is obligated not to derogate from their lawful duties to the owner of the property. The court may also set aside an improperly conducted sale as an exercise of its inherent jurisdiction to supervise the acts of an officer of the court for the purpose of enforcing the court's warrants of seizure and sale, and others of the warrants it issues.[199] A sheriff who by their actions acts unreasonably in accepting a price for goods may be liable to both the execution debtor and the execution creditor.[200]

A sheriff cannot be found liable for their actions at common law unless they have acted unreasonably, carelessly or negligently. A sheriff's liability is not enlivened simply by a sale at a less than fair and reasonable price.

194 *Anderson v Liddell* (1968) 117 CLR 36 at 44–45 per Barwick CJ (citing *Keightley v Birch* (1814) 3 Camp 521; 170 ER 1467) (if a bid, although not illusory, bears no fair or reasonable relation to what was being offered for sale, the sheriff should decline to sell, unless a writ of *venditioni exponas* was subsequently issued).

195 *Anderson v Liddell* (1968) 117 CLR 36 at 44 per Barwick CJ. However, in New South Wales, the sheriff may not sell by public auction at a price substantially below the appropriate market value, which they must determine by making appropriate inquiries before proceeding to sell: *Uniform Civil Procedure Rules 2005* (NSW), rr 39.7(2), 39.10.

196 See *Keightley v Birch* (1814) 3 Camp 521; 170 ER 1467 at 524; 1469: "If a chattel worth £1,000 is put up to sale, and only £5 is bid for it, the sheriff ought not to part with it for that sum; and he may fairly say that it remains in his hands for want of a buyer. He ought to wait for a *venditioni exponas*, the meaning of which is 'sell for the best price you can obtain'." See also *Zhou v Kousal* [2012] VSC 187 per Vickery J.

197 *Sheriff Act 2009* (Vic), s 25.

198 See *Edge v Kavanagh* (1888) 24 LR Ir 1; *Owen v Daly* [1955] VLR 442; *Anderson v Liddell* (1968) 117 CLR 36; *Waldon v Eric Anderson Radio-Television Pty Ltd* (1969) 91 WN (NSW) 528.

199 *Owen v Daly* [1955] VLR 442 at 448.

200 *Mullett v Challis* (1851) 16 QB 239; 117 ER 870; *Wright v Child* (1866) LR 1 Exch 358.

Therefore, a sale at a less than fair and reasonable price resulting from an honest mistake about, or reasonable belief in, the price as representing fair and reasonable value does not expose the sheriff to action.[201]

Sale of land

[12.380] The requirements for the sale of land in execution of a warrant are additional to the requirements under s 208(3) of the *Property Law Act 1958* (Vic). Section 208(3) provides that it is not necessary for the sheriff to seize either the land itself or title to the land in execution of process, provided the land is not sold under execution of the warrant "until one month after notice of the time and place of such sale has been published in the Government Gazette and in some newspaper circulating in the neighbourhood of such houses lands and other hereditaments and real estates."[202]

Advertising sale

[12.390] The sale of a property under a warrant must meet requirements under the rules. The sheriff must advertise the property prior to putting it up for sale. The advertisement gives notice of the time and place of sale, and the particulars of the property in a manner that, in the sheriff's opinion, best publicises the sale.[203] Public notice serves a number of purposes. For example, it enables the execution debtor to clear their debts prior to the sale of the property.[204] It also avoids the sale of the property in a manner detrimental to either the debtor or creditor.[205] Finally, it prevents the sale of property belonging to a person other than the debtor in satisfaction of the debtor's debt.[206]

Land under Transfer of Land Act

[12.400] Where the land to be sold in execution of the warrant comes under the operation of the *Transfer of Land Act 1958* (Vic), it cannot be advertised until the sheriff has served a copy of the warrant on the

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201 *Stevens v Young* [1973] 2 NSWLR 750.

202 *Property Law Act 1958* (Vic), s 208(3). Paragraphs (2) – (6) of the *Property Law Act 1958* (Vic) are taken from the *Supreme Court (General Civil Procedure) Rules 1996* (Vic), O 67(A) rr 4A – 4D, which were introduced in the *Rules of the Supreme Court 1957* (Vic) following the decision in *Owen v Daly* [1955] VLR 442. See also *Anderson v Liddell* (1968) 117 CLR 36 at 43. As to the effect of non-compliance with *Property Law Act 1958* (Vic), s 208(3), see *Dreverman v Doherty* (1870) 1 VR (E) 4; *Re Transfer of Land Statute; Ex parte Ross* (1871) 2 VR (L) 10. Where a successful bidder refused to pay, and the property was immediately resold, it was held that a second notice under the Act was not required: *Beavan v Chadwick* (1866) 3 WW & A'B (L) 127.

203 Rule 69.06(1).

204 *Beavan v Chadwick* (1866) 3 WW & A'B (L) 127.

205 *Palmer v Bourke* (1902) 28 VLR 275.

206 *Beavan v Chadwick* (1866) 3 WW & A'B (L) 127; *Re Transfer of Land Statute; Ex parte Ross* (1871) 2 VR (L) 10.

Registrar of Titles pursuant to s 52,[207] and a memorandum of such service has been registered. If the land does not come under the operation of the *Transfer of Land Act 1958* (Vic) a copy of the warrant is to be left with the Registrar. A sale of land without the sheriff having served the warrant on the Registrar is valid, but the purchaser will not obtain priority over any prior good faith purchaser who has purchased the land for value from the execution debtor, whose title will defeat theirs.[208] Similarly, anyone who has purchased the land more than three months after a copy of the warrant of seizure and sale has been served on the Registrar,[209] or who, having purchased it, will not have priority, if the sheriff does not lodge the transfer of title within the time required.[210]

STAY OF EXECUTION

[12.410] Rule r 66.16 provides that the court may stay execution of a judgment. Rule 66.01 defines "judgment" to include an "order" in O 66. Although r 66.16 does not refer to part of a judgment, the court can under the rule stay execution on part of a judgment.[211] The rule has broad application:[212] the court may therefore stay execution of any judgment or order that it may make, and do so for such time and on such terms or conditions as it thinks fit.[213] The court may, in the exercise of its inherent jurisdiction, stay execution. That jurisdiction is exercised judicially by taking into account factors relevant to the stay of enforcement proceedings.[214] A judgment debtor applies for a stay of execution of a judgment debt by summons on notice to the judgment creditor.[215]

Stay pending appeal

[12.420] An appeal does not itself constitute a stay of execution of the proceedings appealed from unless the Court of Appeal or a judge of the

207 As to land under the general law, see *Property Law Act 1958* (Vic), s 209.

208 *United Hand in Hand and Band of Hope Co v National Bank of Australasia* (1876) 2 VLR (E) 206; *Giles v Lesser* (1879) 5 VLR (E) 38; *Sander v Twigg* (1887) 13 VLR 765; *Watson v Royal Permanent Building Society* (1888) 14 VLR 283.

209 Prescribed by *Transfer of Land Act 1958* (Vic), s 52; *Re Deane's Transfer* (1898) 9 QLJ 106; *Re Anderson Mitchell & Co Pty Ltd* (1928) 23 Tas LR 35.

210 *Pirpiris v Iovanella* [1975] VR 129. As to the effect of the service on the registrar of copies of successive warrants, see *Hoy v AAA Home Loans Pty Ltd* [1985] VR 281.

211 *JC Scott Constructions v Mermaid Waters Tavern Pty Ltd (No 2)* [1983] 2 Qd R 255; *State Bank of Victoria v Parry* [1989] WAR 240.

212 It is wider than the corresponding provision under *Supreme Court (General Civil Procedure) Rules 1996* (Vic), O 42 r 17(b) which was limited to a judgment or order for the payment of money or costs. See *Brook v Emerson* (1906) 95 LT 821.

213 See r 1.14(1)(b). Rule 66.16 follows *Rules of the Supreme Court 1970* (NSW), Pt 44 r 5.

214 The jurisdiction does not extend to grounds which are matters of defence, and which ought to have been raised in the proceeding itself: *TC Trustees Ltd v JS Darwen (Successors) Ltd* [1969] 2 QB 295. See also *London Permanent Benefit Building Society v de Baer* [1969] 1 Ch 321 at 332; *Halsbury's Laws of England* (4th ed, 1976), Vol 17, para 451.

215 See *Rural Finance Corporation of Victoria v Wilson* (unreported; VSC; Cummins J; No 2156/1990; 10 May 1991).

court makes an order to a contrary effect. Therefore, unless otherwise ordered, an act or step taken in execution of a judgment being appealed is not invalid.

Stay of order of Court of Appeal

[12.430] The issue of whether a single judge, or a Master, was empowered to stay the enforcement of an order properly made by the Full Court was raised in *Joskovitz v Bonnick*[216] by Herring CJ. The then O 42, r 17(b) of the *Rules of the Supreme Court 1957* (Vic) provided: "The Court or Judge may at or after the time of giving judgment or making an order stay execution until such time as they or he shall think fit." The rule conferred a very wide discretion upon the court or a judge sufficient, Herring CJ opined, to empower the judge to stay the Full Court's order, and his Honour proceeded on the assumption of being able to do so. However, it was not a question that needed to be decided in that case.[217] The discretion conferred by the rule enabled the judge to consider all the relevant circumstances of the case[218] without being bound by cases decided under different facts.[219]

Discretion

[12.440] Rule 66.16 is expressed as unqualified, and the court's discretion under it is presumably unfettered, or at least very wide. It is exercised judicially in the context of, and taking into consideration, all of the circumstances of the case. As a discretion exercised in relation to the facts of the individual case it is not bound by decisions arrived at on different facts.[220] The presumption that a party having obtained a judgment is entitled to its immediate enforcement[221] is only displaced in exceptional and restricted circumstances. The court's consideration is directed not to the validity, regularity or correctness of the judgment, but is concerned exclusively with its enforcement.[222]

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216 *Joskovitz v Bonnick* [1964] VR 654.

217 See also *Patton v Minister for Defence* (1987) 71 ALR 637 (FCA). His Honour refused the application as to costs of the order *nisi* ordered by the Full Court.

218 Which in that case were the fact that the defendant was impecunious, that no decision on the merits had been made, and that the applicant, although the defendant in the matter, had initiated proceedings.

219 Distinguishing *Re A Debtor (No 21 of 1950) (No 2)* [1951] 1 Ch 612 (in which the court ordered a stay of execution to give effect to a set-off); also distinguishing *Eastman v Wilson* [1938] VLR 83.

220 *Joskovitz v Bonnick* [1964] VR 654 at 656.

221 See *State Bank of Victoria v Parry* [1989] WAR 240 at 244.

222 *TC Trustees Ltd v JS Darwen (Successors) Ltd* [1969] 2 QB 295; *State Bank of Victoria v Parry* [1989] WAR 240.

Effect of stay

[12.450] A party applying for a stay of execution of a judgment is not precluded from applying to have the same judgment set aside at a later date.[223] The party has not, by seeking to have the judgment stayed, approved of or accepted the judgment. The effect of the stay of execution is to prevent execution of the judgment, but not to otherwise effect or prevent the enforcement of rights or remedies the judgment creditor may possess separately from the court's judgment.[224] Further, after the expiry of the time period of the stay, the creditor may issue execution on the judgment.[225] Nor does the stay affect the accrual of interest in the judgment which continues to accrue from the date of judgment.[226]

Instances of grant of stay

[12.460] A stay of execution has been granted in a variety of cases. The court does not normally deprive a successful litigant of the fruits of their litigation. In *TC Trustees v JS Darwen (Successors) Ltd*[227] the court laid down that the "Special Circumstances"[228] in which execution may be stayed on grounds other than the inability to pay must be circumstances relevant to the stay, and not matters of defence in law or in equity which must be raised in the action. Such grounds must be relevant to the enforcement of the judgment and not to the judgment itself.

In *Joskovitz v Bonnick* execution on an order for the costs of an appeal was stayed until the determination of the principal proceedings.[229] *Joskovitz v Bonnick* was decided under O 42 r 17(b) of the *Rules of the Supreme Court 1957* (Vic) which was in terms giving the court a very wide discretion to stay the execution of an order: "The Court or Judge may at or after the time of giving judgment or making an order stay execution until such time as they or he shall think fit." The discretion required the court to take all the facts and circumstances of the case into account. The court refused the application for the majority of the costs except that for the order *nisi* for review. In doing so it took into account:

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223 *Evans v Bartlam* [1937] AC 473.

224 See *Clifton Securities Ltd v Huntley* [1948] 2 All ER 283 (stay of judgment for possession of land not a bar to plaintiff peaceably preventing defendant from using or entering the land).

225 *Ibbotson v Hudson* (1888) 4 WN (NSW) 154. See also *L Joseph Pty Ltd v Gray* (1939) 56 WN (NSW) 190.

226 *Supreme Court Act 1986* (Vic), s 101; see *P Aker Flowerbulbs Pty Ltd v Coulter* (2004) 212 ALR 606.

227 *TC Trustees Ltd v JS Darwen (Successors) Ltd* [1969] 2 QB 295.

228 Referring to *Halsbury's Laws of England* (4th ed, 1976), Vol 17, para 455 which states: "The court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant a stay if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing."

229 *Joskovitz v Bonnick* [1964] VR 654.

- the fact that the respondent was impecunious;
- that the outcome of the Supreme Court action was unknown despite the applicant's arguments that she had a good cause of action, and good prospects for a favourable judgment;
- that the applicant had commenced the proceedings despite the respondent being entitled to have the Supreme Court matter brought on after the stipendiary magistrate had stayed the action in the Court of Petty Sessions;
- that the applicant had incurred costs through unnecessary applications[230] in that the appeal against the order *nisi* for review was hopeless for being contrary to the *Justices Act 1915* (Vic), and because it was unnecessary to appeal against the order *nisi* for mandamus.[231]

The court also considered whether an element of oppression existed in forcing the impecunious respondent to defend multiple sequential proceedings.

Courts have ordered a stay where the losing party had a separate claim "which cuts across the entire basis of the original award which the claimant is seeking to enforce".[232] In *Metropolitan Real & General Property Trust v. Slaters & Bodega*[233] the court held that a stay of execution ought to be granted automatically where the defendant had obtained leave to appeal against a judgment for the recovery of money since compelling the judgment debtor to pay would destroy the foundation of the appeal. Sir Wilfrid Greene MR said:

> Generally, I would say with regard to applications under the Courts (Emergency Powers) Act, 1939, that, in the case of a judgment for money - I say nothing about other cases - where leave to appeal is given to the debtor, it should follow as a matter of course, and it should be expressly stated in the order, that there should be a stay of execution pending the appeal. If that course is not taken, the debtor is under a compulsion to pay. As soon as he pays, the judgment is satisfied, and the substratum of the case is irretrievably destroyed. Therefore, it follows that, where leave to appeal is given to a debtor, the debtor should have a stay of execution in order that his appeal may be determined.

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230 *Eastman v Wilson* [1938] VLR 83 which was distinguished on the facts. The court acknowledged that similar facts were involved: in particular an impecunious respondent. However, the court decided on the basis that the costs orders were the result of the defendant's actions (non-suiting) against the plaintiff's right to take action, and the defendant's actions were determined to be invalid by the court, which was not so in the instant case.

231 Also distinguishing *Attorney-General v Emerson* (1889) 24 QBD 56, where a stay of execution was sought pending an appeal, but was governed by special rules.

232 *G Middleton Ltd v Berry Creek Overseas Development Ltd* [2007] EWHC 318 (TCC) at [9] per Coulson J, basing his approach on "the well-known principles set out in *American Cyanamid v Ethicon* [1975] AC 395."

233 *Metropolitan Real & General Property Trust Ltd v Slaters & Bodega Ltd* [1941] 1 All ER 310.

In *Veale v Warner* a stay was ordered against an execution order issued contrary to an agreement between the parties.[234] The plaintiff (Veale) sued the defendant (Warner) for £2,000 which he alleged he was owed for a loan made to the defendant of that sum and which the defendant never repaid. The defendant in response stated that the plaintiff had been awarded £3,169 by an arbitration panel which the defendant paid after the plaintiff signed a release of all of the defendant's liability from the debt, which release stated that the defendant had paid the plaintiff, who should therefore be barred from proceeding with the present action. The plaintiff denied that the defendant had paid the arbitration award and moved for a judgment on the claim in debt. The defendant argued that the arbitrator's award was void, rendering the defendant's payment of the awarded amount irrelevant, upon which the plaintiff admitted the previous award. Judgment could not be rendered for the plaintiff, who had denied what they had previously pleaded as facts.

A stay of execution of judgment has also been ordered where execution amounted to an abuse of process,[235] and where there was no one within the jurisdiction to whom the judgment debt could be paid so that the judgment debtor had to bring the payment into court.[236]

In *Robinson & Co v Continental Insurance Co of Mannheim* a stay was ordered on a judgment in favour of an enemy alien.[237] In that case the court determined that an alien enemy is not totally *ex lex* and retains the right of defence. While they cannot sue by claim or counterclaim,[238] nor initiate proceedings by third party notice for indemnification, they can be sued whether the cause of action arose before or after the outbreak of war.[239]

In *State Bank of Victoria v Parry*, under the third party procedure, the defendant judgment debtor, claimed an indemnity from the third party in respect of the liability to the plaintiff under the judgment.[240] It was held that the existence of an indemnity, whether raised by way of cross-claim

234 *Veale v Warner* (1669) 1 Mod Rep 20; 86 ER 699.

235 *Carr v Royal Exchange Assurance Co* (1864) 34 LJQB 21.

236 *Re a Debtor* [1912] 1 KB 53.

237 *Robinson & Co v Continental Insurance Co of Mannheim* [1915] 1 KB 155.

238 Compare *Porter v Freudenberg* [1915] 1 KB 857 at 869; and *Robinson & Co v Continental Insurance Co of Mannheim* [1915] 1 KB 155.

239 Bailhache J in *Robinson & Co v Continental Insurance Co of Mannheim* [1915] 1 KB 155 at 159 reasoned that: "[T]o hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy and to defeat the object and reason of the suspensory rule. It is to turn a disability into a relief." The same result was reached in American law in *McVeigh v United States* 11 Wall 259 (1871). Lord Erskine had previously held in *Ex parte Boussmaker* (1806) 13 Ves 71 that an alien enemy could appear and be heard in protection of his right to a dividend in bankruptcy proceedings, but the enemy could not appear as a plaintiff over the defendant's objection.

240 *State Bank of Victoria v Parry* [1989] WAR 240.

or otherwise, may provide grounds for a stay of execution.[241] The resolution of a *bona fide* counterclaim arising out of the subject matter of the claim but unable to be raised in defence may be grounds for granting a stay of execution. However, neither an unconnected cross-action nor a claim that could have been raised in proceedings as a defence prior to judgment[242] would provide foundation for a stay.

In *Reading Entertainment Australia v Burstone Victoria (No 2)* a stay of execution was ordered in circumstances where the proceeding was one of several related proceedings the determination of which was pending.[243] The court operated from the premise that while courts have a wide discretion to make orders with respect to a stay of orders, parties are entitled to enforce judgments as soon as they have received the benefit of them. It ordered a stay of the execution of orders for the following reasons:

- first, that the proceedings were "intimately connected"[244] and had proceeded jointly until they were separated at an advanced stage of hearing, until one had been determined;
- secondly, that execution of the orders at the determination of the separate related proceedings would give rise to new disputes and litigation; and
- thirdly, that the stay would not be intolerably long, the other proceedings already being at an advanced stage, and their resumption being imminent.

Where a defendant raises a counterclaim on a plaintiff's application for a summary judgment either the defendant may be granted unconditional leave to defend the claim brought against them, or the court may decide that the plaintiff will have summary judgment according to the application but stay the execution of the judgment until the hearing on the counterclaim is decided.[245]

241 *State Bank of Victoria v Parry* [1989] WAR 240; and see discussion in *Lewis v Lamb* [2004] NSWSC 322 at [6]–[9]. In appropriate circumstances the existence of set-off or cross-claim may provide grounds for a stay of execution: *Grosvenor Constructions (NSW) Pty Ltd (in admin) v Musico* [2004] NSWSC 344.

242 See *TC Trustees Ltd v JS Darwen (Successors) Ltd* [1969] 2 QB 295.

243 *Reading Entertainment Australia Pty Ltd v Burstone Victoria Pty Ltd (No 2)* [2005] VSC 137.

244 Citing *Automatic Weighing Machine Co v Combined Weighing and Advertising Machine Co* [1839] 61 LT 536 at 537.

245 See r 22.06(2); *State Bank of Victoria v Parry* [1989] WAR 240 at 246. See further as to counterclaim as ground for staying execution of the claim, *Reading Entertainment Australia Pty Ltd v Burstone Victoria Pty Ltd (No 2)* [2005] VSC 137.

Instances of refusal of stay

[12.470] Stays of execution have been refused in a number of cases. They have been refused, for example, against a statutory corporation, even though execution against its assets would halt its operations.[246] Further, no stay was ordered pending the trial for perjury of a witness who had testified against the judgment debtor.[247]

A stay of execution may be refused where the judgment debtor had a claim against the judgment creditor which, if successful, could be set off against the judgment. In *Rawson v Samuel*[248] the criteria for deciding whether the government's cross-claim for unliquidated damages could be set off against a company's claim was whether the cross-claim "impeached the title of the legal demand".[249] The law of equitable set-off was closely examined in *Hanak v Green*.[250] There a general right to equitable set-off was recognised where a "close relationship existed between the dealings and transaction which gave rise to the respective claims".[251] How close the relationship was required to be was examined in *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc ("The Nanfri")*. In that case Lord Denning's view was that cross-claims will impeach a plaintiff's demands when they are "so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim."[252] It is not necessary for the claim and cross-claim to arise out of the same contract, and where they do the existence of a sufficiently close connection between the matters enabling equitable set-off to apply remains a question for consideration.[253] Forbes J in *British Anzani (Felixstowe) v International Marine Management (UK)* further said that it followed from Lord Denning's decision in *The Nanfri* that whether equitable set-off could be applied required "a consideration of what today would be regarded as fair and just."[254]

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246 *Marine & General Mutual Life Assurance Society v Feltwell Fen Second District Drainage Board* [1945] KB 395.

247 *Warwick v Bruce* (1815) 4 M & S 140; 105 ER 787.

248 *Rawson v Samuel* (1839) 1 Cr & Ph 161; 41 ER 451; see also *Hill v Ziymack* (1908) 7 CLR 352.

249 *Rawson v Samuel* (1839) 1 Cr & Ph 161; 41 ER 451 at 179 (Cr & Ph).

250 *Hanak v Green* [1958] 2 QB 9.

251 *Hanak v Green* [1958] 2 QB 9 at 24.

252 *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc ("The Nanfri")* [1978] 1 QB 927 at 974, 981.

253 *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] 1 QB 137 at 154G per Forbes J.

254 *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] 1 QB 137 at 155F. Lord Brandon in *Bank of Boston Connecticut v European Grain and Shipping Ltd ("The Dominique")* [1989] AC 1056 devised a test consistent with Lord Denning's in *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc ("The Nanfri")* [1978] 1 QB 927 but regarded the requirement of impeachment of title as unnecessary. Lord Brandon (at 1102) cited Lord Hobhouse in *Government of Newfoundland v Newfoundland Railway*

Parties are entitled to the enforcement of orders or judgments in their favour. Consequently, it is not a proper basis for a stay of execution merely that related litigation or procedures are pending. The execution of a judgment for the possession of land pending an appeal by the defendant against judgment on a related claim for payment of money was refused.[255] A stay was refused where a party ordered to pay costs on an interlocutory application sought a stay on the ground that the costs could be set off against the judgment if he succeeded in the action.[256] Further, a stay sought merely on the ground that a separate proceeding by the judgment debtor against the judgment creditor was pending, has been refused. In *Wagner v Laubscher Bros & Co*[257] the court held that:

> A stay of execution of a judgment, including a foreign judgment duly registered in England, cannot ordinarily be granted simply because the judgment debtor brings a cross-claim in another action against the judgment creditor, or at any rate in the absence of special circumstances rendering it inexpedient to enforce the judgment.

A party is entitled to the enforcement of a judgment or order in their favour. A stay of the judgment or order is only justified by circumstances which go directly to its enforcement, and not to its validity or correctness.[258] An order staying enforcement is unusual and given strictly when justified by special circumstances,[259] such as where a company associated with the defendant against whom the plaintiff had recovered judgment had an outstanding claim against the plaintiff and others. In *Burnet v Francis Industries plc* where a judgment debt was owed by a subsidiary company to a third party, and where the subsidiary's parent company had a claim against the same third party, the court had jurisdiction to order a stay of execution of the judgment.[260]

Execution of judgment has been stayed for the payment of money at a future date.[261] However, a stay of execution has been refused where the financial position of the defendant was doubtful, and the defendant had

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Co (1888) 13 App Cas 199 at 212–213 who, he said, provided the criteria that "in deciding whether the government's cross-claim for unliquidated damages could be set-off against company's claim was not that the cross-claim 'impeached the title of the legal demand' as in *Rawson v Samuel* … but rather that it was a cross-claim flowing out of and inseparably connected with the dealings and transactions which also give rise to the claim".

255 *Scott v ANZ Banking Group Ltd* [1989] WAR 256.

256 *Grant v Banque Franco-Egyptienne* (1878) 3 CPD 202; compare *Re UTSA Pty Ltd (in liq)* (unreported; VSC; Chernov J; No 8610/95; 26 June 1998).

257 *Wagner v Laubscher Bros & Co* [1970] 2 QB 313.

258 *State Bank of Victoria v Parry* [1989] WAR 240 at 244; *TC Trustees Ltd v JS Darwen (Successors) Ltd* [1969] 2 QB 295.

259 *Burnet v Francis Industries plc* [1987] 2 All ER 323 at 327e, 330a. Some relevant factors as to whether a stay should be ordered or not are usefully (though not exhaustively) enumerated by Bingham LJ in *Burnet v Francis Industries plc* at 330.

260 *Burnet v Francis Industries plc* [1987] 2 All ER 323.

261 *Re a Debtor* [1912] 3 KB 242.

made no disclosure of the true position. In *John Holland Construction & Engineering v Majorca Projects*[262] Hansen J gave summary judgment to a plaintiff (the contractor) seeking payment of a progress certificate issued by an architect on the defendant (the proprietor of a building), and imposed a stay on the entry of judgment (not the execution of an entered judgment) until further orders.[263] The contractor appealed for the discharge of the stay. In considering whether to disturb the order for stay on appeal Byrne J took into consideration in particular the right of the contractor to payment. Whether the payment sought was properly due to the contractor was subject to the finding of a referee's report which would require two months to deliver. Further, Byrne J did not weigh in the balance concerns expressed by the contractor of the proprietor's impecuniosity, or potential insolvency, given the proprietor had provided security for payment by means of bank guarantee, and that the contractor gained no advantage in recovering money from the proprietor if it was subsequently recoverable by an administrator as a preference.[264] The plaintiff sought and was granted leave by the Court of Appeal to appeal Byrne J's decision.[265] Brooking J held that Byrne J had, first, determined the matter upon mistaken facts in relation to the provision of the bank guarantees and that this was fatal to the exercise of the judge's discretion; and secondly, failed to properly consider the relevance of the defendant's solvency and instead engaged in speculation regarding the fate of any payments prior to insolvency.[266] Brooking J said that rather than favouring the stay, the defendant's uncertain financial position, about which it had made no disclosure, was indeed grounds for the stay being removed.

To whom application for stay is made

[12.480] A judge or associate judge who has authenticated an order for a stay of execution becomes thereby *functus officio*. If a further stay is required it cannot be by way of application to that judge or associate

262 *John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd* (1995) 12 BCL 135 (VSC). For an examination of what might constitute special circumstances within the rule in England corresponding to r 66.16, the *Rules of the Supreme Court 1965* (UK), O 47 r 1, as to justify a stay of execution of a judgment for a plaintiff where there was an unresolved claim against the plaintiff by a party associated with the defendant, see *Burnet v Francis Industries plc* [1987] 2 All ER 323. For the situation in Western Australia, see *State Bank of Victoria v Parry* [1989] WAR 240.

263 No point on the form of the order was ever taken and both the defendant and Byrne J treated it is in effect having the form of a stay of execution: *John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd* [1995] VSC 450 (21 August 1995) at 3 per Brooking JA.

264 *John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd* [1995] VSC 429 (10 August 1995) at 6.

265 *John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd* [1995] VSC 450 (21 August 1995) per Brooking and Hayne JJA.

266 *John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd* [1995] VSC 450 (21 August 1995) at 6.

judge. Rather, an appeal is required.[267] However, a judgment creditor who had not been notified of an order being made against them may bring an application before the judge or associate judge who ordered the stay regardless of its having been authenticated.[268]

An application for a stay of execution of judgment is in general made on notice to the judgment creditor.[269] A judgment debtor applying for a stay of execution of judgment pending an appeal to the Court of Appeal may bring the application before a judge or the Court of Appeal.[270] It is not necessary for the judgment debtor to apply to the trial judge for a stay of execution; the application may be made to another judge.[271]

Mode of application for stay

[12.490] An application for the stay of execution of a judgment or order may be made at the time the judgment is given, or the order is made, or at a later date. If it is made at a later date the application is made by summons, and is supported by evidence on affidavit. Otherwise, at the hearing of the application, oral or affidavit evidence supporting the application may be presented at the direction of the court.[272]

Appeal to Court of Appeal

[12.500] A judge or associate judge makes an interlocutory order in granting or refusing a stay of execution of a judgment. Accordingly, if the order is the order of a judge, appeal is not as of right, and leave is required to appeal to the Court of Appeal. In *Deputy Commissioner of Taxation (Vic) v Yosemite Afforestation*[273] judgment in default of appearance had been entered against a defendant in relation to a taxation assessment. The assessment was in relation to a complex investment scheme amongst several companies involving the farming and management of pine plantations. The Deputy Commissioner concluded that the scheme was run for the purpose of tax avoidance. The defendant sought a stay of execution which was dismissed by the Master, but granted by Murphy J on appeal. The plaintiff served notice of appeal against the judge's

267 *Re VGM Holdings Ltd* [1941] 3 All ER 417. See also *Ellis v Scott* [1964] 1 WLR 976; *Erinford Properties Ltd v Cheshire County Council* [1974] Ch 261.

268 See r 46.08(b).

269 See *Rural Finance Corporation of Victoria v Wilson* (unreported; VSC; Cummins J; No 2156/1990; 10 May 1991).

270 Rule 64.25.

271 *Scarborough v Lew's Junction Stores Pty Ltd* [1963] VR 129. In *Joskovitz v Bonnick* [1964] VR 654 Herring CJ raised, but did not decide, the question whether a judge could stay an order of the Full Court. See also *Patton v Minister for Defence* (1987) 71 ALR 637 (FCA).

272 *Tuck v Southern Counties Deposit Bank* (1889) 42 Ch D 471.

273 *Deputy Commissioner of Taxation (Vic) v Yosemite Afforestation Pty Ltd* (1988) 19 ATR 1326 (VSC).

decision, but failed to recognise the order as an interlocutory order requiring them to seek special leave at the time, for which they subsequently filed.

ATTACHMENT OF DEBTS

What are the preconditions for a garnishee order to be made?

[12.510] The Norman-French term "garnishee" denotes a person obliged to "garnish", or furnish, a judgment creditor with the money required to pay off a debt.[274] The garnishee is served with a summons that functions as an injunction. The garnishee summons requires the application of the garnishee order to be heard before the garnishee can pay the judgment creditor's debt. Until the hearing of the application the summons binds the debt to the garnishee, and "attaches" it to the judgment creditor, by means of a charge in favour of the judgment creditor.[275] If the order made at the hearing of the garnishee summons requires the garnishee to pay the "attached" debt, the garnishee's payment discharges their debt to the judgment creditor.[276] The attachment procedure applies only where the judgment creditor has a right to immediate payment by the judgment debtor, and by payment by the garnishee the judgment creditor can thereby discharge the debt.[277]

Procedure described

Garnishee summons order

[12.520] The court exercises discretion in making an order for the filing and service of a garnishee summons. The court may refuse an order in the same circumstances as those which, if they appeared on the hearing of an application for a garnishee order, would lead the court to refuse a garnishee order. The order of a court to file and serve a garnishee summons under r 71.04(1) fixes the amount specified in the summons as the attached amount due or accruing, or likely to be due or accrue,[278] having regard to the amount due, the interest accrued or accruing on the judgment debt as the amount to be attached, and the costs of proceedings.[279] The summons is required to identify each debt that it is being filed for.[280] An application made with respect to a debt that becomes due or accrues between the day an order for the filing and service of a garnishee summons is made and the day for hearing named

274 Rule 71.01.

275 See *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110 at 131.

276 See *Choice Investments Ltd v Jeromninon; Midland Bank Ltd (garnishee)* [1981] QB 149; [1981] 1 All ER 225 at 226–227 per Lord Denning MR.

277 See *Nicholson v McDonald* [1936] VLR 233 at 234.

278 Rule 71.04(3).

279 Rule 71.04(3).

280 Rule 71.06(1).

in the summons,[281] must specify the date of the hearing as a day not more than 30 days from the date of the order.[282]

Enforcement of garnishee order

[12.530] A garnishee order is enforceable in the same manner as any other order for money.[283] If the garnishee pays the judgment creditor the judgment debtor's liability is discharged to the extent of the amount of the money paid.[284]

Garnishee summons as stay of execution against garnishee

[12.540] If a first person who was a judgment creditor against another second person, who in turn was a judgment creditor against a third person, obtained a garnishee order absolute attaching the debt due from the third person to the other, the second person could not enforce the judgment against the third person as long as the order remained undischarged.[285] However, service of a garnishee order *nisi* with notice to the second person did not stay execution of the judgment which the second person had obtained against the third,[286] or the judgment which the first person had obtained against the second person. A garnishee order *nisi* which the creditor obtained attaching debts due to the debtor is not a stay of execution, but is only a security.[287]

Discretion to make garnishee order

[12.550] The court has discretion in the making of garnishee orders. In making the order it will consider whether the order is likely to prejudice or act unfairly upon the garnishee. The court will not make an inequitable order. It will not, for example, make a garnishee order if the foreign garnishee ordered to pay the judgment creditor in one state would nevertheless remain liable in their home state to pay the same debt.[288] A garnishee order will not be made where the judgment creditor is insolvent because the payment to the judgment creditor would be a preference payment to the judgment creditor over other creditors of the

281 Rule 71.02(b).

282 Rule 71.04(4).

283 Rule 71.09(3).

284 Rule 71.12.

285 *Re Connan; Ex parte Hyde* (1888) 20 QBD 690.

286 *Cronmire v Maccolla* (1893) 9 TLR 549 (service of the order when the debt or debts specified is a judgment debt does not act as a stay of execution). Hence payment to the sheriff who has levied the execution will discharge the garnishee: see *Turnbull v Robertson* (1878) 47 LJ (QB) 294.

287 *Re HB* [1904] 1 KB 94 at 97.

288 *Martin v Nadel* [1906] 2 KB 26; *Swiss Bank Corporation v Boehmische Industrial Bank* [1923] 1 KB 673; *Employers' Liability Assurance Corporation Ltd v Sedgwick, Collins & Co Ltd* [1927] AC 95; *Deutsche Shachtbau-und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Co* [1988] 2 All ER 833 (HL).

judgment debtor.[289] Nor will an order be made if on reasonable grounds it is suspected that the debt to be attached is not the judgment debtor's but is money held on trust.[290] Further, the court will exercise its discretion against making an order to attach a small debt that would not significantly reduce the judgment debtor's level of indebtedness to the judgment creditor.[291]

Setting aside garnishee order

[12.560] The court has inherent jurisdiction to ensure that court processes are not abused. If the court is of the view that the enforcement of an order to attach a debt will bring about an injustice, it will set the order aside to prevent the court being used as an instrument of injustice. In *Tile Centre v Symons; Ex parte Kyritsis*[292] Vickery J of the County Court stated a special case pursuant to s 76 of the *County Court Act 1958* (Vic) for the opinion of the Full Court of the Supreme Court. The question as stated was whether a judge of the County Court had the power to set aside a garnishee order absolute made under O 29 r 36 of the *County Court Rules 1964* (Vic). Rule 36 empowered a judge to order execution where the garnishee did not under an order issued pursuant to r 34 pay the amount due, or dispute the debt, or appear to show cause.

The court held that the absence of authority on the point that the order *nisi* absolute may be set aside results from the nature of the garnishee order and proceedings and their place in the structure of the rules themselves. That is, because the power to make the order under r 29 is provided in the context of an authority to issue execution of the order pursuant to r 36, and the objective of the procedure governing the making of garnishee orders is exclusively to render, in the form of an order or judgment,[293] the debts owed by the garnishee to the judgment debtor as property of the judgment debtor available for the satisfaction of the order in favour of the judgment creditor.[294] The court observed that the garnishee order and garnishee proceedings are *sui generis*. The garnishee order is in effect a means of execution, and not an issue to be tried between the judgment creditor and the garnishee until the garnishee under r 29 disputes the attachment of the debt.[295]

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289 *Pritchard v Westminster Bank Ltd* [1969] 1 All ER 999. See also *Kennett v Westminster Improvement Commissioners* (1855) 25 LJ Ex 97; 156 ER 865 (priority over other bondholders).

290 *Roberts v Death* (1881) 8 QBD 319; *Deutsche Shachtbau-und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Co* [1988] 2 All ER 833 (HL). See also *Plunkett v Barclays Bank Ltd* [1936] 2 KB 107.

291 *Cotter v Moran* (1895) 21 VLR 108.

292 *Tile Centre v Symons; Ex parte Kyritsis* [1972] VR 965 at 971. See also r 71.12.

293 Not an order made in a "cause or action" (*Mason v Wirral Highway Board* (1879) 4 QBD 458) although it is a "proceeding": *Llewellyn v Carrickford* [1970] 1 WLR 1124.

294 Citing *McKenzie & Co v Walker* (1891) 17 VLR 221.

295 In *Murdoch v Flexmore* (1906) 2 Tas LR 78.

Similarly, garnishee proceedings have been identified as a method of execution.[296] The principle in *Bailey v Marinoff*[297] is not therefore applied to garnishee orders and garnishee proceedings because they are grants to issue execution on the property of (in the form of a debt owed to) the judgment debtor. The court is not essentially engaged in a judicial function to which principles governing judgments attach, but in an administrative act subject to the court's supervision, including revocation.

The court further considered in general terms whether the County Court as a court of limited rather than plenary jurisdiction was empowered beyond statutory provisions governing it, and specifically, whether it had the power to set aside garnishee orders where the *County Court Act 1958* (Vic) was silent on the matter and did not specifically confer such a power upon it. It held that s 49 was sufficient to confer the necessary power on the court. Section 49 was in terms that the County Court "shall have power to make any order that could be made in regard to any action or matter … in as full and ample a manner as might and ought to be done in the case by the Supreme Court or a Judge thereof".[298] Further, the very grant of power to hear and determine matters conferred upon a court all incidental power to exercise control over that jurisdiction.[299] The court could therefore set aside garnishee orders absolute in the exercise of its inherent jurisdiction.

Garnishee orders have been set aside that resulted from the mutual mistake of the judgment creditor and garnishee, together with an order to repay the money paid under the order.[300] They have also been set aside where unilateral mistakes were made causing injustice.[301] Despite any mistake the fact that the garnishee order is in place means that the garnishee may not recover money paid to the judgment creditor as money had and received.[302]

In *Edwards v Jones*[303] the court held that a judge had the power to set aside the garnishee order absolute upon application by the assignees of a debt. The circumstances of the case were that an order had been made attaching moneys in the garnishee's hands alleged to be the property of the judgment debtor. The debtor's sons served a notice stating that the

296 *White, Son & Pill v Stenning* [1911] 2 KB 418 at 427 per Vaughan Williams LJ, who referred to them as "a species of execution" which ought not to provide the judgment creditor with orders unless there existed property of the judgment debtor to execute the summons upon.

297 *Bailey v Marinoff* (1971) 125 CLR 529.

298 See *Duncan v Lowenthal* [1969] VR 180.

299 *Duncan v Lowenthal* [1969] VR 180 at 182.

300 *Moore v Peachey* (1892) 66 LT 198.

301 *Marshall v James* [1905] 1 Ch 432. See also *Burrell & Sons v Read* (1894) 11 TLR 36; *O'Brien v Killeen* [1914] 2 IR 63.

302 *Beauchamp v Nathan* (1868) 5 WW & A'B (L) 219; *Partridge v National Insurance Co of Australasia Ltd* (1872) 2 VLR (L) 203.

303 *Edwards v Jones* (1888) 14 VLR 224.

moneys in question were in fact theirs and that they had assigned the moneys to a third party. The court granted the garnishee's application to have the order set aside, and directed the third party to appear before the court and provide evidence of the claim.

Can a garnishee order be made if damages are to be assessed by a court?

[12.570] Where the judgment debtor is owed a debt by the garnishee under a judgment in favour of the judgment debtor that debt may be attached.[304]

What debts are attachable

[12.580] Rule 71.02 provides that a debt may be attached under O 71 if the debt:

(a) is due or accruing to the judgment debtor from the garnishee on the day an order for the filing and service of a garnishee summons is made; or

(b) becomes due or accrues to the judgment debtor from the garnishee between the day an order for the filing and service of a garnishee summons is made and the day for hearing named in the summons.

General

[12.590] Application for attachment first requires an application for an order that a garnishee summons be filed and served on the garnishee.[305] If the court subsequently makes a garnishee order, both the garnishee order and the garnishee summons identify the debt required to be attached. Attachable debts are both equitable and legal[306] debts due and accruing to the judgment debtor from the garnishee, including debts due or accruing from partners.[307] If there is no debt satisfying the legal definition, or there is uncertainty about whether a debt is due or has accrued, or will become due or accrue, there can be no attachable debt.[308]

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304 *Holtby v Hodgson* (1889) 24 QBD 103. An interlocutory judgment against the garnishee for damages to be assessed does not constitute a debt. See *Jones v Thompson* (1858) 27 LJQB 234; 120 ER 430; *Synnott v Woods* (1891) 8 WN (NSW) 4 (damages verdict).

305 Rule 71.04(1).

306 *Re Cowans' Estate; Rapier v Wright* (1880) 14 Ch D 638. See also *Vernon v Perry* [1962] VR 223 at 226.

307 Rule 17.09. The debts of partners not resident in Victoria may be attached as long as the garnishee summons was served on a partner or person having control or management of the business in Victoria.

308 *Neustadt v Sammon* (1915) 32 WN (NSW) 32; *Webb v Stenton* (1883) 11 QBD 518; *Re Greenwood; Sutcliffe v Gledhill* [1901] 1 Ch 887; *Israelson v Dawson (Port of Manchester Insurance Co Ltd, garnishee)* [1933] 1 KB 301; *Breen v Doyle* (1920) 37 WN (NSW) 258; *Re Tink* (1895) 17 ALT 11; *Montgomerie's Brewery Co v McKenzie* (1905) 26 ALT (Supp) 1; *Hunt v Balfour* [1928] VLR 488; *Nicholson v McDonald* [1936] VLR 233.

Nonetheless, even a debt of an unknown or unascertainable amount may be attached if it is due or accruing from the garnishee to the judgment debtor.[309]

Debt due or accruing

[12.600] The attachment procedure of O 71 applies to debts which are "due or accruing" to the judgment debtor from the garnishee on the day a garnishee summons order is made. A debt due is a debt which is due and payable, and not simply one that is due. A debt accruing is a due but not immediately payable debt.[310] In *Webb v Stenton* the court said that:

> a debt legal or equitable can be attached whether it be a debt owing or accruing; but it must be a debt, and a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, *debitum in praesenti, solvendum in futuro*. An accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation.[311]

Each instalment of a sum due to be paid by instalments is a debt accruing. The court may order that each instalment is attached when and as it falls due at which point it is a debt due.[312] An instalment of an overdue debt may be attached under an order as a debt due.[313]

Debt to become due or to accrue

[12.610] The order for attachment under O 71 may attach a debt which will become due or accrue to the judgment debtor from the garnishee between the day the order is made and the day for hearing named in the summons. The order may therefore attach a debt which is not a debt due or accruing to the judgment debtor from the garnishee on the day the order for the filing and service of a garnishee summons is made.[314]

Rule 71.04(4) provides that the date of the hearing on the garnishee summons shall not be more than 30 days after the garnishee summons is made. The effect of the rule is that a garnishee summons order will not be made in respect of a debt which will become due or accrue from the

309 See *Lucy v Wood* [1884] WN 58; *Vinall v De Pass* [1892] AC 90, affirming SC sub nom *De Pass v Capital and Industries Corporation Ltd* [1891] 1 QB 216.

310 See *Clyne v Deputy Commissioner of Taxation (Cth)* (1981) 150 CLR 1 at 15 per Mason J.

311 *Webb v Stenton* (1883) 11 QBD 518 at 527 per Lindley LJ. See also *Re Australia & New Zealand Savings Bank Ltd; Mellas v Evriniadis* [1972] VR 690 at 692; *O'Driscoll v Manchester Insurance Committee* [1915] 3 KB 499 at 516; *Westpac Banking Corporation v Eltran Pty Ltd* (1987) 74 ALR 45 at 51.

312 *Tapp v Jones* (1875) LR 10 QB 591 at 593 per Blackburn J: "… there is power to make an order against the garnishee for payment of his debts as and when they become payable, instead of making a fresh order as each falls due".

313 *Woodham Smith v Edwards* [1908] 2 KB 899.

314 This aspect of the procedure for the attachment of debts is new. Formerly, a judgment creditor could not apply for the attachment of a debt which was not due or accruing to the judgment debtor at the time application to the court was first made, that is, on the application for a garnishee order *nisi*.

garnishee to the judgment debtor before the day for hearing named in the summons, unless the debt will or is likely to become due or accrue not more than 30 days after the date of the order. If a debt becomes due or accrues before the day of the hearing it is attached and bound in the hands of the garnishee when it becomes due or accrues.[315]

Assigned debt

[12.620] A debt which the judgment debtor has assigned to a *bona fide* assignee for valuable consideration cannot be ordered to be attached.[316] The court has jurisdiction to determine whether the assignment was a conveyance made with the intention to defraud creditors. The assignment would then be voidable,[317] except where the assignee took property for valuable consideration and in good faith and at the time of the assignment had no notice of the intention to defraud creditors.[318]

The legal assignment of a chose in action is only completed when notice is provided to the debtor. If the debtor is not notified the assignment may still have effect as an equitable assignment. However, an equitably assigned debt is not attachable because the creditor may not deal with a debt assigned in equity.[319] In *Adams (WJ) & Co v Blencowe*,[320] a rice grower was a judgment debtor to certain judgment creditors. It consigned crops to the Rice Marketing Board and directed it by orders given to some of its judgment creditors to credit the amount received from the sale of crops to the judgment creditors' accounts. It was held that by reason of the orders to the Rice Marketing Board the judgment debtor had assigned in equity sufficient moneys from the proceeds of the sale of the rice to pay its debts to its judgment creditors. Further, those judgment creditors obtained priority over garnishees with a garnishee order *nisi* to attach money from the sale of the crops.

Company wound up

[12.630] The liquidator of a company is entitled to the benefit of a debt due to the company over a judgment creditor who attached that debt prior to the company's winding up. But if the debt is received by the

315 Rule 71.08(2).

316 *Hirsch v Coates* (1856) 18 CB 757; 139 ER 1568; *Wise v Birkenshaw* (1860) 29 LJ Ex 240; *Pickering v Ilfracombe Railway Co* (1868) LR 3 CP 235; *Edmunds v Edmunds* [1904] P 362; *Glegg v Bromley* [1912] 3 KB 474; *B Lipton Ltd v Bell* (1923) 93 LJ KB 568; *Harkness v Mayor of Maryborough* (1872) 3 AJR 26.

317 *Property Law Act 1958* (Vic), s 172. *Khan v Russell* [1939] VLR 224; *Harrods Ltd v Stanton* [1923] 1 KB 516; *Glegg v Bromley* [1912] 3 KB 474; *Dundop v Tutty* (1871) 2 VR (L) 14; *Thomson v Nicholson* [1939] VLR 157.

318 *Property Law Act 1958* (Vic), s 172(3).

319 *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1. See also *Cohu v Strahan* (1874) 5 AJR 38; *Keith v Butler* (1866) 1 QSCR 141; *Adams (WJ) & Co Ltd v Blencowe* (1929) 46 WN (NSW) 150.

320 *Adams (WJ) & Co Ltd v Blencowe* (1929) 46 WN (NSW) 150.

company prior to its winding up the attachment is complete and the judgment creditor retains the benefit.[321]

Compensation money

[12.640] If a judgment debtor is due to be paid compensation resulting from the compulsory acquisition of land, the money must be due and the transfer or conveyance of the land complete before there can be attachment of the compensation.[322] The mere receipt of an offer of compensation, or an acquisition notice, is not sufficient for an order of attachment to be made. Nor can a debt be attached where there has been a refusal of an offer of compensation.[323]

Contingent or conditional debts

[12.650] If a debt is subject to a condition without which fulfilment of that condition it will not become due and payable the debt cannot be attached until the condition is fulfilled.[324] In *Howell v Metropolitan District Railway Co*[325] it was held that money was not attachable under a garnishee order as a debt "due and accruing" until after the conveyance of land because an action for the payment of the price of land was not maintainable, and the garnishee was not indebted, until after the conveyance of the land.

Where a judgment debtor is owed a debt by a garnishee arising from a judgment in favour of the judgment debtor in an action against the garnishee the debt cannot be attached if an appeal against the judgment is pending.[326] In *Hunt v Balfour*[327] Hunt obtained a garnishee order *nisi* in relation to a judgment against Balfour for payment of £26 2s 2d, attaching £10 owed to Ernest Balfour by the returning officer of the Shire of Bairnsdale as a deposit paid in respect of an election. Agnes Balfour claimed that the £10 had been assigned and was owed to her and appeared to oppose the order being made absolute. The garnishee gave evidence that he held and owed £10 to Ernest Balfour which he would have paid to Agnes Balfour had it not been for the order *nisi* and of whose claim he had notice. The court made the order absolute and Agnes Balfour obtained an order *nisi* to review the decision, arguing that the court had mistakenly rejected garnishee's evidence of the claim of a third party, and objecting that no debt was attachable until after the election was held.

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321 See *Corporations Act 2001* (Cth), s 569.

322 *Richardson v Elmit* (1876) 2 CPD 9; *Howell v Metropolitan District Railway Co* (1881) 19 Ch D 508.

323 *Australian Joint Stock Bank v McRae* (1887) 3 WN (NSW) 107.

324 *Breen v Doyle* (1920) 37 WN (NSW) 258.

325 *Howell v Metropolitan District Railway Co* (1881) 19 Ch D 508. The provisions of *Land Clauses Act 1845* (UK), ss 49, 50 did not create an absolute debt.

326 *Wymond v Williams* (1885) 7 ALT 97. See also *Hunt v Balfour* [1928] VLR 488.

327 *Hunt v Balfour* [1928] VLR 488.

The court held that Agnes Balfour, as a stranger to the proceeding, had a right to be heard in relation to the debt which had been admitted by the garnishee, being assigned to her after the making of the order *nisi*.[328] The Court of Petty Sessions was therefore in error when it made the order without first determining the entitlement to the money held by the garnishee. The court further observed that the garnishee having "in effect" suggested that a third person had a claim in respect of the debt s 131 of the *Justices Act 1915* (Vic) empowered the court to order that third person's appearance.[329]

Contract for purchase of land

[12.660] In *Harry Davies & Co v East*[330] it was held that the vendor under an executed contract for the sale of land could not attach as a debt the balance of the purchase money owed under the contract of sale where the condition precedent to the payment of the balance of purchase money was the signing of the transfer deed. The purchaser did not owe money to the vendor until title had been accepted which still awaited inspection of the title, and the expiry of the time for making requisitions.[331]

Counsel's fee

[12.670] Historically, in England, a fee due by a solicitor to counsel was not a debt, and so could not be attached.[332] By convention the barrister's fee was an honorarium and a debt of honour and neither recoverable from, nor legally enforceable against, either the client or the instructing solicitor. Similarly in Australia it was said that "[a] barrister is by law incapacitated from entering into a contract of any kind, either with solicitor or client, in respect of fees, for, at all events, litigious work as a barrister."[333] Because barristers did not enter into contracts when performing legal services no legal basis existed for recovering fees. However, the various Legal Profession Acts permit barristers to enter

328 Citing *Brunet v Miller* (1897) 22 VLR 496: A'Beckett J interpreting *Rules of the Supreme Court 1916* (Vic), O 45 rr 1, 3, in a case where by contrast the assignment preceded the making of the order *nisi*; Lowe J applying that interpretation to *Justices Act 1915* (Vic), s 128 on which the instant case turned.

329 *Hunt v Balfour* [1928] VLR 488 at 491.

330 *Harry Davies & Co Pty Ltd v East* [1925] VLR 681.

331 See also *Laird v Pim* (1841) 7 M & W 474; *East London Union v Metropolitan Railway Co* (1869) LR 4 Ex 309; *Barsi v Farcas & Nadge* [1924] 1 DLR 1154; *Foran v Wight* (1989) 168 CLR 385; *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476; *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245. See further *McKellar v Abbott* (1891) 17 VLR 215, where it was held that there was no debt due by the purchaser to the vendor under a contract for the purchase of a reversionary interest under a will until the title had been accepted.

332 *Wells v Wells* [1914] P 157. A barrister's immunity from suit for the consequences of his advocacy in court may similarly have been based on his inability to sue for fees. Further, outstanding barrister's fees did not form part of an estate because they were not recoverable even if the client paid the fees into the hands of the instructing solicitor.

333 *Re Neville; Ex Parte Pike* (1896) 17 NSW (B & P) 24 at 26 per Manning J.

contracts for legal services with lay clients or solicitors, and leave them free to render services on either a contractual or conventional non-contractual basis[334] at the barrister's election, therefore barrister's fees may be recoverable and are thereby attachable.

Cover money

[12.680] Money deposited with a stockbroker to cover losses upon speculations in stock and shares cannot be garnished as long as the transactions upon which they were paid remain open. For a debt to be attachable it must be accruing or have accrued (*a debitum in praesenti sol vendum in futuro*). In *Hutt v Shaw*[335] a certain sum of money was deposited with a stockbroker as "cover" for any loss upon speculative transactions in stocks and shares. As soon as the transactions between the depositor and the broker were closed the moneys not used as cover were repayable. The court held that there was no debt until all the transactions were closed, and that the depositing of the cover money itself by the judgment debtor with the broker was not a debt due or accruing to the judgment debtor. Lord Esher said: "This sum was not in the hands of Shaw to be re-paid on demand. When the Garnishee Order Nisi was served the accounts were not settled."

Crown debts

[12.690] Section 40 of the *Supreme Court Act 1986* (Vic) provides:

> **40 Crown payments to be subject to attachment**
>
> Despite any Act or rule of law to the contrary, a court may make an attachment order in respect of earnings due to be paid by the Crown or a statutory authority representing the Crown.

Section 40 modifies, at least "in respect of earnings", the common law position that debts owed by the Crown and Crown instrumentalities,[336] and salaries of a government official,[337] were not attachable debts, but that debts of a statutory body independent of the Crown were attachable.[338] The court may now make an attachment order in respect of earnings due to be paid by the Crown in right of Victoria or a statutory authority representing the Crown in right of Victoria.

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334 See, for example, *Legal Profession Act 2004* (Vic), Pt 3.2 Div 2 (s 3.2.3) and *Legal Profession Act 2004* (NSW), Div 9 s 83. In England see *Courts and Legal Services Act 1999*, s 61; and refer to *Husbands v Warefact Ltd* [2003] All ER (D) 291 (Queen's Counsel successfully suing for fees payable on a contractual basis).

335 *Hutt v Shaw* (1887) 3 TLR 354.

336 See *Aitken v Godkin* (1868) 5 WW & A'B (L) 216; *Magann v Cooke* (1884) 1 WN (NSW) 68; *Drew v Middleton* [1905] QWN 3; *Mildura Co-operative Fruit Co Ltd v Noyce; Ex parte Minister of Agriculture* [1928] VLR 390; *Froelich v Howard* [1965] ALR 1117.

337 *Cullen Bullen Lime Co v Roseby* (1889) 5 WN (NSW) 52.

338 See *WA Purvis Stores Pty Ltd v Richardson* [1941] VLR 56; *Imperial Paint Manufacturers Pty Ltd v Hanson* (1952) 72 WN (NSW) 127.

Dividends in bankruptcy

[12.700] A creditor of an insolvent estate who is a judgment debtor in another proceeding does not take a dividend from the insolvent estate as a debt liable to be attached. In *Prout v Gregory*[339] the defendant was a judgment debtor of the plaintiff and a creditor in the administration of the estate of a deceased insolvent. The plaintiff sought to attach a sum payable to the defendant as a dividend in the administration of that estate. The garnishee was the official receiver of the Birmingham District, in whom the estate was vested as trustee under the provisions of the relevant bankruptcy legislation. The court held that the dividend payable to a creditor under an administration in bankruptcy of an insolvent estate was not a debt due from the administrator in bankruptcy or the trustee to the creditor to whom it is payable, and cannot therefore be attached by garnishee proceedings to answer a judgment obtained against the creditor.[340]

Lord Coleridge CJ determined the matter on the basis that to make a garnishee order in such a case would be to interfere with the administration of an estate the administration of which was expressly provided for by the provisions of the *Bankruptcy Act 1883 (46 & 47 Vic c 52)* (ENG) which contained express directions in relation to how the subject matter was to be handled. Matthew J agreed; however, he determined the matter on the basis of the dividend not being a debt and the judgment creditor not being a debtor:

> It is quite impossible to treat this as a debt, or to say that the official receiver is a debtor; he is responsible to the Court for the due performance of his duties, but is not a debtor of the persons entitled to receive dividends from the estate.[341]

Matthew J held that unless the moneys sought to be attached are a debt they were not captured by O 45 r 1 of the *Rules of the Supreme Court 1883* (ENG) and not liable to be garnished.

Election deposit

[12.710] Candidates are usually required to deposit a sum of money with the returning officer in an election. This sum is refundable upon receiving a set percentage of the available votes which can only be determined after the election is held and the votes finally counted. Therefore the sum cannot comprise an attachable debt prior to the

339 *Prout v Gregory* (1889) 24 QBD 281.

340 Compare *Evans v Stephen* (1882) 3 LR (NSW) L 154.

341 *Prout v Gregory* (1889) 24 QBD 281 at 282. Authority for the point is to be found in *Dolphin v Layton* (1879) 4 CPD 130 in which case a similar question arose, and the court held that money in the hands of the registrar of a county court as an officer of the court was not subject to process of attachment on the ground that the moneys were not a debt due by the registrar.

election. In *Hunt v Balfour*[342] £10 held by the returning officer for the Shire of Bairnsdale was garnished in relation to an order made against a judgment debtor. That sum had been deposited in relation to an election which had not yet been held and therefore was not an attachable debt at the time the order *nisi* had been made because it was not a debt owing and accruing at that time.

Execution proceeds

[12.720] If the sheriff is in possession of the proceeds of an executed warrant of seizure and sale the proceeds are attachable.[343] The proceeds distrained under a warrant of distress may be attached.[344] But moneys paid into court and held by the prothonotary cannot be attached even if the judgment debtor has become entitled to them. The prothonotary holds the money as an officer of the court and not as one indebted to the judgment debtor, regardless of whether the judgment debtor is in receipt of an order in their favour for the payment of the money.[345]

In *Vernon v Perry* Dean J observed:

> There are several cases in which it was held that moneys in the hand of the sheriff, or of a police officer, as a result of an execution or of a distress, could be attached to satisfy a judgment against the person entitled to such moneys. But that is because the sheriff or constable holds such moneys to the use of such persons who may recover them from the officer in whose hands they are.[346]

Cases of the kind referred to by Dean J are not applicable to the prothonotary who holds the money as an officer of the court.

After the execution of a warrant and the payment of a judgment debtor in discharge of the debt, the surplus moneys remaining with the sheriff can be attached as a debt owing to the judgment debtor.[347]

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342 *Hunt v Balfour* [1928] VLR 488 (a candidate's money lodged with the returning officer as a deposit in a municipal election).

343 *Thompson & Co v Vrenderberg* (1888) 14 VLR 150. See also *Re Greer; Napper v Fanshawe* (1895) 2 Ch 217.

344 *Ryan v Grant* (1900) 26 VLR 380.

345 *Vernon v Perry* [1962] VR 223, following *Cummings v Cooke* (1867) 7 SCR (NSW) 17; *Bell Bros & Thompson v Graham* (1856) 2 QLJ 156.

346 *Vernon v Perry* [1962] VR 223 at 225 per Dean J.

347 *Whiteley v Riverina & Echuca Red Gum Co* (1885) 6 ALT 237; compare *Oriental Bank Corporation v Grant* (1861) W & W (L) 16 (a decision on *Common Law Practice Act 1856* (UK), s 179); *Widdis v New Boys Reef Gold Mining Co (NL)* (1897) 23 VLR 323 (no debt due by police officer where surplus after sale under distress warrant paid to clerk of petty sessions).

Foreign debt

[12.730] In line with the *Supreme Court (General Civil Procedure) Rules 1996* (Vic) limiting a garnishee procedure to cases where the garnishee "is indebted to the judgment debtor and is within the jurisdiction",[348] r 71.07(2) prevents a garnishee summons from being served on a garnishee out of Victoria. While the words of the rule expressly refer only to service on a garnishee out of Victoria, the requirements under the former rule continue to apply and require the garnishee's debt to the judgment debtor to be recoverable within Victoria. The former rule required both that the garnishee was within the jurisdiction, and that the garnishee's indebtedness was within the jurisdiction, so that a proper recovery of the debt from the garnishee could be made within the jurisdiction.[349] Under the current rule a garnishee order may be refused if the garnishee's debt is owed and is recoverable outside Victoria, and that the payment of the debt within Victoria carries the real and substantial risk of the foreign debt not being discharged.[350] However, an attachment order will be made against a foreign garnishee if the debt owed to a judgment creditor within Victoria will be discharged by its payment.[351]

Insurance proceeds

[12.740] Money alleged to be due under an insurance policy to indemnify the assured is not a debt due to the assured.[352] It is trite law that the liability of the insurers under a policy of insurance cannot constitute a debt which can be attached.[353] The order for attachment can only be made if the applicant successfully establishes that there is in law a debt due from the garnishee to the judgment debtor.[354] In *Israelson v Dawson*[355] the applicant (the injured party) went straight to seek garnishee orders against the insurer, Port of Manchester Insurance Co Ltd. It did so arguing that, since it had a liability to compensate the insured under the insurance policy issued, then the applicant was entitled to direct attachment of what was due under that policy. The court held — in a decision made under O 45 r 2 of the English *Rules of the Supreme Court 1883* — that the amount which became payable under a policy as a result

348 *Supreme Court (General Civil Procedure) Rules 1996* (Vic), O 45 r (1)(c).

349 See *Richardson v Richardson* [1927] P 228 at 235 (money held by a bank to the credit of the judgment debtor at a foreign branch not attachable).

350 *Martin v Nadel* [1906] 2 KB 26; *Deutsche Shachtbau-und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Co* [1988] 2 All ER 833.

351 *Swiss Bank Corporation v Boehmische Industrial Bank* [1923] 1 KB 673. See *Deutsche Shachtbau-und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Co* [1988] 2 All ER 833 at 854 per Lord Goff.

352 *Israelson v Dawson (Port of Manchester Insurance Co Ltd, garnishee)* [1933] 1 KB 301; *Thos Brown & Sons Ltd v Dempster* [1902] QWN 62.

353 *Israelson v Dawson (Port of Manchester Insurance Co Ltd, garnishee)* [1933] 1 KB 301.

354 See *Israelson v Dawson (Port of Manchester Insurance Co Ltd, garnishee)* [1933] 1 KB 301; *France v Piddington (Cooperative Insurance Society Ltd, Garnishees)* (1932) 43 Ll LR 491.

355 *Israelson v Dawson (Port of Manchester Insurance Co Ltd, garnishee)* [1933] 1 KB 301.

of the accident specified therein having occurred, was not a debt which could be attached under this rule before the compensation had been determined by the arbitrator in accordance with the condition of the policy.

A bonus under a life policy cannot be attached until the death of the assured.[356]

Joint debt

[12.750] An action upon a debt owed to two creditors jointly must be brought in their joint names and therefore such a debt cannot be attached under a judgment against only one of the creditors. A debt owed by the garnishee which is not due or accruing solely to the judgment debtor but jointly to the judgment debtor and another cannot be attached by the judgment creditor,[357] despite it being possible to determine the exact portion of the joint debt that the judgment debtor is to receive. The garnishee order will be ineffective where the debt sought to be attached is due or accruing from the garnishee to two persons ((A) and (B)) jointly only one of whom is the judgment debtor (A), or is owed to the judgment debtor and a third person ((A) and (C)) jointly.

If the judgment debt is owed jointly by two or more judgment debtors the decree holder may attach any debt due or accruing to any one of the judgment debtors to satisfy the judgment debt.[358] Further, a debt owed jointly and severally, or severally, to two or more of the judgment debtors, or to the judgment debtor and another, is owed to persons with different interests and may be attached by the judgment creditor.[359] It follows that a garnishee order on a debt due or accruing from the garnishee to two joint judgment debtors jointly, or to either of them alone, is effective.

Joint judgment

[12.760] A judgment creditor having obtained a joint judgment against two or more judgment debtors can attach a debt due to any of their judgment debtors.[360]

Judgment against executor

[12.770] Upon the death of a third party indebted to the judgment debtor an order can be served upon their executors or personal representatives. The order must not be directed to them personally, but in

356 *Mulholland v Body* (1886) 2 WN (NSW) 90.

357 *Macdonald v Tacquah Gold Mines Co* (1884) 13 QBD 535 at 539 per Bowen LJ; *Beasley v Roney* [1891] 1 QB 509 at 512 per Pollock B; *Lloyd v Jacobs* (1887) 3 WN (NSW) 144; *Cramsie v Hunter* (1888) 4 WN (NSW) 131; *Phillips v MacMahon* (1899) 15 WN (NSW) 206; *Hirschorn v Evans* [1938] 2 KB 801.

358 *Miller v Mynn* (1859) 28 LJQB 324; 120 ER 1213.

359 See *DJ Colburt & Sons Pty Ltd v Ansen; Commercial Banking Co of Sydney Ltd (garnishee)* [1966] 2 NSWR 289.

360 *Miller v Mynn* (1859) 28 LJQB 324; 120 ER 1213.

their representative capacity. The judgment is given against a defendant in their capacity as executor or personal representative, and a debt due to the defendant as executor may be attached by the execution creditor before the rights of the executor were superseded by the decree for administration.[361]

Judgment debt

[12.780] A debt due by the garnishee to the judgment debtor under a judgment for the judgment debtor may be attached.[362] An interlocutory judgment against the garnishee for damages to be assessed does not constitute a debt.[363] A claim for damages does not give rise to a debt even after the jury has returned a verdict in favour of the plaintiff. A claim for damages does not become a debt until the liability is adjudicated and damages have been assessed by a decree or any order of a court or any other adjudicatory authority or forum and the judgment actually delivered.[364] Wightman J, in *Jones v Thompson*, said that "ex parte Charles and several other cases decide that the amount of a verdict in an action for unliquidated damages is not a debt till judgment has been signed".[365] In *O'Driscoll v Manchester Insurance Committee* Swinfen Eady LJ said, referring to cases where the claim was for unliquidated damages, that "in such cases there is no debt at all until the verdict of the jury is pronounced assessing the damages and judgment is given."[366]

Legacy

[12.790] *McDowell v Hollister* is clear authority for the proposition that the interest of a beneficiary in a pecuniary legacy under a will could not be the subject of a garnishee order, but may be attached if the executor has consented to it or has stated an account.[367]

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361 *Burton v Roberts* (1860) 29 LJ Ex 484; 158 ER 39; *Fowler v Roberts* (1860) 2 LT 368; 66 ER 95 (a court of equity would have recognised the validity of the attachment prior to the *Judicature Acts*); *Stevens v Phelips* (1874-5) LR 10 Ch App 417.

362 *Holtby v Hodgson* (1889) 24 QBD 103.

363 See *Jones v Thompson* (1858) 27 LJQB 234; 120 ER 430 (as to a joint judgment against the judgment debtor and another); *Synnott v Woods* (1891) 8 WN (NSW) 4 (damages verdict).

364 *Jones v Thompson* (1858) 27 LJQB 234; 120 ER 430.

365 *Jones v Thompson* (1858) 27 LJQB 234; 120 ER 430.

366 *O'Driscoll v Manchester Insurance Committee* [1915] 3 KB 499.

367 *McDowell v Hollister* (1855) 25 LT 185; see also *Lansforsakringar Bank AB v Wood* [2007] EWHC 2419; and the earlier *Inheritance (Provision for Family and Dependants) Act 1975* (UK) proceedings: *Lansforsakringar Bank AB v Wood* [2006] EWHC 929 (Ch). The Bank had obtained an interim third party debt order under *Civil Procedure Rules 1998* (UK), r 72(4). Master Leslie refused to make that order final under r 72.2(1)(a). Patten J upheld the Master's decision holding that the sum of £300,000 was not "a debt accruing due to the judgment debtor" (the beneficiary under a will) "from the third party" (the executors of the estate). See also *Meudell v Wason* (1897) 23 VLR 176; compare *Re Cowans' Estate; Rapier v Wright* (1880) 14 Ch D 638.

Money in court

[12.800] Where money is standing to the credit of the judgment debtor in court, the court may order that the money or so much thereof as is sufficient to satisfy the judgment sought to be enforced, together with interest and costs, be paid to the judgment creditor.[368]

If the judgment debtor has a beneficial interest in funds in court, the court may by order impose a charge on that interest for the purpose of securing the payment of the judgment debt.[369]

Money of prisoner

[12.810] There is no debt due by the police to a prisoner in respect of money which the police find upon the prisoner at the time of arrest and retain while the prisoner is in custody, and so the money cannot be attached.[370]

Order for payment into court

[12.820] Garnishee proceedings cannot be brought in respect of a judgment or order directing the payment of money into court.[371] In garnishee proceedings the only order that can be made is one whereby the garnishee is required to pay the amount of the judgment debt to the judgment creditor. The procedure is only intended to apply where the judgment creditor has an immediate right to payment by the judgment debtor and to give a good discharge therefor. As an order for payment into court cannot be satisfied by payment to the judgment creditor, the order does not constitute an immediate right in the judgment creditor to payment.[372]

A judgment for the payment of money into court is enforced by the appointment of a receiver or by committal and sequestration.[373]

Garnishee proceedings cannot be brought in respect of money paid into court under a judgment for specific performance of a contract.[374]

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368 Rule 71.13.

369 Rule 73.11.

370 *North v Kerry* (1901) 18 WN (NSW) 250; *Greenwell v Anderson* (1886) 8 ALT 21; *Barker v Bremner* (1891) 17 VLR 643; *Jervis v Peel* (1885) 1 TLR 306.

371 See the definition of "judgment creditor" in r 71.01(1); *Re Greer; Napper v Fanshawe* (1895) 2 Ch 217 at 221.

372 *Re Greer; Napper v Fanshawe* (1895) 2 Ch 217; *Nicholson v McDonald* [1936] VLR 233 at 234. Prior to the change in the rules in 1883 an order under statute having "the force and effect of a judgment" did not provide sufficient grounds for an application for a garnishee order: *Best v Pembroke* (1873) LR 8 QB 863. Prior to 1883 the applicant must have been entitled to a common law judgment.

373 Rule 66.02(2).

374 *Howell v Metropolitan District Railway Co* (1881) 19 Ch D 508.

Promissory note

[12.830] An amount due on a promissory note made by the garnishee in favour of the judgment debtor may be attached[375] but an amount which is not yet due cannot be attached[376] unless, in the circumstances, r 71.02(b) applies. However, in *Hyam v Freeman*[377] an order was made attaching amounts payable before they were due, execution not being allowed to issue until the amounts became due.[378]

Rent

[12.840] Rent due may be attached. It must be rent that has become due to the judgment debtor.[379] Although rent may accrue from day to day it cannot be attached until it becomes payable by the tenant.[380]

Trust money

[12.850] It was held in *Ballhausen v Mitchell*[381] that money in the hands of the curator of estates of deceased persons in the course of the administration of the estate of a deceased person could not be attached, as by the governing statute the money was under the control of the Treasurer and the curator was not in the position of debtor to the creditors of the estate.

Money in the hands of an executor or administrator pending the administration of an estate cannot be attached.[382]

Wages

[12.860] Wages and pensions cannot be attached by third party debt orders, but only under O 72 which provides for the attachment of earnings. Debts due and accruing as defined under O 71 are not earnings within the meaning of O 72 which are due or accruing to the judgment debtor. Order 72 (Attachment of Earnings) provides a procedure for the attachment of earnings by way of wages, salary, fees, bonuses, commission, overtime pay, or other emoluments payable in addition to wages or salary to a judgment debtor. Rule 72.03 permits the court to make an order that a judgment debtor's employer in respect of those earnings or part of them

375 *Pierce v Yarneberg* (1900) 16 WN (NSW) 145.

376 *Pyne v Kinna* (1877) IR 11 CL 40; *David v Malouf* (1908) 5 CLR 749.

377 *Hyam v Freeman* (1890) 35 Sol Jo 87.

378 See also *Jones v Thompson* (1858) 27 LJQB 234; 120 ER 430.

379 *Mitchell v Lee* (1867) LR 2 QB 259; *Barnett v Eastman* (1898) 67 LJQB 517; *Vacuum Oil Co Ltd v Ellis* [1914] 1 KB 693.

380 *Barnett v Eastman* (1898) 67 LJQB 517.

381 *Ballhausen v Mitchell* (1898) 23 VLR 629.

382 *Meudell v Wason* (1897) 23 VLR 176; *O'Neil v Gilbert* (1884) 1 WN (NSW) 7. See also *Rush v Douglas* (1887) 8 ALT 168; *Ruddock v Bates* (1889) 10 ALT 202; *Vernon v Perry* [1962] VR 223.

make them or part of them out as each periodic amount becomes due to the judgment debtor to a "person specified" in accordance with r 72.07.[383]

Bank account

[12.870] A judgment creditor's current account with a bank,[384] or money held in deposit or fixed deposit by a bank,[385] is attachable. Rule 71.03 provides that an amount standing to the credit of a judgment debtor in an account in a bank or in a co-operative[386] is for the purpose of O 71 a debt due or accruing to the judgment debtor, notwithstanding that it cannot be withdrawn without demand or notice, personal application, production of a deposit book, or production of a receipt.[387] The decision in *Re ANZ Savings Bank; Mellas v Evriniadis*[388] had held that the requirement to produce a deposit book as a condition of withdrawal of moneys from an account, and that no withdrawal was possible if the condition was not met meant that no debt was due or accruing by the bank to the customer. The rule removes the obstacle to attachment of moneys in accounts presented in that case. Evidence is required demonstrating that an amount to the credit of the judgment debtor stands in the bank's or co-operative's account for the judgment creditor to receive an order making them garnishee.[389] Where a judgment debtor seeks to transfer money from theirs to another customer's account the consequences depend on the direction given and the actions taken. First, if the bank has not acted on the judgment debtor's instruction the bank still owes the customer an attachable debt.[390] The failure to act on instruction has not disrupted the relationship between banker and customer. Secondly, if the bank has acted on the direction and properly assigned the debt it owes the judgment debtor to another customer the garnishee proceedings are postponed.[391] Thirdly, if the account is merely

383 Formerly, the judgment creditor was required to make a separate application for attachment each time a periodic amount fell due.

384 *Whelow v Bale* (1884) 1 WN (NSW) 16.

385 *Stewart v Duggan* (1890) 6 WN (NSW) 141.

386 *Co-operation Act 1981* (Vic), Pt III.

387 Rule 71.03.

388 *Re Australia & New Zealand Savings Bank Ltd; Mellas v Evriniadis* [1972] VR 690.

389 See *Coyne v Citizen Finance Ltd* (1991) 4 WAR 213. See further as to the effect under the former procedure of a requirement of production of a deposit book or passbook, *Re Australia & New Zealand Savings Bank Ltd; Mellas v Evriniadis* [1972] VR 690 (overruling *Chubb v Emery* [1933] VLR 125; *R v Justices of Brisbane; Ex parte Treasurer of Queensland* (1901) 11 QLJ 77; *Bagley v Winsome* [1952] 2 QB 236; *Dalston Development Pty Ltd v Dean* [1966] WAR 36), or of prior demand or notice, *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110; *Choice Investments Ltd v Jeromninon; Midland Bank Ltd (garnishee)* [1981] QB 149, or of production of a receipt for the money deposited, *Rees v Rees* (1931) 5 ALJ 62.

390 *Rekstin v Severo Sibirsko Gosudarstvennoe Akcionernoe Obschestvo Komseverputj* [1933] 1 KB 47.

391 *Re General Horticultural Co; Ex parte Whitehouse* (1886) 32 Ch D 512; *Badeley v Consolidated Bank* (1888) 38 Ch D 238.

transferred to another without their consent it is a revocable assignment to the transferee, and the bank's debt to the transferor is unchanged.[392]

The rules make no provision for joint accounts. However, at common law money in a joint account could not be attached to satisfy a debt of one of the joint account-holders.[393] If a customer's money is held in a foreign branch of a bank it is not attachable.[394] A solicitor's trust account standing in the name of a particular client can be attached on the basis of the bank's indebtedness to the solicitor.[395] Money that has been paid into a current account by a judgment debtor after a garnishee order is served on the banker cannot be attached.[396] A cheque deposited into a current account before the service of a garnishee order but not cleared until after the order had been served was not attachable.[397] However, O 71 provides that a debt that becomes due or accrues between the day an order for the filing and service of a garnishee summons is made and the day for hearing named in the summons is attachable.[398] Therefore, an amount of money deposited to the credit of a judgment debtor in a bank account between the day of the garnishee summons order and the day for hearing may be an attachable debt.[399]

Protection for banks

[12.880] If a bank served with a garnishee summons, while acting with reasonable diligence, nevertheless pays to the judgment debtor the whole or any part of the debt attached so as to satisfy the debt attached wholly or in part, the court may order that for the purpose of the garnishee application the debt attached be reduced to the extent of the payment.[400] An order might be appropriate where, for instance, payment was made to the judgment debtor at a branch of the bank upon production of a deposit book, there not having been sufficient time for the bank to notify the branch of the service of the garnishee summons.[401]

ENFORCING NON-MONEY JUDGMENTS

Judgment to do or not do an act

[12.890] If a judgment requires a person to either do any act, or to abstain from doing an act, the judgment may be enforced by committal of

392 *Continental Caoutchouc Co v Kleinwort Sons & Co* (1903) 19 TLR 427.

393 *Hirschorn v Evans* [1938] 2 KB 801 at 813, 815. See also *Lloyd v Jacobs* (1887) 3 WN (NSW) 144.

394 *Richardson v Richardson* [1927] P 228.

395 *Plunkett v Barclays Bank Ltd* [1936] 2 KB 107.

396 *Heppenstall v Jackson; Barclays Bank Ltd (garnishees)* [1939] 1 KB 585.

397 *Bank of New South Wales v Barlex Investments Pty Ltd* [1964–65] NSWR 546.

398 Rule 71.02(b).

399 Rule 71.03(2).

400 Rule 71.08(3).

401 Compare *Stonehouse v Bond* [1917] VLR 467.

the person bound, or sequestration of their property.[402] If the person bound is a corporation the judgment may be enforced by committal of an officer of the corporation, and sequestration of the corporate officer's property.[403]

An act that a court may require a person to do is to specifically perform a contract to sell land by signing the appropriate instrument of transfer. An example of an order that a person abstain from doing an act is an order restraining the defendant from repeating or committing acts found to constitute a nuisance.

Where the judgment requires a person bound to do an act and that person does not do the act the court may direct that the act be done by a person appointed by the court, and order the person bound to pay the costs and expenses of the default.[404] Under s 22 of the *Supreme Court Act 1986* (Vic) the court may order that a document which a person has failed or refused to execute or indorse be executed or indorsed by a nominated person. The power of the court under the Act is independent of its power to obtain compliance by committal or sequestration under the rules.[405] A judgment may not be enforced by committal or sequestration unless personal service of the judgment is effected upon the person bound, and, where an act is required to be done within a fixed time, service is effected a reasonable time before the expiry of the time for doing the act.[406] An order for committal or sequestration is only justified if the judgment requiring a person to do an act or abstain from doing an act provides sufficient and precise particulars.[407]

Undertaking to court

[12.900] An undertaking given to the court is, in appropriate cases, equivalent to a judgment or order.[408] A party giving an undertaking has thereby submitted themselves to the jurisdiction of the court, and, in undertaking to do or abstain from doing an act embodied in an order of the court, is in effect under an enforceable order or judgment to do or abstain from doing the act. This is not because the plaintiff will have committed an injustice by failing to obtain a perpetual order having succeeded in obtaining an interlocutory one, but because harm ensues from the grant of the interim order.[409] Enforcement of the undertaking

402 Rule 66.05.

403 Rule 66.05(2)(c).

404 Rule 66.11(1). See also *Supreme Court Act 1986* (Vic), s 22 (neglect or refusal to execute document or indorse negotiable instrument).

405 *Leach v Leach* [1965] VR 599 at 604–605.

406 Rule 66.10.

407 *Wood v Allen* [1956] VLR 111 at 113.

408 *Gandolfo v Gandolfo* [1981] QB 359 at 366–367.

409 Stephen J in *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1981) 146 CLR 249 at 319–320.

against the party giving it is by committal and sequestration of the party's property. If the party is a corporation, enforcement is by sequestration of the corporation's property, the committal of any officer of the corporation, and the sequestration of the property of any officer of the corporation, as provided by rr 66.05 and 66.10.[410]

Enforcement of judgment against corporation

[12.910] Where the person bound by a judgment is a corporation sequestration of the property of the corporation, or committal (that is, imprisonment) of an officer of the corporation, or sequestration of the property of an officer of the corporation,[411] may be used to enforce the judgment. The remedies against the officer and the corporation are additional, not alternative. In an appropriate case committal and sequestration may be invoked simultaneously.[412] Enforcement of a judgment against an officer of a corporation requires that the person entitled to enforce the judgment is also in a position to proceed against the corporation,[413] by either means. The judgment may be equally enforced by committal of an officer of a corporation and sequestration of their property, as by the sequestration of the corporation's property.[414] For example, in *Phonographic Performance v Amusement Caterers (Peckham)*[415] the sequestration of the property of the corporation, and the committal of the corporation's directors was ordered.[416]

Sequestration of property of corporation

Committal and sequestration

[12.920] If a person bound by a judgment wilfully disobeys a court order to do or not do an act that person has committed contempt of court. Enforcement under the rules proceeds by committal, that is to say imprisonment, of the person bound, or sequestration of their property. Committal and sequestration are intended as mechanisms of enforcement

410 See *D v A & Co* [1900] 1 Ch 484; *Milburn v Newton Colliery* (1908) 52 Sol Jo 317; *Biba Ltd v Stratford Investments Ltd* [1973] Ch 281; *Gandolfo v Gandolfo* [1981] QB 359; *National Australia Bank Ltd v Bond Brewing Holdings Ltd* [1991] 1 VR 386 at 583 (undertaking given by the plaintiff). For the nature of damages given under an undertaking as opposed to damages given at common law see the comments of Stephen J in *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1981) 146 CLR 249 at 318–319: "Their special character appears from the fact that their source lies in the plaintiff's own voluntary undertaking, given as the price of obtaining an injunction."

411 Rule 66.05.

412 *Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd* [1963] 3 All ER 493.

413 *Iberian Trust Ltd v Founders Trust and Investment Co Ltd* [1932] 2 KB 87; *Benabo v William Jay & Partners Ltd* [1941] Ch 52.

414 Rule 66.05(2)(c).

415 *Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd* [1963] 3 All ER 493.

416 For a case of application for sequestration against a corporation and for committal of a director, see *Worthington v Ad-Lib Club Ltd* [1965] Ch 236. See also *Steiner Products Ltd v Willy Steiner Ltd* [1966] 2 All ER 387.

not instruments of punishment.[417] A warrant of committal[418] for contempt of court requires that the sheriff imprison the person bound. Sequestration takes the property of the person bound and places it in the hands of sequestrators until the person bound complies with the judgment or order, or until a further order is made.

The purpose of committal and sequestration is to ensure compliance. Historically, the detention of a person in contempt of court under committal and attachment was punitive. Attachment had a dual character, being a means of executing the civil suit between persons, while at the same time representing the disciplinary power of the state.[419]

Rule 66.05 provides that where a judgment requires a person to do an act within a certain time, and the person refuses or neglects to do the act within that time, or a judgment requires a person to abstain from doing an act, and they disobey the judgment, the judgment may be enforced by committal of the person bound and sequestration of their property.[420]

Sequestration

[12.930] Both sequestration and committal are processes of enforcement of a judgment or order to do an act,[421] or not to do an act, in circumstances where disobedience of the judgment amounts to contempt

417 *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483 at 499.

418 See Form 75C.

419 It is possible to see elements of this dual character persisting in, for example, *Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd* [1963] 3 All ER 493, in the enforcement measure for the sequestration of the property of the corporation, and a sanction for disobedience of the court order by the committal (that is, imprisonment) of the corporation's directors. For a case of application for sequestration against a corporation and for committal of a director, see *Worthington v Ad-Lib Club Ltd* [1965] Ch 236. See also *Steiner Products Ltd v Willy Steiner Ltd* [1966] 2 All ER 387. Under the *Supreme Court (General Civil Procedure) Rules 1996* (Vic) there were two processes for securing the detention of a person who was in contempt of court: committal and attachment. Attachment was by writ. A writ of attachment commanded the sheriff to attach a person and bring the person before the court to answer the contempt alleged. Attachment, in relation to civil contempt, had a twofold character. As between parties it was a form of civil execution; as between the person in default and the State it was an exercise of penal or disciplinary jurisdiction: *Tedesco v Tedesco* [1972] VR 491 at 492. Committal was a less formal and more direct process by which the offender was seized by the sheriff under order of the court. Whether one process rather than the other was appropriate in the particular case was not always clear: see, for instance, *Gordon v Gordon* [1946] P 99; *Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd* at 498. Committal is now the only process under the rules. The procedure of writ of attachment is not reproduced, and attachment has disappeared.

420 Rule 66.10(1). In either case, this is subject to service of a copy of the judgment indorsed with notice as required by r 66.10(3).

421 But, in general, not the payment of money. In its earliest manifestation it was used to enforce appearance in court but became the means of coercing a contemnor to comply with a court's orders.

of court.[422] The disobedience amounts to contempt of court if it is wilful, but not if it is unintentional or accidental.[423] The proceedings on a writ of sequestration comprise an action *in rem* and not *in personam*.[424] The contemnor is given an opportunity to purge their contempt by complying with the order,[425] and their property is removed from them until they do so. It is not open to the court to make an order for the payment of money, and sequestration in default of payment.[426] Nor may the court sequestrate property of the contemnor after purgation, or order sequestration in case of future contempt.[427] Sequestration may also be used to compel the performance of a duty from the defendant. It may, for example, compel the payment of money into court.[428]

What judgment or order is enforceable by sequestration

[12.940] Rule 66.05 provides that sequestration may be the means of enforcing a judgment which requires a "person":[429]

(a) to do an act … within a time fixed in the judgment or by subsequent order, and the person refuses or neglects to do the act within that time;

or

(b) requires the person to abstain from doing an act, and the person disobeys the judgment.

Rule 66.10 provides that a copy of the judgment, indorsed with a notice in accordance with r 66.10(3), is served on the "person bound". In the case of a judgment to do an act within a fixed time, it is to be served a reasonable time before that time expires. The notice required to be indorsed on the copy judgment must name the person served, and state that the person is liable to imprisonment or sequestration of property for refusing or neglecting to do the act required to be done within the time fixed, or, in the case of a judgment requiring the person to abstain from doing an act, for disobeying the judgment.[430] A judgment is nevertheless enforceable by committal and sequestration even when personal service of a copy of the judgment has not been effected on the person against whom committal or

422 See *Pratt v Inman* (1889) 43 Ch D 175. It is founded on an existing contempt only: *Hulbert v Cathcart* [1894] 1 QB 244. See also *Burne v Robinson* (1844) 7 I Eq R 188; and *Meyers v Meyers* (1874) 21 Gr 214 (Can).

423 *Fairclough & Sons v Manchester Ship Canal Co (No 2)* [1897] WN 7; *Meters Ltd v Metropolitan Gas Meters Ltd* (1907) 51 Sol Jo 499; *Stancomb v Trowbridge Urban District Council* [1910] 2 Ch 190.

424 *Tatham v Parker* (1853) 1 Sm & G 506; 65 ER 221 at 514 (Sm & G). See also *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483 at 499.

425 *Re Pollard; Ex parte Pollard* [1903] 2 KB 41 at 47. See also *Hulbert v Cathcart* [1894] 1 QB 244 at 246.

426 *Hulbert v Cathcart* [1894] 1 QB 244.

427 *Inland Revenue Commissioners v Hoogstraten* [1984] 3 All ER 25.

428 *Pratt v Inman* (1889) 43 Ch D 175.

429 The *Supreme Court (General Civil Procedure) Rules 2005* (Vic) referred to a "person bound".

430 Rule 66.10(3).

sequestration is sought. There may be enforcement if the person bound had notice of the judgment either because the judgment was given in their presence, or its terms had been conveyed to them either orally or in written form.[431] The court may not require service[432] where the person bound knew of the judgment and intentionally avoided service,[433] or has left the jurisdiction.[434]

Judgment to do an act

[12.950] Rules 66.05 and 66.10 are applicable to permit enforcement by sequestration of judgments requiring a person bound by a judgment to do an act. These include:

(a) a judgment for the payment of money into court;[435]

(b) any other judgment for the payment of money;[436]

(c) a judgment for possession of land;[437]

(d) a judgment for the delivery of goods and a judgment for the delivery of goods or the payment of their assessed value.[438]

Sequestration is also applicable to judgments ordering specific performance of a contract to sell land by a defendant. The defendant will be required to deliver a signed instrument of transfer of title to the plaintiff.

Sequestration will not be ordered to enforce a judgment unless the judgment requires the act to be done with a time fixed by the judgment or by a subsequent order. A judgment requiring the person bound to do an act must allow 14 days after service of a copy of the judgment for the act to be done. The court may by order fix another time. Further, the time period is not applicable to judgments for the payment of money (unless for payment of money into court), for possession of land, or for the recovery of goods.[439] A further order of the court may also fix another time within which the act is to be done.[440] Of course sequestration cannot be used to enforce a judgment requiring an act to be done within a specified time if a copy of the judgment was only served on the person

431 Rule 66.10(5). As to being present in court, see *Re Tuck; Murch v Loosemore* [1906] 1 Ch 692; *Haydon v Haydon* [1911] 2 KB 191. As to notification by telephone, see *Foley v Herald-Sun TV Pty Ltd* [1981] VR 315.

432 Rule 66.10(6).

433 *Allen v Allen* (1885) 10 PD 187; *Hyde v Hyde* (1888) 13 PD 166; *Re Suarez; Suarez v Suarez* [1918] 1 Ch 176.

434 *R v Wigand* [1913] 2 KB 419.

435 Rule 66.02(2)(b).

436 Rule 66.02(1)(f).

437 Rule 66.03(b).

438 Rule 66.04(1)(b).

439 Rule 59.03(3).

440 Rule 59.03(2).

bound after the expiry of the time to do the act required, or not at all, or, if the act required to be done was described ambiguously or with insufficient particularity.[441]

If the judgment or order does not fix a time within which the act is to be done a time may be fixed by court order.[442] In general the court will not fix a time for compliance under r 59.03(4) where the judgment is for the payment of money, for possession of land, or for the delivery of goods. It will, however, fix a time and provide a means for ordering sequestration if the person bound does not comply if there is reason to believe that the person bound would be in contempt of court if a time for compliance were fixed.[443] A judgment for the plaintiff to "recover possession" as opposed to a judgment for the defendant to "give possession" does not require an act on the part of the defendant within the meaning of r 59.03(1). The court may, therefore, make an order to fix a time under r 59.03(4). The payment of a judgment or order for costs may be enforced in the same way as a judgment for the payment of money.[444]

Committal and sequestration against corporation

[12.960] A judgment or order against a corporation may be enforced by the following means:

(a) sequestration of the property of the corporation;[445]

(b) committal of any officer of the corporation;[446] and

(c) sequestration of the property of any officer of the corporation.[447]

Where the corporation gives an undertaking it may be enforced by sequestration given the equivalence of an undertaking to an order for the purpose of enforcement.[448]

The enforcement of judgments against a corporation by sequestration of the property of an officer of the corporation requires that a copy of the judgment be served both on the corporation[449] and on the officer of the

441 *Iberian Trust Ltd v Founders Trust and Investment Co Ltd* [1932] 2 KB 87.

442 Rule 59.03(4).

443 Formerly, sequestration could not issue to enforce a judgment for the payment of money. See *Hulbert v Cathcart* [1894] 1 QB 244; *Re Lumley; Ex parte Cathcart* [1894] 2 Ch 271.

444 See r 63.11; *Hulbert v Cathcart* [1896] AC 470. *Supreme Court (General Civil Procedure) Rules 1996* (Vic), O 43 r 5, which dealt specifically with sequestration to enforce the payment of costs, is not reproduced. Under that rule it was held that an order directing sequestration upon a future uncertain event as, for instance, in default of payment of costs within a specified time, was wrong in form: *Re Lumley; Ex parte Cathcart* [1894] 2 Ch 271.

445 Rule 66.05(2)(b), (c).

446 Rule 66.05(2)(c)(i).

447 Rule 66.05(2)(c)(ii).

448 *Milburn v Newton Colliery* (1908) 52 Sol Jo 317.

449 Under r 66.10(1).

corporation, within the same time fixed for service of the copy of the judgment to be effected upon the corporation.[450]

Rule 66.10(3) provides that "a copy of a judgment served under this Rule shall be indorsed with a notice, naming the person served". The indorsement is addressed to the corporation. It is not addressed to the officer of the corporation.[451] However, it should include the name of the officer of the corporation.[452]

Committal against an officer of a corporation can only be pursued if the party entitled to enforce the judgment is also capable of obtaining an order for sequestration against the corporation.[453] The sequestration order enforcing judgment requires the corporation's refusal to act, or neglecting to act, to amount to a contempt of court. The order will not be made if the corporation's failure to act was unintentional, accidental, or casual. The sequestration order is founded on the person bound's contumacious disregard of the judgment.[454] Such disregard includes wilful disobedience of, and the refusal to obey an, order of the court, either by the corporation or its servants.[455] It is no defence for the corporation to claim that the neglect, abdication of responsibility, refusal, disregard, or dereliction of duty was that of its servants or agents. Nor does the corporation evade liability by claiming that its directors, although ultimately judged to have breached an order or judgment of the court, had acted out of an honest belief that their conduct was just and appropriate.[456]

Corporations whose disobedience of an order was not wilful, or whose disregard was not contumacious, may be given an opportunity to obey

450 Rule 66.10(2). See *Iberian Trust Ltd v Founders Trust and Investment Co Ltd* [1932] 2 KB 87. The service must be personal: r 66.10(2); *McKeown v Joint Stock Institute Ltd* [1899] 1 Ch 671.

451 *Benabo v William Jay & Partners Ltd* [1941] Ch 52.

452 *Iberian Trust Ltd v Founders Trust and Investment Co Ltd* [1932] 2 KB 87.

453 In *Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd* [1963] 3 All ER 493, an order was made for the sequestration of the property of a corporation and for the committal of its directors to prison. See *Iberian Trust Ltd v Founders Trust and Investment Co Ltd* [1932] 2 KB 87; *Benabo v William Jay & Partners Ltd* [1941] Ch 52. For a case of application for sequestration against a corporation and for committal of a director, see *Worthington v Ad-Lib Club Ltd* [1965] Ch 236. See also *Steiner Products Ltd v Willy Steiner Ltd* [1966] 2 All ER 387.

454 *Spokes v Banbury Local Board of Health* (1865) LR 1 Eq 42; *Fairclough & Sons v Manchester Ship Canal Co (No 2)* [1897] WN 7; *Stancomb v Trowbridge Urban District Council* [1910] 2 Ch 190; *Worthington v Ad-Lib Club Ltd* [1965] Ch 236; *Steiner Products Ltd v Willy Steiner Ltd* [1966] 2 All ER 387.

455 *Rules of the Supreme Court 1884* (Vic), O 42 r 31 provided for sequestration against the corporation and attachment against directors if a judgment or order against a corporation was "wilfully disobeyed": *Attorney-General v Walthamstow Urban District Council* (1895) 11 TLR 533. See further *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483; *Steiner Products Ltd v Willy Steiner Ltd* [1966] 2 All ER 387.

456 *Spencer v Ancoats Vale Rubber Co Ltd* (1888) 4 TLR 681.

the order.[457] However, even where the corporation acted wilfully the court may provide it with time to observe the order or judgment, and pay the costs of the sequestration proceedings, by ordering a sequestration but not executing it immediately.[458]

Application for sequestration

[12.970] An application for an order for sequestration is made by summons, supported by an affidavit. The summons and a copy of each affidavit in support must be served personally on the person bound.[459] Where the person bound is a corporation and the applicant seeks sequestration of the property of an officer of the corporation, the documents are also to be served personally on the officer.[460] The court may dispense with service on either the person bound or the corporation.[461]

The court exercises its discretion in deciding whether to make an order for sequestration. The applicant need not identify any particular property to satisfy the sequestration order. The court need only be satisfied that the application is reasonable.[462]

Order for sequestration

[12.980] If an order for sequestration is made, the court will appoint at least four sequestrators. The sequestrators are persons proposed by the party making the application for the sequestration order. Sequestrators need not be professional, and do not give security for what they collect, receive, or obtain. Further, the court will authorise and direct that at least any two of the sequestrators will be authorised and directed to enter upon and take possession of the real and personal property of the person bound, and to "collect, receive and get into their hands" the rents and profits of the person bound's real and personal estate, and to keep the real and personal estate and the rents and profits thereof sequestered until such time as the person bound complies with the judgment, or until the court makes a further order.[463]

Where the person bound is a corporation, the same authority and direction is given to sequestrators with respect to the property of an officer of the corporation as the corporation.[464] The direction requires the

457 *Bonshaw Freehold Gold Mining Co v Prince of Wales Co* (1868) 5 WW & A'B (E) 140.

458 See *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483 at 501.

459 Rule 76.04(1). See also *Snow v Bolton* (1881) 17 Ch D 433.

460 Rule 76.04(2).

461 Rule 76.04(3).

462 *Hulbert v Cathcart* [1896] AC 470.

463 Rule 76.03(1). The rule is adapted from the writ of sequestration in the former Appendix H, No 13. Compliance with the judgment purges the contempt.

464 Rule 66.05(2)(c)(ii).

sequestrators keep the estate under sequestration until the corporation complies with the judgment or until a further order is made.[465]

Effect of order

[12.990] A sequestration order binds the land[466] and personal property (excluding choses in action)[467] of the person against whom the judgment is to be enforced. Windeyer J described the effect of the writ in *Australian Consolidated Press v Morgan*:[468]

> When the property of a contemnor is actually sequestered and held under sequestration it is not confiscated. The contemnor is deprived of the enjoyment of his rents and profits for the duration of the sequestration; but he does not forfeit his property in them. When whatever is considered necessary to purge the contempt has been done, the sequestrator is discharged by the order of the court: and the sequestrator must then give up possession as having those costs and expenses.

The writ therefore does not effect a change of title but simply a change of possession. The contemnor retains property in the sequestrated property. The writ vests in the sequestrators the right to possession of all the contemnor's assets except for those assets vested in the contemnor as trustee[469] but does not give the person issuing the writ any charge over the property seized.[470]

The sequestration order takes effect from the date of the order for sequestration, not from the date the sequestrators collect, receive, get or take possession of the property.[471] A chose in action will only be bound as against the person owing the debt once the sequestrators take a step asserting the right to payment of the debt.[472]

Property liable to sequestration

[12.1000] The property that may be taken under an order for sequestration includes:

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465 Rule 76.03(2).

466 *Dixon v Rowe* (1876) 35 LT 548.

467 *Burdett v Rockley* (1682) 1 Vern 58; 23 ER 308.

468 *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483; 39 ALJR 32 at 40.

469 *Con-Mech (Engineers) Ltd v Amalgamated Union of Engineering Workers* [1973] ICR 620 at 627.

470 *Re Pollard; Ex parte Pollard* [1903] 2 KB 41 at 47 (CA).

471 The cases determined that the operative date was the date of issue of a writ of sequestration, the equivalent today of an order for sequestration. See also *Property Law Act 1958* (Vic), s 209; *Transfer of Land Act 1958* (Vic), s 52.

472 *Re Hoare; Ex parte Nelson* (1880) 14 Ch D 41; *Re Slade; Slade v Hulme* (1881) 18 Ch D 653. See also *Wilson v Metcalfe* (1839) 1 Beav 263; 48 ER 941.

Freehold

[12.1010] In *Whitehead v Harrison*[473] the court held that a sequestration on a decree abates with the death of the party; it ran against the copyhold lands and could not be revived against the customary heir. However, the sequestration could be revived upon the freehold lands.

Leasehold

[12.1020] In *Wharam v Broughton*[474] the issue that arose was whether the rules required the widow and executrix of a deceased plaintiff to revive the sequestration seizing the defendant's goods and leasehold estate, and, if so required, whether the court could excuse the requirement to revive in equity. The court found that a sequestration that remains unexecuted abates with the death of a plaintiff,[475] or indeed either party.[476] The court further held that there being an abatement of the suit a bill of revivor was required but that it could exercise its discretion to not require the plaintiff to revive the suit to avoid the effect of Broughton having absconded, and thereby disbenefitting the plaintiff of the revival of the writ.[477] It was not therefore necessary, according to Lord Hardwicke, to take the step of reviving the sequestration as the revivor of the suit will suffice to revive the sequestration for enforcing the decree.

Choses in action

[12.1030] Under the law as it was at the time of the hearing in *Dundas v Dutens*[478] choses in action were not sequestrable to satisfy creditors. However, the court set aside an assignment of properties, including stocks and debts, from the husband to another, as being invalid as a conspiracy

473 *Whitehead v Harrison* (1730) 1 Barn KB 432; 94 ER 290.

474 *Wharam v Broughton* (1748) 1 Ves Sen 180; 21 ER 220.

475 *Wharam v Broughton* (1748) 1 Ves Sen 180; 21 ER 220 at 181.

476 *Wharam v Broughton* (1748) 1 Ves Sen 180; 21 ER 220 at 182 (Ves Sen), citing *Colston v Garnder* 2 CC 43 per Lord Nottingham. The cases distinguished sequestrations against fee simple lands which required a bill of revivor against the heir and executor even if the land was an *inter vivos* conveyance to the heir, because they assumed new title as heir: *Burdett v Rockley* (1682) 1 Vern 58; 23 ER 308. The court also considered *Hide v Greenhill* (August 1746): sequestration was revived only against the personal estate because the decree was for a personal duty in disobeying the decree.

477 Referring to *Equity Procedure Act 1731 (5 Geo 2 c 25)* (ENG), s 8: that no decree for want of appearance shall be unless an affidavit that the defendant was within the kingdom within two years next before the proceeding against him. See also Sir Jeffrey Gilbert, *Forum Romanum* (London, 1758) where it is said that "if the decree be upon a covenant which bind the heir, and the defendant dies, such decree may be revived & c, and that when you have revived against the heir and executor you may also revive the sequestration upon motion, if upon coming into Court, they can shew no cause why the decree should not be revived" (p 86) which principle Lord Hardwicke appeared to have in mind in making the point that "this court revives its decrees as courts of law do judgments." (pp 183–184).

478 *Dundas v Dutens* (1790) 1 Ves Jun 196; 30 ER 298; *Wilson v Metcalfe* (1839) 1 Beav 263; 48 ER 941; *Miller v Huddlestone* (1882) 22 Ch D 233.

between assignor and assignee to favour his creditors and defraud the married couple's children. The court provided relief against the fraud of a parol agreement which drew the wife into the marriage after which the husband refused to perform the agreement. The *Statute of Frauds 1677 (29 Car 2 c 3)* (ENG) did not permit a settlement after marriage to be supported by a recital of a parol agreement before marriage, taking the marriage as part performance of the earlier alleged agreement.

In *Wilson v Metcalfe*[479] the court held that rental arrears, albeit a chose in action, were subject to sequestration. It said that:

> in such cases as this a chose in action is subject to the processes of sequestration, but how the sequestration is to be made effective in respect of choses in action may be a question requiring much consideration; in a clear and simple case it may be by order only, or voluntary payment may be protected; in other cases it may be necessary to resort to an action or suit under the directions of the court. But I consider it to be clear, that if the party owing the debt requires protection, he ought to have it, and that even if he is willing to make payment, the court would not order it, unless it appeared the protection would be afforded.[480]

Personal estate,[481] a judgment debt[482] and a gift subject to a defeasance

[12.1040] In *Dixon v Rowe*[483] the court found that a writ binds real property,[484] and binds personal property in the possession of the person against whom it is issued from the time of issuance,[485] but cannot unless registered create a charge upon land.[486] A chose in action, however, will not be charged merely by an issued writ being served upon the debtor to the judgment debtor.[487] In relation to a chose in action an order for payment must be obtained from the court as to the effect and operation of the sequestration.[488]

In *Re Baring's Settlement Trust* an order for sequestration which allowed a third party to demand payment of the principal beneficiary's income was a forfeiture of a life interest. The issue that arose was whether forfeiture should occur when the principal beneficiary's right to receive money became payable to someone other than the beneficiary. The court held that "payable to" covered a broader range of cases than those where the

479 *Wilson v Metcalfe* (1839) 1 Beav 263; 48 ER 941.

480 *Wilson v Metcalfe* (1839) 1 Beav 263; 48 ER 941 at 270 (Beav).

481 *Pope v Ward* (1785) 1 Cox Eq Cas 194; 29 ER 1125; *Hyde v Hyde* (1888) 13 PD 166.

482 *Munt v Munt* (1862) 2 Sw & Tr 661; 164 ER 1155.

483 *Dixon v Rowe* (1876) 35 LT 548; *Re Baring's Settlement Trusts* [1940] Ch 737.

484 *Re Lush* (1870) LR 10 Esq 442.

485 *Burdett v Buckley* (1682) 1 Vern 118; *Dixon v Rowe* (1876) 35 LT 548.

486 *Land Charges Act 1972* (UK), s 548.

487 *Re Hoare; Ex parte Nelson* (1880) 14 Ch D 41; *Re Pollard; Ex parte Pollard* [1903] 2 KB 41.

488 *Re Pollard; Ex parte Pollard* [1903] 2 KB 41 at 47, 48 (CA) per Romer LJ.

principal beneficiary's property interest vested in a third party by reason of assignment or charge. But a forfeiture does not arise simply because the beneficiary has debts sufficient to require some of the trust income to pay those debts. They have a personal duty to pay the debts out of the whole of their property, but the trust income remains payable to them. The beneficiary will only forfeit trust income if under the "payable to" provision the third party was able to demand the trustee to pay them the trust money directly.[489]

A reversionary interest[490] and a pension, provided it is assignable

[12.1050] In *Willcock v Terrell*[491] the court held that sequestration may issue on a judgment for the payment of money to a person which limits the time for the payment. The case was found to fall within O 43 r 6 of the *General Chancery Orders* (ENG) which provided that, where any person by decree or order was directed to pay costs or money within a limited time, and after the decree or order was served upon them refused to make the payment, the person prosecuting the decree or order was, when the time expired, entitled to a commission of sequestration issued without need for special order.[492]

The property of a public authority

[12.1060] In *Spokes v Banbury Local Board of Health*[493] John Spokes obtained a Court of Chancery injunction in February 1865 to restrain the Banbury Board of Health from polluting the water of the River Cherwell from 1 July 1865. Spokes was a miller at Twyford Mill, 3 miles downstream of where the town of Banbury's three sewers were discharging into the river. The Board was held to be in gross and wilful contempt for failing to restrain the causing or permitting of sewage, or water polluted with sewage that drained into the sewage system under their control, from passing into the river. Thus Spokes applied for and was awarded a sequestration order in November 1865. The Board appealed the order, arguing that it had not wilfully defaulted upon the order, but that it was practically impossible for it to comply with the order because:

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489 A third party's right to demand income that has already accrued under the trust and therefore comprised funds in the trustees hands did not effect a forfeiture: *Re Greenwood; Sutcliffe v Gledhill* [1901] 1 Ch 887.

490 *Cowper v Taylor* (1848) 16 Sim 314; 60 ER 895.

491 *Willcock v Terrell* (1878) 3 Ex D 323 (a pension granted to a County Court judge for past services); *Sansom v Sansom* (1879) 4 PD 69; *Knill v Dumergue* [1911] 2 Ch 199.

492 In *Re Hoare; Ex parte Nelson* (1880) 14 Ch D 41 the question arose as to whether sequestration could issue to enforce a simple judgment for the recovery of money. It was subsequently settled that a simple judgment of the Queen's Bench Division for the recovery of money could not issue in a sequestration; nor was there jurisdiction enabling sequestration to issue by making a subsequent order under the primary judgment fixing a time for payment: *Hulbert v Cathcart* [1894] 1 QB 244.

493 *Spokes v Banbury Local Board of Health* (1865) LR 1 Eq 42.

- it would require shutting down the town's drainage system;
- it would compel the Board to breach an Act of Parliament;
- it would expose the Board to suits in law and equity;
- sequestration was futile, as all the Board's property was public property;
- it constituted a public danger by preventing the Board from discharging its duties to the public; and
- it would require the Board to resign.

The court held that it was appropriate under the rules to issue a writ of sequestration when the party in contempt was immune from arrest, or a corporation,[494] and that the Board could not question the making of the order by disobeying it but was required to take steps to have it set aside.[495] Spokes neither delivered nor enforced the order.

Money

[12.1065] Money which is either in court to the credit of the person bound by the judgment;[496] or in a bank account;[497] or held on trust[498] is property liable to sequestration.

Taking possession by sequestrators

[12.1070] In enforcing an order for sequestration it is not expected that sequestrators will use force to take possession of property.[499] However, sequestrators in pursuit of the order's enforcement may break open inner doors,[500] or break open boxes,[501] for the purpose of reaching property affected by the order. Further, to identify and ascertain what assets of the person bound may be available for sequestration sequestrators may examine the documents of the person bound by the judgment.[502]

Sequestrators are officers of and come under the oversight of the court. In undertaking their duty under the order sequestrators owe a duty of care to the owner of the property which is the ordinary duty of care in negligence with respect to the property.[503]

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494 *General Chancery Orders* (ENG), O 42 r 31.

495 *Russell v East Anglian Railway Co* (1850) 3 Mac G 104; 42 ER 201.

496 *Knight v Knight* (1856) 25 LJ Ch 848; *Conn v Garland* (1873) LR 9 Ch App 101; *Claydon v Finch* (1873) LR 15 Eq 266.

497 *Guerrine v Guerrine* [1959] 2 All ER 594.

498 *Re Slade; Slade v Hulme* (1881) 18 Ch D 653.

499 See *Halsburys Laws of England* (4th ed, 1976), Vol 17, para 509.

500 *Lowten v Colchester Corporation* (1817) 2 Mer 395; 35 ER 991.

501 *Lord Pelham v Lord Harley* (1713) 3 Swan 311; 36 ER 868.

502 *Re Suarez; Suarez v Suarez* [1918] 1 Ch 176.

503 *Inland Revenue Commissioners v Hoogstraten* [1984] 3 All ER 25.

Position of third party

[12.1080] A third party in relation to an order for sequestration is under a duty to not take an action that it knows will obstruct the sequestrators in the execution of the order of sequestration. That is to say, the third party must not obstruct the sequestrators taking possession, collecting, receiving and getting, and keeping the property and profits generated by the property of the person bound. A third party's duty includes answering questions and providing information that is reasonably requested and necessary for the sequestrators to execute their order. This will usually be directed to questions about assets, which the third party is obliged to answer regardless of whether they are in possession of any of the person bound's property.[504] If the third party believes that the sequestrator will by their actions in executing the order disturb the third party's property, a claim may be brought for determination in the same proceeding in which the sequestration order was made.[505]

WRITS OR WARRANTS OF POSSESSION

Possession of land — judgment

[12.1090] Rule 66.03 provides that a judgment for the possession of land is enforced by warrant of possession[506] or, where r 66.05 applies, by committal or sequestration.[507] The two rules in O 70 dealing with the warrant of possession[508] are:

1. A warrant of possession to enforce a judgment for possession of land may include a provision for enforcing a payment of money required to be paid under the judgment and may be recoverable under the *Service and Execution of Process Act 1992* (Cth);[509] and
2. A sheriff need not remove any of the goods found on the land in execution of the warrant of possession.[510]

A judgment for possession of land must provide a description of the land sufficient to make it identifiable.

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504 See *Eckman v Midland Bank Ltd* [1973] QB 519; *Messenger Newspapers Group Ltd v National Graphical Assn* [1984] 1 All ER 293.

505 *Inland Revenue Commissioners v Hoogstraten* [1984] 3 All ER 25.

506 In Form 68B.

507 Rule 66.03. In the case of a judgment for possession in a summary proceeding for the recovery of land under O 53, the warrant of possession is in Form 53B.

508 The warrant of possession corresponds to the writ of possession under the *Supreme Court (General Civil Procedure) Rules 1996* (Vic).

509 Rule 70.01.

510 Rule 70.02. In contrast, *Supreme Court (General Civil Procedure) Rules 1996* (Vic), O 67(A) provided that on the execution of a writ of possession the sheriff could and, if so required at the time of execution by the person suing out the writ, had to remove all or any of the goods and chattels found on the land.

Judgment for the recovery of possession of land is obtained in the form that the successful plaintiff will, if successful, "recover possession" of the land.[511] The plaintiff will not receive judgment in the terms that the defendant "give the plaintiff possession".[512] A defendant required to give possession would be required to "do an act" within the meaning of r 59.03. A plaintiff having obtained a judgment for possession of land does not require a warrant of possession to enter the land.[513] A warrant for possession may not be issued on an order for foreclosure, which is not a judgment for possession of land, but merely bars the mortgagor from exercising the equity of redemption under the mortgage.[514] An order for foreclosure gives rise to a proceeding for recovery of possession if possession is claimed in the writ.[515]

The sheriff is directed under the warrant of possession to enter the land "and cause the plaintiff to have possession of it",[516] where possession means complete vacant possession. A judgment in favour of the plaintiff to recover possession therefore authorises the sheriff to remove anyone from the land including the defendant, and orders the defendant to remove all their property from the land.[517] The sheriff's authority with respect to the removal of goods is the conferral of a discretion to determine whether or not to remove goods from the land, without an obligation to do so.[518]

A warrant issued on the basis of a judgment for possession of land and the payment of money may be a warrant for possession of the land containing a provision to enforce the money judgment by means of a levy on the defendant's property.[519]

WRIT OF DELIVERY

Judgment for delivery of goods

[12.1100] The plaintiff in a proceeding for the detention of goods may, if the defendant is in default of appearance or defence, obtain a judgment, at the plaintiff's election, that the defendant either deliver the goods or

511 See Forms 53A, 60H.

512 This was the form of order in equity: *Plowman v Palmer* (1914) 18 CLR 339 at 344, 346. See also *Finance Allotments Pty Ltd v Young* [1961] Qd R 452.

513 *Aglionby v Cohen* [1955] 1 QB 558. See also *McPhail v Persons, Names Unknown* [1973] Ch 447 at 457.

514 *Wood v Wheater* (1882) 22 Ch D 281.

515 *Smith v Flippence* [1940] QWN 13. See also *Rogers v Fry* [1930] VLR 134.

516 See Form 68B; *Geen v Herring* [1905] 1 KB 152 at 156; *Plowman v Palmer* (1914) 18 CLR 339 at 346; *Re Wykeham Terrace* [1971] 1 Ch 204 at 209; *McPhail v Persons, Names Unknown* [1973] Ch 447 at 458.

517 *Norwich Union Life Insurance Society v Preston* [1957] 2 All ER 428.

518 Rule 70.02.

519 Rule 70.01.

pay their assessed value, or that the defendant pay the assessed value.[520] No matter whether the plaintiff obtains judgment against the defendant in default, or at the trial, judgment must be in the form that the defendant deliver the goods or pay their assessed value, unless the court orders otherwise. A warrant of delivery, or a committal or sequestration,[521] is used to enforce either the judgment to deliver the goods, or a judgment to deliver the goods or payment of their assessed value.[522]

A judgment for the defendant to pay the assessed value is a judgment for the payment of money. If the plaintiff elects this form of judgment it is enforceable by warrant of seizure and sale.[523] If the plaintiff has received judgment requiring the defendant to pay damages for detention of the goods, or another sum is payable to the plaintiff, the warrant of delivery issued for the delivery of goods or the recovery of their assessed value[524] may include provision for enforcing the payment of damages or other moneys by means of a levy on the defendant's property.[525]

Where a plaintiff brings a proceeding for the detention of goods and receives judgment, it is for the return of the goods or payment of their value. The defendant may satisfy the judgment by returning the goods. However, that precludes the plaintiff receiving their value. The defendant may default on the judgment and not return the goods; in which case, under a warrant of delivery, the sheriff levies for the assessed value of the goods against the defendant's property.[526] The plaintiff may, in case the defendant does not return the goods, apply for an order for the goods' delivery only, and not, alternatively, for the payment of their assessed value.[527]

WRITS OR WARRANTS OF EXECUTION

The process of obtaining a writ or warrant

[12.1110] Rule 68.08 provides that a warrant of execution shall be in Form 53B, 68A, 68B or 68C, whichever is appropriate. The prescribed form may be varied or modified as required[528] in the particular case,

520 Rule 21.03(1)(d).

521 Rule 66.04.

522 May be enforced by warrant of delivery in Form 68C.

523 Form 68A; r 64.04(4).

524 Rule 66.04(2).

525 Rule 66.04(3).

526 *Metal & Ropes Co Ltd v Tattersall* [1966] 3 All ER 401.

527 *Metal & Ropes Co Ltd v Tattersall* [1966] 3 All ER 401 per Danckwerts LJ.

528 See r 1.13(3).

adopting the language most suitable to the case,[529] including directions made in the judgment on the case.[530]

Warrant to accord with judgment

[12.1120] Warrants of execution must be formulated in accordance with the judgment in every respect. If it does not it must give reasons for its discrepancy with respect to the judgment. In *O'Neil v Hart (No 2)*[531] the court held that the authorities under which a writ of *fi fa* could be issued were to be rigorously adhered to. In that case O'Neil, the plaintiff, had obtained judgment against the defendants, Hart and Blake. An order for costs was also made in favour of Hart as plaintiff by counterclaim against Blake and O'Neil as defendants by counterclaim. Hart issued a writ of *fi fa* which O'Neil's solicitor informed Hart and his solicitor was irregular. The plaintiff applied for the writ to be discharged on the basis that, amongst others, it failed to accord with or follow the Supreme Court judgment it sought to enforce in its mandatory parts by omitting to show that the costs of the counterclaim were against both the plaintiff and the defendant Blake,[532] and for being issued in respect of the costs only and not for the entire amount owing under the judgment.[533] The court observed that because the judgment was the only foundation of the writ of *fi fa* the writ can only execute the judgment, and any departure from the judgment, and the reason for doing so, must be shown on the face of the writ. The court held the writ bad for failing to follow the judgment: the writ sought payment jointly from the plaintiff and the defendant, rather than severally; and it proceeded only against O'Neil and not Blake.[534]

A warrant that does not explain or provide reasons for the discrepancy, and does not accord with the judgment, is irregular, and may be amended or set aside.[535] In *Crowley v Union Bank* — decided on the principle that a writ of *fi fa* can only be issued if there has been strict adherence to

529 *Ex parte O'Neill* (1897) 8 QLJ 101.

530 *Boswell v Coaks* (1887) 36 WR 65.

531 *O'Neil v Hart (No 2)* [1905] VLR 259.

532 Citing *Crowley v Union Bank* [1887] 36 Ch D 453 per Hood J, relying on *Daniell's Chancery Practice* (7th ed), pp 659–660, and Chitty's *Archbold Practice* (14th ed), p 796. The other grounds of appeal were that: the writ was issued in the wrong form as the form used was applicable only to an order for costs, not a judgment for costs; the writ was issued prematurely in that the parties adversely affected by the judgment still had time to appeal the judgment and had sought an order that costs be charged to the estate; that the writ was issued in abuse of the court's process, being issued on the day costs were taxed; and that the writ sought to add parties in a manner inconsistent with the judgment it purported to enforce.

533 The law being strictly applied wherever writs are issued for amounts different from what is owed: for example, for amounts less than is owed: *Webber v Hutchins* (1841) 8 M & W 319; 151 ER 1060; *Cobbold v Chilver* 1 Dowl (NS) 726.

534 *O'Neil v Hart (No 2)* [1905] VLR 259 at 266.

535 *Webber v Hutchins* (1841) 8 M & W 319; 151 ER 1060 (writ issued for a smaller sum than the amount due without apparent reason), but see *Clarke v Maybury* (1898) 14 WN (NSW) 116 (holding that it was irregular to issue for a larger sum than that due but not

authority — the error rendering the writ irregular was its failure to show that the judgment for the costs of the counterclaim was against both the defendant and the plaintiff. The writ was irregular regardless of whether the costs order was intended to be joint or several.[536]

An example of a discrepancy is where the execution creditor directs the sheriff to levy against the defendant's property for an amount less than the judgment debt allows.[537] A writ is not irregular if it accords with the corrected judgment after the judgment, having originally been made in error, was corrected, although there had been a discrepancy between the writ of execution and the original judgment.[538]

Leave to issue warrant

[12.1130] Rule 68.02 is limited to execution by warrant of execution. It has no application, for instance, to the appointment of a receiver by way of equitable execution[539] or the attachment of debts under O 71.[540] The rule applies to execution on an order made by the Magistrates' Court in a civil proceeding for the payment of money entered as a judgment of the Supreme Court upon the filing in that court of a certificate of the Magistrates' Court pursuant to s 112 of the *Magistrates' Court Act 1989* (Vic).[541] The period of six years stated in r 68.02(1)(a) starts from the day of the order of the Magistrates' Court.[542]

Discretion

[12.1140] Whether or not the court exercises discretion to grant leave to issue a warrant is a matter of debate. In both *Estate of Carter; Re Ascot Timber Co v Carter*[543] and *Solic v Bertossa*,[544] the court held that in an application for leave its only role was to ensure that the applicant was legally entitled to issue execution. That is not entirely a discretionary decision.[545] The court had the power to refuse leave because execution

for a smaller sum). See also *Crowley v Union Bank* (1903) 29 VLR 385 (order for two persons jointly against two persons jointly and execution issued for one creditor only against one debtor only); *O'Neil v Hart (No 2)* [1905] VLR 259 (incorrect heading on writ of execution, and execution on a judgment against two persons jointly issued as if the judgment were against one of them only).

536 *Crowley v Union Bank* (1903) 29 VLR 385.

537 *Webber v Hutchins* (1841) 8 M & W 319; 151 ER 1060.

538 *Phillips v Birch* (1842) 4 Man & G 403; 134 ER 165.

539 *Re Shephard; Atkins v Shephard* (1889) 43 Ch D 131; *Norburn v Norburn* [1894] 1 QB 448.

540 *Fellows v Thornton* (1884) 14 QBD 335.

541 *Trent Brewery v Lehane* (1895) 21 VLR 283; *Sack v Wolstencroft* (1907) 13 ALR 588.

542 *Trent Brewery v Lehane* (1895) 21 VLR 283.

543 *Estate of Carter; Re Ascot Timber Co Pty Ltd v Carter* [1928] VLR 290 (an application for leave to issue execution against an executor).

544 *Solic v Bertossa* [1969] VR 594 (an application for leave after six years).

545 In other decisions it was said that granting leave is a matter of discretion. See *WT Lamb & Sons v Rider* [1948] 2 KB 331; *World Square Pty Ltd v Taylor* [1990] 1 Qd R 583.

was issued only by leave, and the court scrutinised the entitlement to execution. In *Estate of Carter; Re Ascot Timber Co v Carter* following the death of the defendant (Carter) in an action successfully prosecuted by the plaintiff (Ascot Timber Co Pty Ltd) the plaintiff applied for leave to issue execution on the judgment against the estate and executor of the defendant. The executors, Equity Trustees Executors and Agency Co Ltd, resisted the application on the basis that s 132 of the *Administration and Probate Act 1915* (Vic) put the Crown in the position of preferential creditor of the estate's assets, and s 13 of the same Act provided that debts of record and simple contract debts were to be similarly regarded, so that a grant of execution may disable the estate from making the payment of probate duties to the Crown, and meeting its obligations to other creditors, by giving Ascot priority. Irvine CJ referred to the text of O 42 r 23(a) of the *Rules of the Supreme Court 1884* (Vic) which expressly limited a judge's powers to adjudicating whether the applicant is the entitled under the judgment to issue execution on the judgment, "[w]here six years have elapsed since the judgment or date of the order or any change has taken place by death or otherwise in the parties entitled or liable to execution". If the court is satisfied that the applicant is entitled to issue execution it may make an order to that effect, or order a trial of any issue or question required to be resolved to determine the parties' rights, and whether making either an order of execution or an order of trial, impose such terms as are necessary in order to do justice in the particular case.[546]

Solic v Bertossa[547] was an application for execution in relation to two proceedings. In one proceeding the applicant (Solic) was the plaintiff, and in another the applicant was the co-respondent to a petition brought by the respondent (Bertossa). Judgment in the first proceeding was entered by consent for the plaintiff, who was awarded damages plus costs. The second proceeding was dismissed and the petitioner ordered to pay costs. Menhennitt J considered the effect of O 42 r 22 of the *Rules of the Supreme Court 1957* (Vic), which provides that the person having obtained a judgment may issue execution at any time within six years from the recovery of the judgment or the date of the order. Menhennitt J concluded regarding O 42 r 23, that all that was involved was an inquiry by the judge as to whether or not the party applying was entitled to issue execution; and that if the court was satisfied that the party making the application was so entitled it was empowered to make the order. The expression "entitled to issue execution" in r 23 was to be given "its ordinary meaning" which, his Honour said, referred to being "entitled as

546 Irvine CJ further held that it was appropriate in the case and given the paucity of authority on the legal point to grant the executors leave to appeal and to order a stay of execution on the sale of estate property until the appeal was determined: *Estate of Carter; Re Ascot Timber Co Pty Ltd v Carter* [1928] VLR 290 at 292.

547 *Solic v Bertossa* [1969] VR 594.

a matter of legal right to issue execution".[548] The only enquiry required of the court was to determine if the applicant was still entitled.[549]

The application for leave is supported by affidavit.[550] Delays of more than six years in the execution of a judgment may have to be explained and reasons provided.[551] The absence of good reason or sufficient explanation may cause leave to be refused. Otherwise leave to issue execution of a judgment may be granted on terms. The condition on the grant of leave to enforce a maintenance order in *Welsby v Welsby*[552] was, as was the practice of the court in like cases, to limit the arrears payable to a one year.[553]

CHARGING ORDER

Order charging securities

[12.1150] Rule 73.02 provides that for the purpose of securing the payment of a judgment debt the court may by order impose a charge on the beneficial interest of the judgment debtor in any securities. Order 73 replaces O 46 of the *Supreme Court (General Civil Procedure) Rules 1996* (Vic). Order 73 establishes four procedures:

1. A procedure to create a charge over securities (rr 73.02 – 73.10);
2. A procedure for charging funds in court (r 73.11);
3. A procedure to apply for a stop order for funds in court (r 73.12); and
4. Procedures to apply for a stop notice in respect of corporation stock not in court, and an order prohibiting the transfer of or payment on the stock: rr 73.13 – 73.16.

The first two procedures are enforcement processes of the judgment for a money payment.[554] The remainder are caveat-like procedures under the *Transfer of Land Act 1958* (Vic). They enable a person who claims an interest in property of a particular kind, which is not the subject of a judgment or order, to get notice of any proposed dealing with the property that may be prejudicial to their interest in time to allow proceedings to be taken to protect that interest.

The procedure for a charging order over funds in court is established by r 73.11. The rule recognises the court's equitable jurisdiction to make charging orders by imposing an equitable charge over the beneficial

548 Menhennit J drew support from the House of Lords decision in *Sterling Engineering Co Ltd v Patchett* [1955] AC 534, in particular the discussion of the meaning of being "entitled" in the speeches of Viscount Simmonds and Lord Reid: at 544–546.

549 In this conclusion Menhennit J derived support from *Hammon v Kampfenhenteel* (1895) 21 VLR 202.

550 Rule 68.02(4).

551 Rule 68.04(1)(a), and (4)(b).

552 *Welsby v Welsby* [1961] VR 362.

553 See also *Greig v Greig* [1962] VR 485.

554 See r 66.02(1)(d).

interest of funds paid into court and held in trust for the judgment debtor to secure the payment of a judgment debt.[555] Under r 71.13, the court may order that money standing to the credit of the judgment debtor in court may on the judgment creditor's summons be enforced with interest on the judgment debt. A judgment creditor may charge the interest of a judgment debtor in a partnership by application in accordance with r 17.11[556] for an order under s 27 of the *Partnership Act 1958* (Vic). The charge may be over partnership property and profits.

Judgment payable by instalments

[12.1160] An order to pay a judgment debt by instalments is equivalent to an order to pay each instalment at the specified date. Thus, when an instalment has become due and is not paid, a charging order may be made in respect of that sum.[557] When a judgment order is payable by instalments, the court has power to make a charging order over the whole debt, not merely arrears of instalments. The fact that a debtor is compliant with an order for payment by instalments is relevant to the exercise of the court's discretion to make or refuse a charging order.[558] Simply because there has been no default in payment of instalments does not prevent a charging order from being made on that sum.

Judgment for unascertained amount

[12.1170] It is not possible to impose a charge before there is an ascertained sum.[559] The power of the court to impose charges over funds is restricted to ascertained sums. The effect of such a charge were it allowed would be to "sterilise" the asset over which the charge was imposed because it would not be possible for an intending purchaser or lender of money to ascertain how much equity would finally remain the debtor's asset.[560] Therefore untaxed costs cannot be charged.[561] A judgment for the payment of specified sums the payment of which is to be on or before some date in the future may be the subject of an immediate order for payment.[562] If, however, the future payment is conditional on the judgment creditor's life the court exercises its discretion to make an order cautiously.[563]

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555 See *Brereton v Edwards* (1888) 21 QBD 488; *Wilkie v Wilkie* [1905] VLR 80; *Kennedy v Mackenzie* [1947] ALR (CN) 619.

556 In the *Supreme Court (General Civil Procedure) Rules 1996* (Vic), this was governed by O 46 rr 1A and 1B.

557 *Woodham Smith v Edwards* [1908] 2 KB 899.

558 *Mercantile Credit Co Ltd v Ellis* [1987] CLY 2917; Independent (17 March 1987) (CA).

559 *A & M Records Inc v Darakdjian* [1975] 1 WLR 1610 per Walton J. See the definition of "judgment" and "judgment debt" in r 73.01.

560 *A & M Records Inc v Darakdjian* [1975] 1 WLR 1610 per Walton J.

561 *Widgery v Tepper* (1877) 6 Ch D 364; *Wilkie v Wilkie* [1905] VLR 80.

562 *Bagnall v Carlton* (1877) 6 Ch D 130.

563 *Robinson v Bailey* [1942] 1 Ch 268.

Leave to file and serve charging summons

[12.1180] The rules regulate the procedure where a judgment debtor may obtain an order to impose a charge on the beneficial interest of a judgment debtor in securities.[564] First the judgment creditor applies to the court for an order that a charging summons be filed and served.[565] The application under r 73.03(1) does not require notice to any person.[566] The application must be supported by evidence on affidavit stating that the judgment is unsatisfied either wholly or to the extent stated, identifying the securities over which the order is sought and in whose name they stand, and stating and describing the judgment debtor's beneficial interest in securities.[567] The affidavit in support of the application may contain statements of fact based on information and belief provided the grounds of information and belief are set out in the affidavit.[568]

In *Manson v Ponninghaus*[569] the judgment debtor appealed the decision to order shares held on trust for him to be charged in respect of the debt owed to creditors. The judgment debtor submitted that the order should not have been granted on the basis that an affidavit on information and belief in support of an application for order *nisi* was inadmissible because the order was final and not interlocutory. The court found that the order would charge the shares absolutely, and end the judgment debtor's interest in them, and in that sense the order would be "as final as any order can be." It found the allegations in the judgment creditor's affidavit to have been based on information and belief, without their deposing the source of that information, or the grounds of that belief.[570] The court dismissed the order *nisi*, holding the affidavit to be bad and unable to support the granting of the order whether final or interlocutory.

Charging summons

[12.1190] A charging summons identifies the securities in respect of which it is filed.[571] When a summons is served on the government or on a corporation the government or corporation will not transfer or permit to be transferred any securities, or pay any person any dividend or interest on the securities.[572] If the summons is served on the judgment debtor they

564 See rr 73.02 – 73.10. The procedure under O 73 replaces the procedure under the former *Supreme Court Act 1958* (Vic), s 175, under which a charging order consisted of two parts, an order *nisi* and an order absolute.

565 Rule 73.04(1).

566 Rule 73.03(2).

567 Rule 73.04(1).

568 Rule 73.04(2); compare *Manson v Ponninghaus* [1911] VLR 239. The application is made to an associate judge: rr 77.01, 77.03.

569 *Manson v Ponninghaus* [1911] VLR 239.

570 In agreement with the decision in *Re Young* [1900] 2 Ch 753.

571 Rule 73.05(1). The summons is in Form 73A: r 73.05(2).

572 Rule 73.05(1)(a)(i), (ii).

may not dispose of any interest in securities made before the application of the charging order is heard.[573] The court may make a charging order over securities to which the summons relates at the hearing of the charging summons.[574]

Service of charging summons

[12.1200] If an order that a charging summons be filed and served is issued by the court, the judgment creditor must, not less than seven days before the day for hearing named in the charging summons, serve on the judgment debtor, and serve personally on the government or corporation to which the summons is addressed, the summons and a copy of each affidavit used on the application for the order.[575]

Effect of service of charging summons

[12.1210] Rule 73.07 governs the effect of the service of the summons on the government or corporation concerned and on the judgment debtor. If the government or corporation, without the authority of the court, having been served a charging summons, causes or permits any securities to which the summons relates to be transferred, or pays a dividend or interest on any security, it becomes liable to pay the judgment creditor an amount equal to the value of the securities transferred or the dividend or interest paid to the judgment debtor, or enough as suffices to satisfy the judgment.[576] Any disposition by the judgment debtor of its interest in the securities before the application for the charging order is heard is not valid as against the judgment creditor.[577] Rule 73.10 empowers the court to vary the effect of a charging summons, or vary or discharge a charging order.[578]

"Beneficial interest of the judgment debtor"

[12.1220] Rule 73.02 provides that to secure the payment of a judgment debt the court may impose a charge on the beneficial interest of the judgment debtor over any securities.[579] Such securities may include shares held on trust by the judgment debtor,[580] or shares sold by them.[581]

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573 Rule 73.05(1).

574 Rule 73.08(1).

575 Rule 73.06.

576 Rule 73.07(1). As to the insertion of a term to similar effect in an order *nisi* made under the former statutory procedure, see *West Balmoral Gold Mining Co Ltd v Kelaher* (1887) 8 ALT 162.

577 Rule 73.07(2).

578 Rule 73.10.

579 It is to the same effect as the former *Supreme Court Act 1958* (Vic), s 174 under which an order could be made in respect of securities "standing in his [the judgment debtor] name in his own right or in the name of any person in trust for him".

580 *Cooper v Griffin* [1892] 1 QB 740.

In *Deane v Gillespie*[582] the court ordered shares standing in the judgment debtor's name to be charged with the payment of a judgment debt. The judgment debtor had sold shares which remained in his name in the company register. There could be no charge over these shares. The defendant's interest in the remaining shares and over which the plaintiff had a charge were subject to the rights of a third party, with whom they had been deposited for security.[583]

At issue in *Pryor v Powell*[584] was whether shares on the company books in the name of the judgment debtor could by order *nisi* be charged. The plaintiff sought that the order be made absolute. The defendant declared that the shares could not be charged in respect of the debt because they were in his name only but not his in his own right. The court considered conflicting authority. *Fatorini v Hill*[585] held that where shares were in the company's register in the name of the defendant acting as trustee of the shares in favour of third parties the court could not recognise the beneficiaries' rights in the shares. A'Beckett J in *Deane v Gillespie*[586] held that *Fatorini v Hill* had been decided erroneously to the extent that the principle on which it was purportedly based was incorrect. The court in *Pryor v Powell* preferred the later case and held that to the extent of the conflict the earlier case had been wrongly decided. Section 185 of the *Supreme Court Act 1890* (Vic) permitted shares in a public company standing in the name of a judgment debtor either in the judgment debtor's own right, or in the name of a trustee, to be charged. The legal owner of shares can only have them charged if they are held in their own right, but not if they belong to another person and are only registered in the legal owner's name.

In *Goldie v Junction North Broken Hill Mine NL*[587] it was held that a judgment debtor had a chargeable interest on shares standing in his name where he had sold them and received part but not all of the purchase money, but had not executed a transfer or handed over the share certificates.[588] There can be no charge over the judgment debtor's shares in a company where those shares were forfeited for non-payment of calls.[589]

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581 *Howard v Sadler* [1893] 1 QB 1 (but not transferred); *Hawks v McArthur* [1951] 1 All ER 22 (cannot be charged).

582 *Deane v Gillespie* (1887) 8 ALT 140.

583 See also *Pryor v Powell* (1898) 23 VLR 512. See further as to equitable interests, *Long Tunnel Gold Mining Co v Zimmier* (1884) 6 ALT 25.

584 *Pryor v Powell* (1898) 23 VLR 512.

585 *Fatorini v Hill* (1886) 8 ALT 87.

586 *Deane v Gillespie* (1887) 8 ALT 140.

587 *Goldie v Junction North Broken Hill Mine NL* [1932] VLR 409.

588 See also *Blow v Constable* (1886) 3 WN (NSW) 24; *Hawks v McArthur* [1951] 1 All ER 22.

589 *Hyman v Smith* (1889) 10 ALT 254.

Where securities are held in trust for both a judgment debtor and another person the judgment debtor has sufficient beneficial interest in those securities for the court to order a charge to be imposed over them regardless of the other beneficiary's interest.[590] If a judgment debtor is to receive proceeds of securities in which they have interest and which are held on trust for sale by a trustee a charging order may be imposed over the judgment debtor's security interest.[591] An order may be made over a judgment debtor's entitlement or part of the securities *in specie* if there is no imperative trust for sale.[592] When a judgment debtor is entitled to the estate of the deceased as next-of-kin an order may be made charging the interest in the estate.[593]

In *Service v Flatau*[594] the judgment debtor had shares held in trust for him and others. The judgment agreed to transfer some of his shares to others and gave the trustee direction to hold those shares on behalf of those to whom he had agreed to transfer them. Other shares were still held on trust for the judgment debtor and a charging order was imposed in respect of those shares.

Discretion to make charging order

[12.1230] The court has discretion to determine whether or not to make a charging order.[595] If the securities are heavily encumbered the order may be refused for being futile, given the greatly diminished value of the securities.[596]

If the articles of association of a company restrict the right to transfer shares, and a charging order was unenforceable because enforcement would breach the rights of other shareholders as defined by the articles, the court will only make a charging order over the shares held by a judgment debtor that is consistent with the company's articles.[597]

Costs

[12.1240] In *Schulz v Harding*[598] an order was made that the defendant should pay the costs of an application for a charging order on shares.

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590 *South Western Loan and Discount Co v Robertson* (1881) 8 QBD 17.

591 *Cragg v Taylor* (1867) LR 2 Exch 131. As to whether a charging order can be obtained where trustees hold securities on trust to sell and convert the securities into money, and the interest of the judgment debtor is not in the securities themselves but in the proceeds of sale, see *Dixon v Wrench* (1869) LR 4 Exch 154; *Ideal Bedding Co Ltd v Holland* [1907] 2 Ch 157 at 168.

592 *Bolland v Young* [1904] 2 KB 824; *Ideal Bedding Co Ltd v Holland* [1907] 2 Ch 157.

593 *Union Bank of Australia v O'Leary* (1896) 13 WN (NSW) 124.

594 *Service v Flatau* (1900) 16 WN (NSW) 248.

595 See r 73.08(1).

596 *Wicks v Shanks* (1892) 67 LT 609.

597 *Dalston Development Pty Ltd v Dean* [1967] WAR 176.

598 *Schulz v Harding* (1900) 6 ALR (CN) 17.

Effect and enforcement of charge

[12.1250] The effect of a charging order over securities is that of a charge over securities. The judgment creditor has the same remedies under the charging order that they would have had they charged the security.[599] Like a charge over securities the imposed charging order over the securities is subject to the priority rules and ranks subject to any existing legal and equitable interests.[600]

The judgment creditor with a charging order over charged securities may initiate proceedings as plaintiff against the judgment debtor, whether individual, corporation or government, to effect the enforcement of the charge. The charge is enforced by a sale of the charged securities and applying sufficient of the proceeds from the sale of the charged securities to satisfy the judgment.[601]

Variation or discharge of charging order

[12.1260] A charging order over securities may be varied or discharged at any time by court order.[602] If an application to set aside the judgment under authority of which the charging order was made succeeds, the judgment debtor may move to have the charging order set aside.[603]

Filing and service of charging summons — charging order over funds in court

[12.1270] In order to secure the payment of a judgment debt the debt may be secured by the court ordering a charge over funds in court in which the judgment debtor has a beneficial interest.[604] Where a judgment debtor has funds in court standing to their credit the judgment creditor may apply to the court for an order that such money, or such amount of the money as necessary, as stands to the credit of the debtor, be applied to the satisfaction of the judgment, plus any interest, in favour of the judgment creditor.[605]

The term "funds" or "funds in court" refers to any money, or to any stock, funds, or annuity granted by any government, or to any stock of any corporation which may be either standing, or required to be placed to, the

599 Rule 73.09. See also *Re Leavesley* [1891] 2 Ch 1; *Dalston Development Pty Ltd v Dean* [1967] WAR 176 at 177.

600 See *Pickering v Ilfracombe Railway Co* (1868) LR 3 CP 235; *Robinson v Nesbitt* (1868) LR 3 CP 264; *Gill v Continental Union Gas Co Ltd* (1872) LR 7 Exch 332 at 338; *Re Leavesley* [1891] 2 Ch 1; *Deane v Gillespie* (1887) 8 ALT 140; *Hyman v Smith* (1889) 10 ALT 254; *Hawks v McArthur* [1951] 1 All ER 22.

601 See *Leggott v Western* (1884) 12 QBD 287; *Kolchmann v Meurice* [1903] 1 KB 534; *Cohen v Beadell* (1891) 91 LT Jo 250; *Daponte v Schubert* [1939] 3 All ER 495.

602 Rule 73.10.

603 *Brain v Herrick* (1894) 10 R 171.

604 Rule 73.11(1).

605 Rule 71.13(1).

credit of an account in the court books.[606] The definition of funds refers to "any" corporation or government and therefore includes foreign corporations and governments.[607] The jurisdiction of the courts over foreign governments and corporations is no limitation to the power over the court to order a charge of funds in court. Since the funds are under the court's control the court order charging the funds has territorial effect. An order made to this effect requires the judgment creditor to forthwith notify the Prothonotary, Associate Judge or other officer of the court by whom the funds in court are held.[608]

The court's jurisdiction to impose a charge over funds in court held in trust for the judgment debtor exists independently of the rules. Rule 73.11 is a recognition of the court's power in equity to make such a charging order.[609] The order is obtained using the same procedure as a charging order over securities.[610] In making an order for charging funds held on trust in court the court must have regard to a number of relevant factors, including that the money may be held to the benefit of a person under a disability, the purpose for making the payment of funds into court, and the purpose for which the funds are held.[611]

Stop order for funds in court

[12.1280] Rule 73.12 provides that the court may make an order that funds in court, or any part thereof, or the income thereon, shall not be transferred, sold, delivered out, paid or otherwise dealt with unless notice is first given to the person applying for the order.[612]

The application for a stop on dealings with income may be made by persons with a mortgage or charge on the interest of any person with funds in court, the assignee of interest of funds in court held for the benefit of another person, and a judgment creditor of a person entitled to the interest of funds in court.[613]

The application for a stop order is made in the proceeding for which the funds have been paid into court by summons, or, where the funds paid into court are not associated with proceedings, by originating motion.[614] The applicant is required to serve the summons or originating motion on

606 Rule 73.01.

607 Compare the definition of "securities" for the purpose of r 73.02.

608 Rule 73.11(3).

609 See *Brereton v Edwards* (1888) 21 QBD 488; *Townend v Jones* (1889) 5 TLR 609; *Wilkie v Wilkie* [1905] VLR 80; *The Dirigo* [1920] P 425; *Re Prior; Ex parte Prior* [1921] 3 KB 333; *Kennedy v Mackenzie* [1947] ALR (CN) 619.

610 Rule 73.11(2); the charging under securities is at r 73.02.

611 Rules 15.09(2), 73.11(4).

612 Rule 73.12(1). For the definition of "funds" and "funds in court" see r 73.01.

613 Rule 73.12(2)(a) – (c).

614 Rule 73.12(3). See also *Wrench v Wynne* (1869) 38 LJ Ch 235; *Walsh v Wason* (1874) 30 LT 743.

each person having an interest in the funds in court which the order being applied for may affect. The summons or originating motion must clearly state the nature of the funds over which the order to restrain dealings is sought: for example, whether over income, or capital or both.[615] An affidavit is filed in support of the application demonstrating the nature of the applicant's interest in the funds in court. Service of the summons or originating motion, along with the affidavit, is effected on every person with an interest in the funds in court whose rights the stop order being sought may affect.[616]

An order under r 73.12 does not determine the rights regarding any claim to the funds of the person applying for the order.[617] Stop orders may be made on the basis of an order made for money to be paid into court. It is not necessary for the money the subject of the order to have been paid into court for the stop order to be applied for or made. However, there can be no stop order unless there are funds in court. Nor will an order be made that money be brought into court.[618] The effect of a stop order is to prevent any dealings with the funds in court causing the funds to be paid out of court without notice first being given to the person whose application caused the order to be made, enabling them to oppose the payment of the funds out of court.[619] The person obtaining the order is entitled to notice. By being given notice the person applying for the stop order is afforded the opportunity of restraining the proposed dealings affecting the funds.[620] The stop order also serves to notify the court of a claim over funds in court so as to determine priority for the person obtaining the order.[621] If more than one order is made priorities are based on the priority of the respective orders.[622] An order appointing a receiver of a fund by way of equitable execution has priority over a subsequent stop order:[623]

The court has discretion to determine whether or not to make the stop order with respect to the funds in court.[624] In *Ware v Ware*[625] an application for a stop order by a bank as assignee by way of security of

615 *Mack v Postle* [1894] 2 Ch 449.

616 Rule 73.12(4).

617 *Lucas v Peacock* (1846) 9 Beav 177; 50 ER 311.

618 *Wellesley v Mornington* (1862) 11 WR 17.

619 *Scott v Spashett* (1851) 3 Mac & G 599; 42 ER 391.

620 Compare the effect of a notice given to a trustee of a fund which, instead of being in court, is in his hands: *Stephens v Green* [1895] 2 Ch 148 at 163.

621 *Mack v Postle* [1894] 2 Ch 449.

622 See *Thomas v Cross* (1865) 2 Drew & Sm 423; 62 ER 682; *Re Metropolitan Railway Co, Tower Hill Extension Act; Re Rawlin's Estate; Ex parte Kent* (1871) 19 WR 596.

623 *Re Marquis of Anglesey* [1903] 2 Ch 727.

624 Rule 73.12(1).

625 *Ware v Ware* (1870) 1 VR (E) 1.

the interest of a person in a fund was refused on the ground that the order would embarrass the administration of the funds in which many other people were interested.

The court has discretion to make any order for the costs and expenses associated with the application that it thinks fit, taking into account all of the facts and circumstances of the case. The order is not restricted to the costs and expenses of the applicant, but may also include the costs and expenses of any other party to the application, or any other person against whom an order is sought.

Stop notice in respect of corporation stock

[12.1290] The procedure by means of which a person claiming beneficial interest in the stock of a corporation[626] (excluding stock held in court) may require a corporation to give notice of any proposed transfer of the stock, or the payment of a dividend, or the payment of interest on a dividend, is established by rr 73.13 – 73.16. The corporation is required to be given notice by operation of the rules, by the claimant (that is, the person required to give notice) serving notice in Forms 73B and 73C, and an affidavit.[627] Notice served on a corporation under r 73.13 may be withdrawn by the claimant, and the court may order that the notice be discharged.[628]

The notice served on a corporation under r 73.13 is not injunctive in nature but operates as a caveat under the *Transfer of Land Act 1958* (Vic). The corporation served with an affidavit and notice is required to notify the claimant of any request for a transfer of stock, or any dividend or interest falling due on the stock, related to the notice. The transfer is not registered, or the interest or dividend is not paid, before 10 days after notice has been issued, unless the court authorises it.[629]

The claimant or other person having a beneficial interest in the stock may apply to the court by originating motion to order that any transfer of, or payment of dividend or interest on, the stock be restricted, or prohibited.[630] The court order is served on the corporation who is, nevertheless, not a necessary party to the proceedings.[631]

RECEIVERS

[12.1300] Receivers are appointed either by the court, or pursuant to either statute or the power contained in an instrument.

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626 As defined in r 73.13(1).

627 See r 73.13(2), (3). See also *Hobbs v Wayet* (1887) 36 Ch D 256 at 260.

628 Rule 73.15.

629 Rule 73.14.

630 Rule 73.16.

631 *Chamberlain v Wall* [1921] WN 11.

A receiver is a person having a power, conferred either by court, or pursuant to statute or an instrument, in respect of a corporation in receivership, to receive property and to pay necessary outgoings. A receiver does not have the power to manage the property of a corporation. That is, a receiver may not buy or sell a corporation's assets, or otherwise deal with those assets, or do anything that is otherwise managerial. A receiver is not a manager. Persons occupying management roles in a corporation continue to undertake or are entitled to continue undertaking the acts constituting the carrying on of the corporation's trade or business.[632]

It is not uncommon for a receiver to be both a receiver and a manager,[633] to such an extent that the reference to a receiver is inclusive of both roles. The inclusiveness of the generic term "receiver", including, for example, the statutory definition of receivership to include management under the *Corporations Act 2001* (Cth),[634] has made redundant the need to refer to both roles, or to a corporation's being both in receivership and under management. The Corporations Act further deems a receiver to be a manager of a corporation's property even without being so described. The test is whether the receiver manages, or, has the power to manage under the terms of the receiver's appointment, the corporation's affairs.[635]

A corporation for whom a receiver, or receiver and manager, is appointed no longer has the power to deal with those assets or undertakings placed in the receiver's possession or under their control. A corporation remains a separate legal entity until it is wound up (if indeed it is).[636] The appointment of a receiver does not of itself serve to vest corporation assets in the receiver either legally or in equity.[637] The extent of a receiver's powers, duties and liabilities varies depending on whether they are court appointed, or appointed pursuant to a statute or an instrument.

Appointment by the court

[12.1310] A court may appoint a receiver, or a receiver and manager, to the entirety, or to some part, of a corporation's property. The court does this by exercising an equitable jurisdiction contained in statute.[638]

632 *Re Manchester and Milford Railway Co; Ex parte Cambrian Railway Co* (1880) 14 Ch D 645.

633 Where an instrument only permits a chargee to appoint a receiver or a receiver and manager, but not both, an appointment of both will be invalid: see *Harold Meggitt Ltd v Discount & Finance Ltd* (1938) 56 WN (NSW) 23.

634 *Corporations Act 2001* (Cth), s 416.

635 *Corporations Act 2001* (Cth), s 90.

636 *Moss Steamship Co Ltd v Whinney* [1912] AC 254; *Parsons v Sovereign Bank of Canada* [1913] AC 160. Some deeds may, however, leave the corporation's possessions undisturbed in point of law by the receiver's assumption of control: *Australian Mutual Provident Society v Geo Myers & Co Ltd (in liq)* (1931) 47 CLR 65.

637 *Re Scottish Properties Pty Ltd* (1977) 2 ACLR 264 at 271.

638 *Supreme Court Act 1986* (Vic), s 37(1); see also: *Judiciary Act 1903* (Cth), s 77R (High Court); *Federal Court of Australia Act 1976* (Cth), s 57(1); *Supreme Court Act 1933* (ACT),

Receivers, or receivers and managers, are appointed for a number of reasons including to protect company property, in the case of partnership disputes and equitable execution,[639] and for the enforcement of a security on a corporation. In the case of the enforcement of a security on a corporation, a receiver, or a receiver and manager, will be appointed by a court even if there is neither an express power in the instrument,[640] nor an available statutory power.[641] The court will also appoint a receiver or a receiver and manager if the power of a privately appointed receiver under the terms of the instrument of appointment lacks certainty.[642]

The court is also conferred with specific statutory powers in specified circumstances to make an appointment of a receiver to a corporation.[643] The powers of a receiver appointed pursuant to the exercise of the court's statutory powers are analogous to the powers of a receiver appointed by the court exercising its general power.[644]

A judgment debtor entitled to money, property or the interest in property, is not always able to access money in court by means of a warrant of seizure and sale, nor can it be taken by other processes of execution at law, or under the rules.[645] The court has an equitable jurisdiction under r 73.11 in such cases to charge the money in court for the amount of the judgment debt to secure payment of the debt.[646] If there is money in court to which a judgment debtor is entitled r 66.02(1)(e) provides that O 74 may be engaged by a party seeking enforcement of a judgment for the payment of money. Under O 74 the court may appoint a receiver by engaging the court's jurisdiction to appoint a receiver by means of equitable execution. A receiver may be appointed and a prohibitory injunction ordered against the judgment debtor to prevent dealings with the property in question. There must be something in the way of the enforcement of a judgment debt against the property of the judgment debtor to require and justify the appointment of a receiver. The

s 26; *Supreme Court Act* (NT), s 69(1); *Supreme Court Act 1970* (NSW), s 67; *Supreme Court Act 1995* (Qld), s 246; *Supreme Court Act 1935* (SA), s 29(1); *Supreme Court Civil Procedure Act 1932* (Tas), s 11(12); *Supreme Court Act 1935* (WA), s 25(9).

639 For the grounds for appointment by the court, see *Halsbury's Laws of Australia*, "Receivers", [360-280]–[360-320].

640 *McMahon v North Kent Ironworks Co* [1891] 2 Ch 148.

641 *Tillett v Nixon* (1883) 25 Ch D 238. However, the court will generally not appoint a receiver on the application of a subsequent mortgagee if a prior mortgagee is in possession: *Collie v Merlaw Nominees Pty Ltd (in liq)* [2001] VSC 60.

642 *Re South Australian Barytes Ltd (No 2)* (1977) 19 SASR 91.

643 *Corporations Act 2001* (Cth), ss 1101B(4)(g) and 1323(1)(h).

644 *Corporate Affairs Commission v Smithson* [1984] 3 NSWLR 547.

645 See r 66.02(2).

646 See also *Brereton v Edwards* (1888) 21 QBD 488; *Townend v Jones* (1889) 5 TLR 609; *Wilkie v Wilkie* [1905] VLR 80; *The Dirigo* [1920] P 425; *Re Prior; Ex parte Prior* [1921] 3 KB 333; *Kennedy v Mackenzie* [1947] ALR (CN) 619. For the appointment of a receiver by way of equitable execution to receive both future debts and debts due or accruing due at the date of the appointment see *Soinco SACI v Novokuznetsk Aluminium Plant* [1998] QB 406.

obstruction by means of the ordinary way of enforcement may be that those methods are simply not applicable in the circumstances, or because the particular nature of the property will probably make those methods of enforcement ineffective.[647] A receiver is not appointed if the property can be accessed using the means otherwise available in law and under the rules.

Equitable execution, however, "is not execution, but a substitute for execution".[648] Section 37(1) of the *Supreme Court Act 1986* (Vic) provides that a court may appoint a receiver where it is just and convenient to do so. A receiver may be appointed by way of equitable execution. The application for the order is made according to the procedural requirements of O 39, which is the general rule applying to the appointment of receivers[649] — whether a receiver who is appointed by way of equitable execution, or any other receiver. The party applying for the appointment of a receiver or another party as the court directs must serve a copy of the order upon the receiver. The person being appointed receiver must file a letter accepting their appointment. The receiver gives the court security to account for what property it receives in its role as receiver. A receiver is subject to a range of obligations, including being obliged to keep accounts and to make them available for inspection, amongst other things. A default in relation to accounts may result in a show cause hearing for the receiver's default, and the court is empowered to make any order including one for the discharge of the current order and the replacement of a receiver by a new receiver.

Appointment of receiver by way of equitable execution

[12.1320] The court in determining an application for the appointment of a receiver by way of equitable execution takes into account the sum claimed by the judgment creditor, the amount the receiver is likely to obtain, and the cost of appointing a receiver in the case.[650] A person appointed receiver must give security, unless the court otherwise orders.[651] To properly consider these matters the court may initiate and direct enquiries into these or other questions.

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647 For instance, an equitable interest which could not be reached under a warrant of seizure and sale: see *Wills v Luff* (1888) 38 Ch D 197; *Re Shephard; Atkins v Shephard* (1889) 43 Ch D 131; *Thompson v Gill* [1903] 1 KB 760 at 765; *Levermore v Levermore* [1980] 1 All ER 1.

648 *Re Shephard; Atkins v Shephard* (1889) 43 Ch D 131 at 137 per Bowen LJ.

649 Rule 74.01.

650 Rule 74.02.

651 Rule 39.05. As to requiring an undertaking in damages for the benefit of third parties upon the court appointing a receiver by way of equitable execution see *Allied Irish Bank v Ashford Hotels Ltd* [1997] 3 All ER 309.

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