Judicial Commission of New South Wales

CIVIL TRIALS BENCH BOOK

Update 44

June 2021

SUMMARY OF CONTENTS OVERLEAF

Judicial Commission of New South Wales

Level 5, 60 Carrington Street, Sydney NSW 2000

GPO Box 3634, Sydney NSW 2001

SUMMARY OF CONTENTS

Update 44

Update 44, June 2021

The following changes have been incorporated in this Update:

[2-0500] Alternative dispute resolution

BJP1 v Salesian Society (Vic) [2021] NSWSC 241 has been added at **[2-0550] Enforceability of mediated agreements**, where the mediated agreement was held to be immediately binding and conclusive as the plaintiff's solicitors were properly and adequately instructed and authorised to enter into a full and final settlement of the proceedings which they confirmed to the mediator and the defendant; and the plaintiff's solicitors' correspondence indicated they had entered into a "full and final settlement".

[2-1000] Search orders

This chapter has been revised and updated. *Showcase Realty Pty Ltd v Nathan Circosta* [2021] NSWSC 355 has been added at **[2-1010] Search orders**, which discusses the applicant's required duty of candour in order that the court can be fully appraised of all relevant matters in the exercise of its discretion during an ex parte hearing. At **[2-1020] Requirements**, the case of *Global Medical Solutions Australia v Axiom Molecular* [2012] NSWSC 1262 has been added, as an example of how the court weighs the considerations in determining that the requirements of r 25.20 have been made good. New paragraphs **[2-1095] Setting aside a search order**, which includes text explaining that search orders, that have already been executed, may be set aside ab initio if there has been bad faith or material non-disclosure and **[2-1110] Costs** in relation to search order proceedings have been added.

[2-2600] Stay of pending proceedings

Wigmans v AMP Ltd [2021] HCA 7 has been added at **[2-2680] Abuse of process**. This case discusses the power to order a stay provided by s 67 of the *Civil Procedure Act* (CPA), and the fact it overlaps with the inherent power to stay a proceeding to prevent abuse of its processes.

[2-3900] Limitations

This chapter has been reviewed and minor updates have been made, including the addition of the limitation period for child abuse at **[2-3970] Table of limitation provisions in NSW**.

[2-5400] Parties to proceedings and representation

Wigmans v AMP Ltd [2021] HCA 7 has been added at **[2-5500] Representative proceedings in the Supreme Court** under a new heading *Parallel representative proceedings in relation to the same controversy*. The Supreme Court's power to grant a stay under s 67 of the CPA of competing representative proceedings is not confined by a rule or presumption that the proceeding filed first in time is to be preferred. There is no "one size fits all" approach.

[2-5900] Security for costs

At **[2-5965] Ordering security in appeals**, the case of *Murray John Carter v Ian Mehmet t/as ATF Ian G Mehmet Testamentary Trust* [2021] NSWCA 32 has been added. Security for costs in the sum of $40,000 were ordered in this case as the appellants had resolved to pursue an appeal which was more likely to fail than not. *Nyoni v Shire of Kellerberrinin (No 9)* [2016] FCA 472 has also been added at **[2-5990] Dismissal of proceedings for failure to provide security**, where it was noted that an order for security for costs should not be used as an alternative way of striking out an appeal. Nor should it be used to push an appellant towards discontinuing an appeal.

[2-6900] Summary disposal and strike out applications

The case of *Minister for Education and Early Childhood Learning v Zonnevylle* [2020] NSWCA 232 has been added at **[2-6920] Summary disposal**. This case considered the power of NCAT to dismiss proceedings it considers to be vexatious under s 55(1)(b) of the *Civil and Administrative Tribunal Act* 2013.

[5-0800] The Mining List

This chapter has been substantially revised and updated to reflect legislative changes. The case of *Mount Thorley Operations Pty Ltd v Farrugia* [2020] NSWDC 798 has been added at **[5-0840] Redemption applications**, as an example of the effect of a redemption on a latent injury.

[5-7000] Intentional torts

Young v RSPCA NSW [2020] NSWCA 360 has been added at **[5-7120] Malicious prosecution**, where it was found a s 32 order under the *Mental Health (Forensic Provisions) Act* 1990 (now repealed) did not constitute a finding that the charges were proven for the purposes of an action for malicious prosecution. A plaintiff must show the prosecution ended in favour of the plaintiff. If it did, it does not matter how that came about. It is sufficient if the plaintiff can demonstrate the absence of any judicial determination of his or her guilt.

[10-0300] Contempt generally

Minor amendments have been made to this chapter as a result of the repeal of the *Mental Health (Forensic Provisions) Act* 1990.

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FILING INSTRUCTIONS OVERLEAF

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FILING INSTRUCTIONS

Update 44

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Please discard previous filing instructions and summary sheets before filing these instructions and summary.

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Alternative dispute resolution

[2-0500] Introduction

Alternative dispute resolution, including mediation and arbitration, should be encouraged where appropriate to facilitate the "just, quick and cheap resolution" of the dispute, in accordance with the overriding purpose rule in s 56 of the CPA.

Part 4 of the CPA provides for court-ordered mediation and Pt 5 provides for court-referred arbitration.

Part 20 of the UCPR, "Resolution of proceedings without hearing", applies to matters referred for mediation or arbitration. Practice Note SC Gen 6 explains the court's mediation procedures under Pt 4 of the Act. Parts 4 and 5 do not apply to proceedings of the Local Court sitting in its Small Claims Division due to the operation of s 4 of the CPA and Sch 1 to the UCPR.

[2-0510] Mediation

Compulsory court-referred mediation has been available as "an integral part of the Court's adjudicative processes" since 2000, see J Spigelman "Mediation and the Court" (2001) 39 (2) *LSJ* 63. Part 5 CPA provides for mediation of proceedings. Section 25 of the CPA defines mediation as:

> a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.

[2-0520] Exercise of discretion

Mediation may be appropriate for the following, amongst other, reasons:

- to preserve the commercial and/or personal relationships of the parties and to reduce the risk of an appeal,
- to define the contested issues, in accordance with s 61 of the CPA, should the matter proceed to litigation,
- to settle the facts, and
- to limit the court's role to determining only liability or quantum of damages.

The court may make an order under s 26 to refer any proceedings before it, or part thereof, to mediation if "it considers the circumstances are appropriate". The practice note makes it clear that mediation is not appropriate in all proceedings; however, the parties may agree to mediation, nominate a mediator and request the court to make the appropriate orders at any time: Practice Note SC Gen 6 cl 7. The court may order mediation on its own motion, on the motion of a party, or on referral by a registrar: Practice Note SC Gen 6 cl 8. The court may also refer the parties to the registrar or other court officer for an information session to discuss the suitability of the dispute for mediation: Practice Note SC Gen 6 cl 8.

The exercise of the court's discretion is not dependent on the parties' consent: s 26(1). However the parties are not forced to settle and may generally continue the litigation without penalty, but this is subject to the parties: see "Parties' obligation of good faith" at [2-0540] below.

The court's discretion under s 26 is "very wide and the Court should approach an application for an order without any predisposition, so that all the relevant circumstances going to the exercise of the discretion may properly be taken into account": *Higgins v Higgins* [2002] NSWSC 455 at [6]. By way of guidance:

(a) The existence of a dispute resolution clause in a contract is of marginal relevance to the question whether the court should order mediation. The question of referral has to be determined by reference to the circumstances which exist at the time of the proceedings and not at the time the parties contracted: *Morrow v chinadotcom Corp* [2001] NSWSC 209 at [43].

(b) An earlier unsuccessful attempt at mediation, and the costs to be incurred if a second mediation is ordered, is a relevant factor to consider: *Harrison v Schipp* [2002] NSWCA 27 and *Unconventional Conventions Pty Ltd v Accent Oz Pty Ltd* [2004] NSWSC 1050.

(c) The opposition of one or both of the parties to a court-ordered mediation is a relevant consideration, but is not conclusive: *Harrison v Schipp*, above; *chinadotcom corp v Morrow* [2001] NSWCA 82. The compulsory referral power is directed to disputants "who are reluctant starters but may become willing participants": Spigelman J "Mediation and the Court" (2001) 39 (2) *LSJ* 63 at 65. See, for example, *Remuneration Planning Corp Pty Ltd v Fitton* [2001] NSWSC 1208.

(d) Compulsory mediation has been considered appropriate in disputes between family members and friends, and between former business partners, where the court is persuaded that mediation offers a plausible prospect of success: *Higgins v Higgins*, above; *Yoseph v Mammo* [2002] NSWSC 585; *Singh v Singh* [2002] NSWSC 852.

(e) In defamation proceedings, the court held that a mediation conducted in good faith could result in a public vindication of the plaintiff: *Waterhouse v Perkins* [2001] NSWSC 13.

[2-0530] Appointment of mediator

The parties may agree to the mediator. If there is no agreement, the court may select the mediator or appoint a person to conduct the mediation in accordance with the Joint Protocol procedures detailed in Practice Note SC Gen 6 (issued 9 March 2018). The court may refer the proceedings to a registrar to conduct a short information session about the benefits of mediation.

Court registrars or officers may be certified as qualified mediators by the Chief Justice. The Court has a Joint Protocol arrangement (set out in paragraphs 19-35 of Practice Note SC Gen 6, above) with five mediation provider organisations suitable to mediate Supreme Court cases as follows:

- the NSW Bar Association
  https://nswbar.asn.au/using-barristers/alternative-dispute-resolution/baradr-approved-mediators
- the Law Society of New South Wales
  https://www.lawsociety.com.au/sites/default/files/2018-12/Mediators%20Panel.pdf
- the Resolution Institute
  https://www.resolution.institute/
- the Australian Commercial Disputes Centre
  https://www.disputescentre.com.au/
- the Australian Branch of the Chartered Institute of Arbitrators
  https://www.ciarb.net.au/

[2-0535] Community Justice Centres Act 1983

The court may refer proceedings or parts of proceedings for mediation under the *Community Justice Centres Act* 1983: CPA s 26(2A). No dispute shall be accepted for mediation without the consent of the Director of Community Justice Centres: s 20(3) *Community Justice Centres Act*.

Section 20A of that Act provides for disputes which have been referred by an order of a court or tribunal under a provision of another Act or statutory rule. The Director may accept or decline to accept such a dispute: s 20A(2). If the Director accepts the dispute, he or she must report as to the outcome: s 20A(5). If the Director declines the dispute, he or she must give notice of the decision and the reasons therefore: s 20(6).

[2-0540] Parties' obligation of good faith

Section 27 of the CPA creates an obligation on the parties to participate in a referred mediation in good faith. There is, however, no sanction for failure to comply with s 27 except semble, a stay of proceedings where a plaintiff is in default (*Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996), or an adverse costs order being made against the obstructive party in later court proceedings: *Capolingua v Phylum Pty Ltd* (1991) 5 WAR 137.

In *Aiton Australia Pty Ltd v Transfield Pty Ltd*, above, at [92], Einstein J suggested that the requirement of good faith is directed to the conduct of the parties, rather than mere attendance at the process and identified at [156], without being exhaustive, the core content of an obligation to negotiate or mediate in good faith.

[2-0550] Enforceability of mediated agreements

The court may make orders giving effect to any agreement or arrangement arising out of the mediation: s 29(1). However, this does not affect any other agreement or arrangement that may be made in relation to the dispute: s 29(3).

Evidence may be called from the mediator in support of an application to give effect to an agreement arising out of a mediation: ss 29(2) and 31(b).

Whether an agreement reached at mediation is final and immediately binding to resolve proceedings, rather than conditional or an in-principle agreement, will depend on the parties' objective intentions as disclosed by the facts and circumstances including how the terms of the agreement are expressed to the parties: *Masters v Cameron* (1954) 91 CLR 353 at 360; *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 at [634]. In *BJP1 v Salesian Society (Vic)* [2021] NSWSC 241 at [88]–[91], the mediated agreement was held to be immediately binding and conclusive as the plaintiff's solicitors were properly and adequately instructed and authorised to enter into a full and final settlement of the proceedings which they confirmed to the mediator and the defendant; and the plaintiff's solicitors' correspondence indicated they had entered into a "full and final settlement".

[2-0560] Costs

The costs of mediation may be met by the parties as agreed among themselves, or as ordered by the court: s 28. The court may request that the Chief Executive Officer of the nominated mediation association consider providing the mediation on a reduced or no fee basis: see cll 25 and 29 of the Practice Note SC Gen 6. See [8-0180] item 7 "Costs reserved, or costs orders with liberty to apply".

[2-0570] General

Mediation proceedings attract the same privilege with respect to defamation as judicial proceedings and, except with the consent of all relevant persons, nothing said at, or document prepared in relation to, a mediation session is admissible in any subsequent proceedings, other than proceedings under s 29 for enforcement of any agreement arising out of the mediation session: CPA s 30. As to the mediator's duty of confidentiality, see CPA s 31.

[2-0580] Sample orders

Order for referral to mediation

1. Pursuant to s 26 of the *Civil Procedure Act* 2005, the issues identified in the Schedule hereto are referred to mediation.
2. Parties are reminded of the obligation to mediate in good faith imposed by s 27 of the Act.
3. The mediator shall be [*name*] or the mediator shall be agreed by the parties or, failing agreement, will be appointed by the court, selected from two nominees put forward by each party.
4. The parties are to deliver to the mediator forthwith a sealed copy of this order.
5. The mediation is to be completed by [*date*].
6. The parties are to provide a copy of the pleadings to the mediator within seven days of this order.
7. Unless otherwise agreed or ordered by the court, the parties are to be jointly and severally liable for the costs of the mediation including the fees of the mediator.
8. The matter is listed for further directions on [*date*].

[2-0585] Arbitration

Part 5 CPA provides for court-referred arbitration of proceedings. There is funding available in the Supreme Court for this. It is advisable to check the status of such funding in the Supreme Court with the Executive Director/Principal Registrar before referring a case for arbitration. The District Court no longer runs an arbitration scheme. The Local Court runs an arbitration scheme funded by the court. The Department of Justice pays the arbitrator according to a scale of fees. The criteria for a case to be referred for arbitration is confined to the following:

- the case does not involve complex issues of law or fact
- the hearing time is 3 hours or less
- the case does not involve allegations of fraud.

The court will choose an arbitrator from a list of arbitrators appointed by the head of jurisdiction.

[2-0588] Jurisdiction and rules of evidence

Section 37(1) provides that the jurisdiction conferred on the arbitrator for referred proceedings is part of the jurisdiction of the court that referred the proceedings. The arbitrator may exercise all the functions of the court but only for the purpose of determining the issues in dispute in referred proceedings, for the making of an award in the referred proceedings and related purposes: s 37(2) and (4). While proceedings are before an arbitrator, a tribunal has no jurisdiction in respect of any issue in dispute in the proceedings being arbitrated: s 37(5).

Subject to the uniform rules, evidence in referred proceedings before an arbitrator is to be given and received in the same way as it would be given and received before the referring court: s 51(1). Referred proceedings are taken to be judicial proceedings for the purposes of s 327 (Offence of perjury) of the *Crimes Act* 1900: s 51(4).

[2-0590] Exercise of discretion

The court may make an order under s 38(1) of the CPA to refer to determination by an arbitrator:

(a) a claim for damages or other money, or

(b) a claim for any equitable or other relief ancillary to a claim for the recovery of damages or other money.

Before making an order for arbitration, s 38(2) provides that the referring court must:

(a) consider the preparations made by the parties for the hearing of the proceedings: s 38(2)(a),

(b) as far as possible deal with all matters that may be dealt with by the court on application to the court before the hearing of the proceedings: s 38(2)(b), and

(c) give such directions for the conduct of the proceedings before the arbitrator as appear best adapted for the just, quick and cheap disposal of the proceedings: s 38(2)(c).

The court may not make an order referring proceedings under s 38(3) if:

(a) no issue in the proceedings is contested or judgment in the proceedings has been given or entered and has not been set aside: s 38(3)(a),

(b) the proceedings involve an allegation of fraud or are proceedings of the Local Court sitting in its Small Claims Division, unless the parties consent or the court finds there are special circumstances justifying the referral: s 38(3)(b) and UCPR r 20.8, and

(c) cause is shown why the proceedings should not be referred: s 38(3)(c).

The fact that a jury has been requisitioned by a party does not preclude the possibility of a referral to arbitration, as a party aggrieved by an arbitrator's award is entitled to a rehearing, and where a jury has been requisitioned, this would include a jury trial: *Karkoulas v Newmans of Kogarah Pty Ltd* [2000] NSWCA 305.

The court should refrain from referring proceedings to arbitration where the amount in issue is small compared to the legal costs likely to be involved in the arbitration and any subsequent litigation, and arbitration is unlikely to resolve the dispute: *Troulis v Vamvoukakis* (unrep, 27/2/97, NSWCA). In the Local Court generally, only straightforward matters, estimated to take less than four hours, are referred to arbitration.

In practice, referrals to arbitration are made by the relevant registrar having regard, inter alia, to the state of the court's list and funding available.

[2-0595] Arbitrations under the *Commercial Arbitration Act* 2010

The *Commercial Arbitration Act* 2010 (CAA) provides for the resolution of commercial disputes for both court-referred and private arbitrations . The functions of an arbitral tribunal must be exercised, so that the paramount object of the CAA is achieved. The paramount object of the CAA stated in s 1C is "to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense". The Act aims to achieve this by:

(a) enabling parties to agree about how their commercial disputes are to be resolved (subject to subsec (3) and such safeguards as are necessary in the public interest), and

(b) providing arbitration procedures that enable commercial disputes to be resolved in a cost effective manner, informally and quickly.

The CAA is substantially based on the provisions of the UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985 with amendments as adopted by that Commission in 2006).

[2-0598] Role of the court under the *Commercial Arbitration Act*

Where litigation is brought in a matter the subject of an arbitration agreement, a court must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed: s 8 CAA. In construing the terms of an arbitration agreement, the court will have regard to the context and purpose of the deeds, including the circumstances in which they were made as reflected in the text of the deeds: *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13 at [27]; [36]; [83]. In *Rinehart*, the High Court dismissed an appeal to the validity of settlement deeds containing arbitral clauses and stayed the proceedings pending arbitration. The evident object of the deeds was to maintain confidentiality and ensure no further public airing of claims brought by the appellants. It was inconceivable that a party to the deed could have thought that any challenge to it would be determined publicly in court: at [44]–[49].

Section 9 CAA provides that "it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant the measure". As this section is confined to interim measures designed to facilitate and protect the arbitration process, s 9 does not confer any jurisdiction on a court: *Ku-ring-gai Council v Ichor Constructions Pty Ltd* (2019) 99 NSWLR 260 at [57], [62].

If an arbitrator becomes in law or in fact unable to perform the arbitrator's functions or for other reasons fails to act without undue delay, the arbitrator's mandate terminates if the arbitrator withdraws from office or if the parties agree on the termination: s 14(1) CAA.

If the parties do not agree on the termination and a controversy remains concerning any of the grounds specified in s 14(1), any party may request the court to decide on the termination of the arbitrator's mandate: s 14(2). Section 14(2) is directed to a particular controversy and the decision of the court resolves that controversy. The court's decision under s 14(2) is final and not subject to an appeal: s 14(3); *Ku-ring-gai Council v Ichor Constructions Pty Ltd* at [67]–[75]; [87]; [88]. The legislature intended only a limited form of review should be available under the Act: at [71].

[2-0600] Finality of arbitrator's award

Subject to a party applying for a rehearing, the arbitrator's award is taken to be "final and conclusive" and a judgment of the referring court. Where it is made by consent of all parties it is effective on the date it is received from the arbitrator by the referring court. Otherwise, the award is final at the expiry of 28 days after it is sent to all the parties: s 40 of the CPA.

There is no relief from an award by way of appeal, new trial or judicial review, unless relief is sought on the ground of lack of jurisdiction or a denial of natural justice: s 41 of the CPA.

[2-0610] Rehearings

A person aggrieved by an award may apply by way of notice of motion for a full or limited rehearing: CPA s 42 and UCPR r 20.12(1). If application is made for a rehearing before the award takes effect, that is, within the 28-day period, the court *must* order a rehearing: s 43(1). The court *must* decline to order a rehearing if the amount claimed or the value of the property does not exceed the jurisdictional limit of the Local Court when sitting in its Small Claims Division: s 43(2). The jurisdictional limit is currently $10,000. The court may decline to order a rehearing if the applicant failed to attend the arbitration hearing without good cause: s 43(3). The court may direct that the rehearing be a full rehearing or limited rehearing as it thinks appropriate, regardless of the applicant's request: s 43(4). In the absence of a direction under s 43(4), the rehearing is to be a full rehearing: s 43(5). An order for a limited rehearing must specify the aspects which are to be the subject of the rehearing, whether by reference to specific issues in dispute, or otherwise: s 43(6). In particular, the rehearing may be limited to the issues of liability or quantum. The court may amend an order for rehearing at any time before or during a rehearing: s 43(7).

If a full rehearing is ordered, the arbitrator's award ceases to have effect and the court must hear and determine the proceedings as if they had never been referred to the arbitrator: s 44(1). If a limited rehearing is ordered, the award is suspended and the court must hear and determine the limited matters in dispute. The court may then reinstate the award with any modifications it deems appropriate: s 44(2)(c).

The practice is for the arbitrator's award and the request for the rehearing to be placed in the file in a sealed envelope. This should not be opened until judgment on the rehearing has been delivered, at which stage it will often become necessary to refer to it on the question of costs. However, a court is not required to disqualify itself from rehearing proceedings if it becomes aware of the nature or quantum of the arbitrator's award: r 20.12(4).

No reference can be made to the evidence given before the arbitrator unless the material is tendered by consent: *Courtenay v Proprietors Strata Plan No 12125* (unrep, 30/10/98, NSWCA).

[2-0620] Costs of rehearing

The court may make a costs order in respect of both the referred proceedings and the rehearing: s 46.

Under the old scheme (s 18C of the *Arbitration (Civil Actions) Act* 1983), if the applicant did not obtain a result "substantially more favourable" than that at arbitration, then the applicant would be ordered to pay the costs of other parties to the proceedings. Section 46 of the CPA does not include the "substantially more favourable" test, however, the court is entitled to promote the fact that the scheme of arbitration is intended to be a final hearing. Hence, costs may be awarded against a party who does not assist the court in furthering this scheme, for example, by not calling available evidence at arbitration for tactical reasons, but reserving the evidence for the rehearing: see *MacDougall v Curleveski* (1996) 40 NSWLR 430 and *Quach v Mustafa* (unrep, 15/6/95, NSWCA). In *Chiha v McKinnon* [2004] NSWCA 273 it was held that, where in a personal injuries case, a defendant improves its position on a rehearing (for example, in having the damages reduced) but the plaintiff is nevertheless successful in the proceedings, the plaintiff should not be ordered to pay the costs of the arbitration or rehearing as the plaintiff still has to prove his or her case in the rehearing. Orders for costs in favour of the defendants in such circumstances would unreasonably encourage defendants not to accept arbitration awards because they would have the opportunity of obtaining orders for costs from the plaintiffs, even if the plaintiffs were successful in the rehearings, and unreasonable pressure would be put on plaintiffs to make safe offers of compromise and to accept settlements.

In exercising the discretion to make an order for costs, such order "must be fair and just in all the circumstances of the case": *Howard v Telstra Corporation Ltd* [2003] NSWCA 188 per Young CJ in Eq at [14].

Legislation

- *Civil Procedure Act* 2005 Pt 4 (ss 25–34), Pt 5 (ss 35–55)
- *Civil Procedure Regulation* 2012 cl 16
- *Civil Dispute Resolution Act* 2011 (Cth)
- *Commercial Arbitration Act* 2010 (NSW), ss 14, 17J, 27D
- *Community Justice Centres Act* 1983, ss 20, 20A
- *Courts and Crimes Legislation Further Amendment Act* 2010
- *Courts and Other Legislation Further Amendment Act* 2011
- *Courts and Other Legislation Further Amendment Act* 2013

Rules

- UCPR Pt 20, Div 1 rr 20.1–20.7, Div 2, rr 20.8–20.12

Further references

- TF Bathurst, "The future of alternative dispute resolution" (2020) (Autumn) *Bar news* 50
- U Tahur, "Does mandatory ADR impact on access to justice and litigation costs?" (2019) 30 *ADJR* 31.
- D Spencer "Mandatory Mediation and Neutral Evaluation: A Reality in New South Wales" (2000) 11 *ADJR* 237
- J J Spigelman "Mediation and the Court" (2001) 39 (2) *LSJ* 63

Practice Notes

- Practice Note: Supreme Court — Mediation SC Gen 6

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Search orders

Acknowledgement: the following material was originally prepared by the Honourable Justice P Biscoe of the Land and Environment Court and updated by Judicial Commission staff.

Portions of this chapter are adapted with permission from Chapter 7 of P Biscoe, Freezing and Search Orders: Mareva and Anton Piller Orders, 2nd edn, LexisNexis Butterworths, Australia, 2008.

[2-1000] Introduction

Search orders are governed by detailed rules in UCPR Pt 25, Div 3 (rr 25.18–25.24) and Practice Note SC Gen 13 ("PN 13") available on the Supreme Court website at http://supremecourt.justice.nsw.gov.au/.

The practice note applies to the Court of Appeal and, Equity and Common Law divisions of the Supreme Court and includes example forms of ex parte orders which are complex. They should not be significantly varied without good reason.

An object of the rules, practice notes and forms is to strike a fair balance between the legitimate objects of these drastic orders and the reasonable protection of respondents and third parties.

[2-1010] Search orders

Search orders are also known as Anton Piller orders. The title "search orders" follows the title used in the English rules. The original name "Anton Piller order" derives from the seminal case of *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 Ch 55.

The object of a search order is to preserve evidence needed to prove the applicant's claim which is in danger of destruction, concealment or removal from the jurisdiction. It does so by ordering the respondent to permit the applicant's representatives and an independent supervising solicitor to enter, search, copy documents and remove property from the respondent's premises for safekeeping. A species of discovery of the most extreme kind, it lies at the limit of a court's civil jurisdiction. The heartland of the search order is copyright infringement and breach of confidence.

A search order is normally obtained ex parte without notice to the respondent and before service of the originating process, because notice or service may prompt the feared destruction or disappearance of evidence.

The execution of a search order is a serious invasion of people's privacy. While it is an important tool in ensuring that evidence is preserved so that justice may be done, such orders should only be made on an ex parte basis if the applicant discharges their duty of candour so that the court is fully appraised of all relevant matters to the exercise of its discretion in such an important decision. The need for candour is particularly acute on duty judge applications, where judges often have insufficient time to review affidavits and documentary evidence in detail: *Showcase Realty Pty Ltd v Nathan Circosta* [2021] NSWSC 355 at [36].

The characteristics of a search order are secrecy, mandatory form and virtually immediate execution. A search order does not permit forcible entry. In that crucial respect it differs from a search warrant. A search party encountering resistance to entry or search must depart: *Anton Piller KG v Manufacturing Processes Ltd* at 61. The main sanction for disobedience to a search order is contempt of court.

Concern about the draconian effect of search orders, and the fact that they are made against respondents who have not been notified or heard, have led to detailed safeguards being built into the example form of order in Practice Note 13.

Although a search order is normally ex parte and granted before service of the originating process, it has also been granted after judgment in order to obtain documents essential to the execution of

the judgment where there was a serious risk that a respondent would remove or destroy them in order to frustrate enforcement: *Distributori Automatici Italia SPA v Holford General Trading Co* [1985] 1 WLR 1066.

[2-1020] Requirements

The court may make a search order if the following requirements set out in r 25.20 are satisfied (they are modelled on those stated in *Anton Piller* per Ormiston LJ):

(a) an applicant seeking the order has a strong prima facie case on an accrued cause of action;

(b) the potential or actual loss or damage to the applicant will be serious if the search order is not made; and

(c) there is sufficient evidence in relation to a respondent that

(i) the respondent possesses important evidentiary material; and

(ii) there is a real possibility that the respondent might destroy such material or cause it to be unavailable for use in evidence in a proceeding or anticipated proceedings before the court.

In every case, the court will balance the strength of the case, the seriousness of the damage, the gravity of the risk of destruction, and the potential injury to the defendant. These are factors to be taken into account in the exercise of a discretion, rather than essential proofs: *Brags Electrics Ltd v Gregory* [2010] NSWSC 1205 at [18]. See *Global Medical Solutions Australia v Axiom Molecular* [2012] NSWSC 1262 at [11]–[24] for an example of how the court weighed these considerations in determining that the requirements of r 25.20 had been made good. The crux of the evidence required to obtain a search order often concerns the third requirement that there is a "real possibility" that the respondent might destroy the material or cause it to be unavailable for use unless an ex parte order is made. This will usually require clear evidence of matters such as dishonesty, fraud or contumacy or the transitory nature of the respondent's business, but such cases may be quite common.

[2-1030] Safeguards

Safeguards for the protection of respondents have been built into the example form attached to Practice Note 13. The most important is the appointment of one or more independent solicitors to supervise the search and report to the court. This is a mandatory requirement and the only safeguard expressly mentioned in the rules: r 25.23. Other safeguards appear in the example form and are mentioned in Practice Note 13. The responsibilities of a supervising solicitor are set out in the example form and are summarised in Practice Note 13 [11] as follows:

[2-1040] Sample orders

(a) serve the order, the notice of motion applying for the order (if applicable), the affidavits relied on in support of the application, and the originating process;

(b) offer to explain, and, if the offer is accepted, explain the terms of the search order to the respondent;

(c) explain to the respondent that he or she has the right to obtain legal advice;

(d) supervise the carrying out of the order;

(e) before removing things from the premises, make a list of them, allow the respondent a reasonable opportunity to check the correctness of the list, sign the list, and provide the parties with a copy of the list;

(f) take custody of all things removed from the premises until further order of the Court;

(g) if the independent solicitor considers it necessary to remove a computer from the premises for safekeeping or for the purpose of copying its contents electronically or printing out information in documentary form, remove the computer from the premises for that purpose, and return the computer to the premises within any time prescribed by the order together with a list of any documents that have been copied or printed out;

(h) submit a written report to the Court within the time prescribed by the order as to the execution of the order; and

(i) attend the hearing on the return day of the application, and have available to be brought to the Court all things that were removed from the premises. On the return day the independent solicitor may be required to release material in his or her custody which has been removed from the respondent's premises or to provide information to the Court, and may raise any issue before the Court as to execution of the order.

The applicant's solicitor is required to undertake to the court to pay the reasonable costs and disbursements of the independent solicitor and any independent computer expert: PN 13 example form Sch B [1].

[2-1050] Sample orders

Undertakings given to the Court by the applicant:

The applicant undertakes to submit to such order (if any) as the Court may consider to be just for the payment of compensation (to be assessed by the Court or as it may direct) to any person (whether or not a party) affected by the operation of the order.

Other safeguards for the respondent include the following:

- The respondent is not required to permit anyone to enter the premises until the independent solicitor serves the order and affidavits and the respondent is given an opportunity to read the order. If requested, the independent solicitor must explain the terms of the order: PN 13 example form [11].
- Before permitting entry to the premises by anyone other than the independent solicitor, the respondents for a time (not exceeding two hours from the time of service or such longer period as the independent solicitor may permit) may seek legal advice, may ask the court to vary or discharge the order, and (provided the respondent is not a corporation) may gather together anything which the respondent believes may tend to incriminate the respondent or make the respondent liable to a civil penalty and hand them to the independent solicitor. Similarly the respondent may gather together any documents that passed between you and your lawyers for the purpose of obtaining legal advice or for which legal professional privilege or client legal privilege is claimed and hand them to the independent solicitor: PN 13 example form [12].
- Documents for which privilege is claimed which have been handed to the instructing solicitor must be delivered to the court on the return date without having been inspected by anyone: PN 13 example form [13].

- Ordinarily a search order should be served between 9 am and 2 pm on a business day in order to permit the respondent more readily to obtain legal advice, and must not be executed at the same time as execution of a search warrant: PN 13 [13] and [14].
- Anything the subject of a dispute as to whether it is a thing the subject of the search order must promptly be handed by the respondent to the independent solicitor for safekeeping pending resolution of the dispute or further order of the court: PN 13 example form [15].
- The premises must not be searched and things removed except in the presence of the respondent or a person who appears to the independent solicitor to be the respondent's director, officer, partner, employee, agent or other person acting on the respondent's behalf or instructions: PN 13 example form [17]. This requirement may be waived by the independent solicitor if he or she considers that full compliance with it is not reasonably practicable: PN 13 example form [18].
- If it is expected that a computer will be searched, the search party must include an independent computer expert who has prescribed responsibilities: PN 13 example form [20].
- Other safeguards appear in the various undertakings by the applicant, the applicant's solicitor, the instructing solicitor and any independent computer expert which are set out in Sch B to the example form.

[2-1060] Disclosure of customers and suppliers

It has become common for search orders to require respondents to provide information and documents as to their suppliers and customers. Such a provision appears in the PN 13 example form [23]:

[2-1070] Sample orders

Provision of information

Subject to paragraph 24 below, you must:

(a) at or before the further hearing on the return day (or within such further time as the Court may allow) to the best of your ability inform the applicant in writing as to:

  (i) the location of the listed things;

  (ii) the name and address of everyone who has supplied you, or offered to supply you, with any listed thing;

  (iii) the name and address of every person to whom you have supplied, or offered to supply, any listed thing; and

  (iv) details of the dates and quantities of every such supply and offer.

(b) within [ ] working days after being served with this order, make and serve on the applicant an affidavit setting out the above information.

[2-1080] Gagging order

Except for the sole purpose of obtaining legal advice, the respondent is usually prohibited until 4.30 pm on the return date from informing anyone of the proceedings or of the contents of the

order or from telling anyone that a proceeding has been or may be brought by the applicant: PN 13 example form [25]. A similar obligation is cast on the applicant by undertaking (3) in Sch B to the example form. Such a gagging order has been rationalised on the basis that it gives the applicant an opportunity to use information obtained from the search so as to locate and preserve evidence and assets in the possession or control of others.

[2-1090] Cross-examination

As in freezing order cases, the court may grant leave to cross-examine a respondent on disclosures.

[2-1095] Setting aside a search order

An applicant seeking to set aside an ex parte order bears the onus of showing why it should be set aside: *Brags Electrics Ltd v Gregory* [2010] NSWSC 1205 at [10], [17]. It may be a sufficient reason to set aside the order that the grounds for such an order were not satisfied. Where search orders have already been executed, the court may set aside the orders ab initio if there has been bad faith or material non-disclosure. Otherwise a discharge will operate in futuro only: *Brags Electrics Ltd* at [17] per Brereton J. The court may take into account on the hearing of the application the "fruits of the order" — that is to say, any evidence or admission procured as a result of the order — and any further evidence adduced in the meantime. The test for determining whether a non-disclosure is "material" was explained by Ball J in *Principal Financial Group Pty Ltd v Vella* [2011] NSWSC 327 at [17].

See further r 36.16(2)(b) and *Showcase Realty Pty Ltd v Nathan Circosta* [2021] NSWSC 355.

[2-1100] Risks for applicants and their solicitors

Applicants or their solicitors, who do not comply with requirements imposed on them by a search order or who act scandalously on its execution, are in contempt of court, and may be liable in damages to the respondent, and run the risk that the search order may be set aside or not continued. In *Long v Specifier Publications Pty Ltd* (1998) 44 NSWLR 545 in which the New South Wales Court of Appeal dismissed an appeal from a finding of contempt of court for breaches of undertakings to the court given by a solicitor for the applicant when he obtained a search order for his client.

Another risk eventuated in *Canadian Bearings Ltd v Celanese Canada Inc* (2006) SCC 36. There privileged documents obtained pursuant to a search order came into the possession of the applicant's lawyers. The Supreme Court of Canada ordered that those lawyers no longer act for the applicant. This risk should be minimised under points 12 and 13 of the Example Form of Search Order in PN 13, which permit the respondent to give the independent solicitor any documents for which privilege is claimed in a sealed container, and require the independent solicitor not to inspect or permit anyone to inspect them, and to deliver them to the court on the return date.

[2-1110] Costs

The court has a wide discretion as to costs orders under r 25.24:

(1) The court may make any order as to costs that it considers appropriate in relation to an order made under this Division.

(2) Without limiting the generality of subrule (1), an order as to costs includes an order as to the costs of any person affected by a search order.

Practice Note

- SC Gen 13 (PN 13)

Rules

- UCPR rr 25.18–25.24

[The next page is 821]

Stay of pending proceedings

[2-2600] The power

There is a statutory power for all courts to stay, by order, any proceedings before the court, either permanently or until a specified day: CPA s 67.

The Supreme Court has inherent power to stay proceedings which are an abuse of process: *Jago v District Court of NSW* (1989) 168 CLR 23.

Certain stay proceedings may be affected by the *Trans-Tasman Proceedings Act* 2010 (Cth), as to which see "Trans-Tasman proceedings" at [5-3520]–[5-3540].

[2-2610] Forum non conveniens

An application for a stay of proceedings on the ground of forum non conveniens is ordinarily made by a defendant, with a view to requiring that the claim made by the plaintiff in the proceedings be litigated in some other jurisdiction.

[2-2620] The test for forum non conveniens

The test is whether the court is a "clearly inappropriate forum": *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *Garsec v His Majesty The Sultan of Brunei* (2008) 250 ALR 682.

English authorities, such as *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, lay down a different test, namely, in which jurisdiction the case would most suitably be tried. Those cases should be disregarded.

[2-2630] Applicable principles of forum non conveniens

The following statement of principle appears in *Voth*, above, at 554 (HCA [30]):

> First, a plaintiff who has regularly invoked the jurisdiction of a court has a prima facie right to insist upon its exercise. Secondly, the traditional power to stay proceedings which have been regularly commenced, on inappropriate forum grounds, is to be exercised in accordance with the general principle empowering a court to dismiss or stay proceedings which are oppressive, vexatious or an abuse of process and the rationale for the exercise of the power to stay is the avoidance of injustice between parties in the particular case. Thirdly, the mere fact that the balance of convenience favours another jurisdiction or that some other jurisdiction would provide a more appropriate forum does not justify the dismissal of the action or the grant of a stay. Finally, the jurisdiction to grant a stay or dismiss the action is to be exercised "with great care" or "extreme caution".

"Oppressive" in this context means seriously and unfairly burdensome, prejudicial or damaging; and "vexatious" means productive of serious or unjustified trouble and harassment: *Oceanic*, above, per Deane J at 247, approved in *Voth* at 556.

The test focuses on the advantages and disadvantages arising from a continuation of the proceedings in the selected forum rather than on a judgment concerning the comparative merits of the two legal systems: *Voth* at 558–559.

For a further statement of principle to the same effect as in *Voth*, see *Henry v Henry* (1996) 185 CLR 571 at 587 (a passage adopted and applied in *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 504):

> In *Voth*, this Court adopted for Australia the test propounded by Deane J in *Oceanic Sun*, namely, that a stay should be granted if the local court is a clearly inappropriate forum, which will be the case

> if continuation of the proceedings in that court would be oppressive, in the sense of "seriously and unfairly burdensome, prejudicial or damaging", or, vexatious, in the sense of "productive of serious and unjustified trouble and harassment" [*Oceanic Sun*, above at 247].

See also *Murakami v Wiryadi* (2010) 268 ALR 377.

[2-2640] Relevant considerations for forum non conveniens

Connecting factors

"Connecting factors" are relevant: *Spiliada*, above, per Lord Goff (dissenting) at 477–478, approved in *Voth* at 564–565. According to that passage in *Spiliada*:

- Connecting factors include factors "indicating that justice can be done in the other forum at 'substantially less inconvenience or expense'" (such as the availability of witnesses).
- They also include factors which may make the other forum "the 'natural forum', as being that with which the action (has) the most real and substantial connection", such as the law governing the relevant transaction and the places where the parties respectively reside or carry on business.

Legitimate personal or juridical advantage

A "legitimate personal or juridical advantage" to the plaintiff in having the proceedings heard in the domestic forum is a relevant consideration: *Spiliada* per Lord Goff at 482–484, a further passage approved in *Voth* at 564–565. According to that passage:

- Such advantages may include damages awarded on a higher scale than in the other forum, a more complete procedure of discovery, a power to award interest, or a more generous limitation period. But the mere fact that the plaintiff has such an advantage is not decisive.
- A stay order might be made notwithstanding that the plaintiff would be defeated by a time bar in the other jurisdiction; but, where a plaintiff has acted reasonably in commencing the proceedings in the domestic court and has not acted unreasonably in failing to commence proceedings within time in the other jurisdiction (for example, by issuing a protective writ), the plaintiff should not be deprived of the advantage of having the proceedings heard in the domestic court.
- Where a stay would otherwise be appropriate and the time limitation in the foreign jurisdiction is dependent on the defendant invoking the limitation, it can be made a condition of the stay that the defendant waive the time bar in the foreign jurisdiction.

Parallel proceedings in different jurisdictions

Parallel proceedings in different jurisdictions should be avoided if possible; it is prima facie vexatious and oppressive to commence a second action locally if an action is pending elsewhere with respect to the matter in issue; but this consideration is not necessarily determinative: *Henry v Henry*, above, at 590–591 (HCA [34]–[35]):

> Parallel proceedings in another country with respect to the same issue may be compared with multiple proceedings with respect to the same subject matter in different courts in Australia. In *Union Steamship Co of New Zealand Ltd v The Caradale* [(1937) 56 CLR 277 at 281], Dixon J observed of that latter situation that "[t]he inconvenience and embarrassment of allowing two independent actions involving the same question of liability to proceed contemporaneously in different courts needs no elaboration." From the parties' point of view, there is no less — perhaps, considerably more — inconvenience and embarrassment if the same issue is to be fought in the courts of different countries according to different regimes, very likely permitting of entirely different outcomes.
>
> It is prima facie vexatious and oppressive, in the strict sense of those terms, to commence a second or subsequent action in the courts of this country if an action is already pending with respect to the matter in issue. And although there are cases in which it has been held that it is not prima facie vexatious, in

> the strict sense of that word, to bring proceedings in different countries, the problems which arise if the identical issue or the same controversy is to be litigated in different countries which have jurisdiction with respect to the matter are such, in our view, that, prima facie, the continuation of one or the other should be seen as vexatious or oppressive within the *Voth* sense of those words. [references deleted]

Waste of costs

A waste of costs if the proceedings were stayed is a legitimate consideration: *Julia Farr Services Inc v Hayes* [2003] NSWCA 37 at [89].

Local professional standards

Where professional standards in a particular locality are in question, that is a relevant consideration: *Voth* at 570.

Law of the local forum

If the law of the local forum is applicable in determining the rights and liabilities of the parties, that is a very significant consideration against granting a stay of the local proceedings, but not a decisive factor: *Voth* at 566.

Foreign lex causae

Where the applicant for a stay seeks to rely on a foreign lex causae as providing an advantage, it is for the applicant to give proof of the foreign law and, in particular, the features of it which are said to provide the advantage: *Regie Nationale des Usines Renault SA v Zhang*, above, at [72]. Further, the applicant must establish that the lex causae is the foreign law relied upon: *Puttick v Tenon Ltd* (2008) 238 CLR 265.

The local court is not a clearly inappropriate forum merely because foreign law is to be applied as the lex causae: *Regie Nationale des Usines Renault SA v Zhang* at [81].

Agreement to refer disputes to a foreign court

An agreement to refer disputes to a foreign court exclusively does not mandate a determination that the domestic court is a clearly inappropriate forum, but substantial grounds are required for refusing a stay in such a case: *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association Ltd* (1997) 41 NSWLR 559 at 569, per Giles CJ Com Div and the authorities cited therein. Also see *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* [2010] NSWCA 196 at [83]–[92].

Further relevant considerations

The following matters were stated in *Henry v Henry*, above, at 592–593, to be relevant considerations:

- No question arises unless the courts of the respective localities have jurisdiction
- If the orders of the foreign court will not be recognised locally, the application for a stay will ordinarily fail
- If the orders of the foreign court will be recognised locally, it is relevant whether any orders made locally may need to be enforced elsewhere and, if so, the relative ease with which that can be done
- Which forum can provide more effectively for the complete resolution of the matters in issue
- The order in which the proceedings were instituted, the stage the respective proceedings have reached, and the costs that have been incurred, or
- Whether, having regard to their resources and their understanding of language, the parties are able to participate in the respective proceedings on an equal footing.

[2-2650] Conditional order

In an appropriate case, proceedings may be stayed conditionally (see above). In *Voth*, the defendant had undertaken not to invoke the time bar available in the foreign court (at 571). A stay was ordered on the condition that the respondent did not plead the bar, provided that the plaintiff commenced proceedings in the foreign court within a time specified in the order.

[2-2660] Conduct of hearing and reasons for decision

Argument should be brief and reasons for decision may ordinarily be brief. The following passage appears in *Voth* at 565 (HCA [53]):

> The qualification is that we think that, in the ordinary case, counsel should be able to furnish the primary judge with any necessary assistance by a short, written (preferably agreed) summary identification of relevant connecting factors and by oral submissions measured in minutes rather than hours. There may well be circumstances in which the primary judge may conclude that it is desirable to give detailed reasons balancing the particular weight to be given to the presence or absence of particular connecting factors and explaining why the local forum is or is not a clearly inappropriate one. Ordinarily, however, it will be unnecessary for the primary judge to do more than briefly indicate that, having examined the material in evidence and having taken account of the competing written and oral submissions, he or she is of the view that the proceedings should or should not be stayed on forum non conveniens (ie "clearly inappropriate forum") grounds.

Suggested formula for ultimate finding

I am satisfied / not satisfied that this court is a clearly inappropriate forum for the determination of these proceedings.

Suggested forms of order

I order that these proceedings be stayed permanently [*adding, if appropriate*] on the condition that …

The application that these proceedings be stayed is dismissed. (Costs as appropriate.)

[2-2670] Related topic: anti-suit injunction

For injunction to restrain the prosecution of proceedings in a foreign court, see *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

[2-2680] Abuse of process

Proceedings may be stayed permanently, as an abuse of process, where there cannot be a fair trial due to delay in commencing the proceedings: *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256.

The varied circumstances in which the use of the court's processes will amount to an abuse, notwithstanding that the use is consistent with the literal application of its rules, do not lend themselves to exhaustive statement. Either of two conditions enlivens the power to permanently stay proceedings as an abuse of process: where the use of the court's procedures occasions unjustifiable oppression to a party, or where the use serves to bring the administration of justice into disrepute: *UBS AG v Scott Francis Tyne as trustee of the Argot Trust* (2018) 92 ALJR at [1]; *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [33].

The inherent jurisdiction of the Supreme Court to stay proceedings on this ground extends to proceedings in courts and tribunals over which the Supreme Court exercises a supervisory jurisdiction: *Walton v Gardiner* (1993) 177 CLR 378; *Jago v District Court of NSW*, above.

The power to order a stay provided by s 67 of the CPA is available as a tool to resolve the problem presented by multiple proceedings, and overlaps with the inherent power to stay a proceeding to prevent abuse of its processes, which extends to staying proceedings that are frivolous, vexatious or oppressive: *Wigmans v AMP Ltd* [2021] HCA 7 at [14], [72], [112].

Proceedings may be stayed, as an abuse of process, where the predominant purpose in bringing the action is not the vindication of reputation but to provide a forum for the advancement of the plaintiff's beliefs: *Toben v Nationwide News Pty Ltd* (2016) 93 NSWLR 639, or where there is an attempt to litigate that which should have been litigated in earlier proceedings or to re-litigate a previously determined claim: *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [33] citing *Reichel v Magrath* (1889) 14 App Cas 665.

[2-2690] Other grounds on which proceedings may be stayed

- Pending the determination of proceedings in another forum: see *Sterling Pharmaceuticals Pty Ltd v Boots Company (Australia) Pty Ltd* (1992) 34 FCR 287 and *L & W Developments Pty Ltd v Della* [2003] NSWCA 140; including partial stay of proceedings where not all parties to litigation are parties to the relevant exclusive jurisdiction clause: see *Australian Health and Nutrition Assoc Ltd v Hive Marketing Group Pty Ltd* (2019) 99 NSWLR 419.
- Concurrent criminal proceedings: see [2-0280] in "Adjournment".
- Consolidation of arbitral proceedings: *Commercial Arbitration Act* 2010, ss 27C(3)(c), 33D(3).
- Agreement to mediate and/or arbitrate before action: *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13.
- Failure to pay the costs of discontinued proceedings involving substantially the same claim: r 12.4.
- Failure to pay the costs of dismissed proceedings involving substantially the same claim: r 12.10.
- Failure to answer interrogatories: r 22.5.
- Failure to comply with directions. Section 61 of the CPA provides that, in the event of non-compliance with a direction, the court may (amongst other things) dismiss or strike out the proceedings, or may make such other order as it considers appropriate, which would appear to include an order for a stay pending compliance with the direction.
- Failure to conform to timetable for medical examination: *Rowlands v State of NSW* (2009) 74 NSWLR 715.
- Significant delay between the events giving rise to the cause of action and the commencement of proceedings, which delay has resulted in relevant evidence becoming unavailable or impoverished: *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at [77], [87]; [182]; [207]; *The Council of Trinity Grammar School v Anderson* [2019] NSWCA 292 at [303]; [428].
- Where it is demonstrated on the balance of probabilities that a fair trial would not be possible in the circumstances. Such circumstances may include where the defendant's oral evidence goes to a critical aspect of liability but the defendant is unable to give evidence for example due to incapacity: *Moubarak by his tutor Coorey v Holt* at [88], [92]–[96]; [182]; [207].
- For a discussion of lack of proportionality as a ground for a permanent stay, see *Toben v Nationwide News Pty Ltd* (2016) 93 NSWLR 639; [2016] NSWCA 296 at [130]–[143].

This list is not necessarily comprehensive.

Legislation

- CPA ss 61, 67
- *Commercial Arbitration Act* 2010, s 27C(3)(c)
- *Trans-Tasman Proceedings Act* 2010 (Cth)

Rules

- UCPR rr 12.4, 12.10, 22.5

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Limitations

[2-3900] Introduction

The substantive law in relation to limitation of actions is not dealt with in this section except to the extent that the topic is the subject of the CPA and the UCPR.

For a table providing the limitation period for various causes of action under the legislation of the various States and Territories, see *Thomson Reuters*, "Table of Limitation of Actions", at https://support.thomsonreuters.com.au and at [5.10.10] in *The Laws of Australia*.

For the law relating to limitations, as at the years of publication, see P Handford, *Limitation of Actions: The Laws of Australia*, 2017, 4th edn, Thomson Reuters, Australia and G McGrath, D Price and I Davidson, *Limitation of Actions Handbook NSW*, 1998, Butterworths, Sydney.

As to the application of limitation provisions to equitable claims, see *In the Matter of Auzhair Supplies Pty Ltd (in Liq)* (2013) 272 FLR 304; [2013] NSWSC 1.

Certain limitation provisions may be affected by the *Trans-Tasman Proceedings Act* 2010 (Cth), as to which see "Trans-Tasman proceedings" at [5-3540].

[2-3910] Provisions relating to personal injury and death in the Limitation Act 1969

In relation to causes of action for personal injury or death, the *Limitation Act* 1969 provides for three categories of case:

> Category 1: where the cause of action accrued before 1 September 1990
>
> Category 2: where the cause of action accrued on or after 1 September 1990, but not including Category 3 cases
>
> Category 3: where the injury or death occurred on or after 6 December 2002, but not including cases covered by the *Motor Accidents Compensation Act* 1999.

[2-3920] Provisions applicable to all three categories

For ultimate bar of 30 years, see Pt 3, Div 1, s 51.

For suspension of limitation periods while a person is under a disability, see Pt 3, Div 2, s 52.

Category 1: Where the cause of action accrued before 1 September 1990

Part 2, Div 2, ss 14 and 19(1)(a) of the Act apply. The limitation period is six years from accrual of the cause of action.

For extension of this limitation period, see Pt 3, Div 3, Subdiv 1, ss 57–60.

Category 2: Where the cause of action accrued on or after 1 September 1990, but not including Category 3 cases

Part 2, Div 2, ss 18A and 19(1)(b) apply. The limitation period is three years from accrual of the cause of action.

For extension of this limitation period, see Pt 3, Div 3, Subdiv 2 (Secondary limitation period), ss 60A–60D. The subdivision provides for a maximum five years extension if it is just and reasonable to so order. Matters to be considered are listed in s 60E. Also see *Certain Lloyds Underwriters v Giannopoulos* [2009] NSWCA 56.

An extension cannot be granted if proceedings had not commencing within the five year secondary limitation period: *Turagadamudamu v PMP Ltd* (2009) 75 NSWLR 397.

Further as to Categories 1 and 2: Discretionary extension for latent injury etc

For a further provision for extension in relation to Category 1 and Category 2 cases, see Pt 3, Div 3, Subdiv 3, ss 60F–60H. The extension is available where the plaintiff was unaware of the fact, nature, extent or cause of the injury, disease or impairment at the relevant time. Matters to be considered are listed in s 60I.

As to the limits of permissible cross-examination at the hearing of such an application, see *Commonwealth of Australia v McLean* (1996) 41 NSWLR 389. In that case, Handley and Beazley JJA at 394–395, Santow AJA agreeing, approved the review of the authorities relating to ss 60G and 60I provided in the judgment under appeal, *McLean v Commonwealth of Australia* (unrep, 28/6/96, NSWSC), which included the following passage:

1. The matter or matters in s 60I(1)(a), as to which the applicant says he was unaware at the relevant time, need not be proved as the fact.
2. Such matters need only have been claimed in the cause, subject to the following qualification.
3. The claimed matter must not be fanciful, in the sense that there must be a serious issue to be tried.
4. The last-mentioned requirement will ordinarily be satisfied by establishing that the plaintiff is likely to be able to adduce credible evidence at the trial which, if accepted, would establish the matter in question, or that there is a reasonable prospect that he would be able to do so.
5. Cross-examination of witnesses on the motion concerning such matters and/or concerning the merits of the cause of action as a whole will ordinarily be inapposite, subject to the following qualification.
6. Cross-examination of witnesses will be permitted if cross-examination might show that the plaintiff's prospects of proving the matter or matters, as to which ignorance is alleged, and/or the cause of action as a whole are hopeless or, at least, extremely low.
7. Proof of the applicant's unawareness, at the relevant time or times, of one or more of the matters specified in s 60I(1)(a) (as distinct from the matters themselves) must be proved as a fact.
8. Ordinarily, liberal, if potentially productive, cross-examination of the applicant and any other witnesses on the issue of ignorance will be allowed.

As to the cross-examination of expert witnesses on an application of this kind, Handley and Beazley JJA said in their judgment at 395, Santow AJA agreeing:

> We also endorse the judge's interlocutory ruling disallowing cross-examination of the applicant's experts. An application for extension is not a trial, or a dress rehearsal for the trial. The court is concerned with whether there are serious questions to be tried, and once this threshold is established on the relevant issues, cross-examination or further cross-examination on those issues can serve no useful purpose. We respectfully adopt the judge's reasons on these matters. These grounds of appeal have not been established.

Category 3: Where the injury or death occurred on or after 6 December 2002, but not including cases covered by the Motor Accidents Compensation Act 1999

Part 2, Div 6, ss 50A–50F apply. The limitation period is the first to expire of "the 3 year post discoverability limitation period" and "the 12 year long-stop limitation period": s 50C. For the meaning of these terms and for provisions relating to the date on which a cause of action is discoverable, see ss 50C and 50D.

There is no provision for extension of the limitation period in Category 3 cases.

For special provisions relating to minors injured by close relatives and relating to the effect of disability on the limitation period, see ss 50E and 50F. For a detailed analysis of the provisions relating to this category, see *Baker-Morrison v State of NSW* (2009) 74 NSWLR 454 and *State of NSW v Gillett* [2012] NSWCA 83.

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
Contribution and indemnity between joint tortfeasors	2 years from date action accrues to tortfeasor, or 4 years from expiry of limitation period for principal cause of action, whichever period expires first: s 26(1) See [5.10.1920]	
PERSONAL INJURY		
Personal injury: Causes of action accruing before 1 September 1990	6 years: s 14(1)(b) (general tort limitation period) See [5.10.1050]	1 year after material facts of decisive character within P's means of knowledge: s 58(2) See [5.10.1050] In cases of latent injury, disease or impairment: Any period, if just and reasonable: Schedule 5 Pt 1 cl 4 See [5.10.1080]
Personal injury: Causes of action accruing between 1 September 1990 and 5 December 2002	3 years: s 18A See [5.10.1060]	An additional 5 years, if just and reasonable: s 60C See [5.10.1070] In cases of latent injury, disease or impairment: Any period, if just and reasonable: s 60G, See [5.10.1080]
Personal injury: Causes of action accruing on or after 6 December 2002	3 years from date of discoverability or 12 years from act or omission, whichever expires first: s 50C See [5.10.1090]	12 year period can be extended for maximum of 3 years from date of discoverability, but 3 year period cannot be extended: s 62A See [5.10.1100] There is a special provision for minors: s 62D See [5.10.2230]
Dust-related conditions	No limitation period: *Dust Diseases Tribunal Act* 1989 s 12A See [5.10.990]	
Child abuse	No limitation period where death or personal injury results from child abuse: s 6A (has retrospective effect).	
Road accidents	See [5.10.990]	
Work accidents	See [5.10.990]	

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
Wrongful death actions: Causes of action accruing before 1 September 1990	6 years from death: s 19(1) See [5.10.1340]	1 year after material facts of decisive character within deceased's means of knowledge: s 60(2) See [5.10.1340] In cases of latent injury, disease or impairment: Any period, if just and reasonable: Schedule 5 Pt 1 cl 4
Wrongful death actions: Causes of action accruing between 1 September 1990 and 5 December 2002	3 years from death: s 19(1)(b) See [5.10.1340]	5 years, if just and reasonable: s 60D(2) See [5.10.1340] In cases of latent injury, disease or impairment: Any period, if just and reasonable: s 60H(2) See [5.10.1340]
Wrongful death actions: Causes of action accruing on or after 6 December 2002	3 years from date of discoverability or 12 years from death, whichever expires first: s 50C(1) See [5.10.1340]	12 year period can be extended for maximum of 3 years from date of discoverability, but 3 year period cannot be extended: s 62A(2) See [5.10.1340]
Personal injury action surviving for benefit of estate of deceased person: Causes of action accruing before 1 September 1990	6 years: s 14(1)(b) (general tort limitation period) See [5.10.1760] and [5.10.2010]	1 year after material facts of decisive character within P's means of knowledge: s 59(2) See [5.10.2020]
Personal injury action surviving for benefit of estate of deceased person: Causes of action accruing between 1 September 1990 and 5 December 2002	3 years: s 18A(2) See [5.10.1760] and [5.10.2010]	Up to 5 years if just and reasonable: s 60C(2) See [5.10.2020]
Personal injury action surviving for benefit of estate of deceased person: Causes of action accruing on or after 6 December 2002	3 years from date of discoverability or 12 years from death, whichever expires first: s 50C See [5.10.1760] and [5.10.2010]	12 year period can be extended for maximum of 3 years from date of discoverability, but 3 year period cannot be extended: s 62A(2) See [5.10.1340]
Cause of action in tort surviving against estate of deceased person	Period same as if deceased had survived See [5.10.1760] and [5.10.2010]	
PROPERTY DAMAGE AND ECONOMIC LOSS		
Action for negligence for property damage or economic loss	6 years: s 14(1)(b) (general tort limitation period) See [5.10.830] See also [5.10.1470]	

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
Action in respect of defective building work	10 years from completion: *Environmental Planning and Assessment Act* 1979 s 6.20 See [5.10.840]	
RELATED ACTIONS		
Actions on a judgment	12 years from date judgment became enforceable: s 17(1) See [5.10.1970]	
Actions to enforce an arbitral award (where agreement to arbitrate not under seal)	6 years: s 20(2)(b) Action accrues when default in observance of award first occurs: s 20(3) See [5.10.1980] and [5.10.1910]	
Actions to enforce an arbitral award (where agreement to arbitrate made under seal)	12 years: s 20(2)(a) Action accrues when default in observance of award first occurs: s 20(3) See [5.10.1980] and [5.10.1910]	
Actions to enforce a recognizance	6 years: s 14(1)(c) See [5.10.1990]	
Actions to recover a penalty or forfeiture or other sum recoverable by virtue of an enactment	2 years: s 18(1) See [5.10.2000]	
Actions to recover sum recoverable by virtue of an enactment (other than penalty or forfeiture or sum by way of penalty or forfeiture)	6 years: s 14(1)(d) See [5.10.2000]	
Actions to recover arrears of income	6 years: s 24(1) See [5.10.2040]	
LAND		
Action to recover land	12 years: s 27(2) See [5.10.1470]	
Action to recover land by holder of future interest to recover land	12 years: s 27(2) Action accrues when P becomes entitled to immediate possession, if no person in possession under interest claimed: s 31 See [5.10.1580]	
Action by tenant entail	Entailed interests abolished See [5.10.1630]	
Actions by the Crown to recover land	30 years: s 27(1) See [5.10.1620]	

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
Action to recover land brought by person other than Crown where right first accrued to Crown	At any time before expiration of Crown limitation period, or 12 years from date when right of action accrued to person other than Crown, whichever period first expires: s 27(4) See [5.10.1620]	
Action to recover arrears of rent, or damages in respect of arrears	6 years: s 24(1) See [5.10.1660]	
MORTGAGES		
Action by mortgagor to redeem (land and personalty)	12 years from date mortgagee last went into possession, or last received payment of principal or interest: s 41 See [5.10.1680]	
Action by mortgagee to recover possession (land and personalty)	12 years: s 42(1)(b) See [5.10.1690]	
Action by mortgagee to foreclose (land and personalty)	12 years: s 42(1)(c) See [5.10.1700]	
Action by mortgagee to recover principal money (land and personalty)	12 years: s 42(1)(a) See [5.10.1710]	
Action by mortgagee to recover interest	6 years from accrual (or date prior mortgagee discontinues possession) or when limitation period for action to recover principal expires, whichever period first expires: s 43(1) See [5.10.1720]	
TRUSTS		
Actions by a beneficiary against a trustee to recover trust property, or for breach of trust	6 years: s 48(a) See [5.10.1730]	
Actions in respect of fraud or fraudulent breach of trust, and actions to recover trust property converted by a trustee	12 years from date of discoverability, or expiration of any other applicable limitation period under *Limitation Act*, whichever is later: s 47(1) See [5.10.1740]	
DECEASED ESTATES		
Actions claiming the personal estate of the deceased, under will or on intestacy	6 years: s 48 (breach of trust limitation period) See [5.10.1760]	

CAUSE OF ACTION	LIMITATION PERIOD	EXTENSION PROVISION
Actions to recover arrears of interest in respect of legacy, or damages in respect of arrears	6 years: s 24(1) See [5.10.1760]	
ADMIRALTY ACTIONS		
Maritime claims generally	Limitation period that would have been applicable if proceeding brought otherwise than under *Admiralty Act* 1988 (Cth), or 3 years from when cause of action arose: *Admiralty Act* 1988 (Cth) s 37(1) See [5.10.1880]	May be extended where court otherwise has no power to extend limitation period in respect of maritime claim, but has power to extend limitation period in respect of claim of same kind: *Admiralty Act* 1988 (Cth) s 37(3) See [5.10.1890]
Actions to enforce claim or lien against ship or shipowner in respect of damage to another ship, its cargo or freight, any property on board, or loss of life or personal injury suffered by anyone on board	2 years from date of damage: s 22(2), (3) See [5.10.1880]	Can be extended to such extent as court thinks fit: s 22(4) See [5.10.1890]
Actions to enforce claim or lien in respect of salvage services	2 years from date services rendered: s 22(3), (4) See [5.10.1890]	Can be extended to such extent as court thinks fit: s 22(3), (4) See [5.10.1890]
MISCELLANEOUS		
Arbitrations	After expiration of limitation period fixed by *Limitation Act* for cause of action in respect of same matter: s 70(2) See [5.10.1910]	In stated circumstances, court can order that time between commencement of arbitration and making of order should not count in reckoning of limitation period: s 73 [5.10.1910]
Actions to recover tax	12 months after tax paid: *Recovery of Imposts Act* 1963 s 2(1)(b) See [5.10.2040]	
ULTIMATE BAR		
Ultimate bar	30 years from date limitation period runs (in all cases except wrongful death or personal injury where the court has extended the limitation period): s 51(1) See [5.10.2150]	

Legislation

- *Admiralty Act* 1988 (Cth) s 37
- *Choice of Law (Limitation Periods) Act* 1993 s 6
- *Dust Diseases Tribunal Act* 1989 s 12A

- *Environmental Planning and Assessment Act* 1979 s 6.20
- *Limitation Act* 1969 (NSW) ss 14, 14A, 14B, 15, 16, 17, 18, 18A, 19, 20, 21, 22, 24, 26, 27, 41, 42, 43, 47, 48, 50A–50F, 51, 52, 57–60, 60A–60D, 60E, 60F–60H, 60G, 60I, 63, 68A, 70, 73
- *Motor Accidents Compensation Act* 1999 s 109(1), (3), (5)
- *Motor Accident Injuries Act* 2017 s 6.32(1)–(5)
- *Recovery of Imposts Act* 1963 s 2(1)(b)
- *Trans-Tasman Proceedings Act* 2010 (Cth)
- *Workers Compensation Act* 1987 s 151D(2), (3)

Rules

- UCPR r 14.14(2), (3)

Further References

- G McGrath, D Price and I Davidson, *Limitation of Actions Handbook NSW*, 1998, Butterworths, Sydney
- P Handford, *Limitation of Actions: The Laws of Australia*, 2017, 4th edn, Thomson Reuters, Australia

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Parties to proceedings and representation

[2-5400] Application

Part 7 of the UCPR applies to all courts except that Div 2, dealing with representative actions, and Div 6, dealing with relators, does not apply to the Small Claims Division of the Local Court.

Part 10 of the CPA concerning representative proceedings in the Supreme Court commenced operation on 4 March 2011.

[2-5410] By whom proceedings may be commenced and carried on

A natural person may commence and carry on proceedings in any court, either by a solicitor acting on his or her behalf or in person: r 7.1. Where proceedings are commenced by a natural person on behalf of another person pursuant to a power of attorney, the court may order that the proceedings be carried on, on behalf of that other person, by a solicitor: r 7.1(1A). A solicitor on the record must hold an unrestricted practising certificate: r 7.1(6).

As to a litigant in person see "Unrepresented litigants and lay advisers" at [1-0800].

A company within the meaning of the *Corporations Act* 2001 (Cth) may commence and carry on proceedings in any court by a solicitor or by a director of the company and may commence and, unless the court orders otherwise, carry on proceedings in a Local Court by a duly authorised officer or employee of the company: r 7.2.

Rule 7.2 is qualified by the provision in r 7.3 that, in the case of the Supreme Court, commencement by a director is only authorised if the director is also a plaintiff in the proceedings.

A corporation, other than a company within the meaning of the *Corporations Act* 2001 (Cth), may commence and carry on proceedings in any court by a solicitor. In any court, other than a Local Court, by a duly authorised officer of the corporation; and may commence and, unless the court orders otherwise, carry on proceedings in a Local Court by a duly authorised officer or employee of the corporation: r 7.1(4).

See r 7.1(5) as to provisions applicable in the Local Court permitting specified proceedings to be commenced, and unless the court otherwise orders, carried on by specified persons.

[2-5420] Affidavit as to authority to commence and carry on proceedings in the Supreme Court or District Court

A person who commences or carries on proceedings in the Supreme Court or District Court as the director of a company within the meaning of the *Corporations Act* 2001 (Cth) or as the authorised officer of a corporation not being such a company, must file with the originating process, notice of appearance or defence, an affidavit of his or her authority to act in that capacity, together with a copy of the instrument evidencing that authority: r 7.2(1).

The requirements of the respective affidavits are set out in r 7.2(1) and (3). A significant feature of those requirements is that the director or officer acknowledge that he or she may be liable to pay some or all of the costs of the proceedings: r 7.2(2)(iv), (3)(iv).

[2-5430] Issue of subpoena

A subpoena may not be issued, except by leave of the court, unless the party at whose request the subpoena is issued is represented by a solicitor in the proceedings: r 7.3(1). Leave may be given generally or in relation to a particular subpoena or subpoenas: r 7.3(2). A subpoena may not be issued in relation to proceedings in the Small Claims Division of the Local Court except by the leave of the court: r 7.3(3).

[2-5500] Representative proceedings in the Supreme Court

General

Following amendments to the CPA in 2011, a new regime which echoed the provisions of Pt IVA of the *Federal Court of Australia Act* 1976 (Cth) was enacted. (See Supreme Court Practice Note, No SC Gen 17, concerning representative proceedings which was issued on 27 July 2017, commencing 31 July 2017). Part 58 of the UCPR was inserted to make provision for opt out notice requirements together with Form 115, which may be downloaded from the Supreme Court website.

Part 10 permits the commencement of proceedings by a representative party and does not provide for the appointment of a representative party for defendants or respondents. However, the Supreme Court has jurisdiction to make such representative orders: *Ahmed v Choudbury* [2012] NSWSC 1452 and *Burwood Council v Ralan Burwood Pty Ltd (No 2)* [2014] NSWCA 179.

Case management of representative proceedings

The representative proceedings are case managed by a Judge or Associate Justice of the Division in which they are commenced. (See [2-0000] ff as to case management.) The management of representative proceedings is discussed in *Merck Sharp and Dohme (Aust) Pty Ltd v Peterson* [2009] FCAFC 26 at [4]-[10] and *Bright v Femcare Ltd* (2002) 195 ALR 574 at [160].

Finklestein J, in *Bright v Femcare*, above, observed at [160]:

> By giving appropriate directions the court can ensure that the parties get on with the litigation and do not become bogged down in what are often academic or sterile arguments about pleadings, particulars, practices and procedures … it is not unknown for respondents in class actions to do whatever is necessary to avoid a trial, usually by causing the applicants to incur prohibitive costs. The court should be astute to ensure that such tactics are not successful.

See also *Giles v Commonwealth of Australia* [2014] NSWSC 83 and *Wigmans v AMP Ltd* [2021] HCA 7 at [116].

Commencement of representative proceedings

Proceedings can be commenced in the Supreme Court by seven or more people who have claims against the same person or persons. The claims must arise out of the same, similar or related circumstances and the claims must give rise to a substantial common question or law or fact: s 157(1). The person who commences the proceedings, known as the representative party, must have standing to commence representative proceedings on behalf of other persons. It is sufficient if the representative party has standing to commence proceedings on his or her own behalf: s 158(1).

A person may commence proceedings against more than one defendant. This can occur irrespective of whether or not the group have a claim against every defendant in the proceedings: s 158(2). This provision overcomes a contrary view expressed in *Philip Morris (Australia) Ltd v Nixon* [2000] 170 ALR 487, in relation to Pt IVA.

Consent of a person to be a group member is not required unless he or she is a Minister or an officer of the Commonwealth, a State or a Territory. An incorporated company or association does not require to give consent, however, consent is required if the proposed group member is the Commonwealth, a State, Territory or a body corporate established for a public purpose by a Commonwealth, State or Territory law: s 159.

The originating process must describe or otherwise identify the group members, specify the nature of the claims and the relief claimed, and the question of law or facts common to the claims. It is not necessary to name or specify the number of the group members: s 161.

It is not inappropriate for representative proceedings to be brought on behalf of a limited group of identified individuals: s 166(2). As to the framing of group definitions, see *Petrusevski v Bulldogs Rugby League Ltd* [2003] FCA 61, per Sackville J at [19]-[23].

Specification of common questions is important. The court may make orders for a hearing of common questions; these are referred to as *Merck* orders after *Merck Sharp and Dohme (Aust) Pty*

Ltd v Peterson [2009] FCAFC 26. These common questions provide the backbone of the proceedings and "careful compliance" is "of the greatest importance", per Lindgren J in *Bright v Femcare Ltd* (2002) 195 ALR 574 at [14]. See also *Merck Sharp and Dohme (Aust) Pty Ltd v Peterson* [2009] FCAFC 26, at [6]; *Dillon v RBS Group (Australia) Pty Ltd* [2017] FCA 896 at [66] and *Richmond Valley Council v JLT Risk Solutions Pty Ltd* [2021] NSWSC 383.

Group members are given the option to opt out of representative proceedings in the Court: s 162. Part 58 of the UCPR provides that the opt out notice must be filed and served on the representative party in the approved form (see Form 115). The form specifies that the potential group member understands that he or she forgoes the right to share in any relief obtained by the representative party in the representative proceedings and will not be entitled to receive any further notification about the conduct or disposition of the proceedings, and, to the extent he or she has a claim against the defendant/s, any limitation period suspended by the commencement of the representative proceedings has recommenced to run.

Within 14 days after the opt out date, that is the date fixed by the court before which a group member may opt out, the representative party must provide to the other parties a list of the persons who have opted out: UCPR r 58.2(2).

If, at any stage of the proceedings, it appears likely to the court that there are fewer than seven group members, the court may, on such conditions as it thinks fit, order that the proceedings continue under Pt 10 or order that they no longer do so: s 164.

The court may, on application by the defendant or of its own motion, order that proceedings no longer continue under Pt 10 if it is satisfied that it is in the interests of justice to do so upon one or more of the grounds set out in the section: s 166(1). As to the ground of "inappropriateness", see *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 244 ALR 600: s 166(2).

If the court orders proceedings not to continue under Pt 10, they may continue as proceedings by a representative party on its own behalf. The court may order that a group member be joined as an applicant in those proceedings: s 167(1).

Where it appears to the court that determination of the question or questions common to all group members will not finally determine the claims of a group member, the court may give direction in relation to the determination of the remaining questions: s 168(1). A sub-group may be established and a sub-group representative party appointed: s 168(2). The court may permit an individual group member to appear in the proceedings for the purpose of determining a question that relates only to that member's claims: s 169(1).

Representative proceedings may not be settled or discontinued without leave of the court: s 173(1). The court may make orders as to the distribution of settlement moneys: s 173(2). As to settlement offers to group members, see *Courtney v Medtel Pty Ltd* [2002] FCA 957, per Sackville J at [64]. For a detailed discussion concerning the fairness and reasonableness of an overall settlement sum, see *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche (No 2)* (2006) 236 ALR 322, at [42]–[64].

With the leave of the court, a representative party may settle their own claim at any stage of the representative proceedings: s 174(1). They may, with leave, withdraw as a representative party: s 174(2). By order, another group can be established: s 174(3). Before granting leave to withdraw as a representative party, the court must be satisfied that notice has been given to group members, that the notice was given in sufficient time for them to apply for another person to be substituted, and that any application for substitution has been determined: s 174(4).

Parallel representative proceedings in relation to the same controversy

There is no provision in Pt 10, CPA that expressly or impliedly prevents the filing of a second representative proceeding against a defendant in relation to a controversy. Where seven or more persons have claims against the same person, and the conditions in s 157(1)(b) and (c) are met, s 157

permits "one or more" of those persons to commence proceedings representing some or all of them. Provisions in Pt 10, such as ss 171 and 162, do not detract from the Supreme Court's power under s 67 to stay competing representative proceedings or impose any limitations: *Wigmans v AMP Ltd* [2021] HCA 7 at [78].

The Supreme Court's power to grant a stay under s 67 CPA of competing representative proceedings is not confined by a rule or presumption that the proceeding filed first in time is to be preferred. There is no "one size fits all" approach. In matters involving competing open class representative proceedings with several firms of solicitors and different funding models, where the interests of the defendant are not differentially affected, it is necessary for the court to determine which proceeding going ahead would be in the best interests of group members. The factors that might be relevant cannot be exhaustively listed and will vary from case to case: *Wigmans v AMP Ltd* [2021] HCA 7 at [52].

Notices

Part 10, Div 3 concerns notices. Section 175 provides for notices that must be given in representative proceedings. Generally, the court has a wide power to order that notice of any matter be given to the group or individual members: s 175(5). The court must be clear who is to give the notice and the way in which the notice is to be given: s 176(2). Any conditions and compliance periods must also be clearly specified in the order. Pursuant to s 175(6), notices must be given as soon as practicable after the happening of the event to which it relates.

Specifically, notices must be given for the following:

- commencement of the proceedings and the right of group members to opt out
- dismissal of the proceedings for want of prosecution
- withdrawal of a representative party.

The court has the power to dispense with compliance if the relief sought in the proceedings does not include any claim for damages (s 175(2)) or it may order that the notice includes a direction to a party to provide information relevant to the giving of the notice and relating to the costs of giving notice: s 176(3).

The court may also order that notice be given in the media, for example by means of press advertisement, radio or television broadcast: s 176(4). This may be particularly useful if the court is "not confident all the group members were known by name, and so could be notified by letter": *McMullin v ICI Australia Operations Pty Ltd (No 6)* (1998) 156 ALR 257 at 260, per Wilcox J. The court may not order that notice be given personally to each group member unless it is satisfied that it is reasonably practical and not unduly expensive, to do so: s 176(5).

Powers of the Court

In determining a matter in representative proceedings, pursuant to s 177(1), the court has the power to:

- determine a question of law
- determine a question of fact
- make a declaration of liability
- grant any equitable relief
- make an award of damages for group members, sub-group members or individual group members being specified amounts or amounts worked out in such a manner as the court specifies
- make an award of an aggregate amount of damages.

In making an award of damages, the court must make provision for the payment or distribution of the money to the group members entitled: s 177(2).

The court may provide for the constitution and administration of a fund: s 178. The court may give directions as it thinks just in relation to the manner in which a member's entitlement to damages is established and how to determine any disputes concerning that member's entitlement: s 177(4).

If a group member does not make a claim within the set timeframe, the court may allow his or her claim, taking into account such factors as whether it is just to do so or if the fund has not already been fully distributed: s 178(4). The defendant may apply to the court for an order to receive any money remaining in the fund: s 178(5).

The court may, of its own motion or on application by a party or a group member, make any order that the court thinks appropriate or necessary to ensure that justice is done in the proceedings: s 183. However, s 183 is not a plenary power "at large" and is not a power conferred on the Supreme Court simply to make such orders "as the court thinks fit" or which are "in the interests of justice" or which will promote or facilitate settlement: *Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia* [2020] NSWCA 66 at [4]. Section 183 (and the identical s 33ZF of the *Federal Court of Australia Act* 1976) cannot be given a more expansive construction and a wider scope of operation than the other provisions of the scheme. To do so would be to use ss 183 and 33ZF as a vehicle for rewriting the scheme of the legislation: *BMW Australia Ltd v Brewster* [2019] HCA 45 at [70].

A majority of the High Court in *BMW Australia Ltd v Brewster* held that s 183, properly construed, does not empower a court to make a common fund order. Sections 183 and 33ZF empower the making of orders as to how an action should proceed in order to do justice; they are not concerned with the radically different question as to whether an action can proceed at all: at [3]. It is one thing for a court to make an order to ensure that the proceeding is brought fairly and effectively to a just outcome; it is another thing for a court to make an order in favour of a third party with a view to encouraging it to support the pursuit of the proceeding, especially where the merits of the claims in the proceeding are to be decided by that court: at [47], [49].

In related litigation in *Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia*, a five-judge bench of the Court of Appeal held that an order for "class closure" which in effect destroyed a person's cause of action within the limitation period, without a hearing and with no guarantee that the person would necessarily know of the outcome or consequence of their failure to register, was not an order that was "necessary to ensure that justice is done in the proceedings" or "appropriate … to ensure that justice is done in the proceedings": at [12] The court held that he scheme of Pt 10 of the CPA is inconsistent with an interpretation of s 183 which empowered the Supreme Court to make an order effecting "class closure". In so finding, the Court of Appeal analysed and followed the construction of Pt 10 of the *Civil Liability Act* preferred by the majority of the High Court in *BMW Australia Ltd v Brewster*: at [99]. See also *Wigmans v AMP* (2020) 102 NSWLR 199.

If the court makes an award of damages, the representative party may apply for reimbursement of the representative party's costs: s 184. The court must be satisfied that the costs, reasonably incurred in relation to the representative proceedings, are likely to exceed the costs recoverable from the defendant. In this case, the court may order that an amount equal to the whole or a part of the excess be paid to that person out of the damages awarded. The court may also make any other order that it thinks just.

Pursuant to s 179, a judgment given in representative proceedings must describe or otherwise identify the group members who will be affected by it and bind them, other than those who have chosen to opt out of the proceedings.

Appeals

Under Pt 10, Div 5, appeals can be brought before the Court of Appeal by the group or sub-group's representative in respect of the judgment to the extent that it relates to questions common to the group or sub-group's claims: s 180(1). The parties to an appeal which relates only to the claim of any

individual group member are that group member and the defendant: s 180(2). If the representative party does not bring an appeal within the time provided for instituting appeals, another group member may bring an appeal within 21 days: s 180(3). The court may direct to whom and how a notice of appeal should be given: s 180(4). The notice instituting an appeal must describe or identify the members of the group or sub-group but not necessarily the number or the names of those members: s 180(5).

[2-5530] Representation in cases concerning administration of estates, trust property or statutory interpretation

Where a person or class of persons is, or may be interested in, or affected by proceedings, the court may appoint one or more of those persons to represent any one or more of them, provided that those proceedings concern the administration of a deceased person's estate, property subject to a trust or the construction of an Act, instrument or other document: r 7.6(1).

A person cannot be so appointed unless the court is satisfied that the person or a class, or a member of a class cannot, or cannot readily, be ascertained or, if ascertained, cannot be found or, if ascertained and found, it is expedient for the purpose of saving expense for a representative to be appointed to represent any one or more of them: r 7.6(2).

A person may be treated as having an interest or liability for the purpose of this rule even if it is a contingent or future interest or liability or if the person is an unborn child: r 7.6(3).

A judgment or order made in proceedings in which an appointment has been made under r 7.6, binds the persons or members of the class represented as if they had been a party: r 7.7.

The court may give the conduct of the whole or any part of any proceedings to such persons as it sees fit: r 7.8 and see *Ritchie's* at [7.8.5].

[2-5540] Judgments and orders bind beneficiaries

It is not necessary, in proceedings against a trustee, executor or administrator, to join as a party any of the persons having a beneficial interest under the trust or in the estate concerned: r 7.9(1), (2).

Any judgment or order is as binding on the beneficiary as it is on the trustee, executor or administrator: r 7.9(3).

However, if the court is satisfied that the representative, trustee, executor or administrator did not in fact represent a beneficiary, the court may order that the judgment or order not bind that beneficiary: r 7.9(4).

This rule does not limit the power of the court to order that a party be joined under r 6.24: r 7.9(5).

[2-5550] Interests of deceased persons

Where it appears to the court that a deceased person's estate is not represented in proceedings or that the executors or administrators of the estate have an interest that is adverse to the interests of the estate, it may order that the proceedings continue in the absence of a representative of the estate or appoint a representative for the purpose of the proceedings but only with the consent of the person to be appointed: r 7.10(1), (2). For an example of the appointment of such a representative, see *RL v NSW Trustee and Guardian (No 2)* [2012] NSWCA 78.

A judgment or order then binds the deceased person's estate to the same extent as the estate would have been bound had a personal representative of the deceased been a party: r 7.10(3).

Before making an order under the rule the court may order that notice of the application be given to such persons having an interest in the estate as it sees fit: r 7.10(4).

Sample orders

I order that the plaintiff X be appointed to represent the estate of the plaintiff Y, deceased for the purposes of this suit.

For further examples and appropriate title amendment, see *Re Hart; Smith v Clarke* [1963] NSWR 627 at 631.

[2-5560] Order to continue

An examples of a situation where the court orders the proceedings to continue is where another party has the same interest or the relevant interest is small: *Porters v Cessnock City Council* [2005] NSWSC 1275. See also *Borough of Drummoyne v Hogarth* (1906) 23 WN (NSW) 243.

[2-5570] Executors, administrators and trustees

In proceedings relating to an estate, all executors or administrators must be parties unless one or more of them has represented the other pursuant to r 7.4 : r 7.11(1).

In proceedings relating to a trust, all the trustees must be parties: r 7.11(2).

In proceedings commenced by executors, administrators or trustees, any executor, administrator or trustee who does not consent to being joined as a plaintiff must be made a defendant: r 7.11(3).

[2-5580] Beneficiaries and claimants

In proceedings relating to an estate, all persons having a beneficial interest in a claim against the estate need not be parties, but the plaintiff may make parties of such of these persons as he or she thinks fit: r 7.12(1).

In proceedings relating to a trust, all persons having a beneficial interest under the trust need not be parties, but the plaintiff may make parties of such of those persons as he or she thinks fit: r 7.12(2).

Rule 7.12 has effect despite r 6.20. See "Joinder of causes of actions and parties" at [2-3400].

[2-5590] Joinder and costs

As to the appropriateness of joining beneficiaries and claimants and costs, see *Ritchie's* at [7.12.5]–[7.12.10], *Thomson Reuters* at [r 7.12.40].

[2-5600] Persons under legal incapacity

See "Persons under legal incapacity" at [2-4600].

[2-5610] Business names

Rules 7.19 and 7.20 provide that persons are to sue and be sued in their own name and not under any business name, except where the proceedings are in respect of anything done or omitted to be done in the course of, or in relation to, a business carried on under an unregistered name. In such a course the proceedings may be commenced against the defendant under the unregistered business name.

The unregistered name is taken to be a sufficient description of the person sued (r 7.20(2)) and any judgment or order in the proceedings may be enforced against the person carrying on the unregistered business: r 7.20(3).

[2-5620] Defendant's duty

If sued under a business name, a defendant must not enter an appearance or file a defence otherwise than under his or her own name: r 7.21(1). With the appearance or defence the defendant must file a statement of the names and residential addresses of all persons who were carrying on the business when the proceedings were commenced: r 7.21(2). Unless this is done, the court may order that the appearance or defence be struck out: r 7.21(3).

[2-5630] Plaintiff's duty

Where the defendant is sued under a business name, the plaintiff must take such steps as are reasonably practical to ascertain the name and residential address of the defendant and to amend such documents as will enable the proceedings to be continued against the defendant in his or her own name: r 7.22(1).

The plaintiff may not, except with the leave of the court, take any step in the proceedings other than the filing and serving of originating process and steps to ascertain the name and residential address of the defendant until the documents have been amended as above: r 7.22(2).

[2-5640] Relators

As to relator proceedings, see *Ritchie's* at [7.23.5]–[7.23.15] and *Thomson Reuters* at [r 7.23.40].

A relator must act by a solicitor: r 7.23(1). A solicitor may not act for a relator unless he is authorised to do so by the relator (r 7.23(2)(b)), and a copy of the instrument authorising the solicitor to so act has been filed: r 7.23(2)(b).

The consent of the Attorney General is needed for the commencement of relator proceedings, for they are brought in his or her name. However, if an action is commenced without the Attorney General as plaintiff, an amendment may be made with the permission of the Attorney General: *Farley and Lewers Ltd v The Attorney-General* [1963] NSWR 1624 at 1631.

[2-5650] Appointment and removal of solicitors

Subject to the content or subject matter otherwise indicating, every act or thing which, by or under the CPA or the UCPR or otherwise by law, is required or allowed to be done by a party, may be done by his or her solicitor: r 7.24.

As to the conduct of proceedings without retaining a solicitor, see "Unrepresented litigants and lay advisers" at [1-0800] and *Ritchie's* at [7.1.5], [7.24.5].

As to challenging the retainer of a solicitor see *Doulaveras v Daher* [2009] NSWCA 58 at [76]–[161].

[2-5660] Adverse parties

A solicitor or a partner of a solicitor who is a party to any proceedings, or acts as a solicitor for a party to any proceedings, may not act for any other party in the proceedings, not in the same interest, except by leave of the court.

Leave is commonly granted for a solicitor to appear for defendants in different interests in will-contention cases, unless there is likely to be an evidentiary dispute. Usually separate counsel are briefed for each interest.

[2-5670] Change of solicitor or agent

A party may change solicitors (r 7.26(1)) and a solicitor may change agents: r 7.26(2). The party or solicitor must file notice of the change: r 7.26(3). A copy of the notice filed must be served on all other active parties and, if practicable, on the former solicitor or agent: r 7.26(4).

An "active party" is defined in the dictionary to the UCPR as:

> a party who has an address for service in the proceedings, other than:
>
> (a) a party against whom judgment has been entered in the proceedings, or
>
> (b) a party in respect of whom the proceedings have been dismissed, withdrawn or discontinued,
>
> being, in either case, a party against whom no further claim in the proceedings subsists.

[2-5680] Removal of solicitor

A party who terminates the authority of a solicitor to act must file notice of the termination and serve a copy on all other parties and, if practicable, on the former solicitor: r 7.27(1), (2). The filing of the notice and its service may be effected by the former solicitor: r 7.27(3). Rule 7.27 does not apply to a change of solicitor referred to in r 7.26.

[2-5690] Appointment of solicitor by unrepresented party

A party who acts for himself may afterwards appoint a solicitor to act in the proceedings on the party's behalf: r 7.28(1). Notice of the appointment must be filed and served: r 7.28(2).

[2-5700] Withdrawal of solicitor

A solicitor who ceases to act may file the notice of change and serve the notice on the parties: r 7.29(1).

Except by leave of the court, a solicitor may not file or serve notice of the change unless he or she has filed and served on the client a notice of intention to file and serve the notice of change:

(a) in the case of proceedings for which a date for trial has been fixed, at least 28 days before doing so, or

(b) in any other case, at least seven days before doing so: r 7.29(2).

Unless the notice of change is filed with the leave of the court, the solicitor must include in the notice a statement of the date on which service of the notice of intention was effected: r 7.27(3).

Leave may be effected by post to the former client at the residential or business address last known to the solicitor: r 7.27(4).

As to a solicitor ceasing to act, see *Ritchie's* at [7.29.5] and *Thomson Reuters* at [r 7.29.40].

As to suggested form of notices, see *Thomson Reuters* at [r 7.29.60].

[2-5710] Effect of change

A notice of change of solicitor which is required or permitted to be given does not take effect as regards the court until the notice is filed (r 7.30(a)) and, as regards any person on whom it is required or permitted to be served, until a copy of the notice is served on that person: r 7.22(b).

Thus, service upon a solicitor who is still upon the record, but who is no longer retained, is good service: *Turpin v Simper* (1898) 15 WN (NSW) 117c.

[2-5720] Actions by a solicitor corporation

In the case of a solicitor corporation, any act, matter or thing authorised or required to be done which, in the circumstances of the case, can only be done by a natural person may be done by a solicitor who is a director, officer or employee of the corporation: r 7.31.

Legislation

- *Civil Procedure Act* 2005 Pt 10, Sch 6
- *Corporations Act* 2001 (Cth)
- *Federal Court of Australia Act* 1976 (Cth) Pt IVA

Rules

- UCPR Pt 7, Div 2, 6, rr 6.20, 6.24, 7.1-7.3, 7.6-7.12, 7.19–7.24, 7.26–7.31, Pt 58

Practice Note

- Supreme Court, General List: Practice Note SC Gen 17

[The next page is 1951]

Security for costs

Acknowledgement: the following material was originally prepared by Her Honour Judge J Gibson of the District Court and updated by Judicial Commission staff.

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[2-5900] The general rule

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. However, as the NSW Law Reform Commission, *Security for costs and associated costs orders*, Report 137, 2012 notes at [1.5] and [2.4]–[2.6], the court has a wide discretion both at common law and pursuant to the *Civil Procedure Act* 2005 and UCPR. That discretion means that an order need not be made merely because grounds can be established: *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2012] NSWSC 1026 at [85]–[86]. "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. 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).

This general rule is not, however, absolute: *Melville v Craig Nowlan & Associates Pty Ltd* (2001) 54 NSWLR 82 at 108; *Morris v Hanley* [2000] NSWSC 957 at [11]–[21]. The exercise of the power to order security for costs is a balancing process, requiring the doing of justice between the parties. The court must have a concern to achieve a balance between ensuring that adequate and fair protection is provided to the defendant, and avoiding injustice to an impecunious plaintiff by unnecessarily shutting it out or prejudicing it in the conduct of the proceedings: *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744 at [47].

Rule 42.21 provides direction in achieving that balance by adding a non-exhaustive list of matters to which the court may have regard: r 42.21(1A). Further, provisions enable a court to order security where there are grounds for believing that a plaintiff has divested assets with the intention of avoiding the consequences of the proceedings (r 42.21(1)(e)) or changed their place of residence without reasonable notification of the change: r 7.3A. In addition, r 42.21(1B) provides that if the plaintiff is a natural person, an order for security for costs cannot be made "merely" on account of impecuniosity. See further at [2-5930] and [2-5940].

[2-5910] The power to order security for costs

The sources of the court's power to order a party to provide security or pay money into court are "many and varied": *JKB Holdings Pty Ltd v de la Vega* [2013] NSWSC 501 at [11] per Lindsay J, listing (at [11]–[13]) not only the Supreme Court's inherent and statutory powers, but examples where money may be paid into court where no order for security for costs has been made: see also *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 at [34].

The Supreme Court has inherent jurisdiction to make orders for security for costs (*Bhagat v Murphy* [2000] NSWSC 892), but the District Court and Local Court do not: *Philips Electronics Australia Pty Ltd v Matthews* (2002) 54 NSWLR 598 at [50]–[53]. While it has been held that the District Court has an implied power under *District Court Act* 1973 s 156 to order security for costs (*Phillips Electronics Australia Pty Ltd v Matthews*, above, at [45]), the provisions of the *Civil Procedure Act* 2005 and UCPR render this unnecessary. Additionally, where an order for security for costs is sought against a corporate plaintiff, *Corporations Act* 2001 (Cth) s 1335 gives power.

[2-5920] Exercising the discretion to order security

The power to order security for costs is discretionary and the order will not be automatic: *Idoport Pty Ltd v National Australia Bank Ltd*, above, at [20], [56]–[57] and [60]–[62]. The discretion is to be exercised judicially, and not "arbitrarily, capriciously or so as to frustrate the legislative intent":

Oshlack v Richmond River Council, above, at [22]. Exercise of the power requires consideration of the particular facts of the case: *Merribee Pastoral Industries v Australia and New Zealand Banking Group Ltd* (1998) 193 CLR 502. Although r 42.21(1A) now provides a list of factors, these are not exhaustive; the factors that may be taken into account are unrestricted, provided they are relevant: *Morris v Hanley*, above; *Southern Cross Exploration NL v Fire and All Risks Insurance Co Ltd* (1985) 1 NSWLR 114. The weight to be given to any circumstance depends upon its own intrinsic persuasiveness and its impact on other circumstances which have to be weighed: *Acohs Pty Ltd v Ucorp Pty Ltd* (2006) 236 ALR 143 at [12].

[2-5930] General principles relevant to the exercise of the discretion

The relevant factors have been summarised and discussed in *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, most recently by the NSW Court of Appeal in *Wollongong City Council v Legal Business Centre Pty Ltd* [2012] NSWCA 245 at [26]–[35]. The NSW Law Reform Commission, *Security for costs and associated costs orders*, Report 137, 2012 led to amendment to the rules: Uniform Civil Procedure Rules (Amendment No 61) 2013 (NSW).

These factors are set out below, in headings which mirror the provisions of rr 42.21(1A) and (1B):

(a) The prospects of success or merits of the proceedings: r 42.21(1A)(a)

A consideration of the plaintiff's prospects of success is an important element of balancing justice between the parties. However, care needs to be exercised when assessing the proportionate strength of the cases of the parties at an early stage of proceedings: *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 at [39].

As a general rule, where a claim is prima facie regular on its face and discloses a cause of action, then, in the absence of evidence to the contrary, the court should proceed on the basis that the claim is bona fide and has reasonable prospects of success: *KP Cable Investments Pty Ltd v Meltglow Pty Ltd*, above, at 197; *Staff Development & Training Centre Pty Ltd v Commonwealth of Australia* [2005] FCA 1643 at [12]–[13].

(b) The genuineness of the proceedings: r 42.21(1A)(b)

Whether the claim is bona fide or a sham is a relevant consideration, and the court will take into account the motivation of a plaintiff in bringing the proceedings: *Bhagat v Murphy*, above, at [20]–[21]. Examples include an unsatisfactory pleading, or a vexatious claim (*Bhagat* at [26]), particularly where the plaintiff is self-represented with "abundant time" to pursue incessant and numerous applications: *Lall v 53–55 Hall Street Pty Ltd* [1978] 1 NSWLR 310 at 313–314.

(c) The impecuniosity of the plaintiff: r 42.21(1A)(c)

The court must first consider the threshold question of whether there is credible testimony to establish that the plaintiff will be unable to pay the defendant's costs if the defendant is ultimately successful: *Idoport Pty Ltd v National Australia Bank Ltd* at [2], [35] and [60]. However, once the defendant has led credible evidence of impecuniosity, an evidentiary onus falls on the plaintiff to satisfy the court that, taking into account all relevant factors, the court's discretion should be exercised by either refusing to order security or by ordering security in a lesser amount than that sought by the defendant: *Idoport Pty Ltd v National Australia Bank Ltd* at [62] and [65]. In other words, proof of the unsatisfactory financial position of the plaintiff "triggers" the court's discretion: *Fiduciary Ltd v Morningstar Research Pty Ltd*, above, at [35]–[36]; *Thalanga Copper Mines Pty Ltd v Brandrill Ltd* [2004] NSWSC 349 at [12]–[13]; *Acohs Pty Ltd v Ucorp Pty Ltd*, above, at [10]; *Ballard v Brookfield Australia Investments Ltd* [2012] NSWCA 434 at [29]–[41].

While "mere impecuniosity" does not justify an order for security for costs in itself, impecuniosity when combined with other factors led to an order for security for costs in *Levy v*

Bablis [2011] NSWCA 411 at [9], although payment was adjusted to be made in two tranches (at [11], [13] ff). Particular note should be taken of UCPR r 42.21(1B). Where the plaintiff is a natural person, an order cannot be made because of mere impecuniosity.

(d) Whether the plaintiff's impecuniosity is attributable to the defendant: r 42.21(1A)(d)

Where the plaintiff's lack of funds has been caused or contributed to by the defendant, the court will take this consideration into account. This has been described as the "causation" factor: *Fiduciary Ltd v Morningstar Research Pty Ltd* at [85]–[101]. It is a relevant consideration that an order would effectively shut a party out of relief in circumstances where that party's impecuniosity is itself a matter which the litigation may help to cure: *Merribee Pastoral Industries v Australia and New Zealand Banking Group Ltd*, above, at [26.4(g)]. However, a plaintiff cannot rely on the poverty rule where he or she has so organised their affairs so as to shelter assets: *Rajski v Computer Manufacture & Design Pty Ltd* [1982] 2 NSWLR 443 at 452. See also UCPR r 42.21(1)(f).

In *Dae Boong International Co Pty Ltd v Gray* [2009] NSWCA 11 at [34] the court noted that, in determining the causation factor, it is not inappropriate to have regard to the apparent strength of the case.

(e) Whether the plaintiff is effectively in the position of a defendant: r 42.21(1A)(e)

It is appropriate to examine whether the impecunious plaintiff is, in reality, the defender in the proceedings, and not the attacker: *Amalgamated Mining Services Pty Ltd v Warman International Ltd* (1988) 88 ALR 63 at 67–8.Where a plaintiff has been obliged to commence proceedings, and is effectively in the position of a defendant, security may not be ordered: *Hyland v Burbidge* (unrep, 23/10/92, NSWSC). Each case will turn on its facts. In *Hyland v Burbidge*, 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.

(f) The "stultification" factor: r 42.21(1A)(f)

Where the effect of an order for security would be to stifle the plaintiff's claim, this is an important consideration to be weighed, particularly in light of the poverty rule: *Fiduciary Ltd v Morningstar Research Pty Ltd* at [72]; *Staff Development & Training Centre Pty Ltd v Commonwealth of Australia*, above, at [39]. It may also be appropriate to look behind the actual litigant to examine the means of others who stand to benefit from the litigation: *Acohs Pty Ltd v Ucorp Pty Ltd* at [49]; *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 5)* [2006] FCA 1672 at [38.8]. In *Pioneer Park Pty Ltd (In Liq) v ANZ Banking Group Ltd* [2007] NSWCA 344 at [56], Basten J noted that it might be seen as oppressive to allow a large corporate defendant to obtain an order for security for costs likely to stifle the litigation, in circumstances where the claim had potential merit and the security sought, although a relatively insignificant amount, was beyond the capacity of the corporate plaintiff to pay. However, in *Odyssey Financial Management Pty Ltd v QBE Insurance (Australia) Ltd* [2012] NSWCA 113, McColl JA held that to demonstrate that there was such oppression, it would be necessary for those who stood behind the corporate plaintiff to demonstrate that they were also without the means to provide an order for security in the relatively modest amount sought by the corporate defendant: at [17].

(g) Whether the proceedings involve a matter of public importance: r 42.21(1A)(g)

If the proceedings raise matters of general public importance, this may be a factor relevant to the discretion. This may be the case where the area of law involved requires clarification for the

benefit of a wider group than the particular plaintiff: *Merribee Pastoral Industries v Australia and New Zealand Banking Group Ltd* at [31]; *Soh v Commonwealth of Australia* (2006) 231 ALR 425 at [26].

(h) Whether there has been an admission or a payment into court: r 42.21(1A)(h)

The circumstances in which parties may pay money into court are outlined in *JKB Holdings Pty Ltd v de la Vega*, above, at [11]–[13]. Where there has been an existing order made, and a further order sought, this may be a factor to take into account: *Welzel v Francis (No 3)* [2011] NSWSC 858.

(i) Whether delay by the plaintiff in commencing the proceedings has prejudiced the defendant: r 42.21(1A)(i)

In addition to bringing the application for security promptly, the conduct of the litigation may be taken into account, including delay in the commencement of the proceedings, where there is evidence that the defendant is prejudiced by that delay.

(j) The costs of the proceedings: r 42.21(1A)(j)

The party seeking the order generally tenders evidence of costs estimates for preparation for hearing and hearing costs and, if overseas enforcement is required, information about the likely costs and difficulties. In *Western Export Services Inc v Jireh International Pty Limited* [2008] NSWSC 601 at [82] Jagot AJ took into account that the defendant would incur "substantial legal costs" in defending the proceedings.

(k) Proportionality of the security sought to the importance and complexity of the issues: r 42.21(1A)(k)

The court may have regard to the proportionality of the costs to the activity or undertaking the subject of the claim. An example would be where the amount sought is so minuscule as to impose an undue hardship on an already vulnerable plaintiff, see *Shackles & Daru Fish Supplies Pty Ltd v Broken Hill Proprietary Co Ltd* [1996] 2 VR 427 at 432. The court may also take into account the relative disparity of resources of the parties (*P M Sulcs v Daihatsu Australia Pty Ltd (No 2)* [2000] NSWSC 826 at [82]) and the modesty of the sum sought in comparison to the importance of the issue: *Maritime Services Board of NSW v Citizens Airport Environment Association Inc* (1992) 83 LGERA 107.

(l) The timing of the application for security: r 42.21(1A)(l)

Applications for security should be brought promptly. Delay by a defendant is a relevant factor in the exercise of the discretion: *Idoport Pty Ltd v National Australia Bank Ltd*, above, at [68]. A corporate plaintiff is expected to know its position "at the outset", before it embarks to any real extent on its litigation: *Buckley v Bennell Design & Constructions Pty Ltd* (1974) 1 ACLR 301 at 309.

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).

(m) Whether an order for costs is enforceable in Australia: r 42.21(1A)(m)

The Law Reform Commission report, above, identifies the problem of recoverable costs in terms of overseas enforcement. This provision should be read in conjunction with r 42.21(1A)(n).

(n) Ease and convenience (or otherwise) of overseas enforcement: r 42.21(1A)(n)

A defendant is not expected to bear the uncertainty of enforcement in a foreign country: *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]. It has been stated that this principle is not absolute and must be weighed against other discretionary considerations: *Corby v Channel Seven Sydney Pty Ltd* [2008] NSWSC 245. However, the difficulty in enforcing an order for costs overseas against a non-resident plaintiff will usually be sufficient to ground an order: *Shackles & Daru Fish Supplies Pty Ltd v Broken Hill Proprietary Co Ltd* [1996] 2 VR 427, especially where there is no reciprocal right of enforcement in the relevant foreign jurisdiction or legislation which may make recovery difficult: *Dense Medium Separation Powders Pty Ltd v Gondwana Chemicals Pty Ltd (in liq)* [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); Sch 2 to the *Foreign Judgments Regulations* 1992 (Cth).

The residence of an appellant outside Australia is a powerful factor in favour of ordering security, even where enforcement may not be an issue. Security for costs was ordered where the appellant resided in Papua New Guinea in *Batterham v Makeig (No 2)* [2009] NSWCA 314 at [8] (see [2-5940] below) and in *Mothership Music v Flo Rida (aka Tramar Dillard)* [2012] NSWCA 344, where the appellant resided in the United States.

The non-exhaustive nature of the list

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 Corp* [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.

Security may be ordered in any cause of action. Although it has been suggested that security for costs will not be ordered against a plaintiff in personal injury or similar tortious proceedings (*De Groot (an infant by his tutor Van Oosten) v 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.

[2-5935] The impoverished or nominal plaintiff: r 42.21(1B)

UCPR r 42.21(1B) provides that if the plaintiff is a natural person, an order for security for costs cannot be made "merely" on account of his or her impecuniosity. Prior to this rule coming into force, security against a person was ordered where a plaintiff brings repeated applications *Mohareb v Jankulovski* [2013] NSWSC 850 (security of $5,000 ordered), and where the claim was hopelessly framed: *Nanitsos v Pantzouris* [2013] NSWSC 862 (security of $5,000 ordered). In both cases the plaintiffs were litigants in person.

The court will also take into account, in balancing the interests of a defendant, that the plaintiff is suing for the benefit of other persons who are immune from the burden of an adverse costs order: *Idoport Pty Ltd v National Australia Bank Ltd*, above, at [31] ff. This factor has received increased attention in modern litigation with the advent of commercial litigation funding and insurance. The relevant principles are discussed more fully below in "Nominal plaintiffs" at [2-5950]. Representative plaintiffs are to be distinguished from nominal plaintiffs who have no personal interest and merely act in a representative capacity (such as executors, and trustees).

[2-5940] Issues specific to the grounds in r 42.21(1)

Additional factors are set out in r 42.21(1):

(a) The plaintiff is ordinarily resident outside Australia: r 42.21(1)(a)

The question of what the term "ordinarily resident" means is discussed in *Corby v Channel Seven Sydney Pty Ltd* [2008] NSWSC 245.

UCPR r 42.21(1)(a) was amended to replace "New South Wales" with "Australia" by Uniform Civil Procedure Rules (Amendment No 61) 2013. This provision is designed to be read in conjunction with r 42.21(1A)(m) and (n), as to which see [2-5930], above.

(b) Misstatement of address: r 42.21(1)(b)

It was previously the case that the defendant must prove a plaintiff has failed to state an address, or has misstated an address, with the intention to deceive, or has changed address with a view to avoiding the consequences of an adverse costs order: *Knight v Ponsonby* [1925] 1 KB 545 at 522. The requirement for compliance with this rule will lighten the evidentiary burden.

(c) Change of address after proceedings are commenced: r 42.21(1)(c)

This is a rarely used provision. In *Ghiassi v Ghiassi* (unrep, 19/12/2007, NSWSC), Levine J rejected an application made after the plaintiff left to travel overseas, on the basis that it was unsupported by evidence. In *Kealy v SHDS Services Pty Ltd as Trustee of the SHDS Unit Trust* [2011] NSWSC 709 the defendant complained that the plaintiff returned to Ireland without notice, although he later disclosed his new address in an affidavit of documents. Johnson J considered that the basis of the application was essentially that the plaintiff resided outside the jurisdiction, and made an order for security for costs in the sum of $40,000.

(d) The plaintiff is a corporation: r 42.21(1)(d)

It is not sufficient to prove simply that the plaintiff is a corporation. There must be some credible testimony that the corporation is likely to be unable to pay the defendant's costs, if unsuccessful. The test for the application of r 42.21(1)(d) is substantially similar to that for s 1335 of the *Corporations Act* 2001 (Cth) (*Fitzpatrick v Waterstreet* (1995) 18 ACSR 694), and this topic is therefore considered together with the section below on "Corporations" at [2-5960].

(e) The plaintiff is suing for the benefit of some other person: r 42.21(1)(e)

See *Riot Nominees Pty Ltd v Suzuki Australian Pty Ltd* (1981) 34 ALR 653. This ground overlaps the inherent jurisdiction and is discussed more fully below in the section on "Nominal plaintiffs". The discretion is more likely to be exercised where the nominal plaintiff has insufficient assets within the jurisdiction: *Bellgrove v Marine & General Insurance Services Pty Ltd* (1996) 5 Tas R 409. See [2-5950] below, "Nominal plaintiffs".

(f) There is reason to believe the plaintiff has divested assets to avoid the consequences of the proceedings: r 42.21(1)(f)

This new provision was added on 9 August 2013. Applications have been brought on such a basis in other jurisdictions in Australia, as summarised in *Vizovitis v Ryan t/as Ryans Barristers & Solicitors* [2012] ACTSC 155 at [49]–[54] (the application in those proceedings failed due to lack of evidence). In *Evans v Cleveland Investment Global Pty Ltd* [2013] NSWCA 230, Leeming JA made an order for security for costs of $15,000 where the respondent alleged that a series of withdrawals contrary to Mareva orders.

[2-5950] Nominal plaintiffs

A nominal plaintiff is "nothing but a puppet for some third party, a mere shadow, in the sense that he has parted with any right he may have had in the subject matter": *Andrews v Caltex Oil (Aust) Pty Ltd* (1982) 40 ALR 305 at 309.

The poverty rule must be qualified in circumstances where the claim is put forward on behalf of others: *Grizonic v Suttor* [2006] NSWSC 1359 at [20]. See also *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 at [79].

The real plaintiff is not allowed to seek to enforce a right through a nominal plaintiff who is a person of straw: *Sykes v Sykes* (1869) LR 4 CP 645 at 648; *Riot Nominees Pty Ltd v Suzuki Australian Pty Ltd*, above.

The involvement of third-party funders with no pre-existing interest in the proceedings, who are in some instances resident out of Australia but who stand to benefit substantially from any recovery from the proceedings is a material consideration: *Idoport Pty Ltd v National Australia Bank Ltd* at [107]; *Chartspike Pty Ltd v Chahoud* [2001] NSWSC 585. It is fair for the courts to proceed on a basis which reflects the proposition that those who seek to benefit from litigation should bear the risks and burdens that the process entails: *Fiduciary Ltd v Morningstar Research Pty Ltd* at [83]; *Chartspike Pty Ltd v Chahoud*, above, at [5]. This topic is discussed in the Law Reform Commission report, above, 3.3–3.40.

[2-5960] Corporations

The power to order security for costs against corporations is derived from UCPR r 42.21(1)(d) (and r 51.50 in the case of appeals) and from s 1335 of the *Corporations Act* 2001 (Cth). The Supreme Court also has inherent jurisdiction in order to regulate the court's procedures and processes and to prevent abuse of process: *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148 at [33]–[35].

Corporations are in a different category from natural person plaintiffs: *Pacific Acceptance Corp Ltd v Forsyth (No 2)* [1967] 2 NSWR 402 at 407; *Fiduciary Ltd v Morningstar Research Pty Ltd* at [53]; *Idoport Pty Ltd v National Australia Bank Ltd* at [53]–[59]; *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189; *Whyked Pty Ltd v Yahoo Australia and New Zealand Ltd* [2006] NSWSC 1236 at [25].

A corporation which seeks to rely on the stultification factor must also demonstrate that those standing behind it, likely to benefit from the litigation (such as shareholders and creditors) are also without means to satisfy an adverse costs order: *Re Staway Pty Ltd (in liq)(rec and mgrs appted)* [2013] NSWSC 819 at [57]–[60] (application for security deferred due to merits of corporation's claim). It is not for the party seeking security to raise such issues: *Thalanga Copper Mines Pty Ltd v Brandrill Ltd*, above, at [12]–[18]; *Acohs Pty Ltd v Ucorp Pty Ltd* at [42] ff. The same is the case where there is a third party funder: *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd*, above, at [51].

Undertakings or offers to pay the surety by directors or other persons may be accepted: *Harpur v Ariadne Australia Ltd (No 2)* [1984] 2 Qd R 523 at 532 (company principal agreeing to meet costs); *Project 28 Pty Ltd (Formerly Narui Gold Coast Pty Ltd) v Barr* [2005] NSWCA 240 (shareholders agreeing to meet costs liability); *Jazabas Pty Ltd v Haddad* (2007) 65 ACSR 276 (security ordered as shareholders were not prepared to provide formal undertaking to meet costs).

Where a liquidator conducts the litigation on behalf of the company in liquidation, the court should not treat an application for security at large, but should have regard to guidelines as set out in *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* at [45].

[2-5965] Ordering security in appeals

The differences in principle between security for costs at trial level and on appeal have been noted and explained in *Tait v Bindal People* [2002] FCA 332 at [3]; *Preston v Harbour Pacific Underwriting Management Pty Ltd* [2007] NSWCA 247 at [18] and *Ballard v Brookfield Australia Investments Ltd* [2012] NSWCA 434 at [13]–[28]. While security for costs is more likely to be

awarded because the issues have been the subject of findings by a primary judge, security for costs was refused where an impecunious appellant had reasonable prospects of success on appeal: *Neale v Archer Mortlock & Woolley Pty Ltd* [2013] NSWCA 209. See also *Murray John Carter v Ian Mehmet t/as ATF Ian G Mehmet Testamentary Trust* [2021] NSWCA 32, where special circumstances justified the order for security for costs (security of $40,000). These included that the appellants had resolved to pursue an appeal which was more likely to fail than not (at [41]). Because of the appellants' impecuniosity, in the absence of any provision of security, the respondents faced the reality of incurring substantial further legal costs with no realistic prospect of recovering them if the appeal was unsuccessful. The security for costs procedure is intended to ensure that the beneficiary of a security for costs order is not left out of pocket in the event of success on appeal: *Evans v Cleveland Investment Global Pty Ltd* [2013] NSWCA 230 (security of $15,000 ordered); *Swift v McLeary* [2013] NSWCA 173 (security of $40,000 ordered where unexplained dissipation of assets was alleged).

In *Porter v Gordian Runoff Ltd* [2004] NSWCA 69 at [41], Hodgson JA considered a factor in favour of an order for security to be that the appellant's legal advisors were owed substantial amounts of money giving them a "large stake" in the success of the appeal. The relevance of that factor is that lawyers with such an interest may reasonably be expected to provide some financial support for the prosecution of the appeal. See also *Porter v Gordian Runoff Ltd* [2004] NSWCA 171 at [32] (application to discharge the order dismissed) and *Murray John Carter v Ian Mehmet t/as ATF Ian G Mehmet Testamentary Trust*, above, at [34]. In the latter case, in the unlikely event that the appeal succeeded, the appellants stood to recover their costs incurred at first instance and the beneficiaries of their doing so were their lawyers and others whose fees at first instance remain unpaid.

The court's role includes a re-exercise of the discretion to award security for costs: *Wollongong City Council v Legal Business Centre Pty Ltd* [2012] NSWCA 245 at [53]; *Wollongong City Council v Legal Business Centre Pty Ltd (No 2)* [2012] NSWCA 366.

In *Batterham v Makeig (No 2)* [2009] NSWCA 314, Macfarlan JA was of the view that the reference to "plaintiff" in r 42.21(1)(a) encompasses an appellant, even if the appellant was not a plaintiff in the court below: at [6]. In that case, the first appellant's residence outside Australia, his manifested preparedness to place what hurdles he could in the path of enforcement by the respondent of the judgment, and the limited financial resources available to the first appellant combined to require security to be ordered: at [10].

[2-5970] Amount and nature of security to be provided

The order should not provide a complete indemnity for costs: *Brundza v Robbie & Co (No 2)* (1952) 88 CLR 171 at 175. Fixing the amount to be provided by way of security is part of the exercise of the court's discretion: *Fiduciary Ltd v Morningstar Research Pty Ltd* at [132]. The court will therefore require evidence by which it might estimate the defendant's probable recoverable costs: see, for example, the evidence adduced in such cases as *Fiduciary Ltd v Morningstar Research Pty Ltd*; *Idoport Pty Ltd v National Australia Bank Ltd*; and *Gujarat NRE Australia Pty Ltd v Williams* [2006] NSWSC 1131; *Western Export Services Inc v Jireh International Pty Limited* [2008] NSWSC 601.

Evidence generally consists of an affidavit from a solicitor or costs assessor as to the amount of costs, although the court may accept a general estimate from a costs assessor or senior solicitor. Factual matters, such as proof of the plaintiff's residence overseas, or a corporation's financial circumstances, may be the subject of affidavit or tender.

The court may initially only order security for the costs of preparing the matter for hearing and make further orders at a later date, or order the sum to be paid in tranches (*KDL Building v Mount* [2006] NSWSC 474 at [36]; *Porter v Aalders Auctioneers and Valuers Pty Ltd* [2011] NSWDC 96 at [29]–[30]), or make such other order as may be appropriate to ensure that the party paying the security has adequate opportunity to do so. The security may take such form as the court considers will provide adequate protection to the defendant. In lieu of the more traditional payment into court,

guarantees, charges or the provision of a bank bond: *Estates Property Investment Corp Ltd v Pooley* (1975) 3 ACLR 256. Other examples of how security may be provided are set out in the NSW Law Reform Commission, *Security for costs and associated costs orders*, Report 137, 2012, at [1.6]. The basic principle is that so long as the defendant can be adequately protected, the security should be given in the way that is least disadvantageous to the giver: G Dal Pont, *Law of Costs*, 4th edn, LexisNexis Butterworths, Sydney, 2018 at [29.96].

[2-5980] Practical considerations when applying for security

1. **Timing of an application**
   It is important to foreshadow any application in correspondence*: Crypta Fuels Pty Ltd v Svelte Corp Pty Ltd* (1995) 19 ACSR 68 at 71. The court will exercise care when assessing the proportionate strength of the cases of the parties at the early stages of proceedings: *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 at [39].

2. **Multiple parties**
   Difficulties arise where there are two or more plaintiffs, including one or more individuals and one or more corporations, or where one or more of the plaintiffs resides overseas; or where the prospects of success vary as amongst the co-plaintiffs: *Fiduciary Ltd v Morningstar Research Pty Ltd*, above, at [54] ff. Similarly, when only one of several defendants applies for security: *Gujarat NRE Australia Pty Ltd v Williams* [2006] NSWSC 992.

3. **Ordering security against a defendant**
   An order for security will not ordinarily be made against parties defending themselves and thus forced to litigate: *Weily's Quarries v Devine Shipping Pty Ltd* (1994) 14 ACSR 186 at 189. Where, however, the defendant is in fact pursuing a claim as, in substance, the claiming party, the position is reversed: *Classic Ceramic Importers Pty Ltd v Ceramica Antiga SA* (1994) 12 ACLC 334; *Motakov Ltd v Commercial Hardware Suppliers Pty Ltd* (1952) 70 WN (NSW) 64. Where a corporation, which is a defendant, brings a cross-claim, an application for security for costs in relation to the cross-claim may be made.

[2-5990] Dismissal of proceedings for failure to provide security

The court has power to dismiss proceedings where the plaintiff fails to comply with an order to give security: 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. UCPR r 50.8 has been amended to enable a court to which Pt 50 applies to dismiss an appeal or cross-appeal for failure to provide security for costs. UCPR r 51.50 has similarly been amended to enable the NSW Court of Appeal to dismiss appeals or cross-appeals for failure to comply with security for costs orders.

A party unable to provide security within the time frame ordered may seek an extension: *Wollongong City Council v Legal Business Centre Pty Ltd (No 2)* [2012] NSWCA 366 (application for extension dismissed).

An order for security for costs should not be used as an alternative way of striking out an appeal. Nor should it be used to push an appellant towards discontinuing an appeal. Rather, it is a process available to secure, in advance, the costs of a respondent to an appeal where the circumstances justify reversing the sequence which usually applies: namely that costs orders are made, if at all, after a proceeding has been heard and determined: *Nyoni v Shire of Kellerberrinin (No 9)* [2016] FCA 472.

[2-5995] Extensions of security for costs applications

Applications for further security may be brought at any time: *Welzel v Francis* [2011] NSWSC 477; *Welzel v Francis (No 2)* [2011] NSWSC 648; *Welzel v Francis (No 3)* [2011] NSWSC 858.

Applications to vary or extinguish the terms may be made during the proceedings before the primary court or on appeal: *Nicholls v Michael Wilson & Partners (No 2)* [2013] NSWCA 141 (application for release of security).

[2-6000] Sample orders

Although judgments may refer to payment of money into court under these provisions, parties generally prefer to provide security by way of a bank bond or a deposit of funds, placed in an interest bearing account in the joint names of solicitors on either side of proceedings: *JKB Holdings v de la Vega* [2013] NSWSC 501 at [12].

The following sample orders contemplate payment into court, but may be varied to suit the parties' convenience:

1. The plaintiff is to provide security for the defendant's costs by paying into court the sum of $35,000 or by otherwise providing security for that amount in a manner satisfactory to the defendant. Until that security is provided, there will be a stay of the proceedings. The security is to be provided before 23 June 2007, on which date the matter is to be listed before the court for consequential orders, or, in the event that the security has not been provided, an order for the dismissal of the proceedings under r 42.21(3).
2. All orders currently in place for the case management of the proceedings are presently stayed until the motion seeking security for costs is determined.
3. The first defendant is to provide security on or before 22 June 2007, for the costs of the first defendant and the second defendant up to the end of the first day of the trial, in the amount of $150 000, by way of unconditional bank guarantee, or otherwise to the satisfaction of those defendants.
4. The parties have liberty to apply for additional security for costs at any stage of the proceedings.

Legislation

- *Corporations Act* 2001 (Cth), s 1335
- *Foreign Judgments Act* 1991 (Cth)
- *Foreign Judgments Regulations* 1992 (Cth)

Rules

- UCPR Pt 7 r 7.3A, Pt 42, r 42.21, Pt 50, Pt 51 r 51.50

Further references

- G Dal Pont, *Law of Costs*, 4th edn, LexisNexis Butterworths, Sydney, 2018
- NSW Law Reform Commission, *Security for costs and associated costs orders*, Report 137, 2012, <www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/r137.pdf>, accessed 15 August 2013
- P Blazey and P Gillies, "Recognition and Enforcement of Foreign Judgments in China", *International Journal of Private Law*, Macquarie University, 2008, (cited in *Chen v Keddie* [2009] NSWSC 762 at [18]).

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Summary disposal and strike out applications

[2-6900] Summary disposal

The courts have power to terminate proceedings at an early stage where either the plaintiff or defendant has no prospect of success, without putting the other party to the expense and delay of a full trial of the proceedings or the preliminary steps involved in preparing for such a trial such as discovery, interrogatories and inspection of property.

These powers, which apply in all courts except the Small Claims Division of the Local Court, may be summarised as follows:

- the power to enter judgment for a plaintiff pursuant to UCPR r 13.1,
- the power to summarily dismiss proceedings pursuant to r 13.4,
- the power to dismiss proceedings for non-appearance of the plaintiff at the hearing pursuant to r 13.6,
- the power to strike out pleadings pursuant to r 14.28,
- the court's inherent power to prevent abuse of its process.

See generally *Brimson v Rocla Concrete Pipes Ltd* [1982] 2 NSWLR 937 at 940–944.

Remedy discretionary

Summary judgment and summary dismissal are discretionary remedies and although detailed argument may be necessary to determine the hopelessness of the respondent's case, the more complex and arguable the legal point, or the more dependent it may be on debatable factual premises, the less likely that summary disposal will be appropriate, particularly if the relevant law is in a state of development: *NRMA Insurance Ltd v AW Edwards Pty Ltd* (1995) 11 BCL 200. Where there are multiple parties, the desirability of proceedings against all parties being heard before removing one party may constitute a reason for refusing summary judgment: *NRMA Insurance Ltd v AW Edwards Pty Ltd*, above.

As to applications for summary judgment in cases where a defendant seeks to rely on the *Contracts Review Act* 1980, see *Ritchie's* at [13.1.40].

Generally

Although its use is appropriate in a variety of circumstances provided they come within the principles set out above, the procedure of summary judgment or dismissal is particularly useful in cases where irrelevant and extravagant claims are made in pleadings by a party (often unrepresented), and the other party will be put to considerable expense in providing evidence to refute such irrelevant and extravagant allegations. On the other hand, where there can be no dispute on the facts, there is often little point in an application for summary disposal and the preferable course is to proceed expeditiously to a final hearing.

Further proceedings

If a party against whom summary judgment is given has made a cross-claim against the party obtaining the judgment, the court may stay enforcement of the judgment until determination of the cross-claim: r 13.2.

If on an application for summary judgment, the proceedings are not wholly disposed of by the judgment, the proceedings may be continued as regards any claim or part of a claim not disposed of by the judgment: r 13.3.

[2-6910] Summary judgment for plaintiff

Rule 13.1 provides that, if on application by the plaintiff in relation to the plaintiff's claim for relief or any part of the plaintiff's claim for relief:

(a) there is evidence of the facts on which the claim or part of the claim is based, and

(b) there is evidence, given by the plaintiff or by some responsible person, that, in the belief of the person giving the evidence, the defendant has no defence to the claim or part of the claim, or no defence except as to the amount of any damages claimed,

the court may give such judgment for the plaintiff, or make such order on the claim or that part of the claim, as the case requires.

In order to succeed on such an application, the plaintiff must adduce evidence (on affidavit):

- to establish the facts justifying the claim to relief, and
- from the plaintiff or some responsible person that in his or her belief, the defendant has no defence to the claim or part thereof, or except as to the amount of damages, and
- if the claim for summary judgment is disputed, to show that there is no real issue to be tried.

The rules of the various courts formerly provided that applications for summary judgment were not available in respect of claims for fraud, defamation, malicious prosecution or false imprisonment. No such restriction exists under the UCPR.

Where the plaintiff's entitlement to judgment is clearly established, but the amount of damages or the value of the goods the subject of the proceedings remains to be determined, the court may give judgment for damages to be assessed: r 13.1(2).

When entering judgment for the plaintiff under r 13.1, it is desirable to deal not only with the costs of the motion for summary judgment, but also with the costs of the proceedings so far.

No issue to be tried

The plaintiff must show that any defence intended to be relied on is untenable and cannot possibly succeed. See generally *Spellson v George* (1992) 26 NSWLR 666 at 678–679 per Young AJA, with whom Handley JA and Hope AJA agreed. Summary judgment will not be granted where there is any serious conflict as to a matter of fact (*Sidebottom v Cureton* (1937) 54 WN (NSW) 88), or any question of credit involved: *Bank of New South Wales v Murray* [1963] NSWR 515. The power to order summary judgment should be exercised with great care, and not unless it is clear that there is no real question to be tried: *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 99.

In practice, the test applied to summary judgment applications by plaintiffs is the same as that applied to summary dismissal applications by defendants. That test is 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". The test has been variously expressed, including "so obviously untenable that it cannot possibly succeed", "manifestly groundless", etc: *General Steel Industries Inc v Commissioner for Railways (NSW)* (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 Sue Bidwell & Associates Pty Ltd* [2005] NSWCA 81 at [37]–[38].

Summary disposal is not limited to cases where argument is unnecessary to show the futility of the claim or defence, and argument, even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff (or of the defendant) is so clearly untenable that it cannot possibly succeed: *General Steel Industries v Commissioner for Railways (NSW)*, above, at 130. The court will determine questions of law on such applications if satisfied that the point is clear: *Silverton*

Ltd v Harvey [1975] 1 NSWLR 659 at 665. It follows that the court examines the evidence, not for the purpose of making findings of fact, but only to determine whether a triable issue is disclosed: *Wickstead v Browne* (1992) 30 NSWLR 1 at 9.

Belief that no defence

The requirement in r 13.1(1)(b) for evidence from the plaintiff or some responsible person of belief that the defendant has no defence, does not require any particular form of words. The requisite belief must be established, but that can be done by an inference properly drawn from evidence furnished by the plaintiff or other responsible person; opinion, as opposed to belief, is insufficient: *Cosmos E-C Commerce Pty Ltd v Bidwell & Associates Pty Ltd*, above, at [47].

[2-6920] Summary dismissal

Rule 13.4(1) provides that, if it appears to the court that in relation to the proceedings generally or to any claim for relief:

- the proceedings are frivolous or vexatious, or
- no reasonable cause of action is disclosed, or
- the proceedings are an abuse of process,

the court may order that the proceedings be dismissed generally or in relation to that claim. On such an application, the court may receive evidence: r 13.4(2).

Frivolous proceedings

Neither the CPA nor the UCPR contain a definition of "frivolous". It is defined in the Shorter Oxford Dictionary as "of little or no value or importance, paltry; (of a claim, charge, etc) having no reasonable grounds; lacking seriousness or sense"; and in the Macquarie Dictionary as "of little or no weight, worth or importance; lacking seriousness or sense". In rules such as the present it is invariably used in conjunction with "vexatious".

Vexatious proceedings

In *Attorney-General v Wentworth* (1988) 14 NSWLR 481 at 491, in the context of the *Supreme Court Act* 1970, s 84(1) (vexatious litigant), Roden J said:

1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.
2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.
3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.

Vexatious proceedings have also been described as "proceedings intended to harass or annoy, cause delay or … taken for some other ulterior purpose or which lack reasonable grounds": B Cairns, *Australian Civil Procedure*, 11th edn, Thomson Reuters, Australia, 2016 at [3.30]. For an examination of relevant principles and the *Vexatious Proceedings Act* 2008, see *Teoh v Hunters Hill Council (No 8)* [2014] NSWCA 125 at [41], [67].

Section 84 of the *Supreme Court Act* was repealed by the *Vexatious Proceedings Act* 2008 (the Act). Section 6 of the Act (as amended by the *Vexatious Proceedings Amendment (Statutory Review) Act* 2018), provides that vexatious proceedings include:

- proceedings that are an abuse of the process of a court or tribunal, and
- proceedings instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose, and

- proceedings instituted or pursued without reasonable ground, and
- proceedings that are conducted to achieve a wrongful purpose, or in a way that harasses, or causes unreasonable annoyance, delay or detriment, regardless of the subjective intention or motive of the person who instituted the proceedings.

Section 4 defines "proceedings" to include any civil and criminal proceedings or proceedings before a tribunal.

In practice, cases coming within para (a) of r 13.4(1) will generally also come within para (b) (no reasonable cause of action) and/or para (c) (abuse of process).

As to the power of NCAT to dismiss proceedings it considers to be vexatious under s 55(1)(b) of the *Civil and Administrative Tribunal Ac*t 2013 (NSW), see *Minister for Education and Early Childhood Learning v Zonnevylle* [2020] NSWCA 232.

See [2-7600]ff for further information.

No reasonable cause of action

Unlike applications to strike out pleadings under UCPR r 14.28, where the court is concerned solely with the form of the pleading and where, if the application is successful, leave may be granted to amend to plead in proper form, in applications under this rule the court is not limited to a consideration of the form of the pleading but receives evidence to determine whether the plaintiff's claim has any prospect of success. If it has, but the claim is not adequately expressed in the pleading, the court should not dismiss the proceedings or the particular claim, but should grant leave to the plaintiff to file an amended statement of claim or cross-claim (in the case of an application in respect of a cross-claim). See generally *Brimson v Rocla Concrete Pipes Ltd* [1982] 2 NSWLR 937 at 943–944.

The test for determining whether a reasonable cause of action is disclosed is that set forth in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 128–129 and the other cases referred to in **No issue to be tried** at [2-6910].

Where the facts are peculiarly within the defendant's knowledge, the plaintiff's claim should not be summarily dismissed because of gaps in the plaintiff's case if the necessary evidence might be obtained as a result of discovery or interrogatories: *Wickstead v Browne* (1992) 30 NSWLR 1 at 11.

Similarly, one of a number of defendants cannot be entitled to summary dismissal because of deficiencies in the plaintiff's case because, if the matter proceeds to trial, such deficiencies may be filled by evidence in the case of other defendants: *Wickstead v Browne*, above, at 11–12; *Ford v Nagle* [2004] NSWCA 33.

Abuse of process

Abuse of process can take many forms including:

- The institution of proceedings for an improper purpose, for example, to exert pressure on a former employer for reinstatement, to induce a favourable settlement of other proceedings or to extort money: *Williams v Spautz* (1992) 174 CLR 509;
- The bringing of concurrent proceedings in different courts relating to the same subject-matter: *Moore v Inglis* (1976) 50 ALJR 589; *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* [2003] NSWCA 192;
- An attempt to re-litigate issues which have already been determined in previous proceedings where the principles of res judicata or issue estoppel are applicable: *Stokes (by a tutor) v McCourt* [2013] NSWSC 1014;
- An attempt to litigate issues which could and should have been litigated in previous proceedings: *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589;

- Claims that cannot be justly determined, for example, on account of delay: *Herron v McGregor* (1986) 6 NSWLR 246 at 251; *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256;
- Modest claims which will involve disproportionate costs and time to determine. Compare CPA s 60, and see *Jameel v Dow Jones & Co Inc* [2005] QB 946 at [67]–[76];
- Forum non conveniens: see "Stay of pending proceedings" at [2-2610];
- Destruction of evidence: *Palavi v Queensland Newspapers Pty Ltd* (2012) 84 NSWLR 523.

Limitation defence

In *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514 at 533, the majority described it as undesirable that limitation questions be decided in interlocutory proceedings, except in the clearest of cases. In *Hillebrand v Penrith Council* [2000] NSWSC 1058, Austin J relied on the former equivalent of r 13.5 to strike out a claim for relief which was clearly statute-barred.

[2-6930] Dismissal for non-appearance of plaintiff at hearing

Rule 13.6 provides that if there is no appearance by or on behalf of a plaintiff at a hearing of which he has due notice, the court may adjourn the hearing to another date and direct that not less than five days before that date, a notice of the adjournment be served on the plaintiff advising that in the event of further non-appearance the proceedings may be dismissed. If such notice has been given, and there is no appearance on the adjourned date, the court may dismiss the proceedings.

"Hearing" is defined in CPA s 3 and includes both trial and interlocutory hearing.

This rule has nothing to do with the strength or weakness of the plaintiff's case or pleadings, but only with the fact of non-appearance. It is included here only for completeness and because it occurs in Pt 13.

[2-6940] Striking out pleadings

Rule 14.28 provides that the court may strike out the whole or any part of a pleading if it discloses no reasonable cause of action or defence, etc, or has a tendency to cause prejudice, embarrassment or delay in the proceedings, or is otherwise an abuse of the process of the court.

Unlike UCPR Pt 13, applications under this rule are directed to the form of the pleading rather than to the merits, or lack thereof, of the respective parties, and if the application is successful the order usually made is not that the proceedings be struck out or dismissed, but that the pleading or particular parts thereof be struck out, usually with leave given to file an amended document, in which case the proceedings remain on foot.

If on the other hand, the evidence establishes that, no matter how the plaintiff pleads his or her case, he or she has no arguable cause of action and cannot possibly succeed, the proceedings should be dismissed pursuant to r 13.4.

Although r 14.28(2) permits the court to receive evidence on applications under the rule, the focus of such an application is primarily on the form of the pleading and evidence will be of only limited use. It may, however, be relevant to explain the allegations or terms used in the pleading or to prove that the pleading is inconsistent with a previous judgment or admission.

Discloses no reasonable cause of action or defence

A pleading or part thereof will be struck out if the court is satisfied that even if all the allegations of fact set out in the pleading are proved, those facts would not establish the essential ingredients of a cause of action or constitute a defence. Often such applications are used in this way to determine whether the facts alleged (and for the purpose of the application assumed to be true) constitute a valid cause of action or defence.

Prejudice, embarrassment or delay

A pleading or part thereof may tend to prejudice, embarrass or delay the fair trial of the proceedings if it contains allegations which are vague or imprecise such that the other party cannot plead to such allegations specifically, or if it contains allegations that are irrelevant, unnecessary or scandalous.

See generally *Northam v Favelle Favco Holdings Pty Ltd* (unrep, 7/3/95, NSWSC) per Bryson J.

In some such cases it will be appropriate to merely strike out the offending passages, in others it will be more appropriate to strike out the whole pleading and grant leave to replead.

Before seeking on order under this rule, the solicitors for the moving party should write to the opposing solicitors pointing out the objection and inviting an amendment. Whether such a letter has been written and its response, if any, will often be relevant on the question of costs.

Abuse of process

See [2-6920] above.

[2-6950] Inherent power

Every court has an inherent power to stay or dismiss proceedings or strike out pleadings which are frivolous or vexatious or otherwise an abuse of process: *Brimson v Rocla Concrete Pipes*, above, at 944. As Cross J there pointed out in *Brimson* at 944, the equivalent power under r 13.4 (former SCR Pt 13 r 5) and the inherent power are now apparently co-extensive; and it is difficult to envisage any case where it would be necessary to rely on the inherent power rather than the rules. See also *Hillebrand v Penrith Council*, above, at [30].

[2-6960] Sample orders

Summary judgment for the plaintiff: r 13.1

I direct entry of judgment for the plaintiff for [.....] (or for damages to be assessed). I order the defendant to pay the plaintiff costs of the motion and of the proceedings to date.

Summary dismissal: r 13.4

I order that the proceedings be dismissed with costs.

Striking out of pleadings

I order that the statement of claim (or as the case may be) be struck out, grant leave to the plaintiff to file an amended statement of claim within (14) days (costs).

Striking out parts of a pleading

I order that paragraphs 7, 9 and 13 (or as the case may be) of the statement of claim and/or the words [.....] and [.....] wherever appearing be struck out. Direct the plaintiff to file an amended statement of claim in accordance with this order within 14 days (costs).

Legislation

- CPA ss 3, 60
- SCA s 84(1)
- *Vexatious Proceedings Act* 2008, s 6

Rules

- UCPR Pt 13, rr 13.1–13.6, 14.28

Further reference

- B Cairns, *Australian Civil Procedure*, 11th edn, Thomson Reuters, Australia, 2016

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The Mining List

Acknowledgement: the following material was originally prepared by Her Honour Judge L Ashford of the District Court of NSW. It has been reviewed and updated by his Honour Judge Neilson of the District Court of NSW.

[5-0800] The residual jurisdiction of the District Court

There are currently two Lists which hear matters falling under the residual jurisdiction of the District Court: the Coal Miner's Compensation List (the Mining List), and the Special Statutory Compensation List: see [5-1000] and ff.

[5-0810] The Mining List

The District Court now determines all claims in respect of compensation claims for coal miners. They are treated as an exceptional case for compensation purposes and have thus retained substantial rights to workers compensation which were not retained by other workers. This includes the right to 'redeem' their entitlement to lump sum payments and also the benefit of an ability to have access to the "deemed" total incapacity provision available under the *Workers' Compensation Act* 1926 (the 1926 Act).

The effect of Sch 6 Pt 18 of the *Workers Compensation Act* 1987 (the 1987 Act) is that ss 9, 11(1), 11(2), 12, 13 and 15 of the 1926 Act ("the former Act" as defined in s 3 of the 1987 Act) continue to apply to coal miners, that the rates in respect of weekly payments are to be calculated pursuant to the rates set out (as adjusted) under the 1987 Act and that the lump sum payments pursuant to s 66 are calculated under the 1987 Act unaffected by the Workers Compensation Amending Acts of 2001.

[5-0820] Commencement of proceedings

Proceedings are commenced by statement of claim (UCPR Sch 11 Pt 2 cl 3; though particular proceedings are commenced by summons: Sch 11 Pt 2 cl 7) and can be filed in the Sydney or Newcastle registries of the District Court. The statement of claim in proceedings under the Acts shall bear in the heading the words "Coal Miners' Workers Compensation List": UCPR Sch 11 Pt 2 cl 4. At the present time two judges are allocated to hear matters in the mining list and normally sit in Newcastle at regular intervals to hear matters filed in the Newcastle registry. Those matters listed for hearing in Sydney are called over by the judge allocated to hear the matters in Sydney and dates for hearing fixed.

With respect to the Newcastle hearings, the particular judge allocated to a sittings in Newcastle controls the listing of claims for Newcastle in consultation with the conciliation officer and with the Newcastle registry.

As well, one of the mining judges is available on short notice to deal with any redemption application filed and this is normally done in Sydney, or in Newcastle at the time the judge is listed to sit in Newcastle.

[5-0830] Conciliation procedures

Sch 11 Pt 2 Div 2 of the UCPR provides for conciliation of coal miner's claims, the conciliator being an officer or employee of the District Court nominated by the Registrar to carry out such conciliation. All such claims shall be referred for conciliation no later than three months after the claim is filed: Sch 11 Pt 2 cl 25.

Conciliation conferences are held in Katoomba/Lithgow, Newcastle, Sydney and Wollongong/Port Kembla during the year.

The primary purpose of the conciliation conference is to explore the possibility of settlement. However, even if settlement is unlikely, the conference provides an opportunity to seek concessions, narrow the issues and make application for directions to enhance readiness for hearing.

When a mining matter is filed in the Registry it is immediately referred to the conciliator. Matters are listed for conciliation by the conciliator in four lists, Wollongong, Western Mining, Newcastle and Sydney. Most of the matters are in the Newcastle list.

Matters are listed for conciliation in order of dated filed, with some variation to accommodate the practitioners. At the moment, most of the solicitors on the Coal Mines Insurance panel have Sydney based offices. Matters are grouped where possible so that practitioners are not travelling for single matters.

Newcastle Mining

Newcastle conciliations occur each month. There is a Registrar's list in Newcastle each month to coincide with the conciliations. At the conclusion of conciliation, if the matter has not settled, it is determined whether the matter is ready for hearing. A date for hearing may be allocated from conciliation in consultation with the relevant mining list judge or the matter may be placed in the pending list. If necessary the conciliator can make orders to ensure the matter will be ready for hearing when listed.

Wollongong Mining and Western Mining

Wollongong and Western Mining matters are heard in Sydney.

Matters are listed in the Wollongong and Western Mining conciliation lists with a view to ensuring there are always sufficient matters for the next call over list. After discussion with the Judge allocated to the Sydney sitting, if there is insufficient time between the conferences the sitting week, matters are listed directly for hearing from conciliation.

Conciliation outcome

Following conciliation, if an overall settlement of the coal miner's rights has been agreed between the parties then it is necessary for the employer to file a statement of claim/application for redemption, which is heard by the judge conducting a mining list.

If resolution is achieved in respect of other matters such as settlement of lump sums for loss of use of a limb or function pursuant to ss 66 *Workers Compensation Act* 1987 then such matters are ordinarily disposed of by the filing of terms of settlement.

See further Practice Note DC (Civil) No 12 "Coal Miners' Workers Compensation List", 3.1 – 3.7.

[5-0840] Redemption applications

All redemption applications under s 15 of the former Act are made by the employer following agreement having been reached with the worker as to a redemption sum.

This constitutes a full and final settlement of the workers rights to compensation in respect of the particular injuries/incapacities as set out in the statement of claim filed, or may be the result of separate negotiation between the parties without any statement of claim having previously been filed. The redemption application includes any right or further right to lump sum payments for loss of any limb or function (s 66). For an example of the effect of a redemption on a latent injury, see *Mount Thorley Operations Pty Ltd v Farrugia* [2020] NSWDC 798.

It is necessary for the worker to give medical evidence, in appropriate circumstances by affidavit, in respect of any injuries and ongoing incapacity which are included in the redemption application and in respect of any payments of compensation which have been made, including evidence in respect of medical expenses paid or unpaid.

It is the responsibility of the judge to determine if the sum offered in redemption is adequate following consideration of matters such as:

- the likelihood of further medical treatment
- the prospects of future employment
- the reasons as to why the worker would prefer a lump sum in settlement of the claim acknowledging that in accepting a lump sum the worker is aware of potential rights for the future which are being forgone.

It is necessary for the worker to advise the court of consent to the redemption and a signed consent form is handed to the judge for inclusion on the file along with the tender of Short Minutes setting out the payment details in respect of the redemption.

Often the redemption amount will be part of a common law settlement and the parties will advise the Judge accordingly.

It is always within the discretion of the judge hearing the application to determine if the amount is adequate and in the best interests of the worker. If the judge decides the amount is not adequate then generally the application will be rejected.

Any redemption takes effect from the date of the application being approved. It is prudent to check that the worker is aware of any deductions by way of Health Insurance Commission payments which can be deducted from any sum redeemed or of any Centrelink benefits outstanding which will also be deducted as these sums obviously have a bearing on whether the amount approved is an adequate one. As well the worker should be aware of any preclusion period to be served prior to an ability to access Centrelink benefits in the future.

If a worker is in receipt of voluntary payments or subject to an award of compensation of the court it is relevant to note that those payments cease on the day of the approval of the redemption. Medical expenses should be paid up to that date. It is not appropriate there should be any deduction from the redemption sum to pay any outstanding medical/treatment expenses.

See Sch 6 Pt 4 cl 6 of the 1987 Act.

[5-0850] Costs in respect of the redemption application

The usual order is that the employer bears the costs of the application even if the worker withdraws his consent on the day of or prior to the application being heard by the judge, or if the judge refuses to approve the application. Costs orders are not made against a worker unless the court is satisfied an application was frivolous, vexatious or without proper justification, and of course the application in redemptions is made by the employer: s 112 *Workplace Injury Management and Workers Compensation Act* 1998.

[5-0860] Medical hospital and related expenses

Sections 59 and 60 of the *Workers Compensation Act* 1987 apply.

Section 59 ***Definitions*** — sets out the services for which compensation can be claimed and by whom such services are provided.

Section 60 relates to compensation for the cost of medical hospital and rehabilitation treatment and includes the cost of travel related expenses to obtain such treatment.

It is necessary for the worker to show:

(a) the worker received injury arising out of or in the course of employment,

(b) relevant treatment expense was as a ‘result’ of that injury, and

(c) the treatment was ‘reasonably necessary’.

There is some dispute as to whether declaratory orders can be made. In the Compensation Court a number of decisions came to the view that such orders could be made: *Lupton v BetterCare Pty Ltd* (1996) 13 NSWCCR 246; *McEvoy v Southern Cross Homes (Broken Hill) Incorporated* (2001) 22 NSWCCR 415. In the Workers Compensation Commission, Sheahan P decided there was no power to make a declaratory order in *Widdup v Hamilton* (2006) NSW WCC PD 258 but see *Zanardo & Rodriguez Sales & Services Pty Ltd v Tolevski* [2013] NSWCA 449 at [13].

Quite often mining claims relate solely to the cost of medical expenses for items such as physiotherapy and/or remedial massage. This is a factual issue. In determining the claim it is necessary to look at the amount of treatment, by whom it was provided, the cost of that treatment and whether the treatment is such that it maintains the worker at work. "Reasonably necessary" is the relevant consideration (see discussion in LexisNexis, Mills Workers Compensation Practice (NSW) p 2940.4 and 2940.5).

[5-0870] Lump sum payments for permanent losses or impairments: s 66

In general terms medical opinions will be proffered by the plaintiff and by the defendant which are often markedly different in their determination of the percentage impairment. The evidence of the worker is of some assistance in determining the issue as it is unlikely medical witnesses will be called or those opinions tested in evidence. It is an objective assessment. Many of the claims are for loss of sexual organs, usually resulting from back injury. It is rare to have evidence called of a partner of the injured worker which might assist in evaluating the veracity of such a claim.

Section 67 assessments are made in comparison to a most extreme case. See commentary in LexisNexis, Mills Workers Compensation Practice (NSW), p 2988.

In respect of any injury received prior to 30 June 1987 then s 16 of the former Act applies so long as there has been no employment in the mining industry which may have caused, accelerated, or exacerbated injury beyond 1 July 1987, as the 1987 Act procedures then apply.

Under the 1926 Act there is no provision for pain and suffering.

[5-0880] Special provisions in respect of continuation of weekly compensation payments

Section 11(1) of the 1926 Act applies instead of s 38 of the 1987 Act.

Sch 11 Pt 2 cl 18 of the UCPR provides that a wage schedule is required to be filed if the quantum of weekly payments is in dispute or there is a dispute in respect of actual or probable earnings of a worker during any relevant period. If a disputing schedule is not filed in accordance with the rules, the filed schedule is accepted: Sch 11 Pt 2 cl 18(c).

Section 11(2) provides:

> An employer shall provide suitable employment for his injured worker during the worker's partial incapacity for work, but, if the employer fails to do so the worker shall be compensated as if his incapacity for work were total.

If partial incapacity still exists the judge must consider if the employer provided suitable employment and whether the worker is ready willing and able to enter into such employment. If the worker shows that he or she is ready willing and able to enter into the suitable employment and the employer has failed to provide such employment, the worker must be compensated as if totally incapacitated: *Atlas v Bulli Spinners Pty Ltd* (1993) 9 NSWCCR 378.

[5-0890] Cessation of payments at age 67 pursuant to s 54(2) of the Workers Compensation Act 1987

If injury was sustained before 30 June 1985, s 52(4) does not apply. If an award of weekly payments of compensation is made in respect of incapacity due to injury, both before and after 30 June 1985, this provision comes into operation: *Rizk v Royal North Shore Hospital* (1994) 10 NSWCCR 427.

[5-0900] Issues arising

- As to the issue whether a worker is employed "in or about a mine" under Sch 6 Pt 18 of the 1987 Act see *Ellavale Engineering P/L v Pilgrim* [2005] NSWCA 272.
- As to issue whether an employer is an "employer in the coal industry" under s 7A of the 1987 Act see *Central West Group Apprentices Ltd v Coal Mines Insurance Ltd* [2008] NSWCA 348.

[5-0910] Costs

Costs are governed by s 112 of the *Workplace Injury Management Workers Compensation Act* 1998.

Legislation

- *Workers' Compensation Act* 1926 (as amended)
- *Workers Compensation Act* 1987 (as amended). A version of the 1987 Act which does not incorporate Workers Compensation Amending Acts of 2001 is available at <www.legislation.nsw.gov.au>. Access the current Act and then select the "Historical versions" option from the menu at the top of the screen.
- *Workplace Injury Management and Workers Compensation Act* 1998

Rules

- Uniform Civil Procedure Rules 2005 Sch 11 Pts 1, 2, 3, 5

Forms

- The forms for the Mining List are available at: https://districtcourt.nsw.gov.au/district-court/forms-and-fees/residual-jurisdiction-forms-and-fees.html.

Further references

- Practice Note DC (Civil) No 12 "Coal Miners' Workers Compensation List"
- LexisNexis, Mills Workers Compensation Practice (NSW)

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the treatment. The court acknowledged that, without the order, the proposed treatment would have constituted a battery upon the young man. The order was made, notwithstanding that in a few months time, the appellant would be, as an adult, entitled to refuse any further treatment for his condition.

[5-7100] False imprisonment

A false imprisonment is an intentional, total and direct restraint on a person's liberty: Barker et al at p 48. As in the case of trespass to the person, there is no requirement that the defendant intend to act unlawfully or to cause injury. In that regard, liability for the tort may be considered as strict liability: *Ruddock v Taylor* (2005) 222 CLR 612 at [140], per Kirby J.

For example, where a prisoner is held in detention beyond the terms of their sentence as a consequence of an honest mistake, the defendant will nonetheless be liable for false imprisonment: *Cowell v Corrective Services Commission (NSW)* (1988) 13 NSWLR 714.

[5-7110] What is imprisonment?

Traditionally the notion of false imprisonment related to arrest by police officers or other authorities. This is still a feature of the reported cases but the potential areas of "detention" have expanded remarkably, especially in recent times, not always however with success. The following cases provide a range of illustrations of this contemporary enlargement of the notion of "imprisonment".

Watson v Marshall and Cade: In *Watson v Marshall and Cade* (1971) 124 CLR 621, a police officer asked the plaintiff to accompany him to a psychiatric hospital. The plaintiff believed he would have been compelled to go along if he had refused. The High Court held that the plaintiff had a justified apprehension that, if he did not submit to do what was asked of him, he would be compelled by force to go with the defendant. This restraint thereby imposed on the plaintiff amounted to imprisonment (per Walsh J at 625).

McFadzean v Construction, Forestry, Mining and Energy Union: In *McFadzean v Construction, Forestry, Mining and Energy Union* (2007) 20 VR 250, the appellants were a group of protesters who had engaged in a protest against logging in a Victorian forest area. The respondents imposed a picket near the site which made it impossible for the appellants to leave by the most direct route without permission. However, there was an alternative route available through the bush for exit purposes. There was also evidence that the protesters were anxious to remain at the site during the duration of the picket.

The Victorian Court of Appeal held that the appellants had remained in the forest, not primarily because of the respondents' actions but rather for their own reasons — to continue their protest in an endeavour to stop the logging. They remained at the site, independently of the respondents' conduct. Moreover, the court agreed with the trial judge that an alternative means of exit was both available and reasonable.

Whitbread v Rail Corporation of NSW: In *Whitbread v Rail Corporation of NSW* [2011] NSWCA 130, two brothers who were intoxicated and belligerent, attempted to travel from Gosford railway station in the early hours of the morning without tickets. There was an altercation between the two brothers and state rail transit officers. One of the transit officers was convicted of a criminal assault on one of the brothers. This assault occurred immediately before the officers made a so-called "citizen's arrest", the brothers were restrained by handcuffing and pinned to the ground until police arrived. The Court of Appeal agreed with the trial judge that the transit officers were entitled to "arrest" the brothers and that the degree of force used, and the duration of their being restrained, was not unreasonable. The brothers had been validly arrested and restrained because of their failure to comply with the transit officers' lawful directions to leave the railway station. See also *Nasr v State of NSW* (2007) 170 A Crim R 78 where the Court of Appeal examined the issue of the duration of detention.

Darcy v State of NSW: *Darcy v State of NSW* [2011] NSWCA 413 demonstrates the width of the concept of imprisonment. The plaintiff was a young woman with severe developmental disabilities. She lived in the community but in circumstances where she had been in trouble with the police on occasions. Ultimately, the Local Court ordered that she be taken to Kanangra, a residential centre which accommodates and treats persons with intellectual and other disabilities, located in Morisett. The order required Ms Darcy to be taken there "for assessment and treatment". The Department of Community Services intended that Ms Darcy should be returned to the community but difficulties of a bureaucratic and funding nature prevented this happening. Her case was an unusual one and, in the situation which developed, she remained at Kanangra for some six years before residential accommodation was arranged for her. The primary issue was whether the circumstances of her stay at Kanangra amounted to imprisonment. The secondary issue was whether the Public Guardian had consented to her remaining at the institution.

The Court of Appeal held that Ms Darcy had been detained at Kanangra. She did not wish to stay there and, while she had a relatively wide degree of freedom within the property, she was required to return there after any absence. The degree of latitude she had in being able to leave the premises, for example to visit her mother, was offset by the fact that she could only do so with permission, and on condition that she returned to the institute.

The court explored the issue of lawful justification for her detention at Kanangra. In this regard, the court, while acknowledging that the Public Guardian did not consent to Ms Darcy staying at the premises on a permanent basis, nevertheless consented tacitly to her remaining there while attempts were made to find her appropriate accommodation.

State of SA v Lampard-Trevorrow: In *State of SA v Lampard-Trevorrow* (2010) 106 SASR 331, the Full Court of the South Australian Supreme Court gave consideration to whether a member of the stolen generation, Bruce Trevorrow, had been falsely imprisoned. The circumstances were that, when he was about a year old, he was taken from hospital by an officer of the Aborigines Protection Board and later placed in long-term foster care without his parents knowing of the removal or the fostering. There was no maltreatment or issue of neglect or any other matter which justified the removal of the plaintiff from his family. The plaintiff lived in foster care until he was 10 years old. The Full Court unanimously held that, while neither the plaintiff nor his parents had consented to his foster placement, he was not falsely imprisoned during the period of his foster care. The fact that the plaintiff was an infant and needed care and nurture spoke against any finding of restraint. Any element of restraint, whilst he grew as a young child, was solely attributable to the obligation of his foster parents to care for him and also attributable to his immaturity. The court said:

> We do not think it realistic to describe the care and protection given by the carer of a child a restraint on the child, in the relevant sense of the term.

It is significant however that the plaintiff's claim of negligence against the State was upheld by the appeal court.

State of NSW v TD: In *State of NSW v TD* (2013) 83 NSWLR 566, the respondent was charged with robbery and assault with intent to rob. Her fitness to be tried was in doubt and a special hearing under the mental health legislation in New South Wales was held. A District Court judge found, on the limited evidence available, that she had committed the offence of assault with intent to rob. His Honour set a "limiting term" of 20 months and ordered that she be detained at Mulawa Correctional Centre. The Mental Health Review Tribunal determined that the respondent was suffering from mental illness. Accordingly, the District Court judge then ordered that the respondent be taken to and detained in a hospital. Contrary to this order, for some 16 days, the appellant was detained in a cell at Long Bay Gaol in an area which was not gazetted as a hospital.

The Court of Appeal had to determine whether she was entitled to damages for unlawful imprisonment. The court held that, as a consequence of the second order made, it became the only lawful authority for the continued detention of the respondent. In these circumstances, the State could not justify her detention in the particular area of Long Bay Gaol where she had been held. The

order required her to be detained in a hospital and this was the only relevant order which determined her place of detention. The mere fact that she could and should have been detained in another place did not prevent the detention being unlawful. Consequently, the necessary elements of the claim were established.

This decision may be contrasted with the decision of the House of Lords in *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* [1992] 1 AC 58. In that case, the House of Lords decided that prisoners lawfully committed to prison under the relevant legislation did not have a residual liberty which would entitle them to sue the Secretary of State for the Home Department or a governor of the prison if the prisoners were unlawfully confined in a particular area of the prison. However, in *State of NSW v TD*, the Court of Appeal held that the House of Lords' decision was principally based on the terms of the legislation under consideration.

State of NSW v Kable: In *State of NSW v Kable* (2013) 252 CLR 118, the High Court of Australia held that a detention order which had been made by the Supreme Court (but under legislation which was later held invalid) provided lawful authority for Mr Kable's detention. The trial judge had held that the detention order was valid until it was set aside. The High Court agreed that the original detention order provided lawful authority for the respondent's detention and allowed the appeal by the State against the orders made in the New South Wales Court of Appeal.

Hyder v Commonwealth of Australia: In *Hyder v Commonwealth of Australia* [2012] NSWCA 336, the judgment of McColl JA contains a valuable discussion of the meaning to be given to the phrase "an honest belief on reasonable grounds". The appellant had bought proceedings against the Commonwealth of Australia alleging that a federal police agent had arrested him without lawful justification and thereby falsely imprisoned him. There was no doubt that the police officer honestly believed that the respondent was a particular person of dubious background and that he had committed an offence for the purposes of the *Crimes Act* 1914 (Cth) s 3W. The critical issue at trial was whether the officer held this honest belief "on reasonable grounds". Basten JA did not agree with McColl JA's conclusion. However, Hoeben JA, the third member of the court, agreed with McColl JA that the officer's belief was held on reasonable grounds. See also **[5-7170] Justification**.

The critical question turned upon the evaluation of the complex and thorough material obtained by the Australian Tax Office. The police officer relied on this information to form his belief that the respondent had been engaged in a fraudulent scheme. Hoeben JA also placed reliance on the surrounding circumstances and the source of information on which the officer had relied. His Honour agreed that the primary judge had not erred in concluding that the officer had reasonable grounds for his belief for the purposes of the *Crimes Act* 1914 s 3W(1).

Haskins v The Commonwealth: In *Haskins v The Commonwealth* (2011) 244 CLR 22, the High Court held that a member of the defence force who had been convicted by a military court of disciplinary offences and sentenced to punishment, including detention, could not succeed in a claim for false imprisonment. This was so notwithstanding that the relevant provisions of the *Defence Force Discipline Act* 1982 subsequently had been held to be invalid. A majority of the High Court held that while serving members of the defence forces retained the rights and duties of the civilians, it did not follow that an action for false imprisonment would lie as between service members in respect of the "bona fide execution of a form of military punishment that could be lawfully imposed": at [57]. This is one of those rare cases where the court considered matters of public policy in deciding whether a cause of action for this tort would be available. The court said at [67]:

> To allow an action for false imprisonment to be brought by one member of the services against another where that other was acting in obedience to orders of superior officers implementing disciplinary decisions that, on their face, were lawful orders would be deeply disruptive of what is a necessary and defining characteristic of the defence force.

State of NSW v Le In *State of NSW v Le* [2017] NSWCA 290 the respondent was stopped by transport police at Liverpool railway station and asked to produce his Opal card. The card bore the endorsement "senior/pensioner". He produced a pensioner concession card but could not supply any

photo ID when asked. There was a brief interlude during which the officer checked the details over the radio. Mr Le was then told he was free to go. The respondent commenced proceedings in the District Court claiming damages for assault and false imprisonment. He was successful and the State sought leave to appeal in the Court of Appeal. The court held that all that was involved was "a brief interruption of the respondent's intended progress … a temporary detention". In this situation, the court's task is to "assess what a reasonable person … would have inferred from the conduct of the officer." In the circumstances, the court held that the officer was justified in detaining the respondent while the necessary checks were made. The appeal was upheld.

State of NSW v Exton In *State of NSW v Exton* [2017] NSWCA 294, the issue related to a police officer directing a young Aboriginal man to exit a motor vehicle. Eventually the young man was arrested and charged with assault and resist arrest. The trial judge awarded damages to the respondent, relying in particular on the police officer's direction "to exit the vehicle". The Court of Appeal disagreed with the trial judge's finding that the direction, without more, constituted the arrest of the respondent. In the circumstances, this finding was not open and should not have been made.

Lewis v ACT In *Lewis v ACT* [2020] HCA 26, the appellant was convicted and sentenced for recklessly or intentionally inflicting actual bodily harm, to be served by periodic detention rather than full-time imprisonment. The Supreme Court of the ACT found that he was unlawfully imprisoned in full-time detention for 82 days by reason of an invalid decision of the Sentence Administration Board to cancel his periodic detention after he failed to report on numerous occasions. He sought substantial damages to compensate him or "vindicatory damages". The primary judge assessed damages at $100,000 but ordered that only $1 be paid because the periodic detention order would have been inevitably cancelled. The Supreme Court and the High Court dismissed an appeal. Despite the unlawful detention, it was decided since the same imprisonment would have occurred lawfully even if the Board had not made an invalid decision, there was no loss for which to compensate the appellant. Two justices (Kiefel CJ and Keane J) considered that this particular appeal failed at a point anterior to the application of the compensatory principle because the appellant's right to be at liberty was already so qualified and attenuated, due to his sentence of imprisonment together with the operation of the Act, that he suffered no real loss. In separate reasons, Gageler, Gordon and Edelman JJ agreed that while the imprisonment was unlawful, the appellant was not entitled to compensation. The court also held there is no basis in principle or practice for the development of a new head of "vindicatory damages" separate from compensatory damages.

[5-7120] Malicious prosecution

The tort of malicious prosecution is committed when a person wrongfully and with malice institutes or maintains legal proceedings against another. At the heart of the tort is the notion that the institution of proceedings for an improper purpose is a "perversion of the machinery of justice": *Mohamed Amin v Jogendra Bannerjee* [1947] AC 322.

The tort is, in forensic terms, quite difficult to prove. Its constituent elements were stated by the plurality of the High Court in an extensive decision on the topic in *A v State of NSW* (2007) 230 CLR 500 at [1]. These were succinctly reformulated by the High Court in *Beckett v NSW* (2013) 248 CLR 432 at [4] as follows:

> …the plaintiff must prove four things: (1) the prosecution was initiated by the defendant; (2) the prosecution terminated favourably to the plaintiff; (3) the defendant acted with malice in bringing or maintaining the prosecution; and (4) the prosecution was brought or maintained without reasonable and probable cause.

Beckett, above, has laid to rest an anomaly which had existed in Australian law since 1924. In *Davis v Gell* (1924) 35 CLR 275, the High Court stated that where proceedings have been brought to a close by the Attorney-General's entry of a nolle prosequi, the plaintiff in a subsequent malicious prosecution case, is required to prove his or her innocence. The High Court, in *Beckett*, refused to follow *Davis*. The result is that, in all malicious prosecution cases, the plaintiff's guilt or innocence

of the criminal charge is not now an issue. All that must be shown is that the proceedings terminated favourably to the plaintiff, for example, where proceedings were terminated by the entry of a nolle prosequi or by a direction from the Director of Public Prosecutions under his statutory powers.

It might be noted that in *Clavel v Savage* [2013] NSWSC 775, Rothman J held that where a charge had been dismissed, without conviction, under the *Crimes (Sentencing Procedure) Act* 1999 s 10, this did not constitute a "termination of proceedings favourably to the plaintiff". This was because the ultimate order had been preceded by a finding of guilt. See also *Young v RSPCA NSW* [2020] NSWCA 360, where it was found a s 32 order under the *Mental Health (Forensic Provisions) Act* 1990 (now repealed) did not constitute a finding that the charges were proven. A plaintiff must show the prosecution ended in favour of the plaintiff. If it did, it does not matter how that came about: at [76]. It is sufficient if the plaintiff can demonstrate the absence of any judicial determination of his or her guilt: at [77].

In *HD v State of NSW* [2016] NSWCA 85, the CA had under consideration a case where an interim ADVO was obtained by police against a father on behalf of his daughter. The evidence of a physical assault was reported to a friend, to a school teacher and the daughter was taken to hospital by ambulance and treated by doctors and social workers. Later she attended the local police station but denied she had been hit by her father. Nevertheless, the police initiated a serious assault charge against the father. The charge was dismissed in the Local Court, whereupon the father instituted proceedings for unlawful arrest and malicious prosecution. The trial judge dismissed all the father's claims.

This decision was upheld by the CA. The prosecution was not activated by malice. Indeed the prosecution had no personal interest in the outcome and had been exercising a public duty. Secondly the trial judge had not erred in finding that the investigating police honestly concluded that the evidence warranted the institution of proceedings against the father. Thirdly, the whole of the circumstances demonstrated that this was not a case where there was an absence of reasonable and probable cause. This was not a case where a reasonable prosecutor would have concluded that the prosecution could not succeed. Reference was made to Gyles AJA's decision in *Thomas v State of NSW* (2008) 74 NSWLR 34; [2008] NSWCA 316 which emphasised that a reasonable basis for a decision by an investigating officer to lay a charge is not to be equated with a magistrate's decision or a judge's ruling. The hypothetical reasonable prosecutor is not a judge or barrister specialising in criminal law.

In 2008 Gordon Woods was convicted of the murder of Caroline Byrne. He served a number of years in prison before the NSW Court of Appeal acquitted him on the murder charge. The court found that the verdict had been unreasonable. At the forefront of the decision was trenchant criticism of the Crown Prosecutor and the Crown's expert witness.

The plaintiff brought proceedings for damages on the basis of malicious prosecution. (See *Wood v State of NSW* [2018] NSWSC 1247.) He argued that the proceedings had been maintained without reasonable and probable cause and that the prosecution had been brought "with malice for an ulterior purpose". The plaintiff identified three prosecutors, namely the lead detective, the expert witness and the actual Crown Prosecutor.

Fullerton J agreed with the plaintiff's contention that, from an objective point of view, the trial had been initiated and maintained without reasonable or probable cause.

Central to the Crown case had been the expert witnesses evidence that the deceased must have been thrown from the cliff to land where her body had been located. However, the theory and conclusion had been fundamentally flawed and left open the reasonable possibility of suicide. After an exhaustive analysis, Fullerton J concluded that neither the lead detective nor the expert witness could properly be categorised as "prosecutors".

The primary judge was trenchantly critical of the Crown Prosecutor. She found that he had a profound lack of insight into the flawed approach he took to the plaintiff's prosecution and that this

caused great unfairness in the trial. Nevertheless, she dismissed the plaintiff's case on the basis that the prosecutor's failures, extensive though they were, were not driven by malice. An appeal to the Court of Appeal was dismissed: see *Wood v State of NSW* [2019] NSWCA 313.

[5-7130] Proceedings initiated by the defendant

Who is the prosecutor? In *A v State of NSW*, (2007) 230 CLR 500, the plurality of the High Court gave a detailed and historical narrative of the development of the tort. In the past, informations were laid privately, whereas in modern times prosecutions are generally in the hands of the police and subsequent prosecuting authorities, such as the Director of Public Prosecutions.

There is a "large question" as to whether the tort of malicious prosecution extends to the commencement and carrying on of civil proceedings. In *A v State of NSW*, above, the High Court expressed the first element of the tort as being "that proceedings of the kind to which the tort applies (generally, as in this case, criminal proceedings) were initiated against the plaintiff by the defendant". See also *Perera v Genworth Financial Mortgage Insurance Pty Ltd* [2019] NSWCA 10 at [16] in which an appeal against the dismissal of an action for malicious prosecution in civil proceedings was refused.

The present position may be best comprehended by contrasting the situation in that case (*A v State of NSW*) with the facts in *Coles Myer Ltd v Webster* [2009] NSWCA 299 (although the latter case was concerned with wrongful imprisonment). In *A v State of NSW*, as is most often the case, it was a police officer who was the informant who laid charges against the defendant. It was his conduct and his state of mind at the relevant time that formed the basis of the plaintiff's case against the State. On the other hand, in the *Coles Myer* case, the police had acted lawfully in detaining two men identified by a store manager as acting fraudulently in a department store. It was held that the store manager, however, had acted maliciously and had, without reasonable cause, procured, and brought about the arrest by involving the police. (See also *Martin v Watson* [1996] AC 74 at 86–7.) Consequently, the manager's employer was vicariously responsible for the wrongful detention.

Generally, however, a person who provides the police with information, believing it to be true, will be held not to have initiated the proceedings. Rather, the proceedings will be regarded as instituted by and at the discretion of an independent prosecuting authority: *Commonwealth Life Assurance Society Limited v Brain* (1935) 53 CLR 343, at 379 per Dixon J.

[5-7140] Absence of reasonable and probable cause

This, together with the concept of malice, are the components of the tort most difficult to prove. This is especially so where a member of the public has given apparently credible information to the police and the police have then charged the plaintiff with a criminal offence. The question arises: how does a plaintiff go about establishing the negative — an absence of reasonable and probable cause?

Prior to illustrating the answer to this question by reference to decided cases, it is necessary to emphasise the High Court's general strictures on the subject (*A v State of NSW* (2007) 230 CLR 500):

- the question of reasonable and probable cause has both a subjective and an objective element
- if the defendant did not subjectively believe the prosecution was warranted — assuming that could be proved on the probabilities — the plaintiff will have established the negative proposition,
- however, even when the prosecutor did believe the prosecution was justified, the plaintiff may yet succeed if it can be shown that, objectively, there were no reasonable grounds for the prosecution.

As has been pointed out (Barker et al p 91) there is an important temporal element in determining whether the defendant commenced or maintained the proceeding without reasonable or probable cause. This will first focus on the matters known at the time of institution of the proceedings, and

then subsequently on fresh matters known as the proceedings continue. A prosecutor who learns of facts only after the institution of proceedings which show that the prosecution is baseless may be liable in malicious prosecution for continuing the proceedings: *Hathaway v State of NSW* [2009] NSWSC 116 at [118] (overruled on appeal [2010] NSWCA 184, but not on this point); *State of NSW v Zreika* [2012] NSWCA 37 at [28]–[32].

[5-7150] Some examples

In *State of NSW v Zreika*, above, the plaintiff succeeded in assault, wrongful arrest and malicious imprisonment claims against police. There had been a shooting at a home unit in Parramatta. Shortly after the shooting, the plaintiff was reported as having made some bizarre remarks at a nearby service station. The police officer investigating the shooting, when informed of this, became convinced that the plaintiff was the shooter and, five days later, arranged for his arrest and charging. However, a description of the shooter and his vehicle could not conceivably have matched the plaintiff. After the arrest, police learned the plaintiff had a credible alibi and that a witness had taken part in a "photo array" but had not identified the plaintiff. Despite all this, the plaintiff was refused bail (on the application of the police) and remained in custody for two months before the Director of Public Prosecutions withdrew all charges against him.

In *A v State of NSW*, the plaintiff had been arrested and charged with sexual offences against his two stepsons. The High Court agreed with the trial judge that the evidence demonstrated that the plaintiff had shown an absence of probable belief in the case of the charge relating to the younger child but had failed to do so in the case of the older boy. In the first situation, the police officer did not form the view that the material he possessed warranted laying the charge; or, alternatively, if he had in fact formed that view, there was no sufficient basis for his doing so. The evidence suggested a strong possibility that the younger boy was "making up" a story to support his older brother in circumstances where there was substantial animosity on the part of the older boy towards the plaintiff.

Finally, as the High Court pointed out in *A v State of NSW*, there is a need for the court to decide "whether the grounds which actuated [the prosecutor] suffice to constitute reasonable and probable cause." (*Commonwealth Life Assurance Society Limited v Brain*, above, at 74 per Dixon J.)

This may often require the court to consider the proper response of the "ordinarily prudent and cautious man, placed in the position of the accuser," to the conclusion that the person charged was probably guilty. The enquiry is to an "objective standard of sufficiency".

In this regard, it is not enough to show the prosecutor could have made further or different enquiries. His duty is "not to ascertain whether there is a defence, but whether there is a reasonable and probable cause for a prosecution": *Herniman v Smith* [1938] AC 305 at 319 per Lord Atkin.

[5-7160] Malice

In *A v State of NSW*, the plurality examined the types of "extraneous purpose" that will suffice to show malice in malicious prosecution proceedings. They approved a general statement in Fleming at 685:

> At the root of it is the notion that the only proper purpose for the institution of criminal proceedings is to bring an offender to justice and thereby aid in the enforcement of the law, and that a prosecutor who is primarily animated by a different aim steps outside the pale, if the proceedings also happen to be destitute of reasonable cause.

The plurality instanced cases of spite and ill-will; and cases where the dominant motive was to punish the alleged offender. Generally, there must be shown a purpose other than a proper purpose. However, strict proof will be required, not conjecture nor mere suspicion. The tort "is available only upon proof of absence of reasonable and probable cause and pursuit by the prosecutor of some illegitimate or oblique motive": *A v State of NSW* at [95].

The plaintiff succeeded in *A v State of NSW* (on the malice issue) because he was able to show that the proceedings were instituted by the police officer essentially because he had been under extreme pressure from his superiors to do so, not because he wished to bring an offender to justice. In *State of New South Wales v Zreika*, the police officer was motivated by an irrational obsession with the guilt of the plaintiff, despite all the objective evidence pointing to his innocence.

However, it is necessary to stress that the presence of malice will not of itself be sufficient to establish the tort, there must also be an absence of reasonable and probable cause. See also, *HD v State of NSW* [2016] NSWCA 85 at [5-7120].

Note: a comprehensive and practical summary of all the relevant legal principles stated in *A v State of NSW* is to be found in the judgement of Tobias AJA in *State of NSW v Quirk* [2012] NSWCA 216 at [69]–[70].

[5-7170] Justification

In proceedings for false imprisonment, it is necessary to consider first whether the plaintiff was detained; and second, if so, whether there was a justification for the detention. The two issues need to be addressed separately. The burden of demonstrating justification falls on the defendant: *Darcy v State of NSW* [2011] NSWCA 413 at [141]–[148].

Where there is a requirement for a detaining officer or person to have "reasonable grounds" for suspicion or belief, there must be facts sufficient to induce that state of mind in a reasonable person: *George v Rockett* (1990) 170 CLR 104 at [112]. In addition, there must be some factual basis for either the suspicion or belief. The state of mind may be based on hearsay materials or materials which may otherwise be inadmissible in evidence. "[T]he assent of belief is given on more slender evidence than proof": *George v Rockett* at [112].

What constitutes reasonable grounds for forming a suspicion or belief must be judged against "what was known or reasonably capable of being known at the relevant time": *Ruddock v Taylor* (2005) 222 CLR 612 at [40] per Gleeson CJ, Gummow, Hayne and Heydon JJ. In that sense, the criterion has an objective element to it: *Anderson v Judges of the District Court of NSW* (1992) 27 NSWLR 701 at 714.

The question of identifying the material sufficient to support an objective finding that an arresting officer had reasonable grounds for his or her belief has to be approached with practical considerations as to the nature of criminal investigations in mind: *Hyder v Commonwealth of Australia* (2012) 217 A Crim R 571 at [18]–[19] per McColl JA.

An example of wrongful arrest appears in *State of NSW v Smith* (2017) 95 NSWLR 662. Two police officers had arrested the respondent at his home, asserting that he had committed a "domestic incident". The respondent was taken to the police station and retained there until his release on bail.

The State of NSW relied on two critical defences. The Court of Appeal agreed with the trial judge that neither of these defences had been made out. The first issue related to the police officer's failure to state adequately the reason for the arrest. To describe the reason as "a domestic incident" was insufficient. This constituted a breach of *Law Enforcement (Powers and Responsibilities) Act* 2002 (LEPRA) s 201.

The second issue concerned a breach of s 99(3) LEPRA, as it then was, which required the police officer to suspect "on reasonable grounds" that it was necessary to arrest the person to achieve the purposes listed in s 99(3). There had been no basis to suspect, on reasonable grounds, that the arrest was necessary. In this regard the court accepted that the police officer's decision to arrest the respondent was made essentially — for reasons of "administrative convenience" — namely to facilitate the process of issuing an AVO.

In *State of NSW v Robinson* [2016] NSWCA 334, the Court of Appeal held that for an arrest to be lawful, a police officer must have honestly believed the arrest was necessary for one of purposes

in s 99(3) (repealed) and the decision to arrest must have been made on reasonable grounds: at [27], [44]. The word "necessary" means "needed to be done", "required" in the sense of "requisite", or something "that cannot be dispensed with": at [43]. Although s 99(3) has since been repealed, the primary judge misconstrued important legislation which governs the circumstances in which people are lawfully arrested.

In construing s 99 LEPRA as it now stands, see *New South Wales v Robinson* [2019] HCA 46. In confirming the Court of Appeal's decision (*Robinson v State of NSW* (2018) 100 NSWLR 782), the High Court held by majority, that an arrest under s 99 of LEPRA can only be for the purpose, as soon as reasonably practicable, of taking the arrested person before a magistrate and that the arrest in this case was unlawful. The arresting officer must form an intention at the time of the arrest to charge the arrested person. The majority in *Robinson* held that arrest cannot be justified where it is merely for the purpose of questioning. An arrest can only be for the purpose of taking the arrested person before a magistrate or other authorised officer to be dealt with according to law to answer a charge for an offence and nothing in LEPRA or any previous legislative amendment displaces that single criterion: at [63], [92]–[94], [109]–[111], [114]. See also *Owlstara v State of NSW* [2020] NSWCA 217 at [8], [65], [122].

[5-7180] Intimidation

The elements of the tort of Intimidation were identified in *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Assoc of Australia* [1971] 1 NSWLR 760. These were identified as:

1. A intends to injure C
2. A gives effect to his intention by threatening B that A will commit an unlawful act as against B
3. The unlawful act is threatened, unless B refrains from exercising his legal right to deal with C, and
4. B is thereby induced to refrain from exercising his legal right to deal with C.

In *Uber BV v Howarth* [2017] NSWSC 54, Slattery J issued a permanent injunction to restrain a litigant in person who had engaged in the unusual tort of intimidation. His actions were made against Uber and consisted of a series of "citizens arrests".

[5-7185] Collateral abuse of process

The tort of collateral abuse of process was discussed by the High Court in *Williams v Spautz* (1992) 174 CLR 509. The tort has not established a large foothold in the jurisprudence of Australia or England, and examples of parties succeeding on the basis of the tort are rare: see *Williams v Spautz* at 553 for examples and the discussion in *Burton v Office of DPP* (2019) 100 NSWLR 734 at [14]–[42]; [48]–[49], [60]; [124]. The exact shape of th tort remains uncertain and even its existence has been viewed with scepticism: A Burrows, *Oxford Principles of English Law: English Private Law*, 2nd edn, cited in *Burton v DPP* [2019] NSWCA 245 at [17].

The tort was established in *Grainger v Hill* (1838) 132 ER 769. That case "has been treated as creating a separate tort from malicious prosecution, but it has been difficult to pin down the precise limits of an improper purpose as contrasted with the absence of reasonable and probable cause within the meaning of the tort of malicious prosecution": *Willers v Joyce* [2018] AC 779 at [25]. The tort of collateral abuse of process differs from the older action for malicious prosecution in that the plaintiff who sues for abuse of process need not show: a) that the initial proceedings has terminated in his or her favour; and b) want of reasonable and probable cause for institution of the initial proceedings. Central to the tort of abuse of process is the requirement that the party who has instituted proceedings has done so for a purpose or to effect an object beyond that which the legal process offers. While an action for collateral abuse can be brought while the principal proceedings

are pending, the action is at best an indirect means of putting a stop to an abuse of the court's process: *Williams v Spautz*, above at 520, 522-523 citing *Grainger v Hill*. See also *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 at 123.

The majority in *Burton v Office of DPP*, above, found it unnecessary to decide on an authoritative formulation of the elements of the tort (cf Bell P at [42]) in what was an appeal from the summary dismissal of proceedings seeking damages for breach of the tort. The matter was remitted to the District Court as the appellant's claim ought not to have been summarily dismissed because it was arguable he had an underlying cause of action, albeit one that has not been sufficiently pleaded.

[5-7188] Misfeasance in public office

The tort of misfeasance in public office has a "tangled" history and its limits are undefined and unsettled. Aronson suggests that what has emerged over the last 50 or so years is in reality nothing less than a new tort to meet the needs of people living in an administrative State. Most of the modern changes to the tort have occurred through a series of cases in which judges have diluted the requirement of malice at the same time as they have expressed confidence that their changes leave sufficient protection for public officials against liability to an indeterminate class to an indeterminate extent: M Aronson, "Misfeasance in public office: some unfinished business" (2016) 132 *LQR* 427.

Only public officers can commit the tort, and only when they are misusing their public power or position. It is an intentional tort: it is not enough to prove gross incompetence, neglect, or breach of duty.

In *Northern Territory v Mengel* (1995) 185 CLR 307, Deane J summarised the elements of the tort as:

(i) an invalid or unauthorised Act;

(ii) done maliciously;

(iii) by a public officer;

(iv) in the purported discharge of his or her public duties;

(v) which causes loss or damage to the plaintiff.

The authorities to date have not elucidated the boundaries of Deane J's fourth element of the tort: *Ea v Diaconu* [2020] NSWCA 127 per Simpson JA at [147], [153].

The principles regarding the tort emerge from a number of decisions from Australia, the UK and New Zealand; see particularly: *Northern Territory v Mengel*, above; *Sanders v Snell* (1998) 196 CLR 329; *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1; *Odhavji Estate v Woodhouse* [2003] 3 SCR 263; *Sanders v Snell* (2003) 130 FCR 149 ("*Sanders No 2*"); *Commonwealth of Australia v Fernando* (2012) 200 FCR 1; *Emanuele v Hedley* (1998) 179 FCR 290; *Nyoni v Shire of Kellerberrin (No 6)* (2017) 248 FCR 311: *Hamilton v State of NSW* [2020] NSWSC 700.

Regarding the meaning of a "public officer" for the purpose of misfeasance, Bathurst CJ stated in *Obeid v Lockley* (2018) 98 NSWLR 258 at [103]:

> The review of the Australian authorities demonstrates two matters. First, the tortfeasor must be a "holder of a public office". Second, the act complained of must be the exercise of a public power. However, the cases provide no clear statement of what constitutes the "holding of a public office", or whether the power exercised has to be "attached" to the public office, or whether it is sufficient that the public officer by virtue of their position is entitled or empowered to perform the public acts in question. However, in my view, the power does not have to be expressly attached to the office.

It is also necessary to identify any public power or duty invoked or exercised by the public officer. In *Ea v Diaconu* [2020] NSWCA 127, the applicant claimed the first respondent (an officer of the

Australian Federal Police) committed misfeasance in public office by reason of her conduct in the court public gallery in view of the jury during his trial, including laughing, gesturing, rolling her eyes and grinning, which attempted to influence the outcome of the proceedings. As White JA held in *Ea v Diaconu*, the respondent's alleged misbehaviour in court was not done in the exercise of any authority conferred on her, but was arguably the exercise of a de facto power, that is, a capacity she had, by virtue of her office, to influence the jury by her reactions to submissions and evidence: at [76]. It is arguable that the abuse of de facto powers, ie the capacity to act, derived from the conferral of powers that make the office a public office, are within the scope of the tort: at [127].

Further, as *Mengel* made clear, the tort is one for which a public officer is personally liable. Before one reaches the issue of the vicarious liability of the State, it is necessary for the plaintiff to identify which individual officer or officers performed the unauthorised act: *Doueihi v State of NSW* [2020] NSWSC 1065 at [32]. Damage is an essential element of the tort. It may be reputational harm as in *Obeid v Lockley* at [153].

Misfeasance in public office was made out in *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732. Minister for Agriculture, the Hon Joe Ludwig MP, made a control order in June 2011 that Australian cattle could not be exported to various Indonesian abattoirs that had been engaging in inhumane practices, unless the abattoir satisfied the Minister that its practices met internationally recognised animal welfare standards ("**First Order"**). Political pressure led to the Minister making a second control order that banned the export of livestock to Indonesia for a period of 6 months ("the Ban**"**). There was no "exceptions power" which would allow the Minister to make an exception if needed. Brett Cattle Company Pty Ltd ("BCC") was a cattle exporter affected by the Ban. BCC claimed it lost the opportunity to sell more than 2,700 head of cattle into Indonesia in 2011 because of the Ban, and suffered losses of $2.4 million. BCC was the representative in a class action against the Minister. Both the First Order and the Ban were enacted under delegated legislation pursuant to s 7, *Export Control Act* 1982 (Cth).

Rares J held that the Ban was invalid as an absolute prohibition was not necessary nor reasonably necessary and it imposed unnecessary limitations on the common law right of persons to carry on their lawful business: at [329], [348]–[354], [358]-[361]. Rares J further held the Minister committed misfeasance in public office as he was recklessly indifferent as to: (i) the availability of his power to make the control order in its absolutely prohibitory terms without providing any power of exception, and (ii) the injury which the order, when effectual, was calculated to produce: at [373]–[386], [391]–[395]. To satisfy the test for the tort of misfeasance in public office, the office holder must have known, or been recklessly indifferent to, the fact that the plaintiff/applicant was likely to suffer harm. It does not suffice that there is only a foreseeable risk of harm. In addition, a finding that a Minister has committed misfeasance in public office should only be reached having regard to the seriousness of such a finding based on evidence that gives rise to a reasonable and definite inference that he or she had the requisite state of mind: at [280]–[284].

[5-7190] Damages including legal costs

As has been said, proof of damage is not an element of the three "trespass to the person" torts. However, specific damage or loss may be claimed and, if proven, damages will be awarded. These torts allow for the amount of aggravated damages and, where appropriate, exemplary damages: *State of NSW v Ibbett* (2005) 65 NSWLR 168.

Where a party claims damages for harm suffered due to an intentional tort, the loss must be the intended or natural and probable consequence of the wrong: *State of NSW v Cuthbertson* (2018) 99 NSWLR 120 at [40]; *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388; *TCN Channel Nine v Anning* (2002) 54 NSWLR 333 at [100].

In *Lewis v ACT* [2020] HCA 26, regarding a claim for false imprisonment, the High Court held that an independent species of "vindicatory damages", or substantial damages merely for

the infringement of a right, and not for other purposes including to rectify the wrongful act or compensate for loss, is unsupported by authority or principle. The notion that "vindicatory damages" is a species of damages that stands separately from compensatory damages draws no support from the authorities and is insupportable as a matter of principle: at [2]; [22]; [51]; [98].

The legal costs incurred in defending a charge of resisting an officer in the course of duty are not the "natural and probable consequence" of the tortious conduct of wrongful arrest. Although harm suffered in resisting arrest, such as physical injury or property damage, is a natural and probable consequence of the wrong, the resistance being directly related or connected to wrongful arrest, the costs incurred in what ultimately turns out to be a failed prosecution are not: *State of NSW v Cuthbertson*, above at [44]–[45]; [135]. The costs of successfully defending a criminal proceeding can only be recovered in a proceeding which alleges that the laying of a charge was an abuse of process: *Berry v British Transport Commission* [1962] 1 QB 306 at 328.

The legislative scheme in NSW for the award of costs in criminal proceedings is provided for by s 70, *Crimes (Appeal and Review) Act* 2001. Section 70 limits the circumstances in which costs in favour of a party who successfully appeals a conviction may be ordered and for the appeal to be the forum in which that determination is made. A party cannot avoid the constraints of s 70 by later claiming costs incurred in conducting a criminal appeal in later civil proceedings: *State of NSW v Cuthbertson* at [63]–[67]; [114]; [144]–[145]; [161].

Legislation

- *Casino Control Act* 1992
- *Civil Liability Act* 2002, Pt 7, s 52
- Crimes Act 1914 (Cth) s 3W
- *Crimes (Sentencing Procedure) Act* 1999 s 10
- *Defence Force Discipline Act* 1982
- *Law Enforcement (Powers and Responsibilities) Act* 2002 ss 99(3), 201
- *Migration Act* 1958 (Cth) s 5, s 233C(1)

Further References

- M Aronson, "Misfeasance in public office: some unfinished business" (2016) 132 *LQR* 427
- J Fleming, *Law of Torts,* 9th edn, LBC Information Services, Sydney, 1998
- K Barker, P Cane, M Lunney and F Trindade, *The Law of Torts In Australia*, 5th edn, Oxford University Press, Australia and New Zealand, 2011

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Contempt generally

Nature of contempt

[10-0300] Civil and criminal contempt

Contempts of court still fall to be classified as civil or criminal. Contempt by breach of an order or undertaking is regarded as a civil contempt unless "it involves deliberate defiance or, as it is sometimes said, if it is contumacious": *Witham v Holloway* (1995) 183 CLR 525 at 530.

The distinction has been described as "unsatisfactory" in *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 109, and in *Witham v Holloway*, above, the High Court held that the criminal standard of proof applies to all contempts (cf *ASIC v Sigalla (No 4)* [2011] NSWSC 62 at [92]–[94]). However, the distinction remains for some purposes. For example, an appeal may be brought against acquittal on a charge of civil contempt: see s 101(6) of the SCA and *Hearne v Street* (2008) 235 CLR 125. For recent discussions of the distinction see *Matthews v ASIC* [2009] NSWCA 155 and *Pang v Bydand Holdings Pty Ltd* [2011] NSWCA 69.

Civil contempts are normally left to the offended party to enforce, whereas the Attorney General or the court has a more clearly defined role in the prosecution of criminal contempts since these more directly involve interference with the administration of justice.

In *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 at 89, *Witham v Holloway* (1995) 183 CLR 525 at 534 and *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 89 ALJR 622 at [35] the High Court held that while contempt of court may be criminal in nature, proceedings for punishment of contempt were brought in the civil jurisdiction of the court and were "civil proceedings" (though that term was not defined in the Supreme Court (General Civil Procedure) Rules 2005 (Vic) then under consideration). Hence, where a charge of criminal contempt is brought in the Supreme Court by motion in "civil proceedings", as defined in the CP Act, s 3(1), that Act and the UCPR apply: CPA, s 4(1), Sch 1; UCPR, r 1.5(1), Sch 1: *Kostov v YPOL Pty Ltd* [2018] NSWCA 306 at [16], [17]. Section 101(5) of the *Supreme Court Act* 1970 provides that the Court of Appeal, rather than the Court of Criminal Appeal, has jurisdiction to hear and determine an appeal from a judgment or order of the Supreme Court in proceedings relating to contempt of court. Note also that the *Mental Health (Forensic Provisions) Act* 1990 (rep) has been held not to apply to criminal contempt proceedings: *Prothonotary of the Supreme Court of NSW v Chan (No 15)* [2015] NSWSC 1177; *Kostov v YPOL Pty Ltd* at [19]. Note: the 1990 Act has been replaced by the *Mental Health and Cognitive Impairments Forensic Provisions Act* 2020 (commenced 27 March 2021).

The common-law requirement that a criminal trial not proceed unless the accused is fit to plead is a safeguard applicable to civil proceedings for criminal contempt: *Kostov v YPOL*, at [18], [19].

Contempt by publication

[10-0310] Time at which the law of contempt commences

For the purposes of sub judice contempt, the law of contempt does not begin to operate until proceedings are pending in a court. It is not sufficient that proceedings be imminent: *James v Robinson* (1963) 109 CLR 593.

[10-0320] Test for contempt

To amount to a sub judice contempt of court, a publication must have, as a matter of practical reality, a tendency to interfere with the course of justice in a particular case: *John Fairfax & Sons Pty Ltd*

and Reynolds v McRae (1955) 93 CLR 351. The tendency to prejudice proceedings must be clear, or "real and definite". There should be a substantial risk of serious interference: *Hinch v Attorney General (Vic)* (1987) 164 CLR 15.

The tendency of a publication to prejudice proceedings is to be determined objectively having regard to the nature of the material published and the circumstances existing at the time of publication: *Attorney General v John Fairfax & Sons Ltd* [1980] 1 NSWLR 362 at 386; *Director of Public Prosecutions v Wran* (1987) 7 NSWLR 616 at 626. As to the time at which an internet publication takes place, see *Tate v Duncan-Strelec* [2014] NSWSC 1125 at [145].

[10-0330] Intention

While the act of publication must be intentional, an intention to prejudice the due administration of justice is not an element of contempt: *John Fairfax & Sons Pty Ltd and Reynolds v McRae*, above, at 371.

[10-0340] Relevant considerations

Factors to be considered in determining whether a publication has the necessary tendency to cause serious prejudice to a trial include (per Mason CJ in *Hinch*, above, at 28):

- the nature and the extent of the publication
- the mode of trial (whether by judge or jury), and
- the time which will elapse between publication and trial.

The practical tendency of a publication to endure and influence prospective jurors must be viewed against its background of pre-existing legitimate publicity: *Attorney General v John Fairfax & Sons Ltd and Bacon* (1985) 6 NSWLR 695 at 711.

The likely delay between the date of publication and the commencement of the subject proceedings is an important consideration. It is also appropriate to take into account that, during this period, jurors will be assailed by the media with sensational reports of other events: *Victoria, State of and Commonwealth of Australia v Australian Building Construction Employees and Builders Labourers Federation* (1982) 152 CLR 25 at 136; *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344, per Spigelman CJ at [100].

[10-0350] Influencing the tribunal of fact

The most common and obvious form of media contempt is influencing the tribunal of fact. There will generally not be a danger of this in civil proceedings, where no jury will usually be present. It is essentially established that a publication or broadcast will not be regarded as presenting a substantial risk of prejudice by influencing a judge: *Victoria, State of and Commonwealth of Australia v Australian Building Construction Employees and Builders Labourers Federation*, above, at 58.

The same principle has been extended to magistrates: *Attorney General v John Fairfax & Sons Ltd and Bacon*, above.

[10-0360] Influencing witnesses

Contempt may be committed by publications that have a real tendency to influence the evidence of witnesses or to deter them from attending. Publication of photographs may risk contamination of identification evidence: *Ex parte Auld; Re Consolidated Press Ltd* (1936) 36 SR (NSW) 596 at 598.

The premature publication of evidence may have a tendency to influence the evidence of witnesses or potential witnesses: see *Attorney General v Mirror Newspapers Ltd* [1980] 1 NSWLR 374.