

### **Pleading in commercial cases**

1. Pleading is an essential part of any civil case. In simple contract cases, there is often little difficulty in effectively pleading a case in contract. However, when cases become more complicated, in particular where there are equitable claims or defences, the task of properly pleading the case often becomes more difficult. Real difficulty often attends the inclusion of multiple parties.
2. This paper aims to isolate some particular practical tips for effectively pleading a case in commercial litigation.

#### **Rules for proper pleading**

3. It is useful to reflect on the fundamental principles affecting pleading. The essential purpose of pleading is to inform the other party of the case they have to meet. In practical terms, this involves the clear delineation of the facts necessary to support the particular cause of action, and a clear articulation of the relief sought. A separate, but often overlooked function of pleading is to extract admissions or fact which are matters that party will not have to prove at hearing.
4. It is convenient to call to mind the basic rules of pleadings (references are the Uniform Civil Procedure Rules):
  - a party's pleading must contain only a summary of the material facts on which the party relies, not matters of evidence: UCPR 14.7
  - a pleading must be as brief as the nature of the case allows: UCPR 14.8
  - a pleading must give such particulars as are necessary to enable the opposite party to identify the case they are required to meet: UCPR 15.1. These must be given with the pleading, but may form an attachment: UCPR 15.9
  - a pleading must give particulars of any state of mind, fraud, misrepresentation, breach of trust, wilful default or undue influence: UCPR 15.3-4
  - each matter should be put in a separate, consecutively numbered paragraph: UCPR 14.6

- a party must specifically plead any matter that may take the defendant by surprise, including fraud, performance, release, statute of limitation, extinction of right or title: UCPR 14.14
- a pleading should not be internally inconsistent: UCPR 14.18

5. UCP Rule 14.28 provides that:

The court may at any stage of the proceedings order that the whole or any part of a pleading be struck out if the pleading:

- (a) discloses no reasonable cause of action or defence or other case appropriate to the nature of the pleading, or
- (b) has a tendency to cause prejudice, embarrassment or delay in the proceedings, or
- (c) is otherwise an abuse of the process of the court.

## **Practice points**

### *Where to start*

6. By necessity you should always start with the causes of action. Work out what the precise causes of action are. Identify the contracts, the clauses of the contracts, and any misrepresentations. Work out the nature of any particular equity to be pleaded. Most importantly, identify the remedies that flow from the cause of action. While the remedies are sometimes an appropriate starting point, necessarily involving a search for a cause of action that can provide such a remedy, the link between remedy and cause of action is easy to overlook. Even the way in which the forms are drafted under the current UCPR encourages a division of remedy from pleaded fact. Starting with the causes of action assists in this approach.

### *Isolate the elements*

7. Pleading a cause of action, whether it be in common law, statutory or a particular equity, is almost always assisted by setting out the elements before commencing any drafting. Even where it seems obvious, in any complicated set of facts or matter involving actions against many parties, preparation of a dot point list of the elements of each cause of action, and the remedies available, is time well spent.

8. More often than not, this involves research to ensure that the pleader has the correct elements and remedies. The elements of a particular equity, such as estoppel or the establishment of a fiduciary duty, need to be stated with precision. The task of ensuring that all of the elements are covered is assisted by even the most experienced practitioners having a checklist of the precise elements.

### *Articulate the remedies*

9. In many equity cases, the precise way in which the relief is framed is often the most difficult aspect of the pleading. For this reason, once the elements of each cause of action have been isolated and written out in rough form, it is often useful to draft the claims for relief in full. This way, they can be refined as you work through the pleading allegations.

### *Structure your approach*

10. The next step is the allegations of fact for each cause of action against each defendant. Where there are multiple parties, there is real utility to pleading the case against each individual party separately. Although this sometimes involves duplication, it does force the pleader to focus on the particular claims that are made against that defendant. A regular problem that emerges in cases with many defendants and/or many plaintiffs is that the pleader loses sight of what particular remedies are sought against what particular defendants.
11. Of course, there is nothing wrong with grouping the pleading into individual causes of action, and setting out, for example, the contract case against each defendant. However, it is necessary to review the pleading from the perspective of each plaintiff and each defendant, with particular attention to the relief claimed, before the pleading is finalised.
12. On this point, a word of caution. A long pleading is not necessarily bad. An element of duplication against individual defendants can often make the pleading a more workable document and make the pleader's job easier. However, individual facts that apply to all parties, such as corporate identities and uncontroversial dates and events, should be pleaded at the beginning used throughout by cross-referencing.

### *Definitions*

13. It is not traditional to have a "dictionary" section of a pleading. However, it is extremely common for individual terms (e.g. "the Property") to be defined within the text of the pleading. In a complicated matter, defining all of the relevant terms at the beginning will often make the document much more readable, and save the reader from having to thumb through the text of the document to find where an individual term was first used. For clarity, any defined term should

have initial capitals. Putting some of the detail into the defined term often allows for a crisp, short and accurate allegation of fact in the body of the document.

### *Particulars*

14. Particulars are important. The rules require that they be given with the pleading. While poor particulars can often be cured through a request for further and better particulars, there are three key reasons why every effort should be made to give good particulars in the pleading:
  - (a) It means that the detail of the allegation is in one place and not tucked away in another document that does not find its way onto the court file.
  - (b) It forces the pleader to confront any particular problems they have in making the allegation by removing “short cuts”. This can help to stay off strike out applications.
  - (c) The temptation to leave something to further and better particulars is often an indication that you lack sufficient facts and may be about to allege something you can never prove.
  
15. Common law pleaders regularly adopt an approach of putting substantial allegations in particulars. For example, it is customary to see an allegation of breach of duty followed by an extensive list of particulars of breach. There is nothing fundamentally wrong with applying such an approach in complex commercial cases. However, in the author’s view, the practice should be avoided. This is so because:
  - (a) Allegations of “breach” in commercial cases sometimes involve notions of equitable fraud, such as breach of fiduciary duty. These are important and serious allegations, sometimes attracting a *Brigginshaw* onus. They should be individually pleaded and not tucked away in particulars in a way that encourages the pleader to an approach that lacks precision. The pleader is often forced to make the allegation more detailed and precise.
  - (b) The individual allegations, once separated, may attract an admission of partial admission where separately pleaded.
  - (c) On a strict application of the rules, individual facts that are said to comprise (for example) a fiduciary breach or breach of contract are sometimes allegations that the defendant is entitled

to plead to. The fact that a defendant is not required to plead to particulars, is of itself a good reason to separately plead these matters in substantive allegations.

- (d) In a matter of any complexity, there is often difficulty in precisely stating the factual allegation. This is sometimes because of the limited information available to the pleader. Where a particular aspect of conduct is pleaded as a separate allegation, although with a lack of the ideal precision, it can sometimes be “saved” through the provision of further and better particulars. On many occasions, the defendant will do this work for you by requesting the necessary particulars, provided it is a sufficiently clear allegation of fact.
- (e) The conduct or event may be relevant to several causes of action.

- 16. In complicated matters, it should also be kept in mind that particulars are not limited to long checklists of short points. The particulars may form a dense paragraph that reads like somewhat of an explanation. Even where this strays into matters of evidence and matters the plaintiff will rely on, that is not of itself problematic. In a complicated or serious allegation, this may assist in fairly putting the defendant on notice of the case they have to meet.

#### *Subheadings*

- 17. The use of subheadings in any lengthy form of pleading should, as a practical matter, be considered mandatory. There is no better tool to the delineation of individual causes of action.
- 18. While it is genuinely not preferable to plead a matter of law, subheadings can sometimes be used to direct a reader (such as the judge) to the particular legal principle that the pleader is seeking to invoke. For example, there is nothing wrong with having a subheading such as “claim by the third plaintiff against the second defendant under the second limb in *Barnes v Addy*”. This can make a complex pleading easy to follow where the collection of individual facts does not make the matter of law that arises obvious.

#### *Don't plead the section*

- 19. Commercial law is increasingly governed by statutory provisions. The necessary elements of a particular statutory cause of action may be perfectly obvious on a reading of the provision. However, the individual facts need to be pleaded first, rather than pleading the conclusion which is the formula expressed in the section.

20. For example, under s.79 of the *Corporations Act 2001*, a person involved in another person's contravention may be liable to remedies including damages. However, it is not acceptable to simply plead the section itself. For example:

*The third defendant has:*

- (a) *has aided, abetted, counselled or procured the contravention; and/or*
- (b) *has induced, by threats or promises or alternatively otherwise, the contravention; and/or*
- (c) *has, by act and/or omission, been directly and/or indirectly, knowingly concerned in, and/or a party to, the contravention; and/or*
- (d) *has conspired with others to effect the contravention.*

21. What is necessary is to break up the individual conduct. For example:

- 41. *The third defendant was, from 1 January 2004 to 30 October 2006, a director of Dodgy Dealings Pty Limited.*
- 42. *The third defendant controlled the company's share register.*
- 43. *The third defendant was the controlling mind of the company to the extent that the company engaged in the share transfer set out in paragraph 21 above.*
- 44. *The third defendant executed the share transfer set out in paragraph 21 above.*
- 45. *By reason of the facts set out in paragraph 41 to 45 above, the third defendant aided, or alternatively procured the contravention set out in paragraph 36 above.*
- 46. *By reason of the facts set out in paragraph 45, the third defendant was involved in the contravention set out in paragraph 36 above.*
- 47. *Pursuant to s.79 of the Corporations Act 2001, and by reason of her involvement set out in paragraph 46, the third defendant is liable for the breach contravention set out in paragraph 36 above.*

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