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## LAWS2244 Litigation and Dispute Management 1<sup>st</sup> Semester 2005

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## **PART A: QUESTION ONE [28/35]**

### **PART A [3.5]**

Could seek identity of the guards using preliminary discovery method of identity discovery. [✓]  
You would probably try and get identity [✓] discovery against GMS as it would be aware who worked at what time, etc. [✓]

## **Equitable Bill of Discovery**

Under equity you can get discovery against a party who was involved in wrongdoing [✓] even if they were mixed up innocently (*Norwich*). Here this could be used against GMS, though they may not be so innocently involved. **[still have to demonstrate GMS involvement]**

### **O34A [✓]**

It is easier to get identity discovery under O34A. [✓] You can seek an order from the court requiring a person to do things to identify a party if it is likely they have knowledge of facts or have certain documents (O34A r3). [✓] Here it is very likely GMS at least has records of guards on duty, [✓] when they were on and maybe video footage. Must show have made reasonable enquiries first though (O34A r3(1)). [✓] The court may give a range of orders under O34A r3(2) [✓] requiring to give [✓] this info. Note, must personally serve application on person and support with affidavit (O 34A r7) [✓]. Possibly could also get identity discovery against DIMIA. [✓] Possible issue of self-incrimination for GMS [✓] – aware of things occurring – vicariously liable – etc. (O34 r2(b)).

Personal service is required for originating applications (O2 r18A). [✓]

### **PART B [3.5]**

As Jack lives outside of Australia, you would need to get leave from the court to serve him (O12 r2). [✓] However will need to satisfy one of criteria in O12 r2. [✓] Here could argue tort committed in ACT (e). Also could argue broad provision (g). [✓] – where a person is a necessary

or proper party to an action [i.e. another def ?? served] However judgement may not be enforced against him unless there is treaty enabling this.

## **PART C [14]**

The Commonwealth (Cth) is claiming privilege. There are a number of arguments it can use to protect all the copies of the report being provided.

### Legal professional privilege [✓]

O34 r2 imports Pt 3.10 of the Cth Evidence Act into the rules. [✓] Therefore the sections relating to LPP are imported – s118 and 119. [✓]

Cth could argue that copy of report held by AGS and DIMIA are protected under the preparation for litigation limb (s119). [✓] Although report made by Squeaky, it is arguably a confidential communication [✓] made for the dominant purpose of providing [✓] legal advice relating to a pending proceeding b/c AGS commissioned Squeaky to make [✓] the report upon getting [in response to] a letter about allegations against Juan and seems could be litigation from this. [✓] Though fact that it is an investigation into the management generally of the centre goes against this [✓] – suggests that may not have been for dominant purpose litigation. Alternatively Cth could argue s119 – it was for the dominant purpose of providing legal advice in relation to the management of the Centre. [✓] However it should be noted that it is not made by the client or a lawyer (i.e. AGS – *Waterford* [✓] is authority for fact that privilege can be asserted over AGS lawyers and government departments [✓]) however would still argue that it is for dominant purpose of providing legal advice. [✓]

However there is a question as to whether they have [✓] waived that privilege. There are similar facts to *Mann v Carnell*. [✓] Possibly by sending it to the principal advisor [✓] they have waived that privilege under s122 Evidence Act b/c they have knowingly and voluntarily disclosed it to another person (s122(2)). [✓] However in *Mann v Carnell* (which used the test of inconsistency between conduct of client and maintenance of confidentiality) [✓] – the fact that a report was handed to another person in government and not a third party meant that privilege was not waived [intentionally]. Thus possibly situation in LPP. [✓]

## **Public interest immunity** [✓]

O34 r2(c) – a document is privileged where it relates to a matter of state. [✓] Have to use Cth Act for ‘matter of state’ (s130(4)). Here could argue that for the proper functioning of the Cth, the report should not be disclosed. [✓] This is supported by the fact that the minister’s principal advisor is using it to prepare a refugee processing policy. [✓] It is a balancing exercise (*Sankey*). [✓] But on balance, probably argue that should not disclose given sensitiveness [✓] of issue of refugees in Australia and need to determine [✓] an effective policy. [✓]

### Self-incrimination: O34 r2(b) [only for guards/individuals]

As there is damning evidence – this may effect Crown if it tends to prove it committed an offence under Australian/foreign law or liable to civil penalty. [?] But note Crown privilege.

Concl: don’t need to disclose.

## GMS

Self-incrim b/c damning evidence [✓] – no b/c corporations cannot claim self-incrimination (*EPA v Caltex*) [✓]

## LPP

Fact that in-house lawyer has report and using it to advise GMS [✓] – could argue s118 and s119 – see arguments above. Fact that in-house lawyer – need to prove she is sufficiently independent for privilege to attack (*Southern Equities*) [✓] otherwise will have to disclose report. [✓]

## Guards

The guards could argue self-incrimination and therefore refuse to produce diaries [✓] – O34 r2(b) as it tends to suggest they have committed an offence. [✓]

## How else to obtain report and diaries? [✓]

Could try and get non-party production against Squeaky under O34B [✓] b/c the report is in their possession and relates to the matter in question. Registrar shall give order, unless court orders otherwise. A certain form is required (O34B r4(1)) and must serve copy of notice on each of the parties in 2 days (O34B r4(2)). [✓] Squeaky can refuse to produce the report on the grounds of privilege or otherwise objects (O34B r7), [✓] in which case you would have to apply to the court for determination in relation to the objection. Unlikely Squeaky could maintain a privilege argument. **[only after Cert of Readiness filed]**

Also subpoena argument under O1AA – require to give evidence. This method can also be used against the guards [✓] **[not if they're to b/c parties]** to get them to provide their diaries or to GMS. Must be served personally (O1AA r5). [✓] Could challenge though might be hard to get diaries b/c privilege still applies though might not apply to GMS.

**[EXAM PAPER MIXED UP NUMBERING – THERE WAS NO D]**

### **PART E [3.5]**

GMS could argue that it would be oppressive for them to provide evidence of the subpoenas as it is difficult for them to get them all and will be costly and take a long time to do so. [✓] In response you could argue that it is necessary for the interests of justice to do so – that it is important to decide the real issues in trial as required under s59 Supreme Court Act. And also not really that oppressive – re: costs, you can pay conduct money to do so.

Maybe GMS would argue privilege [✓] – self-incrimination – again would not apply b/c GMS is a corporation (*EPA*). [✓]

### **PART F [3.5]**

The Cth could argue that CRAP's proceedings should be stayed [✓] or dismissed on the grounds of abuse of process. [✓] Where the party's dominant purpose is an improper one [✓] this can occur (*Williams v Spautz*). [✓] Here you would argue that if CRAPs proceedings are a joke and a political stunt they have been launched predominantly for a collateral purpose and therefore an abuse of process. [✓] Very likely given their actions are similar to Mr. Skyrings. Also argue their pleadings are vexatious [✓] or oppressive or disclose no cause of action and therefore should be struck out (O29 r4). [✓] This is very likely given trying to argue that is the case given CRAP is trying to rely on Magna Carta etc. Therefore would try and get default judgement (O17 r1(2)). Or could try and get a summary judgement in favour of Cth under O17 r1(2). [✓] The Cth must

have filed a condition appearance first and after 10 days can apply for summary judgement (O17 r1(1)). Again use basis that vexatious or frivolous. If CRAP often engages in this activity may be considered a vexatious litigant. [✓]

## **PART A: QUESTION TWO**

### ***PART A***

To see if proceedings validly commenced check following:-

#### Formalities for Originating Appln (OA) [✓]

Certain form required (O2 r4(1)). Time for appearance must be stated (O2 r7) [✓], cause of action (O2 r8), [✓] and relief sought (O2 r9). [✓] The OA remains in force for 6 months (O2 r23) [✓] and therefore must have been served within that time. Here it was issued on the 9 May 2005 and as it is 17 June 2005 – clearly complied. A statement of claim may accompany the OA (O2 r10(3)) in this case. [✓]

### **Limitation period**

Have 6 years from date of accrual cause of action for the damages claim (s11 Limitation Act) and 6 years for TPA claim (s82 TPA). Here causes of action accrued on 2 June 1999 b/c that is when there was breach and 6 years had not passed when filed OA on 9 May 2005 – so no problem. [✓]

### **Jurisdiction**

Supreme Court (SC) has original jurisdiction to hear the breach of contract (K) claim [✓] (s20 Supreme Ct Act) and jurisdiction to hear Pt V TPA claim (s86 TPA). [✓]

### **Service**

Must be personal O2 r18A. Because it is a corporation outside ACT – use SEPA. S9 [✓] says must serve in accordance with s15 SEPA [✓]. Can serve by registered post or serve it personally (s9) or serve personally on directors. Must be a s16 prescribed notice. [✓]

## **PART B**

Could apply to have an opt-in proceeding under O19 r10. [✓] [Possibly] Where there are numerous parties with a same interest in a same cause or matter can have opt-in proceeding (O19 r10). Test for same interest must be satisfied (*Carnie*) – possible. [✓] Alternatively could argue to have a consolidation of the actions (O 51). [✓]

## **Advantages opt-in**

This is probably a more cost efficient method of determining claims for client, especially if there are potentially lots of parties who have claims – they can opt in and all be heard together. [✓] This will also be excellent in terms of reducing time spent on the matter – less time in court and preparing separate cases.

## **Disadvantages**

People who were not initially going to litigate because they could not afford it may ‘opt-in’ now that can be run together – less cost for them. This will mean more payouts by client.

## **PART C**

Would apply to transfer under cross-vesting legislation – section 5. The basis for this would either be that it is more appropriate to hear in Federal Court (FC) or it is otherwise in interests of justice to do so.

## **More appropriate test?**

- whether apart from cross-vesting scheme the relevant proceeding would have been incapable of being instituted in court in question? – no – as pointed out SC have jdn b/c s20 SC Act and s86 TPA
- Whether case involves application of law of receiving court – yes – TPA is within a federal court jurisdiction [✓]
- Interests of justice can look at adjectival matters (*Bourke*) – need more facts here re: court lists etc. – and ability of court to deal with all aspects of mater. B/c not just TPA claim – also breach K – possible not in interests justice and hence more appropriate to move. *MacPac* considerations regarding witnesses where things occurred etc. is irrelevant as both courts in ACT.

## Otherwise in interests justice?

*Bourke* – look at objective factors. Here as both cts are in ACT wouldn't move on this basis. No objective factor. [FCA has Darwin registry]

## Disadvantages moving to FC

- Possibility of launching an opt-out procedure under Pt IVA FC Act
- Even more likely to get more partis who can claim relief from client
- Bear burden of proof in seeking to transfer [**no – bank invest**]

## Advantages

- If have opt-out procedure – reduces cost, time, for client

## **PART D**

Could use mediation as this is renowned for being cheap and quick. Though it is no always appropriate – here because there are quite a few litigants [✓] may be more difficult to come to an agreement where all happy – might still take a while though probably faster than litigation. [✓] Further mediation does not deal very well with power imbalances (depending on extent to which mediator intervenes) and hence client could use its various forms power as identified by Astor and Chinkin to achieve an outcome that suits it and is probably not as 'fair' for plaintiffs as if got decision in trial. Because no need to further relations b/c commercial matter so this advantage of mediation is not applicable. [✓]

## **PART E**

MS would amend statement of claim under O32. [✓] They can firstly apply without leave [?] to amend the pleadings before pleadings closed once (O32 r2(1)) and a second time can amend without leave by getting consent of parties (O32 r2(2)). In deciding whether to give consent it is relevant to consider what MS might do if you refuse – they can apply to court for an order or leave to amend pleadings. Courts generally tend to allow amendment as long as can be remedied with costs (*Howartz v Adey*) and courts often allow it as they want to determine the real question in issue (*Etna*). Courts have power to add cause of action under O22 r1. Thus very likely they could allow it and therefore you should probably consent as it will save time and possibly by refusing – court may decide award some costs against you if you fail to consent and unreasonable.

However the problem here is that MS is now out of time [✓] (i.e. 6 years has expired – s11) and therefore to add a cause of action would circumvent Limitation period. Courts have discretion to allow addition new cause of action arising out of same or substantially same facts (O32 r16) [✓] even though limitation period expired (O32 r1(7)). [✓] They will have regard to above factors and therefore may allow it if consider arises out of same facts. For above reasons, will give consent.

## **PART F**

I would call private sessions with the parties and calm Johnny down [✓] and remind them how far they have come and that they should possibly persevere. If cannot get out of deadlock – refer to litigation. [✓]

## **PART G**

There is probably not much can do about Johnny's disclosures because it was made in the context of a negotiation for settlement and therefore without prejudice privilege applies (*AWA v Daniels* – context mediation). [✓] That is they cannot be used in context of further litigation, although question whether they are incidental to negotiation (*Field v Comr Railways*) [✓] and may not be covered. Though s9 [✓] of Mediation Act prevents disclosure communications made in mediation and mediator cannot reveal them (s10). [✓] s131 Evidence Act [✓] also reflects without prejudice privilege. Therefore may not be able to use J's disclosures in court.

## Application to Supreme Court

Might try and get a Mareva Order against velocity [✓] which is designed to prevent a D from disposing or removing assets so as to defeat any judgement which P may obtain against D at trial – this appears to be occurring as said that velocity given away things. [✓] 4 things to prove (*Jackson Sterling Industries*)

- real risk D will frustrate judgement by dissipating assets
  - clearly this is the case here as already gotten rid of things
- assets which can form subject matter of order
  - This element is problematic b/c as J said – everything already owner [*owned*] by another company. However might be able to prove that the other company merely “holds” assets and therefore can properly be said that velocity still owns the things i.e. velocity has real ‘power of disposition’ (*Cardile v LED*). Need more facts to prove this. Or where some process exists, which is ultimately enforceable by courts, that would oblige the other company to disgorge the assets to satisfy the judgement – can then meet this requirement (*Cardile*). Again need more facts
- Also would require P to have a sufficiently strong case to justify relief
  - This seems to be met
- Requires undertaking as to damages [✓]

Problem – can you adduce evidence of J’s disclosure to prove can get Mareva Order b/c of privilege attaching to it? May not be able to get one.

## **PART B: ESSAY QUESTION – QUESTION 5 [21/30]**

A limitation period should not be seen as an arbitrary cut off point in related *[relation]* to the demands of justice or the general welfare of society. Despite the principles of a person's right to have a cause of action, there are a number of strong policy reasons which indicate that Limitation Periods are not arbitrary. McHugh J identifies a number of reasons why we need limitation periods. These reflect the achievement of the general aims of justice and efficiency.

### **What is a limitation period?**

Limitation periods are imposed on parties to prevent them bringing a cause of action a certain time after that cause of action accrues. This period varies between jurisdictions and in relation to certain matters. 6 years is the general period in the ACT under the Limitation Act.

While it seems to be a denial of justice to the plaintiff in imposing a limitation period, by not allowing them to bring a cause of action after a certain period, limitation periods do justice to defendants. As Best CJ noted in *A Court v Cross*, long dormant claims often have more or cruelty than justice in them. People should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them. For example, insurers, public institutions and businesses. Even where a cause of action relates to personal injuries, it is unfair to shareholders and others affected by claims of today ultimately liable for a wrong of the distant past. In this regard a limitation period is not unrelated to the demands of justice or the general welfare of society. There should be some point when it is fair to avoid people in the future being liable for claims that they have had little to do with (as in the case of shareholders). Companies and businesses need certainty in organising their affairs and given that awards of damages compensation can be so large as to jeopardise the financial viability of companies, an open-ended liability from unforeseen claims is arguably an unreasonable burden on business. This may deter people from starting up businesses and therefore limitation periods are related to the general welfare of society. Personal defendants cannot live their whole lives in fear that a claim may be brought against them at any time. This would be unjust and against the general welfare of society.

The fact that there are great evidential difficulties associated with bringing an action years after it has occurred also indicates that the prevention of this actually achieves justice. Decisions need to be based on what actually happened and with regard to as much relevant evidence as possible – otherwise it could be argued that justice is not done. By bringing an action years after it has

occurred it is very likely that witnesses will have died. Memories will have faded, documents destroyed, etc. You could not expect that what evidence is available in such cases would give an objectively just idea of what the issues are between the parties and what the actual facts of a case are. In this regard, one can see that a limitation period is not an arbitrary cut off point unrelated to the demands of justice and society's welfare.

Furthermore public interest requires that disputes be settled as quickly as possible. Thus by placing a time limit on bringing causes of action – the Limitations Acts are related to the general welfare of society. They encourage plaintiffs with good causes of action to pursue them with reasonable diligence. Furthermore courts have great troubles as it is in managing their case loads and this adds one way of managing them – by blocking out claims that fall outside the limitation period. Thus courts can better manage cases before them and thus limitation periods are related to justice and general welfare of society.

A factor going against this proposition is the fact that limitation periods start running from the time when a cause of action accrues, even where the individual is unaware. In this regard it seems unjust and arbitrary. However this is remedied in certain circumstances like Dust Diseases Tribunal claims. But where there is a breach of contract a party and a party does not know about it for a long time while the clock is ticking – this seems somewhat unjust.

Courts do not have sufficient powers to extend limitation periods if the interests of justice so require. Courts have discretion to extend limitation periods where it is just and reasonable to do so in relation to latent damage to property and personal injury. Thus the fact that a limitation possibly seems unjust due to the fact that they accrue even where a prospective plaintiff is unaware that time has started running, this ability of courts to extend limitation periods is a remedy. However it is only in relation to some circumstances when this is allowed i.e. property damage and personal injury. Arguably courts should have a general discretion to extend limitation periods as they see fit – though they should exercise such discretion cautiously if they had such a power. This would enable total justice as there may be some circumstances where it seems unjust not to allow an extension and it is not possible to extend under sections 36 and 40. Furthermore the addition of subsection (5) into s36 has really limited this exception. Thus courts do not retain sufficient powers to extend limitation periods if interests of justice so require as there are only very limited circumstances where they can exercise this power. Courts should have a general discretion to extend wherever it seems just.

In general, limitation periods are not arbitrary and unrelated to justice. But limited power of extension – insufficient.