SUPREME COURT
OF THE NORTHERN TERRITORY

Self Represented Civil Litigants Handbook

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Chapter One: Introduction

Disclaimer and Alternative Resources

This Handbook is provided by the Supreme Court to assist unrepresented litigants in civil matters by providing information on Court practices and procedures. It contains only very general information and in abbreviated form.

It only covers the substantive law in so far as it is required to elaborate on procedural issues.

It does not purport to cover all the contingencies which might occur in the course of a case. It is not intended to be a substitute for legal advice.

No claim is made as to the accuracy of the contents of this Handbook and the contents do not constitute legal advice. All litigants are encouraged to obtain legal advice from a lawyer before taking any steps in proceedings. The Court does not accept any liability for anything occurring as a result of reliance on the contents of this Handbook, nor will any concessions be made on that account.

Most litigation conducted in the Supreme Court is complicated and not all persons are capable of conducting proceedings in the Supreme Court without professional assistance.

Lawyers can be sourced via the yellow pages or by enquiry to the Law Society.

The telephone number for the Law Society is 8981 5104 and their website address is: lawsocietynt.asn.au

Limited free assistance may also be able to be obtained via the Northern Territory Legal Aid Commission or various community legal aid services.

The following agencies provide legal advice and some assistance in various matters namely:-

Northern Territory Legal Aid Commission

Darwin Office: 6th Floor, 9-11 Cavenagh Street
Darwin NT 0800
Locked Bag No.11
Darwin NT 0801
Telephone: (08) 8999 3000
Facsimile: (08) 8999 3099
Web: www.ntlac.nt.gov.au

Palmerston Office: Shop 6, 25 Chung Wah Terrace
Palmerston NT
Locked Bag No.11
Darwin NT 0801

Telephone: (08) 8999 4750
Facsimile: (08) 8999 4747

North Australian Aboriginal Justice Agency Inc.

Darwin Office: 61 Smith Street
Darwin NT 0800
GPO Box 1064
Darwin NT 0801
Telephone: (08) 8982 5100 / 1800 898 251
Facsimile: (08) 8981 5199
Web: www.naaja.org.au

Darwin Community Legal Service

8 Manton Street
Darwin NT 0800
GPO Box 1901
Darwin NT 0801
Telephone: (08) 8982 3000
Facsimile: (08) 8941 9935
Web: www.dcls.org.au

Top End Women's Legal Service

8 Manton Street
Darwin NT 0800
GPO Box 3180
Darwin NT 0801
Telephone: (08) 8982 1111 / 1800 812 953
Facsimile: (08) 8982 1112
Web: www.tewls.org.au

Northern Land Council

45 Mitchell Street
Darwin NT 0800
GPO Box 1222
Darwin NT 0801
Telephone: (08) 8920 5100
Facsimile: (08) 8945 2633
Web: www.nlc.org.au

There also are a number of resources which can be utilised to assist litigants in the conduct of proceedings.

The Supreme Court website (www.supremecourt.nt.gov.au) contains useful material such as various practice directions and the judgments handed down by the Court.

Various websites provide a wealth of resources. Examples include:-

1. Australasian Legal Information Institute (Austli) – www.austlii.edu.au;
2. Foundation Law – www.lawfoundation.net.au;
3. Comlaw – www.comlaw.gov.au;
4. Findlaw – www.findlaw.com.au;
5. The Law Society - lawsocietynt.asn.au.

All Northern Territory legislation, including repealed legislation, is available from the Parliamentary Counsel website by following the links from www.dcm.nt.gov.au

There are a number of easy to follow legal publications that can be referred to. The Northern Territory Legal Aid Commission publishes a handbook titled "The Law Handbook". Legal Aid agencies in most other jurisdictions also publish a similar guide and some have an online version, for example the Law Handbook Online of the Legal Services Commission of South Australia (www.lawhandbook.sa.gov.au). Care needs to be taken when using interstate references due to the likely differences in procedure.

Although laws and procedures are not generally interchangeable between the various States and Territories, many of the procedures in the Northern Territory Supreme Court are based on those in Victoria so publications in Victoria may be a particularly relevant alternative source.

There are many legal texts which can be referred to. They may be available through reference libraries. There are texts covering evidence, procedure and specifically pleadings. Some are very specialised texts dealing with specific matters or procedures such as discovery, subpoenas and the like.

Judgments of various courts, but specifically those of the Supreme Court of the Northern Territory, are relevant due to the principle that like cases are to be decided alike.

More generally a case may specifically decide an issue dealing with either a point of law or procedure or the interpretation of the section of an Act.

Judgments from all Australian jurisdictions are available on the websites referred to above, particularly Austlii. Judgments of the Supreme Court are also available on the Court's website.

The Court

The Court comprises the Judges and the Master. The Judges have unlimited original jurisdiction. The Master's jurisdiction is limited as set out in the Supreme Court Act and the Supreme Court Rules.

The Supreme Court Rules regulate the procedures and practices of the Court and they are the primary reference source for procedural matters. This Handbook is essentially a summary of those Rules in respect of the various topics discussed.
The Supreme Court Rules follow a format of numbering as Orders with sub-rules, for example the rules dealing with costs are all within Order 63. There are 75 sub-rules in that Order and, for example, the rule dealing with costs sanctions for issuing proceedings in the Supreme Court in lieu of the Local Court is Order 63 Rule 22. In this Handbook the formatting will be abbreviated to the commonly used parlance so that Order 63 Rule 22 will be referred to as Rule 63.22.

The applicable Rule relative to each matter referred to in this Handbook is cited in the text of the discussion of each matter and the abbreviation 'SCR' wherever used in this Handbook means the 'Supreme Court Rules'.

Registry Staff

Of the staff in the Supreme Court Civil Registry, only the Registrar has legal qualifications. The remainder of the staff are administrative staff. Therefore they can only provide limited administrative assistance.

Registry staff cannot provide legal advice about your matter.

They can sometimes provide you with information regarding the Court's administrative processes such as listing enquiries and the like. They are able to provide you with some court forms. However they cannot help you to complete your court documents.

Registry staff cannot tell you what to say in Court and they cannot speak to a Judge or the Master on your behalf.

The role of Registry staff in checking documents is mostly limited to formal matters such as the correctness of the manner of completion of the document.

For these reasons you cannot rely in Court on any information given to you by Registry staff.

Communications with the Court

It is not appropriate to communicate with a Judge or the Master other than in Court proceedings. It is inappropriate for there to be any private audience or private correspondence with a Judge or the Master.

All correspondence should be addressed to the Registry.

The Court is situated in State Square next to Parliament House and the postal address of the Court is GPO Box 3946, Darwin, NT 0801.

Chapter Two: Pre-Action Requirements

Proper Court

It is first necessary to determine the proper court in which to commence proceedings.

There are two courts exercising civil jurisdiction in the Northern Territory.

The Local Court has jurisdiction for claims up to a value of $100,000.00.

The Supreme Court has unlimited civil jurisdiction.

Both the Supreme Court and the Local Court have the power to transfer proceedings to each other in appropriate cases, see section 16(2) of the Supreme Court Act in the case of transfers by the Supreme Court.

There are consequences if a matter is commenced in the wrong court. Cost penalties can apply if a claim is brought in the Supreme Court which should have properly been commenced in the Local Court *[Rule 63.22].*

Also a significantly higher filing fee applies in the Supreme Court.

Pre-Action Procedures

The Supreme Court has a Practice Direction which sets out various steps to be taken before an action is commenced. The Local Court does not have a similar requirement.

The relevant Practice Direction is Practice Direction 6 of 2009 and it is referred to as "PD6". It is available on the Supreme Court website.

Very generally PD6 requires the Plaintiff to communicate with the intended Defendant giving details of the claim sufficient to enable the claim to be understood.

Copies of essential documents must be provided at the same time.

The communication can also request copies of any necessary documents from the intended Defendant which the intended Plaintiff does not have.

A Defendant is required to promptly acknowledge the letter and thereafter submit a detailed response within a reasonable time.

That response must include copies of any documents on which the Defendant relies and is to indicate whether, and to what extent, the claim is accepted.

It is contemplated that the parties will then seek to undertake some form of alternative dispute resolution and that proceedings will only be issued after that

avenue has been exhausted. Commencement of proceedings is intended to be the last resort.

Non-compliance with PD6 is not a bar to the issue of proceedings however there are costs and interest consequences for non-compliance.

Chapter Three: Proceedings

Time Limits

Civil proceedings must be commenced within a fixed time after the cause of action arises.

In general the *Limitation Act* terms sets the time limit. The general time limit fixed by that Act is three years from the date when the cause of action arises.

Some specific Acts of Parliament set a special time limit for the commencement of proceedings e.g. the *Police Administration Act* for claims made against the Northern Territory for actions of police officers. That time limit is two months and that is much shorter than the norm.

Generally a cause of action arises on the occurrence of the events giving rise to the claim. For example, in the case of a claim for injuries it will be the time when the accident or other event leading to the injuries occurred.

In contract claims the ascertainment of the date may be more problematic. In general terms a claim for damages for breach of contract arises at the time of the breach.

Most time limits set by the *Limitation Act* or by other Acts can be extended by a court in specific circumstances, see generally section 44 of the *Limitation Act*.

Filing Fees

Fees are payable on the commencement of proceedings.

Currently the fees are $1,407.00 for a corporation and $1,055.00 for an individual.

There is provision for waiver or the deferral of the whole or part of the fee in cases of financial hardship. Likewise, payment by instalments may be permitted. An application supported by a statutory declaration is required to be completed for this purpose.

The Civil Registry can provide the relevant forms.

Originating Process

Actions in the Supreme Court are commenced by either a Writ or an Originating Motion *[Rule 4.01]*.

An unrepresented litigant would mostly be involved in the type of matter routinely commenced by Writ and therefore only matters commenced by Writ are dealt with in this Handbook.

The form of a Writ is in the Schedule to the SCR and is available on the Court's website.

A Writ can be issued with either an Endorsement of Claim or a Statement of Claim *[Rule 5.04(2)]*.

An Endorsement of Claim is a broad general statement outlining the nature and basis of the claim.

The Statement of Claim on the other hand is a statement of all of the material facts and all of the particulars which the Plaintiff must set out for the purposes of the claim.

Different time limits apply to the steps subsequent to the issue of the Writ depending on whether the Writ is issued with an Endorsement of Claim or a Statement of Claim *[Rules 14.01 and 14.02]*.

When preparing a Writ for filing it will be necessary to have one copy for the Court and one copy for each proposed Defendant.

There should also be one copy for the Plaintiff to retain for record purposes.

On filing, the Court will retain the original and will stamp the remaining copies.

Service

Once a Writ has been issued, it is then necessary for the Plaintiff to arrange service of the Writ on each Defendant.

In general, service must be effected personally, see *Rules 6 and 7* of the SCR which deal generally with matters relevant to service.

Service on a company is effected at its registered office and in the case of a company can be effected by posting the document to the registered office. The registered office is that set out in the company's official documents and can be ascertained by a search at the offices of the Australian Securities and Investments Commission.

There are additional requirements where service has to be effected in another State or Territory. Service outside of the Northern Territory requires a document known as a Form 1 Notice under the Commonwealth *Service and Execution of Process Act* to be attached to the Writ.

The requirement is a mandatory one and failure to comply renders the service totally ineffective.

In certain circumstances the Court may permit service to be effected other than personally *[Rule 6.09]*. This is known as substituted service. In appropriate cases the Court can also deem service that has not been strictly effected according to the rules as valid service *[Rule 6.10]*.

Substituted service is generally ordered only after a party has exhausted all reasonably available means to effect personal service.

The methods of substituted service vary according to the circumstances. It may take the form of service by post, service on another person or service by advertisement in a newspaper.

Generally service of a Writ must be effected within 12 months of its filing. Service cannot be effected after this time without first obtaining the permission of the Court [*Rule 5.12].*

After service has been effected it is necessary to prove that service. That is done by an affidavit of service *[Rule 6.16]*. That step will be unnecessary if the Defendant files an Appearance, see below.

It is necessary for the affidavit of service to specify the time, date and place when service was effected, by whom service was effected, the documents served (including the Form 1 Notice referred to above where appropriate) and the method by which it was established that the person required to be served was in fact the person served.

The latter requirement is usually proved by the server asking of the person served whether they are the person named in the Writ and the person served responding in the affirmative.

Appearance

The next step after service has occurred is for each of the Defendants to enter an Appearance by filing the appropriate notice at the Registry. The form for an Appearance is available on the Supreme Court website.

The SCR provide that, unless the Court otherwise permits, a Defendant cannot take any step in a case without filing an Appearance *[Rule 8.02]*.

Where a party is a company, it cannot take any step in the proceeding (which includes the filing of an Appearance) without representation by lawyers unless the Court first otherwise approves *[Rule 1.13]*.

How long a Defendant has to file an Appearance will depend on where the Defendant is served.

The different time limits are set out in the Writ. For example, the time is seven days when served within 200 kilometres of the Registry and it is 21 days if it is served outside of the Northern Territory *[Rule 8.04]*.

Service outside of Australia is more complicated and generally requires compliance with various international conventions *[Rule 7]*.

Private bailiffs or process servers can be engaged to effect service in Australia.

They will charge a fee for their service which usually includes the preparation and provision of the affidavit of service. Bailiff's fees can be recovered as part of the costs of the claim by the successful party.

The effect of an Appearance is that it is notice of the Defendant's intention to contest the action.

The steps thereafter depend on whether each Defendant files an Appearance or fails to do so within the allowed time.

See Chapter 4 which deals with the position where a Defendant fails to file an Appearance as required.

The SCR specify a timetable for subsequent court documents to be filed and served after the filing of an Appearance *[Rules 14.02, 14.04, 14.05 and 14.07]*.

Address for Service

The Appearance is required to stipulate an address, which must be within 15 kilometres of the Registry where the Writ was issued, at which documents can be served on the Defendant either by post and or personal delivery *[Rule 6.05]*.

As it must accommodate personal delivery, a post office box or similar postal address does not suffice.

Likewise the Writ is required to contain an address for service of the Plaintiff, which must also be within 15 kilometres of the Registry where the Writ was issued *[Rule 6.05]*.

Effectively therefore all process to be served on a Plaintiff after commencement, and on a Defendant after an Appearance, can be effected by post or delivery to the address for service. Personal service, although permitted, is not required.

Pleadings Timetable

The first step is the filing and serving of a Statement of Claim. This step only applies if the Writ only contained an Endorsement of Claim and not a Statement of Claim.

In this case the time limit for the filing and service of the Statement of Claim is 14 days after the filing of Appearances *[Rule 14.02]*.

The next document is the Defence which is filed by the Defendant(s) and if the Defendant intends to make a counterclaim, additionally a Counterclaim.

The time limit for this is 14 days after the filing of the Appearance where the Writ contained the Statement of Claim *[Rule 14.04(a)]* and 14 days after service of the Statement of Claim where the Writ contained only an Endorsement of Claim *[Rule 14.04(b)]*.

If the Defendant makes a Counterclaim then the Plaintiff must respond to the Counterclaim by filing a document known as a Defence to Counterclaim within 14 days of service of the Counterclaim *[Rule 14.07]*. It is similar to the Defence which a Defendant files in respect of a Statement of Claim.

If there is no Counterclaim and there are matters in the Defence to which the Plaintiff needs to respond, the Plaintiff does so by filing a Reply which must also be filed within 14 days of service of the Defence *[Rule 14.05]*.

Likewise if there is a Defence to Counterclaim and the Defendant needs to respond, that is done by a Reply to Defence to Counterclaim, which must be filed within 14 days of service of the Defence to Counterclaim *[Rule 14.07]*.

All court documents filed up to this point are referred to as the pleadings.

Once all necessary pleadings have been filed, after a further 14 days, it is said that the pleadings are “closed” *[Rule 14.08]*.

Most pleadings are complicated legal documents. They are required to set out all the material facts and particulars necessary to establish the Plaintiff’s claim.

Pleadings are a critical and important part of any civil claim.

The purpose of the pleadings is to notify both the Court and the Defendant of the nature of the Plaintiff’s claim, the case the Defendant must meet and the issues to be decided by the Court.

Pleadings are the ambit for the evidence which can be called. Only relevant evidence can be called and the statement of material facts and particulars in the pleadings is the primary factor by which relevance is determined.

A party is not entitled to obtain any relief which is not set out in the pleadings.

Rule 13 of SCR sets out the specific requirements for pleadings. It is not exhaustive as case law also sets requirements but a discussion of that case law is outside the scope of this Handbook.

Despite the time limits fixed by the SCR for the taking of various steps there is a provision in the SCR which enables the Court to either extend or abridge the time allowed for the taking of any *[Rule 3.02]*.

Insufficient Pleadings

There are varying consequences if an insufficient pleading is filed and served.

The simplest is that a request for particulars is made by the other party. This is a document, often in the form of a letter, which sets out specific matters which the other party requires the pleading party to specify.

Any dispute about the appropriateness of a request for particulars or of the supplied particulars will ultimately be resolved by the Court either at a Directions Hearing or on a specific application (Interlocutory application, see below), made by one of the parties *[Rule 13.11]*.

A more significant consequence is that an application may be made either for the pleading to be struck out or for summary judgment to be entered in favour of the other party *[Rules 23.01 and 23.02]*.

The striking out of a pleading does not automatically dismiss an action as the Court will usually give a party time to file an amended pleading.

Amending a pleading may have an impact on the timetable as time must be allowed for filing of amended pleadings in response by the other parties.

There are also cost consequences which follow. A party who makes an amendment or who is ordered to make an amendment bears the costs of all parties of all things which follow from the amendment irrespective of the ultimate result in the case *[Rule 63.11(7)]*.

An application for summary judgment is the most severe of the consequences for inadequate pleading.

Summary judgment can be sought either by a Plaintiff or Defendant *[Rules 23.01(2) and 23.03]*.

The basis for summary judgment is that it is apparent that on the face of the pleadings that either the Plaintiff's claim or the Defendant's defence cannot be maintained such that the other party should be entitled to judgment in a less formal way than through the trial process.

Summary judgment operates as a final determination of the claim.

A party may amend a pleading without permission of the Court, or the input of the other side, at any time before the close of pleadings *[Rule 36.03(a)]*.

Additionally any party can amend a pleading at any time with the consent of the other party *[Rule 36.03(b)]*.

Lastly the Court can give permission to amend a pleading at any stage of the process *[Rule 36.03(b)]*. Recent changes to the law effectively mean that there is a practical limit to when an amendment can occur as courts now take into account factors such

as the necessity of case management and the proper utilisation of court resources in determining such applications.

Subsequent to the close of pleadings two other court documents are to be filed.

The first relates to the discovery process and requires the filing of a List of Documents.

The second document is a Litigation Plan.

Both documents are separately discussed below, Chapters 6 and 11 respectively.

Additional Parties

An additional Plaintiff or Defendant may be added to the proceedings on the application of either the Plaintiff or the Defendant *[Rule 9.06]*.

Where an additional party is added then orders in relation to the timetable for pleadings for those additional parties and Lists of Documents if required will be made.

Usually additional parties can only be added with the permission of the Court *[Rule 9.02]*. The Court is concerned to avoid multiple proceedings which may cover the same issues and will normally allow the addition of a party if it will bring finality once and for all to the proceedings.

Different considerations may apply if the case is at an advanced stage.

A Defendant is entitled to join a party, known as a Third Party, within 28 days of the filing of its Defence without the Court's permission *[Rule 11.05(2)]*.

This applies where the Defendant claims a right to be indemnified for the claim made by the Plaintiff by the proposed Third Party.

A claim against a Third Party is commenced by a document known as a Third Party Notice which essentially recites the nature of the Plaintiff's claim against the Defendant and then sets out all the material facts relevant to establishing the Defendant's claim against the Third Party.

The Third Party is then required to file an Appearance *[Rule 11.08]* followed by a pleading known as a Defence to Third Party Notice within 14 days after filing an Appearance *[Rule 11.09]*.

A Third Party joined by a Defendant is treated as a Defendant for all purposes under the SCR.

Therefore a Third Party is required to comply with rules relating to Lists of Documents and the like *[Rule 11.12]*.

Likewise a Third Party is also able to join subsequent parties through the third party process in the same way as the Third Party was joined *[Rule 11.16]*.

Further where a Defendant has served a Counterclaim on the Plaintiff, the Plaintiff is then entitled to join a Third Party in respect of that Counterclaim *[Rule 11.17]*.

Chapter Four: Default

This section deals with the position wherever a default occurs for example a default by a Defendant in filing an Appearance, a default by a party in filing a pleading a default in complying with an order made by the Court or a failure of a party to attend when required.

The earliest likely default is a default by a Defendant in the filing of an Appearance within the time allowed and after service of a Writ.

If the claim is a liquidated amount then the Plaintiff is entitled to informally enter judgment *[Rules 21.01(2) and 21.03(1)(a)]*. Once that occurs the effect is as if the matter had proceeded to trial and the Plaintiff was awarded a judgment for that amount.

A liquidated amount is one which does not require an assessment of damages and requires simply an arithmetical calculation for example, a claim for a debt.

On the other hand a claim for damages for injuries requires the Court to assess and determine the amount of damages.

Where the claim requires damages to be assessed then the Plaintiff is entitled to enter interlocutory judgment for damages to be assessed *[Rule 21.03(1)(b)]*.

The effect of this is that liability is determined in favour of the Plaintiff and the matter proceeds purely on evidence going to the issue of the assessment of the damages.

A Defendant may also default by failing to file a Defence after having filed an Appearance.

If the claim is for a liquidated claim then the Plaintiff is entitled to proceed in the same way as if an Appearance had not been entered *[Rules 21.02(1) and 21.03(1)(a)]*.

Likewise if damages need to be assessed the Plaintiff is entitled to enter interlocutory judgment and proceed to have damages assessed *[Rules 21.02(2) and 21.03(1)(b)]*.

In the latter case, as the Defendant has appeared, the Defendant may still be heard on the assessment.

Similar consequences follow if a party fails to attend at Court when required, for example, if a party fails to attend a Directions Hearing, the Court may dismiss the claim where the party is the Plaintiff or strike out the Defence where the party is the Defendant *[Rule 48.11]*.

Wherever judgment is entered either by entering judgment or entering interlocutory judgment, the party in default may apply to have the judgment set aside *[Rule 21.07]*.

If the judgment is set aside then the matter is reinstated and it will proceed in the normal way with appropriate orders being made fixing a timetable for procedural steps.

When deciding on an application to set a judgment aside, the Court will require an explanation for the default and to be satisfied that the defaulting party has a good defence to the claim.

A party may also be in default by failing to serve pleadings or failing to comply with an order made by the Court, for example an order for discovery.

In that event an opposing party may apply for judgment if the default is by the Plaintiff or for the Defence to be struck out where the default is by the Defendant *[Rules 24.01 and 24.02]*.

Depending on the nature of the claim, in the latter case the consequences are the same as if a Defendant had failed to file a Defence *[Rule 24.02(a)]*.

Whether such an order is made will depend on the explanations offered and the remaining circumstances of the case such as the extent of and the reason for the delay, prejudice to other side and the like.

A default in the filing of a Defence can also occur if a Defence has been struck out and an amended Defence is not filed within any time that is allowed for that purpose *[Rule 21.02(3)]*. A Plaintiff can then seek judgment or interlocutory judgment, as the case may be, in the same way as if no Defence had been filed in the first place.

Chapter Five: Case Management

Case Management is the process by which the progress of a case is monitored by the Court to ensure that the case proceeds in a timely and orderly fashion and without unnecessary delays.

The Case Management process commences with the convening of an Initial Directions Hearing by the Master *[Rule 48.04]*.

The Initial Directions Hearing is scheduled within two months of the issue of a Writ or within 21 days of the filing of an Appearance, whichever first occurs *[Rules 48.04(1) and (2)]*.

The Initial Directions Hearing usually deals with the following matters:-

1. Categorising the action;
2. Setting timetables for pleadings, completion of discovery and filing of Litigation Plans;
3. Dealing with any initial applications for extensions of time limits;
4. Determining whether discovery should be dispensed with in matters where PD6 applies;
5. Scheduling a Case Management Conference in PD6 matters or otherwise scheduling a further Directions Hearing;
6. Advising a likely or estimated trial date.

The category is determined by reference to the complexity of the matter, its urgency and the likely duration of the trial *[Rule 48.06]*.

Most routine matters are given a category B which relates to matters which are not urgent and which will require in excess of three days for the trial.

The bulk of the Case Management is conducted by the Master.

The Master also conducts the Initial Directions Hearings for cases which may ultimately be transferred for Case Management by a Judge.

Judges may manage complex cases such as those which are likely to be document intensive or will require complex pleadings or will also likely require more than two weeks for trial.

Subsequent to the Initial Directions Hearing there will usually be further Directions Hearings or, in cases where PD6 applies, a Case Management Conference.

Ideally Directions Hearings are kept to a minimum.

Directions Hearings are often also convened to monitor progress when there are long adjournments between Directions Hearings.

Chapter Six: Discovery

Discovery is the process by which parties disclose to the other parties details of relevant documents they hold and facilitates the inspection of those documents.

The process commences with the filing of the List of Documents which was briefly referred to in Chapter 3.

In matters to which PD6 applies, the discovery process is intended to be dealt with by the pre-action disclosure process. If properly complied with, this should mean that discovery is unnecessary. Hence the process is usually dispensed with in PD6 matters. If so, an order to that effect is usually made at the Initial Directions Hearing.

If discovery is not dispensed with then each party must file and serve a List of Documents within 21 days after the close of pleadings or such other time as the Court determines *[Rule 29.03(2)]*.

A List of Documents is essentially a document filed by a party which identifies documents which the party has in its possession, custody or control which are relevant to the issues in dispute between the parties. The requirement extends also to specifying documents which a party has had in its possession, custody or control but no longer has at the time of the filing the List of Documents.

A simple example of the latter is where a party has sent a letter, even if having retained a copy (which is discoverable as a copy in any event), details of the original sufficient to describe it (the date and addressee will usually suffice), and how the party disposed of it, must be set out.

A List of Documents makes special provision in respect of a class of documents known as privileged documents.

Although a party is obliged to include privileged documents in the List of Documents, actual production of those documents cannot be compelled in normal circumstances.

There are a number of forms of privilege but the usual one relevant in such an instance is the legal professional privilege. This essentially relates to communications between a legal advisor and the client or with others for the purposes of legal advice.

An unrepresented litigant is unlikely to have any privileged documents in the usual case. Although there is no obligation to provide privileged documents, the List of Documents must state the nature of the document over which privilege is claimed with sufficient detail to enable the other party to assess the validity of the claim for privilege.

If the claim for privilege is disputed then that matter will ultimately fall to be decided by the Court usually following an Interlocutory application.

A List of Documents is to be in the form specified in the SCR *[Rule 29.04]*. The form is in the Schedule to the SCR and is available on the website.

The test for determining whether a document is discoverable is essentially relevance. In an expanded form the test is that a document is discoverable if it either advances a party's case or adversely affects the opponent's case.

However documents which are only relevant because they may be the starting point of a train of enquiry leading to the ascertainment of other possible relevant documents are only discoverable upon a specific order being made by the Court *[Rule 29.02(3)]*. The Court will want to be satisfied of the need for such an order before it is made.

The Court has a power to limit discovery to exclude documents or classes of document as the Court determines *[Rule 29.05]*. This rule is designed to prevent unnecessary discovery.

A List of Documents usually is signed by or on behalf of the party making discovery.

A party may however require the other party to verify discovery by affidavit which requires that party to swear the contents of the List of Documents *[Rule 29.03(5)]*.

The Court can order an affidavit verifying discovery in any case.

The Court may also order, usually on Interlocutory application, a party to provide discovery of specific documents which may include an explanation as to whether the specified documents have been in the power, possession or control of the party and if so, to require confirmation that they are no longer in that party's possession, when the party last had possession and what the party believes has happened to the documents in question.

This is known as an order for particular discovery and the Court makes the order where there are grounds to believe that a document or a class of document may have been in possession of a party and has not been discovered by that party *[Rule 29.08]*.

A party may also seek discovery of documents against a non-party *[Rule 32.07]*.

Similar provisions apply for discovery against non-parties as for discovery between the parties to an action.

A non-party is entitled to have legal representation for the purposes of compliance with an order for non-party discovery. The costs of that legal representation are usually ordered to be paid by the party applying for the order.

A document for the purposes of discovery has a broad definition. It is not limited to paper documents.

The Court can give directions as to the mode of discovery for items such as videotape, audiotape and the like including information stored on computer hard drives and portable memory devices *[Rule 29.12]*.

Inspection of documents usually occurs shortly after parties file and serve Lists of Documents *[Rule 29.09]*.

In routine cases inspection usually occurs informally i.e., by one party requesting, and the other party providing, copies of certain documents.

In cases where there is more extensive discovery actual physical inspection may occur.

The SCR provide for formal ways to arrange appointments for inspection. The Court can give directions in the absence of agreement or if copies are refused or unreasonable conditions are imposed by a party *[Rule 29.11]*.

Chapter Seven: Pre Trial Procedures

Reference has been made earlier to Interlocutory applications.

These are the applications by which orders and directions are sought and usually in respect of procedural matters. For example, where the SCR state that certain procedures apply "…unless the Court otherwise orders", then that exemption is generally applied for by this process

Interlocutory orders do not finally determine the issues between the parties.

Most Interlocutory applications are heard and determined by the Master. The more complex applications such as freezing orders, search orders and interim injunctions may be heard by the Master but are usually heard by a Judge.

Interlocutory applications are heard at 10.00am on each Thursday. Interlocutory applications filed before 4.00pm on a Tuesday will be heard on the Thursday of that week or else the Thursday following unless the parties request a special date for any particular reason.

An Interlocutory application will not necessarily be finally heard and determined on the date that it is first heard by the Court as much depends both on time being available and whether the parties are ready to proceed with the matter.

Routine matters are often dealt with on the first date and matters which cannot be determined on the first date are usually adjourned to a date when they can be argued.

The more routine types of Interlocutory applications are:-

1. Discovery, including non-party discovery;
2. Leave to issue subpoenas;
3. Leave to amend pleadings;
4. Leave to join parties;
5. Leave to administer interrogatories;
6. Substituted service;
7. Setting aside default judgments;
8. Extending or abridging time limits.

The more significant types of Interlocutory applications include:-

1. Summary judgment;
2. Striking out a pleading;
3. Freezing order;

4. Search order;
5. Interim injunction.

Interlocutory applications are made by filing the appropriate Summons *[Rules 46.02 and 46.04]*. The appropriate forms are contained in the Schedule to the SCR and are available on the Court's website.

Evidence on an Interlocutory application is generally by affidavit and therefore an affidavit which sets out all of the evidence required for the application must also be filed *[Rule 40.02(a)]*.

All the necessary facts to establish the entitlement to the order sought in the application must be proved by affidavit.

The application and affidavits are to be served on the other party and on other interested persons, for example, a person against whom an order for non-party discovery is sought.

The opposing party may file affidavit material.

Although all evidence is intended to be in the form of affidavits, in appropriate cases permission of the Court may be sought to cross-examine the author of an affidavit *[Rule 40.04(1)]*. This is also specifically provided for in applications for summary judgment *[Rule 22.07]*.

Hearsay evidence is allowed in Interlocutory applications but only if the source of the information and the grounds for believing that information are set out *[Rule 43.03(2)]*.

Chapter Eight: Affidavits

An affidavit is a statement in writing which is sworn or affirmed setting out evidence to be used before the Court.

Affidavits are broadly used in Court.

They are required to support an Interlocutory application (see Chapter 7).

Although not specifically required by the SCR, usually a direction will be given that all evidence in chief at trial is to be by affidavit so that witnesses are only cross-examined orally *[Rule 40.02(b) and 40.03(1)(b)]*. This reduces the time required for the trial.

Although hearsay is allowed in affidavits in support of Interlocutory applications in certain circumstances, the normal rules of evidence apply in respect of affidavits used for any other purpose. Therefore hearsay evidence is not permitted *[Rule 43.03(1)]*.

The SCR contain a number of provisions regulating affidavits, see generally Rule 43.

The more basic requirements are:-

1. It is to be in the first person *[Rule 43.01(1)]* ;
2. It is to be divided into consecutively numbered paragraphs and, as far as possible, each paragraph is to deal with a distinct portion of the subject matter: *[Rule 43.01(4)]*;
3. The date of swearing/affirming must appear on the first page immediately beneath the title of the proceeding *[Rule 43.01(7)*;
4. The back sheet of the affidavit must identify the party on whose behalf it is filed and specify the name of the deponent and the date of swearing *[Rule 43.01(8)*;
5. The contents are to be confined to facts which the deponent is able to state of his/her own knowledge *[Rule 43.03(1)]*;
6. An affidavit containing an alteration, errata or interlineation in any part of the affidavit may be filed but it may not be used in Court without the court's permission unless the person before whom the affidavit is sworn has initialled the alterations in each case *[Rule 43.05]*;
7. Documents and physical evidence to be used in conjunction with an affidavit are to be annexed to the affidavit unless that is inconvenient, in which case it may be made an exhibit *[Rule 43.06]*;
8. Extracts of a document can be recited in the body of the affidavit in lieu of annexing the document *[Rule 43.06(3)]*. This is particularly useful when the document is large and the part relied upon is relatively small;

The *Oaths, Affidavits and Declarations Act* also sets out some formal requirements for affidavits, see generally section 14 of that Act.

An affidavit which has not been filed and served may not be relied upon without the Court's permission. For that reason such affidavits are handed up to the Court and permission is then sought for that purpose *[Rule 43.09]*.

A party or an employee of a party should not be the person before whom an affidavit is sworn. Such an affidavit can only be used as evidence with permission of the Court *[Rule 43.10(1)]*.

Generally affidavits may be sworn before any authorised person.

This is regulated by the *Oaths, Affidavits and Declarations Act* which sets out the class of persons before who may swear an affidavit, see section 15 of that Act. The list includes a Justice of the Peace and a Commissioner for Oaths.

Multiple exhibits in large affidavits pose particular problems from the point of view of readily being able to locate an exhibit or a relevant part of an exhibit. For that reason there is a requirement that long affidavits be paginated and that each exhibit to an affidavit is individually tabbed.

Documents or other items of physical evidence can be exhibited or annexed to the affidavit *[Rule 43.06(2)]* and copies are usually acceptable for this purpose unless the original is specifically required for any particular reason.

Chapter Nine: Proof and Aids to Proof

Burden of Proof

The Plaintiff generally has the obligation to prove all of the relevant facts in a case. This obligation is known as the burden of proof.

A Defendant may have the burden of proof in part in some circumstances. For example, if a Defendant in a false imprisonment claim alleges that a detention is justified, then the Defendant bears the burden of proving that.

In civil proceedings the required standard of proof is on the balance of probabilities.

In the simplest terms the balance of probabilities means more likely than not.

Evidence

The most common form of evidence before a Court is oral evidence. This is simply evidence given verbally by a witness of matters within that witnesses own knowledge and as a result of their own observation.

Oral evidence is not in any special category of evidence and except in certain specified and limited circumstances, it does not need to be corroborated by physical evidence.

Physical evidence refers to the production of a document or thing and the tendering in Court of that item as an exhibit.

The same rules of evidence as for oral evidence apply also to physical evidence.

A document or item can only be tendered in evidence if it can be proved either via oral testimony or by any of the admission processes, see below.

If it is required to be proved by oral testimony then there must be first hand testimony i.e., by a witness who can attest to the relevant matters of their own knowledge. That means, for example in the case of a document such as a letter, the author of that letter needs to give evidence to confirm the letter.

There are exceptions in all cases but discussion of those is beyond the scope of this handbook.

Aids to Proof

Parties are able to utilise certain procedures which aid the proof of various matters.

Many of these are designed to avoid the calling of unnecessary evidence where a matter is either uncontroversial or not disputed.

The most common and straightforward aid to proof is an admission on the pleadings.

Admissions

Any fact in a pleading admitted by the opposing parties in their pleadings or, in any other acceptable and binding form (see for example, Rule 35.02), is taken as proved.

There is also the procedure commonly known as the Notice to Admit or Notice to Produce.

This is particularly useful where facts may not have been admitted on the pleading but where some considerable expense may have to be incurred to prove those facts.

A party can serve a notice on the other party specifying various facts and identifying various documents and requesting the other party to admit those facts or documents *[Rule 35.03 and 35.05]*.

If not admitted the party required to prove those facts or documents must still prove them in the ordinary way. Once proved however that party is entitled to the costs of proof unless the Court otherwise orders *[Rule 65.16]* and that is irrespective of the final result in the case.

Certain documents are admissible by their very nature. For example, official certificates such as a certified birth certificate. The relevant legislation provides for a form of document which is able to be tendered in Court without further proof.

Various official documents are also able to be tendered in the same way.

Certain facts are so uncontroversial and obvious that specific proof is not required and a Court can treat those facts as proved. This is known as judicial notice. The principle is that if a fact is so generally known that every ordinary person may reasonably be presumed to be aware of it, the Court takes ‘notice’ of it.

Examples include local conditions such as names and directions of important streets in a town.

There are also a number of procedures which can be adopted to obtain evidence.

Discovery and Inspection have already been discussed in Chapter 6. A similar process, as already discussed, also operates in respect of persons who are not parties.

Subpoenas

In appropriate cases subpoenas can be issued to persons to attend Court to give evidence and/or produce documents *[Rule 42]*.

There are many rules which apply to this procedure and care needs to be taken because, as is the case with non-party discovery, parties who are served with a subpoena are entitled to legal representation to deal with the subpoena and their costs are usually ordered to be paid by the party issuing the subpoena.

Interrogatories

Interrogatories are a set of questions by one party which are to be answered on oath by another party.

Interrogatories cannot be administered as of right. It is necessary to first obtain the permission of the Court on an Interlocutory application *[Rule 30.02]*.

The Court takes into account many factors in deciding whether the permission will be granted such as the need for and relevance of the information sought, whether the interrogatories will facilitate the expedition of the case (this includes considerations of likely costs involved or saved) and whether other means reasonably available of ascertaining the information have been unsuccessfully attempted (such as Discovery, Inspection, Request for Particulars, Notice to Admit).

What is reasonable in this respect will vary from case to case. In addition to Court processes, regard can also be had for more basic means of ascertaining the information such as interviewing potential witnesses.

Examinations and Testing

The rules also provide a procedure where an application can be made for an order for examination and/or testing of physical objects *[Rule 37]*. For example inspecting a motor vehicle involved in an accident or testing it to determine its roadworthiness.

Expert's Reports

Many witnesses who give evidence in Court are experts in their field. Those persons usually provide an expert report.

SCR 44 deals generally with expert's reports and the Court also has a Practice Direction dealing with expert's reports (Practice Direction 4 of 2009). That Practice Direction is available on the Court's website. SCR 33 deals with a specific type of expert report namely, a medical report. It also contains provisions for compelling a Plaintiff to attend a medical examination *[Rule 33.04]*

An expert's report or a medical report is not able to be tendered in its own right except by agreement between the parties. That means that ordinarily the author of the report must be called to give evidence.

Chapter Ten: Alternate Dispute Resolution

The Court encourages parties to attempt to resolve disputes other than by trial.

The advantages of this are that it avoids the significant disruption to the parties and the significant costs and delays that can occur through the Court process.

PD6 specifically requires the parties to consider alternative dispute resolution prior to the issue of proceedings. This is discussed above in Chapter 2

The SCR also make provision for the holding of a mediation and/or a settlement conference *[Rule 48.12 and 48.13]*.

One or the other will almost invariably occur before a matter proceeds to trial.

Both settlement conferences and mediations are confidential and the SCR specifically state that nothing said there can be used in evidence except to prove the nature and extent of any agreement which may have been reached *[Rule 48.12(8) and 48.13(8)]*.

This Rule is designed to encourage parties to be as open as possible in those sessions with a view to maximising the possibility of a resolution of the dispute.

Settlement conferences are usually hosted by the Master but many are also hosted by the Registrar.

Mediations are usually adopted in more complex matters.

A Judge, the Master or a Registrar is able to act as a mediator with the proviso that they can have no further part in the proceedings beyond the mediation.

Additionally external mediators may be appointed.

The Court keeps a list of approved mediators for that purpose but in any event the parties are free to agree on any mediator.

The procedures at settlement conferences and mediations can vary from case to case. They will depend on the circumstances of the case and will be determined by the host of the settlement conference or the mediator.

Procedures are tailored to suit the circumstances.

In the lead up to a settlement conference or mediation the parties will usually be directed to exchange a précis of their case. This précis is commonly referred to as a position paper and is basically a summary of the party's position for the purposes of the settlement conference or the mediation. It serves as a useful and convenient summary of the position for the benefit of the person presiding and also for the other parties.

The costs of a settlement conference or a mediation, unless otherwise ordered, are 'costs in the proceeding' *[Rule 48.14]*. This means that the decision on the costs for the substantive proceedings will apply to those costs.

Chapter Eleven: Procedure to Trial

The trial date is set at either a Listing Hearing or, if PD6 applies, at a Case Management Conference.

In the case of a Listing Hearing, where counsel has been retained to appear at trial, counsel must provide a counsel's certificate before the matter may be listed unless the Court decides otherwise *[Rule 48.18(2)(b)]*.

In the lead up to a Listing Hearing or Case Management Conference, parties are required to file Litigation Plans. These were briefly discussed in Chapter 3.

A Litigation Plan is provided for in Practice Direction 4 of 2004 titled "Litigation Plan" and that is available on the Court's website.

It is required to be filed by each party within one month after the close of pleadings. It contains information from the party in respect of specified matters relevant to the management of the case up to the date of trial such as the number of witnesses to be called, which witnesses are still to be interviewed, the exchange of statements or affidavits of the evidence of witnesses, the required time to enable steps to occur, estimates of the duration of the trial and any interlocutory steps which may be required before trial.

Each party is required to serve their Litigation Plan on the other party.

The Litigation Plans, as well as input from the parties or representatives, are utilised at the Listing Hearing or Case Management Conference for the purposes of the listing of the matter for trial.

If it had not already occurred prior to a Listing Hearing or Case Management Conference, directions are usually made for parties to file and serve affidavits of all of the evidence in chief upon which they intend to rely *[Rule 40.03(1)(b)]*.

The timetable for affidavits is staggered such that the Plaintiff usually first files affidavits approximately one month before trial and the Defendant approximately two weeks later.

The affidavits are intended to contain all of the evidence of each witness and any further evidence in chief will require permission from the Court at the time.

In some cases directions for affidavits are given at the callover which is discussed below.

The Listing Hearing or Case Management Conference concludes with an order referring the matter to a callover for civil sittings. The precise callover will be determined having regard to the availability of witnesses and the like.

The Supreme Court civil sittings occur for a period of time, usually four weeks, and usually four times a year. They are normally in February, May, August and November.

The callover is held approximately six weeks before the commencement of the sittings. The actual trial dates are allocated at the callover.

Chapter Twelve: Offers of Compromise

Parties are encouraged to attempt to resolve disputes without recourse to a trial. The procedures in the SCR regulating Offers of Compromise flow from that.

An Offer of Compromise is a formal way of making and recording an offer to settle a matter, see generally SCR 26.

The SCR allow the other party to accept an offer within 14 days *[Rule 26.03(3)]*.

Both the Plaintiff and the Defendant can submit an offer of compromise.

An Offer of Compromise is not kept on the Court file. It is kept sealed and separate from the Court file. Even the fact that an offer has been made is not disclosed to the Judges or the Master.

Where an Offer of Compromise is not accepted, its effect depends on the result in the case after the trial.

In general terms if the other party does not better the Offer in the final result then different cost orders can be made depending on the circumstances *[Rule 26.08 and 63.15]*.

For example if the Offer is made by a Plaintiff who then recovers more than the amount offered, the Plaintiff can seek costs on a basis which would result in recovery of more than the usual amount of costs *[Rule 26.08(2)]*.

If on the other hand a Plaintiff achieves less than the amount offered by a Defendant then a cost penalty usually applies, for example that only costs up to the date of the offer are recoverable by the Plaintiff who must then in turn pay the costs of the Defendant from that time *[Rule 26.08(3)]*.

The consequences of not bettering an Offer of Compromise can therefore be quite severe.

Sometimes an Offer of Compromise cannot be expressed in such simple terms as is envisaged by the formal Court process.

An alternative to the formal procedure exists where a party sets out the terms of its offer in detail in letter form in lieu of the Court form and on the basis that the letter cannot be used in Court except for the purposes of determining a costs order at the appropriate time. This is known as a *Calderbank* offer and costs orders similar to those which may be made where an Offer of Compromise is filed can likewise be made.

Chapter Thirteen: At the Trial

It may be very useful for you to attend and view similar proceedings in the Court prior to your own case as this will enable you to become familiar with the courtroom and the procedures.

Certain standards of behaviour and observance of protocol are expected of any person in the courtroom. A summary of these is:-

1. Attend court suitably dressed;
2. Respectful behaviour is required from all parties and persons inside a courtroom;
3. There is to be no eating or drinking in Court, although drinking water would usually be permitted;
4. Chewing gum is prohibited;
5. Generally talking in Court is only allowed where it is necessary e.g., for a party to speak to their representative;
6. Any talking in the Court is to be of a volume so that it does not disrupt proceedings. Remember that the acoustics in the Court are directed towards the bench and you should have regard to this when talking to any person;
7. In any case, no persons in Court are to talk and move about in the courtroom when witnesses are being sworn or when the Judge or Master is speaking;
8. Mobile phones must be turned off – leaving them on silent is not sufficient as they can still then interfere with the Court's recording equipment.
9. Laptops and iPads may be used in the courtroom, but may be prohibited by the Court;
10. Video or other cameras (from mobile phones), tape recorders, two-way radios or other electronic equipment are not permitted to be used in the courtroom without the permission of the Court;
11. Sunglasses, caps, hats and the like should not be worn unless there is a valid reason (if so you should have alerted the associate to this before the commencement of the trial);
12. You should bow to the Judge or Master when you enter or exit the courtroom;
13. A Judge is addressed as 'Your Honour' and the Master is addressed as 'Master';
14. Barristers are addressed by their surname e.g. 'Mr Smith';
15. Parties addressing or being addressed by the Court should stand;
16. Only one person should address the Court at any time.

Depending on the nature of the case, it will be heard either by a Judge or the Master.

The Judge or the Master will sit on the bench. The barristers for the parties will sit at the bar table. You should sit in the body of the Court until the case is called on.

The Judge or Master and the barristers will wear robes.

Some arrangements can be attended to before the Judge or the Master enters the courtroom such as notifying the associate who you are and advising which of your witnesses are also present.

You should ensure that you have everything you need for the case such as stationery, copies of the court documents, your correspondence with other parties and other relevant persons, the exhibits you intend to tender and all documents necessary for you to conduct your case. Originals of documents should be available, where applicable.

Likewise it is imperative that you have made arrangements for the attendance of witnesses at suitable times. This includes where necessary, the issuing and serving of subpoenas on witnesses and in sufficient time.

Court staff will announce the intended entry of the Judge or the Master and request everyone to be silent and to stand. All persons in the courtroom are to remain standing until the Judge or the Master is seated.

The associate then will call the case on and the parties will announce their appearance. Barristers will announce their appearance first and once that has occurred you should stand and advise who you are.

The Judge or Master will invite you to take a seat at the bar table.

At this point if you require someone to assist you, this matter should be raised. The general rule is that parties may only be represented by lawyers. Whether you will be permitted to have such an assistant is entirely in the Court's discretion. Such an assistant is known as a *'McKenzie friend'*.

Any preliminary issues are raised and these are decided by the Court before the trial commences.

One of the preliminary matters usually attended to before the opening of the case is for the calling on of subpoenas if any have been issued.

If there is a subpoena to a person or body simply to produce documents, those documents may have been left with the Court and if so, subject to any claim for privilege that the subpoenaed party may make, the usual order made is for the parties to inspect and take copies of the documents.

The proceedings are at a stage when the matter is now to proceed to trial. If an adjournment is to be sought, it is appropriate that this occur at the earliest possible time. An adjournment will only be granted with good reason. The law has changed recently and adjournments at a late stage will generally be refused.

If an adjournment is granted then as work would have been performed at the cost of the other parties which will essentially be wasted (known as 'costs thrown away') it is almost invariably the case that such costs are ordered against the party seeking and obtaining the adjournment.

If any of your witnesses are present in the courtroom, this should be indicated to the Judge or Master before the formal part of the case commences.

All witnesses, other than parties, are ordered to leave the courtroom until they are required to give evidence.

Once a witness gives evidence they are free to remain in the courtroom and observe the rest of the proceedings.

Plaintiff's Opening

If the matter is ready to proceed to trial then the Plaintiff opens its case.

The opening is a summary of the issues in the case and the evidence to be called with an indication as to how the evidence will prove the facts in issue.

The Plaintiff then commences the evidence by calling witnesses in turn.

Although the order of the witnesses is up to the party, usually witnesses are called in such an order as will make all of the evidence easier to follow.

However the actual Plaintiff, or the Defendant as the case may be, should always go first to avoid the suggestion that the party's later evidence was tailored to take into account their witnesses evidence.

It is not mandatory that witnesses attend to give evidence. There are some matters which can be agreed between the parties prior to the commencement of the trial.

For example where a witness is only required to prove uncontroversial and unchallenged evidence the other party may simply agree to the affidavit of that witness being tendered as evidence without the attendance of that witness.

Documents can be tendered by consent in the same way.

Examination of Witnesses

The evidence of each witness, irrespective of which party calls the witness, involves three stages.

The first is known as the examination in chief.

Usually this evidence will be in affidavit form (see Chapter 11). The affidavit is proved by asking the witness to view the affidavit, to confirm that the signature appearing on

the affidavit is that of the witness, to confirm that the affidavit was sworn or affirmed and to confirm the truth of the contents of the affidavit.

As most of the evidence of the witness is in the form of affidavit, objections to the admissibility of the evidence are dealt with before the witness gives evidence and parts of an affidavit may be struck out, for example if the evidence is inadmissible.

As the affidavit contains the evidence in chief of the witness, it will only be necessary to have any further evidence from the witness to update or supplement matters since the affidavit or to address matters raised in the other parties' affidavit evidence.

Different rules apply to evidence in chief as opposed to cross-examination (see below).

Leading questions are not permitted in evidence in chief whereas they are allowed in cross-examination.

A leading question is one which suggests to the witness the answer which the party would prefer. A simple example is:-

'Were you at State Square at noon on the 25th of this month?'

This tells the witness that the answer sought is "State Square". The correct way to ask the question in evidence in chief is:-

'Where were you at noon on the 25th of this month?'

It has been said that any question which can be answered with a simple yes or no response is a leading question but that is not always the case.

There are exceptions to the rule concerning leading questions.

For example uncontroversial matters, such as the example given above, would rarely be the subject of an objection to a leading question. Also the rule against leading questions is relaxed when it is for the purposes of introducing a new topic or a new line of questioning.

Other rules of evidence apply equally to all stages of evidence, such as inadmissibility as a result of hearsay, relevance or that the evidence expresses an unqualified opinion or conclusion.

The second stage of the evidence is cross examination. This is where the witness is asked questions by the opposing party or their barrister.

The purpose of cross-examination is to challenge the testimony that is in dispute and to test the credibility of the witness.

Certain things must occur in cross-examination. The *Browne v Dunn* rule requires a party to specifically put any contrary version of any aspect of the evidence to the witness and give the witness an opportunity to comment.

This includes not only verbal evidence but also documentary evidence hence documents which challenge the version of the witness must be produced and shown to the witness.

Care is required here if it is sought to cross-examine a witness based on a document authored by another person as the party must be able to prove that document at a later stage. Clearly that process should only be undertaken where the party can prove such a document if required and has made the necessary arrangements for that purpose.

Although leading questions are allowed in cross-examination the Court may still impose limits.

In examination in chief a party is not permitted to cross-examine its own witness. This means they cannot challenge the evidence of their witness except in limited circumstances.

For this reason care should be taken to ascertain precisely what evidence a witness will give before calling them. It may have an adverse effect on a party's case if their witness contradicts them in material aspects.

The third stage of a witness's evidence is re-examination.

The witness is again questioned by the party who called the witness.

Generally the same rules as for evidence in chief apply e.g., no leading questions, no cross-examining the witness etc.

Re-examination is not simply a further opportunity to extract evidence from a witness. Questions in re-examination will not be allowed unless they arise out of the cross-examination of the witness and then only to the extent that clarification of that evidence is required.

Further evidence in chief may be permitted by the Court in its discretion. Permission is not easily given as it does disrupt the usual process. If it is given then leave is usually given to the other parties to further cross-examine the witness.

Each of the Plaintiff's witnesses gives evidence in turn following this format.

The Judge or the Master may ask questions of a witness although this is usually kept to a minimum.

The Judge or Master is able to provide limited assistance to an unrepresented party.

The Judge or Master may inform an unrepresented party of the options they have but not which option they should take.

As the Judge's or Master's understanding of a case is necessarily limited to the evidence called at any particular stage and the documents on the file, you should not rely on questioning by the Court to either assist you or to fill in any gaps in your case.

The actual steps that occur when a witness gives evidence are:-

1. If they are not a party then they will usually be out of the courtroom when they are called;
2. Court staff will therefore call the name of the witness outside and, assuming they are present, will lead them to the witness box;
3. If the witness is a party then the Court will simply invite the party to move to the witness box;
4. The Court will then ask the witness whether he or she would prefer to take a religious oath or simply a promise to tell the truth. Nothing turns on the choice the witness makes;
5. The witness is then 'sworn' according to the preferred choice;
6. The first question asked of a witness is his or her name, address and occupation;
7. Next, and where evidence in chief in the form of affidavits has been ordered, the affidavit is proved as set out above;
8. Any questions by way of supplemental evidence in chief are then asked;
9. The witness is then cross-examined;
10. The witness is then re-examined;
11. The Court will excuse the witness and they are then free to leave.

There are some simple rules to follow when giving evidence.

The evidence needs to be easy to follow and hence should be given in a chronological or logical order.

It is imperative that a witness speaks slowly to allow all concerned to make whatever notes they need regarding the evidence.

Importantly witnesses should not ramble on. They should answer only the question asked as succinctly and simply as possible.

After the Plaintiff has called its last witness the Plaintiff will advise the Court that their case is closed.

The Defendant's case then commences and with appropriate modifications the above procedure as it applied to the Plaintiff's case applies equally to the case of the Defendant.

When the Defendant has closed its case then the parties will make submissions to the Court. The submissions are an opportunity for a party to review the evidence that

has been presented and to attempt to persuade the Court to determine the case in their favour.

Generally the Plaintiff addresses the Court first unless the Defendant has called evidence other than that of the actual Defendant.

Once the submissions have concluded the case is all but finalised and requires only the decision of the Court.

The Court may give its decision immediately. This does not will usually occur but the Court may do so in very clear cases or where the case is short and the evidence is not complex.

Otherwise the Court will reserve its decision and adjourn the case to a date and time to be fixed for the decision to be given.

On that date the decision will likely be in writing.

Chapter Fourteen: Enforcement

Once a Court decision has been made the amount found by the Court in favour of a party becomes a debt due to that party.

The Court decision however does not include any provisions for the enforcement or payment of that debt. Enforcement is an entirely separate process.

The manner of enforcement of a judgment is entirely up to the party in whose favour the judgment is given.

Although the liable party may be able to negotiate an arrangement with the successful party, it remains entirely up to the successful party to either agree to any such proposal or to proceed in any other manner available to that party.

The options for enforcement of debt are:-

1. Payment by instalments. If this option is taken it is usually preceded by the liable party being summoned to the Court to be examined as to their assets, liabilities, income and expenses *[Rule 67.02(1)(a)]*. The Court then makes an order for instalment payments;
2. Warrants may be issued for the seizure and the sale of assets including real estate *[Rule 69]*;
3. Attachment of debts *[Rule 71]*. This occurs where a judgment debtor is owed money by another and payment of that debt is redirected to the judgment creditor;
4. Attachment of earnings *[Rule 72]*. The Court can order a part of a judgment debtor's earnings to be paid direct to the judgment creditor;
5. Charging orders. Here an order is registered on an asset owned by a judgment debtor asset with the effect that the proceeds of sale of that asset or dividends earnt will be paid to the judgment creditor. This is distinct from a sale of assets under warrant in that the charging order does not include a power of sale;
6. Insolvency such as bankruptcy or company winding up. Bankruptcy is regulated by the Commonwealth *Bankruptcy Act* and a company winding up is regulated by the *Corporations Act*.

These options are not mutually exclusive alternatives.

Chapter Fifteen: Costs

Security for Costs

A party may apply for an order for Security for Costs against another party at any time in the course of the proceedings, see generally SCR 62. This mostly occurs where there is evidence that the other party may not be able to satisfy an order for costs in the event that costs are ordered against the party.

Whether an order is made is a matter of discretion for the Court. It is not available in all cases and circumstances. The SCR set out preconditions to the making of an order, for example, where the Plaintiff is ordinarily resident outside of the Territory *[Rule 62.02(1)]*.

Once the qualification is established, it remains a matter of discretion for the Court. Various factors are taken into account for example, the strength and bona fides of the claim and whether an order may be oppressive and may stultify the claim.

If security is ordered, the Court will decide the amount and form of the security *[Rule 62.03]*. Options include the payment of the amount into Court or for delivery of an unconditional bank guarantee.

The Court will usually fix the time by which the security is to be provided and will usually stay the proceedings until the security is provided. A stay suspends the proceedings and no further step can be taken while a stay is in force.

Where the order is not complied with, the Court can dismiss the proceedings *[Rule 62.04]*.

Costs Orders

The general principle is that a successful party will usually be awarded their costs of the proceedings.

It is however a discretionary matter and there are a plethora of relevant matters which a Court will take into account when exercising its discretion. The foregoing is simply the general rule. Dealing with all of the factors that the Court may take into account when deciding on an appropriate costs order is beyond the scope of this Handbook.

When an order for costs is made it is usually for the costs of the proceedings. This includes Directions Hearings, Settlement Conferences and the like but is in addition to any specific costs orders made in the lead up to the finalisation of the matter.

When costs are ordered, it is usually on what is known as the ‘standard basis’. The other basis is known as the ‘indemnity basis’, see the definitions in SCR 63.01(1).

An indemnity costs order will result in a greater amount being recovered. It is generally only made in limited circumstances such as:-

1. Where an Offer of Compromise has not been bettered;
2. Where a claim or a defence is considered to be entirely without merit;
3. Where the party's conduct in the course of the proceedings warrants such an order.

On either basis, a costs order will not result in payment of all of the successful party's costs.

Parties are free to attempt to negotiate finalisation of the costs and if successful to record an agreement in binding terms.

Where costs cannot be agreed the successful party is entitled to commence the taxation process. Taxation is the process of the Court whereby the Master or the Registrar assesses a claim for costs and determines the amount of costs which are payable, see generally SCR 63.35 – 63.55.

The procedure involves the successful party preparing a Summons for Taxation and a Bill of Costs in a prescribed form *[Rules 63.36 and 63.37]*. The Bill of Costs specifies the date that a cost was incurred, by whom it was incurred and the nature of the item.

The paying party has an opportunity to object to items on the successful party's Bill of Costs. An objection is in written form and filed with the Court and served on the other party at least 14 days before the date fixed for the taxation *[Rule 63.45(2)]*.

If no objection is filed within the prescribed time the Master or Registrar may fix costs in the amount claimed without further inquiry *[Rule 63.47]*.

There are a number of specific rules dealing with taxation which are the beyond the scope of this Handbook. Unrepresented persons are referred to the costs provisions in Order 63 of the SCR and the Guidelines to Taxation which are published on the Court's website under the 'For Lawyers' tab. Further information concerning costs can be obtained from text books on legal costs.

Once costs have been fixed by the Court they become a judgment and can be enforced in the same way as any judgment (see Chapter 14).

There are fees payable to the Court for a taxation of costs, known as a taxing fee. The taxing fee is 7.5% of the amount determined as costs.

This is to be paid initially by the successful party but is recoverable from the liable party as they form part of the taxed costs.

The taxing fee is not payable if the parties resolve costs before the Master or Registrar undertakes the taxation process.

Interest at the rate prescribed for judgments (currently 10.75%) is usually awarded on a taxation of costs from the time that the order for costs was made.

The Court has some discretion in that regard. If there is any unacceptable delay between the filing of the Bill of Costs and when the order for taxation is made, the Court may adjust the commencement date for interest.

Appendix: Common Legal Terms

Adjourned, Adjournment	When a case is adjourned the hearing of the case is put off to another time or day.
Affidavit	A written statement that is sworn or affirmed. It can sometimes be used in place of oral evidence.
Balance of Probabilities	This is the 'standard of proof' in civil trials and in simple terms means more likely than not.
Barrister	Barristers are lawyers who represent clients in court, usually when engaged by a solicitor on behalf of a client. They also provide opinions and advice.
Burden of Proof	This refers to the obligation on the party who has the onus of proving a case at Trial.
Callover	A time set aside when all cases to be heard in a civil sitting are allocated final Trial dates.
Date to be fixed	When a date for a hearing on a matter is required but the Court is unsure when it should be held the Court will leave the date open to be fixed at a later time.
Default Judgment	A judgment that is obtained without the Court hearing any evidence as to the merits of the claim, e.g., when a party fails to answer a claim, judgment can be entered against them.
Defendant	The party against whom a claim is made in the civil jurisdiction.
Defence	The Defendant's pleading in answer to the Plaintiff's Statement of Claim.
Discovery	The process by which documents are disclosed and made available for inspection.

Directions Hearing	A relatively informal court appearance that takes place as part of the Case Management process and where directions are given for the future conduct of the case.
Evidence	The means by which facts in a case are proved. It can be spoken or written, and can consist of physical objects such as photos and documents.
Ex tempore	A legal term, usually referring to a decision which is given immediately following the conclusion of a Trial. It means literally 'at the time'.
Exhibits	Evidence in physical form brought before the Court (e.g. documents, objects or electronic evidence such as CCTV, video footage, recording).
Hearing or Trial	A term referring to the time when the evidence and legal argument is presented in Court.
Interlocutory	A legal term which can refer to an order on a temporary or provisional decision on an issue at an intermediate stage of a case.
Interlocutory Application or Summons	Any application for an Interlocutory order made within a proceeding.
Interrogatories	A series of questions delivered by one party to another and which require sworn answers.
Judge	A Judge is an independent judicial officer who presides over and decides cases in the Supreme Court. Judges are members of the Supreme Court and have unlimited authority to hear cases.
Judgment	A decision of the Court. It may be given verbally at the conclusion of the hearing, in which case it is known as *ex tempore*. It may be given at a later time in writing where it will be described as 'Reasons for Decision' or 'Reasons for Judgment'.
Jurisdiction	Generally refers to the extent of powers of a Court including as to the authority to hear a particular type of case.
Master	The Master is, like a Judge, an independent judicial officer who also presides over and decides cases in the Supreme Court but whose authority is limited to the specific authority given in the Supreme Court Act or the SCR.

Party, Plaintiff, Defendant	A party is one of the people or entities involved in the legal matter. A party who brings a claim is known as a Plaintiff and a party against whom a claim is brought is known as a Defendant.
Pleadings	Pleadings are written statements which alternate between the parties and which contain allegations of facts and otherwise define the issues to be decided in a case.
Practice Direction	A Practice Direction is a supplement to the SCR made by the Judges in respect of specific matters of procedure.
Reserved Decision	Following the hearing of a case the Court may reserve the decision by deferring the decision to a later date or time. In urgent cases an immediate decision may be given, but reserving the provision of reasons to a later time.
Senior Counsel (SC)	Senior Counsel are practitioners who have attained professional eminence at the Bar, and they apply to be appointed 'Senior Counsel' (SC). In the past, this appointment was known as 'Queen's Counsel' (QC).
Solicitor	A solicitor is the term used to describe a lawyer who, although able to and qualified to appear in court, does not routinely do so and instead undertakes the preparation of a case for court and gives legal advice to parties.
Standard of Proof	The applicable standard or measure for determining whether a disputed fact or issue has been proved.
Subpoena	A document issued by the Court which summonses a person or entity to attend court to give evidence or to produce documents. It is also sometimes referred to as a summons to witness or summons to produce documents.
Summons	A process issued by a court at the instigation of a party for the purpose of notifying another party of the nature of an application and to attend the hearing of the application.
Without Prejudice	Discussions or communications between opposing parties are sometimes made "without prejudice" to enable a freer interchange of view. The effect of this is that if negotiations fail the parties have signalled that they do not want one another to make use in evidence of what has passed between them.