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Litigation Civil Procedure Cram Notes

1st Edition

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1. INTRODUCTION

A. HOW TO USE CRAM NOTES

The Litigation – Civil Procedure Cram Notes are formatted into a step-by-step guide, which you can use as a checklist in your exams to ensure that every element of the exam question is answered. You may find the Table of Contents to be a quick and useful overview of the law to be applied.

You should also answer the exam question using the ILAC method, which will ensure your answer is comprehensive.

Issue	State the legal issue relevant to the problem
Law	Identify the relevant case law and legislation
Analysis	Analyse and apply the law to the legal issue. This is the most important part, so ensure your legal analysis is very thorough.
Conclusion	Form a conclusion based on your analysis and application of the law, giving some practical advice to the hypothetical client.

It is very important to spend time perfecting your analysis section, as this is the part that examiners are most interested in. Do not worry if you reach the correct conclusion (there often isn't one clear answer) – examiners will give more weight to your legal analysis, and sometimes may even reward answers that propose an innovative and unconventional answer!

B. Abbreviations

The Litigation – Civil Procedure Cram Notes will refer frequently to the following legislation by using abbreviations.

Legislation	**Abbreviation**
Uniform Civil Procedure Act	UCPR
Federal Court Australia Act 1976 (Cth)	FCA Act
Civil Procedure Act 2005 (NSW)	CPA

In addition, the plaintiff will be referred to as the P, and the defendant, as the D. The High Court of Australia will be referred to as the HCA, and the Federal Court of Australia as the FCA.

2. Case Management

A. New South Wales

The Master Calendar system is used for case management under the NSW court system. Judges for each case and interlocutory step are selected from a pool of judges. Courts also tend to overbook trials, as the court expects a proportion of cases to be settled prior to the hearing, thus causing uncertain hearing dates. However, where settlements do not occur, the time allocated for a hearing may overlap, causing a wastage of time and money.

Under the Supreme Court of NSW Practice Note SC CL 5, direction's hearing can now be conducted by online court or via telephone. In addition, pre-trial conferences can also be done online, leading to a significant reduction in costs. The Supreme Court of NSW also has divisions, including specialist lists for commercial, construction, personal injury and professional negligence cases.

B. Federal Court

The Federal Court of Australia operates under the individual docket system, which provides that the same person is responsible for all pre-trial and trial matters. This ensures the efficiency in the conduct of proceedings, as every judge has an intrinsic interest to deal with their case efficiently. In addition, each judge has prior knowledge of the case. This is an advantage compared to the Master Calendar system, where different judges are allocated for each pre-trial conference.

C. Overriding Purpose Rule

i. CPA

Section 56 of the CPA provides for the overriding purpose rule of case management. The rule provides for overriding purpose of a just, quick and cheap resolution to the real issues in dispute, which correspond broadly to the aim of a just, efficient and cheap resolution to litigation. The court has the aim of giving effect to the overriding purpose rule and the parties each have a duty to assist the court to further that aim.

of assets being removed from the jurisdiction, or disposed of or otherwise dealt with such that there is a danger that P's judgment will not be satisfied.
- It must be necessary to prevent abuse of process of the court (i.e. it is a limited exception - not merely to give the P the position of a secured creditor)

Cardile v LED Builders (1999) 198 CLR 380
- Facts: The D company's shares were primary owned by two people. During litigation, the D company declared substantial dividends to the shareholders, which were used by the shareholders to set up a new company to run substantially the same business.
- Here, there was a prima facie case that the payment of the dividends was to practically liquidate the assets of the company such that the D could not satisfy the P's judgment.
- The court made an order against the shareholders and the new company to freeze their assets to the extent the judgment required.
- Note: this case is notable for the fact that a Mareva order was made against a third party to the proceedings.

i. UCPR (PART 20 DIV 2)

The UCPR allows for the grant of Mareva orders to prevent the frustration of the court's process, where there is danger that judgement may be wholly or partly unsatisfied (r 25.11). The court is also able to make an order against a third party (r 25.13). In order to apply for a Mareva order, the applicant must already have a judgment in their favour, or they have sufficient prospects of being successful in the litigation (r 25.14)

ii. PRACTICE NOTE

The Supreme Court of NSW Practice Note SC Gen 14 provides the following:
- Mareva orders are not used to provide security, but rather are used to prevent abuse of process (cl 5)
- It is an extraordinary interim remedy that is usually ex parte (cl 6)
- The amounts subject to the order cannot exceed that needed to satisfy judgment (cl 11)
- The order should exclude certain expenses that the D has for legitimate reasons (cl 12)
- The Mareva order can also be made before the commencement of litigation (cl 15)
- The respondent to a Mareva order can be a third party (the Practice Note refers specifically to the *Cardile* case discussed previously)

iii. ANCILLARY ORDERS TO MAREVA ORDERS

In some cases, ancillary orders to Mareva orders may be needed, such as the disclosure of information relating to where the D's assets are held in order for the P to make effective use of the Mareva order. Under r 25.12, ancillary orders may be granted for the purpose of eliciting such information. In addition, clause 14 of the Supreme Court of NSW Practise Note SC Gen 14 provides that the court may make ancillary orders for the disclosure of assets.

8. JOINDER OF PARTIES & CAUSES OF ACTION

Joinder is often granted for convenience and to minimize cost, delay and the risk of inconsistent decisions

A. ANSHUN ESTOPPEL (RESTRICTION ON JOINDER OF CAUSES OF ACTION)

Under r 6.22 of the UCPR, the court can refuse joinder of causes of action if it may embarrass, inconvenience or delay proceedings. The implication is that if the P fails to join all causes of action at the start, there is a risk that the P cannot later run these causes of action. It is also

intended to prevent re-litigation of the same series of facts. This is what is referred to as Anshun estoppel.

Port of Melbourne Authority v Anshun (1981)

- Facts: P brought claim against two D. D1 failed raised the indemnity agreement with D2, and later sued D2 on the indemnity.
- The court held:
  - D1 should have raised the indemnity agreement at the first proceeding. This was because if D1 raised it in a subsequent proceeding, there was a risk that they would receive two contradictory and inconsistent judgments. Thus it was held not to be reasonable.
- The court espoused the principles of "Anshun estoppel"
  - A party will be estopped from litigating if it appears that the matter that is relied on in the second action was so relevant and "so closely connected with the subject matter" of the first action that they were unreasonable not to rely on it in the first matter.
  - Effectively, the test is of reasonableness – would it have been reasonable to mention it in the first matter?
  - There may well be circumstances where it is justifiable to refrain from litigating the issue in the first matter, yet proceed with the issue in another proceeding.

Gibbs v Kinna (1998)

- The test is whether it was reasonable to defer reliance upon a cause of action or defence. If it were reasonable, Anshun estoppel would not apply.
  - The cause of action in question must be one that could have been raised in the first matter.
  - It must arise from the same or substantially the same set of facts.
  - If there is a risk of inconsistent judgments, then it would be considered unreasonable to defer reliance upon a cause of action in the first proceedings.
- Parties must take into account consideration of the:
  - Previous proceedings
  - Scope of pleadings
  - Length and complexity
  - Real or reasonably perceived difficulties of raising the issue at the earlier matter
- In this case, the court held:
  - It was not unreasonable because the Industrial Relations Commission (IRC) was a specialised court designed to deal with Industrial Relations legislation, and their jurisdiction was under such legislation only.
  - In addition, the IRC was designed to be effective and cheap. If all the actions had been added, the proceedings would've been complicated and lengthy.

Rippon v Chilcotin (2001)

- Facts: P sued D on contract for breach of warranty and under the *Trade Practices Act* for misrepresentation. The P initially won on the contract action and lost on misrepresentation ground relating to the financial statements. The P then sued their accountants for the deficient financial statements.
- The court held:
  - That the new litigation against the accountants was an attempt to re-litigate the matter, since the initial court decision had found on the evidence that the P had not relied on the financial statements. If they bring the same claim against the accountants, then there may be a possibility of inconsistent decisions.

As can be seen, the most influential factor is the risk of inconsistent decisions.

B. THE JOINDER PROCEDURE UNDER THE UCPR

i. SUES/SUED IN SAME CAPACITY

As per r 6.18, the P can join several causes of action if the D is being sued in the same capacity and the P sues in same capacity, or the court grants leave.

ii. COMMON QUESTION OF LAW OR FACT

Alternatively, persons may be joined as plaintiffs or defendants in the proceedings if there is a common question of law or fact, and (r 6.19):

- all rights of relief claimed in the originating process concern the same transaction/series of transactions; or
- the court gives leave for them to be joined (see section below).

1) "Transactions"

In the case of *Bendir v Anson (1936)*, the court held that the term "transaction" should be broadly interpreted.

Payne v Young (1980)

- Facts: The seven plaintiffs each had an abattoir. Under WA legislation, each abattoir had to pay inspection fees. The plaintiffs wanted to bring action arguing invalidity of the legislation, as well as their money back.
- The court held:
  - This was not a case involving the same transaction or series of transactions, because each P paid their fee at a different time to a different defendant. At most, it gave rise to a similar transaction.
  - The rule in 6.19 does not cover similar transactions.

Birtles v Cth (1960)

- Facts: The P suffered injuries and sued everyone connected with the incident. There was a problem with the limitation period, so the P decided to sue his lawyers by joining them to the existing action.
- The court held:
  - A broad view is taken of the same transaction or series of transactions. In this case, this covers events related not only to the initial accident, but also everything arising from the accident, including the litigation.

iii. GENERAL PRINCIPLES

- Any person may request to be joined as a party to the proceedings (r 6.27).
- If multiple parties are jointly entitled to the same relief, they must be joined as parties (r 6.20). However, parties that are merely jointly and severally liable with a defendant need not be joined (r 6.21).
- Where there is misjoinder (the joinder of incorrect parties) or non-joinder (failure to join parties), proceedings will not be defeated on that basis alone (r 6.23).

iv. JOINDER OF PLAINTIFFS

If the person is to be joined as a P, their consent will be required (r 6.25). By virtue of r 19.2(2), all plaintiffs must use the same legal representatives.

Marino v Esanda [1986]

- Even though all the loan contracts were the same (and thus a series of transactions to the lender), each P had separate actions with the D, arising only on their individual contracts.

v. JOINDER OF DEFENDANTS

It must be noted that joinder of defendants will be required to prevent the operation of Anshun estoppel.

Birtles v Cth (1960)

- Facts: The P suffered injuries and sued everyone connected with the incident. There was a problem with the limitation period, so the P decided to sue his lawyers by joining them to the existing action.
- The court held:
  - "Indeed a P would be neglectful of his own interest if he did not join his own solicitors" – i.e. if the P did bring two separate trials, Anshun estoppel might prevent the P from re-litigating the matter.

C. JOINDER BY LEAVE OF THE COURT UNDER R 6.19

The court will only consider whether to grant leave to join where there is no same transaction or series of transactions.

Bishop v Bridgelands Securities (1990)

- Facts: The court did not allow joinder under r 6.19 because the facts did gave rise to different transactions. However, the court considered whether leave should be given.
- Held:
  - The court will do whatever is necessary for a just resolution of the dispute, having regard to limiting the cost and delay of litigation (overriding purpose rule).
  - Leave ought not to be granted unless the court is affirmatively satisfied that joinder is unlikely to result in unfairness (i.e. leave not given lightly).
  - Practical matters will be considered, such as:
    - Whether the P have the same lawyer (required under r 19.2(2))
    - Nature of the evidence – documentary evidence would not cause an undue burden on the D, as opposed to oral evidence
    - Possibility that the respondent's/D's resources to satisfy any potential judgement may not extend to all the parties. This may give rise to an advantage for those plaintiffs who started their case early. Such injustice can be prevented by joining all parties.

D. JOINDER BY COURT ORDER (R 6.24)

Under r 6.24, the court can join parties if the court considers that the parties ought to have been joined or joinder is necessary for determination of the issues in the case. Rule 6.28 provides that if a court orders a party to be joined, joinder is only effective on date of order.

News Ltd v Australian Rugby Football League (1996)

- The court refers to the *Penang Mining case,* citing, "one of the principle objects of the rule is to prevent injustice without being given an opportunity to be heard… the test is will his rights against or liabilities to any party to the action be directly affected by any order made in the decision?"
- An order which directly affects a third person's rights should not be made unless they are

also joined as a party.
- While the damages sought would not affect the parties, the order preventing News Ltd from employing the parties would logically affect them. Therefore, they should have been joined as a party. As they were not joined, the orders are set aside.

Effectively, after this case, there is no discretion for the courts as to ordering joinder of parties, as parties must not be joined under r 6.24 or the orders will be set aside.

i. Difference between Joinder under r 6.19, r 6.24 and r 6.28

Logically, r 6.19 applies if either of the existing parties apply for someone to be joined. Rule 6.24 applies only on the initiative of party wanting to be joined or the court. Rule 6.28 is implicitly connected to r 6.24, since r 6.28 does not refer to giving leave (as r 6.19 does). The implication is that under r 6.19, if leave is given, joinder is effective as if parties joined from the beginning of the proceedings.

E. Costs where there are multiple parties

Generally, costs follow the event, meaning that the unsuccessful party bears the party/party costs of the successful parties. What then happens where the P sues two parties, and is successful against one D only? The general rule is that the unsuccessful D pays the P's costs, while the P pays the "successful" D's costs.

As the court always has discretion under s 98 as to what cost order to make, the court will make different costs orders where particular circumstances are fulfilled. The P need not pay the successful D's costs where:
- P demonstrates it was reasonable choice to sue both; and
- The unsuccessful D's actions led the P to also sue the successful D (e.g. unsuccessful D claimed it was the successful D's fault).

In this case, the court may make either a Bullock or Sanderson order.
- Bullock order
  - The cost order passes through the P – P is ordered to pay costs of the "successful" D, but these costs are included in the costs paid by the unsuccessful D.
- Sanderson order
  - This is a direct order requiring the unsuccessful party to pay all costs.
  - This order is problematic where the unsuccessful D does not have the financial ability to pay both the P and the successful D. In this case, the successful D may be burdened with the costs.
  - However, this order is now preferred, as the interest of the successful D can be protected by allowing the successful D to recover from the P where the unsuccessful D can't pay the costs (*Walker v Corporation of the City of Adelaide (No. 2) [2004]* SASC 139).

9. Consolidation of Proceedings

Under r 28.5 of the UCPR, individual cases involving a common question, or the same series of transaction may be consolidated. This means that the court can try the cases together, either running one immediately after the other, or staying all other cases until the first test case is decided (to establish a precedent). The practical result is that if the first case is decided in the D favour, then the rational P will try to settle the rest of the cases. If the D loses, then the other D's will withdraw from the proceedings. Compared to the joinder rule under r 6.19, consolidation is more flexible and broader.

In personal injury cases, discovery is not allowed unless there are special reasons for the court to order otherwise (r 21.8).

2) D provides list of documents

Under r 21.3, the D must serve a list of documents on the P that deals with all the documents relating to the discovery order. There must be brief description of each document, and for documents for which privilege is claimed, the D must specify the reason privilege is claimed and under what circumstance it arises. Note that the D is also not required to provide excluded documents, which include all those documents that came into existence after commencement of the proceedings (r 21.1).

In addition, under r 21.4, the D must affirm or swear an affidavit in support specifying that the litigant has made all reasonable inquiries and believes there are no more documents other than the ones listed. In addition, under r 21.4(3) the solicitor must certify that they have advised the party of the obligations arising under a discovery order, as well as the fact that the solicitor is not aware of any other documents.

3) Access to documents discovered

The defendant must ensure that the documents discovered are physically available (r 21.5). All those documents in the D's possession must be made available. In addition, the D must make available a person who is able to explain how the D organised the documents, as well as assist in the identification of particular documents. The D must also provide facilities for inspection and copying of documents.

As to the P's duties, the P must only use the documents for the particular proceedings under which discovery is order, and not for any other purpose or for any other court proceedings unless the court gives leave or unless the documents are received into evidence in court (r 21.7).

ii. Implied authenticity of documents discovered

Documents allowed for inspection under r 21.5 are implied to be an admission of the authenticity of the documents (r 17.5), unless the authenticity of the documents are itself disputed (r 17.5(3)). Note that if the authenticity of documents is subsequently proved to be true, the non-admitting party will have to pay for the other's costs in proving the authenticity of the documents on an indemnity basis (r 42.9).

iii. Subsequently found documents to be made available

While there is no continuing duty for discovery in relation to documents made after commencement of proceedings (r 21.1), parties are required to notify of any changes in the status of the documents that may make them discoverable, and must allow such documents for inspection (r 21.6). This is more akin to a duty of correction than a duty of continuing discovery.

iv. Breach of rules for discovery

1) Incomplete list

Where there is an incomplete list of documents, the court may strike out the proceedings for non-compliance.

British American Tobacco v McCabe (2002)

- Facts: BAT subverted the process of discovery prior to litigation by destroying certain evidence. This made it impossible for P to have a fair trial as the evidence was destroyed.
- On appeal to the HCA, the court overturned the trial court's decision to strike out the D's defence. However, the HCA did not specifically address the circumstances in which is was appropriate to strike out a defence for non-compliance with the rules of discovery.

2) Breach of undertaking not to disclose (UCPR r 21.7)

Breach of the undertaking not to disclose discovery documents or to use them for the collateral purposes may give rise to contempt of court (r 21.7).

Hammersley Iron v Lovell (1998)
- The court held that this was a long standing common law rule, and would apply even if not specified under the UCPR.
- As discovery amounts to an interference with the right of privacy, the court must restrict the potential interference as far as possible, leading to the implied undertaking for no collateral use of discovered documents (i.e. cannot use for any other purposes).

D. SUBPOENA TO PRODUCE

A subpoena to produce is use to gain production of documents prior to trial. It is an alternative to the notice to produce and discovery mechanisms. A subpoena can be very wide provided it is not oppressive or difficult to determine whether a particular document falls within the description. As such, it is different from discovery, where a judgment has to be made as to relevance. If the subpoena is set too wide or requires a judgment to be made by the D as to documents to be produced, it may be set aside as oppressive. A subpoena can only be used to acquire documents in the possession of the party.

i. UCPR PART 33

Under r 33.2, a court order is not need for a subpoena to produce. However, the subpoena must satisfy the form requirements of r 33.3, and then under r 33.2(2), the issuing officer will issue the party with a subpoena.

The subpoena must identify the document to be produced, and must specifically describe the document (r 33.3(4)). This is because subpoenas can be used against any stranger to the litigation, who may not know anything about the proceedings. In addition, the party must give conduct money to the addressee of the subpoena for the reasonable of producing the documents, such as photocopying costs (r 33.6(1)).

The subpoena must be served personally on the addressee (r 33.5). Even if a subpoena is not personally served, if the addressee has actual knowledge of the subpoena, the must comply with it (r 33.6). Failure to comply with the subpoena by addressee amounts to contempt (r 33.12).

ii. GROUNDS FOR SETTING ASIDE

On the application by the addressee of the subpoena, it can be set aside (r 33.4). If such an application is made, the court will consider whether the subpoena was validly issued.

Yunghanns v Candoora (2000)
- Subpoena cannot be used for the purposes of discovery.
- The subpoena will be set aside if judgment is required as to whether the document relates to issue between the parties (i.e. the document is not specifically identified). This is

considered by the courts to be too heavy a burden for the addressee.

Pasini v Vanstone (1999)
- There are 3 grounds on which to object against a subpoena:
  - Where it is oppressive or vexatious (*Yunghanns case*)
  - Where the purpose of the subpoena was to discover whether the party had a case (i.e. a "fishing expedition")
  - Where it is abuse of process of the court (e.g. as a substitute to discovery)

E. PRELIMINARY DISCOVERY AND INSPECTION (I.E. PRIOR TO PROCEEDINGS)

Under UCPR r 6.4(1)(c), a summons is required to obtain preliminary discovery and inspection.

i. TO ASCERTAIN PROSPECTIVE DEFENDANT'S IDENTITY OR WHEREABOUTS (R 5.2)

Under r 5.2(1), if the applicant has made reasonable inquiries as to the D's identity or whereabouts but cannot find sufficient information to ascertain such information, and a person has documents in their possession which tends to assist in ascertaining such information, the court may make an order for preliminary discovery.

RTA v Aus National Car Parks (2007)
- Facts: ANC wanted to sue the registered owners of the cars which had outstanding parking fines in their private car park.
- Factors relevant to exercise of court discretion:
  - An intention to sue is a factor in the applicant's favour
  - A prima face case is a factor in the applicant's favour
  - The cost, delay and uncertainty of obtaining such information through alternative measures is also relevant

ii. DOCUMENTS FROM PROSPECTIVE DEFENDANT (R 5.3)

UCPR r 5.3 specifically allows for discovery prior to proceedings against a prospective D, where the P has not demonstrated a prima facie case. Rule 5.3 is only applicable where such a document in the possession of the potential D would assist the applicant to make a decision as to whether to commence proceedings.

St George Bank v Rabo Australia (2004)
- The court held that the rule is to be beneficially constructed and given the fullest scope its language allows (i.e. broad interpretation)
- r 5.3 is an objective test of belief as to the right to obtain relief
  - The applicant does not have to make out a prima facie case, but it must be more than a mere assertion, suspicion or conjecture.
- Decision to commence proceedings:
  - This decision is not whether the applicant has sufficient information to decide if a cause of action is available, but rather whether the applicant has sufficient information to make a decision whether to commence proceedings.
  - Thus, this mechanism can be used to see what defences are available, the possible strength of those defences and determine the extent of their breach and likely quantum of damages
  - This is a very wide test formulation (which was unsuccessfully restricted in *Optiver* below).

Optiver v Tibra Trading (2007)

- Facts: the applicant applied to use the equivalent FCA Act rule to get discovery of certain computer programs based on a suspicion that former employees had breached commercial confidence and their copyright.
- The rule implied an objective test of belief
  - The belief can be mistaken, and the applicant need only establish a tenable objective basis to believe that they have a claim
- The case suggested a narrow interpretation of *St George* but this has since been overruled.

Panasonic v Ngage (2006)
- r 5.3 should also apply where the applicant wants information material to their decision of whether the D has assets that make it worthwhile for the P to sue.

iii. DOCUMENTS FROM OTHER PERSONS (R 5.4)

This rule in 5.4 expressly allows for discovery against a stranger to the proceedings. As this is invasive and counter to the established principles of discovery and subpoenas, courts are wary of giving such orders.

Richardson Pacific Ltd v Fielding (1990)
- Discovery on a third party may be possible due to the close relationship of the stranger to the defendant.

Siemon v Warren Brown (2002)
- Where discovery is sought from a stranger, the party seeking discovery must pay the reasonable costs of the stranger. "Reasonable costs" has been interpreted to mean an order for indemnity costs to be paid since the party is a non-party and it is unreasonable to expect the non-party to be out of pocket.

F. INTERROGATORIES (UCPR PART 22)

Interrogatories refer to the procedure by which one party serves questions on the opponent, to which the opponent replies. It is an outmoded mechanism and is rarely used in modern litigation.

A court order is needed (r 22.1) and will not be made unless it is necessary (r 22.1(4)). The answers to the interrogatory may be tendered as evidence at the trial (r 22.6).

An interrogatory may be objected to on three grounds (r 22.2), being that the questions:
- don't relate to the issues;
- are vexatious or oppressive;
- refer to privileged information.

The answers must be answered without evasion (r 22.3). If the party has not answered the question sufficiently, the court may order further answers or an oral examination (r 22.4), or alternatively may make any order it thinks fit, including dismissing the proceedings or striking out the defence (r 22.5).

G. MEDICAL EXAMINATION

The provisions under UCPR Part 23 Div 1 relating to medical examination apply in all proceedings where a person's physical condition is relevant (r 23.1), such as personal injury cases where the issue of damages is in dispute.

Under r 23.2, the D can serve notice on the P to require the P to undergo a medical examination, or alternatively, the D can apply for court order to order such examination (r 23.4). A person that is asked to undergo medical examination has a right to have a medical expert of their own choice to attend (r 23.5). In addition, the D would have to pay the reasonable expenses of the P in travelling as well as for the P's medical expert (r 23.3).

A person requested to undergo a medical examination must do all things reasonably requested (r 23.4(2)). If the party doesn't comply with the orders under Part 23 (r 23.9), the court may dismiss the action (for plaintiffs) or the court can strike out the defence (for defendants).

Stace v Cth (1989)

- In this case, the court upheld an objection to the medical examination on the basis that the procedure was extremely uncomfortable, possibly painful and involved possible dangers which were not negligible.
- However, it was not an objection to the whole medical examination. The P was merely exempted from that particular procedure.

H. Expert evidence (UCPR Part 31 Div 2)

A party who wants to lead expert evidence can only do so if they first request the court for a direction permitting them to do so (r 31.19). Parties must disclose if the expert charges a contingency fee (r 31.22), as it may be seen by the court to affect the expert's impartiality. The expert's terms of engagement must also be disclosed (r 31.22). Expert witnesses must comply with the code of conduct set out in Schedule 7 of the UCPR (r 31.23). The party must provide the expert with the code of conduct as soon as the report is requested. The report must contain an acknowledgment that the expert has read the code of conduct and abides by it. Generally, the expert witnesses code of conduct states that:

- The expert's overriding duty is to assist the court in an impartial manner.
- Their paramount duty is to the court and not to any party.
- The expert is not an advocate for either party.