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**S 58 – Provides more guidance about the kinds of factors that the court should take into consideration when trying to achieve the object of s 57.**

**S 57: Practical implications of overriding purpose: case management**(1) For the purpose of furthering the overriding purpose referred to in section 56 (1), proceedings in any court are to be managed having regard to the following objects:

- (a) the just determination of the proceedings,
- (b) the efficient disposal of the business of the court,
- (c) the efficient use of available judicial and administrative resources,
- (d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

(2) This Act and any rules of court are to be so construed and applied, and the practice and procedure of the courts are to be so regulated, as best to ensure the attainment of the objects referred to in subsection (1).

**S58 (1): ‘court must seek to act with the dictates of justice in deciding whether to make any order or direction for the management of proceedings’.**

Re ‘dictates of justice’ in a particular case, the court must have regard to ss 56 and 57, and may have regard to (s 58(2)):

- (i) the degree of difficulty or complexity of issues in proceedings,
- (ii) expedition of parties throughout proceedings,
- (iii) degree to which any lack of expedition is due to circumstances beyond the control of the parties,
- (iv) degree to which parties have fulfilled their duties under section 56 (3),
- (v) parties taking procedural opportunities,
- (vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction,
- (vii) other matters as the court considers relevant in the circumstances of the case

## Pre litigation and Case Management

- Overriding objective in s 56(1) emerged due to inaccessible, slow and expensive litigation
- Mechanics of how it is actually achieved rests on the role of judges in micro managing the steps of litigation
- 56(1) was to put more of a role on the courts throughout the litigation
- Shift to the courts having a more active role rather than just determining the dispute at the end
- Word that is used to describe what the judge is doing now is “case management”
- ‘an approach to the control of litigation in which the court supervises or controls the progress of the case through its interlocutory phase.’ (Colbran et al, Readings p 89)
- Shift from ‘adversarial’ judging to ‘managerial’ judging (see ALRC report, Kirby J in *JL Holdings*)
- Availability of sanctions: CPA s 61
- Case management still guided by overriding purpose – not efficiency or cost alone (i.e. trial judges cannot be over-zealous and must still have regard to the just determination of the proceedings: *Hans Pet Constructions Pty Ltd v Cassar* [2009] NSWCA 230)

**Ethical issues arising from the Rules:** How do lawyers' duties to the court impact on the pre-litigation stage? What kinds of matters should lawyers discuss with their clients to ensure they are meeting their duties to the court? Does client care always involve following your client's instructions, even when these are inconsistent with your duties to the court?

**Impact of technology on legal practice:** How does legal technology impact on open justice and access to justice? How has legal technology prompted shifts in civil procedure?

**'Procedural law** is the law that governs the conduct of proceedings before the court. Procedural law is "rules which are directed to governing or regulating the mode or conduct of court proceedings"; *McCain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 26-27 per Mason CJ. It is the mode or method of proceeding to enforce a right, it is not concerned with the law that establishes or defines the particular right.': Miiko Kumar, Michael Legg & Ilija Vickovich, *Civil Procedure in New South Wales* (Law Book Co, 2016, 3<sup>rd</sup> ed) 3

**Purposes of civil procedure:**

- Provide institutions and rules which facilitate dispute resolution
- Perpetuate the rule of law
- Mediate flow of litigants
- CP rules function to manage the flow and conduct of litigants and the resources of the court

### Civil procedure law v Substantive law

- subsidiary to or supportive of substantive law
- substantive law deals with 'the end to be obtained'
- Procedural law deals with the means of how to obtain the end
- 'trans-substantive'
- in the service of achieving justice
- informs the rights and interests embedded in substantive law
- has its own norms and values and as such can transform the requirements and meaning of substantive law

### Open justice in civil litigation

- courts are open to the public
  - would only be in rare circumstances that it would be closed.
- Media have access to courts
- Central to ensuring non arbitrary and transparent legal system
- Only depart from this principle in extreme circumstances

**Where they have made exceptions:**

- Extortion and blackmail cases
  - Wards of the state and mental health
  - If proceedings relate to minors
  - CPA provision is about closing the court and secluding from public access
- 
- *Fundamental aspect of system of justice: 'It is well established that the principle of open justice is one of the most fundamental aspects of the system of justice in Australia. The*

*conduct of proceedings in public ... is an essential quality of an Australian court of justice. There is no inherent power of the court to exclude the public.': John Fairfax Publications Pty Ltd v District Court of NSW (2004) 61 NSWLR 344 at [18] per Spigelman CJ*

### Scope and limits

- Common law: *Scott v Scott; Rinehart v Welker* [2011] NSWCA 403
- Statutory: *Civil Procedure Act 2005* (NSW) s 71 NSW CPA; *Court Suppression and Non-publication Orders Act 2010* (NSW) ss 7-8 (see *Rinehart v Welker* [2011] NSWCA 403)
- Note also Art 14 of ICCPR (not legally enforceable in NSW)

#### ***Rinehart v Welker* [2011] NSWCA 403**

'... the principle of open justice is one of the most fundamental aspects of the system of justice in Australia. Open justice ensures public confidence in the administration of justice. ... It is sufficient, in our view, to illustrate the proposition embedded in s 6 by referring to Lord Atkinson's statement in *Scott v Scott* [1913] AC 417 (at 463), that "in public trial is [to be] found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means of winning for it public confidence and respect."

The entitlement of the media to report on court proceedings is a corollary of the right of access to the court by members of the public.' : *Rinehart v Welker* [2011] NSWCA 403 at [32], [33] per Bathurst CJ and McColl JA

- Case decided that it wasn't going to benefit the administration of justice if the public knew about the case, and if anything it just would have hindered it.

### Pre-litigation steps and client care

#### **Prior to commencing litigation parties should:**

- take reasonable steps to resolve their disputes; or
- narrow the issues in dispute before commencing proceedings.

#### **Attempt to resolve dispute:**

- Notifying other party of issues and offer to discuss them.
- Providing relevant information and documents to the other party to enable greater understanding of issues.
- ADR (eg arbitration).
- Negotiation.

#### **Choosing ADR process:**

- Nature of the relationship between the parties
- Outcomes sought
- Cultural norms shaping parties' expectations