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## **Case Management:**

### **Importance of good procedure to the fairness of process:**

#### **Common law**

- Hogan v Hinch – open justice principle
  - Courts open to public
  - Proceedings allow public/professional scrutiny
  - Critical to maintenance of public confidence in courts
- Exceptions to open justice principle:
  - Protect ID of informer
    - Cain v Glass
    - Witness v Marsden
  - Protect ID of blackmail victims
    - R v Socialist Worker Printers and Publishers Ltd; Ex Parte Attorney General
  - Protect national security
    - Mirror Newspaper Ltd v Waller
- Justice delayed = justice denied:
  - Jackamara v Kraoker (1998)
- Delays in courts are major issue
- Backlog reduction:
  - Spigleman AC – Case Management in NSW, 2009:
    - Reduce backlog of courts by increasing jurisdiction of low courts, transfer matters from supreme to district
    - Appoint more judges
    - Refer non-complex personal injury cases to arbitrators
    - Blitzing = large number of similar cases listed together
- Purpose of CPA is to eliminate delay
  - Bi v Mourad (2010)
- Costs:
  - Hamper access to justice
  - Tactical weapon to use fewer resources/discontinue proceedings

- Case management = tool to reduce cost
- Spiggleman AC: Access to Justice and Access to Lawyers, Aus Bar Review 2007:
  - S60 CPA – costs proportionate to impotence, complexity of subject matter in dispute
  - Time billing system creates incentive to stretch out matter
  - Could liberate hundreds of millions of dollars

## Caseload management and managerial judging:

- Spigleman AC: Case Management in NSW 2009
  - Court given comprehensive range of powers to achieve overriding purpose
  - Court organisation for management:
    - District = high volume, litigation not to proceed unless ready
    - Supreme: different divisions management by particular group
- Objective to achieve trial date certainty
- Managerial judges:
  - Role of judge in individual cases
  - Judge tailor's procedure for each individual case
  - Requires judge to take active role, but not so active as to inflate cost of litigation
- QLD v JL Holdings\*\*\* (1997)
  - Pre CPA
  - Trial judge refused leave to amend because it should have been done earlier
  - HC allowed amendment, case management endorsed, justice dominant requirement
  - Costs can be used to sufficiently deal with prejudice to opposing side
    - No longer authority – Aon + CPA

## **Civil Procedure Act:**

- **S56: Overriding Purpose**
  - 1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

- 2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.
- 3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.
- 4) Each of the following persons must not, by their conduct, cause a party to civil proceedings to be put in breach of a duty identified in subsection (3):
  - a. Any solicitor or barrister representing party in proceedings
  - b. Any person with relevant interest in proceedings commenced by party
- 5) Court may take into account failure to comply with (3) or (4) in exercising discretion as to costs
- 6) For purpose of this section, person has **relevant interest** in civil proceedings if person:
  - a. Provides financial assistance or other assistance to any party to the proceedings, and
  - b. Exercises any direct or indirect control, or any influence over conduct of proceedings or conduct of party in respect of proceedings

**Note:** examples of persons who may have relevant interest = insurers, litigation funders

- **57: Objects of 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).

- **58 Court to follow dictates of justice**

(1) In deciding:

(a) whether to make any order or direction for the management of proceedings, including:

(i) any order for the amendment of a document, and

(ii) any order granting an adjournment or stay of proceedings, and

(iii) any other order of a procedural nature, and

(iv) any direction under Division 2, and

(b) the terms in which any such order or direction is to be made, the court must seek to act in accordance with the dictates of justice.

(2) For the purpose of determining what are the dictates of justice in a particular case, the court:

(a) must have regard to the provisions of sections 56 and 57, and

(b) may have regard to the following matters to the extent to which it considers them relevant:

(i) the degree of difficulty or complexity to which the issues in the proceedings give rise,

(ii) the degree of expedition with which the respective parties have approached the proceedings, including the degree to which they have been timely in their interlocutory activities,

(iii) the degree to which any lack of expedition in approaching the proceedings has arisen from circumstances beyond the control of the respective parties,

(iv) the degree to which the respective parties have fulfilled their duties under section 56 (3),

(v) the use that any party has made, or could have made, of any opportunity that has been available to the party in the course of the proceedings, whether under rules of court, the practice of the court or any direction of a procedural nature given in the proceedings,

(vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction,

(vii) such other matters as the court considers relevant in the circumstances of the case.

- **59 Elimination of Delay**

- In any proceedings, the practice and procedure of the court should be implemented with the object of eliminating any lapse of time between the commencement of the proceedings and their final determination beyond that reasonably required for the interlocutory activities necessary for the fair and just determination of the issues in dispute between the parties and the preparation of the case for trial.

- **60 Proportionality of costs**

- In any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.
- Case law:
  - Triple Take v Clark Rubber Franchising (2005) – effect of CPA on civil procedure
    - Einstein J: Just quick cheap resolution per CPA s56, s57 dictates justice, s58(2)(b) dictates costs

- **61 Directions as to practice and procedure generally**

- 1) Court may give directions as it sees fit for speedy determination of real issues between parties
- 2) Court may by order:
  - a. Direct party in proceedings to take specified steps
  - b. Direct parties as to time within which steps in proceedings must be completed
  - c. Directions regarding conduct as it considers appropriate
- 3) If party to whom direction is given fails to act:
  - a. Dismiss proceedings
  - b. Strike out/limit claim
  - c. May strike out defence filed by def, give judgement
  - d. Strike out or amend doc filed by party, whole or in part
  - e. Strike out, disallow, reject evidence that party has adduced to seeks to adduce
  - f. May direct party pay whole or part of the costs of another party
  - g. May make such other order or give such other direction as considers appropriate
- 4) Subsection (3) does not limit other power of court to take action of kind referred in that subsection or to take any other action court is empowered to take per failure to comply

- **62 Directions as to Conduct of Hearing**

- **63 Directions with respect to procedural irregularities**

## UCPR:

- 2.1 Directions and orders
  - The court may, at any time and from time to time, give such directions and make such orders for the conduct of any proceedings as appear convenient (whether or not inconsistent with these rules or any other rules of court) for the just, quick and cheap disposal of the proceedings.
- 2.2 Appointment for hearing
  - The court may, at any time and from time to time, of its own motion, appoint a date for a hearing at which it may give or make the directions or orders referred to in rule 2.1.
- 2.3 Case management by Court
  - Without limiting generality of rule 2.1, directions and orders may relate to any of the following:
    - a) Filing of pleadings
    - b) Defining issues
    - c) Provision of any essential particulars
    - d) Filing of Scott Schedules referred to in rule 15.2
    - e) Making admissions
    - f) Filing of lists of documents, either generally or with respect to specific matters,
    - g) Delivery or exchange of experts reports and holding of conference of experts
    - h) Provision of copies of documents including provision in electronic form
    - i) Administration and answering of interrogatories, either generally or with specific matters
    - j) Service and filing of affidavits, witness statements or other documents to be relied on
    - k) Giving of evidence at hearing, including whether evidence of witnesses in chief must be given orally or by affidavit or witness statement or both
    - l) Use of phone in support of an app for adjournment or amendment
    - m) Provision of evidence in support of an application for adjournment/ amendment
    - n) Timetable with respect to any matters to be dealt with, including timetable for conduct of any hearing



- o) Filing of written submissions

## Cases:

- **Banque Commerciale SA v Akhil Holdings Ltd (1990)**
  - Relief is restricted to those claimed in pleadings, no trial by ambush
- **Dennis v Australian Broadcasting Corp (2008)**
  - Party relied on JL to amend pleadings 5 times
  - Spigelman CJ: JL holdings subject to CPA, overriding purpose
- **Hans Pet Construction Pty Ltd v Cassar (2009)**
  - S56-60 statutorily compulsory
  - Balance overriding purpose v allowing parties to air matter
- **Halpin v Lumely General Insurance Ltd (2009)**
  - Resolution between real issues and just, quick, cheap
  - CPA s61(1), (2)(c), UCPR rr2.1, 2.3 – rules to help alleviate
- **McGuirk v UNSW (2010)**
  - Directions for any conduct in proceedings (r2.1), diff from CPA s61(1)
- **Aon Risk Services Australia v Australian National University (2009)\*\*\***
  - Case management principles important in ensuring interest of justice, minimising cost and delay
  - Costs cannot accommodate all prejudice to party (And to the court)
  - Matters to consider if party should be granted leave to amend claim:
    - Reasons and length of delay in applying for the amendment & whether application was brought in good faith;
    - prejudice suffered by the opposing party if the amendments were allowed (and whether an award of costs can adequately ameliorate that prejudice);
    - the costs associated with the delay;
    - the point in the litigation at which the application for amendment is made, particularly relative to the trial commencement date, if applicable; and
    - prejudice to other litigants awaiting trial dates or whose trial dates may be affected,
- **James Ashby Case – action against Peter Slipper + Cth**
  - Alleged Slipper made unwelcome sexual advances etc

- At first instance said it was an improper purpose, overturned on appeal
- **Expense Reduction Analysts Group v Armstrong Strategic Management and Marketing (2013)**
  - Intention of CPTA is that court can use broad powers to facilitate overriding purpose
  - Not deal with petty and costly disputed
- **Tugrul v Tarrants Financial Consultants Pty Ltd (no 5) (2014)**
  - Lots of interlocutory proceedings, one party ran out of funds
  - Parties should help find real issues and resolve them or bring to court
  - Notice of motion should be last resort, once filed parties are obliged to ensure that only real or essential issues are litigated
  - Where unnecessary delay/expense caused by conduct contrary to overriding purpose, court should award costs – s56(5)
- **Sali v SPC Ltd (1993)**
  - Principles of case management endorsed by Brennan, Deane + McHugh JJ
  - Predates CPA + AON
- **Racescan management Pty Ltd - Case**
  - Loadstar which guides the commercial division of the supreme court = is the star that guides navigation at sea, i.e. guiding principle, overriding purpose
  - Dennis v Aus broadcasting corp (2008)
    - CJ Spigglman, said that JL holdings had a binding statement re common law in case management, but that had been trumped in NSW by UNPR and the CPA
  - Einsterin in Racescan goes through what they said in Dennis
- **Kelly v Mina (2014)**
  - The appellant (the defendant) argued that the trial judge had wrongfully refused leave to amend the defence.
  - This application for leave to amend the defence was made on the first day of the hearing.
  - First, Justice Barrett in the Court of Appeal noted that an appeal court is reluctant to interfere with the exercise of a judge's discretion on an interlocutory matter unless the trial judge was "plainly erroneous" - a very high threshold
  - Justice Barrett looked at the factors that are relevant to leave to amend in the post CPA/Aon world: