

# Exam Notes (1)

Sunday, 4 October 2020 3:13 PM

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## OVERARCHING OBLIGATIONS

- Pt 2.3 Civil Procedure Act
  - S7-overarching purpose "just, efficient, timely and cost-effective resolution"
    - (2) includes any determination of court, agreement between parties or any other dispute resolution process
  - S10-Overarching obligations apply to anyone party to proceedings
  - S16-Paramount duty to the court in the administration of justice
  - S17-Act honestly at all times in relation to a civil proceeding
  - S18-Proper basis for claim. Not frivolous or vexatious (see *Gibb v Gibb*)
  - S19-Take steps to resolve dispute
  - S20-Cooperate with other parties in civil proceeding
  - S21-Obligation not to mislead(a) or deceive(b)
  - S22-Reasonable endeavours to resolve dispute
  - S23-Narrow issues in the dispute
  - S24-Ensure costs are reasonable and proportionate to complexity of case/amount in dispute
  - S25-Minimise delay
  - S26(1)-Disclose existence of critical documents (in possession currently or in past) at earliest reasonable time
  - S27(1)-only use documents for valid purpose in connection to civil proceeding

## SOLICITOR CONDUCT RULES

- 4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client;
- 4.1.2 be honest and courteous in all dealings in the course of legal practice;
- 4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;
- 4.1.4 avoid any compromise to their integrity and professional independence; and
- 5.1 A solicitor must not engage in conduct, that demonstrates the solicitor is not a fit and proper person to practise law, or materially might be:
  - 5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice, or
  - 5.1.2 bring the profession into disrepute.
- 7.1 clear and timely advice

- 8.1 must follow client's lawful, proper and competent instructions
- 17 avoidance of personal bias
- 19 may not deceive or knowingly mislead court
- 20 where solicitor is told of lie/falsification/suppression of witness to court, must advise client that court be informed and cannot act further until client authorises solicitor to tell court
  - Criminal guilt- may cease or continue to act
    - If continue must not: falsely suggest that other person committed the offence, set up an affirmative case inconsistent with confession, argue that the evidence does not prove that the client is guilty,
      - ◆ Must not continue to act if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client's innocence
  - Where knows client is to disobey court order
    - Advise client against it and warn of dangers
    - Not advise as to how to carry it out
    - Not inform court or opponent of client of this unless client authorises or it could reasonably constitute to any person's safety
- 31.1 Unless otherwise permitted, a solicitor to whom material known/reasonably suspected to be confidential is disclosed must not use the material and must: (SEE privilege, confidentiality)
  - 31.1.1 return, destroy or delete the material (as appropriate) immediately upon becoming aware
  - 31.1.2 notify the other solicitor/person
  - 31.2 A solicitor who reads part or all of the confidential material before becoming aware of its confidential status must:
    - 31.2.1 notify the opposing solicitor or the other person immediately, and
    - 31.2.2 not read any more of the material.
    - 31.3 If a solicitor is instructed by a client to read confidential material received in error, the solicitor must refuse to do so.

## ETHICS

- **Dispute:** Two or more parties are unable or unwilling to resolve a situation and one or more are not prepared to accept to the status quo or accede to the demands of another (Christopher Moore)
- **Fair Trial**
  - Elements
    - Independent and impartial tribunal
      - Judge impartially evaluates dispute by reference to rules which are accepted independently of the particular case without being influence by personal preference or animosity Zuc[3.25].
      - *Ebner v Official Trustee*
        - ◆ Judge can be disqualified (actual or apprehended bias)
          - ◇ A fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind
      - Bullying parties/witnesses - *Serafin v Malkiewicz and Others*; CA found judge had "seriously transgressed the core principle that a judge remains neutral during the evidence"
    - Open/publicity
      - *Russell v Russell* (Gibbs)
        - ◆ Proceedings shall be conducted 'publicly and in open view'...fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected
          - ◇ Integrity and independence of the courts; distinguishes judiciary from administrative procedure.
      - BUT: Court orders accessible but not docs
        - ◆ *John Fairfax publications v Ryde Local Court*-Spiegelman CJ: open justice is a principle, not a free standing right

# Exam Notes (2)

Wednesday, 7 October 2020 12:57 PM

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- **Civil Procedure**
  - Overarching obligations
  - ADR
  - Costs disclosures
  - Preliminary discovery
  - Class actions/Joinders
  - Commencing proceedings
  - Faulty process
  - Preventing cases from proceeding
  - Interim orders
  - Discovery
  - Appeals
  - Costs and settlement

## CIVIL PROCEDURE

- **Dispute:** Two or more parties are unable or unwilling to resolve a situation and one or more are not prepared to accept to the status quo or accede to the demands of another (Christopher Moore)
- **Overarching obligations**
  - Justice on merits v overarching obligation
    - *Shannon v Lee Chun Isaacs*: imperative duty cast by the legislature...to let no formality stand in the way of...justice
    - *Aon Risk Services*: overriding objective...displaces justice on the merits as the sole objective of the justice system and substantive justice is to be balanced with equally important but competing considerations of expedition and proportionality
      - *Pearse v Pears* (UK): truth, like all other good things, may be loved unwisely-may be pursued too keenly-may cost too much
  - Case management
    - *Sali v SPC* (vic SC)
      - In [considering adjournment] the judge of a busy court is entitled to consider the effect on court resources and the competing claims by litigants in other cases
    - *Aon Risk Services v ANU*
      - Public purpose in resolving disputes
        - Critically, the matters relevant to a just resolution of ANU's claim required ANU to provide some explanation for its delay in seeking the amendment (since it was to its favour and disadvantage to Aon). None was provided
    - *JL vs Aon risk*
      - *JL*: Justice is the paramount consideration in determining an application such as the one in question...[case management] it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between parties
      - *Aon*: *JL holdings* cannot be taken as authority for the view that waste of public resources and undue delay...should not be taken into account
        - What is a 'just resolution' is to be understood in light of the purposes

and objective stated...speed and efficiency...are seen as essential to a just resolution. This should not detract from a proper opportunity being given to the parties to plead their case

- Supplemented by
  - SC Rules: r1.14 any power 'shall endeavour to ensure all questions in the proceedings are effectively, completely, promptly and economically determined'
    - Agree timetable, issue directions (r34), set place/mode of trial (r47), fix date for trial (r48)
  - Federal Court of Australia Act (1976): S37N(1) duty to act consistently with the overarching purpose
  - CPA:
    - S47(1) give directions in interest of administration of justice (a) or public interest (b)
      - ◇ (3) court may actively case manage by giving directions for efficiency (a), deciding order of issues (c), encourage party cooperation/out of court settlement (d)(i and ii), controlling progress (e) eg. timetables (i) and limiting time for civil proceeding (f) (incl limiting number of witnesses i, limiting examination/cross ii, limiting issues in examination/cross iii)
    - S48 2(c) referral to ADR

- **ADR**

- Court may make order referring (part/whole) civil proceeding to ADR (s66(1) CPA)
  - (2) Can be made without consent of parties (as long as not arbitration)
  - SC rules: 50.07 At any stage of a proceeding, court may with or without consent of parties, order the proceeding be referred to a mediator
  - SCR: r7.2- must inform client about alternatives to full adjudication which are reasonably available unless reasonable grounds to believe client already has knowledge of it to allow them to make their own decisions
- Confidentiality
  - Without prejudice-not admissible other than by consent
    - Public policy does not allow admissions made in course of negotiations to be admissible in court Zuc[29.12-29.14]
      - Evidence Act s131, s24A SC Act
- Mediation
  - Types-Zuc[29.5]
    - Facilitative- facilitate mutually beneficial outcome/discussion between parties based on their wants
    - Evaluative- mediator evaluates, gives his/her opinion about strengths and weakness of each party's position and result of proceeding to court
    - Therapeutic- improve relationship between parties on assumption that dispute is symptomatic of problematic relationship
    - Settlement- focus placed on reaching compromise eg incremental bargaining
  - Cons
    - Does not contribute to access to courts
    - Does not contribute to formal justice
    - Substantive justice and 'fairness' not goals of mediation
    - Adjudication as 'defining democratic ritual' and practice of public equality before the law (Genn)
  - Pros
    - Alternative pathway-provides access to settlement that does 'no worse harm' than non-resolution of the dispute
    - Delivers form of procedural justice
    - Transformative process that strengthens parties' relationship (Genn)
  - NOT an ethics free zone: