

## Civil Practice – Subject Notes

### Three themes:

1. Overriding purpose of the CCPA 2005 (NSW), s56
2. Impact that technology is having on legal practice
3. Sometimes a lawyer's duty to the court may seem to conflict with our duty to the client

How substantive law can be channelled through courts to provide justice to clients

### 1. Guiding Principles, Case Management and the overriding Purpose

#### Key Points:

- CP laws govern conduct of proceedings
- CP laws operate in service of achieving justice and contribute to public understanding of justice and substantive rights
- **Key legislation:** Civil Procedure Act 2005 (NSW); Uniform Civil Procedure Rules 2005 (NSW)
- 'Quick, just and cheap': guiding principles that impact on conduct of parties, lawyers and judges' case management decisions
- Case management: Shift to 'managerial judging'
  - ongoing involvement of judge throughout progress of litigation
  - Judicial orders must uphold overriding purpose
  - Decisions must be made in way that considers interests of parties to dispute as well as broader interests of public and other litigants

#### What is civil procedure?

Procedural law: law that governs conduct of proceedings before court.

- 'Rules which are directed to governing or regulating mode or conduct of court proceedings' (McCain v RW Miller & Co (SA) Pty Ltd (1991) 174 CLR 1 (As per Mason J (26-27)))
- Mode of method of proceeding to enforce a right- not concerned with law that establishes or defines the particular right

#### Purposes of civil procedure:

- Provide institutions and rules which facilitate dispute resolution
- Perpetuate rule of law: State can show that gov't is not exercising arbitrary power over its citizens
- Mediate flow of litigants

#### Civil procedure vis-à-vis substantive law – various perspectives:

- Subsidiary to or supportive to substantive law
- Tarns-substantive'
- In the service of achieving justice
- Informs rights and interests embedded in substantive law
- Has its norms and values and as such can transform the requirements and meaning of substantive law

### Adversarial v inquisitorial justice model

- Function and operation of civil procedure is contingent to the model of justice
- Civil justice reforms in NSW have increased role of court in shaping and pacing litigation
- **Inquisitorial:** State officials shape case and way it progresses. Less control with parties involved (Roman/French)
- **Adversarial:** Proceedings essentially controlled by parties. Emphasis on oral argument with judiciary having a reactive role (English history)

### Sources of civil procedure law:

- **Legislature:** Supreme Court Act 1970 (NSW); Civil Procedure Act 2005 (NSW)
  - s4 CPA tells which courts the Act applies to
- **Executive:** Uniform Civil Procedure Rules 2005
  - Not a code – does not have the status of an Act
- Courts: Inherent jurisdiction (superior courts); court practice notes; judicial decisions
  - Inherent jurisdictions allows courts to ‘properly exercise their powers, perform their functions and to control abuse of process’ (Riley McKay Pty Ltd v McKay [1982] 1 NSWLR 264)
  - Eg. Security for costs orders, asset preservation orders and search and seizure orders
- Anton Pillar orders

### ‘Just, quick and cheap’

- CPA 2005 (NSW) s 56 (1): **overriding purpose** of Act and rules of court, in application to civil proceedings, is to facilitate, just, quick and cheap resolution of real issues in proceedings
- Historical context: expensive, long, inaccessible litigation; UK reforms; legislative reforms to Australian jurisdictions

### Practical implications of overriding purpose- duties (s 56 CPA):

- **Court** seeks to give effect in exercising powers under CPA and court rules: s56 (2)
  - Overriding purpose guides management
- **Parties** under a duty to assist the court to further the overriding purpose (participate in the court processes and comply with court directions and orders); s56 (3)
- **Solicitors, barristers and others** with relevant interested in proceedings (eg. Litigation funders, insurers) must not, by their conduct, cause a party to civil proceedings to be put in breach of a duty in s 56(3): s56(4)
- Cannot conduct yourself in litigation that would cause delay, result in disproportionate costs being incurred by other parties etc.
- Overriding purpose important for our understanding but also because there are significant consequences for non-compliance

Practical implications of overriding purpose- case management (s 57 CPA)

Also UCPR r 2.1

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.

### Practical implications of overriding purpose – court orders and directions in case management (s 58):

- Court has to look beyond the parties
- Court is required to take into account effect of judicial and administrative resources in other proceedings

Re 'dictates of justice' in a particular case, the court must have regard to s56 and 57 and may have regard to s58(2)

### Practical implications of overriding purpose – costs, sanctions

- Punitive element: if provisions are not complied with costs may be awarded to impart/offset the disadvantage caused to one party by another (due to breach of provision)
- Courts with an express power to make a costs order against a legal practitioner in circumstances where costs have been incurred improperly or without reasonable cause, including non-compliance with the obligations imposed on legal practitioners under s56(4); s99(1)(b) CPA
- Court can make orders against party that fails to comply with court directions that are made for the speedy determination of the real issues between the parties to the proceedings: S 61(3) CPA

### Practical implications of overriding purpose:

#### S56 relevant to way in which CPA and UCPR are interpreted and applied

- Relevant throughout civil litigation process
- Relevant to lawyer's conduct and decisions as civil litigator
- Relevant to all case management decisions made by judges pursuant to CPA and UCPR

### Just, quick and cheap: not always compatible, tensions arise between these

'It is self-evident that what will be required in most cases if the resolution of a tension between speed (including avoidance of delay), reduction of costs and the proper consideration of the issues raised by the parties, especially in cases of complexity.': Halpin v Lumley General Insurance Ltd (2009) 78 NSWLR 265 at [28], [29] (Basten JA)

## 1.3 Case Management and Overriding Purpose

### Case Management:

- 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.’: UCPR r 2.1; for examples, see UCPR r 2.3

- ‘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 18 Cassar [2009] NSWCA 230)

#### Judicial discretion in case management:

- Overriding objective sought to facilitate courts having a more active role in directing case and/in litigation
- Managerial judging: contemporary approach to case management
- Case management: court supervises/controls case through interlocutory phase

**Sali v SPC Ltd (1993) 116 ALR 625**: parties, other litigants and public interest in resource use ‘Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But 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 the parties.’ (at 155 per Dawson, Gaudron and McHugh JJ)

**Queensland v JL Holdings Pty Ltd (1997) 189 CLR 146**: parties (with costs used to remedy any prejudice caused to a party)

‘What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources.’ (at 626 per Brennan, Deane and McHugh JJ)

‘Whilst taking all of the considerations relevant to the circumstances of the case into account, the judge must always be careful to retain that flexibility which is the hallmark of justice. ... A judge who ignores the modern imperatives of the efficient conduct of litigation may unconsciously work an injustice on one of the parties, or litigants generally, and on the public. But a judge who applies case management rules too rigidly may ignore the fallible world in which legal disputes arise and in which they must be resolved.’ (at 171-172 per Kirby J)

**AON Risk Services v Australian National University (2009) 239 CLR 175**: parties + other litigants and public interest in resource use and rule of law, in broader context of the overriding objective

‘Of course, a just resolution of proceedings remains the paramount purpose of r 21; but what is a “just resolution” is to be understood in light of the purposes and objectives stated. Speed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of proceedings. This should not detract from a proper opportunity being given to the parties to plead their case, but it suggests that limits may be placed upon re-

pleading, when delay and cost are taken into account.’ (at [98] per Gummow, Hayne, Crennan, Kiefel and Bell JJ)

‘In the past it has been left largely to the parties to prepare for trial and to seek the court’s assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.’ (at [113] per Gummow, Hayne, Crennan, Kiefel and Bell JJ)

‘Both the primary judge and the Court of Appeal should have taken into account that, whatever costs are ordered, there is an irreparable element of unfair prejudice in unnecessarily delaying proceedings. Moreover, the time of the court is a publicly funded resource. Inefficiencies in the use of that resource, arising from the vacation or adjournment of trials, are to be taken into account. So too is the need to maintain public confidence in the judicial system.

...

Undue delay can undermine confidence in the rule of law. To that extent its avoidance, based upon a proper regard for the interests of the parties, transcends those interests. Another factor which relates to the interests of the parties but transcends them is the waste of public resources and the inefficiency occasioned by [changes to litigation].’ (per French CJ at [5], [25])