

Amendment of pleadings

AON Risk Services Australia Ltd v Australian National University (2009) 83 ALJR 951, 258 ALR 14

In *Aon Risk Services Australia Ltd v Australian National University* (2009) 83 ALJR 951; [2009] HCA 27, the High Court considered the factors relevant to a trial judge's discretion to grant leave to file amended pleadings. The High Court unanimously upheld the appeal from the Court of Appeal in the Australian Capital Territory.¹ By majority, the Court of Appeal had dismissed an appeal from the trial judge's decision² allowing the Australian National University (ANU) to file amended pleadings following an application made at the commencement of a four week hearing of a commercial dispute.

Factual background

The facts were set out in the joint judgment (Gummow, Hayne, Crennan, Kiefel and Bell JJ) at [38]-[54] and in the judgment of Heydon J at [136]-[151]. The proceedings were commenced on 10 December 2004 by ANU against three defendants (the insurers), which did not include Aon Risk Services Australia Ltd (Aon). ANU claimed an indemnity for losses it had suffered by reason of extensive fire damage to ANU property in January 2003. After the insurers had filed defences to the original statement of claim, ANU amended its pleadings to join Aon to the proceedings in June 2005. The original claim against Aon, which was ANU's insurance broker, alleged that Aon had failed to arrange the renewal of insurance over some of the property which the insurers claimed was not the subject of insurance. It was expressed to be in the alternative to the claims brought against the insurers. ANU alleged that the balance due to it was in the order of \$75 million.

ANU settled the claim against the insurers during the first two days of the period allocated for the hearing of the matter. The following day, counsel for ANU informed the court that ANU wished to apply for an adjournment in order to seek leave to file a second further amended statement of claim in respect of its claim against Aon, the only remaining defendant. The trial judge granted an adjournment to allow a period of time for the proposed amendment to be drafted and served with evidence in support of the application, and for submissions to be taken on the application. As a consequence the hearing did not proceed in the four weeks that had been allocated.

The proposed amendment sought to expand the claim against Aon substantially. ANU's new allegations included that pursuant to their agreement Aon was to review ANU's policies of insurance, meet with ANU on a regular basis in the process of review, prepare submissions to insurers to ensure all material facts were disclosed and to enable the insurers to determine their criteria for indemnity, and place insurance upon instructions from ANU.

Decisions at first instance and on appeal

The trial judge determined the application by reference to rules 21 and 501 of the *Civil Procedure Rules 2006* (ACT) (CPR (ACT)).³ Rule 21 provided for case management principles including the

just resolution of the real issues in the proceedings and the timely disposal of proceedings at a cost affordable to the parties. Rule 501 provided for certain circumstances in which amendments should be made.

The trial judge granted leave to amend the pleadings. The trial judge treated as important the factor that the allegations raised real triable issues between ANU and Aon. This outweighed the fact that the matter had been set down for four weeks and other litigants may be said to have been disadvantaged by the allocated time of the trial: [2007] ACTSC 82 at [43].

In the Court of Appeal, the majority (Higgins CJ and Penfold J) applied *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 and upheld the trial judge's decision on the grounds that the proposed amendment raised a claim which was arguable, there were no case management considerations that would require leave to amend to be refused, and Aon could be compensated for any prejudice by a costs order: [2008] ACTCA 13 at [66]-[67] (Penfold J), see also at [6] (Higgins CJ). Justice Lander delivered a dissenting judgment.

Reasoning of the High Court

All of the justices of the High Court accepted that the relevant provision under which the amendment application fell to be determined was CPR (ACT) rule 502 rather than rule 501.⁴

The joint judgment noted that the trial judge was in error in failing to recognise the extent of the new claims and the effect that amendment would have on Aon, and by failing to recognise the extent to which the case management principles in rule 21 would not be met if the amendments were allowed (at [105]). The joint judgment referred to the known ill-effects of a delayed determination, and stated that rule 502(1) read with rule 21 did not provide an unfettered discretion to grant leave to amend. The fact that ANU's new claims were arguable was not of itself sufficient to permit amendment and could not prevail over the objectives of rule 21. A 'just' resolution of the proceedings between ANU and Aon required those objectives to be taken into account (at [105]).

It was incumbent upon ANU to tender an explanation as to why the matter had been allowed to proceed to trial in its existing form. The fact that none was given was of some significance (at [106]-[108]). The trial judge incorrectly elevated the fact that the claim was arguable to a level of importance it did not have and failed to recognise the importance of the objective stated in rule 21, being the timely disposal of the proceedings (at [110]). The joint judgment concluded that the trial judge's discretion miscarried.

Chief Justice French delivered a separate judgment which supported the orders proposed in the joint judgment. His Honour considered that the trial judge should have taken into account waste of public resources and undue delay, the associated strain and uncertainty caused to litigants, and the potential for loss of public confidence in the legal system which arises where a court

accedes to applications made without adequate explanation or justification (at [30]). Having regard to all of the relevant factors, the amendment application should have been refused (at [35]).

Justice Heydon also delivered a separate but concurring judgment. The ratio of his Honour's decision was that ANU's amendment application had at all times been put before the trial judge and the Court of Appeal on the basis of rule 501 of the CPR (ACT), and that rule did not provide any foundation for the application to amend (at [120]). As the application was made in reliance on rule 501, the trial judge erred in failing to dismiss the application for leave to amend (at [121]). Justice Heydon went on to consider what the position would be if ANU had filed a notice of contention to rely on the discretion conferred by rule 502, which discretion was informed by the case management principles enunciated in rule 21. It is clear from the firm criticism of the general delay with which the proceedings were prosecuted that Heydon J would not have allowed the application on the basis of the discretion conferred by rule 502 (at [135]-[156]).

Application as a precedent

This decision is likely to become the leading authority on amendment of pleadings in most Australian jurisdictions, and on the application of case management principles to interlocutory applications more generally, for the foreseeable future. Although the case concerned rules 21 and 502 of the CPR (ACT), the joint judgment noted that the purposes expressed in rule 21 reflect principles of case management by the courts, which management is 'now an accepted aspect of the system of civil justice administered by courts in Australia' (at [92], see also at [36] (French CJ)). The decision has already been cited in the Supreme courts of each state and in the Federal Court.

It is noteworthy that the High Court held that, at least in jurisdictions having rules similar to rules 21 and 502 of the CPR (ACT), *Queensland v JL Holdings Pty Ltd* has ceased to be of authority: at [6], [30] (French CJ), [95]-[97], [111], [116] (joint judgment), [133] (Heydon J). It is now clear, if it was not previously, that an application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation (joint judgment at [111]).

Practitioners and trial judges faced with amendment applications may draw general guidance from paragraphs [97]-[103] of the joint judgment. Relevant factors include:

- The nature and importance of the amendment to the party applying. These factors are to be weighed against the extent of the delay that may be caused and the costs associated with it, as well as the prejudice which might reasonably be assumed to follow (at [102]; see also at [111]-[114]).
- The point the litigation has reached relative to a trial. The court should consider whether a party has had sufficient

opportunity to plead its case, having regard to the other party and other litigants awaiting trial dates (at [102]).

- The explanation for the late application to amend, which will invariably be required where there is delay (at [102]-[103]). The party proffering the explanation will need to show that its application is brought in good faith. That party will also be required to bring the circumstances giving rise to the amendment to the court's attention, so that they may be weighed against the effects of any delay and the objectives expressed in the rules of the court (at [103]).

Aon Risk Services Australia Ltd v Australian National University does not require that every application for amendment should be refused because it involves the waste of some costs and some degree of delay (joint judgment at [102]). However, in light of the court's treatment of *Queensland v JL Holdings Pty Ltd* and the significance ascribed to any cost and delay that may be caused by an amendment, the decision will be likely to make it more difficult for parties successfully to amend pleadings.

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Endnotes

1. *Aon Risk Services Australia Ltd v Australian National University* (2008) 227 FLR 388; [2008] ACTCA 13 (Higgins CJ and Penfold J; Lander J dissenting).
 2. *Australian National University v Chubb Insurance Co of Australia Ltd* [2007] ACTSC 82 (Gray J).
 3. Rule 21 provided: '(1) The purpose of this chapter, and the other provisions of these rules in their application to civil proceedings, is to facilitate the just resolution of the real issues in civil proceedings with minimum delay and expense. (2) Accordingly, these rules are to be applied by the courts in civil proceedings with the objective of achieving – (a) the just resolution of the real issues in the proceedings; and (b) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties. ...'
- Rule 501 provided: '(1) All necessary amendments of a document must be made for the purpose of – (a) deciding the real issues in the proceeding; or (b) correcting any defect or error in the proceeding; or (c) avoiding multiple proceedings.'
4. Rule 502 provided: 'At any stage of a proceeding, the court may give leave for a party to amend, or direct a party to amend, an originating process, anything written on an originating process, a pleading, an application or any other document filed in the court in a proceeding in the way it considers appropriate.'