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## High Court judgment has significant implications for the ability of parties to amend pleadings

The recent High Court decision in *Aon Risk Services Limited v Australian National University* [2009] HCA 27 (5 August 2009) has significantly changed the existing position in relation to the ability of parties to amend pleadings, signalling that courts will pay more than lip service to case management principles.

This decision will be relevant to Australian Government departments and agencies involved in court litigation. Although the decision focused on the particular court rules in the ACT, the High Court made it clear that the principles discussed in their judgment will be relevant in other jurisdictions as well.

### *Background facts*

In December 2004 the Australian National University (ANU) commenced proceedings in the ACT Supreme Court against three insurers. ANU claimed an indemnity for losses suffered by reason of the destruction of buildings and their contents at its Mount Stromlo Complex in the Canberra bushfires in January 2003. ANU's insurance broker, Aon Risk Services Australia Limited (Aon), was joined to the proceedings in June 2005. The claim against Aon was initially limited to its failure to arrange the renewal of insurance over some of the property which the insurers claimed was not the subject of insurance.

A four-week period was allocated for hearing the matter. On the first day appointed for trial the ANU and the insurers commenced a mediation. They reached a settlement two days later. ANU then sought an adjournment of the trial of its claim against Aon and foreshadowed an application for leave to amend their claim against it to allege a substantially different case. ANU sought to allege that, under a different contract for services, Aon had been obliged to ascertain and declare correct values to the insurers and provide certain advices to ANU regarding insurance.

Justice Gray of the Supreme Court granted ANU's application for adjournment and subsequently granted ANU's application to amend the pleadings, awarding Aon the costs occasioned by the amendment. His Honour's decision was upheld by a majority of the Court of Appeal (Higgins CJ and Penfold J, Lander J dissenting) subject to a further order that ANU pay Aon's costs occasioned by the amendment on an indemnity basis.

However, the High Court allowed Aon's appeal and ordered that ANU's application for leave to amend its pleadings be dismissed with costs.

## *The position before Aon v ANU*

Before the High Court's decision in this case, the position as generally understood was that a party's right to present its case took primacy over case management principles. Any prejudice to the other party arising from amendments to pleadings was considered to be 'curable' by an award of the costs consequential on the amendment.

This position was expressed in the High Court's previous decision in *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 (*JL Holdings*), which reversed a refusal of a request to amend a defence. The High Court stated that the 'ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim'. Further, case management should not 'prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties'.

## *The High Court's decision in Aon v ANU*

In *Aon v ANU* the High Court dismissed ANU's application to amend its pleadings and held that the above statements in *JL Holdings* should not be followed. The High Court's decision comprised three judgements: a plurality of five judges (Gummow, Hayne, Crennan, Kiefel and Bell JJ), and separate judgments written by French CJ and Heydon J, both of whom agreed with the orders made but set out their own reasoning. In the discussion below, we focus on the plurality judgment.

### The relevant court rules

The High Court noted that the starting point for an application to amend pleadings is the court rules of the relevant jurisdiction, in this case rr 501 and 502 of the *Court Procedures Rules 2006* (ACT). Rule 501 sets out circumstances in which amendments must be made. It relevantly states:

> All necessary amendments to 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.

(‘Document’ refers to any document filed in a proceeding, other than affidavits: r 500.)

While r 501 *requires* certain amendments, r 502 gives the court a *discretion* to allow amendments in other circumstances. Rule 502 relevantly permits the court to give leave for a party to amend a pleading, at any stage of a proceeding, even if the effect would be to include a cause of action arising after the proceeding was started.

Rules 501 and 502 are affected by r 21, which states the purpose of the chapter containing rr 501 and 502 and requires that those rules be applied to particular ends. Rule 21 states that the purpose of the rules is 'to facilitate the just resolution of the real issues in civil proceedings with minimum delay and expense' and that, accordingly, the rules are to be applied with the objective of achieving:

- the just resolution of the real issues in the proceedings
- the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

Rule 21(3) requires the parties to a civil proceeding to help the court achieve these objectives.

#### Application of the rules

The plurality found (as did Heydon J) that r 501 did not apply to the amendments proposed by ANU. As the amendments proposed raised entirely new issues, the application to amend should have been considered under the general discretion given by r 502(1), rather than the requirement in r 501(a). The plurality stated that r 501(a) only required mandatory amendments where the issue or controversy was in existence prior to the application for amendment being made. Here, that was not the case. The plurality also found that the proposed amendments were not necessary to avoid multiple proceedings (r 501(c)).

The plurality then discussed how r 21 affected the discretion given by r 502(1) to allow pleadings to be amended. The plurality noted that the purposes stated in r 21 reflect principles of case management and that case management is now an accepted aspect of civil justice administered by the courts. The plurality stated that r 21 indicates that:

> the rules concerning civil litigation no longer are to be considered as directed only to the resolution of the dispute between the parties to a proceeding. The achievement of a just but timely and cost-effective resolution of a dispute has an effect upon the court and upon other litigants.

The plurality stated that while a 'just resolution' is the paramount purpose of r 21, what is a 'just resolution' is to be understood in light of the purposes stated, including minimising costs.

The plurality emphasised that these rules took precedence over the position as expressed in *JL Holdings*, particularly as the rules were enacted after the decision in *JL Holdings*.

#### Relevant factors here

The plurality dismissed ANU's application to amend its pleadings. The plurality considered the following factors relevant to the exercise of the discretion in r 502(1), read in light of r 21:

- ANU's amendments **sought to introduce new and substantial claims** (the fact that the new claims were 'arguable' should not be overemphasised)
- the amendments were so substantial as to **require Aon**, in effect, **to defend again, as from the beginning**
- the application was brought **during the time set for the trial** and would result in the **abandonment of the trial** if granted
- **ANU did not explain the reason** for the lateness of the proposed amendments, or the circumstances giving rise to the amendments
- there was a question as to whether **costs**, even indemnity costs, would overcome the **prejudicial effects to Aon**.

### *Implications: not limited to ACT*

The plurality noted that the overriding purpose of r 21, to facilitate the just resolution of the real issues in civil proceedings with minimum delay and expense, is stated in the rules of other courts in Australia, although in various terms.

(The judgment referred to the *Civil Procedure Act 2005 (*NSW), ss 56 58; *Uniform Civil Procedure Rules 1999* (Qld), r 5; *Supreme Court (General Civil Procedure) Rules 2005* (Vic), r 1.14; *Supreme Court Civil Rules 2006* (SA), r 3; *Supreme Court Rules* (NT), r 1.10; *Rules of the*

*Supreme Court 1971* (WA), O 1, rr 4A, 4B. The judgment noted that the *Supreme Court Rules 2000* (Tas) and the *Federal Court Rules* (Cth) appear to be the only rules which do not contain such a provision.)

The plurality also made a number of general statements of principle regarding applications for leave to amend pleadings (at [111]–[113]). The implications of the judgment are:

- 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.
- The fact of substantial delay and wasted costs (the concerns of case management) will assume importance on an application for leave to amend.
- Parties seeking leave to amend pleadings at a late stage should ensure that adequate explanation for the delay is given.
- Statements in *JL Holdings* which suggest only a limited application for case management should not be applied.
- Limits will be placed upon a party's ability to change pleadings, particularly if the litigation is advanced: parties have an opportunity, not a right, to change pleadings.
- The effect on other litigants and the public as a whole will be considered.

## *Legislative review of case management in the Federal Court*

It should also be noted that the general topic of case management in the Federal Court, is presently up for legislative review—see the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009, dealing with proposed new civil practice and procedure provisions.

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