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JUSTICE CANNOT ALWAYS BE MEASURED IN MONEY

Introduction

In *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 (5 August 2009), all seven judges of the High Court delivered a landmark judgment re-writing the generally applied case management principle that an order for costs occasioned by late amendments to pleadings would overcome injustice to the amending party's opponent. In so doing the Court overturned previous authority (*Queensland v JL Holdings Pty Limited* (1997) 189 CLR 146) and recognized '*justice cannot always be measured in money*'[1] when applying case management principles to determine whether or not a party should be permitted to raise a new argument at a late stage in proceedings.

Outline of facts

The relevant facts can be summarised as follows:

- these proceedings arise from the destruction of the Mount Stromlo Observatory Complex (owned by the Australian National University (**ANU**)) in the Canberra bushfires in January 2003;
- in December 2004, ANU commenced proceedings against three of its insurers to recover losses caused by the fire;
- one of the defences raised by the insurers was that their liability to indemnify ANU should be reduced because of ANU's alleged understatement of the value of some of the subject property. There were also issues about whether or not all of the losses claimed fell within the cover provided;
- after the defences of the insurers were filed, ANU joined to the proceedings its insurance broker, Aon Risk Services Australia Limited (**Aon**). The claim against Aon concerned allegations about the sufficiency of the insurance cover but significantly did not concern any claim in respect of the alleged under valuing of the property;
- on the third day of the hearing of the proceedings (which was scheduled for four weeks), ANU:
  - settled the proceedings against the insurers; and
  - made an application to adjourn the proceedings against Aon on the basis that it would be amending its claim against Aon to include, amongst other things, allegations concerning Aon's involvement in the alleged under valuing of the property;
- Counsel for ANU sought to explain that the reason why the case the subject of the proposed amendments had not previously been raised was because the amendments arose from the settlement with the insurers, recent affidavits and discovery from the insurers and conversations with the insurers during mediation. The affidavit filed by ANU's solicitor in support of the application for adjournment did not offer any explanation for the need to amend and under cross examination the solicitor agreed that a decision had been made not to give a reason; and
- Aon opposed the adjournment application on the basis that the proposed amendments should not be permitted because of the prejudice arising from their late notification and that the amendments were an abuse of process. Aon argued that ANU should be confined to the case as had been pleaded and maintained throughout the proceedings.

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[1] at [100]

ACT Supreme Court and Court of Appeal

Whilst the trial judge did not accept that the case now sought to be brought by ANU was entirely new, his Honour accepted that the allegations in respect of the under valuing were new.

His Honour also found that the explanations for the delay in seeking the amendment were not entirely satisfactory. However, following the principles in *JL Holdings*, his Honour identified that the factor of fundamental importance to the grant of leave was that the allegations raised a real triable issue between ANU and Aon and that justice was the paramount consideration. The trial judge held that any prejudice to Aon by the adjourned hearing could be cured by an order for costs in its favour, although the trial judge dismissed Aon's claim for costs on an indemnity basis[2].

The trial judge and the Court of Appeal (who dismissed Aon's appeal but did allow Aon's appeal in respect of indemnity costs) both applied the principles in *JL Holdings* and found that the amendment would not cause substantial injustice, was not an abuse of process and that any injustice was capable of remedy by an order for costs.

High Court

All seven Judges of the High Court[3] found in Aon's favour and allowed the appeal.

The key principles which arise from the Judgments can be summarised as follows.

- an application for leave to amend the 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. There is no such entitlement;
- all matters relevant to the exercise of the Court's discretion to permit an amendment should be weighed by the Court. The existence of substantial delay and wasted costs and concerns of case management both in terms of the parties, but also the Court and other litigants, will assume importance on the application for leave to amend;
- a Court should not assume that costs, even indemnity costs, will always be sufficient compensation for the prejudice caused by the amendments;
- there is an obligation on the party seeking the amendments to provide a satisfactory explanation for the delay in raising the amendments;
- the party seeking the amendments may not have available to it the alternate option of discontinuing the proceedings and raising the new case in fresh proceedings (if the relevant limitation period has not expired) because the fresh proceedings would face the potential barrier of an abuse of process objection and possibly an estoppel. Whilst the Court did not need to conclude this issue, the recognition of the existence of such 'barriers' is instructive as to how the Court might approach this issue in the future and a general recognition of the undesirability of the multiplicity of proceedings[4]; and
- statements in *JL Holdings* which suggest only a limited application of case management in these circumstances, no longer apply.

Commentary

This decision will have a significant impact on how all Australian courts now deal with applications to amend pleadings particularly when such applications raise a new case and are made when the proceedings are advanced (eg close to or during the hearing).

This decision removes the general assumption that prejudice created by such applications can be remedied by costs orders and focuses the onus of justifying the application on the party wishing to raise the new argument. There can now be no certainty that applications of this nature will be granted.

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[2] The trial Judge's decision was not delivered until October 2007, 11 months after the application was made.

[3] Separate Judgments were delivered by French CJ and Heydon J and a joint Judgment was delivered by Gummow, Hayne, Crennan, Kiefel and Bell JJ.

[4] See in particular French CJ at [31]-[34] and joint Judgment at [86]-[87].

Without finally determining the point, the judgment raises significant doubt about whether the problem created by the late amendment can be overcome by discontinuing the proceedings and commencing fresh proceedings to include the new argument (if the limitation period permits). The Court has given an indication that fresh proceedings face the obstacles of abuse of process and/or estoppel.

The decision will be welcome news to parties who face the disruption and prejudice of responding to late and significant changes in their opponent's case. However, it sounds a warning bell to litigants and their legal advisors to focus on getting the pleadings right and ensuring all arguments are raised at the earliest possible stage.

Whether there will be an expansion of the front end of litigation caused by the desire to protect against the consequences of *Aon v ANU*, and the extent to which such expansion is productive to the resolution of disputes, remains to be seen.

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