

Insurance Case Note

12 August 2009

Aon Risk Services Australia Limited –v– Australian National University [2009] HC 27 (5 August 2009)

New authority – the cure by costs for late amendment of the pleadings is no longer good law.

by Linda Hamilton, Notary Public, Partner

Overtaken Precedent – *J L Holdings*

This decision has overturned established authority in *J L Holdings Pty Ltd –v– the State of Queensland* that so long as an amendment to the pleading raises a claim which is arguable and, there are no case management considerations that require refusal of leave to amend, and that the other party could be compensated for any prejudice by an order for costs, that the Court will grant leave to amend.

JL Holdings has been extensively utilised in Court to enable late and sometimes, very late amendments to be made by a party – even during trial. As long as a costs order could be made it could “cure” the delay caused by the amendment. It was very hard to successfully oppose a late amendment because of this authority. This authority therefore, at its most advanced, could be utilised as a tactical tool in the overall strategy of the litigant to control the timing of the release of certain allegations.

Facts

1. ANU claimed indemnity for losses it suffered by reason of the destruction of and damage to its buildings by fire in January 2003.
2. ANU initially claimed an indemnity for losses against the insurance company, but also claimed against its insurance broker, AON, for failing to arrange the renewal of insurance over some of the property.

3. The insurers claimed that they were able to reduce their liability since ANU had substantially undervalued the property value.
4. ANU reached a settlement with these insurers.
5. ANU then sought to change their claim against AON to allege that AON had been obliged to ascertain and declare correct values to the insurers and provide certain advices to ANU regarding insurance.
6. ANU gave no reason why it sought to amend its claim at this stage rather than 1 year earlier when the insurers identified the issue central to the claim it sought to bring in the amended proceedings.
7. The Court was of the belief that ANU only sought to amend its claim against AON after settling with the insurers for tactical reasons. French CJ described it indirectly as “a late and deliberate tactical change by one party in the direction of its conduct of the litigation.” ANU’s tactical decision was presumably due to its unwillingness to run concurrent claims against the insurers where they were to argue that the property was not undervalued, and against AON, where they were to argue that the property was undervalued.

Main Points of Decision

1. In determining whether to grant leave to amend pleadings, the court should take into account the unfair prejudice against the other party in unnecessarily delaying proceedings, the costs to the court of such delays, and the general public policy reasons against such delays.
2. An award of costs will not always be sufficient to remedy the damage caused by such delays. In this situation, leave should not necessarily be granted.
3. Where the delay is the result of a tactical decision by the party applying for leave to amend the pleadings, the court should be particularly reticent to grant leave.
4. The court should seek to ensure that a party is not advantaged by a deliberate tactical decision which results in undue delay to proceedings.

His Honour, Chief Justice French

5. *His Honour criticised the “unduly permissive approach at both trial and appellate level to an application which was made late in the day, was inadequately explained, necessitated the vacation of the dates set down for trial, and raised new claims*

not previously agitated apparently because of a deliberate tactical decision not to do so."

6. *He said that the primary judge 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."*
7. *Importantly, to the extent that the decision in J L Holdings suggested that "case management considerations and questions of proper use of court resources are to be discounted or given little weight, it should not be regarded as authoritative."*
8. *Under r 501 of the ACT Civil Procedure Rules, where the amendment may be necessary to determine the real questions in controversy, the court shall still be required to allow the amendment.*
9. *However, under r 502, the court has only a discretion to grant leave to make amendments which raise new issues – this case fell into this category.*
10. *These rules "confer a flexibility which was not intended to provide parties with a tactical instrument, and their deployment as such should not be permitted where it wastes the time and resources of the court and other parties."*

Their Honours Justices Gummow, Hayne, Crennan, Kiefel and Bell

1. Their Honours concurred with French CJ.
2. Their Honours emphasised that *"limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced."*

Held

An application for leave to amend a pleading is no longer to 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. The assumption that costs will always be a sufficient compensation for the prejudice caused by amendment is not reflected in the rules (r21).

This case was said to be an example of how litigation should not be conducted or dealt with by both the parties and by the Courts. It was said that this caused it to merit a place in the precedent books.

Comment

This case will have day to day practical and substantive effect nationally. Parties who reach trial, have maybe briefed counsel late or for other reasons, and then seek to rectify their pleadings to match their evidence, or to reflect the evidence orally given in the Court can no longer assume they will be able to do so.

Pleadings must, by this new authority, be continually re-examined throughout the pre-trial process to ensure they are correct. There may come a point despite supported application, when the ability to amend will totally cease.

The Court has strengthened the importance of accurate pleadings. Those parties whose tactics include trial by ambush may now find their armoury depleted.

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