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Insight

Commercial Dispute Resolution

September 2009

'The dog ate my homework' is not a valid excuse in the High Court

Following the High Court's decision in *Queensland v J L Holdings*[1], most parties involved in litigation thought that amending pleadings during litigation (even during trial) was simple; make application to the Court and advise the Judge that your pleadings require amendment in the interests of justice. The reasoning behind the JL Holdings decision was thought to be that the attainment of justice was paramount and parties should not be prevented from litigating relevant issues

Since JL Holdings, a trend has developed in Australian courts whereby a party would be allowed to amend pleadings as long as the amending party paid the other party's costs thrown away as a consequence of the amendments. This was often the case even when an amending party was bereft of any reasonable excuse for the amendments.

However in the recent case of *Aon Risk Services Australia Limited v Australian National University*[2], the High Court departed from its decision in *Queensland v J L Holdings* in finding that:

- the timely resolution of litigation is a key concern of the court when considering an application to amend pleadings;
- a party requesting leave to amend pleadings may be denied the opportunity if the court considers that the amendments will have unreasonable costs consequences or will delay the resolution of proceedings; and
- a party wishing to seek leave to amend must present the court with reasonable evidence outlining the reasons why leave should be granted.

This case has important implications for all parties involved in litigation in Australian courts.

Facts

The Australian National University (**ANU**) commenced proceedings in the ACT Supreme Court against a number of insurers, claiming indemnity for buildings destroyed in a fire. The insurers contended, among other things, that the relevant buildings were not insured. ANU joined Aon Risk Services Australia Limited (**Aon**), ANU's insurance broker, as a defendant to the proceedings alleging that Aon had failed in its duty to renew the insurance on the alleged indemnified buildings.

Prior to the trial of the matter (which was set down for four weeks) ANU applied to the trial judge, Justice Gray, for an order that the matter be adjourned and leave to amend its pleading in order to bring a new claim against Aon.

ANU claimed that the application to amend its pleadings was necessary after mediation with the insurance companies (without Aon) had disclosed a number of affidavits that led to questions regarding Aon's valuations of the destroyed buildings. No explanation as to why ANU had failed to obtain this evidence before the mediation was offered to the trial judge.

The trial judge allowed ANU's amendments on the basis of JL Holdings. The Judge found that the interests of justice required that he allow the application with costs being awarded in favour of Aon.

The High Court overruled the trial judge's decision. The High Court noted that there is currently a significant shift in domestic courts towards a streamlined case flow management structure to give cost effective dispute resolution to litigants. In refusing ANU's application to amend its pleadings, the High Court affirmed this trend even though the new claim against Aon was arguable.

Amending pleadings

The High Court's observations look critically at parties who wish to amend pleadings late in the litigation process. The key considerations of the Court will be:

1. What efforts have the parties made to define issues and make disclosure early in proceedings;
2. What efforts have the parties made to consider all potential witnesses (and attempt to obtain evidence from them); and
3. Whether the amendments to the pleading could or should have been discovered before the time of the request.

1 (1997) 189 CLR 146

2 2009 HCA 27 (decision made 5 August 2009)

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What litigants can do to avoid losing the opportunity to present their entire case

Aon Risk Services Australia Limited v Australian National University is a stark reminder that parties to litigation must be prepared every step of the way so as to avoid losing the opportunity to present part of their claim.

1. Litigants can be proactive in preparing for their case by doing the following things:
2. Preserving their records (including electronic records) in an organised way;
3. Providing their lawyers with all relevant and up-to-date disclosure documents throughout the proceedings; and
4. Providing their lawyers with an up-to-date list of possible witnesses and the evidence they may bring.

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