

High Court sends warning about “eleventh-hour” amendments in litigation

Aon Risk Services v Australian National University [2009] HCA 27 (5 August 2009)

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In an important decision relating to the conduct of commercial litigation, the High Court has distinguished the long-standing decision of *Queensland v JL Holdings Pty Ltd* that is often relied on when parties in litigation seek to make “eleventh-hour” changes to their case.

The *Aon Risk Services v Australian National University* [2009] HCA 27 decision should lead to greater efficiencies, less cost and quicker resolution of commercial disputes. It is also a wake-up call to practitioners to ensure that they manage their clients’ cases and conduct litigation in a way that is consistent with the Courts’ case management principles and objectives.

For some years, the Courts have recognised that cases need to be run more efficiently, cost effectively and in a more timely manner to reduce the costs and duration of litigation. Increasingly, Courts are becoming more involved in cases and becoming more interventionist in managing the way cases are run, such as by setting deadlines, encouraging parties to limit the issues raised at trial to avoid wasting court time, minimising unnecessary interlocutory steps and exploring options for assisted dispute resolution. Balanced against this has been the importance of ensuring that a party has the opportunity to put its “best case” forward – to ensure that justice is done.

In *Aon Risk Services*, 6 out of 7 judges of the High Court held that statements in its earlier decision in *Queensland v JL Holdings* that suggested only a limited application for case management in litigation should not be applied in future. *Aon Risk Services* involved litigation over an insurance claim relating to bush fire damage caused to ANU property at Mount Stromlo

in January 2003. ANU settled its case against all but one of the respondents in the litigation, at the start of the trial in November 2006. On the 3rd day of the trial (which was expected to run for 4 weeks), ANU sought to adjourn the trial so that it could amend its case against the only remaining respondent (its insurance broker, Aon Risk Services). At the time ANU told the Court that it had not had sufficient time to properly consider what those amendments were likely to be. The trial was subsequently adjourned and an interlocutory hearing was held two weeks later, to determine whether ANU’s proposed amendments should be allowed.

The trial judge (whose decision was upheld by the ACT Court of Appeal) allowed ANU to amend its case, following statements in *JL Holdings*, which essentially provided that parties should be permitted to amend their case, even at a late stage in litigation, to ensure that justice could be done by allowing a party to put their “best case” forward. *JL Holdings* held that the interests of justice in ensuring that all relevant facts were before the court when making its decision, outweighed any interests in ensuring that litigation ran with minimal expense and delays, as long as any prejudice suffered by the other party could be rectified by a costs order.

The High Court (in 3 separate judgments) unanimously held that ANU should not have been allowed to change its case on the 3rd day of the trial. The Court recognised that there was a public interest in ensuring that litigation was run as quickly and cost-effectively as possible. This required parties to organise their case and their arguments early in litigation, and to take seriously the time limits imposed by the Courts for filing evidence and preparing a case for trial.



The High Court Judges noted that changing a party's case late in court proceedings, has a wider impact than just on the parties involved in litigation. Amendments at a late stage in proceedings can cause additional costs and delays in when a trial is heard. The resultant delay can cause legal uncertainty and cash flow problems, and can affect a business' ability to make long-term plans while it awaits resolution of the dispute. Ongoing litigation also ties up business resources, and can distract principals of a business from their main activities while they are required to focus on the litigation. The Court also noted that ongoing litigation places considerable strain on witnesses and on court resources.

Chief Justice French noted that delays caused by last-minute amendments could "undermine confidence in the administration of civil justice". The High Court indicated that in the future parties involved in litigation should not assume that they will have an "automatic right" to change their case at any stage in proceedings. The judgments suggest that much wider considerations (other than just whether the parties' proposed new case is "arguable") will be taken into account when a Court decides whether to allow parties to change their arguments late in proceedings. These factors will include the reasons why the party did not seek to make that argument earlier in the case, how long the proceeding has been running and how close it is to trial, what the impact of the amendments will be on the other parties to the litigation (including also witnesses), whether a scheduled trial date is likely to be lost as a result of the amendments, and what the impact will be if the amendment is not allowed.

Lawyers and parties to litigation should now be "on notice" that in light of the High Court's decision in *Aon Risk Services*, Australian Courts are now likely to be less receptive of "eleventh hour", whole-scale changes to litigation, and more mindful of case management principles, particularly when the greater public interest is taken into account. The consequences of this should be that proceedings are conducted substantially faster and at less cost.

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FURTHER INFORMATION

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