

The Litigation Landscape Post-Aon Risk Services v Australian National University – Five Years On

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Introduction

It is now just over five years since the High Court handed down the seminal decision of *Aon Risk Services Australia Ltd v Australian National University*¹ (“*Aon*”). *Aon* fundamentally changed the way in which litigation is conducted. It has addressed delay in amendment or late reliance on evidence which, prior to *Aon*, was seen as potentially being cured by cost orders – See *State of Queensland and Another v J L Holdings Pty Ltd*² (“*J L Holdings*”).

Prior to *Aon*, but relevant to the way in which litigation was to be approached, in New South Wales the *Civil Procedure Act 2005* (NSW) (“CPA”), and in particular ss 56-60 considerably impacted case management, whereby the overriding purpose was enshrined to facilitate “*the just, quick and cheap resolution of the real issues in the proceedings.*”

Aon still has work to do where parties attempt to amend or utilise evidence late in the day and/or contrary to previous directions. The effects of *Aon* may be ameliorated where delay is explicable in terms of justifiable circumstances as to a late change in case presentation and preparation, in particular where the nature of the case to be presented is not significantly altered by the proposed changes.

The impetus for change

Prior to *Aon*, in July 1996, the Right Honourable Lord Woolf, Master of the Rolls, published his final report on the civil justice system in England and Wales. One of his recommendations was to place responsibility for the conduct of litigation firmly with the court, rather than with the parties. This objective was to be achieved by an over-riding objective, through a new procedural code to enable courts to deal with cases justly, expeditiously and to save expense.³

Following Lord Woolf’s report, the High Court of Australia handed down its decision in *State of Queensland and another v J L Holdings Pty Ltd*.⁴ The High Court concluded that the State of Queensland should be permitted to amend its defence, notwithstanding that the matter had been previously case managed and the application to amend the defence was sought to be made very late in the day.

¹ (2009) 239 CLR 175.

² (1997) 189 CLR 146.

³ Lord Woolf, Access to Justice: Final Report (1996) at 72-73- see <http://www.dca.gov.uk/civil/final/index.htm>.

⁴ (1997) 198 CLR 146 – decided on 14 January 1997.

The Plurality expressed their views in a passage that has been regularly quoted by parties seeking indulgences from the courts in these terms:-

*“Justice is the paramount consideration in determining an application such as the one in question. Save in so far as costs may be awarded against the party seeking the amendment, such an application is not the occasion for the punishment of party for its mistake, or for its delay in making the application. Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence...”*⁵

Justice Kirby recognised the increasing role of case management for cases in Australia, particularly in circumstances where judges were required to address large and complex litigation and take on an increasing management role. It was a departure from the previous approach of *“passive observance of the game by a neutral judicial umpire”*⁶. Justice Kirby provided a list of considerations (“the ten factors”) that have application as to whether amendments should be allowed or disallowed⁷ as follows:-

1. the failure of a party to offer anything by way of an explanation for a late application;
2. the extent to which an applicant is in default of clear directions;
3. the strain which litigation may place upon those involved;
4. the natural desire of both litigants to be freed as quickly as possible from the anxiety, distraction and disruption which litigation causes;
5. the proximity of the hearing at the time when amendment is sought;
6. the length of time the proceedings have been pending and the disruption that an amendment may cause at the last minute to preparation for trial;
7. the significance of congestion of court lists, particularly where it is a lengthy trial and amendment will lead to the adjournment of a hearing and a late replacement date;
8. the right of a party to be permitted to amend to plead the real issues, but not to have multiple opportunities to plead and present its case;
9. the right to accord justice to the particular litigant, as opposed to the need to responsibly utilise scarce public resources; and
10. the impact which court orders allowing adjournments may have on other litigants and on the public generally.

These ten factors, it is postulated, are of similar, if not identical, proportion to those stressed in *Aon* and cases thereafter, albeit the emphasis Justice Kirby and the Plurality placed on the factors in *J L Holdings* differed from the way subsequent courts interpreted these same factors.

⁵ (1991) 189 CLR 146 at 155.

⁶ (1997) 189 CLR 146 at 168.

⁷ (1997) 189 CLR 146 at 167-172.

To understand how Justice Kirby saw the matter in jurisprudential terms, it is necessary to quote from his judgement:-

*“A judge who ignores the modern imperatives of the efficient conduct of litigation may unconsciously work an injustice on one of the parties, or litigants generally, and on the public. But a judge who applies case management rules too rigidly may ignore the fallible world in which legal disputes arise and in which they must be resolved.”*⁸

The maverick school of thought

It should not be considered that all courts accepted the parameters of *J L Holdings*. In particular there were contrary views expressed by judges of the Federal Court of Australia, in terms of what may be perceived as “a maverick school of thought”, disavowing the cost – curative effect of *J L Holdings*.

Justice French (then a judge of the Federal Court of Australia) in 1999 reflected on *J L Holdings* and the liberality of its approach, indicating an argument in favour of an equitable cost approach, recognising that the pressure on the courts caused by the great increase in litigation means that legal business should be conducted efficiently.⁹ This rationale was further refined by His Honour in the following five years, so that in 2004 when he delivered another paper,¹⁰ he stated:-

“Australian judges recognised in principle that justice should be achieved, as far as possible, expeditiously and economically. The time and human resources of courts are not unlimited...the substantive goals of courts remains always to do justice between parties according to law, an objective note...not too compromised by undue rigidity.”

In *Inamed Development Company v Morton Surgical Pty Ltd*¹¹ Justice Gyles disallowed expert evidence proposed to be tendered at a very late stage, contrary to previous directions of the court, and in a new field of expertise. His Honour stated:-

“The role of case management is relevant....In my opinion, the effect of the decision of the High Court in State of Queensland v J L Holdings Pty Ltd on case management has been exaggerated. It deals with a special situation – prevention of litigating a fairly arguable defence some months before the trial date. Even so, it may prove to be the high water mark of an anti-case management philosophy, probably as a reaction to some perceived overzealous case management in New South Wales at the time.”

⁸ (1997) 189 CLR 146 at 172.

⁹ See his Administrative Justice “The Core and the Fringe” (Paper presented at the 1999 National Administrative Law Forum) opening address – “Administrative Justice in Australian Administrative Laws” Justice French at 13.

¹⁰ Justice RS French (then of the Federal Court of Australia) ‘The role of the trial judge in pre-trial management’ (Paper delivered in Manila Philippines) at 5.

¹¹ [2007] FCA 1359.

Perhaps the most cited decision eschewing *J L Holdings* is that of Justice Finkelstein in *Black & Decker (Australasia) Pty Limited v GMAC Pty Limited*.¹² In a short judgment of eleven paragraphs, His Honour addressed the proposition that a wronged party can be fully compensated by an award of costs. Whilst he accepted the assumption that that may be true in some cases, he considered that often, particularly in commercial disputes, that is not the true result, because parties may incur losses resulting from the delay which can never be compensated by a costs order. In distinguishing *J L Holdings*, His Honour presciently determined limitations of the curative effect of costs orders, stating:-

“It is time that this approach is re-visited, especially when the case involves significant commercial litigation a case that is reasonably well prepared is just as likely to be decided correctly as a perfectly prepared case. I am of the firm view that parties should not be treated as leniently as they have been in the past and deciding whether there were excusable non-compliance, the Court should take into account, amongst other factors:-

- (a) the direct and indirect prejudice to the opposing party;*
- (b) the impact of the delay on the proceedings;*
- (c) the reasons for the delay;*
- (d) good faith or lack of good faith on the part of the parties seeking to be excused; and*
- (e) the effect of putting off a trial, both on other litigants and generally on the Court’s ability to efficiently manage its cases.”*¹³

His Honour, in the circumstances of that case, refused leave on a party to rely on additional late material.

Apart from the maverick approach adopted by a number of the Federal Court judges, there was another relevant seismic shift towards a challenge to *J L Holdings*. On 1 June 2005 in New South Wales, ascent was given to the CPA. The legislation commenced as at 15 August 2005. Under Part 6 – “*Case Management and Interlocutory Matters*”, guiding principles are set out. In particular ss 56-60 set out the overriding purpose to facilitate the simultaneous pursuit of three objectives:-

- the proper (“just”) expeditious (“quick”) and least expensive (“cheap”) resolution of proceedings;
- the statutory objectives of avoiding delay in minimising costs of proceedings, as stated in ss 59–60 of CPA; and
- the importance of case management objectives, as stated in s 57 of CPA, to achieve the dictates of justice.¹⁴

Following the introduction of ss 56-60 of the CPA, the New South Wales Court of Appeal in *NSW v Mulcahy*¹⁵ visited *J L Holdings* in the light of the CPA. The Court of Appeal indicated that the approach to amendment, which the judgments in *J L Holdings* had treated as appropriate, has been significantly altered.¹⁶

¹² [2007] FCA 1623.

¹³ at [4] – [5].

¹⁴ This was seen as a new statutory balance including court and party efficiency – see *Hans Pet Construction Pty Limited v Cassar* [2009] NSWCA 230 per acting Chief Justice Allsop at [36] and reaffirmed in *Yang v Hone (No. 2)* [2014] NSWCA 338 per Chief Justice Bathurst and Justices Ward and Emmett at [115]

The decision of Aon

It is not intended to repeat the facts of the case. Effectively there were three judgements of the High Court.

His Honour Chief Justice French adopted the approach of Justice Lander (who was in dissent in the ACT Court of Appeal), determining that the course adopted by ANU necessitated the vacation of the hearing dates, and an adjournment at the trial. It raised new claims not previously agitated, apparently because of a deliberate tactical decision.¹⁷

His Honour drew a distinction between the discretion to be exercised by a Court to allow a party to amend its pleadings to allow the real question in controversy to be determined, as against parties seeking to set up by amendment a new case at trial.

It is interesting that whilst His Honour raised a number of the classic statements embodied in the earlier decisions, leading up to *J L Holdings*,¹⁸ neither he, nor any of the other Judges of the High Court, referred to the relevant Federal Court decisions, and in particular *Black & Decker*. Furthermore His Honour, notwithstanding his extra-curial statements and obvious awareness of the maverick views within the Federal Court, chose to base his reasons on first principles. His Honour focused on the explanation put forward by ANU and its solicitors. He noted that the affidavit of the solicitor failed to offer any, or any satisfactory, explanation for the need to amend. His Honour considered that discretionary considerations were critical in the determination as to whether the amendment should be allowed. Whilst the existence of a mistake might found the grant of leave, it must be shown that the application was bona fide. In this respect, His Honour concluded the controversy or issue must have been in existence prior to the application for amendment being made. Only then would it be for the court to allow it properly to be raised.

Whilst His Honour considered that a punitive response to a late amendment application is not appropriate, on the other hand a party should not be rewarded by having discretion exercised in its favour, where it has created disruptive consequences by its own actions or non-actions. In the circumstances, His Honour conceded that the exercise of discretion had miscarried and that the matter should be referred back to the trial judge for consideration on the basis of the application to further amend the statement of claim not being permitted.

The Plurality

The second set of judgments within *Aon* is that of the Plurality, consisting Justices Gummow, Hayne, Crennan, Kiefel and Bell. Their Honours noted the amendments proposed by ANU were in fact substantial, and the explanation was unsatisfactory.

Their Honours determined that when a discretion is to be exercised in favour of one party and to the disadvantage of another, the explanation must show the application is brought in good faith, in circumstances justifying the granting of the amendment. It will be necessary to weigh that against the effects of any delay and the objectives of the rules of court. This was a situation where there was no mistake of judgment which might be weighed against the effects of delays so that, in all the circumstances, the discretion of the court should not have been exercised in favour of allowing the amendment.

¹⁵ [2006] NSWCA 303 (3 November 2006).

¹⁶ See [29] of judgment of Justice Bryson, with whom the other two members, Justices Hodgson and Tobias, agreed.

¹⁷ [2009] 239 CLR 175 at 182.

¹⁸ These include *Cropper v Smith* (1884) 26Chd700, *Clough and Rogers v Frog* (1974) 48ALJR 481, and *Sali v SPC Limited* in (1993) 116 ALJR 625.

The Plurality expressly disavowed *JL Holdings* for what was perceived as something approaching a right to amend. They noted that parties have a right to invoke the jurisdiction and the powers of the court, in order to seek the exercise of a discretion. In exercising the discretion, the objectives of case management are highly relevant, particularly in the light of recent legislative amendments in most States.¹⁹ Subsequently the Federal Court, the Federal Magistrates Court (now the Federal Circuit Courts) and the Family Court of Australia have all introduced similar rules and objectives.

The Plurality noted that parties have choices as to what claims are to be made and how they are to be framed. However, limits will be placed on the ability to effect changes to pleadings, once litigation has commenced and progressed. Their Honours concluded that whilst in the past it has been largely left to the parties to prepare for trial and to seek the assistance of the court as required, those times have long gone and that now it is to be recognised that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.

Justice Heydon

The third stream of judicial reasoning came in the separate decision of Justice Heydon. His Honour considered whether *Aon* deserved a place in the precedent books.²⁰ He detailed the history of the matter leading up to the commencement of the trial before Justice Gray. He was highly critical of the court, in failing to deal promptly with the application to adjourn the trial, noting that in this matter it had taken a month of court time set aside for trial, to be taken up with interlocutory steps conducted in a leisurely fashion.

His Honour criticised the events leading up to the application for amendment, criticised Justice Gray's delay in delivering judgment and criticised the ACT Court of Appeal for delay in reviewing the decision. He concluded the present case did deserve a place in the precedent books, but for all the wrong reasons.²¹

The situation post-Aon

Following the decision in *Aon*, courts have applied case management principles, either expressly using *Aon* or the CPA (or its equivalent in other States), to carefully scrutinise whether it is in the interests of justice for amendments or late reliance on evidence to be permitted and/or whether the interest of justice are better served by exercising discretion against the party seeking an indulgence. One of the earliest decisions post *Aon* was that of *Kowalski v Mmal Staff Superannuation Fund Pty Ltd*.²² In a joint judgment of the full Federal Court, Justices Spender, Graham and Gilmour dismissed an application for leave to appeal, where the primary judge had made an order for summary dismissal. In recognising that the paramount duty of the court was to see justice done, their Honours appreciated that the rights of the parties needed to be considered. However applying *Aon*, it was necessary to take account of additional considerations. Following *Aon*, the full Federal Court determined that no further opportunity should be afforded to the Appellant to clarify or amend his pleadings. He had been afforded his last opportunity to provide an intelligible and unobjectionable pleading, but failed to do so. The interests of justice were not to be served by prolonging the matter.²³

¹⁹ At the time *Aon* was handed down, all Australian superior courts except the Tasmanian Supreme Court and the Federal Court had in place rules to facilitate the just resolution of the real issues in dispute.

²⁰ Posed at 225 [135] and answered at 229 [156].

²¹ At 229 [156].

²² [2009] FCAFC 117 (handed down on 9 September 2009).

²³ See [71].

Whilst there have been hundreds of cases since *Aon*, expounding, explaining and qualifying *Aon*, within the available space of this article, only one further example will be raised, that being the decision of *Chaina v The Presbyterian Church*.²⁴ In that matter Justice Hoeben had to consider a matter that had been case managed by him, and where no hearing date had yet been allocated. An application was made by the Plaintiff to adduce further expert and lay evidence which would have the effect of substantially changing the evidentiary basis for the proceedings. If the application was granted, then much of the preparation undertaken by the Defendants to that time would be wasted, and there would be a significant likelihood of the hearing date being substantially delayed.

His Honour undertook a balancing of the relevant factors under Section 58 of the CPA and determined that in all the circumstances justice required that the application to adduce late evidence should be granted, but with the imposition of curative costs. In this regard, His Honour was, on one view, reapplying the principles endorsed in the *J L Holdings* approach. However a closer reading of His Honour's judgment suggests the opposite. His Honour considered carefully the explanation that had been provided and was not prepared to find "a Machiavellian motivation, as had been suggested".²⁵

The way forward

Due emergence of a factorial approach to the application of *Aon* principles is postulated in this short paper, that is to say a synthesis of the *Aon* principles and case management principles formulated in the CPA. In this regard the important decision that laid down the ground rules was *Namberry Craft Pty Limited v Watson* ("*Namberry Craft*"),²⁶ where Justice Vickery provided in summary form the relevant discretionary factors that he had identified from the *Aon* decision. These are as follows:-

- (a) Whether there will be a substantial delay caused by the amendment;
- (b) The extent of wasted costs that will be incurred;
- (c) Whether there is an irreparable element of unfair prejudice caused by the amendment, arising, for example, by inconvenience and stress caused to individuals, or inordinate pressures placed upon corporations, which cannot be adequately compensated for, whatever costs may be awarded;
- (d) Concerns of case management arising from the stage of the proceedings when the amendment is sought, including the fact that the time of the Court is valuable and a publically funded resource, and whether the grant of the amendment will result in inefficiencies arising from the vacation or adjournment of trials;
- (e) Whether the grant of the amendment will lessen public confidence in the judicial system; and
- (f) Whether a satisfactory explanation has been given for seeking the amendment, at the stage when it is sought.

The formulation of the rationale of *Aon* into factors provided a formula in which courts could appropriately consider and apply as they saw fit to the facts of the particular matters before them.

²⁴ *Chaina and Ors v The Presbyterian Church (NSW) Property Trust and Ors* (No. 3) [2009] NSWSC 1243 [23 November 2009].

²⁵ See [45] of the judgement.

²⁶ [2011] VSC136 at [38].

The approach of Justice Vickery has been adopted and applied in New South Wales in a number of cases. In *Kelly v Mina* [2014] NSWCA 9, Justice Barrett delivered the leading judgment. He recited and approved the factors identified by Justice Vickery in *Namberry Craft*, and gave precedence to those factors by reference to the relevant considerations of promptness and efficiency in the conduct of civil litigation, which have been afforded a new and special importance. This was notwithstanding that a party may feel that there was a sense of injustice when they themselves have failed to proceed with dispatch.²⁷ Justice Barrett considered that the primary judge's discretion to dismiss an application for leave to amend did not involve any erroneous exercise of discretion. Viewing the factors as categorised by Justice Vickery in *Namberry Craft*, he considered that the delay was insufficiently explained. Furthermore, there was an attempt to amend a defence in circumstances where the cross claim was to be left unamended, which pleaded contractual terms inconsistent with the proposed amendment.

Overall there was appropriate evidence for the primary judge to find that the appellant had been deliberately opportunistic in her attempt to make substantial changes to the nature and scope of the proceedings a very short time before the proposed commencing of the hearing, and there was clear prejudice to the other side. For these reasons Justice Barrett determined that the primary judge's decision to dismiss the application for leave to amend did not entail an erroneous exercise of discretion, susceptible to correction by the Court of Appeal.²⁸

The *Namberry Craft* factors were again under close scrutiny in a recent decision of *Wambo Coal Pty Ltd v Sumiseki Materials Co Limited*.²⁹ In that matter Justice Barrett delivered the principle judgment, but had the support of Chief Justice Bathurst and President Beazley. Although these proceedings dealt with a number of other aspects, including remedies of membership rights in respect of corporations, relevantly the Court of Appeal had reason to review the decision of Justice Hammerschlag, where in regards to an application to amend during the course of the trial, the primary judge declined to grant leave.

Justice Barrett, repeated what he had said in *Kelly v Mina* and reaffirmed the factorial approach addressed by Justice Vickery in *Namberry Craft*.³⁰ His Honour indicated the provisions of the CPA had made substantive and important changes to the law with respect to considerations of promptness and efficiency in the conduct of civil litigation, which are to be afforded a new and special importance.³¹

His Honour indicated that the primary judge, in declining to exercise his discretion in favour of the amendment, had considered from the list of factors referred to by Justice Vickery factors (a), (b), (d) and (f) and “*saw them as indicating that the amendment should not be allowed*”.³² In this shorthand way, the New South Wales Court of Appeal, at least, seems to be promoting the six factors extracted by Justice Vickery in *Namberry Craft*. It appears to represent a way in which courts can, in a principled way, approach the exercise of the court's discretion where *Aon* and the rules of Court provide a clear direction with regard to promptness and efficiency in the conduct of civil litigation.

It is instructive to compare these six factors of Justice Vickery against the ten factors of Justice Kirby in *J L Holdings*, and the informal descriptors of Chief Justice French, mentioned earlier in this paper.

²⁷ See [48] where His Honour refers in turn for support for this proposition from *Dennis v Australian Broadcasting Corporation* [2008] NSWCA 37, *Hans Pet Construction Pty Ltd v Cassar* [2009] NSWCA 230, *Halpin and Ors v Lumley General Insurance Ltd* [2009] NSWCA 372 and *Richards v Cornford (No. 3)* [2010] NSWCA 134.

²⁸ See [71].

²⁹ [2014] NSWCA 326 (17 September 2014).

³⁰ See [272]. See also *Crawley v Vero Insurance Ltd (No. 6)* [2014] NSWSC 62, per Justice Beech-Jones who also relied on relevant factors in *Namberry Craft*, and *Commonwealth Bank of Australia v Susan Hannaford Pty Ltd (No. 2)* [2013] NSWSC 574 per Justice Davies at [72]. (Both these Judges at first instance adopted and applied the *Namberry Craft* factors to the matters at hand).

³¹ See [273].

³² See [274] and the factors as set out in the prior page to this Article.

It is contended that a comparison of these factors and descriptors suggest that the language and intent is almost identical. It is however a matter of the relative emphasis. In this regard, movement to case management principles under CPA (and the other Federal, State and Territory legislation) has changed the way in which the relevant factors are to be considered and applied by judges in their principled consideration of the discretion available to them with regard to amendments, allowance of late evidence, or other interlocutory disputes that arise under the umbrella of *Aon*. It is a matter for speculation as to whether the *Namberry Craft* factorial approach is likely to gain traction in New South Wales or elsewhere, as a shorthand means of applying *Aon* and CPA case management principles.

Conclusion

In New South Wales, the application by judges of case management considerations, particularly in the light of ss 56–60 of the CPA and the *Aon* factors may lead in particular instances to a perceived sense of injustice by parties, seeking an indulgence from the court and due to their own fallibility.³³ Courts are constrained to look at good faith explanations within the wider landscape, in terms of not only the rights of each of the parties, but the rights of other litigants and the expectations of the public. The application of justice in the exercise of judicial discretion is served by a principled application of the case management requirements pursuant to the objectives set out in ss 56-60 of the CPA, and the relevant counterparts in other Federal, State or Territories. It is postulated that this process will be assisted by the application of the *Namberry Craft* factors to determine whether in each particular case there is warranted the exercise of the court's discretion in favour of the moving party.

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³³ See *J L Holdings Pty Ltd* per Justice Kirby at 172.