HIGH COURT OF AUSTRALIA

FRENCH CJ
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

AON RISK SERVICES AUSTRALIA LIMITED APPELLANT

AND

AUSTRALIAN NATIONAL UNIVERSITY RESPONDENT

Aon Risk Services Australia Limited v Australian National University
[2009] HCA 27
5 August 2009
C1/2009

ORDER

1. *Appeal allowed with costs.*

2. *Set aside orders 2 and 3 of the orders of the Court of Appeal of the Supreme Court of the Australian Capital Territory dated 25 August 2008 and, in lieu thereof, order that:*

    a) *The appeal be allowed.*

    b) *The orders of Gray J made on 12 October 2007 be set aside, and in lieu thereof there be an order that the plaintiff's application for leave to amend the further amended statement of claim be dismissed with costs.*

On appeal from the Supreme Court of the Australian Capital Territory

Representation

J T Gleeson SC with N J Owens for the appellant (instructed by Corrs Chambers Westgarth)

B W Walker SC with J Oakley for the respondent (instructed by Sparke Helmore)

CATCHWORDS

Aon Risk Services Australia Limited v Australian National University

Practice and procedure – Pleadings – Amendment – Where application for leave to amend statement of claim made on third day of four week trial – Whether application should have been granted.

Practice and procedure – Pleadings – Amendment – Where Court Procedures Rules 2006 (ACT) ("Rules"), r 502 provided that court may give leave to amend pleadings "in the way it considers appropriate" – Where r 21 provided objectives of Rules to facilitate just resolution of real issues in proceedings and timely disposal of proceedings at affordable cost – Relevance of case management principles to application to amend – Capacity of costs to overcome prejudice to opposing party – Whether party should be permitted to amend to raise arguable issue subject to payment of costs – Whether *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146; [1997] HCA 1 should be overruled – Relevance of stage of proceedings at which amendment sought – Relevance of explanation for delay in seeking amendment – Relevance of extent of proposed amendment.

Practice and procedure – Pleadings – Amendment – Where r 501(a) of Rules provided that all necessary amendments must be made for purpose of deciding "real issues in the proceeding" – Whether court retains discretion to grant amendment in these circumstances – Whether amendment necessary to raise arguable issues.

Practice and procedure – Pleadings – Amendment – Where r 501(c) of Rules provided that all necessary amendments must be made for purpose of "avoiding multiple proceedings" – Whether amendment necessary where potential further proceedings – Relevance of possibility that further proceedings would be barred on abuse of process or estoppel grounds.

Evidence – Legal professional privilege – Whether inference may be drawn from absence of explanation for delay where explanation rested on legal advice.

Words and phrases – "all necessary amendments", "avoiding multiple proceedings", "just resolution", "real issues in the proceeding".

Court Procedures Rules 2006 (ACT), rr 21, 501, 502.

FRENCH CJ.

Introduction

1 In November 2006, at the commencement of a four week trial of an action against its insurers and its insurance broker Aon Risk Services Australia Ltd ("Aon"), the Australian National University ("ANU") settled with the insurers and consent orders were made to give effect to the settlements. ANU then applied for an adjournment of the trial to make substantial amendments to its statement of claim against Aon. The circumstances are set out in detail in the joint judgment[1]. The adjournment was granted, the application for amendment was heard two weeks later, and for reasons which do not appear from the record, the primary judge did not give judgment until 12 October 2007[2].

2 The reasons for judgment of the primary judge involved the following steps:

- The decision of this Court in *Queensland v J L Holdings*[3] ("*J L Holdings*") stood as authority for the proposition that "justice is the paramount consideration" in determining the application to amend[4].

- ANU's new case was not totally inconsistent with the case as pleaded originally. The original pleading was widely expressed and not confined to a claim that Aon had failed to act in accordance with its instructions[5].

- Although the explanations for delay given by counsel and the solicitor for ANU were not entirely satisfactory, it was important that the allegations raised real triable issues between ANU and Aon[6].

- On an overall consideration of the matters put by ANU and by Aon, leave should be granted[7].

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1 Reasons of Gummow, Hayne, Crennan, Kiefel and Bell JJ at [38]-[54].

2 *The Australian National University v Chubb Insurance Company of Australia Ltd* [2007] ACTSC 82.

3 (1997) 189 CLR 146; [1997] HCA 1.

4 [2007] ACTSC 82 at [37].

5 [2007] ACTSC 82 at [38]-[40].

6 [2007] ACTSC 82 at [43].

7 [2007] ACTSC 82 at [44].

His Honour rejected a contention by Aon that ANU was seeking a judgment against it inconsistent with the consent orders made in respect of the insurers[8]. He held that there was no abuse of process[9]. His Honour ordered ANU to pay Aon's costs, but refused to make an order for indemnity costs.

3 The primary judge's decision was appealed to the Court of Appeal of the Supreme Court of the Australian Capital Territory. On 25 August 2008, that Court allowed the appeal only in so far as it agreed unanimously that the costs of and thrown away by the amendments should have been awarded on an indemnity basis[10]. By majority (Higgins CJ and Penfold J), the Court dismissed the challenge to the order granting leave to amend. Lander J dissented. The reasoning of the majority, delivered in separate judgments, some aspects of which were consistent with the dissenting judgment of Lander J, may be summarised as follows:

- The Supreme Court of the Australian Capital Territory was bound to follow the majority opinion in *J L Holdings*, decided in relation to Rules of Court similar to the Court Procedures Rules 2006 (ACT) (the "ACT Rules")[11].

- Case management considerations, including the availability of court resources, were not irrelevant, but the paramount consideration was "justice as between the parties"[12].

- The decision to amend was unreasonably delayed and the delay lacked a satisfactory explanation. But it was not thereby to be inferred that ANU believed a more frank explanation would have led to a refusal of the application to amend[13].

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8 [2007] ACTSC 82 at [53].

9 [2007] ACTSC 82 at [54].

10 *AON Risk Services Australia Ltd v Australian National University* [2008] ACTCA 13 at [19] per Higgins CJ, [22] per Penfold J and [238] per Lander J.

11 [2008] ACTCA 13 at [8]-[9] per Higgins CJ, [24]-[26] and [53] per Penfold J, and [149] per Lander J.

12 [2008] ACTCA 13 at [10] per Higgins CJ, [54] per Penfold J and [196] per Lander J.

13 [2008] ACTCA 13 at [13] per Higgins CJ and [61] per Penfold J and see [230] per Lander J in dissent.

- There were no case management considerations that would require leave to be refused, and any additional work required of Aon could be compensated adequately by an appropriate order for costs[14].

Special leave to appeal to this Court against the decision of the Court of Appeal was granted on 13 February 2009[15].

4 Save for the dissenting judgment of Lander J in the Court of Appeal, the history of these proceedings reveals an 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 or adjournment 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. In such circumstances, the party making the application bears a heavy burden to show why, under a proper reading of the applicable Rules of Court, leave should be granted.

5 In the proper exercise of the primary judge's discretion, the applications for adjournment and amendment were not to be considered solely by reference to whether any prejudice to Aon could be compensated by costs. Both the primary judge and the Court of Appeal 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. Inefficiencies in the use of that resource, arising from the vacation or adjournment of trials, are to be taken into account. So too is the need to maintain public confidence in the judicial system. Given its nature, the circumstances in which it was sought, and the lack of a satisfactory explanation for seeking it, the amendment to ANU's statement of claim should not have been allowed. The discretion of the primary judge miscarried.

6 It appears that a factor in the decision of the primary judge and of the Court of Appeal was the decision of this Court in *J L Holdings*. That case arose out of an entirely different factual setting. However, to the extent that statements about the exercise of the discretion to amend pleadings in that case suggest 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. For the reasons set out more fully below, I would allow the appeal. I agree with the orders proposed in the joint judgment[16].

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14 [2008] ACTCA 13 at [16] per Higgins CJ and [67] per Penfold J, and see [233]-[236] per Lander J in dissent.

15 [2009] HCATrans 026.

16 Reasons of Gummow, Hayne, Crennan, Kiefel and Bell JJ at [117].

The applicable rules

7 The relevant provisions of the ACT Rules are rr 21, 501 and 502. These are all to be found in Ch 2, entitled "**Civil proceedings generally**". Part 2.1 of Ch 2 contains introductory provisions. It includes r 21, entitled "**Purpose of Ch 2 etc**", which provides:

> "(1) The purpose of this chapter, and the other provisions of these rules in their application to civil proceedings, is to facilitate the just resolution of the real issues in civil proceedings with minimum delay and expense.
>
> (2) Accordingly, these rules are to be applied by the courts in civil proceedings with the objective of achieving –
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> (a) the just resolution of the real issues in the proceedings; and
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> (b) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.
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> (3) The parties to a civil proceeding must help the court to achieve the objectives.
>
> (4) The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court."

A note under the title indicates that the rule was based upon[17] s 1.1 of the Civil Procedure Rules 1998 (UK), r 5 of the Uniform Civil Procedure Rules 1999 (Q) and s 60 of the *Civil Procedure Act* 2005 (NSW).

8 Part 2.7 of Ch 2 is entitled "**Amendment**". It applies in relation to documents (other than affidavits) that have been filed in a proceeding[18]. Rules 501 and 502 in Pt 2.7 relevantly provide:

> "501 **Amendment – when must be made**
>
> (1) All necessary amendments of a document must be made for the purpose of –

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17 The Explanatory Statement indicates that the reference under each rule heading is to the "source of the provisions of the rule": Australian Capital Territory, Rule-making Committee, Court Procedures Rules 2006, Explanatory Statement at 2.

18 ACT Rules, r 500.

(a) deciding the real issues in the proceeding; or

(b) correcting any defect or error in the proceeding; or

(c) avoiding multiple proceedings.

502 **Amendment – of documents**

(1) At any stage of a proceeding, the court may give leave for a party to amend, or direct a party to amend, an originating process, anything written on an originating process, a pleading, an application or any other document filed in the court in a proceeding in the way it considers appropriate.

(2) The court may give leave, or give a direction, on application by the party or on its own initiative.

(3) The court may give leave to make an amendment even if the effect of the amendment would be to include a cause of action arising after the proceeding was started."

History and construction of the Rules

9 Rules 501 and 502 have their origins in 19th century reforms of civil procedure in the United Kingdom. Rule 21 draws its inspiration from the Civil Proceedings Rules introduced into the United Kingdom in 1998 following the Woolf Report[19].

10 The impetus for civil procedure reform in the 19th century was provided by critics of the system in place at the beginning of that century, which was described by Jeremy Bentham as one of "exquisitely contrived chicanery which maximises delay and denial of justice"[20]. In 1828 Henry Brougham, later to become Lord Chancellor, made a celebrated speech in the House of Commons which led to the appointment of commissions of inquiry and ultimately to the enactment of the *Common Law Procedure Act* 1852 (UK) and subsequent statutes reforming Common Law and Chancery procedure[21]. The *Common Law*

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19 Lord Woolf, *Access to Justice: Final Report*, July 1996 ("the Woolf Report").

20 Quoted in "Civil Procedure Since 1800" in Jacob, *The Reform of Civil Procedural Law and Other Essays in Civil Procedure*, (1982) 193 at 207.

21 As to Common Law: *Common Law Procedure Act* 1852 (UK) 15 & 16 Vict c 76, *Common Law Procedure Act* 1854 (UK) 17 & 18 Vict c 125, *Common Law Procedure Act* 1860 (UK) 23 & 24 Vict c 126; as to Chancery: *Court of Chancery Act* 1852 (UK) 15 & 16 Vict c 80, *Chancery Amendment Act* 1852 (UK) 15 & 16

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Procedure Act 1852 provided, relevantly, for amendment of pleadings at any stage of the proceedings to overcome problems caused by non-joinder or mis-joinder of parties[22]. A number of technical pleading rules were also abolished by that Act[23].

11 The Reports, in 1868 and 1869, of the Judicature Commission established under the chairmanship of Lord Cairns led to the enactment of the *Supreme Court of Judicature Act* 1873 (UK)[24] amended by the *Supreme Court of Judicature Act* 1875 (UK)[25]. The *Judicature Acts* caused the Common Law Courts, the Courts of Chancery and other specialist courts[26] to be combined into the High Court of Justice which, together with the Court of Appeal, comprised the Supreme Court of Judicature[27]. Section 24(7) of the Act of 1873 empowered the Court to grant all remedies to which any of the parties appeared to be entitled:

> "so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

12 This legislative formula was promptly and substantially reproduced in most of the Australian colonies[28], and continues to be in force in the various

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Vict c 86, *Chancery Amendment Act* 1858 (UK) 21 & 22 Vict c 27. See commentary in Jenks, *A Short History of English Law*, (1912) at 365-372.

22 *Common Law Procedure Act* 1852 (UK) 15 &16 Vict c 76, s 36.

23 Jenks, *A Short History of English Law*, (1912) at 367.

24 36 & 37 Vict c 66.

25 38 & 39 Vict c 77.

26 Including the Court of Probate, the Court of Divorce and the High Court of Admiralty.

27 "Civil Procedure Since 1800" in Jacob, *The Reform of Civil Procedural Law and Other Essays in Civil Procedure*, (1982) 193 at 209.

28 *Judicature Act* 1876 (Q) 40 Vict No 6, s 4(8); *Supreme Court Act* 1878 (SA) 41 & 42 Vict No 116, s 5(8); *Supreme Court Act* 1880 (WA) 44 Vict No 10, s 7(7); *Judicature Act* 1883 (Vict) 47 Vict No 761, s 8(7). The notable exception was New South Wales, which did not enact a statute modelled on the *Judicature Acts* until 1970; though see discussion in Meagher, Heydon and Leeming (eds), *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 4th ed (2002) at 50 [2-075]. Although Tasmania did enact such a statute in the *Legal Procedure*

(Footnote continues on next page)

States[29]. It was also reproduced in s 32 of the *Judiciary Act* 1903 (Cth) and s 22 of the *Federal Court of Australia Act* 1976 (Cth). The corresponding provision of the *Supreme Court Act* 1933 (ACT) is s 32.

13 The Act of 1875 set out in its first Schedule, Rules of Court which were to regulate proceedings in the High Court of Justice and the Court of Appeal[30]. Order XXVII r 1 of the 1875 Rules authorised a court or a judge "at any stage of the proceedings" to allow either party to amend a statement of claim or defence or reply, and provided that:

> "all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties."

The language of O XXVII r 1, so far as it related to amendments, was substantially replicated in O XXVIII r 1 of the Rules of the Supreme Court 1883 (UK). The verbal formula was replicated in r 501(a) of the ACT Rules. Rules 501(a) and 501(c) also give effect, in relation to amendments, to the statutory purposes effected by s 32 of the *Supreme Court Act* 1933 (ACT).

14 There is a distinction between the discretion of a court to allow a party to amend its pleading on that party's motion and the requirement to make all such amendments as may be necessary to determine the real questions in controversy. That requirement engages with the authority conferred on the court to make amendments of its own motion[31]. The point was made in 1887 by the Full Court of the Supreme Court of Victoria in *Dwyer v O'Mullen*[32] in relation to O XXVIII r 1 of the 1875 Rules. Higinbotham CJ said of the last clause of the rule that it[33]:

Act 1903 (Tas) 3 Ed VII No 19, that Act contained no provision equivalent to s 24(7) of the *Judicature Act* 1873 (UK).

29 *Supreme Court Civil Procedure Act* 1932 (Tas), s 10(7); *Supreme Court Act* 1935 (SA), s 27; *Supreme Court Act* 1935 (WA), s 24(7); *Supreme Court Act* 1970 (NSW), s 63; *Supreme Court Act* 1986 (Vict), s 29; *Supreme Court Act* 1995 (Q), s 244(9).

30 See *Supreme Court of Judicature Act* 1875 (UK), s 16.

31 An example of this kind of case is *Nottage v Jackson* [1883] 11 QBD 627 at 638.

32 (1887) 13 VLR 933.

33 (1887) 13 VLR 933 at 939, and 940 per Williams J and Kerferd J.

> "makes an amendment mandatory. The judge is under the obligation of making an amendment, but only for a certain purpose and in certain cases – for the purpose of determining the real question in controversy between the parties – that being expressed in many cases to be the question which the parties had agitated between themselves, and had come to trial upon."

The position is different where a party seeks to set up, by amendment, a new case at trial[34].

15 The *Judicature Act* Rules introduced "fact pleading". That change was effected by O XIX r 4 of the 1875 Rules which required that:

> "Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved".

Professor Jolowicz described the system thus introduced as one that[35]:

> "confers almost total freedom on the parties to fix 'the facts' to which the law is to be applied, leaving it to the court only to resolve, on the evidence produced by the parties, those issues which are in controversy between them."

The new system of fact pleading was allied with an approach to the amendment of pleadings which was relatively liberal when compared with the system it replaced[36].

16 The coupling of fact pleading and a liberal approach to amendment of pleadings was noted by Barwick CJ in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd*[37]. In the same case Gibbs J made reference to s 22 of the

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34 *Hipgrave v Case* (1885) 28 Ch D 356 at 361 per Earl Selborne LC.

35 Jolowicz, *On Civil Procedure*, (2000) at 364.

36 Under that system, the perceived "evils" attending amendments to pleadings, especially at hearing and to make a new case, meant that they were very difficult to obtain: see *Watts v Hyde* (1847) 2 Ph 406 at 409-410 per Cottenham LC [41 ER 1000 at 1001]. Plaintiffs were at liberty to amend to the extent that they were merely adding parties, but if the Bill was sought to be amended further then they would need to institute new proceedings or recommence existing proceedings in amended form: *Palk v Lord Clinton* (1805) 12 Ves Jun 48 at 65-66 per Grant MR [33 ER 19 at 25-26]; *Roe v Davies* [1876] 2 Ch D 729 at 734 per Bacon V-C.

37 (1981) 148 CLR 457 at 472-473; [1981] HCA 7.

Federal Court Act which he characterised as giving effect to a "fundamental principle of the *Judicature Act* procedure", namely "the avoidance of a multiplicity of proceedings"[38]. He quoted, with evident approval, the observation of Sir George Jessel MR that the section meant[39]:

> "that whenever a subject of controversy arises in an action which can conveniently be determined between the parties to the action, the court should, if possible, determine it so as to prevent further and needless litigation".

To that observation, Gibbs J added[40]:

> "It has been said, and no doubt rightly, that having regard to the nature and purposes of the provision, it should be construed liberally."

17 Section 24(7) of the Act of 1873 was originally enacted as part of a reform process designed to avoid a multiplicity of proceedings in different courts. That imperative, imported into its statutory offspring in Australia, also applies to the avoidance of a multiplicity of proceedings in the same court. Nevertheless, as indicated in the passage quoted by Gibbs J in *Philip Morris*, practical considerations of convenience are relevant to its application. The same is true for Rules of Court which, in relation to amendment of pleadings, give effect to the original objective of the section. They 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.

18 A liberal approach to amendment applications in the late 19th century is evidenced by the observation of Bramwell LJ in *Tildesley v Harper*[41] that he would always give leave to amend unless satisfied that the party applying was acting *malâ fide* or that he had, by his blunder, "done some injury to his opponent which could not be compensated for by costs or otherwise". The dissenting

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38 (1981) 148 CLR 457 at 489.

39 (1981) 148 CLR 457 at 489, citing *In the Goods of Tharp* (1878) 3 PD 76 at 81.

40 (1981) 148 CLR 457 at 489, citing *Roberts v Gippsland Agricultural and Earth Moving Contracting Co Pty Ltd* [1956] VLR 555 at 564-565 and *McLeish v Faure* (1979) 25 ALR 403 at 413-414.

41 [1878] 10 Ch D 393 at 397 and at 397 per Thesiger LJ. See also the observations of Bacon V-C in both *King v Corke* [1875] 1 Ch D 57 at 59-60 and *Roe v Davies* [1876] 2 Ch D 729 at 733-734.

judgment of Bowen LJ in *Cropper v Smith*[42] is often quoted as the leading statement of that liberal approach. He said[43]:

> "I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party."

He later added[44]:

> "I have found in my experience that there is one panacea which heals every sore in litigation, and that is costs."

19 It is necessary to recall the context of the statements made by Bowen LJ. An action for infringement of a patent had been defended by two partners, one objecting to the validity of the patent, the other not doing so. The objection as to validity was upheld in the Court of Appeal but only in favour of the partner who had raised it. This led to radically inconsistent orders in respect of the two men. Bowen LJ would have allowed the unsuccessful defendant to amend his case to raise invalidity on the basis that the case had already been fought "exactly in the same way as it would have been fought" had both partners objected to validity[45]. The other judges in the Court of Appeal would not have allowed the amendment.

20 The House of Lords reversed the decision of the Court of Appeal, but on the basis of inconsistency in the orders and because of its practical consequences for the successful partner[46]. While the Earl of Selborne LC saw "very excellent sense" in the general tenor of Bowen LJ's observations on the subject of amendment, nevertheless he would not have reversed the orders of the Court of Appeal in order to allow an amendment to be made[47].

21 Bowen LJ's belief in costs as a cureall for the inconveniences of amendment may have underpinned the high degree of satisfaction which he

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42 [1884] 26 Ch D 700.

43 [1884] 26 Ch D 700 at 710.

44 [1884] 26 Ch D 700 at 711.

45 [1884] 26 Ch D 700 at 711.

46 *Smith v Cropper* (1885) 10 App Cas 249. The successful partner would have been adversely affected by the award of injunctive relief against his unsuccessful partner who had not raised validity.

47 (1885) 10 App Cas 249 at 259.

expressed with the state of civil procedure when, as Lord Bowen, he asserted "without fear of contradiction" in 1887 that[48]:

> "it is not *possible* in the year 1887 for an honest litigant in her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation. The expenses of the law are still too heavy, and have not diminished *pari passu* with other abuses. But law has ceased to be a scientific game that may be won or lost by playing some particular move." (emphasis in original)

This claim has not been vindicated by history and has been characterised charitably as "premature, if not overexaggerated"[49].

22 The approach reflected in the judgments of Bramwell LJ and Bowen LJ was approved by this Court in 1912 in relation to the Rules of the Supreme Court of New South Wales. In his judgment in *Shannon v Chun*[50], Barton J set out at length passages from those judgments. O'Connor J referred to the "principles always acted on in granting amendments" as "principles laid down with great clearness by Bramwell LJ and Bowen LJ"[51]. Isaacs J said of the relevant rule[52]:

> "There is not only a power, but even an imperative duty cast by the legislature on the Court, to let no formality stand in the way of solid justice. The Court is directed to make every amendment, and at all times, so as to enable it to do what is right between the parties, and in the fairest and fullest manner possible to arrive at a determination of the substantial matter in dispute."

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48 Bowen, "Progress in the Administration of Justice during the Victorian Period", in *Select Essays in Anglo-American Legal History*, (1907) vol 1, 516 at 541, discussed in Jolowicz, *On Civil Procedure*, (2000) at 356.

49 Jacob, "The Judicature Acts 1873-1875 Vision and Reality", in Jacob (ed), *The Reform of Civil Procedural Law and Other Essays in Civil Procedure*, (1982) 301 at 309.

50 (1912) 15 CLR 257 at 260-262; [1912] HCA 52.

51 (1912) 15 CLR 257 at 263.

52 (1912) 15 CLR 257 at 265.

More than half a century later the principles enunciated by Bowen LJ were again held by this Court to be applicable, in a case considering the amendment provisions of the Rules of the Supreme Court of the Northern Territory[53].

23 The *Judicature Act* Rules and their Australian offspring did not in terms make reference to the public interest in the expeditious dispatch of the business of the courts. The way in which proceedings progress has been left to the parties. This may be seen as an aspect of the adversarial system which is a dominant part of the common law inheritance of *Judicature Act* procedure[54]. In this respect, however, the adversarial system has been qualified by changing practices in the courts directed to the reduction of costs and delay and the realisation that the courts are concerned not only with justice between the parties, which remains their priority, but also with the public interest in the proper and efficient use of public resources.

24 The *Judicature Acts* and associated Rules of Court are reflected in rr 501 and 502 of the ACT Rules. The ACT Rules, like their precursors, confer the discretion to give leave to amend and impose the duty to make amendments for the purpose of deciding the real issues in, and avoiding multiplicity of, proceedings. The discretion is exercised in the context of the common law adversarial system as qualified by changing practice. But that is not a system which today permits disregard of undue delay. Undue delay can undermine confidence in the rule of law. To that extent its avoidance, based upon a proper regard for the interests of the parties, transcends those interests. Another factor which relates to the interests of the parties but transcends them is the waste of public resources and the inefficiency occasioned by the need to revisit interlocutory processes, vacate trial dates, or adjourn trials either because of non-compliance with court timetables or, as in this case, because of a late and deliberate tactical change by one party in the direction of its conduct of the litigation. These are matters which, even under the Australian versions of the *Judicature Act* system, unaffected by the sequelae of the civil procedure reforms of 1998 in the United Kingdom, are to be regarded as both relevant and mandatory considerations in the exercise of the discretion conferred by rules such as r 502.

25 Recognition of the public interest in the administration of civil justice procedures in Australia and the United Kingdom pre-dates the Woolf Report and its attendant reforms. In *Dawson v Deputy Commissioner of Taxation*[55], King CJ

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53 *Clough and Rogers v Frog* (1974) 48 ALJR 481 at 482 per McTiernan ACJ, Menzies, Gibbs and Mason JJ; 4 ALR 615 at 618.

54 Jolowicz, *On Civil Procedure*, (2000) at 27-28.

55 (1984) 71 FLR 364 at 366.

acknowledged the responsibility of judges to ensure, "so far as possible and subject to overriding considerations of justice", that the limited resources which the State commits to the administration of justice are not wasted by the failure of parties to adhere to trial dates of which they have had proper notice. In a late amendment case considered by the House of Lords in 1987[56], there was a marked departure from the approach of Bowen LJ in *Cropper v Smith*. Lord Griffiths required that judges considering amendments weigh in the balance[57]:

> "the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently".

The same indulgence could not be shown towards the negligent conduct of litigation as might have been possible in a "more leisured age"[58]. That approach was followed by Sheppard J in a revenue case heard in the Federal Court[59]. And in the New South Wales Court of Appeal in *GSA Industries*, Samuels JA said that[60]:

> "the emollient effect of an order for costs as a panacea may now be consigned to the Aladdin's cave which Lord Reid rejected as one of the fairy tales in which we no longer believe."

The approach reflected in these authorities was applied by a majority of the Full Court of the Federal Court in *Bomanite Pty Ltd v Slatex Corp Aust Pty Ltd*[61].

26 *Sali v SPC Ltd*[62] was concerned with a refusal by the Full Court of the Supreme Court of Victoria to grant an application for an adjournment of an appeal. By majority, this Court held that in the exercise of a discretion to refuse or grant an adjournment, the judge of a busy court was entitled to consider "the

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56 *Ketteman v Hansel Properties Ltd* [1987] AC 189.

57 [1987] AC 189 at 220.

58 See *GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710 at 716 per Samuels JA.

59 *Commissioner of Taxation v Brambles Holdings Ltd* (1991) 28 FCR 451 at 455-456.

60 (1990) 24 NSWLR 710 at 716.

61 (1991) 32 FCR 379 at 387 per Gummow J, 391-393 per French J.

62 (1993) 67 ALJR 841; 116 ALR 625; [1993] HCA 47.

effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the court as well as the interests of the parties"[63]. Brennan, Deane and McHugh JJ went on to say[64]:

> "What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources."

Toohey and Gaudron JJ dissented in the result but acknowledged by reference to *GSA Industries*, that[65]:

> "The contemporary approach to court administration has introduced another element into the equation or, more accurately, has put another consideration onto the scales. The view that the conduct of litigation is not merely a matter for the parties but is also one for the court and the need to avoid disruptions in the court's lists with consequent inconvenience to the court and prejudice to the interests of other litigants waiting to be heard are pressing concerns to which a court may have regard." (footnote omitted)

27 The observations made in the two joint judgments in *Sali* were linked to the particular knowledge that a judge or court, called upon to exercise a discretion to adjourn, would have of the state of that court's lists. However, the mischief engendered by unwarranted adjournments and consequent delays in the resolution of civil proceedings goes beyond their particular effects on the court in which those delays occur. In that connection, there have been a number of cases after *Sali* in which it has been accepted, in the context of *Judicature Act* Rules, that the public interest in the efficient use of court resources is a relevant consideration in the exercise of discretions to amend or adjourn[66].

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63 (1993) 67 ALJR 841 at 843-844 per Brennan, Deane and McHugh JJ; 116 ALR 625 at 629.

64 (1993) 67 ALJR 841 at 844; 116 ALR 625 at 629.

65 (1993) 67 ALJR 841 at 849; 116 ALR 625 at 636. See also [2007] ACTSC 82 at [53].

66 See for example, *State Pollution Control Commission v Australian Iron & Steel Pty Ltd* (1992) 29 NSWLR 487 at 494-495 per Gleeson CJ; *Byron v Southern Star Group Pty Ltd t/a KGC Magnetic Tapes* (1995) 13 ACLC 301 at 302 per Kirby J; *Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd* (1996) 40 NSWLR 543 at 553-554 per Clarke JA and 601-605 per Powell JA.

28 Both the primary judge and the Court of Appeal in the present case regarded the decision of this Court in *J L Holdings* as determinative of the approach they should take to the amendment application. But that case was factually very different. As counsel for Aon pointed out in written submissions:

1. The applicant had explained, and the Court had accepted, that the application was made late because a material fact had only recently been discovered[67].

2. The application was made before a hearing date was fixed and, once it had been fixed, the period of six months intervening between the application and the commencement of trial meant that the hearing dates would not be imperilled[68].

3. The point sought to be raised could not be avoided at trial, as it was apparent on the face of certain documents[69].

In reversing the decision of the Full Federal Court, which upheld the primary judge's refusal to grant leave to amend the defence, this Court held case management principles to be relevant, but said that they could not be used to prevent a party from litigating a fairly arguable case[70].

29 In their joint judgment, Dawson, Gaudron and McHugh JJ reaffirmed the "principles established in *Cropper v Smith* and accepted in *Clough and Rogers v Frog*…"[71]. They held that nothing said in *Sali* suggested that proper principles of case management might be employed, except perhaps in extreme circumstances, to shut a party out from litigating a case which was fairly arguable. Their Honours said[72]:

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67 (1997) 189 CLR 146 at 152.

68 (1997) 189 CLR 146 at 154.

69 (1997) 189 CLR 146 at 154.

70 (1997) 189 CLR 146 at 154-155.

71 (1997) 189 CLR 146 at 154.

72 (1997) 189 CLR 146 at 154.

> "Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim."

And further[73]:

> "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 a 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, thus precluding the determination of an issue between the parties."

Kirby J wrote a concurring judgment.

30 It might be thought a truism that "case management principles" should not supplant the objective of doing justice between the parties according to law. Accepting that proposition, *J L Holdings* cannot be taken as authority for the view that waste of public resources and undue delay, with the concomitant strain and uncertainty imposed on litigants, should not be taken into account in the exercise of interlocutory discretions of the kind conferred by r 502. Also to be considered is the potential for loss of public confidence in the legal system which arises where a court is seen to accede to applications made without adequate explanation or justification, whether they be for adjournment, for amendments giving rise to adjournment, or for vacation of fixed trial dates resulting in the resetting of interlocutory processes.

Application of the Rules to ANU amendment

31 The amendment allowed in the present case could only be supported as an exercise of the discretion under r 502. On no view was it required by r 501(a). The requirement to make amendments for the purpose of deciding "the real issues in the proceeding" does not impose some unqualified duty to permit the late addition of any new claim. The real issues in the proceeding were to be determined in this case by reference to the limited way in which ANU had

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73 (1997) 189 CLR 146 at 155.

deliberately chosen to frame its original claim against Aon, and its persistence in that limited approach up to the trial date itself.

32 The requirement under r 501(c) to avoid a multiplicity of proceedings is to be understood as operating within the framework of an ordered progression to a fixed trial date. It does not oblige the court to accept the addition of new claims at the last moment before trial, on the basis that if they are not allowed there might be subsequent proceedings in which those claims are raised. The steps which r 501(c) requires to be taken to avoid multiple proceedings are "all necessary amendments". The Court had no basis for inferring that, absent the amendments, there would be further proceedings.

33 In any event the institution by ANU of fresh proceedings, raising claims which could have been raised against Aon much earlier in the existing proceedings, would face the potential barrier of an abuse of process objection and, possibly, that kind of estoppel[74] discussed in *Henderson v Henderson*[75] and by this Court in *Port of Melbourne Authority v Anshun Pty Ltd*[76]. Abuse of process principles may be invoked to prevent attempts to litigate that which should have been litigated in earlier proceedings as well as attempts to re-litigate that which has already been determined. *Reichel v Magrath*[77] is a long standing example of a re-litigation case decided on abuse of process grounds, rather than on the basis of *res judicata* or issue estoppel[78]. It was relied upon in *Walton v*

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74 Probably better described as an extended application of *res judicata*; see Heydon, *Cross on Evidence*, 6th Aust ed (2000) vol 1 at 179 [5170]; and *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31 per Lord Bingham. As to classificatory issues, see *Effem Foods Pty Ltd v Trawl Industries (Aust) Pty Ltd* (1993) 43 FCR 510 at 512-514 per Northrop and Lee JJ.

75 (1843) 3 Hare 100 [67 ER 313].

76 (1981) 147 CLR 589; [1981] HCA 45.

77 (1889) 14 App Cas 665.

78 Although it has been said that the case could have been dealt with on grounds of *res judicata*: see Handley, *Spencer Bower, Turner and Handley on the Doctrine of Res Judicata*, 3rd ed (1996) at 121 [231] and 252 [445], and *Rippon v Chilcotin Pty Ltd* (2001) 53 NSWLR 198 at 202 per Handley J.

Gardiner[79] and *Rogers v The Queen*[80]. In the former case, Mason CJ, Deane and Dawson JJ said that[81]:

> "proceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings." (footnote omitted)

The majority also endorsed the observation in *Hunter v Chief Constable of West Midland Police*[82] that courts have an inherent power to prevent misuse of their procedures in a way which, although not inconsistent with the literal application of the Rules, would nevertheless be unfair to a party to the litigation "or would otherwise bring the administration of justice into disrepute among right-thinking people"[83]. In *Rogers v The Queen*[84], the majority characterised as an abuse the tender of records of interview at a criminal trial in circumstances where the records had been rejected as involuntary at another trial on other charges. Mason CJ said[85]:

> "The circumstances in which abuse of process may arise are extremely varied and it would be unwise to limit those circumstances to fixed categories. Likewise, it would be a mistake to treat the discussion in judgments of particular circumstances as necessarily confining the concept of abuse of process." (footnote omitted)

34 The House of Lords in *Johnson v Gore Wood & Co*[86] acknowledged the distinction between "*Henderson v Henderson* abuse of process" on the one hand,

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79 (1993) 177 CLR 378; [1993] HCA 77.

80 (1994) 181 CLR 251; [1994] HCA 42.

81 (1993) 177 CLR 378 at 393.

82 [1982] AC 529 at 536.

83 (1993) 177 CLR 378 at 393; see also *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at 264 [6] per Gleeson CJ, Gummow, Hayne and Crennan JJ; [2006] HCA 27.

84 (1994) 181 CLR 251.

85 (1994) 181 CLR 251 at 255.

86 [2002] 2 AC 1.

and cause of action estoppel and issue estoppel on the other. Referring to public interest considerations of the kind discussed earlier in these reasons, Lord Bingham of Cornhill said[87]:

> "The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all."

A broad merits-based judgment was required, taking account of public and private interests affected and focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it an issue which could and should have been raised earlier. As Lord Bingham said[88]:

> "As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

A court faced with a late amendment seeking to raise new claims and the *in terrorem* prediction that a multiplicity of proceedings may follow if the amendment is not allowed, is entitled to have regard to the barriers to the implementation of suggestions of that kind.

35 It might be said that the adjournment effected by the primary judge's decision to entertain the amendment application and to allow written submissions to be filed and evidence to be put on, and the subsequent delay in his decision, rendered academic any concern about further waste of court resources or inefficiencies flowing from the amendment ultimately being allowed. It might be said that, in those circumstances, to refuse the amendment would be punitive. It is true that a punitive response to the substance of a late amendment application is not appropriate. But neither is a party to be rewarded by weighing in its favour the disruptive consequences of its own application. In any event the granting of the amendment in this case, at the time it was granted, meant that there would still be further delay while interlocutory processes flowing from the new claims were put in place. Aon had to prepare a new defence. The further delay, in the

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87 [2002] 2 AC 1 at 31.

88 [2002] 2 AC 1 at 31.

circumstances of this case, would be such as to undermine confidence in the administration of civil justice. This factor was not taken into account by the primary judge, nor by the Court of Appeal. The discretion of the primary judge miscarried and the Court of Appeal was in error in not allowing the appeal. In the circumstances, giving proper weight to the factors to which I have referred, the application for the amendment should have been refused.

36 The above conclusion is able to be reached on the facts of this case without having regard to r 21. But r 21 strengthens the conclusion. It mandates consideration of the effect of the proposed amendment on the just resolution of the real issues in the proceeding "with minimum delay and expense". It informs both the requirements set out and the discretions conferred in rr 501 and 502.

Conclusion

37 For the preceding reasons the appeal should be allowed. I agree with the orders proposed in the joint judgment.

38 GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ. These proceedings were commenced in December 2004 by the Australian National University ("ANU") against three insurers. It claimed an indemnity for losses it had suffered by reason of the destruction of, and damage to, buildings and their contents at its Mount Stromlo Complex by fire in January 2003. ANU's insurance broker Aon Risk Services Australia Limited ("Aon") was joined to the proceedings in June 2005. The claim against it was limited to its failure to arrange the renewal of insurance over some of the property which the insurers claimed was not the subject of insurance.

39 Two of the insurers also claimed, in their defences filed in April 2005, to be entitled to reduce their liability to indemnify ANU with respect to the property which was insured, because the value of the property had been substantially understated by ANU. On 15 November 2006, which was the third day of a four-week period which had been allocated for the trial of the action in the Supreme Court of the Australian Capital Territory, ANU reached a settlement with the insurers. It may be inferred that the sums secured by way of settlement did not reflect the full replacement value of the property. ANU sought an adjournment of the trial of its claim against Aon and foreshadowed an application for leave to amend that claim to allege a substantially different case. It now sought to allege that, under a different contract for services, Aon had been obliged to ascertain and declare correct values to the insurers and provide certain advices to ANU regarding insurance.

40 Gray J granted leave to amend[89]. Influential to his Honour's decision was that ANU sought to raise real triable issues. His Honour placed a lesser importance upon the objectives stated in the Court Procedures Rules 2006 (ACT) ("the Court Procedures Rules"), of the minimisation of delay and cost of proceedings. His Honour considered the matter to be governed by the decision in *Queensland v J L Holdings Pty Ltd*[90]. His Honour's decision was upheld by a majority of the Court of Appeal (Higgins CJ and Penfold J, Lander J dissenting) subject to a further order that ANU pay Aon's costs occasioned by the amendment on an indemnity basis[91].

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89 *The Australian National University v Chubb Insurance Company of Australia Ltd* [2007] ACTSC 82.

90 (1997) 189 CLR 146; [1997] HCA 1.

91 *AON Risk Services Australia Ltd v Australian National University* [2008] ACTCA 13.

The background to the amendments

41 The proceedings were initially brought against Chubb Insurance Company of Australia Limited ("Chubb"), CGU Insurance Limited ("CGU") and ACE Insurance Limited ("ACE"), the insurers under a policy of insurance for the period 31 December 2002 to 31 December 2003 in the proportions, respectively, of 50 per cent, 20 per cent and 30 per cent of any loss. The property in question was listed in two Schedules – Schedule C and the Property Not Insured Schedule ("the PNI Schedule") – which had been provided to Chubb by Aon in October 2002. The Schedules were alleged to form part of the contract of insurance.

42 At the time the proceedings were brought the insurers had each made some payments to ANU with respect to the property referred to in Schedule C. However, in their defences, filed in April 2005, Chubb and CGU alleged that ANU had declared the value of the property in Schedule C to be much less than its true value and that had they known its true value, they would have taken steps to reduce their risk. They claimed to be entitled to reduce their liability to indemnify ANU pursuant to s 28(3) of the *Insurance Contracts Act* 1984 (Cth) which provides that, in the event of a misrepresentation being made to the insurer prior to the contract of insurance being entered into, but where the insurer was not entitled to avoid the contract, the insurer's liability is reduced to the amount that would place the insurer in the position the insurer would have been in if the misrepresentation had not been made. ACE claimed to be entitled to an additional premium as a consequence of the misrepresentation. The insurers further disputed that the property listed in the PNI Schedule was the subject of the policy at all. ANU alleged that the balance due to it with respect to the property in the two Schedules was in the order of $75 million.

43 The original claim brought by ANU against Aon was based upon a contract dated 28 June 1999, the term of which was said to have been extended until 30 June 2004. ANU alleged that the agreement required Aon to arrange for the renewal of insurance cover for the period in question for all buildings and their contents which were then the subject of insurance which was due to expire. It was alleged to be an implied term of that agreement that Aon would exercise reasonable care, skill and diligence in arranging for the renewal of the expiring cover.

44 The claim against Aon was expressed to be in the alternative to the claims brought against the insurers and to arise in the event that the buildings and contents referred to in the two Schedules were not the subject of a contract of

insurance. Understood in light of the insurers' defences, the claim was limited to the property in the PNI Schedule, which was alleged not to have been insured. ANU alleged that if insurance had not been effected, Aon had breached its retainer and breached its duty of care to it by failing to arrange insurance or to advise ANU that it had not been arranged.

45 On the first day appointed for trial ANU, Chubb and CGU commenced a mediation and a settlement was reached two days later. A settlement was reached with ACE without mediation. The settlements provided for further payments by the insurers in satisfaction of ANU's claims with respect to the Schedule C property. It is not necessary to detail the amounts paid. It was later alleged that the amounts paid left a substantial shortfall remaining in the claim with respect to the Schedule C property in consequence of the insurers' claim to reduction of liability and no payment at all for the claim with respect to the property in the PNI Schedule.

46 After dealing with orders which were made by consent with respect to the insurers, counsel for ANU advised the court that ANU would apply for leave to amend its claim against Aon and sought an adjournment of the trial. In the events which followed the adjournment was effectively granted. The trial did not proceed. The applications were not heard until 27 November 2006. The decision to grant leave was not made until 12 October 2007. This delay is regrettable given the nature of the applications, the time at which they were brought and their importance for the future of the litigation.

The amendments

47 The amendments permitted to be made to ANU's claim as a result of the grant of leave were substantial. The contract between ANU and Aon was now said to be one for insurance broking and advisory services and to have come into effect from 1 July 1999. It is not apparent from the documents particularised whether it was referable, in part, to the agreement earlier pleaded. Pursuant to this agreement Aon was to review ANU's policies of insurance; meet with ANU on a regular basis in the process of review; prepare submissions to insurers which would ensure all material facts were disclosed and enable the insurers to determine their criteria for indemnity; and place insurance upon instructions from ANU. It was to provide an annual stewardship report.

48 Central to the new claim was the allegation that Aon knew or ought to have known that the true replacement value of both building and contents were material to the insurers' consideration of indemnity, including the decision to reinsure. ANU alleged breaches of the services agreement, and of Aon's duty of

care to it, by its failure to arrange insurance on declared values which were the true replacement values of the property; that it failed altogether to obtain valuations of the contents of the property; and that it was negligent in failing to obtain accurate valuations.

49 The claims with respect to Aon's failure to effect insurance of the PNI Schedule property were maintained, but in the context of the new agreement for services. It was now alleged that Aon knew that ANU required renewal of insurance cover in 2003 over all the property which had been listed in three Schedules, which included the PNI and Schedule C lists, and which had been the subject of its express instruction to insure in the preceding year. It was alleged that Aon failed to obtain ANU's instructions before placing the insurance in question and that it had failed to advise of the effect of the provision for a "deductible", which is to say an "excess", on the amount ANU was not entitled to recover. The contract of insurance was alleged to have applied a deductible of $1 million to "each and every loss" with the effect that ANU might not be able to recover where buildings had a value less than the deductible.

50 It was further alleged that Aon had breached provisions of the *Australian Securities and Investments Commission Act* 2001 (Cth) in the provision of its services; it had made representations as to future matters without reasonable grounds for doing so[92]; and had been guilty of misleading and deceptive conduct[93].

The "explanation"

51 The proposed amended pleading had not been drawn when ANU sought an adjournment of the trial. Senior Counsel for ANU outlined three matters as necessitating the foreshadowed application for amendment: the settlements which had just taken place with the insurers; the recent receipt by ANU of affidavits of evidence from Chubb and CGU and of discovery from Chubb of documents relating to its underwriting processes; and conversations with the insurers during mediation. It was said that it was now apparent that the declared value of the property had critical significance to the insurers, beyond the calculation of premium, and that Aon was directly responsible for the valuations.

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92 See *Australian Securities and Investments Commission Act* 2001 (Cth), s 12BB.

93 See *Australian Securities and Investments Commission Act* 2001, s 12DA.

52 On the hearing of the application ANU filed an affidavit by its solicitor. It assumes some importance. The solicitor referred to the fact and date of the receipt of Chubb's and CGU's affidavit evidence and discovery. He referred to the undertaking of mediation and said that settlement was reached with Chubb and CGU. He said that the contents of the papers exchanged at the mediation and the discussions had been agreed to be kept confidential by the parties to it. He concluded by stating that, at the conclusion of mediation, Senior Counsel for ANU advised that it was necessary to seek leave to amend.

53 It was pointed out to the solicitor, in cross-examination, that his affidavit did not offer any explanation for the need to amend. The solicitor agreed with the suggestion that a decision had been made not to give a reason. He was asked questions concerning his understanding of the pleadings prior to the application for amendment. He said that he understood Chubb and CGU to have alleged that the declared values of the property had been understated. He said that he appreciated that no claim was originally made against Aon with respect to the Schedule C property. When he reviewed the pleadings he did not consider raising such a claim. He agreed that the decision to do so was made on the basis of information received during the mediation.

54 Letters from Chubb to ANU dated 2 April 2003 and 24 October 2003 were produced to the solicitor. They contained the insurer's explanations of the significance of the provision of accurate declared values to its decision to insure. It appeared that Chubb had also discovered its underwriting manuals, containing a similar reference, in November 2005.

Statements in *J L Holdings*

55 The starting point in this appeal is the provisions of the Court Procedures Rules which govern the application to amend and to which reference will shortly be made. However, it is convenient to refer at this point to statements made in *J L Holdings* which pre-date those Rules. Those statements were considered by the primary judge and members of the Court of Appeal as authoritative in limiting the application of the case management principles to which those Rules give expression.

56 It is not necessary to recite the facts of *J L Holdings*. It is sufficient to observe that the defendant, the State of Queensland, sought leave to amend its defence to raise a clearly arguable matter, which depended upon the terms of a statute but which had been overlooked in the course of the litigation towards a trial. The primary judge refused leave to amend, on the basis that it would jeopardise the dates allocated for hearing. The plurality (Dawson, Gaudron and

McHugh JJ) did not accept that J L Holdings would necessarily be prejudiced by the amendments, given the nature of the issue raised, the fact that the hearing was some months ahead and the likelihood that the length of the trial would be such as to accommodate it[94].

57 More important, for present purposes, is what their Honours said concerning the requirements of case management, which had been referred to by the Full Court of the Federal Court in dismissing the appeal from the primary judge's orders. Referring to the previous decision of this Court in *Sali v SPC Ltd*[95], the plurality said of case management principles[96]:

> "… nothing in that case suggests that those principles might be employed, except perhaps in extreme circumstances, to shut a party out from litigating an issue which is fairly arguable. Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim."

In their conclusion, their Honours said[97]:

> "In our view, the matters referred to by the primary judge were insufficient to justify her Honour's refusal of the application by the applicants to amend their defence and nothing has been made to appear before us which would otherwise support that refusal. 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 a 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

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94 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 154.

95 (1993) 67 ALJR 841; 116 ALR 625; [1993] HCA 47.

96 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 154.

97 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 155.

from raising an arguable defence, thus precluding the determination of an issue between the parties. In taking an opposite view, the primary judge was, in our view, in error in the exercise of her discretion."

The Court Procedures Rules

58 As earlier stated, the starting point for any application to amend must be the rules governing such applications in the relevant jurisdiction. In this case rr 501 and 502 appear in Ch 2 of the Court Procedures Rules, which is concerned with civil proceedings in courts in the Territory. Rule 501 provides:

"All necessary amendments of a document[98] must be made for the purpose of –

(a) deciding the real issues in the proceeding; or

(b) correcting any defect or error in the proceeding; or

(c) avoiding multiple proceedings."

59 Rule 502 provides:

"(1) At any stage of a proceeding, the court may give leave for a party to amend, or direct a party to amend, an originating process, anything written on an originating process, a pleading, an application or any other document filed in the court in a proceeding in the way it considers appropriate.

(2) The court may give leave, or give a direction, on application by the party or on its own initiative.

…

(3) The court may give leave to make an amendment even if the effect of the amendment would be to include a cause of action arising after the proceeding was started.

(4) If there is a mistake in the name or identity of a party, the court must give leave for, or direct the making of, amendments necessary

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98 Refers to any document filed in a proceeding, other than affidavits: r 500.

to correct the mistake, even if the effect of the amendments is to substitute another person as a party.

(5) This rule does not apply in relation to an amendment of an order.

…"

60 Rule 21 states the purposes of the Rules in Ch 2 and requires that they be applied to those ends. The Rule is in these terms:

"(1) The purpose of this chapter, and the other provisions of these rules in their application to civil proceedings, is to facilitate the just resolution of the real issues in civil proceedings with minimum delay and expense.

(2) Accordingly, these rules are to be applied by the courts in civil proceedings with the objective of achieving –

(a) the just resolution of the real issues in the proceedings; and

(b) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

(3) The parties to a civil proceeding must help the court to achieve the objectives.

(4) The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court."

The decision of the primary judge and of the Court of Appeal

61 Gray J acknowledged that r 21(2)(b) encompassed case management principles[99] but did not consider that the Rules required an approach different from that taken in *J L Holdings*, namely that justice is the paramount

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99 *The Australian National University v Chubb Insurance Company of Australia Ltd* [2007] ACTSC 82 at [24].

consideration[100]. His Honour said that "appropriate consideration" should be given to the matters embraced in the Court Procedures Rules, such as the timely disposal of all proceedings and costs[101]. It is not apparent that these objectives were given much weight by his Honour.

62 Gray J did not accept that the case now sought to be brought by ANU with respect to Aon's retainer was new, but accepted that the issue with respect to the declared values of the Schedule C property was[102]. His Honour did not consider the explanations for the delay in seeking amendment entirely satisfactory[103]. He accepted however that ANU's lawyers had not appreciated Aon's involvement with respect to the declared values until the receipt of the evidence from Chubb and CGU, discovery relating to the underwriting process and discussions in mediation. He accepted that this had caused the lawyers to reassess the matters which had previously been pleaded by those insurers[104]. The factor identified by his Honour as of fundamental importance, to the grant of leave, was that the allegations raised real triable issues between ANU and Aon[105].

63 In the Court of Appeal Penfold J held that the application fell squarely within principles to be drawn from *J L Holdings*, because the amendments raised a claim which was arguable, there were no case management considerations that required refusal of leave to amend and Aon could be compensated for any

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100 *The Australian National University v Chubb Insurance Company of Australia Ltd* [2007] ACTSC 82 at [36]-[37].

101 *The Australian National University v Chubb Insurance Company of Australia Ltd* [2007] ACTSC 82 at [37].

102 *The Australian National University v Chubb Insurance Company of Australia Ltd* [2007] ACTSC 82 at [38], [41]-[42].

103 *The Australian National University v Chubb Insurance Company of Australia Ltd* [2007] ACTSC 82 at [43].

104 *The Australian National University v Chubb Insurance Company of Australia Ltd* [2007] ACTSC 82 at [42]-[43].

105 *The Australian National University v Chubb Insurance Company of Australia Ltd* [2007] ACTSC 82 at [43].

prejudice by an order for costs[106]. Higgins CJ likewise considered it sufficient, to justify the grant of leave, that the amendment would not cause substantial injustice and that any injustice was capable of remedy by an order for costs[107]. His Honour appears to have accepted as correct the weight placed by the primary judge upon the fact that "real triable issues" were raised[108]. Both Higgins CJ and Penfold J considered it significant that it had not been suggested that evidence was lost as a result of the delay in raising the claims[109] and that the additional work which Aon's solicitor had said would be rendered necessary by the amendments could be compensated by an appropriate order for costs[110]. Their Honours considered indemnity costs should be ordered.

64 Lander J, in his dissent, listed a number of matters concerning which the primary judge had given insufficient weight. He considered the primary judge to have been wrong to conclude that ANU's lawyers had not appreciated that the declared value of the Schedule C buildings had consequences for the insurers[111]. His Honour said that it could be inferred that ANU deliberately adopted the course that it did and maintained it until it settled with the insurers. In his Honour's view, in the circumstances, ANU should have been required to conduct its case "in accordance with the decision it made some years before"[112].

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106 *AON Risk Services Australia Ltd v Australian National University* [2008] ACTCA 13 at [67].

107 *AON Risk Services Australia Ltd v Australian National University* [2008] ACTCA 13 at [6].

108 *AON Risk Services Australia Ltd v Australian National University* [2008] ACTCA 13 at [15].

109 *AON Risk Services Australia Ltd v Australian National University* [2008] ACTCA 13 at [16] per Higgins CJ, [66] per Penfold J.

110 *AON Risk Services Australia Ltd v Australian National University* [2008] ACTCA 13 at [16] per Higgins CJ, [66] per Penfold J.

111 *AON Risk Services Australia Ltd v Australian National University* [2008] ACTCA 13 at [229].

112 *AON Risk Services Australia Ltd v Australian National University* [2008] ACTCA 13 at [235]-[236].

65 Penfold J agreed that an inference that ANU deliberately conducted its case in this way could be drawn[113]. However it did not follow, in her Honour's view, that the application should be refused; that would amount to punishment[114]. ANU's failure to provide an explanation for its "tactics" did not provide a basis for such a course, her Honour said[115].

66 Aon had further objected to that part of the amendments which related to its failure to insure the PNI Schedule buildings, as an abuse of process. This was on the basis that the claim, as amended, would be inconsistent with the judgment entered against CGU and the matters thereby determined in respect of the insurance coverage of the PNI Schedule. The primary judge rejected that contention[116]. Lander J pointed out that it was not possible to conclude that the judgment represented any determination in respect of that part of ANU's claim against CGU[117]. In any event, his Honour observed, the issue raised was more relevant to an application to strike out the claim, which had not been before the primary judge[118].

Rule 501(a)

67 The judgments below dealt with the question of amendment by reference to discretionary considerations, despite their reference to r 501. The general discretion is given by r 502(1). On this appeal ANU relied upon the importance placed by the Court Procedures Rules on the need for the courts to decide the

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113 *AON Risk Services Australia Ltd v Australian National University* [2008] ACTCA 13 at [58].

114 *AON Risk Services Australia Ltd v Australian National University* [2008] ACTCA 13 at [60].

115 *AON Risk Services Australia Ltd v Australian National University* [2008] ACTCA 13 at [61].

116 *The Australian National University v Chubb Insurance Company of Australia Ltd* [2007] ACTSC 82 at [53].

117 *AON Risk Services Australia Ltd v Australian National University* [2008] ACTCA 13 at [250].

118 *AON Risk Services Australia Ltd v Australian National University* [2008] ACTCA 13 at [254].

"real issues in the proceedings"[119], and more particularly upon the terms of r 501(a), which obliges amendments that are necessary for deciding the real issues in the proceeding. ANU did not dispute that the substance of its contention was that the "real issues in the proceeding" extended to any issues which a party sought in good faith to advance and which were arguable. For the reasons which follow, that contention cannot be accepted.

68 Rules 501 and 502 are more recent adaptations of Rules of the Supreme Court 1883 (UK), which dealt with amendment of pleadings after the passage of the Judicature Acts[120]. Those earlier Rules[121] provided the pattern for rules adopted by many courts in this country[122]. They included power to correct errors, occasioned by way of "slip" or omission and mistakes in the identities of parties. The Rule which gave power to amend defects or errors in any proceedings contained the statement, in imperative terms[123]:

> "and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings".

The Rule containing the general discretionary power to amend pleadings or indorsements[124] contained a similar command, except that the purpose of the amendments considered to be necessary was the determination of "the real questions in controversy between the parties". There is no relevant distinction between questions or issues raised and controversies[125].

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119 Court Procedures Rules, r 21(2)(a).

120 *Supreme Court of Judicature Act* 1873 (UK); *Supreme Court of Judicature Act* 1875 (UK).

121 Rules of the Supreme Court 1883 (UK), O XXVIII.

122 See for example High Court Rules 1952 (Cth), O 29.

123 Rules of the Supreme Court 1883, O XXVIII r 12; and see High Court Rules 1952, O 29 r 12.

124 Rules of the Supreme Court 1883, O XXVIII r 1; and see High Court Rules 1952, O 29 r 1.

125 The Supreme Court Annual Practice considered the principal differences in the rules to be that the general discretion was confined in its terms to pleadings,

(Footnote continues on next page)

69 The purpose of these earlier Rules, to permit a determination of the real issue or controversy in the proceedings, which informed those powers to amend, is now stated as a separate and distinct obligation in r 501(a). The question which arises from the terms of r 501(a) is whether it is necessary to make an amendment for the purpose of deciding the real issues in the proceeding.

70 Some general observations concerning rr 501(a), 502(1) and 21 are necessary at this point.

71 The words "the real issues in the proceeding" in r 501(a) obviously refer to issues raised, perhaps unclearly, in the pleadings at the time of the application for leave to amend. The "real" issues may also extend beyond the pleadings, as cases concerned with the purpose stated in the original Rules show. But, as is explained in these reasons, to be regarded as a real issue, and for amendment therefore to be necessary, the relevant dispute or controversy must exist at the time of the application. Amendments raising entirely new issues fall to be considered under the general discretion given by r 502(1), read with the objectives of r 21.

72 The purposes of r 21, to minimise the delay and expense of proceedings, are plainly intended to guide the exercise of discretion in r 502. There may be questions as to the extent to which the objectives there stated apply where a matter is identified as a "real issue" in the proceedings and one therefore within the terms of r 501(a). The Rule would appear to oblige amendment without more. The amendments necessary for the purpose of r 501 may be less likely to be productive of delay and cost and therefore not cut across the objectives to a substantial degree. And it may be that the "real" issues in civil proceedings, referred to in r 21 and read with that Rule's objectives, are intended to refer to issues which are not peripheral. In referring to the "just resolution of the real issues" in the proceedings, r 21 may be intending to refer to those issues which are determinative of the matter in dispute. It is not necessary to further consider these questions. Even if r 21 and the objectives there stated have no real significance for the application of r 501(a), r 501(a) did not apply to the amendments proposed by ANU.

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whereas defects or errors could be corrected in legal documents of any kind: White et al (eds), *The Annual Practice 1922* at 461.

73 In a passage from *Cropper v Smith*[126], which was cited with approval in *J L Holdings*[127], Bowen LJ said, with respect to the object of the courts to determine matters in controversy[128]:

> "Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace."

74 Much of what Bowen LJ said to this point was relevant to the discretionary aspect of the Rule under which the application was brought. As earlier explained, that Rule also required consideration of whether amendment was necessary to determine the "real questions in controversy between the parties". Bowen LJ went on[129]:

> "It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right."

75 The statements made by Bowen LJ in *Cropper v Smith* are best understood by reference to the circumstances of that case, and the course of the litigation.

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126 (1884) 26 Ch D 700. A fuller report appears in (1884) 1 RPC 81.

127 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 154; and see also *Clough and Rogers v Frog* (1974) 48 ALJR 481 at 482 per the Court (McTiernan ACJ, Menzies, Gibbs and Mason JJ); 4 ALR 615 at 618.

128 *Cropper v Smith* (1884) 26 Ch D 700 at 710; and see *Clough and Rogers v Frog* (1974) 48 ALJR 481 at 482; 4 ALR 615 at 618.

129 *Cropper v Smith* (1884) 26 Ch D 700 at 711.

This is true of many statements made in cases concerning amendment of pleadings, even if they are stated in terms of general application.

76 In *Cropper v Smith*, Smith and his business partner Hancock were co-defendants in an action brought to restrain them from infringing a patent for improvements in lace machines. Hancock had been the patentee prior to the patent being sold by his trustee in bankruptcy to the plaintiffs. Each of the defendants denied infringement, but only Smith gave notice of objection to the validity of the patent, on the grounds of lack of novelty and insufficiency of the specification. The patent was held valid by Pearson J[130], but invalid by the Court of Appeal on the construction of the claims in the specification. In the Court of Appeal the question was whether Hancock could rely upon invalidity, not himself having delivered objections and defended upon that basis. Much of the reasons deal with the question of whether he was estopped from doing so because he had been the patentee. This was not established, but the majority in the Court of Appeal, Cotton and Fry LJJ, held that he could not have the benefit of the decision respecting invalidity, having regard to the issues on the pleadings and refused his application to amend his defence to enable him to do so.

77 Bowen LJ was in dissent on the lastmentioned issue, but this does not detract from his reasoning as to whether there was a question in controversy which necessitated the grant of leave to amend. His Lordship observed that Hancock had left it to his partner to fight the case on invalidity[131] and surmised either that he did not wish to make allegations concerning his own patent or that his advisers might have thought he was estopped from having the benefit of an order based upon invalidity[132]. Bowen LJ identified them as mistakes of judgment and turned to consider the position of the other party and whether an order for costs was necessary. It is at this point that the special feature of this case is brought out. His Lordship said[133]:

> "Here I fail even to see that the Respondents want costs to remedy any grievance, because they have been put to none. The case has been fought exactly in the same way as it would have been fought if Mr Hancock had

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130 See (1884) 1 RPC 81 at 84-86.

131 *Cropper v Smith* (1884) 26 Ch D 700 at 709.

132 *Cropper v Smith* (1884) 26 Ch D 700 at 710.

133 *Cropper v Smith* (1884) 26 Ch D 700 at 711.

> delivered particulars of objection, and therefore it seems to me that he ought to be allowed to amend."

The issue of invalidity, which Hancock sought to raise by way of amendment had not only been raised, albeit by his co-defendant, it had also been litigated and it affected Hancock in exactly the same way as his partner.

78 An appeal by Smith and Hancock to the House of Lords succeeded[134]. The Earl of Selborne LC pointed out that it would have been an odd result if a patent was declared invalid as against one defendant and the rest of the world, but valid as against the other defendant[135]. Bowen LJ's conclusion turned upon the identification of the issue of invalidity, already litigated, as a matter in controversy concerning Hancock. Amendment was necessary in order to permit a determination with respect to Hancock. The Rule's requirement to amend in these circumstances may be seen as engaged.

79 *Tildesley v Harper*[136] is often referred to in connection with amendment to raise a matter in issue between the parties, but not expressed in the pleadings. It was there alleged that the donee of a power who had granted a lease had received a bribe and the circumstances surrounding the payment were stated. The lessee's defence denied the payments and those facts, but did not specifically deny a bribe having been given. Fry J gave judgment for the plaintiff, in the absence of a sufficient denial, despite the defendant having filed an affidavit in which he denied the bribe[137]. The Court of Appeal held that leave to amend ought to have been given to permit the denial to be made. Thesiger LJ said that the object of the rules "is to obtain a correct issue between the parties, and when an error has been made it is not intended that the party making the mistake should be mulcted in the loss of the trial"[138]. It may be inferred that the plaintiff well understood the matter of the bribe to be in issue. During argument it was pointed out that, were it otherwise, he might have moved for judgment on admissions prior to trial[139].

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134 (1885) 10 App Cas 249.

135 *Smith v Cropper* (1885) 10 App Cas 249 at 253.

136 (1878) 10 Ch D 393.

137 *Tildesley v Harper* (1878) 10 Ch D 393 at 395.

138 *Tildesley v Harper* (1878) 10 Ch D 393 at 397.

139 *Tildesley v Harper* (1878) 10 Ch D 393 at 395.

80 Amendment was held to have been wrongly refused in *O'Keefe v Williams*[140] where it was sought to allege that the Crown had derogated from its grant of licences to O'Keefe. Isaacs J identified the real question in controversy as whether a wrong had been done to O'Keefe by the Crown in issuing licences to a third party notwithstanding that O'Keefe was the Crown's licensee[141]. The facts relating to the bargain concerning the licences were not in dispute nor was it in doubt that the terms of the bargain were to be ascertained by implication from those facts. His Honour held that the lawyer's description of the bargain was not the real question in controversy; "[i]t was the mere husk, not the kernel"[142].

81 Mention should also be made of *Dwyer v O'Mullen*[143], not because it was correctly decided, but because the case is often referred to in connection with amendment of pleading. The error which attended the question, whether the matters the subject of the application for leave to amend were part of the controversy between the parties, is instructive for present purposes. The case concerned the execution of a deed by an illiterate person. Although it bore her mark, she denied that she had executed it and said that she had put her mark to a document which she believed related only to some potatoes and flour. The primary judge's decision, to refuse her application to amend to plead that she had been induced to execute by mistake and fraud was upheld, on the ground that these questions "had not been previously in controversy"[144]. This was not a correct approach. The issue as pleaded comprehended the state of mind which formed the basis for the pleas sought to be raised. Moreover the primary judge had found on the evidence that she had not understood what she had executed and was not aware that she was parting with her interest in the land[145].

82 The need for amendment will often arise because of some error or mistake having been made in the drafting of the existing pleading or in a judgment about

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140 (1910) 11 CLR 171; [1910] HCA 40.

141 *O'Keefe v Williams* (1910) 11 CLR 171 at 205.

142 *O'Keefe v Williams* (1910) 11 CLR 171 at 205.

143 (1887) 13 VLR 933.

144 *Dwyer v O'Mullen* (1887) 13 VLR 933 at 939 per Higinbotham CJ.

145 *Dwyer v O'Mullen* (1887) 13 VLR 933 at 934.

what is to be pleaded in it. But it is not the existence of such a mistake that founds the grant of leave under rules such as r 501(a), although it may be relevant to show that the application is bona fide[146]. What needs to be shown for leave to amend to be given, as the cases referred to above illustrate, is that the controversy or issue was in existence prior to the application for amendment being made. It is only then that it is *necessary* for the court to allow it properly to be raised to enable a determination upon it.

83 The existence of a controversy may be seen in the way in which the matter had already been pleaded, albeit inferentially, in *Tildesley v Harper* and *Dwyer v O'Mullen*; or where the issue is raised by another party in the same proceedings but in respect of which the party applying was inextricably involved, as in *Cropper v Smith*. It may be present in the nature of the bargain struck, as in *O'Keefe v Williams*. A consideration of these cases does not suggest that an unduly narrow approach should be taken to what are the real issues in controversy, although they are not, or are not sufficiently, expressed in the pleading.

84 These observations do not avail ANU. True it was that the insurers had pleaded that the values declared for the purposes of insurance had been substantially understated, but this had no relevance to Aon, having regard to the extent of the contractual obligations ANU had identified as in issue. The insurers' defences should have alerted ANU to the need to reconsider its claim against Aon, if its contractual relationship was other than it had alleged. Prior to the application to amend there was no issue about Aon's involvement with respect to the declared values. Indeed there was no issue concerning any aspect of the insurance effected with respect to the Schedule C property. There was no dispute about deductibles and none about Aon having made misrepresentations or engaging in misleading conduct. The dispute was only as to whether Aon had been obliged to effect cover over the PNI Schedule property but had not done so.

85 Rule 501(a) did not require the allowance of the amendment sought by ANU.

A multiplicity of proceedings: r 501(c)

86 In the course of argument ANU submitted that the order for amendment could be seen as supported by r 501(c) because it overcame the need for ANU to

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146 See *Tildesley v Harper* (1878) 10 Ch D 393 at 396-397 per Bramwell LJ.

bring further proceedings. ANU submitted that, at the time the application for leave to amend was heard, the time for the bringing of the claims which were the subject of the amendment had not expired. Nonetheless, in the event that leave to amend was refused, the possibility of ANU bringing further proceedings depended upon a number of matters. It required that ANU be able to abandon its case against Aon in such a way as would not preclude a later claim. Discontinuance of the existing proceeding required leave[147]. The case having been fixed for trial and leave to amend having been refused, Aon might have led evidence to answer the claim originally framed against it and moved for judgment. It cannot be assumed that ANU could have avoided a judgment being entered. That raises the question of whether further proceedings would be met by an application for a stay based upon *Port of Melbourne Authority v Anshun Pty Ltd*[148]. The issue would then be whether an exercise of reasonable diligence on the part of ANU would have led to the bringing of the claim in these, the earlier proceedings.

87 It is not immediately obvious how ANU could have dealt with an *Anshun* point in the further proceedings to which it refers. Further consideration of these matters is not required. It is sufficient for present purposes that ANU did not seek to show this Court how it might have done so. It is therefore not demonstrated that the amendment proposed was necessary to avoid multiple proceedings.

88 Rule 501(c) did not apply. The application fell to be determined solely by exercise of the power conferred by r 502(1), read in conjunction with the purposes in r 21.

Rules 502(1) and 21(1) – the power to allow amendment and the objectives

89 A power is given to the court by r 502(1) to permit the amendment of pleadings "in the way it considers appropriate". Rule 21(2) specifies, in pars (a) and (b), the objectives to be sought by the exercise of the power conferred by r 502(1). In this setting, some care is called for in describing the grant or refusal of an application to amend in such a way as to suggest a very wide discretion in the decision whether to permit amendment. The observations by Gleeson CJ,

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147 Court Procedures Rules, r 1160(2).

148 (1981) 147 CLR 589 at 602 per Gibbs CJ, Mason and Aickin JJ; [1981] HCA 45 referring to *Henderson v Henderson* (1843) 3 Hare 100 at 115 [67 ER 313 at 319].

Gaudron and Hayne JJ in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*[149] are apposite:

> "'Discretion' is a notion that 'signifies a number of different legal concepts'[150]. In general terms, it refers to a decision-making process in which 'no one [consideration] and no combination of [considerations] is necessarily determinative of the result'[151]. Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made[152]."

Their Honours went on to point out that the latitude as to choice may be considerable or it may be narrow. Given the terms of r 21, it could not be said that the latitude as to the choice of decision, as to whether to grant or refuse leave to amend, was at large. The objectives in r 21(2) are to be sought in the exercise of the power given by r 502(1).

90 The overriding purpose of r 21, to facilitate the just resolution of the real issues in civil proceedings with minimum delay and expense, is stated in the rules of other courts in Australia[153], although those purposes and the obligations cast upon the court and the parties may be stated in somewhat different terms.

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149 (2000) 203 CLR 194 at 204-205 [19]; [2000] HCA 47.

150 *Norbis v Norbis* (1986) 161 CLR 513 at 518 per Mason and Deane JJ; [1986] HCA 17.

151 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76 per Gaudron J; [1989] HCA 46.

152 See *Jago v District Court (NSW)* (1989) 168 CLR 23 at 75-76 per Gaudron J; *Russo v Russo* [1953] VLR 57 at 62 per Sholl J. See also Pattenden, *Judicial Discretion and Criminal Litigation*, 2nd ed (1990), at 5-6.

153 See *Civil Procedure Act* 2005 (NSW), ss 56-58; Uniform Civil Procedure Rules 1999 (Q), r 5; Supreme Court (General Civil Procedure) Rules 2005 (Vic), r 1.14; Supreme Court Civil Rules 2006 (SA), r 3; Supreme Court Rules (NT), r 1.10; Rules of the Supreme Court 1971 (WA), O 1, rr 4A, 4B. The Supreme Court Rules 2000 (Tas) and the Federal Court Rules (Cth) appear to be the only rules now absent such a provision.

91 In submissions before Gray J, Aon relied upon a decision of the New South Wales Court of Appeal[154] which distinguished *J L Holdings* on the basis of later provisions of the *Civil Procedure Act* 2005 (NSW). His Honour did not consider those provisions to be comparable with the Court Procedures Rules and the Act under which they were made, the *Court Procedures Act* 2004 (ACT). No issue is taken concerning that aspect of his Honour's decision. The importance of r 21 to an application for leave to amend is to be determined by reference to its own terms.

92 The purposes stated in r 21 reflect principles of case management by the courts. Such management is now an accepted aspect of the system of civil justice administered by courts in Australia. It was recognised some time ago, by courts here and elsewhere in the common law world, that a different approach was required to tackle the problems of delay and cost in the litigation process[155]. In its report in 2000, *Managing Justice: A review of the federal civil justice system*[156], the Australian Law Reform Commission noted that: "Over the last ten years Australian courts have become more active in monitoring and managing the conduct and progress of cases before them, from the time a matter is lodged to finalisation"[157].

93 Rule 21(2)(b) indicates that the rules concerning civil litigation no longer are to be considered as directed only to the resolution of the dispute between the parties to a proceeding. The achievement of a just but timely and cost-effective resolution of a dispute has an effect upon the court and upon other litigants. In

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154 *State of New South Wales v Mulcahy* [2006] NSWCA 303.

155 See for example *Department of Transport v Chris Smaller (Transport) Ltd* [1989] AC 1197 at 1207 per Lord Griffiths; and see *Galea v Galea* (1990) 19 NSWLR 263 at 281-282 per Kirby ACJ; *State Pollution Control Commission v Australian Iron & Steel Pty Ltd* (1992) 29 NSWLR 487 at 493-494 per Gleeson CJ; and *Lenijamar Pty Ltd v AGC (Advances) Limited* (1990) 27 FCR 388 at 395 per Wilcox and Gummow JJ.

156 Australian Law Reform Commission, Report No 89.

157 Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system*, Report No 89, (2000) at [6.3].

Sali v SPC Ltd Toohey and Gaudron JJ explained that case management reflected[158]:

> "[t]he view that the conduct of litigation is not merely a matter for the parties but is also one for the court and the need to avoid disruptions in the court's lists with consequent inconvenience to the court and prejudice to the interests of other litigants waiting to be heard …".

94 It will be recalled that in *J L Holdings* the plurality said that nothing in *Sali v SPC* suggested that principles of case management might be employed "except perhaps in extreme circumstances, to shut a party out from litigating an issue which is fairly arguable"[159]. Their Honours said that case management was not to be seen as an end to itself and that the ultimate aim of the court remained the attainment of justice, even in changing times[160]. In *Gale v Superdrug Stores Plc*[161] Millett LJ expressed a similar concern, regarding the need to ensure that justice is not sacrificed. Waller LJ, delivering the judgment of the Court of Appeal in *Worldwide Corporation Ltd v GPT Ltd*[162], said that such a concern did not pay sufficient regard to the fact that the courts are concerned to do justice to all litigants. Where a party had had a sufficient opportunity to plead his or her case, it may be necessary for the court to make a decision which may produce a sense of injustice in that party, for the sake of doing justice to the opponent and to other litigants[163].

95 The statement of Waller LJ identifies a fundamental premise of case management. What may be just, when amendment is sought, requires account to be taken of other litigants, not just the parties to the proceedings in question. The statement is consistent with what was said in *Sali v SPC*, which reflected a proper understanding of case management. The statements in *J L Holdings* do not

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158 *Sali v SPC Ltd* (1993) 67 ALJR 841 at 849; and see also at 843-844 per Brennan, Deane and McHugh JJ; 116 ALR 625 at 636, 629.

159 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 154.

160 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 154.

161 [1996] 1 WLR 1089 at 1098; [1996] 3 All ER 468 at 477.

162 [1998] EWCA Civ 1894.

163 *Worldwide Corporation Ltd v GPT Ltd* [1998] EWCA Civ 1894.

reflect such an understanding and are not consistent with what was said in *Sali v SPC*. To say that case management principles should only be applied "in extreme circumstances" to refuse an amendment implies that considerations such as delay and costs can never be as important as the raising of an arguable case; and it denies the wider effects of delay upon others.

96 An important aspect of the approach taken by the plurality in *J L Holdings* was that it proceeded upon an assumption that a party should be permitted to amend to raise an arguable issue subject to the payment of costs occasioned by the amendment[164]. So stated it suggests that a party has something approaching a right to an amendment. That is not the case. The "right" spoken of in *Cropper v Smith* needs to be understood in the context of that case and the Rule, which required amendment to permit the determination of a matter already in issue. It is more accurate to say that parties have the right to invoke the jurisdiction and the powers of the court in order to seek a resolution of their dispute[165]. Subject to any rights to amend without leave given to the parties by the rules of court, the question of further amendment of a party's claim is dependent upon the exercise of the court's discretionary power.

97 The objectives of case management are now expressly stated in r 21 of the Court Procedures Rules. It cannot be overlooked that later rules, such as r 21, are likely to have been written with the decision in *J L Holdings* in mind[166]. The purposes stated in r 21 cannot be ignored. The Court Procedures Rules make plain that the Rules are to be applied having regard to the stated objectives of the timely disposal of the proceedings at an affordable cost. There can be no doubt about the importance of those matters in litigation in the courts of the Australian Capital Territory.

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164 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 154: "If it is arguable, the applicants should be permitted to argue it, provided that any prejudice to [J L Holdings] might be compensated by costs"; and at 155: "[Case management] … should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence".

165 As observed by Jolowicz, *On Civil Procedure*, (2000) at 62.

166 See for example the Second Reading Speech to the Civil Procedure Bill 2005 and Uniform Civil Procedure Rules 2005 (NSW), New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 April 2005 at 15115.

98 Of course, a just resolution of proceedings remains the paramount purpose of r 21; but what is a "just resolution" is to be understood in light of the purposes and objectives stated. Speed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of proceedings. This should not detract from a proper opportunity being given to the parties to plead their case, but it suggests that limits may be placed upon re-pleading, when delay and cost are taken into account. The Rule's reference to the need to minimise costs implies that an order for costs may not always provide sufficient compensation and therefore achieve a just resolution. It cannot therefore be said that a just resolution requires that a party be permitted to raise any arguable case at any point in the proceedings, on payment of costs.

99 In the past it has more readily been assumed that an order for the costs occasioned by the amendment would overcome injustice to the amending party's opponent. In *Cropper v Smith* Bowen LJ described an order for costs as a panacea that heals all[167]. Such a view may largely explain the decision of this Court in *Shannon v Lee Chun*[168], which upheld a decision allowing the plaintiff to raise a new case at the second trial, but which imposed a condition as to costs. The modern view is that even an order for indemnity costs may not always undo the prejudice a party suffers by late amendment[169]. In the present case it is difficult to see that such an order could be sufficient compensation, given that Aon would be required to again defend litigation which was, effectively, to be commenced afresh.

100 The views expressed by Lord Griffiths in *Ketteman v Hansel Properties Ltd*[170], that justice cannot always be measured in money and that a judge is entitled to weigh in the balance the strain the litigation imposes upon litigants,

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167 *Cropper v Smith* (1884) 26 Ch D 700 at 711.

168 (1912) 15 CLR 257; [1912] HCA 52. See the reasons of Barton J at 262-263, O'Connor J at 264 and Isaacs J at 266.

169 See *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 464-465 per Toohey J; [1990] HCA 39.

170 [1987] AC 189 at 220, referred to in *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 464-465 per Toohey J, 482 per Gaudron J.

are also now generally accepted[171]. In *Bomanite Pty Ltd v Slatex Corp Aust*[172] French J said of Bowen LJ's statements in *Cropper v Smith*:

> "… That may well have been so at one time, but it is no longer true today … Non-compensable inconvenience and stress on individuals are significant elements of modern litigation. Costs recoverable even on an indemnity basis will not compensate for time lost and duplication incurred where litigation is delayed or corrective orders necessary."

101 In *Ketteman* Lord Griffiths recognised, as did the plurality in *J L Holdings*, that personal litigants are likely to feel the strain more than business corporations or commercial persons[173]. So much may be accepted. But it should not be thought that corporations are not subject to pressures imposed by litigation. A corporation in the position of a defendant may be required to carry a contingent liability in its books of account for some years, with consequent effects upon its ability to plan financially, depending upon the magnitude of the claim. Its resources may be diverted to deal with the litigation. And, whilst corporations have no feelings, their employees and officers who may be crucial witnesses, have to bear the strain of impending litigation and the disappointment when it is not brought to an end. The stated object in the Court Procedures Rules, of minimising delay, may be taken to recognise the ill-effects of delay upon the parties to proceedings and that such effects will extend to other litigants who are also seeking a resolution in their proceedings.

102 The objectives stated in r 21 do not require that every application for amendment should be refused because it involves the waste of some costs and some degree of delay, as it inevitably will. Factors such as the nature and importance of the amendment to the party applying cannot be overlooked. Whilst r 21 assumes some ill-effects will flow from the fact of a delay, that will not prevent the parties dealing with its particular effects in their case in more detail. It is the extent of the delay and the costs associated with it, together with

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171 *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364 at 376-377 [37] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; [2006] HCA 32; *GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710 at 715-716 per Samuels JA; *Worldwide Corporation Ltd v GPT Ltd* [1998] EWCA Civ 1894.

172 (1991) 32 FCR 379 at 392.

173 *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220; *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 155.

the prejudice which might reasonably be assumed to follow and that which is shown, which are to be weighed against the grant of permission to a party to alter its case. Much may depend upon the point the litigation has reached relative to a trial when the application to amend is made. There may be cases where it may properly be concluded that a party has had sufficient opportunity to plead their case and that it is too late for a further amendment, having regard to the other party and other litigants awaiting trial dates. Rule 21 makes it plain that the extent and the effect of delay and costs are to be regarded as important considerations in the exercise of the court's discretion. Invariably the exercise of that discretion will require an explanation to be given where there is delay in applying for amendment.

103 The fact that an explanation had been offered for the delay in raising the defence was regarded as a relevant consideration in *J L Holdings*[174]. Generally speaking, where a discretion is sought to be exercised in favour of one party, and to the disadvantage of another, an explanation will be called for. The importance attached by r 21 to the factor of delay will require that, in most cases where it is present, a party should explain it. Not only will they need to show that their application is brought in good faith, but they will also need to bring the circumstances giving rise to the amendment to the court's attention, so that they may be weighed against the effects of any delay and the objectives of the Rules. There can be no doubt that an explanation was required in this case.

Application of r 502(1) and r 21 to this case

104 The salient features of the application for leave to amend in this case were, as Lander J pointed out in his dissent, that the amendments sought to introduce new and substantial claims; they were so substantial as to require Aon, in effect, to defend again, as from the beginning; the application was brought during the time set for the trial of the action and would result in the abandonment of the trial if granted; and there was a question whether costs, even indemnity costs, would overcome the prejudicial effects on Aon if the litigation to this point was not productive of an outcome.

105 The primary judge was in error in failing to recognise the extent of the new claims and the effect that amendment would have upon Aon. His Honour was in error in failing to recognise the extent to which the objectives of r 21 would not be met if the amendments were allowed. The known ill-effects of a

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174 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 152.

delayed determination, which informed the purposes and objectives of the Rule, were present. Rule 502(1) read with r 21 did not provide an unfettered discretion to grant leave to amend. The objectives of r 21 were to be pursued in the exercise of the power conferred by r 502(1). The fact that ANU's new claims were arguable was not itself sufficient to permit amendment and could not prevail over the objectives of r 21. A "just" resolution of the proceedings between ANU and Aon required those objectives to be taken into account.

106 Given the requirements of the Rule and the effects associated with delay, it was incumbent upon ANU to tender an explanation as to why the matter had been allowed to proceed to trial in its existing form. It needed to explain why it was seeking leave to amend at the time of the trial, when the two insurer's defences had identified the issue central to the claim it sought to bring against Aon more than 12 months earlier. None was given. His Honour was in error in accepting that ANU had provided a satisfactory explanation. The statements made by counsel foreshadowing leave to amend were not evidence. The ANU's solicitor's later affidavit did not support them. In addition to the defences, the letters written by Chubb in 2003 showed that ANU was told of the importance of the valuation of the property to the insurers long before the receipt of more recent documentation. ANU's solicitor did not suggest that the defences, raising the same matter in connection with the misrepresentations, were misunderstood in their potential relevance to Aon. He did not say that ANU was *first* alerted to Aon's possible involvement as a result of what was said in mediation.

107 The possibility that ANU was not in a position to explain itself was adverted to in argument on the appeal but that possibility could not be taken very far. ANU's solicitor could have said that ANU only realised the potential for claim as a result of confidential communications, but he made no such claim. In a carefully worded affidavit he merely said (i) that the discussions were agreed to be kept confidential; and (ii) at the conclusion of mediation Senior Counsel advised of the need to amend. In cross-examination he agreed that the decision to amend was made on the basis of information received during mediation. At no point did he suggest that this was the first time that ANU appreciated that it had a claim against Aon of the kind it sought to raise by amendment.

108 This evidence was no basis for a finding that there had been an oversight and that ANU's lawyers had not appreciated Aon's possible involvement until the mediation talks. It invited speculation as to whether ANU first realised the potential for a claim against Aon during mediation, assuming there to be a basis for such a claim. One possibility is that ANU only decided to proceed against Aon when it realised the insurers would not settle for a higher sum. If so, that was the basis upon which it had determined to proceed to trial. The absence of

explanation suggests the possibility that none which favoured ANU could be offered.

109 Whatever was the reason for the delay in applying for the amendment, none was provided. There was no mistake of judgment, such as that to which Bowen LJ referred, which might be weighed against the effects of the delay, effects which r 21 required to be taken seriously into account.

110 The primary judge was mistaken as to the extent of the new claims and what would be required of Aon if they were permitted and the matter effectively re-litigated. His Honour incorrectly elevated the fact that the claim was arguable to a level of importance it did not have. His Honour failed to recognise the importance of the objective stated in r 21, of the timely disposal of the proceedings. The exercise of the power conferred by r 502(1) miscarried[175]. The application should have been refused.

Conclusion and orders

111 An application for leave to amend a 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 power to permit amendment should be weighed. The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend. Statements in *J L Holdings* which suggest only a limited application for case management do not rest upon a principle which has been carefully worked out in a significant succession of cases[176]. On the contrary, the statements are not consonant with this Court's earlier recognition of the effects of delay, not only upon the parties to the proceedings in question, but upon the court and other litigants. Such statements should not be applied in the future.

112 A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed

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175 *House v The King* (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ; [1936] HCA 40.

176 See *John v Federal Commissioner of Taxation* (1989) 166 CLR 417; [1989] HCA 5; *Imbree v McNeilly* (2008) 82 ALJR 1374 at 1385-1386 [45] per Gummow, Hayne and Kiefel JJ; 248 ALR 647 at 659; [2008] HCA 40.

upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient *opportunity* to identify the issues they seek to agitate.

113 In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy[177]. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.

114 Rule 21 of the Court Procedures Rules recognises the purposes of case management by the courts. It recognises that delay and costs are undesirable and that delay has deleterious effects, not only upon the party to the proceedings in question, but to other litigants. The Rule's objectives, as to the timely disposal of cases and the limitation of cost, were to be applied in considering ANU's application for amendment. It was significant that the effect of its delay in applying would be that a trial was lost and litigation substantially recommenced. It would impact upon other litigants seeking a resolution of their cases. What was a "just resolution" of ANU's claim required serious consideration of these matters, and not merely whether it had an arguable claim to put forward. A just resolution of its claim necessarily had to have regard to the position of Aon in defending it. An assumption that costs will always be a sufficient compensation for the prejudice caused by amendment is not reflected in r 21. Critically, the matters relevant to a just resolution of ANU's claim required ANU to provide some explanation for its delay in seeking the amendment if the discretion under r 502(1) was to be exercised in its favour and to the disadvantage of Aon. None was provided.

115 In view of the conclusion reached concerning the amendments, it is not necessary to further consider Aon's contentions based upon abuse of process.

116 Since the drafting of these reasons we have had the opportunity to read the reasons, in draft, of the Chief Justice. There may be some point of distinction in our views as to what *J L Holdings* holds. We do not understand there to be any difference between us as to the principles which should now be applied in relation to applications for amendment.

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177 Jolowicz, *On Civil Procedure*, (2000) at 79.

117 The appeal should be allowed with costs, the orders of the Court of Appeal and of the primary judge set aside, except for the orders that Aon have leave to appeal and that ANU pay Aon's costs of that appeal. In lieu it should be ordered that the appeal to that Court be allowed, the application by ANU for leave to amend be dismissed and that it pay Aon's costs of that application. The parties will need to list the matter in the Supreme Court of the Australian Capital Territory for further directions in the proceedings towards their final determination.

118 HEYDON J. The circumstances are set out in the joint reasons.

The interrelationship between rr 21, 501 and 502

119 The only satisfactory method of reconciling rr 21, 501 and 502 of the Court Procedures Rules 2006 (ACT)[178] ("the Rules") is to accept the following conclusions arrived at in the joint judgment:

(a) That r 501 creates a duty, which operates in relation to the "real issues" in the proceeding between the parties as it exists at the time when the court is considering whether it is necessary to make an amendment[179].

(b) That r 502 creates a discretion, which operates in relation to an application for leave to make amendments raising new issues – issues which were not in controversy between the parties before the time when the application for leave was made; and that among the factors relevant to the exercise of that discretion are those referred to in r 21[180].

That result is to be supported, not by reference to authorities decided on other rules of court, but as a matter of construction of those particular rules of court.

Application of r 501

120 The following conclusions of the joint judgment must also be accepted: that r 501(a) did not apply in the present circumstances[181]; and that ANU did not succeed in demonstrating that r 501(c) could assist its position[182]. Obviously r 501(b) could not apply. It follows that r 501 had no application to ANU's desire to amend.

What rule did ANU rely on before the primary judge?

121 According to the operative part of the primary judge's reasons, ANU's application for leave to amend the statement of claim was made in reliance only

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178 They are set out at [58]-[60] above.

179 At [69] and [82] above.

180 At [71] above.

181 At [85] above.

182 At [86]-[88] above.

on r 501[183]. If that were so, the consequence of r 501 being inapplicable is that the primary judge erred in law in failing to dismiss the application for leave to amend.

122 Was it so?

123 In his second address presented at the adjourned application for leave to amend on 27 November 2006, after the first address had been delivered and the evidence had closed, senior counsel for ANU read r 501, and submitted that r 501(a) and (c) applied[184]. He then read in part or referred to r 502(1), (2) and (3), rr 503-504, 506-507, 509 and 511-513. These rules had come into force on 1 July 2006, about five months earlier; and the primary judge disavowed familiarity with the rules "in their new form". Counsel's reading of r 502(1) was part of a general survey of the Rules. He made no specific point about r 502(1). He then said: "[T]he overriding purpose of amendments is to ensure that the real questions in the proceedings are determined". This was to use the language of r 501(a), not r 502(1). He reiterated the submission at the conclusion of his address. In the course of that half hour address, he made no further reference to the Rules. In particular, he did not refer to r 21. Counsel for Aon at one point referred to r 21, to which the primary judge replied that he understood that r 21 stated the purpose of the Rules, but that r 501 was a specific provision requiring that "all necessary amendments of a document … be made for the purpose of deciding the real issues in the proceedings". Counsel for Aon then submitted that r 501 had to be read in the light of the objectives set out in r 21(2)(a) and (b), and that *Queensland v J L Holdings Pty Ltd*[185] was not decided on enactments of the type that now control the power of amendment granted to the Supreme Court of the Australian Capital Territory. Apart from a reference to r 513 in relation to costs, there was no further reference to the Rules. Counsel for ANU did not say that his application was based on r 502 as well as r 501 or that the trial judge should not limit his attention to r 501.

124 Neither the written submissions prepared by Aon and handed up to the primary judge on 27 November 2006, nor the later written submissions which the primary judge gave leave to file after that day, are in the appeal books or the file of this Court.

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183 *The Australian National University v Chubb Insurance Company of Australia Ltd* [2007] ACTSC 82 at [16]-[17]. There is a reference to r 507 at [1], but the topic is not returned to.

184 The senior counsel who appeared for ANU in this Court did not appear before the primary judge or the Court of Appeal.

185 (1997) 189 CLR 146; [1997] HCA 1.

125 It follows that, so far as the materials before this Court indicate, the primary judge was correct to treat the application as being based only on r 501. Since r 501 could not apply, and since he himself did not identify any other possibly relevant source of power, he erred in not dismissing the application.

What rule was relied on before the Court of Appeal?

126 In the reasons for judgment of the Court of Appeal, the question whether leave to amend was correctly granted was approached only by reference to rr 21 and 501, not r 502. Rule 502 was not quoted or even mentioned. Assuming that this silence corresponded with a silence in the parties' argument, it follows that the Court of Appeal erred in failing simply to allow the appeal to it on the ground that the basis for the primary judge's grant of leave, r 501, did not apply.

What rule was relied on in this Court?

127 The same position initially prevailed in this Court. Although ANU's written submissions did make reference to r 502 and its possible interrelation with r 501, they posed the primary question as turning on r 501.

128 Early in ANU's oral submissions in this Court it said:

> "As has been remarked in the reasons of the courts below, as has been remarked already in [argument] today, the terms of rules 501 [and] 502 may tolerably be regarded as 21st century equivalents with very little difference from the 19th century precursors which have been discussed."

In actuality, r 502 had not been mentioned in oral argument, had not been mentioned in the judgments of either the Court of Appeal judges or the primary judge, and had been referred to only on one occasion in passing before the primary judge. ANU then attributed to the Court of Appeal, as it had in its written submissions, an attention to r 502 which did not exist. A little later ANU said: "it is possible that [r] 502 has nothing to do with a case of this kind". Certainly, in the courts below ANU does not appear to have submitted that it had anything to do with it.

129 It would follow that, in view of its failure under r 501, the reliance which ANU now places on r 502 would require it to file a notice of contention. This it did not do.

Exercise of r 502 discretion in this Court

130 If the absence of a notice of contention were the only obstacle to ANU's success in this Court, it would be a very slight one. That is because eventually adequate attention was given in argument to the construction of r 502 and its

interrelationship with r 501, and the notice of contention could have been filed late. The conclusion arrived at in the joint judgment means that this Court must exercise the discretion conferred by r 502 for itself – for the first time in these proceedings. It is not a question of setting aside an erroneous exercise of discretion under r 502 by the courts below, for they did not embark on that enterprise and were not invited to do so.

131 The discretion conferred by r 502 should be exercised against ANU because of certain considerations pointed out in the joint judgment[186]. However, there is one matter to be added to those considerations. It will be remembered that among the reasons given by counsel for ANU for the amendment and the adjournment were:

> "the receipt by [ANU] of a number of affidavits from Chubb and CGU, in the period between 8 and 10 November, that is to say, late last week, and the receipt of two sets of further discovery documents from Chubb, late last week, relating to their underwriting processes".

The affidavit sworn by ANU's solicitor in support of the adjournment application referred to two affidavits filed by Chubb and served on 8 and 10 November 2006, and also to further discovery of documents on Chubb on 7 and 10 November 2006. But nothing in these affidavits or documents was identified as pointing for the first time to any possible amendment, or as justifying any adjournment. There was nothing to indicate that whatever was seen as relevant had not been available earlier if diligence had been employed.

132 That consideration, and some of those pointed out in the joint judgment, are subject to one qualification. It concerns the following paragraph of the affidavit sworn by ANU's solicitor:

> "At the conclusion of the mediation, Senior Counsel for ANU advised me that it would be necessary, and appropriate, in order to fully articulate the claims to be made against Aon, that leave of the Court be sought to file a second further amended statement of claim. ANU instructed me on 14 November 2006 to accept Senior Counsel's advice."

It may be inferred that senior counsel for ANU had offered detailed justification for the advice to which the solicitor referred. It may also be inferred that the solicitor, in seeking instructions from ANU, had given detailed explanations as well. To the extent that the affidavit, by non-disclosure of that detail, was claiming privilege for it, it would not have been open at common law to draw

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186 At [104]-[110] above.

any inference from the claim[187]. The *Evidence Act* 1995 (Cth), which applies in the Australian Capital Territory, does not make it clear whether the common law position in that respect continues[188]. If for some reason the common law position does continue, it would not be open to infer from the absence of an explanation, so far as a possible explanation may have rested on legal advice, that no explanation which favoured ANU could be offered. In view of the fact that there was no argument about the possibility in law of doing so, it is undesirable to draw any inference from the failure to reveal the legal advice.

Queensland v J L Holdings Pty Ltd

133 In relation to *Queensland v J L Holdings Pty Ltd*[189], it is sufficient to hold that, at least in jurisdictions having rules similar to rr 21 and 502, that case has ceased to be of authority. It is necessary to apply the Rules without any preconceptions derived from what was said in that case. There is a common opinion – it is far from universal, but it is common – within the judiciary and the legal profession that *Queensland v J L Holdings Pty Ltd*, whether it has been correctly understood or not, has had a damaging influence on the conduct of litigation. One judge who held that opinion was Bryson J. In a passage which merits preservation from the oblivion of unreported judgments, he pointed out one undesirable consequence of the way *Queensland v J L Holdings Pty Ltd* has been understood[190]:

> "In view of the state of the law governing allowance of amendments, amendment applications brought forward before the trial began were treated with uncomplaining supine liberality, notwithstanding that they sometimes showed that problems had been addressed years after they should have been. I do not think that the law requires the discretion to allow amendments to be exercised in entire innocence of understanding the obvious impact of forbearance and liberality on the behaviour of litigants, who have diminished incentive to do their thinking in due time and to tell the court and their opponents their full and true positions. When forbearance and liberality are extended to a delinquent the burden of inconvenience and lost opportunities for preparation tends to fall heavily and without adequate repair on parties who have not been delinquent. A relative disadvantage is imposed on those who proceed

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187 *Wentworth v Lloyd* (1864) 10 HLC 589 at 590-592 [11 ER 1154 at 1154-1155].

188 See *Evidence Act* 1995 (Cth), ss 117-126, and cf ss 20 and 89.

189 (1997) 189 CLR 146.

190 *Maronis Holdings Ltd v Nippon Credit Australia Pty Ltd* [2000] NSWSC 753 at [15].

> methodically and in due time; their interest in procedural justice should claim at least as much consideration as the interests of the applicant for a late amendment who does not have to look far for the creator of his difficulty. It is even conceivable that a litigant might deliberately pursue a course which will impose disadvantage on an opponent who has to reconsider his ground and change course in the midst of a contest."

134 Below the approach of ANU to the conduct of this litigation and the approach of the Supreme Court to its resolution will be described. Those approaches reflect a certain culture and mentality. If *Queensland v J L Holdings Pty Ltd* is a cause of that culture and mentality, the common opinion just referred to receives considerable support. Though Aon made some limited complaint in the course of argument about the approaches in question, there was no complaint about them in the grounds of appeal. But, lest silence be taken as approval of what happened, it is necessary to say the following.

A place in the precedent books

135 At times in its address to this Court, ANU seemed to suggest that the presentation and adjudication of the case in the courts below merited it securing a place in the precedent books. Did it?

136 *Events before the proceedings began*. The fire damage to ANU's property took place on 18 January 2003. That damage was extensive. The interruption to ANU's normal activities must have been profound. Proceedings did not begin against the three insurers until 10 December 2004. Although some insured persons, and their advisers, consider that the best way to deal with recalcitrant insurers is to serve initiating process first and negotiate afterwards, this delay is not in itself enough to raise any criticism. On 2 April 2003, 24 October 2003 and 20 January 2004, Chubb informed ANU that it declined to meet ANU's claim against it in full. It may be assumed that the balance of the delay was accounted for by attempts to resolve the dispute without litigation.

137 *The character of the litigation commenced.* The litigation thus commenced was commercial litigation. While in general it is now seen as desirable that most types of litigation be dealt with expeditiously, it is commonly seen as especially desirable for commercial litigation. Its claims to expedition may be less than those of proceedings involving, for example, extraordinary prejudice to children; or the abduction of children; or a risk that a party will lose livelihood, business or home, or otherwise suffer irreparable loss or extraordinary hardship, unless there is a speedy trial[191]. But commercial litigation does have

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191 See the discussion of expedited appeals by Sir Thomas Bingham MR, Mann and Saville LJJ in *Unilever plc v Chefaro Proprietaries Ltd* [1995] 1 WLR 243 at 246-247; [1995] 1 All ER 587 at 591.

significant claims to expedition. Those claims rest on the idea that a failure to resolve commercial disputes speedily is injurious to commerce, and hence injurious to the public interest.

As Rogers J stated in *Collins v Mead*[192]:

> "For example, if banks are unable to collect overdue loans from borrowers speedily, if small traders can not recover monies owed to them speedily the commercial life of the [c]ommunity is detrimentally [a]ffected. The consequences of delay in the hearing of a commercial dispute … will impact not just on the two or three persons or companies who are the immediate parties, but may have an effect on the creditors of the business, on employees, and perhaps on other traders unrelated to the immediate dispute."

Commercial life depends on the timely and just payment of money. Prosperity depends on the velocity of its circulation. Those who claim to be entitled to money should know, as soon as possible, whether they will be paid. Those against whom the entitlement is asserted should know, as soon as possible, whether they will have to pay. In each case that is because it is important that both the claimants and those resisting claims are able to order their affairs. How they order their affairs affects how their creditors, their debtors, their suppliers, their customers, their employees, and, in the case of companies, their actual and potential shareholders, order their affairs. The courts are thus an important aspect of the institutional framework of commerce. The efficiency or inefficiency of the courts has a bearing on the health or sickness of commerce.

138 In the present proceedings, it was vital for ANU to know how much of its loss would be recovered. It was vital for ANU to know how soon it would be recovered. It was vital because the question of how fully its pre-fire activities could be resumed turned on those points. It was vital for the insurers to know how much of their net worth would have to be paid to ANU. It was vital because the question would have affected the setting of premiums, the making of investment decisions, the reputation of the insurers for credit worthiness, and, at least potentially, their survival. Similar but not identical considerations doubtless arose for Aon once it was joined as fourth defendant.

139 *Events before the trial date was fixed.* On 6 June 2005, ANU joined Aon as fourth defendant to an amended statement of claim. That document alleged that Aon had failed to procure insurance for the buildings in the PNI Schedule. On 19 September 2005, ANU filed a further amended statement of claim. However, it made no new claim against Aon. On 12 April 2006, the Supreme

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192 Unreported, Supreme Court of New South Wales, 7 March 1990.

Court of the Australian Capital Territory fixed the trial of the proceedings for four weeks commencing on 13 November 2006.

140 *ANU's concern about delay.* On 17 July 2006, ANU filed written submissions opposing a motion by Chubb and CGU seeking a separate determination of liability and quantum. In those written submissions, ANU rightly complained about the lateness of the application given the lengthy period during which the proceedings had already been on foot.

141 *The events of 15 November 2006.* It was against the background of those circumstances that ANU announced on 15 November 2006, the third day of the period of four weeks set down for the trial, that it wished to apply for an adjournment in order to amend its further amended statement of claim against Aon. It might be thought that that was a surprising announcement. The sum of money which ANU had obtained or was to obtain from the proceedings was quite large – the total of what it had been paid earlier, and what it was to be paid under the settlements. But its outstanding claim against Aon was much larger – approximately $75 million. It had secured from a busy court a lengthy period in which to have its claims tried. Leaving aside any objections which Aon might have had to the amendments, it would seem to have been in ANU's interest to draft whatever amendments it wanted to make as quickly as possible and use the time set aside for claims against the four defendants to have tried its claims against the remaining one[193].

142 However, it is not possible to arrive at an assessment of the thinking underlying ANU's announcement. Indeed, it is irrelevant to do so. The tactics of barristers and their clients are influenced by the goals they are trying to achieve, and are moulded by pressures to which they are subject. Courts often have no more than an incomplete understanding of those goals and pressures.

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193 On 15 November 2006 counsel for Aon contended that ANU had not complied with the court's orders to prepare and file an agreed bundle of documents, a chronology and an opening. He continued:

> "Now, that leads, critically, to the assessment that this plaintiff was never intending to run this case against us if it couldn't settle with us, and we made it clear at the mediation what our position was.
>
> Now, your Honour, it's transparent, in our submission, that the plaintiff is now seeking to avoid starting the case against us, seeking to avoid having to run a case on the basis that it pleaded, and on the basis that it was prepared to go to trial."

The primary judge did not deal with this question in his reasons for his decision to allow the amendment.

143 But if barristers propose, it is courts which must dispose. Whether or not ANU's announcement was surprising, the primary judge's reaction to ANU's application certainly was. Applications to adjourn trials and related applications for amendments to pleadings are usually decided with extreme speed. At the time when those applications are made, the parties are very familiar with the proceedings in their unamended form; the judge often is; and at least the moving party is familiar with the amended case it wishes to advance. It is not usual to permit a month of court time set aside for a trial to be taken up with interlocutory steps conducted in a leisurely fashion.

144 Yet, by degrees, this is what happened. ANU did not complain that the recently served affidavits, the recently provided discovery, the information it had learned during the mediation or the fact and terms of the settlements made it necessary that there be an adjournment with a view to assessing the significance of what had been learned and formulating a new theory of the case before attention could be given to drafting amended pleadings. ANU's statements to the primary judge on 15 November 2006 indicate that although it had taken counsel "some days and weeks to come to understand it", it had a good understanding of its new theory of the case. All that was lacking was its expression in the form of pleadings[194]. ANU informed the judge that it had not been able to prepare the amendments between the end of the mediation on 14 November 2006 and the start of the hearing on 15 November 2006. It also said that it did not "want to rush it". And it appealed to the adage "More haste less speed", though neither the parties nor the primary judge professed to understand its meaning. In response, the primary judge gave ANU seven days within which to file and serve the amended pleading and the evidence relied on (ie by 22 November 2006), gave Aon two further days to file evidence in reply, and listed the amendment application for hearing on 27 November 2006.

145 *The position as at 15 November 2006 reviewed.* Pausing at this point, it is convenient to identify a school of thought hostile to the assumptions underlying ANU's tactics and the primary judge's response to them. Adherents to that school of thought would think that a party in the position of ANU was under an obligation to burn the midnight oil, to move with a degree of haste, and even to "rush it". After all, ANU was represented by senior counsel who had delivered a well prepared, lucid and detailed address in order to secure the adjournment from

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194 Reference was made to the need to obtain, file and serve further evidence, and to the need for a change of senior counsel in view of the fact that existing senior counsel had advised ANU on the reasonableness of the settlements. Those factors played no significant role in the arguments in this Court criticising or defending the courts below, and may be put to one side. The needs in question would not have arisen if the amendments were disallowed, and might not have arisen if the amendments were allowed and Aon's amended defence made relevant admissions.

15 November to 27 November 2006. It was represented also by two junior counsel and a substantial firm of solicitors. It employed at least one solicitor of its own in-house. It was seeking to recover $75 million in a commercial cause which it had chosen to institute in a busy court which had 18 days left of the time fixed for the trial. The amendments should have been ready by the morning of 15 November 2006, or at least it should have been possible to provide them within a few hours thereafter.

146 The course adopted by the primary judge had the effect of giving a party seeking to adjourn a four week hearing half of what it wanted before any opportunity to investigate the merits of that course had been afforded. Correspondingly, it took away from the other party, which resisted the adjournment and the amendment, any opportunity to oppose granting the first half of the adjournment which ANU desired. At the time when the primary judge adopted the course he did, it remained an open question whether the amendments would be allowed. If they were allowed, perhaps a vacation of all the hearing dates would be called for. If a speedy decision were made not to allow them, there was no impediment to the trial proceeding on the existing pleadings within the four weeks fixed. The course adopted by the primary judge – granting the first half of the adjournment which ANU desired – did create a potential impediment.

147 The other half of what ANU wanted was also granted before an opportunity to assess its desirability had been fully afforded. This came to pass by reason of the following events.

148 *The events of 27 November 2006.* On 27 November 2006 ANU made its application. It was styled as an application for amendment of the pleadings. But ANU did not resile from the assertions made on 15 November 2006 that adjournment of the proceedings, too, was necessary on the grounds then assigned. Aon so treated the application. By lunchtime both the evidence and ANU's two addresses had been completed. Aon's counsel then addressed in the course of the afternoon, partly by reference to written submissions which were handed up shortly before the luncheon adjournment. When that address ended, counsel for ANU informed the court that he would not be able to finish his reply before the normal time for adjournment. He said that Aon's written submissions contained 18 authorities, that he had not read them, and that he needed time to do so if he were to be in a position to assist the court. Counsel for ANU asked for leave to file written submissions in reply to Aon's by 30 November 2006. In response the primary judge gave leave to do so by 1 December 2006. He then gave leave to Aon to file further written submissions by 8 December 2006. In that fashion, the whole of the four weeks set aside for the trial vanished.

149 *The events of 27 November 2006 reviewed.* Pausing again, it is necessary to notice that adherents to the school of thought identified earlier would be fundamentally hostile to the assumptions underlying the primary judge's

directions. Adherents to that school of thought would maintain that in circumstances where the primary judge had not, before 27 November 2006, made any order vacating the trial dates for the four week trial, there was no reason why ANU should not have presented its reply the following day. Neither the transcript for 27 November 2006 nor any evidence before this Court suggests that either the primary judge or the legal representatives of the parties were unable to be present on 28 November 2006 to complete the argument.

150 Nor is there any material explaining why the primary judge was not in a position to deliver judgment immediately on the termination of the argument, particularly since, if argument had proceeded, as it should have, on 28 November 2006, he would have had the advantage of the overnight adjournment to consider the matter. Decisions about amendments and adjournments are pre-eminently interlocutory decisions on matters of practice and procedure. Particularly in relatively urgent matters like commercial cases involving claims for large sums of money, where an expeditious resolution of the issues is desirable for the reasons already noted[195], decisions about amendments and adjournments must be made speedily. As counsel for Aon pointed out just after the primary judge completed the making of directions which terminated on the last day of the four week trial period, if ANU's application failed, the trial should proceed. He said: "we would really like to know where we stand". The primary judge said the matter "is now to be determined ultimately after 8 December".

151 Indeed it was – more than ten months after 8 December, namely on 12 October 2007.

152 *The primary judge's delay in giving judgment.* There may be some good explanation for the primary judge's delay in giving judgment. However, the materials before this Court do not indicate, and the parties did not suggest, any good explanation. Unless there is some good explanation for that delay which has not been revealed to this Court, it is deplorable. Authority both in England and in intermediate appellate courts in this country would correctly regard ten months as an excessive period of reservation, even for the most complex of trials or appeals[196]. In relation to a fairly routine procedural application, even assuming a short period of reservation were justifiable, the delay in giving judgment in this case is alien to every axiom of modern litigation. It is particularly inappropriate in commercial litigation. For what is the point of expediting interlocutory steps and fixing early trial hearings if judgments,

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195 See above [137].

196 See *Friend v Brooker* (2009) 83 ALJR 724 at 746 [113], n 110; 255 ALR 601 at 628; [2009] HCA 21.

particularly interlocutory judgments, are not "relatively speedy"[197]? In 1954, in a joint judgment, Jenkins LJ, Hodson LJ and Vaisey J said: "[f]ew judgments are reserved"[198]. That is no longer true. It is understandable why the position has changed. But the reasons why courts reserve more often are not considerations justifying lengthy periods of reservation.

153 Aon rightly submitted that the judgment was "infected by heavy delay". Aon also rightly suggested that the delay led to some of its deficiencies – failure to refer to the affidavit evidence or the cross-examination of ANU's solicitor, failure to appreciate the gulf between what counsel for ANU said were the reasons for the amendment and what the evidence on the point was, and failure to identify what factors, if any, there were which explained ANU's failure to appreciate and raise the new claims earlier.

154 It is also true to say that all the procedural directions made on 15 November 2006 and 27 November 2006 were alien to the axioms underlying modern litigation. Contrary to the precepts of r 21, those directions did not "facilitate the just resolution of the real issues in civil proceedings with minimum delay and expense". Nor did they achieve "the timely disposal of the proceedings". And they did not achieve "the timely disposal of … all other proceedings in the court". That is because the failure of the primary judge to resolve the applications described on 15 November 2006 speedily meant that the dates for trial of the ANU-Aon proceedings were lost, that those proceedings would have to be heard at a future date, and that any future hearing would prevent some other set or sets of proceedings in the court being heard at the time at which they should have been heard. Further, it cannot be said that ANU complied with its obligation under r 21(3) to "help the court to achieve the objectives" set out in r 21(2).

155 *The Court of Appeal's delay in giving judgment.* Although the hearing of the appeal took place on 27 and 28 February 2008, judgment was not delivered until 25 August 2008. That is a delay of nearly six months. No explanation for that delay, either, appears in the papers or was offered by the parties.

156 *Conclusion.* The presentation and adjudication of the case in the courts below do cause it to merit a place in the precedent books. The reasons for placing it there turn on the numerous examples it affords of how litigation should not be conducted or dealt with. The proceedings reveal a strange alliance. A party which has a duty to assist the court in achieving certain objectives fails to

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197 *Rexam Australia Pty Ltd v Optimum Metallising Pty Ltd* [2002] NSWSC 916 at [29] per Einstein J.

198 *In re Harrison's Share under a Settlement* [1955] 1 Ch 260 at 276.

do so. A court which has a duty to achieve those objectives does not achieve them. The torpid languor of one hand washes the drowsy procrastination of the other. Are these phenomena indications of something chronic in the modern state of litigation? Or are they merely acute and atypical breakdowns in an otherwise functional system? Are they signs of a trend, or do they reveal only an anomaly? One hopes for one set of answers. One fears that, in reality, there must be another.

Orders

157 The orders set out in the joint judgment should be made.