LITIGATION AND DISPUTE MANAGEMENT/CIVIL PROCEDURE CASE NOTES

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CONTENTS

Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589

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Court details: High Court of Australia

Procedural history:

Port of Melbourne Authority v Anshun Pty Ltd ("*Anshun*") was an appeal from the Supreme Court of Victoria.

A workman brought an action in negligence against the Port of Melbourne Authority ("the Authority") and Anshun Pty Ltd ("Anshun"). Both defendants claimed contribution from the other. The Supreme Court of Victoria entered judgment against both defendants and costs, and ordered, in effect, that the Authority to pay 90% damages and costs to the plaintiff, and Anshun the remaining 10%.

The Authority subsequently commenced an action in the Supreme Court against Anshun claiming indemnity for the damages and costs paid to the workman, and for its own legal costs and disbursements.

At first instance, McGarvie J, relying on *Henderson v Henderson*,[1] found that the second action by the Authority against Anshun was an abuse of Court process. McGarvie J stayed the action.[2]

The Authority appealed to the Full Court of the Supreme Court, who found unless special circumstances were shown, there was no discretion to allow the matter to proceed. The Full Court found that special circumstances did not exist, and dismissed the application.[3]

The Authority appealed to the High Court.

Facts:

The Authority lent a crane to Anshun for the purpose of handling cargo and other materials. On 21 December 1973 a crane being used by Anshun was handling steel girders which struck a worker, Mr Soterales, and severely injured him. Mr Soterales sued the Authority and Anshun for damages in negligence ("the first action"). The Authority and Anshun

[1] (1843) 3 Hare 100.
[2] *Port of Melbourne Authority v Anshun Pty Ltd* [1980] VR 321.
[3] *Port of Melbourne Authority v Anshun Pty Ltd* [1981] VR 81.

claimed contributions from each other pursuant to under s 24 of the *Wrongs Act 1958* (Vic) ("*Wrongs Act*").

The agreement between the Authority and Anshun included an indemnity clause, which relevantly stated that Anshun would indemnity the Authority against all actions, proceedings and claims attributable to the use of the crane, unless the injury was caused solely by the negligence of the Authority.

The case was found in favour of Mr Soterales against both defendants with Anshun recovering contribution from the Authority for 90% of the damages, and the Authority recovering from Anshun for 10% of the damages. In effect, the Authority paid 90% of the damages and costs, and Anshun the remaining 10%.

On 24 August 1977 the Authority subsequently commenced proceedings in the Supreme Court against Anshun claiming an amount by way of indemnity for the amount the Authority had paid to Mr Soterales, plus its own costs and disbursements for the case ("the second action"). The claim was based on the indemnity agreement.

Anshun defenced the claim by way of estoppel, arguing that the Authority could have raised the claim in the first action and therefore should be estopped from arguing it now. The primary judge McGarvie J found that this was not a case of res judicata or issue estoppel since the Authority's claim had not ceased to exist following the judgment in the first action. He instead applied the principle in *Henderson v Henderson* applied, that the matter should have been raised in the earlier litigation, and perpetually stayed the proceedings.[4]

On appeal, the Full Court found that McGarvie J did not have the discretion to stay the proceedings, and that once the decision that the *Henderson v Henderson* principal applied, should have considered whether any special circumstances existed that would require the principal not be applied. They went on to consider whether any special circumstances existed and, finding none, dismissed the appeal.[5]

Issue:

In the High Court, the Authority argued that the indemnity was not part of the subject matter of the first action, not determined by the judgment in that action, and they can therefore not be prevented from litigating the indemnity matter now. In the alternative, the Authority argues that as a matter of discretion the action should not have been stayed.

[4] *Port of Melbourne Authority v Anshun Pty Ltd* [1980] VR 321.
[5] *Port of Melbourne Authority v Anshun Pty Ltd* [1981] VR 81.

Reasoning / Decision (Commentary):

There were three judgments delivered by the High Court; a joint judgment by Gibbs CJ and Mason and Aickin JJ, a two paragraph judgment by Murphy J, and a judgment by Brennan J. All three judgments held that the order to stay the action was correct, but for somewhat different reasons.

The majority judgment found that the Authority should be estopped from the second action on two grounds; firstly that it had been *unreasonable* for them not to have raised it during the first action, since using the indemnity agreement as a defence for their contribution of Mr Soterales' damages in the first action is so closely connected with the subject matter of that action it would be expected that they would raise it as a defence during the first action.[6] Secondly, that if a judgment was found in the second and new action of the indemnity, it would conflict with the judgment entered in the first action regarding contribution.[7]

The majority put emphasis on the fact that there was no reason the indemnity issue could not have been determined in the Soterales action as adding to the unreasonableness factor.[8] Even if the indemnity was excluded by way of the main cause of action between Mr Soterales and the two defendants as a whole, there was nothing to prevent the determination of the indemnity when contribution judgment was handed down, after the determination of Mr Soterales against both defendants.[9]

Both Murphy and Brennan JJ agreed with the results, but neither adopted the test of unreasonableness. Murphy J did not discuss any of the issues at length, but agreed with the majority's second point that if the case was to proceed, the judgment being sought in this case was to be inconsistent with the previous judgment already entered; it is therefore against the administration of justice to allow this action.[10] He considered important in this finding that the issue had been open for the Authority to argue in the first action.[11]

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[6] *Anshun* 602, 604 (Gibbs CJ, Mason and Aickin JJ).
[7] Ibid 596, 603 (Gibbs CJ, Mason and Aickin JJ).
[8] Ibid 596 (Gibbs CJ, Mason and Aickin JJ).
[9] Ibid.
[10] Ibid 605 (Murphy J).
[11] Ibid.

Brennan J agreed that the proceeding should be stayed, and on the point that the issue at hand was the rights and liabilities of the parties, which had already been determined in the contribution order of the first action. [12] However, contrary to the majority,[13] he found since the issue at hand was the basis of the cause of action between the Authority and Anshun in the second action,[14] the cause of action had therefore already been determined, judgment having been determined in the contribution orders, and there can therefore be no further litigation of an already determined matter. [15]

Ratio:

Where a party attempts to argue a defence in a second action that is so relevant to the subject matter of the first related action that it would be *unreasonable* to rely on it, the party will be estopped from relying on said defence. It would be unreasonable for a defence or action to be argued in a second action where, given the nature of the plaintiff's claim and its subject matter, it would be expected that the defence would be raised in the first action and thereby enable the relevant issues to be determined in the first proceeding.[16]

Obiter:

On the unreasonableness test, the majority offered little guidance as to what would actually be considered unreasonable, apart from cases where it would be expected the defendant would raise the defence in the first proceeding, outlined in the ratio above.[17] However, they did offer the following guidance:

- Considering whether a new action would be an 'abuse of process' is not of great use;[18]
- There are a variety of circumstances why a party may be justified in not litigating in one proceding, but litigating the issue in other proceedings;[19] and
- The fact that the indemnity defence required to be specially pleaded at common law is not a material consideration that makes a second course of litigation more reasonable.[20]

Order: Appeal dismissed with costs.

[12] Ibid 608-9 (Brennan J).
[13] Ibid 604 (Gibbs CJ, Mason and Aickin JJ).
[14] Ibid 615 (Brennan J).
[15] Ibid 615-6 (Brennan J).
[16] Ibid 602 (Gibbs CJ, Mason and Aickin JJ).
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Ibid 604 (Gibbs CJ, Mason and Aickin JJ).


SAMPLE ONLY

Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia (1999) 201 CLR 49

Source: Authorised version via hard copy via your law library or electronically via a subscription service; unauthorised version on Austlii.

Court details: High Court of Australia

Procedural history:

Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia (1999) 201 CLR 49 ("*Esso*") was a case on appeal from the Federal Court of Australia.

In 1996, Esso Australia Resources Ltd ("Esso") commenced proceedings in the Federal Court of Australia to appeal against assessments of income tax which had been amended. The Court made general orders for discovery in October 1996. A dispute arose over certain documents listed by Esso as privileged on the basis of legal professional privilege. The Commissioner of Taxation of the Commonwealth of Australia ("the Commissioner") filed notices of motions seeking the production and inspection of the documents.

At first instance Foster J found the Court did not have the power to exclude documents from discovery, and ordered that any documents described as dominant purpose documents, if not otherwise excluded, must be produced to the Commissoner.[21]

The Commissioner appealed to the Full Court of the Federal Court who, by majority, agreed with Foster J that the documents described as covered by 'dominant purpose' legal privilege should be produced to the Commissioner.[22]

Esso appealed to the High Court by special leave granted by McHugh, Kirby and Callinan JJ.

Facts:

In 1996 Esso commenced proceedings in the Federal Court to appeal against amended assessments of income tax for 1987 to 1992. General orders for discovery were made in October 1996. In June 1997, Esso filed and served a list of documents, claiming privilege in respect of 577 documents, as disclosure would result in disclosure of confidential information between Esso and their lawyers made for the dominant purpose of providing legal advice.

[21] Esso Australia Resources Ltd v *Commissioner of Taxation* (1997) 150 ALR 117.
[22] Esso Australia Resources Ltd v *Commissioner of Taxation* (1998) 83 FCR 511.

The Commissioner disagreed over the claims for privilege; after discussions between the parties, the number of privilege documents in dispute narrowed.

In October 1997 the Commissioner filed notices of motions seeking orders that the documents described as being made for the 'dominant purpose of providing legal advice' be produced and inspected. Esso argued firstly that the ss 118 and 119 of the *Evidence Act 1995* (Cth) ("the Act") applied to discovery and inspection. Sections 118 and 119 of the Act relevantly stated that evidence cannot adducted in court where it would result in disclosure of confidential information for the *dominant* purpose of providing legal advice or legal services relating to litigation to the client.

Secondly, in the alternative the sole purpose test established at common law in *Grant v Downs* should be treated as modified according to the tests in the Act.[23] Thirdly, that the Court should exercise a discretion under Order 15 Rule 15 of the Federal Court Rules ("the Rules") to compel the inspection of documents even if they could not be adduced as evidence, on the basis that they were necessary to the proceedings.

At first instance, Foster J considered two questions:

(a) Whether the correct test for claiming legal professional privilege in the production of discovered documents is the 'sole purpose test' or the 'dominant purpose test', and
(b) Whether the Court has power pursuant to Order 15 Rule 15 of the Rules to make an order excluding from production discovered documents on the basis that they meet the 'dominant purpose test.

He answered them by finding that the correct test to be applied to the documents over which Esso was claiming privilege was the 'sole purpose test', which is that the any communication between a lawyer and client which contains confidential information is privileged if it was created for the *sole purpose* of giving legal advice or for the purposes of litigation. The documents could therefore not be excluded, even on discretion of the Court under Order 15 Rule 15 of the Rules, on the basis that they satisfied the dominant purpose test.[24]

On appeal to the Full Court of the Federal Court, the majority held the sole purpose test was the correct tests for privileged documents, and that while the Court did have the power under Order 15 Rule 15 of the Rules to exclude documents from discovery, exercising this discretion on documents for the sole reason they meet the dominant purpose test would not be a proper exercise of that power.[25]

Issues:

[23] (1976) 135 CLR 674 ("*Grant v Downs*").
[24] Esso Australia Resources Ltd v *Commissioner of Taxation* (1997) 150 ALR 117.
[25] Esso Australia Resources Ltd v *Commissioner of Taxation* (1998) 83 FCR 511.

In the High Court, Esso argued that at common law the dominant purpose test was the preferred test for determining whether legal professional privilege applied, as the sole purpose test was unworkable and had been overturned in multiple jurisdictions. The Court should therefore depart from the decision in *Grant v Downs*.

Reasoning / Decision (Commentary):

There were four judgments delivered by the High Court, a join judgment by Gleeson CJ, Gaudron and Gummow JJ, and three individual judgments delivered by McHugh, Kirby and Callinan JJ. The majority consists of the joint judgment and that of Callinan JJ, with McHugh and Kirby JJ dissenting.

Both the majority and McHugh J, Kirby J not commenting, found that sections 118 and 119 of the Act only applied to adducing evidence, and not to a request for the making available of documents for inspection, as the legislation concerns only the adducing of evidence in litigation, and does not address discovery of document in its language.[26]

The Court was also unanimous in finding that the common law should not be modified in accordance with the Act, as the legislation does not speak to it as outlined above, in addition to the fact that the tests in those sections only applied in some jurisdictions and were not consistent with other jurisdictions.[27] There can be no analogy made between the dominant purpose test in the Act, and the test to apply to discovery of privileged documents.[28]

Further the majority and McHugh J, Kirby J not commenting, found that the discretionary power contained in the Rules did not enable a Court to disregard the rules determining the existence of privilege[29]. The joint judgment held that the purpose of the discretion contained in the Rules was not to allow a Court to subvert or circumvent the rules which determine the existence of privilege.[30]

However, only the majority found that the test at common law for legal professional privilege was whether a communication was made or prepared for the *dominant* purpose of a lawyer providing legal advice or legal services, which should apply to discovery and inspection of confidential documents.[31] The majority considered that the common law doctrine of privilege exceeded the provisions in the Act,[32] and that the sole purpose test was extraordinarily narrow.[33] Callinan J found that the sole purpose test had not, in being applied since *Grant v*

[26] *Esso* 58-9 (Gleeson CJ, Gaudron and Gummow JJ); 73 (McHugh J); 99-101 (Callinan J).
[27] Ibid 61-2 (Gleeson CJ, Gaudron and Gummow JJ); 73 (McHugh J); 86 (Kirby J); 99 (Callinan J).
[28] Ibid 59-63 (Gleeson CJ, Gaudron and Gummow JJ); 73 (McHugh J); 86 (Kirby J); 99 (Callinan J).
[29] Ibid 64 (Gleeson CJ, Gaudron and Gummow JJ); 73-4 (McHugh J); 99 (Callinan J).
[30] Ibid 64 (Gleeson CJ, Gaudron and Gummow JJ).
[31] Ibid 73 (Gleeson CJ, Gaudron and Gummow JJ); 105 (Callinan J).
[32] Ibid 55 (Gleeson CJ, Gaudron and Gummow JJ).
[33] Ibid72-3 (Gleeson CJ, Gaudron and Gummow JJ); 103 (Callinan J).

Downs was determined, been any more convenient, less productive of controversy or more productive of justice than its counterpart.[34]

The majority were heavily influenced by the fact that there is much advantage in assimilating common law and statutory privilege tests, as if the sole purpose test is accepted for discovery, and the dominant purpose test for the adducing of evidence, a party may obtain access to documents outside the courtroom which cannot be used in litigation.[35] The majority was also influenced by the fact that many other common law jurisdictions prefer the dominant purpose test,[36] and that the dominant purpose test was law in Australia prior to *Grant v Downs*.[37]

Kirby and McHugh JJ, however, were concerned that the dominant purpose test would reduce the information available for a court to make its decision, which McHugh J thought may lead a Court to make a decision contrary to what it otherwise would have,[38] and was inconsistent with the rationale of legal professional privilege in that it may protect non-legal communications.[39] They also considered that the dominant purpose test would be harder to apply than the sole purpose test, which would clog up the courts with interlocutory litigation.[40] Both McHugh and Kirby JJ acknowledge that the sole purpose test only became law with *Grant v Downs*, but saw no reason to reject it,[41] Kirby J arguing that a change in law now would disrupt more than it would solve.[42]

Ratio:

The test at common law for legal professional privilege in relation to documents is whether the communication was made or prepared for the *dominant* purpose of a lawyer providing legal advice or legal services.[43] This should be applied to the discovery and inspection of confidential communications between lawyer and client.

Sections 118 and 119 of the Act concerned the adducting of evidence in litigation, and do not apply to discovery and inspection of documents either directly or by analogy.[44] The discretion contained in the Rules was not designed to subvert or circumvent the rules which

[34] Ibid 106 (Callinan J).
[35] Ibid 55-6 (Gleeson CJ, Gaudron and Gummow JJ).
[36] Including England, Canada, New Zealand and Ireland, as well as New South Wales and the ACT; ibid 56, 73 (Gleeson CJ, Gaudron and Gummow JJ).
[37] Ibid 71 (Gleeson CJ, Gaudron and Gummow JJ).
[38] Ibid 75 (McHugh J).
[39] Ibid 76-9 (McHugh J); 91-2 (Kirby J).
[40] Ibid 74, 77 (McHugh J); 90-1 (Kirby J).
[41] Ibid 74-5 (McHugh J); 85 (Kirby J).
[42] Ibid 86-7 (Kirby J).
[43] Ibid 73 (Gleeson CJ, Gaudron and Gummow JJ); 105 (Callinan J).
[44] Ibid 59 (Gleeson CJ, Gaudron and Gummow JJ).

determine the existence of privilege,[45] and it would therefore be a misuse of power for a Court to use them in such a manner.

Obiter:

The joint judgment includes a definition of legal professional privilege which has been used as the definitive definition: [l]egal professional privilege (or client legal privilege) protects the confidentiality of certain communications made in connection with giving or obtaining legal advice or the provision of legal services, including representation in proceedings in a court'.[46]

Whatever test is chosen to apply to determining whether documents are privileged, the test much strike an appropriate balance between two public policy considerations, first that contained in privilege itself, and secondly that there should be unfettered access to relevant information in litigation.[47] The joint judgment held that it would be possible to formulate a new test that would be preferred, but as a practical matter in this case the decision is only between sole purpose and dominant purpose.[48]

Order:

The appeal to be all allowed with costs. The orders of the Full Court of the Federal Court made on 22 December 1998 be set aside, and instead ordered that the appeal be allowed with costs, and the respondents pay the costs of the proceeding before Foster J. The Questions of law raised for decision by Foster J answered: (a) the correct test is the dominant purpose test, and (b) the issue of discretion does not arise.

[45] Ibid 64 (Gleeson CJ, Gaudron and Gummow JJ).
[46] 64 (Gleeson CJ, Gaudron and Gummow JJ).
[47] Ibid 72 (Gleeson CJ, Gaudron and Gummow JJ).
[48] Ibid 73 (Gleeson CJ, Gaudron and Gummow JJ).

Aon Risk Services Australia Ltd v Australian National University

(2009) 239 CLR 175

Source: Authorised version via hard copy via your law library or electronically via a subscription service; unauthorised version on Austlii.

Court details: High Court of Australia

Procedural history:

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175 ("*Aon*") was an appeal from the Supreme Court of the Australian Capital Territory ("ACT").

Australia National University ("ANU") had commenced proceedings against three insurers and later joined Aon Risk Services Australia Ltd ("Aon") as a defendant and claimed damages against them. After ANU settled claims with two of the insurers, it applied for an adjournment of the trial and leave to amend its statement of claim against Aon.

On 12 October 2007 Gray J granted ANU leave to amend. Grey J also ordered ANU to pay Aon's costs of and resulting from the amendment, but denied to order indemnity costs.[49]

Aon appealed to the ACT Court of the Appeal, which upheld Gray J's decision on the amendment, but awarded costs on an indemnity basis.[50]

Aon appealed to the High Court of Australia, and special leave was granted to hear the appeal on 13 February 2009.

Facts:

In December 2004 ANU commenced proceedings in the Supreme Court of the ACT against three insurers, Chubb Insurance Co of Australia Ltd, CGU Insurance Ltd and ACE Insurance Ltd seeking indemnity for losses due to building damage caused by bushfires. Two of the insurers claimed that the property was not covered by ANU's insurance policies, and that under the *Insurance Contracts Act 1984* (Cth) they were entitled to reduce their liability under the policies for the property that was insured because ANU had substantially understated the value of the property.

[49] *Australian National University v Chubb Insurance Company of Australia and ors* [2007] ACTSC 82.
[50] *Aon Risk Services Australia Ltd v Australian National University* (2008) 227 FLR 388.

In June 2005 ANU joined its insurance broker Aon Risk Services Australia Ltd ("Aon") as a defendant and claimed damages based on its apparent failure to renew insurance over some of the property the insurers claimed was not covered by ANU's insurance policies.

The trial began on 13 November 2006, by which date ANU had already reached settlement with one insurer; on 15 November 2006 ANU reached settlement with the remaining two insurers. It then applied for an adjournment of the trial and leave to amend its statement of claim against Aon, claiming damages based on Aon's apparent breach of contract with and duty of care to ANU by failing to ascertain and declare the correct value of the property to the insurers, and to provide advice regarding arranging insurance to ANU.

The proposed amendments were governed by the *Court Procedure Rules 2006* (ACT). Relevantly, rule 501 provides that all 'necessary' amendments *must* be made for the purposes of determining the real issues in the proceedings and avoiding multiple proceedings. Rule 502 provides that the Court may give leave or direct a party to amend in the way it considers appropriate. The objective of the Rules is in rule 21, which gives the purpose as 'to facilitate the just resolution of the real issues in civil proceedings with minimum delay and expense'.[51]

On first instance, Gray J granted leave to amend, finding that ANU sought to raise real triable issues. Gray J placed lesser importance on ("the Rules") which emphasised delay and cost of proceedings. He considered himself bound by *Queensland v JL Holdings Pty Ltd*, which held that the paramount consideration in determining an application to amend pleadings was justice between the parties.[52]

On appeal, the ACT Court of Appeal upheld Gray J's decision, the majority finding that the Rules did not justify departing from *JL Holdings* and that Gray J had put correct weight on the issue of real triable issues being raised by the amendment.[53]

Issues:

In the High Court Aon argued that ANU's amendment should have been refused firstly because the amendment was not necessary under r 501 as it did not concern the real issue in the proceedings, and secondly that it would have been barred under 502 on the *JL Holdings* approach, or that *JL Holdings* should be reconsidered.

Reasoning / Decision (Commentary):

[51] *Court Procedures Rules 2006* (Act) r 21(1).
[52] (1997) 189 CLR 146, 154-5 (Dawson, Gaudron and McHugh JJ) ("*JL Holdings*").
[53] In his dissent, Lander J considered the primary judge to have given a number of matters insufficient weight, however agreed that the amendment should be allowed as there was no injustice to Aon in holding ANU to its decision; *Aon Risk Services Australia Ltd v Australian National University* (2008) 227 FLR 388, 421-3.

There were three judgments delivered, one by French CJ, the majority judgment by Gummow, Hayne, Crennan, Keifel and Bell JJ, and one by Heydon J, which all held that the application for amendment should have been refused. The majority did not consider there to be 'any difference' between their judgment and French CJ's as to the principles that should be applied to applications for amendment.[54]

The Court found that the amendment application came under r 502, rather than r 501, as it concerns an amendment raising entirely new issues, and should be read with the objectives in r 21.[55] Because of these objectives, parties do not have a right to amend pleadings at any times, even if subject to costs; rather, leave to amend is in the discretion of the trial judge, taking all relevant considerations into account.[56]

The Court found that in exercising that discretion, both Gray J and the Court of Appeal erred in not having sufficient regard to the following factors:

- Failing to recognise the extent of the new claims and effect the amendment would have on Aon;[57]
- Failing to recognise the extent to which the objectives in r 21 of the Rules would be frustrated if the amendments were allowed;[58]
- That a just resolution of the proceedings required the objectives in r 21 to be taken into account;[59]
- Failing to recognise that indemnity costs may or would not overcome the prejudicial effects on Aon if the amendment was allowed;[60]
- The lack of explanation from ANU as to why they were seeking leave to amend at the time of the trial; the High Court did not believe there was any evidence to form the basis of a finding that the amendment was due to an oversight;[61]
- The extent to which the matter would need to be 'effectively re-litigated' if the application was allowed;[62]
- Overstating the importance of the fact that the claim was arguable;[63] and
- That granting the application would delay the hearings of other litigants;[64] and

[54] *Aon* 218 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[55] Ibid 205 (Gummow, Hayne, Crennan, Kiefel and Bell JJ); 218 (Heydon J).
[56] Ibid 175, 217 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[57] Ibid 215 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[58] Ibid.
[59] Ibid.
[60] Ibid; 182 (French CJ).
[61] Ibid 182 (French CJ); 216 (Gummow, Hayne, Crennan, Kiefel and Bell JJ); 222 (Heydon J).
[62] Ibid 216 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[63] Ibid.
[64] Ibid 182 (French CJ); 217 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

- That granting the application would undermine public confidence in the legal system.[65]

All three judgments found that due to these factors, the application to adjourn and amend by ANU should not have allowed under r 502.[66]

This decision departed from the view established in *JL Holdings*, which held that the paramount consideration in determining an application to amend pleadings was justice between the parties,[67] and that 'case management considerations' should *only* be applied in extreme circumstances.[68] The majority and French CJ held that to the extent that *JL Holdings* denies the importance of case management as a relevant consideration in exercising discretion in such applications, it should not be followed.[69] Heydon J, on the other hand, stated that *JL Holdings* had ceased to be authority, at least in jurisdictions with rules similar to rr 21 and 502.[70]

Ratio:

The High Court held that parties do not have a *right* to amend pleadings at any time, but it is an act of discretion of the trial judge who must consider not only justice between the parties, taking all relevant matters into account, including case management.[71] It thus explicitly departed from *JL Holdings* by holding that case management considerations may sometimes, but not only in extreme circumstances, require denying an application.[72]

When faced with a decision between allowing an amendment or face multiple proceedings, a Court may examine whether a party could bring subsequent or related proceedings against the defendant, or whether an existing doctrine would prevent this.[73]

Obiter:

When considering an amendment application, the Court should consider the following relevant factors:

- The nature and importance of the amendment;[74]

[65] Ibid 195 (French CJ).
[66] Ibid 182 (French CJ); 215 (Gummow, Hayne, Crennan, Kiefel and Bell JJ); 221 (Heydon J).
[67] *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146, 154-5 (Dawson, Gaudron and McHugh JJ)
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[68] Ibid 154 (Dawson, Gaudron and McHugh JJ); 170 (Kirby J).
[69] *Aon* 182, 192 (French CJ); 215 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[70] Ibid 222 (Heydon J).
[71] Ibid182, 189, 191-2 (French CJ); 175, 217 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[72] Ibid 212 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[73] Ibid 193 (French CJ); 209 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

- The extent of the delay and the costs associated with it;[75]
- The time of the court, a publically funded resource, and whether allowing the application would be an inefficient use of that resource;[76]
- The prejudice that might reasonably be assumed to follow, and any actual prejudice shown, including the strain put on personal and business or commercial litigants;[77]
- The point the litigation has reached in relation to a trial, with applications brought where a party has had opportunity to plead their case less likely to succeed;[78]
- The explanation for the delay in applying for the amendment;[79] and
- The need to maintain public confidence in the judicial system.[80]

Although this particular application fell under r 502 of the Rules, the 'real issues in the proceeding' in r 501 refer to the issues raised in the pleadings at the time of the application for leave to amend, although the Court may look beyond the pleadings in cases where the relevant dispute or controversy exists at the time of the application.[81]

Order:

The High Court allowed Aon's appeal, setting aside the orders of the Court of Appeal and the orders of Gray J, dismissing ANU's application for leave to amend the pleadings and ordered ANU to pay Aon's costs of that application.[82]

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lawskool hopes that you have enjoyed this comprehensive case note. We welcome your feedback, please email info@lawskool.com.au with your suggestions.

[74] Ibid 214 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[75] Ibid.
[76] Ibid 182 (French CJ).
[77] Ibid 182 (French CJ); 214 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[78] Ibid 214-5 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[79] Ibid 215 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[80] Ibid 182 (French CJ).
[81] Ibid 205 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[82] Ibid 218 (Gummow, Hayne, Crennan, Keifel and Bell JJ); 229 (Heydon J).