

**HOW WILL AON EFFECT TRIAL PREPARATION --- FROM COUNSEL'S POINT OF VIEW (John Digby QC – President of the Commercial Bar Association of Victoria) : 19 August 2010**

1. Accepting that in most litigation each of the basic steps in the entire forensic exercise directed towards conducting an effective trial are interrelated and in many ways integrated, it is immediately obvious that the effect of AON on trial preparation is at the front end of litigation.
2. AON provides great incentive for all Counsel and their Instructors to be acutely mindful of the current jurisprudence in relation to amendments, the possible need to supplement evidence, from the moment when the initial instructions are taken in relation to potential litigation.
3. Because AON represents a movement towards the imposition of more rigour and less latitude where a proceeding requires change in the nature of a pleading amendment (and analogously a change in or supplementation of evidence or an adjournment by reason of other exigencies), greater than ever care and exactitude must be undertaken by Counsel (and indeed all legal advisers) from the outset.
4. This has always been how good Counsel have proceeded, however under a different judicial culture there may be said to have been some wiggly room.
5. Successful applications for leave to amend and consequential adjournments, whether to deal with the effect of pleading changes or the filing of additional evidence, or just because parties found themselves unready for trial, could be anticipated. Things have changed.
6. Accordingly, from the outset of planned litigation it is more crucial than ever that Counsel ensure that they have all necessary instructions and documents

so that there can be an early comprehensive analysis of instructions resulting in a complete identification of the issues, the necessary parties and causes of action.

7. It is also more important than ever that Counsel interrogate their instructions at the time they are initially received and I believe, in nearly all cases spend time understanding the facts and the case in conference with the Client. I am speaking here of the initial pre-issue analysis.
8. Our Court Rules and practices have recently re-emphasised these objectives (SEE: the Supreme Court , Green Book at 2.1 & 2.2 , earlier referenced by Justice Croft) .
9. Of course ensuring this approach often brings with it some practical difficulties and tensions.
10. These difficulties sometimes arise because Counsel may not be provided with adequate instructions or not involved, or adequately involved, as early in a matter as would be ideal.
11. Perhaps the Client's budget does not accommodate the early comprehensive evaluation of the matter, the comprehensive identification of the issues, the necessary parties and causes of action and therefore this may not have occurred by the time Counsel is briefed with another lawyer's Statement of Claim. These are just some of the possible difficulties.
12. When Counsel is involved early he or she must make every effort to ensure, even insist, that the necessary time and effort is devoted to producing a settled initiating pleading which is sound, and on current instructions should not require amendment down the track.
13. The tensions I referred to in the approach which I am suggesting, can arise, for example because the resultant pleaded case appears overly

faceted including in relation to multiple parties. The Courts are sometimes critical of such a pleading.

14. In this respect AON might be seen as something of a discouragement to the presentation of the narrower case concept of taking a deep breath and advancing only the strongest case available discarding the alternative and back-up type pleadings.
15. If there is sufficient diligence in the identification of issues, necessary parties and causes of action, with continuing consideration of the adequacy of the pleading (and in commercial matters in our Supreme Court, there is renewed focus at the time of the required Case Management Conference), then a late but explicable need to change the case should, notwithstanding AON, be acceptable. However, with the application of the diligence referred to, such an application is most unlikely to be needed.
16. In AON the Chief Justice emphasised that *J L Holdings* was a case where the need for the late amendment was explained by reference to recently discovered facts, and that the application was made in a timely way and well before the hearing was fixed. There was also an additional feature, namely that it was likely that the materials in the existing case would mean that the new point sought to be raised would unavoidably need to be addressed in any event.
17. By contrast in AON , Justice Hayne highlighted that a long time before the relevant application there had been letters in existence which revealed the case which ANU sought to raise by late amendment against AON, namely in relation to the significance of declared values to the insurers, and furthermore Justice Hayne pointed out that underwriting manuals, discovered

some time before the amendment application was advanced, had also exposed and highlighted the same issue.

18. I again make the point that provided that the need to amend has been addressed in a diligent manner, a late amendment, not likely to have been averted by reasonable diligence, necessary to adjudicate all the real issues between the parties, and perhaps avoid multiple proceedings, will probably be acceded to by the Courts, even post AON. This will probably be so, in the current judicial context which places much weight on the importance given to disposing of commercial disputes efficiently and the recognition of the relevance of the interests of other litigants (Sali) and the public interest in the efficient use of the Courts.
19. For Counsel, in fulfilling their obligations to advance the best available case for their Client and in fulfilling Counsel's obligation to assist the Court (and the Client) by doing their best to facilitate the timely and cost efficient disposition of proceedings, the task is often to impress upon their Instructors and Clients the need for Counsel to be involved at the earliest stage in identifying the issues, the relevant parties and the causes of action.
20. Instructors (and Clients) must of course appreciate that Counsel must therefore, at that early time, be given the necessary materials and time to do so.
21. Counsel must also impress upon their Instructors and Clients that they need to be involved in the review of pleadings as soon possible after discovery has been analysed, after the other parties pleadings have come in and after evidence has been filed (in the form of statements from opposing parties) and as one's own witnesses provide their evidence.

22. I note at this point that the AON approach, emphasising the relevance and importance of the case management objectives of minimising delay and expense (and conserving and best deploying the Court's resources), also recognises:

- the just resolution of proceedings remains paramount;
- whatever costs are ordered there is an irreparable element of unfair prejudice in unnecessarily delaying proceedings;
- inefficiencies in the use of the publically funded Court resources arising from the vacation or adjournment of trials are to be taken into account;
- maintaining the public confidence in the judicial system is also to be taken into account;
- the case management objectives do not of course require that every application for amendment should be refused because it involved the waste of some costs and some delay. As Justice Croft has also said, "*Case management is not an end in itself ...*";
- factors such as the nature and importance of the proposed amendment are relevant;
- much is likely to depend on the point the litigation has reached relative to a trial when an application for amendment is made;
- an explanation will need to be provided where there is delay in applying for amendment. Generally, as with most procedural indulgences, where a discretion is sought to be invoked, in favour of one party, and to the disadvantage of another, an explanation will be called for. (Justice Croft has warned parties to expect that the Court will conduct a *rigorous inquiry* as to whether, in relation to an

application for a late amendment, any waste of time or resources has been adequately justified by the applicant);

- from Counsel's point of view, rigorous attention will need to be given to ensuring that when amendments need to be advanced the circumstances giving rise to the need for amendment and the justification for the amendments themselves, are fully addressed including by an appropriate affidavit as to the facts;
- in AON the High Court has provided some guidance when explanation is necessary, by observing that such explanation should include showing the application is in good faith, and exposing the circumstances giving rise to the amendment.

Justice Croft has in effect said the same.

Ultimately, in summary Counsel should for the reasons I have mentioned be ever mindful that:

- (i) their obligation to settle sound and comprehensive pleadings is more important than ever;
- (ii) Instructors and their Clients need to place Counsel in a position to undertake this process, including the early identification of the important facts at the earliest stage in a matter in which litigation is planned;
- (iii) the courts, well motivated by broader considerations of efficiency, the interests of other litigants in the queue and the recognition that costs are not a complete panacea have adopted a more stringent and demanding attitude and approach applications for amendment, particularly if such an application is made at a time which will imperil the trial date;

- (iv) it is legitimate to reject applications for amendment, in appropriate circumstances based on the conduct of the applicant in the litigation;  
and
- (v) applications for amendments will need to be more fully developed and supported by relevant evidence than may have been acceptable in the past.

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