[2018] WASC 223

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	**:**	G D PORK PTY LTD -v- DERBY INDUSTRIES PTY LTD
CORAM	**:**	VAUGHAN J
HEARD	**:**	18 JULY 2018
DELIVERED	**:**	18 JULY 2018
FILE NO/S	**:**	CIV 2031 of 2018
BETWEEN	**:**	G D PORK PTY LTD Plaintiff AND DERBY INDUSTRIES PTY LTD First Defendant

Catchwords:

Practice and procedure - Application for leave to amend writ - Application to disallow amendments to pleading - Turns on own facts

Legislation:

Rules of the Supreme Court 1971 (WA), O 21 r 5

Result:

Application to amend writ dismissed

Amendments contained in pars 18 - 35 of the amended statement of claim disallowed
Amendments contained in pars 4.2 - 4.6 of the amended reply disallowed

Representation:

Counsel:

Plaintiff	:	Mr S J Davis and Mr B Gauntlett
First Defendant	:	Mr T Carmady

Solicitors:

Plaintiff	:	MDS Legal
First Defendant	:	Williams + Hughes

Case(s) referred to in decision(s):

Aon Risk Services Australia Ltd v Australian National University [2009] HCA 27; (2009) 239 CLR 175
High Time Investments Pty Ltd v Lungan [No 2] [2010] WASC 296
Sino Iron Pty Ltd v Mineralogy Pty Ltd [2014] WASC 406

VAUGHAN J:

(These reasons were delivered orally at the conclusion of the hearing. They have been edited to correct matters of grammar and infelicity of expression. Authorities and other references have also been footnoted rather than appearing in the body of the reasons.)

Introduction and background

1 There are two matters before me.

2 The first is the plaintiff's application for leave to amend its writ under O 21 r 5 of the *Rules of the Supreme Court 1971* (WA). Leave is required as the plaintiff seeks to add two new causes of action. The second application is on the part of the defendant. The defendant applies to disallow certain amendments made to the plaintiff's pleading, namely pars 20 to 35 of the amended statement of claim and par 4 of the amended reply.

3 The application to disallow the amendments is largely the other side of the coin to the application for leave to amend the writ. This is because the pleas in pars 18 - 35 are as to material facts in support of new causes of action. Without leave to amend the writ, those pleas exceed the limit of the indorsement to the writ and must necessarily be disallowed.

4 Paragraph 4 of the amended reply must be treated separately.

5 These applications have been brought on urgently in the context of what is proposed to be an expedited trial. My chambers were informed of the applications just before 6.00 pm last night. They have been heard in my CMC List at 9.30 am this morning. The applications are made in the context of a trial that is listed to commence on Monday 30 July 2018 for three days. It was necessary to determine the applications on the date they came before me and to do so orally. Accordingly, these reasons will be more truncated than might otherwise be the case.

6 The action was commenced by a writ of summons on 18 June 2018. The writ sought orders as to the proper construction of a Pig Supply Agreement. In addition, the writ sought damages. The writ also raised an estoppel claim. The nature of the estoppel claim was more fully ventilated in the plaintiff's statement of claim filed on 27 June 2018. The plaintiff articulated a conventional estoppel claim in par 17.

7 Following commencement of the proceedings application was made for an urgent interim injunction.

8 That application was listed before me on 28 June 2018. All parties sought an expedited trial on the basis that: (1) the issues had real commercial significance for the parties' businesses - indeed, there was evidence that the plaintiff's business might not be able to continue post-August 2018 without a determination of the construction question; and (2) the issues in dispute are relatively confined and suitable for an expedited trial.

9 I informed the parties that the court could accommodate an expedited trial. I offered three days commencing 16 July or three days commencing 30 July. The parties elected to take the 30 July option. The parties then prepared, by consent, a relatively tight timetable to trial. I made orders to give effect to the parties' timetable. Among other things, the timetable varied the usual rules that apply under O 21 r 3 of the *Rules of the Supreme Court* as to amendment of pleadings without leave.

10 Amendment was permitted without leave at any time prior to the date two weeks before the day fixed for the commencement of trial. In effect, that meant amendment of pleadings without leave could occur up to and including Monday 16 July 2018. The day fixed for commencement of the trial is 30 July. Two weeks before then is 16 July. The date prior is 15 July but, as that is a Sunday, O 3 r 4 of the *Rules of the Supreme Court* extends the date for amendment without leave to 16 July.

11 Accordingly, the amendments that the plaintiff has made without leave were made on the last possible day; and, effectively, only nine working days before the date listed for the commencement of trial.

12 The programming orders permit the other party to apply for disallowance of any amendment without leave within three working days after service of the amended pleading. Accordingly, the defendant's application for disallowance is within time.

The legal principles to be applied to leave to amend

13 Order 21 of the *Rules of the Supreme Court* concerns the amendment of writs and pleadings. As mentioned, ordinarily O 21 r 3 permits a party to amend a pleading without the leave of the court at any time up to seven weeks prior to the commencement of the trial. Here the orders made in programming the matter to trial have, effectively,

substituted two weeks for the seven weeks. But the purpose of the order was consistent with what is intended by O 21 r 3.

14 Order 21 r 3 was introduced in July 2010. It involved a significant change to the procedure relating to amendments, although amendments without leave might still be disallowed. The effect of O 21 r 3 (and, I interpose, the order made on 28 June 2018) is that the court's supervision over amendments to pleadings is now primarily concerned with the period shortly before and at trial.

15 Order 21 r 5 provides that the court may allow the amendment of a writ or pleading on such terms as to costs or otherwise as may be just and in such manner as the court may direct.

16 The principles concerning whether the amendment should be allowed are not prescribed by O 21 r 5. They involve the exercise of discretion in the interests of justice. The overarching principles concerning amendment of pleadings were considered by the High Court of Australia in ***Aon Risk Services Australia Ltd v Australian National University***.[1] In the joint judgment of the plurality, their Honours said:

> 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.[2]

17 The principles in ***Aon Risk Services Australia Limited v Australian National University*** were also applied by Beech J (as his Honour then was) and summarised in the context of the *Rules of the Supreme Court* in ***High Time Investments Pty Ltd v Lungan [No 2]***.[3]

18 Beech J made 10 observations:

(1) The effect of an amendment on the court and other litigants is relevant.

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[1] ***Aon Risk Services Australia Ltd v Australian National University*** [2009] HCA 27; (2009) 239 CLR 175.
[2] ***Aon Risk Services Australia Ltd v Australian National University*** [111].
[3] ***High Time Investments Pty Ltd v Lungan [No 2]*** [2010] WASC 296 [52].

(2) There is no right to amend to introduce an arguable case and it is wrong to say that only in extreme circumstances would a party be shut out from litigating an arguable case.

(3) Justice requires that the parties have a proper opportunity to plead their case but limits may be placed on re-pleading when delay and costs are taken into account.

(4) A just resolution does not mean that a party will always be permitted to raise any arguable case at any point in a proceeding on payment of costs, even indemnity costs.

(5) The inevitable strains of litigation must be taken into account in weighing the adverse consequences of delay. This applies to natural persons and other litigants.

(6) The nature and importance of the amendment to the party amending must be taken into account.

(7) Attention must be given to the extent of the delay, the costs associated with it, the prejudice which might reasonably be assumed to follow from it and any prejudice that is shown.

(8) The point in the litigation relative to the trial may be an important consideration.

(9) Where a discretion is sought to be exercised in favour of a party an explanation will be called for.

(10) The point can be reached where a party has had a sufficient opportunity to put its case.

19 Beech J's observations were noted and adopted by Edelman J in ***Sino Iron Pty Limited v Mineralogy Pty Ltd***.[4] Having noted the ten points enunciated by Beech J, Edelman J offered two additional matters of moment in the particular context of the *Rules of the Supreme Court*. They were:

(1) O 1 r 4A provides that a goal of the Supreme Court practice and procedure is the elimination of delay; and

(2) O 1 r 4B provides for the principles of case flow management including: (a) the just determination of litigation; as well as the

[4] ***Sino Iron Pty Ltd v Mineralogy Pty Ltd*** [2014] WASC 406 [31].

following (which are, in any event, aspects of (a)) (b) the efficient disposition of the court's business, the efficient use of judicial resources, the timely disposal of business and proportionality.[5]

The proposed amendments

20 There are four aspects to the proposed amendments:

(1) Pars 18 - 29 of the amended statement of claim add an equitable estoppel case based on alleged representations said to have been made at restaurant meetings on 24 January 2017 and 17 October 2017.

(2) Pars 30 - 35 of the amended statement of claim add a misleading conduct claim based on the same alleged representations.

(3) Par 4.1 of the reply adds an implied term argument.

(4) Pars 4.2 - 4.6 of the reply add an argument as to the proper construction of the Pig Supply Agreement based on competition grounds, namely that the construction advanced by the defendant would put the parties in breach of cartel provisions under the relevant Pt IV provisions of the *Competition and Consumer Act 2010* (Cth).

21 In my assessment, as indeed both counsel accepted in argument, the introduction of these matters will inevitably result in the adjournment of the trial.

22 For example, as to the equitable estoppel and misleading conduct claims, there must be additional factual inquiry by the defendant pre-trial. It will be necessary for the defendant to fully proof an additional three witnesses who were said to be present at the meetings. It is not to the point that there is reference to the meetings in the plaintiff's main affidavit sworn in support of the interim injunction application. What was said at the meetings will assume a new significance based on the additional claims. Apart from witness preparation, it will be necessary for there to be further discovery. The defendant will also need to assess what, if any, attack it might make on the plaintiff's pleas as to reliance, detriment and damages.

23 In addition, the competition law argument raises a new and very complex set of legal and factual issues. The first of those is whether it

[5] ***Sino Iron Pty Ltd v Mineralogy Pty Ltd*** [32].

should even be considered in this court. Prima facie, it raises a special federal matter. Such a matter can only be considered in this court if there is special reason to do so and before making an order to that effect notice must be given to both the Commonwealth and the State Attorneys-General. It is unrealistic to expect that those issues could be resolved within eight working days before trial.

24 Accordingly, in my assessment, if the amendments were permitted there would be an inevitable vacation of the trial dates. It remains the case, however, that the underlying commercial dispute is urgent. The plaintiff, in particular, seeks resolution by the end of August 2018. The court's only available dates in August are the week commencing 6 August, ie seven days after the existing trial dates.

25 There will be considerable inconvenience to the defendant were the current trial dates to be vacated and instead substituted by dates commencing 6 August 2018. The current solicitor advocate who represents the defendant will no longer be able to appear as counsel. It will be necessary for the defendant to brief new counsel with all the prejudice that entails.

Disposition

26 Ultimately, accepting that my task is to exercise my discretion in the interests of justice, I will not grant leave to amend the writ; and, with one exception, will disallow the amendments to the plaintiff's pleadings. There are five reasons that compel that conclusion.

27 First, the amendments come very late. It is, essentially, now only eight working days before the trial. Even if the alternate available dates were considered, the parties are only 13 working days before trial.

28 Second, the amendments are not fully formulated. In particular, as discussed in argument, the alleged detriment, reliance and damages as pleaded in pars 27 and 35 of the amended statement of claim are unparticularised. It is said that particulars will be provided before trial. That is of little comfort given the time period that the parties are currently facing. As matters stand, the defendant does not know fully the case it has to meet.

29 To the extent that the plaintiff's case of reliance and detriment is based on a suggestion that the plaintiff continued to expand its operations to be able to supply up to 1,400 pigs per week, nowhere in the pleading is it said what the plaintiff did differently in purported reliance on the

alleged representations. This has consequences over and above the pleading itself. Given the present state of the additional claims, I cannot be satisfied that, if the amendments are allowed, the case will, in fact, be ready to be heard on the only available alternate dates. It is not clear to me what additional inquiries might need to be made by the defendant to answer the case that the plaintiff seeks to pursue. That is a result of the plaintiff's pleading. The lack of exposition in the amendments tells heavily against leave to amend being granted.

30 Third, allowing the amendments will inevitably cause real prejudice to the defendant. There is prejudice in adjourning the trial even for a week but, as I say, it is not clear to me that the trial would proceed if it was to be listed for 6 August 2018 with the amendments as proposed. But, assuming that was possible, these amendments will necessarily mean that the defendant is adversely affected in its preparation and presentation of the case. In part, that is self-evident insofar as the defendant will no longer be able to use its current solicitor advocate as counsel.

31 Given the additional factual inquiries, and the current opaque nature of the pleading, I am not satisfied that there will not be further prejudice in properly preparing for trial on what will be, even on the available alternate dates, a very tight timeframe.

32 Fourth, the reason for the late amendments is unexplained. There is no affidavit to explain why these amendments come at this time. It was explained in oral submissions that, given certain denials by the defendant, the trial would be a witness trial in any event. I accept that submission by counsel for the plaintiff. But it does not explain why the plaintiff seeks to expand the dispute at this late juncture in what was intended to be an expedited trial to accommodate both parties' pressing commercial interests.

33 Fifth, the amendments have the potential to increase the length of the trial. Inevitably that would be the case if the competition argument was allowed to proceed. But even the additional causes based on the equitable estoppel and misleading conduct pleas may push a three day trial over to a four day trial. There is a risk, if the amendments are allowed, that a trial might go part-heard. Certainly, allowing the amendments will delay the resolution of the commercial issue that caused the court to seek to accommodate the parties' understandable desire to seek an expedited trial, namely to obtain a binding ruling on the proper construction of the Pig Supply Agreement.

34 In these circumstances I am not satisfied that it is in the interests of justice to allow the amendments.

35 There is one exception. Paragraph 4.1 of the reply, being the implied term plea, raises no more than a legal argument. It is, in my view, an argument that the defendant should be able to deal with in the time before trial; and would not, in my assessment, cause any real prejudice in terms of the defendant properly preparing for trial. Accordingly, I will not disallow the amendment effected by par 4.1 of the reply.

36 Subject to hearing from counsel, I propose to make the following orders:

(1) The plaintiff's application to amend the writ in terms of the minute dated 16 July 2018 is dismissed.

(2) The amendments contained in pars 18 - 35 of the amended statement of claim are disallowed.

(3) The amendments contained in pars 4.2 - 4.6 of the amended reply are disallowed.

37 I will hear from each of the parties as to costs.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

CC
ASSOCIATE TO JUSTICE VAUGHAN

25 JULY 2018