04/11; [2011] VSC 136

SUPREME COURT OF VICTORIA

NAMBERRY CRAFT v WATSON

Vickery J

29 March, 12 April 2011

PRACTICE AND PROCEDURE – DURING FINAL ADDRESSES MAGISTRATE SUGGESTED THAT PLEADINGS BE AMENDED – APPLICATION BY PLAINTIFF FOR AMENDMENT OF PLEADINGS – APPLICATION GRANTED – CIRCUMSTANCES IN WHICH *CERTIORARI* OR PROHIBITION MAY ISSUE IN RESPECT OF GRANT OF AMENDMENTS – DELAY IN RESUMPTION OF TRIAL – EXPLANATION FOR DELAY – PREJUDICE – JURISDICTION OF MAGISTRATES' COURT TO GRANT AMENDMENTS – WHETHER MAGISTRATE IN ERROR IN GRANTING APPLICATION TO AMEND: *MAGISTRATES' COURT CIVIL PROCEDURE RULES* 2009, RR 1.12; 35.02; 36.01, 36.03; *SUPREME COURT (GENERAL CIVIL PROCEDURE) RULES* 2005 – *AON RISK SERVICES AUSTRALIA v AUSTRALIAN NATIONAL UNIVERSITY* [2009] HCA 27 CONSIDERED AND APPLIED.

W. regularly took part in a Tattslotto syndicate run by NCP/L and paid any amounts due on the Monday following the draw. He often paid the amount due by personal cheque to the owner but on the relevant occasion, the business had been sold and when W. went to pay for his ticket, he did not have the appropriate amount of cash on him. Although W.'s name had been pencilled in the syndicate, his name was erased when the new owner observed that he had not paid for his ticket and another's name substituted. When the syndicate was successful, W. sought his share but was refused. W. sued NCP/L and after a four-day, hearing during final addresses, the Magistrate suggested to W's counsel that an amendment be introduced into the statement of claim to plead a cause founded essentially on a misrepresentation by silence. When NCP/L objected to this amendment, the matter was adjourned and submissions taken. Some 9½ months later the Magistrate ruled that the amendment should be allowed. Upon an originating motion to quash—

HELD: Originating motion dismissed.

1. A decision by a trial judge to accede to an application for the amendment of pleadings is a discretionary decision provided there is power conferred on the judge to make such an order. In the present case it was for the applicant seeking the amendment to demonstrate under a proper reading of the applicable Rules of Court that leave should be granted.

2. The rules concerning civil litigation are no longer 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.

***Aon Risk Services Australia v Australian National University* [2009] HCA 27; (2009) 239 CLR 175; (2009) 258 ALR 14; (2009) 83 ALJR 951, applied.**

3. The object of doing justice between the parties is not to be ignored. A just resolution of proceedings between the parties remains a critically important consideration, which will necessarily include as part of that process, a proper opportunity being given to the parties to plead and re-plead their respective cases, should that need arise and the circumstances are present to warrant the discretion being exercised in favour of the grant of the amendment. The principle that a civil trial should be conducted fairly to the parties is beyond controversy. It is a human right enshrined in s24(1) of the *Charter of Human Rights and Responsibilities Act* 2006.

4. Nevertheless, there are to be limits placed upon re-pleading. The High Court in *Aon* referred to a range of other considerations which need to be weighed in the balance in the exercise of the discretion to grant an amendment to a pleading. The High Court made reference to the following factors:

> **(a) Whether there will be substantial delay caused by the amendment;**
> **(b) The extent of wasted costs that will be incurred;**
> **(c) Whether there is an irreparable element of unfair prejudice caused by the amendment, arising, for example, by inconvenience and stress caused to individuals or inordinate pressures placed upon corporations, which cannot be adequately compensated for, whatever costs may be awarded;**
> **(d) Concerns of case management arising from the stage in the proceeding when the amendment is sought, including the fact that the time of the court is a publicly funded resource, and**

whether the grant of the amendment will result in inefficiencies arising from the vacation or adjournment of trials;
(e) Whether the grant of the amendment will lessen public confidence in the judicial system; and
(f) Whether a satisfactory explanation has been given for seeking the amendment at the stage when it is sought.

5. The Magistrate had power to grant the amendment pursuant to Rule 35.02 of the *Magistrates' Court Civil Procedure Rules* 2009 ('Rules'). This Rule should be construed with reasonable amplitude so as to arm a court with the necessary discretion to determine whether or not to grant an amendment. The interests of justice are best served by such a construction.

6. Even if the Rules are found wanting, in that they fail to cover the situation which occurred in this case, rule 1.12 of the Rules renders Order 36.03 of the *Supreme Court Rules* applicable to proceedings in the Magistrates' Court, such as to confer the necessary jurisdiction on the Magistrate to make the order to amend which he did. Such rules exist to promote the attainment of justice, not to impede it. The Magistrate also had power to grant the amendment pursuant to rule 1.12 of the Rules, if it was necessary to rely upon this source of jurisdiction.

7. In light of the Magistrate's finding that the application to amend was brought as a result of analysis of the issues by the court, which was open, in the absence of other vitiating discretionary factors, in order to do justice between the parties the grant of the amendment was necessary.

8. Given the delay in the hearing of the matter, it could not be concluded that a fair trial conducted on the basis of the amended pleading would not be possible or at least compromised to the point where the amendment should not be permitted. Nor was there any basis for concluding that inordinate costs had been incurred or would be incurred by reason of the amendment nor any element of non-compensable prejudice being suffered by NCP/L.

VICKERY J:

Introduction

1. "Kahuna" is a Hawaiian word which can be used to describe a "priest, sorcerer, magician, wizard, or expert in any profession".[1] "The Big Kahuna" in surfing language can be traced back to the 1959 film Gidget, where the name was applied to the leader of a group of surfers. From that origin, it evolved to describe the best surfer on the beach.

2. Surfing is a pleasurable pastime but it is well stocked with chance. Sandbars, rocks, reefs, marine creatures and perhaps above all, other surfers, combine with the ever present challenges of unpredictable wave patterns.

3. Considerations such as these, no doubt, also inspired adoption of the name "The Big Kahuna" by certain syndicates of investors in the Australian lottery known as "Tattslotto". In particular, the name was used by syndicates of persons who were accustomed to purchasing shares in large Tattslotto drawings from an agency conducted by the First Plaintiff, Namberry Craft Pty Ltd ("Namberry Craft"), and its director and business proprietor, the Second Plaintiff, Mark Pezzin ("Mr Pezzin").

4. On 1 November 2008, in Tattslotto draw number 2847, the sorcery worked for "The Big Kahuna". The syndicate won a total of $867,000. The Defendant, Daniel Watson ("Mr Watson") claims that he was a member of The Big Kahuna syndicate for that draw, and is entitled to 10% of the winnings less the cost of his share of the ticket. Mr Pezzin denies that this was the case.

5. By a civil complaint commenced in the Magistrates' Court on 8 December 2008 (proceeding No. X03455204), (the "Complaint") Mr Watson commenced proceedings against Namberry Craft and Mr Pezzin claiming a 10% interest in the winnings of The Big Kahuna syndicate amounting to $86,700.

6. The Complaint came on for hearing on 14 July 2009. The Magistrate heard the trial over four days, concluding on 17 July 2009. During the course of final addresses the Magistrate suggested to counsel for Mr Watson, that an amendment be introduced into the statement of claim annexed to the Complaint to plead a cause of action founded essentially on a misrepresentation by silence. Mr Watson's counsel acceded to this suggestion. However, counsel for Namberry Craft and Mr Pezzin requested an adjournment so that the form of the proposed amendment could be considered. The matter subsequently reconvened on 24 August 2009. Counsel for Mr Watson

pressed for the amendments to the statement of claim, which had by then been formulated in writing. The amendments included 32 additional paragraphs. The amendments were opposed.

7. The Magistrate ruled on the amendment on 17 May 2010. In delivering his ruling, the Magistrate said:

> I should preface this by saying this is the third occasion on which I've attempted to have this matter listed for this ruling. The first occasion was shortly after the matter was argued. I advised the registry that the matter should be listed for ruling, nothing occurred. I also said that it should be listed at a time where counsel was available to come before the court. I inferred that simply counsel was not available and that some date would be arranged in the future. Nothing happened.
>
> Earlier this year I similarly attempted to have the matter listed, I was not advised of any hearing date and the matter simply was not listed. More recently I attended to the matter again and sought some explanation as to why the matter had not been listed and apparently some administrative errors had occurred and the solicitors hadn't been contacted, counsel hadn't been contacted and the date hadn't been fixed. That is no fault of the parties, it seems that administrative error has taken over for some reason on a number of occasions in relation to this matter. In any event the parties are both represented here today by counsel for the plaintiff, who has been in the matter from the beginning, and by a representative for the defendant.

8. The Magistrate permitted the amendments as they had been drafted. In ruling on the matter the Magistrate said:

> The court undoubtedly has power to control any proceeding before it and to grant leave to amend a pleading if circumstances demand. The considerations are not, as was the case, simply whether the interest of justice demand, even if any prejudice may be remedied by an order for costs. The court must take the case management considerations, the access to justice by all persons who seek relief before a court, the availability of the court to all which may be limited by the extension of the hearing time dedicated to a particular matter to the detriment of others, the lateness of such an application and any fault of a party in bringing an application.
>
> This application is brought as a result of analysis of the issues by the court. The finding of the court based upon that analysis is open and more than merely arguable. Of course any final determination will rely upon a finding of fact. Notwithstanding the time which the application is made, the undeniable fact that others with business before the court will have the eventual determination of their matters delayed by the length of any resumed hearing required after amendment, the plaintiff may have sought leave to amend earlier than he did.
>
> Given the matter in which the issue was raised by the court and elevating case management issues to primary consideration, accepting that prejudice may not be overcome by a simple order for costs and having regard to the pressure of the court business generally and in the interests of all who come before the court, I grant leave to amend.
>
> I say in relation to the pressure of court business, it has been evident to me that between the time that this matter was last listed and today there have been many occasions where there was time and substantial time upon which this matter could have been determined without any detriment to any other parties who have business before the court. There have been numbers of days available where this matter could have, upon reasonable notice, been listed. Such would not have interfered with or not unreasonably interfered with access to justice for other persons having business before the court. The interests of other persons will not be and have not been overborne by this matter being adjourned further and by time being spent determining the matter. I have to balance the interests of justice in relation to all having regard to *Aon*. Having done that as I said, I grant leave to amend.
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> It will be necessary then for the matter to be – it is leave to amend in the terms of the application as amended and it will be recollected during the course of argument there were various dates and times that needed to be amended in the amended pleadings which was done at the time. I give leave to amend.

9. In referring to "Aon" in his reasons, the Magistrate was referring to *Aon Risk Services Australia Limited v Australian National University*.[2] *Aon* was handed down by the High Court on 5 August 2009 in the interval between 17 July 2009, when the first part of the trial concluded, and 17 May 2010 when the Magistrate delivered his decision on the amendment application.

10. By their originating motion, dated 15 July 2010, Namberry Craft and Mr Pezzin seeking

an order that:

> An order pursuant to Order 56 of the *Supreme Court (General Civil Procedure) Rules 2005* in the nature of *certiorari* and/or prohibition to quash the decision of the Magistrates' Court of Victoria made on 17 May 2010 that the First Defendant be given leave to amend his Statement of Claim in Magistrates' Court Proceeding No. X03455204.

11. It is this proceeding which is before the Court for determination.

The Facts Open to be Found

12. The chain of events which led to this litigation were not at all lucky for Mr Watson. The evidence thus far reveals that the following facts are open to be found.

13. Mr Pezzin conducted a news agency business through his company Namberry Craft Pty Ltd. It was situated at 287 Brunswick Street, Fitzroy in Victoria. As part of his business, he also operated a lottery agency and acted as a selling agent for lotteries conducted by Tattslotto. In this capacity, from time to time, he conducted what were known as "house syndicates" for the purchase of "system 17" tickets in lottery draws conducted by Tattslotto. The opportunity to invest in these syndicates was made available to Mr Pezzin's customers, who were members of the public.

14. Mr Watson was one of Mr Pezzin's customers. He was an accountant who conducted his practice in close proximity to Mr Pezzin's newsagency. He was accustomed to purchasing stationery and newspapers from Mr Pezzin. He also, from time to time, purchased tickets in the house syndicates organised by Mr Pezzin in Tattslotto draws. Indeed, prior to the Tattslotto draw in question, Mr Watson was a regular participant in these "system 17" Tattslotto house syndicates. Although he did not participate in every syndicate offered by Mr Pezzin, prior to The Big Kahuna drawing he had previously participated in 14 lottery draws, spanning some two and a half years. On three previous occasions, Mr Watson had not paid Mr Pezzin for his ticket prior to the draw, which was usually on a Saturday. On these occasions, he had left it to the Monday following the draw to pay. On one such occasion, the syndicate had won in the draw, and Mr Watson was paid his winnings by Mr Pezzin, less the cost of his ticket after the event. On another occasion, although the syndicate had won a small prize, it was not sufficient to result in a net gain for Mr Watson, and he subsequently paid Mr Pezzin the difference. On yet another occasion, the syndicate had not won anything at all, nevertheless, Mr Watson honored what he saw as his obligation, and paid Mr Pezzin for the cost of his losing ticket after the draw, on the Monday following the draw, or soon thereafter. Further, because of the relationship which he developed with Mr Pezzin, when Mr Watson did pay to Mr Pezzin for his ticket, Mr Pezzin was prepared to accept a personal cheque from Mr Watson as payment. However, other shop assistants employed by Mr Pezzin, were not prepared to accept Mr Watson's personal cheque for this purpose.

15. About two weeks before the drawing of The Big Kahuna superdraw, Mr Pezzin telephoned Mr Watson to see if he was interested in participating in the syndicate. Mr Watson advised that he may be interested, but asked that he be contacted again closer to the draw.

16. On 27 October 2008, Mr Pezzin purchased a syndicate ticket in Tattslotto draw number 2847 for a total ticket price of $7,419.50. Under the contractual rules which applied to the ticket, Mr Pezzin was authorised to sell a total of 10 units in the ticket comprising a syndicate.

17. In the week leading up to the draw, a poster was prominently displayed in Mr Pezzin's news agency which was in the following form:

18. During that week, Mr Watson attended Mr Pezzin's newsagency. Mr Pezzin said to him words to the effect: "Do you want a share in the syndicate?" Mr Watson said words to the effect of "Yes", upon which Mr Pezzin said words to the effect: "OK, I will pencil you in". By this he meant that he would enter Mr Watson as a syndicate member in a running sheet maintained for the purpose. Mr Watson made no payment for his ticket on this occasion, and the fact of his non-payment was also entered in the running sheet. The cost of a single ticket was $741.95.

19. The day of the draw was Saturday 1 November 2008. This was during the spring Melbourne Cup Carnival conducted at the Flemington Race Track, and the draw date coincided with a major event in the carnival, Derby Day.

20. On the Friday afternoon, the day before the draw, Mr Watson attended at the newsagency. The superdraw had enthused the public appetite. There was a long queue. Mr Watson stood in a queue for some time at the Tattslotto counter with the intention of paying for his ticket in The Big Kahuna syndicate. However, he observed that the person taking payments for tickets was not Mr Pezzin. Mr Watson had no cash with him, and was hoping to pay by cheque. However, he realised that it was not likely that his cheque would be accepted as payment for the ticket. Rather than waiting in the queue any longer, Mr Watson left the shop.

21. There were two things of relevance which were not known to Mr Watson. First, and unbeknown to him, Mr Pezzin had recently sold his business. On the afternoon of the Friday before the draw, the prospective new proprietor of Mr Pezzin's business was in attendance in the shop and acting as a shop assistant during the hand-over period. Second, on the Friday afternoon, after Mr Watson left the shop, another customer expressed interest in purchasing a ticket in The Big Kahuna. The other customer approached the prospective new proprietor who was then serving at the Tattslotto counter. The customer indicated that he was interested in participating in The Big Kahuna draw. The prospective new proprietor looked up the running sheet maintained for the syndicate and advised that it was full, but that there was one customer, most likely Mr Watson, who had not yet paid. To this the other customer indicated that he was prepared to pay for a ticket there and then. An arrangement was entered into between the prospective new proprietor and the other customer whereby, if the other customer deposited the ticket price with him, and the customer entered in the running sheet had not paid by close of business that day, the other customer would be entered into The Big Kahuna syndicate in his place.

22. Mr Watson did not pay for his ticket in The Big Kahuna syndicate by the close of business at the shop on the Friday. Further, he appears to have taken himself to the Derby at the Flemington Races on the Saturday, and did not pay for his ticket in The Big Kahuna syndicate prior to the draw on the Saturday night.

23. As luck, or fate, would have it, The Big Kahuna came home on the Saturday night with a win totalling $867,000.

24. On the following Monday morning, Mr Watson attended at the newsagency expecting to claim his share of the winnings and pay for his ticket. He was advised of what had transpired, became disappointed, and sued Namberry Craft and Mr Pezzin by his Complaint issued in the Magistrates' Court.

The Role of *Certiorari* and Prohibition

25. An application for judicial review of an adjudication determination or an adjudication review determination is not an appeal.

26. In *R v Northumberland Compensation Appeal Tribunal; ex parte Shaw* Denning LJ observed:[3]

> ... the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. The King's Bench does not substitute its own views for those of the tribunal, as a Court of Appeal would do.
>
> The adjudicator appointed under the Act and not the Court is the body charged with the duty of evaluating the evidence and finding the facts. The role of the Court is wholly different. Its duty is to review the decision of the adjudicator and to consider whether the impugned decision should be quashed on one or more of the well recognised grounds. In an appropriate case, having found one or more of the grounds exist for quashing the decision, the Court may then proceed to exercise its discretion to so order.

27. The High Court said in *Craig v South Australia*:[4]

> Where available, *certiorari* is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or other tribunal. It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal or a substitution of the order or decision which the superior court thinks should have been made. Where the writ runs, it merely enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and "error of law on the face of the record". Where the writ is sought on the ground of jurisdictional error, breach of procedural fairness or fraud, the superior court entertaining an application for *certiorari* can, subject to applicable procedural and evidentiary rules, take account of any relevant material placed before it. In contrast, where relief is sought on the ground of error of law on the face of the record, the superior court is restricted to the "record" of the inferior court or tribunal and the writ will enable the quashing of the impugned order or decision only on the ground that it is affected by some error of law which is disclosed by that record.

28. More recently, Kirby J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S 20/2002* said:[5]

> Regardless of the supervisory jurisdiction invoked in a particular case, judicial review is said to be limited to reviewing the legality of administrative action. Such review, ordinarily, does not enter upon a consideration of the factual merits of the individual decision. The grounds of judicial review ought not be used as a basis for a complete re-evaluation of the findings of fact, a reconsideration of the merits of the case or a re-litigation of the arguments that have been ventilated, and that failed, before the person designated as the repository of the decision-making power. [Footnotes omitted]

29. Prohibition is a writ directing a subordinate body, which is amenable to the process, to stop doing something which, according to law, may not be done, but which the body is doing.[6] In this case, in the event that it could be found that the grant of the amendments to the statement of claim were not made within power, prohibition would potentially be open to prevent the further hearing of the matter proceeding upon the statement of claim as amended.

30. The prerogative writs of *certiorari* and prohibition are discretionary. As McHugh J said in *Re McBain; Ex parte Australian Catholic Bishops Conference*: "*Certiorari* to quash is not granted as of right. Its grant lies in the discretion of the Court".[7]

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31. A decision by a trial judge as to whether to accede to an application for the amendment of pleadings, is a discretionary decision, provided there is power conferred on the judge to make such an order.

32. In the exercise of such a discretion, *Aon Risk Services Australia v Australian National University*[8] affirmed the importance, not only to the parties, but to the Court and other litigants, to ensure "just but timely and cost-effective resolution of a dispute between the parties to a proceeding".[9] French CJ noted there is "an irreparable element of unfair prejudice in unnecessarily delaying proceedings".[10] In particular, the Chief Justice drew attention to "the waste of public resources", the "strain and uncertainty imposed on litigants" and "the potential for loss of public confidence in the legal system" arising from adjournment of trials brought about by pleading amendments without adequate justification.[11] Similarly, in *Aon*, Gummow, Hayne, Crennan, Kiefel and Bell JJ referred to the "ill-effects of delay" upon employees and officers of corporations, as well as upon defendant corporations whose ability to plan financially may be affected by a contingent liability.[12]

33. In *Aon*, the High Court accepted the principles of case management by the courts, saying: 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.[13]

34. Further, the High Court in *Aon* said that the rules concerning civil litigation are no longer 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. As explained by Gummow, Hayne, Crennan, Kiefel and Bell JJ:

> In *Sali v SPC Ltd*[14] Toohey and Gaudron JJ explained that case management reflected:
>
> > "[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 ..."[15]

In this vein, their Honours also concluded:

> 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. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.[16]

35. The Court of Appeal in *Trevor Roller Shutter Service Pty Ltd v Crowe*[17] reinforced the reasoning in *Aon* when it observed:

> As we construe *Aon*, it was about the impropriety of granting a party leave to make a late amendment to a pleading, in circumstances where that party had failed to act expeditiously, and where to allow the amendment was likely to be productive of wasted costs and resources. More generally, *Aon* may be thought to have re-invigorated the procedural paradigm, to some extent and for some time diminished by *JL Holdings*, that time, costs and limited judicial resources are relevant considerations in the determination of whether to allow late applications for amendment and invoke other interlocutory processes.[18]

36. As illustrated in *Aon*, it is for the applicant seeking the amendment to demonstrate under a proper reading of the applicable Rules of Court, that leave should be granted.[19]

37. This is not to say that the object of doing justice between the parties is to be ignored. In fact, it is quite the contrary – a just resolution of proceedings between the parties remains a critically important consideration, which will necessarily include as part of that process, a proper opportunity being given to the parties to plead and re-plead their respective cases, should that need arise and the circumstances are present to warrant the discretion being exercised in favour of the grant of the amendment. The principle that a civil trial should be conducted fairly to the parties is beyond controversy. It is a human right enshrined in s24(1) of the *Charter of Human Rights and Responsibilities Act* 2006.[20]

38. Nevertheless, there are to be limits placed upon re-pleading. The High Court in *Aon* referred to a range of other considerations which need to be weighed in the balance in the exercise of the discretion to grant an amendment to a pleading. The High Court made reference to the following factors:

(a) Whether there will be substantial delay caused by the amendment;[21]

(b) The extent of wasted costs that will be incurred;[22]

(c) Whether there is an irreparable element of unfair prejudice caused by the amendment, arising, for example, by inconvenience and stress caused to individuals or inordinate pressures placed upon corporations, which cannot be adequately compensated for, whatever costs may be awarded;[23]

(d) Concerns of case management arising from the stage in the proceeding when the amendment is sought, including the fact that the time of the court is a publicly funded resource, and whether the grant of the amendment will result in inefficiencies arising from the vacation or adjournment of trials;[24]

(e) Whether the grant of the amendment will lessen public confidence in the judicial system;[25] and

(f) Whether a satisfactory explanation has been given for seeking the amendment at the stage when it is sought.[26]

39. The list of factors referred to in *Aon* is not exhaustive. In the end, all matters arising in any particular case relevant to the exercise of the power to permit an amendment must be weighed.[27]

Jurisdiction to Grant the Amendment

40. Ground 1 of the Plaintiffs' originating motion raises a question as to whether the Magistrate had jurisdiction to grant the amendment.

41. The *Magistrates' Court Civil Procedure Rules* 2009 (the "Magistrates' Court Rules")[28] contained the following rules of relevance:

1.19 Overriding objective
(1) The overriding objective of these Rules is to enable the Court to deal with a case justly.
(2) Dealing with a case justly includes, so far as is practicable—
(a) effectively, completely, promptly and economically determining all the issues in the case;
(b) avoiding unnecessary expense;
(c) dealing with the case in ways which are proportionate to—
(i) the amount of money involved;
(ii) the complexity of the issues;
(d) allocating to the case an appropriate share of the Court's resources, while taking into account the need to allocate resources to other cases.

1.21 Exercise of power
(1) In exercising any power under these Rules or in interpreting any Rule the Court must seek to give effect to the overriding objective.

1.22 Case management
(1) The Court must further the overriding objective by actively managing cases.
(2) Active case management includes—
(a) encouraging the parties to cooperate with each other in the conduct of proceedings;
(b) identifying the issues at an early stage;
(c) deciding promptly which issues need full investigation and a hearing and accordingly disposing summarily of the others;
(d) deciding the order in which the issues are to be resolved;
(e) encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate and facilitating the use of such procedure;
(f) helping the parties to settle the whole or part of the case;
(g) fixing timetables or otherwise controlling the progress of the case;
(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
(i) dealing with as many aspects of the case as it can on the same occasion;
(j) dealing with the case without the parties needing to attend court;
(k) making use of technology;
(l) giving directions to ensure that the hearing of a case proceeds quickly and efficiently;
(m) limiting the time for the hearing or other part of a case, including at the hearing the number of witnesses and the time for the examination or cross-examination of a witness.

35.02 General power of amendment
For the purpose of determining the real question in issue between the parties to any proceeding, or of

correcting any defect or error in any proceeding, or of avoiding multiplicity of proceedings, the Court may at any stage order that any document (including a complaint) in a proceeding be amended or that any party have leave to amend any document in the proceeding.

42. The Plaintiffs referred to the fact that the applicable *Court Procedures Rules* 2006 (ACT) which were considered in *Aon* contained the following provisions:

> **501. Amendment — when must be made**
> (1) All necessary amendments of a document 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.
>
> **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.

43. The Plaintiffs further submitted that the Magistrates' Court Rules do not contain an equivalent rule 502, rather, these Rules are confined to the substance of rule 501. The effect of this, it was submitted, is that an amendment can only be made in the Magistrates' Court if the controversy or issue was in existence prior to the application for amendment being made. It was submitted that this was not the case here because the issue of a misrepresentation by silence was not in controversy between the parties until the matter was raised by the Magistrate during final addresses at trial.

44. The Defendant submitted that Magistrate's jurisdiction to make the order in issue was derived from:

> (a) Rule 35.02 of the Magistrates' Court Rules; or
>
> (b) Order 36.03 of the *Supreme Court (General Civil Procedure) Rules* 2005 (the "Supreme Court Rules") which is applicable by reason of rule 1.12 of the Magistrates' Court Rules.

45. The Defendant further submitted that the amendment emerged from the evidence and from the Magistrate's view that the evidence raised a possible construction which brought into play a possible misrepresentation by silence which enlivened the provisions of the *Trade Practices Act* 1974.

46. In my opinion, the Magistrate had power to grant the amendment pursuant to rule 35.02 of the Magistrates' Court Rules. Rule 35.02 was in the following terms: Rule 35.02 of the Magistrates' Court Rules corresponded to rule 36.01(1) of the *Supreme Court Rules*, which was materially in the same terms. With respect to the operation of rule 36.01, Williams, *Civil Procedure Victoria*[29] notes the following as to the operation of rule 36.01:

> Rule 36.01(1) provides that the court may at any stage of a proceeding order that any document in the proceeding be amended or that any party have leave to amend the document. The amendment may be made for the purpose of determining the real questions in controversy between the parties, or of correcting any defect or error in any proceeding, or of avoiding multiplicity of proceedings. The court, in exercising its power in relation to amendment, may give any direction or impose any term or condition it thinks fit. See r 1.14(1)(a). When construing rules of court of a general kind such as r 36.01, the courts have adopted an approach which gives the empowering words as full a meaning as they can reasonably bear in the context. The preferred approach is to give courts very ample jurisdiction to grant amendments, including those which as a matter of simple fact allow causes of action to be litigated which could not be litigated if the amendment were not allowed, leaving it to the discretion of the court to decide when justice requires that such an amendment should or should not be granted. In contrast, the earlier approach was to leave the rules, rather than the discretion of the court, to determine whether or not particular causes of action should be litigated: *McInnes v Wingecarribee Shire Council* (1987) 10 NSWLR 660 at 668.
>
> In the case of a pleading, determining the real question in controversy is a purpose for which,

> according to r 36.01(1), an amendment of the pleading may be made. In the Rules "question" means "any question, issue or matter for determination by the court, whether of fact or law or of fact and law, raised by the pleadings or otherwise at any stage of a proceeding by the court, by any party or by any person not a party who has a sufficient interest". See the definition in r 1.13. Except where the parties otherwise agree, the court ought not to determine a question on which the right to relief or remedy or a ground of defence depends unless the question is raised by the pleadings. See [r 36.01.150].
>
> The words "the real question in controversy" mean a question, one not raised by the existing pleadings, the determination of which by the court would (whether alone or together with any other question that is pleaded) one way or the other dispose of the plaintiff's claim for relief or remedy. The words refer to a question other than a question that is raised by the pleadings. The "real question" may be in substitution for the existing question, as where it constitutes an entirely different ground of claim or defence, or it may simply be additional to an existing question, as where it affords a separate ground of claim or defence. ***A question not raised by the pleadings may be put in controversy, that is, become a "real question", so as to enliven the jurisdiction of the court to allow a pleading amendment to raise the question, by a party or by the parties, or by the court of its own motion. The question will be put in controversy before trial upon application made by a party for leave to amend the pleadings to raise the question. A question will be no less in controversy if not adverted to until the trial following its emergence from the evidence or the argument of counsel***. [Emphasis added]

47. The Court of Appeal in *Etna & Ors v Arif & Ors*[30] considered a late amendment which was prompted, as it was in this case, by the trial Judge's suggestion in final addresses. Questions on appeal included whether there was power to grant leave to amend under rule 36.01 and whether the discretion miscarried. Batt JA, with whom Charles and Callaway JJA agreed, delivered the principal judgment on the question of the amendment.[31] The appellant contended that the trial Judge had no power to allow the amendment under rule 36.01 in the circumstances where the application for leave to amend was inspired by the Judge's observations made in the final stages of the trial, given that the particular question which was raised by the Judge's suggestion had not been previously in controversy or debated between the parties and the defendant never came to the Court to have that case tried. Although the matter was determined on another basis, the Court of Appeal did not determine that rule 36.01 did not confer the necessary power to order the amendment suggested by the trial Judge. Further, in the course of considering the question of power to make the order under rule 36.01, Batt JA observed:[32]

> ... I find it hard to conceive that, in the absence of unusual circumstances, a plaintiff who has commenced a proceeding alleging, for instance, breach of a duty of care will at an early stage be refused leave to amend the statement of claim to allege misleading and deceptive conduct on the ground that up to that stage that had not been suggested or "agitated" between the parties. Further, if one turns to defences, the fact that Dawson J's explicit reference in *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 456 to the provision in rules of court for the giving of leave to amend pleadings for the purpose of determining the real question in controversy was made in the context of the grant of leave to amend a defence to enable a period of limitation to be pleaded by a defendant who had failed to plead it shows at the least, I consider, that the question does not have to have been *explicitly* agitated. (In that case the defendant had over some period stated that it would not contend that the action was statute-barred, so that that defence can scarcely be said to have been agitated between the parties as a question on which they were proceeding towards trial). In addition, the terms of para (3) of r.36.01 suggest that a somewhat wider interpretation of "the real question in controversy" may be required: para (3) permits amendment under para (1) having the effect of adding or substituting a cause of action arising after the commencement of the proceeding, and one would think that, at any rate in most cases, such a cause of action is unlikely to have been agitated as the question on which the parties were proceeding towards trial. The word "real", indeed, suggests a contrast between what is ostensible (on the pleadings) and the underlying dispute.

48. In my opinion, the empowering words contained in rule 36.01(1), and its counterpart in rule 35.02 of the Magistrates' Court Rules, should be construed with reasonable amplitude so as to arm a court with the necessary discretion to determine whether or not to grant an amendment. The interests of justice are best served by such a construction. Such an approach would be in accordance with the review of cases undertaken by Batt JA in *Etna*, where his Honour noted:[33]

> There are moreover cases in which a wider reading has been adopted. In *National Australia Bank Ltd v Nobile* [1988] FCA 72; (1988) 100 ALR 227 at 235-236 Davies J, in the Full Court of the Federal Court, took a wide view of the admittedly somewhat different words "the real questions raised by

> or otherwise depending on the proceeding" in the corresponding rule of that Court, and in *Re Great Eastern Cleaning Services Pty Ltd v The Companies Act* [1978] 2 NSWLR 278 at 281 Needham J treated the expression "matters in dispute" in the rule relating to joinder of parties as covering "what *could be considered to be* the issues in the proceedings" (emphasis added). Importantly, in *Qantas Airways Ltd v A.F. Little Pty Ltd* [1981] 2 NSWLR 34 at 38 Glass JA (with whom Samuels JA agreed) said, in a case where the plaintiff had applied to add a defendant, that the phrase "all matters in dispute in the proceedings" should not be construed as limited to matters arising in the pleadings. It might also properly include those disputed issues of fact "which are subjacent to the pleadings." (I have already used the linguistic equivalent, "underlying".) Mahoney JA at 54 stated that the words should not be given a limited meaning such as the basis of claim which the plaintiff had postulated. In *Blake v Done* [1861] EngR 981; (1861) 7 H&N 465; 158 ER 555 the Court of Exchequer took a non-technical and liberal view of s222 above-mentioned. Importantly again, so too did Isaacs J in *O'Keefe v Williams* at 205. As to the width of the power conferred by r.36.01 reference may be made to Williams, *Civil Proceedings - Victoria*, Vol.1, para [36.01.15]. Compare also s29(2) of the *Supreme Court Act* 1986 and r.1.14(1).

49. The second basis advanced by the Defendant in support of the position, that the Magistrate was possessed of the necessary power, arose from Order 36.03 of the *Supreme Court Rules*, which was submitted to apply by reason of rule 1.12 of the Magistrates' Court Rules.

50. Rule 1.12 of the Magistrates' Court Rules provides:

> Where the manner or form of the procedure—
> (a) for commencing, or for taking any step, in a proceeding; or
>
> (b) by which the jurisdiction, power or authority of the Court is exercisable—
>
> is not prescribed by these Rules or by or under any Act the general principles of practice and the Rules and forms observed and used in the Supreme Court may, at the discretion of the Court, be adopted and applied to any proceeding with such modification as may be necessary.

51. Order 36.03 of the Supreme Court Rules provides:

> A party may amend any pleading served by that party at any time, by leave of the Court or with the consent of all other parties.

52. In *Roux v Robert Mills Architect Pty Ltd*,[34] Justice Bongiorno considered the operation of rule 1.12 of the Magistrates' Court Rules, and held:

> Rule 1.12 is in a form common in the rules of inferior courts which incorporates the practice and procedure of another court where the applicable lower court rules are in some way wanting. Of course it must be remembered that the rules, including the Magistrates' Court Rules exist to assist the attainment of a just result, not to hinder it. In expressing the view that he didn't have the power to accede to the first defendant's request the magistrate fell into jurisdictional error.

53. In my opinion, even if the Magistrates' Court Rules are found wanting, in that they fail to cover the situation which occurred in this case, rule 1.12 of the Magistrates' Court Rules renders Order 36.03 of the Supreme Court Rules applicable to proceedings in the Magistrates' Court, such as to confer the necessary jurisdiction on the Magistrate to make the order to amend which he did. Such rules exist to promote the attainment of a justice, not to impede it.

54. Accordingly, the Magistrate also had power to grant the amendment pursuant to rule 1.12 of the *Magistrates' Court Rules*, if it was necessary to rely upon this source of jurisdiction.

Discretion to Amend

55. The second issue pressed in this proceeding was whether, assuming he did have power to exercise it, the Magistrate erred in the exercise of his discretion in determining to grant the amendment.

56. As said in *Aon*,[35] the observations by Gleeson CJ, Gaudron and Hayne JJ in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*[36] are apposite:

> 'Discretion' is a notion that 'signifies a number of different legal concepts'. 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'. Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made. [Citations omitted]

57. Their Honours in *Aon* went on to explain that in *Coal and Allied Operations* the Court observed that the latitude as to choice may be considerable or it may be narrow.[37] The answer ultimately lies in the terms of the amending power in question.

58. In the present case, accepting that the amending power is rule 35.02 of the Magistrates' Court Rules, the amendment was sought by the Plaintiff for the purpose of determining the real questions in controversy between the parties, so as to allow a cause of action to be litigated which could not be litigated if the amendment were not allowed. Alternatively, if rule 1.12 is to be relied upon, as it is, this purpose of the amendment which should also be taken into account within the terms of the rules. was materially the same. It is in this context that discretion of the Court is enlivened to decide whether justice requires that such an amendment should or should not be granted.

Doing Justice Between the Parties

59. The Magistrate said in his ruling:

> This application is brought as a result of analysis of the issues by the court. The finding of the court based upon that analysis is open and more than merely arguable.

60. In the light of this finding, which in my opinion was open, in the absence of other vitiating discretionary factors, in order to do justice between the parties in the case, the grant of the amendment was necessary.

Delay

61. The delay engendered by the application to amend, in the events that have happened, was inordinate.

62. However, the principal cause of the delay was the delay in the Magistrate delivering his ruling on the amendment application. The Magistrate heard the trial over four days concluding on 17 July 2009. It was then that the Magistrate suggested the amendment to the Plaintiff. The matter reconvened on 24 August 2009 for submissions on the amendments. However, and for the reasons set out in his ruling, the Magistrate did not rule on the amendment until 17 May 2010. This caused a delay of some nine and a half months.

63. Although the cause of the delay appears to have been administrative problems arising from difficulties in re-listing the matter for the ruling, this was not the fault of either party to the proceeding. Highly unsatisfactory as the delay was, in my opinion, it could not have been anticipated by the parties, and, save for one potentially relevant consideration, its consequences should not have been visited upon them in the exercise of the Magistrate's discretion.

64. The one factor of relevance arising from the delay is whether a fair trial of the proceeding is possible, assuming the trial is to resume within a reasonable time of delivery of this judgment.

65. As was observed in *Hodgson v Amcor Ltd*,[38] delay may have a direct impact on the quality of the justice able to be administered. Indeed, it has been said that the longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose.

66. McHugh J wrote the following as to the potential effects of delay on the course of a trial in *Brisbane South Regional Health Authority v Taylor*:[39]

> The enactment of time limitations has been driven by the general perception that "[w]here there is delay the whole quality of justice deteriorates." Sometimes the deterioration in quality is palpable, as in the case where a crucial witness is dead or an important document has been destroyed. But sometimes, perhaps more often than we realise, the deterioration in quality is not recognisable even by the parties. Prejudice may exist without the parties or anybody else realising that it exists. As the United States Supreme Court pointed out in *Barker v Wingo*, "what has been forgotten can rarely be shown". So, it must often happen that important, perhaps decisive, evidence has disappeared without

> anybody now "knowing" that it ever existed. Similarly, it must often happen that time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose. A verdict may appear well based on the evidence given in the proceedings, but, if the tribunal of fact had all the evidence concerning the matter, an opposite result may have ensued.

67. The question is, if the trial is resumed within a reasonable time of the delivery of this judgment on the amended case advanced by the Plaintiff, assuming the amendment is granted, will the trial be compromised by the delay to the point where it should not be re-commenced on the re-pleaded case?

68. A number of scenarios may be contemplated as to the manner in which the resumed trial may proceed on the re-pleaded case. However, in the end, I am not satisfied that a fair trial conducted on the basis of the amended pleading will not be possible, or at least compromised to the point where the amendment should not be permitted.

Costs

69. The costs thrown away and incurred by the amendment are likely to be paid by the Defendant on the basis considered necessary by the Magistrate in the exercise of his discretion.

70. I am not satisfied that inordinate costs have been incurred or will be incurred by reason of the amendment, if it was to be granted.

Unfair and Non-Compensable Prejudice

71. Inevitably, given the circumstances of this case, a level of stress and inconvenience has been caused to the parties.

72. Although the subject matter involves a potential share of winnings in a public lottery for the Defendant, the Plaintiffs are faced with the risk of paying not insignificant damages and costs. The Plaintiffs include Mr Pezzin, who is a natural person. They have being exposed to this risk since the proceedings were commenced in December 2008. Finality is called for.

73. The Plaintiffs were entitled to expect that the case against them would be concluded within the three days allocated to it and that the formulation of the Defendant's case was in final form before the trial commenced.

74. However, I am not satisfied that this element of non-compensable prejudice being suffered by the Plaintiffs is sufficient, in this case, to require that the resumed case should not proceed on the basis of the amended statement of claim.

Case Management Issues

75. As to case management issues, the Magistrate accepted the principles in *Aon*, and recognised that modern trials need to be conducted, not only fairly to the parties, but also efficiently in the interests of the public at large. In this respect, he observed in his reasons:

> I say in relation to the pressure of court business, it has been evident to me that between the time that this matter was last listed and today there have been many occasions where there was time and substantial time upon which this matter could have been determined without any detriment to any other parties who have business before the court. There have been numbers of days available where this matter could have, upon reasonable notice, been listed. Such would not have interfered with or not unreasonably interfered with access to justice for other persons having business before the court.
>
> The interests of other persons will not be and have not been overborne by this matter being adjourned further and by time being spent determining the matter. I have to balance the interests of justice in relation to all having regard to *Aon*. Having done that as I said, I grant leave to amend.

76. The Magistrate was in the best position to determine the effect, if any, of the proposed amendment on the conduct of the business of his Court with regard to other litigants.

77. I do not depart from his findings on the matter.

Public Confidence

78. Although the inordinate delay in delivering his reasons on the amendment application may well be regarded as likely to bring into question public confidence in the administration of justice, the extent of this delay was not caused by the conduct of the parties to the litigation.

79. Some delay was caused by the Defendant in seeking the amendment and then having to adjourn to formulate the amended pleading and argue the amendment before the Magistrate. However, the extent of this delay was relatively insignificant in the scheme of this litigation, as it has evolved.

Explanation for Amendment

80. The reason for the amendment being pressed can be found in the admitted facts of this case. The Magistrate raised the matter with the Defendant in the course of final address at the first trial.

81. However, no explanation has been proffered as to why the subject of the amendment was not pleaded well before trial, save that, until the Magistrate offered his suggestion in final address, the Plaintiff was content to advance his case as it had been pleaded originally.

Conclusion and Orders

82. Some criticism was directed at the reasoning of the learned Magistrate. In particular, it was submitted that his conclusion did not follow from his findings when he said:

> Given the manner in which the issue was raised by the court and elevating case management issues to primary consideration, accepting that prejudice may not be overcome by a simple order for costs and having regard to the pressure of the court business generally and in the interests of all who come before the court, I grant leave to amend.

83. However, this passage must be read in the context of the reasons when considered as a whole.

84. On balance, and having considered the competing discretionary factors referred to in these reasons, I am not satisfied that the learned Magistrate erred in the exercise of his discretion to permit the amendments sought by the Defendant in this case. His discretion did not miscarry.

85. It follows that the Plaintiffs have failed to make out a basis for their claim for relief by way of *certiorari* and prohibition.

86. The originating motion should be dismissed.

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[1] Pukui & Elbert (1986).
[2] [2009] HCA 27; (2009) 239 CLR 175; (2009) 258 ALR 14; (2009) 83 ALJR 951.
[3] [1951] 1 QB 711.
[4] [1995] HCA 58; (1995) 184 CLR 163 at [16]–[17]; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[5] [2003] HCA 30; (2003) 198 ALR 59 at [114]; (2003) 77 ALJR 1165; (2003) 73 ALD 1; (2003) 24 Leg Rep 10.
[6] See: *Annetts and Anor v McCann and Ors* [1990] HCA 57; (1990) 170 CLR 596; 97 ALR 177 per Brennan J at 184; (1990) 65 ALJR 167; 21 ALD 651.
[7] [2002] HCA 16; (2002) 209 CLR 372 at 415; (2002) 188 ALR 1; (2002) 76 ALJR 694; [2002] EOC 93-207; (2002) 23 Leg Rep 2; See too per Kirby J at 453–457 CLR; and per Hayne J at 465 CLR.
[8] [2009] HCA 27; (2009) 239 CLR 175; (2009) 258 ALR 14; (2009) 83 ALJR 951 .
[9] Supra at [93] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.
[10] Ibid at [5].
[11] Ibid at [30].
[12] Ibid at [101].
[13] *Aon* at [92] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.
[14] *Sali v SPC Ltd* [1993] HCA 47; (1993) 116 ALR 625; (1993) 67 ALJR 841 at 849.
[15] *Aon* at [93].
[16] *Aon* at [113].
[17] [2011] VSCA 16, per Warren CJ, Ashley and Nettle JJA.
[18] Ibid at [42].
[19] *Aon* at [4] per French CJ.
[20] Section 24(1) *Charter of Human Rights and Responsibilities Act* 2006 provides: "A person charged with

a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing".
[21] *Aon* at [4] per French CJ and at [111] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.
[22] *Aon* at [111] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.
[23] *Aon* at [5] per French CJ and at [100]-[101] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.
[24] *Aon* at [5] per French CJ and at [111] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.
[25] *Aon* at [5] per French CJ.
[26] *Aon* at [5] per French CJ.
[27] *Aon* at [111] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.
[28] The *Magistrates' Court Civil Procedure Rules* 2009 (SR 181/2009) have now been replaced with the *Magistrates' Court General Civil Procedure Rules* 2010 (SR 140/2010) effective 1 January 2011.
[29] Williams, *Civil Procedure, Victoria*, at paragraph 36.01.15.
[30] [1999] VSCA 99; [1999] 2 VR 353; [1999] V Conv R 54-609.
[31] Supra at 362-369.
[32] Ibid at 365.
[33] Ibid at 366.
[34] [2006] VSC 114 at [8].
[35] *Aon* at [89] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.
[36] [2000] HCA 47; (2000) 203 CLR 194 at 204-205 [19]; (2000) 174 ALR 585; (2000) 74 ALJR 1348; (2000) 21 Leg Rep 14; (2000) 99 IR 309.
[37] *Aon* at [89] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.
[38] [2011] VSC 63 at [13].
[39] [1996] HCA 25; (1996-1997) 186 CLR 541 at 551; (1996) 139 ALR 1; (1996) 70 ALJR 866; [1996] Aust Torts Reports 81-402; (1996) 15 Leg Rep 2 per McHugh J (with whom Dawson J agreed).

APPEARANCES: For the plaintiffs Namberry Craft Pty Ltd: Mr DJ Christie, counsel. Wotton + Kearney, solicitors. For the first defendant Watson: Mr LM Watts, counsel. Rosemary Brondolino & Co, solicitors.
