Late Amendment of Pleadings

- Ian Bailey, Barrister, Sydney.

When dealing with a late application to amend the claim, as a general rule arbitrators will not be constrained by the modern principles of case management in the same manner, or to the same degree, as the courts have been in recent years. That is not to say that efficiency in the conduct of proceedings and the costs consequences of allowing late amendment of pleadings and adjournments are not relevant considerations for arbitrators when confronted by such applications.

The traditional approach to amendments has been that a party is entitled to have the real issues resolved so long as there is no injustice to the other which is not compensable by an appropriate order for costs. The introduction of a new emphasis in the courts on what has been broadly described as case management has meant that, apart from considerations of justice, courts are constrained by "*the interests of the whole community*": see *Ketteman v Hansel Properties Ltd* [1987] AC 189, and the impact thereon of what could be regarded as misuse of the courts resources. This new approach has required that consideration be given to the effect of an adjournment on court resources, and the competing claims by litigants in other cases: see *Sali v SPC Ltd* (1993) 116 ALR 625; *State Pollution Control Commission v AIS Pty Ltd* (1993) 29 NSWLR 487; and *Cohen v McWilliam* (1995) 38 NSWLR 476. Decisions in which there was a refusal of a late application to amend on this discretionary basis have produced a range of judicial emphasis and balances which lead to a degree of conflict.

The High Court of Australia has recently offered some guidance on the approach to be taken by courts to pleading amendments and, in so doing, referred to the wider discretionary considerations which are applicable to similar applications before arbitrators: see *State of Queensland v JL Holdings* 141 ALR 353. Those considerations, in so far as they concern arbitration proceedings, are summarised below. The Court of Appeal in New South Wales has also revisited the issue of the appropriate considerations in such a case, and held that, in determining whether to grant an amendment, the judge should seek justice between the parties, but should, apart from taking into account the traditional considerations, also consider the efficient management of the court: see *Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd and Ors* (1996) 40 NSWLR 543. This case is a graphic illustration of circumstances where the impact upon a party of a refusal of the amendment was so severe as to require subordination of policy (case management) considerations to the need to avoid such impact. Arbitrators will be constrained by considerations of fairness and justice as between the parties, and should take account of efficiency in the conduct of the proceedings, but will not be required to take into account the interests of other litigants, or the administration of justice generally. The restatement and summary, with numerous citations, by Kirby J in *Queensland v JL Holdings* at 368 to 370 of the relevant considerations to be weighed when deciding whether to grant an indulgence to a party will be of assistance to arbitrators when dealing with a late application to amend.

His Honour identified the following as those factors, of themselves or in combination, which favoured the granting of the application to amend:

- that it was the only way in which the true issues and the real merits, factual and legal, can be litigated and artificiality avoided;
- that the oversight which occurred is adequately explained as, for example, that it arose out of sudden and unexpected events;
- that the proposed amendment is of considerable importance to the rights of a party, particularly where it provides a complete answer to a claim;
- that any fault is that of the party's legal representatives;
- that the oversight was wholly accidental;
- that it was simply the product of unavoidable human error or it arose as a result of the application to the case of fresh legal minds who perceived an important new point;
- that cost orders or the imposition of

conditions could adequately re-balance the completing claims of justice; and

- that the hearing date was sufficiently distant to enable the other party to deal with the amendment and to prepare any necessary additional evidence and undertake other pre-trial procedures.

Considerations tending against the granting of an indulgence to amend, including the counterparts of the foregoing, are:

- the failure of a party to offer anything by way of explanation for the late application;
- the blamelessness of the resisting party and the extent to which the applicant is at fault in breach of clear directions;
- the strain of the litigation upon the parties and the natural desire to be freed, as quickly as possible, from the anxiety, distraction and disruption which litigation causes;
- that costs orders or conditions are not an adequate balm to the other party;
- the consequences for the other party, particularly where it would cause disarray at the last minute of the preparation for the trial;
- the length of time during which the proceedings have been pending before the application is made: the longer the time, the more reasonable it would be to expect the parties or their lawyers to have raised all points in issue;
- the extent to which the new issue would give rise to a substantial and new case in reply; and
- whether there has been repeated default of directions on the part of the applicant such that the application constitutes an abuse.

Apart from the discretionary considerations referred to above, which are directed to the objective of ensuring justice is done, the arbitrator may also need to determine whether the amended claim is within the scope of the arbitration agreement; and whether the amended claim or the new claim is part of the reference. The amendment may also involve questions of time bars and the application of statutory limitation periods.

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