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CASENOTE: *Alexiou v Australia and New Zealand Banking Group Ltd [2025] FCA 7*

(17 January 2025)

Mr Alexiou (also '**Applicant'**) was from about 2011 a senior employee in of ANZ Banking Group Ltd ('**ANZ'** or **Bank**). In 2015,[1] and again in 2020, Mr Alexiou sued the Bank for contraventions of federal legislation, including the *Corporations Act* 2001 (Cth) whistleblower provisions, and for breaches of general protections under the *Fair Work Act* 2009 (Cth) ('**FW Act**'). This was lengthy, ongoing litigation, involving several interlocutory proceedings,[2] including concerning privilege.[3] The Statement of Claim ('**Claim**') in the 2020 proceeding changed many times (with four amendments and 11 drafts). I have confined this casenote, as much as is possible, to the FW Act allegations.

Background

Mr Alexiou's claim arises out of the manipulation of the Bank Bill Swap Rate ('**BBSW'**) by traders employed by the Bank. Bank bills are instruments recording loans (including principal and interest) but like securities can be bought and sold. By selling bank bills in a particular way, traders employed by the Bank (and by another bank) were able to alter the BBSW. After an ASIC investigation, it was found that both the Bank and the National Australia Bank Ltd had employees who were involved in this manipulation.[4]

Basis of the Application

Between June 2011 and September 2015 Mr Alexiou occupied senior roles with the Bank, such as Head of Mismatch Trading (from June 2011), and Head of Balance Sheet Trading Australia (from December 2012). Between October 2011 and December 2014 Mr Alexiou warned the Bank that its traders had been manipulating the BBSW. In response, on 19 November 2014 the Bank stood Mr Alexiou down from his employment and made a press release that seven of its traders had been stood down. About a year after the stand-down the Bank terminated Mr Alexiou's employment and withheld his bonuses.

Amendment

The Applicant sought leave to file an amended Claim adding, in broad terms, twelve allegations to his Claim. A summary of the amendments relating to the FW Act claims is:

- the Bank's press release (and an announcement to the Australian Stock Exchange in the same terms) was accompanied by a direction to Mr Alexiou not to speak to the media. The most significant aspect of the press release was the Bank suspected those stood down (apparently including Mr Alexiou) were involved in Bank Bill manipulation, though Mr Alexiou was not terminated for that reason; and
- the Bank (so alleged Mr Alexiou) could have taken steps to prevent the damage to his reputation by publicly stating that ANZ had no evidence that Mr Alexiou had engaged

[1] The first proceeding was discontinued: see NSD 1423/2015.
[2] Alexiou v Australia and New Zealand Banking Group Ltd [2020] FCA 1777 (11 December 2020). This decision concerned the operation of Part 9.4AAA of the Corporations Act.
[3] Alexiou v Australia and New Zealand Banking Group Ltd [2021] FCA 1538 (8 December 2021). This decision concerned the production of notes, which were claimed to be affected by legal professional privilege.
[4] A detailed discussion by Jagot J is contained in ASIC v National Australia Bank Ltd [2017] FCA 1338 (10 November 2017) and forms part of the background to this proceeding.

in any of the conduct the subject of ASIC's investigation. This allegation was termed the 'Vindication Inaction'.

Hearing

Perram J heard the application, which ranged widely, but in part focused of section 342 of the FW Act, and the injury to Mr Alexiou's employment and prejudicial alteration to his position with the Bank. The Applicant attached a draft pleading to one of his affidavits in support of the application for amendment, which read (in part):

> *327A. The Applicant [. . .] and says that:*
>
> *(a) the Media Release;*
> *(b) the ASX Announcement;*
> *(c) the ANZ Media Comment; and or*
> *(d) the ANZ Vindication Inaction,*
>
> *constituted adverse action contrary to* [. . .] *s 342 Item 1 (b) and (c) of the* [FW Act].

The particulars following this paragraph included allegations of the Applicant's reduced prospects of employment with the Bank following the media release and other comments; and his reduced future prospects of employment, elsewhere.

The Bank opposed the amendment, on three grounds:

a. first, it alleged that the pleading was too generic; in the sense that the Applicant was required to plead specific loss such as loss of some legal right;
b. second, the Bank claimed that the draft pleading had not alleged that the Bank had created in Mr Alexiou 'the expectation of re-employment', which was required for him to allege adverse action against it; and which fell within section 342 of the FW Act; and
c. finally, the Bank submitted that Mr Alexiou's reduced employment prospects flowing from the Bank's conduct were mere possibilities or hypotheses, rather than being real or substantial consequences.

Consideration

His Honour examined the Bank's submissions regarding the proposed Claim, and concluded:

a. generally, a decision to grant amendments involves an assessment of what the interests of justice require (including considering any likely consequences or prejudice);
b. the objections to paragraph 327A were not beyond legal argument or couched in a way which would be liable to be struck out. In fact, these would be permissible on the basis that they were legally arguable; however, in this instance:
   i. the choices made by Mr Alexiou including issuing the 2015 proceeding, discontinuing it and then (some years later) suing again; and
   ii. the amendments now sought in this application which could have been made as early as October 2023, and the fact there was no explanation for them not being sought earlier

   made the balancing act (between utility of amendments, and reason for delay (see Tamaya)[5] impossible for the Court to perform; and
c. his Honour concluded that turning to the Court's discretion, amendments should only be permitted where the allegations were subject to consent from the Bank; or were not

[5] Tamaya Resources Ltd (in liq) v Deloitte Touche Tohmatsu [2015] FCA 1098, Gleeson J.

attended by years of delay. His Honour otherwise dismissed the Applicant's application, and ordered a portion of costs to be paid by the Applicant.

<u>Rationale of the decision</u>

This case is an unusual one, as much for its subject matter as the breadth of the proposed pleading (which was only partly allowed).

First, delay (as much as several years' delay) is relatively seldom in the main Courts which exercise jurisdiction under the FW Act. Many cases (rather than taking five years to be listed for trial) are heard and determined in less than half of that time. Second, a key element of the discretion to be exercised by the Court is the explanation for delay – or for an unwillingness to expand a proceeding at an earlier time. This aspect of pleading amendment is well known, and may have undermined Mr Alexiou's attempt to expand his Claim, as sought in the application.

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