



Late amendments and amendments after the expiry of the limitation period

Whether a party obtains permission to amend can make or break a case. Litigants seeking to amend very late and/or after the expiry of the limitation period can face particular difficulty.

In general:

- (1) Very late amendments are unlikely to be allowed, irrespective of the merits of the proposed amendment, where there is no good reason for the delay in the application to amend and where the amendment would result in real disruption or prejudice to the parties and/or to the court.
- (2) Amendments made after the expiry of the limitation period carry risk. Those which introduce a new cause of action will only succeed if they arise out of the same or substantially the same facts as are already in issue.

(1) Late amendments

The Commercial Court considered late amendments in Quah Su-Ling v Goldman Sachs International [2015] EWHC 759 (Comm).

The court adopts a two-stage process:

- (1) **Threshold:** A party seeking to amend must have a substantive case on the proposed amended statement of case which is better than merely arguable.
 - (a) An application to amend (at any stage) will be refused if it is clear that the proposed amendment has no real prospect of success.
 - (b) The test is that for summary judgment under CPR Part 24.
 - (c) The court may reject an amendment which raises a case which is inherently implausible, self-contradictory or unsupported by contemporaneous documents.

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(2) **Discretion:** If the substantive pleading on the amendment has a real prospect of success, whether the court allows a late amendment is a matter of discretion.

(a) A very late amendment is one made when the trial date has been fixed and where granting the amendment would cause the trial date to be lost.

(i) Parties and the court have a legitimate expectation that trial fixtures will be kept.

(ii) Lateness is not an absolute, but a relative concept.

(iii) It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done.

(b) The overriding objective is of the greatest importance. The court must strike a balance between injustice to the:

(i) applicant if the amendment is refused; and

(ii) respondent and wider litigants if the amendment is allowed.

(c) The applicant in a late amendment has a heavy burden to demonstrate:

(i) The strength of the new case.

(ii) A good explanation for the delay in making the application to amend.

(iii) Why justice to the applicant, the respondent and other court users requires the pursuit of the amended case.

(d) The court takes a much stricter view nowadays of non-compliance with the Civil Procedure Rules (“**CPR**”) and directions of the court.

(i) The achievement of justice means something different now.

- (ii) The correct approach in late amendments is *not* that they ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon.
- (iii) It is *not* sufficient for the amending party to argue that no prejudice had been suffered, save as to costs.
- (iv) The court accepts in modern litigation that payment of costs may not be adequate compensation.
- (v) The courts, including the Commercial Court and TCC, proactively manage litigation for the benefit of all court users. The relevant Court Guides are designed to avoid last minute problems which delay or adjourn trials and hearings.

(2) Amendments after the expiry of the limitation period

CPR r.17.4(2) reflects section 35 of the Limitation Act 1980. It provides:

“The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.”

Where a party commences proceedings relating to rights which accrued within the limitation period, but subsequently seeks to amend its case after the expiry of the limitation period, so as to assert a right which might otherwise be time-barred by limitation, the court must decide whether the amended case raises a new cause of action and would be time-barred, unless arising out of the same or substantially the same facts as those already pleaded, or whether the amended case forms part of the already-pleaded cause of action.

The court adopts the following analysis:

- (1) Does the amendment have a real prospect of success.
- (2) Does the amendment plead a ‘new claim’, namely a new cause of action.
 - (a) A cause of action is:

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- (i) “a factual situation the existence of which entitles one person to obtain from the court a remedy against another person”: Letang v Cooper [1965] 1 Q.B. 232 at 242.
 - (ii) “that combination of facts which gives rise to a legal right”: Berezovsky v Abramovich [2011] 1 W.L.R. 2290 at [59].
 - (iii) “every fact which is material to be proved to entitle the plaintiff to succeed – every fact which the defendant would have a right to traverse.”: Cooke v Gill (1873) LR 8 CP 107 at 116.
- (b) To ascertain the relevant cause of action in issue, the court compares the essential factual allegations already pleaded with those proposed by way of amendment: Co-operative Group Ltd v Birse Developments Ltd [2013] EWCA Civ 474 at [20]-[21].
- (c) The pleading of unnecessary allegations or the addition of further instances or better particulars do not amount to a distinct cause of action: ibid at [20].
- (d) If the claimant asserts a duty not previously pleaded and alleges a breach of such duty, this usually amounts to a new claim: ibid at [22].
- (e) If the new breach does not arise out of the same or substantially the same facts as those already in issue on a claim previously made in the original action, it is likely to be a new cause of action: ibid at [22].
- (f) If the claimant alleges a different breach of some previously pleaded duty, it will be a question of fact and degree whether that constitutes a new claim: ibid at [22].
- (g) In the case of a construction project, if the claimant alleges breach of a previously pleaded duty causing damage to a different element of the building, that will usually amount to a new claim: ibid at [22].
- (h) Amendments to the quantum of damages claimed (even substantial additions) do not necessarily involve new causes of action: British Airways PLC v Apogee Enterprises Inc (2007) 111 Con LR 200 at [8].
- (3) If not a ‘new claim’, the amendment will be allowed, subject to the discretion of the court and to the lateness at which it is sought to be introduced, as considered above.

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- (4) If a 'new claim', the amendment will be allowed only if it arises out of the same or substantially the same facts as those already pleaded.
- (a) New facts are substantially the same as those already relied on if they comprise:
- (a) minor differences likely to be the subject of inquiry but do not involve any major investigation; and/or
 - (b) differences merely collateral to the main substance of the new claim, proof of which would not necessarily be essential to its success: Harland & Wolff Trustees v Aon Consulting [2010] I.C.R. 121at [68].
- (b) The purpose of the rule is to protect defendants from having to investigate facts and obtain evidence of matters unrelated to those which they could reasonably be assumed to have investigated for the purpose of defending the unamended claim: ibid at [66].
- (c) In cases of factual complexity it is likely that an amendment would seek to plead new facts. However, that does not mean that a new claim does not arise out of substantially the same facts: Harland at [67].
- (d) If factual issues are in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts: Smith v Henniker-Major & Co [2003] Ch. 182 at [96].

Conclusion

Litigants must take great care to plead their case fully at the outset.

Applications for late amendments and for amendments after the expiry of the limitation period are usually of great significance in commercial litigation and of particular financial importance. Such applications are likely to be contested.

Whether making or resisting these applications, clear advice and specialist legal representation are essential.

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If you require advice or representation, please contact Tom or his Clerks on 020 7544 2600.

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