

## Litigation - Cyprus

### Amendments to pleadings – factors that guide courts' discretion

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#### **Introduction**

#### **Factors**

#### **Comment**

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Order 25, Rule 1 of the Civil Procedure Rules gives courts the discretionary power to allow amendments to pleadings. Well-settled principles on amendments to pleadings laid down in landmark English cases have historically been adopted and followed by the Cyprus courts.

The relevant case law confirms that the courts generally adopt a relatively permissive approach when exercising their discretion in this regard, allowing amendments to pleadings in most cases. This is in line with the principles of justice, as amendments aim to identify the relevant issues and facts and to play out the real disputes between parties, with the proviso that any party prejudiced should be compensated for costs. The rationale behind this is that amendments to pleadings help to clarify disputed matters, determine the real controversy between the parties and avoid multiple proceedings.

Ultimately, courts aim to do justice. In order to achieve this, the court will look at the facts of each particular case and exercise its discretion, guided by certain principles. In exercising its discretion, the court is required to strike a balance between conflicting considerations. For example, the court will normally allow an amendment that clarifies the issues in dispute, but it will not do so if it believes that the amendment will adversely affect the opposing party or hinder the overall process of the trial.

#### **Factors**

A number of recent Cyprus court decisions highlight the underlying factors that courts will apply in order to determine whether an amendment is justified. These underlying factors are outlined below.

#### ***Need***

The party requesting an amendment must demonstrate that the amendment is necessary. Amendments that help to clarify the matters in dispute and that avoid multiple proceedings will usually be allowed, as long as they cause no injustice to the respondent. However, the court will not allow any amendment that it considers superfluous.

#### ***Nature and extent***

The court will consider the nature and extent of the amendments requested, and whether they are material, substantial or extensive, in order to determine whether approving the application may cause the issues in dispute to be redefined.

#### ***Party's conduct***

The court will also consider the conduct of the party requesting the amendment and the reason why the amendment was submitted at a particular stage of the proceedings. If a party requests an amendment late in the proceedings, it must show a sufficient cause to justify the delay and explain not only why it is pursuing a late application, but also why it did not make the amendments earlier. The court will be less likely to allow amendments if it finds that, by exercising proper diligence, the party could have raised the matter at an earlier stage.

In a recent Nicosia District Court<sup>(1)</sup> case, the plaintiff applied to amend its statement of claim more than eight years after initiating proceedings. The court refused the application, finding that the applicant had not adequately justified its conduct to date, particularly its tardiness in applying to amend the pleadings.

While delay in submitting an application to amend does not constitute, on its own, a reason for dismissing the request, the court will look for a valid justification for the delay, keeping in mind the opposing party's constitutional right to be heard within reasonable time. The court based its judgment on an earlier case<sup>(2)</sup> in which an application to amend the statement of defence was filed 11 years after filing of the writ of summons. The application was dismissed at first instance and the Cyprus Supreme Court upheld the judgment.

### **Hearing commencement**

Once the hearing of the case has begun, the court will consider an application to amend from a different perspective. While commencement of the hearing alone does not constitute an insuperable obstacle to an amendment, the court will exercise its discretion more sparingly. It will be reluctant to allow an amendment if the applicant has failed to demonstrate clearly that it could not have raised the issue before the trial commenced. In addition, the court will consider whether the opposing party has finished giving evidence, in which case the amended pleading will constitute a *fait accompli*, unless the opposing party is allowed to recall witnesses or call new ones.

This was an issue in *Famanet v Reuters*. By the time the plaintiff presented its application, not only had the hearing of the case begun, but also the plaintiff had presented six witnesses. The court dismissed the application on the grounds that the delay was inordinate, the procedure was at an advanced stage and there were real dangers that the defendants' constitutional rights would be adversely affected if the amendment were allowed, since the witnesses that the plaintiff had already presented would need to be recalled for cross-examination.

Similarly, in *Jamal Khan v The Republic of Pakistan*, the Supreme Court upheld the first-instance judgment, dismissing an application to amend the statement of defence after the hearing of the case had begun and was at an advanced stage. Among its reasons for dismissing the application, the court noted that if the application had been allowed, the evidence already given would need to be ignored as it might contradict evidence given in the framework of the amended pleading.

### **Risk**

The court will also look for any inherent risk that the procedure might be derailed from its normal route. In *Famanet*, the court noted that this was one of its reasons for refusing the application.

### **Prejudice**

The court will also assess whether the amendment will create a prejudice against the respondent – for example, by infringing Section 30.2 of the Constitution, which guarantees the right to a fair and public hearing within a reasonable time. The court must be mindful of any additional delay that the amendment might cause, the need to call or recall witnesses, as well as any advantage that the applicant will gain over the respondent if the amendment is allowed. The court will not allow any amendment that might cause the other party irreparable damage or injustice that cannot be monetarily compensated. In *Jamal Khan v The Republic of Pakistan*, the Supreme Court put considerable weight on the fact that allowing the amendment would irreparably damage the respondents' case and that the respondents could not be monetarily compensated. This was because they had already closed their case and therefore did not have the opportunity to address the issues raised in the requested amendments. In support of its decision, the Supreme Court quoted the following passage from the Paphos District Court judgment:<sup>(3)</sup>

*"With the requested amendment the applicants wish to change their admission by adding provisions of the foreign law which contradict their admissions. Having, however, in mind that the plaintiffs have adapted their evidence on the basis of these admissions and that the applicants have cross-examined the plaintiffs' witnesses on the basis of these admissions, possible approval of the request at this stage will cause injustice to the plaintiff's case."*

### **Type of amendment**

Finally, the court will look at whether:

- the requested amendment would result in the introduction of a new cause of action;
- the applicant is seeking to introduce facts that did not exist at the time of filing the writ; or
- the applicant is seeking to present an entirely new case.

In *Branco Forcan v Hemslade Trading Ltd*,<sup>(4)</sup> the Nicosia District Court dismissed an application for amendment of the statement of claim on the grounds that the amendments would introduce a new cause of action based on facts that took place after filing of the action which did not exist when the writ of summons was filed. The court distinguished this from a case where an amendment is sought in order to add facts that occurred after filing of the case, but which support the initial cause of action.

## Comment

While the courts will not allow parties to amend their pleadings as a right, neither will they reject applications for amendment arbitrarily. The following passages encapsulate the approach that the courts will adopt:

*"We are of the opinion that in view of the long delay which has been noted in submitting the application for amendment, the nature and extent of the requested amendments which in essence redefine the issues in dispute, the fact that the case is pending for more than ten years, the real danger of irreparable damage, the negative impact on the respondents' rights, including the danger to breach section 30.2 of the Constitution due to the additional delay that will be caused and the necessity to call and recall witnesses, we hereby decide that the first instance Court has correctly exercised its discretion and did not grant leave for amendment."<sup>(5)</sup>*

*The opponents' rights cannot be put in danger neither can the case sustain any further inconvenience at such a late stage with obvious dangers of deviation because the plaintiff has negligently, as it appears from its own allegation, failed to ask for the requested amendment earlier although it has the opportunity to have done so."<sup>(6)</sup>*

The courts will exercise their discretion on a case-by-case basis, carefully considering the guidelines outlined above in order to strike the appropriate balance between the parties in a way that will best serve in the interest of justice.

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## Endnotes

<sup>(1)</sup> Action 475/2006, Nicosia District Court, *Famanet Holdings Ltd v Reuters Telerate LLC*.

<sup>(2)</sup> Civil Appeal 295/2010, *Jamal Khan v The Republic of Pakistan*.

<sup>(3)</sup> Action 1259/99, September 15 2010, in the Paphos District Court.

<sup>(4)</sup> Action 4739/2010, *Branco Forcan v Hemslade Trading Ltd*.

<sup>(5)</sup> Civil Appeal 295/2010, *Jamal Khan v The Republic of Pakistan*.

<sup>(6)</sup> Action 475/2006, Nicosia District Court, *Famanet Holdings Ltd v Reuters Telerate LLC*.

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