

Litigation - Cyprus

Supreme Court considers application to amend *in rem* report

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The decision in *Oscar Shipping PTE Ltd v The Cargo on Board the Ship Asphodel (Liberian Flag) Now Lying at the Port of Limassol Sea Roads*⁽¹⁾ related to an application by summons to amend the statement of claim filed by plaintiff Oscar Shipping Pte Limited in an action *in rem*.

Facts

The plaintiff had initiated an action *in rem* against the defendant cargo, claiming damages for losses of \$1.953 million which it claimed to have suffered as a result of breach of the charterparty regarding the carriage of the cargo.

During the hearing, the plaintiff filed an application by summons requesting the court's permission to amend its report. The reason for the application was to satisfy its obligation towards the court to provide evidence of the actions that it had taken in order to mitigate its losses and to demonstrate the actual losses suffered. The court noted that with its application, the plaintiff was increasing its claim to \$2,245,370.

Libyan company ENMA Food Stuff Company, the owner of the cargo and beneficiary of the proceeds of sale of the cargo, filed an objection against the application for amendment on the basis that:

- the plaintiff had been aware for some time of the facts that it now wished to incorporate into the action and had provided no justification for failing to inform the court at an earlier stage; and
- the amendments made the statement of claim so different from that already pleaded that they were impermissible.

Judgment

The amendment or alteration of pleadings in cases brought before the Supreme Court in its admiralty jurisdiction is addressed under Order 25, Rule 1 of the Civil Procedure Rules:

"The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."⁽²⁾

In assessing the plaintiff's application, the court referred to *Foiniotis v Greenmar Navigation*,⁽³⁾ in which the court summarised the principles to be observed regarding the exercise of its discretion with regard to the amendment of pleadings as follows:

- The amendment of the pleadings is permissible at every stage of the proceedings, provided that the provisions that render such amendment necessary for the effective attribution of justice coexist.
- In assessing whether it is in the interests of justice to allow the application, the court must consider the effect of the amendment on the rights and interests of the respondent to the application.
- Amendment is permissible in principle, provided that no irreparable damage is caused to the respondent – that is, damage that cannot be remedied with the issuance of an appropriate order for costs. The burden of proof for the justification of the request and the delay in the presentation of the applicant's grounds varies, depending at what stage the application is filed: the longer the delay, the greater the burden of proof of justification that the applicant must discharge.

- The commencement of the trial does not itself create an insurmountable barrier to amendment of the pleadings. Nevertheless, at this stage the court's discretion is exercised sparingly, also taking into consideration the derailment of the trial from its defined course and the impact on the respondent's rights. The court will consider such applications with reluctance.⁽⁴⁾

The court found that with the proposed amendment, the plaintiff was seeking to redefine the basis of the calculation of its damages by introducing for the first time facts and evidence relevant to its duty to disclose all actions taken to mitigate its losses.

The court noted that the charterparty ended on August 25 2012, while the hearing started on September 26 2012 and the plaintiff's first witness statement was completed the following day. It found that the plaintiff had had ample time to take all necessary procedural steps to amend its report before the first hearing. Even if it had taken the view that there was insufficient time, the plaintiff could have requested an adjournment of the hearing. Instead, it proceeded with the hearing of the case.

The court was of the opinion that the requested amendment would derail the trial from its course, effectively requiring the hearing of the case to start again, which would adversely affect the defendant's rights. The court therefore dismissed the application.

Comment

The key consideration that the courts will apply in assessing an application for leave to amend pleadings is the effect of the proposed amendment on the interests of the respondent. If the effect on the respondent is disproportionate, or if allowing the application would cause the case to deviate from its course to such an extent that an order for costs could not rectify the harm done, the court will dismiss the application.

This case also highlights how important it is for parties to disclose all facts and evidence relevant to the case before the first hearing. Any effort to present them at a later stage will be considered reluctantly by the court. Based on the established principles, this will ultimately be a matter of fact; however, where the interests of the respondent are potentially severely affected, as in the case at hand, the courts will be especially rigorous.

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Endnotes

- ⁽¹⁾ Admiralty Action 22/2011, November 15 2012.
- ⁽²⁾ Rule 90 of the Cyprus Admiralty Jurisdiction Order 1893 provides that: "Any pleading may at any time be amended, either by consent of the parties, or by order of the Court or Judge."
- ⁽³⁾ (1989) 1 (E) CLR 33.
- ⁽⁴⁾ A reference to the English case of *Hipgrave v Case*, 28 Ch D 361.

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