Applications to Amend: Grounds for Resistance

Guidance on whether amendments to Particulars of Claim will be permitted by the court has recently been provided by Mr Justice Coulson in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd and Others*

In a helpful review of the authorities, it has been made clear that the court will conduct a ‘balancing exercise’ weighing up specific factors that may militate for or against amendments being allowed. In the case in question, Mr Coulson gave the claimant’s application fairly short shrift. Thus, it is this clear that claimants will not always get away with amending their pleadings as a matter wends its way through litigation. This is a welcome decision for those conducting professional indemnity defence work and defendants in general.

The court’s assessment of applications to amend will be governed by the following considerations:

1) Lateness of the application. This is a relative concept. An amendment will be late if it could have been advanced earlier, or involves duplication of cost, or if it requires the resisting party to revisit any major steps in the litigation which have been completed.

2) If an amendment jeopardises a trial date it can be regarded as ‘very late’.

3) The applicant must be able to provide a good explanation for the delay in making the amendment in order to have a prospect of success.
4) The amendment will have less chance of being permitted if it is not tightly drawn or focussed.

5) The question of prejudice to applicant and respondent will be considered. There is a spectrum of possible prejudice to the respondent which can range from being ‘mucked about’, to pre-trial disruption, to duplication of cost and effort. Prejudice to the amending party if the amendments are not allowed will include its inability to advance its amended case (obviously). However, if that prejudice has arisen due to the amending party’s own conduct then it is not a significant factor.

In the case in question, the preservation of the trial date was considered of paramount importance and it was ‘critical’ that it be maintained, partly due to costs considerations: “Any adjournment of the trial date would increase those costs significantly and any semblance of proportionality would then be lost.” Mr Justice Coulson weighed the above factors with that in mind and firmly rejected the application to amend. The claimant had not properly explained the lateness of the application, indeed it was very arguable that certain elements of the amendments had been ‘deliberately omitted’ at the outset. Nor were the amendments tightly-drawn or focussed. As such the “balancing exercise came down firmly against allowing the amendments.”

The claimant conjured up a last ditch argument that the outcome of the balancing exercise was immaterial because the claimant could simply commence fresh proceedings if the amendments were not allowed. As such, it was in the interests of all the parties to permit the amendments. However, this argument was defeated by reference to Henderson v Henderson, where it was held that the court would not permit “the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence or even accident, omitted part of their case.”
The decision sends a welcome message to claimants that they will not simply be able to amend their case at will as litigation proceeds. Hopefully this will restrict the amount of claims that end up with amended Particulars of Claim, re-amended Particulars or worse.

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