

# The last-minute change of plan: How courts are no longer easing the path for late amendments

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Late amendments to Particulars of Claim involving the introduction of new allegations can result in cost and inconvenience to both parties. Historically, the courts have tended to indulge parties wishing to make late amendments but a number of recent decisions show that the courts are prepared to refuse permission for late amendments.

## ***Henderson v Dorset*: Introduction of a new Human Rights Act claim**

The first of two reported decisions in the case of *Ecila Henderson v Dorset Healthcare University NHS Foundation Trust*<sup>1</sup> (where this firm later successfully defended the claim at trial<sup>2</sup>) concerned an eleventh-hour application by the Claimant to amend her Particulars of Claim to introduce a claim under the Human Rights Act.

The tragic circumstances of the case were that on 25 August 2010 Miss Henderson had caused her mother's death and had been convicted of manslaughter as a result. At the time of the offence she had been labouring under the effects of a psychiatric condition. She alleged that if the psychiatric care provided by the Defendant had been adequate then the offence would not have occurred. Her claim was advanced in tort, and this was reflected in her Particulars of Claim.

At a case management hearing in May 2016 (some seven months before trial) the Claimant's representatives indicated that she might wish to advance claims under the Human Rights Act. It was common ground that if the Claimant were to do so, she would need to amend her Particulars of Claim promptly. This was especially important because the normal limitation period for Human Rights Act claims is one year, and the proposed amendment was canvassed almost six years after the index events.

However, the Claimant did not apply to amend her Particulars of Claim until 14 November 2016, some three weeks before trial. The Claimant's draft amendments provided only a brief outline of the claims under the Human Rights Act but did not particularise the claims in any real detail.

In dismissing the Claimant's application Mr Justice Warby outlined several issues which were relevant to his conclusions, and which will assist in the determination of similar applications in the future:

1. Did the proposed amendments set out adequately pleaded claims with a real prospect of success? Here, it was possible that the Claimant might have arguable claims but the proposed amendments did not set these out.
2. If the amendments were inadequate, should the application be adjourned to allow adequate amendments to be formulated? The Claimant had had ample time to plead her claim and had failed to do so. Furthermore, adjourning the application would certainly have caused the loss of the trial date and would have exposed the Defendant to substantial cost which it probably could not recover from the Claimant.
3. Did CPR r17.4 apply (requiring amendments made outside of the limitation period to arise from the same facts as the existing claim) and if so did the HRA claim arise from the same facts? In this case, CPR r.17.4 did apply. The HRA claim required investigation of different facts to the claim in tort, so it did not arise from the same facts.
4. Would the amendment require the trial to be adjourned? Given the need for further investigation, for the Defendant to respond to the amended claim, and for the possibility of additional evidence needing to be served the trial would need to be adjourned.
5. As a matter of discretion should the amendment be permitted? A number of factors weighed against the Claimant, including:
  - (a) the application was made late;
  - (b) the CPR in paragraph 15.2 of PD16 expressly requires applications to plead new HRA claims to be made as soon as possible;
  - (c) the trial date would be lost;
  - (d) the amendment would expose the Defendant to substantial cost; and
  - (e) the Claimant was publically funded so the Defendant would never be likely to recover these costs from her.

## ***CIP v Galliford Try*<sup>3</sup>: Substantial amendments 8 months before trial**

The Henderson decision sits neatly with the 2015 decision of Mr Justice Coulson in *CIP Properties (AIP) Ltd v Galliford Try Infrastructure Ltd and others*. The case arose from the construction of the Broadway Plaza development in Birmingham. The Claimant, who owned the development, alleged the Defendant was responsible for various construction defects.

The case had a chequered procedural history. A Letter of Claim had been sent in 2011 and proceedings were commenced in October 2013. It appeared that there had been a 17 month period when the Claimant had done nothing to progress the claim. At a costs management hearing<sup>4</sup> the judge made substantial cuts to the Claimant's costs budget (reducing it from £9m to £5m). The costs budget revealed that the Claimant had spent some £900,000 formulating the Particulars of Claim. Then in April 2015, about 8 months before trial, the Claimant applied to make substantial amendments to its Particulars of Claim.

Against this backdrop it is perhaps unsurprising that the judge was not minded to indulge the Claimant. The application was refused, it being noted that while the application had been made many months before trial it should still be viewed as a "late" application because of the effect that it would have on the other parties by requiring substantial additional work and making the directions timetable almost impossibly tight.

### **Is the door always closed?**

The courts will continue to entertain late applications to amend because litigation is, by its nature, changeable. New facts might emerge making it necessary for a claimant to amend his or her claim.

It might be said that if the factors outlined by Warby J in Henderson are met (assuming all are relevant) then a court would be likely to permit the late amendment. Consistent with this, well-pleaded amendments supported by evidence were permitted in *Manchester Ship Canal Co Ltd v United Utilities Water Ltd*<sup>5</sup>. Similarly, the addition of a new allegation which had been the subject of argument between the parties for at least the last 6 months was allowed in *Ahmed v Ahmed*<sup>6</sup> because it would have been anticipated by the Defendant.

In considering amendments to any pleadings parties must consider the impact of those amendments in terms of whether additional evidence is required, whether they threaten a trial date, and whether any inconvenience to the responding party can be compensated in costs.

<sup>1</sup>[2016] EWHC 3032 (QB)

<sup>2</sup>[2016] EWHC 3275 (QB)

<sup>3</sup>[2015] EWHC 1345 (TCC)

<sup>4</sup>[2015] EWHC 481 (TCC)

<sup>5</sup>[2016] EWHC 259 (Ch)

<sup>6</sup>[2016] EWCA Civ 686

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