AMENDMENT OF PLEADINGS: A RIGHT OF THE PARTIES OR A GIFT FROM THE COURTS
THE LAGOS STATE HIGH COURT EXAMPLE

PROEM

*In the year 1868, when Bullen and Leake brought out the third edition of their book (**titled Precedents of Pleadings**), the system of pleadings had reached a high pitch of development. The pleader had to state his cause of action with meticulous accuracy: else he might be met with objections from which he could never recover. This was replaced in 1875 by the modern system under which the pleader had only to state the material facts. This reform took away much of the incentive to accuracy and led to much loose pleading and, worse still, to much loose thinking. The pleader did not trouble to see whether the facts really did give rise to a cause of action. He just threw them all together in hope that they would. In the long run, this served him ill – because in this way he might overlook some vital matter – on which the case would be lost.*

Lord Denning of Whitchurch

Introduction

1. Indisputable is the fact that every legal system needs a method of defining the dispute that is to be resolved by the court. In common law tradition, this role is played by documents known as "**pleadings**" - the generic term to describe the formalized process by which each party states its case prior to trial. This article takes the reader on an excursion into the dynamics of the litigant's entitlement to amend his pleadings, with focus on the provisions of the High Court of Lagos State Rules 2012. It begins in Part I with a brief discussion on the essence of pleadings and in Part II, analyses the extent to which the ability of a party to amend his pleadings is indispensible to the dispensation of justice. In Part III, it proceeds to its quintessence, which is an analysis of the extent to which the Rules makes the amendment of pleadings an unrestricted right of the parties or a privilege to be enjoyed on the exercise of the court's discretion; and in Part IV it ends with a consideration of the position in other jurisdictions, with focus on the United Kingdom.

Part I - The Essence of Pleadings

2. By way of definition, pleadings are the written statements of the parties in actions begun by writ which are served by each party in turn on the other, setting forth in a summary form the material facts on which each relies in support of his claim or defence, as the case may be. They are a means by which the parties are enabled to state and frame the issues which are in dispute between them, without embarking at that stage on the evidence which each party may adduce at the trial.

3. Pleadings are indispensable to dispute resolution procedure, as they operate to define and delimit with clarity and precision, the real matters of controversy between the parties upon which they can prepare and present their respective cases, and on which the court will be called upon to adjudicate between them.

4. It is often stated that "the purpose of pleadings is to define the issues and give the other party fair notice of the case which he has to meet".[1] This perspective supports the views expressed by Jessel M.R. viz:

> *"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules of Order XIX was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and to be decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."*[2]

5. It is also the object of pleadings to inform the court of the precise matters in issue between the parties which the court may determine, since they set the limits of the action which may not be extended without due amendment being made. In *The Why Not,*[3] Phillimore J. said

> *"[The Pleadings] are not to be considered as constituting a game of skill between the advocates. They ought to be so framed as not only to assist*

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1 *Barclays Bank v. Boulter [1999] 4 All E.R. 513 at 517; Farrell v Secretary of State for Defence [1980] 1 All E.R. 166 at 173*

2 *Thorp v. Holdsworth (1876) 3 Ch. D. 637 at 639*

3 *(1868) L.R. 2 A. & E. 265 at 266*

the party in the statement of his case but the court in its investigation of the truth between the litigants."

6. Off the back of the foregoing, it would be apposite to say that pleadings serve the two-fold purpose of (x) giving each party information about the case of the opposite party which he will have to meet before and at trial, and at the same time (y) informing the court about the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial. Their importance cannot be over-emphasized in the adjudication process, and this is why it is every so often said that, *"Good matter must be pleaded in good form, in apt time, and in due order, or otherwise great advantage may be lost."*[4]

Part II - Pleadings and Parties' Right of Amendment: Peanut Butter and Jelly?

7. The rule that a party is bound by his own pleadings[5] is, to a certain extent, mitigated by the powers to amend pleadings. This power is justified by the need to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts or the true relief or remedy which the parties really and finally intend to rely on or to claim.[6] A litigant may sometimes find it necessary to revise his own pleadings to re-state or re-frame his case before the action proceeds to trial, in order to bring out "the real question in controversy" between the parties.

8. So, for example, where fresh information has become available, e.g. the interrogatories have been fully answered by the adverse party; or documents initially unknown to him have been disclosed, this will necessitate the re-shaping of his statement of claim or defence. Or his opponent may have raised some well-founded objections to his pleadings, in which case it will be advisable for

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4 Co. Litt. 303 a.

5 See Jacob, the Present Importance of Pleadings" (1960) Current Legal Problems, pp. 171, 174

6 See G.L. Baker Ltd. v. Medway Building and Supplies Ltd. [1958] 1 W.L.R. 1216, per Jenkins L.J. at 1236, where he said that the proposed amendment raised what "was a vital point in the case and unless it was adjudicated on, the real matter in issue between the parties would not be decided, for the case would proceed on an assumed state of the facts which more likely than not, was wholly at variance with and bore no relation to the true facts of the case."

him to amend at once before it is too late.[7] The Court has wide and ample powers to permit this amendment.[8]

The Lagos State High Court Rules

9. The Lagos State High Court Rules 2012 ("**the 2012 Rules**") which came into effect in December 2012 are generally spirited to ensure speedy dispensation of justice while emphasizing the primacy of substantive justice over technical justice. The Rules provide in Section 24 that:

> *"A party may amend his originating process and pleadings at any time before the Case Management conference and not more than twice during the trial but before the close of the case."*

10. The guiding principle of cardinal importance on the question of amendment is that, generally speaking, all such amendments ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings.[9]

11. In *Egwa v Egwa*, [10] the Court of Appeal stated the rationale for amendment of pleadings when it held that amendment is allowed to correct slips, blunders, errors, omissions and inadvertence of counsel, in the interest of justice once the court is satisfied that no injustice would be occasioned to the adverse party. It further stated that amendment may be allowed at any stage of the proceedings, before, during, or after trial, or even after judgment or on appeal as the courts would rather grant an application for amendment than give judgment in ignorance of facts which ought to be known before rights are finally decided.

12. Our courts are scarcely reluctant to grant a party leave to amend its pleadings where such amendment is clearly intended to clarify the issues in controversy between the parties and also, where the proposed amendment is neither fraudulent nor intended to overreach the other party.[11]

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7 *I.H. Jacob , Precedents of Pleadings, (1975) Third edition, Sweet & Maxwell. P. 123*

8 *At common law there was very little room for amendment of pleadings, but amendments of mistakes were allowed, as it was said, in furtherance of justice (see Rex v. Mayor, etc. of Grampound (1978) 7 T.R. 699) whilst the proceedings remained in paper*

9 *See Ikyernum v. Iorkumbur [2002] 11 NWLR (Pt. 777) 52 at 71-72 (H-A)*

10 *[2007] 1 NWLR (Pt. 1014) 71 at 95 (H)*

11 *N.N.B. Plc. v. Denclag Limited [2005] 4 NWLR (Pt. 916) 549 at 602 (A)*

13. In *Irepodun-Ifelodun Local Government v. Balemo,*[12] the Court of Appeal, on the issue of granting leave to amend pleadings held that:

> *"...an amendment of pleadings should be allowed unless:-*
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> *(1) It will entail injustice to the respondent;*
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> *(2) The applicant is acting mala-fide; or*
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> *(3) By his blunder, the applicant has done some injury to the Respondent, which cannot be compensated by costs or otherwise."*

14. There is no injustice if the other side can be compensated by costs, but if the amendment will put the other side into such a position that they must be injured, then it ought not to be made.[13]

15. It follows from the above that an amendment ought, as a rule, to be allowed if thereby, the real substantial question in controversy can be raised between the parties and to avoid multiplicity of legal proceedings.[14]

16. Naturally, the 2012 Rules also prescribe the procedure to be followed by a party in an application for leave to amend its pleadings. Order 24 Rule 2 provides that an application to amend shall be supported by an affidavit with the proposed amendment attached as an exhibit, while Order 24 Rule 3 provides that:

> *"Where any originating process and or a pleading is to be amended a list of any additional witness to be called together with his written statement on oath and a copy of any document to be relied upon consequent on such amendment shall be filed with the application."*

17. A liberal approach to the interpretation of these provisions suggests that unlike Rule 2 which requires the proposed amendment to be exhibited to the affidavit in support of the application, Rule 3 only requires the additional list of witnesses, their written statements on oath, and additional list of documents to be filed with the application. It informs the view that if the draftsman's intention was that the Applicant should exhibit the additional written statement on oath

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12 *[2007] LPELR-8439(CA)*

13 *Tildesley v. Harper (1878) 10 Ch. D. 393 at 396; Akaninwo v. Nsirim (2008) Vol 3 M.J.S.C 40 @ Pp. 51 - 52 (E – D)*

14 *The Alert (1895) 72 L.T. 124*

and additional list of documents, Order 24 Rule 2, would have expressly employed the word "exhibit" as against the expression "shall be filed with the application" used in Order 24 Rule 3.

18. A distinction must therefore be drawn between attaching a document as an exhibit *vis-a-vis* filing with the application for amendment. This view is bolstered by the application of the latin maxim: *"expressio unius est exclusio alterius"* – "*the express mention of a word excludes others not so mentioned."* More so, where words in a statute are clear and unambiguous, a literal interpretation must be employed and such words must be given their ordinary meaning.[15]

19. The more conservative construction of Rule 3 endorses a compulsory requirement for the applicant to exhibit all the additional documents to the application, failing which the application will be incompetent and therefore liable to be struck out. Of foremost consideration here is the use of the word "shall" in Order 3 which implies compulsion.[16]

20. The above school of thought gains traction especially in view of the Court of Appeal's decision in the 2012 case of *Popoola v Babatunde*[17] where it held per Okoro JCA that

> *"Maybe I should emphasize that the requirement of Order 24 Rule 3 of the High Court of Lagos State (Civil Procedure) Rules, 2004 that an Applicant seeking to amend his process should file along with the application list of additional witness together with their written statement on oath and other documents to be relied upon consequent on such amendment is not made to punish any of the parties or create some technical bottleneck for the parties...*
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> *Taking the principles enunciated in Alsthom S. A. v. Saraki (supra) together with order 24 Rule 3 of the High court of Lagos State (civil procedure) Rules, 2004, it is crystal clear that the grant of an amendment is not a matter of course. The Applicant has to satisfy the court that he deserves an amendment. Thus where the court has*

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15 *Wema Bank Plc. v. Osilaru [2008] 10 NWLR (Pt.1094) 150 at 177(F-G).*

16 *Nwankwo v.Yar'adua (2010) 12 NWLR (Pt. 1209) 518 at 589; Agip (Nig.) Ltd. v. Agip Petroli International & Ors. (2010) 5 NWL (Pt. 1187) 348 at 419 paras. F-G*

17 *(2012) 7 NWLR (Pt. 1299*

considered the Rules of court and the principles enumerated above and decides to exercise its discretion against the grant of the application, this cannot be termed as punishment or technicality."

21. It appears from the foregoing that by the decision in *Popoola*, the Court of Appeal intended to overrule its decision in *Abah v. Jabusco*, and therefore the current position of the law until the Supreme Court provides guidance on the subject is that an application for leave to amend, in order to be competent, must have attached to it, the application, list of additional witness together with their written statement on oath and other documents to be relied upon.

Part III - A Right of the Parties or Gift from the Court

22. Amidst all the concurrence on the importance of pleadings and parties' right to amend as provided under the 2012 Rules, there exists a disaccord which merits some consideration: Whether leave for a party to amend its pleadings is granted upon an exercise of the court's discretion, or is a right, and should therefore be granted as a matter of course.

23. Proponents of the former school of thought argue that notwithstanding the provisions of Order 24 Rule 1 of the High Court of Lagos State (Civil Procedure) Rules, 2012, several factors will be considered by the court in determining whether or not to exercise its discretion in favour of an applicant by granting an order of amendment. They numerate these factors to include where the amendment will lead to gross injustice by the other party; where the facts upon which the proposed amendment are based were known to the defendant a long time ago; and where the amendment is an unnecessary one. Some of these factors will now be addressed concisely.

24. First, there is the argument that an application for amendment cannot be granted as a matter of course and the party seeking an amendment must be seen to have made out a case for the grant of the application by placing sufficient materials before the court upon which the court can base its exercise of discretion. In *World Gate Ltd. v. Senbanjo*,[18] the Court of Appeal held per Galadima J.C.A. (as he then was) that:

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18 (2000 4 NWLR (Pt. 654) 669

In an application seeking the discretion of Court to amend pleading cogent and convincing reasons must be adduced.

It is not enough to say simply that the amendment is necessary"...

The Court has the duty to decide whether an amendment is necessary or not and not for the counsel to do so. It is the duty of the applicant to place facts or material before the Court so as to assist the court in coming to the right conclusion."[19]

25. It is also argued that another yardstick for the exercise of the court's discretion is a consideration of whether the amendment sought is in bad faith and is intended to overreach the adverse party. In the case of *Adetutu v. Aderohunmu,*[20] the court held that:

> *"The general rule is that the court will always allow amendment to enable matters in controversy between the parties to be completely adjudicated upon and the issues between them settled once and for all. This rule however, is subject to consideration of facts of each particular case. Amendment which will act prejudicially to the other side should not be granted, especially where a court is of the view that the other side cannot be compensated by the award of costs..."*

26. The word "overreaching" in the context of amendment of pleadings connotes a situation where a party, fully aware of the case of the adverse party, applies to amend his pleadings with trick or craftiness to put the respondent or adverse party in a state of hopelessness or helplessness such that he cannot meaningfully respond for the good of his case. In *Kode v Yusuf*[21], the court held per Karibi-Whyte, J.S.C., at p. 415 that:

> *"The court will be obliged to refuse an amendment intended to overreach or that will result in injustice to the other party..."*

27. The need for the court to avert its mind to fairness and justice was underscored in the case of *Arojoye v. U.B.A & Anor*[22] where the court held that:

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19 *See also Horsfall v West (1994) 4 NWLR (Pt. 597) 120*
20 *(1984) 6 SC 92*
21 *(2001) 4 NWLR (Pt. 703) 392*
22 *(1986) 2 NWLR (Pt. 20) 101*

"In considering whether or not to grant an amendment of pleadings, the court must always be guided by the materiality of the amendment sought, the rules of audi alteram partem, and the genuineness of the amendment. But the court will not grant an amendment which will cause injustice to the other party."

28. It has also been suggested that the discretion of the court would be exercised against the party seeking leave to amend where it will be impossible for the adverse party to effectively and adequately react to the new facts and issues sought to be introduced by the proposed amendment at an advanced stage of the proceedings. This suggestion gains traction from *Adetutu*,[23] where the Supreme Court held that the court should refuse to grant leave to amend where the plaintiff would have no opportunity to file a reply and adduce evidence in rebuttal of the facts sought to be introduced by a defendant.

29. The alternative view, as highlighted above, is that amendment of pleading is a matter of rights of the parties. Exponents of this view rely partly on the history of the Lagos State High Court Rules as a pillar for their arguments.

30. Historically, the legal regimes for amendment of pleadings were similar under the 1972 and 1994 High Court of Lagos State (Civil Procedure) Rules. Under these rules, amendments were only possible with the leave of the court at any stage of the proceedings. Thus, amendments were at the discretion of the judge for the purpose of determining the real questions in controversy between parties.

31. Under the 1972 Rules of this Court, (1972 Rules) particularly Order 25 Rule 1: "The Court or judge in chambers 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". (This provision was replicated under Order 26 Rule 1 of the 1994 Rules of this honourable Court).

32. However, the 2004 Rules introduced a new legal dispensation which confers the right to amend pleadings on litigants and provides that: "a party may amend his

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23 Supra, Note 20. Also in Ndazoko v Zakariyau (1999) 1 NWLR (Pt.586) 191 @ 199, it was stated that "… an amendment which is sought by a defendant after the plaintiff has closed his case and which introduces matter that the plaintiff can no longer reply to should normally not be allowed."

originating process and pleadings at any time before the close of pre-trial conference and not more than twice during the trial but before the close of the case". [*Emphasis supplied*].

33. Notably, the 2004 legal regime was preserved under the 2012 Rules with only a slight modification. These Rules broke away from the old regime and introduced a more liberal and more beneficial regime for litigants. The rationale for this view is made clear as daylight upon the comparison of the 1972 Rules and the 2004 Rules. In the 1972 Rules, the focus appears to be on the Court allowing the amendment, whereas in the new Rules, the emphasis appears to be on the parties' right to amend its pleadings. It is for this reason that the champions of this view recommend that most of the cases decided under the old regime should be applied with caution to avert injustice and frustration of the intendment of the 2012 Rules.

34. The Court of Appeal seems to support this view in the case of *Maduabuchi v A.G. Lagos*[24] where it held per Danjuma J.C.A. that,

> "*an application for amendment is a right of a party to enable him present his case in the way it appears best to him once it does not occasion injustice to the other party.*"

35. Although based on a Rule not *impari materia* with the 2012 Rules, it is pertinent to call to mind the case of **Concord Press Ltd v Obijo**[25] where the Court of Appeal, per Ejiwunmi JCA (as he then was) held that:

> *"Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy and I do not regard such amendment as a favour or of grace. It seems to me that as soon as it appears that the way in which party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected..."*

36. The Court of Appeal in the case of *Abah v. Jabusco*,[26] had considered the issue of the right of a party to amend its pleadings and decided, rather ultimately, that

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24 *(2012) LPELR-8022 (CA), P 28(C-G)*
25 *(1990) 7 N.W.L.R. (Pt. 162) 303 at 315,*
26 *[2008] 3 NWLR (Pt. 1075) 526, per Belgore JCA*

"an application to amend pleadings can be made any time before judgment and there are certain times when amendments are allowed on appeal. It is within the power of the court to grant an amendment even if the amendment would add to the existing cause of action or substitute therefore a new cause of action provided the additional or the new cause of action arises out of the same or substantially the same facts as are contained in the pleadings. ***Not only is a court entitled to make final amendments, it indeed has a duty to do so and this duty remains whether there is a formal application before the court or not and whether it is in the trial court or any of the appellate courts****"[emphasis supplied]*

The Court in that case went ahead to hold that, *"A trial court therefore has no power to close the door to amendments before its judgment; and any pronouncement by a trial court which is suggestive of closing the door to amendments against the parties before it, is made without jurisdiction and can be set aside by the same court."*[27]

International Comparative Analysis – The United Kingdom Model

37. Amendments to "statements of case"[28] are governed by part 17 of the Civil Procedure Rules (**CPR**) as well as Part 19, which deals with the addition and substitution of parties.

38. The basic principle is that a party is free to amend his statement of case at any time before it has been served[29] but thereafter may only amend with either the consent of the parties or with the permission of the court. Special rules apply where the effect of the amendment is to remove, add or substitute a party: in those cases, it is necessary to obtain the court's permission if the claim form has been served[30].

39. Under the previous rules, the courts were inclined to allow amendments to pleadings provided that they did not result in injustice to the other party.[31] Under the CPR however, the fundamental criteria to which the court must have

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27 Supra, Note 23, C-D
28 As they are referred to in England
29 R. 17.1(1) of the CPR
30 Rr. 17.1(3) and 19.4
31 Cropper v. Smith (1884) 26 Ch. D. 700 at 710

regard are set out within the overriding objective which, *inter alia*, is to enable the court to deal with cases justly and at proportionate cost.

40. As a general principle, whilst there is a power to allow an amendment at any stage of the proceedings, the court may be increasingly reluctant, as the case proceeds to allow amendments that change or redefine the issues,[32] as "late amendments could undermine the just resolution of a dispute rather than advance it..."

41. The implication of the above therefore is that in England, the later the application to amend, the less the chances of success.[33]

Conclusion

42. History has taught the wise practitioner that attention to detail in the drafting of his pleadings is indispensable to the successful conduct of his client's case. But the same teacher has shown legal systems that a slavish devotion to the pleadings of the parties as initially drafted, even where laden with errors, may be lethal to the delivery of justice to all concerned. Therefore, to ensure that both the letter and spirit of the Rules are observed in the conduct of civil proceedings, compromise is advised.

43. It is the view of the writer that whilst a party is entitled to amend its pleadings, this entitlement must be moderated somewhat by the courts, in the interest of justice, which itself is the *raison d'etre* of those documents.

44. The principles discussed in this piece can be said to apply in general terms to pleadings. It has been seen that their main purpose as a tool in litigation is to define the issues concisely and accurately in order to achieve substantive justice in civil proceedings – the provisions of the 2012 Rules, and the preponderance of judicial authority contain a powerful message to that effect.

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32 *Woods v. Chaleff (Unreported) May 28, 1999 (amendment here was refused six days before trial). However, in Cobbold v. London Borough of Greenwich (Unreported) August 9 1999 for a case in which amendment was allowed the day before trial*

33 *AC Electrical Wholesale Plc. v. IGW Services Ltd., The Times, October 10, 2000*