Amendment of Pleadings: A Right of the Parties or A Gift from the Courts?

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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

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 formalised 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

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 also the means by which the parties are enabled to frame the issues that are in dispute between them, without embarking at that stage on the evidence that each party may adduce at the trial.

Pleadings are indispensible 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.

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". 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."

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

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 in the adjudication process cannot be over-emphasised.

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

The rule that a party is bound by his own pleadings 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. 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.

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

The Lagos State High Court Rules

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 emphasising 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."

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.

In **EGWA v EGWA** (2007) 1 NWLR (Pt. 1014) 71 at 95 (H), 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.

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.

In **IREPODUN-IFELODUN LOCAL GOVERNMENT v BALEMO**, the Court of Appeal, on the issue of granting leave to amend pleadings held that:

"…an amendment of pleadings should be allowed unless:-

(1) It will entail injustice to the respondent;-

(2) The applicant is acting mala-fide; or

(3) By his blunder, the applicant has done some injury to the Respondent, which cannot be compensated by costs or otherwise."

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.

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.

The 2012 Rules also prescribe, in Order 24 Rules 2 & 3, the procedure to be followed by a party in an application for leave to amend its pleadings. These provisions have been made subject to conflicting interpretations regarding whether the additional list of witnesses, their written statements on oath, and additional list of documents to be exhibited to the supporting affidavit just like the proposed amendment, or merely filed alongside the application. For brevity, this issue would be considered in a subsequent article.

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

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.

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:

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** (2000) 4 NWLR (Pt. 654) 669, the Court of Appeal held per Galadima J.C.A. (as he then was) that:

"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."

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** (1984) 6 SC 92, 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…"

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. The need for the court to avert its mind to fairness and justice was stated in **AROJOYE v U.B.A & ANOR** (1986) 2 NWLR (Pt. 20) 101 and underscored in **KODE v YUSUF** (2001) 4 NWLR (Pt. 703) 392 where 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…"

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 in view of Adetutu, 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.

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.

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.

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).

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 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].

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.

The Court of Appeal seems to support this view in the case of **MADUABUCHI v A.G. LAGOS** (2012) LPELR-8022 (CA), P 28(C-G) where it held per Danjuma J.C.A. that,

"an application for amendment is a right of a party

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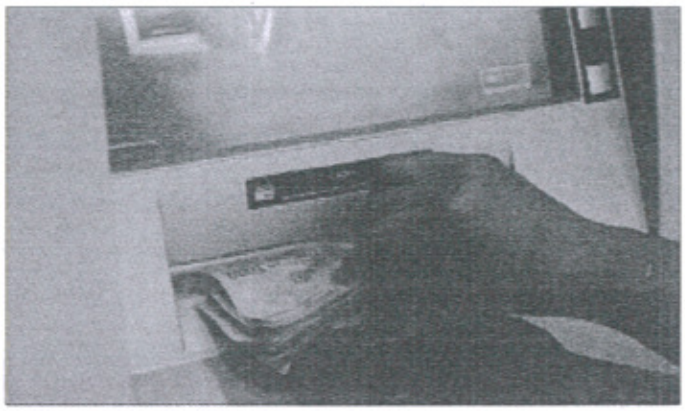
E-payments Challenges and the Burden of Responsibility

Michael Dugeri



An e-payment system is a way of paying for goods or services electronically, instead of using cash or a cheque, in person or by mail. E-payment is a subset of an e-commerce transaction and a basic component of the cash-less economy. There are many benefits associated with e-payment systems and many challenges too. The common challenges include unauthorised charges to payment cards and other card related frauds, failure to properly execute funds transfer instructions, non-delivery or non-conformity of goods and services, unauthorised use of a lost or stolen card, identity theft, non-receipt fraud, skimming or cloning, counterfeit cards and phishing.

E-transactions present new and complex legal challenges to the extant legal and institutional framework in the resolution of disputes because e-payments often involve so many participants ranging from the merchant and the user to the banks, as well as intermediaries. This raises the question as to where liability may lie where an online user incurs certain financial loss. For instance, where there has been an unauthorised funds transfer on any of the e-payment channels, how can the aggrieved user determine against whom to bring an action? Or, who has the liability for phishing websites (that replicate a genuine website of a bank) where a customer is lured to enter his PIN?

Nigeria does not have any payments system law or any specific legislation that clearly allocates liability among the participants in e-transactions. The Cybercrimes (Prevention, Prohibition, etc) Act 2015 merely criminalizes a number of activities that could result in e-payment fraud without addressing the peculiar issue of fraud liability allocation in e-transactions that result in cybercrimes. Knowing who is liable is important, not only because of the 'distributional consequences,' but also because liability allocation is considered as a form of incentive. It is believed that the party with greater liability usually have the greater incentive to take required steps to minimise or avoid fraud losses.

The practice in other jurisdictions is to make laws that have specific bearing on e-payments issues. In relation to card-based e-payments, for instance, laws have been made to place liability caps to the amount for which a user cardholder can be held liable. By this arrangement, the card issuer is expected to absorb all fraud liability in excess of the maximum cardholder liability allowed under law. The emphasis, however, in some of the laws is to shift liability between the cardholder and the card issuers, with little attention paid to other participants in the e-payment system, like the merchants.

Card networks, in a bid to protect themselves have issued fraud liability shifts rules which impose certain obligations and allocate fraud liability risk between merchants and card issuers. A common feature of the fraud liability shifts rules is that the merchants are often made to bear much of the liability for online payment fraud unless they are able to prove that there was no negligence in the verification of the purchase order and delivery of the goods or services to the payee or customer.

However, the allocation of fraud liability risks by card networks has been criticised as being disingenuous because merchants are not always in the best position to avoid the fraud, since innovation in fraud control technology often rests with financial institutions and payment networks, rather than the merchants. The card networks fraud liability shifts rules may be sufficient for issues relating to non-delivery or non-conformity of goods and services which are mainly handled by the merchants, but they conveniently overlook issues arising from fund transfer transactions. For instance, who bears liability where there has been delay in the proper execution of a transfer order? It is important to bear in mind that there is usually privity of contract between all parties involved in an instance of e-transaction.

The Central Bank of Nigeria (CBN), in a bid to address some of the challenges associated with e-payments and increase confidence in the system, has developed various strategies and issued a number of guidelines and standards to ensure the reliability, integrity and confidentiality of e-payment systems in Nigeria. These include the following: Guidelines on Electronic Banking in Nigeria; Standards and Guidelines on Automated Teller Machine (ATM) Operations in Nigeria; Guidelines for Card Issuance and Usage in Nigeria; Guidelines on Point of Sale (POS) Card Acceptance Services; and E-Payment Dispute Arbitration Framework. These guidelines and standards contain fraud liability shifts rules, which have allocated the fraud liability of the card issuers, merchants and users as follows:

i. A card issuer shall be held liable (where proven) for card frauds arising from card skimming or other compromises of the issuer's security system, including payment done with hot-listed card, or cards reported lost or stolen.

ii. The merchant shall be held liable for frauds with the card arising from its negligence and connivance.

iii. The cardholder shall be held liable for fraud committed with his card arising from the misuse of his PIN or the card.

There is also the CBN Guidelines on Transaction Switching Services, which set out the procedures for the operation of switching services in Nigeria, including the rights and obligations of the parties to the switching contract. The Guidelines attach fraud liability to a switch in cases where there is proof that the company was negligent through the breach, contravention/non-compliance of industry guidelines, policies and circulars directly caused or contributed to the fraud.

An agreement for transaction switching services is required to clearly specify the responsibilities of each party, operational rules and procedures and liabilities of parties in the event of loss of funds arising from negligence of any of the parties.

The Guidelines however, require banks that enter into any contractual relationship with any merchant in respect of accepting payments by electronic means to ensure that the merchant 'put in place reasonable processes and systems for confirming payee identity and detecting suspicious or unauthorised usage of electronic payment instruments both where customer/card is physically present at point of sale or in cases where customer/card is not physically present like in Internet/web and telephone payment systems/portals'.

In the case of fraudulent transactions, a card holder may bear the 'cost of operations performed by persons, to whom he made available the payment card or disclosed his PIN' and that which arise from 'operations performed by means of a lost payment card up till the time of notifying the issuer about the loss'. Fraud liability shifts to the card issuer where fraud occurs from card skimming or other compromises of the issuer's security system.

The basis for allocation of liability by the aforementioned regulatory guidelines and standards are not clear and some of the provisions have been criticised as been rather technical. Also, the guidelines are limited in scope and application. The CBN E-Payment Dispute Arbitration Framework, for example, is designed to guide an already constituted arbitral panel situated at the office of the Consumer Protection Council in Lagos. They are therefore not applicable to proceedings before the regular courts and are not also readily accessible for aggrieved users that live outside the major cities.

In addition to the foregoing, the regulatory policies, standards and guidelines are piecemeal and reactive rather than pre-emptive in approach. Not only are they not easy to comprehend, they are also not comprehensive. As can be seen from highlights of the various guidelines, too much reliance is placed on the more commonly used card-based payments systems as against other e-payment types that are continually being discovered or being developed. Enforcement of compliance with the guidelines and standards has also been subjected to legal debate.

Nigeria needs a comprehensive regulatory system for e-payments, which involves the enactment of comprehensive laws to harmonise the various regulatory interventions and better deal with the ever-increasing challenges of e-payments. Efforts should be intensified to enact the Payment System Management Bill and the Electronic Transactions Bill, which are both pending before the National Assembly, which spell out, in clear terms, the responsibilities, and liabilities of all participants in the e-payment system, as well as the rules for allocating risk between them. Addressing the challenges associated with e-payments would consolidate the gains of the cash-less policy and boost e-commerce.

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to enable him present his case in the way it appears best to him once it does not occasion injustice to the other party."

Although based on Rules not impari materia with the 2012 Rules, it is pertinent to call to mind the case of **CONCORD PRESS LTDv OBIJO** (1990) 7 N.W.L.R. (Pt. 162) 303 at 315 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…"

The Court of Appeal in the case of **ABAH v JABUSCO** [2008] 3 NWLR (Pt. 1075) 526; per Belgore JCA, had considered the issue of the right of a party to amend its pleadings and decided, rather ultimately, that

"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 right, 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."

International Comparative Analysis – The United Kingdom Model

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

The basic principle is that a party is free to amend his statement of case at any time before it has been served 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.

As seen in **CROPPER v SMITH** (1884) 26 Ch. D. 700 at 710, the courts, under the previous rules, were inclined to allow amendments to pleadings provided that they did not result in injustice to the other party. Under the CPR however, the fundamental criteria to which the court must have regard are set out within the overriding objective that, *inter alia*, is to enable the court to deal with cases justly and at proportionate cost.

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, as "late amendments could undermine the just resolution of a dispute rather than advance it…" This was exemplified in the unreported 1999 case of **WOODS v CHALEFF** where an amendment was refused six days before trial. Although, in **COBBOLD v LONDON BOROUGH OF GREENWICH**, an amendment was allowed the day before trial.

The implication of the above is that in England, the later the application to amend, the less its chances of success.

Conclusion

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.

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.

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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