**Amending statements of case and changing parties**

**Amending Statements of Case**

This element explains how and when to amend statements of case, including adding new causes of action and parties, and also the issues arising when such amendments are made after the limitation period has expired.

**Amendments generally**

A party might need to amend a statement of case as a knock on consequence of having added a party or claim, or this might have become necessary due to a change in their knowledge of a case (eg upon disclosure or the exchange of witness statements) or because of a simple drafting error.

Amendments to statements of case must be verified by a Statement of Truth (CPR 22) unless the court orders otherwise. The rules in this area are grouped as follows and apply together when the situation requires:

**CPR 17 deals with general amendments**

**CPR 19 governs amendments which remove, add or substitute a party**

The rules are particularly strict after the limitation period has expired.

The court will ensure that other parties are safeguarded in costs. A party applying for an amendment will usually be responsible for the costs of and arising from the amendment. Also, upon giving an order to substitute or add a party the court generally makes an order for costs against the party seeking the change.

**Amendment without permission or consent**

A party may amend a statement of case **at any time before it is served** (CPR 17.1(1)).

Such amendments will largely be limited to amendments to the claim form in the period between issue and service and amendments to other statements of case (such as particulars of claim) prior to service.

Amendments before service can be as extensive as the re-writing of the entire text of the statement of case, even as far as changing the parties and the causes of action. Having said this, any amendment to the particulars of claim that alters the parties involved may require consent or permission if the claim form has been served, as such changes may require consequential amendment to the – already served - claim form.

Bear in mind, however, that the court retains the power to disallow such amendments under CPR 17.2.

**Amendment by consent**

Any statement of case can be amended at any time **with the written consent** of all the other parties (CPR 17.1(2)(a)).

The general rule is that the party making the amendment will bear the costs of and arising from the amendment (PD 17).

When an amended statement of case is filed without the need for the permission of the court, as set out in 17 PD 2.1(2), it should be endorsed with the words:

‘Amended [particulars of claim/defence (or as may be)] under CPR [rule 17.1(1) or 17.1 (2)(a)] dated …’

Remember, however, that the court can still disallow such amendments (CPR 17.2).

**Amending with the court’s permission - procedure**

When a statement of case has been served and the written consent of all the parties has **not** been given, a party will need to apply to the court for permission to make an amendment (CPR 17.1(2)(b)).

The party seeking the amendment should file an application notice with the court, together with a copy of the proposed amended statement of case (17 PD 1.2). The application can be dealt with at a hearing or, where all parties consent, without a hearing on written submissions.

If permission to amend is given, the court will usually give directions as to any consequential amendments and the service of any amended statements of case (CPR 17.3(1)). In any event, the amended statement of case should usually be filed by the applicant within 14 days of the date of the order granting amendment unless the court orders otherwise. A copy of the amended statement of case and the order should also be served on every party to the proceedings.

Where an amended statement of case is filed with the permission of the court, it should be endorsed as follows:

‘Amended [particulars of claim/defence (or as may be)] by order of [Mr Justice…] dated …’ (17 PD 2.1(1))

If the substance of the statement of case is changed by reason of the amendment, the statement of case should be re-verified by a statement of truth.

**When will the court give permission to amend?**

Except in cases where the limitation period has expired (CPR 17.4), which are discussed later, there is no specific guidance on the principles upon which the court is to exercise its discretion to allow amendments to statements of case. Parties are expected to be cooperative in litigation so, once the necessity to amend has become apparent, a party should tell their opponents about the proposed amendment so as to enable them to consider whether to oppose or consent to it.

In practice, this is an area in which the facts of your case will need to be carefully compared with the authorities that exist in order to understand how a court is likely to approach the application to amend.

You will try to find authorities that are nearest or most analogous with your own case and use those to persuade the court that permission should be given.

**Will permission to amend be granted?**

**General principles**

It is recognised that the general principle is that the court is required to give effect to the overriding objective of dealing with cases justly and at proportionate cost (CPR 1.1).

The decision will always involve the court seeking to find a **balance** between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted. There are a number of cases dealing with this area. Some general principles that have emerged from some of these cases are mentioned below.

**Need to show some prospects of success**

An application for permission to **amend a defence** will be refused if it is clear that the proposed amendment has no prospect of success.

The court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation. A party will also not be permitted to raise by amendment an allegation which is unsupported by any evidence and is therefore pure speculation or invention. The required statement of truth verifying such an amendment could not properly be given.

Late amendments

In accordance with the court seeking to further the overriding objective, a late amendment (ie an amendment sought close to the trial date) can potentially cause unfairness in that it might put the parties on an unequal footing or add an excessive burden to the respondent’s task of preparing for trial. The court will therefore be very mindful of this fact when considering permission in these circumstances.

A late amendment might even put the trial date at risk and cause a postponement of the trial, which is always something that the court will wish to avoid.

An applicant seeking permission in these circumstances will need to work very hard to convince the court that permission should be given, providing a good explanation as to why they did not apply earlier and must show the strength of the new case and why justice to them, their opponent and other court users requires them to be able to amend.

**Swain-Mason and ors v Mills & Reeve [2011] EWCA Civ 14**

In this case the Trial Judge had allowed the claimants in a professional negligence action to re-amend their particulars of claim on the first day of trial. The Court of Appeal said that the judge had misdirected himself and set out the following principles:

The court should be less ready than it used to be to allow a very late amendment, where the need for the amendment does not result from some late disclosure or new evidence.A heavy onus lies on the party seeking a late amendment to justify it, not only as regards its own position, but also in relation to other parties to the litigation and other cases before the court, and to give evidence as to why the application is made at such a late stage.The party seeking the late amendment must satisfy the full requirements of preparing a proper pleading.In other words, the party cannot say that deficiencies can be rectified by way of further information or evidence in due course.

**Permission to amend example**

· Claimant C is suing Defendant D for breach of contract.

· C now wishes to amend its particulars of claim to claim breach of duty of care (negligence) as well as breach of contract against D.

· The alleged damages will be doubled in size and there are only 2 months to go before trial.

The court may not allow this amendment as it may jeopardise the trial date and might put a considerable burden on D to amend its own statements of case and to produce further disclosure and evidence (witnesses and experts).

A refusal of permission may especially be the case if the amendment does not result from late disclosure or new evidence or C cannot adequately justify making the amendment at such a late stage (see Swain-Mason case above).

However, the court does have discretion and the amendment **may** be allowed but it would be with a heavy costs penalty on C.

**Amendments which add, remove or substitute parties (CPR 19)**

As mentioned above, adding, removing and substituting parties is dealt with in CPR 19.

‘Any number of claimants or defendants may be joined to a claim’ (CPR 19.1).

Ø Except in cases where the limitation period has expired (CPR 19.6) which are discussed below, the main test to be satisfied when seeking to add, remove or substitute a party is that the amendment is ‘desirable’ (CPR 19.2)

In considering this test the court will have in mind the policy objective of enabling parties to be heard if their rights may be affected by a decision in the case, and the overriding objective.

Adding parties to a claim increases the complexity and case management decisions required, which will add to the cost and the time the particular matter might take so the court will have this in mind when exercising their discretion here.

**Additional claims and adding parties**

When additional claims arise, the status in the **main claim** of the parties to the additional claim should be considered, as the allegations and basis of the additional claim might impact the issues in the main claim. This can have the effect of leaving a party exposed

**Example**:

Ø C sues D for misrepresentation and the loss of a £500,000

investment C made in D’s business.

Ø D brings an additional claim for a contribution / indemnity against E, its financial advisers, who were also involved in making the representations inducing the £500,000 investment by C. (This is a CPR 20.7 claim and E is the Third Party.)

Ø At the trial, C fails in its claim against D, with the judgment laying the blame against E.

Ø As C had not joined E into the main action as a defendant to C’s claim, the judge could not make a judgment in that main claim against E in favour of C.

Ø In this situation, even though E is to blame, C recovers nothing.

Accordingly, there may be circumstances where it would be convenient for a claimant or defendant to apply for an order that the defendant to an additional claim is added as a defendant in the main claim under (CPR 19.2(2)(b)).

**Permission and / or consent needed**

No one can be added as a claimant without his or her consent, with the consent being filed at court (CPR 19.4(4)). If someone refuses to be added as a claimant, they can instead be added as a defendant (CPR 19.3(2)). Finally, the court’s permission is **always** required to add, remove or substitute a party, unless the claim form has not yet been served (CPR 19.4(1)).

• The rule is designed to avoid the possibility of claims being defeated on the basis that one or another party should or should not have been joined.

• The decision to amend is, as with the amendments already referred to, made in accordance with the overriding objective.

• Permission is usually given to amend on the basis that the amending party must pay the costs of the amendment (plus those arising from it).

**Amendments after the limitation period has expired**

There are special rules in relation to amendments in cases where the limitation period has expired.

An amendment to add a **new cause of action or party** to existing proceedings is deemed to be a separate action which is commenced on the same date as the original action.

The addition of a new party now takes effect on the date the amended claim form is served upon him, unless the court orders otherwise (CPR 19.4(9). By contrast, when one is considering new claims, the Limitation Act determines when a new claim is deemed to be commenced.

**Post limitation amendments provisions**

There are a number of relevant provisions to consider.

The starting point is s 35 Limitation Act 1980 and the usual rule is that such amendments will **not** **be allowed** (s.35(3) Limitation Act 1980).

There are, however, **exceptions** to this general rule. These include when an original set off or counterclaim is raised by an amendment and where otherwise provided in the Limitation Act and by the rules of the court. The relevant provisions here are:

**(s 33 Limitation Act)** Amendments in relation to personal injury claims

**(CPR 17.4)** Amendments generally

**(CPR 19.6)** Amendments which add or substitute a party

**Adding causes of action post limitation**

A new cause of action can be added to an existing statement of case **after** the end of the limitation period only in the following circumstances:

Ø When the court directs that the limitation period will not apply in a **personal injury action (s.33 Limitation Act 1980)**. This provision gives the court a general discretion to disapply that time limit if satisfied that it is equitable to do so.

For example, the cause or significance of personal injuries or disease caused by someone’s negligence might not be apparent within the standard 3 year limitation period for personal injury claims and this could be a reason for the court to exercise its discretion under this provision in order to do justice. If an action on some other basis was already underway, it could be amended under this provision to add this new claim after the limitation period had expired.

Ø The new cause of action is an **original set-off or counterclaim** (s.35(3) Limitation Act 1980).

Ø The new cause of action **arises out of the same facts or substantially the same facts as are already in issue** in the original claim (s.35(5)(a) Limitation Act 1980.

The court **may** allow the amendment when the effect will be to substitute or add a new claim after the end of the limitation period, but **only** if the new claim arises out of the same facts (or substantially the same facts) as a claim in respect of which the party seeking permission to amend has **already** claimed a remedy (CPR 17.4(2). The onus is on the applicant to show that the proposed amendment falls within this criteria.

An amendment **adding a new duty or obligation** on the part of a defendant (or possibly even a claimant) will usually raise a new cause of action so this will be a new claim.

An amendment adding additional facts or particulars which **clarify** a duty or obligation which has **already been alleged**, will **not** normally be interpreted as raising a new cause of action.

Ø The court will therefore examine the alleged duty, breach, causation and loss very carefully in order to decide which of the above two categories the proposed amendment comes into. If there is a new distinct allegation, it will be a new cause of action and will need to be justified within the criteria mentioned above as this amendment will add a new claim after the limitation period has expired.

Ø If the only change is the addition of a further instance of the alleged breach or a new remedy, there will be no additional cause of action.

**Adding parties post limitation**

There can also be amendments which change the **parties** to an action.

There is an interplay between the general provisions for amendments and those which specifically deal with adding or substituting parties substantively. This is because any change in the parties will also necessitate and amendment to the statements of case. There are three main situations that can arise:

· Relates to correcting a mistake as to the **name** of a party (CPR 17.4(3))

· Relates to changing the **capacity** of a party (CPR 17.4(4))

· Relates to changing the **identity** of a defendant (CPR 19.6)

There are a limited number of situations where new parties can be added or substituted despite the limitation period’s expiration (CPR 19.6) – these are addressed in detail on the next slide. If the case does not fall into one of these categories the proposed amendment will not be allowed.

The onus is on the applicant to show that the proposed amendment falls within the applicable criteria.

**Requirements for adding/substituting parties post limitation**

Parties may only be added or substituted after the end of the relevant limitation period if:

• the limitation period was current when the proceedings were actually started; and

• the addition or substitution is ‘necessary’ (CPR 19.6(2)).

The addition or substitution is deemed to be ‘**necessary**’ only if the court is satisfied that (CPR 19.6(3)):

the new party is to be substituted for one that was named in the claim form in **mistake** for the new party; or

the claim **cannot properly be carried on**/by/against the original party unless the new party is added or substituted; or

the original party has **died or had a bankruptcy order** made against him and his interest or liability has passed to the new party.

**Change in name only, or a different person?**

The court will distinguish between mistakes in name only, and those which actually result in an entirely different person or entity becoming a party ie mistakes as to identity.

Ø For example, the intended party might have been named in the claim form but there was a genuine mistake such as causes no reasonable doubt as to the identity of the party in question. The claim form will have been served on this defendant despite their name being wrong. ​An amendment to this party's name might be allowed (CPR 17.4(3)).

Ø Sometimes the mistake is more fundamental and the situation can **only** be made right by the new party being substituted (CPR 19.6(3)(a)). So here, a new person **will** be joining the action, however their identity will have been known already.

For example, a claimant might know the attributes of the proposed defendant (eg their employer or a seller of an item) but has no personal knowledge of their name. The claimant might have been incorrectly informed of the name, resulting in proceedings against the wrong defendant.

Many of the cases in this area involve corporate or quasi corporate entities changing business structure but effectively being the same going concern.

In summary, amendments post limitation in relation to the name of the party might be allowed but those relating to someone with an entirely new identity will not be allowed.

**The Sardinia Sulcis [1991] 1 Lloyd’s Rep. 201**

This case sets out the correct approach for the court when deciding such issues. The test is as follows:

*Has the intended defendant been identified in the statements of case ‘by reference to a description more or less specific to the particular case’?*

If yes, it is a mistake of the type covered by CPR 19.6(3)(a) and the amendment may be permitted by the court. If not, then the court cannot permit the amendment.

This test might allow the substitution of a new defendant, unconnected with the original defendant and unaware of the claim until after the expiry of a relevant limitation period. Any potential injustice in these circumstances can be avoided by the exercise of the court’s discretion – the court may allow the amendment, but is not obliged to allow it if it would be unjust.

It is probably easier to understand this test, and the provisions relating to amending the names of parties, if we consider an example…

**Example:**

The claimant is injured in a car accident caused by the negligent driver of a VW Polo registration Y476 LNY.

The driver was Darren Boardman – he should be the defendant.

The registered keeper of the vehicle is Sarah Boardman, Darren's wife. She was not in any way involved in the accident.

**Scenario 1**

Rather than naming Darren Boardman in the claim form and particulars of claim the claimant names Daryl Boardman.

The court would have the power to allow amendment (CPR 17.4(3)).

Genuine mistake such as causes no reasonable doubt as to the identity of the party in question

Court has the power to allow amendment

**Example:**

The claimant is injured in a car accident caused by the negligent driver of a VW Polo registration Y476 LNY.

The driver was Darren Boardman – he should be the defendant.

The registered keeper of the vehicle is Sarah Boardman, Darren's wife. She was not in any way involved in the accident.

**Scenario 2**

The statements of claim make clear that C intends to sue the driver, but wrongly identify the driver as Sarah Boardman. The court cannot allow this amendment under CPR 17.4(3), but it has the power to allow the amendment (CPR 19.6(3)(a)) because the intended defendant has been identified 'by reference to a description more or less specific to the particular case' ie by description as the driver of a specific car at a specific time.

named in the claim form in **mistake** for the new party – adequately described

Court has the power to allow amendment

**Example:**

The claimant is injured in a car accident caused by the negligent driver of a VW Polo registration Y476 LNY.

The driver was Darren Boardman – he should be the defendant.

The registered keeper of the vehicle is Sarah Boardman, Darren's wife. She was not in any way involved in the accident.

**Scenario 3**

Due to a serious misunderstanding of the law, C brings a claim against Sarah Boardman, setting out a claim (which is legally unsupportable) against her as the registered keeper of the vehicle. C later realises the error and wants to bring a claim against Darren Boardman instead. This substitution / amendment is not permissible because the driver of the Polo is not identified as the intended defendant by a description in the statements of case.

named in the claim form in mistake for the new party – **not** adequately described

Court has no power to allow amendment

**Summary in relation to mistakes as to parties after the limitation period has expired**

Genuine mistake such as causes no reasonable doubt as to the identity of the party in question

Court has the power to allow amendment (CPR 17.4(3)).

Named in the claim form in **mistake** for the new party – adequately described

Court has the power to allow amendment (CPR 19.6(3)(a)).

Named in the claim form in mistake for the new party – **not** adequately described

Court has no power to allow amendment

**Permission to Amend : A Summary**

**If the statement of case has already been served…**

**General Amendments to Statements of Case**

The party may only amend its statement of case:

with the written consent of all the other parties; or

with the permission of the court.

(CPR 17.1(2)).

**Amendments Removing, Adding or Substituting Parties**

The claimant will require the court’s permission to remove, add or substitute a party if the claim form has already been served.

(CPR 19.4(1)).

**If the statement of case has not been served…**

The party can amend its statement of case without the court’s permission.

(CPR 17.1(1)).

The claimant can remove, add or substitute a party without permission so long as the claim form has not been served.

(CPR 19.4(1)).

**Where the limitation period has expired**…

See the special rules above – in most or all cases, the court’s permission will be required.

See the special rules above – the court’s permission will be required.

**Format of the amended statement of case**

The format of the statements of case once it has been agreed or ordered that they may be amended as follows:

Ø There is no need for the amended statement of case to show the original text, unless the court orders otherwise (17 PD 2.2).

Ø Amendments are to be shown by either: (i) using coloured amendments; or (ii) by using a numerical code (17 PD 2.2).

Ø If colour coding is used, the order of colour for successive amendments is (1) **red** (2) **green** (3) **violet** and (4) **yellow** .

Ø The amended statement of case should contain the appropriate endorsement (17 PD 2.1) and be verified by a statement of truth (CPR 22.1(2)).

Finally, once an amended statement of case has been served, there will often be knock on amendments to the existing statements of case so eg if the particulars of claim are amended, the defendant will likely need to amend their defence as a consequence.

**Summary**

• CPR 17 and 19 deal with amendments to statement of case.

• For some amendments consent of the other parties or permission from the court will be required.

• Amendments that are late ie close to the trial date can cause injustice to the other parties or put the hearing date at risk. The court will therefore be less willing to allow late amendments.

• Amendments sometimes add new causes of action or change the parties and these types of amendment are treated as a separate claim which was commenced on the same date as the original claim.

• As a result, if the limitation period has passed, the court will be careful to ensure there is no prejudice to a defendant now deprived of their defence of limitation. Special rules apply and the court will exercise particular care.

• There are specific rules that apply to post limitation amendments and the court will decide whether to allow such amendments.