[ZEKIA, J. and ZANNETIDES, J.]

NICOS LAGHOUDI of Limassol

Appellant (Plaintiff)

v.

GEORGHIOS M. GEORGHIOU of Famagusta

Respondent (Defendant).

(Civil Appeal No. 4250)

1958
May 9, July 4

NICOS LAGHOUDI
v.
GEORGHIOS M. GEORGHIOU

Practice—Pleadings—Cause of action not pleaded—First introduced by one of the grounds of Appeal—No issue before the trial Court upon such claim or cause of action—No application made on Appeal for amendment.

The plaintiff, an architect, brought an action in the District Court of Famagusta claiming £300, being agreed fees or reasonable remuneration for the preparation of plans at the request of the defendant. The District Court dismissed the action. On appeal the appellant-plaintiff sought to raise for the first time by one of his grounds of appeal—namely by ground 2—a new cause of action which was never pleaded to the effect that "the preliminary plans having been used by the Defendant, the latter was liable to pay for them". There was no such issue before the Court of trial nor was there any application to the Court of Appeal for the appropriate amendment of the Statement of claim. Apparently the new cause of action was based on the authority of *Landless* v. *Wilson* (*post*) and on the statement appearing in *Halsbury's Laws of England,* 3rd Edit. Vol. 3 p. 539.

Held : The Court cannot entertain the ground advanced without offending well established principles of law and practice.
Dicta of Lord Atkin, in *Bell* v. *Lever Brothers Ltd.* (1932) A.C. 161, at pp. 215—16, and of Lord Russel of Killowen in *London Passenger Transport Board* v. *Moscrop* (1942) A.C. 332, at p. 347, *followed* ; Principle laid down in *Stylianou* v. *Photiades* 21 C.L.R. 60 at p. 80, *approved.*

Appeal dismissed. No order as to costs.

Cases referred to :

Landless v. *Wilson* (1880) 8 R. (Ct. of Sess.) 289 ;

Bell v. *Lever Brothers Ltd.* (1932) A.C. 161 ;

London Passenger Transport Board v. *Moscrop* (1942) A.C. 332 ; *Stylianou* v. *Photiades* 21 C.L.R. 60.

Per curiam: "It is a fundamental principle of procedure that the defendant be afforded an opportunity of pleading to an amendment and of calling or recalling witnesses." This statement by this Court in *Stylianou* v. *Photiades* 21 C.L.R. 60 at p. 80, should be borne in mind where a Court intends to exercise its power of amendment either on its own motion or otherwise at the time of giving its judgment.

Appeal.

Appeal by the plaintiff against the judgment of the District Court of Famagusta (Vassiliades, P.D.C.) dated the 1st February 1958 (Action No. 1266/57) dismissing the plantiff's claim for £300 as agreed or reasonable remuneration for work done by him as an architect.

M. Houry with *J. Jones* for the appellant.

M. Triantaphyllides for the respondent.

Cur. Adv. Vult.

Only the portion of the judgment referring to the points of practice raised is reported.

The judgment of the Court was delivered by :

ZEKIA, J., who after dealing with the facts and the grounds of appeal Nos. 1 and 3, went on : We turn now to the consideration of the 2nd ground of appeal. The trial Court in the concluding passage of its judgment said :

"As to costs, I find that in the circumstances of this case, the usual rule of costs folowing the event should not be applied. The defendant entered into an arrangement with the plaintiff of considerable financial consequences in a manner, which can hardly be called clear, definite or very satisfactory. And when he eventually received the plans delivered by the plaintiff, he kept them in his possession and most probably made use of them in his studies for his big building prospect, without taking the trouble to inform the plaintiff that he had not found them satisfactory, and to return them as soon as he made up his mind about them, as he should have done.

In these circumstances, I take the view that the defendant is not entitled to an order for costs, and I make none.".

This reveals a finding on the part of the Court that defendant very probably made use of the probationary plans delivered to him by the plaintiff in his studies for the prospective building. On the authority of *Landless* v. *Wilson* (1880) 8 R. (Ct. of Sess.) 289 it is stated in Halsbury Laws of England (3rd Edition) Vol. 3 p. 539: "If the plans or drawings submitted for approval are used for any purpose they will have to be paid for." There was some evidence to support the said finding of the Court. The main question which confronts this Court in considering ground 2 is the legal aspect. Can this Court consider this ground without any amendment of the pleadings? Nothing was averred in the statement of claim as to the plans being made use of by the defendant. No facts were pleaded by the plaintiff in any form in this direction. On the contrary by paragraph 6 of the Statement of Defence defendant expressly stated that he did not use the plans in any way. In view of Order 19, Rule 11, it is arguable whether plaintiff by not attempting to deny this statement is not precluded from setting it as a ground of claim. There was no issue before the trial Court for such claim or cause of action. There was no application before this Court for the amendment of pleadings enabling us to adjudicate on this matter. We considered our powers, inherent and statutory, and we have come to the conclusion that unless we were ready to offend a principle of law and practice we could not entertain the ground advanced.

Lord Atkin in *Bell* v. *Lever Brothers Ltd.* (1932) A.C. 161, at p. 215 said:—

> "Before the Court of Appeal and before this House the appellants contended that no issue as to mutual mistake had been raised by the pleadings, and that it was not open to the learned judge or to the Court of Appeal to determine the case without an amendment of the pleadings and upon an issue of fact which was not submitted to the jury. The Lords Justices appear to have held varying views on this point. Scrutton, L.J. thought that the point was not pleaded but that it was the practice of the Courts to deal with the legal result of pleaded facts, though the particular legal result is not pleaded except where to ascertain the validity of the legal result would require

the investigation of new and disputed facts which had not been investigated at the trial. Here he thought that there were no such disputed facts, and the question could be dealt with without amendment. Lawrence, L.J., on the assumption that mutual mistake was not pleaded, thought that all the facts relevant to mutual mistake had been fully investigated and ascertained at the trial: and that the objection was a mere technical objection without merits. Greer, L.J. thought that mutual mistake was sufficiently pleaded.

I think it is sufficient to say for present purposes that it seems to me clear when the pleadings and particulars are examined that the pleading was confined to unilateral mistake. In these circumstances the judge on a trial with a jury has without consent of the parties no jurisdiction to determine issues of fact not raised by the pleadings; nor in my opinion would a general consent to determine issues not decided by the jury include a power without express further consent after the jury had been discharged to amend pleadings so as to raise further issues of fact. Similarly the powers of the Court of Appeal which, under Order LVIII, r. 4, are wider than those of the judge, are limited in the case of trials by jury to determine issues of fact in cases where only one finding by a jury could be allowed to stand. Further, I think that the Court of Appeal cannot without amendment decide a case upon an unpleaded issue of Law which depends upon an unpleaded issue of fact. If the issue of fact can be fairly determined upon the existing evidence they may of course amend: but in any such case amendment appears to me to be necessary."

Again in *London Passenger Transport Board* v. *Moscrop* (1942) A.C. 332, at p. 347 Lord Russell of Killowen said :—

"Any departure from the cause of action alleged, or the relief claimed in the pleadings should be preceded, or, at all events, accompanied, by the relevant amendments, so that the exact cause of action alleged and relief claimed shall form part of the court's record, and be capable of being referred to thereafter should necessity arise. Pleadings should not be 'deemed to be amended' or

'treated as amended'. They should be amended in fact.".

This was followed by this Court in *Stylianou* v. *Photiades* (21 C.L.R. 60 at p. 80) with the following statement: "It is a fundamental principle of procedure that the defendant be afforded an opportunity of pleading to an amendment and of calling and recalling witnesses".

This is a consideration to be borne in mind where a Court intends to exercise its power of amendment on its own motion, or otherwise at the time of giving its judgment.

The appeal is therefore dismissed without any order as to costs.

Appeal dismissed. No order as to costs.