1971
Mar. 26

CHRISTAKIS LOUCAIDES
v.
C. D. HAY AND SONS LTD.

[VASSILIADES, P., JOSEPHIDES, HADJIANASTASSIOU, JJ.]

CHRISTAKIS LOUCAIDES,
Appellant-Defendant,

v.

C. D. HAY AND SONS LTD.,
Respondents-Plaintiffs.

(*Civil Appeal No.* 4829).

Practice—Pleadings—Issue not pleaded—Court should confine itself to issues as appearing at close of the pleadings—Where substantial departure from the pleadings is desired to be made a proper application should be made to the Court for leave to amend accordingly—See further infra.

Pleadings—Amendment—Proper application for leave to amend—Need that amended pleading be filed—Pleadings should not be "deemed to be amended" or "treated as amended"—They should in fact be amended—Cf. supra—*See further* infra.

Pleadings—Appeal—Amendment of pleadings sought in the course of the appeal—Court of Appeal exercising its discretion in the matter and in the circumstances of the case refused such amendment.

Trial in civil cases—Misdirection—New trial ordered—Section 25(3) *of the Courts of Justice Law,* 1960 (*Law of the Republic No.* 14 *of* 1960).

Re-trial—See immediately hereabove.

Appeal—Amendment of pleadings—Re-trial—See supra.

This is an appeal by the defendant in the action against the judgment of the District Court of Limassol whereby he was adjudged to pay to the plaintiffs the sum of £132.610 mils alleged to be due on a bill of exchange. The defence was that the said bill was duly paid off.

In the course of this appeal counsel for the plaintiffs-respondents applied to the Supreme Court for leave to amend the statement of claim so that it might accord with the case set up by the plaintiffs at the trial, which case clearly was not covered by their pleadings. The Supreme Court exercising their discretion in the matter refused such leave ; and

eventually set aside the judgment appealed from, directing a re-trial of the case before a different Judge, on the ground that the trial Judge misdirected himself as to the issues before him.

Allowing this appeal by the defendant in the action, the Supreme Court :

Held, (1) (*a*). It is essential that a case should be tried and determined on the issues arising from the parties' pleadings ; and pleadings should not " be deemed to be amended " or " treated as amended " ; they should be amended in fact. Consequently, where a substantial departure from the pleadings is desired to be made, it is necessary that a proper application be made to the Court for leave to amend the pleadings accordingly.

(*b*) Coming now to the case in hand it is quite clear that the case set up by the plaintiffs (respondents) at the hearing before the trial Judge was not covered by their pleadings.

(*c*) Counsel for the respondents (plaintiffs) realizing his difficulties in this respect, has invited this Court, relying on the authority of *Kemal* v. *Kasti*, 1962 C.L.R. 317, to exercise its discretion and direct the amendment of the plaintiffs' pleadings.

(*d*) On the particular facts of this case, having regard to what took place at the trial, we came to the conclusion that an injustice would be done to the other side by allowing the amendment sought ; we, therefore, feel unable to acceed to counsel's request on this point.

(2) (*a*). With regard to the merits of this appeal we agree with counsel for the appellant (defendant) that the trial Judge misdirected himself as to the proper issues before him ; and we take the view that this is a proper case for a re-trial to be ordered, particularly so, because the issue raised in paragraph 3 of the statement of claim was not tried and no evidence was heard on this issue.

(*b*) That this Court has power at its discretion to order a new trial—in the case where some substantial wrong or miscarriage occurred at the trial—has never been doubted before, and is now expressly provided in section 25 (3) of the Courts of Justice Law, 1960 ; and in view of the said misdirection, we think that a substantial wrong or miscarriage

has thereby been occasioned. We allow, therefore, the appeal and we set aside the judgment of the trial Judge and we make an order for a re-trial before a different Judge. There will be, also, an order in favour of the appellant for his costs in the appeal ; the costs in the Court below to be costs in cause.

Appeal allowed ; re-trial ordered ; order for costs as above.

Cases referred to :

Halil Kemal v. *Georghios Kasti*, 1962 C.L.R. 317, at p. 323 ;

Nicos Laghoudi v. *Georghios Georghiou* (1958) 23 C.L.R. 199, at p. 203 ;

Yiannakis Pourikkos v. *Mehmed Fevzi* (1963) 2 C.L.R. 24, at pp. 33–34 ;

Aliki Karmiotis v. *Michael Pastellis and Another*, 1964 C.L.R. 447, at p. 452 ;

Eleni Iordanou v. *Polycarpos Anyftos* (1959–1960) 24 C.L.R. 97, at p. 106 ;

Bray v. *Ford* [1896] A.C. 44, at pp. 49, 53 ;

Automatic Woodturning Co. Ltd. v. *Stringer* [1957] A.C. 544.

Appeal.

Appeal by defendant against the judgment of the District Court of Limassol (Papaioannou, Ag. D. J.) dated the 16th June, 1969, (Action No. 1444/68) whereby he was adjudged to pay to the plaintiffs the sum of £132.610 mils in respect of a motor car sold to him by the plaintiffs.

G. Cacoyiannis, for the appellant.

Chr. Demetriades, for the respondent.

Cur. adv. vult.

VASSILIADES, P.: The judgment of the Court will be delivered by Mr. Justice Hadjianastassiou.

HADJIANASTASSIOU, J.: In this case, the appellant-defendant appeals from the judgment of the District Court of Limassol dated June 16, 1969, awarding to the plaintiff-respondent the sum of £132.610 mils, plus interest, in respect of a motor car sold by the plaintiff to the defendant.

The facts of the case, so far as it is necessary to state them, can be summarized as follows :—

On September 29, 1967, the plaintiff company, who are the distributors of cars, sold to the defendant a new Morris 1100, registration No. DK 966 for the sum of £829.700 mils less a discount of £39.250 mils. The defendant made an advance payment of £260.000 by cheque No. 318756 which was filled in the handwriting of Mr. Costas Potonides, the person in charge of the Limassol office of the plaintiff company since October, 1956. The defendant was given a receipt No. 3824, and signed for the balance due by him to the company four bills of exchange for the total amount of £530.450 mils, which were due for payment on October 30, November 30, December 30 of 1967, and on January 30, 1968, respectively. All the four bills were of the same amount, *viz.* £132.610 mils, except the third bill which was £132.620 mils. It appears that the defendant had carried out a lot of business transactions with the plaintiffs earlier, and on April 24, 1968, he had agreed to purchase another new car in exchange for his own old car for the sum of £354.000. This amount was paid again by cheque No. 318774. It is to be added that each time the defendant was paying by cheque it was filled in the handwriting of Mr. Potonides because the defendant was not well educated. However, a dispute arose between the parties over the payment of the fourth bill of exchange, and on May 28, 1968, the plaintiffs' advocates addressed a letter (*exhibit* 1) to the defendant, asking him to pay the amount of £132.610 mils, plus interest due to them.

On May 31, 1968, the advocates of the defendant in reply denied that their client owed any balance to C. D. Hay and Sons, the plaintiffs, adding that the four bills of exchange were paid off and were delivered to their client (see *exhibit* 2).

On June 4, 1968, the advocates of the plaintiffs wrote again (*exhibit* 3) in these terms :—

«Ὁ πελάτης σας ἐξώφλησε τὸ 1ον συνάλλαγμα τὴν 13.11.67 δυνάμει τραπεζικῆς ἐπιταγῆς ὑπ' ἀρ. 318759, τὸ 2ον τὴν 20.3.68 δυνάμει τραπεζικῆς ἐπιταγῆς ὑπ' ἀρ. 318770, καὶ τὸ 3ον τὴν 24.4.68 πάλιν δυνάμει τραπεζικῆς ἐπιταγῆς ὑπ' ἀρ. 318775. Κατὰ τὴν ἐξόφλησιν τῶν τοιούτων συν/των ἐξεδίδοντο καὶ αἱ σχετικαὶ ἀποδείξεις ἐκ τοῦ Οἴκου Σ. Δ. Χέϋ καὶ Υἱοὶ Λτδ.

Ὁ Οἶκος Σ. Δ. Χέϋ καὶ Υἱοὶ ἐνίσταται εἰς τὸν ἰσχυρισμὸν τοῦ πελάτου σας ὅτι ἐξώφλησε καὶ τὸ 4ον συν/γμα ὡς ἦτο ὑποχρεως νὰ πράξῃ. Εἰς τὴν πραγματικότητα ἐκ λάθους παρεδόθη εἰς τὸν πελάτην σας τὸ 4ον συν/γμα. Ὁ πελάτης σας

γνωρίζει τοῦτο πολὺ καλῶς καθότι ἐπὶ τοῦ συν/γματος οὐδὲν σημεῖον ὑπάρχει δεικνῦον τὴν ἐξόφλησίν του. Ἐπιπροσθέτως ὡς φαίνεται ἐκ τῶν βιβλίων τῶν πελατῶν μας δὲν ἔχει ἐκδοθῆ ἡ σχετικὴ ἀπόδειξις ἐμφαίνουσα τὴν ἐξόφλησιν τοῦ τοιούτου συν/γματος».

It would be observed that the plaintiffs allege in this letter that although the fourth bill of exchange has not been paid off by defendant, in reality it was delivered to him by mistake.

On June 7, 1968, the defendant's advocates in reply stated, *inter alia*, that their client has paid the third bill of exchange in cash and was delivered to him ; and that the fourth bill had been paid by cheque, which was delivered to him after pressure was put on the employee of the company (see *exhibit* 4).

Regarding the delivery of the fourth bill, the plaintiffs alleged in paragraph 3 of the statement of claim that the defendant " using unlawful means and/or by fraud and deceit, took delivery of the fourth bill without paying it ". The defendant in the statement of defence denied that he took delivery of the fourth bill by using unlawful means and/or by fraud and deceit and alleged that he paid off all four bills of exchange.

In support of the claim, the plaintiff called their employee, Mr. Costas Potonides, who told the Court that each time the defendant was paying off a bill of exchange he was delivering it to him and was issuing, at the same time, a receipt for such payment. He stated that the defendant paid the first and second bills on November 13, 1967, and on March 20, 1968, respectively. On April 23 or 24, he requested the defendant to pay both the third and fourth bills of exchange, which he had at the Limassol office, but the defendant paid only the third one by cheque ; before delivering the third bill to the defendant he wrote on it the words " settled " and at the same time he issued a receipt to him. Two or three weeks later on, about the middle of May, 1968, the defendant called to his office, in Limassol, and complained that he did not deliver to him the bill, which the defendant said had paid earlier. Mr. Potonides told the defendant that he did not remember and that he would look into it. On about May 15 or 20, when he met the defendant by chance in the street, he delivered to the defendant the fourth bill by mistake, he said.

Pausing here for a moment, one would observe that the statement of the witness, that he delivered the fourth bill to the defendant by mistake—in the light of what he said earlier that he would look for the bill—must be looked upon with some reservation as to its correctness.

Towards the end of May, on a Saturday, after he had realized his mistake, he said Mr. Potonides visited the defendant's office which is situated in the same street as that of the plaintiff's office, to see his files, and explain to him that what had happened was a mistake. He traced in the file the fourth bill and took it ; the defendant showed to him also his cheque book and both went to the office of the plaintiffs. Potonides telephoned the office of the plaintiffs in Nicosia, and contended that the fourth bill was not paid. The defendant started shouting and protesting that he had paid the third bill in cash and the fourth by cheque. The police were called and finally the fourth bill was returned to the defendant.

In cross-examination he said :—

" When defendant asked me for the first time to give him the fourth bill of exchange I had it in the office but I told him that I had to check first. When defendant paid off the third bill of exchange I had in my office the fourth one too. After a few days I came across defendant in the street, he asked me for the fourth bill of exchange and I gave it to him. I was under the mistaken impression that it was paid off. It may happen sometimes to deliver to clients bills of exchange paid off without writing on them the word 'settled' . When a client pays off a bill of exchange I telephone to Nicosia to send me the bill which I deliver to the client. This is the procedure that I follow. Not true that the defendant has paid off the fourth bill of exchange. Not true that the defendant has paid off in cash the third bill of exchange, few days prior to the payment of the fourth bill. He paid it off by cheque No. 318775 in *exhibit* 6."

In re-examination he said :—

" Whenever a client pays off a bill of exchange I always issue a receipt in respect thereof. The third and fourth bills of exchange were sent to me from Nicosia in order to be paid off by defendant prior to selling to him a new motor car."

The defendant in his evidence stated that he paid the third bill in cash to Mr. Potonides three or four days before

paying the fourth bill ; on April 24, 1968, he paid the fourth bill by cheque which was filled again by Potonides, and before he signed it the defendant looked at the amount of the pounds he said, but he paid no attention to the mils. On the same date he issued another cheque, No. 318776, for the amount of £340, in respect of a new motor car which he bought from the plaintiffs. Mr. Potonides again did not issue receipts to him because, he said, the defendant had the bills for a proof, and because the payment was made by cheque.

With regard to the fourth bill of exchange, the defendant stated that he asked Mr. Potonides to deliver it to him, but his reply was that it was in Nicosia and that he would write to get it for him. Within a period of seven days, the defendant called to see Mr. Potonides at his office and asked him for the bill, but as he was too busy, he brought the bill to his office later on. After a period of about three weeks, Mr. Potonides called at defendant's office and asked to see the file of his dealings with the plaintiffs. The defendant handed over to him the file, and when he saw him taking a bill from the file, the defendant asked him why was he taking the bill, and his reply was that he wanted to check their accounts. They went together to the office of the plaintiffs, taking with them his cheque book in order to do the checking. At the office Mr. Potonides told him that he had a letter from Nicosia in which the plaintiffs were saying that the defendant owed them the amount of £132.000 in respect of motor car DK 916. Defendant again said that he did not owe the plaintiffs money and asked Mr. Potonides to return the bill to him. Because Potonides refused to do so the police were called in and, finally, the bill was returned to the defendant.

I should have said that in my view, at the close of the trial, it became apparent that the case set up by the plaintiffs at the hearing was not covered by their pleadings. It is essential that a case should be tried and determined on the issues arising from the parties' pleadings.

It is clear here that neither counsel appearing on behalf of the plaintiffs applied for an amendment, nor did the Court consider it necessary. But in dealing with the case set up at the trial, the learned trial Judge in his judgment framed the issues between the parties in these terms :—

> " 1. Did defendant pay in cash the third bill prior to 24.4.68 and witness No. 1 delivered to him the fourth bill instead?

2. Did witness No. 1 deliver to defendant the fourth bill by mistake under a misconception that it was paid off by defendant ?

The result was that the Judge found on both the issues in favour of the plaintiffs.

The points of substance as raised by the notice of appeal are :

" (1) The issues as defined by the Court are not the issues as set or disclosed by the pleadings and/or are contrary to the evidence adduced at the trial. In particular the plaintiffs made no allegation of mistake in their pleadings and the issue of mistake was not put forward by the plaintiffs during the trial. This was not an issue properly before the Court.

(2) The plaintiffs allege in their statement of claim that the defendant took delivery of the fourth bill by unlawful means and/or by fraud and/or deceit. None of these allegations were dealt with or accepted by the Court. The learned Judge was not entitled to replace these allegations by an allegation of ' mistake ' or ' misconception '.

(3) The findings of the Court, the reasoning in support thereof, and its final conclusions on the two issues were contrary to the law, unjustified by the evidence, against the weight of evidence and unreasonable having regard to the law applicable and the evidence adduced."

Counsel, on behalf of the appellant, in arguing together the first and second grounds of appeal, contended that the learned trial Judge misdirected himself both as to what were the proper issues before him, and as to the facts with regard to the first question posed by him, because, he argued, the evidence is not to the effect that when the defendant paid the third bill he received the fourth bill instead.

Counsel submitted that the proper issues arising from the pleadings are :— Did defendant pay the fourth bill ; and if not was that bill extracted by him by fraud ?

Counsel on behalf of the respondent submitted that the action was based on a bill of exchange ; and that when the defendant, knowing that he has not paid his debt, tries to obtain the bill and actually receives it fully knowing that

he has not paid it, counsel argued—that this must amount in effect that the defendant has used unlawful means and/or misrepresentations within the substance of the pleadings. Moreover, counsel, apparently realizing his difficulties from his earlier submission, has invited the Court, relying on the authority of *Halil Kemal* v. *Georghios M. Kasti*, 1962 C.L.R. 317, to exercise its power and direct the amendment of the pleadings of the plaintiffs.

The first question posed is : Whether this Court in the exercise of its discretionary powers is prepared, at this very late stage, to order the amendment of the pleadings of the plaintiffs.

In the case of *Kasti* (*supra*) Josephides, J., dealing with this question, had this to say at p. 323 :—

> " Whenever a Court amends a pleading it is the duty of a party in whose favour the amendment is made to file with the Registrar an amended statement of claim or defence, as the case may be, so that the record is in order. This has been stated over and over again by this Court, and if any authority need be quoted that is the case of *London Passenger Transport Board* v. *Moscrop* [1942] A.C. 332, at p. 347, where it is stated : ' 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'. "

In *Nicos Laghoudi* v. *Georghios M. Georghiou*, 23 C.L.R. 199, Zekia, J. delivering the judgment of the High Court, and after quoting the dictum in *Moscrop* (*supra*) said at p. 203 :—

> " 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 re-calling 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."

In *Yiannakis Kyriacou Pourikkos* v. *Mehmed Fevzi* (1963) 2 C.L.R. 24, Josephides, J., dealing once again with the question of the amendment of the pleadings, had this to say at pp. 33 & 34 :—

> " In my opinion in the circumstances of this case no injustice will be done by allowing the amendment on appeal, if leave was asked for. But respondent's counsel has not asked for leave to amend.
>
> If an application for leave to amend is made before us and the desired amendment formulated we are prepared to grant such leave on payment of the costs by the respondent.
>
> However, I think that it is important to make it quite clear that cases may very well occur in future where this loose way of dealing with pleadings may lead to grave injustice to the other side and in such a case I apprehend that this Court would not be prepared to entertain an application for leave to amend on appeal.
>
> It has been said more than once in this Court that it is the duty, not only of the Court but of counsel on each side, to see that the record is kept in order i.e. that a proper application is made to the Court for leave to amend the pleadings at the trial and where leave is granted an amended pleading is actually filed in Court."

In *Aliki Christodoulou Karmiotis* v. *Michael Pastellis and Another*, 1964 C.L.R. 447, Vassiliades, J., had this to say with regard to the amendment of the pleadings at p. 452 :—

> " We indicated at that stage that we would deal with the application for amendment if necessary, after hearing appellant's counsel on the merits. And having done so, we do not think that this litigation should be allowed to go on further. We refuse the application for amendment, ... "

In the light of the authorities, it is clear what it has been said on a number of times in this Court that, where a substantial departure from the pleadings is desired to be made, it is necessary that a proper application be made to the Court for leave to amend the pleadings. On the particular facts of this case, having regard to what took

place at the trial, I came to the conclusion that an injustice would be done to the other side by allowing the amendment and, I would, therefore, not accept the submission of counsel for the respondent on this point.

With regard to the points raised by the appellant, I find myself in agreement with counsel that the learned trial Judge has misdirected himself, and I would, therefore, propose considering whether there are reasons which, in accordance with judicial precedent, would justify an order for a new trial, particularly so, because the issue raised in paragraph 3 of the statement of claim was not tried and no evidence was heard on this issue.

That this Court has power in the exercise of its discretionary jurisdiction to order a new trial—in the cases where some substantial wrong or miscarriage has been occasioned at the trial—has never been doubted before, and is now expressly provided in section 25 (3) of the Courts of Justice Law, 1960, which empowers this Court "to make any order which the circumstances of the case may justify, including an order for re-trial". I would reiterate that in this case the learned trial Judge has misdirected himself as to the proper issues before him.

In *Bray* v. *Ford* [1896] A.C. 44 (H.L.), Lord Watson, dealing with the question of misdirection, said at p. 49 :—

> "Every party to a trial by jury has a legal and constitutional right to have the case which he has made, either in pursuit or in defence, fairly submitted to the consideration of that tribunal."

Lord Herschell, giving a separate judgment in the same case, had this to say at p. 53 :—

> "The jury have returned their verdict on what they were erroneously led to think was the case, and not on the real case which the defendant was entitled to have submitted to them.
>
> I find it impossible to say that the case upon which the jury ought to have adjudicated ever was wholly before them, and that they were allowed to give to all the circumstances which might legitimately have influenced the verdict their due weight. This seems to me to establish that there has been a substantial miscarriage and that the appellant is entitled to a new trial."

Cf. *Automatic Woodturning Co. Ltd.* v. *Stringer* [1957] A.C. 544 (H.L.).

In *Eleni Panayiotou Ioannou* v. *Polycarpos Neophytou Anyftos* (1959–1960) 24 C.L.R. 97, Zekia, J., said at p. 106 :—

> " A Court of law has to confine itself to the issues as appearing at the close of the pleadings or properly added to at the date of the hearing and not take up at the trial other issues which the evidence of a particular witness might suggest."

For the reasons I have endeavoured to explain, and as I find it impossible to say that the case upon which the trial Judge ought to have adjudicated ever was wholly before him, and since I cannot speculate, it appears to me that there is a misdirection, and that there is in such a case a right to a new trial. Because I am of the opinion that a substantial wrong or miscarriage has thereby been occasioned, I would allow the appeal, and setting aside the judgment of the District Court, I would make an order for a re-trial before a different judge.

Regarding the costs, I would make an order in favour of the appellant for his costs in the appeal, and make the costs in the District Court costs in cause.

VASSILIADES, P. : I agree that for the reasons just stated, this appeal should be allowed ; and that an order should be made for re-trial ; with directions for costs as proposed.

JOSEPHIDES, J. : I concur.

Appeal allowed ; re-trial ordered ; order for costs as above.