1980 October 30

[MALACHTOS, J.]

UNITED SEA TRANSPORT CO. LTD. AND ANOTHER,
Plaintiffs,

v.

STAVROS ZAKOU,
Defendant.

(*Admiralty Action No.* 27/74).

Practice—Pleadings—Amendment—Principles applicable—Application for leave to amend reply—Refused because evidence rendering amendment necessary in applicants' hands for 16 *months—And because defendant's case closed and plaintiffs' case half way through—Moreover allowing the amendment at such very late stage could result in the defendant being confronted with an entirely new case.*

After the closing of the case of the defendant and when the evidence for the plaintiffs was half way through the latter applied for leave to amend the reply to the answer on the ground that all documents and other papers concerning the action, including the bill of lading dated 28.12.1973, were left behind at their offices at Famagusta after the occupation of the town by the Turkish troops in 1974 and since then no one is allowed to visit Famagusta; and that it became apparent at the hearing of the Action, when the bill of lading was produced by the defendant, that the amendment applied for was necessary.

Counsel for the defendant opposed the application and submitted that although it was not made mala fide yet, it should not be granted at this very late stage of the proceedings, as the file of the case with all relevant documents was made available to counsel for applicants soon after 1.10.1976 and a copy of the bill of lading was handed to him on 9.10.1976, that is about sixteen months before the filing of this application.

Held, (*after stating the principles governing the grant of leave to amend pleadings—vide* p. 515 *post*) that this Court will

not exercise its discretion in favour of the applicants, as the application for amendment was filed about sixteen months after a copy of the bill of lading was delivered to their counsel and when all the evidence for the defence had been adduced and the evidence for the plaintiffs was already half way through and, furthermore, at this very late stage of the trial by granting the amendment applied for it could result in the defendant being confronted with an entirely new case.

Application refused.

Cases referred to:

Tildesley v. *Harper*, 10 Ch. D. 393 at p. 396;

Steward v. *North Metropolitan Transways Co.* 16 Q.B.D. 556;

Hipgrave v. Case, 28 Ch. D. 356;

Rawding v. *London Brick Co.* [1971] K.I.R. 207 C.A.

Application.

Application by plaintiffs for leave to amend their reply by inserting a new paragraph after paragraph 6 to be numbered as paragraph 6A(a)(b)(c)(d).

G. Michaelides, for applicants.

Chr. Chrysanthou, for respondent.

Cur. adv. vult.

MALACHTOS J. read the following judgment. On the 4th April, 1974, the applicants-plaintiffs in this action instituted the present proceedings before this Court in its Admiralty Jurisdiction against the respondent-defendant claiming the sum of £1,404.450 mils freight for carriage of 228 pieces of furniture from Piraeus to Famagusta loaded on M/S AYIA IRINI on or about 28/12/73 and arriving between the 6th and 7th January, 1974 under a bill of lading No. 35 dated 28/12/73. They also claim £13.150 mils as landing charges, legal interest and costs.

The defendant in his answer, which was filed on 7/11/75, admits that he was the consignee of the cargo described in the said bill of lading but alleges that the said cargo upon arrival was so badly damaged due to the negligence of the plaintiffs that it was virtually useless and/or valueless and/or considered for all purposes as a total loss.

The defendant adduced a counterclaim against the plaintiffs for the value of the furniture in question amounting according to the relevant invoice of the consignor to U.S. Dollars 8,076 which the defendant paid by means of a letter of credit through the Cyprus Popular Bank for the sum of £3,041.960 mils. He also counterclaimed £1,520.980 mils loss of profit and £54.150 mils bank charges.

The plaintiffs in their reply, which was filed on 3/1/76 deny that they failed to carry the cargo safely to its destination or that the said cargo was damaged due to their negligence.

On 25/6/76 the plaintiffs applied to the Registrar of this Court for a date of hearing. On 1/10/76 counsel for the parties appeared before the Court and counsel for the plaintiffs made the following statements:

> "In view of the fact that the main file of this case is at our office in Famagusta, I would apply for discovery and inspection of documents which are in the possession of the other side".

Mr. Chrysanthou appearing for the defendant stated the following:

> "I have my file with all documents relevant to this case for inspection at any time by the other side at my office and am ready and willing to make photocopies of any documents they may require".

Mr. Michaelides then said:

> "In such a case I would apply for an adjournment of about two months to inspect the file in the office of my learned friend and to act accordingly".

The case was then adjourned to the 3rd December, 1976 for mention. On that day counsel for the parties appeared before the Court and Mr. Michaelides applied for an adjournment, as there were some documents still not traced so as to be able to trace them, if possible. The case was then adjourned consecutively for mention as counsel for applicant could not trace copies of some documents which, as he stated, were left behind at his office in Famagusta, which documents he considered as being of importance to the case, and, finally, the case

was set down for hearing on the 2nd December, 1977. On that day counsel for the parties agreed that on the formation of the pleadings the defendant had a right to begin. Counsel for the defendant then opened his case and called evidence and the case was then adjourned to 2nd February, 1978, for further hearing. On that day counsel for the defendant called further evidence and closed his case and then counsel for the plaintiffs called evidence. The case was then adjourned to 24/4/78 for further hearing. On the 20th February, 1978, the plaintiffs filed the present application for amendment of their reply by inserting the following new paragraph after paragraph 6 to be numbered as paragraph 6A(a), (b), (c) and (d). This new paragraph reads as follows:

"6A (a) The Plaintiffs say that freight and charges whether prepaid or to be collected shall be deemed fully and irrevocably earned upon shipment and shall be paid forthwith without any deduction or refund under any circumstances whatever ship and/or cargo lost or not lost, even though the voyage is not begun, or if such loss be caused through negligence of the servants of the ship owners.

(Clause 16 of the Bill of Lading dated the 28/12/73).

(b) The Plaintiffs further say that the ship owners are not to be responsible for any losses, shortages, or injuries which can be covered by insurance, and the price shall be the market price ruling at the port of destination on the day of clearing in of the vessel. The ship owners responsibility is limited in all cases to £5. per package or £10. per 1,000 kilos, whichever may be less. Any claims for damages can only be taken into consideration if the agents of the ship owners have been notified thereof in writing within seven days after the goods have been discharged.

(Clause 20 of the Bill of Lading dated the 28/12/73).

(c) The Plaintiffs further say that defendant failed to give notice in writing of loss or damage and the general nature of such loss or damage to the carrier or his agents at the Port of discharge before or at the time

of the discharge of his cargo within three days from such discharge or removal.

(Article III of clause 6 of the Carriage of Goods by Sea CAP. 263).

(d) The Plaintiffs further say that defendant failed to give to the carrier or his agents at the port of destination any prompt or other notice in writing of the loss or damage and the general nature of such loss or damage of his cargo."

The application as stated therein is based on rules 90, 203, 204, 207, 208 and 237 of the Cyprus Admiralty Jurisdiction Order, 1893.

In the affidavit in support of the application, which was sworn by the manager of plaintiff No. 1 company, and particularly in paragraphs 3 and 4 thereof, it is stated that all documents and other papers including the bill of lading dated 28/12/73, concerning the action, were left behind at their offices at Famagusta after the occupation of the town by the Turkish troops in 1974 and since then no one is allowed to visit Famagusta, and that it became apparent at the hearing of the action on 2/12/77 and 2/12/78, when the bill of lading was produced by the defendant as *exhibit* No. 2, that the amendment applied for was necessary.

Counsel for the defendant opposed the application and submitted that although it was not made mala fide yet, it should not be granted at this very late stage of the proceedings, as the file of the case with all relevant documents was made available by him to counsel for applicants soon after 1/10/76 and a copy of the Bill of Lading was handed to him on 9/10/76, about sixteen months before the filing of the present application.

The application for amendment of the reply to the answer of the defendant, as stated earlier in this judgment, is based on rule 90 of the Cyprus Admiralty Jurisdiction Order, 1893, which provides that any pleading may, at any time be amended, either by consent of the parties, or by order of the Court or Judge. This rule is similar to the Order 28, rule 1 of the Rules of the Supreme Court in England, which provides that the Court or Judge may, at any stage of the proceedings allow either party

to alter or amend his indorsement or pleadings in such a 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.

The general principles as to when leave to amend should be given are stated by L.J. Bramwell in the case of *Tildesley* v. *Harper*, 10 Ch. D. 393 at page 396: "My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise".

However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs. Before the hearing leave is readily granted, on payment of the cost occasioned, unless the opponent will be placed in a worse position than he would have been if the amended pleading had been delivered in the first instance. (*Steward* v. *North Metropolitan Transways Co.* 16 Q.B.D. 556).

Leave to amend is sometimes given at the hearing but the Court will not readily allow at the trial an amendment, the necessity of which was abundantly apparent months ago, and then not asked for. (*Hipgrave v. Case*, 28 Ch. D. p. 356). At any rate it would be wrong to allow an amendment at the close of the evidence or even at an extremely late stage of the trial where it could result in a party being confronted with an entirely new case. (*Rawding* v. *London Brick Co.* [1971] K.I.R. 207 C.A.).

I have carefully considered the facts of the case and the arguments of counsel in the light of the above authorities and I came to the conclusion not to exercise my discretion in favour of the applicants, as the application for amendment was filed about sixteen months after a copy of the Bill of Lading was delivered to their counsel and when all the evidence for the defence had been adduced and the evidence for the plaintiffs was already half way through, and, furthermore, at this very late stage of the trial by granting the amendment applied for

it could result in the defendant being confronted with an entirely new case.

For the above reasons the application for amendment is dismissed with costs.

The Registrar of the Court is directed to fix a date for continuation of hearing of the Action on the application of either party to the proceedings.

Application dismissed with costs.