1989 July 4

(SAVVIDES KOURRIS BOYADJIS JJ)

GEORGHIOS LOIZOU MAVROVOUNIOTIS,

Appellant-Defendant,

v

MICHALAKIS GEORGHIOU,

Respondent-Plaintiff

AND

LAKIS ELIA MAVROU,

Respondent-Third Party 1

AND

COSMOS GENERAL INSURANCE S A .

Respondent-Third Party 2
(Civil Appeal No 7127)

Appeal — Credibility of witnesses — Interference with findings relating to credibility — Principles applicable

Words and Phrases — «Road» in section 2(1) of the Road Traffic Law, 1972 (Law 86/72) — The essential characteristic of a «road» is «public access» — A place to which the public, but not only a particular class or section thereof, have access by «tolerance» is a «road»

Appeal — Costs — Interference with order for — Principles applicable

The question in this case is whether the Limassol Port, where an accident, the subject-matter of the action, occurred is a «road» within the meaning of section 2(1) of Law 86/72 If yes, the respondent insurance company should indemnify the insured, i e the appellant-defendant in the action in rem in respect of the damages payable to the plaintiff If not, the respondent is not bound to indemnify the appellant

The primary facts as found by the trial Court are

«Although a considerable number of persons enter the Port daily such persons do so on business The reasons of their visit to the Port may be different for every person entering Some of them visit the port on business regarding imports and exports and go to the Customs Offices or the Offices of the Ports Authority Others visit the offices of the Ministry of Commerce and Industry and even passengers visit the duty-free shops in order to purchase goods All of them, however, fall within the same category They are persons having business in the area of the port and cannot be considered as general public Nobody is allowed in unless he has business within the area of the port and the casual by-passer is not allowed in A mateur fishermen can be seen there, but as soon as they are seen by the officials they are removed This means that they are trespassers who entered without permission Furthermore the area of the port is fenced and well guarded on a twenty four hour basis and there are signs at the entrance of the port indicating that there is a control before entering the gates»

Held *dismissing the appeal* (1) The essential characteristic of a «road» in the sense of section 2(1) of Law 86/72 is «public access» «Public access» implies a place to which the general public but not a particular class or section thereof has access, whether by right or by tolerance The number of persons entering the place is irrelevant The quantity test is not the right one

(2) In this case the primary facts are such as to lead to the conclusion that the general public had no right to enter the port and that access to the port was not allowed by tolerance as far as the general public was concerned

(3) There is no reason to interfere with the order for costs in favour of the respondents, i e the successful litigant

Appeal dismissed with costs in favour of the respondent-third party 2 No order as to costs between appellant and respondent plaintiff

Cases referred to

Kynacou v Kortas and Sons Ltd (1981) 1 C L R 551,

Mamas v The Firm «ARMA» Tyres (1966) 1 C L R 158,

Achillides v Michaelides (1977) 1 C L R 172,

Watt v Thomas [1947] A C 484,

Epifaniou v Hadjigeorghiou (1982) 1 C L R 609,

Polycarpou v. Polycarpou (1982) 1 C.L.R. 182,

Harrison v. Hill (1932) S.C. (J) 13;

Charalambous v. Police (1982) 2 C.L.R. 134,

Neocleous and Another v. Chnstodoulou (1979) 1 C.L.R. 714,

Papadopoulos v Stavrou (1982) 1 C.L.R. 321,

O' Brian v. Trafalgar Insurance Company Ltd [1945] 78 Lloyds List Law Reports 223,

Talyon Ltd v Soteriou (1982) 1 C.L.R 777,

Miltiadous v. Miltiadous (1982) 1 C.L.R 797;

Efthymiadou v Zoudros (1986) 1 C.L.R. 341.

Appeal.

Appeal by defendant against the judgment of the District Court of Limassol (Fr. Nicolaides, S.D.J.) dated the 31st January, 1986 (Action No. 5869/80) whereby his claim against the third party No. 2 in the action, for a declaration that the latter are bound to indemnify him in respect of his liability against the plaintiff was dismissed.

C. Erotoritou, for the appellant-defendant.

A. Neocleous, for the respondent-plaintiff.

No appearance for respondent-third party 1.

St Erotocritou, for the respondent-third party 2.

Cur. adv. vult.

SAVVIDES J: The judgment of the Court will be delivered by Mr. Justice Boyadjis.

BOYADJIS J: The present appeal filed by the appellant-defendant in the action below, is directed against the judgment of the District Court of Limassol, dated 31 January, 1986, whereby the claim of the appellant against the respondent, third party No. 2 in the action, for a declaration that the latter are bound, qua insurers, to indemnify the appellant in respect of his liability towards the plaintiff in the action and for other consequential relief, was dismissed with costs.

The defendant's liability towards the plaintiff in the present action, in respect of which the defendant was claiming the

aforesaid indemnity relief, was a liability in negligence for the personal injuries which the plaintiff had sustained in a collision which had occurred within the area of the new port of Limassol, involving the defendant's motor car which was at the time insured with third party No 2, and a motor cycle driven by third party No 1, carrying the plaintiff as a pillion rider The defendant had denied any liability for the collision and had blamed third party No 1 for it He consequently filed a statement of claim against third party No 1 claiming indemnity and/or contribution equal to his share in the blame which resulted to the sub-judice collision So far, so good By instituting third party proceedings against third party No 1 the defendant had taken a correct and convenient procedural step which is usual in similar cases as well as commendable He proceeded, however, to issue third party proceedings against third party No 2 claiming indemnity against them under a contract of insurance, thus introducing a completely different issue which was totally unconnected with the factual and legal issues in the action between all other parties thereto As the matter has not been raised or argued before us, we do not say that this course is impermissible under the relevant Civil Procedure Rules What we most certainly say is that the defendant chose to take an extremely inconvenient course which should be avoided in the future

Be that as it may, on 29 March 1985, after several witnesses had testified mostly on the issue of liability for the collision the quantum of special and general damages payable to the plaintiff was agreed at £7,500 on a full liability basis The issue of liability was also settled The defendant admitted liability towards the plaintiff and as between the defendant and third party No 1 it was agreed to be shared equally As it appears from the record, the hearing then proceeded on what all counsel had described to be the only remaining issue, i e «the issue between Defendant and Third Party No 2 whether the accident occurred in a public or private place» The issue was thus defined evidently in view of the common understanding of all the parties that the liability of third party No 2 to the defendant under their contract of insurance depended on whether the area of the new port of Limassol, where the accident had occurred, was a road within the meaning of section 2(1) of the Motor Vehicles and Road Traffic Law (Law No 86/72) or not

After hearing the evidence which all parties to the action had adduced on this issue and after considering the authorities cited to it in the light of the arguments of counsel, the trial Court reached its conclusion on the matter. It ruled that the new Limassol port is not a road within the definition of the law. Consequently, the defendant's claim against third party No. 2 was dismissed with costs.

The defendant now seeks to annul this decision of the trial Court and the plaintiff who was joined as respondent in the defendant's appeal, now joins forces with him, whereas third party No. 1, though also joined as respondent, did not take any part in the appeal.

The grounds of appeal and the reasons therefor, set out in the Notice of Appeal, are the following:

«1. The decision of the trial Court was erroneous in that it is not warranted by the evidence adduced.

2. The decision of the trial Court was erroneous in that it is against the weight of the evidence.

3. The trial Court misunderstood and/or misaprehended the evidence and/or drew wrong and arbitrary inferences therefrom and/or gave wrong and/or unsatisfactory reason for its inferences and conclusions.

4. The trial Court relied on unreliable and unsatisfactory and biased evidence and disregarded and/or refused to act on evidence which was reliable, truthful and independent.

5. The learned Judge wrongly admitted the evidence of the Port Master Mr. Ghighis and the guard Mr. Yiannakis Demetriou as independent evidence, regarding the status of the New Limassol Port.

6. The trial Court treated the evidence of the plaintiff, the defendant and third party 1 in an unfair way compared with the way it treated the evidence of third party 2.

7. The learned Judge was wrong in law in holding that the new Limassol Port is not a road within the definition of the law.

8. The learned Judge was wrong in law and in fact in finding that the public has no access to the area of the New Limassol Port.

9. The learned Judge was wrong in interpreting the provisions of CAP 333 in that he did not, inter alia, take into account sufficiently and/or at all the intention of the legislature.

10. The learned Judge wrongly exercised his discretion in awarding to Third Party 2 their legal costs.»

During the course of the hearing ground 9 was abandoned.

The arguments put forward by learned counsel for the appellant in presenting his case before us, covering thereby all the aforesaid grounds of appeal, may be conveniently grouped as follows.

(A) Arguments directed to convince us that the trial Court made a wrong evaluation of the credibility of witnesses in preferring the evidence of the witnesses called by third party No. 2 and rejecting that of the witnesses called by all the other sides in the action and made, as a result, wrong findings on primary facts.

(B) Arguments directed to convince us that the trial Court drew wrong inferences from the primary facts as found by it.

(C) Arguments directed to convince us that the trial Court misapplied the law to the facts of this case.

(D) Arguments against the order for costs.

Learned counsel for the respondent-plaintiff adopted the arguments put forward on behalf of the appellant.

We shall first examine the arguments falling under the first aforesaid group.

GROUP A

Appellant's attack is mainly directed against the acceptance by the Court of the evidence of the first witness called by the respondent-third party No. 2, namely Ioannis Ghingis and the rejection of the evidence of D.W.2 Michalakis Kyprianou. The only reason put forward against the credibility of Ioannis Ghingis is his alleged partiality in the subject-matter of the dispute, and the only reason against the refusal of the Court to rely on the evidence of Michalakis Kyprianou is the fact that he is an independent

witness Ioannis Ghingis is the Port Master and Michalakis Kyprianou is a senior officer in the office of the Ministry of Commerce and Industry which is housed within the area of the new port of Limassol

The submission that the evidence of witness Ioannis Ghingis should be viewed with suspicion or reservation on the sole ground of lack of impartiality emanating from the fact that, being the person primarily responsible for the strict compliance by his employees with the existing regulations restricting access by the public into the area of the port, he had an interest in alleging that in practice such regulations were being properly adhered to, is not justified and we reject it Ioannis Ghingis and Michalakis Kyprianou are equally independent witnesses The evidence of the former was preferred to that of the latter because many material allegations therein were corroborated by the evidence of several other witnesses called by parties to the action other than the respondent-third party No 2, including the defendant himself

Be that as it may it has been said time and again that the principles upon which this Court decides appeals directed against findings of the trial Court mainly based on the credibility of witnesses are well settled, that matters relating to credibility of witnesses fall primarily within the province of the trial Judge who has the opportunity to see and hear the witnesses, and that it must be shown that the trial Judge was wrong in evaluating the evidence and the onus is on the appellant to persuade the Court that that is so See, for instance, *Nicolas Kyriacou v A Kortas & Sons Ltd* (1981) 1 C L R 551 The findings of the trial Court will not be disturbed on appeal, unless the appellant can satisfy the Court that the reasoning behind such findings is unsatisfactory, or that they are not warranted by the evidence when considered as a whole *Sofoclis Mamas v The Firm «ARMA» Tyres* (1966) 1 C L R 158, and *Zenon Achillides v Vyron Michaelides* (1977) 1 C L R 172, where the following principle enunciated in *Watt v Thomas* [1947] A C 484 (H L) was adopted

> «When a question of fact has been tried by a judge without a jury and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound The appellate court is,

however, free to reverse his conclusions if the grounds given by him therefor are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantange of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved».

Useful reference on this aspect of the case may lastly be made to the case of *Michalakis Epifaniou etc. v. Andreas Hadjigeorghiou* (1982) 1 C.L.R. 609, and to the following extract from the judgment of Stylianides, J. in *Maroulla Polykarpou v. Savvas Polykarpou* (1982) 1 C.L.R. 182 at pp. 194, 195:

«It is the practice of an appellate Court not to interfere with the verdict of the trial Court which had the advantage of hearing the witnesses and watching their demeanour unless some very strong ground is put forward establishing that the verdict is against the weight of the evidence. That this is a most salutary practice there can be no doubt, as a study of the notes of evidence, even when taken with the utmost accuracy, cannot possibly convey to the mind of a Judge the same impression which the oral examination of the witnesses and their demeanour under that process would have made upon the same Judge, if it had been his duty to hear the case in first instance. It is for the appellant to show that the conclusions arrived at by the Court, appealed from, are erroneous. In a case where the matter turns on the credibility of witnesses, it is obvious that the trial Court is in a far better position to judge the value of their testimony than we are. We are, of course, not oblivious of the fact, that quite apart from manner and deneamour, there are other circumstances which may show whether a statement is credible or not, and we should not hesitate to act upon such circumstances, if, in our opinion, they warranted our intervention».

In this appeal we have not been persuaded that there exists any valid reason for this Court to interfere with the evaluation of the evidence and the findings of fact made by the trial Court. On the contrary we are satisfied that such evaluation and findings were not only reasonably open to the trial Court to make, but they were fully warranted by the totality of the evidence.

GROUPS B AND C

We find it convenient, in the light of the manner in which the case haw been argued before us, to examine the appellant's arguments falling under the aforesaid Groups B and C together Put very shortly, the main submission of the appellant is that, on the evidence as accepted by it, the trial Court ought to have drawn the inference that the public had access to the area of the port with the tolerance of the port authorities within the principle laid down in *Harrison v Hill* (1932) S C (J) 13, adopted in *Ioannis Charalambous v The Police* (1982) 2 C L R 134, and that, though purporting to rely on the aforesaid two decisions, the trial Court misconceived and misapplied the principle ennunciated therein

Concerning the evidence which the trial Court had accepted as true and from which it ought to have drawn the inference that the public had access to the area of the port, if not for any other reason, by reason of tolerance by the port authorities, learned counsel for the appellant drew out attention to several extracts from the evidence of witnesses, including that of Ioannis Ghingis, whom the trial Court declared to be credible and truthful, according to which not every person who passes the gate leading to the area of the port is in fact stopped and checked by the guard who is indispensably on duty there, and that a large number of such persons who are government and other employees pernamently working within the area of the port, and who are known to the guards to be so employed, are not in fact stopped or asked as to the reason of their seeking entry inside the port area Though the trial Court did not make a specific finding on this matter, we shall proceed to examine the appellant's submission on the basis, inter alia, that this matter which has not been disputed by counsel for the respondent-third party No 2, is in fact common ground

Relying on this fact, counsel for the appellant submitted that the existing regulations expressly require that the guards on duty at the gates of the port should stop and check every person seeking entry into the port area, and that their admitted failure to carry out this check at least as far as permanent employees within the port are concerned, amounts in itself to tolerance by those exercising control of the port, as envisaged by the authorities already cited Counsel concluded his submission on this aspect of the case by

saying that the number of people entering the port every day is so large and the diverse reasons for which they qualify for entrance therein are so numerous, that the only correct thing to infer is that the public at large and not only a restricted class of persons enter the port by the tolerance of the port authorities.

Section 2(1) of Law No. 86 of 1972, reads as follows:

> «'Road' means any road, street, square, pathway, open place and space to which the public has access and includes any bridge, culvert, ditch, embankment, drain, causeway or supporting wall used in connection with a road».

This definition was judicially considered in *Charalambous v. The Police* (supra), referred to by both sides and cited by the trial Court in its judgment. The issue was whether an open space in front of the house of the appellant, where the collision had occurred, which was a continuation of a non-asphalted road, used by pedestrians, animals and traffic, was a «road» within the aforesaid definition or not. On the facts of that case it was held that it was. It was pointed out that the essential characteristic of a «road» as defined in section 2(1) of Law 86 of 1972 is «public access» and that it is irrelevant whether the area is private land. The Court then proceeded to examine the meaning of «public access» deriving guidance from the decision in *Harrison v. Hill* (supra), upon which the present appellant mainly relies, where a provision with regard to «public access» in exactly similar terms was considered. The law is quite plainly laid down in the following extract from the unanimous judgment of the Supreme Court, delivered by Stylianides, J. at pp. 139-141:

> «The question that poses is whether the place the appellant was driving on was a road within the meaning of this section. This is a question of mixed law and fact. The place were the accident occurred was not a road in the ordinary sense of the word.
>
> A provision with regard to 'public access' in exactly similar terms was considered in the Scottish case of *Harrison v. Hill* (1932) S.C. (J.) 13. In the course of his judgment the Lord Justice-General, Lord Clyde, said at p. 16:
>
> > 'It is plain, from the terms of the definition, that the class of road intended is wider than the class of public roads to which the public has access in virtue of a positive right belonging to the public, and flowing either from statute or

from prescriptive user A road may therefore be within the definition (1) although it belongs to the class of private roads and (2) although all that can be said with regard to its availability to the public is that the public 'has access' to it I think that, when the statute speaks of 'the public' in this connection what is meant is the public generally, and not the special class of members of the public who have occasion for business or social purposes to go to the farmhouse or to any part of the farm itself, were it otherwise, the definition might just as well have included all private roads as well as all public highways I think also that, when the statute speaks of the public having 'access' to the road, what is meant is neither (at one extreme) that the public has a positive right of its own to access, not (at the other extreme) that there exists no physical obstruction, of greater or less impenetrability, against physical access by the public, but that the public actually and legally enjoys access to it It is, I think, a certain state of use or possession that is pointed to There must be, as matter or fact, walking or driving by the public on the road, and such walking or driving must be lawfully performed - that is to say, must be permitted or allowed, either expressly or implicitly, by the person or persons to whom the road belongs I include in permission or allowance the state of matters known in right of way cases as the tolerance of a proprietor'

Lord Sands said at p 17

'In my view, any road may be regarded as a road to which the public have access upon which members of the public are to be found who have not obtained access either by overcoming a physical obstruction or in defiance of prohibition express or implied'

This similar question was considered and the aforesaid dicta of the Scottish Judges were applied by the English Courts for the last 40 years, starting from the case of *Bugge v Taylor*, [1941] 1 K B 198

In *Buchanan v Motor Insurers' Bureau*, [1955] 1 All E R 607, McNair, J , pointed out that the public for this purpose is the general public rather than people who have a specific

concern with walking on the area in question (See also *Houghton v Scholfield*, [1973] R T R 239 (Q B D) *Regina v Shaw*, [1974] R T R 225 (C A), *Deacon v A T (a minor)*, [1976] R T R 244, *Cox v White*, [1976] R T R 248)

The best way of showing that a member of the general public has access to a road with at least the tolerance of the owner of the property is to show that a member of the public does in fact so use it

In the end it comes down to a simple question of fact as the law is quite plain It is irrelevant whether the area is private land It is sufficient if it is an open space or place to which the public, but not a particular class or section of the public, have access not by leave but either by tolerance or habitually or without express prohibition and without having to overcome physical obstacles placed by the owner or the person entitled to possession»

It follows that, if, on the facts as found by the trial Court, it is established that the area of the new port of Limassol, though it is private and not public land, it is a place to which the public, but not only a particular class or section thereof, have access «by tolerance» of the port authorities, the port is a «road» within the meaning of the Law

It becomes pertinent at this juncture to refer to the facts as found by the trial Court and then to consider whether «tolerance» within the meaning attributed to this word in the above authorities may reasonably be inferred therefrom We might add that we as appellate Court, are in as good a position as the trial Court, to draw our own inferences from proven primary facts, if we are satisfied that the trial Court failed to draw the correct or all the inferences warranted from such established facts See in this respect *Neocleous and Another v Christodoulou* (1979) 1 C L R 714, and *Papadopoulos v Stavrou* (1982) 1 C L R 321

The primary facts found by the trial Court are the following

«Although a considerable number of persons enter the Port daily, such persons do so on business The reasons of their visit to the Port may be different for every person entering Some of them visit the port on business regarding imports and exports and go to the Customs Offices or the Offices of the Ports Authority Others visit the offices of the Ministry of

Commerce and Industry and even passengers visit the duty-free shops in order to purchase goods. All of them, however, fall within the same category. They are persons having business in the area of the Port and cannot be considered as general public. Nobody is allowed in unless he has business within the area of the Port and the casual by-passer is not allowed in. Amateur fishermen can be seen there, but as soon as they are seen by the officials they are removed. This means that they are trespassers who entered without permission. Furthermore, the area of the Port is fenced and well guarded on a twenty four hour basis and there are signs at the entrance of the Port indicating that there is a control before entering the gates».

Neither from the facts set out in the above extract from the judgment of the trial Court, nor from the manner in which those guarding the gates of the fenced area of the port are in practice performing their duties in checking entry into the area of the port, to which we have already referred, can it reasonably be inferred that the public, as opposed to a particular section thereof, has access to the port by the tolerance of the port authorities who have the area of the port under their control under the law and regulations. Nothing that has been said in *Harrison v. Hill* (supra) regarding tolerance is of any help to the appellant in view of the circumstances of the present case. Before any person steps inside the fenced area of the port he has to overcome the physical obstacle placed there by the authority entitled to possession thereof, i.e. the gate and the guard who is there all the time endowed with power to stop all persons seeking admittance and enquire as to their discretion to allow or to refuse entrance therein. These are matters totally inconsistent with the tolerance referred to in the two judicial authorities relied upon by the appellant, in connection with the access which the public must have over a private place before such place is deemed to be a «road» within the meaning of section 2(1) of Law 86 of 1972. To use the words of Lord Clyde in *Harrison v. Hill* (supra), the public does not «actually and legally enjoy access to it».

We would like to add that it is immaterial that a large number of persons are allowed to enter the port every day. All these people have common between them their occasion for some kind of business within the area of the port. They are, in this respect, a special class of members of the public, whereas, when the statute

speaks of «the public» in this connection, it means the public generally. That the «quantity test» is not the right test is clear from the following words of Mr. Justice Stable in *O' Brien v. Trafalgar Insurance Company Ltd.* [1945] 78 Lloyds List Law Reports 223, C.A., at p. 225:

> «I do not think that the quantity test is the right one. An area which, we will say, was open, confined to the passage of, we will say, the troops of a particular regiment or division, could not be said to be accessible to the public, because the individuals having access to the place, although very numerous, were there not as members of the public, the man in the street, the casual passer-by, but were there because they belonged to the particular unit or corps, and here nobody was on this place unless either they were employed in some capacity or another in the activity prevailing in this place or unless they had some definite, disclosed business, and that class of person, very numerous though it was and a very wide category of persons, does not, in my view, come within the meaning of the word 'public' as used in the Road Traffic Act, 1930».

GROUP D

Counsel for the appellant argued that, in awarding to third party No. 2 their legal costs, the trial Court has exercised its direction on the matter wrongly. Third party No. 2 was the successful party in the action vis-a-vis the appellant-defendant, who chose to institute against them the third party proceedings. Yet, it is submitted that no costs should be awarded to them on the following two reasons. First, because, the appellant's claim against them involved the determination of a novel legal point, and secondly, because of the conduct of the parties during the several stages of the proceedings. With regard to the first reason, we are unable to agree that the case involved the determination of any novel legal point. With regard to the second reason, the appellant is not suggesting any misconduct on behalf of the successful third party No. 2 during the several stages of the proceedings below. He simply relies on the allegation that the appellant himself did nothing to delay the proceedings. In support of his arguments he referred the Court to *Talyon Ltd. v. Panayiotis Soteriou* (1982) 1 C.L.R. 777, *Nitsa Miltiadous v. Kriton Miltiadous* (1982) 1 C.L.R. 797, and *Poly Efthymiadou v. Georghios Zoudros* (1986) 1 C.L.R. 341.

We see no reason whatsoever to interfere with the manner in which the trial Court exercised its discretion in awarding costs to the successful litigant, i.e. to third party No. 2 against the unsuccessful defendant. We are in fact satisfied that the Court did the right thing in the circumstances.

In the result, the appeal is dismissed, and the judgment of the trial Court is affirmed. The appellant-defendant is adjudged to pay the costs of the appeal to the respondent-third party No. 2. There should be no order as to costs between the appellant and the respondent-plaintiff.

Appeal dismissed. Order for costs as above.