1980 June 30

[TRIANTAFYLLIDES, P., DEMETRIADES, SAVVIDES, JJ.]

U DRIVE COMPANY LIMITED,
Appellants-Plaintiffs,

v.

EFSTATHIOS PANAYI AND ANOTHER,
Respondents-Defendants.

(*Civil Appeal No.* 5667).

Civil Procedure—Practice—Pleadings—Statement of claim—Amendment—Departure from cause of action alleged should be preceded, or, at all events, accompanied by the relevant amendment—Claim for damages to self-drive car—Statement of claim alleging that defendant 2 came to possess car as agent of defendant 1—And not disclosing cause of action against defendant 2 as bailee—Failure of plaintiffs to apply for amendment of the statement of claim during the trial—Application for amendment on appeal refused in the circumstances of this case.

Contract—Bailment—Claim for damages to self-drive car—Pleadings—Cause of action—Statement of claim—Not disclosing cause of action against defendant as bailee—Claim dismissed.

Findings of trial Court—Based on credibility of witnesses—And on inferences drawn from primary facts—Reasonably open to trial Court in the circumstances of this case.

Evidence—Extrinsic evidence—Contract for hire of self-drive car—Extrinsic evidence as to circumstances of signing of, adduced on the initiative of the party claiming thereunder—Whether wrongly allowed to be adduced.

By means of an agreement dated February 8, 1975 the appellants hired to respondent 2 a self-drive car. Though in the text of the said agreement there appeared the name of respondent 1 as the hirer, in fact it was signed by respondent 2, who paid, also, the rental for the hiring. In an action by the appellants

for C£950 damages in respect of the destruction beyond economical repair of the car in question, as a result of a collision at a time when such car was in the possession of respondent 2 but was being driven by another person without his permission, the trial Judge found that it was not hired by respondent 2 on behalf of respondent 1, but by respondent 2 as the actual and sole hirer and, therefore, the action as against respondent 1, was dismissed, because there was no privity of contract between him and the appellants. The trial Court dismissed the action also as against respondent 2, because in the manner in which the statement of claim had been framed it disclosed no cause of action against him.

The statement of claim stated that respondent 1 had authorised respondent 2 to sign on his behalf the hiring agreement and to take delivery of the car and that whilst the said car was in the possession of the respondents and/or either of them, and respondent 2 was acting as the agent of respondent 1, the collision in which it was damaged beyond repair occurred.

Upon appeal by the plaintiffs it was stated in the notice of appeal that "the plaintiffs will apply in due time for the amendment of the statement of claim if necessary"; and after the appeal was fixed for hearing there was filed an application for amendment of the statement of claim so that there could be averred therein that respondent 2 had signed the hiring agreement in his personal capacity for his own purposes and had taken delivery of the car concerned for his own use; and that at the time of the collision it was in the possession of respondent 2 and was being used by him.

Held, (1) with regard to the dismissal of the action against respondent 1:

(1) That the relevant findings of the trial Judge were based, to a great extent, on his view regarding the credibility of the evidence adduced before him and, also, on inferences drawn by him from primary facts; and that this Court is not satisfied that it should interfere either as regards his findings based on credibility or the inferences drawn by him, which were reasonably open to him in the circumstances of this case.

(2) *On the contention that extrinsic evidence was wrongly allowed to be given during the trial as regards the circumstances*

in which the hiring agreement came to be signed by respondent 2:

That irrespective of any other consideration there is no merit in this complaint of the appellants because the said extrinsic evidence was adduced on their initiative in an effort to burden, too, respondent 1 with liability towards them.

Held, (*II*) *with regard to the dismissal of the action against respondent* 2:

That it was never alleged anywhere in the statement of claim that respondent 2 came to possess the car in any capacity other than as an agent of respondent 1; that any departure from the pleadings should be preceded, or, at all events, accompanied by the relevant amendment; that at no time during the trial and up to the delivery of the judgment in the action any attempt was made to amend the statement of claim in a manner disclosing a cause of action against respondent 2; that the actual manner in which the claim of the appellants in the present case was pleaded against respondent 1 has excluded the existence of any cause of action against respondent 2 as the bailee of the car in question; and that, therefore, the action was rightly dismissed in so far as, also, respondent 2 is concerned.

Held, (*III*) *with regard to the application for amendment of the statement of claim, after stating the relevant principles:*

That had the claim of the appellants been properly pleaded respondent 2 could have brought in as a party, against whom he could have claimed contribution or indemnity, the other person who was actually driving the car at the time of the collision; that by now it is too late for him to adopt such a course and, in any event, it is not in dispute that due to the passage of time his claim against such other person has become statute-barred; that, therefore, it would be unjust to allow the amendments of the statement of claim sought to be effected by the appellants at this very late stage, on appeal, which would result in judgment being given in favour of the appellants against respondent 2 (*Pourikkos* v. *Fevzi* (1963) 2 C.L.R. 24 distinguished).

Held, further, that the amendment of the statement of claim must be disallowed because the defendants could not be placed in the same position as if the plaintiffs had pleaded correctly in the first instance.

Appeal dismissed.

Cases referred to:

Patsalides v. *Yiapani* (1969) 1 C.L.R. 84 at p. 96;

London Passenger Transport Board v. *Moscrop* [1942] A.C. 332 at p. 347;

Laghoudi v. *Georghiou*, 23 C.L.R. 199 at p. 202;

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

Iordanou v. *Anyftos*, 24 C.L.R. 97 at p. 106;

Courtis v. *Iasonides* (1970) 1 C.L.R. 180 at pp. 182–183;

Karmiotis v. *Pastellis*, 1964 C.L.R. 447 at p. 452;

Loucaides v. *C.D. Hay and Sons Ltd.* (1971) 1 C.L.R. 134 at pp. 142–144;

Patsalidou v. *Kyriakides* (1977) 1 C.L.R. 95;

Nicolaides v. *Yerolemi* (1980) 1 C.L.R. 1 at pp. 12–13;

Pourikkos v. *Fevzi* (1963) 2 C.L.R. 24 at pp. 32–34;

Steward v. *North Metropolitan Tramways Company* [1885–86] 16 Q.B.D. 556 at pp. 558–559.

Appeal.

Appeal by plaintiffs against the judgment of the District Court of Nicosia (Artemides, D.J.) dated the 9th February, 1977 (Action No. 939/75) whereby their action for C£950.– damages in respect of the destruction beyond economical repair of a self-drive car was dismissed.

E. Vrahimi (*Mrs.*), for the appellants.

P. Ioannides, for the respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment of the Court. This is an appeal against a judgment of the District Court of Nicosia by virtue of which there was dismissed an action by the appellants, as plaintiffs, against the respondents, as defendants, for C£950 damages in respect of the destruction beyond economical repair of a self-drive car, No. ZGT 608, belonging to the appellants, as a result of a collision at a time when such car was in the possession of respondent 2 but was being driven by another person without his permission.

As was found, correctly in our opinion, by the trial judge the said car was hired from the appellants by respondent 2 by means of an agreement dated February 8, 1975.

Though in the text of the said agreement there appears the name of respondent 1 as the hirer, in fact it was signed by respondent 2, who paid, also, the rental for the hiring. The trial Judge found that it was not hired by respondent 2 on behalf of respondent 1, but by respondent 2 as the actual and sole hirer and, therefore, the action, as against respondent 1, was dismissed, because there was no privity of contract between him and the appellants.

The relevant findings of the trial Judge were based, to a great extent, on his view regarding the credibility of the evidence adduced before him and, also, on inferences drawn by him from primary facts. We find that we are not satisfied that we should interfere either as regards his findings based on credibility or the inferences drawn by him, which were reasonably open to him in the circumstances of this case.

It has been contended on behalf of the appellants that extrinsic evidence was wrongly allowed to be given during the trial as regards the circumstances in which the aforementioned hiring agreement came to be signed by respondent 2, as the hirer, even though, as already stated, the name of respondent 1 appeared as the hirer in the text of the agreement. Irrespective of any other consideration, we find no merit in this complaint of the appellants because the said extrinsic evidence was adduced of their initiative in an effort to burden, too, respondent 1 with liability towards them.

The trial Court dismissed the action also as against respondent 2, because in the manner in which the statement of claim had been framed it disclosed no cause of action against him.

Paragraph 3 of the statement of claim stated that respondent 1 had authorized respondent 2 to sign on his behalf the hiring agreement and to take delivery of the car, and paragraph 6 of the statement of claim stated that whilst the said car was in the possession of the respondents and/or either of them, and respondent 2 was acting as the agent of respondent 1, the collision in which it was damaged beyond repair occurred.

In our opinion it is clear, beyond doubt, that it was never alleged anywhere in the statement of claim that respondent 2 came to possess the car in any capacity other than as an agent of respondent 1 and, therefore, we cannot accept that,

by means of the said pleading, there was disclosed a cause of action vested in the appellants against respondent 2 in the capacity of a bailee.

At no time during the trial and up to the delivery of the judgment in the action any attempt was made to amend the statement of claim in a manner disclosing a cause of action against respondent 2.

In *Patsalides* v. *Yiapani*, (1969) 1 C.L.R. 84, there was quoted by this Court (at p. 96) the following dictum in *London Passenger Transport Board* v. *Moscrop*, [1942] A.C. 332, by Lord Russell of Killowen (at p. 347):

> " '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'."

The above dictum had already been quoted, with approval, in Cyprus, in, *inter alia*, *Laghoudi* v. *Georghiou*, 23 C.L.R. 199, 202 and in *Kemal* v. *Kasti*, 1962 C.L.R. 317, 323.

Also, in the *Patsalides* case, *supra*, there was quoted the following passage from the judgment of Zekia J.—as he then was—in *Iordanou* v. *Anyftos*, 24 C.L.R. 97 (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."

In *Courtis* v. *Iasonides*, (1970) 1 C.L.R. 180, Vassiliades P. said (at pp. 182-183):-

> "The pleadings in an action are the foundations of the litigation; they must be carefully prepared as the set of rails upon which the train of the case will run. The Civil Procedure Rules (Or. 19 r. 4) are clear on the point; and daily practice lays stress on the need to apply strictly

this rule. A case is decided on its pleaded facts to which the law must be applied. If in the course of the trial it appears that a party's pleading requires amendment, steps for that purpose must be taken as early as possible in order to give full opportunity to the parties affected by the amendment to meet the new situation; to run their case, so to speak, on the new rails."

The actual manner in which the claim of the appellants in the present case was pleaded against respondent 1 has excluded the existence of any cause of action against respondent 2 as the bailee of the car in question. The position is analogous to that in *Karmiotis* v. *Pastellis*, 1964 C.L.R. 447, and attention is drawn, in particular, to a relevant dictum by Vassiliades J.—as he then was—(at p. 452).

We are, therefore, of the view that the action was rightly dismissed in so far as, also, respondent 2 is concerned.

This appeal was filed on Feburary 11, 1977, and in the notice of appeal it was stated (see paragraph 6) that "The plaintiffs will apply in due time for the amendment of the statement of claim if necessary."

The appeal was fixed for hearing, for the first time, on May 14, 1979, and on May 11, 1979, there was filed an application for amendment of the statement of claim so that there could be averred therein that respondent 2 had signed the hiring agreement in his personal capacity for his own purposes and had taken delivery of the car concerned for his own use; and that at the time of the collision it was in the possession of respondent 2 and was being used by him.

The application for amendment was opposed and was, eventually, heard together with the appeal on April 11, 1980.

In the *Karmiotis* case, *supra*, Vassiliades J.—as he then was—stated the following in refusing an application for amendment at the stage of the appeal (at pp. 452–453):-

"At the opening of the appeal before us, Mr. Tornaritis applied for amendment of the pleadings which, as pointed out in the judgment of the trial Court, would be required to connect plaintiff's claim with the evidence adduced. His client's claim is twofold, learned counsel said. She

claimed the right of passage over a public pathway; but if the evidence failed to establish a public path, then plaintiff, as owner and occupier of plot 173 claimed a right of way to her plot, over 194 now belonging to the defendant (2), and plot 174 belonging to a third person; not a party in this action.

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, and we find it unnecessary to call on the respondent on the merits.

As we have pointed out during the hearing of the appeal, the right to use a public pathway, or a public road as such, is, legally, of a different nature to the right of owner or occupier of immovable property to pass over property belonging to another person, for certain purposes connected with the enjoyment of the dominant property. The matter is so obvious that it requires no further elaboration. The claim to the exercise of a right of way over the servient property, is inconsistent with the allegation for the existence of a public pathway thereon. The evidence to establish a right of way attached to the enjoyment of property, would, normally, disprove the existence of a public path there.

By her present action, the plaintiff claimed judicial remedies against interference by the defendant, with her (plaintiff's) use of an alleged public pathway. The existence of such a pathway having been denied by the defendants, the plaintiff set out to prove it. But at the conclusion of the trial it was submitted on her behalf that plaintiff had established a private right of way; a right which did not form part of the claim in the action. We are, therefore, of the opinion that plaintiff's action was rightly dismissed. And this appeal must fail."

In *Loucaides* v. *C.D. Hay and Sons Ltd.*, (1971) 1 C.L.R. 134, an amendment of the pleadings for the purposes of the appeal was refused in the exercise of the relevant discretionary powers of the Supreme Court (see the judgment of Hadjianastassiou J. at pp. 142–144).

In *Patsalidou* v. *Kyriakides*, (1977) 1 C.L.R. 95, the Supreme Court again disallowed an amendment of the pleadings at the stage of the appeal and, in doing so, it referred, with approval, to the cases of *Kemal*, *Karmiotis*, *Courtis* and *Loucaides*, *supra*; and the same course was followed by this Court in *Nicolaides* v. *Yerolemi*, (1980) 1 C.L.R. 1, where Hadjianastassiou J. after reviewing relevant case-law said (at pp. 12–13):–

> "The application for the amendment of the pleadings was filed on 31st May, 1978, after judgment was delivered, that is on 16th December, 1977. In this application, the amendment sought was alleged to be a material one, but in effect is introducing at this very late stage a new ground of relief.
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> It is said time and again that a case is decided on its pleaded facts to which the law must be applied. If in the course of the trial it appears that a party's pleading requires amendment, steps for that purpose must be taken as early as possible, in order to give to the parties affected by the amendment the opportunity to meet the new situation. After the closing of the case and after judgment is delivered, the Court very rarely should grant leave for the amendment of the pleadings unless there are exceptional circumstances, justifying such a course, once it is in the interest of justice to finalize litigation between the parties.
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> In the light of the authorities quoted and in the absence of any exceptional circumstances, and particularly because of such a long delay, it is clear to us in the circumstances of this case, that the amendment sought should not be allowed. We, therefore, dismiss this interlocutory application."

Counsel for the appellants has relied, in support of her application for leave to amend the statement of claim at this very late, indeed, stage, on the case of *Pourikkos* v. *Fevzi*, (1963) 2 C.L.R. 24; this case is, however, distinguishable from the present case because, as it appears from the judgment of Josephides J. (at pp. 32–34) leave to amend the statement of claim was granted during the hearing of an appeal so that there could be recovered special damages which had been awarded in relation to the damage caused to the scooter of the plaintiff in that case

and which could not otherwise have been recovered because he had only claimed damages for personal injuries. Josephides J. said the following (at pp. 33-34):-

"On these authorities I have no hesitation in holding that the plaintiff cannot recover the amount of special damage awarded in the judgment without having the indorsement of his writ and the prayer in the statement of claim amended. 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."

We have duly considered whether we should allow amendments of the statement of claim in this case so as to enable the appellants to recover the damages they claim from respondent 2 in his capacity as bailee of the car in question, especially since the trial judge, in his judgment, did find that, on the evidence adduced, respondent 2 would have been liable to compensate the appellants as bailee had their case been properly pleaded.

In the end we have decided that it would be unjust to allow the amendments of the statement of claim sought to be effected by the appellants at this very late stage, on appeal before us, which would result in judgment being given in favour of the

appellants against respondent 2. Had the claim of the appellants been properly pleaded respondent 2 could have brought in as a party, against whom he could have claimed contribution or indemnity, the other person who was actually driving the car at the time of the collision. By now it is too late for him to adopt such a course and, in any event, it is not in dispute that due to the passage of time his claim against such other person has become statute-barred.

In *Steward* v. *North Metropolitan Tramways Campany*, [1885-86] 16 Q.B.D. 556, an amendment of the statement of defence was disallowed because the plaintiff could not be placed in the same position as if the defendants had pleaded correctly in the first instance; Lord Esher M.R. stated the following (at pp. 558-559):

> "With regard to questions of amendment of pleadings, a rule has been enunciated by the Court, which is rather a rule of conduct than a rule of rigid law such as can never be departed from; because I take it that the Court might depart from it if there were very exceptional circumstances in any particular case leading the Court to think that it would not be right to apply it. It is nevertheless a rule of conduct which must be generally followed. The rule was thus laid down in *Tildesley* v. *Harper*[1] by Lord Bramwell, who there says: '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.' The subject was again discussed in *Claraped* v. *Commercial Union Association*[2], where I stated the rule in terms substantially equivalent to those used by Lord Bramwell. I there said, 'The rule of conduct of the Court in such a case that, 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: but, if the amendment will put them into such a position that they

1. 10 Ch. D. 393
2. 32 W.R. 262.

must be injured, it ought not to be made.' And the same principle was expressed, I think perhaps somewhat more clearly, by Bowen, L.J., who says that an amendment is to be allowed 'whenever you can put the parties in the same position for the purposes of justice that they were in at the time when the slip was made.'

To apply that rule to the present case; if the amendment is allowed now, will the plaintiff be in the same position as if the defendants had pleaded correctly in the first instance? If the defendants had in the first instance pleaded as they now ask to be allowed to plead, the plaintiff could have discontinued his action against the defendants, and then have given notice of action and brought an action against the vestry; but now, more than six months having elapsed, he can no longer sue the vestry. If, therefore, the amendment were allowed, the plaintiff could not be put in the same position, or compensated by costs or otherwise."

In the light of all the foregoing the leave sought by counsel for the appellants to amend now the statement of claim must be refused.

As the claim of the appellants as pleaded against both respondents was rightly dismissed by the trial Court–as has already been held in this judgment—and as without amending their statement of claim at the stage of this appeal before us it is impossible for the appellants to succeed against respondent 2 this appeal is dismissed with costs.

Appeal dismissed with costs.