1981 October 6

[A. LOIZOU, J.]

HUNGARIAN SHIPPING CO. LTD.,

Plaintiffs,

v.

CYPRUS COMPOUND FODDERS CO. LTD.,

Defendants.

(*Admiralty Action No.* 21/80).

Practice—Pleadings—Departure—Reply—New ground inconsistent with petition or raising new claim—"Inconsistent"—Meaning—Claim in damages for breach of contract of carriage contained in bill of lading—Reply referring to failure of defendants to abide by terms of their import licence—Whether reply inconsistent with petition and raising new ground of claim—Rule 10(1) *of Order* 18 *of the Rules of the Supreme Court of England, as revised in* 1962, *applicable by virtue of rule* 237 *of the Cyprus Admiralty Jurisdiction Order,* 1893.

This was an application* by the defendants for "an order of the Court directing that such parts of the reply which raise a new ground of claim of contain allegations of fact inconsistent with petition be struck out".

The plaintiffs as owners of the ship "SZEKESFEHERVAR" claimed against the defendants, as holders and/or indorsees for value of a bill of lading and/or as owners of the goods carried on board the said ship, demurrage, discharging and/or reloading expenses and damages for breach of contract of carriage contained in the said bill of lading.

* The application was based on rule 10(1) of Order 18 of the Rules of the Supreme Court of England, as revised in 1962, which runs as follows and is applicable by virtue of rule 237 of the Cyprus Admiralty Jurisdiction Order, 1893:

"10(1) A party shall not in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his".

The above application was based on the following facts:

"..... whereas in the petition the plaintiffs' claim is based upon an alleged breach of Contract as evidenced by the Bill of Lading referred to therein, the plaintiffs by their reply refer to confirmations and undertakings allegedly given by the defendants and their bankers (para. 3 of the reply) to the defendants' alleged failure to abide by the terms of their import licence (paras. 4, 8 and 9 of the reply) and to representations allegedly made by the defendants (para. 9 of the reply) as new grounds of claim or setting out allegations of fact inconsistent with the petition to which the defendants had no opportunity to plead to".

The plaintiffs opposed the above application on the ground that none of the facts alleged by them in their reply were inconsistent in any way with anything pleaded in the petition nor did they set up any new ground of claim; they were a reply to the allegations and denials of the defendants (vide pp. 383–4 *post*).

Held, (after dealing with the meaning of the word "inconsistent" in the said rule 10(1) *of Order* 18—*vide p.* 385 *post*) that rule 10(1) of Order 18 means that a party's second pleading must not contradict his first; that the effect of this rule is to prevent a plaintiff from setting up in his reply a new claim which is inconsistent with the cause of action alleged in the statement of claim; that considering the nature of the claim, the contents of the pleadings in particular, the answer and the denials, confessions and avoidance contained therein and the reply and its contents, this Court has come to the conclusion that the parts objected to raise no new ground of claim or contain no allegation of fact inconsistent with the petition; accordingly the application must fail.

Application dismissed.

Observation: The very parts of a pleading which are objected to and are sought to be struck out ought to be specifically indicated.

Cases referred to:

Herbert and Another v. *Vaughan and Others* [1972] 3 All E.R. 122 at p. 125;

Earp v. *Henderson* [1876] 3 Ch. 254;

Williamson v. *L. & N. W. Ry. Co.* [1879] 12 Ch. D. 787.

Application.

Application by defendants for an order of the Court directing that such parts of the reply which raise a new ground of claim or contain allegations of fact inconsistent with the petition be struck out.

A. Dikigoropoulos, for the applicants-defendants.

E. Psillaki (Mrs.) for the respondents-plaintiffs.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. By the present application the defendants apply for "an order of the Court directing that such parts of the reply which raise a new ground of claim or contain allegations of fact inconsistent with the petition be struck out".

The broad manner in which the relief sought is framed has been somehow remedied by the statement of facts which are relied upon and are set out in the application and the arguments advanced by counsel for the applicants. It should, however, be pointed out that the very parts of a pleading which are objected to and are sought to be struck out ought to be specifically indicated. With these observations intended for future guidance I turn now to the relevant facts of the case.

As it appears from the indorsement to the writ of summons the plaintiffs as owners of the ship "SZEKESFEHERVAR" claim against the defendants as holders and/or indorsees for value of the bill of lading No. LI/1 dated Port Sudan 13/7/79 and/or as owners of the goods carried on board the ship "SZEKESFEHERVAR" under the said bill of lading:

(a) U.S. $2.101.57 or the Cyprus pound equivalent thereof for demurrage in respect of the above vessel's discharging at Limassol under the bill of lading No. LI/1 dated 13/7/79 at Limassol.

(b) Cy£795.235 discharging and/or reloading expenses and/or port dues and/or other charges and/or expenses incurred by the plaintiffs in respect of the cargo carried under the said bill of lading or alternatively.

(c) The same amounts of U.S. $2.101.57 and Cy£795.235 by way of damages for the defendants' breach of the contract of carriage contained in the said bill of lading.

The facts relied upon in support of this application are stated to be apparent on the face of the proceedings and are summed up therein as follows:

> "..... whereas in the petition the plaintiffs' claim is based upon an alleged breach of Contract as evidenced by the Bill of Lading referred to therein, the plaintiffs by their reply refer to confirmations and undertakings allegedly given by the defendants and their bankers (para. 3 of the reply) to the defendants' alleged failure to abide by the terms of their import licence (paras. 4, 8 and 9 of the Reply) and to representations allegedly made by the defendants (para. 9 of the Reply) as new grounds of claim or setting out allegations of fact inconsistent with the petition to which the defendants had no opportunity to plead to".

The plaintiffs in opposing the application have, by reference to the pleadings filed, maintained that none of the facts alleged by them in their reply are inconsistent in any way with anything pleaded in the petition, nor do they set up any new ground of claim. It is their case that by their petition they claim that the defendants are the owners and or consignees of the cargo in question and that the bill of lading referred to in the petition contain and or evidence the relevant contract of carriage of the cargo, (paragraphs 2 and 3 of the petition). They further say that they describe in the petition the breach of such a contract by the defendants and claim damages therefor and/or demurrage, but as the defendants by their answer denied that they were the owners of the goods or that they were bound by the bill of lading in question and alleged that they had been acting all along as agents for Union Trading Company Ltd., of Sudan, they had to reply to such allegations and denials and in support of the allegations of fact and the claims made in the petition to refer in the reply to the defendants' written confirmation and bank guarantee, dated the 21st July 1979, to the effect that they were the owners of the cargo and would produce the relevant bill of lading within 30 days. Moreover it is pointed out in paragraph 9 of the petition that "the vessel was refused permission to discharge on the ground that the defendants had not complied with the terms and conditions of the import licence issued for the cargo and/or that importation of the cargo was prohibited on/or about the 24th July 1979,

the defendants were finally able to settle the matter with the Cyprus authorities concerned and the vessel was allowed to berth at 0650 hours and to commence discharge of the cargo at 0800 hours on the 26th July 1980."

The defendants, however, in their answer deny this allegation and the plaintiffs have argued that by their reply in paragraph 4, they merely set out more detailed facts in support of their original allegation.

Although matters might have been clearer and more obvious had the three pleadings been reproduced verbatim, yet for the sake of brevity I have refrained from doing so, as I feel that what has been stated above is to my mind sufficient to explain the situation and give the factual background upon which the determination of the issues raised by this application can be made.

Both sides rely on rule 237 of the Cyprus Admiralty Jurisdiction Order 1893 which provides that "in all cases not provided by these Rules the practice of the Admiralty Division of the High Court of Justice of England, so far as the same shall appear to be applicable, shall be followed". By virtue of this provision both sides invoked Order 18 rule 10 of the rules of the Supreme Court of England, as in fact revised in 1962 and which reads as follows:

> "10.–(1) A party shall not in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his.
>
> (2) Paragraph (1) shall not be taken as prejudicing the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative".

This rule was taken from the former Order 19 rule 16. Paragraph 2, however, is new but embodied the former practice. Order 19 rule 16 which may be found in the Annual Practice of 1958 reads:

> "16. No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same".

I need not, however, embark on a consideration of the change of terminology, as same neither has a bearing, nor does in any way affect the outcome of these proceedings. A very useful, however, analysis of these changes can be found in the judgment of Goff, J., in *Herbert and another* v. *Vaughan and others* [1972] 3 All E.R. p. 122 at p. 125, where he concluded by saying: "I think it is clear that the change of terminology does subject 'ground of claim' as well as 'allegation of fact' to the adjective 'inconsistent', but I think that 'inconsistent' here does not mean mutually exclusive but merely new or different".

As commented in the Supreme Court Practice (1973) with regard to Order 18 rule 10 by reference to the cases of *Earp* v. *Henderson* [1876] 3 Ch. D. 254; *Williamson* v. *L. & N. W. Ry. Co.* [1879] 12 Ch. D. 787, this rule means that a party's second pleading must not contradict his first; and the effect of the rule is to prevent a plaintiff from setting up in his reply a new claim which is inconsistent with the cause of action alleged in the statement of claim.

Having considered the nature of the claim, the contents of the pleadings in particular, the answer and the denials, confessions and avoidance contained therein and the reply and its contents, I have come to the conclusion that the parts objected to raise no new ground of claim or contain no allegation of fact inconsistent with the petition.

The allegation contained in paragraph 3 of the reply that "the defendants produced an import licence for the cargo in their name and represented to the plaintiffs that they were the rightful owners of the cargo, but that the original bill of lading was not yet in their possession" does not amount to introducing new grounds of claim other than those clearly set out in the petition and for which the reliefs of indorsement earlier set out in this judgment are claimed.

For all the above reasons this application is dismissed with costs.

Application dismissed with costs.