

1983 March 31

[HADJIANASTASSIOU, A. LOIZOU AND MALACHTOS. JJ.]

ETERIA SKEPI LTD.

*Appellants-Defendants.*

IOANNIS TH. KAITIS AND ANOTHER,

*Respondents-Plaintiffs.*

*(Civil Appeal No. 5859).*

*Civil Procedure—Pleadings—Questions of law need not be pleaded  
—Contract—Ascertainment of facts relevant to its execution  
an issue in the proceedings—Open to trial Court to find that  
relevant stipulation for damages amounted to a penalty clause  
even in the absence of a specific averment because the question  
was one of law.*

*Civil Procedure—Pleadings—Amendment—Possible even at stage  
of judgment.*

The following issues arose for consideration in this appeal:

a) Whether it was competent for the trial Court to find the contract stipulation for damages as amounting to a penalty clause in the absence of a specific averment and (b) whether it was feasible for the trial Court to authorise the amendment of pleadings at the stage of judgment at all or without formal application.

Regarding (a) the trial Court decided that when issue is joined as regards to the effect and implications of the provisions of a contract it is unnecessary to make a specific averment that the relevant clause is of penal character; for the question is one of law and as such need not be pleaded.

*Held*, that since the ascertainment of facts relevant to the execution of the contract was an issue in the proceedings their effect was a matter of law; that the effect in law of a factual situation need not be pleaded, requiring specific averment of legal conclusions would be counter productive and an un-

justified extension of the present rules of pleadings; that the trial Court rightly took the view and it was open to them to pronounce that the relevant clause of the contract was a penal provision in terrorem and not the result of a pre-estimate of damages likely to arise in the event of breach by the purchaser; and that, consequently, its approach must be upheld. 5

(2) That in appropriate circumstances when an issue is fully canvassed before the trial Court it is competent for the Court to authorise an amendment of pleadings at the end of the day in order that judgment be brought in accord with the findings of the trial Court and the realities of the case. 10

*Appeal dismissed.*

### **Appeal.**

Appeal by defendants against part of the judgment of the District Court of Nicosia (Demetriades, P.D.C. and Nikitas, D.J.) dated the 11th May, 1978 (Action No. 3650/73) whereby they were ordered to pay to the plaintiffs the sum of £600.-. 15

*K. Michaelides*, for the appellants.

*T. Papadopoulos*, for the respondents.

*Cur. adv. vult.* 20

HADJIANASTASSIOU J. read the following judgment of the Court. The appeal in substance raises two points for decision. They are: (a) Whether it was competent for the trial Court to find the contract stipulation for damages as amounting to a penalty clause in the absence of a specific averment and (b) whether it was feasible for the trial Court to authorise the amendment of pleadings at the stage of judgment at all or without formal application. 25

The trial Court dealt with both points in its elaborate and well considered judgment. In effect it decided with regard to (a) above that when issue is joined as regards to the effect and implications of the provisions of a contract it is unnecessary to make a specific averment that the relevant clause is of penal character; for the question is one of law and as such need not be pleaded. Reference was made to Chitty on Contracts Vol. 1 30 35

23rd Ed. paragraph 1492 p. 696, establishing to the satisfaction of the trial Court that the issue is one of law.

Indeed nothing we heard persuaded us to make a contrary view on the matter. There is no doubt that the ascertainment of facts relevant to the execution of the contract was an issue in the proceedings. They were resolved in a most conclusive manner. Their effect was a matter of law as rightly appreciated by the trial Court. The effect in law of a factual situation need not be pleaded, requiring specific averment of legal conclusions would be counter-productive and an unjustified extension of the present rules of pleadings. The trial Court rightly in our opinion took the view and it was open to them to pronounce that the relevant clause of the contract was a penal provision in terrorem and not the result of a pre-estimate of damages likely to arise in the event of breach by the purchaser. Consequently we would uphold the approach of the trial Court. In our view this disposes of the issue defined under (a) above.

Regarding the second leg of the appeal under (b) above the appeal can have no different fate from that concerning the first point above analyzed.

In appropriate circumstances when an issue is fully canvassed before the trial Court it is competent for the Court to authorise an amendment of pleadings at the end of the day in order that judgment be brought in accord with the findings of the trial Court and the realities of the case. This matter was put in the right perspective by the trial Court, and we can do no better than reproduce and adopt the relevant extract of the judgment:

“The present state of pleadings falls short of setting forth the specific relief to which the plaintiffs are entitled, viz., the refund of money as money had and received; and what must be resolved is whether they should be allowed to amend at this late stage. It is perfectly possible to amend provided the possibility of prejudice to the other side is ruled out as it can be ruled out in this case for the very issue was raised and fully canvassed before us. The best course is to give judgment in favour of the plaintiffs for the equivalent of the money to which they are entitled by way

of restitutio ab integrum, but suspend its enforcement until a formal amendment is properly obtained.”

In the light of these reasons we would uphold the judgment of the trial Court and dismiss the appeal with costs.

*Appeal dismissed with costs.* 5