1983 December 14

[A. LOIZOU, DEMETRIADES AND SAVVIDES, JJ.]

COSTAS GERMANOS AND ANOTHER,
Appellants-Plaintiffs-Applicants

v.

ANDREAS N. CHRISTODOULOU,
Respondent-Defendant-Respondent,

and

LACHI BEACH DEVELOPMENT CO. LTD.,
Third Party-Respondent

(*Civil Appeal No.* 6380).

Civil Procedure—Pleadings—Amendment—Discretion of the Court—Principles applicable—Dismissal of Action—Appeal—Application for leave to amend statement of claim—Delay—Allowing the amendment after such a long delay will be unjust and highly prejudicial to the respondents who could not be placed in the same position as if the plaintiff had pleaded correctly in the first instance, or compensated by costs or otherwise—Application refused.

The plaintiff in this case having filed an appeal against the judgment of the District Court of Nicosia whereby his claim against the defendant and defendant's claim against the third party were dismissed, by means of an interlocutory application in the appeal sought leave to amend* his statement of claim.

Held, after stating the principles governing amendment of pleadings, that in the circumstances of the present case it will be unjust and highly prejudicial to the respondents, who could not be placed in the same position as if the plaintiff had pleaded correctly in the first instance, or compensated by costs or otherwise, to allow the application for an amendment of the State-

* The proposed amendment is quoted at pp. 876–877 post.

ment of Claim which has been made after such a long delay; accordingly the application must be refused.

Application refused.

Cases referred to:

Pourikkos v. *Fevzi* (1963) 2 C.L.R. 24;

Claraped v. *Commercial Union Association*, 32 W.R. 262;

Steward v. *North Metropolitan Tramways Co.* [1885–86] 16 Q.B.D. 556 at p. 558;

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

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

Loucaides v. *C.D. Hay and Sons Ltd.* (1971) 1 C.L.R. 134;

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

Nicolaides v. *Yerolemi* (1980) 1 C.L.R. 1 at p. 12;

U Drive Co. v. *Panayi and Another* (1980) 1 C.L.R. 544 at pp. 553–554.

Application.

Application by appellants for leave to amend their statement of claim filed in Action No. 2242/79 before the District Court of Nicosia.

A. Eftychiou with *N. Clerides*, for the appellants–plaintiffs.

V. Tapakoudes, for the respondent–defendant.

L. Papaphilippou, for respondent–third party.

A. LOIZOU, J.: The judgment of the Court will be delivered by Mr. Justice Savvides.

SAVVIDES, J.: By an interlocutory application in this appeal counsel for appellants seeks leave of the Court to amend his Statement of Claim filed in Action No. 2242/79 before the District Court of Nicosia, the hearing of which was concluded and judgment was delivered whereby appellants' claim against the defendant and defendant's claim against the third party were dismissed, and which judgment is the subject matter of this appeal. The amendment prayed is for the addition at the end of paragraph 2 of the Statement of Claim of the following:

"and/or the said cheque was issued by the defendant to the plaintiffs for lawful consideration given by the plaintiffs to the defendant, that is the plaintiffs by the issue to them

of the said cheque suffered loss or damage in that expressly and or impliedly they released the third party from their liability to pay the said commission or remuneration to the plaintiffs and that the plaintiffs undertook expressly or impliedly not to claim the said commission or remuneration from the third party or sue the defendant in respect of their claim for the said commission or remuneration".

The application is based on Order 25, r. 1, of the Civil Procedure Rules which reads as follows:

"1. The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such 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 application was opposed both by the defendant and the third party. The grounds relied upon in opposition by counsel for both respondents are the following:

"(a) The application of the appellants is unjustifiably delayed taking into consideration the fact that the judgment of the District Court was delivered on the 28th December, 1981.

(b) The hearing of the action took place on the basis of the pleadings as they stood before the Court and the defence was made accordingly. If the applied amendment is allowed, the calling of further evidence or the retrial of the case will be necessary so that the defendant and the third party may be able to defend the case in the light of the proposed amendment.

(c) In any event the third party has filed a cross appeal which touches the subject of applied amendment and if such amendment is allowed he will suffer irreparable loss or injustice.

(d) For all the above reasons the amendment applied for is mala fide and tends to harm the rights of the defendant and the third party".

In support of his application, counsel for the appellant sought

to rely on the case of *Pourikkos* v. *Fevzi* (1963) 2 C.L.R. 24. The present case is, however, distinguishable from *Pourikkos* case as in that case leave to amend the statement of claim was granted during the hearing of the appeal so that the appellant could recover special damages awarded in relation to his scooter and which could not otherwise have been recovered because he had only claimed damages for personal injuries, Josephides, J. had this to say (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.
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> 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.
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> 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.
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> 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".

In *Claraped* v. *Commercial Union Association*, 32 W.R. 262 Lord Esher M.R. 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 must be injured, it ought not to be made".

In *Steward* v. *North Metropolitan Tramways Company* [1885–86] 16 Q.B.D. 556 Lord Esher M.R. stated (at p. 558):

"With regard to question 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 there laid down in *Tildesley* v. *Harper*[1] by Lord Bramswell, 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 has done some injury to his opponent which could not be compensated for by costs or otherwise' ".

In the above case Lord Esher, M.R., disallowed an amendment of the statement of defence because the plaintiff could not be placed in the same position as if the defendants had pleaded correctly in the first instance, or compensated by costs or otherwise.

In *Courtis* v. *Iasonides* (1970) 1 C.L.R. 180, Vassiliades, P., in dealing with the question of amendment of pleadings said (at pp. 182, 183):

"There can be no doubt that the Court has the power to allow amendment of a party's pleadings; and that in certain circumstances, such power has also been used for correcting formal mistakes or omissions before judgment. I would say it has been used in a proper case. At the same time the Courts in most of the English cases referred to, and this Court in the *Pourikkos* case, made it clear that the Court should be very slow and reluctant to order or allow amendments of the pleadings at a late stage in the proceedings; and that in any case, such amendments should

1. 10 Ch. D. 393

only be made if they are found necessary and as provided in the Rules.

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. An amendment of the pleadings after the closing of the case and for the purpose of the judgment, is a matter which in exceptional circumstances may have to be done; but it should be avoided unless it is unavoidable in the circumstances of the particular case, in order to finalize litigation in the interests of justice. In the circumstances of this case, it is clear to us that the amendment in question should not have been allowed in that stage. It was contended on behalf of the respondent that the amendment made no difference to the outcome of the case. If that were so, it should have not been attempted. To us, it appears to have been a material amendment; and we must treat it as such".

In the exercise of its discretionary powers to allow an amendment of pleadings at the stage of an appeal the Supreme Court has refused an application for an amendment in *Karmiotis* v. *Pastellis*, 1964 C.L.R. 447, *Loucaides* v. *C.D. Hay and Sons Ltd.* (1971) 1 C.L.R. 134, *Patsalidou* v. *Kyriakides* (1977) 1 C.L.R. 95, *Nicolaides* v. *Yerolemi* (1980) 1 C.L.R. 1, *U Drive Co.* v. *Panayi and Another* (1980) 1 C.L.R. 544.

In *Nicolaides* v. *Yerolemi* (supra) Hadjianastassiou, J., after reviewing relevant authorities, had this to say (at p. 12):

"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 betwen the parties....."

and concluded as follows at p. 13:

"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".

In *U Drive Co.* v. *Panayi and Another* (supra) Triantafyllides, P., after reviewing relevant case law said (at pp. 553–554):

"We have considered whether we should allow amendment 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".

Bearing in mind the above authorities, we have come to the conclusion that in the circumstances of the present case, it will

be unjust and highly prejudicial to the respondents, who could not be placed in the same position as if the plaintiff had pleaded correctly in the first instance, or compensated by costs or otherwise, to allow the application for an amendment of the Statement of Claim which has been made after such a long delay.

In the light of the above the leave sought by counsel for appellants to amend the Statement of Claim at this stage must be refused. The application is therefore dismissed with costs in favour of the respondents.

Application dismissed.