

1983 April 7

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

COSMO-PLAST LTD.,

Appellants-Defendants.

v.

CHEMIE LINZ AG,

Respondents-Plaintiffs.

(Civil Appeal No. 6351).

Civil Procedure—Appeal—Notice of Appeal—Amendment—Discretion of Court of Appeal—Principles applicable—New ground relating to one of the main issues that were raised at the trial—And was, thus, very material, in the interests of justice, for the proper determination of the appeal—Amendment allowed—Order 35, rule 4 of the Civil Procedure Rules. 5

During the hearing of the above appeal counsel for the appellant submitted that certain evidence was not in accordance with the averments in the pleadings. Counsel for the respondents objected that such submission was not covered by any of the grounds of appeal and counsel for the appellant was not allowed to proceed with the submission but was granted an adjournment in order to be enabled to apply for leave to amend the notice of appeal. 10

Upon an application for amendment: 15

Held, after stating the relevant principles, that the new ground relates to one of the main issues that were raised at the trial and is, thus, very material, in the interests of justice, for the proper determination of this appeal; accordingly the application must be granted. 20

Application granted.

Cases referred to:

Charalambous v. Koutsides (1966) 1 C.L.R. 271 at p. 272;

S.O.R.E.L. Ltd. v. Servos (1968) 1 C.L.R. 123 at p. 126;

- Papadopoullou v. Polycarpou* (1968) 1 C.L.R. 352 at pp. 359, 360;
Soyhan (No. 1) v. Remzi (1972) 1 C.L.R. 33 at p. 35;
HjiSolomou (No. 1) v. Manolis (1972) 1 C.L.R. 37 at p. 38;
Vassiades v. Michaelides Bros. (1973) 1 C.L.R. 80 at p. 81;
5 *Attorney-General of the Republic v. Adamsa Ltd.* (1975) 1 C.L.R.
8 at p. 10;
Epiphaniou Ltd. v. Charlwood International Livestock Co. Ltd.
(1978) 1 C.L.R. 112 at p. 114;
Electrofabric Co. Ltd. v. Nicolaidou (1978) 1 C.L.R. 421 at p. 423;
10 *HjiHanni v. Elia* (1979) 1 C.L.R. 1 at p. 4;
Valana v. Elia (1981) 1 C.L.R. 616 at p. 617..}

Application.

Application by Counsel for the respondents that the sub-
mission of Counsel for the plaintiffs that certain evidence
15 which was adduced for respondents before trial Court was not
in accordance with the averments of the pleadings, was not
covered by any of the grounds of appeal in the notice of appeal.

L. Papaphilippou, for the appellants.

A. Ladas, for the respondents.

20 TRIANTAFYLLIDES P. gave the following decision of the Court.
During the hearing of this appeal on the 31st January 1983
counsel for the appellants, after referring to certain evidence
which was adduced for the respondents, as plaintiffs, before
the trial Court, went on to submit that such evidence was not
25 in accordance with the averments in the pleadings of the res-
pondents.

Counsel for the respondents objected that this submission was
not covered by any of the grounds of appeal in the notice of
appeal.

30 After perusing the grounds of appeal—which were drafted
by counsel other than counsel appearing now for the appellants
in this appeal—we reached the conclusion that even if we were
prepared to give them a wide interpretation we would still not

find a ground of appeal which could be held to cover the submission that the evidence in question, which was adduced by the respondents at the trial, was not in accordance with their pleadings.

We, therefore, decided not to allow counsel for the appellants to proceed with that submission but, on the other hand, we granted him an adjournment in order to enable him to apply for leave to amend the notice of appeal. 5

The application for amendment was filed on the 1st February 1983 and it was opposed on the 28th March 1983; and we heard it today. 10

As regards those of the applied for amendments in respect of which counsel have reached agreement we have no difficulty to make an order, by consent, accordingly.

As regards the proposed substitution of the existing ground 5 in the notice of appeal with a new ground 5, which is opposed, we have examined the matter in the light of the relevant principles which should guide the exercise of our discretionary powers under rule 4 of Order 35 of the Civil Procedure Rules and which were expounded in cases such as, inter alia, *Charalambous v. Koutsides*, (1966) 1 C.L.R. 271, 272, *S.O.R.E.L. Limited v. Servos*, (1968) 1 C.L.R. 123, 126, *Papadopoulou v. Polykarpou*, (1968) 1 C.L.R. 352, 359, 360, *Soyhan (No.1) v. Remzi*, (1972) 1 C.L.R. 33, 35, *HjiSolomou (No. 1) v. Manolis*, (1972) 1 C.L.R. 37, 38, *Vassiades v. M. Michaelides Bros.*, (1973) 1 C.L.R. 80, 81, *The Attorney-General of the Republic (No. 1) v. Adamsa Ltd.*, (1975) 1 C.L.R. 8, 10, *Phanos N. Epiphaniou Ltd. v. Charwood International Livestock Co. Ltd.*, (1978) 1 C.L.R. 112, 114, *Electrofabric Co. Ltd. v. Nicolaidou*, (1978) 1 C.L.R. 421, 423, *HjiHanni v. Elia*, (1979) 1 C.L.R. 1, 4 and *Valana v. Elia*, (1981) 1 C.L.R. 616, 617. 15 20 25 30

We have decided that we should allow the existing ground 5 to be substituted by the proposed new ground 5 to the extent to which such new ground relates to the reasons stated in support of the addition of this new ground which are to be found in subparagraphs (a), (b) and (c) of paragraph 5 of the affidavit of counsel for the appellants which was filed together with the application for amendment and was sworn on the 1st February 1983. According to such reasons the trial Court, allegedly, 35

received evidence adduced by the respondents in respect of facts which were not set out at all in the pleadings of the respondents and has, also, misconceived the effect of such evidence.

5 The introduction of a new ground 5, as aforesaid, relates, indeed, to one of the main issues that were raised at the trial and is, thus, very material, in the interests of justice, for the proper determination of this appeal.

10 Counsel for the appellants should file, within three weeks from today, an amended notice of appeal, incorporating all the amendments which we have allowed today.

The costs of this application for amendment should be borne by the appellants.

Order accordingly.