1988, October 19

(MALACHTOS, PIKIS, PAPADOPOULOS, JJ.)

WILLIAM PATRICK JACK AND ANOTHER,

Appellants Plaintiffs,

AND

PHILIAPPA FSTATES LTD.,

Respondents Defendants.

(Civil Appeal Nos 7249-7250)

Civil procedure — Amendment of pleadings — Principles applicable — Whether necessary to verify in the affidavit that the amendment sought is necessary — Whether necessary to explain in the affidavit the reasons for the delay in applying — Both questions determined in the negative — The Civil Procedure Rules, 0.25. R.1.

The plaintiff in action 2619/82 District Court Limassol claims damages for breach of contract for the sale of a flat and the return of the deposit paid by him to the vendor and, alternatively, specific performance of the contract.

Identical claims, but in respect of another flat, were advanced by plaintiff in action 2618/82.

The following joint statement was made by counsel in the said action:

«The final outcome of Action No. 2619/82, regarding the liability of the company, the validity of the contract and the agency, will bind the parties in the action. The parties are free. however, to call evidence on other matters not mentioned above.»

On 28.4.86 the plaintiff in action 2619/82 applied for the amendment of the statement of claim by adding a claim for 9 per cent interest on the amounts paid against the price of the flat as from the time of the alleged breach.

A similar application was made by plaintiff in action 2618/82.

The trial Court dismissed the applications on the following grounds

(a) Failure to state in the affidavit that the amendment is necessary

(b) Failure to explain the delay in applying for amendment, and

(c) the joint statement in action 2618/82 was made in the light of the existing at the time facts and if an amendment is allowed, it would amount to introducing a new deal for the parties

Held, allowing the appeal

(1) The trial court did not exercise its discretion properly and did not take into consideration the principles governing applications for amendment of pleadings *(United Sea Transport Co Ltd v Zakou* (1980) 1 C L R 510, stating such principles, adopted)

(2) The mere fact that the application for amendment was made makes it clear that it was considered necessary by the applicants It is not necessary to mention such a fact in the affidavit

(3) It is not imperative that in the affidavit in support of the application reasons should be given justifying the lapse of time between the filing of the action and the filing of the application

(4) The agreement embodied in the aforesaid joint statement of counsel is irrelevant to the present issue

Appeals allowed with costs. Order for costs of the Court below to remain intact

Cases referred to

United Sea Transport Co Ltd v Zakou, (1980) 1 C L R 510

Appeal.

Appeal by plaintiffs against the ruling of the District Court of Limassol dated the 22nd September, 1986 (Action Nos 2618/82 and 2619/82) whereby their applications to amend their statements of claim were dismissed

A Lemis with Z Lemis, for the appellants

A Boyadjis, for the respondents

Cur adv vult.

MALACHTOS J read the following judgment of the Court This is an appeal by the plaintiffs in Actions Nos 2619/82 and 2618/82 of the District Court of Limassol against the ruling of the Full

District Court where their applications to amend their statements of claim were dismissed.

On the 6th August, 1982, the plaintiff in Action No. 2619/82 instituted legal proceedings against the defendants claiming specific performance and/or damages for breach of contract of sale of a flat situated at Yermasoyia River locality known as «The Azur Court». On the same day, in the District Court of Limassol, an almost identical Action No. 2618/82 was filed by another plaintiff against the same defendants for breach of a contract of sale of another flat which was forming part of the same block.

It is the case of the plaintiff in Action No. 2619/82 that by virtue of a written contract between the parties dated 4.1.82, the purchase price of the said flat was fixed at £29,000.-. A sum of £14,000.- was paid as against the purchase price and the balance was agreed to be paid by instalments of £2,500.- each, every six months, plus interest. The plaintiff upon signing the said contract entered into possession of the flat.

It is also the case for the plaintiff in Action No. 2618/82 that an identical contract dated 4.1.82 was signed by the parties under the same terms and conditions. The purchase price of this flat was fixed at £27,000.- and also a sum of £9,000.- and another sum of £3.100.- was paid as against the purchase price and the relevant instalments were agreed at £3,000.- each. This plaintiff also entered into possession of the flat upon signing the contract.

It is the allegation of the plaintiffs in their almost identical statements of claim that on or about the 28th day of April, 1982, the defendants cancelled the said agreements and through their servants and agents wrongfully and/or forcibly trespassed on the said flats, took possession thereof and changed the locks of the entrance doors.

According always to the allegations of the plaintiffs the market value of the flats at the time of the breach of the said contracts, increased considerably and is estimated to £65,000.- each.

As stated in the prayer of the statements of claim, the plaintiffs claim refund and/or return of the deposit, the difference between the sale price and the market value of the flats at the time of the breach and, alternatively,specific performance of the contracts.

At the commencement of the hearing of Action No. 2619/82 on

28.3.86, while the first witness for the plaintiff was giving evidence, counsel for the parties in action No. 2618/82, who were the same in both cases, made the following statement: «Both counsel state that they have agreed that the final outcome of Action No. 2619/82, which is being tried now by the court, regarding the liability of the company, the validity of the contract and the agency, will bind the parties in this action. The parties are free, however, to call evidence on other matters not mentioned above. For this purpose they apply that the action be fixed for hearing but the hearing will follow Action No. 2619/82».

Then the hearing of Action No. 2618/82 was fixed for 24.9.86 and Action No. 2619/82 was fixed for continuation of hearing on 22, 23 and 24th September, 1986. In the meantime, on 28.4.86 the application for amendment of the statement of claim in Action No. 2619/82 was filed and was fixed for hearing on 5.6.86. On 7.5.86 a similar application for amendment of the statement of claim in Action No. 2618/82 was also filed. Both applications for amendment were opposed.

On 30.5.86 the files of both actions were, at the request of counsel for the parties, brought before the court and the hearing of application for amendment in Action No. 2619/82 was shifted to 22.9.86 and the continuation of hearing of the action was adjourned sine die. Also, the application for amendment in Action No. 2618/82 was fixed for mention on 22.9.86 and it was agreed that the result of the other application would be binding on the parties in this application.

The proposed amendment is to add three new paragraphs after paragraph 7 of the statement of claim and in substance amounts to add a claim for interest at 9% per annum on the amount paid against the purchase price of flats from the date of the breach till final payment.

On 22.9.88 the Full District Court of Limassol, after hearing counsel for the parties in the application for amendment in Action No. 2619/82, issued its ruling dismissing the application with costs. As a result, the application for amendment in Action No. 2618/82 was also dismissed with costs. The ruling was delivered ex tempore by the junior member of the court, who after referring very briefly to the principles governing applications for amendment of pleadings, and in particular to the discretionary power of the court, which usually is exercised in favour of the

applicant, if the application is made bona fide and by the amendment no injustice is being caused to the other side which could not be compensated for by costs, and after finding that the application under consideration was made bona fide, said the following at page 29 of the record:

«There are, however, certain circumstances which we have considered crucial to this application indicating that the discretion of the Court in granting an amendment would not be properly exercised in this case if the amendment prayed for was granted. In the first instance, we wish to refer to the fact that , as Mr. Boyadjis has pointed out, the affidavit in support of the application does not refer to the amendment being considered necessary as such but rather to the application being made out of abundant caution, and to that extent we do not consider that there is sufficient material before us in order to justify the necessity for the amendment.

Furthermore, it is true that the affidavit does not refer in any way whatsoever to the reason for the delay involved, a circumstance which is important on the facts of the present case. Although time in itself would not be a crucial factor and the Court does not place any time limit regarding the proposed amendment, nevertheless the length of time that has elapsed between the filing of the action and the proposed amendment should be considered in relation to the other circumstances and, although again the Court will not punish a party by refusing the amendment for any omission or otherwise in the drafting of the Statement of Claim, nevertheless it does appear to be an important factor to be taken into consideration whether the facts upon which a proposed amendment rests were known to the Applicant all along and whether an unreasonably long period of time has elapsed between the time these facts were known and the time the application is made. In the present instance it is not possible to over-emphasize the fact that the action, which started over four years ago, involved even at that stage the full knowledge of the present facts upon which the application for amendment is made and clearly the delay involved has not been established on the basis of the affidavit to be justified nor has it even been explained.

Furthermore, and although we do not wish to decide this point definitely, there might be some merit in the submission

of learned counsel for the Respondents to the effect that the relief claimed by the proposed amendment might be seen to introduce a new claim in so far as the nature of the relief involved as well as the amount in question might introduce a new dimension in the action.

The most important circumstance, however, upon which the Court has decided to refuse the proposed amendment is the fact that on 28th March, 1986 a settlement of a certain issue in Action No. 2618/82 as well as in this action was made to the effect that the final outcome of Action No. 2619/82, which was being tried by the Court then regarding the liability of the Company, the validity of the contract and the agency, these matters being specifically mentioned therein, would bind the parties in Action No. 2618/82. It seems to us that this settlement was made, and was made justifiably, only on the basis of the facts as they existed at the time even though there was no further direct reference to this and that for the Court to allow the proposed amendment would amount to introducing a new deal for the parties in this action not envisaged by the agreement reached on that day. To do so would consequently involve an injustice to the other side which could not be compensated for in costs and which we have considered crucial in deciding that the discretion of the Court could not be exercised in favour of the Applicant in this application.»

We must say straight away that we entirely disagree with the above aproach of the trial Court. We are of the view that the trial court did not exercise its discretion properly and did not take into consideration the principles governing applications for amendment of pleadings.

In the present proceedings the applications, as stated therein, are based on Order 25 rule 1 of our Civil Procedure Rules, which is identical to the old Order 28.1 of the Rules of the Supreme Court in England, which provides that «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.»

In the case of the *United Sea Transport Co. Ltd.* v. *Zakou*, (1980) 1 C.L.R. 510, the following is stated at page 515:

The general principles as to when leave to amend should be given are stated by L.J. Bramwell in the case of *Tildesley v. Harper*, 10 Ch. D. 393 at page 396: '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'.

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. Before the hearing leave is readily granted, on payment of the cost occasioned, unless the opponent will be placed in a worse position than he would have been if the amended pleading had been delivered in the first instance. *(Steward v. North Metropolitan Transways Co.* 16 Q.B.D. 556).

Leave to amend is sometimes given at the hearing but the Court will not readily allow at the trial an amendment, the necessity of which was abundantly apparent months ago, and then not asked for. (*Hipgrave v. Case*, 28 Ch.D. p. 356). At any rate it would be wrong to allow an amendment at the close of the evidence or even at an extremely late stage of the trial where it could result in a party being confronted with an entirely new case. (*Rawding v. London Brick Co.* (1971) K.I.R. 207 C.A.).»

In the present case, it cannot be said, as already stated, that the trial court applied the above principles properly to the facts of the case and the reasons given as to why the application for amendment was not granted, cannot stand.

With all due respect to the trial Court we are of the view that it is immaterial the fact that an allegation that the amendment was considered necesary should be contained in the affidavit in support of the application. The mere fact that the application for amendment was made makes it clear that it was considered necessary by the applicants.

Likewise, it is not imperative that in the affidavit in support of the application, reasons should be given justifying the lapse of time between the filing of the action and the filing of the application.

Finally, the agreement reached before the Court on 28.3.86 that the final outcome of Action No. 2619/82 would bind also the litigants in Actions No. 2618/82. cannot be considered as a decisive factor militating to the refusal of the order for amendment, as found by the trial court, but we consider is as entirely irrelevant to the issue.

It is clear from the facts placed before the trial Court that the applications for amendment were made bona fide, that no injustice can be caused to the defendants if the amendment is allowed, that the hearing of the evidence is not at an advanced stage and that by the amendment the other side is not confronted with an entirely new case.

For the above reasons we allow the appeals, set aside the ruling of the trial Court and allow the amendment applied for. We also direct that both actions be remitted back and be tried by the Full District Court of Limassol differently constituted. An amended statement of claim should be filed by the plaintiffs in both actions within one month as from today and an amended statement of defence, if any, to be filed within two weeks thereafter.

On the questions of costs we think that the appellants are entitled to the costs of these appeals and an order is made accordingly.

The order for costs of the Court below to remain intact as the respondents in applications of this kind are entitled to the costs thrown away.

Appeals allowed. Order for costs as above.