

1989 March, 27

(SAVVIDES, KOURRIS, BOYADJIS, J J)

SOTERIS IOANNOU

Appellant-Defendant,

v.

MARIOS ATHIENITIS AND OTHERS,

Respondents-Plaintiffs.

(Civil Appeal No. 7143).

MARIOS ATHIENITIS AND OTHERS,

Appellants-Plaintiffs,

v.

SOTERIS IOANNOU,

Respondent-Defendant.

(Civil Appeal No. 7178).

Civil Procedure — Pleadings — Amendment of defence — Application for amendment filed after conclusion of evidence — Sole object of the amendment sought was to bring the defence in line with evidence given without objection — The application should have been granted.

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Civil Procedure — Pleadings — Trial Court acting on evidence not covered by the defence — Such evidence had been adduced without objection — Still the trial Court, which earlier refused an application to amend the defence in manner bringing it in line with such evidence, could not act on such evidence.

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In the light of the principles, which are sufficiently stated in the above headnote, the Court allowed the appeals and ordered a retrial.

Appeals allowed. No order as to costs of the appeals.

Cases referred to

Skepi Ltd v Kaitis and Another (1983) 1 C L R 231

Pounkkos v Fevzi (1963) 2 C L R 24,

Stavrou v Asproghenis (1985) 1 C L R 341

5 **Appeals.**

Appeal by defendant in Action No 6447/81 against the ruling of the District Court Nicosia (Kramvis D J) dated 7th April, 1986 whereby his application for the amendment of the statement of defence was dismissed and by plaintiff in the above action who
10 challenge the final judgment whereby their claims arising out of a road collision were dismissed

A Dikigoropoulos, for appellant-defendant in C A 7143 and respondents-defendants in C A 7178

Z Katsouns, for respondents plaintiffs in C A 7143 and
15 appellants-plaintiffs in C A 7178

SAVIDES J The judgment of the Court will be delivered by my brother Judge I Boyadjis

BOYADJIS J In the course of the hearing of the first Appeal (Civil Appeal 7143), we found it necessary that it should be tried
20 together with the second Appeal (Civil Appeal 7178) inasmuch as they both challenge proceedings in the same consolidated actions and the outcome of the former would affect the result of the latter appeal

The appellant in Civil Appeal 7143 was the defendant in all
25 consolidated actions below He challenges thereby the ruling of the trial Court given on 7 April 1986, whereby his interlocutory application for leave of the Court to amend his Defence was dismissed His main complaint is that relevant evidence had been given at the trial without objection and the only object of the
30 amendment sought were to bring the Defence in line with such evidence

The appellants in Civil Appeal 7178 were the plaintiffs in the consolidated actions below They challenge thereby the final
35 judgment of the trial Court, whereby their claims arising out of a road collision were dismissed One of the grounds of appeal is that the trial Court should not have acted, as it had done, upon evidence which, though led in without objection, was not covered by the pleadings

In the course of the hearing, learned counsel for the respondents in Civil Appeal 7143 acknowledged that there was merit in the appellant's complaint in this appeal regarding the trial Court's refusal to allow the amendment sought by the appellant. This was a wise and a fair course to follow inasmuch as the authorities clearly establish that, when the object of the amendment sought is to bring the pleadings in line with relevant evidence given at the trial without objection, leave is granted even at the end of the day: *Skepi Ltd. v. Kaitis and Another* (1983) 1 C.L.R. 231, or even at the stage of appeal if no injustice will be done thereby: *Yiannakis Pourikkos v. Mehmet Fevzi* (1963) 2 C.L.R. 24. 5 10

In view of this development and of our expressed readiness to act upon the submission of counsel for respondents in Civil Appeal 7143 to the issue of an order granting leave to the appellant to amend his Defence in the terms set out in his application, the hearing of Civil Appeal 7178 proceeded on the assumption that the ruling of the trial Court refusing to allow the amendment of the Defence would not be aside. 15

It is an admitted fact, evident from the text of the judgment of the trial Court, that the Court was influenced by and had acted upon the very evidence which was not covered by the Defence and in respect of which it had earlier refused to allow the amendment of the Defence. 20

Learned counsel for the appellants in Civil Appeal 7178 submitted that the trial Court should have never acted upon such evidence and its judgment should be set aside on this sole ground. He also invited the Court to order a retrial of the consolidated actions on the issue of liability only as the quantum of damages had already been agreed. 25 30

Learned counsel for the respondent in Civil Appeal 7178 stated very fairly, if we may say so, that the making of an order for retrial on the terms suggested by his learned colleague, is the only course open in the circumstances of this case.

We are in agreement with both learned counsel. In *Loizos Stavrinou v. Stavros Asproghenis* (1985) 1 C.L.R. 341, it was held that a verdict based on evidence which is not in line with the pleadings as they stood at the end of the day, must be set aside. This applies a fortiori to the present case where the Court had 35

wrongly refused a timely application submitted for the purpose of bringing the pleadings in line with such evidence.

For the reasons hereinabove stated, both appeals succeed, and we make orders as follows:

- 5 (a) *In Civil Appeal 7143*: The Ruling of the trial Court dated 7 April 1986 is set aside. Leave is granted to the appellant to amend the Defence as per his application dated 18 February 1986. The amended Defence to be filed within one month from today. Costs of the application for amendment to be costs against the appellant
- 10 - defendant and in favour of the plaintiff in Action No. 6447/81. Such costs to be assessed by the Registrar unless agreed upon between counsel and be payable at the end of the new hearing. There will be no order as to costs in this appeal.
- (b) *In Civil Appeal 7178*: The judgment of the trial Court dated
- 15 24 April 1986 is set aside. In exercise of our powers under Order 35, r.9 of the Civil Procedure Rules, and Section 25(3) of the Courts of Justice Law 1960, we order a trial de novo on the issue of liability only before another judge of the District Court of Nicosia. Costs of the proceedings before the trial Court, incurred so far, to
- 20 follow the result of the new trial. There will be no order as to costs in this appeal.

Both appeals allowed.