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(DEMETRIADES, SAVVIDES, BOYADJIS JJ)

ANDREAS TSIARTAS AND OTHERS,

Appellants-Defendants,

v.

AVGERINOS TALIOTIS,

Respondent-Plaintiff.

(Civil Appeal No. 7109).

Civil Procedure — Trial — Evidence in reply — The Civil Procedure Rules, 0.33, rule 7(b) — Principles governing the discretion of the Court — Extensive reference to English authorities on the point — Burden of proof in respect of particular issue cast on the defendant — Trial Judge rightly exercised his discretion and granted to the plaintiff leave to adduce evidence in reply.

The plaintiff claimed damages for breach of contract for the payment to him of commission for services rendered in securing to the defendants a plot of land for purchase. Defendants alleged in their defence that the relevant contract for the sale of the land had been rescinded by them in exercise of a right under such contract. The defendants summoned as a witness the seller of the land, but at the end, they did not call him as a witness. Evidence about such rescission was given by defendant 2 during his cross-examination. The plaintiff sought leave to adduce evidence in reply in order to rebut the allegation of rescission by calling the seller of the land. The trial Judge granted such leave. Hence this appeal.

The matter is governed by the Civil Procedure Rules, 0.33 rule 7 (b)*. Having stressed that the authorities relating to acceptance of new evidence on appeal have no bearing on this case and having extensively referred to English authorities on the question of allowing evidence in rebuttal, approving at the same time, the summary of the principles of such authorities, as referred to in Phipson On Evidence, 13th Edition under the heading «Evidence in rebuttal» para 33-92, the Court.

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* *Quoted at p. 220 post.*

Held, *dismissing the appeal* The allegation that the agreement between the defendants and the third party (the owner of land) was rescinded was raised by the defendants It was their contention that the plaintiff was not entitled to the agreed remuneration once the agreement has been rescinded The burden of proof was upon the defendants in this respect and obviously it was for this reason that they summoned the seller of the land to give evidence on their behalf Once the proof of this allegation rested upon the defendants the trial Court rightly allowed the plaintiff to call evidence in reply

Appeal dismissed with costs

Cases referred to

Pounkkos (No 2) v Fevzi, 1962 C L R 283,

Ashiotis and Others v Weiner and Others (1968) 1 C L R 43,

Moumdjis v Anstidou and Others (1974) 1 C L R 226,

Pavlidou and Another v Yerolemou and Others (1982) 1 C L R 912,

Skone v Skone and Another [1971] 2 All E R 582,

Ladd v Marshall [1954] 3 All E R 745,

Williams v Davies, 1 Cr & M 464,

Wright v Willcox, 9 C B 650,

Penn v Jack, L R 2 Eq 314,

Shaw v Beck, 9 Exch 392,

Bigsby v Dickinson, 4 Ch D 24,

Budd v Davison, 29 W R 192,

Rogers v Manley, 42 L T 584,

Jacobs v Tarleton [1848] 11 Q B 421, 116 E R 534

Appeal.

Appeal by defendant 2 against the decision of the District Court of Limassol (Korfiotis, D.J) dated the 8th January, 1986 (Action No 4210/82) whereby leave was granted to the plaintiff to adduce further evidence

A. Lemis, for the appellant

E Theodoulou, for the respondent

Cur. adv. vult

DEMETRIADES J The judgment of the Court will be delivered by Mr Justice Savvides

SAVVIDES J This is an appeal against the decision of a Judge of the District Court of Limassol granting leave to the respondent-plaintiff to adduce further evidence in Civil Action No 4210/82 of the District Court of Limassol

By a writ of summons issued on 11th December, 1982, the respondent-plaintiff, hereinafter to be called the plaintiff, claimed against the appellants-defendants, hereinafter to be called defendants, damages for breach of contract for the payment to him of commission for services rendered in securing to the defendants a plot of land for purchase

Defendant 2 by his Statement of Defence admitted that acting for himself and the other defendants engaged the plaintiff to secure for them a plot of land As to his commission it is his allegation that though the commission was payable by the seller nevertheless the defendants agreed to pay to him, in equal shares, by way of gift a total sum of £2,000 - It is also admitted that as a result of the efforts of the plaintiff, one Miltiades Mina, who was the owner of a plot of land suitable for the defendants was introduced to the defendants and an agreement was concluded between the defendants and such owner for the purchase of such property According to the defendants the agreement was subject to a condition that if the yield of the borehole on such property was less than 24 tons per hour or unsuitable for exploitation as drinking water the defendants would be entitled to revoke the agreement

He further mentioned in his Statement of Defence that a few days after the agreement was concluded and signed the water was tested and was found not to comply with the condition precedent, and as a result the agreement was rescinded

The case went on for hearing and both plaintiff and defendant 2 adduced evidence in support of their respective versions

After the close of the case for the defendants, the plaintiff filed an application praying for leave of the Court to adduce further evidence in reply in the action By such application he sought to call as a witness the seller of the plot of land, namely, Miltiades Mina of Kalo Chorio to give evidence in rebuttal to the allegations of defendant 2 that the agreement was rescinded for the reasons alleged by him

The application was supported by an affidavit sworn by the plaintiff to the effect that Miltiades Mina of Kalo Chorio is a witness whose evidence is necessary for the determination of the claim and that such evidence should be allowed to be given in reply to the evidence called by defendant 2. The evidence of such witness would be to the effect that the agreement of sale was never rescinded as alleged by defendant 2. The reason that he did not call such witness in the first instance was that the witness was summoned by the defendants to give evidence in support of their allegation that the contract was rescinded but who finally did not call him.

The learned trial Judge after referring to the provisions of Order 33, rule 7(ii) stressed the fact that each party has to adduce evidence to prove his allegations and should not wait till the end of the case to call additional evidence in support of his case and concluded as follows:

«The judge however has discretionary power to allow one of the parties to adduce further evidence even if such evidence could have been produced when he was presenting his case if he considers it to be in the interests of justice or to the satisfaction of the Court. (*Doe d. Nicoll v. Bower* [1851] 16 Q.B. 805; *Rogers v. Manley* [1880] 42 L.T. 584; *Budd v. Davison* (1880) 29 W.R. 192).

The judge generally will allow such evidence to be adduced if the party asking for it has been taken by surprise and for this reason he did not adduce such evidence at the beginning (*Bigsby v. Dickinson* [1876] 4 Ch., p.24 C.A.).

The evidence in reply whether oral or by affidavit should as a rule be strictly limited in rebuttal of evidence of the defendant and not in support of plaintiff's evidence.

.....

In the present case whilst defendant ... was being cross-examined by counsel for the plaintiff mentioned that he instructed Mr. Tsiartas to cancel the agreement exhibit 1.

Bearing in mind this allegation arose during the cross-examination of defendant 2 the Court considers that it is in the interest of justice bearing also in mind the aforesaid authorities that witness Miltiades Costa Mina of Kalo Chorio should be

called to give evidence whether the agreement between them dated 7 3.85 was terminated or not.

For all other matters the Court is of the opinion that the plaintiff has no right to call evidence in reply because he should have done so from the beginning and in any event if leave is granted to him it will amount to leave to adduce evidence in support of his own evidence».

Both the application and the opposition were based on Order 33, rule 7, which under paragraph (ii) provides as follows:

«7 (ii) In other cases -

(a) The first party may open his case and adduce evidence; after he has done so, the second party shall be asked whether he intends to adduce evidence and if he states that he does so intend, then the first party may address the Court for the purpose of summing up the evidence; and finally the second party may address the Court. If the second party states that he does intend to call evidence, then this party may open his case and adduce his evidence; and after he has done so, he may sum up the evidence, and finally the first party may reply.

(b) The first party may not adduce evidence in reply except by leave of the Court. If he desires to adduce such evidence, he must ask for leave immediately after the second party's evidence is concluded. If such leave is granted, the second party's summing up shall be postponed until after the evidence in reply is heard.

(c) When the first party has replied, or, if he has no right to reply, when the second party has addressed the Court, the case shall be closed, unless the Court directs either party to adduce further evidence or itself calls any witness».

Rule 7 of the Civil Procedure Rules and the subsequent rules 8, 9, 10, 11, 12 of Order 33, regulating the procedure in civil actions, are based on the old Cyprus Civil Procedure Rules C.14,6 to C.14,11 and not on any corresponding English Rules.

Counsel for the appellant submitted that the trial Court was wrong in allowing such evidence to be adduced. He contended that the rescission of the agreement of sale was in issue in the case and if such evidence was necessary it was foreseeable and could be adduced in time had due diligence been exercised. In support

of his contention counsel for the appellant sought to rely on the dicta in a number of cases of our Supreme Court in applications to adduce further evidence before the Court of Appeal such as Pourikkoş (No. 2) v. Fevzi, 1962 C.L.R. 283; *Ashiotis and Others v. Weiner and Others* (1968) 1 C.L.R. 43; *Moumdjis v. Aristidou and Others* (1974) 1 C.L.R. 226; *Pavlidou and Another v. Yerolemou and Others* (1982) 1 C.L.R. 912.

It should be observed however that all the above authorities as well as the principles underlining the dicta in them touch the question whether additional evidence on questions of fact may be allowed by the Court of Appeal to be adduced on appeal and not the procedure and powers of a District Court at the hearing of a civil action to allow further evidence in reply under the provisions of 0.33, r.7.

We have not traced any decision of our Supreme Court in which the question of allowing evidence in reply or in rebuttal by the trial Court was raised. The only case in which comments were made was in *Pourikkos v. Fevzi* (supra) in which the Court of Appeal in dealing with an application to adduce further evidence on appeal made a remark on the decision of the trial Court to call fresh evidence in reply as follows: «... the trial Court gave the plaintiff the opportunity, erroneously for the reason given above, to call such evidence in reply», which however cannot be of any guidance in the circumstances of the present case.

The power of the Court of Appeal to admit further evidence on appeal emanates from section 25(3) of the Courts of Justice Law 1960 and 0.35, r.8.

Rule 8 of Order 35 corresponds to the English Order 58, rule 4. The principles on which the Court of appeal will allow further evidence to be adduced on appeal are well-established and are to the effect that the Court of appeal shall not allow evidence to be adduced which could have been adduced at the trial had reasonable diligence been exercised unless it is in respect of events which have supervened after the trial and the delivery of the judgment. (See, *Pavlidou and Another v. Yerolemou and Others* (supra) in which our case law on the subject is reviewed and reference is made to the dicta of Lord Hodson in *Skone v. Skone & Another* [1971] 2 All E.R. 582, 586 and Denning, L.J. in *Ladd v. Marshall* [1954] 3 All E.R. 745, 748 as to the conditions to be fulfilled in order to justify the reception of fresh evidence). The

object of restricting further evidence to be called on appeal was as stated in most of the cases hereinabove referred to that it is in the public interest that there will be an end to litigation (interest reipublicae ut sit finis litium)

In the present case we are not concerned with the power of the Court of appeal to allow further evidence of fact under O 35, r 8, but whether the trial Court may allow evidence in reply under O 33 r 7 Useful assistance in this respect may be derived from the provisions in the English Rules of the Supreme Court and in particular the notes to O 37, r 1 of such Rules which deal with the question of rebutting evidence At p 864 of the said Rules (see Annual Practice 1960) cases are mentioned in which the Judge at the trial has a discretion to allow the plaintiff to adduce rebutting evidence Such cases are -

(1) In answer to evidence of the defendant in support of an issue, the proof of which lay upon him (*Williams v Davies*, 1 Cr & M 464, *Wright v Willcox*, 9 C B 650, *Penn v Jack*, L R 2 Eq 314), and the plaintiff does not lose his right to have such discretion exercised in his favour by not giving evidence in the first instance to rebut the plea set up by the defendant, although the nature of the evidence was disclosed by the cross-examination of the plaintiff's witness, (*Shaw v Beck*, 8 Exch 392)

(2) When the plaintiff has been taken by surprise, or the evidence in contradictory (*Bigsby v Dickinson*, 4 Ch D 24, *Budd v Davison*, 29 W R 192, *Rogers v Manley*, 42 L T 584)

In Odger's Principles of Pleading and Practice, 22nd Edition, we read the following at p 298

> «In some cases, at the close of the defendant's case, the plaintiff may be allowed to call further evidence to answer an affirmative case raised by the defendant Thus, if the defendant has pleaded an excuse or justification for his conduct, the plaintiff may, if he chooses, deal with this defence and call evidence to rebut the justification in the first instance, or he may, at the judge's discretion, be allowed to confine his original case to proving what the defendant did, and, when a prima facie defence has been established, to deal with it in his reply But the plaintiff cannot, in the absence of special circumstances, call some evidence to rebut the justification in the first instance, and more afterwards in reply, thus dividing his proof»

An elucidation of the above principles may be derived from some of the cases to which reference is made in the Annual Practice and Phipson on Evidence in support of the above quotations, to the extent that these reports could be traced in our Supreme Court Library.

In *Wright v. Willcox*, 9 C.B. 650, English Rep. 137 C.P. 1047, the claim was for false imprisonment. The defendant pleaded, that the plaintiff had stolen the defendant's chaff. He further pleaded that his chaff had been stolen, and that he had reasonable ground to suspect the plaintiff. The plaintiff gave evidence, in the first instance, to account for her possession of chaff.

The defendant produced witnesses, who pointed out marks shewing that the chaff found in the plaintiff's drawer corresponded with that belonging to the defendant, and mentioned in particular, that linseed was mixed with the chaff, which was to be unusual.

In reply, the plaintiff's father was called to prove that several months before he had bought linseed, the invoice of which he produced, and that he sent it, mixed with chaff, to his daughters. It was objected, that this witness should have been called in the first instance. The learned judge, however, received the father's evidence and his invoice; and a verdict was returned for the plaintiff.

On appeal it was held that the judge had rightly exercised his discretion in allowing the plaintiff to call a witness in reply. Briefly the observations on appeal were as follows:

Wilde, C.J., after stating that he was not dissatisfied with the verdict said (at p.1050):

> «I think the evidence in reply was properly received. The objection is not to the admissibility of the evidence, but to the stage of the cause in which it was offered. Were that objection to prevail, there might often be a failure of justice. The time at which evidence is to be received, must be in the discretion of the judge, the exercise of that discretion being subject to the review of the court. In this case I cannot see that the admission of the evidence has led to any injustice».

Maule, J., stated, at p.1050:

> «Supposing, however, this was not a matter in the discretion of the judge, I do not think that the evidence should

have been excluded. The defendant introduced a mark by which he sought to identify the chaff. Even supposing that the plaintiff had reason to suspect that such evidence might be given, I do not think that she would be bound to waste time by answering by anticipation that which might never be set up».

Cresswell, J., stated, at the same page:

«If the question had been, whether the judge was bound to receive or bound to reject the evidence, I should have said that he was bound to receive it. When the witnesses for the plaintiff were examined, there was nothing to call their attention to the fact of linseed being mixed with the chaff.

But, however that may be, it was clearly a matter for the exercise of the discretion of the judge. The case is analogous to the practice at nisi prius, of allowing a question to be put on re-examination which does not arise out of the cross-examination».

Talfourd, J., at the same page:

«I think that this was a matter for the discretion of the judge, and I also think that such discretion was soundly exercised. In my opinion, no injustice has been done; and I see no ground for disturbing the verdict».

Reference was made in the above case to the earlier case of *Jacobs v. Tarleton* [1848] 11 Q.B. 421 (English Rep. 116, p.534) but the Court did not consider such case as having any resemblance to the case under consideration. The facts of the case as appearing in the report are as follows:

«*Jacobs v. Tarleton* which was an action against the indorser of a bill, the plaintiff made out a prima facie case by proving the defendant's signature. In support of a plea traversing the indorsement, evidence was given to shew that the plaintiff was too poor to have given value for the bill, and that he had denied that he knew anything of the bill or had authorised the bringing of the action. Mr. Baron Parke refused to receive evidence in reply, that the plaintiff had possessed the means of discounting the bill, and had in fact discounted it. After time taken, the court held that Mr. Baron Parke was right in rejecting his evidence, saying, that the plaintiff might either rely upon a prima facie case, or go into all

the evidence he had to confirm that prima facie; but that he was not entitled to rely, in the first instance, upon a prima facie case upon that issue, and afterwards, when that prima facie case was called in question by the defendant, to call other evidence to confirm his prima facie case; and that it was not proposed to call the witness to contradict any statement made by the defendant's witnesses, but to add a fact tending to support the plaintiff's prima facie case. (Maule, J. If the witness called by the plaintiff to prove an indorsement prove it weakly, and the defendant calls evidence to shew the improbability of the genuineness of the indorsement, the plaintiff cannot call a witness to prove that he saw the defendant sign it. If that were allowed, a plaintiff might call witnesses, and keep back one who it was supposed might, on cross-examination, disclose something which would damage the plaintiff's case.)»

In *Penn v. Jack and Others* (supra) evidence was allowed in reply in a suit for the purpose of restraining an infringement of the plaintiff's patent for the purpose of rebutting a case of prior use set up by the defendant. Sir W. PAGE WOOD, V.C. in his judgment had this to say, at p. 317:

«*I think the Plaintiff is entitled to adduce evidence in reply* for the purpose of rebutting the case set up by the Defendants; and for this reason, that it is quite impossible for him to know what is the nature of the evidence which will be produced..... The practice at common law is stated in Taylor on Evidence; and it appears that where, as here, several issues are joined, the Plaintiff may content himself with adducing evidence in support of those issues which he is bound to prove, reserving the right of rebutting his adversary's proofs in the event of the Defendant establishing a prima facie case with respect to the issues which lie upon him. In support of this proposition, *Shaw v. Beck* is cited, where Parke, B., used the following expressions: 'But Abbott, C.J., laid down what appears to me to be a more reasonable rule, by holding that the Defendant was bound to prove his plea, and that the Plaintiff might answer it by additional evidence'. Other instances are also mentioned, all shewing the wide discretion given to the Judge in allowing evidence to be given by the Plaintiff in reply».

In *Shaw v Beck and Another* (supra) (English Rep 155, p 1401) upon the trial of an interpleader issue in a county court, for the purpose of trying the title to certain goods taken in execution, the plaintiff, in support of his title, gave in evidence a deed (which was valid upon the face of it) by which the execution debtor had assigned to him the goods in question, but the witness called to prove the execution of the deed was cross-examined by the defendants with a view to show that the transaction was fraudulent, and the deed was therefore void - Held that the plaintiff was not bound to give evidence in the first instance to establish the validity of the deed, although called upon by the judge to do so, and although the nature of the defence appeared by the cross-examination of the attesting witness, and therefore, that the judge was wrong in refusing to receive evidence in reply, to rebut a case of fraud set up by the defendants to invalidate the deed

In the judgment of Pollock C B at p 1403 we read the following

> «I quite agree with the decision in *Wright v Wilcox* There, a prima facie case having been established by the plaintiff, the defendant introduced an entirely new element into it, and although the effect of the evidence in reply, to a certain extent strengthened the case originally made, yet it rebutted the new matter adduced by the defendant, and it was clearly in the discretion of the Judge to admit it, and he did so But there are cases in which, I think, the plaintiff is entitled, almost as a matter of right, to give evidence in reply Where there are several issues, some of which are upon the plaintiff and some upon the defendant, the plaintiff may begin by proving those only which are upon him, leaving it to the defendant to give evidence in support of those issues upon which he intends to rely, and the plaintiff may then rebut the facts which the defendant has adduced in support of his defence I think that the plaintiff was entitled to rely upon a prima facie case, by proving the execution of the deed, for that was all which it was incumbent upon him in the first instance to establish He had a perfect right to do so, and leave it to the defendant to impeach the consideration, and he was entitled in reply to rebut the defendant's evidence The same principle of practice is recognised in the action of ejectment, in which the question depends upon the title of the disputed property, the

'plaintiff may prove a prima facie case; the defendant may then set up an entirely new case; the plaintiff may then in reply set up another case, and so on: *Doe d. Sturt v. Mobbs* (Car. & M.1), *Rowe v. Brenton* (8 B. & C. 737), are authorities in support of this proposition. I, therefore think that the plaintiff was entitled to rest upon his prima facie case, and that the judge was wrong in refusing to allow him to give the evidence which he tendered in reply to the defendants' case. I am therefore of opinion that there ought to be a new trial»

PARKE B. had this to add, at the same page:

«I am of the same opinion. I will not say that this was not a matter in the discretion of the judge; but I think that he ought to have exercised that discretion in accordance with the rule of practice in these matters, and that according to that rule he ought to have admitted the evidence offered in reply.»

In *Rogers v. Manley* (supra) the plaintiff rested his case partly on an alleged conversation between himself and the defendant at the plaintiff's house on a certain evening in the presence of plaintiff's wife. Plaintiff's wife was cross-examined as to the substance of the alleged conversation, but not as to the fact of the defendant having been in the house on that occasion.

The defendant having in his examination in chief denied that he was in the house at all on the evening in question, leave was given to the plaintiff, after the evidence on both sides was closed, to call further evidence to rebut the defendant's denial.

MALINS, V.C. after making reference to 'Taylor's Work on Evidence' went on (at p.585) as follows in his judgment:-

«... Therefore on that ground alone, it being within the discretion of the court, and as I am left in a most painful position with regard to the evidence, I having the positive statement of one witness that the defendant was in the house, and the statement of the defendant himself that he was not there, and when the plaintiff has not had an opportunity of meeting that, as there was no cross-examination upon it, I think I am at liberty to admit additional evidence. Another reason why I think I ought to admit the evidence is, that I know there is an order in the old rules which authorises the court on any point on which it feels a difficulty to require further evidence. Therefore, independently of the cases, I am armed

with a power which I have exercised on several occasions before this. In this case I feel the greatest possible difficulty as to whether I am to believe the lady and Mr. Rogers himself, or whether I am to belive Mr. Manley; and it being the turning point of the case, I think I am perfectly at liberty to have my mind relieved by any further evidence that can be called to set the matter at rest, and therefore, on the old cases cited by Mr. Taylor, and upon the rule of the court which arms me with this power, I give leave to adduce further evidence to prove that Mr. Manley was in the house of Mr. Rogers on the evening of the 19th Aug. 1878».

In *Bigsby v. Dickinson* (supra) it was held by the Court of Appeal that where a party is taken by surprise by a point made against him at the hearing, the Judge may, if he thinks right, at any stage of the trial allow him to produce rebutting evidence; and if such permission is refused, the Court of Appeal will, in a proper case, permit the fresh evidence to be taken on the appeal.

The principles emanating from the above authorities with particular reference to them appear in a summary form in Phipson on Evidence, 13th Edition, under the heading «Evidence in rebuttal» at pages 824 and 825 under paragraph 33-92 where we read the following:

«33-92 Evidence in reply, whether oral or by affidavit, must, as a general rule, be strictly confined to rebutting the defendant's case, and must not merely confirm that of the plaintiff. Thus, where the latter had closed his case without calling a defendant who did not appear, the plaintiff was not allowed to call him in reply. So, in an action on a bill, where indorsement to the plaintiff was in issue, his case resting on mere proof of the indorser's handwriting, and the defendant, denying knowledge of the transaction, or authority to sign, had tendered evidence that the plaintiff was too poor to give value, proof by the plaintiff to rebut this was excluded as being merely confirmatory. Moreover, where the issues on the claim and counterclaim are identical, evidence in rebuttal cannot be called, as it must necessarily be confirmatory. With the judge's leave, rebutting evidence may be called by the plaintiff in answer to evidence of the defendant in support of an issue, the proof of which lay upon him. The

discretion may still be exercised in the plaintiff's favour where the nature of the defence became apparent during cross-examination of his own witnesses. The judge, however, has a discretion to admit further evidence either for his own satisfaction or where the interests of justice require it, and confirmatory evidence in rebuttal will generally be allowed when the party tendering it has been misled or taken by surprise».

As already explained in the course of narrating the facts of the present case the allegation that the agreement between the defendants and the third party (the owner of the land) was rescinded was raised by the defendants. It was their contention that the plaintiff was not entitled to the agreed remuneration once the agreement has been rescinded. The burden of proof was upon the defendants in this respect and obviously it was for this reason that they summoned the seller of the land to give evidence on their behalf. Once the proof of this allegation rested upon the defendants the trial Court rightly, in our view, allowed the plaintiff to call evidence in reply. In the result the appellants have not convinced us that the trial Court exercised its discretion wrongly or in a manner not allowed by the rules of court.

The appeal, therefore, fails and it is hereby dismissed with costs.

Appeal dismissed with costs.