DAM v. J. K. ADDO AND BROTHERS
[1962] 2 GLR 200

Division:	IN THE SUPREME COURT
Date:	21ST DECEMBER, 1962
Before:	ADUMUA-BOSSMAN, OLLENNU AND AKUFO-ADDO, JJ.S.C.

Practice and procedure—Pleadings—Issues for trial—Court must not accept defence contrary to and inconsistent with that put forward by defendant—Denial of justice.

Judgment—Not based on pleadings—Substituted defence—Judge, proprio motu, put forward and accepted defence inconsistent with pleadings—Fundamentally wrong.

HEADNOTES

The appellant sued the respondents in the High Court, Kumasi, for accounts and for money due and owing to him. Simpson, J. after due consideration of the respective cases of the parties, resolved the issues as set out in the summons for directions and thereby rejected the respondents' case. He did not however give judgment for the appellant but gave judgment for the respondents, basing himself on details on which no evidence had been adduced since they did not form part of the respondents' case as disclosed by the pleadings.

Held, allowing the appeal:

(1) once the trial judge had resolved the outstanding controversial issues in favour of the appellant, he should have given judgment for the appellant.

(2) A court must not substitute a case proprio motu, nor accept a case contrary to, or inconsistent with, that which the party himself puts forward, whether he be the plaintiff or the defendant. Esso Petroleum Co., Ltd. v. Southport Corporation [1956] A.C. 218, H.L.; Fischer & Co. v. Thompson (1904) 1 Ren. 302; Akua Oye v. Baddu (1924) D.Ct. '21–'25, 116 and Oloto v. Williams (1944) 10 W.A.C.A. 23 applied.

(3) The function of pleadings is to give fair notice of a case which has to be met, so that the opposing party may direct his evidence to the issue disclosed by them. To condemn a person on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded. Dicta of Lord Normand in Esso Petroleum Co., Ltd. v. Southport Corporation [1956] A.C. 218 at pp. 238–239, H.L. adopted and applied.

CASES REFERRED TO

(1) Esso Petroleum Co., Ltd. v. Southport Corporation [1956] A.C. 218; [1956] 2 W.L.R. 81; [1955] 3 All E.R. 864, H.L.

(2) Fischer & Co. v. Thompson (1904) 1 Ren. 302

(3) Akua Oye v. Baddu (1924) D.Ct. '21-'25, 116

(4) Oloto v. Williams (1944) 10 W.A.C.A. 23

NATURE OF PROCEEDINGS

APPEAL from a judgment of Simpson, J. in the High Court, Kumasi, dismissing an action by the plaintiff for accounts and for money due and owing to him. The facts are fully set out in the judgment of Adumua-Bossman, J.S.C.

COUNSEL

Dr. J. B. Danquah for the appellant.

No appearance by or on behalf of the respondent.

JUDGMENT OF ADUMUA-BOSSMAN J.S.C.

The appeal is against a judgment of the High Court, Kumasi, (Simpson, J.) which disallowed the claim of the plaintiff appellant (hereafter referred to shortly as the appellant) for the sum of £G588 18s. as due and owing to him upon the taking of accounts of guns and ammunitions supplied to him by the defendants-respondents (hereafter referred to shortly as the respondents) who employed and stationed him as their storekeeper at Tamale in terms of a written agreement, exhibit C. For the purposes of this case the material period of his employment was from September 1958 to March 1959. He was supplied with the guns and ammunitions under debit notes which he signed to acknowledge receipts of the same, and if the employers themselves or any person authorised by them, including another storekeeper called Mr. Ofori stationed at Wa, applied for and obtained any of the merchandise from his stock, a credit note duly signed by the recipient was delivered to him in respect of the articles taken away. He claimed that among the merchandise supplied to him under a debit note dated the 25th September, 1958, (exhibit E) was a quantity of twenty single-barrelled guns at £G40 each, of the total value of £G800; that subsequently between the dates the 13th to the 16th October, 1958, the respondents' manager, Mr. J. K. Addo, himself came to Tamale and had the twenty single-barrelled guns withdrawn from the official armoury or magazine where all arms and ammunitions were kept, and took delivery of them from him on the 16th October, 1958, against a receipt signed by the manager and delivered to him (exhibit F); that when his employment came to an end and accounts were gone into some time in March 1959, he had misplaced the withdrawal receipt delivered by the manager to him and, therefore, the latter refused to allow him credit for £G800 the value of the twenty single-barrelled guns withdrawn and taken away, with the result that his accounts showed a debit or deficiency of £G712 12s. against which the manager retained his cash security of £G500; that the manager assured him, however, that whenever the missing receipt could be produced, his account would be credited with the £G800; that fortunately for him he found the receipt (exhibit F) and then claimed the credit of £G800 due to him, which would make his account show a credit of £G588 18s. in his favour, but the manager refused to allow him the credit, and hence the action against the firm.

Against this case of the appellant, the respondents' manager set up the case that the twenty single-barrelled guns were never included in any supply of merchandise for sale sent to the plaintiff under any debit

note, and were never debited to the appellant's account nor kept in the official magazine; that the lot of twenty single-barrelled guns were damaged ones in the magazine at Sunyani, Brong-Ahafo, where the firm's head office was located, and that, after obtaining a permit from the Sunyani police, he withdrew them and brought them to Tamale for the purpose of getting them repaired by a repairer, one Akumako, whom the appellant mentioned as working at Kintampo, and on his arrival in Tamale he delivered them to the appellant for safe-keeping in the wholesale part of his store against the

appellant's receipt; that eventually as he heard that the repairer had moved away from Kintampo he went and applied to the appellant and received back from him on a single occasion the lot of twenty single-barrelled guns; that on that occasion the appellant demanded his receipt which he (the manager) had then misplaced and could not therefore surrender, so he gave the appellant the receipt now relied on by the appellant, exhibit F; that subsequently however he discovered the receipt, which he produced and tendered as exhibit 9.

The learned judge after due consideration of the respective cases of the parties, categorically rejected the respondents' case, holding in the course of his judgment as follows:

> "J. K. Addo has acknowledged the receipt (exhibit F) signed by him ... I am satisfied that all the twenty guns withdrawn on the 15th October, 1958, were taken by him or on his order. They were not withdrawn for sale by the plaintiff. I do not believe Addo's evidence that he took away twenty damaged guns which had been left with the plaintiff for safe custody."

It is to be noted, at this stage, that the issues expressly set out in the summons for directions and agreed to and ordered to be the issues for trial were:

> "(1) Whether or not the defendant took twenty single-barrelled guns from the plaintiff's stock against a receipt.
>
> (2) Whether or not the defendant handed twenty damaged single-barrelled guns to the plaintiff for repairs."

As, therefore, the learned judge so conclusively resolved those two outstanding controversial issues against the respondents and in favour of the appellant—and quite rightly, in my view, having regard to the available evidence, and particularly to the circumstance that the respondents were unable to produce any evidence towards establishing the basic fact of their case that they withdrew the twenty guns in question from the official magazine at Sunyani under police permit—that should have been the end of the case, and he should have given judgment for appellant upholding his claim. Unfortunately, however, he went on to make what counsel for the appellant has described, not without some measure of justification, as "speculations," and proceeded to arrive at the conclusion, rather difficult to understand, that the sixteen single-barrelled guns also valued at £G40 each, which were withdrawn or obtained from the appellant's stock on a number of different occasions, as evidenced by certain credit notes issued in November 1958 and February 1959 to the appellant (as set out or appearing in the respective statements of accounts of the parties, exhibits G and H) in effect disproved the appellant's case that he had not been credited with the value of the whole lot of twenty guns which the manager withdrew and took away as per his receipt exhibit F, but on the contrary established that appellant received credit for sixteen out of the twenty, as per those credit notes issued in November 1958 and February 1959 leaving only four unaccounted for, for which the appellant should now receive credit. The

learned judge's reasoning, as emerges from what he has set down in his judgment, appears to be that the withdrawal of those sixteen guns as per the credit notes of November 1958 and February 1959, i.e. "(a) credit notes included in sales amounting to £G1,325 4s. in November 1958; (b) credit note No. 63 of the 8th February, 1959 signed by Ofori; and (c) credit note No. 65 of the 10th February, 1959 signed by Yeboah," came after the withdrawal for distribution of the twenty single-barrelled guns, the subject of dispute, from the magazine in Tamale on the 15th October, 1958. But, with respect to the learned judge, the reasoning appears to be fallacious, in that it is not suggested by, and it is definitely not the case of, either party that the twenty guns at £G40 each, the subject of dispute, were the only lot or quantity of that particular type of guns which were supplied under debit notes to plaintiff, stored in the magazine as was the usual practice, and ultimately withdrawn for distribution or sale, prior to the undisputed withdrawal of those sixteen guns which the learned judge has held to be the solution to the main problem or issue outstanding for determination in the action. The appellant had to adduce evidence that the twenty guns, the subject of dispute, were included as an item of supply under debit

note No. 90 of the 25th September, 1958, and upon receipt by the appellant deposited according to routine in the magazine, then subsequently withdrawn from the magazine on the 15th October, 1958 (according to the evidence of constable Satsafia, the first witness) and then taken away from him on the 16th October, 1958, as per exhibit F, having regard to the respondents' case that that lot of twenty guns were not consigned under any debit note, nor deposited in the magazine and subsequently withdrawn therefrom. But in his statement of account, and in the defendants' also, (exhibit H) are shown two other supplies of merchandise:

10–9–58—Goods supplied Debit Notes 85 and 86—£G1,365 0s. 6d.

10–11–58—Goods supplied Debit Notes 91—£G1,587 10s.

which might well have contained some more of the same type of single-barrelled guns at £G40 each, as was contained under debit note No. 90, and which on arrival in Tamale were first deposited in the magazine but later withdrawn for distribution on sale or otherwise. The evidence as to those details was not adduced, because the necessity for adducing evidence as to those details did not arise on the pleadings. It was therefore quite wrong for the learned judge, with due respect to him, to conclude that any number less than twenty of single-barrelled guns valued £G40 each taken from the appellant's stock in November 1958 and February 1959, by the mere fact that their withdrawal or acceptance from the appellant took place after the 15th October, 1958, when the twenty single-barrelled guns, the subject of dispute, were withdrawn from the magazine in Tamale, must necessarily be part of that lot or quantity of twenty withdrawn on the 15th October, 1958.

The process of consideration and weighing up of the respective cases of the parties by which the learned judge arrived at the conclusion at which he did arrive, would appear to have involved the substitution by him proprio motu of a case substantially different from, and inconsistent with, the case put forward by the respondents and the ultimate acceptance by him of that substituted case which was not the respondents' case at all. This acceptance in favour of a party of a case different from and inconsistent with that which he himself has put forward in and by his pleadings, has been consistently held to be unjustifiable and fundamentally wrong both by the English superior courts and our local superior courts.

In one of the leading English cases dealing with the question Esso Petroleum Co., Ltd. v. Southport Corporation1(1) an action in which the Southport Corporation claimed damages alleged to have been caused to their foreshore by the discharge of a quantity of oil from vessel belonging to Esso Petroleum Company, and the damages were said to have resulted from the negligence of the master of the vessel in his navigation of the vessel, the trial judge found adversely against the plaintiffs on the issue of negligence raised by the pleadings and gave judgment against them. On appeal, however, a majority of the Court of Appeal2(2) reversed the trial judge's decision and gave judgment for the plaintiffs, not on the issue of negligence raised in the pleadings and dealt with by the trial judge, but on a completely new ground, namely the unseaworthiness of the vessel. On appeal to the House of Lords, the Court of Appeal's judgment was set aside and that of trial judge restored. In the course of his speech supporting the allowing of the appeal,3(3) Lord Normand made the following pertinent and significant observations:

> "I agree with my noble and learned friends, . . . that the real issue in the appeal is that of negligence . . .
>
> There was no notice in the pleadings of any other cause of action, such as that the appellants negligently sent the vessel to sea in an unseaworthy condition.
>
> The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. In fact the evidence in the case was concerned only with the negligence alleged. The result was that the master of the vessel was acquitted by Devlin, J. of the negligence alleged, and the logical consequence was that the owners were also acquitted by him.
>
> The majority of the Court of Appeal, however, held that the onus lay on the owners to show that the

> accident which caused the damage was inevitable . . . . As the appellants has made no attempt to lead evidence to discharge this onus, the majority of the Court of Appeal found them liable in damages. . . .
>
> Confining myself to the actual allegations of negligence and to the evidence in the case, I find the conclusion inevitable that, since the master has been acquitted of the faults alleged against him, the owners must also be acquitted . . . . To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded."

So far as our local superior courts are concerned the point or question of principle now under discussion appears to have engaged the attention of the judges from an early stage. In a case as far back as April, 1904, Fischer & Co. v. J.O. Thompson4(4) an appeal from the decision of the District Commissioner, Accra, to the Supreme Court in which counsel for the appellant appears to have taken the point that the decision of the court below was contrary to the claim for goods sold and delivered made by the plaintiff in that it appeared to be established that no goods were in fact delivered, Brandford Griffith, C.J., presiding, pointed out that5(5):

> "that is so, but that the case in the Court below was fought out on the ground that the goods had not been delivered, but that the goods had been ordered by sample, and that then the defendant had not taken them up, and the Court states that, if necessary, it will amend the Writ of Summons so as to make it agree with the issue actually fought out in the Court below."

The result was that counsel for the respondent applied for the amendment and the same was granted on the terms that either side might lead evidence which was accordingly led by both counsel, and the learned Chief Justice was then able to confirm the judgment of the court below, on the issue of the defendant's failure to take delivery and pay after the goods had been procured according to his own sample, that being the issue which appears to have been disclosed all along by the evidence, and which the amended claim was made to accord with.

In a subsequent case in 1924, the question under discussion engaged the attention of another Chief Justice, Sir Crampton Smyly, in the case of Nana Akua Oye (Ohemia) on behalf of the Oman of Akropong v. Yao Baddu and F. W. Q. Akuffo.6(6) In that case the plaintiff claimed, on behalf of and as the representative of the Oman of Akropong, delivery up to her of the stool and paraphernalia of the paramount stool of Akwapim and by her pleadings put forward the case that the second defendant who held the stool and paraphernalia as Omanhene had been destooled at the date of her action. Her alleged position as representative of the Oman and her right to sue, as well as her allegation of the second defendant's destoolment, were all traversed and put in issue. At the trial, from one of her own witnesses, the Secretary for Native Affairs, was elicited the fact that far from the second defendant having been destooled, his election and installation as Omanhene was officially confirmed by the government shortly before her action, whereupon her counsel, Mr. Sekyi7(7):

> "then applied to amend the writ of summons, by adding a paragraph, that the confirmation of the election and enstoolment of the defendant, Akuffo, was procured by fraud. The Court refused to allow the amendment, as raising entirely new issues to those raised in the pleadings."

In respect of her general claim, the learned Chief Justice ultimately held that in his opinion8(8):

> "the plaintiff has failed to establish the claim set out in the pleadings, as distinguished from the claim she made in the former action, and in her evidence here, namely, that the stool and its paraphernalia were her own from her house."

Of many other cases from 1924 up to date, in which the question under discussion has also been considered, I would mention only Oloto v. Williams,9(9) where it was stated by the court that:

> "At the trial the defendants satisfied the learned Judge that their statement of the facts was correct and that the plaintiff 's statement of the facts in his statement of claim was incorrect. Having come to that definite conclusion of fact the learned Judge then proceeded to give judgment for the plaintiff. That means judgment for the plaintiff for what he claimed, and to discover what plaintiff claimed, one must,

> of course, look at the claim as stated in the writ and statement of claim.... Looking at the statement of claim, and particularly the last sentence of paragraph 2 ... it is clear that 'judgment for plaintiff' meant that the ownership by Native law and custom [of the plaintiff] was free of any tenancy under native law and custom.

> But it is also clear that the learned Judge in his judgment has found as a fact that defendants' ancestors and the defendants had respectively acquired and inherited 'a right of occupation under native law and custom' which is a 'tenancy under native law and custom.' It follows therefore that in giving judgment for the plaintiff the learned Judge was in terms deciding the case before him in a way which was quite inconsistent with his express findings of fact . . .
>
> For these reasons we are of opinion that the learned Judge was wrong to give judgment for the plaintiff, and that instead he should have non-suited the plaintiff's claim."

In both Esso Petroleum Co., Ltd. v. Southport Corporation and Oloto v. Williams above referred to, it was the case of the court accepting a case contrary to and manifestly inconsistent with that which the plaintiff himself had set up, whereas in our instant case it is the case of the court accepting a defence contrary to and inconsistent with that which the defendant himself has put forward; but the principle of law involved is undoubtedly the same; and in the words of Lord Normand, amounts to condemning "a party on a ground of which no fair notice has been given [and that] may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded."10(10)

For the foregoing reasons, and having regard to the principle expressed in the cases above referred to, I have formed the opinion that the judgment given by learned trial judge substantially in favour of the defendants was per incuriam and accordingly, that this appeal should be allowed, the judgment appealed against set aside, and in place thereof judgment entered in favour of the appellant upholding his claim for the sum of £G588 18s. as balance due in his favour upon the taking of the accounts in respect of his employment.

The appellant to have the costs of this appeal assessed at £G52 19s. and of the trial in the court below to be taxed.

JUDGMENT OF OLLENNU J.S.C.

I agree.

JUDGMENT OF AKUFO-ADDO J.S.C.

I also agree.

DECISION

Appeal allowed.

Judgment entered for the plaintiff.

J. D.

Endnotes

1 (Popup - Footnote)

1 [1953] 3 W.L.R. 773.

2 (Popup - Footnote)

2 [1954] 2 Q.B. 182, C.A.

3 (Popup - Footnote)

3 [1956] A.C. 218 at pp. 238-239, H.L.

4 (Popup - Footnote)

4 (1904) 1 Ren. 302.

5 (Popup - Footnote)

5 Ibid.

6 (Popup - Footnote)

6 (1924) D.Ct. ’21–’25, 116.

7 (Popup - Footnote)

7 Ibid. at p. 126.

8 (Popup - Footnote)

8 Ibid. at p. 130.

9 (Popup - Footnote)

9 (1944) 10 W.A.C.A. 23 at pp. 24–25.

10 (Popup - Footnote)

10 [1956] A.C. 218 at p. 239, H.L.