

SONCO CANNING LIMITED,
Plaintiffs (Respondents),
v.
"ADRIATICA" (*SOCIETE PER AZIONI DI NAVIGAZIONE*),
Defendants (Applicants).

SONCO
CANNING LTD.
v.
"ADRIATICA"
(SOCIETE PER
AZIONI DI
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(Admiralty Action No. 48/71).

Practice—Admiralty action—Parties—Foreigner resident out of the jurisdiction—Application by defendant to add him as co-defendant—Such joinder will cause delay, hardship and embarrassment to plaintiffs—Court's discretion exercised against addition—Application refused.

Admiralty Action—Practice—Parties—Joinder of co-defendant—Cf. The Cyprus Admiralty Jurisdiction Order, 1893, rules 30, 32, 23 to 26 both inclusive, and 237—Cf. Civil Procedure Rules Order 9, rule 10 and Order 16, rule 11 of the English Rules of the Supreme Court (Order 15, rule 6 of the Revised Rules, 1962).

This is an application by the defendants in this Admiralty action for an order of the Court directing that the owners of the M.V. "Bonmar" Messrs. Fenice S.A. of Palermo, Sicily, be joined as defendants. It should be pointed out that the present action is for damages for the damage caused, through the negligence of the defendants, their servants or agents, to goods which they undertook by a contract to carry from Venice to Famagusta on the said ship. It would appear that the sole purpose for which the applicants-defendants seek to add the owners as co-defendants, is to claim from them indemnity and/or contribution.

The Court refused this application for the following reasons :—

Held, (1). The owners sought to be joined as co-defendants are foreign nationals and resident out of the jurisdiction. That, on the authorities, is a factor to be taken into account in weighing and deciding how the Court should exercise its discretion.

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(2) Adding these defendants, it will cause delay and no further delay than is necessary should be caused to the plaintiffs. It will, also, cause real hardship and difficulty to them, as they will have to proceed against defendants who are outside the jurisdiction and with whom there was no privity of contract and whilst being unaware of their exact relationship and the terms of their agreement regarding the liabilities of the defendants and the owners *vis-a-vis* each other ; and an otherwise simple issue will be further complicated and embarrassment would be caused to the plaintiffs.

(3) All these, are good reasons for not adding the owners as co-defendants.

Application dismissed. - No order as to costs.

Cases referred to :

Dollfus Mieg et Compagnie S.A. v. Bank of England [1951]
Ch. 33 ;

Atid Navigation Co. Ltd. v. Fairplay Towage and Shipping Co. Ltd. [1955] 1 All E.R. 698 ;

Wilson, Sons & Co. Ltd. v. Balcarres Brook Steamship Co. Ltd. [1893] 1 Q.B. 422, C.A. at pp. 427 and 428 *per* Lord Esher M.R. ;

Artemis Co. Ltd. v. The Ship "Sonja" (1972) 1 C.L.R. 153, at p. 156 *et seq.*

Application.

Application by the defendants in an admiralty action, for an order of the Court that the owners of m.v. "BONMAR" Messrs. Fenice Sp. A. of 3 Tripoli Str., Palermo, Sicily, be joined as defendants.

G. Economou, for the applicants.

R. Stavrakis with *V. Sarris*, for the respondents.

Cur. adv. vult.

The following ruling was delivered by :—

A. LOZOU, J.: By the present application the defendants apply for an order of the Court—

A. Directing that the owners of the m.v. "BONMAR" Messrs. Fenice Sp. A., of 3, Tripoli Street, Palermo, Sicily whose presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in this action, be joined as defendants.

B. Granting leave to serve notice of the writ of summons in the above action on Messrs. Fenice, through local advocates.

C. Any further directions in the matter as shall seem fit.

The application is based on rules 30, 32, 23 to 26 both inclusive, and rule 237 of the Cyprus Admiralty Jurisdiction Order 1893, by which the practice of the Admiralty Division of the High Court of Justice of England, "so far as same shall appear to be applicable, shall be followed" in all cases not provided by the Cyprus Rules. Rule 30, as it was pointed out in the case of *Artemis Co. Ltd. v. The Ship "Sonja"* (1972) 1 C.L.R. 153, at p. 156 *et. seq.*, corresponds in all material respects to Order 9, rule 10 of our Civil Procedure Rules and to Order 16, rule 11 of the English Rules of the Supreme Court (Order 15, rule 6 of the Revised Rules of 1962).

The present action is for damages for the damage caused to goods which the defendant Company undertook by a contract to carry from Venice to Famagusta on m.v. "BONMAR". The said damage and loss is alleged in the plaintiffs' Petition to have been due to the negligence and/or breach of contract on the part of the defendants, their servants or agents in that they:—

- (a) failed to stow and/or keep stowed the said cargo properly while in *transitu*, and/or
- (b) failed to ventilate the said cargo properly while in *transitu*, and/or
- (c) failed to apply the proper temperature required for the said cargo, and/or
- (d) failed to apply to the said cargo the temperature indicated by the suppliers at the port of embarkation, and/or
- (e) failed to take the proper customary measures for the safe carriage of the said cargo.
- (f) The plaintiffs will further rely on the maxim of *res ipsa loquitur*.

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The applicants in their affidavit contend that the alleged negligence, if any, should be attributable to the owners of the said motor-vessel as the master, officers and crew of the vessel were at the material time the servants and/or agents of the owners and the present defendants being the charterers thereof, had no control over the master, officers and crew of the said vessel.

They further state that although the plaintiffs may have a claim against the present defendants, nevertheless the defendants have a good cause to be indemnified by the owners and they claim that the order for joining the owners as co-defendants in the action should be granted for the following, *inter alia*, reasons :—

- " (a) The possible liability of the present defendants and the owners *vis-a-vis* the plaintiffs is joint.
- (b) The presence of the owners is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in this action.
- (c) If the owners are not joined as defendants in the present action then the present defendants will be statute barred from proceeding against the owners for contribution and/or indemnity, after the conclusion of the present proceedings.
- (d) From the outcome of the present proceedings the legal rights of the owners will be affected, in that admissions and/or conclusions will be reached that will affect them as carriers.
- (e) From the outcome of the present proceedings the finances of the owners will be affected, in that they may be called to indemnify, in another action, the present defendants, without having had an opportunity to query the claim of the plaintiffs.
- (f) If any negligence exists which is denied, then the owners are vicariously liable for the torts of their servants and/or agents, *i.e.*, the Master, Officers and members of the crew of the vessel."

The plaintiffs opposed the applicants' application and in paragraph 6 of their affidavit filed in support of their opposition state :—

- " (6) With reference to paragraph 9 of the above affidavit (*i.e.* on the question of adding the proposed co-defendant) we believe and are advised :
 - (a) that the liability of the alleged owners and the defendants towards us cannot be joint

because there is no legal relationship between the said owners and us and therefore no cause of action against them, and in any event we cannot—as a matter of jurisdiction—and do not wish to pursue any claim against them.

- (b) That the only question involved in this action is whether the defendants are in breach of contract or negligent *vis-a-vis* the persons they contracted with, *i.e.* us, and, if so, whether the alleged damage is a consequence thereof.
- (c) That if the defendants will be statute barred as against the alleged owners after the conclusion of the present proceedings—a matter wholly within their knowledge and depending on the terms of their contractual relationship with the said alleged owners,—they can take whatever steps are now afforded to them by the legal machinery and procedure governing their legal relationship with the said alleged owners.
- (d) That the alleged owners could, by virtue of Rule 30 of the Admiralty Jurisdiction Order, 1893, willingly have entered the present proceedings as interested parties, a matter which they have not elected to do although they had or must have had (through the defendants) ample notice of the proceedings.
- (e) That, so far as we are concerned, there is no question of vicarious liability on behalf of the alleged owners in that, in addition to the above reasons, the Master and crew in question were the persons whom the defendants used in order to carry out their contract with us and no more."

As it appears from the affidavit, the sole purpose for which the applicants—defendants seek to add the owners as co-defendants, is to claim from them indemnity and/or contribution, as the dispute arising in relation to plaintiffs' claim is not liable to be defeated by the non-joinder of the third parties as defendants.

Wynn-Parry, J. in *Dollfus Mieg et Compagnie S.A. v. Bank of England* [1951] Ch. 33 referred with approval to the note which appears in the Annual Practice (1962

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edition, p. 324 and 1967 edition, p. 161) that—"generally in Common Law and Chancery matters a plaintiff who conceives that he has a cause of action against the defendant is entitled to pursue his remedy against that defendant alone. He cannot be compelled to proceed against other persons whom he has no desire to sue". And in *Atid Navigation Co. Ltd. v. Fairplay Towage and Shipping Co. Ltd.* [1955] 1 All E.R. p. 698 he adds—"But the Court is given a discretion by Order 16, rule 11—which corresponds to our Order 9, rule 10—and it is entirely a discretionary jurisdiction in certain circumstances, to compel the plaintiff to join other parties as defendants, as a condition of allowing him to proceed with his action".

Furthermore, as it is stated in the Annual Practice, 1967, p. 160 :—

"Under this rule, the Court has power to add or substitute a defendant on the application of the defendant and also of a person not already a party and in either case against the wishes of plaintiff, but a defendant against whom no relief is sought by plaintiff will generally not be added against the wish of the latter. (*Hood-Barrs v. Frampton & Co.* (1924) W.N. 287). A third party notice is in such a case usually the proper course. Such a defendant can, however, be added in a proper case. (*Dollfus Mieg (supra)*)."

The discretion under this rule is widely exercised. The case of *Wilson, Sons & Co. Ltd. v. Balcarres Brooks Steamship Co. Ltd.* [1893] 1 Q.B. 422 C.A. is of considerable assistance for the determination of the present case, though it referred to an application to add a joint contractor not sued by plaintiff as a co-defendant. Lord Esher, M.R. at pp. 427 and 428 said :—

"There is a discretion ; and, therefore, if one of two joint contractors were resident out of the jurisdiction, but the circumstances were such that the joinder of such joint contractor could not possibly delay the plaintiff or cause any real hardship or difficulty to him, the Court, I apprehend, would have a discretion to make an order that he should be joined ; but I think that such a discretion ought to be exercised with the very greatest caution. To say that, although a joint contractor is resident abroad, there is an absolute right to have him joined, gives rise to many difficulties, which I have pointed out during the agreement. Suppose the Court to have ordered that such a joint contractor should be joined. He must then be served ; but a writ cannot be issued for service out of the

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jurisdiction without the leave of the Court. The Court has a discretion with regard to granting that leave. So the Court might be in this difficulty ; after ordering that he should be joined, when leave was asked to issue a writ for service upon him out of the jurisdiction or of which notice was to be given to him out of the jurisdiction, the Court might find, when the circumstances were brought before them upon that application, that it would be unjust and improper to give such leave, and they might refuse it. I think, therefore, that it was a matter of discretion whether the order should be made. It does not appear that by leaving the defendants to their remedy over against Benier, if they have any, we shall be doing any injustice to the defendants. If Benier is a joint contractor with them, it would seem that there must be a right of contribution, and therefore the defendants could bring him in as a third party. If there is no right of contribution, then I cannot help thinking that the defendants are endeavouring to put on the plaintiffs the burden of suing a foreigner out of the jurisdiction for no real legal benefit to themselves, but for some indirect purpose."

And Bowen, L.J. at page 429, said :—

" Unless we can see that it is just that we should compel a plaintiff who is suing one of two joint contractors to sue the other who is without the jurisdiction, and who conceivably might have to be pursued to the ends of the earth, we ought not to do so. We are not bound to do so, because the terms of the rule give me a discretion ; and I should hesitate long before compelling a plaintiff to pursue in his pursuit of one joint contractor within the jurisdiction until he has chased the other who is beyond the jurisdiction."

The owners sought to be joined as co-defendants are foreign nationals and resident out of the jurisdiction. That, on the authorities, is a factor to be taken into account in weighing and deciding how the Court should exercise its discretion. Adding these defendants, it will cause delay and no further delay than is necessary should be caused to the plaintiffs. It will also cause real hardship and difficulty to them, as they will have to proceed against defendants who are outside the jurisdiction and with whom there was no privity of contract and whilst being unaware of their exact relationship and the terms of their agreement regarding the liabilities of the defendants and the owners *vis-a-vis*

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each other. An otherwise simple issue will be further complicated and embarrassment would be caused to the plaintiffs. All these, are good reasons for not adding the owners as co-defendants.

The defendants may start proceedings of their own, and take steps to avoid the risk of having their claim statute barred. I cannot, however, suggest that third party proceedings might be instituted, as under Order 10, rule 2, an application for leave to issue and serve a third party notice, had to be filed together with the memorandum of appearance and that is an imperative provision.

It may be pointed out here that one of the considerations that had bearing on the Court in assuming jurisdiction in this case, was, as it appears from the ruling* of the 18th November, 1972, given on the application for stay of proceedings, that the present defendants were connected with Cyprus through long links and permanent representation through the Firm of Messrs. A.L. Mantovani & Sons Ltd. These are factors which do not appear to exist in the case of the owners and which would certainly weigh against the exercise of the Court's discretion in granting leave for the issue of service out of the jurisdiction.

For all the above reasons, I have come to the conclusion that the application to add the owners as co-defendants should fail. In view of this, an examination of the second part of the application for an order granting leave to serve notice of the writ of summons out of the jurisdiction becomes unnecessary.

In the circumstances the application is dismissed but I make no order as to costs.

*Application dismissed. No
order as to costs.*

* Reported in (1972) 1 C.L.R. 210.