

1977 September 26

[TRIANTAFYLLIDES, P, STAVRINIDES, L LOIZOU, JJ.]

STATE MACHINERY IMPORT CO OF IRAQ,
Appellants-Plaintiffs,

v

LIMASSOL LICENSED PORTERS ASSOCIATION,
Respondents-Defendants

(Civil Appeal No 5749)

Civil Procedure—Practice—Interim order pending determination of Action—Applied for ex parte—Notice thereof directed to be served on defendants and date of hearing fixed—Similar interim order applied for ex parte pending the determination in future of the first application

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By means of an *ex parte* application, filed on July 16, 1977, the appellants (plaintiffs) sought an interim order restraining the respondents (defendants) from using five lift trucks, being the subject matter of plaintiffs' action against the defendants, till the determination of the action. When the appellants appeared to argue the application the Court adjourned it to August 8, 1977 and, in exercise of its power under r 8 (3) of Order 48 of the Civil Procedure Rules, directed that notice of it had to be given to the respondent. The application was, for reasons appearing on the record, (vide p 124-125 *post*) eventually fixed for hearing on October 1, 1977 and the Court directed that the respondents should file the opposition twenty-five days before such hearing.

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The appellants have at no time challenged the above directions of the Court and have not attempted to bring forward the hearing of the application which was fixed as above.

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On August 30 1977, the appellants filed a second *ex parte* application by means of which they sought the same interim order pending the determination of their first application fixed for hearing on October 1

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The trial Judge dismissed this application having held that once an opportunity to be heard had been given to the defendants it was unjust and not equitable to grant *ex parte*, and behind the back of the defendants, the interim order applied for.

5 The plaintiffs appealed:

Held, in the light of the history of the proceedings we have not been satisfied, by counsel for the appellants, that the trial Judge has exercised his relevant discretion wrongly in refusing to grant the interim order applied for on August 30, 1977 and we agree with him that in view of this it was not necessary for
10 him to go further into the merits of the matter at that stage.

Appeal dismissed.

Appeal.

15 Appeal by plaintiffs against the order of the District Court of Limassol (Hadjitsangaris, S.D.J.) dated the 31st August, 1977 (Action No. 1748/77) whereby their *ex parte* application, made on August 30, 1977, for an interim order restraining the defendants from using in any way five lift trucks, till the determination of an application by them for a similar interlocutory
20 order, which was filed on July 16, 1977, and was fixed to be heard on October 1, 1977, was dismissed.

L. Papaphilippou, for the appellants.

Y. Aristedou, for the respondents.

Cur. adv. vult.

25 The judgment of the Court was delivered by:

TRIANTAFYLLIDES P.: The appellants complain against the dismissal, on August 31, 1977, of an *ex parte* application, made by them on August 30, 1977, in action No. 1748/77 in the District Court of Limassol.

30 By means of the said application the appellants were seeking an interim order restraining the respondents from using in any way five lift trucks, till the determination of an application by them for a similar interlocutory order, which was filed on July 16, 1977, and which is fixed to be heard on October 1,
35 1977.

The aforementioned five lift trucks are the subject matter of the said action in which the appellants—as plaintiffs—are

seeking, against the respondents, a declaration that they are the owners of such trucks, an order directing the defendants to deliver possession thereof to them, as well as damages and costs.

The history of the relevant part of the proceedings is as follows:— 5

The action was filed on July 5, 1977, against the Attorney-General of the Republic and the respondents to this appeal, as defendants.

As already mentioned, on July 16, 1977, the appellants filed an *ex parte* application seeking an interim order restraining the defendants from using the lift trucks in question till the determination of the action. 10

On July 18, 1977, counsel for the appellants appeared to argue the said application but the Court adjourned it to August 8, 1977, and directed that notice of it had to be given to the respondents; it is clear that this direction was made in the exercise of the powers given to the Court by rule 8 (3) of Order 48 of the Civil Procedure Rules. 15

It does not appear from the record before us that counsel for the appellants objected to such a course; and, in any case, the said direction has not been, subsequently, challenged by means of any appropriate procedural step. 20

On August 8, 1977, the application for an interim order was not heard due to the funeral on that date of the late President of the Republic, Archbishop Makarios, and it was refixed for hearing on August 24, 1977; counsel were notified accordingly on August 12, 1977. 25

On that date there appeared before the Court counsel for the appellants and the respondents, but there was no appearance for the Attorney-General. Counsel for the respondents stated that he was opposing the application. 30

On that occasion counsel for the appellants stated that he had been informed by telephone by Mr. A. Frangos, a Senior Counsel of the Republic—who was handling the case on behalf of the Attorney-General—that he had not been given notice of the adjournment to August 24, 1977, and counsel for the appel- 35

lants undertook to notify him of the new date of the hearing of the application.

5 The Court, then, fixed the hearing of the application on October 1, 1977, and directed that the opposition should be filed twenty-five days before such hearing; it, also, directed that the Office of the Attorney-General should be notified, in writing, accordingly.

10 It does not appear from the record that counsel for the appellants raised any objection to such a course, nor has the order made by the Court, as above, been challenged thereafter in any way.

15 Then, as already stated, on August 30, 1977, an *ex parte* application was made by the appellants seeking an interim order restraining the defendants from using the lift trucks in question pending the determination of the application fixed for hearing on October 1, 1977; and against the dismissal of the said *ex parte* application the present appeal has been made on September 2, 1977.

20 On September 12, 1977, soon after the notice of appeal and the file of the proceedings were received in the Registry of the Supreme Court, this appeal was fixed for hearing on September 22, 1977, and the parties were notified in writing accordingly.

25 On September 21, 1977, counsel for the appellants filed in Court a notice by means of which the action was withdrawn in so far as it was against the Attorney-General, who thus ceased to be a party to the present appeal before it came up for hearing.

30 In the appealed from decision of August 31, 1977, by means of which there was dismissed the *ex parte* application of the appellants made on the previous day, a Judge of the District Court of Limassol took the view that, once an opportunity to be heard had been given to the defendants in the action (who, at the time, were both the present respondents to this appeal and the Attorney-General) it was unjust and not equitable to grant *ex parte*, and behind the back of the respondents, the interim order applied for, pending the hearing of the application which was fixed on October 1, 1977.

In the light of the history of the proceedings, to which we have referred already in this judgment, and of the conduct of the appellants, who, as already mentioned, have not, at any time, challenged any of the directions or orders previously made therein, and have not, as it is common ground, even attempted to bring forward the hearing of the application fixed on October 1, 1977, we have not been satisfied, by counsel for the appellants, that the learned trial Judge has exercised his relevant discretion wrongly in refusing to grant the interim order applied for on August 30, 1977, and we agree with him that in view of this it was not necessary for him to go further into the merits of the matter at that stage.

As at present advised, we leave open the question whether, in law, the trial Judge could have made, *ex parte*, an interim order pending the determination in future of an application for a similar interim order, which would be determined after hearing all parties concerned.

In the light of the foregoing this appeal is dismissed, but, in line with the course adopted by the trial Judge, we are not prepared to make an order as to the costs of the appeal against the appellants.

We would like to conclude by stating that it is expected that the application for an interim order in the action concerned, which is fixed on October 1, 1977, will be heard and determined as expeditiously as possible.

Appeal dismissed. No order as to costs.