1979 June 19

[TRIANTAFYLLIDES, P., STAVRINIDES, HADJIANASTASSIOU, A. LOIZOU, JJ.]

GRADE ONE SHIPPING LTD., OWNERS OF THE CYPRUS SHIP "CRIOS II",

Appellants-Plaintiffs,

v.

THE CARGO ON BOARD THE SHIP "CRIOS II",

Respondents-Defendants.

(*Civil Appeal No.* 5626).

Practice—Evidence—Admissibility—Documentary evidence sought to be produced during oral testimony of witness—Rejected on ground that it had already been held inadmissible when sought to be produced as exhibit *to an affidavit by same witness—Had it been accepted it might have influenced or affected Court's decision regarding credibility of said witness—Wrongly excluded.*

By a writ of summons issued on June 9, 1976 the appellants-plaintiffs claimed, *inter alia*, a declaration of the Court that they were entitled to a lien on the cargo on board the ship "CRIOS II", in respect of freight, demurrages, loss of earnings and employment of the ship and other expenses. On the same day the appellants, upon an *ex-parte* application supported by affidavit, obtained an order for the arrest of the cargo in question which was made returnable on July 1, 1976. On July 21, 1976, the respondents applied for an order cancelling the aforesaid order for the arrest of the cargo; and their application which was supported by an affidavit was opposed by the appellants. During the hearing of respondents' application the appellants applied for leave to produce two further affidavits—one by Mr. Lestos and one by Mr. Papadopoulos—which were sworn on September 28, 1976. The respondents opposed the application on the ground that it contained entirely new facts other than those relied upon in the opposition; and the Court sustained the objection by a ruling given on October 16, 1976. The appellants then called Mr. Lestos to give oral evidence and in so doing he sought

to produce certain documents that were attached as *exhibits* to his aforementioned affidavit of September 28, 1976 which had been held inadmissible. Upon an objection by the respondents to the production of these documents the Court ruled that the documents in question were inadmissible on the ground that they had already been rejected by a previous ruling of the Court. In the end the Court discharged the order of arrest as made on insufficient grounds.

Upon appeal by plaintiffs the sole issue for consideration was whether the trial Judge rightly excluded the documents which were sought to be produced by Mr. Lestos whilst giving oral evidence.

Held, that the documents which were excluded as being inadmissible, appear to be prima facie admissible; that they should not have been rejected because at an earlier stage of the proceedings they had been treated as being inadmissible when it was sought to have them produced in another way; and that inasmuch as the said documents might have influenced or affected favourably the decision of the trial Judge regarding the credibility of Mr. Lestos, had they been accepted in evidence, the order, subject-matter of this appeal should be set aside; and that, accordingly, the appeal must be allowed.

Appeal allowed.

Appeal.

Appeal by plaintiffs against the order* of a Judge of the Supreme Court of Cyprus (Malachtos, J.) dated the 29th October, 1976 (Admiralty Action No. 83/76) whereby an order of arrest of the defendant cargo, which was made on the 9th June, 1976, was discharged.

L. Papaphilippou, for the appellants-plaintiffs.

C. Erotocritou, for the respondent-defendant.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by Mr. Justice Hadjianastassiou.

HADJIANASTASSIOU J.: In this appeal the main question raised is whether the learned trial Judge rightly excluded the documents produced by Captain Lestos during his evidence before the trial Court. The facts, as shortly as possible, are

* Reported in (1976) 1 C.L.R. 350.

these: On June 9, 1976, the plaintiffs, by a writ of summons, claimed (a) a declaration of the Court that the plaintiffs are entitled to a lien on the cargo on board the ship " CRIOS II " in respect of freights, demurrages, for loss of earnings and employment of the ship and other expenses; (b) an order of the Court enforcing the plaintiffs' lien against the cargo on the ship " CRIOS II " by selling the cargo by public auction or private agreement; and (c) judgment for the equivalent of U.S. 286,095.79 for freight, demurrages and or damages and expenses in virtue of a Charterparty dated 26th November, 1975 and/or the same amount for breach of the terms and conditions of the said Charterparty and/or for fraud and/or misrepresentations and/or deceit and/or otherwise.

On the same date, the plaintiffs applied (a) for an order for the issue of a warrant of arrest of the cargo laden on board the ship " CRIOS II " and lying in Larnaca port; and (b) an order of the Court appointing Messrs. Francoudi & Stephanou Ltd., upon arrest of the cargo, to discharge the same from the ship " CRIOS II " and place it in a safe place or warehouse under the supervision and custody of the Marshal until further order of the Court.

In support of this application, an affidavit was sworn by a certain Jean Diakakis of Piraeus, who stated that the plaintiffs were a private company of limited liability registered in Cyprus under the Companies Law, Cap. 113 and the owners of the ship " CRIOS II " which was registered in Cyprus under the Cyprus flag. He further stated that on November 26, 1975, the plaintiffs, as owners of the ship " CRIOS II ", and a certain Italian firm known as Intermediterranean S.R.L. of Genova, entered into a voyage charter for the carriage of general cargo from Venice and Rijeka to Jeddah of Saudi Arabia for a lump-sum freight of U.S. 280,000 payable within 5 working days from the signing of Bills of Lading at each port by payment in owner's favour to Banca of Switzerland Geneva. It appears further that the demurrage was agreed at loading, at U.S. 2.250 per day.

By an addendum attached to *exhibit* A, the parties had agreed (a) that the loading ports of Venice and Rijeka be changed to Marina di Carrara and Pozzuoli, and for this deviation, the charterers agreed to pay to the plaintiffs, together with the

freight, U.S. 280,000 and an additional amount of U.S. 5,000; (b) that in addition to the loading ports referred to earlier, the ship " CRIOS II " was to call also to a third loading port of Rijeka and to a second discharging port, i.e. Jeddah of Saudi Arabia and Hodeidah of Yemen. In view of this change, the said charterers agreed to pay to the plaintiffs together with the freight, an additional amount of U.S. 50,000 plus the full amount of the disbursement, accounts at Rijeka and Hodeidah.

In paragraph 9 the affiant stated that in compliance with the charterparty the said ship loaded the cargo according to the instructions of the said charterers from Marina di Carrara Pozzuoli and Rijeka and has completed her voyage. She first called at Jeddah port where she registered her turn for berthing and thereafter went to Hodeidah where she discharged the cargo. Then she proceeded to Jeddah where she was waiting to berth and to obtain the payment of the freight and/or hiring, demurrages and expenses. However, in spite of the repeated demands by telexes and telephone calls, the charterers failed and/or refused to pay. The ship while on the roads had an accident by which she was damaged and as her turn to berth would delay for a few months, she sought the nearest safe port to unload her cargo and exercise lien on the cargo for unpaid freights and hiring and other amounts payable under the charterparty. Cyprus was considered the nearest and safest port.

On June 9, 1976, the learned trial Judge, having considered the *ex-parte* application, and the affidavit in support, as well as the other material before him, was satisfied that it was a proper case for the issue of the warrant of arrest of the cargo in question. Furthermore, the shipowning company was ordered to file a security bond in the sum of £7,000.—to be answerable in damages to the charterers or owners of the cargo in question, and the application was fixed on July 1, 1976, for the other side to show cause why the order should not be made final. On July 1, 1976, counsel having disputed the claim and the order for the arrest of the cargo, applied for an adjournment to file an application to set aside that order

On July 21, 1976, counsel for the defendants, applied for an order cancelling the order made on June 9, 1976, for the arrest

of the cargo in question and/or varying the said order by excluding therefrom the cargo described in para. 'B', and/or by increasing the security supplied by plaintiffs to an amount commensurate to the amount of damages which applicants might suffer. This application was supported by an affidavit sworn by Mr. Fr. Nicolaides, an advocate, who said that the shippers appearing in the attached application duly paid all freights for the carriage of the said cargo and obtained clean Bills of Lading marked "freight prepaid" evidencing the contract of carriage between the owners of " CRIOS II " and the shippers. The said bills of lading were forwarded to the consignees by the shippers who indorsed same to the ultimate receivers of the cargo after the latter paid full value of the said cargo and the freight; and the property in the said cargo did duly pass to the indorsees who were also the holders of the original Bills of Lading and are the applicants.

In paragraph 5 the affiant challenged the affidavit of Mr. Jean Diakakis as containing incorrect and untrue statements, and that it was misleading; and that it did not justify or support the issue of an order for the arrest of the said cargo because (a) the freight alleged to be due and owing to the plaintiffs, even if correct, which is denied, is due under the terms of the voyage charter dated November 26, 1975, between the plaintiffs and Intermediterranea of Genova (the charterers).

The charterers were neither the shippers nor the consignees of the cargo, nor the indorsees of the bills of lading. The shippers took clean bills of lading in which no mention of the voyage charter was made nor they incorporated in any way the terms of the voyage charter, and neither the shippers nor the consignees nor the indorsees of the bills of lading knew of or could have known of the existence of the said voyage charter. Upon the issue of the bills of lading, the affiant alleged that a new contract had in fact sprang up between the ship and the consignees upon the terms of the bills of lading and what can be claimed by the plaintiffs in the present case against cargo and in fact against the cargo owners who are the indorsees of the bills of lading is only what is due under the contracts shown by the bills of lading and that nothing is due under the contract shown by the bills of lading, and which are all marked "freight prepaid".

In addition the affiant stated that no action in rem lies once the plaintiffs knew that no freight is due to them by the owners of the said cargo, who are obviously persons other than the charterers; and that from the said bills of lading no lien whatsoever on the defendant cargo for any of the claims made by the plaintiffs in the above action existed and/or was preserved by the said bills of lading. The plaintiffs had never at any stage claimed any amount for freight and/or otherwise from the consignees and/or indorsees of the bills of lading. Even on the plaintiffs' own allegations contained in the affidavit of Jean Diakakis, the bills of lading marked "freight prepaid" were issued by the master in respect of the cargo in question whilst the plaintiffs' claims as clearly appear in the said affidavit, are solely against the charterers in accordance with the terms of the voyage charter.

On August 17, 1976, counsel for the respondents-plaintiffs opposed the application and maintained that there were facts and legal issues different from the application mentioned by the other side. The trial Court, having fixed the case on September 11, 1976, for hearing, ruled also that the opposition ought to be filed on or before September 4, 1976.

On September 14, 1976, the date fixed for the hearing of the application to show cause why the order of arrest should be cancelled, Mrs. Psillaki on behalf of the cargo owners, invited the Court to grant leave to file a supplementary affidavit which was sworn by Mr. Nicolaides on September 1, 1976. The affidavit, counsel stated, related solely to facts which came to their knowledge long time after the filing of the present application.

After further argument, Mr. Papaphilippou intervened to inform the Court that the affidavit of the 1st September has not been sent to them, but in any event, he was raising no objection to the production of that affidavit at any stage of the proceedings, but he wished to take time to see how this affidavit would affect this case. With that in mind, the Court granted leave to produce that affidavit, and Mrs. Psillaki made also a statement that she was not objecting to the filing of the supplementary affidavit by the other side dated September 10, 1976, reserving at the same time the right to file a supplementary affidavit.

Then, the Court made this ruling: "In view of the statement

of Mr. Papaphilippou that he would not object to any supplementary affidavits even in the course of this application, I think that there will be no difficulty in filing any supplementary affidavits"

During the hearing of the application Mr. Papaphilippou asked the Court to give him leave to produce two further affidavits, the affidavit of Mr. Lestos and Mr. Papadopoulos which were sworn and filed with the Registrar on September 28, 1976, but Mrs. Psillaki opposed that application because, as she put it, it contained entirely new facts than those relied upon in opposition. It even contained certain new facts from the affidavit of Mr. Simos Papadopoullos dated September 10, 1976.

The objection of Mrs. Psillaki was sustained by the ruling of the Court dated October 16, 1976. And then on October 18, 1976, counsel for the applicants sought to call Mr. D. Lestos to give evidence; counsel for the other side having objected the trial Court overruled the objection and said that under rule 114 of the Cyprus Admiralty Jurisdiction Order 1893, evidence shall be given either by affidavit or by oral examination or partly in one mode and partly in another. So, the respondents in this application are entitled to call a witness or witnesses. It is another matter whether the evidence to be given by the witness is admissible in evidence or not.

With that ruling in mind, Mr. Papaphilippou called Captain Demetrios E. Lestos, who told the Court that he became the Master of the ship " CRIOS II " as from December 8, 1975. That ship was at Elefsina, Greece, and proceeded to Italy to load general cargo and from there to take it to Saudi Arabia. He arrived at Marina di Carrara in Italy on December 15, 1975. The loading commenced on December 20, 1975, and was completed on December 31, 1975. When he arrived at Marina di Carrara on February 15, 1975, Mr. Donati of Tremar Agency came on board and gave him the notice of loading and the blank bills of lading of Great Pale Shipping Co. which he took with him from Pireaus. He gave those bills of lading in blank in order to be filled by Tremar, and to bring them back to him for signature. The loading was completed, but he was waiting for the bills of lading to be filled up in order to be signed. Mr. Donati returned and brought to him the bills of lading. He refused to accept them because they were not the bills of lading

which he gave to him, and Mr. Donati told him that one of his employees made a mistake in filling up the bills of lading. He kept only of those documents, the master's copy and agent's copy. The originals were taken back by Mr. Donati in order to replace them with those he gave to him. In fact, he said *exhibit* 'D' attached to the affidavit of Mr. Diakakis was then given to him who accepted and signed it in his presence. He added that if he saw the Master's copy and the agent's copy of those presented by Donati, which he rejected he would recognize them. He said that they were those attached to his affidavit of September 28, 1976. At that stage the witness was asked to produce them. Mrs. Psillaki objected to the production of these documents which were exhibits to an affidavit and, therefore from evidence which has already been held inadmissible. The Court in dealing with the objection of counsel said: "Objection sustained, the respondent at this stage tries to put in evidence which has already been rejected by a previous ruling of this Court. That evidence was contained in an affidavit sworn by the witness on the 28th September, 1976, to which the documents in question were attached as *exhibits.*"

When the witness continued with his evidence, he conceded that he had signed some original bills of lading at Pozzuoli on board the vessel, both for Marina di Carrara and for Pozzuoli and he had signed also the mate's receipts. In that particular case, he added, the mate's receipts were signed by him and by Mantsini of Navigo in his presence both for Marina di Carrara and for Pozzuoli. He signed and affixed the seal of the ship as well. He posted the master copies of the bills of lading as well as the receipts to the owners in Piraeus. He saw those documents again at the office of Mr. Papaphilippou on September 27, when he arrived from Nigeria.

There was a further objection by counsel for the other side that in view of the previous ruling of the Court that the documents attached to the affidavit of Mr. Lestos dated September 28, 1976, which affidavit was ruled inadmissible as evidence, the documents attached to that affidavit can not be put in evidence in another way. The Court, having heard further argument on this issue, reached this decision:- "The objection is sustained. The documents which are objected to be put in evidence are documents attached to the affidavit of the witness and which affidavit was, by the ruling of this Court, on the 16th

October, 1976, ruled as unacceptable in evidence. Furthermore, what transpired between the witness and Tremar is considered as res inter alios acta, and as such irrelevant to the issue in the present application. What transpired between the witness, the master of the ship and Tremar, cannot be admitted in evidence as binding the consignees and owners of the cargo."

Finally, Captain Lestos said that he left Puzzuoli on the 16th January, 1976, and that there was on board freight payable at destination which was covered by bills issued by him, Nos. 15 and 20. He notified the consignees of the goods covered by those bills on arrival for payment of the freight but they did not pay. All the other bills of lading signed by him, the freight was "freight pre–paid", but which was not paid. In explaining this position, he said that that is why he gave the letters to Tremar and Navigo, *exhibits* C & D attached to the affidavit of Diakakis.

Finally, on October 29, 1976, the learned Judge, having considered all the material put before him and the evidence of Captain Lestos (Master of " CRIOS II "), said:–

" I must say from now that for the purposes of this application, I discard the evidence of this witness, which is in direct contradiction with the facts contained in the affidavit of Jean Diakakis of 9.6.76 and the documents attached thereto, on which the Order for arrest of the cargo was granted. What strikes me peculiar in this case is the fact alleged by the witness that he did not have the master's copy of the bills of lading signed by him when he arrived at Larnaca port for the unloading of the cargo and he delivered to Frangoudhi and Stephanou a set of bills of lading which were issued by Tremar. This strengthens the allegation of the applicants that the story told by the witness as regards the issue of bills of lading at Marina di Carrara is an afterthought. Furthermore, it is also peculiar the fact that although the plaintiffs must have had knowledge of the fraud committed by the charterers since January, 1976, as it appears from the letter of the charterers dated 16.1.1976, yet, there is no evidence that they took any steps to secure their claim or to notify either the shippers or the consignees of the goods. However, for the purposes of this application, it makes no difference whether the bills of lading for the cargo loaded at Marina di Carrara were

signed by the master or Trimar as agents, as bills of lading may be signed by the master or the ship's agents.

It is clear from the affidavits in support of the application and the opposition that Trimar and Navigor were agents of the shipowners at Marina di Carrara and Pozzuoli respectively. It is also clear that the applicants are holders of bills of lading stamped 'freight prepaid' and the fact that the freight has been prepaid is verified by the letter of the charterers dated 16.1.76. There is no allegation that in the bills of lading any conditions of the charter party were incorporated."

Then the learned Judge, having raised the question whether the respondents had a maritime lien on the cargo, as against the applicants either at common law or ex contractu went on to add:-

" No doubt at common law the shipowners have a lien on the cargo for freight irrespective of any contract but such lien does not exist in cases of freight prepaid as in the present case. If the bill of lading represents that freight has been paid the shipowner cannot, as against the assignee of the goods who had given value for them on the faith of that representation, say afterwards that it has not been paid. He can neither sue the assignee for that freight nor set up a lien for it as against him. This proposition is supported by the case of *Howard and Others* v. *Tucker & Others*, [1831] 1 B & Ad. 712."

Finally, the learned Judge, having quoted a number of cases, concluded his judgment in these terms:-

" It is clear from the above that the respondents have no maritime lien on the cargo, the subject matter of the present proceedings, either at common law or ex contractu as the bills of lading were stamped 'freight prepaid' and no terms of the charter party were incorporated therein.

The Order of this Court issued on the 9th June, 1976, for the arrest of the said cargo, was, therefore, issued on insufficient grounds and is hereby discharged, after, of course, payment of all fees dues and charges incurred in respect of the arrest and custody thereof. Needless to say

that the discharge Order affects only the cargo under the bills of lading stamped 'freight prepaid'."

We think that, once the learned trial Judge rejected the argument of Mrs. Psyllaki that it was a fixed and well-known rule of practice and procedure that the facts relied upon must be fully set out in the relevant documents of both parties in an interlocutory application, and that no evidence could be accepted, the question is whether, once Lestos gave evidence, he was entitled to produce the documents he had already signed.

With respect, the documents which the learned Judge excluded as being inadmissible, when Captain Lestos sought to produce them in giving evidence, appear to us to be prima facie admissible and they should not have been rejected because at an earlier stage of these proceedings they had been treated as being inadmissible being produced in another way.

With this in mind, we think that inasmuch as the said documents, if they were accepted in evidence, might have influenced or affected favourably the decision of the learned Judge regarding the credibility of Captain Lestos, we have reached the conclusion that the order, the subject matter of this appeal, should be set aside for the reasons given earlier. As, however, such order has already taken effect since it was not stayed, we see no practical reason to order a re-trial of the matter regarding the warrant of arrest. It is, of course, to be understood that any party is at liberty to take any step or steps which may be deemed necessary for the protection of their interests pending the trial of the action.

As we have not pronounced on the other issues raised before us during the hearing of the appeal, and as such issues were decided by the trial Judge for the purpose of dealing with the matter of the warrant of arrest, we think that we should leave such issues open as issues to be determined at the trial of the action.

For the reasons we have given at length we would allow the appeal.

Appeal allowed, with costs in favour of the appellants.

Appeal allowed with costs.