

1981 February 16, 28

[DEMETRIADES, J.]

SHEEPSWERF BODEWES-GRUNO AND OTHERS,

Plaintiffs,

v.

THE SHIP "ALGAZERA",

Defendants.

*(Admiralty Actions Nos. 271/79
and 279/79-285/79).*

5 *Admiralty—Practice—Extension of time within which to comply
with an Order of the Court—Discretion of the Court—Principles
applicable—Applicant must show great diligence and not unneces-
sary delay—Order for sale of ship pendente lite—Stay of
execution of, upon certain conditions—Application for extension
of time within which to comply with such conditions—Delay
in applying—Ship put up for sale after filing of application—
But sale not completed because highest bid less than appraised
10 value—Condition of ship deteriorating and in constant danger
for herself and other vessels in the harbour—Application refused
—Whether notice of this application had to be given to the highest
bidder—Rules 204 and 225 of the Cyprus Admiralty Jurisdiction
Order, 1893.*

15 On September 23, 1980, on an application by the plaintiffs,
the Court ordered the sale of the defendant ship pendente lite;
and as a result of such order the Marshal fixed the sale of the
ship by public auction for the 27th October, 1980. On
November 19, 1980 the Court on an application by the defen-
dants granted a stay of execution of the order of sale on condition
20 that they would furnish security for the sum of £100,000 by
the 4th December, 1980, otherwise the Marshal could proceed
with the sale. The defendants did not comply with the above

condition and on December 10, 1980, they filed an application* ("the application for extension") for an order extending the time within which they should comply with the conditions imposed by the order of the Court dated November 19, 1980.

Following an application to this Court for directions the Marshal was, on December 13, 1980, ordered to proceed with the sale of the ship and take all necessary steps to that effect. As a result the vessel was put up for sale by public auction which took place on December 29, 1980. During the auction the highest bidder was a certain Mr. Mombayed ("the highest bidder") but his bid, which was \$350,000, fell much lower than the appraised value of the vessel which was \$700,000. Under the conditions of sale notice was given to bidders that if the highest bid was lower than the appraised value of the ship, such bid had to be approved by the Court in the exercise of its discretion.

On December 12, 1980 the Marshal reported to the Court that the defendant ship started being swept by strong winds with the risk of being crashed and that it was necessary for the vessel to be removed as her anchors were not strong enough to keep her safely. Thereupon the Court directed, in the presence of the parties, that the plaintiffs should lodge in Court the sum of C£300 so that the Marshal may be enabled to secure the safety of the ship and that the Marshal should proceed with the sale of the ship which he did on December 29, 1980.

In the course of the hearing of the application for extension counsel for the plaintiff submitted** that notice of this application should be given to the highest bidder in the public auction so as to participate in the proceedings if he so wishes.

Held, (1) On the question whether notice of the application should be given to the highest bidder:

* This application was, *inter alia*, based on rule 225 of the Cyprus Admiralty Jurisdiction Order 1893 which reads as follows:

"The Court or Judge may, on the application of either party, and if it shall seem fit without notice to any other party, by order direct that the time prescribed by these Rules or forms or by any order made under them for doing any act or taking any proceedings, be enlarged or abridged, upon such terms as to the Court or Judge shall seem fit; and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time prescribed".

** The submission was made in pursuance of r. 204 of the Cyprus Admiralty Jurisdiction Order, 1893 which is quoted at pp. 166-167 *post*.

That under the conditions of sale if the highest bid was lower than the appraised value of the ship such bid had to be approved by the Court in the exercise of its discretion; that in view of the appraised value of the ship which was \$ 700.000 and the highest bid which was \$ 350.000 such bid could not be approved by the Court unless all parties concerned consented; that, also, in view of the fact that the application for extension was filed on the 10th December, 1980, that is before the auction was fixed and took place, the highest bidder cannot be held to be an interested person and have an interest in the proceedings; that, therefore, he cannot be considered as a person who can have a say in these proceedings; accordingly the submission of Counsel for the plaintiffs must fail.

Held, (II) on the application for extension:

That the principles on which this application has to be considered cannot be different from those applicable to the rules of practice dealing with extension of time to file appeals, pleadings etc.; that under these principles the Court has a discretion to be exercised after considering the particular facts and circumstances of each individual case; that the person who applies for extension of time within which to comply with an order must show great diligence, and not unnecessary delay, in doing so (pp. 174-75 *post*); that as the sale of the ship *pendente lite* was ordered from the 23rd September, 1980; that as, *inter alia*, all following steps taken by the defendants were taken in time; and that as the condition of the ship is deteriorating and in constant danger for herself and other vessels in the harbour this is not a proper case in which this Court will exercise its discretion in favour of the applicants-defendants and extend the period within which they had to comply with the order of the 19th November, 1980; accordingly the application must fail.

Application dismissed.

Cases referred to:

- Turkish Co-Operative Carob Marketing Society Ltd. v. Kiamil and Another* (1973) 1 C.L.R. 1 at p. 8;
- Revici v. Prentice Hall Incorporated and Others* [1969] 1 All E.R. 772 at p. 774;
- Atwood v. Chichester* [1878] 2 Q.B. 722;
- Schafer v. Blyth* [1920] 3 K.B. 140 at p. 143.

Application.

Application by the defendants for an order extending the time within which they had to comply with the conditions imposed by an order of the Court, dated 19th November, 1980.

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L. Papaphilippou, for the plaintiffs in Action No. 271/79.

N. Chr. Anastasiades, for the plaintiffs in Actions Nos. 179/79–285/79.

E. Montantos with *D. HadjiChambis* for the defendant ship.

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Cur. adv. vult.

1981, February 16.

DEMETRIADES J. read the following ruling. During the hearing of an application by the defendants–applicants, by which they pray for—

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“(1) An order extending the time by which they should comply with the conditions imposed by the order of this Court dated 19th November, 1980, until the 31st December, 1980, or until 7 days from the date of an order granting such extension, whichever is the latest,

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(2) any other relief that the Court may deem proper,

(3) costs,”

counsel appearing on behalf of the plaintiffs–respondents made the following submission which I shall quote verbatim from the record of the proceedings:

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“I believe that it is a proceeding or an application in which, according to the Cyprus Admiralty Jurisdiction Order (1893), Rule 204, there is a person affected already by the public auction which took place, and I believe that the present application cannot proceed unless the said person is served and given notice. With all due respect, I should like to be allowed to read rule 204. Rule 204 reads: ‘Except where by these Rules it is otherwise provided, no order affecting the interests of any person other than the person on whose application the order is made,

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shall be made unless notice of the application shall have been given to all other persons interested, except in the case hereinafter provided'.

5 A particular bidder, Mr. Mombayed was the highest bidder during the public auction and his interest, I am afraid may be affected or otherwise exposed, if he is not given notice of the present application so as to participate in the proceedings, if he so wishes".

10 No authorities were cited in support of the above submission, nor have I been able to trace any authority which could give me guidance to decide on such submission.

15 The circumstances which gave rise to the submission of counsel for the plaintiffs-respondents, were these. On the 23rd September, 1980, on an application by the plaintiffs, which was opposed by the defendants and tried, I granted an order for the sale of the defendant ship "Algazera" pendente lite. As a result of my order the Marshal fixed the sale of the ship by public auction for the 27th October, 1980.

20 On the 24th October, 1980, the defendants filed an *ex-parte* application by which they prayed for a provisional stay of execution of the said order till the 31st October, 1980. This provisional stay was granted on condition that an application for stay of execution be made by summons and served on all parties concerned, so that they could participate in the proceedings. In compliance with the said directions, the defendants
25 filed and served on all the plaintiffs in the actions, in which the defendant ship is involved, applications by summons praying for the stay of execution of my order of the 23rd September, 1980, for the sale of the ship pendente lite.

30 These applications were opposed by the plaintiffs and after hearing the parties I granted, on the 19th November, 1980, a stay on the following terms:

35 "..... I direct that the stay of execution shall not be enforced unless the applicants furnish a security bond in the form of a bank guarantee for the sum of £100,000.- (One Hundred Thousand Pounds) to cover the claim of the plaintiffs in the present action, and/or insure the vessel

for the same amount in favour of the Marshal against all risks until the final determination of the appeal.

I further direct that the applicants, in view of their delay in filing the present application, pay to the Marshal all costs that he has incurred for advertising the sale of the vessel.

The applicants-defendants have to comply with the above conditions on or before the 4th December, 1980, otherwise the Marshal to proceed with the sale".

The defendants did not comply with the terms imposed but, as it appears from affidavits filed by them and from the *exhibits* attached thereto, they, on the 5th December, 1980, applied to the Appeal Court for a stay of execution of my order of the 23rd September, 1980. This application was, on the 8th December, 1980, dismissed after a hearing and on the 10th December, 1980, the defendants filed the present application which was opposed by the plaintiffs and was fixed for hearing on the 5th January, 1981. On that day counsel for the plaintiffs made the above quoted submission and the Court adjourned the hearing in order to give a ruling.

The application of the defendants is based on facts which are set out in two affidavits. The first affidavit, the one that accompanies the application of the defendants, is sworn by Miss Panayi who states that following the order of the Court dated 19th November, 1980, the defendants tried to raise the necessary finance in order to comply with the conditions imposed by the Court, i.e. to pay the expenses of the Marshal and insure the vessel, but their efforts had not as yet been successful.

The second affidavit, a supplementary one, was later sworn by Mr. E. Montanics, the leading counsel appearing for the defendants. In this affidavit it is stated that on information he had received from the London solicitor of the defendants Mr. Peter McHale, Cerise Maritime S.A., the defendants, as owners of the ship "Algazera", had been able to find the finance necessary to comply with the terms imposed by the Court.

As it appears from the file of the case, the Marshal, after an application to this Court for directions, was, on the 13th December, 1980, ordered, in the presence of all parties in the

actions in which "Algazera" is involved, to proceed with the sale of the ship and take all necessary steps to that effect. As a result of this order, the vessel was put up for sale by public auction, which took place on the 29th December, 1980.

5 During these proceedings, there was no complaint by any party that the Marshal had failed to take all steps prerequisite for the sale by auction.

As it appears from the report of the Marshal, Mr. Mombayed was, during the auction, the highest bidder, but his bid fell
10 much lower than the appraised value of the vessel. Under the conditions of sale, notice was given to bidders that if the highest bid was lower than the appraised value of the ship, such bid had to be approved by the Court in the exercise of its discretion. The approval for the bid of Mr. Mombayed
15 was never asked for. In view of the appraised value of the ship, which was \$700,000 and the highest bid which was \$350,000, such bid could not, in my view, be approved unless all parties concerned consented.

In the light of all the above and in view of the fact that the
20 present application was filed on the 10th December, 1980, that is before the auction was fixed and took place, I cannot see how Mr. Mombayed can be held to be an interested person or have an interest in these proceedings. He cannot, therefore, be considered as a person who can have a say in these proceedings.
25 Therefore, the submission of counsel for the respondents fails.

In view of my ruling, I shall have to give a date for addresses by counsel on whether the application of the defendants should be granted.

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Order accordingly.

1981, February 28.

DEMETRIADES J. read the following ruling. The circumstances that gave rise to the present proceedings are the following: On the 23rd September, 1980, on an application by the plaintiffs
35 which was opposed by the defendants, I granted, after a hearing, an order for the sale of the defendant ship "ALGAZERA" pendente lite. As a result of my order, the Marshal fixed

the sale of the ship by public auction for the 27th October, 1980. On the 24th October, 1980, the defendants filed an *ex-parte* application by which they prayed for a provisional stay of execution of the said order till the 31st October, 1980. This provisional stay was granted on condition that an application for stay of execution be made by summons and served on all parties concerned, so that they could participate in the proceedings. The defendants, in compliance with the said directions, filed and served on all the plaintiffs in the actions in which the defendant ship is involved, applications by summons praying for the stay of execution of my order of the 23rd September, 1980.

These applications were opposed by the plaintiffs and on the 19th November, 1980, after hearing the parties, I granted a stay on condition that the applicants would furnish by the 4th December, 1980, security, for the sum of C£100,000.-, in the form of a bank guarantee to cover the claim of the plaintiffs in this action and/or insure the vessel against all risks for the same amount in favour of the Marshal, until the final determination of the appeal. I further directed that the applicants-defendants, in view of their delay in filing that application, would pay to the Marshal all expenses incurred in advertising the sale of the vessel. The defendants-applicants had to comply with the above terms not later than the 4th December, 1980, otherwise the Marshal could proceed with the sale of the ship

The defendants did not, till the 4th December, 1980, comply with the said conditions, but as it appears from affidavits filed by the plaintiffs and the *exhibits* attached thereto, they, on the 5th December, 1980, applied to the Court of Appeal for a stay of execution of my order of the 23rd September, 1980. This application was, on the 8th December, 1980, after a hearing, dismissed.

On the 10th December, 1980, the defendants filed the present application by which they pray for-

- (1) An order extending the time by which they should comply with the conditions imposed by the order of this Court, dated 19th November, 1980, until the 31st December 1980, or until 7 days from the day

of an order granting such extension, whichever is the latest.

- (2) Any other relief that the Court may deem proper.
- (3) Costs.

5 The facts relied upon in support of the application are set out in an affidavit sworn by Miss Persefoni Panayi, dated 10th December, 1980, an advocate in the firm of Messrs. Montanios & Montanios, counsel for the defendants, and a supplementary one sworn on the 3rd January, 1981 by Mr. Eleftherios Montanios, leading counsel appearing for the defendants. On the 10 21st February, 1981, that is during the hearing of the application, Mr. E. Montanios, who had been given notice by the plaintiffs-respondents that he had to avail himself for cross-examination, chose not to rely on his affidavit, so he was not asked to take 15 the stand.

As the application of the defendants was opposed by the plaintiffs, it was adjourned for hearing for the 5th January, 1981.

On the 12th December, the Registrar of the Court brought 20 to my knowledge a report by the Marshal that on the 10th December, 1980 "Algazera" started being swept by strong winds towards the south break-water of the Limassol Port with the risk of being crashed on the break-water, that her anchors were, as a result, intermingled with the anchors of 25 another vessel, and that after efforts it was possible to secure it partly. The Marshal further informed the Court that it was necessary for the vessel to be removed as her anchors were not strong enough to keep the ship safely anchored and that he could not guarantee its safety, and for this reason he applied 30 for directions.

As the matter appeared to be of very urgent nature, I directed the Registrar to serve copies of the Marshal's report on all parties concerned and inform them that I was to hear arguments by them on its contents if they so wished. On the following 35 day, that is on the 13th December, 1980, all counsel representing the parties involved in the actions against the ship "Algazera", appeared before me and argued their case. The Marshal, who was present, was not asked by anyone to step on the witness box to be questioned or cross-examined on his report. After

considering the arguments advanced and the report of the Marshal, I gave directions that—

- (a) the plaintiffs in Action No. 271/79 should lodge in Court the sum of C£300.—so that the Marshal may be enabled to secure the safety of the ship, and 5
- (b) the Marshal should proceed with the sale of the ship after taking all necessary steps to that effect.

As a result of these directions the Marshal, on the 29th December, 1980, put up the ship for sale by public auction, but before the sale took place, he advertised same in six local daily newspapers and two newspapers published in Greece. 10

The defendants—applicants in these proceedings complain that the Marshal did not put any notice of the sale by auction in the Lloyds list—a publication printed in England—and in newspapers published in the Persian Gulf area. 15

The defendants—applicants alleged that they have made efforts to comply with my order of the 19th November, 1980; that they were unable to do so till the 4th December, 1980, because they could not, by then, raise the necessary finance in order to comply with the conditions imposed by the Court, and that as a result of this inability of theirs they took the steps before the Court of Appeal, but that when their application for stay of execution before that Court was dismissed, they were forced to take the present steps. 20

At the beginning of the hearing of this application, on the 5th January, 1981, counsel appearing for the plaintiffs—respondents raised an objection that the defendants—applicants had not complied with rule 204 of the Cyprus Admiralty Jurisdiction Order 1893, which provides that no order affecting the interests of a person other than the person on whose application the order is made, shall be made unless notice of the application shall have been given to all other persons interested, in that they had failed to serve copy of their application on the highest bidder of the public auction for the sale of the ship, which had taken place on the 29th December, 1980. In view of the objection taken, I had to adjourn the further hearing of the application. The ruling* on the objection taken by counsel for the 25 30 35

* The ruling in reported at p. 166 *ante*.

plaintiffs-respondents was delivered on the 16th February, 1981.

On the 12th February, 1981, during the hearing of an application before me filed by the Marshal for directions as to whether
5 to approve the sale of the ship by private sale for \$550,000, counsel for the defendants produced in Court an insurance policy cover note. This cover note appears, on its face, to be valid from the 14th January, 1981, till the 13th April, 1981, and purports to cover the vessel for \$750,000. The conditions
10 of insurance appearing on this cover note read as follows:-

"CONDITIONS: Institute port risks clauses, as amended on 1st October, 1971, whilst the vessel is laid up at the new Limassol Port, subject to an excess of 5,000 Dollars (Five Thousand U.S. Dollars) each and every loss not
15 applicable in case of total or constructive total loss: jurisdiction clause.

WARRANTIES: It is hereby understood and agreed that:

- (a) the vessel is laid-up in the Limassol new Port and not under repair.
- 20 (b) There is no cargo aboard.
- (c) A representative of the Marshal of the Naval Court to visit the vessel daily.
- (d) Claims are made payable to the Naval Court, Cyprus".

On the 7th January, 1981, the hearing of the action started
25 before me and continued on the 8th, 9th 10th and 12th January. Mr. Abuzeid, who from the pleadings and the evidence before me appears to be one of the original purchasers of the vessel, gave evidence and said that he and members of his family own 60% of the shares of Cerise Maritime S.A. who, according
30 to the affidavit sworn by Mr. Eleftherios Montanios dated 3rd January, 1981, are the defendants owners of "Algazera". Mr. Abuzeid presented himself to be a person possessing considerable property and vast amounts of money in cash. When
35 cross-examined, he said that the nominal share capital of Cerise Maritime S.A. is St. £750,000.- which the shareholders paid up and which sum is privately in his possession.

The application of the defendants is based on rules 203, 204, 225 and 237 of the Cyprus Admiralty Jurisdiction Order 1893, and on Order 59 rules 13 and 14, of the Rules of the Supreme Court in England 1965.

Rule 203 prescribes the procedure by which applications for an order in admiralty actions can be made. Rule 204 makes reference to the persons to whom notice of an application should be given. Rule 225 deals with the right of the Court to extend the time, and rule 237 provides that in all cases not provided by the Rules, the practice of the Admiralty Division of the High Court of Justice in England, so far as the same shall appear to be applicable, shall be followed.

Rules 13 & 14 of Order 59 of the Rules of the Supreme Court in England, 1965, have nothing to do with the present case. As it appears from the Annual Practice, 1965, rule 13 makes provision for the consolidation of applications and rule 14 deals with applications for Habeas Corpus. In the Annual Practice of 1967 it is to be noted that rule 13 of Order 59 deals with stay of execution or of proceedings pending appeal and rule 14 of the same Order with applications to the Court of Appeal. So, I take it that the only rule on which the defendants-applicants can really rely upon is rule 225. This rule reads:-

"The Court or Judge may, on the application of either party, and if it shall seem fit without notice to any other party, by order direct that the time prescribed by these Rules or forms or by any order made under them for doing any act or taking any proceedings, be enlarged or abridged, upon such terms as to the Court or Judge shall seem fit; and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time prescribed".

There have been no precedent dealing with rule 225, but in view of the wording of the rule, I take it that the principles governing the application of this rule cannot be different from those applicable to the rules of practice dealing with extension of time to file appeals, pleadings, setting aside of judgments etc. A guidance as to what are the principles governing this type of applications can be found in a number of English and Cyprus cases.

In other words, these principles are that the Court has a discretion to extend the time, which discretion has to be exercised after considering the particular facts and circumstances of each individual case. (See *The Turkish Co-Operative Carob Marketing Society Ltd. v. Kiamil and another*, (1973) 1 C.L.R. 1. where it is stated (at p. 8) that the person who comes to ask the Court to extend the time within which he has to comply with an order must show great diligence, and not unnecessary delay, in doing so; that non-compliance with the Rules must be explained (*Revici v. Prentice Hall Incorporated and others*, [1969] 1 All E.R. 772, 774); that injury caused by the delay may be compensated for by payment of costs (*Atwood v. Chichester*, [1878] 3 Q.B. 722, 723) and that the discretion must be exercised with a view to the avoidance of injustice (*Schafer v. Blyth*, [1920] 3 K.B. 140, 143).

In the present case it should be examined whether irreparable damage or injustice will be done to the applicants-defendants, without any fault on their own, if the time fixed for them to comply with the terms imposed on the 19th November, 1980, is not enlarged. Although they have stated that they finally found the finance to insure the vessel, they, originally, produced an insurance cover note which was valid for three months, that is up to the 13th April, 1981, and which does not state that the ship is covered against all risks. It is true that on the day prior to the continuation of the hearing, and, also, the day of the hearing, they filed two affidavits and appended on the first the general terms under which their insurance was prepared to cover the vessel, and on the second another cover note that purported to insure the vessel for a year, but in which it is stated that the premium for the year was payable quarterly. I did not accept these two affidavits in evidence, as I considered that they had been filed too late in the day and that it was a last minute attempt to protract the proceedings.

Considering the legal position as I found it to be, that the sale of the ship *pendente lite* was ordered from the 23rd September, 1980, and that all following steps to which I have referred at length earlier in my ruling were not taken in time, that despite the desperate attempts of the Marshal to find funds to keep the vessel safe, the President of Cerise Maritime, the defendants owners, had in his possession huge amounts in

cash which belonged to the defendants, and that, as it appears from the various reports of the Marshal, which are in the file of the action, and his evidence in the number of proceedings before me in the action, the condition of the ship is deteriorating and in constant danger for herself and other vessels in the harbour, I feel that this is not a proper case in which to exercise my discretion in favour of the applicants-defendants and extend the period within which they had to comply with the order of the 19th November, 1980.

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Application dismissed.

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