1982 October 19

[SAVVIDES, J.]

ANTHIMOS DEMETRIOU

Plaintiff,

v.

LLOYD'S UNDERWRITERS AND 20 OTHERS,

Defendants,

(Admiralty Action No. 1/80).

Admiralty—Practice—Appearance by counsel—Entered by mistake, without authority through a misunderstanding—Can be withdrawn by leave of the Court—Order 12 *Rule* 1 *of the English Rules of the Supreme Court* 1979, *applicable by virtue of rule* 237 *of the Cyprus Admiralty Jurisdiction Order* 1893.

This was an application by counsel for the defendants to withdraw the conditional appearance they have entered on behalf of some of the defendants on the ground that such appearance was entered by a mistake. After filing a conditional appearance on behalf of all defendants counsel applied for an order to set aside the issue and service of the writ of summons; but prior to the hearing of their application they discovered that by entering appearance on behalf of any defendants, other than defendants No. 21 they acted without authority and that it was as a result of a mistake due to a misunderstanding that they entered such appearance. Hence this application.

Held, that when applicants were retained to defend this case, it was only in respect of defendants No. 21 that they were given authority to do so but by a misunderstanding the applicants entered a conditional appearance and applied to set aside the notice of the writ of summons and service thereof on behalf of all defendants; that they acted so under a bona fide mistake that their authority extended to all defendants, whereas they did not have such authority from the other defendants; that an appearance entered by mistake, without authority, may, before any subsequent step has been taken, be withdrawn by the defend-

ant by leave of the Court; that therefore the application should be granted and an order setting aside the conditional appearance entered by applicants on behalf of defendants (1), (8) and (17), as well as any subsequent proceedings taken by the applicants on behalf of such defendants will be made with no order as to costs (see Order 12 rule 1 in the Annual Practice 1979 applicable by virtue of Ord. 237 of the Cyprus Admiralty Jurisdiction Order 1893).

Application granted.

Cases referred to:

Marsh v. *Joseph* [1897] 1 Ch. 245;

Gold Reefs of Western Australia Ltd. v. *Dawson* [1897] 1 Ch. 115 at p. 118;

Somportex Ltd. v. *Philadelphia Chewing Gum Corporation* [1968] 3 All E.R. 26;

Yonge v. *Toynbee* [1910] 1 K.B. 215;

A.E. Pantelides, Advocate v. *Pafiti and Another* (1967) 1 C.L.R. 281.

Application.

Application by defendants' counsel for an order granting them leave to withdraw the conditional appearance on behalf of all defendants with the exception of defendants 3, 14, 16, 20 and 21 and also all subsequent proceedings taken on their behalf.

D. Hadjichambis with *P. Panayi* (*Miss*), for the applicants.

H. Solomonides for L. Papaphilippou, for the respondents.

Cur. adv. vult.

SAVVIDES J. read the following decision. This is an application by counsel for the defendants for an order granting them leave to withdraw the conditional appearance entered on behalf of all defendants, with the exception of defendants 3, 14, 16, 20 and 21, and also all subsequent proceedings taken on behalf of them.

Plaintiff's claim against the defendants in this action is for the equivalent in Cyprus Pounds of U.S. dollars 200,000 for loss under a policy or cover note upon the ship "KIMON", ex "DORAMI", issued on or about the 6th January, 1978. Defendants 1 are sued as insurers and the remaining defendants as re-insurers underwriters.

On the 3rd January, 1980 counsel for plaintiff applied for leave to serve notice of the writ of summons on all the defendants outside the jurisdiction of this Court by double-registered letter addressed to Constant & Constant, solicitors in London, who, as alleged by plaintiff in his affidavit dated the 3rd January, 1980 accompanying the application, were authorised by the defendants to accept service of the writ of summons. In support of his allegation the plaintiff filed together with his affidavit, a photocopy of a letter sent to plaintiff's advocate by Stewart Wrightson (Marine) Limited, International Insurance Brokers, dated the 21st November, 1979 which is Annex "E" to the said affidavit. The contents of such letter read as follows:

"Dear Sirs,

Re: *m.v.* '*Kimon*'

We would refer to your letter of the 4th October, 1979 to Messrs. Nasco Insurers Cyprus Ltd. and would advise that they passed it to us for our advice.

We have, now, examined the matter and find that as you are no doubt aware, the lead Underwriter has referred the claim to Messrs. Constant & Constant and we understand they are acting on his behalf and if Owners wish to commence legal proceedings, Messrs. Constant & Constant will be in a position to accept service of suit on the leading Underwriter's behalf.

From previous telexes, we note that you have been in touch with Messrs. Constant & Constant so, presumably, you are fully aware of the latest position. We would mention we have advised Nasco that should they be entered in legal proceedings they should instruct Solicitors to attend the Court to show that they are only Brokers and that liability for the claim, if any, is on Underwriters.

We hope this now clarifies the position.

Yours faithfully,

(Sgd) Stewart Wrightson (Marine) Ltd."

Leave for substituted service was granted and such service was effected accordingly on the said solicitors in England who instructed Messrs. Montanios & Montanios, the applicants in this application, to enter a conditional appearance and take

steps to have the notice of the writ of summons and service thereof, set aside. The applicants in compliance with such instructions entered a conditional appearance on the 3rd March, 1980 for all defendants and on the 31st March, 1980, they filed an application praying for an order to set aside the issue and service of the notice of the writ of summons on the defendants and/or declaring that the notice of the writ of summons had not been duly served on them. Such application was opposed and a date was given for the hearing of such application. Prior to the hearing of such application the applicants filed the present application alleging that by entering appearance on behalf of any defendants other than defendants No. 21 they acted without authority and that it was as a result of a mistake due to misunderstanding that they entered appearance for all defendants.

The facts relied upon in support of the application as set out in an affidavit dated the 26th August, 1980, sworn by Persefoni Panayi, an advocate associated with the firm of applicants, are briefly as follows:

The applicants were instructed to act in this action by a firm of solicitors in England, namely, Constant & Constant. The said solicitors had authority and intended to act only on behalf of defendants 21 and had no authority to act on behalf of any of the other defendants with whom they had never communicated and who had no knowledge of these proceedings. When they instructed Messrs. Montanios & Montanios to enter a conditional appearance in this action, it was the intention of the said solicitors in England to instruct them to act only on behalf of defendants 21 but as the instructions were communicated by telephone they were misunderstood by Messrs. Montanios & Montanios as instructions to represent all defendants and not only defendants 21 and for this reason they acted accordingly and entered a conditional appearance for all defendants and subsequently applied on their behalf to have the writ of summons and service thereof, set aside. The said mistake was discovered shortly before the hearing of the application to have the writ of summons and service thereof set aside and they applied for an adjournment of the hearing of such application and filed the present application.

Several documents, material to these proceedings, were

attached to a supplementary affidavit sworn by the same affiant in support of the present application. Amongst such documents, is a telex dated 28.2.1980 and a letter dated 24th April, 1980, both of which were sent to the applicants by Constant & Constant, the instructing solicitors in England. The contents of the telex dated 28.2.80 (marked 'A'), read as follows:

"*SUBJECT:* 'KIMON'.

Thanks your telexes of 26.2.80 and 27.2.80. Contract of Insurance was sent to you under cover of our letter of 7.2.80 and referred to as enclosure No. 2 in the letter. Please advise soonest if not received by you. You will see that the contract is expressed to be made in London, through London brokers, Stewart Wrightson. Its breach occurred in the Lebanon, not Cyprus, there is however no express provision that it is governed by English Law.

Payment by the Underwriters would be to Stewart Wrightson in London.

The policy of insurance and the 'slip' attached to it are only in respect of the Dolphin Insurance Co. Ltd. who are the leading Underwriter, there are slips in existence for the other Underwriters but we do not have these in our possession.

Please note that we received the letter and writ of L. Papaphilippou & Co. on the 6.2.80 but as we have indicated we do not have instructions to accept service."

And the contents of the letter dated 24th April, 1980 (marked 'B') read as follows:

"*Re: 'Kimon'.*

Thank you for your telex of the 15th April, 1980. We enclose herewith original Policy of Insurance on the above vessel signed on behalf of Dolphin Insurance Company Limited. You will appreciate that we do not act for the other Underwriters and we are only able to obtain documents from our own Clients, Dolphin Insurance Company Limited. We trust therefore that this policy will be sufficient for your purposes. Please confirm by telex."

The applicants, after the filing of this application, tried to communicate, through the instructing solicitors in England

with any of the defendants whom they could trace, and as a result, the majority of them retained the applicants to act on their behalf in this admiralty action, whereas, defendants No. 19 retained another advocate. In consequence thereof, the present application and the prayer sought was limited only to defendants Nos 1, 8 and 17 from whom the applicants had no communication and no instructions to appear on their behalf.

The present application was opposed by plaintiff and the facts relied upon in opposition are, briefly, as follows:

There were contradictions between the two affidavits sworn by Persefoni Panayi in that she is not correct in saying in her first affidavit that the instructions were given over the phone, whereas, by her second affidavit, she produced certain documents which could not be given by phone but were sent by mail and it was unlikely that such documents were sent without any written instructions. That the application could not be made by Montanios & Montanios who have no locus standi in the present proceedings and that their allegation is frivolous and vexatious being unwarranted in law and in fact and its sole purpose was to delay or protract the present proceedings. Finally, that Constant & Constant, the instructing solicitors were at all material times acting for all underwriters, a fact that transpires from the correspondence already in the file of the Court.

At the hearing of the application, counsel for respondent-plaintiff adduced in evidence as exhibit 1, a letter dated 15th October, 1979, sent to him by Constant & Constant, the solicitors who instructed Messrs. Montanios & Montanios to act in this action, in support of respondent's allegation that counsel for defendants had authority to act for all defendants in this action. Such letter, reads as follows:

"Messrs. L. Papaphilippou & Co.,
1, C. Pantelides Avenue,
P.O.Box 2313,
Nicosia,
Cyprus.

WITHOUT PREJUDICE

Dear Sirs,

Re: M.V. 'KIMON'.

Thank you for your letter of the 25th August, 1979.

We note that your Client appears to be claiming that the vessel was sunk on the 16th July, 1978 and you attach three short inconclusive statements in support of your claim. It is normal for a total loss claim for all of the crew to be made available immediately so that statements can be taken from them and we would suggest that if you seriously wish to pursue this matter, you put this in hand right away, whereupon we shall discuss the matter further with our Clients.

Yours faithfully,

(Sgd) Constant & Constant."

The questions which pose for consideration in the present application are:

(a) Whether the applicants had been authorised by the defendants mentioned in the application, to appear on their behalf in these proceedings and take the steps taken by them, or, whether in so doing, the applicants acted by mistake.

(b) Whether the applicants, who entered a conditional appearance on behalf of such defendants, if they acted by mistake and without any authority from the defendants, can apply for an order to have such appearance and any subsequent proceedings set aside.

It is common ground that the service of the notice of the writ of summons in this action was effected on the Solicitors in England, Constant & Constant by double registered letter after leave was granted by the Court on the strength of an affidavit sworn by the plaintiff that the said solicitors were acting on behalf of all defendants and had authority to accept service for all the defendants.

From the allegations contained in the affidavits and the various documents filed by the parties, I can make the following findings:

The plaintiff negotiated the collective Insurance Policy through Stewart Wrightson (Marine) Limited who on their behalf and as brokers for all the defendants in this action, accepted such policy and as a result issued a collective Policy for the ship "KIMON" ex "DORAMI". The plaintiff all along

was aware that he was negotiating such policy through the agents of Stewart Wrightson (Marine) Limited in Cyprus, namely, Nasco Insurers Cyprus Ltd. This is clear from the correspondence between the plaintiff's counsel and Stewart Wrightson (Marine) Limited as it appears from the contents of the letter dated 21st November, 1979 which is Annex "E" to the affidavit of the plaintiff dated 3rd January, 1980, the full contents of which have been mentioned earlier in this judgment. The contents of such letter speak by themselves. Stewart Wrightson (Marine) Limited confirmed by such letter that Messrs. Constant & Constant, the English solicitors, were acting on behalf of the leading underwriter, and that they would be in a position to accept service of suit on the leading underwriter's behalf, a fact which was brought to the knowledge of the plaintiff. Furthermore, that plaintiff's counsel was in touch by telexes and letters with Messrs. Constant & Constant. One of such letters, is the letter dated 15th October, 1979 written without prejudice, addressed to plaintiff's counsel (exhibit 1 in these proceedings) and to the contents of which reference has already been made earlier in this judgment.

As the whole correspondence and telexes between plaintiff's counsel and Messrs. Constant & Constant, to which reference is made in the various exhibits before me, has not been produced, I must try and find out from the material before me, as to whether Messrs. Constant & Constant were representing all the defendants in this action or only some of them. An important piece of evidence in this respect, is the letter of the Insurance Brokers Messrs. Stewart Wrightson (Marine) Limited which was written more than a month after exhibit 1 was sent to plaintiff's advocate by Constant & Constant and considerable time before the writ of summons was issued in this action. It is made clear to the plaintiff by such letter that Messrs. Constant & Constant were acting on behalf of the leading underwriter only, on whose behalf they were prepared to accept service of suit.

As to who are such leading underwriters, reference is made in the telex sent to applicants by Messrs. Constant & Constant which is exhibit "A" to the affidavit sworn on behalf of the applicants on the 7th May, 1981. According to such telex, the leading underwriters are the Dolphin Insurance Company

Limited, defendants 21 in these proceedings, in respect of whom the applicants do not deny that they had authority to act.

From all the material before me and particularly from the letter of the Insurance Brokers which was annexed to the affidavit of the plaintiff and which speaks clearly that Constant & Constant were acting only on behalf of the leading underwriters, that is defendants 21 in this action, and that if they had any authority to accept service such authority could not extend beyond such defendants, I have come to the conclusion that Messrs. Constant & Constant and consequently the applicants, who were retained by Messrs. Constant & Constant had no authority to act for the defendants, in respect of whom this application is pursued. No authority existed for any of the defendants other than the leading underwriters, defendants 21, but as subsequently such authority was obtained for all defendants with the exception of defendants Nos. 1, 8 and 17, whereas defendants No. 19 retained another advocate, and once the application was withdrawn concerning such other defendants, I find it unnecessary to deal with the position of such other defendants. In the circumstances, I find that when applicants were retained to defend this case, it was only in respect of defendants No. 21 that such authority was given but by a misunderstanding the applicants entered a conditional appearance and applied to set aside the notice of the writ of summons and service thereof on behalf of all defendants; they acted so under a bona fide mistake that their authority extended to all defendants, whereas they did not have such authority from the other defendants.

Having found as above, I am now coming to consider whether applicants are entitled to an order as per application. The procedure and practice in England in this respect which can be invoked as applicable in Cyprus under Order 237 of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction once there is no provision in our Rules in this respect, can be found in the Supreme Court Practice in England and the explanatory notes contained therein. Reading the notes under Order 12 rule 1 in the Annual Practice, 1979 (which are in substance the same as those in the Annual Practice 1960) at pp. 100 - 101 under the heading "Appearance by Solicitor" it is stated:

"A solicitor who enters an appearance for a defendant

impliedly warrants or contracts that he has authority to do so

If a solicitor appears for a defendant without his knowledge or authority, the defendant has a clear right to have the appearance vacated (*Re Gray; Gray* v. *Coles* [1891], 65 L.T. 743, in that case on motion; in *Yonge* v. *Toynbee,* [1910] 1 K.B. 215, C.A., and *The Neptune,* [1919] P. 21, on summons; in *Simmons* v. *'Liberal Opinion',* [1911] 1 K.B. p. 968, on application in Court at conclusion of trial). The plaintiff too may apply to strike out the appearance (see *Yonge* v. *Toynbee,* supra; *Porter* v. *Fraser* [1912] 29 T.L.R. 91)."

Also, at page 101 of the same book, under the heading, "Appearance under mistake", it reads as follows:

"An appearance entered by mistake, without authority, may, before any subsequent step has been taken, and with consent of plaintiff's solicitor, be withdrawn by the defendant by leave of a Master. The plaintiff may have such an appearance struck out by leave obtained on summons."

In Chitty's Queen's Bench Forms 18th Edition, at p. 257 a form of application to stay proceedings in an action commenced without authority and for the dismissal of the action for this reason is given under No. 12 of Chapter 5.

As to the responsibility of counsel who act without authority for any party in the proceedings, reference is made in the Annual Practice of the Supreme Court in England (1979) Vol. 2 at p. 910 under the heading "Jurisdiction to order the solicitor to compensate others for his neglect or misconduct in proceedings before the Court" to the case of *Marsh* v. *Joseph* [1897] 1 Ch. at p. 245 where the alleged negligence of the solicitor consisted in allowing an unauthorised solicitor to use his name and thereby obtain an order for the payment out of a fund in Court, in which it was held by Lord Russel at p. 245 that:

"Where negligence or other breach of duty is committed by a solicitor, an officer of the Court, in a matter of which the Court has seisin, the Court may, and, if it can do full

justice, will summarily order its officer to make good the loss occasioned by his neglect or breach of duty. But the limit of liability is the measure of the loss flowing from the negligence or breach of duty. The Court cannot, merely because the officer has been guilty of misconduct, mulct him in damages. The damages must flow from the negligence or misconduct."

In the Annual Practice (supra) at pp. 911 and 912, it goes as follows:

"*Solicitor acting in proceedings without authority.* - On the above principle solicitors are ordered to pay personally the costs of proceedings taken by them without a client's authority. This principle applies where proceedings are instituted without authority or an appearance is entered (*Re Gray* [1891], 65 L.T. 743; *The Neptune*, [1919] P. 21), or the proceedings are defended without authority or an authority once given comes to an end. For example, the plaintiff may be non-existent (*Simmons* v. *Liberal Opinion, Ltd.*, [1911] 1 K.B. 966), or may die (*Tetlow* v. *Orela, Ltd.*, [1920] 2 Ch. 24), or may be an infant (*Geilinger* v. *Gibbs*, [1897] 1 Ch. 479), or may be or become of unsound mind (*Yonge* v. *Toynbee*, [1910] 1 K.B. 210, C.A.), or may be a limited company which has no directors properly appointed or other officers capable of giving instructions to institute proceedings (see *West End Hotels Syndicate* v. *Bayer* [1912], 29 T.L.R. 92), or the instructions may have come from minority directors (*Fergus Navigation Co.* v. *Kingdom* [1861], 4 L.T. 262) or directors not properly appointed (*John Morley Building Co.* v. *Barras*, [1891] 2 Ch. 386) or dissident directors acting mala fide (*Marshall's Valve Gear Co.* v. *Manning Wardle & Co.* [1909] 1 Ch. 267). The jurisdiction exists even where the solicitor bona fide believes he has authority (*Yonge* v. *Toynbee*, supra). But the Court has a discretion in the matter and is not bound in all cases to order the solicitor to pay the costs, and if there is a substantial dispute as to the facts, may in a proper case leave the party asking for costs to bring his action for damages for breach of warranty of authority (*Yonge* v. *Toynbee*, supra, at p. 235). Usually it will, if necessary, inquire or direct an inquiry into the facts - for example, whether a plaintiff, alleged to be of unsound mind, was

capable of instructing a solicitor (see *Pomery* v. *Pomery*, [1909] W.N. 158); for if the proceedings are unauthorised they should be stayed. There is even authority for the proposition that a solicitor wilfully bringing an action without authority may be attached or committed (2 Hawkins P.C. II, Chap. 22, s. 6; *Re Stuckey*, 2 Cox 283).

The want of authority of the plaintiff's solicitor cannot be raised as a defence; it should be raised promptly to avoid the answer that it was ratified (*Reynolds* v. *Howell* [1873] L.R. 8 Q.B. at p. 400; *Danish Mercantile Co.* v. *Meaumont*, [1951] 1 All E.R. 925), and should be made by application (*Russian, etc. Bank* v. *Comptoir de Mulhouse*, [1925] A.C. 112) to a Judge in the Chancery Division and a Master in the Q.B.D. Nevertheless if in the course of an action the Court becomes aware that the plaintiff is incapable of giving any retainer at all, it will not allow the action to proceed (*Daimler Co., Ltd.* v. *Continental Tyre & Rubber, etc., Ltd.*, [1916] 2 A.C. at p. 337).

The ordinary practice is to serve the notice of motion or summons (D.C.F. 875; Chitty and Jacob, Form 1175) on the opposing party as well as the solicitor responsible, and, where the want of authority is that of the plaintiff's solicitor, asking that the action may be stayed or dismissed and that the solicitor do pay the costs of the plaintiff as between solicitor and client and of the defendant as between party and party (*Newbiggin Gas Co.* v. *Armstrong* [1879] 13 Ch. D. 310) or solicitor and client (see *Férnee* v. *Gorlitz*, [1915] 1 Ch. 177). If the want of authority only relates to one plaintiff that party's name should be struck out (see *Fricker* v. *Van Grutten*, [1896] 2 Ch. 649, C.A.; *Re Savage* [1880], 15 Ch. D. 557; Set on 1028 (2). But if the want of authority can and should be cured, the Court will, in a proper case, only stay the proceedings (for example, to enable a next friend to be appointed, *Cooper* v. *Dumme*, [1930] W.N. 248; or to enable the wishes of shareholders to be ascertained, *East, etc., Mining Co.* v. *Merryweather*, 2 Hem. & M. 254). If it is an appearance which was entered without authority, it will be vacated (see O. 12, r. 1 (nn.)). The application may be made at any stage in

the proceedings - for example, after the action has been discontinued (*Gold Reefs of Western Australia, Ltd.* v. *Dawson,* [1897] 1 Ch. 115), or at the conclusion of the trial (*Simmons* v. *Liberal Opinion,* supra) or to strike out the applicant's name from a final order (*Re Savage,* 15 Ch. D. 557). A solicitor who has been ordered to pay costs personally may appeal without leave (*Re Bradford* [1883], 15 Q.B.D. 635)."

In the *Gold Reefs of Western Australia, Ltd.* v. *Dawson,* [1897] 1 Ch. 115, the facts were briefly as follows:

"A company named as co-plaintiffs in an action served notice of motion to strike out their name, and asked that the solicitors who had issued the writ might be ordered to pay the company's costs, on the ground that their name had been used without their authority. Before the motion could be heard the solicitors served a notice wholly discontinuing the action".

North J., had this to say in his judgment at p. 118:-

"In my opinion this motion is properly made. It is argued that the notice of discontinuance has put an end to the action and to the motion of which notice had been previously served. This is a technical objection, and I must assume that the motion is rightly made if the technical objection can be got over. Is the objection well founded? Rule 1 of Order XXVI says that on wholly discontinuing the action the plaintiff shall pay the defendant's costs of the action; but it does not say in express terms that nothing else shall be done in the action. In my opinion the discontinuance of an action cannot have any larger effect than the dismissal of a bill with costs under the larger effect than the dismissal of a bill with costs under the old practice. Under that practice it was well settled that after the dismissal of a bill with costs a person whose name had been used as plaintiff without authority could obtain an order to strike out his name, and that the solicitor should indemnify him against costs. This was so under the old practice, and it has not been in express terms altered by rule 1 of Order XXVI. It would be surprising if such

an application as this could be evaded by the solicitor's putting an end to the action in this way."

And at page 119:-

"I cannot find any provision in the Acts or in the Rules as to what is to be done when a solicitor has used the name of a person as plaintiff without his authority. I think, therefore, that the old practice remains in force, and that this motion is technically right."

In *Somportex Ltd.* v. *Philadelphia Chewing Gum Corporation* [1968] 3 All E.R. 26, which was a case in which withdrawal of appearance was not allowed as the Court found that no mistake had been shown such as to warrant allowing the withdrawal of the appearance, Lord Denning, M.R., in briefly stating the principle governing the withdrawal of an appearance had this to say at p. 28:

"It is indeed a difficult point. No doubt in a proper case this court can give leave to withdraw an appearance. It would do so, for instance, if a solicitor entered an appearance without proper authority, or if some mistake had been made which rendered it just to allow the appearance to be withdrawn".

Under our Civil Procedure Rules, Order 59, r. 7, the Court may order an advocate to repay his client any costs which the client may have been ordered to pay to any other person where such costs have been incurred either improperly or without any reasonable cause or of any misconduct or default of the advocate. Though such Rules do not apply to Admiralty Proceedings, nevertheless, Order 59, rule 7 corresponds to the English Order 65, rule 11 of the old rules in force prior to 15th August, 1960, the Independence Day of Cyprus and which by virtue of the provision of rule 237 of the Cyprus Admiralty Rules are applicable in the exercise by this Court of the Admiralty jurisdiction where no express provision to that effect is made by the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction.

Reference to Order 55 rule 7 as well as to the case of *Yonge* v. *Toynbee* (supra) was made by this Court in the case of *A.E.*

Pantelides, Advocate v. *Emine Pafiti & another* [1967] 1 C.L.R. 281 but in the circumstances of that case the Court found it unnecessary for the purpose of the judgment to discuss either the provisions in our rule or the effect of the cases referred to by counsel for appellant. That was an appeal from an order of the District Court for the payment of costs by the appellant, one of the advocates in the case, for misconduct in the way he handled the case for one of the defendants who proved to be a person of unsound mind and as a result was incompetent to retain an advocate. The instructions to the appellant were given by the husband, who was a co-defendant in the proceedings and appellant was not aware that the wife was of unsound mind. Appellant saw the wife for the first time at the hearing and after seeing her and from what he was told by her husband, he formed the impression that she was not of sound mind. He mentioned the matter informally to his colleague on the other side and then brought the matter to the notice of the Court as in view of the unsoundness of mind of his client the appointment of a guardian ad litem was necessary. Counsel for respondent at the appeal stated that he found himself unable to support the order made against the appellant in the circumstances. The Court agreed with the statement made by counsel for respondent and expressed the opinion that he very rightly adopted such course and in the circumstances set the order for costs against the appellant aside.

Turning now to the application before me, as I have already found the applicants in the present case operating under the mistaken belief that they had authority to appear for all defendants, entered a conditional appearance and applied to have the writ of summons and service thereof set aside, whereas in fact they had no such authority from defendants (1), (8) and (17). Applicants upon finding such mistake, had a duty to bring the matter to the notice of the Court and the other party and make an effort at this early stage of the proceedings to make good their mistake. If they continued to act for the said defendants in an unauthorised way, they might have found themselves guilty of misconduct and in breach of warranty of authority; also, liable for any consequence that might have resulted to persons who not only had no knowledge of the proceedings, but who never authorised the applicants to act on their behalf.

In the result, I find that the application should be granted and I make an order setting aside the conditional appearance entered by applicants on behalf of defendants (1), (8) and (17), as well as any subsequent proceedings taken by the applicants on behalf of such defendants. In the circumstances of this case, I shall make no order for costs in this application.

Application granted. No order as to costs.