1983 April 16

[A. LOIZOU, J.]

AHMED ABOUL QAWI BAMAODAH,

Plaintiffs

v.

1. ESTHER SHIPPING CO. LTD.,
2. PACIFIC TRADING CO. LTD.,

Defendants.

(*Admiralty Action No.* 255/81).

Practice—Parties—What is a proper party to an action—Principles applicable—Claim for short delivery of goods—Identity of the carrier not certain—Shipowners and charterers properly joined as parties—Order 11, rule 1(g) of the Old English Rules of the Supreme Court. 5

The plaintiffs, as owners of goods loaded on board the vessel "Lara" at Port Sudan for carriage to Jeddah, and as holders of a bill of lading sued the defendants for damages arising from short delivery of the said goods and by reason of the conversion of part of such goods. 10

Defendants No.1 were a limited company, registered in Cyprus with its registered offices in Limassol and were at all material times the owners of the ship "Lara". Defendants No.2 were a company with offices in Khartum, Sudan, and were at all material times the charterers of the said ship. Following the service of 15 the notice of the writ upon defendants 2, with the Court's leave, they filed a conditional appearance which was followed by an application for "an order of the Court that the writ of summons in this action and all subsequent proceedings as against defendants No.2 be set aside as irregular and/or bad in law" 20

It was the case for the plaintiffs that the identity of the carrier was not clear under the bill of lading and the point in issue in these proceedings was whether the person who signed the bill of lading signed it as a charterer, the charterer's agent or as the owner's agent or both. 25

Held, that the question whether defendants 2 is a proper party is whether they are a proper party at the date of the writ, not whether they are proper according to what ought to be the the result of the action; that since in the present case there is no reference in the bill of lading to the charterparty nor anything to suggest an incorporation of any of its clauses therein and the identity of the carrier is not certain the plaintiffs have been left without option but to join both defendants as parties and that has been the position at the time of the issuing of the writ; that, further, defendants 2 have denied liability and this is not the proper time to carry out an investigation on the issue of liability; that this was a bona fide action against defendants 1 and defendants 2 have been properly joined as parties and this Court has jurisdiction to entertain the action against them as well; accordingly the application must fail.

Application dismissed.

Cases referred to:

Massey v. Heynes & Co. and Others [1887] 57 L.J., Q.B.521 at p. 522;

Witted v. Galbraith & Co. and Dunlop and Sons [1893] Vol. 62 L.J. Q.B. 248 at p. 251.

Application.

Application by defendants 2 for an order setting aside the writ of summons and service thereof.

St. McBride for *Chr. Demetriades*, for the plaintiffs.

Fr. Saveriades, for defendants 1.

G. Michaelides, for defendants 2.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. The plaintiffs, a firm from Saudi Arabia, have instituted the present proceedings in the admiralty jurisdiction of this Court as owners of goods loaded on board the vessel "LARA" at Port Sudan for carriage to Jeddah and/or as holders and/or endorsees of the Bill of Lading No. J/3, dated Port Sudan 31.10.1980, whereunder the said goods were shipped, and claim against the defendants jointly and severally:

(a) 76,365.44 Saudi Rials for breach of contract and/or breach of duty and/or negligence of the defendants

and/or their servants or agents in respect of damage and/or short delivery of the said goods, and/or

(b) The same amount by way of damages sustained by the plaintiffs by reason of the conversion of part of the said goods by the defendants and/or servants or agents. 5

(c) Interest on the above sum at the rate of 9% p.a. from 9.11.1980 till payment.

(d) Costs.

Defendants No. 1 are a limited company, registered in Cyprus under the Companies Law with registered offices in Limassol and were at all material times the owners of the ship "LARA". 10

Defendants No. 2 are a company with offices in Khartum, Sudan, and were at all material times the charterers of the said ship. On the 28th January, 1982, the writ was duly served upon defendants No. 1 and they applied for leave to serve out of the jurisdiction the notice of the writ issued in this action on defendants No. 2. 15

In the affidavit filed in support of this application it was contended that defendants No. 2 are necessary and proper parties to the action and that this action was properly brought against defendants No. 1, who had been duly served within the jurisdiction, and the said leave was granted. 20

Upon service on defendants 2, a conditional appearance was entered and time was granted to them in order to apply to have the writ of summons and service thereof set aside. An application to that effect was filed and we are concerned now only with their prayer (B), namely, for "an order of the Court that the writ of summons in this action and all subsequent proceedings as against defendants No. 2 be set aside as irregular and/or bad in Law". 25 30

In support of this application, which is based on the Cyprus Admiralty Jurisdiction Order 1893, rules 207-209, 212, and 237, and on the Old English Rules, Order 12, rule 30, an affidavit was filed in which it is stated "that the Cyprus Courts have no jurisdiction to try the claim between the plaintiff and defendants No. 2 because, inter alia, (a) neither the plaintiff nor defend- 35

ants 2 are residents of Cyprus or have any connection with Cyprus. (b) The contract of carriage was entered into abroad. and (c) The breach, if any, of the said contract occurred outside Cyprus.

5 It is further claimed therein that defendants 2 acted at all material times as agents and cannot have any personal liability towards the plaintiffs.

In opposing the application, an affidavit was filed on behalf of the plaintiffs stating that defendants 2 were at the material 10 time the charterers of the said ship and the persons who issued or on whose behalf the said Bill of Lading was issued. Copy of that Bill of Lading was attached thereto and they maintain that defendants 1, the owners of the ship "LARA", have declined liability claiming that (a) the relevant Bill of Lading is a Charter-15 er's Bill of Lading, and (b) Defendants 2 also deny liability under the Bill of Lading, claiming that they acted as agents. In view of this and also of the fact that (a) the identity of the carrier is not clear from the Bill of Lading, and (b) if the action proceeds against the defendants No. 1 alone, they can, in the 20 absence of defendants No. 2, throw the blame on the latter and the same fate could happen in an action brought later against defendants No. 2 alone, justice could only be done if both defendants were before the same Court at the same time, so that it can determine whether the owners or the charterers 25 of the vessel were, in fact, the carriers and the persons responsible under the Bill of Lading.

It was further contended that the Court has jurisdiction to hear the present action as it was properly brought and served within the jurisdiction on defendants No. 1 who are a company 30 duly registered in Cyprus and leave to serve on defendants No. 2 as a necessary and/or proper party was obtained in accordance with Order 11(1)(g) of the Old English Rules. The Charter-party was also produced and attached to the opposition filed on behalf of defendants 1 who claim in their affidavit that any 35 liability either in tort or in breach of the Bill of Lading or other agreement, falls on defendants No. 2 and not on defendants No. 1, and that defendants No. 1 are contemplating to commence third party proceedings against defendants No. 2 for indemnity and/or breach of the referred Charterparty agreement

dated 5th October, 1980, and that, furthermore, defendants No. 2 are a necessary party to the action.

Under Order 11, rule 1(g) "whenever any person out of the jurisdiction is a necessary or a proper party to an action properly brought against some other person duly served within the jurisdiction, service out of the jurisdiction of a writ of summons or notice thereof may be allowed by the Court or Judge".

This rule has been judicially considered in a number of cases and reference may be made to the case of *Massey* v. *Heynes & Co. and Others* [1887] 57 L.J., Q.B., p. 521, where Lord Esher, M.R., at p. 522 had this to say:

> "In determining the true construction of the rule we ought to give effect to what appears to be the intention of the Legislature. That intention was that where there is one transaction, and a party has a remedy against one of two other parties, he may claim against them in the alternative. Our procedure allows it in regard to persons within the jurisdiction; why should we not apply it when one is a foreigner out of the jurisdiction? If the plaintiff's claim is true he must have relief against one defendant or the other. Is the foreign firm a proper party? The question is whether the party is a proper party at the date of the writ, not whether he is proper according to what ought to be the result of the action. We cannot try the action at this stage, and the rule cannot mean that the party must be proper according to the result. Are the two parties such that the plaintiff may properly ask for alternative relief? I am of opinion that they are; and if this is the true result of the rules, no question of infringing the rights of a foreign country arises".

In the same case Lindley, L.J. agreeing to the aforesaid said that "where liability depends on the result of an investigation, all who may be liable are proper parties, whether jointly, mutually, or exclusively". And Lopes, L.J. defined "Proper party" as meaning a party against whom the action is properly brought and the question whether a party is proper must be decided as of the time of issuing the writ.

It is the case of the respondents/plaintiffs that the identity of the carrier is not clear under the Bill of Lading and that

whenever a vessel is chartered it does not necessarily mean that a Bill of Lading is a charterer's Bill of Lading, that. it may be as well, an owner's Bill of Lading and that is the point in issue in this case. the identity of the carrier. Did the person who 5 signed the Bill of Lading sign it as a charterer, the charterer's agent or as the owner's agent or as both?

Indeed in the present case there is no reference in the bill of lading to the charterparty, nor is there anything to suggest an incorporation of any of its clauses therein, and in any event 10 the identity of the carrier is correctly claimed not to be certain. It is on account of that that the respondents/plaintiffs have been left without option but to join both defendants as parties to these proceedings and that has been the position at the time of the issuing of the writ, but in addition and as a confirmation 15 to that uncertainty there has come the denial of liability on behalf of defendants 2, on the result of which liability will depend. But this is not the proper time to carry out that investigation.

As to what is a proper party to an action within the meaning 20 of rule 11 and 1(g), Lindley, L.J. in *Witted* v. *Galbraith & Co.. and Dunlop and Sons* [1893] Vol. 62 Law Journal Queen's Bench 248 at 251, had this to say:

> "There is, however, a very easy method of testing that question as a matter of good sense—namely, by seeing 25 whether, if both these sets of defendants had been in this country, the plaintiff would have sued the brokers, because, if she would not, then it is inevitable that they have been put in as defendants simply for the purpose of bringing in the Scotch owners. If that be so, then the rule does 30 not apply".

Having considered the totality of the circumstances I think that this is a bona fide action against defendants 1 and defendants 2 have been properly joined as parties and this Court has jurisdiction to entertain the action against them as well.

35 This application therefore is dismissed with costs in cause. but in any event not against the plaintiffs.

Application dismissed.