

1987 July 2

[A LOIZOU, SAVVIDES, STYLIANIDES, JJ]

ELIAS G. AGISILAOU,

Appellant-Defendant,

v.

MICHAEL SAVVA,

Respondent-Plaintiff.

(Civil Appeal No. 7035).

5 *Civil procedure — Actions under Order 65 of the Civil Procedure Rules — Whether third party procedure excluded by said Order — Question answered in the negative — Whether an application for leave to file and serve a third party notice can be made before the date of the hearing — Question answered in the affirmative — Rules 5, 7 and 8 of aforesaid Order.*

Words and phrases: «Pleadings» in Rule 7 of Order 65 of the Civil Procedure Rules — The term does not include pleadings to be exchanged between the defendant and a third party.

10 The appellant, who was the defendant in the action instituted under Order 65 of the Civil Procedure Rules, applied for leave to issue and serve a third party notice. The application was dismissed on the following grounds: (a) In the light of rule 8* of the aforesaid Order, the application, being an interlocutory application, could not be filed before the hearing of the action, and (b) Third party procedure does not exist in proceedings under Order 65.

15 Held, *allowing the appeal*: (1) Rule 8 does not exclude an application in writing for leave to issue and serve before the hearing a third party notice which does not affect in essence the case between the plaintiff and the defendant but it aims at introducing in the proceedings a third party for indemnity of and contribution to the defendant. Moreover this rule has to be
20 read subject to the general provision contained in rule 15**.

* Quoted at p 447 post.

** The concluding part of Rule 15 reads: «The Court shall have power to vary the procedure in any action to which this Order applies in such manner as it may think fit with a view to saving time and expense but so that no prejudice is caused to the parties concerned».

(2) Rule 5* does not apply to third party proceedings. The term «pleadings» in rule 7 invoked by the trial Judge and which provides that «no other pleadings shall be delivered» is used by reference to the pleadings exchanged between the plaintiff and the defendant and not to the pleadings that are to be exchanged between a defendant and a third party.

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Appeal allowed. No order as to costs.

Appeal.

Appeal by defendant against the order of the District Court of Limassol (Stavriniades, D.J.) dated the 9th July, 1985 (Action No. 1077/85) whereby his application in an action instituted under Order 65 of the Civil Procedure Rules for leave to issue and serve a third party notice to a certain Andreas Christou from whom he was claiming contribution and/or indemnity regarding the claim of plaintiff for damages, was refused.

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A. S. Myrianthis, for the appellant.

No appearance for the respondent.

A. LOIZOU, J. gave the following judgment of the Court. This is an appeal from the order of a Judge of the District Court of Limassol by which he refused the application of the appellant, defendant in the action instituted under Order 65 of the Civil Procedure Rules, for leave to issue and serve a third party notice on a certain Andreas Christou from whom he was claiming contribution and or indemnity regarding the claim of the plaintiff for damages, as he was alleging that the accident subject matter of the said action was due wholly and/or partly to the negligence and/or breach of statutory duty of the said Andreas Christou.

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The application was filed on the 3rd April 1985 and the date fixed, on the strength of the provisions of Rule 2(1), on the writ of summons calling upon the defendant to appear before the Court was the 5th April 1985, informing him that if he intended to dispute the plaintiff's claim he should within ten days after service on him of the writ of summons deliver his defence in writing to the plaintiff at his address or at his address for service, when had he complied with the said Order the Court would have fixed a date for the hearing of the action under rule 14. It may be mentioned here

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* The relevant part of rule 5 is quoted at p. 448 post.

that the usual practice is for the defendant or his counsel to appear on such a day and then file the defence for which purpose time is given.

5 The learned trial Judge in giving his reasons for the conclusion reached by him in his elaborate judgment referred to almost all rules of Order 65, but relied basically on the provisions of Rules 1, 4, 7 and 8 of the said Order as precluding him from granting the application.

10 The first question considered and answered by the learned trial Judge was whether such an application could be filed before the date of hearing of the action.

Rule 8 provides:

15 «8. No application for interlocutory orders antecedent to judgment (other than application for injunctions or variation of the times prescribed by the rules of this Order) shall be made before the hearing of the action. Any application for any such interlocutory order may be made orally at the hearing, and the Court may hear the application and deal with it in such manner as may be just.»

20 The learned trial Judge concluded after referring to the authorities as to the meaning of the term interlocutory, that the said application was referring to an interlocutory proceeding and consequently rule 8 was applicable and so the said application could not have been filed before the hearing of the action on
25 account of the mandatory provisions of rule 8 and he dismissed the application as premature.

In our view this rule does not exclude an application in writing for leave to issue and serve before the hearing a third party notice which does not affect in essence the case between the plaintiff and
30 the defendant but it aims at introducing in the proceedings a third party for indemnity of and contribution to the defendant. Moreover this rule has to be read subject to the general provision contained in rule 15 where in its concluding part it says that «the
35 Court shall have power to vary the procedure in any action to which this Order applies in such manner as it may think fit with a view to saving time and expense but so that no prejudice is caused to the parties concerned.»

We are of the opinion that within this provision the learned trial Judge had power to entertain the application for the issue of third
40 party proceedings as no prejudice could be caused and

considerable expense and time would be saved if the third party was properly brought before him at the hearing for the final determination of all issues raised in the proceedings.

No practical benefit could have been gained by anyone, to wait until the date of the hearing. After all a third party procedure aims at bringing in on the date of the hearing a third party against whom indemnity or contribution et cetera is claimed. 5

The whole tenor of Order 65 is to simplify proceedings and to save expense and time but in no way that is to be achieved at the expense of the parties or to cause delay or multiplicity of proceedings or deprive a defendant of his right to indemnity and contribution that he may raise in third party proceedings and have the extent of the liability of a third party decided in them as well. 10

On the second question posed by the learned trial Judge, namely whether there exists the third party procedure in Order 65 we take again a different view from that of the learned trial Judge. Under rule 1, Order 65 applies to actions relating to claims now not exceeding five-thousand pounds. In such actions the foregoing Orders of the Civil Procedure Rules must be observed with the modification made by Order 65 in regard to the conduct of such actions down to judgment. 15 20

Under rule 5 thereof «the defendant may by his defence set up a counterclaim against the plaintiff; but no counterclaim shall be entertained which raises questions between the defendant and the plaintiff along with others». 25

This rule is clear. It does not apply to the case of third party proceedings where no question arises of a counterclaim filed against the plaintiff along with the third party.

Moreover rule 7, invoked by the learned trial Judge in concluding that no third party proceedings could be initiated under Order 65, provides that save as in the preceding rules of Order 65 «no other pleadings shall be delivered». 30

This rule in other words excludes the exchange of pleadings other than those referred to in the preceding rules, including rule 5, just referred to, but a perusal of rules 1 to 6, shows that the term «pleadings» in this respect is used by reference to the pleadings 35

exchanged between the plaintiff and the defendant and not to the pleadings that are to be exchanged between a defendant and a third party.

For all the above reasons the appeal succeeds.

- 5 As the learned trial Judge, however, after concluding that in view also of his answer to the second question posed he saw no reason at that stage to examine whether the ground set forth in the application would justify the grant of same, the application has to be sent back for retrial to be examined by him on its merits, subject
- 10 to our approach on the legal aspect of the case.

The appeal is therefore allowed with no order as to costs.

Appeal allowed.

No order as to costs.