

1976  
Jan. 31

[MALACHTOS, J.]

ESTA SHIPPING CO. LTD.,

*Plaintiffs,*

v.

NIKIFOROS A. M. LASKOS,

*Defendant.*

—  
ESTA  
SHIPPING  
CO. LTD.  
v.  
NIKIFOROS  
A. M. LASKOS

(Admiralty Action No. 34/75).

*Admiralty—Practice—Security for costs—Defendant not resident in Cyprus—Counterclaim arising out of the same transaction as claim—Not in respect of a matter wholly distinct from and independent of that upon which the claim is based—Substantially amounting to defence—Discretion of Court—Exercised against granting security—Rule 185 of the Cyprus Admiralty Jurisdiction Order, 1893.* 5

*Security for costs—Admiralty.*

*Admiralty—“Seaman” in rule 185 of the Cyprus Admiralty Jurisdiction Order, 1893 does not include a master.* 10

The plaintiff company is the registered owner of the ship “Barbara S” which is registered in Cyprus and flies the Cyprus flag. The said ship was transferred into the name of the plaintiff company on the 9th May, 1974 by her previous owner, namely, Harmony Ltd. By a contract of employment dated 12th May, 1973 between the defendant and the said Harmony Ltd. the defendant was appointed as the captain of the said ship. 15

By an action filed on the 24th June, 1975 the plaintiff Company claimed against the defendant, *inter alia*, an order of the Court ordering the defendant to deliver to them the ship “Barbara S” and damages for unlawful detention. 20

The defendant by a counterclaim prayed for:

- (a) A declaration of the Court that the purchase and/or transfer to the plaintiff company by Harmony Ltd. of the vessel “Barbara S” was invalid and/or null and void and of no effect; 25

- (b) An order setting aside such transfer as having been made fraudulently and
- (c) the sum of C£10,180 for wages and disbursements.

5 In view of the counterclaim the plaintiff company filed an application under r. 185 (quoted in full at p. 26 of the judgment *post*) of the Cyprus Admiralty Jurisdiction Order, 1893, claiming an order of the Court ordering the defendant to give security for costs in the sum of C£500.—

Counsel for the defendant contended:

- 10 (a) That the defendant being the master of the ship in question should be considered as a seaman and therefore, was exempted from the provisions of rule 185.
- 15 (b) That the position of a counterclaiming defendant, residing abroad is not always the same as that of an ordinary plaintiff; and that when the counterclaim is in substance the defence of the defendant, then, as a rule, the Court exercises its discretion in favour of such defendant and no order for security of costs is made.

20 *Held*, (1) the first contention cannot stand because “seaman” in rule 185 of the Cyprus Admiralty Jurisdiction Order, 1893 does not include a “master” (see *Karamailis (No. 2) v. Pasparo Shipping Co. Ltd.* (1972) 1 C.L.R. 72).

25 (2) It is clear that the counterclaim arises out of the same transaction as the claim and is not in respect of a matter wholly distinct from and independent of that upon which the claim is based. In substance the counterclaim is the defence of the defendant to the plaintiff’s claim. The matters set out in the counterclaim are so closely connected with the plaintiff’s claim that in substance they are really the defence to the action.

30 (3) Under the circumstances it does not seem to me just or fair that the defendant should be ordered to give security for costs, and, therefore, the application is dismissed. (See *Mapleson v. Masini* [1879–80] 5 Q.B.D. 144, *Neck v. Taylor* [1893] 1 Q.B.D. 560 and p. 27 et seq. of the judgment *post*).

35 *Application dismissed with costs.*

Cases referred to:

*Karamailis (No. 2) v. Pasparo Shipping Co. Ltd.* (1972) 1 C.L.R. 72;

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*Mapleson v. Masini* [1879–80] 5 Q.B.D. 144;  
*Neck v. Taylor* [1893] 1 Q.B.D. 560;  
*New Fenix Compagnie Anonyme D' Assurances De Madrid v. General Accident, Fire, and Life Assurance Corp. Ltd.* [1911] 2 K.B. 619.

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### Application.

Application by the plaintiff under rules 185 and 203 of the Cyprus Admiralty Jurisdiction Order, 1893, for an order of the Court ordering the defendant to give security for costs for the sum of £500.— in view of the counterclaim adduced by defendant in an admiralty action whereby plaintiff claimed, *inter alia*, an order of the Court ordering the defendant to deliver to the plaintiff the ship “Barbara S”.

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*E. Lemonaris*, for the applicant.

*G. Mitsides*, for the respondent.

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The following judgment was delivered by:—

MALACHTOS, J.: The plaintiff company in this Admiralty Action is the registered owner of the ship “Barbara S” which is registered in Cyprus and flies the Cyprus flag. The said ship was transferred into the name of the plaintiff company on 9/5/74 from her previous owner, namely, Harmony Ltd., which is also a company formed and incorporated in Cyprus and has its registered office in Nicosia.

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By a contract of employment dated 12/5/73 between the defendant and Harmony Ltd. through its managing director George Spanopoulos, who is also the managing director of the plaintiff company, the defendant was appointed as the captain of the ship “Barbara S”, which was at the time at the port of Las Palmas, and on instructions he navigated her and brought her to the port of Naples in Italy, where she has been stranded ever since.

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On 24/6/75 the plaintiff company filed the present action against the defendant claiming —

(a) an order of the Court ordering the defendant to deliver forthwith to the plaintiff company the ship “Barbara S” which flies the Cyprus flag and is the property of the said company and is at the port of Naples in Italy;

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(b) damages for unlawful detention of the said ship as from 1/9/73;

(c) further or any other remedy; and

(d) legal interest and costs.

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At the same time by an *ex parte* application the plaintiff company applied for an order of the Court ordering the defendant to deliver forthwith to the plaintiff the ship "Barbara S". This application which by order of the Court was served on the defendant was opposed and was bitterly contested by him. In view of the fact that the evidence which was given at the hearing of the application was substantially the same that was to be given at the trial of the action itself, both advocates, in order to save time and costs, agreed to the withdrawal of the application with costs in cause and fight the case on its merits.

The plaintiff company filed its petition on 25/10/75 and on 6th November, 1975, the defendant filed his answer and adduced also a counterclaim where he alleges that by written agreement signed on or about 12/5/73, the defendant was appointed master of "Barbara S" by the then ship owners Harmony Ltd. His basic remuneration was agreed at £370.- per month. On or about 13/7/73 when the ship was in the port of Naples having arrived there on or about 20/6/73, for the purpose of discharging cargo and carrying out repairs many warrants for the arrest of the vessel were issued by the Italian Courts because of the ship owners liability to Italian and other creditors. At no time from the date of the first warrant *i.e.* 13/7/73, until 6/11/75, was there a period during which the ship was free from any such warrants making it thus possible for her to leave Naples. By virtue of these orders the defendant became custodian of the ship and could not be removed or replaced or resign without the leave of the Italian Courts. He also alleges, that he is entitled to receive his salary as master of the said ship and that he is lawfully in possession of the ship as the master and/or custodian and/or as exercising possessory lien. Furthermore, it is his allegation that Harmony Ltd. caused registration of the ship in question into the name of the plaintiff in order to defraud its creditors. In fact, the main shareholder in both companies and managing director is the same person, namely, George Spanopoulos.

The defendant in his counterclaim prays -

(a) for a declaration of the Court that the purchase and/or transfer to the plaintiff by Harmony Ltd. of the vessel

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“Barbara S” was invalid and/or *null* and *void* and of no effect;

- (b) for an order setting aside such transfer as having been made fraudulently;
- (c) the sum of C£10,180.- for wages and disbursements; and 5
- (d) interests and costs.

In view of the counterclaim adduced by the defendant the plaintiff on 28/11/75 filed the present application under rules 185 and 203 of the Cyprus Admiralty Jurisdiction Order 1893, claiming an order of the Court ordering the defendant to give security for costs for the sum of £500. This application was opposed by the defendant. 10

Rule 185 reads as follows:

“If any plaintiff (other than a seaman suing for his wages or for the loss of his clothes and effects in a collision) or any defendant making a counterclaim is not resident in Cyprus, the Court or Judge may, on the application of the adverse party, order him to give such security for the costs of such adverse party as to the Court or Judge shall seem fit; and may order that all proceedings in the action be stayed until such security be given”. 15 20

Counsel for the applicant company submitted that since it is not in dispute that the counterclaiming defendant is not a resident of Cyprus the Court may exercise its discretion and order him to give security for costs. On the other hand, counsel for the respondent argued that the defendant being the master of the ship in question should be considered as a seaman and, therefore, is exempted from the provisions of rule 185. 25

I must say straight away that this contention of counsel for the defendant cannot stand in view of the decision in the case of *Pantelis Karamailis (No. 2) v. Pasparo Shipping Co. Ltd.* (1972) 1 C.L.R. 72 where it was held by the Full Bench of this Court that “seaman” in rule 185 of the Cyprus Admiralty Jurisdiction Order 1893 does not include a “master”. 30 35

The other argument of counsel for the defendant is that the position of a counterclaiming defendant, residing abroad is not always the same as that of an ordinary plaintiff. He submitted

hat when the counterclaim is in substance the defence of the defendant, then, as a rule, the Court exercises its discretion in favour of such defendant and no order for security for costs is made.

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5 In the case of *Mapleson v. Masini* [1879–80] 5 Q.B.D. 144, which was an action for breach of contract against the defendant, a foreigner residing abroad, he, by his defence, denied the breaches, and also made a counterclaim for breaches of the same contract by the plaintiff, claiming damages to an amount  
10 less than the plaintiff's claim, it was held that the defendant could not be ordered to give a security for the plaintiff's costs occasioned by the counterclaim.

Also in the case of *Neck v. Taylor* [1893] 1 Q.B.D. 560, which  
15 was a case where a defendant resident out of the jurisdiction set up a counterclaim which arose out of the same transaction as the claim, and was in substance, though not technically in the nature of a defence to the action, it was held that the Court had a discretion to refuse to order the defendant to give security  
20 for the costs of the counterclaim. The facts in that case were as follows:

“The action was brought by the plaintiff, a boarding-house keeper, for the sum of £69, the balance of an account for board and lodging supplied to the defendant, after giving credit for payments made. The defendant in her statement  
25 of defence denied that she was indebted as alleged in the claim; and counterclaimed in respect of the wrongful detention of certain jewellery. She alleged in the counterclaim that the plaintiff by force and threats induced and constrained her to part with a diamond ring, and wrong-  
30 fully refused to deliver to her and retained certain other jewellery, which she had deposited with the plaintiff for safe custody; and she claimed a return of the ring and other jewellery or £250.— damages. Particulars of the counterclaim had been delivered, which stated that the  
35 plaintiff refused to allow the defendant to leave the boarding-house until she had handed over a diamond ring to the plaintiff; that the plaintiff represented to the defendant that by the law of England the defendant must remain in the house till she paid plaintiff's demand; that the defen-  
40 dant, constrained by such threats and acting on the plaintiff's representations, parted with the diamond ring as aforesaid, in order to obtain liberty to leave the house;

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and that the plaintiff, in whose custody the rest of the jewellery was deposited, refused to deliver the same on the defendant's demand, and compelled the defendant to depart without delivery of the same, and still withheld the same. The defendant was a foreigner and was resident out of the jurisdiction. It appeared from the affidavits, that the plaintiff had given the defendant a receipt for the jewellery, stating it to be deposited as a security for the sum of £69 owing to the plaintiff. The plaintiff applied at chambers for an order that the defendant should give security for the costs of the counterclaim, and the master granted the application. The Judge at chambers, on appeal, affirmed the decision of the master. But the Divisional Court, on appeal, reversed his decision, and set aside the order for security for costs." 5  
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At page 562 Lord Esher, M.R. had this to say:

"The rule laid down by the cases seems to be as follows: Where the counterclaim is put forward in respect of a matter wholly distinct from the claim, and the person putting it forward is a foreigner resident out of the jurisdiction, the case may be treated as if that person were a plaintiff, and only a plaintiff, and an order for security for costs may be made accordingly, in the absence of anything to the contrary. Where, however, the counterclaim is not in respect of a wholly distinct matter, but arises in respect of the same matter or transaction upon which the claim is founded, the Court will not, merely because the party counterclaiming is resident out of the jurisdiction, order security for costs; it will in that case consider whether the counterclaim is not in substance put forward as a defence to the claim, whatever form in point of strict law and of pleading it may take, and, if so, what under all the circumstances will be just and fair as between the parties; and will act accordingly. Therefore, the Court in that case will have a discretion." 20  
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This case was cited with approval in the case of *New Fenix Compagnie Anonyme D' Assurance De Madrid v. General Accident Fire and Life Assurance Corp. Ltd.* [1911] 2 K.B.D. 619 where it was held that "There is no hard and fast rule of practice which prevents the Court from making an order for security for costs against a person resident out of the jurisdiction who, upon being sued in this country, sets up a cross-claim, either 40

5 by counterclaim or by cross-action. It is for the Court to consider, in the exercise of its discretion, whether, having regard to the circumstances of the particular case, the cross-claim must be treated as made, substantially, by way of defence to the action against the claimant, or whether it must be regarded as being in the nature of an independent claim made in respect of matters foreign to that action, and therefore one with regard to which security for costs ought to be ordered to be given”.

10 In the present case it is clear that the counterclaim arises out of the same transaction as the claim and is not in respect of a matter wholly distinct from and independent of that upon which the claim is based. In substance the counterclaim is the defence  
15 of the defendant to the plaintiff’s claim. The matters set out in the counterclaim are so closely connected with the plaintiff’s claim that in substance they are really the defence to the action.

20 Under these circumstances, it does not seem to me just or fair that the defendant should be ordered to give security for costs, and, therefore, the application of the plaintiff is dismissed with costs.

*Application dismissed with costs.*