

1978 March 16

[TRIANAFYLLIDES, P.]

HESHAM ENTERPRISES,

Plaintiffs.

v.

THE SHIP "RAMI" AND OTHERS,

Defendants.

(Admiralty Action No. 45/76).

5 *Admiralty—Practice—Costs—Security for costs—Plaintiffs a foreign
concern residing abroad—Action for breach of contract—Dis-
cretion of the Court to order security—Necessity of an affidavit
in support of application—Rule 185 of the Cyprus Admiralty
Jurisdiction Order, 1893 and r. 9 (t) of Order 48 of the Civil
Procedure Rules.*

10 This was an application by the defendants in the action,
under rule 185* of the Cyprus Admiralty Jurisdiction Order,
1893, for an order directing the plaintiffs to give security for
the defendants' costs and for a stay of the proceedings until
the security is given. The plaintiffs were a foreign concern,
whose residence was abroad and they claimed the sum of
C£13,497.650 mils for breach of a contract for the carriage of
goods by the defendant ship.

15 Plaintiffs opposed the application and raised the issue that no
affidavit has been filed in support of such application. They
submitted that any allegation which was not proved by an
affidavit has to be ignored by the Court; and that the amount
of costs to be taken into account in deciding on this application
20 are the costs normally needed in relation to the present action.
On the other hand counsel for the defendants stated that due
to insurmountable difficulties it has not become possible to file
an affidavit in support of the application.

* See p. 197 *post*.

Held, (1) Rule 9 (t) of Order 48 of the Civil Procedure Rules affords useful guidance in relation to an application for security for costs in an admiralty action (see *Senior Service Ltd. and Others v. Chrysanthi Shipping Co. Ltd. and Another* (1975) 11 J.S.C. 1613, 1616).

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(2) Although it is not an inflexible rule that, but a matter of discretion whether, a foreign plaintiff should be ordered to provide security for costs, it is the usual practice to order so if the justice of the case demands it (See *Aeronave SPA and Another v. Westland Charters Ltd., and Others* [1971] 3 All E.R. 531).

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(3) This is a proper case in which to make such an order, especially as it is apparent on the face of the writ of summons that the respondents are a foreign concern and it is not disputed that their residence is abroad and that they have no assets within the jurisdiction of this Court.

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(4) In the absence of an affidavit in support of the application I have to rely only on the material apparent on the face of the record, without taking into account matters which normally would have had to be proved by such an affidavit.

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(5) Having weighed all relevant factors, I have decided to order the plaintiffs to give security for costs by way of an amount of £400.-. In the meantime, all proceedings in this action shall be stayed until the security is given (pp. 198-200 *post*).

Application granted. No order as to costs.

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Cases referred to:

Senior Service Ltd. and Others v. Chrysanthi Shipping Co. Ltd. and Another (1975) 11 J.S.C. 1613 at p. 1616 (to be reported in (1975) 1 C.L.R.);

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Aeronave SPA and Another v. Westland Charters Ltd. and Others [1971] 3 All E.R. 531.

Application.

Application for an order directing the plaintiffs to give security for the defendants' costs and for a stay of the proceedings until the security is given.

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C. Velaris, for applicants-defendants.

L. Papaphilippou, for respondents-plaintiffs.

The following judgment was delivered by:

5 TRIANTAFYLIDIS P.: The defendants in this action have applied for an order directing the plaintiffs to give security for the defendants' costs in the present proceedings, and for a stay of such proceedings until the security is given.

The application, which has been opposed by the respondents, is based mainly on rule 185 of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction, enacted by the Cyprus Admiralty Jurisdiction Order, 1893, which reads as follows:-

10 " 185. 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
15 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."

20 The above rule is comparable to rule 1 of Order 60 of the Civil Procedure Rules (and see, also, rule 1 of Order 23 of the Rules of the Supreme Court in England, in the Supreme Court Practice, 1976, vol. 1, p. 384).

It is not in dispute that the respondents are not resident, and have no property, in Cyprus.

25 Counsel for the applicants has submitted that the security for costs, to be furnished by the respondents, should be about C£1,000, as this amount is approximately two thirds of the anticipated total costs of the applicants in defending this action; such costs include about C£700 expenses of witnesses who have to come from abroad.

30 Counsel for the applicants has submitted further that the claim of the respondents is greatly exaggerated and that this is one of the reasons for which witnesses from abroad will have to come to Cyprus in order to give evidence.

35 As it appears from the Petition in this action the respondents are claiming C£13,497.650 mils for breach of a contract for the carriage of goods by the defendant ship.

By their Answer the applicants denied liability.

In opposing the present application for security for costs counsel for the respondents has raised the issue that no affidavit has been filed in support of such application and he has submitted that any allegation which was not proved by an affidavit has to be ignored by the Court; and that the amount of costs to be taken into account in deciding on this application are the costs normally needed in relation to the determination of the present action. Counsel for the applicants has stated that due to insurmountable difficulties it has not become possible to file an affidavit in support of the application.

I was referred, in this connection, to Order 48, rule 9 (t), of the Civil Procedure Rules, whereby it is provided that an application for security of costs made under Order 60 need not be accompanied by an affidavit if the fact relied upon is plaintiff's residence out of Cyprus and such fact appears on the writ of summons.

I am in agreement with the view expressed by Malachos J. in *Senior Service Ltd., and Others v. Chrysanthi Shipping Co. Ltd., and Another*, (1975) 11 J.S.C. 1613, 1616*, to the effect that the above rule 9 (t) affords useful guidance in relation to an application for security for costs in an admiralty action.

Moreover, as has been held in *Aeronave SPA and another v. Westland Charters Ltd and others*, [1971] 3 All E.R. 531, although it is not an inflexible rule that, but a matter of discretion whether, a foreign plaintiff should be ordered to provide security for costs, it is the usual practice to order so if the justice of the case demands it.

Indeed, the *Aeronave* case, *supra*, was decided in relation to the application of Order 23, rule 1, of the Rules of the Supreme Court in England, which is differently worded from our aforementioned rule 185; but there is sufficient similarity between the said two rules in material respects so that the *Aeronave* case can be of guidance for the purposes of the present application; in that case Lord Denning M.R. stated the following (at p. 533):-

“ In 1894 in *Crozat v. Brogden*¹ Lopes L.J. said that there was an inflexible rule that if a foreigner sued he should

* To be reported in (1975) 1 C.L.R.

1. [1894] 2 Q. B. 30 at 35.

give security for costs. But that is putting it too high. It is the usual practice of the Courts to make a foreign plaintiff give security for costs. But it does so, as a matter of discretion, because it is just to do so. After all, if the
5 defendant succeeds and gets an order for his costs, it is not right that he should have to go to a foreign country to enforce the order. It is to be noted that Italy is not within the provisions as to the recognition of foreign
10 judgments under the Foreign Judgments (Reciprocal Enforcement) Act 1933. But even if it were, *Kohn v. Rinson & Stafford (Brod) Ltd.*¹ shows that is not a ground for refusing security. The ordinary rule still remains, that it is a matter of discretion. I certainly did not mean to say anything different in *Banque du Rhone SA v. Fuerst
15 Lawson Ltd.*²

Under our rule 185, above, I have to exercise a discretion regarding the making of an order for security for costs in the present instance.

20 I am of the view that this is a proper case in which to make such an order, especially as it is apparent on the face of the writ of summons that the respondents are a foreign concern and it is not disputed that their residence is abroad and that they have no assets within the jurisdiction of this Court.

25 I do agree, however, with counsel for the respondents that in the absence of an affidavit in support of this application for security for costs I have to rely only on the material apparent on the face of the record, without taking into account matters which normally would have had to be proved by such an affidavit and which have only been mentioned in the course of the
30 submissions of applicants' counsel.

Having weighed all relevant factors including, *inter alia*, the nature of the claim in this action and the allegations made in the pleadings, which are indicative of the probable duration of its hearing and of the expenses to be incurred in this connection,
35 I have decided to order the respondents to give security for costs by way of an amount of C£400, to be deposited in Court

1 [1947] 2 All E.R. 839.

2 [1968] 2 Lloyd's Rep. 153.

or to be secured by a bank guarantee to the satisfaction of the Registrar.

In the meantime, all proceedings in this action shall be stayed until the security is given; and in the event of the security not being given within three months from today then the action shall stand dismissed unless, in the meantime, an order to the contrary is made. 5

I have decided that there should be made no order as to the costs of this application.

Application granted. 10
No order as to costs.