

1978 March 20

[A. Loizou, J.]

THE COMMERCIAL BANK OF THE NEAR EAST LTD.,

*Plaintiffs,*

v.

THE SHIP "PEGASOS III",

*Defendant.*

(Admiralty Action No. 330/77).

---

*Admiralty—Sale of ship in execution of consent judgment and lodgment of proceeds in Court—Claim based on mortgage—Proceeds of sale claimed by several creditors—Application by plaintiffs for determination of priorities and for payment to them of the judgment debt out of proceeds of sale—Opponents (claimants) to plaintiffs' application applying for production and proof in evidence of mortgage—Stage of hearing of application for priorities not reached—Court not prepared, at present, to exercise its powers under rule 113 of the Cyprus Admiralty Jurisdiction Order, 1893 and direct, on the strength thereof, the plaintiffs to produce the mortgage or in any way decide for them the manner in which they should establish the priority of the claim under the mortgage—Claimants' application dismissed.*

On October 15, 1977, the plaintiffs obtained judgment by consent against the defendant ship in respect of their claim in the above action which was based on a mortgage and guarantee. The defendant ship was then sold by order of the Court and the proceeds of sale lodged in Court. Following the above judgment several claimants entered caveats against payment of the proceeds of sale out of Court without notice to them.

On January 18, 1978, plaintiffs filed an application, under rules 111, 112, and 113 of the Cyprus Admiralty Jurisdiction Order, 1893 for the determination of the priorities of the several claims against the defendant ship and for an order directing that

they may be paid their judgment debt out of the proceeds of sale of the defendant ship which had been paid in Court. This application was served on the claimants and directions were given by the Court that oppositions should be filed setting out the priority alleged by each claimant

5

On March 3, 1978 four of the claimants—opponents to plaintiffs' above application—filed the present application by means of which they applied for an order of the Court directing that the alleged mortgage and guarantee (on which plaintiffs' claim was based) be produced and proved in evidence and that all other mortgages and/or guarantees securing debts be produced and proved in evidence

10

*Held*, as the stage of hearing the application for priorities has not been reached, this Court is of opinion that it should not exercise, at present, its powers under rule 113 of the Cyprus Admiralty Jurisdiction Order, 1893 and direct on the strength thereof the plaintiffs to produce the mortgage or in any way decide for them the manner in which they should establish the priority they claim under the said mortgage. So far, the several claimants rely on affidavits and the records of the proceedings in the files of their respective actions against the defendant ship or the proceeds of its sale, and they are, moreover, at liberty to adduce any oral or documentary evidence they deem necessary in order to support their claims or in order to disprove the claim of any other party to the proceedings. The application will, therefore, be dismissed with costs (*Stylianou v Fishing Trawler "Narkissos"* (1965) 1 C.L.R. 297 at p 300 distinguished)

15

20

25

*Application dismissed*

Cases referred to.

30

*Lambanides v Mavrides*, 23 C.L.R. 49;

*Stylianou v Fishing Trawler "Narkissos"* (1965) 1 C.L.R. 297.

**Application.**

Application, made in proceedings for the determination of the priorities of the several claims against the defendant ship,

35

for the production and proof in evidence of certain mortgages and guarantees on which judgment by consent was given in favour of the plaintiffs in this action.

5            *M. Vasiliou* with *S. Stavrinides* and *C. Hadjioannou*, for the applicants.

*E. Constantinides (Mrs.)* for *Chr. Demetriades*, for the respondents.

A. LOIZOU J. gave the following decision. By the present application the applicants pray for an order of the Court:

10            "(a) Directing that the alleged mortgage and guarantee be produced and proved in evidence.

              (b) Directing that all other mortgages and/or guarantees securing debts be produced and proved in evidence.

              (c) Any further or other relief".

15            The application is based on the Admiralty Jurisdiction Order, 1893, Rules 111, 112, 113, 203 and 237, and on the General Practice and Inherent Powers of the Court.

20            The mortgage in question is the subject-matter of this action filed on the 17th September, 1977, by plaintiffs against the defendant ship, at the time lying in Limassol Port, and by which the plaintiffs claimed as "mortgagees under a first preferred mortgage dated 18.2.1977".

25            On the 13th October, 1977, Mr. Papaphilippou appeared on behalf of the defendant ship and the record of the Court for that date reads: "Both counsel state that they reached a provisional settlement, but they ask for an adjournment until Saturday, the 15th October, to finalize same".

30            On the 15th October, 1977, one application for the arrest of the defendant ship and another for her appraisalment and sale by public auction or private treaty were also filed. Counsel for the defendant ship consented to the arrest of the ship and also that the petition in the action be filed, whereupon judgment

by consent was entered as per paras. 12 (a), (b), (c), (d) and (e) of the petition with costs which reads as follows:-

"12. By reason of the aforesaid failure of the Owners of the Defendant ship to pay the said amounts and/or by reason of the latters' breach of the terms of the Mortgage and/or the Guarantee, the plaintiffs suffered loss and damage and/or incurred expenses and/or liabilities and/or liabilities which they hereby claim. 5

And the plaintiffs claim:

- (a) The Cyprus pound equivalent of U.S.\$ 159,131.66 being the amount of principal outstanding under the said Mortgage and Guarantee. 10
- (b) The Cyprus pound equivalent of U.S.\$ 975.75 being the interest due on the said sum under the Mortgage and Guarantee as at 25th August, 1977. 15
- (c) Interest on the sum of U.S.\$ 159,131.66 as agreed and secured by the said Mortgage, as from 25th August, 1977, until payment.
- (d) The Cyprus pound equivalent of U.S.\$ 35,791.85 being insurance premiums paid and/or guaranteed by the plaintiffs as set out in detail in para. 9 above. 20
- (e) Interest on the amount referred to in (d) above as agreed and secured by the Mortgage on the sum of U.S.\$ 18,729.35 from 13.7.77 and on the sum of U.S.\$ 17,062.50 from 13.10.77 until payment". 25

Thereafter the application for appraisalment and sale was entertained by the Court and an order was made accordingly.

Eventually the defendant ship was sold as per the directions of the Court of the 13th January, 1978, and the plaintiffs in this action filed an application for the determination of the priorities of the several claims against the defendant ship, as well as for an order of the Court directing that the plaintiffs- 30

applicants be paid their judgment-debt and cost out of the proceeds of sale of the defendant ship which had, in the meantime, been paid into Court. This application was served on all claimants and on appearing before the Court it was directed  
5 by consent that oppositions to the application should be filed setting out the priority alleged by each claimant. In other words, instead of having several applications on the subject and consolidate them for hearing, or have any other exchange of pleadings, it was agreed by all parties, to proceed on the  
10 application already filed with each party making out his claim for priority in the manner described; consequently, the present direction in no way affects the duty of a litigant to prove his claim in respect of the priority alleged by him.

15 Rule 113 of the Cyprus Admiralty Jurisdiction Order, 1893, reads:-

"The Court or Judge may direct such evidence to be adduced as it shall think fit as to the right of the person making the application, to the moneys in Court and may make such order on the application as shall seem just".

20 In support of the application I was referred to two cases. The one is that of *Lambrianides v. Mavrides*, 23 C.L.R. 49, a case that turns on the effect of consent orders in rent restriction cases, where it was held that Courts have no jurisdiction to issue an order of ejection or for the recovery of possession  
25 in respect of protected premises, except on the grounds set out in the Rent (Control) Law, 1954, section 18, and that the parties cannot confer jurisdiction upon the Court by agreement nor the tenant can waive his statutory protection by agreement.

30 I need hardly say that this case has no bearing to the case in hand.

I was further referred to the case of *Costas Stylianou v. The Fishing Trawler "Narkissos"*, (1965) 1 C.L.R. 297. That was a case of consolidated proceedings for priorities, where, to facilitate matters, interested parties agreed to an order directing  
35 (a) consolidation of the proceedings regarding priorities, the claimants having the conduct of the proceedings as the first

party; (b) exchange of pleadings and filing of affidavits in support, or in opposition of the priority claims; and (c) authorizing the Marshal to accept credit buyers with a Bank guarantee, to facilitate the sale. My attention was drawn to the fact that in respect of a claim for priority on the strength of a mortgage, Vassiliades, J. said the following at page 300: 5

"The mortgage of the ship and the pledge of her equipment were denied by Mr. Houry; but on the evidence before me, and particularly on the certificate for the registration of such mortgage, produced in support of the claim of the fourth suitor, in Action 7/63, and marked *Exhibit 'C'* therein, duly pleaded for the first party in the consolidated proceedings, and confirmed by the mortgager's admission and by the judgment in *Exhibit 6* herein, I find as a fact that the ship and her equipment were duly mortgaged to the fourth suitor, under Greek law as alleged". 10 15

The significance of this passage, according to counsel for the applicants, was that in addition to the judgment produced as *exhibit*, evidence was heard and in particular a certificate for the registration of such mortgage was produced in support of that claimant's claim. 20

This case, in my view, does not take the present application any further as the evidence adduced in that case was that which the claimants themselves elected to adduce in order to prove their claim for priority. It was not ordered by the Court to be adduced by a claimant in order to prove and establish his priority as against the other claimants. 25

As, therefore, we have not reached the stage of hearing the application for priorities, I am of the opinion that I should not exercise, at present, my powers under Rule 113 (*supra*) and direct, on the strength thereof, the applicants to produce the mortgage or in any way decide for them the manner in which they should establish the priority they claim under the said mortgage. So far, the several claimants rely on affidavits and the records of the proceedings in the files of their respective actions against the defendant ship or the proceeds of its sale, and they are, moreover, at liberty to adduce any oral or documentary evidence they deem necessary in order to support their 30 35

claims or in order to disprove the claim of any other party to the proceedings.

The application is, therefore, dismissed with costs.

*Application dismissed with costs.*