1978 September 15

[TRIANTAFYLLIDES, P., DEMETRIADES AND SAVVIDES, JJ.]

LOIZOS CONSTANTINIDES,
Appellant–Defendant,

v.

GREGORIOS MAKRIYIORGHOU AND ANOTHER,
Respondents–Plaintiffs.

(*Civil Appeal No.* 5818).

Injunction—Interlocutory injunction—Principles governing grant—Probability that plaintiffs are entitled to relief as against the defendant—Proviso to section 32(1) *of the Courts of Justice Law,* 1960 (*Law* 14 *of* 1960)*—Misconception by trial Judge as regards a fact which seemed to be very material in relation to the aspect of such probability—Relevant Judicial discretion of trial Judge exercised wrongly and caused injustice to the defendant—Interfered with by Court of Appeal.*

The respondents–plaintiffs sued the appellant–defendant, together with other defendants, and their claim, in so far as the appellant was concerned, was for 67,000 U.S.A. dollars which allegedly belonged to the respondents and has been obtained from them by the appellant, together with others, by fraud or false pretences.

On January 26, 1977, on an *ex parte* application, the respondents obtained an interim injunction, under section 32* of the Courts of Justice Law, 1960 (Law 14 of 1960) by means of which the appellant was restrained from selling, mortgaging, charging or alienating, in any way, his immovable property, pending the final determination of the action or until further order.

On February 25, 1978, the trial Court, after hearing the parties, decided that the interim injunction should remain in force pending the final determination of the action.

In deciding as above the trial Judge stated** that there were

* Quoted at pp. 588–89 *post.*

** See the whole text of the relevant passage at p. 589 *post.*

serious issues to be tried and determined; that it was "an admitted fact that the second defendant" (the appellant in these proceedings) "collected money from the plaintiffs for and on account of the first defendant"; that "the plaintiffs claim that the money were collected by fraud and/or by false pretences and that the second defendant was a party to the fraud"; and that "there is a probability that the plaintiffs are entitled to relief against the defendant if successful".

Though during the hearing of the appeal it has not been disputed that there were serious issues to be tried at the hearing of the action, it has been strongly contested whether there has been established a prerequisite stated in the proviso to section 32(1) of Law 14/60, namely that there is a probability that the respondents are entitled to relief against the appellant.

Held, (after stating the principles to be applied and matters to be taken into consideration when an interlocutory injunction is sought—vide pp. 590–95 post). (1) That the trial Judge has, apparently, been labouring under a misconception as regards a fact which seems to be very material in relation to the aspect of the probability that the respondents are entitled to relief as against the appellant, because he has taken it to be an admitted fact that the appellant collected money from the respondents allegedly in a manner that amounted to taking it by fraud or false pretences, for and on account of a co-defendant of his in the action in question, whereas in fact the appellant never received any money at all in the course of the transaction in relation to which the said action has been filed (see, *inter alia*, paragraph 22 of the affidavit of respondent 1, filed in support of the application for the interim injunction).

(2) That in view of the aforementioned material misconception this Court is entitled to interfere with the exercise of the relevant judicial discretion of the trial Judge on the ground that such exercise is wrong and causes injustice to the appellant (see, *inter alia, HadjiAthanassiou* v. *Parperides* (1975) 1 C.L.R. 401); and that, accordingly, this appeal is allowed and the interim injunction granted in relation to the property of the appellant is set aside.

Appeal allowed.

Per curiam: Before concluding we might add that another reason for interfering with the decision of the trial Judge would be that at the material time there was in force another interim

injunction which had been granted for the purpose of restraining some of the appellant's co-defendants from dealing with money which was the subject matter of the action.

Cases referred to:

Acropol Shipping Company Ltd., and Others v. *Rossis* (1976) 2 J.S.C. 188 (to be reported in (1976) 1 C.L.R.);

Karydas Taxi Co. Ltd., v. *Komodikis* (1975) 1 C.L.R. 321;

Nemitsas Industries Ltd., v. *S. & S. Maritime Ltd. & Others* (1976) 10 J.S.C. 1542 (to be reported in (1976) 1 C.L.R.);

American Cyanamid Co., v. *Ethicon Ltd.*, [1975] 1 All E.R. 504 at p. 510;

Grade One Shipping Limited v. *The Cargo on board the ship "Crios II"* (1976) 11 J.S.C. 1602 at p. 1604 (to be reported in (1976) 1 C.L.R.);

Smith and Others v. *Inner London Education Authority* [1978] 1 All E.R. 411 at p. 426;

British Broadcasting Corporation v. *Hearn and Others* [1978] 1 All E.R. 111 at p. 122;

Hubbard and Others v. *Pitt and Others* [1975] 3 All E.R. 1 at p. 19;

Fellowes and Another v. Fisher [1975] 2 All E.R. 829 at. p. 841;

J. T. Stratford & Son Ltd. v. *Lindley & Another* [1964] 3 All E.R. 102;

Bryanston Finance Ltd., v. *de Vries* (*No.* 2) [1976] 1 All E.R. 25 at p. 34;

Re Lord Cable (deceased) Garatt & Others v. *Waters & Others* [1976] 3 All E.R. 417 at pp. 430-431;

HadjiAthanassiou v. *Parperides & Others* [1975] 1 C.L.R. 401;

Skaliotou v. *Pelekanos* (1976) 7 J.S.C., 1042 (to be reported in (1976) 1 C.L.R.);

Economou v. *Economou* (1977) 3 J.S.C. 320 (to be reported in (1976) 1 C.L.R.).

Appeal.

Appeal by defendant No. 2 against the order of the District Court of Nicosia (Orphanides, S.D.J.) dated the 25th February, 1978 (Action No. 380/77) whereby it was ordained that an interim injunction, obtained by plaintiffs on an *ex parte* application, by means of which defendant No. 2 was restrained from

selling, mortgaging, charging or alienating, in any way, his immovable property pending the final determination of the action or until further order should remain in force pending the final determination of the action.

A. Paikkos, for the appellant.

G. Mitsides, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment of the Court. The appellant, who is defendant No. 2 in Action No. 380/77 in the District Court of Nicosia, has appealed against an order made by that Court, on February 25, 1978, on the application of the respondents, who are the plaintiffs in the said action.

By virtue of such order it was ordained that an interim injunction, which the respondents obtained on an *ex parte* application on January 26, 1977, and by means of which the appellant was restrained from selling, mortgaging, charging or alienating, in any way, his immovable property pending the final determination of the action or until further order, should remain in force pending the final determination of the action.

The provision under which the injunction was granted is section 32 of the Courts of Justice Law, 1960 (Law 14/60), which reads as follows:-

" 32.-(1) Subject to any Rules of Court every Court, in the exercise of its civil jurisdiction, may, by order, grant an injunction (interlocutory, perpetual or mandatory) or appoint a receiver in all cases in which it appears to the Court just or convenient so to do, notwithstanding that no compensation or other relief is claimed or granted together therewith:

Provided that an interlocutory injunction shall not be granted unless the Court is satisfied that there is a serious question to be tried at the hearing, that there is a probability that the plaintiff is entitled to relief and that unless an interlocutory injunction is granted it shall be difficult or impossible to do complete justice at a later stage.

(2) Any interlocutory order made under subsection (1) may be made under such terms and conditions as the Court thinks just, and the Court may at any time, on reasonable cause shown, discharge or vary any such order.

(3) If it appears to the Court that any interlocutory order made under subsection (1) was applied for on insufficient grounds, or if the plaintiff's action fails, or judgment is given against him by default or otherwise, and it appears to the Court that there was no probable ground for his bringing the action, the Court may, if it thinks fit, on the application of the defendant, order the plaintiff to pay to the defendant such amount as appears to the Court to be a reasonable compensation to the defendant for the expense and injury occasioned to him by the execution of the order.

Payment of compensation under this subsection shall be a bar to any action for damages in respect of anything done in pursuance of the order; and any such action, if begun, shall be stayed by the Court in such manner and on such terms as the Court thinks just."

The claim of the respondents in the action in question, in so far as the appellant is concerned, is for the equivalent of 67,000 USA dollars which allegedly belonged to the respondents and has been obtained from them by the appellant, together with others, by fraud or false pretences.

In deciding that the interim injunction should remain in force until the final determination of the action the trial Judge stated the following:-

" I need not expand any further, suffice it to say that in the present case there are indeed serious issues to be tried and determined by the trial Court. It is an admitted fact that the second defendant collected money from the plaintiffs for and on account of the first defendant. The plaintiffs claim that the money were collected by fraud and/or by false pretences and that the second defendant was a party to the fraud. It is not for the Court to decide at this stage whether these allegations are true. It is sufficient that there is an issue between the plaintiffs and the defendant to be tried at the hearing and as there is a probability that the plaintiffs are entitled to relief against the defendant if successful, I have come to the conclusion that the interim injunction was obtained on grounds justifying the making of the order."

During the hearing of this appeal it has not been disputed

that, as it appears on the face of the record, there are, as found by the trial Judge, serious issues to be tried at the hearing of the action.

What has been strongly contested, however, is whether there has been established a prerequisite stated in the proviso to section 32(1) of Law 14/60, namely that there is a probability that the respondents are entitled to relief against the appellant. The importance of this prerequisite was considered in *Acropol Shipping Company Ltd., and Others* v. *Rossis*, (1976) 2 J.S.C. 188*, where Hadjianastassiou J. said (at pp. 216–218):-

> " Having reviewed at length what are the principles in granting an interlocutory injunction in England and having regard to the weighty judicial pronouncements, we think that we can safely conclude that until the recent judgment of the House of Lords in the *American Cyanamid* case, an interlocutory injunction would normally be granted only when the party seeking it can show a *prima facie* case or a strong *prima facie* case and/or a probable case in support of his right and that he was likely to suffer substantive, *i.e.* irreparable injury if an action is not granted.
>
> On the contrary, in Cyprus in granting an interim injunction, the Courts followed closely the principles formulated in *Preston* v. *Luck* (*supra*) that a party seeking it would show that there was a serious question to be tried at the hearing and that on the facts before the Courts there is a probability that the plaintiff was entitled to relief.
>
> The trial Court in the case in hand, as it appears from the whole record, in considering whether to grant the interim injunction looked not only at the plaintiff's case to see if he had made out a case satisfying the Court that there was a serious question to be tried at the hearing, and that on the facts before it there was a probability that the plaintiff was entitled to relief — but also at the defendants' case to see if they might have given a good answer to it, to enable the Court to decide that there was no probable ground for his bringing the action or whether a reasonable cause was shown requiring the Court to vary, discharge or continue it. Having heard exhaustive argument by both counsel on this issue, we have reached the conclusion that the Court had

* To be reported in (1976) 1 C.L.R.

properly addressed its mind to the provisions of s. 32 of the Courts of Justice Law in granting the said interim injunction because the proviso to section 32(1) says in clear and unambiguous language that 'an interlocutory injunction shall not be granted unless the Court is satisfied that there is a serious question to be tried at the hearing, that there is a probability that the plaintiff is entitled to relief and that unless an interlocutory injunction is granted it shall be difficult or impossible to do complete justice at a later stage'.

We would, therefore, dismiss this contention of counsel once again. But the question still remains whether we would be prepared to follow the decision of the House of Lords in the *American Cyanamid* case, where it was stated that 'the use of such expressions as 'a probability', 'a *prima facie* case', or 'a strong *prima facie* case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief'.

Having given this matter our best consideration, we are of the opinion that this is one of those individual cases in which the Courts should go by the clear and unambiguous language of our Statute section 32, of the Courts of Justice Law, 1960, quoted earlier, rather than the principles stated by the House of Lords in the *American Cyanamid* case."

We shall refer, next, to some other relevant case-law, both here and in England:

Prior to the *Acropol* case, *supra*, our Supreme Court had occasion to deal on appeal with the matter of an interlocutory injunction in *Karydas Taxi Co. Ltd.*, v. *Komodikis*, (1976) 7 J.S.C. 1101*; it was decided before the *Acropol* case, but was reported after the *Acropol* case; and it has been, in effect, decided in a manner consistent with the approach adopted in the *Acropol* case. The same matter was, also considered, subsequently, in a number of judgments given in the course of the exercise of the first instance jurisdiction of the Supreme Court, such as in *Nemitsas Industries Ltd.*, v. *S. & S. Maritime Ltd. and Others*, (1976) 10 J.S.C. 1542**, in which express reference was made to the *Acropol case*.

* Now reported in (1975) 1 C.L.R. 321.

** To be reported in (1976) 1 C.L.R.

In his judgment in the *Acropol* case Mr. Justice Hadjianastassiou referred to certain dicta by Lord Diplock in *American Cyanamid Co.* v. *Ethicon Ltd.*, [1975] 1 All E.R. 504; and it is in this respect that it was stated later by me in *Grade One Shipping Limited, owners of the Cyprus ship "Crios II"* v. *The Cargo on board the ship "Crios II"*, (1976) 11 J.S.C. 1602* (at p. 1604), that the *Cyanamid* case, *supra*, has been incorporated in our own case-law by the judgment given in the *Acropol* case; without my having, of course, overlooked that because of the need, under section 32 of our Law 14/60, to show that there is a probability that the plaintiff is entitled to relief, the *Cyanamid* case has not been followed here as regards the view of the House of Lords (see per Lord Diplock, at p. 510) that there is no rule –

> " ..... that the Court is not entitled to take any account of the balance of convenience unless it has first been satisfied that if the case went to trial on no other evidence than is before the Court at the hearing of the application the plaintiff would be entitled to judgment for a permanent injunction in the same terms as the interlocutory injunction sought."

Lord Diplock went on, however, to say, also, the following, later on in the *Cyanamid* case (at p. 510):–

> " So unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

The just quoted above dictum of Lord Diplock has been applied as recently as in *Smith and Others* v. *Inner London Education Authority*, [1978] 1 All E.R. 411, 426.

Though there is no doubt that the decision in the *Cyanamid* case is regarded in England as being still good law (see, for example, *British Broadcasting Corporation* v. *Hearn and Others*, [1978] 1 All E.R. 111, 122) nonetheless in *Hubbard and Others* v. *Pitt and Others*, [1975] 3 All E.R. 1, 19, as well as in the

* To be reported in (1976) 1 C.L.R.

earlier case of *Fellowes and another* v. *Fisher*, [1975] 2 All E.R. 829, 841, the view was expressed that the *Cyanamid* case may not in effect be an inconsistent decision with the previous decision, in a matter of the same nature, of the House of Lords in England, in *J. T. Stratford & Son Ltd.* v. *Lindley and Another*, [1964] 3 All E.R. 102, which does not appear to have been cited in argument before the House of Lords in the *Cyanamid* case and in which all the members of the House of Lords—(there having been no argument to the contrary)—expressed the view that the plaintiff is not entitled to an interlocutory injunction unless he establishes a *prima facie* case; it was pointed out, however, both in the *Fellowes* and in the *Hubbard* cases that if the *Stratford* and the *Cyanamid* cases have, eventually, to be treated as inconsistent decisions of the House of Lords, then the latter should prevail as being the more recent authority.

In *Bryanston Finance Ltd.*, v. *de Vries* (*No.* 2), [1976] 1 All E.R. 25, it was pointed out that the judgment in the *Cyanamid* case must be looked at bearing in mind the character of that particular case; Buckley L.J. stated the following (at p. 34):-

> " In this Court, as below, counsel for the plaintiff company has mainly relied on *American Cyanamid Co.* v. *Ethicon Ltd.*[1]. In that case the House of Lords undoubtedly stated principles which were intended to have a wide application. It is necessary, however, to bear in mind the character of the case then before their Lordships' House in order to appreciate the extent of that wide application. The case related to an alleged threatened infringement of a patent. Lord Diplock, discussing the principles to be applied and matters to be taken into consideration when an interlocutory injunction is sought, referred[2] to 'an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right ...' Primarily, at any rate, it was that type of injunction which he had in mind. Both his language and his reasoning indicate this. His attention was addressed to the kind of action in which issues relating to the existence of a right claimed by the plaintiff and the existence or threat of some infringement by the defendant

1. [1975] 1 All E.R. 504.
2. [1975] 1 All E.R. at 509.

of that right are for the time being uncertain but will be investigated and determined at the trial."

Then, in *Re Lord Cable (deceased) Garatt and Others* v. *Waters and Others*, [1976] 3 All E.R. 417, Slade J. said (at pp. 430–431):-

"2. *The Cyanamid case: evidence on interlocutory applications.*

Inevitably and rightly, counsel have referred me at some length to a number of recent decisions, beginning with *American Cyanamid Co.* v. *Ethicon Ltd*[1], in which higher Courts have considered the principles according to which interlocutory relief by way of injunction should or should not be granted. Before the decision of the House of Lords in the *American Cyanamid* case[2], it had been a widely held belief that a plaintiff had to establish a *prima facie* case of some breach of duty to him by the defendant if he was to have a hope of succeeding in obtaining relief by way of interlocutory injunction. From this decision, it would appear that the description of the obligation falling on any plaintiff seeking interlocutory relief by way of injunction as being an obligation to establish 'a *prima facie* case' somewhat exaggerates the extent of such obligation. Nevertheless, it is in my judgment clear, not only from the *American Cyanamid* case[3] but also from more recent decisions of the Court of Appeal, that it remains incumbent on a plaintiff seeking an interlocutory injunction to establish that there is at least a serious question to be tried. On any claim for an interlocutory injunction the Court must still, as a first step, consider whether the evidence available to the Court discloses or fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial; if the available evidence fails to disclose this, the motion must fail in limine and questions of balance of convenience will not fall to be considered at all (see, for example, the *American Cyanamid* case[4], per Lord Diplock; *Hubbard* v. *Pitt*[5], per Stamp L.J.; *Fellowes* v. *Fisher*[6], per Browne L.J.).

1. [1975] 1 All E.R. 504.
2. [1975] 1 All E.R. 504.
3. [1975] 1 All E.R. 504.
4. [1975] 1 All E.R. 504 at 509, 510.
5. [1975] 3 All E.R. 1 at 13.
6. [1975] 2 All E.R. 829 at 841.

I add one further observation in relation to the evidentiary position. *American Cyanamid Co.* v. *Ethicon Ltd.*[1] may have led prospective plaintiffs to the belief, perhaps partially justified, that it is not necessary for them to adduce affidavit evidence in support of a motion for an interlocutory injunction of such a precise and compelling nature as might have been required before that decision. Nevertheless, in my judgment it is still necessary for any plaintiff who is seeking interlocutory relief to adduce sufficiently precise factual evidence to satisfy the Court that he has a real prospect of succeeding in his claim for a permanent injunction at the trial. If the facts adduced by him in support of his motion do not by themselves suffice to satisfy the Court as to this, he cannot in my judgment expect it to assist him by inventing hypotheses of fact on which he might have a real prospect of success. For example, if he wishes the Court to grant him relief on the basis that another person has at all material times held certain assets as nominee for a third party, he must adduce sufficient factual evidence to show both the grounds on which such claim is made and that he has a real prospect of establishing that such assets are so held. Likewise, if he wishes the Court to grant him relief on the basis that certain trustees have in the past been acting in breach of trust, he must adduce factual evidence sufficient to show not only what acts or omissions are relied on but also that he has a real prospect of establishing that they constituted a breach of trust under the relevant system of law."

In the light of all the foregoing we shall revert, now, to the particular situation in the present appeal, and the first thing to be noted is that the trial Judge has, apparently, been labouring under a misconception as regards a fact which seems to be very material in relation to the aspect of the probability that the respondents are entitled to relief as against the appellant; such misconception is that the trial Judge has taken it to be an admitted fact that the appellant collected money from the respondents, allegedly in a manner that amounted to taking it by fraud or by false pretences, for and on account of a co-defendant of his in the action in question, namely defendant No. 1. In fact, however, the appellant never received any money at

1. [1975] 1 All E.R. 504.

all in the course of the transaction in relation to which the said action has been filed; and that this is so can be derived from paragraph 22 of the affidavit of respondent 1 Gregorios Makriyiorghou, which is dated January 26, 1977, and was filed in support of the application for the interim injunction in this case, as well as from paragraph 15 of the Statement of Claim of the respondents, which was filed on March 7, 1978, after the appealed from decision had rendered final the interim injunction.

Also, the appellant in his affidavit dated March 15, 1977, denies completely any liability in relation to the claims of the respondents, and, moreover, the contents of two affidavits, by Ioulios Shaloup and Panayiotis Anastassiou, which are both dated May 18, 1977, and were filed in support of the opposition to the application for an interim injunction, establish that actually the appellant never received any money himself. The said two affiants are both persons who appear not to be at all partisan in relation to the present proceedings, with the result that their affidavits constitute *prima facie* credible evidence.

In view of the aforementioned material misconception we feel that we are entitled to interfere with the exercise of the relevant judicial discretion of the trial Judge on the ground that such exercise is wrong and causes injustice to the appellant (see, *inter alia*, *HadjiAthanassiou* v. *Parperides and Others*, (1975) 1 C.L.R. 401, the *Karydas Taxi Co. Ltd.* case, *supra*, *Skaliotou* v. *Pelekanos*, (1976) 7 J.S.C. 1042* and *Economou* v. *Economou*, (1977) 3 J.S.C. 320)*.

Before concluding we might add that another reason for interfering with the decision of the trial Judge would be that at the material time there was in force another interim injunction which had been granted for the purpose of restraining some of the appellant's co-defendants from dealing with money which was the subject matter of the action.

In the result this appeal is allowed and the interim injunction granted in relation to the property of the appellant is set aside; and the respondents should bear the appellant's costs in this appeal.

Appeal allowed. Order for costs as above.

* To be reported in (1976) 1 C.L.R.