1979 March 19

[SAVVIDES, J.]

THE AGRICULTURAL PRODUCTS CO- OPERATIVE MARKETING UNION LTD.,

Plaintiffs,

v.

DSR LINES OF ROSTOC THROUGH CHR. IEROPOULLOS & CO. LTD., OF LIMASSOL,

Defendants.

(Admiralty Actions Nos. 288/78 *and* 295/78).

Admiralty—Practice—Writ of summons—Issue and service—Distinction—Position arising if issue or service of writ bad—Defendants outside jurisdiction—No leave to issue writ required but only leave to serve—Service, in Cyprus, on person not authorised to transact business for defendant corporation in Cyprus or to accept legal process—Bad service—Set aside—Writ of summons not automatically struck out if service proves bad—Rules 5, 9 *and* 23 *of the Cyprus Admiralty Jurisdiction Order* 1893.

The plaintiffs in these actions, who had a claim for damages for breach of contract and/or bailment, issued a writ of summons against the defendants through S. Ch. Ieropoullos & Co. Ltd., of Limassol and served it upon the latter as their agents.

The defendants appeared under protest and applied for -

(a) an order setting aside the service of the writ of summons upon them; and

(b) an order striking out and/or setting aside the writ of summons as irregular and/or wrong in law.

Applicants-defendants contended:

(a) that the service on Ieropoullos & Co. was wrong and bad in law as the defendants, whose business place is in Rostoc, have never authorised Ieropoullos & Co. to accept service of any action or other legal process on their behalf.

At the hearing counsel for respondents-plaintiffs conceded that service on Ieropoullos & Co. was wrong, as such company were not authorised by the defendants to accept service of the process and that the defendants were not carrying on business in Cyprus through them, and submitted to an order setting aside the service of the writ of summons as wrongly made.

(b) That once the service was wrong in law, defendants were entitled to an order striking out and/or setting aside the writ of summons as well.

Counsel submitted that when an order setting aside the service of the writ of summons is made, such order has the effect of automatically entitling the party asking for it to have the writ of summons set aside as well.

Held, (1) that the service of the writ of summons had been effected on a person who was not authorised to transact business for the defendant Corporation in Cyprus or to accept service of legal process and it was evidently bad service; that the respondents-plaintiffs very rightly submitted to an order setting aside the service of the writ of summons; and that, accordingly, the service of the writ of summons upon the defendants is set aside.

(2) That the issue of a writ of summons is an independent step from the service of same; that different rules apply to the issue of the writ of summons and different ones to the service of same; that the issue of a writ of summons is the first step for proceedings to commence and the service is the second step; that there is no requirement for leave to issue a writ in an admiralty action in cases where the defendant is outside the jurisdiction of the Court (see rules 5 and 9 of the Cyprus Admiralty Jurisdiction Order, 1893); that leave is only necessary when service outside the jurisdiction is to be effected (see rule 23 of the Cyprus Admiralty Jurisdiction Order, 1893); that if the issue of the writ of summons proves bad, then the writ of summons and any subsequent proceedings thereafter, including service, are set aside; that if, on the other hand, service proves bad, this may be cured by effecting proper service in the manner contemplated by the Rules, after such service is set aside; that, therefore, the argument of counsel for the applicants that if

service proves bad then automatically the writ of summons has to be struck out is unfounded; and that, accordingly, his prayer in this respect must be dismissed.

Applications partly granted.

Cases referred to:

The Lalandia, 44 Ll.L.R. 55;

The Holstein, 55 Ll.L.R. 379;

Counnas & Sons v. *Union Lebanese Transport Agencies* (1977) 6 J.S.C. 819 (to be reported in (1977) 1 C.L.R.);

Westcott & Lawrence Line v. *The Mayor etc. of Limassol*, 22 C.L.R. 193;

Thames and Mersey Marine Insurance Co. v. *Societe di Navigazione a Vapore del Lloyd Austriaco* [1914] 12 Asp. M.L.C. 491;

Okura & Co. v. *Forsbacka Jernverka A/B* [1914] L.R. 1 K.B. 715;

Counnas & Sons v. *Union Lebanese Transport Agencies* (Civil Appeal No. 5727 decided on 3.11.77 to be reported in (1979) 1 J.S.C.);

Panayi v. *Fraser* (1963) 2 C.L.R. 356.

Applications.

Applications by the defendants for an order setting aside the service of the writ of summons upon them and for an order striking out and/or setting aside the writ of summons as irregular and/or wrong in law.

Fr. Saveriades, for applicants–defendants.

A. Timothy (Mrs.) for *St. Ambizas*, for respondents–plaintiffs.

SAVVIDES J. read the following judgment. By these two applications which have been heard together at the request of both counsel, in view of the common points in issue, the defendants–applicants pray for –

(a) an order setting aside the service of the writ of summons upon the defendants; and

(b) an order striking out and/or setting aside the writ of summons as irregular and/or wrong in law.

The plaintiffs' claim in the above actions is for damages for

breach of contract and/or bailment on the part of the defendants. The writ of summons was issued against the defendants through S. Ch. Ieropoulos & Co. Ltd., of Limassol, and served upon the latter as their agents.

The defendants appeared under protest and filed the present applications. The facts relied upon in support of the applications appear in two affidavits: The first, sworn by Mrs. Chrystalleni Houry, an advocate associated with Mr. Saveriades, counsel for the applicants-defendants, authorized to make the affidavit on behalf of the applicants. The second, sworn by Mr. Paris Marcoullides, the internal lawyer of S. Ch. Ieropoullos & Co., Ltd. In the first affidavit it is alleged that the writ of summons is irregular on the ground that the name of the Court before which the action was instituted is not stated on the top of the writ of summons. It is further alleged that the service on S. Ch. Ieropoullos & Co., Ltd., is wrong and bad in law, as the defendants, whose business place is in Rostoc, have never authorized S. Ch. Ieropoullos & Co., Ltd., of Limassol to accept service of any action or other legal process on their behalf.

The second affidavit contains a statement to the effect that S. Ch. Ieropoullos & Co., Ltd., were not the agents of the defendants and they have never been authorized by them to accept service of the writ of summons or any other Court documents.

At the hearing, counsel for the respondents-plaintiffs, conceded that service on Ieropoullos & Co., Ltd., was wrong, as such company were not authorized by the defendants to accept service of the process and that the defendants were not carrying on business in Cyprus through them, and submitted to an order setting aside the service of the writ of summons as wrongly made.

Counsel for the applicants-defendants insisted on the second part of his prayer, that is, to have the writ of summons set aside as well. In his very short address before the Court, counsel for the applicants argued that once the service was wrong in law, defendants were entitled to an order striking out and/or setting aside the writ of summons as well. He did not pursue the objection set out in the affidavit as to the defect in the writ of summons by omitting to mention the jurisdiction within which the action was brought. The whole argument was directed to his submission that when an order setting aside the

service of the writ of summons is made, such order has the effect of automatically entitling the party asking for it to have the writ of summons set aside as well. In support of his argument he relied on the *Lalandia*, 44 Ll. L.R. 55, the *Holstein*, 55 Ll. L.R. p. 379, [1936] 2 All E.R. p. 1660 and *Counnas & Sons* v. *Union Lebanese Transport Agencies of Beirut* (1977)* 6 J. S.C. p. 819.

Mrs. Timothy, counsel for the respondents-plaintiffs argued that a distinction must be drawn between the issue of a writ of summons and the service thereof. She submitted that this is clear from the wording of the Rules of Court and the Admiralty Rules which make separate provisions for the issue of the writ of summons and the service thereof. Therefore, the setting aside of the service has not the effect of automatically entitling the applicants to an order setting aside the writ of summons. She further contended that no cause has been shown why the action should not be maintainable either for want of jurisdiction or for any other reason which might entitle the applicants to an order setting aside the writ of summons.

Counsel for the respondents, very rightly, in my opinion, submitted to an order setting aside the service of the writ of summons. Such service had been effected on a person who was not authorized to transact business for the defendant corporation in Cyprus or to accept service of legal process and it was evidently bad service. This is in line with the decisions of our Court in *Counnas & Sons* v. *Union Lebanese Transport Agencies of Beirut* (*supra*), *Westcott & Lawrence Line* v. *The Mayor, Deputy Mayor, Councillors and Townsmen of Limassol*, 22 C.L.R. p. 193 and the English decisions in the *Lalandia* case (*supra*), the *Holstein* (*supra*), *Thames and Mersey Marine Insurance Co.* v. *Societe di Navigazione a Vapore* del Lloyd Austriaco [1914] 12 Asp. M.L.C. 491 and *Okura & Co.* v. *Forsbacka Jernverka* A/B [1914] L.R. 1 K.B. 715.

Zekia, J. in delivering the judgment in *Westcott & Lawrence Line* v. *The Mayor etc.* (*supra*) dealt with the provisions in our Rules of Court concerning service on an agent and drew the distinction between such Rules and the corresponding English Rules in this respect. At page 196, his judgment reads as follows:

* To be reported in (1977) 1 C.L.R.

" The legality of the service of the writ of summons upon the defendant corporation by delivering the same to the Cyprus company depends as to whether the director of the company with whom the sealed copy of the writ was left by the process-server in Limassol is a person who appears to be authorized to transact business for the defendant corporation in Cyprus or not, and the present case, therefore, stands or falls on the interpretation of the part quoted from O. 5 r. 7 of the Civil Procedure Rules. Undoubtedly the corresponding English Rule, 0 9 r. 8 of the Rules of the Supreme Court of 1883, is not similarly worded. The latter does not specifically refer to service on the companies formed outside the U.K. and which have no place of business within the country and, furthermore, the English Rule does not expressly provide for service on a person who appears to be authorized to transact business for an overseas company within the U.K. It appears, however, that the main part of the Rules of the Supreme Court of 1883 and the preceding procedural rules, especially those relating to process service within and out of jurisdiction, were, with certain modifications and exceptions, based on Common Law. Under Common Law doctrine a writ could never be served on a defendant out of England especially in actions in personam. 0.9 r. 8 and its prototype were expounded judicially (by a long line of decided cases) as providing mode of service on agents residing within jurisdiction for their principals, corporations formed out of jurisdiction. The scope of the rule was enlarged without it being redrafted as Backley, L.J. said:

> ' In 0.9 r. 8 which relates to service upon corporations, there is such expression as 'reside' or 'carry on business'. Those are expressions found in judgments which have dealt with this subject'. (*Hercules* v. *Grand Trunk Pacific Railway* [1912] 1 K.B. 227).

It is apparent, however, that throughout this line of cases, while a practice or system of process service on the local agent of foreign corporations for actions brought against the latter was being evolved, care was taken neither to offend the letter of 0.9 r. 8 nor the underlying principle of Common Law we have just referred to. On the other hand, the greater part of our Civil Procedure Rules are

almost identical with the corresponding English Rules of the Supreme Court and by section 35 of the Courts of Justice Law, in default of any provisions in our Civil Procedure Rules, the practice and procedure prevailing in the Courts in England shall be observed. The great similarity between the two sets of Rules of Court indicates forcibly that the underlying principles in both sets are similar and, unless an express provision or the context leads to a contrary view, in interpreting our Rules of Court preference should be given to a construction more consonant to the corresponding English Rules of the Supreme Court. In *R.* v. *Theori* (1902) 6 C.L.R. 14 it was held that –

> 'the Cyprus Courts of Justice Order, 1882, to a great extent was based on English practice and in seeking to determine what was the intention of the enacting power, where it is not clearly expressed, regard should be had to the rules in force in England in regard to the matter in question'.

That our Civil Procedure Rules follow to a very great extent the English model cannot be disputed."

I come now to the argument of counsel for the applicant concerning the setting aside of the writ of summons. I find it necessary, however, at this stage, to deal briefly with the Rules of Court in respect of the issue of a writ of summons.

Under the Civil Procedure Rules, 0.2 r. 2:

> " No writ of summons for service out of Cyprus or of which notice is to be given out of Cyprus shall be sealed without the leave of the Court or a Judge."

It is only after such leave is obtained that the writ of summons may be presented for sealing in the manner provided by Order 2, rule 12.

Order 2, rule 2 is based and is in fact identical with the corresponding English Order 2, rule 4, of the Rules of the Supreme Court of England, 1883, as revised up to 1953 (vide Annual Practice, 1953), the time when the last edition of our Rules of Court was revised and published under Cap. 12, of Vol. 2 of the Rules of Court. The English Rules, however, were revised

in 1962 (R.S.C. Revision 1962) and in 1965 by the Rules of the R.S.C. 1965 which are in force till to-day. Order 2, rule 4 of the English Rules was substituted by Order 6, rule 7(1) which added a proviso to the original rule and which now reads as follows:

> " No writ which, or notice of which, is to be served out of the jurisdiction shall be issued without the leave of the Court:
>
> Provided that if every claim made by a writ is one which by virtue of an enactment the High Court has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction of the Court or that the wrongful act, neglect or default giving rise to the claim did not take place within its jurisdiction, the foregoing provision shall not apply to the writ."

Under the English Admiralty Rules, Order 75, rule 3(2), the same rules concerning the issue of a writ of summons are made applicable. Order 75, rule 3(2) reads as follows:

> " Order 6, rule 7, shall apply in relation to a writ by which an Admiralty action is begun, and Order 12 shall apply in relation to such an action, as if for references therein to the Central Office there were substituted references to the registry."

Under the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction, the procedure in issuing a writ of summons is regulated by rules 5-14. Rule 5 provides as follows:

> "Every action shall be commenced by writ of summons calling upon the defendant to appear before the Court at a time to be named therein."

Rule 9 of the said Rules provides that -

> "Every writ of summons shall be prepared by or on behalf of the plaintiff so as to set forth all the particulars required by the last preceding rule and when so prepared shall be presented to the Registrar, who shall inscribe on the writ the date of the year and the number of the writ and insert in the writ a statement of the day and hour when the de-

fendant is required to appear before the Court, and the date of the day on which the writ is issued."

It is clear that there is no requirement under the Admiralty Rules for leave to issue a writ in cases where the defendant is outside the jurisdiction of the Court. Leave is only necessary and contemplated by rule 23, when service outside the jurisdiction is to be effected, as follows:

" Where the person to be served is out of Cyprus application shall be made to the Court or Judge for an order for leave to serve the writ of summons or notice of the writ."

Comparing the Admiralty Rules with the Civil Procedure Rules and the corresponding English Rules of the Supreme Court and the Admiralty Rules, there is no doubt that whereas under the latter Rules a writ of summons for service out of the jurisdiction cannot be presented for sealing without the leave of the Court, under the Cyprus Admiralty Rules no such leave is required.

Having dealt with the respective provisions in the Rules concerning the issue of service of the writ of summons, I am now coming to consider the cases referred to by counsel for the applicants in support of his argument.

The *Lalandia* case (*supra*) was a case of collision that happened in the high seas outside the territorial jurisdiction and the defendants were a Danish firm not carrying on business through agents within the jurisdiction, so as to be resident within the jurisdiction. A writ in personam within the jurisdiction was issued against the defendants and served on agents in England. Defendants' contention, in addition to lack of jurisdiction, was that in the circumstances, leave could not be granted for service out of the jurisdiction. The Court having been satisfied that the defendants were not carrying on business within the jurisdiction and taking into consideration all the facts before it, reached the conclusion that the issue of the writ was bad and should be set aside and also the service of the writ was bad, and made an order setting aside the writ of summons and the service of the writ as well.

In the *Holstein* case, reference was made to the *Lalandia* case which was treated as a similar case. The points raised by counsel for the defendants were –

(1) that the writ was one for service within the jurisdiction, though his clients did not carry on business, nor did they reside within the jurisdiction, and

(2) that the service was bad because it was not made on the "Head, officer ... treasurer, or secretary" of the defendant Company within the meaning of Order 9, rule 8 of the Rules of the Supreme Court.

The Court found that both the issue of the writ of summons and the service thereof were bad and in consequence the writ and any subsequent proceedings, including service, should be set aside. Sir Boyd Merriman, P., concluded his judgment as follows:

> " If I had to hold that the writ was good I would have had to consider that which is now academic, that is to say, whether service on somebody who happens to be the secretary of Messrs. Stelp & Leighton, Ltd., but who is not himself in any way employed under the Hamburg South America Steamship Company, would have been good, even if the writ itself had been properly made out."

In the *Lalandia* case, reference is made to the *Okura & Co.* case (*supra*) where the issues before the Court were the same as in the two above referred cases, that is, that the issue of the writ of summons was bad, and, also, that service was not duly effected and, in consequence, bad.

It is clear that in all the above cases the issue of the writ was found to be bad, on the ground that such writ was a writ issued within the jurisdiction, whereas the defendants were outside the jurisdiction with no place of business within the jurisdiction, contrary to the provisions of the Rules of the Supreme Court. Furthermore, service having been proved to be bad, such service was also set aside.

In *Counnas & Sons* v. *Union Lebanese Transport etc.* (1977)* 6 J.S.C. p. 819, cited by counsel for the applicant, the Court, in dealing with an application to set aside the service of the writ of summons, after finding that the service of the writ of summons was bad, as made on persons who were not the agents

* To be reported in (1977) 1 C.L.R.

of the defendants, made an order setting aside both the issue and the service of the writ of summons. This case came before the Supreme Court on appeal (Civil Appeal No. 5727*). Counsel for the defendants–respondents in the appeal conceded that the application was only for an order to set aside the service of the writ of summons and not for striking out the writ of summons, and in the light of such statement, the Court held as follows:

> " We are of the view that the issue of the writ of summons could not have been set aside by the trial Judge as it was no longer required to determine this matter at the time when the relevant application was heard. We, therefore, vary accordingly the order appealed from, so as to limit it to the setting aside of the service of the writ of summons."

The question of setting aside a writ of summons and/or service thereof was dealt with by our Courts in a number of cases. In *Panayi* v. *Fraser* (1963) 2 C.L.R. 356, the writ of summons and service thereof were set aside on an application in that respect, the objection being that the Court had no jurisdiction to adjudicate in the matter as the defendant was a person enjoying diplomatic immunity. In setting aside the writ of summons the Court took into consideration that such writ could not have been issued in the circumstances of the case. In *Westcott & Lawrence Line* v. *The Mayor Deputy Mayor* etc. (*supra*), though the Court found that service of the writ of summons on the local agents was bad and ought to be set aside and made an order accordingly, without at the same time treating the issue of the writ as irregular.

It is clear from the above cases and also from the provisions in the Rules of Court that the issue of a writ of summons is an independent step from the service of same. Different rules apply to the issue of the writ of summons and different ones to the service of same. The issue of a writ of summons is the first step for proceedings to commence. The service is the second step. If the issue of the writ of summons proves bad, then the writ of summons and any subsequent proceedings thereafter, including service, are set aside. If, on the other hand, service proves bad, this may be cured by effecting proper service in the manner contemplated by the Rules, after such

* To be reported in (1979) 1 J.S.C.

service is set aside. The argument, therefore, of counsel for the applicant that if service proves bad then automatically the writ of summons has to be struck out, is unfounded and his prayer in this respect is dismissed. Counsel for applicants has not advanced any other argument to show that the writ of summons was bad for any cause whatsoever, whereby the Court might have considered the question of setting aside such writ.

In the result, the application succeeds in respect of paragraph (a) and an order is hereby made setting aside the service of the writ of summons upon the defendants.

Coming now to the question of costs, I find that once applicants have succeeded only to the one part of their prayer and failed in respect of the other, the case is a proper one for awarding no costs. I, therefore, make no order for costs.

Applications partly granted.
No order as to costs.