1979 May 10

[MALACHTOS, DEMETRIADES, SAVVIDES, JJ.]

LOUCAS PAPASTRATIS,

Appellant-Plaintiff,

v.

GLAFKOS PETRIDES, PERSONALLY AND IN HIS CAPACITY AS SECRETARY OF THE CLUB "TRUST" NICOSIA AND AS REPRESENTATIVE OF THE MEMBERS AND COUNCIL OF THE SAID CLUB,

Respondent-Defendant.

(*Civil Appeal No.* 5919).

Injunction—Interlocutory injunction—Principles governing grant—Section 4 *of the Civil Procedure Law, Cap.* 6 *and section* 32 *of the Courts of Justice Law,* 1960 (*Law* 14/60)—*Whether an application for an interlocutory order under the former section can be considered independently of the provisions of the latter section—Expulsion of member of social club—No wrong exercise of discretion by trial Judge in refusing interlocutory injunction, staying effect of expulsion, on the ground that irreparable damage will not be prevented and that pecuniary compensation will be adequate compensation for any damage plaintiff may have suffered.*

Injunction—Interlocutory injunction—Irreparable damage—Proviso to section 32 *of the Courts of Justice Law,* 1960—*Wording thereof "it shall be difficult or impossible to do complete justice at a later stage" may include other factors in addition to irreparable damage.*

Civil Procedure—Appeal—"Parties directly affected by the appeal"—Rule 5 *of Order* 35 *of the Civil Procedure Rules.*

Following the expulsion of the appellant-plaintiff from the "Trust" club for a period of six months he filed an action for a declaration that the said expulsion was null and void and of no legal effect whatsoever. At the same time he filed an *ex-parte* application for an interlocutory injunction restraining the de-

fendant, as Secretary of the Club, from implementing the decision to expel him until the determination of the action. The application was based on sections 4* and 9* of the Civil Procedure Law, Cap. 6 and on section 32** of the Courts of Justice Law, 1960 (Law 14/60).

The trial Judge dismissed the application having held that the appellant will not suffer any irreparable damage if the application is refused and that pecuniary compensation will be adequate compensation for any damages he may have suffered.

Upon appeal Counsel for the appellant contended:

That the trial Judge wrongly exercised his discretion in not granting the order applied for because

(a) in considering the application he ignored altogether the provisions of section 4 of the Civil Procedure Law, Cap. 6.

Counsel submitted that this section is similar to section 25(8) of the Judicature Act, 1873 in England and section 45 of the Judicature Act, 1925 which replaced section 28(8). So if one moves the Court in time and properly and at an early stage of the proceedings applies for an Order for the preservation of the status quo or for an Order preventing any loss or damage, then the Order should be granted as section 4 of Cap. 6 can be applied independently of the provisions of section 32 of Law 14/60.

(b) That in framing his decision regarding the element of irreparable damage the trial Judge went out of the ambit of the Law as irreparable damage is only one factor to be taken into account when applying the proviso to section 32 of Law 14/60.

(c) Once the trial Judge found that there was a serious question to be tried and there was a probability that the appellant was entitled to relief, he had to make the Order as the harm caused to the appellant was a continuing one and could not be assessed in money, the

* Quoted at pp. 234–5 *post*.

** Quoted at p. 235 *post*.

club being a social club for the recreation of its members which could not be assessed in money.

After stating the principles governing the issue of interlocutory injunctions and the principles on which the Court of Appeal will interfere with the discretion of a trial Court—vide pp. 238–39 *post.*

Held, (1) that with the exception of cases where property is the subject-matter of the action, in all other cases an application for an interlocutory order under section 4 of Cap. 6 cannot be considered independently of the provisions of section 32 of Law 14/60; that section 32 of Law 14/60 is of a wider application than section 4 of Cap. 6 and consequently, when an application is considered under this section the provisions of section 4 of Cap. 6 are automatically taken into account; and that, accordingly, contention (a) must fail.

(2) That though it is true that the wording of the proviso to section 32 of Law 14/60, "it shall be difficult or impossible to do complete justice at a later stage", may include other factors in addition to irreparable damage in the case in hand this was not due to a wrong interpretation of the wording of the proviso to the said section by the trial Judge, but to his effort to answer the allegation contained in the affidavit of the appellant in support of his application that if the interlocutory order was not granted he would suffer irreparable damage; that even if it is assumed that this was a mistake on the part of the trial Judge, it does not go to the root of the matter and cannot carry the case of the appellant any further once the trial Judge found that payment of compensation would be an adequate remedy if the case resulted in favour of the appellant; and that, accodingly, contention (b) must fail.

(3) That the appellant has failed to satisfy this Court that the discretion of the trial Judge was wrongly exercised; that if the appellant is successful in the action he will be reinstated as member of the club and will also be entitled to compensation; and that, accordingly, the appeal must fail.

On the question whether the defendant, who in the meantime had been served with a copy of the writ of summons and notice of hearing of the appeal, could take part in the appeal:

That Counsel for the appellant is allowed to appear under the

powers vested in this Court by Order 35 rule 5 of the Civil Procedure Rules (see, also, *Verscicherungs (No. 2)* v. *Ship "Dimitrakis" and Another* (1976) 1 C.L.R. 408).

Appeal dismissed.

Cases referred to:

Karydas v. *Komodikis* (1975) 1 C.L.R. 321;

Acropol Shipping Co. & Others v. *Rossis* (1976) 1 C.L.R. 38;

Gerling-Konzern Allgemeine Versicherungs A.G. (No. 2) v. *Ship "Dimitrakis" and Another* (1976) 1 C.L.R. 408.

Appeal.

Appeal by plaintiff against the order of the District Court of Nicosia (Papadopoulos, S.D.J.) dated the 18th January, 1979 (Action No. 189/79) dismissing his application for an interlocutory injunction restraining the defendant, in his capacity as Secretary of the "Trust" Club, and the Members of the Committee from implementing their decision by which the appellant, a regular member of the said club, was expelled for a period of six months.

L. Papaphilippou, for the appellant.

N. Zomenis, for the respondent.

Cur. adv. vult.

MALACHTOS J. read the following judgment of the Court. This is an appeal by the plaintiff in Action No. 189/79 of the Nicosia District Court against the Order of a District Judge dated 18th January, 1979 dismissing his application for an interlocutory injunction restraining the defendant in his capacity as Secretary of the "Trust" Club and the Members of the Committee, their agents and servants, from implementing their decision of the 10th January, 1979, by which the appellant, a regular member of the said Club, was expelled for a period of six months.

The application for an interlocutory injunction was filed on the 13th January, 1979, at the same time with the filing of the action, and was based on sections 4 and 9 of the Civil Procedure Law, Cap. 6, and on section 32 of the Courts of Justice Law, 1960, (Law 14/60). The relevant parts of these sections read as follows:

"4. (1) The Court may at any time during the pendency of

any action therein make in the action an order for the sequestration, preservation, custody, sale, detention, or inspection of any property, being the subject of the action or an order for preventing any loss, damage, or prejudice which but for the making of the order might be occasioned to any person or property, pending a final judgment on some question affecting such person or property or pending the execution of the judgment.

9. (1) Any order which the Court has power to make may, upon proof of urgency or other peculiar circumstances, be made on the application of any party to the action without notice to the other party."

"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."

The application was made *ex parte* and in the affidavit in support thereof the appellant stated that he has been a Member of the "Trust" Club since the 28th December, 1947. He was the General Secretary of the Committee from 1952 to 1966 and from 1974 to 1976.

On the 4th January, 1979, he received a letter from the defendant calling upon him to appear before the Committee of the Club on Wednesday the 10th January, 1979, at 6. 30 p.m. in order to be heard and give explanations for alleged accusations he had made against Members of the Committee and Members of the Club during the General Meeting of the 29th November, 1976. A number of the alleged accusations complained of were contained in a leaflet which he circulated on the 8th December,

1978. It was also stated in that letter that this action was taken in accordance with rule 47 of the Rules of the Club.

As the appellant failed to appear before the Committee, on the 11th January, 1979 he received another letter by which he was informed that he had been expelled from the Club for a period of six months.

It is the allegation of the appellant that the Committee acted contrary to rule 47 of the Rules of the Club and in excess of their powers, as the case against him in the way it was formulated by the Committee, according to rule 47, only the Members in a General Meeting of the Club were competent to deal with it.

It is also the allegation of the appellant in the affidavit in support of the application, that, as a result of the said decision of the Members of the Committee he will not be allowed to exercise his right and enjoy the advantages of being a Member of the Club, his dignity will be offended, and if the interlocutory injunction applied for is not granted, he will suffer irreparable damage.

The trial Judge, after hearing counsel for the appellant, referred to the principles governing the issue of interlocutory orders contained in section 32 of the Courts of Justice Law, 1960, as enunciated in the cases of *Karydas Taxi Co. Ltd.* v. *Komodikis* (1975) 1 C.L.R. 321 and *Acropol Shipping Co. & Others* v. *Rossis* (1976) 2 J.S.C. 188* and reached the following conclusion at page 24 of the record.

> " From the authorities that I have referred to above it is certain in my mind that there are elements which must be considered before interlocutory injunctions are granted. These elements must exist simultaneously at the time of the application:
>
> They are:-
>
> 1) Serious question to be tried
>
> 2) Probability that the applicant may be entitled to relief, and
>
> 3) If the interlocutory injunction is not granted then the applicant will suffer irreparable damage.

* To be reported in (1976) 1 C.L.R. 38.

Regarding (1) above, I am of the view that there may be a question to be tried. This transpires from the affidavit in support of the application, where the plaintiff-applicant alleges that the committee had no right under the club regulation to expel him and that only the general meeting of the club had such a right. As to (2) the probability of the applicant winning his case, I have to say that since there is a serious question to be tried, there is a probability that he may be entitled to relief. I do not say that this probability is great or small because such expression of opinion would embarrass the Judge who will eventually try the case, *American Cyanamid* v. *Ethicon*, (*supra*) at p. 512, where Lord Diplock said:

> 'In view of the fact that there are serious questions to be tried on which the available evidence is incomplete, conflicting and untested, to express an opinion as to the prospects of success of either party would only be embarrassing to the Judge who will eventually try the case'.

However, regarding point (3) I am of the opinion that the plaintiff-applicant will not suffer any irreparable damage if I refuse the interlocutory injunction. He has been expelled from a Social Club. He may have been degraded, defamed or offended, if wrongly expelled, but the harm has already been caused to him. Therefore, if I grant the injunction I am not going to prevent any irreparable damages. For any damages he may have suffered pecuniary compensation will be adequate compensation. I do not think that this is a proper case of Interlocutory Injunction."

At the commencement of the hearing of this appeal Mr. Zomenis appeared for the defendant in the action, who in the meantime had been served with a copy of the writ of summons and a notice of hearing of this appeal, and applied for leave to take part in the proceedings. As counsel for the appellant objected, after hearing arguments we allowed Mr. Zomenis to appear under the powers vested in this Court by Order 35 rule 5 of the Civil Procedure Rules and on the authority of *Gerling-Konzern Allgemeine Versicherungs A.G.* v. *The ship "DIMITRAKIS" and Another* (1977) 11 J.S.C. 1764.*

* To be reported in (1976) 1 C.L.R. 408.

The grounds of appeal, as stated in the Notice of Appeal, are the following:

1. The trial Court erred in its conclusion that by not granting the interlocutory injunction applied for, would not be difficult or impossible to do complete justice at the end of the action.

2. The trial Court erred in law and in fact since it did not consider properly all the facts of the case, particularly the remedies claimed as appearing in the writ of summons and the subject matter of the action, by which it was claimed the preservation of the status quo of the applicant in the Club in order to prevent personal damage, which cannot be assessed on monetary basis, and

3. The trial Court did not exercise its discretion, judicially and in accordance with the legal principles in force, particularly in view of its findings that there is a serious question to be tried and that there is a probability of the action being successful.

In the case of *Karydas* v. *Komodikis, supra*, Triantafyllides, P., in reviewing the authorities, as regards the issue of interlocutory orders by our Courts, said at pages 326 to 328:

> " What is stated in section 32 of Law 14/60, as regards the making of interlocutory injunctions, is to be applied in accordance with relevant principles expounded in England, which are consistent with the said section 32.
>
> It is well-settled that the granting of an interlocutory injunction, of this nature, is a matter of judicial discretion; and as was held in, *inter alia*, *Ioannis Kotsapas and Sons Ltd.* v. *Titan Construction and Engineering Company*, 1961 C.L.R. 317, 322, the onus is on the appellant to satisfy the appellate tribunal that the trial Court's discretion was wrongly exercised.
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> Also, as was held by this Court in *Efstathios Kyriacou and Sons Ltd.* v. *Mouzourides* (1963) 2 C.L.R. 1, if the discretion has been properly exercised this Court will not interfere even if it would have made a different order had it been dealing with the matter in the first instance.

The approach to the matter of the interference by an appellate Court with the exercise, at first instance, of judicial discretion has been considered in a number of cases; a recent decision of this Court is that in *Re Eleni M. Hji Petri* (1973) 1 C.L.R. 166, 169, where reference was made to the English case of *Evans* v. *Bartlam* [1937] 2 All E.R. 646, 654.

It is useful to note that the Evans case, *supra*, was followed in *Ward.* v. *James* [1965] 1 All E.R. 563, 570, and, later on, in *Re O* (*infants*) [1971] 2 All E.R. 744, where (at p. 748) Davies L.J. said the following:-

> 'I, with respect, entirely agree with those observations and would follow them. In my considered opinion the law now is that if an appellate Court is satisfied that the decision of the Court below is wrong it is its duty to say so and to act accordingly. This applies whether the appeal is an interlocutory or a final appeal, whether it is an appeal from justices to a Chancery Judge or from justices to a Divisional Court of the Divorce Division. Every Court has a duty to do its best to arrive at a proper and just decision. And if an appellate Court is satisfied that the decision of the Court below is improper, unjust or wrong, then the decision must be set aside. I am quite unable to subscribe to the view that a decision must be treated as sacrosanct because it was made in the exercise of 'discretion'; so to do might well perpetuate injustice.'

We have, of course, not lost sight of the fact that in *Thompson* v. *Park* [1944] 2 All E.R. 477, Goddard L.J., as he then was, observed that if the interim injunction is not granted at first instance it is very seldom that an appellate Court grants one."

Counsel for the appellant in arguing this appeal before us put in the forefront of his argument, that the trial Judge wrongly exercised his discretion in not granting the Order applied for, the following two legal propositions:

(a) that the trial Judge in considering the application ignored altogether the provisions of section 4 of the Civil Procedure Law, Cap. 6. This section, he submitted, is

similar to section 25(8) of the Judicature Act 1873 in England and section 45 of the Judicature Act 1925, which replaced section 28(8). So, if one moves the Court in time and properly, and at an early stage of the proceedings applies for an Order for the preservation of the status quo or for an Order preventing any loss or damage, then the Order should be granted as section 4 of Cap. 6 can be applied independently of the provisions of section 32 of Law 14/60. This means that the Court may grant an interlocutory injunction without taking into account the proviso to section 32(1) of Law 14/60.

We must say that we entirely disagree with this proposition of counsel. With the exception of cases where property is the subject matter of the action, in all other cases an application for an interlocutory order under section 4 of Cap. 6 cannot be considered independently of the provisions of section 32 of Law 14/60. Section 32 of Law 14/60 is of a wider application than section 4 of Cap. 6 and, consequently, when an application is considered under this section the provisions of section 4 of Cap. 6 are automatically taken into account.

(b) The second contention of counsel for the appellant, as he put it, is that in framing the third element, the trial Judge went out of the ambit of the law as irreparable damage is only one factor to be taken into account when applying the proviso to section 32 of Law 14/60.

It is quite true that the wording of the proviso, "it shall be difficult or impossible to do complete justice at a later stage", may include other factors in addition to irreparable damage. But, in the case in hand, we hold the view that this was not due to a wrong interpretation of the wording of the proviso to the said section by the trial Judge, but to his effort to answer the allegation contained in the affidavit of the appellant in support of his application, that if the interlocutory order was not granted he would suffer irreparable damage. Even if we assume that this was a mistake on the part of the trial Judge, it does not go to the root of the matter and cannot carry the case of the appellant any further once the trial Judge found that payment of compensation would be an adequate remedy if the case resulted in favour of the appellant.

The last point to be considered is the contention of counsel for the appellant that the trial Judge wrongly exercised his judicial discretion in not granting the order applied for. It was argued that once the trial Judge found that there is a serious question to be tried and there is a probability that the appellant was entitled to relief, he had to make the order as the harm caused to the appellant was a continuing one and could not be assessed in money. The club is a social club for the recreation of its members and this cannot be assessed in money.

We have considered the arguments of counsel for the appellant on this point and we came to the conclusion that he has failed to satisfy us that the discretion of the trial Judge was wrongly exercised. If the appellant is successful in the action he will be reinstated as member of the club and will also be entitled to compensation. So, complete justice will be done at the end.

We, therefore, see no ground for interfering with the discretion of the trial Judge that he exercised in not granting the injunction applied for.

The appeal is, therefore, dismissed.

The costs to be costs in cause but in no case against the respondent.

Appeal dismissed. Order for costs as above.