

1981 March 13

[A. LOIZOU, J.]

MAROULLA PARASKEVA CHRYSOSTOMOU
AND ANOTHER, AS ADMINISTRATORS OF THE ESTATE
OF PARASKEVAS CHRYSOSTOMOU, ALIAS CHRYSOS,
DECEASED,

Plaintiffs,

v.

YUGOSLAVENSKA LINIJSKE PLOVIDBA AND ANOTHER,
Defendants,

and

AMATHUS NAVIGATION CO. LTD.,

Third Party.

(Admiralty Action No. 172/77).

Practice—Third party notice—Leave to issue—Discretion of the Court—Principles applicable—Application for third party notice has to be made promptly, at the latest before close of pleadings—Application made more than three years after filing of action and after four witnesses for the plaintiff were heard—Refused as granting of same at such late stage will cause considerable embarrassment to plaintiffs—Order 16 rules 1 and 2 of the Old English Rules of the Supreme Court.

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On June 23, 1977, the plaintiffs, as administrators of the estate of Paraskevas Chrysostomou, filed an action for special and general damages which arose out of the injuries and/or death sustained by the said deceased, whilst employed on the vessel "Primorge", as a result of the negligence of the defendants. Following the close of the pleadings the hearing of the action commenced on the 7th February, 1979 when four witnesses for the plaintiff were heard. The hearing was thereafter repeatedly adjourned on the application of the one or the other side and on August 3, 1980, defendants 2 filed an *ex-parte* application for leave to issue and serve a third party

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notice on Amathus Navigation Co. ("the proposed third party") which was granted by the Court on September 3, 1980. This application was based on the fact that the proposed third party was the employer of the deceased whilst he was working on the said ship.

Upon an application by defendants 2 for third party directions and an application by the proposed third party for an order setting aside the said third party notice and all subsequent proceedings thereon:

Held, that the Court has a discretion whether it will allow or not a third party notice to issue; that an application for third party notice has to be made promptly and as a general rule within the time limited for delivering the defence and at the latest before the close of the pleadings; that the facts of this case are not sufficient to justify, at such a late stage, the non-discharge of the third party notice, as proceeding with same, considerable embarrassment will be caused to the plaintiffs and the dependants, who have been awaiting the conclusion of this case for many years now, which delay would be further extended by the necessity of affording the third party the opportunity to have the witnesses so far heard recalled for its benefit; and that, therefore, the issue of third party proceedings must be refused; accordingly the third party notice is discharged.

Order accordingly.

25 Cases referred to:

Photiou v. Azevedo (1980) 1 C.L.R. 536 at pp. 541, 542;

Associated Home Company v. Whichcord [1878] Vol. 38, The Law Times, p. 602;

Nigerian Produce Marketing Co. Ltd. and Another v. Sonora Shipping Co. Ltd., and Another (1979) 1 C.L.R. 395 at p. 399.

Applications.

Application by defendant 2 for third party directions and application by Amathus Navigation Co. Ltd. that the third party notice issued and served on them under the order of the Court dated 3.9.1980 and all subsequent proceedings thereon be set aside.

A. P. Anastassiades, for applicants, proposed third party.
G. Arestis for *G. Cacyannis*, for respondents 1 (defendants 2).
Chr. Houris (Mrs.) for *A. N. Lemis* for respondents 2 (plaintiffs).

A. LOIZOU J. gave the following judgment. This is an action instituted by the administrators of the estate of Paraskevas Chrysostomou, alias Chrysos, deceased, for special and general damages under The Administration of Estates Law, Cap. 189 and the Civil Wrongs Law, Cap. 148, for damage and/or injuries and/or death sustained by the said deceased on or about the 4th August, 1975, on the vessel "PRIMORGE" at the Limassol Port as a result of the alleged negligence and/or breach of statutory duty and/or breach of contract on the part of the two defendants, their servants or agents and/or either of them.

Eventually and after the close of the pleadings the hearing of the case commenced on the 7th February 1979, when four witnesses of the plaintiff were heard. The further hearing of the case was adjourned to the 15th March, 1979. On the 14th March 1979, a notice was served by the defendants 1 on defendants 2 that the defendants 1 claimed to be entitled to contribution from defendants 2 in respect of any sum which the plaintiff might recover in these proceedings against them to the extent of such amount as may be found by the Court to be just and equitable, having regard to their responsibility for such damages on the ground that their negligence contributed to or was responsible for the happening referred to in the said petition.

On the 15th March negotiations for an out of Court settlement reached apparently an advanced stage and the case was adjourned to the 5th May, 1979. On that date it was adjourned once more and then once more adjourned to the 23rd June 1979. The case was then repeatedly adjourned on the application of the one or the other side until the 30th April 1980, when it was adjourned to the 3rd September 1980, at the request of counsel for defendants 2. On the 3rd August 1980, however, an *ex parte* application was filed for leave to issue and serve a third party notice on Amathus Navigation Co. Ltd., which was granted by the Court.

The facts relied upon are to be found in the affidavit of Chri-

stakis Marcou and which to the extent that are relevant to the issues before me were these:

5 “The claim of defendants 2 against the proposed third party company is for damages as against the claim of the plaintiffs and costs of the present action and/or contribution to the claim of the plaintiffs to such a degree as the Court might decide, namely: (a) the proposed as third party Amathus Navigation Company Ltd., was the employer of the deceased as well as the rest of the stevedores and porters and the foreman who
10 at all material times to the present action were working on the ship “PRIMORGE” in the port of Limassol, who were under the orders and/or directions of the said proposed party. (b) The accident which caused the death of the deceased and/or the alleged material damage to his property and his heirs and/
15 or his dependents, was caused as a result of the negligence and/or the contributory negligence and/or the breach of statutory duty by the proposed third party company of Limassol, which was the employer of the deceased as already stated”.

20 It was also stated that it was fair and just that the question of liability and/or its apportionment for the said accident be examined and decided, both between the parties to the action as well as with the proposed third party, and that it was fair and just for defendants 2 to be allowed to issue a third party notice to the said proposed third party.

25 An application was then filed by the said defendants 2 for third party directions whilst Amathus Navigation Co., Ltd., filed an application for an order that the order of the Court dated the 3rd of September 1980 giving leave to the above defendants 2 to issue and serve a third-party notice against them
30 and that the Third Party Notice issued and served under the said order and all subsequent proceedings thereon be set aside.

35 Both applications came up for hearing to-day and with the consent of the parties were heard together as they turned on common questions of Law and their outcome was interconnected, as in case of refusal of the Court to give directions on the application of the defendant, that would put an end to the third party proceedings and the application by the third party would consequently be successful and the order for a third party notice discharged for the same reasons.

It has been the case for the plaintiff and the third party that if third party directions were made, or if the third party notice was not discharged there would be embarrassment to the right of the plaintiff to have a speedy trial of his case and the safeguarded right of hearing of Amathus would be violated once most of the case of the plaintiff has already been heard and in any event there has been considerable delay in taking the necessary steps to join Amathus Navigation Company as third party. 5

I had recently the opportunity of dealing with this matter in the case of *Elias Photiou v. Azevedo & Guimaraes Ltd.*, (1980) 1 C.L.R. p. 536, and referred therein to the legal principles governing this issue; at p. 541 I had this to say: 10

“Under Order 16 rule 2 the Court has a general discretion in all cases whether it will allow or not a third party notice to issue. As stated in the Supreme Court Practice, 1958, the practice is that if a prima facie case is made out, which would bring the matter within any paragraph of rule 1(1) leave will be granted to issue the notice (see as to the former practice, *Furness, Withy & Co. Ltd. v. Pickering*, [1908] 2 Ch. 224); and the Court will not, in granting leave, consider the merits of the claim (*Edison & Co. v. Holland*, 33 Ch. D. 497; *Carshore v. N.E. Ry.*, 29 Ch. D. p. 344), but will leave these matters and objections by the plaintiff to be dealt with upon the application for directions under r. 7; see *Baxter v. France*, [1895] 1 Q.B. 455; *Furness v. Pickering*, *supra*. 15 20 25

Also the procedure will not be allowed where the result will be to embarrass or delay the plaintiff (*Swansea Shipping Co. v. Ducan*, 1 Q.B.D. 644; *Bower v. Hartley*, 1 Q.B.D. 652; *Carshore v. N.E. Ry.*, 29 Ch. D. 344), nor where the questions at issue cannot be completely disposed of in the action (*Baxter v. France*, [1895] 1 Q.B. 591). But again these matters will be considered on the application for directions not on the application for leave to issue”. 30

And further down at p. 542 I said: 35

“Even if I were to accept that a prima facie case has been made out by the material placed before me, I would still refuse this application on the principle that this application has been made too late as same should have been made promptly and as a general rule within the time limited 40

5 for delivering the defence and at the latest before the close of the pleadings. (See *The Birmingham and District Land Company Limited v. The London and North-Western Railway Company*, No. 2(a) [1887] Vol. 56 L.T.R. pp. 702-703)".

On the question of delay reference may also be made to the case of the *Associated Home Company v. Whichcord* [1878] Vol. 38 The Law Times, p. 602 where delay was found to be a sufficient reason for refusing such an application.

10 In addition to the facts set out in the affidavit as having necessitated the filing of this third party notice at such a late stage, counsel for defendants 2 urged also that some of the plaintiffs' witnesses stated that they were employed and paid by Amathus Navigation Co., Ltd., and consequently they were justified
15 in applying for third party notice against the said company.

In my view the facts of this case are not sufficient to justify, at such a late stage, the non-discharge of the third party notice, as proceeding with same, considerable embarrassment will be caused to the plaintiffs and the dependants, who have been
20 awaiting the conclusion of this case for many years now, which delay would be further extended by the necessity of affording the third party the opportunity to have the witnesses so far heard recalled for its benefit.

Before concluding, however, I would like to deal with a
25 point raised by counsel for defendants 2, namely that the principles stated in the *Photiou case* refer to the Old English Rules, whereas the rules applicable to the present case are the New English Rules, that is the Rules of the Supreme Court in force in England since 1962, and in particular those referred to in
30 the White Book of 1976.

The question as to which rules are applicable has been dealt with by Savvides J., in the case of *Nigerian Produce Marketing Co. Ltd. and Another v. 1. Sonora Shipping Co. Ltd., 2. The Ship "ASPYR"*, (1979) 1 C.L.R. p. 395 at p. 399, where he said
35 the following:

"In the light, however, of the provisions of s. 19 and s. 29(2)(a) of the Courts of Justice Law 14 of 1960, the practice of the Admiralty Division of the High Court of Justice

in England and the Admiralty Rules in force on 15.8.1960 are the material ones to be applied for in the present case".

I am inclined to agree with this approach, though I need not decide this point now as under the New Supreme Court Rules of England the issue of a third party notice is still a matter of a discretion and in its exercise the embarrassment to the plaintiff, danger of infringing the safeguarded right of hearing of the proposed third party, and the delay in the filing of such an application, are matters that inevitably will have to be taken into consideration, and in my view on the facts of this case I would still exercise my discretion in favour of discharging a third party notice.

For all the above reasons I hereby refuse the issue of third party directions and I also make an order discharging the third party notice. In this way both applications heard together are adjudicated upon. Defendants 2 to pay the costs of the plaintiffs and the proposed third party in these proceedings.

Order accordingly.