

1982 February 18

[HADJIANASTASSIOU, DEMETRIADES, SAVVIDES, LORIS,
STYLIANIDES, PIKIS, JJ.]

NICOS ASIMENOS AND CHRISTAKIS MARKOU SUED ON
THEIR BEHALF AND ON BEHALF OF ALL MEMBERS OF
THE LIMASSOL LICENSED PORTERS ASSOCIATION OF
LIMASSOL,

Appellants-Defendants,

v.

1. MAROULLA PARASKEVA CHRYSOSTOMOU AND
2. CHRISTAKIS ANTONIOU AS ADMINISTRATORS OF
THE ESTATE OF PARASKEVAS CHRYSOSTOMOU,
ALIAS CHRYSOS, DECEASED,

Respondents-Plaintiffs,

and

AMATHUS NAVIGATION COMPANY LIMITED,

Respondents-Third-Party.

(Civil Appeal No. 6242).

5 *Admiralty—Practice—Third party notice—Rules applicable—The
Rules applied by the High Court of Justice in England in its
admiralty jurisdiction on the day preceding Independence Day,
to the extent contemplated by rule 237 of the Cyprus Admiralty
Jurisdiction Order, 1893.*

10 *Admiralty—Practice—Third party notice—Issued with the leave
of the Court—Discharged on application of third party—Entry
of an unconditional appearance by third party does not fetter
it from objecting to third party notice—Third party notice could
be discharged even if plaintiff had raised no objection to third
party proceedings—Order 16A rules 4, 7(1)(c), 7(3) of the Old
English Rules of the Supreme Court applicable by virtue of rule
237 of the Cyprus Admiralty Jurisdiction Order and section
29(2)(a) of the Courts of Justice Law, 1960.*

Admiralty—Practice—Third party notice—Discharge of—Discretion of the trial Judge—Court of Appeal will not interfere with exercise of such discretion unless satisfied that it was wrongly exercised and the onus of showing that trial Judge was wrong in the exercise of such discretion rests on the person making such allegation— 5
Third party notice discharged because it was applied for at a late stage and if allowed to proceed would cause considerable embarrassment to plaintiff—Trial Judge legitimately exercised his discretion—No reason why the exercise of such discretion should be disturbed. 10

On June 23, 1977, the respondents-plaintiffs, as administrators of the estate of the deceased Paraskevas Chrysostomou, filed an action for special and general damages which arose out of the injuries and/or death sustained by the deceased, whilst employed on the vessel "PRIMORGE", as a result of the negligence of the appellants-defendants, the owners of the said ship. 15
 Following the close of the pleadings the hearing of the action commenced on the 7th February, 1979 when four witnesses testified for the plaintiffs. The hearing was thereafter repeatedly adjourned on the application of the one or the other side and 20
 on August 3, 1980, defendants 2 filed an ex-parte application for leave to issue and serve a third party notice on the respondents-third party. This application, which was based on the fact that the proposed third party was the employer of the deceased whilst he was working on the said ship was granted by the Court 25
 on September 3, 1980.

Upon an application by defendants 2 for third party directions and on an application by the proposed third party for an order setting aside the above third party notice and all subsequent proceedings thereon the trial Court discharged the third party 30
 notice on the ground that the facts of this case were not sufficient to justify, at such late stage, the non-discharge of the third party notice, as proceeding with same, considerable embarrassment will be caused to the plaintiffs.

Upon appeal by defendants 2 it was mainly contended: 35

- (a) That the trial Judge was wrong in holding that the Rules applicable are those of the Admiralty Division of the High Court of Justice in England on the 15th August, 1960.

(b) That by entering an unconditional appearance the third party waived his right to oppose the third party notice.

(c) That it was not legitimate for the trial Judge to discharge the order giving leave to issue the third party notice because the plaintiff did not object to the issue of the third party notice and took no step to set aside the proceedings.

(d) That the trial Judge in discharging the order giving leave to issue the third party notice, which had been previously made by him on the ex-parte application, assumed the role of an appellate Court.

Held, (1) that since after the Independence of Cyprus and as contemplated by the Constitution, which came into force on the 15th August, 1960 ("the Independence Day"), the Courts of Justice Law, 1960 (Law 14/60) was enacted by virtue of section 19(a) of which the Supreme Court shall have jurisdiction as a Court of Admiralty vested with and exercising the same powers and jurisdiction as those vested in or exercised by the High Court of Justice in England in its Admiralty jurisdiction on the day immediately preceding Independence Day; that since the law to be applied in the exercise of such jurisdiction is, by virtue of section 29(2)(a) of the Courts of Justice Law, the law applied by the High Court of Justice in England in the exercise of its Admiralty Jurisdiction, as in force on the day preceding the Independence Day, subject to any amendments which might be effected by any law of Cyprus; and that since Rules of Court are a species of legislation and, therefore, the provisions of section 29(2)(a) extend to them as well, the Rules of the Supreme Court which were in force and applied in the Admiralty Division of the High Court of Justice of England on the day preceding the Independence Day are the ones applicable by this Court in the exercise of its admiralty jurisdiction to the extent contemplated by rule 237 of the Cyprus Admiralty Rules of 1893; accordingly contention (a) should fail.

(2) That a third party after service upon him of a third party notice has to enter appearance within 8 days from service or within such further time as may be directed by the Court or Judge and specified in the notice (see R.S.C. Order 16A r.4) and then he may wait to raise his objection to the issue of

the notice at the hearing of the summons for third party directions when the Judge may refuse the application with the result that the third party proceedings are terminated (see R.S.C. Order 16A r. 7(1)(c)) or after appearance he may file an application to set aside the proceedings (see R.S.C. Order 16A r. 7(3)); and that, therefore, the entry of an unconditional appearance does not fetter the third party in any way from objecting to the third party notice; accordingly contention (b) should fail. 5

(3) That the stage at which the plaintiff could make his objection, once he did not consider it necessary to make an application to set aside the proceedings under R.S.C. 0.16A r.7(3) as such step had already been taken by the third party, was at the hearing of the summons for third party directions (see *Furness etc. v. Pickering* [1908] 2 Ch. 224) as he rightly did; accordingly contention (c) should fail. 10 15

Held, further, that even if plaintiff had raised no objection to third party proceedings, it would be perfectly legitimate for the trial Judge to dismiss the application for the joinder of the third party on a motion of the latter, considering the inherent risks to the administration of Justice by the belated attempt to join them as a party to the proceedings. 20

(4) That the role of the Judge when granting leave for the issue of a third party notice is to examine whether there is or will be a prima facie case for contribution against the third party and he need not go into the merits of the case or into questions such as embarrassment or delay, leaving such matters to be considered on the application for third party directions, or on an application for the discontinuance of the third party proceedings when all interested parties will be before him; that, therefore, in deciding such matters at the hearing of the summons for directions or of an application for the discontinuance of the third party proceedings, he is not sitting to decide whether such proceedings will be allowed to continue and if allowed, what necessary directions will have to be made; that such power of the Judge is safeguarded under the rules (see R.S.C. Order 16A r. 7(1)(c) and r. 7(3)); accordingly contention (d) should also fail. 25 30 35

(5) That the discharge of the third party notice is within the discretion of the trial Judge; that this Court will not interfere

with the exercise of the discretion of the trial Judge unless satisfied that such discretion was wrongly exercised and the onus of showing that the trial Judge was wrong in the exercise of such discretion, rests on the person making such allegation; that
 5 having considered carefully the matters which the trial Judge has taken into consideration in the exercise of his discretion in refusing the application for third party directions and discharging the third party notice, and, in particular, the late stage
 10 at which the application for the issue of a third party notice was made, which, if allowed to proceed, would, according to the learned trial Judge, have caused considerable embarrassment to the plaintiff and the dependants of the deceased who have been waiting for the conclusion of the case for many years and the delay would have been protracted if the third party was
 15 allowed to participate and fight the proceedings afresh this Court has reached the conclusion that the trial Judge in making the order discharging the third party procedure, legitimately exercised his discretion, and there is no reason why the exercise of such discretion should be disturbed; accordingly the appeal
 20 should be dismissed.

Appeal dismissed.

Observations with regard to the need for the redrafting in a more systematic way of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction, as well as the Civil Procedure Rules so that provisions which correspond in both rules to be drafted in the same terms (p. 168 post).

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Cases referred to:

Photiou v. Azevedo (1980) 1 C.L.R. 536 at p. 541;
Nigerian Produce Marketing Co. Ltd. and Another v. Sonora Shipping Co. Ltd. (1979) 1 C.L.R. 395;
 30 *Churair & Sons v. Snatiren Shipping* (1980) 1 C.L.R. 183 at p. 184;
Myers v. N. & J. Sherick Ltd. [1974] 1 W.L.R. 31 at p. 35;
Furness, Withy & Co. Limited v. Pickering [1908] 2 Ch. D. 224;
 35 *Kotsapas & Sons Ltd. v. Titan Construction and Engineering Company*, 1961 C.L.R. 317 at p. 322;
Paphitis v. Bonifacio (1978) 1 C.L.R. 127;
Evans v. Bartlam [1937] A.C. 473;

- Charles Osenton & Co. v. Johnston* [1941] 2 All E.R. 245 at p. 250;
- Beck and Others v. Value Capital Ltd. and Others* (No. 2) [1976] 2 All E.R. 102 at p. 109;
- Almana Engineering v. Glyfos Commercial* (1981) 1 C.L.R. 273 at p. 289; 5
- General Engineering Co. Ltd. v. Seddon Atkinson Vehicles Ltd.* [1975] 1 C.L.R. 278.

Appeal.

Appeal by defendants 2 against the judgment of a Judge of the Supreme Court (A. Loizou, J.) dated the 13th March, 1981, (Adm. Action No. 172/77) whereby the third party notice issued on the application of defendants 2 was discharged. 10

G. Cacoyannis, for appellants-defendants.

A. Lemis, for respondents-plaintiffs. 15

A. Anastasiades, for respondents-third party.

Cur. adv. vult.

HADJIANASTASSIOU J.: The judgment of the Court will be delivered by Mr. Justice Savvides.

SAVVIDES J.: This is an appeal against the decision* of a Judge of this Court whereby a third party notice issued on the application of appellants-defendants 2, in Admiralty Action No. 172/77, was discharged. 20

By their said action the plaintiffs who are the administrators of the estate of the deceased Paraskevas Chrysostomou who met his death in an accident whilst engaged as a porter on the ship "PRIMORGE", claim both as administrators of the estate of the deceased and as representing his legal heirs and dependents, special and general damages exceeding the sum of £3,000.- against defendants 1, the owners of the said ship, and against defendants 2 personally and as the representatives of the Limassol Porters Association, alleging that the death of the deceased was caused as a result of the negligence and/or breach of statutory duty and/or breach of contract on the part of the defendants 1 and/or 2, their servants or agents. 25
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The writ of summons was issued on the 23rd June, 1977. Pleadings were exchanged and the action came up for hearing

* Reported in (1981) 1 C.L.R. 130.

on the 7th February, 1979 before the Admiralty Court when four witnesses called for the plaintiffs gave evidence, and the further hearing of the action was adjourned to the 15th March, 1979. On the 14th March, 1979 a third party notice was served
5 by defendants 1 on defendants 2, whereby defendants 1 claimed to be entitled to contribution from defendants 2 in respect of any sum which the plaintiff might recover in the proceedings against defendants 1. On the 15th March, 1979 when the hearing was to be continued, negotiations for an out-of-court
10 settlement apparently reached an advanced stage and the action was adjourned to the 5th May, 1979 and then, after several adjournments at the request of the parties, was fixed on the 30th April, 1980, when it was adjourned, once again, to the 3rd September, 1980 at the request of counsel for defendants 2.
15 A month prior to such hearing, and in fact on the 3rd August, 1980, an ex-parte application was made by defendants 2 for leave to issue and serve a third party notice on Amathus Navigation Co. Ltd., which was granted by the Court. The facts on which the Court relied in granting such leave, as appearing
20 in the judgment, are as follows:

“The facts relied upon are to be found in the affidavit of Christakis Marcou and which to the extent that are relevant to the issues before me were these:

25 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:

30 (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 at all material times to the present action were working on the ship “PRIMORGE” in the port of Limassol, who were under the orders
35 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/or his dependents, was caused as a result of the negligence and/or the contributory
40 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.

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". 5

Such third party notice was served on the third party who entered an appearance in the action and defendants 2 filed an application for third party directions. The third party opposed such application and at the same time filed an application for an order that the order of the Court dated 3rd September, 1980 giving leave to defendants 2 to issue and serve a third party notice be set aside. In view of the fact that both applications turned on common questions of law and their outcome was interconnected, they were tried together for the reason, as very rightly mentioned by the trial Judge in his judgment, 10 15

"-----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". 20

As it appears from the judgment of the trial Court both the plaintiff and the third party opposed the application for third party directions. The case for them at the hearing of the application is summarised by the trial Judge as follows: 25

"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". 30 35

The trial Judge then dealt with the principles governing the issue of Third Party Notice, by adopting and reiterating what

was said by him in *Elias Photiou v. Azevedo & Guimaraes Ltd.*, (1980) 1 C.L.R. p. 536 and in particular at page 541 as follows:

5 “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] 10 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).

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. 20 652; *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’.

25 And further down at p. 542 I said:

‘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 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. 30 702-703)’ ”.

35 In dealing further with the question of delay, the trial Judge considered that delay by itself was a sufficient reason for dismissing the summons for third party directions, and he concluded on this question as follows:

“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 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”.

In dealing with the question as to whether the Rules of the Supreme Court of England as in force on the 15th August, 1960 (the old ones) or whether any amendments to the said rules or the substitution of any rules by new ones made after 1960 and in force at the time of the hearing of the applications, were the ones applicable in Cyprus, he expressed his inclination to agree with the view expressed by a member of this Bench in the *Nigerian Produce Marketing Co. Ltd. and another v. (1) Sonora Shipping Co. Ltd. (2) The ship “ASPYR” (1979) 1 C.L.R. p. 395* in which it was held that the Admiralty Rules of the Supreme Court of England as in force on the 15th August, 1960 were the ones applicable in Cyprus. Then the trial Judge went on to consider the matter as being a matter of exercise of discretion which under the new Supreme Court Rules of England has not affected the position as it existed under the old rules and that in the exercise of such discretion,

“—— 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 of the facts of this case I would still exercise my discretion in favour of discharging a third party notice”.

Taking the above into consideration, the trial Judge refused to issue third party directions and made an order discharging the third party notice.

It was against the refusal of the Court to issue third party directions and its order discharging the third party notice, that this appeal was lodged.

The grounds of appeal as set out in the notice of appeal by the appellants, are as follows:

- “1. The learned trial Judge misdirected himself on the Law and/or on the facts in refusing to issue third party directions and in discharging the third party notice.
2. On the facts and special circumstances of this case, as appearing on the record, the delay in applying for leave to issue third party notice was justified.
3. The learned trial Judge exercised his discretion wrongly and/or acted on a wrong principle and/or unreasonably in all the circumstances of the case.
4. The learned trial Judge was wrong in holding that the rules applicable are those of the Admiralty Division of the High Court of Justice in England on 15.8.1960.
5. The learned trial Judge failed to consider the prejudice and embarrassment that will be caused to the second defendant by the decision appealed from and that by his said decision there will result an unnecessary multiplicity of proceedings, unnecessary costs and delay as the defendants No. 2 will be obliged to institute an action against the intended third party and to apply for a stay of execution of any judgment that may be obtained in this action.
6. The learned trial Judge wrongly assumed the role of an appellate Court thereby cancelling the Order previously made by the same Judge on the ex-parte application of defendants No. 2. The fact of delay was well known to the learned trial Judge when he made the order of the said ex-parte application and in fact there were no new circumstances before him justifying the cancellation of the order so made”.
- Counsel for the appellants argued that in the present case the Judge when allowing the issue of the third party notice was acquainted with all material circumstances of the case and the fact that four witnesses had already been heard was within his knowledge. Having been satisfied on the merits of the case, he exercised his discretion and allowed the issue of third party notice. In that state of things, if he had the least doubt that any delay or embarrassment might be caused, he could have required service on the plaintiff of the application for leave to issue the third party notice, as the plaintiff was the only one

who could be embarrassed by the delay. The third party might have been embarrassed, if any question on the Statute of Limitations might come into play which is not the case in the present action. Furthermore, delay was not a matter to be taken into consideration in the circumstances of the present case, as the plaintiffs themselves had been guilty of considerable delay in pursuing their claim, in that they filed the present action nearly two years after the cause of action arose. Counsel submitted that the delay was justified in the present case, because it was due to the fact that it was after the last witness for the plaintiffs was heard that it came to the knowledge of the appellants that all porters, including the deceased, who were working on the ship on the day of the accident were employees of the third party. 5

In the submission of counsel for the appellants, though the question of delay could be raised at the stage of summons for third party directions and, provided that the Court was satisfied that such delay might cause embarrassment to the plaintiff or the third party, the order might be discharged accordingly, in the present case this matter could not be taken into consideration at the stage of summons for directions as it was a matter which had already been within the knowledge of the Court when making the order granting leave for the issue of the third party notice, together with all other material facts of the case. Therefore, the trial Judge in reconsidering the same matters at the stage of the summons for directions acted as if hearing an appeal from his own order. In the present case, nothing changed between the time when the ex-parte application was determined and the time when the summons for directions came up for hearing. Furthermore, according to counsel for the appellants, plaintiffs who were the parties mainly to be affected by the delay as a result of the third party proceedings, never objected to such course either by applying to have the third party notice discharged or by filing an opposition to the summons for third party directions; the application for the discharge of the order for the issue and service of third party notice, did not emanate from the plaintiffs but from the third party who could not allege that they were embarrassed in any way by the delay. Another point which was raised by counsel for the appellants, was that the third party after having been served with the notice, entered an unconditional appearance. 10 15 20 25 30 35 40

On the question as to which rules are applicable in the present case, though counsel for the appellants expressed the view that the new rules are the ones to apply, he conceded that the trial Judge did not have to decide this issue as no material changes
5 have been brought about by the new rules on the issue under consideration.

Counsel for the respondent third party submitted that the third party notice was issued with considerable delay and after four witnesses for the plaintiff had already testified before the
10 Court and more than a year after the alleged facts came within the knowledge of the appellants. The application for leave to issue a third party notice was made out of time and in any event it could not remain in force as it was granted on inadequate grounds. The present application, counsel argued, has to be
15 considered in the light of the provisions of the Rules of the Supreme Court of England as in force on the 15th August, 1960 (the old Rules) and not the Rules in force at the time of the hearing of the application (the new Rules). Counsel said that if such notice was allowed to stand the third party would
20 have been embarrassed in view of the fact that the case for plaintiff had nearly ended. He concluded his address by submitting that the trial Judge properly exercised his discretion in the case which was based on several considerations as mentioned in his judgment and that once the appellants have failed
25 to establish that the discretion of the Judge was wrongly exercised, this Court cannot interfere in the case.

Counsel for plaintiffs also addressed the Court in this appeal by adopting the arguments of counsel for the third party and laying stress to the fact of delay as the application was made
30 at a very late stage and after the plaintiffs had nearly concluded their case and that if the third party proceedings were allowed to continue, then considerable delay and embarrassment would have been caused to the plaintiffs who were in this case suing for damages for the estate of the deceased and for the dependents
35 of the deceased in respect of an accident which occurred in 1975.

We shall deal first with ground (4) of this appeal as to whether the Rules applicable in the present case are those of the Admiralty Division of the High Court of Justice in England as in force

on 15.8.1960 or whether any amendments to the said Rules after 15.8.1960 were also applicable.

The learned trial Judge in his judgment expressed an inclination to agree with the view that the Rules in force on 15.8.1960 (the old Rules) were the ones to apply in Cyprus in matters not provided for by our Admiralty Rules. Nevertheless, in considering the issue before him, he found that he needed not decide this point, because, as he found, even under the new Rules the issue of a third party notice is a matter of discretion as it was under the old Rules.

As this question is a matter of considerable importance on the practice of this Court in the exercise of its admiralty jurisdiction and in view of the confusion which is apparent on the record of the proceedings, which is before us, as the application for leave to issue the third party notice was based on the Civil Procedure Rules, the Admiralty Rules of this Court and the R.S.C. in force in England, the summons for third party directions was based on the Civil Procedure Rules and the application to set aside the third party notice was based on the practice of the Admiralty Division of the High Court of Justice in England and the Admiralty Rules of this Court, and also in view of the fact that this is one of the grounds of appeal before us, we find it expedient to decide this matter finally.

The problem as to which Rules are applicable, arises out of the provisions of rule 237 of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction made under the Cyprus Admiralty Jurisdiction Order 1893 which provides as follows:

“In all cases not provided by these Rules, the practice of the Admiralty Division of the High Court of Justice of England, so far as the same shall appear to be applicable, shall be followed”.

The Order of 1893 was made on the 23rd November, 1893 by virtue of the powers vested in the Queen of the United Kingdom in Council under the Colonial Courts of Admiralty Act 1890 and the Foreign Jurisdiction Act 1890, vesting admiralty jurisdiction to the Supreme Court of Cyprus, which was then a British Colony, and extending the application of the Colonial Courts of Admiralty Act 1890 to Cyprus, subject to certain

conditions, exceptions and qualifications set out therein, which, for the purposes of this appeal, we need not consider. The Rules to be applied under the said Order were the "Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction" as set out in the Schedule to the said Order which under the provisions of paragraph 7 of same: "shall, until revoked or varied, be the Rules of Court of the Supreme Court of Cyprus in its Admiralty Jurisdiction".

Such Rules did remain in force and still are substantially the same as made in 1893 with minor amendments and have to be relied upon, in contrast with the Civil Procedure Rules 1953 which though in substance (subject to a few amendments made since 1953) remained unchanged since 1953 in most material respects compared to the amendments effected ever since to the corresponding English Rules, they had undergone important amendments since they were first made till 1953 to come in line with the amendments effected in the Rules of the Supreme Court of England to which reference is made in the marginal notes of the Civil Procedure Rules.

In view of the fact that no provision is contained in the Cyprus Admiralty Rules of 1893 as to the procedure to be followed in case of third party procedure (a provision which does exist in the Civil Procedure Rules, but which is not applicable to Admiralty Jurisdiction) Rule 237 comes into play by incorporating the practice of the Admiralty Division of the High Court of Justice in England in so far as the same shall appear to be applicable.

The practice of the Admiralty Division of the High Court of Justice in England is to be found in the Rules of the Supreme Court of England which appear in the Annual Practice.

Till the 15th August, 1960 when Cyprus became independent any new Rules of the Supreme Court in England and any amendments to the original rules (which are cited as "the Rules of the Supreme Court 1883") were extended to Cyprus in respect of admiralty matters under the provisions and subject to the limitations contained in our Rule 237.

After the Independence of Cyprus and as contemplated by the Constitution of Cyprus which came into force on the 15th

August, 1960 (The Independence Day) the Courts of Justice Law 1960 (Law 14/60) was enacted which is a law providing for the constitution, jurisdiction and powers of the Courts of the Republic. Under the provisions of section 19 of such law, the Admiralty jurisdiction shall be exercised by the Supreme Court and the exercise of such jurisdiction shall be: 5

“19(α) ὡς ναυτοδικεῖον περιβεβλημένον καὶ ἀσκοῦν τὰς ἐξουσίας διὰ τῶν ὁποίων περιεβάλλετο καὶ τὰς ὁποίας ἔσκει τὸ Ἀνώτατον Δικαστήριον τῆς Δικαιοσύνης ἐν Ἀγγλίᾳ ἐν τῇ ἐπὶ ναυτικῶν ὑποθέσεων δικαιοδοσίᾳ αὐτοῦ εὐθύς ἀμέσως πρὸ τῆς ἡμέρας ἀνεξαρτησίας”. 10

(“19(a) as a Court of Admiralty vested with and exercising the same powers and jurisdiction as those vested in or exercised by the High Court of Justice in England in its Admiralty jurisdiction on the day immediately preceding Independence Day.”). 15

The law to be applied in the exercise of such jurisdiction is defined under section 29(2)(a) as the law applied by the High Court of Justice in England in the exercise of its Admiralty jurisdiction, as in force on the day preceding the Independence Day, subject to any amendments which might be effected by any law of Cyprus. Section 29(2)(a) reads as follows: 20

“29(2) Τὸ Ἀνώτατον Δικαστήριον ἐν τῇ ἀσκήσει τῆς δικαιοδοσίας—

(α) δι’ ἧς περιβέβληται δυνάμει τῆς παραγράφου (α) τοῦ ἄρθρου 19 θὰ ἐφαρμόζη, τηρουμένων τῶν διατάξεων τῶν παραγράφων (γ) καὶ (ε) τοῦ ἐδαφίου (1) τὸ ὑπὸ τοῦ Ἀνωτάτου Δικαστηρίου τῆς Δικαιοσύνης ἐν Ἀγγλίᾳ, ἐν τῇ ἀσκήσει τῆς ἐπὶ ναυτικῶν ὑποθέσεων δικαιοδοσίας αὐτοῦ ἐφαρμοζόμενον κατὰ τὴν πρὸ τῆς ἡμέρας ἀνεξαρτησίας ἡμέραν δίκαιον, ὡς θὰ ἐτροποποιεῖτο τοῦτο διὰ νόμου τῆς Δημοκρατίας. 30

(“29(2) The High Court in exercise of the jurisdiction—

(a) conferred by paragraph (a) of section 19 shall apply, subject to paragraphs (c) and (d) of subsection (1), the law which was applied by the High Court of Justice in England in the exercise of 35

its admiralty jurisdiction on the day preceding Independence Day, as may be modified by any law of the Republic.”).

5 The Rules of Court are a species of legislation; therefore, the provisions of section 29(2)(a) extend to them as well. In consequence, the Rules of the Supreme Court which were in force and applied in the Admiralty Division of the High Court of Justice of England on the day preceding the Independence day of Cyprus (the 15th August, 1960) are the ones applicable
10 by this Court in the exercise of its Admiralty jurisdiction to the extent contemplated by rule 237 of the Cyprus Admiralty Rules of 1893. This view was expressed and followed by me, in the exercise of original jurisdiction in Admiralty Action 174/76 in the *Nigerian Produce Marketing Co. Ltd.*, (*supra*) at p.
15 399, referred to by the learned trial Judge in the present case. (Vide, also, *Churair & Sons v. Snatiren Shipping* (1980) 1 C.L.R. 183 at p. 184 where the same principles are reiterated).

Having found as above, ground (4) of the present appeal fails.

20 The relevant provisions as to third party procedure under the R.S.C. are to be found in the Annual Practice of 1960 under Order 16(A). Rule 1 of Order 16(A) reads as follows:

“1(1) Where in any action a defendant claims as against any other person not already a party to the action (in this Order called the third party)

- 25 (a) that he is entitled to contribution or indemnity, or
- (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or
- 30 (c) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff
35 and the defendant but as between the plaintiff and defendant and the third party or between any or either of them,

the Court or Judge may give leave to the defendant to issue and serve a 'third party notice'.

(2) The Court or Judge may give leave to issue and serve a 'third party notice' on an ex parte application supported by affidavit, or, where the Court or judge directs a summons to the plaintiff to be issued, upon the hearing of the summons". 5

This rule has been adopted and introduced verbatim in our Civil Procedure Rules (Volume II Rules of Court, Cap. 12 previously cited as the Rules of Court, 1938 to (No. 2) 1953) which regulate the procedure in various civil matters other than admiralty jurisdiction. 10

The changes which were introduced in England under the new Order 16 in respect of third party proceedings after the 15th August, 1960 and which as we have already found, do not extend to Cyprus, are: 15

- (a) A third-party notice may be issued without leave at any time before service by the defendant of his own defence,
- (2) A fourth or subsequent party notice may be issued without leave within 14 days after the time limited for appearing to the notice served upon the third, fourth or subsequent party as the case may be, 20
- (3) A late appearance may be entered to a third, fourth or subsequent party notice without leave, 25
- (4) A defendant or subsequent party to the action may without leave issue a notice upon any other party to the action requiring a claim, question or issue to be determined in the same proceedings,
- (5) The wording of r. 1(1)(c) has been altered by omitting after the word 'subject-matter', the words 'is substantially the same as some question or issue arising between the plaintiff and the defendant making the claim', and the scope of this rule has thereby apparently been widened, see per Goff J. in *Myers v. N. & J. Sherick Ltd.* [1974] 1 W.L.R. 31, 35; [1974] 1 All E.R. 81, 85. 35

(Vide Annual Practice 1979, pp. 227, 228).

As to the time when a third party notice must be served, provision is made by rule 2(2) of Order 16(A) as follows:

5 “2(2). The notice shall, unless otherwise ordered by the Court or Judge, be served within the time limited for delivering the defence or, where the notice is served by a defendant to a counterclaim, the reply, and with it there shall be served a copy of the writ of summons or originating summons and of any pleadings delivered in the action”

10 Under the notes in the Annual Practice of 1960 dealing with the time as to when an application for leave to issue a third party notice must be made, we read at p. 382-

15 “When application made.—The application cannot be made by a defendant until after appearance: it must be made, and the application served, within the time for delivering the defence, or if made by a plaintiff as defendant to a counterclaim, for delivering reply; but the Court may extend the time. The application will as a rule be refused if not made until after close of the pleadings (*Birmingham Land Co. v. L. N.W.Ry.*, 56 L.T. 702)”

20 As to the discretion of the Court under Order 16(A) r. 1 it is a general discretion in all cases whether or not to allow the notice to be served, seeing that leave is required in all cases, in addition to the special discretion under r. 1(1)(c). This is supported by the notes in the Annual Practice 1960 at p. 382
25 under the heading “Discretion”. The principles expounded by the learned trial Judge in the case of *Elias Photiou v. Azevedo & Guimaraes Ltd.* (supra) and which were adopted by him in the present case are correctly stated and are in line with the notes in the Annual Practice 1960 at p. 382 notwithstanding the
30 fact that in *Photiou* case the matter was considered at the stage of an ex parte application for leave to issue and serve a third party notice whereas in the present case the matter was dealt after the issue and service of the third party notice and when the Court was considering an application by the third party
35 for the discharge of the order granting leave for the issue of such notice and also with a summons for third party directions.

It is clear, however, from the said notes in the Annual Practice and the authorities referred to therein that questions such as

embarrassment or delay to the plaintiff or where the questions at issue cannot be completely disposed of in the action, or whether the procedure will be allowed to continue, are matters which will have to be considered on the application for directions under Order 16(A) r. 7 and not on the application for leave to issue the notice. It is also presumed that if a prima facie case is made out which would bring the matter within any paragraph of rule 1 and leave to issue a third party notice is granted, the Court will not, in granting leave, consider the merits of the claim. Thus, in *Furness, Withy & Co. Limited v. Pickering* [1908] 2 Ch. D. 224 which, though a case which was decided before the J.A. 1925 and deals with the old practice, nevertheless, the principle that the merits of the claim are to be considered not at the stage of leave to issue the notice but at the hearing of the application for directions still holds good not only under the old R.S.C. (vide Annual Practice 1960 p. 382) but also under the new R.S.C. (vide Annual Practice 1979 p. 234 under the heading, "Discretionary power to grant leave"). In that case the plaintiff appeared at the stage of the application by the defendant for leave to issue a third party notice and hotly contested the application. Joyce J. had this to say at p. 227:

"Without prejudice to what I might have to decide if an application be made by this third person to discharge the order on notice or anything of that kind, I am, as at present advised, of opinion, having regard to what I have heard from Mr. Noad, that there is or will be a prima facie case for contribution against this third party. In that state of things I must make the order.

The plaintiffs have appeared and have hotly contested the matter before me. I confess that I am not disposed to pay much attention to what they have to say on the present occasion, but on a future occasion, when the necessary application is made under r. 52 of the same order for directions as to what course is to be taken, they may have a good deal to say, and whatever they say on that occasion will deserve attention and will have to be most carefully considered. I shall take care, to the best of my ability, that such an order be made as will protect them fully from the evil consequences which Mr. Hughes says will necessarily ensue from the granting of this order....."

The procedure to be followed by the plaintiff or the third party after leave for the issue of third party notice is granted, is explained in the Annual Practice 1960 (vide notes at p. 383) as follows:

- 5 “The plaintiff (*The Bianca*, 8 P.D. 3) or the third party
 (Barton v. L. & N. W. Ry., 38 Ch. D. 147; D.C.F. 81)
 may apply to discharge the order after appearance (*Benecke*
 v. *Frost*, 1 Q.B.D. 419). The application is made in Q.B.D.
 10 by summons to the Master (Chitty F., 296). It is sometimes
 made in Ch. D. by motion (see *McCheane v. Gyles* (No. 1),
 [1902] 1 Ch. p. 289), but the more convenient course in
 all cases is to apply on the hearing of the application for
 directions; the Master can then dismiss the application
 15 (r. 7(1)(c)) and so terminate the proceedings. But applica-
 tion may be made to set aside the proceedings at any time
 under r. 7(3); see *Greville v. Hayes*, (1894) 2 Ir. R. 20;
Furness v. Pickering [1908] 2 Ch. 224. A co-defendant
 served under r. 12 must wait until the summons for direc-
 20 tions, as there is no order to appeal against (*Baxter v.*
France, [1895] 1 Q.B. 455)”.

Having explained the practice under the R.S.C. (as in force in 1960) we come now to consider the merits of this appeal on the other grounds of appeal other than ground 4 with which we have already dealt.

- 25 The objection that the third party entered an unconditional
 appearance which is taken to mean that the third party waived
 his right to oppose such notice, cannot stand. In accordance
 with the rules, a third party after service upon him of a third
 party notice has to enter appearance within 8 days from service
 30 or within such further time as may be directed by the Court
 or Judge and specified in the notice (R.S.C. Order 16 A r. 4)
 and then he may wait to raise his objection to the issue of the
 notice at the hearing of the summons for third party directions
 when the Judge may refuse the application with the result that
 35 the third party proceedings are terminated (R.S.C. Order 16A
 r.7(1)(c) or after appearance he may file an application to set
 aside the proceedings (R.S.C. Order 16A r. 7(3)).

- Therefore, the entry of an unconditional appearance does not fetter the third party in any way from objecting to the third
 40 party notice.

The further argument of counsel for the appellants that plaintiff did not object to the issue of the third party notice and that he took no step to set aside the proceedings, cannot stand either. The stage at which the plaintiff could make his objection, once he did not consider it necessary to make an application to set aside the proceedings under O.16A r. 7(3) (*supra*), as such step had already been taken by the third party, was at the hearing of the summons for third party directions (*Furness etc. v. Pickering* (*supra*)) as he rightly did according to what is stated by the trial Judge in his judgment in that:

“It has been the case for the plaintiff and the third party that if the 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.....”

Even if plaintiff had raised no objection to third party proceedings, it would be perfectly legitimate for the trial Judge to dismiss the application for the joinder of the third party on a motion of the latter, considering the inherent risks to the administration of justice by the belated attempt to join them as a party to the proceedings.

We have considered carefully the matters which the learned trial Judge has taken into consideration in the exercise of his discretion in refusing the application for third party directions and discharging the third party notice, and, in particular, the late stage at which the application for the issue of a third party notice was made, which, if allowed to proceed, would, according to the learned trial Judge; have caused considerable embarrassment to the plaintiff and the dependants of the deceased who have been waiting for the conclusion of the case for many years and the delay would have been protracted if the third party was allowed to participate and fight the proceedings afresh.

It is apparent from the record of the proceedings that though the alleged facts on which the appellants relied to avail themselves of the third party proceedings came to their knowledge when the last witness for plaintiffs concluded his evidence which was the 7th February, 1979, nevertheless, the application for leave to issue the third party notice was made on the 3rd August,

1980, that is, 18 months later, and after several adjournments in the meantime one of which at least, according to the facts appearing in the judgment, was for the reason that negotiations for an out-of-court settlement had apparently reached an advanced stage. Beside the fact that the application for leave to issue a third party notice was made out of time, whereas, as a general rule in admiralty proceedings it should have been made within the time limited for delivering the defence and at the latest before the close of the pleadings, in the present case it was made at a very late stage after the case for the plaintiffs had nearly been concluded and after the lapse of 18 months from the date of hearing of the evidence for the plaintiffs.

It has been held by this Court time and again that this Court will not interfere with the exercise of the discretion of the trial Judge unless satisfied that such discretion was wrongly exercised and the onus of showing that the trial Judge was wrong in the exercise of such discretion, rests on the person making such allegation. This principle is expounded in *Kotsapas & Sons Ltd. v. Titan Construction and Engineering Company*, 1961 C.L.R. 317 at p. 322, *Paphitis v. Bonifacio* (1978) 1 C.L.R. 127. See also in this respect, *Evans v. Bartlam* [1937] A.C. 473 per Lord Wright at p. 485, *Charles Osenton & Co. v. Johnston* [1941] 2 All E.R. 245 per Viscount Simon L.C. at p. 250, *Beck and Others v. Value Capital Ltd. and Others* (No. 2) [1976] 2 All E.R. 102 per Buckley, L.J. at p. 109. In the present case we have reached the conclusion that the trial Judge in making the order discharging the third party procedure, legitimately exercised his discretion, and we find no reason why the exercise of such discretion should be disturbed.

This disposes of all grounds of appeal, except ground (6) by which it is alleged that the trial Judge in discharging the order giving leave to issue the third party notice which had been previously made by him on the ex-parte application, assumed the role of an appellate Court.

In dealing with the practice regulating third party proceedings earlier in our judgment, we have expounded on the principles which govern such procedure and we need not repeat them. The role of the Judge when granting leave for the issue of a third party notice is to examine whether there is or will be a prima facie case for contribution against the third party and he

needs not go into the merits of the case or into questions such as embarrassment or delay, leaving such matters to be considered on the application for third party directions, or on an application for the discontinuance of the third party proceedings when all interested parties will be before him. Therefore, in deciding such matters at the hearing of the summons for directions or of an application for the discontinuance of the third party proceedings, he is not sitting to decide whether such proceedings will be allowed to continue and if allowed, what necessary directions will have to be made. (R.S.C. Order 16A r. 7(1)(c) and r. 7(3)).

In the light of the above, ground 6 of the appeal also fails.

Before concluding with the present case, we wish to stress the need for the redrafting in a more systematic way of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction, as well as the Civil Procedure Rules so that provisions which correspond in both rules to be drafted in the same terms. In England the Rules of the Supreme Court have undergone considerable amendments to take into account developing realities. Our Rules of Court are modelled and take cognisance of the English Rules. Therefore, the need for amendment becomes obvious to be brought up-to-date and avoid any confusion when comparison has to be made with the corresponding English Rules. We wish further to add in particular that Rule 237 of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction which incorporates in general terms the practice of the Admiralty Division of the High Court in England where no provision is contained in the Admiralty Rules, should be substituted by Rules expressly regulating the practice and procedure in this respect, and emanating from our Supreme Court which, under Article 163 of the Constitution and section 69 of the Courts of Justice Law of 1960 (Law No. 14/60) is the competent organ vested with the power of making Rules of Court for regulating the practice and procedure of the High Court and/or of any other Court established by or under Part X of the Constitution other than Communal Courts established under Article 160. The need for amendment of our Rules has been stressed by this Court in *Almana Engineering v. Glyfos Commercial* (1981) 1 C.L.R. 273 at p. 289, in which reference is also made to *General Engineering Co. Ltd. v. Seddon Atkinson Vehicles Ltd.* (1975) 1 C.L.R. 278.

In the result, the appeal is dismissed with costs in favour both of the respondent-third-party, and the plaintiffs, against the appellants-defendants 2.

Appeal dismissed. Order for costs as above.

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