1983 September 14

[SAVVIDES, J.]

ANTHIMOS DEMETRIOU,

Plaintiff,

v.

LLOYD'S UNDERWRITERS AND 20 OTHERS,

Defendants.

(*Admiralty Action No.* 1/80).

Admiralty—Practice—Writ of summons—Not served within 12 *months of date of issue—Expiration—Renewal—Discretion of the Court—Principles applicable—Plaintiff effecting wrong service—And applying to have writ of summons renewed without delay, when the original service was set aside—Has shown good cause justifying exercise of the Court's discretion in his favour.*

On the 3rd January, 1980 the plaintiff in this case issued a writ of summons against the defendants. At the time of the filing of the action he applied, ex parte, for leave to serve notice of the writ of summons on the defendants outside the jurisdiction by double-registered letter addressed to Constant & Constant, solicitors in England who were in correspondence with plaintiff's advocate and whom plaintiff believed to be acting on behalf of the defendants. The notice of the writ of summons was in fact served on the said solicitors who, as a result, applied to the Court for an order setting aside the service of the writ of summons upon them on the ground that they were not authorised by the defendants to accept service.

The application of Constant & Constant for setting aside the service of the writ of summons upon them was decided by the Court on the 9th June, 1983, and by such decision the application was granted and it was ordered that service be set aside as improperly made on the ground that the said solicitors were not authorised to accept service.

Upon an ex parte application by the plaintiff, dated 14*th June,* 1983 *for an order extending the time for renewal of the writ of*

summons and for an order that upon granting the extension the writ of summons be renewed for until six months from the date of such order.

Held, after stating the principles which guide the Court in refusing or allowing a renewal of the writ of summons, that considering the facts of this case the applicant at this stage, has shown a good cause justifying the exercise by the Court of its discretion in his favour; accordingly the application will be granted.

Application granted.

Cases referred to:

Nigeria Produce Marketing Co. Ltd. and Another v. Sonora Shipping Company Ltd. and Another (1979) 1 C.L.R. 395;

Sheldon v. Brown Bayley's Steelworks Ltd. and Another [1953] 2 All E.R. 894 at p. 897;

Heaven v. Road Rail Wagons Ltd. [1965] 2 Q.B. 355;

Buttersby v. Anglo-American Oil Co. Ltd. [1944] 2 All E.R. 387 at p. 391;

E. Ltd. v. C. and Another [1959] 2 All E.R. 468;

Jones v. Jones and Another [1970] 3 All E.R. 47 at p. 52;

Stylianides v. Skot (1982) 1 C.L.R. 786.

Ex parte application.

Ex parte application by plaintiff for an order extending the time for renewal of the writ of summons.

L. Papaphilippou, for the applicant-plaintiff.

Cur. adv. vult.

SAVVIDES J. read the following decision. Plaintiff in the above action by an ex-parte application dated 14th June, 1983 applies for:

(a) An order extending the time for renewal of the writ of summons.

(b) An order that upon granting the extension, the writ of summons be renewed for until six months from the date of such order.

The application is based on rules 225 and 237 of the Rules of the Supreme Court of Cyprus in its Admiralty jurisdiction,

and Order 8, rule 1 and Order 64, rule 7 of the old English Rules in force on or before the 15th August, 1960.

Rule 225 of our Admiralty Rules empowers the Court to enlarge or abridge the time prescribed by the Rules for doing any act or taking any proceedings upon such terms as the Court shall deem fit.

Under this rule, enlargement of time may be ordered although the application for the same is made after the expiration of the time prescribed.

Rule 237 provides that in all cases not provided by our Admiralty Rules, the practice of the High Court of Justice in England so far as the same shall appear to be applicable, shall be followed.

Under our Admiralty Rules, no provision is made as to limitation of time during which a writ of summons remains in force or as to its renewal. Therefore, in view of rule 237, the English Rules which regulate the practice of the Admiralty Division of the High Court of Justice of England, as in force on the 15th August, 1960, became applicable.

Order 8, rule 1 of the English Rules (R.S.C. 1960) provides as follows:

> "No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the Court or a Judge for leave to renew the writ; and the Court or Judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ. And the writ shall in such case be renewed by being marked with a seal bearing the date of the day, month, and year of such renewal; such seal to be provided and kept for that purpose at the proper office, and to be impressed upon the writ by the proper officer, upon delivery to him by the plaintiff or his solicitor of a memorandum in Form No. 18 in

Appendix A, Part I, with such variations as circumstances may require; and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons".

The above provision was applicable to cases where the application for renewal was made before the expiration of 12 months from the issue of the writ. In case where the application was made out of time, then such application had also to be based on R.S.C. Order 64, rule 7, which provides that:-

"A Court or a Judge shall have power to enlarge or abridge the time appointed by these Rules, or fixed by an order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed".

In *Nigeria Produce Marketing Co. Ltd. and Another* v. *Sonora Shipping Company Ltd. and Another* (1979) 1 C.L.R. 395, after reviewing the authorities on the point, I concluded that an application for renewal of the writ of summons after its expiration could be granted if based both on Order 8, rule 1 and Order 64, rule 7. Reference was made in that case, inte alia, to the judgments in *Sheldon* v. *Brown Bayley's Steelworks, Ltd. and Another* [1953] 2 All E.R. 894, which, at p. 897 reads as follows:

"In determining the question, it is important to notice that, even after the twelve months have expired, the writ can be renewed. This is not done under Ord. 8, r.1 for that only permits renewal before the twelve months have expired. This is done under Ord. 64, r. 7, which is the general rule permitting enlargement of time. It was first done in 1877 by Sir George Jessel, M.R., in *Re Jones*, which has been accepted as good law ever since".

Order 8, rule 1 of the 1960 R.S.C. in England was substituted by R.S.C. (Rev.) 1962, Order 6, rule 8 still in force, which has

been largely taken from the former Order 8 and in part from the former Order 64, rule 7. Irrespective, however, of such substitution and the difference in the wording between the old and the revised rule, the construction of the underlying principle remained unchanged. Thus in *Heaven* v. *Road and Rail Wagons Ltd.* [1965] 2 Q.B. 355, Megaw, J. in dealing with the effect of the new Order 6, rule 8 on the old Order 8, rule 1, and the dictum of Lord Denning in *Sheldon* v. *Brown etc Ltd.*, [1953] 2 All E.R. 894 that a writ can be renewed after its expiration under R.S.C. Order 64, rule 7 had this to say (at page 363):

> "The discretion under Ord. 64, r. 7, was in terms unlimited. I am unable to see, therefore, how an alteration in wording as between the old Ord. 8, r. 1, and the new Ord. 6, r. 8, can by itself operate to widen the discretion or to annul, or derogate from, the authority of what was said in *Sheldon v. Brown Bayley's Steel Works Ltd.* as to the exercise by the Court of that discretion. However, even if it were correct to say, as counsel for the plaintiff contends, that the pre-existing authorities have to be treated as having interpreted Ord. 64, r. 7, against the background of, or by reference to, the terms of the old Ord. 8, r. 1, I should still be unable to accept the argument that the alteration of wording between the old Ord. 8, r. 1, and the new Ord. 6, r. 8(2), can validly be said to have made any material change. What is said is this: the old Ord. 8, r. 1, dealing, as I have said, only with applications for renewal (as it was then called) before the expiry of the 12 months, includes the words: 'if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons': but the new Ord. 6, r. 8(2) contains no such words.
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> Assuming that I am wrong about the irrelevance of the words in the old Ord. 8, r. 1, to the pre-1964 decisions on Ord. 64, r. 7, I do not think that the removal of the words 'or for other good reasons' can be said to have increased the permissible scope of the discretion or to have impaired the authority of the earlier cases. That could only be the case if the Court in consequence now has authority to exercise its discretion otherwise than 'for good reasons'. That would be a remarkable proposition. No suggestion has been made, nor I think could be made, that 'other good

reasons' in the old Ord. 8, r. 1, was in some way limited by some sort of application of the ejusdem generis rule, by reason of the collocation of that phrase with the preceding words relating to reasonable efforts to effect service. The words 'or for other good reasons', then, did not operate to limit the discretion under the old Ord. 8, r. 1. Their presence could not have been material to the decisions in *Battersby* v. *Anglo-American Oil Co. Ltd.* or *Sheldon* v. *Brown Bayley's Steel Works*. Their omission from the new Ord. 6, r. 8, cannot affect the continuing authority of those cases, even if the wording of the old Ord. 8, r. 1, was relevant at all to those decisions as to the discretion. I think the omission was probably because the words omitted added nothing and subtracted nothing. They were surplusage".

The principles which will guide the Court in refusing or allowing a renewal of the writ of summons have been set out by Lord Goddard in *Battersby* v. *Anglo-American Oil Co. Ltd.* [1944] 2 All E.R. p. 387 at p. 391 as follows:

"It is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course, on an application which is necessarily made ex parte. In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the Court is satisfied that good reasons appear to excuse the delay in service, as, indeed, is laid down in the order. The best reason, of course, would be that the defendant has been avoiding service, or that his address is unknown, and there may well be others. But ordinarily it is not a good reason that the plaintiff desires to hold up the proceedings while some other case is tried, or to await some future development".

The said principles were affirmed in *E. Ltd.* v. *C. and Another* [1959] 2 All E.R. 468 and in *Sheldon* v. *Brown etc. Ltd.* [1953] 2 All E.R. 894. In the latter case Singleton L.J. has treated *Battersby* case as the locus classicus as to how the discretion of the Court should be exercised.

In *Jones* v. *Jones and another* [1970] 3 All E.R. 47, Salmon L.J. made the following observations at pp. 51 and 52:

> "So, as a rule, the extension will not be granted. It is for the person asking for it to show, as Lord Denning M.R. said, 'sufficient reason' or 'good cause', or as Lord Goddard said 'good reasons.....to excuse the delay'. I ought perhaps finally to refer briefly to *Heaven* v. *Road and Rail Wagons Ltd.*, the decision of Megaw J. which was quoted with approval by Lord Denning M.R. in the passage in his judgment which I have just read in *Baker's* case. The only part of Megaw J.'s judgment which I need read is as follows:
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> > 'The rules of Court provide twelve months—a not ungenerous time, it might be thought—within which the plaintiff can hold up proceedings by not serving his writ. Surely, beyond that period the same public policy requires that the Court should ensure that it is only in really exceptional cases that the effective start of litigation should be yet further delayed; especially where the twelve months allowed for service extends beyond the end of the limitation period; and, above all, where the application is not made until after the period of twelve months, and with it the validity of the writ, has expired'.
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> Much depends on how the words 'really exceptional cases' are construed in relation to the other phrases I have already referred to—'sufficient reason' or 'good cause' or 'good reason'. I suppose that it is only in an exceptional case that 'sufficient reason' or 'good cause' or 'good reasons', exists. It is of great importance that the rules should be observed. The writ should certainly be served within the 12 months, especially if it is not issued until just before the expiration of the three-year period, unless there is good cause for extending the time for service; and I hope that nothing that I say in this case will be construed as an encouragement for anyone to imagine that, even if he lets the 12-month period go by, he has only to come to the Courts with some fairly plausible excuse, in order to get the time extended. Certainly anyone who takes that view would be disappointed".

And Karminski, L.J., in the same case, at p. 56, had this to say:

> "In my view, the real test is 'good cause' or 'good reason' which may be translated into the words 'a sufficient reason or reasons'. Discretion in a matter of this kind, as in other matters, must be exercised judicially, that is by weighing all the circumstances on each side and balancing so far as possible the priorities and merits".

The grounds recognised by the Courts as justifying renewals have been considerably extended during recent years. (See, in this respect, the *Nigerian Produce* v. *Sonora Shipping* (supra) and the cases referred to therein, and *Stylianides Andreas* v. *Ekaterini Charly Skot Trading under the Business Name Flair Fashion and Another* (1982) 1 C.L.R. 786, in which the exposition of the case-law as reviewed in *Nigerian Produce* was approved.

I come now to consider whether the circumstances of the present case justify the grant of an order as per application.

According to the facts before me, the writ of summons was issued on the 3rd January, 1980. At the time of the filing of the action, the plaintiff applied ex parte for leave to serve notice of the writ of summons on the defendants outside the jurisdiction by double-registered letter addressed to Constant & Constant, solicitors in England who were in correspondence with plaintiff's advocate and whom plaintiff believed to be acting on behalf of the defendants. The notice of the writ of summons was in fact served on the said solicitors who, as a result, applied to the Court for an order setting aside the service of the writ of summons upon them on the ground that they were not authorised by the defendants to accept service. (The history of the proceedings preceding this application, appear in the decision given by me in two applications in the above action. (See, (1982) 1 C.L.R. p. 711 and (1983) 1 C.L.R. p. 304).

The application of Constant & Constant for setting aside the service of the writ of summons upon them was decided by me on the 9th June, 1983, and by such decision I granted the application and I ordered that service be set aside as improperly made on the ground that the said solicitors were not authorised to accept service. (See, (1983) 1 C.L.R. p. 304).

As a result of the order setting aside service of the notice of the writ of summons, plaintiff filed the present application praying for the renewal of the writ of summons.

Having considered the facts of this case, I have come to the conclusion that the applicant, at this stage, has shown a good cause justifying the exercise by me of my discretion in his favour. Plaintiff had with the leave of the Court, attempted to serve the defendants through solicitors whom he believed were representing them and were willing to accept service on behalf of the defendants. Such belief does not appear to be entirely unfounded. When the plaintiff came to know that the service so effected was wrong, as a result of the decision in the application of the defendants to have the service set aside, he, without delay, applied to have the writ of summons, which had in the meantime expired, renewed.

In the result, I grant the application and I make an order accordingly, renewing the writ of summons for six months from today, without prejudice to the defendants applying to set aside such order.

I make no order for costs.

Application granted with no order as to costs.