1984 August 21

[STYLIANIDES, J.]

MICHALIS HERACLEOUS,

Plaintiff-Applicant.

v.

1. THE SPEED-BOAT "NIKI", NOW LYING AT THE OLD PORT OF LIMASSOL,
2. CHARIS AIVALIOTIS,

Defendants-Respondents.

(*Admiralty Action No.* 92/84).

Admiralty—Practice—Claim for damages by collision—Preliminary acts—Failure to file—Not a nullity but only an irregularity—No right to the other party to judgment—Defaulting party ordered to file preliminary acts within 15 days—Rule 48 of the Cyprus Admiralty Jurisdiction Order, 1893 and Order 19, rule 28 of the Old English Rules of the Supreme Court.

The plaintiff in this action claimed damages by collision between M/V "Michael" belonging to him and M/V "Niki", defendants No. 1, the ownership of defendant 2. On the date of issue of the writ the plaintiff filed with the registry preliminary acts.

Upon an application by the plaintiff for judgment against the defendants as per his claim and dismissal of the counterclaim on the ground that the defendants made default in filing preliminary acts within the time appointed by the Rules:

Held, that the Rules* provide in a peremptory manner the filing of preliminary acts but non-compliance with the Rules does not give right to the other party to obtain judgment on this ground; that the non filing of preliminary acts is not a nullity but only an irregularity; that, therefore, the application for judgment must be dismissed but that the defendants are hereby ordered to file their preliminary acts within 15 days (see, also

* The relevant rule is r. 48 of the Cyprus Admiralty Jurisdiction Order, 1893 which is quoted at p. 509 post.

Order 19, r. 28 of the old English Rules of the Supreme Court and the English practice obtaining on the matter).

Application dismissed.

Cases referred to:

Asimenos v. Paraskeva and Another (1982) 1 C.L.R. 145;

The Inflexible, 166 E.R. 1003;

The Vortigern [1859] S.W. 518; 166 E.R. 1242;

The Semiramis [1952] 2 Ll. R. 86 at p. 93;

The Geo. W. McKnight [1947] 80 Ll. L.R. 419;

The El Oso [1925] 21 Ll. L.R. 340 at p. 343;

The Beaverford [1960] 2 Ll. L.R. 216 at p. 218.

Application.

Application by plaintiff for judgment against defendants as per claim and dismissal of the counterclaim on the ground that the defendants made default in filing preliminary acts within the time prescribed by the rules.

Chr. Christofides, for the plaintiff-applicant.

St. Houry (Mrs.), for the defendants-respondents.

Cur. adv. vult.

STYLIANIDES J. read the following ruling. The applicant-plaintiff by this application seeks judgment against the defendants as per his claim and dismissal of the counterclaim on the ground that the defendants made default in filing Preliminary Acts within the time appointed by the Rules.

This action was filed on 19.3.84. The claim is for damage by collission between two vessles, M/V "MICHAEL" belonging to the plaintiff and "NIKI", defendant No. 1, the ownership of defendant No.2.

The writ of summons was served on the defendants at Limassol with astonishing speed, the day following its issue the 20th March, 1984. By the writ of summons the 18th April, 1984, was fixed for the appearance of the parties before the Court. The plaintiffs filed with the registry on the date of the issue of the writ Preliminary Acts.

Defendant No. 2 notified advocate A. Lemis that he would retain him to defend the case. Mr. Lemis by letter informed

plaintiff's counsel that he would appear for the defendants before the Court on 18.4.84.

On 24.3.84 the plaintiff took out a summons whereby he applied that three witnesses, members of the crew of M/V "ISLAND", be examined before the trial as the said ship, lying at the time at the Port of Limassol, would leave this country. The summons was not served on the defendants-respondents but on Mr. A. Lemis.

On 4.4.84 Mr. Koutras, who appeared for Mr. Lemis for the defendants-respondents, stated that "In view of the nature of the case it would not be convenient or practicable for the evidence of the three witnesses to be taken before the filing of pleadings and in particular the petition". Counsel for the parties made statements and undertakings to file petition within 5 days and answer within 7 days thereafter. The Court ordered filing and service of pleadings accordingly and that the evidence of the three witnesses be taken preparetory to the hearing on 18.4.84 in virtue of the Cyprus Admiralty Jurisdiction Order, 1893, rr. 125-131.

The petition was filed and delivered on 9.4.84 and the defendants filed and delivered answer and counterclaim on 16.4.84.

On 18.4.84 two other advocates appeared for the parties, namely, Mr. Papaphilippou for the plaintiffs and Mr. Odysseos for the defendants. Due to a misapprehension on the part of counsel for the defendants the Court adjourned the case for the following morning - 19th April, 1984 - to take the evidence of one of those witnesses.

On 19.4.84 reply and defence to the counterclaim as well as application for a date of hearing were filed by the plaintiff. As the pleadings closed, instead of taking the evidence of the witnesses preparatory, on the suggestion of the Court and the consent of counsel the hearing of the case commenced. One witness for the plaintiff was heard and the further hearing was adjourned to 10th May, 1984.

On 24.4.84 the plaintiff took out this summons.

This application, which has no precedent in Cyprus, was hotly contested. Counsel for the applicant argued that r.48 is peremptory and as the defendants did not file in Court a

Preliminary Act at any time before the time fixed by the writ of summons for the appearance of the parties before the Court, i.e. 18.4.84, and indeed no Preliminary Act was filed till the day of the hearing of this application, the plaintiff-applicant is entitled to judgment as per his application.

Counsel for the respondents argued that the application cannot be entertained as it was not supported by affidavit; that the plaintiff-applicant impliedly consented to the non-filing of Preliminary Acts in time or at all due to the steps he had taken in the action prior to the date fixed for appearance before the Court as set out hereinabove; that no notice of the filing of the Preliminary Act by the plaintiff was served on the defendants; that the steps taken in the action until 18.4.84 made the filing of Preliminary Acts by the defendants unnecessary, impossible and superfluous, and none of the objects for filing Preliminary Acts would have been served by filing same by the defendants after the close of the pleadings or at any rate the filing of the answer.

Learned counsel for the applicant in the course of his address referred the Court to the provisions of O.75, r. 19(3) and (4) of the English Rules which, he submitted, are applicable in Cyprus in virtue of s.237 of the Cyprus Admiralty Jurisdiction Order, 1893, as there is no provision on the matter in our Rules.

In *Asimenos v. Paraskeva & Another*, (1982) 1 C.L.R. 145, the Full Bench held that after the Independence of Cyprus and as contemplated by the Constitution, the Courts of Justice Law, 1960 (Law No. 14/60) was enacted; by virtue of s.19(a) 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. The law to be applied in the exercise of such jurisdiction is defined under s.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. Consequently, 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 (15th August, 1960) are the ones applicable by this Court in the

exercise of its admiralty jurisdiction to the extent contemplated by r.237 of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction, 1893.

Having regard to r.203 of the Admiralty Rules and the English Rules, I find no merit in the submission that an affidavit in support of this application was necessary as the facts, on which it relies, are apparent from the record of the proceedings.

Preliminary Acts were introduced in England by the Rules and Regulations of the High Court of Admiralty, confirmed by Order in Council, 7th December, 1855, Appendix No. 3.

In *The "Inflexible"*, 166 E.R. 1003, Dr. Lushington said:-

> "There is, upon the present occasion, a proceeding which has only recently been introduced into the practice of the Court, and which appears to me of very great importance: I mean, requiring the parties to give in, sealed up, so that no one sees it, the preliminary act, setting forth the particular, from which they cannot depart... It is important to tell you that I shall never allow any evidence to be used to contradict a fact so stated - that is, from the parties themselves who make the averment deliberately".

In *The "Vortigern"*, (1859) S.W. 518 (166 E.R. 1242), Dr. Lushington, in the course of his summing up to the Trinity Masters, said:-

> "I wish now to call your attention to the preliminary acts. Preliminary acts were instituted for two reasons, - to get a statement from the parties of the circumstances *recenti facto,* and to prevent the defendant from shaping his case to meet the case put forward by the plaintiff. In practice they have been found very useful; and neither party is allowed to depart from the case he has set up in his preliminary act. Some of the facts stated in the preliminary act are facts absolutely within the knowledge of the party making the statement, some are matters of opinion only."

The Court will only very rarely allow a party before or at the hearing to depart from his preliminary act.

In *The "Semiramis"*, [1952] 2 Ll.R. 86, at p.93, it was said:-

> "I said that I would come back to another question, which

has also caused me some difficulty, namely, the bearing on which the *Semiramis* was first seen according the the plaintiff's preliminary act. It may be said that in recent years this Court has been less rigid than of old in holding parties to admissions made on their behalf in preliminary acts. If that is so, it is a fact which I should, I think, acknowledge with contrition; for as long as 40 years ago the Court of Appeal laid it down in no uncertain terms in the case of *The Seacombe and the Devonshire*, [1912] P. 21, that a statement in a preliminary act is a binding admission against the party making it, not to be departed from in evidence except with the leave of the Court, which leave will only be given in very exceptional circumstances".

The preliminary acts are not binding upon the Court which must proceed upon the evidence which it deems to be most accurate and trustworthy - (*The Geo. W. McKnight*, [1947] 80 Ll.L.R. 419).

The above judicial pronouncements indicate the importance of the preliminary acts and the object of the time of their filing. The paramount object is to have statements of the parties of the circumstances of facts recent and, secondly, to prevent the defendant from shaping his case to meet facts put forward by the plaintiff. The preliminary acts help also, having regard to the particulars required, as set out in the Rules, the Court in the adjudication of the dispute before it. A case may be tried even on the preliminary acts - (See rule 49).

The relevant part of r. 48 reads as follows:-

"In an action for damage by collision, the Plaintiff shall, within one week from the issue of the writ, and the Defendant shall, at any time before the time fixed by the writ of summons for the appearance of the parties before the Court, file in the Court a Preliminary Act, sealed up, signed by the party, and containing a statement of the following particulars..... ".

In England the English rule obtaining before 1960 - indeed before the revision of 1962 and 1965 - Order 19, r. 28, was identical with our r. 48 with the exception that the defendant was required to file his Preliminary Act within 7 days after appearance. The practice in England is that on filing his Preliminary Act

each party gives notice of filing to his opponent, who should search to see that the filing is in order, because sometimes it is not. The filing of particulars, however, by the defendant is not dependent on the giving of such notice. In the great majority of cases in England a much longer time elapsed after either the issue of the writ or the entry of the appearance before the respective parties filed their preliminary acts - (*British Shipping Laws*, Volume 1, Admiralty Practice, paragraph 677, p.303).

When the party did not file preliminary acts, application could be made to the Registrar to order him to do so. I find support in this proposition in *The El Oso*, [1925] 21 Ll.L.R. 340, at p. 343, and in *The "Beaverford"*, [1960] 2 Ll.L.R. 216. In *The "Beaverford"*, it was said at p. 218:-

> "There is no doubt that when there is a collision between two or more vessels, preliminary acts must be filed. There is no doubt in appropriate cases, subject to the exercise of the discretion of the Court, that where more than two ships are concerned, but only two are in collision, preliminary acts should be filed.
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> I do not think it is necessary for me to go into any great detail into the law which has been accumulated in the course of years on those points. It is sufficient for me to say that the matter is summarized on p. 300 of Roscoe's Admiralty Practice, 5th ed., from which the following excerpt is taken from Lord Merrivale's judgment in *The El Oso*, [1925] 16 Asp. 530:-
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> '..... In *The El Oso*, ([1925], 16 Asp. 530) the practice was laid down by Lord Merrivale, P., at p. 533, as follows: "The conclusion at which I have arrived is that the true view, at any rate so far as this Division is concerned, is that the practice as to requiring Preliminary Acts, outside of the cases in which parties to the collision by their vessels are parties to the litigation, is a matter for the discretion of the Court. There is no difficulty with regard to the normal damage case. That is, the case where vessels have been in collision and the owners of one vessel bring their suit against the owners of the other in the Admiralty jurisdiction to determine the liabilities. The rule undoubtedly applies in its full force in these cases. The difficulty arises with regard to what I may call "third party" collisions. it seems

to me . that the proper course is that there should be the communication between the solicitors which commonly takes place in Admiralty cases, and the solicitors should ascertain whether on the one side or the other the parties are ready to take advantage of 0.19, r.28 ..... If both parties are not ready to deliver Preliminary Acts (- by "ready" I understand Lord Merrivale means "willing" -) the matter should be raised by summons in the Registry". The principle is mutuality"".

And further down:-

"Let it be said at once that one of the principles of the filing of preliminary acts is that there must be mutuality, and that is that no party must be put at an advantage or at a disadvantage through such filing".

The application of the applicant and the relief sought are in line with 0.75, r.19(3) of the new English Rules. (See Supreme Court Practice, 1967). This was introduced in England by R.S.C. Revision 1965. It is not applicable in Cyprus. (See, also, Atkin's Court Forms, 2nd ed., vol. 3, p.97, Step 67). Even if the new English Rules were applicable, no judgment is issued without proof as 0.75. r.19(4), reads:-

"On the hearing of a motion under paragraph (3) the Court may make such order as it thinks just, and where the defendant does not appear on the hearing and the Court is of opinion that judgment should be given for the plaintiff provided he proves his case, it shall order the plaintiff's preliminary act to be opened and require the plaintiff to satisfy the Court that his claim is well founded".

With regard to the counterclaim, it has to be observed that previously to the coming into operation of the Judicature Acts in England in cases where two vessels had been in collision, and each had sustained damage, and sought to recover compensation against the other, two separate actions were instituted. The action first instituted was called the principal cause, and the action which was subsequently instituted was called the cross cause. Under the Judicature Acts a defendant was for the first time enabled to set up by way of counterclaim, against the claim of the plaintiff, any right or claim so as to enable the Court to pronounce judgment in the same action, both on the original and on the cross claim, and it is therefore no longer necessary for

cross actions of damage to be instituted. Such actions are still, however, sometimes instituted. In fact it often happens, where there is a collision between two ships, that writs are issued against each simultaneoulsy. There is generally an effort on behalf of each party to be the first to take proceedings, because the conduct of the proceedings is usually given to the plaintiffs in the cause first instituted. When two writs have been issued in actions pending at the same time between the same parties, and relating to the same collision, it is usual for the actions to be consolidated before the delivery of pleadings, and for the defendant in the action first instituted to raise his claim by way of counterclaim.

The Rules relating to preliminary acts do not refer at all to counterclaim, but to the issue of the writ and the appearance of the defendant before the Court.

In the present case the pleadings closed before the date fixed by the writ of summons for the appearance of the parties before the Court. Therefore, one of the main objects of the filing of preliminary acts - not to enable a defendant to shape his defence according to the petition - could not be achieved by the filing of preliminary acts by the defendants-respondents. The defendants are, however, bound to file preliminary acts.

The application of the plaintiff is untenable according to the Rules obtaining in our country. The Rules provide in a peremptory manner the filing of preliminary acts but non-compliance with the Rules does not give right to the other party to obtain judgment on this ground. I consider that the non-filing of preliminary acts is not a nullity but only an irregularity.

Having given anxious consideration to the matter involved in this application, the provisions of the Rules and the English practice, I decided to make the following order:-

It is ordered that the defendants do file their preliminary acts within 15 days.

Having regard to all the circumstances pertaining to this application, no order as to costs is made.

Order as above with no order as to costs.