1984 January 30

[A. Loizou, Malachtos Savvides JJ.]

HELLENIC BANK LTD.,

Appellants-Plaintiffs

v.

1. ANTONAKIS DEMETRIOU KOSMA,
2. AGATHOULLA A. KOSMA,

Respondents-Defendants

(*Civil Appeal No. 6536*).

Civil procedure - Parties - Addition - Principles applicable - Order 9, rule 10 of the Civil Procedure Rules - Loan to Company - Creditors appointing receiver of the Company under terms of Contract - Action by creditors against Director under contract of guarantee - Directors alleging that claim against them result of mismanagement of receiver - Receiver added as third party on the application of Directors made about 2 years after filing their defence - Plaintiffs having no claim against receiver - Addition introducing new cause of action and causing delay and hardship to the plaintiffs - Relevant discretion of trial Judge exercised wrongly and caused injustice to plaintiffs - Order adding receiver as third party set aside.

Court of Appeal - Discretion - Judicial discretion - Review of exercise of - Principles applicable.

The respondents-defendants were the only shareholders and Directors of the Company named "Eldes (Clothing Manufacturing) Ltd". In January, 1977 the appellants-plaintiffs offered credit facilities to the said company on the written guarantee of the respondents, such guarantee being of the extent of £24,000.- As a result of the failure of the Company to face its responsibilities to the appellant arising out of the loss, the appellants in accordance with the terms of the contract of guarantee, appointed Loizos Shakallis as the receiver and administrator of the said Company, for the purpose of materialising the assets of the Company in satisfaction of appellants' claim. The res-

pondents were notified about the appointment of such receiver. After such receiver materialised all the assets of the Company, a sum of £17,591,445 mils was collected, which was debited against the debt, leaving a balance of £6,177,271 mils. By means of an action filed on the 16th January, 1980 the appellants claimed the aforesaid balance from the respondents. The latter by their defence, filed on the 11th December, 1980, alleged that as a result of the bad management of the affairs of the Company by the receiver, they suffered a loss of £70,000.- in respect of which they reserved their rights; and by means of an application, which was filed on the 29th January, 1983 they applied that the receiver be added as a defendant in the action.

Upon appeal by the plaintiffs against the order granting the application:

Held, that the Court is empowered to add as parties persons whose presence before the Court may be necessary for effectually and completely adjudicating upon and settle all the questions involved in the cause or matter (see Order 9, rule 10 of the Civil Procedure Rules); that since respondents allege that the claim in respect of which they are sued, is the result of the mismanagement of the party added as co-defendant against whom they have a claim by far exceeding appellants' claim; that since appellants have no claim whatsoever against the added party and it is clear from the alleged facts that the respondents seek to introduce a new cause of action far more complicated than the one before the Court which cannot be conveniently dealt with in the present case; that since the addition of the new defendant, especially at such advanced stage of the proceedings and after such a long delay, involves further delay and hardship to the appellants due to the need of "procedural steps which will have to be taken and widening of the framework on which the action would have otherwise proceeded", this Court cannot agree with the trial Court that these factors are outweighed by the need of securing a full and final adjudication of all matters involved; and that, therefore, this Court is entitled to interfere with the exercise of the relevant judicial discretion of the trial Court on the ground that such exercise is wrong and causes injustice to the appellants; accordingly the appeal must be allowed.

Appeal allowed.

Cases referred to

Gurmer v Cheam [1968] 1 All E R 328

Amon v Raphael Tuck & Sons Ltd [1956] 2 W L R 372

General Insurance Company of Cyprus Ltd v Georghiou and Another (1963) 2 C.L R 117,

Artemis Co Ltd v The Ship 'Sonja' (1972) 1 C L R 153

Re Vandervell Trusts [1969] 3 All E R 496 [1970] 3 All E R 16

S O G E K Cyprus Ltd v The Ship 'Blue Sea' and Other (1975) 1 C L R 472

Manchester Lines Ltd and Another v Viamar Coach Industry Ltd (1983) 1 C L R 178

Katsapas and Sons Ltd v Titan Constructions and Engineering Company 1961 C L R 317,

Efstathios Kyriacou and Sons Ltd v Mouzourides (1963) 2 C L R 1;

Kanydas Taxi Co Ltd v Komodikis (1975) 1 C L R 321

Paphitis v Bonfacio (1978) 1 C L R 127

Constantinides v Makrinorghou and Another (1978) 1 C L R 585,

Gardner v Jay [1885] 29 Ch D 50 at p 58

Evans v Bartlam [1937] 2 All E R 646,

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

Appeal.

Appeal by plaintiffs against the order of the District Court of Larnaca (Constantinides, S D J) dated the 3rd March 1983 (Action No. 66/80) whereby it was ordered that Loizo Shakallis be added as defendant 3 in the above action

M Hadjichristofis, for the appellants

Chr Triantafyllides for the respondents

Cur adv. vult

A Loizou J The judgment of the Court will be delivered by Mr Justice Savvides

SAVVIDES J This is an appeal by the plaintiffs in Civil Action No 66/80 against the decision of a Judge of the District Court of Larnaca, whereby an order was made on the application of defendants 1 and 2 for the addition of Lefzos Shakallis of Larnaca as defendant 3 in the action personally and in his capacity as Receiver and Manager of "Eldes (Clothing Manufacturing) Ltd

The application was based on Order 9, r 10 of the Civil Procedure Rules the material part with which we are concerned reads as follows

> The Court may order that the names of any parties whether plaintiffs or defendants who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter be added

The corresponding English rule was R S C Order 16 rule 11 (now Order 15, rule 6(2)(b))

The learned trial Judge in granting the application, said the following in his decision

> It is not my intention to make any comments as to the election of the plaintiffs as to whom they should sue or not, but I cannot overlook the position of the defendants that only with the addition of Mr L Shakallis it will be possible to effectively examine the question of their responsibility the make justice in this case I am fully aware of the fact that the addition of a defendant, especially at this advanced stage of the proceedings involves delay, possible hardship to plaintiffs and additional costs. It is obvious that the addition of the co-defendant will entail a series of procedural steps which will have to be taken and widening of the framework within which the action would have otherwise proceeded. I believe, however, that these factors should give way before the need of securing a full and final adjudication on all matters involved"

Counsel for appellants, in arguing the appeal contended that the learned trial Judge was wrong in granting the application and that he wrongly construed and applied the principles laid down in the cases on which he relied in reaching his decision as the facts in such cases are distinguishable from the facts in this case. No relief, counsel submitted, is sought by the appellants against the proposed defendant and the proposed defendant is not a party who ought to have been joined, or whose presence before the Court may be necessary to enable the Court completely and effectively adjudicate upon and settle all the questions involved in the cause or matter within the object of Order 9, rule 10 of the Civil Procedure Rules. Counsel further added that appellants' claim is based on two contracts of guarantee in respect of which the respondents are jointly and severally liable and they were the persons against whom their claim could be more effectively pursued, and the addition of Mr. Shakallis as a party to the action will complicate the issues and inevitably introduce a new cause of action in respect of which appellants have no connection. Another factor which the Court should have taken into consideration, counsel submitted, is the delay and hardship which will be caused to the appellants by the addition of a new defendant especially in the circumstances of the present case where the application was made at such late stage in the proceedings. Counsel concluded that the fact that the addition of the new defendant was not necessary, is manifested by the statement of counsel on behalf of the respondents that the respondents offered to submit to judgment as per claim and costs if stay of execution was granted till 15.7.1984.

Counsel for the respondents on the other hand contended that the discretion of the trial Judge was properly exercised in the present case for the reasons explained by him in his decision and that the exercise of his discretion is in line with the principles laid down in *Gurtner* v. *Circuit* [1968] 1 All E.R. 328 in which the corresponding provision in the English R.S.C. was considered and it was found that the exercise of the discretion by the Court under such provision must be construed more widely than in *Amon* v. *Raphael Tuck & Sons Ltd.* [1956] 2 W.L.R. 372. Counsel further contended that the addition of the new defendant was necessary in the present case; having regard to the pleadings and the facts set out in the affidavit in

support of the application which the Court rightly took into consideration in reaching its decision.

The learned trial Judge in reaching his conclusion as to the exercise of his discretion relied on the principles laid down in the English cases of *Amon* v. *Raphael Tuck & Sons Ltd.* and *Gurtner* v. *Circuit* (supra) and also on the decisions of our Supreme Court in *General Insurance Company of Cyprus Ltd.* v. *Georghiou and another* (1963) 2 C.L.R. 117 and *Artemis Co. Ltd.* v. *The Ship "SONJA"* (1972) 1 C.L.R. 153.

We wish to observe that the *Amon* and *Gurtner* cases are distinguishable from the case now under consideration. In the *Amon* case defendants applied for an order to join D as a defendant with his consent and as it appears from the report of the case at his request, so that he could counterclaim against the plaintiff, as otherwise the enjoyment of his legal rights would have been affected by the outcome of the case if he was not allowed to intervene in the proceedings. It was held in that case at pp. 357–358:-

> "The application was, in effect, an application for leave to intervene against the will of the plaintiff; but in such a case the appropriate test to determine whether the intervener was a party 'who ought to have been joined, or whose presence before the Court may be necessary' to enable the Court completely and effectually to adjudicate upon and settle all the questions involved in the cause or matter within Ord. 16, r. 11, was: Would the order for which the plaintiff is asking directly affect the intervener. not in his commercial interests, but in the enjoyment of his legal rights? Applying that test, D. was within the rule, for the injunction sought by the plaintiff in effect would restrain the further manufacture of the 'Stixit' pen and therefore, although the fact that D. was entitled to a royalty or commission gave him only a commercial interest in the continued manufacture, if he could show that the defendants were by contract obliged to manufacture a reasonable quantity of 'Stixit' pens he would have a right of action against them if they did not do so, and might ask in a subsequent action for specific performance of an agreement which the Court had ordered not to be performed. The Court accordingly had jurisdiction to make the order

sought which, in the circumstances was one which it was proper that the Court in its discretion should make".

Devlin, J. at pp. 378, 379, had this to say:-

"If I may express with diffidence my own view of the rule, apart from the authorities, I would support the narrower construction. I do not, with deference to those who have thought otherwise, agree that the main object of the rule is to prevent multiplicity of actions, though it may incidentally have that effect. The Court has other ways of doing that which are amply sufficient for the purpose -- by ordering consolidation or the bringing of actions on together or third party proceedings and so on. The primary object of the rule I believe to be to replace the plea in abatement. The object of that plea was to 'abate' an action in which all the proper parties were not before the Court. The rule is more flexible than the plea, but its object is fundamentally the same.

...

I do not think that the words which I have to construe represent any addition to the powers of the Court initiated by the Judicature Acts. I do not think that the necessary parties contemplated by it are other than those who would have been considered by a Court of Equity to be necessary before the passing of the Judicature Acts".

And at page 380:

"The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party".

And he concluded as follows at page 387:

"The set of rules assembled in the White Book and collected in the authorities which I have sought to follow are those which are applicable in the case of interveners whom it is sought to join against the will of the plaintiff".

Gurtner v. *Circuit* (supra) was again a case of an application by an intervener to be added as a defendant in an action brought

by a pedestrian against a motor cyclist unable to be traced. Plaintiff obtained an order for substituted service on the defendant c/o the insurance company which the Motor Insurers' Bureau had asked to investigate the matter and upon such service having been effected the bureau applied to be added as defendants. On appeal it was held that the Bureau should be added as defendants, on their undertaking to pay any damages that might be awarded to them. The dictum of Devlin, J., in *Amon* case as to the interpretation of the corresponding English R.S.C. Order 16, rule 11 (now Order 15, rule 6(2)(b) of the new rules) was not followed. Lord Denning, M.R. said at pp. 331, 332 (to which Salmon L.J. concurred):

> "There were many cases decided on it: but I need not analyse them today. That was done by DEVLIN, J., in *Amon* v. *Raphael Tuck & Sons, Ltd.*[1] He thought that the rule should be given a narrow construction, and his views were followed by JOHN STEPHENSON, J., in *Fire, Auto and Marine Insurance Co., Ltd.* v. *Greene*.[2] I am afraid that I do not agree with them. I prefer to give a wide interpretation to the rule, as LORD ESHER, M.R., did in *Byrne* v. *Brown*.[3] It seems to me that, when two parties are in dispute in an action at law and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matters in dispute 'to be effectually and completely determined and adjudicated upon' between all those directly concerned in the outcome."

And further down at page 332:

> "It is thus apparent that the Motor Insurers' Bureau are vitally concerned in the outcome of the action. They are directly affected, not only in their legal rights, but also in their pocket. They ought to be allowed to come in as defendants. It would be most unjust if they were bound to

1. [1956] 1 All E.R. 273; [1956] 1 Q.B. 357.
2. [1964] 2 All E.R. 761; [1964] 2 Q.B. 687.
3. [1889] 22 Q.B. 657.

stand idly by watching the plaintiff get judgment against the defendant without saying a word when they are the people who have to foot the bill. I think that *Fire, Auto and Marine Insurance Co., Ltd. v. Greene*[1] was wrongly decided and should be overruled."

Lord Diplock (with Salmon, L.J. concurring) had this to add at page 336:

"Clearly the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff on the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained. A matter in dispute is not, in my view, effectually and completely *'adjudicated upon'* (my italics) unless the rules of natural justice are observed, and all those who will be liable to satisfy the judgment are given an opportunity to be heard."

The wide interpretation of the rule was adopted by the Court of Appeal in *Re Vandervell Trusts* [1969] 3 All E.R. 496 and the dictum of Devlin, J., was disapproved and the Court applying the principle enunciated in the above case that the rule was to be given a wide interpretation to enable any party to be joined in an action whenever it was just and convenient to do so allowed the executors of the deceased, who commenced proceedings against the trustees of a family settlement in respect of certain dividends or shares, to join the Commissioner of Inland Revenue as defendants, with their consent, and who at the same time but in different proceedings claimed surtax against the executors in respect of the same dividends. The decision however, of the Court of Appeal was reversed by the House of Lords ([1970] 3 All E.R. 16) in which it was held that:

"On the true construction of the particular rule applicable to the case, i.e. RSC Ord 15, r.6(2)(b), the 'matter in dispute was between the executors and the trustees and could be 'effectually and completely determined and adjudicated upon' in the absence of the Commissioners of Inland Revenue; it followed, therefore, that their presence was not 'necessary' and that they should not be joined as defendants to the action."

1. [1964] 2 All E.R. 761; [1964] 2 Q.B. 687.

Lord Morris of Borth-y-gest said at page 19:

> ".... although the submissions in this case have ranged extensively the decision can rest on a consideration of the rule which is applicable. In agreement with Buckley J, I do not think that this is a case which falls within RSC Ord 15, r 6(2)(b). It is not suggested that the Commissioners of Inland Revenue 'ought to have been joined as a party'. The only question is whether their presence before the court is 'necessary' - i.e. necessary 'to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon'. I do not think that any process of giving a wide or liberal interpretation to the rule can be employed to alter it or to give it an enlarged meaning which, on a fair and reasonable interpretation, it does not bear."

And Viscount Dilhorne in considering the provisions of RSC Ord. 15, r. 6(2)(b) and its construction by Lord Devlin in *Amon v. Raphael Tuck & Sons Ltd.* (supra) and by Lord Denning in the Court of Appeal in *Vandervell Trusts Ltd.* v. *White* [1969] 3 All E.R. 496, had this to say at pp. 23 - 24:

> "If under this rule, the Commissioners of Inland Revenue can be added as a party, their consent to that is not a condition precedent to that being done unless it is proposed to add them as a plaintiff. Their refusal of consent would be no bar to the exercise by the High Court of its jurisdiction to add them as a defendant. The many reported cases in which this rule has been considered were comprehensively reviewed by Devlin J in *Amon* v. *Raphael Tuck & Sons Ltd.* He said:
>
> > 'There are two views about its cope; and authority can be cited for both. One is that it gives a wide power to the court to join any party who has a claim which relates to the subject-matter of the action .. if it is right, it really kills any submission about jurisdiction. The Court is hardly likely in the exercise of its discretion to join as a party somebody who has no claim relating to the subject-matter of the action; and if its powers extend to joining anyone who has, the question whether a particular intervener should be joined becomes virtually one of discretion'.

In this case the Court of Appeal held that there should be a wide interpretation of the rule. Lord Denning MR said:

> 'We will in this court give the rule a wide interpretation so as to enable any party to be joined whenever it is just or convenient to do so. It would be a disgrace to the law that there should be two parallel proceedings in which the selfsame issue was raised, leading to different and inconsistent results. It would be a disgrace in this very case if the Special Commissioners should come to one result and a Judge in the Chancery Division should come to another result as to who was entitled to these dividends.'

Whether this interpretation is wider than that stated by Devlin J in the passage cited above, it is not necessary to consider. My difficulty about accepting Lord Denning's wide interpretation is that it appears to me wholly unrelated to the wording of the rule. I cannot construe the language of the rule as meaning that a party can be added whenever it is just or convenient to do so. That could have been simply stated if the rule was intended to mean that. However wide an interpretation is given, it must be an interpretation of the language used. The rule does not give power to add a party whenever it is just or convenient to do so. It gives power to do so only if he ought to have been joined as a party or if his presence is necessary for the effectual and complete determination and adjudication on all matters in dispute in the cause or matter."

The facts in the case of *General Insurance Company of Cyprus Ltd.* v. *Georghiou and another* (1963) 2 C.L.R. 117, which is one of the cases relied upon by the trial Court, are also distinguishable from those in the present case. In that case the application was made by an intervener who had sustained personal injuries in a road accident and had brought an action against the person by whose negligence the accident was caused giving at the same time notice to the insurance company covering the defendant in accordance with the law. He sought to intervene in an action brought by the insurance company against its insured, who was the defendant in both actions, for avoiding the insurance policy for non-disclosure of material facts, and the outcome of which might prejudicially affect the intervener's rights under the policy.

The Court of Appeal in affirming the decision of the District Court granting leave for the addition of the intervener as co-defendant held:

> "It is beyond question that regard being had to the whole scheme of the Motor Vehicles (Third Party Insurance) Law, Cap. 333, the intervener has an interest in the policy subject matter of the action instituted by the Insurers (appellants) against their insured, as well as in the outcome of the litigation in question.

In the above case, Josephides, J. had this to say at p. 123:

> "The corresponding English rule is R.S.C. Order 16, rule 11. Devlin, J., as he then was, considered this rule exhaustively in the case of *Amon* v. *Raphael Tuck & Sons Ltd.* [1956] 1 Q.B. 357, to which both learned counsel referred in the course of their argument.
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> I humbly agree with Devlin J. who, in interpreting those words, held that the appropriate test to determine whether the intervener was a party 'who ought to have been joined, or whose presence before the Court may be necessary' to enable the Court completely and effectually to adjudicate upon and settle all the questions involved in the cause or matter within that rule was: 'Would the order for which the plaintiff was asking directly affect the intervener in the enjoyment of his legal rights?'
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> Applying that test, I have no hesitation in holding that the intervener (respondent) was within that rule, for having regard to the whole scheme of Cap. 333, he, as the third party, under that statute, has a legal right and that legal right is that when he obtains judgment, he has a right to have it satisfied by the insurers; and if the insurers' action for a declaration avoiding the policy succeeds then his legal rights will be directly affected."

The last case to which reference has been made by the trial Court, *Artemis Company Ltd.* v. *The Ship "Sonja"* (1972) 1 C.L.R. 153, is distinguishable from the present one. In that case, which was an admiralty action before a judge of this Court in the exercise of the original jurisdiction of the Court, the plaintiffs claimed damages for breach of contract of affreightment

concluded between the parties, in which it was alleged that the defendants acted through their agents. The defendants denied such allegation and applied to have such person added as co-defendants. Plaintiff did not object to such application and in fact joined the application for the addition of the new party. A. Loizou, J., reviewing the case law and the principles underlying such cases concerning the addition of a defendant either on the application of the defendant or of a person not already a party, concluded as follows at pp. 161, 162:

"In these circumstances therefore and on the authorities, had it not been for the joining of the application by the plaintiff with which I shall be shortly dealing more extensively, this application should have been dismissed. However, the joining of the application by the plaintiff in the light of what has already been shown is a significant factor and gives to the present proceedings their special character. I take it that this is not just a case of the plaintiffs merely consenting but a case of adopting the application and urging that it be granted. If this application were to be dismissed there would be nothing to stop the plaintiffs from applying themselves for this joinder. This would unnecessarily cause multiplicity of proceedings and add up to the costs. Nor the dismissal of this application will prevent the plaintiffs from proceeding by another action against the new defendant sought to be added hereto. Under this rule the Court has power on the application of the plaintiffs to add or substitute a defendant. Therefore since the plaintiffs have elected to take the stand in these proceedings to which I have referred and without purporting to lay down a principle of general application, in the special circumstances of this case I grant this application by ordering that A. L. Mantovani &, Sons Ltd. be joined as co-defendant in this action and that the writ of summons be amended accordingly and that as second defendant should be entitled to exercise all the rights of the first defendant in this action."

In *Co-operative Organisation of General Trade (S.O.G.E.K.) Cyprus Ltd.* v. *The Ship Blue Sea and others* (1975) 1 C.L.R. 472, the Court adopted the principles governing the addition of a defendant either on the application of the defendant or of a

person not already party to the proceedings, as expounded in the *Amon* and *Gurtner* cases and dismissed the application of a third party to be joined as defendant, which was opposed by plaintiffs, whereas at the same time it allowed the addition of another party as defendant to whose addition the plaintiffs had no objection. A. Loizou, J. said at pp. 480, 481:

> "They still have their own remedies, as between themselves and the persons with whom they are in conflict, and they still have other procedural means open to them.
>
> The matter in issue between the present parties to the case, is, whether the clause, 'Owners having a lien upon cargo covered by this Bill of Lading outstanding amount due under time charter contract with Messrs. Mortensen and Lange, dated 4th August, 1972 and addendum thereto', was properly inserted and was binding on the plaintiffs or it was arbitrarily inserted, and without their consent and agreement, as claimed by the plaintiffs, and, therefore, not binding on them. The addition of applicants 2 will only complicate, delay and embarrass the proceedings."

In *Manchester Lines Ltd. and another* v. *Viamar Coach Industry Ltd.* (1983) 1 C.L.R. 178, an application by the defendants for leave to add a co-defendant was refused and the Court held.

> "that leave to add a co-defendant may be refused where the addition of a defendant will have the effect of adding a new cause of action; that the claim of applicants is a matter between the present defendants and their suppliers and there does not exist a cause of action between the plaintiffs-respondents in this application and the firm of Albert Jagger Ltd., nor is it necessary to join them as defendants to enable this Court to make an effectual adjudication concerning all matters in dispute; in fact, if they were to be added the Court should be adding a new cause of action and not dealing with the action as it stands between the existing parties; accordingly, the application for the addition of a co-defendant must fail."

The powers of this Court to interfere in a matter which involves the exercise of judicial discretion have been considered inter alia, in *Kotsapas and Sons Ltd.* v. *Titan Construction and Engineering Company*, 1961 C.L.R. 317, *Efstathios Kyriacou and*

Sons Ltd. v. Mouzourides (1963) 2 C.L.R. 1, *Karydas Taxi Co. Ltd.* v. *Komodikis* (1975) 1 C.L.R. 321, *Paphitis* v. *Bonifacio* (1978) 1 C.L.R. 127, *Constantinides* v. *Makriyiorghou and Another* (1978) 1 C.L.R. 585.

As far back as 1885, Bowen L.J. had this to say in *Gartner* v. *Jay* [1885] 25 Ch.D. 50 at page 58:

> "That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it it will be reviewed ...."

The above dictum was applied in *Evans* v. *Bartlam* [1937] 2 All E.R. 646 in which Lord Wright, at page 654, expressed the following opinion:

> "It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction, unless the court is clearly satisfied that he was wrong. But the court is not entitled simply to say that, if the judge had jurisdiction, and had all the facts before him, the Court of Appeal cannot review his order, unless he is shown to have applied a wrong principle. The court must, if necessary, examine by way of review a discretion which may reverse or vary the order."

In *Charles Osenton & Co.* v. *Johnston* [1941] 2 All E.R. 245 at page 250, Viscount Simon, L.C. said:

> "The law as to the reversal by a Court of Appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty which arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appel-

lant, then the reversal of the order on appeal may be justified."

In *Beck and others* v. *Value Capital Ltd. and others* (*No.*2) [1976] 2 All E.R. 102, Buckley, L.J., said (at page 109):

> "Where a trial Judge is not shown to have erred in principle, his exercise of a discretionary power should not be interfered with unless the appellate Court is of opinion that his conclusion is one that involves injustice; or, to use the language of Lord Wright, the appellate Court is clearly satisfied that the Judge of first instance was wrong."

It is clear from the above authorities that a Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the Court is clearly satisfied that the discretion has been wrongly exercised.

Bearing in mind the principles emanating from the above authorities and the cases referred to therein, we are coming to examine whether in the relevant facts and circumstances of this case, the application to join a co-defendant should have been granted. The facts are briefly as follows:

The respondents-defendants were the only shareholders and Directors of the Company named "Eldes (Clothing Manufacturing) Ltd.". In January, 1977 the appellants-plaintiffs offered credit facilities to the said company on the written guarantee of the respondents, such guarantee being of the extent of £24,000.-. As a result of the failure of the Company to face its responsibilities to the appellants arising out of the loss, the appellants in accordance with the terms of the contract of guarantee, appointed Loizos Shakallis as the receiver and administrator of the said Company, for the purpose of materialising the assets of the Company in satisfaction of appellants' claim. The respondents were notified about the appointment of such receiver. After such receiver materialised all the assets of the Company, a sum of £17,591.445 mils was collected, which was debited against the debt, leaving a balance of £6,177.271 mils. In addition to the above indebtedness, respondent 1 borrowed from the appellants on 31.10.1977 £2,000.- which he failed to pay and which is claimed under paragraph (c) of the claim.

The writ of summons was issued on the 16th January, 1980 and the respondents filed their defence on the 11th December, 1980. They allege by their defence that as a result of the bad management of the affairs of the Company by the receiver, they suffered a loss of £70,000.- in respect of which they reserve their rights. The application for the addition of the new defendant was made on the 29th January, 1983 after a delay of more than three years after the issue of the writ of summons and two years after the delivery of their statement of defence by which they thought that it was not necessary to raise this matter in the present action and they reserved it as a cause for another action, and after the action had already been fixed for hearing. We have to point out that this delay was not the fault of counsel appearing today before us as he joined in these proceedings at a very late stage and upon his being retained he filed the application for adding the new defendant.

In the affidavit in support of their application to join Loizos Shakallis as a party in the action, the following are stated under paragraphs 7, 8, 9:

"7. Further and/or alternatively, since we had no association with the management and/or affairs of the Company following the appointment of the Receiver and Manager and/or no information was given to us and/or we were not consulted, we have no responsibility whatsoever for the consequence of the actions and/or omissions and/or negligence of the Receiver and Manager.

8. I verily believe and as I am advised, Mr. Loizos Shakallis personally and/or in his capacity as Receiver and Manager ought to have been joined as defendant in the present action and/or his presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions and/or issues involved in the action and/or cause and/or matter.

9. Further, the addition of Mr. Loizos Shakallis as defendant in the present action, will cause no embarrassment to the plaintiffs but in the contrary, will enable them to have before them as defendants all the parties that may allegedly have caused their loss and/or who are allegedly liable to them."

At the hearing of the application, counsel appearing for the respondents, stated that the respondents offered to submit to judgment for the whole of the claim and costs if the appellants were prepared to grant them a stay of execution and this fact is mentioned in the judgment of the trial Court.

It is clear from the provisions of Order 9, rule 10 that the Court is empowered to add as parties, persons whose presence before the Court may be necessary for effectually and completely adjudicating upon and settle all the questions involved in the cause or matter.

The question which poses for answer is: Was the addition of the new party necessary to enable the Court to adjudicate upon questions involved in the cause? Or such addition would have complicated the issues and embarrass the plaintiffs in pursuing their claim? What appears from the facts set out in the affidavit in support of the application and the other material before us, appellants' claim against the respondents is based on an agreement of guarantee. What the respondents allege by their defence and the affidavit in support of the application, is that the claim in respect of which they are sued, is the result of the mismanagement of the party added as co-defendant against whom they have a claim by far exceeding plaintiffs' claim. The appellants, however, have no claim whatsoever against the added party and it is clear from the alleged facts that the respondents seek to introduce a new cause of action, which cannot be conveniently dealt with in the present case. It relates to the conduct of such new party, as Receiver of the Company, for mismanagement of the affairs of the Company.

There is no doubt, and this appears also in the decision of the trial Court that the addition of the new defendant, especially at such advanced stage of the proceedings and after such a long delay, involves further delay and hardship to the appellants due to the need of "procedural steps which will have to be taken and widening of the framework which the action would have otherwise proceeded." We find ourselves unable to agree with the learned trial Judge that these factors are outweighed by the need of securing a full and final adjudication of all matters involved. It has further been ignored by the learned trial Judge the fact that with the addition of the new defendant, a new cause has been introduced by far more complicated than the one before

him. Also, that in the light of the contention of appellants that they had no claim or cause of action against the new defendant, there was nothing to prevent either such defendant, whom the Court did not have the opportunity to hear when the application was dealt with, to apply that the action against him be dismissed to which the appellants might have consented, or the appellants to discontinue the action against him, in the exercise of their right under Order 15 of the Civil Procedure Rules.

In view of the aforementioned and bearing in mind the relevant considerations relating to the power of this Court to interfere with the exercise of discretion, we feel that we are entitled to interfere with the exercise of the relevant judicial discretion of the trial Court on the ground that such exercise is wrong and causes injustice to the appellants. The respondents still have their own remedies as between themselves and the persons with whom they are in conflict and they still have other procedural means open to them.

In the result the appeal is allowed and the order of the trial Court for the addition of Loizos Shakallis as a co-defendant is set aside with costs of this appeal against the respondents. We find it unnecessary to disturb the order for costs made by the trial Court in the application before him, once such costs were awarded in favour of the appellants.

Appeal allowed.