1984 July 19

[TRIANTAFYLLIDES, P., L. LOIZOU, HADJIANASTASSIOU, A. LOIZOU, DEMETRIADES, SAVVIDES, JJ.]

SAINT NICOLAS SHIPPING CO. LTD.,
Appellants-Defendants,

v.

NISSHO-IWAI CO. LTD.,
Respondents-Plaintiffs.

(*Civil Appeal No.* 6029).

Civil Procedure—Appeal—Grounds of appeal—Amendment—Principles applicable—Application for amendment filed after the hearing of the appeal had commenced—Partly granted—Allowing the application in respect of the remaining grounds would have at this very late stage allowed applicants to extend and alter considerably the basis on which the judgment appealed from was challenged.

In the course of the hearing of the above appeal counsel for appellants contended for the first time in these proceedings that the Rules of Court applicable to them are not the relevant Rules of Court in England which are currently in force, but those Rules of Court in England which were in force on August 15, 1960. As such contention did not come under either of the two grounds of appeal it was pointed out to him that this Court could only deal with matters properly placed before it and it could only deal with it if it was placed before the Court by means of an amendment of the notice of appeal. As a result, counsel for the appellants applied for an adjournment which was not objected to by counsel for respondents and which was granted for the purpose of giving an opportunity to him to apply for an amendment of the notice of appeal. Following that, the appellants filed the present application applying for the substitution of the grounds appearing in the notice of appeal by a number of grounds set out in a four-paged notice of appeal. By such application the appellants sought to introduce not only grounds concerning the question as to which of the English Rules are applicable, which arose in the course of the hearing

of the appeal and which led to the adjournment of the heari but a number of other additional grounds.

Held, that though an amendment of the notice of appeal a matter within the discretion of the appellate Court, nev theless, such discretion should be jealously exercised, bear in mind the particular circumstances of each case; that t Court has decided to allow the amendment of the existing not of appeal by the addition to the grounds therein of grou (1) and (2) which deal with the question of the English Rt of Court applicable, but in the circumstances of the case is not prepared to exercise its discretion in allowing the ap cation in respect of the other grounds set out in the applicat as by deciding otherwise, it would have at this very late st allowed the appellants to extend and alter considerably the b on which the judgment appealed from is challenged.

Application partly allow

Cases referred to:

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

Nissis (No. 2) v. *Republic* (1967) 3 C.L.R. 671 at pp 674, 6

Vassiades v. *Michaelides Bros.* (1973) 1 C.L.R. 80.

Appeal.

Appeal by defendants-applicants against the order of a Ju of the Supreme Court of Cyprus in its Admiralty Jurisdict (Malachtos, J.) dated the 15th November, 1979 (Admir Action No. 24/74) whereby their application for setting as a previous order made ex parte extending the validity of writ of summons and service thereof was dismissed.

E. Montanios with *D. Hadjihambis*, for the appella *Chr. Demetriades*, for the respondents.

Cur. adv. vi

TRIANTAFYLLIDES P.: The judgment of the Court will delivered by Mr. Justice Savvides.

SAVVIDES J.: This is an appeal against the judgment o Judge of this Court in the exercise of the original jurisdict of the Court, whereby he dismissed an application of the ap

lants for setting aside a previous order made ex parte extending the validity of the writ of summons and also for setting aside the said writ of summons and service thereof.

The appeal was based on the following grounds of law:

(a) The trial Court was wrong in law in holding that by virtue of 0.2 rule 1(1) of the Rules of the Supreme Court of England the extension of the writ of summons by the order dated 10.11.1975 as from that date and not from 28.3.1975 could be treated as a mere irregularity which could be corrected and that the said order was not null and void.

(b) The trial Court was wrong in holding that its discretion had been rightly exercised in granting the order dated 10.11.1975.

In the course of the hearing of the appeal counsel for appellants contended for the first time in these proceedings that the Rules of Court applicable to them are not the relevant Rules of Court in England which are currently in force, but those Rules of Court in England which were in force on August 15, 1960. As such contention did not come under either of the two grounds of appeal it was pointed out to him that this Court could only deal with matters properly placed before it and it could only deal with it if it was placed before the Court by means of an amendment of the notice of appeal. As a result, counsel for the appellants applied for an adjournment which was not objected to by counsel for respondents and which was granted for the purpose of giving an opportunity to him to apply for an amendment of the notice of appeal.

Following that, the appellants filed the present application applying for the substitution of the grounds appearing in the notice of appeal by a number of grounds set out in a four-paged notice of appeal. By such application the appellants seek to introduce not only grounds concerning the question as to which of the English Rules are applicable, which arose in the course of the hearing of the appeal and which lead to the adjournment of the hearing, but a number of other additional grounds.

The application was opposed by counsel for respondent who objected to such amendment as having been made very late in the day and also confusing the issues before the Court.

Counsel for appellants contended that after the filing of the appeal the judgment in *Nigerian Produce Marketing Co. Ltd.* v. 1. *Sonora Shipping Co. Ltd.*, 2. *The ship "ASPYR"* (1979) 1 C.L.R. 395 was delivered in which a member of this Court in the exercise of the original jurisdiction ruled that the English Rules to the extent applicable in Cyprus, were the Rules in force on 15.8.1960 and not any subsequent Rules. The report of such decision was published in January, 1980, considerable time after the filing of the appeal and as a result of such decision the amendment of the notice of appeal was deemed necessary. Counsel further submitted that the discretion of the Court to allow such amendment is an unfettered one and that in the present case the grounds sought to be introduced are questions of law and not of fact. He further added that the amendments sought to be introduced are not confusing the issue in any way.

Counsel for respondents on the other hand contended that the application was made too late, and after the lapse of 14 months from the day of the filing of the appeal; the appellants had ample time to apply for an amendment of their notice of appeal and not wait till after the hearing of the appeal had commended. Furthermore that the appellants did not confine their application to the grounds which they raised when they applied for an adjournment of the hearing of the appeal, but took the advantage of such adjournment to introduce other additional grounds covering almost four pages divided into six grounds, two of which are subdivided into thirteen grounds. Had the respondents known, counsel added, that the appellants were not to confine themselves to grounds concerning the application of the old rules, they would have strongly objected to the adjournment of the hearing of the appeal which had already commenced. Counsel for respondents further submitted that if the application is granted and the appellants are allowed to add the new grounds, the respondents will be prejudiced as the case before the Court will be considerably extended since by most of such grounds matters are being raised which were not raised before the trial Court. Counsel further

added that the application before the trial Court was relied upon and argued on the basis of the English Rules currently in force and not the 1960 Rules and therefore applicants cannot now come forward to argue their case on a different basis to the prejudice of the respondents. Though, counsel concluded, the matter is one of judicial discretion, this is not a proper case for the exercise of such discretion and that the trend concerning applications of this nature is that late applications for amendment especially in the course of the hearing of an appeal are discouraged.

It was well settled by a line of decisions of this Court that though an amendment of the notice of appeal is a matter within the discretion of the appellate Court, nevertheless, such discretion should be jealously exercised, bearing in mind the particular circumstances of the case. Thus, in *Nissis (No. 2)* v. *The Republic* (1967) 3 C.L.R. 671, Triantafyllides, J., as he then was, in delivering the judgment of the Full Bench disallowing the appellant in that case from raising a new ground of law, had this to say at pp. 674, 675:

> "As the corresponding provisions in England are closely similar to our own, it is useful to bear in mind how the proper approach of an appellate tribunal to a ground raised for the first time on a civil appeal has been laid down by Lord Herschell in *The Tasmania* [1890] 15 A.C. 223, at p. 225:
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> > 'My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.
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> > It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an Appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that

it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box'.

Lord Herschell's view was repeatedly upheld, as correct, in subsequent jurisprudence (see, for example, *Karunaratne* v. *Ferdinandus* [1902] A.C. 405).

In line with the foregoing, it has been held that if it is only a question of law which is raised for the first time before an appellate Court, and this is done upon facts either admitted or proved beyond controversy after full investigation, then such a plea may properly be entertained (see relevant dicta in *Connecticut Fire Insurance Company* v. *Kavanagh*, [1892] A.C. 473, and *Warehousing & Forwarding Co. of East Africa Ltd.* v. *Jafferali & Sons Ltd.* [1964] A.C. 1).

Similar principles are applicable to appeals, in Greece, from decisions of first instance administrative Courts to the Council of State (see Conclusions from the jurisprudence of the Greek Council of State 1929–1959 pp. 292–293)".

In *Vassiades* v. *Michaelides Bros.* (1973) 1 C.L.R. 80, it was held that:

"It is quite clear that by the proposed new ground the appellant is seeking, at this very late stage, during the hearing of the appeal, to extend considerably the basis on which he challenges the judgment appealed from. In the light of the particular circumstances of this case we are not prepared to exercise our discretion in favour of the appellant; and, therefore, the application in dismissed;"

Having heard elaborate argument on the part of both counsel, we have decided to allow the amendment of the existing notice of appeal by the addition to the grounds therein of grounds (1)

and (2), but in the circumstances of the case, we are not prepared to exercise our discretion in allowing the application in respect of the other grounds set out in the application as by deciding otherwise, we would have at this very late stage allowed the appellants to extend and alter considerably the basis on which the judgment appealed from is challenged.

In the result, the application is granted in respect of grounds (1) and (2) which will be added to the existing grounds as grounds (3) and (4) and is dismissed in respect of the remaining grounds. No new notice of appeal need be filed.

As to costs, bearing in mind that the application succeeds only in part, we make no order for costs in favour of either party in respect of this application but such costs will be costs in cause in this appeal.

Appeal partly allowed.