

1985 December 16

[PIKIS, J.]

ABDUL HAMID BORGHOL AND CO.,

Plaintiff,

v.

THE SHIP "AKAK PROGRESS", NOW LYING
AT THE PORT OF LIMASSOL,

Defendant

(Admiralty Action No. 20/85).

Admiralty—Practice—Warrant of arrest of ship issued upon an ex parte application—Application by defendant ship to set it aside for non disclosure of relevant facts in the affidavit in support of such application—Effect of such non disclosure.

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Admiralty—The Cyprus Admiralty Jurisdiction Order, Rule 50—Affidavit in support of an ex parte application for the arrest of a ship—Such affidavit made in compliance with the said rule and specimen "C" of schedule 1—Plaintiff cannot be held responsible for non disclosing further facts.

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This is a motion to set aside the order of arrest of the defendant ship made on 23.1.85 at the behest of the plaintiffs upon an ex parte application supported by an affidavit by the plaintiffs' clearing agent. The discharge of the order is sought for the sole reason that plaintiffs failed to make full disclosure of all the facts surrounding the alleged breach of contract, particularly the provisions of the agreement as to the port of destination and the fact that the goods were eventually received by the plaintiffs.

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Counsel for the respondents-plaintiffs argued that the facts deposed in the said affidavit were fashioned to the requirements of Rule 50 of the Cyprus Admiralty Jurisdiction Order 1893 and the details required by the specimen affidavit prescribed by the Rules under Form "C" of Schedule 1.

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Held, dismissing the application:

5 (1) Ex parte proceedings constitute a departure from the fundamental principle of natural justice that no one should be condemned or have his rights varied without first being afforded an opportunity to be heard. The need for full disclosure on the part of the ex parte applicant is an essential safeguard for the prevention of abuse of the right to apply.

10 Failure to make such disclosure may result in the discharge of any order made on the ex parte application, even though the facts were such that, with full disclosure, an order would have been justified (*The Andria* [1984] 1 All E.R. 1126 at 1135 letter J and 1136 letter G).

15 (2) *The test whether the disclosure made is complete is objective:*

20 Where, however, as in the case of the Admiralty Rules, necessary disclosure for the purposes of the issue of a warrant of arrest is confined to specific facts, a party cannot be held responsible for non-disclosure of further facts. In this case the plaintiff complied with the Rules.

25 *Observation by the Court:* It is advisable in practice to make a more detailed reference to the facts giving rise to a claim. Hopefully this approach will emerge as a rule of practice.

*Application dismissed.
No order as to costs.*

Cases referred to:

The Andria [1984] 1 All E.R. 1126, 1135; .

Singh v. F/B "ALISURE BLANCO" (1984) 1 C.L.R. 532.

30 **Application.**

Application by defendant for an order to set aside the order of arrest of the defendant boat made on the 23rd January, 1985 for the reason that the plaintiffs failed to make full disclosure of the facts of the case.

L. Papaphilippou, for the applicant-defendant.

A. Georghadjis, for the respondent-plaintiff.

Cur. adv. vult.

PIKIS J. read the following judgment. This is a motion to set aside the order of arrest of the defendant boat made on 23rd January, 1985, at the behest of the plaintiffs upon an ex parte application supported by an affidavit of Vassos Apostolou, the clearing agent of the plaintiffs. The discharge of the order is sought for the sole reason that plaintiffs failed to make full disclosure of the facts of the case. Relying on the principle espoused in *The Andria*(1) defendants invited me to set aside the order independently of any other consideration and irrespective of whether the order would have been justified upon full disclosure of the facts. Failure to make full disclosure on the part of an ex parte applicant disentitles him to relief and renders any order based thereon liable to be set aside as ill-founded. This should, therefore, be the fate of the order made in this case in view of failure on the part of the plaintiffs to make through the affidavit sworn to in support of their application full disclosure of the facts surrounding the alleged breach of contract, particularly provisions of the agreement as to the port of destination and the fact that the goods were eventually received by the plaintiffs at Beirut on payment of cargo and freight. My attention was drawn to the following passage from the judgment in *The Andria* (2) supporting the universality of the rule as to the need for full disclosure in ex parte proceedings: "It is axiomatic that in ex parte proceedings there should be full and frank disclosure to the Court of facts known to the applicant, and that failure to make such disclosure may result in the discharge of any order made on the ex parte application, even though the facts were such that, with full disclosure, an order would have been justified".

Counsel for respondents (plaintiffs) while subscribing to the principle in *The Andria* and the expression given in it by Cyprus caselaw—*Singh v. F/B "ALISURE BLANCO"*(3)—denied that plaintiffs omitted or failed to disclose

(1) [1984] 1 All E.R. 1126.

(2) p. 1135, letter j, to p. 1136, letter a.

(3) (1984) 1 C.L.R. 532.

anything they were bound to disclose. On the contrary he argued the facts deposed in the affidavit sworn to in support of the application were fashioned to the requirements of Rule 50 of the Cyprus Admiralty Jurisdiction Order 1893, and the details required by the specimen affidavit prescribed by the Rules under Form "C" of Schedule 1. Counsel is right that the rules do not require disclosure of anything other than the nature of the claim. Certainly they do not prescribe details respecting the circumstances giving rise to the claim or details of the damage suffered.

The case was, I must say, well argued by both counsel who made reference, apart from the principle embodied in *The Andria*, to the caselaw pertinent to the exercise of the jurisdiction of the Court to direct the issue of a warrant of arrest.

Ex parte proceedings are extraordinary in that orders may be made affecting the rights of a party without him first being heard in the matter. To that extent they constitute a departure from the fundamental principle of natural justice that no one should be condemned or have his rights varied without first being afforded an opportunity to be heard. The need for full disclosure on the part of the ex parte applicant is an essential safeguard for the prevention of abuse of the right to apply, designed to mitigate possible ill-effects from non-adherence to the aforementioned basic rule of natural justice. Therefore, I cannot but wholly subscribe to the principle proclaimed in *The Andria* (supra). As I explained in *Singh* (supra), in proceedings for the issue of a warrant of arrest of a ship, the application of the rule takes the form of a duty imposed upon the applicant to make full disclosure of every fact material for the exercise of the Court's discretion to make or withhold an order for the arrest of the ship. Naturally in such a situation the test whether the disclosure made is appropriately complete is objective. Where, however, as in the case of the Admiralty Rules, necessary disclosure for the purposes of the issue of a warrant of arrest is confined to specific facts, a party cannot be held responsible for non-disclosure of fur-

ther facts. For behind the rule in *The Andria* lies the principle that no one should benefit from lack of probity; and to discourage lack of candour failure to disclose is visited with the severest of the consequences.

The affidavit of the applicant (plaintiff in this case) conformed to the particulars required by the Rules in that the nature of the claim was specified, that is, breach of a contract of carriage of goods by sea, and the damage suffered therefrom. Having complied with the Rules, applicants cannot be faulted for not making a more comprehensive disclosure of facts, though it must be said that it is advisable in practice to make a more detailed reference to the facts giving rise to the claim. Hopefully this approach will, in due course, emerge as a rule of practice, in the interest of the efficacious exercise of the discretion of the Court of order, in the absence of the defendants, the arrest of a ship.

In the light of the above the application will be dismissed. I shall, however, refrain from making an order as to costs.

Application dismissed. 20
No order as to costs.