

1987 March 27
(MALACHTOS, J.)

1. O.N.A.CO. OF ALGERIA,
2. SOCIETE INTERCONTINENTAL D' ASSURANCE POUR LE
COMMERCE ET L' INDUSTRIE (SIACI) OF FRANCE,

Plaintiffs,

v.

1. THE SHIP «MOSCHANTY AND/OR
2. FOLEGANDROS SHIPPING CO LTD., AS OWNERS AND/OR
OPERATORS AND/OR POSSESSORS OF THE SHIP
«MOSCHANTY» DEFENDANT No. 1,

Defendants,

AND BY ORDER OF THE COURT DATED
22 FEBRUARY 1979;

1. O.N.A.CO. OF ALGERIA,
2. SOCIETE INTERCONTINENTAL D' ASSURANCE POUR LE
COMMERCE ET L' INDUSTRIE (SIACI) OF FRANCE,

v.

Plaintiffs,

1. THE SHIP «MOSCHANTY» RENAMED TO «IOS» AND NOW
RENAMED OR TO BE RENAMED TO «ATHOS»,
2. FOLEGANDROS SHIPPING CO. LTD., AS OWNERS AND/OR
OPERATOR AND/OR POSSESSORS OF THE SHIP
«MOSCHANTY» RENAMED TO «IOS» AND NOW RENAMED OR
TO BE RENAMED «ATHOS», DEFENDANT No. 1,
3. LEVANTE SHIPPING CO. LTD., OF NICOSIA, AS OWNERS
AND/OR OPERATORS AND/OR POSSESSORS OF THE SHIP
«MOSCHANTY», DEFENDANT No. 1,

(Admiralty Action No. 511/78).

*Admiralty — Practice — Joinder of parties — The Cyprus Admiralty Jurisdiction
Order, 1893, rule 30 — Action for damages for breach of contract of carriage
of goods — Second defendants did not have any connection with the ship in*

question, when the alleged cause of action arose — Wrongly joined as co-defendants — Application for dismissal of action by defendants on said ground — Granted

Admiralty – Practice – Special case for the opinion of the Court – The Cyprus Admiralty Jurisdiction Order, 1893, rule 101

5

Admiralty – Practice – Applications – Omission to refer in the application the correct rule – In this case rule 30 of the Cyprus Admiralty Jurisdiction Order, 1893 – On which the application could be based – The omission in this case does not render the proceedings a nullity, but constitutes a mere irregularity

The plaintiffs in this action claim damages for breach of a contract of carriage of goods evidenced by a bill of lading dated 6 12 77. The action was originally instituted against defendants 1 and 2, but at a later stage, the plaintiffs, upon an ex parte application supported by affidavit, obtained an order for amendment of the name of the defendant 1 ship and for adding a third defendant, namely Levante Shipping Co Ltd

10

15

The writ was not served on defendant 1 ship. The new defendants 3, although served, entered no appearance. Defendants 2 filed the present application, praying for the dismissal of the action against them, on the ground that the ship in question, namely defendant 1, did not belong to them at the time, when the alleged cause of action arose. This allegation tallies with the allegation in the affidavit, which the plaintiffs had filed in support of their said application for amendment and addition of the third defendants, and on which the plaintiffs relied in order to obtain the said order of the Court.

20

The present application was based on the rules 101, 203 to 212 and 237 of the Cyprus Admiralty Jurisdiction Order, 1893 and on the inherent powers of the Court. The plaintiffs opposed the application.

25

Held, dismissing the action (1) Rule 101 reads «The parties to an action may at any time before the hearing agree to state the questions at issue for the opinion of the Court or Judge in the form of a special case». As the parties in this case did not make such an agreement, it is obvious that the present application could not be based on rule 101.

30

(2) The application, however, could be based on rule 30*. The question is whether the omission to refer to rule 30 in the present application renders the proceedings void or constitutes a mere irregularity. This Court considers the omission as a mere irregularity, particularly in applications of this kind where rule 30 provides that the Court even on its own motion may order the addition or striking out the names of any parties to an action.

35

(3) As it is clear that at the time when the alleged cause of action arose the applicants-defendants 2 did not have any connection with the defendant 1 ship, the Court came to the conclusion that they were wrongly joined as defendants to the action.

40

* Quoted at p 177 post

Action dismissed with costs

Cases referred to:

Ship "Gloriana" v. Breidi (1982) 1 C.L.R. 409;

Re Hadjisoteriou and Another (1986) 1 C.L.R. 429;

Williams and Glyn's Bank Plc. (1987) 1 C.L.R. 85.

5 Application.

Application by defendants 2 for an order of the Court dismissing the action against them on the ground that on the date of the alleged cause of action the vessel in question did not belong to them.

10 *E. Vrahimi (Mrs.) for L. Papaphilippou*, for the applicants-defendants No. 2

C. Hadjiloannou, for respondents-plaintiffs.

Cur. adv. vult.

15 MALACHTOS J. read the following judgment. This Admiralty action has been instituted by the plaintiffs on the 18th December, 1978, against defendants 1 and 2, claiming, as stated therein:-

20 (a) 44,000 French Francs in equal Cyprus sterling as damages-suffered from the breach by the defendants of the contract of carriage evidenced by bill of lading No. 2 dated the 6th December, 1977, by which defendant ship undertook to carry 99.053 cartons of Swedish refined sugar from Lanscroma, Sweden to Alger, where she discharged it on 18th December, 1977 and/or as otherwise;

(b) legal interest and costs.

25 On 26.1.79, the day named in the writ of summons for appearance of the parties before the Court, a conditional appearance was entered on behalf of defendants No. 2, namely, Folegandros Shipping Co. Ltd., as they intended to apply to set aside the issue and service of the writ upon them.

Counsel for the plaintiffs also stated on the above day that he intended to apply for amendment of the title of the action and, furthermore, that he would apply for the addition of a third defendant. No appearance was entered on behalf of the defendant ship as no service was effected on her.

5

The case was then adjourned to 31.3.79 and an order was made that the plaintiffs and defendants No. 2 were at liberty to take any step in the action by filing an interlocutory application and the appearance of defendants 2 was considered as conditional till further order of the court.

10

On 22.2.79, the plaintiffs, upon an ex parte application accompanied by affidavit, obtained an Order of the Court for amendment of the name of defendant No. 1 ship so as to read "The ship "NOSCHANTY", renamed to "IOS", and now renamed or to be renamed to "ATHOS", and also obtained an Order adding a third defendant, namely, Levante Shipping Co. Ltd., of Nicosia, as owners and/or operators and/or possessors of the ship "MOSCHANTY", defendant No. 1.

15

The case was then adjourned to 31.3.79 for service of the amended writ of summons and for further directions.

20

On 31.3.79, again no service was effected on defendant No. 1 ship. The new defendants No. 3, although served, entered no appearance.

Counsel appearing for defendants No. 2 stated that he would file an interlocutory application to set aside the issue and service of the writ of summons within three weeks.

25

Counsel for plaintiffs then applied for directions and stated that as regards defendant No. 1 ship, he would consider how he would effect service on her. An Order of the Court was then made taking into consideration the above statements of counsel and the case was then adjourned to 31.5.79 for mention and for service on defendant No. 1 ship.

30

On the 5th day of April, 1979, defendants No. 2 filed the present application, praying for an Order of the Court dismissing the action against them mainly on the ground that the vessel in

35

question at the time when the alleged cause of action arose, did not belong to them

5 The application, as stated therein, is based on the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction, rules 101, 293 to 212 and 237 and on the inherent powers of the Court

The relevant facts in support of the application appear in paragraphs 2, 3, 4 and 5 of the affidavit in support thereof and are the following

10 «2 The ship 'Moschanty' which was renamed to 'IOS' and later to 'ATHOS' (hereinafter referred to as the vessel) was until about September 1978 registered in the name of Levante Shipping Company Limited. I produce photo copy of a Transcript of Register dated 14th October, 1978 showing Levante Shipping Company Limited as registered
15 owner of the vessel marked Exhibit A

20 3 The vessel was transferred into the name of the 2nd Defendant on or about the 13th September 1978 on the basis of a Bill of Sale issued and signed by the then mortgagees of the vessel on the strength of the Deed of Covenants, and under section 31(2) (e) of Law No 45/63

25 4 From the writ of summons it transpires that the claim arose on a Bill of Lading dated the 6th December, 1977 in respect of goods allegedly discharged on the 18/12/77. During these dates and until the 13th September, 1978 the 2nd Defendants were not the owners nor did they have possession or operation of the vessel

5 The 2nd Defendants in any event have never contracted with the plaintiffs »

30 The plaintiffs opposed the application and in the affidavit in support of their opposition, particularly paragraphs 2 and 3 thereof, the following is stated

35 «2 Neither the Plaintiffs nor their advocates ever agreed with the defendants 2 or their advocates to state a case for the determination of the Court pursuant to rule 101 of the Cyprus Admiralty Jurisdiction Order, 1893 and indeed the Plaintiffs

object to the determination of any of the issues or possible issues in this action before the closing of the pleadings and day of trial of the action. Therefore this application is groundless and must be dismissed as no reliance can be placed on Rule 101 by the Applicants. 5

3. The facts stated in paras. 2,3, 4 and 5 of the affidavit in support of the application are irrelevant at this stage to the Plaintiffs' action against Defendants 2 in any event they are not and/or not yet in issue. Should it appear to the applicants at a later stage that these facts are material for their defence they may plead them in their answer.» 10

However, in the affidavit in support of the application of the plaintiffs to amend the name of defendant No. 1 ship and to join as a party the third defendant, namely, Levante Shipping Co. Ltd., not only they admit the facts contained in paragraphs 2 to 5, inclusive, of the affidavit in support of the present application of defendants No. 2, but also relied on these facts to obtain the Order they applied for. 15

The relevant part of the affidavit of the plaintiffs reads as follows:

“2. On the 17.12.78 we received urgent telephone instructions to institute legal proceedings immediately against the ship “MOSCHANTY” and its owners who were stated to be Messrs. Folegandros Shipping Co. Ltd. to protect the claim referred to in the writ of summons from becoming time barred as the owners were unwilling to grant an extension of time. This we did. 20 25

3. After the institution of the proceedings we investigated the ownership and history of the ship ‘MOSCHANTY’ and we found the following:

(a) The ship ‘MOSCHANTY’ was on the 6.12.77, the date of the relevant bill of lading, owned by Levante Shipping Co. Ltd. of Costi Palama str. No. 20, Apart. A2, Nicosia. 30

(b) On the 13.8.1978 the vessel was transferred and registered in the name of Folegandros Shipping Co. Ltd., of Costakis Pantelides Av. 1, Nicosia and on the same day she was renamed to ‘IOS’. 35

(c) Later an application was filed for the renaming of the ship to 'ATHOS' which was approved and in fact on the 15.1.78 instructions were sent to PIRAEUS for the renaming to 'ATHOS' but it is not known yet whether she has been
 5 renamed to 'ATHOS' or not.»

Therefore, there can be no dispute that the facts contained in paragraphs 2 to 5 of the affidavit in support of the present application, are admitted by the plaintiffs in this action as true and correct.

10 Counsel for applicants-defendants 2 in support of this application in addressing the Court, relied on rule 30 of the Cyprus Admiralty Jurisdiction Order, 1893 and not on rule 101 as stated in the application, obviously realising that in the present case this rule is inapplicable.

15 These Rules read as follows:

«30. The Court or Judge may at any stage of the proceedings and either with or without an application for that purpose being made by any party or person and upon such terms as shall seem just, order that the name or names of any
 20 party or parties be struck out or that the names of any person or persons who are interested in the action or who ought to have been joined either as Plaintiffs or Defendants or whose presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and
 25 settle all questions involved in the action be added.»

«101. The parties to an action may at any time before the hearing agree to state the questions at issue for the opinion of the Court or Judge in the form of a special case.»

30 The main argument of counsel for applicants - defendants 2, is that on the admitted facts of the case there is no privity of contract between them and the plaintiffs and submitted that the issue and service of the writ of summons on defendants 2 should be set aside and the action against them should be dismissed.

35 Counsel for the respondents, on the other hand, submitted that since there is no agreement between the litigants to state the question at issue for the opinion of the court, in the form of a

special case, rule 101 is inapplicable. He further submitted that rule 30, on which counsel for applicants relied in the course of the hearing of this application, is also not applicable as in the case in hand we are not concerned with joinder or misjoinder of parties.

He also submitted that at this stage of the proceedings the court has no jurisdiction to entertain such application. As stated earlier

on in this judgment, it is obvious that the present application could not be based on rule 101 of the Cyprus Admiralty Jurisdiction Order, 1893, but it could certainly be based on rule 30. A point which though not raised by counsel for the respondents, but on which I consider necessary to pronounce, is whether the irregularity of non reference of rule 30, as a provision on which the application is based, which is substantially the same as rule 10 of Order 5, of the Civil Procedure Rules, renders the proceedings a nullity or it is just a mere irregularity. I must say straight away that I consider this omission of applicants a mere irregularity and that it is not fatal, particularly in applications of this kind where rule 30 itself, provides that the Court even on its own motion may at any stage of the proceedings order the addition or striking out the names of any parties to an action. Useful reference may be made as regards the above point in the case of the Ship "Gloria" v Eddy Breidi (1982) 1 C L R 409 at pages 416 to 420, in the case of *In Re Julia Hadjisotenou and Another* judgment delivered on 17th October, 1986 not yet reported* and the recent case of *Williams & Glyn's Bank v Laertis Shipping Enterprises*, Civil Appeal No 7040, judgment delivered on 9th March, not yet reported **

Coming now to the main issue in the present application, it is clear from the facts established by the relevant affidavits that the applicants-defendants No 2, have no connection with the claim of the plaintiffs as at the time when the alleged cause of action arose, they were neither the owners nor the charterers or had any connection with the defendant No 1 ship.

In view of the above, I hold the view that the applicants-defendants No 2, were wrongly joined as co-defendants in the present proceedings and, therefore, the issue and service of the writ of summons, as far as they are concerned, are set aside and

*Reported in (1986) 1 C L R 429

**Reported in (1987) 1 C L R 85

the action is dismissed with costs in favour of the applicants, to be assessed by the Registrar.

*Action against defendants
No. 2 dismissed with costs.*