

1988 June 10

(PIKIS, J)

TRADAX OCEAN TRANSPORTATION, S.A.

Plaintiffs,

v.

TERMINAL NAVIGATION CO. LTD ,

Defendants.

(Admiralty Action No 197/87).

5 *Admiralty—Writ of summons—The Admiralty Jurisdiction Order, 1893, Rules 5-14—The writ should command defendant to appear before the Court on day certain—Registrar should be provided with a copy for service—Court invited argument as to effect of failure to observe aforesaid principles.*

Admiralty—Appearance to an action—Can only be effected personally or through an advocate appearing before the Court on the date specified in the writ of summons.

10 Upon discovering that the present action was instituted against them, the defendants entered a memorandum of appearance and filed the present application summoning the plaintiff to appear before the Court and be heard in respect of the issuance of directions for the exchange of pleadings.

15 The plaintiffs opposed the application on the ground, inter alia, that the defendants had no locus standi, as the writ had not been served on them. The defendants replied that under an old practice they were entitled to enter a gratis appearance.

20 In this case the writ did not contain an invitation to the defendant to appear on a day certain before the Court and no copy of the writ was left with the Registrar for service on the defendants.

Held, dismissing the application:(1) The combined effect of Rules 5 to 14 is that a writ must expressly summon the defendant to appear before the Court on a date certain. The plaintiff is duty bound to leave with the Registrar for sealing a copy of the writ of summons for

service upon the defendant (R.12). The rules confer no discretion to relax observance of the rules relevant to the issue of the writ of summons.

(2) Whether a writ can be deemed to have been validly issued, notwithstanding failure to provide a copy for service upon the defendant and observe of an invitation to the defendant to appear before the Court and make his answer is a question that this Court shall not presently decide because it will invite argument before ruling on this aspect of the case. 5

(3) Appearance in an admiralty action can only be entered personally or through an advocate appearing before the Court on the date specified in the writ of summons. The rules make no provision for a substitute mode of appearance nor is there authority to authorize such a course. 10

Application dismissed. 15
No order as to costs.

Cases referred to:

Oulton v. Radcliffe (1874) L.R.C. 189;

Fell v. Christ's College Cambridge (1785) 2 Brown's Cases 279;

Hope v. Hope (1854) De G.M. and G.R 328; 20

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

Pitria Shipping v. Georghiou (1982) 1 C.L.R. 358;

Lysandrou v. Schiza and Another (1979) 1 C.L.R. 267;

Evagorou v. Christodoulou and Another (1982) 1 C.L.R. 771. 25

Application.

Application by defendants for an order summoning the plaintiffs to appear before the Court on the 31st March, 1988 to be heard in the matter of issuance of directions for the exchange of pleadings between the parties.

A. Haviaras, for applicants - defendants. 30

St. McBride, for respondents - plaintiffs.

Cur. adv. vult.

PIKIS J. read the following judgment. On 15th March, 1988, the defendants upon learning or discovering that the present action

had been instituted by the plaintiffs against them, they entered a memorandum of appearance. On 21st March, 1988, they made an application summoning the plaintiffs to appear before the Court on the 31st March 1988, to be heard in the matter of
 5 issuance of directions for the exchange of pleadings between the parties. The application was opposed, firstly on grounds of defectiveness of the proceeding, stemming from failure to serve the application 10 clear days prior to appearance before the Court as ordained by R 214* and, secondly lack of locus standi of the
 10 defendants in the proceedings. The writ of summons was not served upon the defendants, therefore, they had no right to enter an appearance in the cause. Counsel for the plaintiffs described the writ of summons as an open writ unaccompanied by any invitation to the defendants to appear before the Court on any
 15 specified date and dispute the action. The action was initiated, as counsel explained, solely for the purpose of raising the proceedings within the time limited by the agreement of the parties (charterparty). The dispute, subject-matter of the writ of summons, is presently the subject of arbitration in London.
 20 Depending on the outcome of the arbitration, so far as I was able to gather, the plaintiffs consider themselves at liberty to activate the action or abandon it.

Counsel for the defendants contended that his clients had a right to enter an appearance upon gaining information about the
 25 pendency of the present proceedings. In accordance with the practice of English Courts, a defendant may make what is termed «a gratis appearance» whenever he is informed that an action has been instituted against him**. The practice is one of considerable antiquity founded on authority of long standing***. The same
 30 practice should find application in Cyprus, counsel argued, in view of the provisions of R 237 making English practice applicable in all cases not provided for by the Cyprus Admiralty Rules. Considering, therefore, the absence of provision in the Cyprus rules for a gratis appearance, the gap should be filled by recourse
 35 to English rules and practice****.

* *Cyprus Admiralty Jurisdiction Order 1893*

** *White Book 1960 p 184*

*** See *Oulton v Radcliffe (1874) L R C 189*, *Fell v Christ's College, Cambridge (1785) 2 Brown's Chancery Cases 279*, *Hope v Hope (1854) De G M & G R 328*

**** In *Asimenos v Paraskeva (1982) 1 C L R 145* it was decided that the English rule and practice applicable by virtue of R 237 are those that were in force in 1960. See, also *Pitna Shipping v Georghiou (1982) 1 C L R p 358*

The acknowledged failure on the other hand, to conform to the requirements of R.214 and ensure notice of 10 clear days prior to the hearing of the application, does not render the proceeding a nullity in view of the provisions of Ord. 70, r.1, of the English Rules in force in 1960 conferring discretion on the Court to remedy by an appropriate order the irregularity*. Only a defect vitiating the basis of the action, going to the root of the litigation, can have the effect of voiding the proceeding. For the reasons indicated below, its is unnecessary to ponder the effects of non-compliance with R.214 on the validity of the application here under consideration. For the application must necessarily be dismissed for other reasons explained hereunder.

At the close of the address of counsel for the respondents (plaintiffs) I questioned the legitimacy of the submission that a plaintiff has a right to issue a writ unaccompanied by an invitation to the defendant to appear at a time certain before the Court and make answer to the claim. I drew the attention of counsel to the provisions of R.5 to R.14 governing the issue of a writ of summons in an admiralty action and those of R.35 to R.47 governing the right of the defendant to make appearance thereto. The combined effect of R.5 to R.14 is that a writ must expressly summon the defendant to appear before the Court on a date certain. And in order to serve that purpose the plaintiff is duty bound to leave with the Registrar for sealing a copy of the writ of summons for service upon the defendant (R.12). The rules confer no discretion to relax observance of the rules relevant to the issue of the writ of summons. In fact, the Registrar is duty bound by the provisions of R.9: «..... who shall inscribe on the writ the date of the year and the number of the writ and insert in the writ a statement of the date and hour when the defendant is required to appear before the Court, and the date of the day on which the writ is issued». Whether a writ can be deemed to have been validly issued notwithstanding failure to provide a copy for service upon the defendant and observe of an invitation to the defendant to appear before the Court and make his answer is a question that I shall not presently decide for I shall invite argument before ruling on this aspect of the case.

* The implications of Ord.64 of the Civil Procedure Rules founded on Ord. 70, R.1, of the old English Rules were debated and examined in *Lysandrou v. Schiza & Another* (1979) 1 C.L.R. 267; *Evagorou v. Christodoulou & Another* (1982) 1 C.L.R. 771.

Unlike ordinary civil proceedings* appearance in an admiralty action can only be entered personally or through an advocate appearing before the Court on the date specified in the writ of summons. Whereupon directions are given for the definition of the issues in dispute as provided in R.38 and R.39. The rules make no provision for a substitute mode of appearance nor is there amenity to authorize such a course. I comprehend the anxiety of defendants to be heard in a matter directly affecting them. That matter, however, can only be examined in the context of remedying the defect in the writ of summons arising from failure to summon the defendant to appear before the Court, assuming that the writ was not void ab initio. Consequently, the application will be dismissed and I so direct. At the same time I direct that the issue of the validity of the writ of summons and matters associated therewith be set down for argument on 23rd June, 1988, at 8.45 a.m.

The application is dismissed with no order as to costs.

*Application dismissed.
No order as to costs.*

* Ord. 16, Civil Procedure Rules.