1989 August 5

(STYLIANIDES, J.).

GEORGE P. ZACHARIADES LTD. AND ANOTHER,

Plaintiffs,

v.

GEORGE ECONOMIDES AND OTHERS,

Defendants.

(Admiralty Action No. 238/80).

Admiralty — Practice — Rules applicable — They are to be found in the Admiralty Jurisdiction Order, 1893 and, in virtue of Rule 237 thereof, in cases not provided for in the Order, in the practice of the Admiralty Division of High Court of Justice in England — Well settled that by reason of sections 19(a) and 29(2)(a) of the Courts of Justice Law, 1960 (Law 14/60) the English Rules applicable are those in force on the day preceding Independence Day — The Civil Procedure Rules are not applicable.

Admiralty — Practice — Service out of the Jurisdiction — Governed by Rules 23 and 211 of the Cyprus Admiralty Jurisdiction Order 1893.

Admiralty — Practice — Applications — The Admiralty Jurisdiction Order 1893, Rules 203-212 — No provision is made for a requirement to refer to specific Rules upon which an application is founded — Reference to Rules totally unconnected with the Admiralty Jurisdiction — An irregularity, but not a nullity.

Admiralty — Practice — Distinction between «nullities» and «irregularities» — In Re Pritchard (Deceased) [1963] 1 All E.R. 873 followed.

Admiralty — Practice — Service out of the Jurisdiction — Application for leave — Affidavit by an advocate's clerk — Rules applicable — As the affiant in this case could swear to the facts there was no irregularity.

Admiralty — Practice — Service out of the Jurisdiction — Leave to effect such service — The prerequisities that have to be satisfied — The matter is one of discretion — Ex parte application for leave —

The duty of the applicant to disclose all material facts — Failure to produce the bill of lading which embodied a foreign jurisdiction clause — A material fact — Its non disclosure has to be met with the discharge of the order

The principles emanating from the judgment in this case, where one of the defendants in the action applied to have the leave to serve the writ on him out of the jurisdiction set aside, are sufficiently summarized in the hereinabove headnotes

Application granted with costs

Cases referred to

Nigerian Produce v Sonora Shipping (1979) 1 C L R 395,

Asimenos v Paraskeva (1982) 1 C L R 145,

Ship «Glonana» and Another v Breidi (1982) 1 C L R 409,

Re Pritchard (Deceased) [1963] 1 All E R 873,

Spyropoullos v Transavia (1979) 1 C L R 421,

Sol Ferries Ltd v Naoum Shipping (1985) 1 C L R 73,

In re HadjiSoteriou (1986) 1 C L R 429,

In re Williams & Glyn's Bank (1987) 1 C L R 85,

Jadranska Slobodna Plovidba v Photos Photiades & Co (1965) 1 C L R 58,

Stavrides v Ceskoslovenska Obchodni Banka A S (1972) 1 C L R 130,

George Monro, Limited v American Cyanamid and Chemical Corporation [1944] 1 K B 432,

Re a debtor [1983] 3 All E R 545,

The Hagen [1908] P 189,

Boyce v Gill [1981] 64 L T 824,

The King v The General Commissioners for the Purposes of the Income Tax Act for the District of Kensington-Ex parte Princess Edmond de Polignac [1917] 1 K B 486,

The Andria [1984] 1 All E R 1126,

Leduc v Ward, 20 Q B D 475,

S S Ardennes (Cargo Owners) v S S Ardennes (Owners) [1951] 1 K B D 55,

Altobeiqui v. M/V Nada and another (1985) 1 C.L.R. 543.

Application.

Application by defendants No. 6 for an order setting aside the issue and/or service of the notice of the writ of summons and/or setting aside the order giving leave to serve notice of the writ of summons on them out of the jurisdiction.

M. Montanios, for applicants-defendants No. 6.

G. Cacoyannis, for respondents-plaintiffs.

Cur. adv. vult.

STYLIANIDES J. read the following decision. Two local companies with their seat at Limassol instituted this action against seven defendants. Defendant No. 7 is the ship «BERNHARD S» and defendants No. 6 are the owners thereof.

On application by the plaintiffs, a Judge of this Court granted leave for services of notice of the writ out of the jurisdiction on defendants Nos. 4, 5 and 6, by prepaid double registered post at their address abroad.

Defendants No. 6 entered a conditional appearance and by the present application they apply for an order setting aside the issue and/or service of the notice of the writ of summons and/or setting aside the order giving leave to serve notice of the writ of summons on them out of the jurisdiction.

The grounds on which this application is based are:-

1. The application of the plaintiffs for leave for service aforesaid was based on the Civil Procedure Rules, which are not applicable in Admiralty actions.

2. That the affidavit in support of the said application was deposed by advocates' clerk and not anyone from the plaintiffs.

3. That the plaintiffs failed to disclose in that ex parte application material facts known to them.

4. That no good cause of action was made out in the affidavit by the material placed before the Judge who issued the order. There was no privity of contract between plaintiffs and applicants - defendants No. 6. The plaintiffs contracted with other defendants and the ship was chartered, to the

knowledge of the plaintiffs, under time-charter to Messrs Rhein-Maas-u. See-Schiffahrtskontor Gmbh, Duisburg-Ruhrort. And, to the knowledge of the plaintiffs, the applicants were not responsible for the carriage and/or discharge of the plaintiffs' cargo.

The action arose out of a breach of contract of affreightment of goods of the plaintiffs by ship «BERNHARD» from Limassol to Bahreine. A Bill of Lading was issued at Limassol, not by the Master on behalf of defendants No. 6. It was issued and signed by defendants No. 3 on behalf of defendants No. 4 and 5.

GROUND 1:

The plaintiffs in the ex parte application relied on the Civil Procedure Rules, Order 6, rule 1(e) and 4, 5, 6, Order 5, rule 9 and Order 5(a) and the inherent power and practice of the Court.

It is well settled that the Civil Procedure Rules are not applicable in Admiralty proceedings. It has been repeatedly pronounced by this Court that in Admiralty proceedings the Rules applicable are the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction (the «Rules») and, in all cases not provided by the Admiralty Rules, the practice of the Admiralty Division of the High Court of Justice in England, so far as the same shall appear to be applicable.

It is, also, well settled that the English Rules applicable by virtue of Rule 237 are in virtue of sections 19(a) and 29(2)(a) of the Courts of Justice Law, 1960 (Law No. 14/60), those that were in force on the day preceding Independence Day - (see, inter alia, *Nigerian Produce v. Sonora Shipping* (1979) 1 C.L.R. 395; *Asimenos v. Paraskeva* (1982) 1 C.L.R. 145; *Ship «Gloriana» and Another v. Breidi* (1982) 1 C.L.R. 409, pp. 416-417).

The Rules on which an application for leave to serve abroad in Admiralty proceedings may be founded are Rules 23 and 24 of the Rules, which read as follows:-

«23. Where the person to be served is out of Cyprus application shall be made to the Court or Judge for an order for leave to serve the writ of summons or notice of the writ.

24. The Court or Judge before giving leave to serve such writ or notice of the writ shall require evidence that the Plaintiff has a good cause of action, that the action is a proper one to

be tried in Cyprus, and evidence of the place or country where the Defendant is or may probably be found and of his nationality».

In the part of the Rules providing for «applications», Rules 203 - 212, no provision is made for a requirement to refer to the specific Rule of Court upon which an application is founded. Nevertheless, the plaintiffs invoked Rules totally unconnected with the Admiralty Jurisdiction of the Court. This is not a nullity but an irregularity.

In *Re Pritchard (deceased)* [1963] 1 All E.R. 873, Upjohn, L.J., made the distinction between irregularity and nullity and at p. 881 said:-

«I am not so sure that it is so difficult to draw a line between irregularities, by which I mean defects in procedure which fall within R.S.C., Ord. 70, and true nullities, though I agree that no precise definition of either is possible».

At pp. 882-883 it was said:-

«I do not think that the earlier cases of the later dicta on them prevent me from saying that in my judgment the law when properly understood is that R.S.C., Ord. 70, applies to all defects in procedure unless it can be said that the defect is fundamental to the proceedings. A fundamental defect will make it a nullity. The Court should not readily treat a defect as fundamental and so a nullity and should be anxious to bring the matter within the umbrella of Ord. 70 when justice can be done as a matter of discretion, still bearing in mind that many cases must be decided in favour of the part entitled to complain of the defect ex debito justitiae. LORD DENNING in *MacFoy's* case pointed out that a useful test was whether the defect could be waived. I agree with that as a good common sense test but I also agree with counsel for the defendants that it cannot be a completely legal test, for until one has decided whether the proceeding is a nullity, one cannot decide whether it is capable of waiver.

The authorities do establish one or two classes of nullity such as the following. There may be others, though for my part I would be reluctant to see much extension of the classes. (i) Proceedings which ought to have been served but have never come to the notice of the defendant at all. This, of

course, does not include cases of substituted service, or service by filing in default, of cases where service has properly been dispensed with: see e.g., *Whitehead v. Whitehead (otherwise Vasbor)*; (ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings; (iii) Proceedings which appear to be duly issued, but fail to comply with a statutory requirement: ...»

This defect is a mere irregularity and is not fatal - (*Spyropoullos v. Transavia* (1979) 1 C.L.R. 421; *The Ship «Gloriana»* (supra); *Sol Ferries Ltd. v. Naoum Shipping* (1985) 1 C.L.R. 73; *In re HadjiSoteriou* (1986) 1 C.L.R. 429; *In re Williams & Glyn's Bank* (1987) 1 C.L.R. 85).

GROUND 2:

The affidavit in support of the application was sworn by an advocate's clerk. It is undesirable for affidavits to be sworn by advocate's clerks. It is desirable and expected that such affidavits be sworn by the party, his servant or agent who can swear positively to the facts. The specific requirement of Order 18 of the Rules of Court for affidavits for summary judgment is not applicable; therefore the judgment invoked by the applicants - *Spyros Stavrinides v. Ceskoslovenska Obchondi Banka A. S.* (1972) 1 C.L.R. 130 - is applicable only so far as it relates to affidavits in general.

It may be noted that the affiant in the present case stated in paragraph 2 that he knew the facts of the action and that he was duly authorized to swear the affidavits.

Admiralty Rule 24, as was decided in *Jadranska Slobodna Plovidha v. Photos Photiades & Co.* (1965) 1 C.L.R. 58, should be interpreted and applied not in a different way from Order 11 of the old English Rules.

In the Annual Practice 1958, p. 148, it is stated in relation to Order 11, rule 1 that the affidavit in support should be made by the plaintiff or his solicitor, or anybody who can swear to the facts.

In the circumstances of this case ground 2 fails.

GROUND 3:

The judiciary of the country exercises one of the powers of the State. Its power is primarily exercised over the persons within the jurisdiction and the nationals of the country. The nationals of a

country owe allegiance to it and have the corresponding benefits of their nationality. A foreigner owes no allegiance and, if he is outside the jurisdiction, the extension of the jurisdiction of this Court is an «assumed jurisdiction» which the Court has discretion to exercise. In doing so the Court acts with caution.

In *George Monro Limited v. American Cyanamid and Chemical Corporation*, [1944] 1 K.B. 432, Scott, L.J., said at p. 437:-

> «Service out of the jurisdiction at the instance of our courts is necessarily prima facie an interference with the exclusive jurisdiction of the sovereignty of the foreign country where service is to be effected. I have known many continental lawyers of different nations in the past criticize very strongly our law about service out of the jurisdiction. As a matter of international comity it seems to me important to make sure that no such service shall be allowed unless it is clearly within both the letter and the spirit of Or. XI».

This principle is accepted in International Law and was embodied in the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, done at The Hague, on the 15th day of November, 1965, ratified in this country under Article 169.3 of the Constitution, by Law No. 40/82.

The following prerequisites must be satisfied under Rule 24 for grant of leave for service out of the jurisdiction:-

(i) That evidence must be produced to the Court or Judge that the plaintiff has a good cause of action.

(ii) That the action is a proper one to be tried in Cyprus.

(iii) Evidence as to the place or country where the defendant is or may probably be found.

(iv) His nationality.

The prerequisite (ii) above is of fundamental importance.

The jurisdiction of the Court is essentially discretionary and the Court may, if it seems fit, decline to exercise such jurisdiction and allow service of the writ or notice thereof out of the jurisdiction.

The application was made ex parte without notice.

The Court in determining a dispute or in granting a remedy

normally hears both parties. The rule audi alteram partem is well rooted in the system of our administration of justice. For the proper administration of justice, however, and the issue of prompt and effective orders, a deviation is made without the Court having the opportunity to hear the other party. By definition «an ex parte application», is one in which the party against whom the order is sought is absent. It is accordingly the duty of the applicant to inform the Court of any facts which he knows, which might turn in that person's favour, or influence the Court in exercising its discretion - (*Re a debtor*, [1983] 3 All E.R. 545, at p. 551).

In *The Hagen*, [1908] P. 189, at p. 201, Farwell, L.J., said:-

> «... inasmuch as the application is made ex parte, full and fair disclosure is necessary, as in all ex parte applications, and failure to make such full and fair disclosure would justify the Court in discharging the order, even although the party might afterwards be in a position to make another application».

In *Boyce v. Gill,* [1891] 64 L.T. 824, Kekewich, J. stated (at p. 825):-

> «What the Court would have done if all the facts had been known I cannot say. In such a case I should not think of doing so; but possibly the court would have come to a different conclusion, and said that the interim order was no necessary. If I had had the knowledge I now have that no serious practical inconvenience was likely to arise, I might have come to that conclusion. But, according to my view, on ex parte motions the court should be in a position to weigh all matters which might influence it, so as to decide whether it is a case to give notice of motion rather then that an injunction should be granted. At best the court runs the risk of making an order which may do harm, and the undertaking in damages given by a plaintiff is not satisfactory. It is of the utmost importance that the court should be able to rely upon the statement of counsel, and the affidavits. It is of utmost importance that there should be a full disclosure of the facts».

See, also, the Judgment of Lord Cozens-Hardy, M.R., in *The King v. The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington - Ex parte Princess Edmond de Polignac.* [1917] 1 K.B. 486, at pp. 504-505.

In *The Andria* [1984] 1 All E.R. 1126, at pp. 1135-1136 it was said:-

«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 (see *R. v. Kensington Income Tax Comrs, ex p. Princess de Polignac* [1917] 1 K.B. 486). Examples of this principle are to be found in the case of ex parte injunctions (*Dalglish v. Jarvis* (1850) 2 Mac & G 231, 42 E.R. 89), ex parte orders made for service of proceedings out of the jurisdiction under RSC Ord 11 (*The Hagen* [1908] P. 189 at 201, [1908-10] All E.R. Rep. 21 at 26 per Farwell L.J.) and Mareva injunctions (*Negocios del Mar SA v. Doric Shipping Corp. S.A., The Assios* [1979] 1 Lloyd's Rep. 331). In our judgment, exactly the same applies in the case of an ex parte application for the arrest of a ship where, as here, there has not been full disclosure of the material facts to the court.

Accordingly, the court having in the present case issued the warrant of arrest on the basis of an affidavit which failed to disclose material facts, the appropriate course was to make an unconditional order for the discharge of the security obtained by reason of the arrest. For these reasons, although we shall (for the reasons we have given) set aside the declaration made by the judge, we shall dismiss the appeal from his order that the letter of undertaking be discharged».

It was submitted by counsel for the applicants - defendants No. 6 that in the Bill of Lading there is a foreign jurisdiction clause which reads:-

«Jurisdiction. Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein».

In the affidavit in support of the application of the plaintiffs the affiant stated that a Bill of Lading was issued, but the Bill of Lading was not produced to the Judge and no mention, whatsoever, was made of the existence of the foreign jurisdiction clause. This was a material fact which might influence the mind of the Judge in the

exercise of his discretion. The Bill of Lading was produced by the applicants - defendants No. 6 in this application. It is submitted by counsel for the applicants this was a material fact.

Counsel for the plaintiffs-respondents referred the Court to *Jadranska Slobodna Plovidha v. Photos Photiades & Co. (supra).* Furthermore, as it is well settled, the Bill of Lading is evidence of the contract and not the contract itself-*(Leduc v. Ward, 20 Q.B.D.* 475; *S.S. Ardennes (Cargo Owners) v. S.S. Ardennes (Owners)* [1951] 1 K.B.D. 55).

In the Slobadna case it was hotly disputed whether the foreign jurisdiction clause was part of the contract and the Court decided that this should be left to the trial Court.

Counsel for the plaintiffs made elaborate argument on whether the Court would have decided that Cyprus is forum convenient for the case. With respect, the principle enunciated in *The Hagen* and in the *The Andria* (supra) is to the effect that the non-disclosure of material fact has to be met by the Court with discharge of the order. The Court is not inclined to review the previous order in the light of the undisclosed material fact of the foreign jurisdiction clause and decide which is the forum convenient.

In *Altobeiqui v. M/V Nada and Another* (1985) 1 C.L.R. 543, A. Loizou J. (as he then was) discharged an order for service out of the jurisdiction for failure to disclose a foreign jurisdiction clause in the Bill of Lading.

In the present case there was no full and frank disclosure of all the relevant facts in the affidavit filed in support of the application to serve notice of the writ out of the jurisdiction.

In the light of all the above, I have reached the conclusion to discharge the order for service of the notice of the writ on defendants No. 6 and set it aside.

Extensive argument was advanced by both counsel on all aspects of the fourth ground. As in this ground questions of fact and of finding whether there is prima facie a good cause of action are involved, I shall abstain from dealing with it. In doing so I avoid prejudicing any future application for service out of the jurisdiction on defendants No. 6, in which the same questions may arise.

In the result, the order giving leave for service of notice of the writ of summons on defendants No. 6 and the service pursuant thereto are hereby set aside.

Costs against the plaintiffs-respondents. Such costs to be assessed by the Registrar.

Application granted with costs against respondents-plaintiffs.