DISTOS COMPANIA NAVIERA S.A. (NO. 2),
Plaintiffs,

v.

THE CARGO ON BOARD THE SHIP "SISKINA",
Defendant.

(*Admiralty Action No.* 43/76).

Admiralty—Arrest of property—Security—Power of Court to make order as to security and to vary the terms thereof—Exists under rules 205 *and* 211 *of the Cyprus Admiralty Jurisdiction Order,* 1893 *and s.* 32 *of the Courts of Justice Law,* 1960—*Rules* 165-166 *not applicable.*

Jurisdiction—Supreme Court—Admiralty proceedings—Deemed to be within the civil jurisdiction of the Supreme Court in so far as the exercise of the powers under s. 32 *of the Courts of Justice Law,* 1960 *is concerned.*

Courts of Justice Law, 1960 (*Law* 14 *of* 1960), *section* 32—*It applies to admiralty proceedings—Section* 2 *definition of "Court" and "Civil Proceeding".*

Admiralty—Practice—Action in rem—Intervener—Arrest of cargo—Cargo owners can apply for modification of order of arrest without the leave of the Court—And without entering an appearance by filing a formal memorandum of appearance—And without being expressly named in the application—Rule 35 *of the Cyprus Admiralty Jurisdiction Order,* 1893.

Admiralty—Arrest of property (cargo)—Security—Application by cargo owners for variation of terms of security—Approach to the matter—Principles applicable—Matters taken into account—Proceedings in foreign Court—Value of whole cargo and extent of applicant's interest therein—Storage and insurance expenses and unloading and loading expenses—Fact that plaintiffs a foreign company without any tangible assets in Cyprus—And that it is open to applicants to try to minimize damages by applying under r. 60 *of the Cyprus Admiralty Jurisdiction Order,* 1893 *for the the release of the cargo—Increase of already furnished security of* C£10,000 *to such an extent as to make it commensurate to all*

the expenses which have been, or will be incurred, as a result of the arrest, will encourage applicants not to apply under the said r. 60—In the light of the existing situation security increased to C£30,000.

Admiralty—Practice—Rule 237 *of the Cyprus Admiralty Jurisdiction Order,* 1893*—Effect.*

In making an order for arrest of the defendant cargo the Court directed that the plaintiffs should give security in the sum of C£10,000, in respect of any damages that they might have to pay because of the arrest of the cargo.

Subsequently the owners of the cargo applied for an order that the plaintiffs should provide increased and better security in relation to the said order of arrest.

Plaintiffs contended that:

(A) In an admiralty action in rem this Court did not possess jurisdiction to order the plaintiffs to give security and that, therefore, there does not arise at all the question of making an order that increased and better security be given.

(B) That the applicants owners of the cargo are not entitled to make the present application because their names are not stated in the application; and because no appearance was formally entered by them, or on their behalf, by means of a memorandum of appearance.

Counsel for plaintiffs submitted in this respect that the applicants are interveners and, therefore, they could not have appeared at all without the leave of the Court.

(C) That the applicants could have sought a variation of the order for arrest only by applying to review the order under rule 165* of our Admiralty Rules; and that such application for review had to be made, under rule 166, "within seven days of the making of the order" complained of.

(D) That there do exist proceedings in a foreign Court aiming at ensuring security for a purpose similar to that which is pursued by the present application.

Regarding the merits of the application the factual position was as follows:

The plaintiffs were a foreign company without any tangible

* Vide p. 298 *post.*

assets in Cyprus. There was arrested, initially a cargo which was of the value of about 7,000,000 U.S.A. dollars, but since then about 40% of it has been released. The applicants were not the owners of the whole of the cargo which remained still under arrest but they were beneficially interested in relation to a considerable part of it. The storage and insurance expenses for the cargo still under arrest were in the region of about C£1,500 weekly. There have, also, been incurred about C£28,000 expenses for the unloading and the placing into storage of the whole cargo; and a comparable amount would be expended for its reloading back onto other ships.

Held, (I) with regard to contention (A) above:

(1) It was clearly open to the Judge who granted the order for the arrest of the cargo to order the plaintiffs to furnish security (see rule 205 of our Admiralty rules); and any initially imposed term as regards furnishing of security may be, subsequently, modified under rule 211.

(2) Moreover as admiralty proceedings have to be deemed to be within the civil jurisdiction of the Supreme Court (see definition of "Court" and "civil proceeding" in section 2 of the Courts of Justice Law, 1960, (Law 14 of 1960) in so far as the exercise of the powers under section 32 of Law 14/60 is concerned, this Court in the exercise of such powers can vary, if it deems it proper, the terms as to security for the arrest of the cargo in this case.

Held, (II) with regard to contention (B) above:

(1) As in accordance with the normal practice, applicable in cases of this nature, the writ of summons in the present action in rem would have been addressed to the applicants in their capacity as owners of the defendant cargo (see Atkin's Court Forms, 2nd ed. vol. 3, p. 26) and as the owners of the res, in an action in rem, are defendants (see Admiralty Practice, by McGuffie, Fugeman and Gray—Vol. 1 in the British Shipping Laws series—p. 127, para. 295), certainly they cannot be treated as mere interveners, in the sense of Order 75, rule 17, in England (see, Admiralty Practice, *supra*, pp. 136-138, paras. 310-313). So, even in England, the applicants would not have required the leave of the Court, as interveners, in order to appear in an action such as the present one.

(2) In any case, as there is no express provision in our own

Admiralty Rules making the distinction between defendants and interveners rule 35* of such rules is wide enough to cover both defendants and interveners, giving them right to appear in an action without leave. (See p. 298 *post*).

(3) The applicants cargo owners did not need the leave of the Court in order to be enabled to appear in the present proceedings. Nor was it necessary for them, under our Rules and Practice, to enter an appearance by filing a formal memorandum of appearance; they were entitled to appear through counsel representing them at various stages of the present action.

(4) Furthermore, I do not agree that the applicants cargo owners should have been expressly named in the application; they could be adequately identified by referring to the notices filed by their counsel on July 16, and August 24, 1976, as well as from affidavits filed in support of applications for the discharge of the order for the arrest of the cargo.

Held, (III) with regard to contention (C) above:

I cannot agree with counsel for the plaintiffs on this point, because rule 165 of our Admiralty Rules provides, in effect, for an appeal to the Full Bench of the Court against an order by a Judge, whereas the present application for better and increased security in respect of the arrest of the cargo is not an appeal from the order directing such arrest, but only an application seeking the variation under rule 211 of the term in such order prescribing the security to be furnished by the plaintiffs in respect of the arrest.

Held, (IV) with regard to contention (D) above:

The proceedings in England are entirely outside my jurisdiction; moreover, we do not know what will be the eventual fate of the interlocutory order obtained therein; and it is not at all clear to what extent the plaintiffs in these proceedings are the same as the applicants cargo owners now before me.

Held, (V) with regard to the merits of the application (after reviewing the facts and stating the approach of the Court to such a matter—vide Acropol Shipping Company Ltd. and Others v. Rossis (reported in this Part at p. 38 *ante*)).

(1) I do not agree that, at this stage, in the present action,

* Quoted at p. 298 *post*.

I should specifically order the furnishing by the plaintiffs of "better security", in the sense of greater solvency of the person providing such security. It is sufficient to continue the existing requirement that such security should be to the satisfaction of the Registrar.

(2) I do not think that I should increase the already furnished security of C£10,000 to such an extent as to make it commensurate to all the expenses which have been, or will be, incurred as a result of the arrest of the defendant cargo, because I do not wish to encourage the applicants cargo owners to adopt a merely passive attitude, without trying, pending the outcome of the action, to minimize any damage resulting from the arrest, by seeking to secure the release, under rule 60, on appropriate terms, of parts of the cargo still under arrest.

(3) I do think, on the other hand, that in the light of the situation as it exists today the security of C£10,000 (under paragraph 5 of the order for the arrest of the cargo made on April 10, 1976) should be increased, on a very conservative approach indeed, to C£30,000; and, such security, should be furnished by the plaintiffs, to the satisfaction of the Registrar, within one month from today.

(4) In case the plaintiffs fail to furnish increased security, as aforesaid, the applicants cargo owners will, naturally, be entitled to take steps for delivery of possession to them of cargo in which they are beneficially interested, subject, however, to any rights of parties who have entered caveats against the release of the cargo.

Order accordingly.

Cases referred to:

The James Westoll [1905] P. 47;

Banque des Marchands de Moscou (Koupetschesky) (In liquidation) v. *Kindersley and Another* [1950] 2 All E.R. 549 at p. 552;

Acropol Shipping Company Ltd. and Others v. *Rossis* (reported in this Part at p. 38 *ante*).

Application.

Application for an order that the plaintiffs should provide increased and better security in relation to an interlocutory

order for the arrest of the defendant cargo which was made *ex parte*.

L. Papaphilippou, for the plaintiffs (respondents).

G. Cacoyiannis with *C. Erotokritou* and *E. Psillaki* (*Mrs.*), for the owners of the arrested cargo (applicants).

The following decision was delivered by:–

TRIANTAFYLLIDES, P.: At this stage of this case I am dealing with an application, filed on August 30, 1976, by means of which there is being sought an order that the plaintiffs should provide increased and better security in relation to an interlocutory order for the arrest of the defendant cargo, which was made *ex parte* on April 10, 1976, on an application by the plaintiffs, and which was made absolute on May 22, 1976, without having become possible for any of the present applicants owners to be heard by the Court in this connection (the term "owners" being used to describe, generally, persons having an interest in the cargo).

When the said order of arrest was made it was directed that the plaintiffs should give security—(see paragraph 5 of the order of April 10, 1976)—in the sum of C£10,000, in respect of any damages that they might have to pay because of the arrest of the cargo; and such security was duly furnished.

The first matter with which I have to deal is the contention of counsel for the plaintiffs that in an admiralty action in rem this Court did not possess jurisdiction to order the plaintiffs to give security as aforesaid, and that, therefore, there does not arise at all the question of my making an order that increased and better security should be given.

Of course, if I were to agree with counsel for the plaintiffs, that conclusion of mine would be relevant only to the fate of the application now before me, because I am not sitting on appeal from the order made, as stated, by another Judge of this Court on April 10, 1976. I am simply dealing with a new interlocutory application in the light of the situation as it has developed since then; but, actually, as there will appear from what follows, I cannot uphold as correct the above contention of plaintiffs' counsel:

He has argued, in this connection, that there is nothing in the relevant Admiralty legislation, Rules and practice, either here or in England, which makes provision about the furnishing

of security of the nature with which we are concerned in the present application; and he has submitted that rule 237, of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction, which provides that "In all cases not provided by these Rules, the practice of the Admiralty Division of the High Court of Justice of England, so far as the same shall appear to be applicable, shall be followed" excludes the application by me, in this connection, of any other legislative provision, Rules or practice in Cyprus. In my opinion, however, rule 237 is merely intended to supplement our Admiralty Rules, and not to exclude, in any way, the application of any other, otherwise relevant, provision.

In dealing with the contention of plaintiffs' counsel regarding absence of powers of the Court to order the plaintiffs to furnish security it is to be noted, first, that it was clearly open to the Judge who granted, on an *ex parte* application, the order for the arrest of the cargo, on April 10, 1976, to order the plaintiffs to furnish security, because rule 205 of our Admiralty Rules provides that "The Court or Judge may, on proof of urgency or other peculiar circumstances, make a temporary order, notwithstanding that no notice of the application has been given, on such terms, as to the furnishing of security or otherwise, as shall appear to be just"; and the view can be validly taken that any initially imposed term as regards furnishing of security may be subsequently modified under rule 211, which provides that "The Court or Judge may, on due cause shown vary or rescind any order previously made".

Irrespective, however, of the above provision there exist the powers under section 32 of the Courts of Justice Law, 1960 (Law 14/60), which reads as follows:-

> " 32.-(1) Subject to any Rules of Court every Court, in the exercise of its civil jurisdiction, may, by order, grant an injunction (interlocutory, perpetual or mandatory) or appoint a receiver in all cases in which it appears to the Court just or convenient so to do, notwithstanding that no compensation or other relief is claimed or granted together therewith:
>
> Provided that an interlocutory injunction shall not be granted unless the Court is satisfied that there is a serious question to be tried at the hearing, that there is a probability that the plaintiff is entitled to relief and that unless an

interlocutory injunction is granted it shall be difficult or impossible to do complete justice at a later stage.

(2) Any interlocutory order made under subsection (1) may be made under such terms and conditions as the Court thinks just, and the Court may at any time, on reasonable cause shown, discharge or vary any such order.

(3) If it appears to the Court that any interlocutory order made under subsection (1) was applied for on insufficient grounds, or if the plaintiff's action fails, or judgment is given against him by default or otherwise, and it appears to the Court that there was no probable ground for his bringing the action, the Court may, if it thinks fit, on the application of the defendant, order the plaintiff to pay to the defendant such amount as appears to the Court to be a reasonable compensation to the defendant for the expense and injury occasioned to him by the execution of the order.

Payment of compensation under this subsection shall be a bar to any action for damages in respect of anything done in pursuance of the order; and any such action, if begun, shall be stayed by the Court in such manner and on such terms as the Court thinks just."

The powers under section 32 are available in respect of "the exercise of its civil jurisdiction" by "every Court"; the term "Court" is defined, in section 2 of Law 14/60, as including the Supreme Court, and "civil proceeding" is defined, in the same section, as including "any proceeding other than criminal proceeding"; thus admiralty proceedings have to be deemed to be within the civil jurisdiction of the Supreme Court in so far as the exercise of the powers under section 32 of Law 14/60 is concerned. So, I am of the opinion that in the exercise of such powers I can vary, if I deem it proper, the term as to security in paragraph 5 of the order for the arrest of the cargo made on April 10, 1976.

In relation to the applicability of section 32 to Admiralty proceedings it is useful to refer to the case of *The James Westoll* [1905] P. 47, which is a case where the view was taken (at p. 50) that in the absence of any specific provision in the Admiralty Court Act, 1861, in England, regarding the furnishing of security, in an admiralty action, by foreign plaintiffs, concerning damages claimed by means of a counter-claim, it would have

been open to the High Court to exercise any general powers, in this respect, under the Judicature Act, 1873; but it was, eventually, found that no such powers existed.

In Cyprus, however, the position is different, because the necessary general powers to enable me to order increased and better security, as applied for by the applicants cargo owners, are to be found in section 32(2) of Law 14/60.

In any event, I do not think that counsel for the plaintiffs was entitled, in the present proceedings, to raise the issue of the powers of this Court to impose a term as to security—as was done by means of paragraph 5 of the order for the arrest—because the plaintiffs have enjoyed, and seek to continue to enjoy, the benefit of the said order as made (*i.e.* containing a term concerning the furnishing of security by them) and, therefore, they cannot be allowed to approbate and reprobate at one and the same time (see, *inter alia*, *Banque des Marchands de Moscou* (*Koupetschesky*) (*In liquidation*) v. *Kindersley and another*, [1950] 2 All E.R. 549, 552). The same obstacle does not exist in so far as the applicants owners of the cargo are concerned, because they are not deriving any advantage under such order, and, therefore, they are entitled to ask that it should be varied.

The next point with which I have to deal is the contention of counsel for the plaintiffs that the applicants owners of the cargo are not entitled to make the present application because their names are not stated in the application; and because no appearance was formally entered by them, or on their behalf, by means of a memorandum of appearance.

It was submitted, further, in this respect, by counsel for the plaintiffs that the applicants are interveners and, therefore, they could not have appeared at all without the leave of the Court.

In accordance with the normal practice, applicable in cases of this nature, the writ of summons in the present action in rem would have been addressed to the applicants in their capacity as owners of the defendant cargo (see, *inter alia*, in this respect, Atkin's Court Forms, 2nd ed., vol. 3, p. 26); it, also, appears from Admiralty Practice, by McGuffie, Fugeman and Gray (vol. 1 in the British Shipping Laws series) p. 127, para. 295, that the owners of the res, in an action in rem, are defendants; certainly, they cannot be treated as mere interveners, in the sense of Order 75, rule 17, in England (see, in this connection,

Admiralty Practice, *supra*, pp. 136–138, paras. 310–313). So, even in England, the applicants would not have required the leave of the Court, as interveners, in order to appear in an action such as the present one.

In any case, as there is no express provision in our own Admiralty Rules making the distinction between defendants and interveners, I am inclined to the view that rule 35 of such Rules, which provides that "The parties named in the writ of summons and every person interested in the property sought to be affected by the action who desires to dispute the plaintiff's claim shall appear before the Court or Judge either personally or by advocate at the time named in that behalf in the writ of summons", is wide enough to cover both defendants and interveners, giving them the right to appear in an action without leave; and rule 35 is drafted in such clear terms that it cannot be said that it has to be applied (in view of rule 237 of our Rules) in a restricted or qualified way, in the light of the relevant practice in England, so as to require interveners to apply for leave to appear in an admiralty action in Cyprus.

For all the above reasons I do not think that the applicants cargo owners needed the leave of the Court in order to be enabled to appear in the present proceedings. Nor was it necessary for them, under our Rules and practice, to enter an appearance by filing a formal memorandum of appearance; they were entitled to appear—as they have already done from June 14, 1976, onwards—through counsel representing them at various stages of the present action. Furthermore, I do not agree that the applicants cargo owners should have been expressly named in the application which is now before me; they can be adequately identified by referring to the notices filed by their counsel on July 16, and August 24, 1976, as well as from affidavits filed in support of applications for the discharge of the order for the arrest of the cargo, which were made on July 12 and August 11, 1976, and are now pending before the Court.

Another point which has been raised by counsel for the plaintiffs (who are the respondents in the present application) is that the applicants could have sought a variation of paragraph 5 of the order for the arrest of the defendant cargo only by applying under rule 165 of our Admiralty Rules, which provides that "Save where by these Rules is otherwise provided, any party may apply to the Court to review any order made by a Judge not being a final order or judgment disposing of the

claim in the action" and that such application for review had to be made, under rule 166, "within seven days of the making of the order" complained of. I cannot agree with counsel for the plaintiffs on this point, because in my view rule 165 provides, in effect, for an appeal to the Full Bench of the Court against an order made by a Judge, whereas the present application for better and increased security in respect of the arrest of the cargo is not an appeal from the order directing such arrest, but only an application seeking the variation under rule 211 (which has been quoted earlier on in this Decision) of the term in such order prescribing the security to be furnished by the plaintiffs in respect of the arrest.

The next objection, which has been raised by counsel for the plaintiffs against the granting of the present application, is based on the contents of an affidavit filed, on their behalf, on September 6, 1976: It appears therefrom that certain cargo owners have already obtained—in an action, in the High Court of Justice in England, for damages for the detention of the cargo in Limassol—an interlocutory order restraining the plaintiffs in the proceedings before me, who are the defendants in the said action in England, from disposing of the insurance proceeds (allegedly 800.000 USA dollars) in respect of their ship "Siskina"; this was the ship on which the defendant cargo was loaded when it was arrested here in Cyprus and it is in relation to a claim of the plaintiffs in respect of the carriage of the defendant cargo in the said ship that the present admiralty action has been filed in this Court; such ship has sunk in June 1976, after the making of the order for the arrest of the cargo.

The aforesaid proceedings in England are entirely outside my jurisdiction; moreover, we do not know what will be the eventual fate of the interlocutory order obtained therein; and it is not at all clear, from the aforementioned affidavit, to what extent the plaintiffs in the said action are the same persons as the applicants cargo owners now before me.

I shall, nevertheless, take into account as a relevant, though not as a decisive, factor the fact that there do exist proceedings in a foreign Court aiming at ensuring security for a purpose similar to that which is pursued by the present application.

I shall now deal with the merits of this application; and, in doing so, I shall bear duly in mind the approach to a matter of this nature which has been indicated quite recently in the

case of *Acropol Shipping Company Ltd. and Others* v. *Rossis* (reported in this Part at p. 38 *ante*).

In applying such approach to the present case, there have to be borne in mind—in addition to the fact that the plaintiffs are a foreign company without any tangible assets in Cyprus— the following, *inter alia*, matters:-

It seems that there was arrested, initially, a cargo which was of the value of about 7,000,000 U.S.A. dollars, but since then about 40% of it has been released. The applicants are not the owners of the whole of the cargo which remains still under arrest, but, from the material before me, it is quite clear that they are beneficially interested in relation to a considerable part of it.

Even if I rely only on the figures given by the plaintiffs' side I am bound to find that the storage and insurance expenses for the cargo still under arrest are in the region of about C£1,500 weekly. There have, also, been incurred about C£28,000 expenses for the unloading and the placing into storage of the whole cargo; and a comparable amount will be expended for its reloading back on to other ships.

On the other hand, I have to take into account, too, that it is always open to the applicants cargo owners to try to minimize the damage which they are suffering, through the arrest of the cargo, by applying under rule 60 of our Admiralty Rules, for the release, on suitable terms, of any part of the cargo in which they are beneficially interested.

All the above, as well as other pertinent considerations, I have weighed together, in exercising my discretionary powers in the present matter; and I have reached the following conclusions:-

(a) I do not agree that, at this stage, in the present action, I should specifically order the furnishing by the plaintiffs of "better security", in the sense of greater solvency of the person providing such security. It is sufficient to continue the existing requirement that such security should be to the satisfaction of the Registrar.

(b) I do not think that I should increase the already furnished security of C£10,000 to such an extent as to make it commensurate to all the expenses which have been, or will be, incurred as a result of the arrest of

the defendant cargo, because I do not wish to encourage the applicants cargo owners to adopt a merely passive attitude, without trying, pending the outcome of the action, to minimize any damage resulting from the arrest, by seeking to secure the release, under rule 60, on appropriate terms, of parts of the cargo still under arrest.

(c) I do think, on the other hand, that in the light of the situation as it exists today the security of C£10,000 (under paragraph 5 of the order for the arrest of the cargo made on April 10, 1976) should be increased, on a very conservative approach indeed, to C£30,000;

and, such security, should be furnished by the plaintiffs, to the satisfaction of the Registrar, within one month from today.

In case the plaintiffs fail to furnish increased security, as aforesaid, the applicants cargo owners will, naturally, be entitled to take steps for delivery of possession to them of cargo in which they are beneficially interested, subject, however, to any rights of parties who have entered caveats against the release of the cargo.

The plaintiffs are, of course, at liberty, within the said period of one month, or at any time thereafter, to place before this Court satisfactory proof that all the applicants cargo owners have succeeded, by means of a final interlocutory order in the aforementioned action in England, to stop payment to the plaintiffs of any insurance proceeds regarding the sinking of their ship "Siskina"; and, in such a case, this Court will revert to the matter of the increased security now ordered, in order to examine it in the light of developments.

In the result, paragraph 5 of the order for the arrest of the cargo made on April 10, 1976, is varied as stated hereinbefore.

In the light of all relevant factors I have decided that the better course is not to make any order as regards the costs of the present application.

Order accordingly.