1984 July 20

[DEMETRIADES, J.]

ATLANTIC AARDOLIEPRODUKTENMAATSCHAPPIJ B.V.,
Plaintiffs.

v.

FRIO SHIPPING CO. LIMITED,
Defendants.

(*Admiralty Action No.* 115/83).

Admiralty—Practice—Default of appearance by defendant—Not necessary for the Court to make special directions as to how the plaintiff shall prove his claim—Rule 41 *of the Cyprus Admiralty Jurisdiction Order,* 1893—*Mode of proof of claim—Affidavit by plaintiff's counsel—Not meaning that Counsel sought to sign judgment in his favour—Non compliance with Exchange Control Rules not a fundamental defect making the proceedings a nullity—Prima facie defence on the merits made by defendants—Judgment given in default of appearance set aside on terms.*

The plaintiffs in this case claimed against the defendants the sum of U.S. dollars 95,110.37 for "bunker fuel and/or gas oil supplied to the vessel 'Cabo Frio' property of the defendants". The defendants failed to enter an appearance on the day they were commanded to do so by the writ of summons and the plaintiffs filed an application, accompanied by an affidavit sworn by their advocate praying for judgment in default of appearance, whereupon the Court gave judgment for the plaintiffs as per claim.

The defendants filed an application for the setting aside of the above judgment and submitted:

(a) That the judgment was irregular in that

(i) The plaintiffs did not obtain the leave or the directions of the Court how to prove their case.

(ii) The plaintiffs in their application for judgment in default of appearance simply said that the facts on

which they relied upon were apparent on the face of the proceedings, though no facts were so apparent.

(iii) That the affidavit which was sworn by counsel who appears for the plaintiffs and which was filed in support of the application for judgment in default of appearance prays for judgment in his favour and not in favour of the plaintiffs.

(iv) There has not been compliance with the Exchange Control Law, Cap. 199, and the Regulations made thereunder.

(b) That defendants had a prima facie defence.

Held, (1) that if a defendant chooses not to enter an appearance or fails to do so within the time limit provided by the Rules, and unless the Court feels that further proof of the claim is required, it is not necessary for the Court to make special directions how the plaintiff shall have to prove his claim. (See rule 41 of the Cuprus Admiralty Jurisdiction Order, 1893).

(2) That if the petition filed by the plaintiff clearly stated the particulars of his claim, it suffices if same are supported by the necessary documents, if any are required, for proving the claim; that whether these documents are produced by a witness verifying them personally or by affidavit evidence, makes no difference as to their probative value, since the defendant has failed to enter an appearance (rule 116 of the Cyprus Admiralty Jurisdiction Order, 1893, not applicable).

(3) That in view of the contents of the petition, the affidavit of counsel for the plaintiffs sworn by him and the documents filed in support of the claim of the plaintiffs, there was ample evidence for the Court to give judgment in favour of the plaintiffs.

(4) That though the affidavit of counsel is very badly drafted, he did not mean to sign judgment in his favour but in favour of his client.

(5) That the non compliance with the Exchange Control Rules does not constitute a fundamental defect which made the whole proceedings a nullity.

(6) That from the affidavits and the various documents attached

thereto this Court has come to the conclusion that the defendants have made out a prima facie defence and that they are entitled to have the judgment set aside and be given leave to defend the action; and that, accordingly the judgment in the action must be set aside on condition that the applicants-defendants furnish security in the form of a Bank guarantee in the sum of U.S. dollars 95,000.00.

Application granted.

Cases referred to:

Spyropoullos v. *Transavia Holland N.V. Amsterdam* (1979) 1 C.L.R. 421.

Application.

Application by defendants for an order setting aside the judgment given against them after they had failed to enter an appearance within the prescribed time limit.

M. Montanios with *P. Panayi* (*Miss*), for the applicants.

P. Petrakis, for the respondents.

Cur. adv. vult.

DEMETRIADES J. read the following judgment. By the present application the applicants, defendants in Action No. 115/83, pray for an order that the judgment given against them after they have failed to enter an appearance within the prescribed time limit for doing so be set aside.

The facts which led to the institution of the present proceedings are in brief the following: The plaintiffs, who are the respondents in this application, by their action claim against the defendants-applicants the sum of U.S. $95,110.37 for "bunker, fuel and/or gas oil supplied to the vessel 'CABO FRIO' property of the defendants for her operation and maintenance at the port of Port Said Egypt, on or about the 19th May, 1982, and on or about the 22nd June, 1982, at the request and/or to the order of her owners and/or their servants and/or agents."

It is not in dispute that the defendants-applicants are a company registered in Cyprus and that at all material times they were the owners of the ship "CABO FRIO".

The writ of summons was issued on the 29th April, 1983, and was duly served on the applicants at their registered office. The applicants did not enter an appearance on the day they were

commanded to do so by the writ of summons, that is on the 14th May, 1983, and the Court, after an application filed by the plaintiffs for directions, ordered on the 14th May, 1983, that the petition be filed within three days. On the 16th May, 1983, the plaintiffs filed an application which was accompanied by an affidavit sworn by Mr. Petros M. Petrakis, advocate for the plaintiffs by which they prayed for judgment against the defendants as per claim in default of appearance and the Court on the following day, that is on the 17th May, 1983, gave judgment for the plaintiffs as per claim with legal interest and costs.

On the 4th June, 1983, the applicants filed an application accompanied by an affidavit sworn by Miss P. Panayi, an advocate employed in the firm of Messrs. Montanios & Montanios, counsel for the applicants, by which they prayed for the setting aside of the judgment given on the 17th May, 1983. On the 12th July, 1983, the applicants discontinued their application but on the same day they filed another application, the present one, by which they pray for the setting aside of the judgment given in this action against them on the 17th May, 1983.

Counsel for the applicants submitted that the judgment given against them should be set aside for the following grounds:

(a) That the judgment is irregular, and

(b) that they had a prima facie defence.

With regard to the first ground, counsel for the applicants submitted that if the judgment is found to be irregular, it must be set aside ex depito justitiae, in other words, as of right. On this issue he put forward the following arguments:

(i) The plaintiffs did not obtain the leave or the directions of the Court how to prove their case, i.e. whether by or through an affidavit, contrary to the provisions of rule 116 of the Cyprus Admiralty Rules.

(ii) The plaintiffs in their application for judgment in default of appearance simply said that the facts on which they relied upon were apparent on the face of the proceedings, though no facts were so apparent.

(iii) That the affidavit which was sworn by counsel who appears for the plaintiffs and which was filed in support

of the application for judgment in default of appearance prays for judgment in his favour and not in favour of the plaintiffs.

(iv) There has not been compliance with the Exchange Control Law, Cap. 199, and the Regulations made thereunder.

As regards the first submission of counsel for the applicants on this ground I am of the opinion that there is no merit in it. Rule 41 of the Cyprus Admiralty Jurisdiction Order, 1893, provides:

"41. If at the time fixed by the writ of summons for the appearance of the parties the Plaintiff appears but the Defendant does not appear, then, upon proof of the due service of the writ of summons, the Plaintiff may proceed to prove his claim and the Court or Judge may either give judgment for any remedy or relief which the Plaintiff may appear to be entitled to or the further hearing of the action may be adjourned."

In the light of the wording of this rule, I am of the view that if a defendant chooses not to enter an appearance or fails to do so within the time limit provided by the Rules, and unless the Court feels that further proof of the claim is required, it is not necessary for the Court to make special directions how the plaintiff shall have to prove his claim.

It is, further, my view that if the petition filed by the plaintiff clearly stated the particulars of his claim, it suffices if same are supported by the necessary documents, if any are required for proving the claim. Whether these documents are produced by a witness verifying them personally or by affidavit evidence, makes no difference as to their probative value, since the defendant has failed to enter an appearance.

Rule 116 makes provision for regulating the proceedings in contested cases on applications and does not come into play in the proof of uncontested claims.

With regard to the second submission of counsel for the applicants-defendants, I am of the opinion that in view of the contents of the petition, the affidavit of counsel for the plaintiffs sworn by him and the documents filed in support of the claim of

the plaintiffs, there was ample evidence for the Court to give judgment in favour of the plaintiffs.

Coming now to the third submission on the ground of irregularity of the judgment, it is obvious that though the affidavit of counsel is very badly drafted, he did not mean to sign judgment in his favour but in favour of his client.

With regard to the last submission of counsel for the applicants-defendants on the ground of irregularity, I have only to make reference to the case of *Spyropoullos v. Transavia Holland N.V. Amsterdam* (1979) 1 C.L.R. 421, where it was held that the non-compliance with rule 3 of the Exchange Control Rules does not constitute a fundamental defect which made the whole proceedings a nullity and which could not be waived by the subsequent appearance and the taking of the steps by the appellants as defendants in the action; that there is no inherent illegality in omitting to refer to the possibility of paying into Court the liquidated demand instead of paying same to plaintiff or his advocate; that the said defect is an irregularity that brings the matter within the ambit of Order 64 of the Civil Procedure Rules as being a mere non-compliance with the Rules; and that, accordingly, contention (a), i.e. that the non-compliance with the Exchange Control Rules has rendered the writ issued a nullity and that the trial Judge was wrong in considering same as a mere irregularity which had been waived, must fail.

This last submission of the applicants-defendants, therefore, fails.

I now come to the second ground put forward by the applicants-defendants for the setting aside of the judgment, namely because they have shown by their affidavits filed in support of their application that they have a prima facie defence.

The defendants-applicants have submitted that they were never in contractual relationship with the plaintiffs and this submission is based on a number of invoices produced by them and in which it appears that the creditors for the value of bunkers supplied to "CABO FRIO" and a number of other vessels were a company under the name of "Transcanary Cargadoorsbedrijf B.V.", of Rotterdam and not the defendants. Further, they have produced a number of telexes in which it appears that the

order for the supply of bunkers to the vessel was given by a company named "Castro (London) Ltd."

In addition, the defendants-applicants have produced two other invoices in which it appears that the costs of the bunkers that were supplied by the plaintiffs to the vessel and with the value of which the plaintiffs debited "Transcanary", are charged in an invoice issued by the latter to Messrs. Castro (London) Ltd. and/or Fruit Transportation FRUCASA Ltd., of London. By this invoice "Transcanary" demand payment of -

(a) the value of gas oil delivered to the vessel at Port Said on 22nd June, 1982, and

(b) a commission at $200 per m/t.

From the invoces filed it appears that "Transcanary" debited "Castro (London) Ltd.," with whom they had dealings for payment of expenses, collection of freights and other dealings regarding this vessel, as well as other vessels; and that the plaintiffs-respondents were charging the accounts of "Transcanary" with interest for payments overdue for more than 30 days from the date of the delivery of the bunkers. By the telexes produced by the applicants it appears that "Castro (London) Ltd." were requesting "Transcanary" to make funds available -

(a) to Jeddah so that the arrest of "CABO FRIO" will be avoided, and

(b) pay $23,000.00 for the expenses of the passage of the vessel through to Canal Suez.

Having considered the contents of the telexes and the various invoices produced and having compared them with exhibits 1 and 2 attached to the affidavit filed in support of the application to sign judgment, and having, also, in mind that the said exhibits are not signed by the master of the vessel or anybody on his behalf or on behalf of the defendants, I have come to the conclusion that the defendants have made out a prima facie defence and that they are entitled to have the judgment set aside and be given leave to defend the action.

The next question which poses for decision is whether the leave to defend should be on terms.

Counsel for the applicants submitted that rule 44 of the

Cyprus Admiralty Jurisdiction Order, 1893, which provides that a judgment may be set aside on such terms as to the payment of costs or otherwise as shall appear to be just, appears from its wording to limit the word "terms" to the payment of costs rather than to ordering the defendants to file security for the payment of the amount of the judgment.

He further submitted that neither costs should be awarded to the respondents-plaintiffs, nor the defendants-applicants should be asked to furnish security, because the respondents-plaintiffs instituted these proceedings in bad faith and in abuse of the process of the Court in that though they had failed in obtaining a mareva injunction in an action brought by them in England against the applicants-defendants and despite the fact that they had undertaken not to make any other application without notice to the parties, they filed the present action in Cyprus in breach of their said undertaking, as a result of which they were able, after they obtained judgment, to register the Cyprus judgment in England and obtain an order in their favour, by which the defendants were restrained from removing from England, disposing of or dealing with any of their assets not exceeding U.S. $100,000,00.

I am sure that the mareva injunction granted on the basis of the Cyprus judgment will immediately cease to have any force once the judgment given in this action is set aside.

With regard to the submission that the filing by the plaintiffs of the present proceedings shows bad faith on their behalf and that same is an abuse of the process of the Court, I see nothing wrong with the action filed by the plaintiffs. The defendants are a company registered in Cyprus and I would not be prepared to consider that a foreigner cannot elect to bring proceedings here where one may reasonably believe that the company has its main assets, and it will be easier to execute any judgment obtained in his favour.

In the result, I find that judgment in the action be set aside on condition that the applicants-defendants furnish security in the form of a Bank guarantee in the sum of U.S. $95,000.00.

Security to be filed within 45 days from today.

No order as to costs.

Application granted with no order as to costs.