

1984 December 20

[SAVVIDIS J]

WILLIAMS AND GLYNS BANK LIMITED

Plaintiff

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THE SHIP "MARIA" NOW LYING AT THE PORT
OF LARNACA,

Defendant

AND BY AMENDMENT PURSUANT TO ORDERS
OF THE COURT GIVEN ON 16/1/82 AND 26/1/83

WILLIAMS AND GLYNS BANK PLC

Plaintiff

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THE SHIP "MARIA"

Defendant

(Admiralty Action No. 59/82)

Admiralty—Practice—Affidavit—Scandalous and irrelevant matter therein—Striking out of—Principles applicable—Part of affidavit making reference to judgment of Greek Court and annexing copy thereof—Such part scandalous and oppressive and tends to prejudice the fair trial of the action—Struck out—Order 38, rule 11 of the old English R S C

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The applicants applied for an order of the Court striking out from paragraph 7 of an affidavit, which was sworn on behalf of the respondent, that part by which reference was made to the judgment in Action 639/1983 of the Court of Appeal of Piraeus as well as the copy of such judgment which was annexed to the said affidavit as irrelevant, frivolous, vexatious embarrassing and in abuse of the process of the Court

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Counsel for respondent gave his reasons for making reference to Action 639/83 as being that such case was a good example

in support of his contention that any opinion given by a foreign legal expert, can be supported by reference to books, treaties and Court decisions

Held, that an affidavit must be pertinent and material and may be ordered to be taken off the file if scandalous and irrelevant matter is inserted: that in the affidavit in question Action No. 639/83 is not simply mentioned as an example in support of the opinion given by a legal expert on foreign law but facts are stated which may be prejudicial to the outcome of the case: that the matters stated therein in the way they are stated, are scandalous and oppressive and tend to prejudice the fair trial of the action: and that, therefore, the application must be granted.

Application granted.

Cases referred to:

Re Miller, 54 L.J. Ch. 205:

Knowles v. Roberts, 38 Ch. D. 263 at p. 270:

Smith v. British Insurance Co. [1883] W.M. 232.

Application.

Application by defendant for an order striking out part of para. 6 of the affidavit dated 6th December, 1983 sworn on behalf of the plaintiff.

M. Eliades with *A. Skordis*, for the applicant.

E. Montanios with *P. Panayi (Miss)*, for the respondent.

Cur. adv. vult.

SAVVIDES J. read the following decision. By this application which was filed on the 8th December, 1983 applicant prays for an order of the Court striking out from para. 7 of the affidavit of Persefoni Panayi dated 6.12.1983, sworn on behalf of the respondent, that part by which reference is made to the judgment in Action 639/1983 of the Court of Appeal of Piraeus as well as the copy of such judgment which is annexed to the said affidavit as exhibit 'A', as irrelevant, frivolous, vexatious, embarrassing and in abuse of the process of the Court.

The said affidavit was filed by counsel for plaintiff in support of their opposition to an application made by the applicant,

for striking out certain parts of plaintiff's reply and answer to the defendant's counterclaim in the action. Paragraph 6 of such affidavit reads as follows:

5 "I am further advised by the said Mr. Astras and verily believe that under Greek law Court precedents "Η Νομολογία των Δικαστηρίων" and the opinion of legal writers, though not binding, are taken into consideration by Greek Courts and referred to in their judgments. In support of this he cites judgment No. 639/1983 of the Court
10 of Appeal of Piraeus which, in upholding the decision of the Court of First Instance of Piraeus that the guarantee and the mortgage (which are the subject matters of the present action) granted by the owning company of the defendant ship to the plaintiffs are within the powers of
15 the said company and valid, itself cited at page 6 of the said judgment in support of its conclusion five of the particulars which are sought to be struck out i.e. particulars (c), (d), (g), (h) and (k) as numbered in paragraph 3 of the affidavit in support of the application for striking out.
20 The said judgment also cites in support an opinion of a legal writer on the subject. I attach herewith as exhibit 'A' photocopy which I have made from an original legalised official copy of the said judgment".

25 The part objected to by counsel for applicant as it appears in the prayer is the part commencing in the second sentence with the words "in support of this he cites - - - - -" and ends with the words "of the said judgment", that is, upto the end of paragraph 6, including "Exhibit A" referred to therein and attached thereto.

30 At the hearing of the application counsel for applicant, in answer to an observation made by the Court in the course of the address of counsel for respondent, made it clear that applicant's objection was not in respect of the first part of paragraph 6 of the affidavit by which a general reference is made to the
35 weight attached by the Courts in Greece on Court precedents and opinions of legal writers, but in respect of any reference to the particular Action 639/83. Counsel's statement in this respect is recorded as follows:

40 "It is so Your Honour; I am prepared to make a statement accepting unequivocally para. 6 from that point upto

judgment 639/83 and that to be struck out, because it is only referred to as an illustration and we do need this illustration".

Counsel for applicant, in advancing his argument in support of this application, drew the attention of the Court to an application dated 18th November, 1983, for amendment by respondent of their pleadings for the purpose of pleading therein Action 639/83 as material, which was subsequently dismissed on 5th December, 1983, as withdrawn, and contended that the introduction in the affidavit of particulars concerning such action with a copy of the judgment annexed thereto, was an indirect way of introducing, in the disguise of illustration, material facts which should have been pleaded in the first instance, without following the proper course of applying for amendment of the pleadings.

In his lengthy address, counsel for respondent contended that reference to decided cases and opinions of authors of textbooks are matters which can be pleaded as particulars of the Greek Law, and that they were properly so pleaded. He gave his reason of making reference to Action 639/83 as being that such case was one in many cases which could lend support to the opinion of respondent's expert witness as to the interpretation of the Greek Law.

Counsel for applicant, by an intervention, in an effort of suggesting a solution to the problem, stated that he was prepared to withdraw any objection whatsoever if counsel for applicant were prepared to make reference to any other decided case under the Greek Law as an illustration and not Action 639/83 the particulars of which as set out in the affidavit, are prejudicial in the conduct of the present action. Counsel for respondent, however, did not concede to such offer the result of which would have been the striking out of any reference to Action 639/83 and its substitution by reference to other decided cases, contending that he could not find a better way of establishing his proposition as to the Greek Law than by supporting the opinion of a Greek lawyer with a decision, such as the one in Action 639/83 of a Greek Court, which refers precisely to those particulars which will support the evidence of the expert.

I find it unnecessary, at this stage, to deal with the argument of counsel for respondent as to whether when the position under the Greek Law is pleaded by a general exposition of such law, extensive reference in the pleadings to Court decisions, or opinions of text-book writers on which the expert will rely in support of his opinion as to the state of foreign law, is necessary, as this is not the matter in issue in the present application. Such issue is one which has been raised and will be determined by me in the application for striking out such reference in the respondent's reply and answer to the counterclaim, in which the judgment has been reserved and will be delivered soon.

The issue before me is whether the part in the affidavit by which reference is made to Action 639/83 of the Court in Greece and the contents of the decision in such action, copy of which has been attached to the affidavit should be struck out as embarrassing, irrelevant, scandalous and tending to prejudice the fair trial in this action.

It is well settled that the Court is not to dictate to parties how they should frame their case. But such rule is, of course subject to the limitation that parties must not offend against the rules of pleading which have been laid down by the law, the effect of which is that a party should not introduce in a pleading matters which are unnecessary and tend to prejudice, embarrass and delay the trial of the action (see *Knowles v. Roberts*, 38 Ch. D. 263 at p. 270). Orders 17, rule 27 and 25, rule 4 of the old English Rules (see Annual Practice 1960) are relevant in this respect.

The Court has also a general jurisdiction to expunge scandalous matters in any record or proceeding (even in bills of costs, *Re Miller*, 54 L.J.Ch. 205). Under old rule 11 of Order 38 of the English Rules (those in force on 15th August 1960), the Court may order to be struck out of any affidavit any matter which is scandalous and irrelevant. A similar provision appears in our Civil Procedure Rules which are applicable to civil proceedings but do not apply to Admiralty proceedings in view of the provisions of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction which regulate Admiralty proceedings and, under the provisions of Order 237 of which, "in all cases not provided by these 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, shall be followed". The English practice and the Rules of the Supreme Court applicable are, according to our law and jurisprudence, those in force on 15th August, 1960.

In the notes under Order 38, rule 3, which deal with the contents of affidavits, in the Annual Practice 1960, p. 924 under the heading, "Scandal-Relevancy", we read:

"An affidavit must be pertinent and material and may be ordered to be taken off the file if scandalous and irrelevant matter is inserted (*Osmaston v. Association of Land Financiers*, (1878) W.N. 101; *Kernick v. Kernick*, 12 W.R. 335; *Goddard v. Parr*, 3 W.R. 633; *Cracknail v. Hanson*, 11 Ch. D.p. 12), or the scandalous matter may be expunged (*Warner v. Mosses*, (1881) W.M. 69; and see r.11).

The Court will only strike out matter that is both scandalous and irrelevant, or is otherwise oppressive (per Buckley, L.J., *Re Jessop* (1910) W.M. 128, a case in which the C.A. refused to strike out extracts from letters marked 'without prejudice')

In the example given in the notes in the Annual Practice 1960 under Order 19, rule 27 and Order 25, rule 4, as statements which are scandalous reference is made to *Smith v. The British Insurance Co.* (1883) W.M. 232 which was an action on marine policies and a paragraph which purported to state what took place at an official inquiry held by the Wreck Commissioners was struck out as an attempt to discredit the plaintiff and to prejudice the fair trial of the action.

It is an undisputed fact in this case that what is sought to be struck out is the judgment of the Court of Piraeus that the guarantee and mortgage (which are the subject matters of the present action) granted by the owning company of the defendant ship to the plaintiff are within the powers of the said company and valid.

Counsel for respondent gave his reasons for making reference to Action 639/83 as being that such case was a good example in support of his contention that any opinion given by a foreign legal expert, can be supported by reference to books, treaties and Court decisions.

Having carefully considered the contents of paragraph 6 and the copy of the judgment which is annexed thereto as exhibit 'A' and the way and the extent such judgment is set out therein, I find myself unable to agree with the above contention of counsel for respondent. In the said affidavit, Action 639/83 is not simply mentioned as an example in support of the opinion given by a legal expert on foreign law but facts are stated which may be prejudicial to the outcome of the case. I find that the matters stated therein in the way they are stated, are scandalous and oppressive and tend to prejudice the fair trial of the action.

For all the above reasons, I grant the application and I order that what is stated in paragraph 6 of the affidavit commencing with the words "in support of this he cites....." in the second sentence of paragraph 6 upto the end of paragraph 6 ending with the words "of the said judgment", and the copy of the judgment in Action 639/83 attached thereto be struck out.

Respondent to pay to applicant the costs of this application.

Application granted.