

1988 May 7

(DEMETRIADES, J.)

IN THE MATTER OF AN APPLICATION BY
(1) CHRISTOFOROS PELEKANOS,
(2) GEORHIOS PELEKANOS,
(3) C. & A. PELEKANOS ASSOCIATES LTD. AND
(4) CHRISTOFOROS PELEKANOS LTD., FOR LEAVE TO
APPLY FOR AN ORDER OF CERTIORARI,

AND

IN THE MATTER OF AN INTERIM ORDER GRANTED BY THE
DISTRICT COURT OF NICOSIA IN ACTION NO. 377/88 ON 18.1.88.

(Application No. 27/88).

*Prerogative Orders — Certiorari — Leave to apply for, granted —
Application under 0.48, r.8(4) of the Civil Procedure Rules to set it
aside — What the applicant (assuming he has a right to apply as
aforesaid) should prove.*

5 *Civil Procedure—Setting aside an order made ex parte—The Civil
Procedure Rules, 0.48, r.8(4)—Whether this rule is applicable in
order to set aside leave granted ex parte to apply for an order of
certiorari—Doubtful.*

10 The Court granted to the respondent in this application leave to
apply for an order of certiorari quashing an interim order issued ex
parte by a District Court at the instance of the present applicant
(plaintiff in the action).

This is an application based on 0.48, r.8(4) of the Civil Procedure
Rules to set aside the said leave.

15 Held, dismissing the application: (1) The Court has never
experienced an application of the nature envisaged by this Order of
the Rules of Court, other than in cases in which provisional orders
were made under section 32 of the Courts of Justice Law, Law 14/60,
the Civil Procedure Law, Cap. 6 and when an order was made for the
20 arrest of a ship. Such orders have never been set aside or varied
unless it was found that the prerequisites required for granting the
order were not satisfied.

(2) This Court's right to grant leave to a person to apply for an order of certiorari is a discretionary one, which must be judicially exercised. What the Judge has to decide is whether, on the material before him a prima facie case was made out which was sufficient to justify the granting of leave.

5

(3) It follows that assuming that there is a right by a person affected by such leave to apply for it to be set aside or varied, that person has to satisfy the Judge that

(a) he did not exercise his discretion judicially, and

(b) no prima facie case was made out which was sufficient to justify him in granting the leave.

10

(3) In the present case the arguments put forward by the applicant are directed on the question of whether the order of certiorari ought to be made and not to the lack of the two prerequisites or either of them to which I have earlier referred.

15

Application dismissed.

No order as to costs.

Cases referred to:

Anton Piller KG v. Manufacturing Processes Ltd. and Others [1976]
1 All E.R. 779.

20

Application.

Application for the setting aside of the order of the 1st March, 1988 whereby leave was granted to the respondents to apply for an order of certiorari.

Cur. adv. vult.

25

L. Papaphilippou, for the applicant.

K. Michaelides, for the respondents.

DEMETRIADES J. read the following judgment. This is an application by which Mr. Andreas Pelekanos (hereinafter referred to as the applicant) applies for the setting aside of an order I made on the 1st March, 1988, by which I granted leave to Messrs Christoforos Pelekanos, Georghios Pelekanos, C & A Pelekanos Associates Ltd. and Christoforos Pelekanos Ltd. (hereinafter referred to as the respondents), to apply for an order of certiorari.

30

The application is based on the Civil Procedure Rules 0.48 r.8(4) which provides:

35

«Any person (other than the applicant) affected by an order made ex parte may apply by summons to have it set aside or varied and the Court or Judge may set aside or vary such order on such terms as may seem just.»

5 The application was opposed by the respondents.

Before proceeding to state the facts on which the applicant bases his application, I consider it necessary to give a summary of the facts that led to the present proceedings:

10 On the 16th January, 1988, the applicant filed in the District Court of Nicosia, against the respondents, Action No. 377/88, by which he claimed the following remedies:

«(A) Injunctions restraining defendants 1, 2 and 4 personally, their servants and agents, from -

15 (i) using and/or exploiting machinery, tools, materials and labourers belonging to defendant No. 3 for the construction of two blocks of flats at Nicosia,

(ii) altering or destroying the books, receipts, contracts, papers and correspondence of defendant No. 3 and/or of falsifying the entries to their books and files.

20 (P) An order directing the defendants to give on oath detailed accounts and explanations relating to machinery, materials and labour which were used from the property of defendant No. 3 for the construction of the two blocks of flats in the name of «PELEKANOS COURT NO 10» and «PELEKANOS
25 COURT NO 11» situated at Nicosia, in the name and/or on account of defendant No. 4.

(C) Declaration by the Court that the blocks of flats which are being constructed under the characteristics or names of «PELEKANOS COURT NO 10» and «PELEKANOS COURT
30 NO 11» in Nicosia in the name of defendant No. 4 and/or all profits which will be made out of them, belong and form part of the property of defendant No. 3.

(D) Damages as a result of breach of duty and/or dishonesty and/or trust and/or fraud etc.

35 (E) Damages against defendant No. 3 amounting to £95,820.- plus interest at 9% p.a. as from 1.1.1980.

(F) Order that defendant No. 1 gives on oath full particulars of all dealings that he carried out as the agent of the plaintiff.

(G) Judgment against defendant No. 1 for all amounts of money that he had collected and withholds by virtue of the power of Attorney dated the 7th November, 1979, which was given by the plaintiff to defendant No. 1. » 5

On the 18th January, 1988, and after an ex parte application made by the applicant, the District Court of Nicosia granted to him an Interim Order by which the respondents were prohibited from:

(a) parting or disposing of the books, receipts, contracts and correspondence of defendant No. 3, 10

(b) changing or destroying the books, receipts, contracts and correspondence of defendant No. 3,

(c) using machinery, tools, building materials, labourers and personnel of defendant No. 3 for the purpose of erecting the blocks of flats under the name «PELEKANOS COURT NO 10» and «PELEKANOS COURT NO 11» situated at Nicosia and which belong to defendant No.4. 15

The District Court of Nicosia further made an order in the form of an Anton Piller Order (*Anton Piller KG. v. Manufacturing Processes Ltd. & others* [1976] 1 All E.R. 779). 20

As it appears from the documents appended to the affidavit filed in support of the present application, the applicant, four days after the said Interim Order was granted, filed contempt proceedings against the respondents who, two days later, filed an application by which they prayed for the discharge of the said order. 25

The District Court of Nicosia was then invited to rule which of the two applications was to be heard first and the Court, on the 11th February, 1988, ruled that the contempt proceedings ought to be determined before the respondents' application. 30

On the 17th February, 1988, the respondents filed an application for leave to apply for certiorari proceedings which was heard by me on the 1st March, 1988, when, after hearing extensive arguments by counsel for the respondents and after studying the affidavit filed in support of their application and the contents of the documents appended to it, I found that there was a prima facie arguable case made sufficiently to justify the granting of leave to the respondents to move the Court to issue an order of certiorari. 35

Having reached this conclusion and in exercise of my discretion, I made the following order:

- 5 «1. The applicants are granted leave to apply for an order of certiorari within ten days from today. Any opposition to it must be made and filed within twenty-one days thereafter.
- 10 2. All proceedings related to the interim order granted on the 18th January, 1988, in Civil Action No. 377/88, of the District Court of Nicosia, by way of execution or otherwise, are hereby stayed for ten days as from today and if the applicants apply within the period hereinabove provided, or such extended time as the Court may order, for an order of certiorari, then the stay shall continue to be in operation until further order of the Court.
- 15 3. Copy of this order to be served on the Registrar of the District Court.»

As a result of my said order, the respondents filed Civil Application No. 46/88, praying for an order of certiorari. Copy of this application was served on the applicant's counsel who then filed the present application by which, as I have earlier said, prays
20 for the discharge of the leave that I gave.

In the affidavit filed in support of the present proceedings the applicant alleges, amongst others, that the respondents did not adduce any grounds which support the grant of the leave to file their application for certiorari; that the grounds on which they
25 based their application are in law unfounded and that they failed to disclose to me the real facts. I do not intend to make any reference here to the statements of the applicant made in his affidavit on the prerequisites for the issue of an Anton Piller Order and its effect, for the reasons I shall later explain.

30 As I have earlier said, the applicant relies on O.48 r. 8(4) of the Civil Procedure Rules.

In my long practice, both as a barrister and on the Bench I have never experienced an application of the nature envisaged by this Order of the Rules of Court, other than in cases in which
35 provisional orders were made under section 32 of the Courts of Justice Law, Law 14/60, the Civil Procedure Law, Cap. 6 and when an order was made for the arrest of a ship. Such orders have never been set aside or varied unless it was found that the prerequisites required for granting the order were not satisfied.

Before proceeding to deal with the issue raised it is pertinent to say that neither of the counsel appearing, nor myself were able to trace, either in the English, Commonwealth or Cyprus Case-law or literature, a precedent on the issue I am asked to decide upon.

It has repeatedly been said that this Court's right to grant leave to a person to apply for an order of certiorari is a discretionary one, which must be judicially exercised and that what the Judge has to decide when the application for such leave was before him, is not whether the order applied for ought to be made but whether, on the material before him a prima facie case was made out which was sufficient to justify the granting of leave to the applicant to move the Court for the order sought.

It is my view that assuming that there is a right by a person affected by such leave to apply for it to be set aside or varied, that person has to satisfy the Judge that

- (a) he did not exercise his discretion judicially, and
- (b) no prima facie case was made out which was sufficient to justify him in granting the leave.

In the present case the arguments put forward by the applicant, to my mind are directed on the question of whether the order of certiorari ought to be made and not to the lack of the two prerequisites or either of them to which I have earlier referred. As regards the Anton Piller Order, that is also an issue that I do not think that I could have decided it in the application for leave.

In the circumstances, I find that this application must be dismissed but in view of the novelty of the points raised, I make no order as to costs.

*Application dismissed.
No order as to costs.*