

1976  
Dec. 21

[TRIANTAFYLLIDES, P., STAVRINIDES, L. LOIZOU,  
HADJIANASTASSIOU, JJ.]

GERLING  
KONZERN  
ALLGEMEINE  
VERSICHERUNGS  
A.G. (NO. 2)  
v.  
SHIP  
"DIMITRAKIS"  
AND ANOTHER

GERLING—KONZERN ALLGEMEINE  
VERSICHERUNGS A.G. (NO. 2),

*Appellants—Plaintiffs,*

v.

THE SHIP "DIMITRAKIS" AND ANOTHER,

*Respondents—Defendants.*

(Civil Appeal No. 5632).

*Civil Procedure—Appeal—“Parties directly affected” by the appeal—  
Rule 5 of Order 35 of the Civil Procedure Rules—Appeal against  
dismissal of ex-parte application for an order restraining any  
dealing with defendant ship, pending hearing of action—Defen-  
dants appeared in the action—Whether they are “parties directly  
affected.”* 5

On September 18, 1975, the appellants (plaintiffs) applied, *ex parte*, and obtained, an order under section 30 of the Merchant Shipping (Registration of Ships, Sales and Mortgages) Law, 1963 (Law 45/63) prohibiting and dealing with the defendant ship until the determination of the action. The action was filed on November 14, 1973 and the defendants appeared in the action on December 14, 1973. The said order was discharged by the Judge on November 16, 1976 after counsel for the defendants had been heard. On the same day the plaintiffs filed another *ex parte* application for an order restraining any dealing with the defendant ship. This application, which was made under section 32 of the Courts of Justice Law, 1960 (Law 14/60), was dismissed, as the trial Judge refused to make the order applied for *ex parte* and directed that the application should be made by summons. 10 15 20

The plaintiffs appealed: The only issue for consideration in the appeal was whether it should be heard *ex parte*; and in resolving this issue the Court of Appeal had to examine whether the respondents (defendants) were “parties directly affected by the Appeal” in the sense of rule 5\* of Order 35 of the Civil Procedure Rules. 25

\* Quoted at p. 410 *post*.

*Held, we do not have to give an exhaustive definition of what is a party "directly affected" by an Appeal, in the sense of rule 5 of our Order 35, as we have no difficulty in saying that, in the light of the circumstances and the history of the proceedings of the present case, the defendants, are, in our opinion, parties directly affected by the Appeal. (See Gillooly v. Gillooly [1950] 2 All E.R. 1118).*

*Order accordingly.*

Cases referred to:

10 *Gillooly v. Gillooly* [1950] 2 All E.R. 1118.

**Preliminary issue.**

15 Preliminary issue as to whether an appeal, against an order of a Judge of the Supreme Court (Malachos, J.) made on the 16th November, 1976 (Admiralty Action No. 54/73) dismissing an *ex parte* application for an order prohibiting any dealing with the respondent ship, should be heard *ex parte*.

*E. Montanios with M. Kleopa (Mrs.), for the appellants.*

*Cur. adv. vult.*

The judgment of the Court was delivered by:—

20 TRIANTAFYLIDIS. P.: The issue with which we are faced at this preliminary stage of this appeal is whether it should be heard *ex parte*.

25 It has been filed on November 16, 1976, against the dismissal, by a Judge of this Court, of an application made by the appellants, on that date, for an order prohibiting any dealing with the defendant ship "Dimitrakis"—which is registered in Cyprus—pending the hearing and final determination of admiralty action No. 54/73.

30 The Judge did not dismiss the said application on its merits, but he dismissed it only as an *ex parte* application and directed that it should be made by summons.

35 The admiralty action in question was filed by the appellants, as plaintiffs, on November 14, 1973; it is an action against both the said ship and its owners, the Stella Shipping Company Ltd.

The defendants, who are the respondents in this appeal, appeared in the action on December 14, 1973. On September 18, 1975, the appellants applied for, *ex parte*, and obtained,

1976  
Dec. 21  
—  
GERLING  
KONZERN  
ALLGEMEINE  
VERSICHERUNGS  
A.G. (No. 2)  
v.  
SHIP  
"DIMITRAKIS"  
AND ANOTHER

on the same date, an order under section 30 of the Merchant Shipping (Registration of Ships, Sales and Mortgages) Law, 1963 (Law 45/63) prohibiting any dealing with the defendant ship until the determination of the action; but, after counsel for the defendants had been heard, the Judge discharged the said order, on November 16, 1976. Then, on that date, another *ex parte* application was made, as already stated, for an order restraining any dealing with the defendant ship; this time the application was made under section 32 of the Courts of Justice Law, 1960 (Law 14/60). The trial Judge refused to make such an order *ex parte* and, as a result, the present appeal has been filed by the appellants.

In deciding whether or not notice of this appeal should be given to the respondents we have to examine if they are "parties directly affected" by it, in the sense of rule 5 of Order 35 of the Civil Procedure Rules, which reads as follows:-

" 5. The notice of appeal shall, within the appropriate period prescribed by rule 2 of this Order, be served together with an office copy of the judgment or order appealed from upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Court of Appeal may direct notice of the appeal to be served on all or any parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may be just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties."

This rule corresponds to what was, up to 1956, rule 2 of Order 58 of the Rules of the Supreme Court in England (see the Annual Practice, 1955, p. 1247). Now the corresponding rule in England is rule 3 of Order 59, which, by means of its paragraph 5, makes a slightly different provision from our own, namely that a notice of appeal "must be served on all parties to the proceedings in the Court below who are directly affected by the appeal" (see the Supreme Court Practice, 1976, Part 1, p. 847); and it may be added that, in this respect, rule 3 of Order 59, above, should be read together with rule 8 of the same Order (see p. 861 of the Supreme Court Practice, *supra*).

We do not have to give an exhaustive definition of what is

a party "directly affected" by an appeal, in the sense of rule 5 of our Order 35, as we have no difficulty in saying that, in the light of the circumstances and the history of the proceedings of the present case, the defendants are, in our opinion, parties directly affected by the appeal now before us.

1976  
Dec. 21  
—  
GERLING  
KONZERN  
ALLGEMEINE  
VERSICHERUNGS  
A.G. (No. 2)  
v.  
SHIP  
"DIMITRAKIS"  
AND ANOTHER

We are reinforced in our above view by the approach which was adopted by the Court of Appeal in England in *Gillooly v. Gillooly*, [1950] 2 All E.R. 1118; the relevant part of the head-note of the report of that case reads as follows:—

10 "Appeal by the husband against the order of His Honour JUDGE RHODES sitting as divorce commissioner, dated June 21, 1950, dismissing the husband's petition for dissolution of marriage on the ground of the wife's desertion.

The petition was undefended .....

15 The case is reported on two points only—(i) the right of a spouse who has not defended a divorce petition to appear as respondent to an appeal to the Court of Appeal, and (ii) the exercise of the discretion of the Court where a full confession is made after an incomplete one."

20 In his judgment (at pp. 1118–1119) Bucknill L. J. said:—

25 "After the husband's legal advisers had served on the wife a notice of appeal, her solicitors prepared the usual memorandum of appearance by a wife respondent. The Divorce Registry refused to accept it in its ordinary form because she had not appeared at the hearing, and the memorandum of appearance was altered to make it an appearance only in regard to the appeal. If the matter rested on the Matrimonial Causes Rules, 1947, I should have considerable difficulty in saying that a wife who acted as the wife did in this case had any right to argue on the husband's appeal, but I think the matter is made clear by the Rules of the Supreme Court which apply to the Divorce Court except in so far as they are amended by, or are in direct variance with, the Matrimonial Causes Rules. By R.S.C., Ord. 58, r. 1:

35 'All appeals to the Court of Appeal shall be by way of re-hearing...'

By r. 2:

40 'The notice of appeal shall be served upon all parties directly affected by the appeal...'

1976  
Dec. 21  
—  
GERLING  
KONZERN  
ALLGEMEINE  
VERSICHERUNGS  
A.G. (No. 2)  
v.  
SHIP  
"DIMITRAKIS"  
AND ANOTHER

A notice of appeal was quite properly served on the wife. The fact that she had not appeared did not take her out of the category of a 'party'. In *Re Evans\**, LINDLEY, L.J., said [1893] 1 Ch. 264):

'The defendant has not appeared, and it has been contended that he therefore is not a party to the action; but I think that he became such when he was served'. 5

The wife in this case was served with the petition and with the notice of appeal. Is she directly affected? She is still the husband's wife and does not cease to be so until the decree absolute is made. The result of this appeal, if successful, will be that a decree nisi may be made against her followed by a decree absolute and she will cease to be a wife and to have the rights which she has as a wife. It is quite impossible to argue that she is not a party directly affected by the appeal. I think, therefore, that we were right in allowing counsel for the wife to address us on the merits". 10 15

The *Gillooly* case is still cited in the Supreme Court Practice, 1976, *supra*, in relation to rule 3 of Order 59 in England, as being relevant to the notion of "party affected". 20

For all the foregoing reasons we direct that notice of this appeal should be given to the defendants, as the respondents, and, then, it should take its normal course.

We shall conclude by stressing that we have dealt with the issue of what is a party "directly affected" for the purposes of this particular case only; whether, in another case, where an *ex parte* application has been refused in any proceedings, without the other side having been already served at all with notice of such proceedings, and an appeal has been made against the refusal of the *ex parte* application, the other side should be deemed to be a "party directly affected" by the appeal, this is a matter which we leave entirely open for the time being. 25 30

*Order accordingly.*

\* [1893] 1 Ch. 252.