

1978 October 21

[MALACHTOS, J.]

MEGAS HADJIEVANGELOU (No. 1),

Applicant—Plaintiff.

v.

1. DORAMI MARINE LTD.,
2. THE SHIP "DORAMI" EX "HELLIAR HOLM",
3. ANDREAS STAVROU MAKRIS,
4. KYRIACOS PETROU,

Respondents—Defendants.

(Admiralty Action No. 87/77).

5 *Admiralty—Practice—Parties—Adding a defendant—Principles applicable—Proposed defendant might have been a defendant in the first instance—And is a company against which relief may be sought by the plaintiff if he is successful in the action—Order adding it as defendant granted—Rules 29 and 30 of the Cyprus Admiralty Jurisdiction Order, 1893—Order 15 rule 6 of the Rules of the Supreme Court in England.*

10 *Admiralty—Practice—Writ of summons—Amendment—Principles applicable—No prejudice to the other side—Application granted—Rule 13 of the Cyprus Admiralty Jurisdiction Order, 1893 and Order 28 rule 1 of the Rules of the Supreme Court in England.*

15 By the present action, which was filed on the 22nd March, 1977, the plaintiff was claiming a declaration of the Court that he is the beneficial owner of 40 shares in the defendant 2 ship. In addition he was claiming wages earned as master of the ship, damages for wrongful dismissal and the sum of C£3,000 for disbursements which he incurred in his capacity as master of the ship.

20 A few days after the filing of this action the plaintiff learned that on the 9th March, 1977, the defendant 2 ship was sold and transferred by defendant 1 company to Andreas Makris Shipping Co. Ltd. The plaintiff alleged that this sale and transfer was

effected with intent to hinder or delay him in recovering the debts due to him and with intention of defrauding him of his rights.

Hence the present application by means of which plaintiff applied (a) for an order of the Court adding Andreas Makris Shipping Co. Ltd. as defendant 5 in these proceedings and (b) for an order of the Court amending the writ of summons by the addition of the following remedies: 5

- “1. A declaration of the Court that the transfer of the defendant No. 2 ship Dorami, which was effected on 9.3.77, is void as far as the plaintiff is concerned as it was fraudulent and was made with intent to prevent and/or delay and/or defraud the plaintiff, who, at all material times was a creditor of defendants No. 1 and who despatched to them notice about his claim through his advocate on the 24th February, 1977. 10 15
2. An Order of the Court cancelling the said transfer of the defendant No. 2 ship ‘Dorami’ by defendants No. 1 to defendants No. 5 and retransferring the said ship to the ownership of defendants No. 1 and/or ordering her direct registration in 40/100 shares in the name of the plaintiff.” 20

Held, granting the application, (1) that a plaintiff is prima facie entitled to choose the person against whom to proceed and to leave out any person against whom he does not wish to proceed; that the Court has a discretionary power at any stage of the proceedings on the application of the plaintiff to add or substitute a defendant whose presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the action (see rules 29 and 30 of the Cyprus Admiralty Jurisdiction Order, 1893); that it is evident that the proposed defendant No. 5 in this action might have been a defendant in the first instance if the plaintiff knew that defendant No. 2 ship had been transferred in its name; that the proposed defendant No. 5 is certainly a company against which relief may be sought by the plaintiff if he is successful in the action; and that, accordingly, the order applied for to add Andreas Makris Shipping Co. Ltd. as a co-defendant should be granted. 25 30 35

(2) That however negligent or careless may have been the first omission and however late the proposed amendment, it should be allowed if it could be made without injustice to the other side; that there is no injustice if the other side can be compensated by costs; that before the hearing, as in the present case, leave is readily granted, on payment of the costs occasioned, unless the opponent will be placed in a worse position than he would have been if the amended pleading had been delivered in the first instance; and that, accordingly, leave to amend should be granted in this case.

Application granted.

Cases referred to:

- Edwards v. Lawther*, 45 L.J. C.P. 417;
Tildesley v. Harper, 10 Ch. D. 393 at p. 396;
Steward v. North Metropolitan Tramways Co., 16 Q.B.D. 556.

Application.

Application by plaintiff for an order of the Court adding a new defendant and for an order amending the writ of summons.

- G. Cacoyiannis* with *M. Papas*, for the applicant.
A. Poetis, for the respondents.

Cur. adv. vult.

MALACHTOS J. gave the following judgment. The applicant plaintiff in this Admiralty Action applies for an Order of the Court that Andreas Makris Shipping Co. Ltd. of Vasileos Pavlou Street, No. 13, Larnaca, be added as defendant 5, in the present proceedings. He also applies for amendment of the writ of summons by the addition of the following remedies:

1. A declaration of the Court that the transfer of the defendant No. 2 ship "DORAMI", which was effected on 9.3.77, is void as far as the plaintiff is concerned as it was fraudulent and was made with intent to prevent and/or delay and/or defraud the plaintiff, who, at all material times was a creditor of defendants No. 1 and who despatched to them notice about his claim through his advocate on the 24th February, 1977.
2. An Order of the Court cancelling the said transfer of the defendant No. 2 ship "DORAMI" by defendants No. 1

to defendants No. 5 and retransferring the said ship to the ownership of defendants No. 1 and/or ordering her direct registration in 40/100 shares in the name of the plaintiff.

The relevant facts appear in the affidavit in support of the application sworn by the plaintiff, and are as follows: 5

By an agreement in writing dated 12th November, 1976, entered into between defendants 3 and 4 in their capacity as Directors of defendant 1 company, and/or in their personal capacity, and the plaintiff, the plaintiff was appointed master of the defendant 2 ship "DORAMI" at the monthly salary of U.S. Dollars 2,500 payable monthly in advance with effect as from 7th November, 1976. It was further agreed between the parties that upon payment by the plaintiff of 40% of U.S. Dollars 64,000 *i.e.* 25,000 Dollars, the plaintiff would be entitled to become the beneficial owner of 40 out of 100 shares in the said ship. 10 15

It is the allegation of the plaintiff that he paid in advance the sum of U.S. Dollars, 11,317 in pursuance of the said agreement and took his appointment as master of the said ship as from 7th November, 1976 and skippered her from England to Cyprus where he arrived on or about the 18th March, 1977. 20

The plaintiff further alleges that he received nothing as against his salary and in addition he incurred disbursements in his capacity as master of the said ship, amounting to C£3,000.- over and above the sum which was provided by the owners of the ship for such expenses. He claims in this action wages for five months which amount to U.S. Dollars 12,500. If to this amount the sum of 11,317 U.S. Dollars already paid by him under the said agreement is added, it makes a total of 23,817 dollars. On this amount if the sum of C£3,000.- is added it becomes evident that the plaintiff has paid more than 40% of the sum of 64,000 dollars being the consideration for his becoming the owner of 40 shares in the said ship. 25 30

By the present action, as originally filed, the plaintiff is claiming a declaration of the Court that he is the beneficial owner of 40 shares in the defendant 2 ship and in addition he has a claim for wages earned as master of the said ship during the period from 7th November, 1976 until 6th April, 1977, when his services were terminated. He also claims damages for wrongful dis- 35 40

missal and the sum of C£3,000.- for disbursements which he incurred in his aforesaid capacity as the master of the ship. In addition, to the above claims the plaintiff claims specific performance of the agreement dated 12th November, 1976, or, 5 alternatively, damages for its breach. On 24th February, 1977, a registered letter was sent to defendant No. 1 company by plaintiff's advocates whereby the said company was called upon to take proper action within seven days in order to carry out its obligations undertaken by the aforesaid agreement. As 10 defendants 1, 3 and 4 failed to perform their part of the said agreement within the aforementioned time, the present action was filed on the 22nd March, 1977.

It is further the allegation of the plaintiff that at the time he was instructing his advocates for the commencement of the 15 present proceedings he was under the impression that defendant 2 ship was still owned and registered in the name of defendant 1 company whose Directors are Andreas Stavrou Makris and Kyriakos Petrou defendants 3 and 4 in this action, respectively. Andreas Stavrou Makris is also a director of Andreas Makris 20 Shipping Co. Ltd. of Larnaca, the proposed defendant 5 in this action and the subscriber of 90 shares out of 100, the subscriber of the remaining 10 shares being Chrystalla A. Makri, who is his wife.

A few days after the present action was filed the plaintiff 25 was informed that on the 9th March, 1977, the defendant 2 ship was sold and transferred by defendant 1 company to Andreas Makris Shipping Co. Ltd.

The plaintiff alleges that this sale and transfer was effected with intent to hinder or delay him in recovering the debts due 30 to him and with intention to defrauding him of his rights under the said agreement.

On the other hand, the defendants opposed the application and in the affidavit in support of the opposition sworn by Andreas Makris, defendant 3 in the action, although he admits 35 the written agreement of the 12th November, 1976, he alleges that he, himself, as well as defendant 4 Kyriakos Petrou, signed this agreement under false pretences by the plaintiff, as they both do not know English and the agreement was in English.

Furthermore, in paragraph 13 of the affidavit in support of

the opposition, it is admitted that the ship in question was sold to Andreas Makris Shipping Co. Ltd. by her former owner, defendant 1.

The application of the plaintiff to add a new defendant is based on rule 30 of the Cyprus Admiralty Jurisdiction Order 1893 which is as follows: 5

“ 30. The Court or Judge may at any stage of the proceedings and either with or without an application for that purpose being made by any party or person and upon such terms as shall seem just, order that the name or names of any party or parties be struck out or that the names of any person or persons who are interested in the action or who ought to have been joined either as plaintiffs or defendants or whose presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the action be added.” 10 15

This rule corresponds to rule 6 of Order 15 of the Rules of the Supreme Court in England (former Order 16) and so useful guidance may be obtained from English Judicial Precedent regarding the case in hand. This rule reads as follows: 20

“ 6.-(1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter. 25

(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application – 30

- (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;
- (b) order any of the following persons to be added as a party, namely – 35
 - (i) any person who ought to have been joined as a party or whose presence before the Court is

necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or

- 5 (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;

10 but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.

- 15 (3) An application by any person for an order under paragraph (2) adding him as a party must, except with the leave of the Court, be supported by an affidavit showing his interest in the matters in dispute in the cause or matter or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter.”

No doubt a plaintiff, as in the present case, is *prima facie* entitled to choose the person against whom to proceed and to leave out any person against whom he does not wish to proceed.

25 This is clear from rule 29 of the Cyprus Admiralty Jurisdiction Order 1893 which provides that “any number of persons having interest of the same nature arising out of the same matter may be joined in the same action whether as plaintiffs or defendants.” It is also clear that under rule 30 of the Cyprus Admiralty Jurisdiction Order 1893 the Court has a discretionary power at any stage of the proceedings on the application of the plaintiff to add or substitute a defendant whose presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the action. In the case of *Edwards v. Lawther* 45

30 L.J. C.P. 417 the plaintiff applied to add one Matthew Green, as a defendant in the action. The action was for libel contained in a newspaper of which the defendant against whom the action had been brought, was the publisher. After delivery of statement of defence, and after issue had been closed, the plaintiff

learned for the first time, from the answers of the defendant to interrogatories which had been administered to him, that Matthew Green was the sole proprietor of the newspaper. Thereupon, a summons at chambers was taken out to add the said Matthew Green as a defendant. The master who heard the summons, being of opinion that the case did not come within the terms of Order XVI rule 13 of the Judicature Act, 1875, under which the application was made, refused to make the order and Denman J., to whom the plaintiff went, by way of appeal from the decision of the master, referred the matter to the Court.

Rule 13 of Order 16 empowers the Court or a Judge, at any stage of the proceedings, and on such terms as may appear just, to order “that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle the question involved in the action be added.”

Lord Coleridge C.J. in delivering the unanimous judgment of the Court had this to say at page 418:

“I am of opinion that this application should be granted. I do not mean to say that the point would be free from argument, if it rested on the terms of rule 13 of Order XVI., but I place my judgment on this, that rules 3 and 13 of the same order are to be read together. Now rule 3 states that ‘all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative’.

It is plain, therefore, from that rule, that the person whom it is now sought to make a defendant, might have been made a defendant in the first instance. Then the 13th rule says, ‘that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined,’ may be added. I think that this means that a person may be added as a defendant who ought to have been such defendant for the purpose of general convenience, and of doing justice in the subject-matter of the suit. Now, as Mr. Green, whom it is proposed to add as defendant, is clearly a person against whom if the plain-

tiff's case is right, relief may be sought, and who might have been made a defendant in the first instance, so I think he is one who may now be properly ordered to be joined as a defendant on such terms as the Court may think just.

5 It is clear, that as a matter of discretion, there may be cases in which such an application as the present may be refused because justice cannot be done if it be granted. But here we can grant it in terms by which justice may be done; and those terms, which, as it appears to me, we

10 ought to impose, are, that this person on being made a defendant, should have the same rights now as he would have had if the action against him were now commenced; and on these terms being secured, I am of opinion that the order asked for should be made."

15 In the case in hand, it is evident that Andreas Makris Shipping Co. Ltd., who is sought to be joined as defendant No. 5 in this action, might have been made a defendant in the first instance if the plaintiff knew that defendant No. 2 ship had been transferred in its name. The proposed defendant No. 5

20 is certainly a company against which relief may be sought by the plaintiff if he is successful in the action.

I, therefore, hold the view that the Order applied for to add Andreas Makris Shipping Co. Ltd. as a co-defendant should be granted.

25 The second leg of the present application which is for the amendment of the writ of summons is based on rule 13 of the Cyprus Admiralty Jurisdiction Order 1893 which provides that "the Court or Judge may allow the writ of summons to be amended at any time in such manner and on such terms as to

30 the Court or Judge shall seem fit".

This rule is similar to Order 28 rule 1 of the Rules of the Supreme Court in England, which provides that the Court or a Judge may, at any stage of the proceedings allow either party to alter or amend his indorsement or pleadings, in such a manner

35 and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

The general principles when leave to amend should be given are stated by L.J. Bramwell in the case of *Tildesley v. Harper*

10 Ch.D. 393 at page 396: “My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise.”

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However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it could be made without injustice to the other side. There is no injustice if the other side can be compensated by costs. Before the hearing, as in the present case, leave is readily granted, on payment of the costs occasioned, unless the opponent will be placed in a worse position than he would have been if the amended pleading had been delivered in the first instance. (*Steward v. North Metropolitan Tramways Co.* 16 Q.B.D. 556).

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In the present application I have carefully considered the arguments of both counsel in the light of the above authorities and I came to the conclusion that leave to amend should be granted.

Therefore, there will be an Order for leave to amend as per application.

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Amended writ of summons to be filed and delivered to the address for service of the original defendants within 14 days as from today.

The case is adjourned to 25th November, 1978, for service on the additional defendant No. 5 and for directions.

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As to the costs of this application, the respondents are entitled to the costs thrown away, with the exception of the costs of the hearing of the application, to which the applicant plaintiff is entitled against the defendants respondents and an Order is made accordingly. These costs to be assessed at the end of the proceedings.

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Application granted.