

(1980)

1980 December 10

[A. Loizou, J.]

ELIAS PHOTIOU,

Plaintiff,

v.

AZEVEDO AND GUIMARAES LTD.,

Defendants.

AND AS AMENDED BY ORDER OF THE COURT DATED
24.6.78.

ELIAS PHOTIOU,

Plaintiff,

v.

1. AZEVEDO AND GUIMARAES LTD.,
2. PARTREDEREIT BECH IX WILH CHRISTOPHER BECH,
3. COMARINE LTD.,

Defendants,

and

AZEVEDO AND GUIMARAES LTD.,

Third Party.

(Admiralty Action No. 74/76).

Practice—Third party notice—Leave to issue—Discretion of the Court—Principles applicable—No prima facie case made out by applicant—Application refused—Order 16 rules 1(1) and 2 of the Old English Rules of the Supreme Court.

By means of a writ of summons, filed on May 24, 1976, the plaintiff in this action claimed special and general damages for injuries sustained by him whilst engaged as a stevedore on motor vessel "INGEBECH". Originally his claim was against one defendant, namely "Azevedo and Guimaraes Ltd." who were the owners of the said vessel but after the close of the pleadings and the fixing of the case for hearing defendants

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2 and 3 were, on June 24, 1978, joined as parties on the application of the plaintiff. Defendants 3 filed their answer on June 6, 1979 and on July 6, 1979 they served a third party notice on defendant 1 by means of which they claimed to be indemnified against plaintiff's claim and costs in this action on the ground that defendants 3 were the agents of defendants 1.

On September 2, 1980, and on the eve of the date that the above action was to come up once more for hearing, defendants 3 applied for leave to issue third party notice No. 2 and leave to issue and serve a third party notice No. 2 on Sunderland Steamship Protecting and Indemnity Association of the United Kingdom ("the proposed third party").

The facts relied upon by the applicant in support of the application were that the proposed third party was liable to the applicant (defendant 3) "for breach of agreement with defendant 3, agent of the defendant 2, to undertake the defence and payment of the alleged claim of the plaintiff".

On September 3, 1980, counsel appearing for defendant 1 informed the Court that his instructions to defend defendant 1 as such and as third party had been withdrawn by the proposed third party and that he had notified the plaintiff and defendants 3 about this fact.

Held, that if a prima facie case is made out leave will be granted to issue the third party notice (see Order 16 rule 1(1) of the Old English Rules of the Supreme Court); that defendants 1, were on the application of the present applicant, made a third party; that the fact that defendants 1 are no longer represented by counsel on instructions from the proposed third party does not change the legal position nor the instructions of counsel to represent defendant 1, amount to a representation, which makes it, on grounds of equity, necessary to be joined as third parties; that no facts have been stated in the affidavit of the applicants out of which their claim against the proposed third party arises; that, on the material before this Court, a prima facie case has not been made out which will bring the matter within the above rule; and that, accordingly, the application must fail.

Per curiam:

Even if I were to accept that a prima facie case has been made out by the material placed before me, I would

still refuse this application on the principle that this application has been made too late as same should have been made promptly and as a general rule within the time limited for delivering the defence and at the latest before the close of the pleadings; (see *The Birmingham and District Land Company Limited v. The London and North-Western Railway Company, No. 2(a)* [1887] Vol. 56 L.T.R. pp. 702-703). 5

The facts alleged in the affidavit as having necessitated the filing of this third party notice at such a late stage are not sufficient to justify such a delay. 10

Application dismissed.

Cases referred to:

- Furness Withy & Co. Ltd. v. Pickering* [1908] 2 Ch. 224;
- Edison & Co. v. Holland*, 33 Ch. D. 497; 15
- Carshore v. N.E. Ry.* 29 Ch. D. 344;
- Baxter v. France* [1895] 1 Q.B. 455; [1895] 1 Q.B. 591;
- Swansea Shipping Co. v. Duncan*, 1 Q.B.D. 644;
- Bower v. Hartley*, 1 Q.B.D. 652;
- Djema! v. Zim Israel Navigation Co. Ltd.* (1967) 1 C.L.R. 227; 20
(1968) 1 C.L.R. 309;
- Skapoullaros v. Nippon Yusen Kaisha and Another* (1979) 1 C.L.R. 448.

Application.

Application by defendant No. 3 for leave to issue and serve third party notice No. 2 on Sunderland Steamship Protecting and Indemnity Association of the United Kingdom. 25

Fr. Saveriades, for the applicant.

St. McBride, for the respondents.

Cur. adv. vult. 30

A. LOIZOU J. read the following decision. By this action the plaintiff claims special and general damages for injuries, loss and damage sustained by him whilst engaged as a stevedore on motor vessel "INGEBECH", at the port of Limassol as a result of the negligence and/or breach of statutory duty on the part of the defendant and their servants or agents and breach of contract by the defendant. 35

Originally there was one defendant, namely Azevedo and Guimaraes Ltd., of Portugal, who were the owners of the said vessel and were sued as such "and as owners and/or persons having the management or control of a winch which operated
5 on the said vessel".

After the close of the pleadings and the case was fixed for hearing, an application was filed on behalf of the plaintiff to join two new parties as defendants 2 and 3 and to amend the title of the action and the writ of summons and the petition.

10 After due service was effected an amended petition and the answer thereto was filed by defendants 1 and 3. The latter served a third party notice on defendant 1 claiming thereby from the said defendant to be indemnified against the plaintiff's claim and costs of the action and/or damages on the ground
15 that they were their agents acting for and on their behalf, and liability, and that the plaintiff and/or other persons were employed for and on their behalf, and liability for the unloading and/or unloading operation of the said vessel, and/or for breach by them of express and/or implied agency agreement made
20 between them and that the alleged injuries and damages caused to the plaintiff were due to the said defendants and/or their servants and/or employees' negligence and/or statutory duty.

An application was then filed for an order for third party directions which were by consent granted and the necessary
25 steps were taken thereunder. An answer was also filed by defendant 2.

On the eve of the date that this case was to come up once more for hearing the present application by summons was filed on behalf of defendant 3 praying for the following:

30 "(A) Leave to issue third party notice No. 2 and leave to the defendant No. 3 to issue and serve a third party notice No. 2 on Sunderland Steamship Protecting and Indemnity Association of the United Kingdom.

55 (B) Leave of the Court to serve notice of the Third Party notice No. 2 of the above number and title action on the above named third party No. 2 at 39/55 Hse Borough Road, Sunderland, Tyre-Wear, Tavistock, United Kingdom."

The plaintiff and Messrs. Chr. Demetriades and Co., who were acting until then for both defendants 1 and 2 were the parties named in the summons for service thereof.

On the 3rd September 1980, the date that the case was fixed for hearing, Mr. McBride informed the Court formally that his instructions to defend defendant 1, as such and as third party to the proceedings had been withdrawn and that he had notified the plaintiff and defendant 3 on the fact. 5

Mr. Saveriades in a statement to the Court explained that when he was informed about it he thought it necessary to file the present application and that he would see that same was to be served on the plaintiff and the defendant that had not until then been served. An oral application was then made for judgment against defendant 1 with reservation of the right to proceed for hearing and judgment against defendants 2 and 3. That was, however, deferred until after the determination of the present application which was then adjourned at applicant's request for the necessary service to be effected and oppositions to be filed, in fact the only opposition filed is that of defendant 2. 10 15 20

The facts relied upon by the two sides are to be found in the affidavits accompanying the application and the opposition as well as to a number of telexes that have been exchanged and are attached thereto. The basis of which, the Sunderland Steamship Protecting & Indemnity Association of the United Kingdom (hereinafter to be referred to as the P. & I.) which is sought to be made a third party as being liable to defendant 3, is stated to be "for breach of agreement with defendant 3, agent of the defendant 2, to undertake the defence and payment of the alleged claim of the plaintiff and/or in equity liable towards the defendant 3 as the P. & I. is estopped to withdraw from defending the claim and/or withdrawal of the advocates appointed by them in defending the defendant 1 and third party upon whose undertaking the defendant 3 acted and suffered damage and/or detriment". 25 30 35

The legal position of this P. & I. Association is sought to be established by the telexes exchanged and by the fact that they had instructed counsel to appear on behalf of defendants 1. Nowhere from the said telexes there can be deducted that this

Association has undertaken any obligation to pay the claim. In fact, in *exhibit 4*, they speak of "in order to persuade Azevedo to accept judgment in toto, would you reduce your claim to C£300.-. Your early reply would be much appreciated so we can put firm proposition to Azevedo for approval preferably to-day".

Moreover the allegation of an existence of an agreement is veiled with great uncertainty and the maximum one can deduct from the whole tenor of the affidavit is that defendant 3 relied on some agreement, the terms of which are not brought to the attention of the Court and which in any event had been entered between the said P. & I. Club and defendants 1 and that it should be treated as extending to cover their liability, if defendant 3 were held liable to the plaintiff in respect to the alleged negligence. This P. & I. Club is clearly sought to be made a party because they withdrew the instructions from counsel to appear for defendant 1, as such, in his capacity of a third party.

On the other hand, in the affidavit of defendant 2 it is stated: "The defendant 1 was entered with the P. & I. Club in question. The role of the P. & I. Club was and is to undertake and pay for the defence of any of its members sued, but in no event was it their obligation nor did they ever undertake to pay any sum awarded. Any settlement or judgment funds were always to come from the member or in this case the defendant 1".

Under Order 16 rule 2 the Court has a general discretion in all cases whether it will allow or not a third party notice to issue. As stated in the Supreme Court Practice, 1958, the practice is that if a *prima facie* case is made out, which would bring the matter within any paragraph of rule 1(1) leave will be granted to issue the notice (see as to the former practice, *Furness, Withy & Co. Ltd. v. Pickering*, [1908] 2 Ch. 224); and the Court will not, in granting leave, consider the merits of the claim (*Edison & Co. v. Holland*, 33 Ch. D. 497; *Carshore v. N. E. Ry.*, 29 Ch. D. p. 344), but will leave these matters and objections by the plaintiff to be dealt with upon the application for directions under r. 7; see *Baxter v. France*, [1895] 1 Q.B. 455; *Furness v. Pickering*, *supra*.

Also the procedure will not be allowed where the result will

be to embarrass or delay the plaintiff (*Swansea Shipping Co. v. Ducan*, 1 Q.B.D. 644; *Bower v. Hartley*, 1 Q.B.D. 652; *Carshore v. N. E. Ry.*, 29 Ch. D. 344), nor where the questions at issue cannot be completely disposed of in the action (*Baxter v. France*, [1895] 1 Q.B. 591). But again these matters will be considered on the application for directions not on the application for leave to issue. 5

In the present case I cannot say on the material before me that a prima facie case has been made out which will bring the matter within any paragraph of Order 16 rule 1. Defendant 1 has already been made a third party with regard to defendant 3. If defendants 3 are found to be the agents then they have no liability on the principles stated in *Djemal v. Zim Israel Navigation Co. Ltd.* and *Another* (1967) 1 C.L.R. 227; (1968) 1 C.L.R. 309 (C.A. applied), followed recently in the case of *Costas Michael Skapoullaros, v. 1 Nippon Yusen Kaisha, 2. A. L. Mantovani & Sons Ltd.*, (1979) 1 C.L.R. p. 448. 10 15

If on the other hand they have acted in any way independently of their alleged relationship of agency with defendant 1, then any obligations—about which nothing has been said clearly in the affidavit of the applicants—that may exist between the aforesaid P. & I. Club and defendant 1, cannot extend to defendant 3. In the affidavit of the applicants there should have been stated facts out of which the claim against the third party arises. Nothing of that sort has been stated, except a vague allegation of an agreement besides the contents of the various telexes which do not make out a prima facie case which would bring the matter within any of the provisions of the relevant rule entitling me to grant leave for the issue of a third party notice. 20 25 30

With regard to the contents of this agreement and the relationship of P. & I. Clubs with ship-owners, counsel for the applicant has asked me to examine what is stated in the *British Shipping Laws*, volume 13 "Ship-owners" p. 207 (1967) et-seq. I am afraid I cannot accept the contents of a text-book as being evidence of the terms, if such agreement exists, between a ship-owner and a P. & I. Club and also decide therefrom its legal effect. 35

Even if I were to accept that a prima facie case has been made out by the material placed before me, I would still refuse this 40

application on the principle that this application has been made too late as same should have been made promptly and as a general rule within the time limited for delivering the defence and at the latest before the close of the pleadings. (See *The Birmingham and District Land Company Limited v. The London and North-Western Railway Company, No. 2(a)* [1887] Vol. 56 L.T.R. pp. 702-703).

The facts alleged in the affidavit as having necessitated the filing of this third party notice at such a late stage are not in my view sufficient to justify such a delay. Defendant 1, was on the application of the present applicant, made a third party. The fact that they are represented no longer by counsel on instructions from the P. & I. Club in question, does not change the legal position nor the instructions of counsel to represent defendant 1, amounts to a representation, which makes it, on grounds of equity, necessary to be joined as third parties. Their act, was nothing else but to see that defendant 1 would be represented and defended in Court.

For all the above reasons this application is dismissed with costs against the applicant.

Application dismissed with costs.