1981 April 22

[SAVVIDES, J.]

ALMANA ENGINEERING & CONTRACTING CO. AND ANOTHER,

Plaintiffs,

v.

GLYFOS COMMERCIAL & SHIPPING CO. LTD., AND OTHERS,

Defendants.

(*Admiralty Actions Nos.* 47/77 *and* 69/77).

Admiralty—Practice—Costs—Security for costs—Plaintiffs not resident in Cyprus—Discretion of the Court—Much narrower than that existing in England—Rules applicable—Rule 185 *of the Cyprus Admiralty Jurisdiction Order* 1893, *comparable to rule* 1 *of Order* 60 *of the Civil Procedure Rules but not corresponding to English rule* 1 *of Order* 23—*Desirability of comparable amendment of Cyprus Rules to bring them into line with English Rules—Time—Not a bar to an application for security for costs—Counterclaim by defendants—Not a ground for refusing application for security for costs—Security for releasing goods cannot be considered as security for costs of the action—Application granted.*

By means of Actions filed in February and March, 1977, the plaintiffs in these actions, who were foreigners and not resident in Cyprus, claimed damages in respect of an alleged breach of contract for the carriage by the defendants of goods belonging to them. The pleadings were closed in January, 1980 and in April, 1980 the defendants relying on rules 185* and 237**

* Rule 185 reads as follows:

"If any Plaintiff (other than a seaman suing for his wages or for the loss of his clothes and effects in a collision) or any Defendant making a counterclaim is not resident in Cyprus, the Court or Judge may, on the application of the adverse party, order him to give such security for the costs of such adverse party as to the Court or Judge shall seem fit; and may order that all proceedings in the action be stayed until such security be given".

** Rule 237 reads as follows:

"In all cases not provided by these Rules, the practice of the Admiralty Division of the High Court of Justice of England, so far as the same shall appear to be applicable shall be followed".

of the Cyprus Admiralty Jurisdiction Order, 1893 applied for an order directing the plaintiffs to give security for costs.

Counsel for the plaintiffs opposed the application by contending:

(a) That the plaintiffs have already given security for the release of the goods to the extent of the amount claimed as damages by the defendants in their counterclaim and in consequence this is a case where the Court should exercise its discretion against the making of the order;

(b) that the application has been made at a very late stage;

(c) that once there is a counterclaim the defendants cannot ask security for costs.

Held, (I) *on the question of the Rules governing the application:*

(1) That rule 237 of the Cyprus Admiralty Jurisdiction Order, 1893 does not come into play in the present case as there is express provision in the Cyprus Admiralty Rules (rule 185) as to the power of the Court to make an order for security for costs; that in consequence this application has to be considered in the light of the provisions of rule 185 (see *Senior Service Ltd. and Others* v. *Chrysanthi Shipping Co. Ltd. and Another* (1975) 1 C.L.R. 316 at p. 318); and that though this Court fully agrees with and adopts the view (see, *inter alia*, *Ashour* v. *Claudia Maritime Co. Ltd.*, (1980) 1 C.L.R. 64) that rule 185 is comparable to rule 1 of Order 60 of the Civil Procedure Rules, it is not, however, prepared to go so far as to agree that rule 185 corresponds to English rule 1 of Order 23.

Held, (II) *on the merits of the application*:

(1) That the security for the release of the goods was given to enable the plaintiffs to take such goods outside the jurisdiction of the Court and to secure the lien claimed by the defendants over such goods and not as security for costs; that nothing has been included in that order in respect of the costs of the action or the counterclaim; and that, therefore, such security cannot be considered as covering the costs of the action and precluding the defendants from claiming security for costs; accordingly contention (a) must fail.

(2) That under rule 185 of the Cyprus Admiralty Jurisdiction Order, 1893 no time limit is mentioned for making an application for security for costs and in the corresponding Order 60, rule 1 of the Civil Procedure Rules it is expressly stated that an application may be made "at any stage of the action"; that, therefore, time cannot be a bar to such an application; accordingly contention (b) must fail.

(3) That the question of the existence of a counterclaim is not a ground for refusing an order for security for costs and in case where the defendant making a counterclaim is not resident in Cyprus, there is power in the Court to order him to give security for costs; accordingly contention (c) must, also, fail.

(4) That the new English rule 1, Order 23, widened the scope of the old rule and has introduced a real discretion by virtue whereof the Court is bound to consider all the circumstances of each case; that the discretion under rule 185 of the Cyprus Admiralty Rules as well as that under Order 60, rule 1 of the Civil Procedure Rules is a much narrower discretion than that existing today in England under the new Rules and does not force the Court to go into the merits of the case and take into consideration what is alleged in the pleadings before deciding whether an order should be made; that irrespective as to whether the nature of the discretion is wider under rule 21 of Order 23 of the English Rules, compared to the Cyprus Rules or not, it has been the practice of this Court that where the plaintiff is resident abroad and this fact appears on the writ of summons, to order the plaintiff to give security for costs on the application of the defendant; and that, therefore, this Court has decided to grant the applications and to order the plaintiffs to give security for costs in the sum of C£350 in each of the above actions.

Applications granted.

Observations with regard to the desirability of comparable amendment of our Civil and Admiralty Rules so as to bring them in line with the English Rules.

Cases referred to:

World Shipping Corporation v. *Vassiliko Cement Works Ltd.* (1979) 1 C.L.R. 242;

Karamailis (*No.* 1) v. *Pasparo Shipping Company Ltd.* (1972) 1 C.L.R. 1;

Karamailis (*No.* 2) v *Pasparo Shipping Co. Ltd.* (1972) 1 C.L.R. 72;

Senior Service Ltd. and Others v. *Chrysanthi Shipping Co. Ltd. and Another* (1975) 1 C.L.R. 316 at pp. 318 and 319;

Hesham Enterprises v. *The Ship "Rami" and Others* (1978) 1 C.L.R. 195 at p. 198;

Aeronava SPA and Another v. *Westland Charters Ltd. and Others* [1971] 3 All E.R. 531;

Ashour v. *Claudia Maritime Co. Ltd.* (1980) 1 C.L.R. 64;

Re Percy & Kelly [1876] 2 Ch. D. 531 at pp. 531 and 532;

Republic of Costa Rica v. *Enlarger* [1876] 3 Ch. D. 67 at p. 69;

Crozat v. *Brogden* [1894] 2 Q.B.D. 30 at p. 34;

General Engineering Co. Ltd. v. *Seddon Atkinson Vehicles Ltd.* (1975) 1 C.L.R. 278 at p. 284;

Esta Shipping Co. Ltd. v. *Laskos* (1976) 1 C.L.R. 22.

Applications.

Applications for an order directing the plaintiffs to give security for the costs of defendants 1 and 3 and for an order for a stay of the proceedings until the security is given.

E. Psyllaki (*Mrs.*), for the applicants.

C. Velaris, for the respondents.

Cur. adv. vult.

SAVVIDES J. read the following judgment. At this stage of the proceedings the Court had to deal with applications for security for costs in each of the above actions respectively, on behalf of defendants 1 and 3 in both actions, which were heard together as presenting common questions of law and fact.

The plaintiffs' claims in these actions are for U.S. dollars 50,000 as damages, in Action No. 47/77, and U.S. dollars 140,000 damages in Action No. 69/77, in respect of an alleged breach of contract for the carriage by the defendants of goods belonging to the plaintiffs which, according to the bills of lading were loaded on the ship "SPICA" ex "DESTINY" for transportation

to Doha, Qatar. The freight for the carriage of the said goods had been fully prepaid. It is alleged that the defendants in breach of the said contract of carriage, instead of transporting the goods to Qatar they brought them to Limassol and discharged them there. As a result of such breach, the plaintiffs suffered damages consisting of storage fees, loading expenses on another ship and freight from Limassol to Qatar, insurance expenses, value for goods which were destroyed and miscellaneous other expenses for the transportation of such goods to their destination.

By their answer the defendants deny any breach of contract on their part and allege breach on the part of the defendants in refusing to take delivery of the said goods at their destination, as a result of which the goods had to be transported to Cyprus. As a result of such breach, they allege that they suffered damages for expenses and charges incurred, in respect of which defendants 1 counterclaim the sum of U.S. dollars 2, 325 in Action No. 47/77 and U.S. dollars 7,946 in Action No. 69/77.

As a result of an interlocutory application on behalf of the plaintiffs for the release of the goods from the bonded warehouse in Limassol, plaintiffs agreed to give security to the extent of the amounts counterclaimed by defendants 1 as damages, and such goods were consequently released.

At an early stage of the proceedings the action against defendants 2 was withdrawn as service could not be effected. Defendants 1 and 3 filed the present applications in both these actions, asking security for costs against the plaintiffs, on the ground that plaintiffs are resident abroad. In the course of the hearing of such applications, the action against defendants 3 was withdrawn and, subsequently, dismissed with costs in their favour and the applications were continued by defendants 1, the only remaining defendants in the proceedings.

The facts relied upon in support of the applications are that the plaintiffs are companies ordinarily resident out of Cyprus without any assets within the jurisdiction. The application was opposed and the affidavit in support of the opposition sworn by the clerk of counsel for the plaintiffs, deals with the merits of the case alleging, *inter alia*, that the "plaintiffs further believe and they have been duly advised that the defendants do not have a valid defence". It is further alleged in the affidavit

that defendants 1 failed to comply with the directions concerning the filing of pleadings and that they purposely protracted such delay for the purpose of divesting themselves of any property or any assets within the jurisdiction. There are further allegations of oral undertakings by counsel acting for defendants 1 that defendants would refrain from alienating their ship until the final determination of the action and that in failure of such undertaking, the ship owned by defendants 1 was struck off the Register of Cyprus Ships on 7.6.1979.

In reply to such affidavit, counsel for defendants 1 by their affidavit sworn by Efti Psillaki, one of the advocates appearing for defendants 1, strongly denied the allegations of the other side, and at the same time alleged that there was more delay by plaintiffs to comply with the directions of the Court concerning pleadings. Furthermore, any delay on the part of the defendants to file pleadings, did not deprive the plaintiffs of their right to apply for the proceedings to continue in default of pleadings on the part of the defendants.

Once the matter of delay has been raised by the parties, I shall briefly deal with the history of the proceedings.

The writ of summons in Action No. 47/77 was issued on the 17th February, 1977 and in Action No. 69/77 on the 8th March, 1977. After certain interlocutory proceedings concerning security to be furnished for the release of the cargo, directions were made on the 2nd July, 1977 for pleadings to be exchanged between the parties. According to such directions, the plaintiffs had to file and deliver their petition within two months and defendants to file their answer within two months thereafter and in case of any reply, to the answer, same should have been filed within 15 days from the filing of the answer. The petition in Action No. 47/77 was filed on the 5th January, 1978, that is, six months after the date when the order for the filing of the petition was made and in Action No. 69/77 on the 19th May, 1979, after repeated extensions of time for such filing. Defendants 1 filed their answers with counterclaims in both actions on the 14th September, 1979 and the replies to such answers were filed by counsel for the plaintiffs on the 8th January, 1980.

It is clear from the record that the delay of the defendants in complying with the directions for pleadings which is alleged

to have been done intentionally, cannot stand, as the plaintiffs themselves were in considerable delay in complying with the directions of the Court for filing their own pleadings which, delay, in Action No. 69/77, is a delay of more than 20 months from the date when the order for filing of pleadings was made. Therefore plaintiffs cannot blame the other side for delay, once they themselves have been the initiators of considerable delay in both actions. On the other hand, there was nothing preventing the plaintiffs, had they acted with due diligence in filing their pleadings in time, to apply for judgment by default of pleadings against defendants, if, as they allege, such delay might have been detrimental to their case.

The applications are based on rules 185, 203, 204, 207, 208 and 237 of the Rules of the Supreme Court in Cyprus in its Admiralty Jurisdiction (Cyprus Admiralty Jurisdiction Order 1893) and on the inherent jurisdiction and general powers of the Court.

Counsel for applicants submitted that the applications were very simple and that under the provisions of rule 185 of the Rules of the Supreme Court in its Admiralty Jurisdiction the Court was empowered to order security for costs against the plaintiffs, once it is not disputed that such plaintiffs are foreign plaintiffs with no property within the jurisdiction. Counsel then dealt with the merits of the case and the fact that not only the defendants had a good defence but also they had a counterclaim against the plaintiffs.

Counsel for the respondents on the other hand submitted that this was a matter within the discretion of the Court and that in the circumstances of the present case the Court should exercise its discretion in favour of the respondents, taking, *inter alia*, into consideration the fact that the plaintiffs have already given security for the release of the cargo over which the defendants claimed a lien on which they based their counterclaim. He further submitted that the defendants have filed an application at a very late stage of the proceedings and that if the Court in any event grants the application, then no consideration should be taken for the costs already incurred till the filing of the application due to such long delay on the part of the defendants in applying for security for costs.

Both counsel in arguing their case referred to the case of *World Shipping Corporation* v. *Vassiliko Cement Works Ltd.*

(1979) 1 C.L.R. 242 decided by me as to the principle underlying the discretion of the Court in making an order for security for costs. The issue in that case, however, was not as to the power of the Court to grant or refuse an order but as to the amount of security to be given. Both counsel were in agreement as to the power of the Court to make such order and both referred to Order 23, rule 1 of the English Rules concerning the criteria for the amount of such security. Any reference therefore, in that judgment to the notes in the Annual Practice, is an exposition of the practice followed in England touching the question of the discretion of the Court in making an order for security for costs and, also, as to the amount of the security to be given, the latter only having been the issue before me in that case.

The question for security for costs came before our Supreme Court in a number of cases. In *Pantelis Karamailis (No. 1) v. Pasparo Shipping Company Ltd.* (1972) 1 C.L.R. 1, the Court made an order for security for costs without going into the merits of the case and after it had been satisfied that the plaintiff was not resident within the jurisdiction. The decision of the Court was affirmed on appeal (vide *Pantelis Karamailis* (No. 2) v. *Pasparo Shipping Co. Ltd.* (1972) 1 C.L.R. 72). In *Senior Service Ltd. and Others* v. *Chrysanthi Shipping Co. Ltd. and another*, (1975) 1 C.L.R. 316, Malachtos, J. had this to say at page 318:

> "It is clear from the above Rule that the Court may order security for costs if the plaintiff or any defendant making a counterclaim is not resident in Cyprus. In the present case it is not disputed that the plaintiffs are not residing in Cyprus. Therefore, on the face of the application the applicants are entitled to the order applied for".

And then, after referring to rule 237 of the Cyprus Admiralty Jurisdiction Order 1893 which provides that in all cases not provided by such rules, the practice of the Admiralty Jurisdiction of the High Court of Justice of England, so far as the same shall appear to be applicable, shall be followed, had this to say at page 318:

> "I must say straight away that this practice does not apply in the present case in view of the fact that there is a special provision and that is, rule 185 under which the present application is made".

And at page 319:

"With regard to ground 2 that no allegation is made in the said affidavit as to what is the defence, useful guidance may be obtained from our Civil Procedure Rules, Order 60, which provides for security for costs. Under Order 48, rule 9 (t) an application under Order 60 for security for costs if the fact relied upon is plaintiff's residence out of Cyprus and such fact appears on the writ, as in the present case, then the application for security for costs need not be accompanied by affidavit".

In *Hesham Enterprises* v. *The ship "RAMI" and others* (1978) 1 C.L.R. 195, Triantafyllides, P. had this to say at p. 198:-

"I was referred, in this connection, to Order 48, rule 9()), of the Civil Procedure Rules, whereby it is provided that an application for security of costs made under Order 60 need not be accompanied by an affidavit if the fact relied upon is plaintiff's residence out of Cyprus and such fact appears on the writ of summons.

I am in agreement with the view expressed by Malachtos J. in *Senior Service Ltd., and Others* v. *Chrysanthi Shipping Co. Ltd. and another* to the effect that the above rule 9(t) affords useful guidance in relation to an application for security for costs in an admiralty action".

Then he proceeds at the same page to deal with the position in England in the light of the *Aeronave SPA and another* v. *Westland Charters Ltd. and Others* [1971] 3 All E.R. 531 as follows:-

"Moreover, as has been held in *Aeronave SPA and another* v. *Westland Charters Ltd. and others* [1971] 3 All E.R. 531, although it is not an inflexible rule that, but a matter of discretion whether, a foreign plaintiff should be ordered to provide security for costs, it is the usual practice to order so if the justice of the case demands it".

And he concludes his judgment as follows at page 199:-

"Under our rule 185, above, I have to exercise a discretion regarding the making of an order for security for costs in the present instance.

I am of the view that this is a proper case in which to make such an order, especially as it is apparent on the face of the writ of summons that the respondents are a foreign concern and it is not disputed that their residence is abroad and that they have no assets within the jurisdiction of this Court.

I do agree, however, with counsel for the respondents that in the absence of an affidavit in support of this application for security for costs I have to rely only on the material apparent on the face of the record, without taking into account matters which normally would have had to be proved by such an affidavit and which have only been mentioned in the course of the submissions of applicants' counsel".

In *Farah Hassan Ashour* v. *Claudia Maritime Co. Ltd.* (1980) 1 C.L.R. 64, in which the plaintiff was claiming special and general damages for personal injuries suffered by him whilst in the employment of the defendants in the course of his duties on board the ship "Valle De Pecadura" and which was not a case falling under the reservation of Order 185 whereby no security for costs should be given by a seaman suing for his wages, an order for security for costs was made and the Court had this to say (per A. Loizou, J. at p. 66):-

"As rightly pointed out in the case of *Hesham Enterprises* v. *Ship Rami* (1978) 1 C.L.R. p. 195, the above rule (rule 185 of the Cyprus Admiralty Jurisdiction Order 1893) is comparable to rule 1 of Order 60 of the Civil Procedure Rules.

The corresponding English rule is now rule 1 of Order 23 of the Rules of the Supreme Court of England which though differently worded from our aforementioned rule 185, is, as pointed out by Triantafyllides, P. in *Hesham* case (*supra* at p. 198) sufficiently similar with our rule in material respects so that the cases that turn on its construction, such as the Aeronave SPA and *Another* v. *Westland Charters Ltd. and Others* [1971] 3 All E.R. 531, can be of guidance for the purposes of applications for security for costs under our rule 185".

Rule 185 of the Cyprus Admiralty Jurisdiction Order 1893 on which the applications are based, provides as follows:-

"If any Plaintiff (other than a seaman suing for his wages or for the loss of his clothes and effects in a collision) or any Defendant making a counterclaim is not resident in Cyprus, the Court or Judge may, on the application of the adverse party, order him to give such security for the costs of such adverse party as to the Court or Judge shall seem fit; and may order that all proceedings in the action be stayed until such security be given".

And rule 237 of the same rules reads:-

"In all cases not provided by these Rules, the practice of the Admiralty Division of the High Court of Justice of England, so far as the same shall appear to be applicable shall be followed".

I am in agreement with what was said by Malachtos, J. in *Senior Service Ltd. and Others* v. *Chrysanthi Shipping Co. Ltd. and another* (*supra*) that rule 237 does not come into play in the present case as there is express provision in our Admiralty Rules (rule 185) as to the power of the Court to make an order for security for costs and in consequence the present application has to be considered in the light of the provisions of rule 185.

It was held in the last three cases of this Court (supra) that rule 185 is comparable to rule 1 of Order 60 of the Civil Procedure Rules and I fully agree and adopt such view. I am not, however, prepared to go so far as to agree that our rule 185 corresponds to English rule 1 of Order 23. Rule 1 of Order 60 of the Civil Procedure Rules, reads as follows:-

"A plaintiff ordinarily resident out of Cyprus may, at any stage of the action, be ordered to give security for costs, though he may be temporarily resident in Cyprus".

In the marginal note to rule 1, Order 60 reference is made to the English rule 6(a) of Order 65 of the Rules of the Supreme Court in England in force in 1960, as being the corresponding English rule. Rule 6(a) of Order 65 of the Rules of the Supreme Court in England, reads as follows (vide Annual Practice, 1960):-

"A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs though he may be temporarily resident out of the jurisdiction".

Such rule was in 1962 replaced by rule 1 of Order 23 of the English Rules of the Supreme Court. A material change has been brought about as a result thereof, to the situation prevailing prior to the introduction of the new rule. The new rule, has introduced, a wider scope concerning the discretion to be exercised by the Court when considering an application for security for costs by providing that such order can be made "having regard to all the circumstances of the case the Court thinks it just to do so".

Under the old rule, as it appears from the judgments of the English Courts the practice had become inflexible that in all cases where an action is brought by a plaintiff resident abroad and this fact was established, the Court did not have to go into the merits of the case to decide whether an order for security for costs had to be made considering plaintiff's residence abroad as a sufficient factor to enable the Court to make such order.

In *Re Percy & Kelly etc.* [1876] 2 Ch. D. 531 at pp. 531 and 532, Jessel, M.R. set out the principle governing the granting of an order for security for costs as follows:

> "The principle is well established that a person instituting legal proceedings in this Country and being abroad, so that no adverse order could be effectually made against him if successful, is by the Rules of the Court compelled to give security for costs. That is a perfectly well-established and perfectly reasonable principle".

In *Republic* of *Costa Rica* v. *Enlarger* [1876] 3 Ch. D. 67, the Court of Appeal in dealing with an appeal from the judgment of Marlins VC. refusing to grant an application for additional security for costs, in a case which was commenced before the Judicature Acts came into operation, Mellish, L.J. had this to say at p. 69:-

> "I am of the same opinion. No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done. Certainly there is nothing unjust in the rule which always has prevailed, that suitors who live abroad and have no property in this country should give security for costs. That was the rule in Courts of Equity and Common Law. There seems to have been a practice in Equity of limiting the

amount, but that practice has been altered during this litigation. The order is that when there is a case in which security for costs should be given, the Court is to order it to be given for such an amount and at such time or times as may be just—thus making a technical security a real security; and I see no reason why the rule should not apply to this case. The plaintiffs are a foreign republic having no property in this country, and if the defendants succeed they will probably not get their costs unless they have security".

And Baggallay, J. at p. 70.

"..... Unless there is something in this cause to exempt it from the operation of any rule, the rule applies. When, directly the rule is found to apply, it is clearly a case in which security for costs should be given".

In *Crozat* v. *Brogden* [1894] 2 Q.B.D. 30, which was an appeal from the decision of the Divisional Court whereby an order granted by Grantham, J. for security for costs, was set aside and the Court of Appeal allowed the appeal and restored the decision of Grantham J. the following appears in the judgment as to the principles which should guide the Court in allowing security for costs (Per Lord Esher, M.R. at page 34):

"I myself am inclined to think that it was a matter of discretion in the Divisional Court; I cannot quite make up my mind that, under all or any circumstances, the Court is bound to make a foreigner give security for costs if he brings an action in this country. The rule can hardly go that length; but if the matter is discretionary, the discretion, unless there is something very exceptional, is exercised only in one way".

Lopes, L.J. at pp. 34 and 35, had this to say:

"In the case of *In re Percy and Kelly Nickel, Cobalt, and Chrome Iron Mining Co.* the late Master of the Rolls, Sir George Jessel, and in the case of *Pray* v. *Edie,* Buller, J., held that the principle is well established that where a person is instituting legal proceedings in this country, being resident abroad, so that no adverse order could be effectually made against him if unsuccessful, he is, by the rules of the Court, compelled to give security for costs.

Speaking for myself, I certainly have always understood that to be, I may say, the inflexible rule of the Court".

And Davey, L.J. at p. 36 said:

"I am of the same opinion. It was admitted that there is authority to be found, either in the reports or in any text-book, for the refusal by the Court of an order for security for costs by a person resident abroad, suing in these Courts, except in the well-known exceptions of either cross-actions, or of an action against a defendant who has money of the plaintiff's in his hands, so that he can repay himself if necessary, or (it may be) if the plaintiff has substantial property within the jurisdiction. I should be surprised if there had been any authority, because, in my opinion, it is well established the other way, adopting as I do the language which has been quoted from the judgment of the later Master of the Rolls.

I only desire to add, with regard to the grounds stated by Mathew, J., that in my opinion, the Court cannot, upon an application for security for costs to be given by a plaintiff, go into the merits of the action. It appears to me that it would be highly inconvenient to do so, and as the reason for giving security for costs is not dependent on the merits of the action, I do not see why the merits of the action should be looked into at all. If the defendant has no defence, or if it is a frivolous defence, and a mere attempt to try the action over again, there are appropriate means for setting aside and removing from the files of the Court a statement of defence which affords no real ground of defence, but which is frivolous and vexatious".

As to the change brought about by rule 1 of Order 23, we read in the Annual Practice (1979) under note Order 23/1-3/2 the following:-

"*Discretionary power to Order Security for Costs.*—The main and most important change effected by this Order concerns the nature of the discretion of the Court on whether to order security for costs to be given. Rule 1(1) provides that the Court may order security for costs 'if, having regard to all the circumstances of the case, the Court thinks it just to do so'. These words have the effect of conferring

upon the Court a real discretion, and indeed the Court is bound, by virtue thereof, to consider the circumstances of each case, and in the light thereof to determine whether and to what extent or for what amount a plaintiff (or the defendant as the case may be) may be ordered to provide security for costs. It is no longer for example, an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs".

And under note Order 23/1-3/3, we read:

"There is no longer any inflexible rule or practice that a plaintiff resident abroad will be ordered to give security for costs; the power to make such order is entirely discretionary under rule 1(1), *supra* (see *Aeronave S.P.A.* v. *Westland Charters Ltd.* [1971] 1 W.L.R. 1445; [1971] 3 All E.R. 531, C.A. and reversing *Crozat* v. *Brogden* [1894] 2 Q.B. 30); *Re Pretoria Pietersburg Ry. (No. 2)* [1904] 2 Ch. 350). On the other hand, as a matter of discretion, it is the usual ordinary and general rule of practice of the Court to require the foreign plaintiff to give security for costs, because it is ordinarily just to do so, and this is so, even though by the contract between the parties, the foreign plaintiff is required to bring the action in England (*Aeronave S.P.A.* v. *Westland Charters Ltd. (supra)*".

The position arising under the new rule has been considered by Lord Denning in the *Aeronave S.P.A.* v. *Westland Charters Ltd.* [1971] 3 All E.R. at pages 531 and 532:

"They say that under R.S.C. Ord. 23, r. 1, it is a matter of discretion of the Court. They say that the Judge, if left to himself, would not have ordered security; but he felt bound to order it owing to previous authority in this Court.

The present rule certainly does give a discretion. R.S.C. Ord. 23, r. 1, provides,

'(1) Either on the application of a defendant to an action or other proceeding in the High Court it appears to the Court—(a) that the plaintiff is ordinarily resident out of the jurisdiction ..... then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give security

for the defendant's costs of the action or other proceedings at it thinks just'.

I agree with the note in the Supreme Court Practice that the rule does give a discretion to the Court. In 1894 in *Crozat* v. *Brogden* Lopes, L.J. said that there was an inflexible rule that if a foreigner sued he should give security for costs. But that is putting it too high. It is the usual practice of the Courts to make a foreign plaintiff give security for costs. But it does so, as a matter of discretion, because it is just to do so. After all, if the defendant succeeds and gets an order for his costs, it is not right that he should have to go to a foreign country to enforce the order".

The decision, however, in the *Aeronave case* (*supra*) is a decision based on the new rule 1, Order 23, which, as I have already mentioned, widened the scope of the old rule and has introduced a real discretion by virtue whereof the Court is bound to consider all the circumstances of each case. The discretion under our Admiralty rule 185 as well as that under Order 60, rule 1 of the Civil Procedure Rules is a much narrower discretion than that existing today in England under the new Rules and does not force the Court to go into the merits of the case and take into consideration what is alleged in the pleadings before deciding whether an order should be made. That this is so, it is also clear from the provision of Order 48 rule 9(t) of the Civil Procedure Rules whereby it is provided that an application for security for costs need not be accompanied by an affidavit if the fact relied upon is plaintiff's residence out of Cyprus and such fact appears on the writ of summons. I wish to adopt for the purposes of this application, what was was said by Lord Esher, M.R. in *Crozat* v. *Brogden* (*supra*) at p. 34 and to which I have already referred extensively in this judgment.

"..... if the matter is discretionary, the discretion, unless there is something very exceptional is exercised only in one way".

I have been unable to trace either in the English reports or our Supreme Court Reports any authority for the refusal by the Courts of an order for security for costs by a person resident

abroad except in cases of cross-actions by way of counterclaim or cases where the defendant has money of the plaintiff in his hand so that he can repay himself, or cases where the plaintiff has substantial property within the jurisdiction.

Before concluding on the differences between our Admiralty Rules and the English Rules of the Supreme Court, I wish to express the desirability of comparable amendment of our Civil Procedure Rules, 1953 (previously cited as the Rules of Court 1938 to (No. 2) 1953) in which there is cross reference to the Rules of the Supreme Court in England, once the latter have undergone considerable amendments since 1953. The desirability for amendment applies also to our Admiralty Rules made under the Admiralty Jurisdiction Order 1893 and which date back to the 23rd November, 1893, to bring them in line with the Admiralty Rules of the Supreme Court in England and the practice of the Admiralty Division of the High Court of Justice of England, especially in view of the provisions of rule 237 of our Rules which make such practice applicable in all cases not provided for by our Admiralty Rules. The desirability of amendment of our Rules has also been expressed by Triantafyllides, P. in *General Engineering Co. Ltd.* v. *Seddon Atkinson Vehicles Ltd.* (1975) 1 C.L.R. 278 at p. 284 who had this to say in respect of the particular rule with which he was dealing in that case:

> "In England the Rules of the Supreme Court (see the Supreme Court Practice (1973) vol 1, p. 609) have been appropriately amended so as to take into account the new realities created through the development of relations between the members of the British Commonwealth;.....
>
> .....
>
> In the absence of any comparable amendment of our Civil Procedure Rules—(and, indeed, such an amendment does appear to be desirable)—we cannot treat the membership by Cyprus of the Commonwealth as ipso facto entitling the Cyprus Courts to apply in an accordingly modified form the Civil Procedure Rules (and in particular rule 17 of Order 39, with which we are concerned) because the membership by Cyprus of the Commonwealth is not an arrangement having constitutional force".

In the present applications it has not been contested that

plaintiffs are ordinarily resident out of Cyprus and they have no assets within the jurisdiction. Counsel for respondents has contended that respondents have already given security for the release of the goods to the extent of the amount claimed as damages by the defendants in their counterclaim and in consequence this is a case where the court should exercise its discretion against the making of the order. Such security, however, was given to enable the plaintiffs take such goods outside the jurisdiction of the Court and to secure the lien claimed by the defendants over such goods and not as security for costs. Nothing has been included in that order in respect of the costs of the action or the counterclaim. So, I cannot consider such security as covering the costs of the action and precluding the defendants from claiming security for costs.

Concerning the argument by counsel for the respondents that (a) the application is made at a very late stage and (b) that once there is a counterclaim the defendants cannot ask security for costs, I need not go extensively into such argument. As far as the first point is concerned, I find it sufficient to mention that under rule 185 of the Cyprus Admiralty Jurisdiction Order 1893 no time limit is mentioned for making an application for costs and in the corresponding Order 60, rule 1 of the Civil Procedure Rules it is expressly stated that an application may be made "at any stage of the action". Therefore, time cannot be a bar to such an application. The question of the existence of a counterclaim again is not a ground for refusing an order for costs. In case where the defendant making a counterclaim is not resident in Cyprus, there is power in the Court to order him to give security for costs. Concerning the principles of making such an order in the case of counterclaim, useful guidance may be found in the case of *Esta Shipping Co. Ltd.* v. *Laskos* (1976) 1 C.L.R. p. 22.

Irrespective, however, as to whether the nature of the discretion is wider under rule 1 of Order 23 of the English Rules compared to our rules or not, it has been the practice of this Court, as it appears from the decisions already referred to in this judgment, that where the plaintiff is resident abroad and this fact appears on the writ of summons, to order the plaintiff to give security for costs on the application of the defendant. This practice appears to have been followed in England, even after rule 1 of Order 23 came into operation in England. (Vide, *Aeronave* case to which reference has already been made as

to the usual practice of the Court to make a foreign plaintiff give security for costs).

In the result, I have decided to grant the applications and to order the respondents to give security for costs in the sum of C£350.—in each of the above actions, either by cash deposit of such amount in Court or by securing same by a Bank guarantee to the satisfaction of the Registrar.

In the meantime the proceedings in these actions shall be stayed until such security is given; and in the event of the security not being given within two months from today, then the actions shall stand dismissed, unless, in the meantime, an order to the contrary is made. Applicants will be at liberty to pursue their counterclaims.

Costs of these applications to be costs in favour of applicants–defendants against respondents–plaintiffs.

Application granted. Order for costs as above.