1981 October 2

[TRIANTAFYLLIDES, P., A. LOIZOU AND MALACHTOS, JJ.]

NAKIS BONDED WAREHOUSE CO.,

Appellants–Defendants,

v.

MIDDLE EAST EXPORT PRESS INC.,

Respondents–Plaintiffs.

(Civil Appeal No. 5762).

Civil Procedure—Partnership—Dissolution—A partnership may be sued even after dissolution if cause of action accrued before dissolution—Order 7 rule 1 of the Civil Procedure Rules.

Civil Procedure—Cause of action—"Accrual"—"Accruing"—Meaning—Order 7 rule 1 of the Civil Procedure Rules—Claim in damages for unlawful detention and conversion of goods—Time of accrual of cause of action.

On December 15, 1975 there were unloaded from the ship "Tyrusland" 346 bales of paper ("the goods") belonging to the respondents, which were stored in the stores of the appellants (defendants 2 in the Court below) in transit for Beirut. On July 3, 1977 the appellants published in the local press that they would sell the goods by public auction on the 12th August, 1977. On July 25, 1977 a person acting on behalf of the respondents communicated with defendant 3 in order to be informed of the amount of the storage charges and other expenses with which the goods were burdened in order to inform the respondents. Defendants 2 and 3 replied by telex on the same date giving particulars of the expenses. The respondents offered to pay the expenses and take delivery of their goods but the goods were sold by a private sale to defendants 1 on August 12, 1977.

On August 20, 1977 the respondents brought an action against three defendants, of which the appellants (defendants 2 in the Court below) were a partnership, registered as such under the Partnership and Business Names Law, Cap. 116, and the other

two were natural persons and were sued personally, claiming, *inter alia,* a declaration that the above sale was illegal and damages for unlawful detention, conversion and trespass to the said goods.

On September 3, 1977, the appellant partnership filed an application for an order setting aside the writ of summons and the service thereof on the ground that the partnership in question was dissolved in May, 1977 and was non-existing. 5

The trial Court dismissed the application having held that under Order 7 rule 1* of the Civil Procedure Rules a partnership may be sued in the partnership name even after dissolution if the cause of action arose wholly or in part while the partnership was still in being; and that it did not emerge that the cause of action arose after the dissolution of the partnership. 10

Upon appeal by defendants 2: 15

Held, that the meaning of the word "accruing" to be found in Order 7 rule 1 of the Civil Procedure Rules, in relation to the cause of action, means the time when the plaintiff was entitled to bring the present proceedings and considering their nature, this time was the moment that the conversion occurred, that is, a demand on and refusal to return the goods or the moment they were sold to the first defendants which took place after the dissolution of the partnership; that, hence, the cause of action could not have arisen before its dissolution and the same situation applies also to the case of an alleged detention of the goods, if that was the case; that, therefore, the partnership did not exist at the time of the accruing of the cause of action wholly or in part and the appellants could not have been sued in the partnership name as such; accordingly the appeal must be allowed. (pp. 365–69 *post*). 20 25 30

Appeal allowed.

Appeal.

Appeal by defendants 2 against the order of the District Court of Larnaca (Pikis, P.D.C.) dated the 11th November,

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* Rule 1 is quoted at p. 365 *post*.

1977 (Action No. 1040/77) whereby their application to set aside the writ and/or service thereof was dismissed.

A. Poetis, for the appellants-defendants.

L. Papaphilippou, for the respondents-plaintiffs.

5 *Cur. adv. vult.*

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by Mr. Justice A. Loizou.

A. LOIZOU J.: The appellants-defendants 2 before the trial Court have appealed against the order of the District Court 10 of Larnaca dismissing their application to set aside the writ and/or service thereof.

The facts of the case are as follows:

The respondents as plaintiffs filed on the 20th August, 1977, an action against three defendants, of which the appellants-15 defendants 2 were a partnership registered as such under the Partnership and Business Names Law, Cap. 116; the other two defendants, namely, defendants 1 and 3 being natural persons were sued personally.

By the said action as appearing in the endorsement on the 20 writ they were claiming (a) a declaration of the Court that the goods described in Schedule 'A' were their property; (b) a declaration of the Court that the supposed sale of the said goods by defendants 2 and 3 to defendant 1 is illegal and void; (c) an order of the Court ordering the defendants and/or anyone 25 of them to deliver to the plaintiffs the said goods upon payment by them of a reasonable rent, insurance premiums, and any other expenses for their keeping; (d) damages for unlawful detention, conversion of or trespass to the said goods; (e) any further or other relief, legal interest and costs.

30 The goods in question are 346 bales of paper of a weight of 73,668 kilos and 147.327 sq. meters in size which were unloaded on or about the 15th December, 1975, from the ship "TYRUS-LAND" and stored in the stores of the appellants-defendants 2 in Larnaca in transit for Beirut.

35 After the filing of the action and service of the said writ of summons on them, the appellants-defendants 2 filed an application on the 3rd September, 1977, seeking an order of the Court

setting aside the writ of summons and or service thereof having entered a conditional appearance and having obtained leave to file such application.

The facts relied upon appear in the affidavit of Costas Constantinou, an employee of the Company Nakis Bonded Warehouse Ltd., who prior to that was in the employment of Nakis Bonded Warehouse Company, the appellants–defendants 2. He stated the following: 5

"1. ....

2. The said partnership which appears as defendant 2, has been dissolved and is non–existing and does not carry out any business. 10

3. Hence after this, it is not possible the prosecution of any proceedings against the non–existing person or partnership as the second defendants are". 15

This application was opposed by the respondents–plaintiffs and in the affidavit filed in support of their opposition it is stated *inter alia*.

"1. ....

4. That no publication that the said firm was dissolved was made and in any event the plaintiff had no notice that the said firm was dissolved. 20

5. The goods of the plaintiffs, subject–matter of the proceedings, were placed on the 15th December, 1975, in stores which belonged and/or were registered in the name of defendants 2, that is, the firm Nakis Bonded Warehouse Company and/or were known with this name and it is the said firm which demands storage fees against the said cargo of the plaintiffs. 25

6. .... etc.". 30

It is also stated therein (para. 8) that from a search which he made in the office of the Director of Customs & Excise, he was informed and believed that Nakis Bonded Warehouse Company Ltd. succeeded on or about the 3rd August, 1977, Nakis Bonded Warehouse Company. With regard to the stores in which the goods of the plaintiff were stored, Nakis Bonded 35

Warehouse Co., however, had been dissolved before, namely, the 28th May, 1977.

The learned President after referring to Order 7, rule 1, of our Civil Procedure Rules, and the corresponding provisions in the English Rules which are now as appearing in the White Book of 1976, Order 81, rule 1, 81/1/6, 81/1/10, 81/1/12, and which in the older English Rules were Order 48A, 1, had this to say:

> "On a study of the way that the corresponding English provision to Order 7, Rule 1, of the Civil Procedure Rules was interpreted, it emerges that a partnership may be sued in the partnership name even after dissolution if the cause arose wholly or in part while the partnership was still in being (The old rule of the English Rules of the Supreme Court that corresponds in substance to Order 7, Rule 1 of the Civil Procedure Rules is Order 48, Rule 1). It does not emerge, contrary to what has been submitted on behalf of the applicants, either on a study of the writ of summons or the affidavit in support of the opposition that the cause of action arose after the dissolution of the company".

It is the case for the appellants, that the trial Judge was wrong in holding that the cause of action was possible to have accrued before the dissolution of Nakis Bonded Warehouse Company. Given that, as appearing from the affidavit filed for the issue of an *interim* order, together with the filing of the writ, the cause of action did not arise in any event before the 31st July, 1977.

Order 7, rule 1, as far as relevant reads as follows:

> "1. Any two or more persons claiming or being liable as co-partners and carrying on business in Cyprus may sue or be sued in the name of the respective firms (if any) of which such persons were co-partners at the time of the accruing of the cause of action".

In the commentary to this in the Annual Practice 1959, p. 1153, under the heading "Partners at the time of the accruing of the cause of action", it is stated:

> "These words enable the co-partners in a firm dissolved

before action to sue or be sued as a firm provided the co-partnership existed at the time the cause of action accrued. Where the fact of dissolution is known to the plaintiff before the action against the firm is commenced, the writ must be served personally on every person within the jurisdiction sought to be made liable". 5

A similar commentary is to be found in the Annual Practice of 1976. On the material before us there is nothing to suggest that the plaintiff company knew of the dissolution of this partnership before the filing of the action. 10

What remains to consider is whether the finding of the trial Court that the cause of action arose wholly or partly before the dissolution of the partnership is correct.

In the said affidavit it is stated, *inter alia*, that this cargo was discharged at Larnaca port on the 15th December, 1975, 15 and that defendants 2 and 3 on or about the 3rd July, 1977, published in the local press that they would sell this paper by public auction. On the 12th August, 1977, on or about the 25th July, 1977, the affiant communicated with defendant 3 in order to be informed of the amount of the storage charges 20 and other expenses with which the paper company was burdened in order to inform the plaintiffs who were ready to pay and take delivery of their goods. Defendants 2 and 3 replied by telex dated 25th July, 1977, and immediately affiant informed the plaintiffs. The amount of C£7,900.- (Cyprus pounds) 25 was remitted to the affiant and that he informed defendants 2 and 3 about the arrangements that the plaintiffs were making to remit the amount due. The said cargo of paper was not sold by public auction but by private sale to defendant 1 shortly before the hour fixed for the public auction. 30

The question, therefore, arises as to when the cause of action accrued.

In considering the meaning of the term "accrue" or "accruing" in relation to the cause of action, one has to examine the nature of such cause of action and as it appears from the endorsement 35 on the writ, apart from the declaratory part of the reliefs sought, the claim is one of detention, conversion or trespass to goods.

As stated in *Halsbury's Laws of England*, 4th Ed., Vol. 28,

in connection with the running of time under the Limitation Acts, para. 622:

"Apart from any special provision, a cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when there are present all the facts which are material to be proved to entitle the plaintiff to succeed".

In Footnote 7 to the said paragraph and by reference to a number of authorities, the following is stated:

"See *Cooke* v. *Gill* [1873] LR 8 CP 107 at 116, per Brett J: *Read* v. *Brown* [1888] 22 QBD 128, C.A. Some positive act is frequently needed to be proved to complete a cause of action. Thus, where shares in a company are invalidly transferred, the cause of action against the company to have plaintiff's name replaced on the register of shares is not complete until the company has refused to replace the name; similarly a partner who takes no part in the partnership for six years does not lose his remedy against his partners until they commit an act of exclusion; see *Barton* v. *North Staffordshire Rly Co.* [1888] 38 Ch. D. 458 at 463; *Welch* v. *Bank of England* [1955] Ch. 508 at 543-546, [1955] 1 All E.R. 811 at 828-830".

And further down in the same para. 622, it is stated:

"Where there has once been a complete cause of action arising out of contract or tort, time begins to run and subsequent circumstances which but for the prior wrongful act of default would have constituted a cause of action are disregarded" (See footnote 13).

In *Stroud's Judicial Dictionary*, 4th Ed., Vol. 1, under the word "accrue", page 31, para. 4, it is stated: "A cause of action for a tort 'accrues' when it become effective, i.e. when the resulting damage manifests".

"Cause of action" is defined in section 2 of the Courts of Justice Law 1960, (Law No. 14 of 1960) as follows:

" 'Cause of action' comprises the entire set of facts founding the enforceable right, the subject-matter of the action, but in actions founded on contract does not necessarily

> mean the whole cause of action; a cause of action shall be deemed to have arisen within the jurisdiction if the contract was made therein, though the breach may have occurred elsewhere, and also if the breach occurred within the jurisdiction, though the contract may have been made elsewhere". 5

We may mention here, however, that the part of the above definition referring to causes of action in relation to contracts regulate matters of jurisdiction which do not arise in the present case. 10

And in *Stroud's* (*supra*) under "cause of action", para. 9, at p. 407, it is stated:

> " 'Cause of action' (s. 3, Limitation Act 1623 (*supra*) and, semble s. 3, Civil Procedure Act 1833 (c. 42)—see Limitation Act 1939 (*supra*)), 'means the time at which 15 the debt or money might have been recovered by action' (per Lindley L.J., *Reeves* v. *Butcher* [1891] 2 Q.B. 509, following *Hemp* v. *Garland*, 12 L.J.Q.B. 134; see also *Turner* v. *Midland Railway* [1911] 1 K.B. 832); therefore the statute begins to run from the first time (where there are 20 more times than one) at which the action might have been brought. Thus where a defendant, in an action for conversion, has committed two acts each of which would sustain the action, the first, and not the second, act must be regarded (*Wilkinson* v. *Verity*, L.R. 6 C.P. 206). But where goods 25 or deeds are wrongfully abstracted and get into innocent hands, the action against the latter does not accrue until there has been a conversion by him—i.e. a demand on and refusal by him (*Spackman* v. *Foster*, 11 Q.B.D. 99; *Miller* v. *Dell* [1891] 1 Q.B. 468). See further TROVER". 30

It appears, therefore, from the aforesaid legal approach, that the meaning of the word "accruing" to be found in Order 7, rule 1, in relation to the cause of action, means the time when the plaintiff was entitled to bring the present proceedings and considering their nature, this time was the moment that 35 the conversion occurred, that is, a demand on and refusal to return the goods or the moment they were sold to the first defendants which took place after the dissolution of the partnership. Hence the cause of action could not have arisen before

its dissolution and the same situation applies also to the case of an alleged detention of the goods, if that was the case.

Therefore, the partnership did not exist at the time of the accruing of the cause of action wholly or in part and the appel-
5 lants-defendants 2 could not have been sued in the partnership name as such.

For these reasons the appeal is allowed and the writ of summons and its service thereof as against appellants-defendants 2 is set aside.

10 As to costs we set aside the order made by the learned President as against Nakis Bonded Warehouse Co. Ltd. which in our view was wrongly treated as appearing to be the applicants in the proceedings before him but in the circumstances of this case there will be no order as to costs here and in the Court
15 below.

Appeal allowed. Order for costs as above.