

1983 June 9

[SAVVIDES, J.]

ANTHIMOS DEMETRIOU,

Plaintiff.

v.

LLOYD'S UNDERWRITERS AND 20 OTHERS,

Defendants.

(Admiralty Action No. 1/80).

Admiralty—Practice—Writ of summons—Service of notice of, on solicitors—When possible—Order 9, rule 1, and Order 67, rule 7, of the old Rules of the Supreme Court of England applicable by virtue of rule 237 of the Cyprus Admiralty Jurisdiction Order, 1893.

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The plaintiff in this case brought an action in personam against the defendants claiming U.S. dollars 200,000 for loss under a policy or cover note upon the ship "KIMON" ex "DORAMI" issued on or about 6th January, 1978. Defendants 1 were sued as insurers and the remaining defendants as re-insurers underwriters.

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On the 3rd January, 1980 counsel for plaintiff applied for leave to serve notice of the writ of summons on all the defendants outside the jurisdiction of this Court by double-registered letter addressed to Constant & Constant, solicitors in London, who, as alleged by plaintiff in his affidavit dated the 3rd January, 1980 accompanying the application, were authorised by the defendants to accept service of the writ of summons.

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Leave for substituted service was granted and following such service on the said solicitors a conditional appearance was entered which was followed by an application on behalf of the defendants for an order setting aside the service of the notice of the writ of summons on them on the ground that the notice of the writ of summons was not served on any of the applicants but was served on the said solicitors who were not authorised to receive service of the notice of the writ of summons on behalf of any of the applicants.

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5 *Held* that service on a solicitor can only be made when
 the defendant by his solicitor undertakes in writing to accept
 service or where a party after having been sued or appeared in
 person has given notice in writing to the opposite party or his
 10 solicitor that such solicitor is authorised to act in the cause or
 matter on his behalf, (see Order 9, rule 1 and Order 67 rule 7 of
 the old Rules of the Supreme Court of England applicable by
 virtue of rule 237 of the Cyprus Admiralty Jurisdiction Order
 1893); that since in the present case there has never been any
 15 written undertaking by Counsel to accept service and on the
 contrary the solicitors, upon whom service was effected, made it
 quite clear that they had no authority to accept service and they
 took every reasonable step to contest the alleged authority
 service of the notice of the writ of summons was not properly
 20 made on the applicants, accordingly the application will be
 granted and an order is hereby made setting aside the service of
 the notice of the writ of summons

Application granted

Cases referred to

- 20 *Demetriou v. Lloyd's Underwriters & Others* (1982) 1 C.L.R. 711.
 Asimenos & Another v. Chrysostomou & Another (1982) 1 C.L.R.
 145.

Application.

25 Application by defendants, except defendants 1, 8 and 17, for
 an order of the Court setting aside the issue and service of the
 notice of the writ of summons and/or a declaration that the
 notice of the writ of summons has not been duly served on them.

- 30 *M. Montamos* with *P. Panayi (Miss)*, for applicants-de-
 fendants except Nos. 1, 8, 17 and 19.
 X. Xenopoulos, for applicant-defendant No. 19.
 H. Solomonides, for *L. Papaphilippou*, for respondents-
 plaintiffs.

Cur. adv. vult.

35 SAVVIDES J. read the following judgment. This is an appli-
 cation whereby defendants, with the exception of defendants

1. 8 and 17, ask for an order of the Court setting aside the issue and service of the notice of the writ of summons and/or declaring that the notice of the writ of summons had not been duly served on them.

The facts of the case are briefly as follows:

Plaintiff brought the above admiralty action in personam against the defendants claiming U.S. dollars 200,000 for loss under a policy or cover note upon the ship "KIMON" ex "DORAMI" issued on or about the 6th January, 1978. Defendants 1 are sued as insurers and the remaining defendants as re-insurers underwriters.

On the 3rd January, 1980 counsel for plaintiff applied for leave to serve notice of the writ of summons on all the defendants outside the jurisdiction of this Court by double-registered letter addressed to Constant & Constant, solicitors in London, who, as alleged by plaintiff in his affidavit dated the 3rd January, 1980 accompanying the application, were authorised by the defendants to accept service of the writ of summons. In support of his allegation the plaintiff filed together with his affidavit, a photocopy of a letter sent to plaintiff's advocate by Stewart Wrightson (Marine) Limited, International Insurance Brokers, dated the 21st November, 1979 which is Annex 'E' to the said affidavit. The contents of such letter read as follows:

"Dear Sirs,

Re: m.v. 'Kimon'

We would refer to your letter of the 4th October, 1979 to Messrs. Nasco Insurers Cyprus Ltd. and would advise that they passed it to us for our advice.

We have, now, examined the matter and find that as you are no doubt aware, the lead Underwriter has referred the claim to Messrs. Constant & Constant and we understand they are acting on his behalf and if Owners wish to commence legal proceedings, Messrs. Constant & Constant will be in a position to accept service of suit on the leading Underwriter's behalf.

From previous telexes, we note that you have been in touch with Messrs. Constant & Constant so, presumably,

you are fully aware of the latest position. We would mention we have advised Nasco that should they be entered in legal proceedings they should instruct Solicitors to attend the Court to show that they are only Brokers and that liability for the claim, if any, is on Underwriters.
5 We hope this now clarifies the position.

Yours faithfully,
(Sgd) Steward Wrightson (Marine) Ltd."

10 Counsel for plaintiff also produced a letter dated 15th October, 1979 addressed to him and marked "without prejudice" by Constant & Constant the contents of which were as follows:

"Dear Sirs,

Re: m.v. 'KIMON'

15 Thank you for your letter of the 25th August 1979.
We note that your Client appears to be claiming that the vessel was sunk on the 16th July 1978 and you attach three short inconclusive statements in support of your claim. It is normal for a total loss claim for all of the crew to be made available immediately so that statements can be taken from them and we would suggest that if you seriously wish to pursue this matter, you put this in hand right away, whereupon we shall discuss the matter further with our Clients.
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Yours faithfully
25 (Sgd) Constant & Constant."

Leave for substituted service was granted and such service was effected accordingly on the said solicitors in England who instructed Messrs. Montanios & Montanios, counsel for applicants, to enter a conditional appearance and take steps to have the notice of the writ of summons and service thereof, set aside. Montanios & Montanios in compliance with such instructions entered a conditional appearance on the 3rd March, 1980 for all defendants and on the 31st March, 1980, they filed the present application.
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35 Subsequently to the filing of this application, counsel for defendants discovered that they had no authority to take any steps in the action on behalf of some of the defendants and that

a conditional appearance was entered on their behalf without authority as a result of a mistake due to a misunderstanding. In consequence, counsel filed an application asking for leave to withdraw the conditional appearance as well as any subsequent proceedings taken on behalf of such defendants. This application was dealt by me (see *Demetriou v. Lloyd's Underwriters and others* (1982) 1 C.L.R. 711) and my conclusion was as follows (see pp. 725, 726):

“Turning now to the application before me, as I have already found the applicants in the present case operating under the mistaken belief that they had authority to appear for all defendants, entered a conditional appearance and applied to have the writ of summons and service thereof set aside, whereas in fact they had no such authority from defendants (1), (8) and (17). Applicants upon finding such mistake, had a duty to bring the matter to the notice of the Court and the other party and make an effort at this early stage of the proceedings to make good their mistake. If they continued to act for the said defendants in an unauthorised way, they might have found themselves guilty of misconduct and in breach of warranty of authority; also, liable for any consequence that might have resulted to persons who not only had no knowledge of the proceedings, but who never authorised the applicants to act on their behalf. In the result, I find that the application should be granted and I make an order setting aside the conditional appearance entered by applicants on behalf of defendants (1), (8) and (17), as well as any subsequent proceedings taken by the applicants on behalf of such defendants.”

As a result of my said decision, from which there was no appeal, the present application is now pursued by all defendants except defendants 1, 8 and 17.

At the hearing of the application counsel for applicants restricted his prayer to an order setting aside the service of the notice of the writ of summons and reserved his right to apply to have the writ of summons set aside after proper service will be effected on the defendants. In support of his prayer to have the service set aside, counsel for applicants relied on an affidavit sworn by Miss Panayi on the 31st March, 1980 and, in particular, on paragraph 11 which reads as follows:

5 “Notice of the writ of summons was not served on any of the applicants but was served on the said Constant & Constant. The said Constant & Constant were not authorised to receive service of the notice of the writ of summons on behalf of any of the applicants, never purported to have been so authorised, and did not accept service of the notice of the writ of summons on behalf of the applicants.”

10 The facts relied upon in opposition by counsel for respondent-plaintiff are set out in an affidavit sworn by plaintiff on the 3rd May, 1980. Plaintiff by his said affidavit repeats what was sworn by him in his previous affidavit dated the 3rd January, 1980, in support of his application for leave to serve the notice of the writ of summons outside the jurisdiction and, in particular,
15 paragraph 13 which reads as follows:

20 “13. I am informed by my advocates and I believe that Messrs. Constant & Constant, solicitors in London have dealt with my claim subject matter of this action and furthermore that these solicitors are authorised by the defendants to accept service of the writ of summons. In this respect I produce photo-copy of a letter of Stewart Wrightson (Marine) Ltd. dated 21st November, 1979 which I mark as Exhibit ‘E’.”

25 In his affidavit of the 3rd May, 1980, under paragraph 12 the plaintiff added the following:

“Regarding the allegation that Constant & Constant were not authorised to accept service, I refer to Exhibit ‘E’ of my previous affidavit.”

30 Under our Admiralty Rules, there is no provision as to effecting service on a solicitor. By virtue, however, of rule 237, the practice of the Admiralty Division of the High Court of Justice in England, so far as the same shall appear to be applicable, shall be followed. As already decided by this Court when the Rules of the Supreme Court of England come
35 into play, the rules so applicable are the ones in force prior to the 15th August, 1960, the Independence Day of Cyprus, (see, in this respect, *Asimenos & Another v. Chrysostomou & Another* (1982) 1 C.L.R. 145). The English Rules of the Supreme

Court 1960, make the following provision under Order 9, rule 1. under the heading, "*Undertaking to accept service*".

"No service of writ shall be required when the defendant by his solicitor, undertakes in writing to accept service, and enters an appearance." (See, Annual Practice, 1960, page 101). 5

The Form of Undertaking, as given in the notes to the rule, at page 101, is as follows:

"I accept service of the writ of summons in this action on behalf of defendant A B, and undertake to enter an appearance for him thereto in due course. Date; signature." 10

Service on a solicitor can, subject to the above rule, only be made under Order 67, rule 7 which provides as follows:

"Where a party after having sued or appeared in person has given notice in writing to the opposite party or his solicitor, through a solicitor, that such solicitor is authorised to act in the cause or matter on his behalf, all writs, notices, pleadings, summonses, orders, warrants, and other documents, proceedings, and written communications which ought to be delivered to or served upon the party on whose behalf the notice is given shall thereafter be delivered to or served upon such solicitor." 15
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For such rule, however, to come into operation, a notice in writing should be filed and copy of such notice be given to the other side by the party or his solicitor. A change was brought about to the old rules by Order 10, rule 4 of the new rules (see, Annual Practice, 1982) whereby it is no longer required that the defendant's solicitor should give any undertaking either to accept service or to acknowledge service of the writ. All that is required, is that the defendant's solicitor should endorse on the writ or other originating document, a statement that he accepts service on behalf of the defendant. Order 10, rule 4, reads as follows: 25
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"Where a defendant's solicitor indorses on the writ a statement that he accepts service of the writ on behalf of that defendant, the writ shall be deemed to have been duly 35

served on that defendant and to have been so served on the date on which the indorsement was made."

This amendment, however, has no application to Cyprus, as it was made after the 15th of August, 1960.

5 In the present case there has never been any written undertaking by counsel to accept service as contemplated by Order 9 rule 1. There is not even an endorsement on the notice of the writ that the solicitor accepted service on behalf of the defendant as contemplated by Order 10, rule 4 of the new Rules. On the
10 contrary, the solicitors upon whom service was effected, made it quite clear that they had no authority to accept service and they took every reasonable step to contest the alleged authority. Exhibit 'E' on which plaintiff sought to rely, is not an undertaking by Constant & Constant that they were prepared to accept
15 service, or that they had authority so to do but is a letter from an underwriter with whose agent the plaintiff concluded the agreement, and who, though an underwriter in the policy, was not made a party to the proceedings, expressing a belief that the solicitors Constant & Constant were prepared to accept service
20 for the leading underwriter, who, as I have already found in the previous application, was defendant 21. There is no evidence that the said underwriter had any authority on behalf of Constant & Constant to give an undertaking on their behalf. Besides the fact that the contents of such letter which was written
25 without the knowledge and consent of Constant & Constant may amount to hearsay evidence, they do not in any event amount to an undertaking by the solicitors to accept service on behalf of the defendants. Also, the letter which was written by Constant & Constant on the 15th October, 1979 and marked
30 "Without Prejudice" does not amount, under the Rules, to an undertaking to accept service.

In the light of the above, I find that service of the notice of the writ of summons was not properly made on the applicant. In the result, the application is granted and an order is hereby
35 made setting aside the service of the notice of the writ of summons.

Respondent to pay the costs of this application.

Application granted with costs.