1984 November 29

[HADJIANASTASSIOU, LORIS AND STYLIANIDES, JJ]

E PHILIPPOU LTD,

Appellants-Plaintiffs,

v.

LITTNER HAMPTON LTD,

Respondents-Defendants.

(*Civil Appeal No* 6219)

Civil Procedure—Writ of summons—Service of, on a British national —Not in compliance with rule 6 of Order 6 of the Civil Procedure Rules, as modified after the coming into operation of the Constitution —Notice of the writ of summons had to be served—Said service not an irregularity but a nullity—Order for service of the writ and the service of the writ set aside by Court of appeal ex debito justitiae—Articles 163 and 188 of the Constitution and rule 3 of the Rules of Court (Transitional Provisions), 1960

Constitutional Law—Rules of Court in force on the date of the coming into operation of the Constitution—Continued in force with such modifications as may be necessary to bring them into conformity with the Constitution—Modification of rule 6 of Order 6 of the Civil Procedure Rules—Articles 163 and 188 of the Constitution and rule 3 of the Rules of Court (Transitional Provisions) 1960

The appellants-plaintiffs, a limited company of Nicosia, brought an action against the respondents-defendants, a company incorporated and having its seat of business in London, for damages for breach of contract. On the application of the appellants a Judge of the District Court granted leave for the sealing of the writ of summons and leave to serve the writ of summons on the defendants out of the jurisdiction in London. Leave was granted pursuant to the provisions of Order 6* of

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* The rule most material is rule 6 which provides as follows:

"(6) When the defendant is neither a British subject nor in British Dominions, notice of the writ and not the writ itself, is to be served upon him. Such notice shall be in Form 6"

the Civil Procedure Rules. Thereafter the respondents entered a conditional appearance and applied by summons to set aside the writ of summons and/or the service thereof. The trial Court allowed the application in part and hence this appeal in which the Court of appeal considered the following issue:

Whether notice of the writ and not the writ itself had to be served on the defendants.

Held, that the Rules of Court in force on the date of the coming into operation of the Constitution until amended whether by way of variation, addition or repeal, by any Law made under the Constitution, continued in force on or after the establishment of the Republic and are construed from that date and applied with such modifications as may be necessary to bring them into conformity with the Constitution. (See Articles 163, 188 of the Constitution and rule 3 of the Rules of Court (Transitional Provisions) 1960); that rule 6 of Order 6 was cast in identical words with the old English 0.11, r. 6, as the power of the Court and the command by the writ of summons emanated from the same authority—the British Crown—this country being a British Crown colony; that in view of the radical constitutional change and the international status of this country with the declaration of Independence and the coming into being of the new State the new constitutional and legal order has to be reflected in the Rules of Court; that as the Republic of Cyprus, as aforesaid, has no power outside its jurisdiction and exercises no power over foreign, British subjects, 0.6, r. 6 has necessarily to be modified; that rule 6 should be modified to read as follows:- "When the defendant is not a Cypriot national, notice of the writ and not the writ itself is to be served upon him"; that since the order of the Judge was to serve copy of the writ of summons on a British National in London this was not in compliance with rule 6 of Order 6 as necessarily modified and that a notice of the writ should have been served.

(2) That the service of the copy of the writ on a foreign national outside the jurisdiction was a nullity and not an irregularity; that it may be set aside ex debito justitiae; and that, accordingly, the order for service of the writ and the service of the writ on the defendants must be set aside.

Order accordingly.

Cases referred to:

Johnson v. *Taylor Bros. & Co. Ltd.* [1920] A.C. 144 at p. 153;

R. v. *Theori*, 6 C.L.R. 11;

George Monro Ltd. v. *American Cyanamid and Chemical Corporation* [1944] 1 K.B. 437;

Hewitson and Milner v. *Fabre* [1888] 21 K.B. 6.

Appeal and Cross-appeal.

Appeal by plaintiff and cross-appeal by defendants against the ruling of the District Court of Nicosia (HjiConstantinou, S.D.J. and Kronides Ag. S.D.J.) dated the 17th December, 1980 (Action No. 651/80) whereby defendants' application to set aside the writ of summons and service thereof was allowed with regard to the claim for damages for failure to perform a contract but was dismissed with regard to the other claim.

D. Liveras, for the appellants.

P. Demetriou, for the respondents.

Cur. adv. vult.

HADJIANASTASSIOU J.: The judgment of the Court will be delivered by Mr. Justice Stylianides.

STYLIANIDES J.: The plaintiffs-appellants are a limited company of Nicosia. The defendants-respondents are a company incorporated and having its seat of business in London. The parties entered into a contract for the sale by the defendants to the plaintiffs of goods described in a proforma invoice and set out in the specially indorsed writ. It was a F.O.B. contract. A letter of credit was opened for that transaction through a Cyprus bank at a London bank. The defendants placed on board a ship in London a great number of the said goods but failed to supply two items. When the goods shipped arrived in Cyprus, it was discovered by the plaintiffs that two items were of different quality to the specifications, torn in places and one of them even rotten.

The plaintiffs thereafter filed an action in the District Court of Nicosia claiming damages for breach of contract and/or failure to perform the contract and damages for the defective

goods. On their application a Judge of the District Court of Nicosia granted leave for the sealing of the writ of summons and leave to serve the writ of summons on the defendants out of the jurisdiction in London. The relevant part of that order reads:-

> "This COURT DOTH HEREBY GRANT LEAVE to seal a writ of summons and to serve copy of such writ of summons together with a certified true copy of this order on the said defendants by double registered post at their above address in U.K.".

Pursuant to this order copy of the writ of summons was served on the defendants in London. The defendants thereupon, with the leave of the Court, entered a conditional appearance and applied by summons to set aside the writ of summons and/or the service thereof. The application was based on 0.16, r.9, and 0.64. Order 16, r. 9, reads:-

> "9. A defendant before appearing shall be at liberty, without obtaining an order to enter or entering a conditional appearance, to take out a summons to set aside the service upon him of the writ or of notice of the writ, or to discharge the order authorizing such service".

The leave for service out of the jurisdiction was given in virtue of the powers of the Court under 0.6, rr.1(e) and 6, which read:-

> "6.-(1) Subject to section 15 of the Courts of Justice Law, Cap. 11, service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge whenever—
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> (e) the action is one brought to enforce, rescind, dissolve, annul, or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract—
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> (i) made in Cyprus, or
>
> (ii) made by or through an agent trading or residing in Cyprus on behalf of a principal trading or residing out of Cyprus, or is one brought in respect of a breach committed in Cyprus of a

contract wherever made, even though such breach was preceded or accompanied by a breach out of Cyprus which rendered impossible the performance of the part of the contract which ought to have been performed in Cyprus.

(6) When the defendant is neither a British subject nor in British Dominions, notice of the writ, and not the writ itself, is to be served upon him. Such notice shall be in Form 6".

The application to set aside was heard and determined by a full bench consisting of two Judges of the District Court. They found, on the authority of *Johnson* v. *Taylor Bros. & Co. Ltd.*, [1920] A.C. 144, that the place of the conclusion of the contract and the performance thereof was England but that the breach for the defective goods was committed ultimately in Cyprus and allowed the application for want of jurisdiction with regard to the claim for damages for failure to perform but dismissed the application with regard to the other claim.

The plaintiffs appealed and the defendants cross-appealed against that part of the ruling that was against each one of them.

The relevant rules which govern the matter are 0.6, rr.1(e) and 6, 0.16, r.9, and 0.64. They are in effect identical to the old English 0.11, r.1(e), 0.11, r.6, 0.12, r.30 and 0.70.

The greater part of our Civil Procedure Rules are almost identical with the corresponding English Rules of the Supreme Court in force in 1960. The great similarity between the two sets of Rules of Court indicates forcibly that the underlying principles in both sets are similar and, unless an express provision or the context leads to a contrary view, in interpreting our Rules of Court preference should be given to a construction more consonant to the corresponding English Rules of the Supreme Court.

In *R.* v. *Theori*, (1902) 6 C.L.R. 11, it was held that:-

"....the Cyprus Courts of Justice Order, 1882, to a great extent was based on English practice and in seeking to determine what was the intention of the enacting power, where it is not clearly expressed, regard should be had

to the rules in force in England in regard to the matter in question".

The Civil Procedure Rules, Cap. 12, were made when Cyprus was a British Crown colony. They were previously cited as the Rules of Court, 1938. As from 1955 they are cited simply as the Civil Procedure Rules as it was considered that this is a more appropriate title.

At common law, all persons in the world may invoke or become amenable to the jurisdiction, provided only that the defendant has been duly cited to appear before the Court. He must have been served with process. More precisely, a writ of summons, or its equivalent such as an originating summons, must have been served upon him in person. This suffices to subject him to the power of the Court even though he is a foreigner and only in the course of passage through England and even though the cause of action has no factual connection with England. He must be within the jurisdiction. Nothing else suffices.

This fundamental principle of English Law has been modified by a few exceptions introduced by the Common Law Procedure Act, 1852, and later extended by rules of Court. These give a discretionary power to a Judge to authorize service of a writ upon a defendant abroad in a limited number of cases. The jurisdiction thus based upon the mere service of process is, however, subject to certain limitations to which we need not refer in this judgment.

The rule at common law, that no action in personam will lie against a defendant unless he has been served with a writ while present in England, often precludes a plaintiff from enforcing a claim in what under the circumstances is the most appropriate forum. The Common Law Procedure Act, 1852, introduced what is generally called "assumed" jurisdiction which gave the Courts a discretionary power to summon absent defendants, whether English or foreign. The exercice of this jurisdiction was governed under the English Rules before 1965 by 0.11 of the Rule of the Supreme Court which corresponds to our 0.6 which empowers the Court, upon an application to it being made, to permit the service of a writ of summons upon an absent defendant in the circumstances set out therein. This

enlarged jurisdiction set out in our 0.6 confers upon the Court a new power which it is enabled to exercise in particular cases which seem to it to fall within the spirit as well as the letter of the various classes of case provided for—(*Johnson* v. *Taylor Bros. & Co. Ltd.*, (supra), at p. 153, per Lord Haldane).

The judiciary exercises one of the powers of the State. Its power is primarily exercised over the persons within the jurisdiction and the nationals of the country. The nationals of a country owe allegiance to it and have the corresponding benefits of their nationality. A foreigner owes no allegiance.

Scott, L.J., in *George Monro Ltd.* v. *American Cyanamid and Chemical Corporation*, [1944] 1 K.B. 437, stated:-

> "Service out of the jurisdiction at the instance of our Courts is necessarily prima facie an interference with the exclusive jurisdiction of the sovereignty of the foreign country where service is to be effected. I have known many continental lawyers of different nations in the past criticize very strongly our law about service out of the jurisdiction. As a matter of international comity it seems to me important to make sure that no such service shall be allowed unless it is clearly within both the letter and the spirit of Or. XI".

Obviously the remarks quoted related to service out of the jurisdiction and where leave of the Judge has to be obtained before such service can be allowed.

In *Dicey & Morris on The Conflict of Laws*, 10th edition, volume 1, p. 181, we read:-

> "Every action in the High Court commences with the issue of a writ or originating summons, which is a written command from the Queen to the defendant to enter an appearance in the action; and the service of the writ, or something equivalent thereto, is essential as the foundation of the Court's jurisdiction. When a writ cannot legally be served upon a defendant, the Court can exercise no jurisdiction over him. In an action in personam the converse of this statement holds good, and whenever a defendant can be legally served with a writ, then the Court, on service being effected, has jurisdiction to entertain an action against him. Hence, in an action in personam,

the rules as to the legal service of a writ define the limits of the Court's jurisdiction".

On the 16th August, 1960, as a result of the London and Zurich Agreement and the Cyprus Act of Parliament of the United Kingdom, a new State--the Republic of Cyprus - emerged from the status of dependency by succession from a metropolitan country. On the said date by the emancipation of the former British Colony of Cyprus the independent Republic of Cyprus came into being.

Upon change of sovereignty there is a continuity of Law between the former colony and the new State. The bulk of the legal system of the predecessor State is left unaffected by the change. So much only of the Law of the predecessor State as is repugnant to that of the successor State does not survive the change of sovereignty and so much as is not repugnant does.

Article 188 of the Constitution embodied the principle of continuity of the legal system upon the change of sovereignty. Subject to th provisions of the Constitution and to certain transitional provisions, all Laws in force on the date of the coming into operation of the Constitution, until amended whether by way of variation, addition or repeal, by any Law made under the Constitution, continued in force on or after the establishment of the Republic and are construed from that date and applied with such modification as may be necessary to bring them into conformity with the Constitution. "Law" includes any public instrument made before the date of the coming into operation by virtue of such Law.

Article 163 of the Constitution empowered the High Court to make Rules of Court for regulating the practice and procedure of the High Court and of any other Court established by or under the Constitution.

In virtue of such power the High Court on 12th December, 1960, issued the Rules of Court (Transitional Provisions), 1960, the material part of which is 0.3 that reads as follows:-

"3. Τηρουμένων των διατάξεων του Συντάγματος, πας κατά την αμέσως προηγουμένην της ημέρας ανεξαρτησίας ημέραν ισχύων διαδικαστικός κανονισμός, πίναξ δικαστικών

τελών και η εν τοις δικαστηρίοις ακολουθουμένη και νόμω καθοριζομένη πρακτική και δικονομία (practice and procedure) θα εξακολουθούν να ισχύουν μέχρις ου τροποποιηθούν δια μεταβολής, προσθήκης ή καταργήσεως, δυνάμει διαδικαστικού κανονισμού και θα ερμηνεύωνται και θα εφαρμόζωνται μετά τοιούτων μετατροπών καθ' ο μέτρον είναι τούτο αναγκαίον προς συμμόρφωσιν προς τας διατάξεις του Συντάγματος".

("Subject to the provisions of the Constitution, every Rule of Court, table of Court fees and the practice and procedure followed by the Courts and prescribed by law in force on the day immediately before the day of Independence will continue to be in force until amended whether by variation, addition or repeal, by Rules of Court and shall be interpreted and applied with such modifications that are necessary for compliance with the provisions of the Constitution").

Consonant to the provisions of Article 158 of the Constitution, the Courts of Justice Law, 1960 (No. 14/60) was enacted and came into operation on 17th December, 1960. That Law repealed the Courts of Justice Law, Cap. 8, of the 1959 edition of the Laws of Cyprus, the Courts of Justice (Extension of Jurisdiction) Law (No. 6/60) and s.11 of the Civil Procedure Law, Cap. 6. By this new Law the District Courts and other Courts of the Republic were established with jurisdiction and powers on civil and criminal jurisdiction.

Section 69 of the Courts of Justice Law No. 14/60 provides:-

"The High Court may make Rules (in this Law referred to as 'Rules of Court') to be published in the official gazette of the Republic for the better carrying out of this Law into effect".

The power and jurisdiction of the High Court were conferred by Law No. 33/64 on the Supreme Court of Cyprus. No new Rules of Court were made either by the High Court or by the Supreme Court. The Rules of Court in force on the day before Independence are in force and continue to be applied by the Courts both under the Rules of Court (Transitional Provisions) of 1960 made by the High Court in virtue of its

power under Article 163 of the Constitution and under s.11 of the Interpretation Law, Cap. 1, which provides that when a Law is repealed and substituted and no rules are made under the new Law, the rules made under the repealed Law continue to be good and valid in so far as they are consistent with the substituted provisions. These Rules shall be construed and applied with such modification as may be necessary to bring them into conformity with the Constitution. "Modification" includes amendment, adaptation and repeal.

In England and the British Dominions and territories the British Crown was and is the head of the State, fictitious though it may sometimes be described. The Crown is the source of all powers in a State. A writ in England is a command by the Court in the name of the source of justice—the Crown—to attend the Court. The British subjects owe allegiance to the Crown.

This country after Independence Day is a republican State and the Queen of England and the British Crown have no jurisdiction over it whatsoever. A new State was born. A Cypriot nationality came into being. Only Cypriot nationals owe allegiance to our Republic and the authority of the new State extends under international law within the boundaries of the State, including its territorial waters. A British subject owes no allegiance to the Republic of Cyprus. The Courts of the Republic cannot issue a command to a British subject out of the jurisdiction.

Rule 6 of 0.6 was cast in identical words with the old English 0.11, r.6, as the power of the Court and the command by the writ of summons emanated from the same authority—the British Crown –this country being a British Crown colony.

In view of the radical constitutional change and the international status of this country with the declaration of Independence and the coming into being of the new State, the new constitutional and legal order has to be reflected in the Rules of Court. As the Republic of Cyprus, as aforesaid, has no power outside its jurisdiction and exercises no power over foreign, British subjects, 0.6, r.6, has necessarily to be modified. Rule 6 should be modified to read as follows:-

"When the defendant is not a Cypriot national, notice of the writ and not the writ itself is to be served upon him".

Conventions—bilateral or multilateral—as to the service of process are concluded by States. In the present case no convention was invoked and, to our knowledge, there is none relating to service in England of writs of summons issued out of the Courts of Cyprus.

Reverting now to the facts and circumstances of the present case, the order of the Judge was to serve copy of the writ of summons on a British national in London. This is not in compliance with r.6 of 0.6 as necessarily modified. A notice of the writ should have been served. By a notice a foreign national residing out of the jurisdiction is notified that an action was commenced against him in our Courts and he is required, after the receipt of the notice, to defend the said action, whereas a writ is a command on the defendant, after service of the writ, within the time specified to enter an appearance. There is a significant difference between a command and a courteous notice.

Is this non-compliance an irregularity or a nullity?

In *Hewitson and Milner* v. *Fabre*, [1888] 21 K.B. 6, the plaintiffs sued the defendant, who was a foreigner residing in France, for goods sold and delivered to him in England, and obtained a Judge's order for the service upon him of the writ out of the jurisdiction, the order being obtained upon an affidavit which stated erroneously that the defendant was a British subject. The writ was served upon the defendant in France, and judgment signed against him in default of appearance. It was held that the service of the writ instead of a notice was a nullity, and not a mere irregularity, and that the order for service of the writ and all subsequent proceedings must be set aside. Field, J., said on pp. 8-9:-

"But the evil is still greater in the case of foreign countries, the governments of which resent the service on their subjects without their leave of the process of the Courts of other nations, and for this reason the alteration has been made in the rule, and a specific distinction between serving the process itself and giving a courteous notice of it has been drawn by Order XI., r.6. Under that rule, if the

defendant be a British subject residing abroad, the jurisdiction which the Courts of this country possess over British subjects wherever resident would authorize the service upon him of the writ; but if he be not a British subject, notice only of the writ is to be given to him, so that he may be under no compulsion to obey it, but may be able to exercise an option in that respect.

It is important to consider whether this objection lies in the mouth of the individual himself. In my opinion it is plain that it does, and that the very object of the rule was to enable him to take such an objection, and I have no doubt whatever that a foreigner residing abroad is competent to complain of the service of British process upon him.

The order having been made upon a misrepresentation (however innocent) of a material fact, I think it should be set aside. It must be remembered also that the defendant was not a party to the making of the order, it was obtained ex parte, and to hold that the defendant cannot now come forward and object to it would amount to a denial of justice. I do not think there is any ground for the contention that the defendant has not come here in proper time; he has come when the necessity arose in consequence of proceedings upon the judgment being taken against him in the French Courts. The proceedings here are void ab initio, and I think the defendant is entitled to the relief which he claims".

Wills, J., in a terse language said:-

"I am entirely of the same opinion. The language of Order XI., r.6, is perfectly clear and explicit. The defendant was a foreigner residing in a foreign country, and the writ was served upon him abroad. Such a service is no service at all, for it is forbidden by the rules, and unless some act amounting to an estoppel has been done by the defendant, the service is wrong and wholly void".

The service of the copy of the writ on a foreign national outside the jurisdiction is a nullity. It may be set aside ex debito justitiae and we intend to do so. We shall set aside the order

for service of the writ and the service of the writ on the defendants.

In view of our above conclusion we need not consider the rival submissions of counsel whether the two claims of the plaintiffs come within the ambit of 0.6, r.1(e).

In the result order for service of copy of the writ on the defendants out of the jurisdiction and the service thereof are hereby set aside.

In all the circumstances of this case we make no order as to costs.

Order accordingly.