1986 July 18

[STYLIANIDES, J.]

BALM MARITIME CO. LTD.,

*Plaintiffs,*

*v.*

BIOCHEMIE R.O.S.E. LTD.,

*Defendants.*

*(Admiralty Action 52/84).*

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*Admiralty—Practice—Judgment obtained by default—Application to set it aside—Principles applicable—Applicant should show an "arguable" or "triable" issue—The Admiralty Jurisdiction Order, 1893, Rule 44—The old English Rules 0.13 r 10, 0.27, r. 15.*

*Admiralty—Practice—Application for an order—Evidence—Mode of—Discretion of the Court—Whether upon application to set aside a judgment obtained by default of appearance, the application and the opposition being supported by affidavits, a witness may be called to give oral evidence—Discretion of the Court—The Cyprus Admiralty Jurisdiction Order, 1893, Rules 116, 117 and 237 —Situation covered exhaustively by rule 116—0.38 r.1 of the old English Rules, and 048 r.4 and 0.39, r.11 of the Civil Procedure Rules—Not applicable.*

*The Courts of Justice Law 14/60—Section 29(2)(a).*

The defendants (hereinafter the applicants) in this case applied by summons for an order of the Court setting aside the judgment which the plaintiffs (hereinafter the respondents) had earlier obtained against them in default of appearance for demurrages and agreed port expenses. The plaintiffs opposed the application. Both the application and the opposition were supported by affidavits and both deponents were cross-examined and re-examined respectively.

The applicants contended all along that Cyprian Seaways Agencies Ltd. were the agents of the respondents.

The Director of the respondents admitted that the said company were the agents of the vessel, but in re-examination he stated that for the loading in question they were 5 the agents of the shippers. This was said plainly at that stage for the first time. Mr. Mavrokordatos, who had sworn the affidavits in support of the application was recalled and was cross-examined and re-examined on the point. The respondents then applied to call the Di- 10 rictor of the said company as a witness. The applicants opposed the application.

*Held,* granting the application to call the said Director as a witness: (1) The application to set aside the judgment obtained by default is based on Rule 44 of the 15 Cyprus Admiralty Jurisdiction Order, 1893 which is similar to the old English Rules, 0.13. r.10, and 0.27, r.15. Our rule 44 has to be interpreted and applied as the said English Rules. One of the rules, which the Courts have laid down for themselves to guide them in the 20 exercise of their discretion, is that, where the judgment was obtained regularly, there must be an affidavit as to merits, meaning that the applicant should produce evidence that he has a "prima facie defence" or "arguable case". The rule may be departed from in rare but ap- 25 propriate cases.

(2) Rule 44 gives a discretion untrammelled in terms. The filing of an affidavit is not a rule of Law but only a general indication of convenience in practice to help the Court in exercising the discretion. The primary con- 30 sideration is whether the applicant has merits in the sense of triable or arguable issue.

(3) Where no provision is contained in the Cyprus Admiralty Jurisdiction Order 1893, under rule 237 the practice of the Admiralty Division of the High Court 35 of Justice in England, so far as the same shall appear to be applicable, shall be followed. The English rules so applicable are those which were in force on the day preceding the Independence Day of Cyprus.

(4) This is an application for an order and the matter in question is exhaustively governed by Rule 116* of the Cyprus Admiralty Jurisdiction Order, 1893. Order 38, rule 1 of the old English Rules and 0.48, r.4 of the Civil Procedure Rules do not apply. The question posed is by virtue of rule 116 and as there is no consent of the parties, within the unfettered discretion of the Court. In the circumstances it would be injudicious to exercise the discretion not to direct that the Director of the said company gives oral evidence.

*Application granted.*

Cases referred to:

*Evans* v. *Bartlam* [1937] A. C. 473;

*Burns* v. *Kondel* [1971] Ll. L.Rep. vol. 1, p. 554;

*Kotsapas and sons* v. *Titan Construction and Engineering Co.*, 1961 C.L.R. 317;

*Sidnell* v. *Wilson and Others* [1966] 1 All E. R. 681;

*Land Securities Plc.* v. *Receiver for the Metropolitan* Police District [1983] 2 All E.R. 254;

*Asimenos* v. *Paraskeva* (1982) 1 C.L.R. 145.

**Application.**

Application for leave to call a witness to give oral evidence during the hearing of an application to set aside the judgment given in default of defendant's appearance.

*L. Papaphilippou*, for the plaintiffs.

*M. Montanios* with *P. Panayi (Miss)*, for the defendants.

*Cur. adv. vult.*

STYLIANIDES J. read the following ruling. The point that falls for determination is whether the plaintiffs-respondents

* Quoted at p. 310.

in this application may call a witness to give oral evidence or the Court may direct that oral evidence be given.

The writ of summons in the action was issued on 11th February, 1984, against the defendants, a registered company. On 7.4.84—the time fixed by the writ of summons for the appearance of the parties—the plaintiffs appeared by counsel but the defendants did not. Affidavit of service of the writ of summons at the defendants' registered office was filed. On the following day the plaintiffs filed petition and by a written ex-parte application applied for judgment in default of appearance. The application was based on rr. 41 and 237 of the Cyprus Admiralty Jurisdiction Rules.

The master of the ship "DIANA", who is also the director and shareholder of the plaintiff company—owner of the ship—testified and produced a number of documents; thereupon the Court issued judgment in favour of the plaintiffs against the defendants for C£1,000.- and U.S.A. $11,600.- demurrages and agreed port expenses plus costs.

On 31.5.84 the defendants by written application by summons, based on rr. 41, 44, 46, 203-212 and 237 of the Rules of the Supreme Court in its Admiralty Jurisdiction sought an order of the Court setting aside the judgment given in default of the defendants' appearance and permitting the defendants to appear in and defend the action. The facts relied upon are set out in a long affidavit sworn by Nicos Mavrokordatos, Director of the *defendant-applicant company*.

The plaintiffs-respondents filed notice of opposition. The facts relied upon in opposition were set forth in an affidavit sworn by their Director. The applicants filed a supplementary affidavit sworn again by Mavrokordatos.

When the application was set down for hearing, on the application of the respective counsel and the order of the Court both deponents were cross-examined and re-examined, respectively. The applicant contended all the way that Cyprian Seaways Agencies Ltd. were the agents of the respondents. The Director of the respondents ad-

mitted that Cyprian Seaways Agencies Ltd. were the agents of the vessel but in re-examination by Mr. Papaphilippou he stated that that company was for the loading in question the agents of the shippers. This was said plainly for the first time in these proceedings. With the leave of the Court Mavrokordatos was recalled and stated on oath that Cyprian Seaways Agencies Ltd. were the agents of the owners of the ship. He was cross-examined and re-examined on this point. Mr. Papaphilippou then applied to call the Director of Cyprian Seaways Agencies Ltd. to give oral evidence as to whom they represented for the loading in question. This application was opposed by Mr. Montanios and long argument was heard.

Mr. Montanios contended that in the affidavits sworn by Mr. Mavrokordatos it is repeatedly alleged that Seaways were the agents of the plaintiffs: this was not denied expressly in the affidavit of the respondents; that in these proceedings both sides filed affidavits as to facts and, therefore, it is not permissible to call oral evidence; that in virtue of r. 237 of the Admiralty Rules, the English Order 38, r. 1, is applicable, and once evidence by affidavit was given, it is not permissible to call oral evidence; lastly, that the Court in the present application should only hear general grounds whether the applicants have "prima facie good merits of defence", and, therefore, the evidence of the proposed witness affecting a material issue of the substance of the case, which is not within the province of this Court in this application, is not admissible.

Mr. Papaphilippou, on the other hand, submitted that Rules 114, 115, 116 and 117 of the Cyprus Admiralty Jurisdiction Rules, 1893, cover exhaustively the matter; the English O.38, r. 1, is inapplicable; the Court may order an oral examination of the witness proposed: and as the evidence of the proposed witness tends to substantiate the allegations of the respondents-plaintiffs, the Court should not exclude such evidence.

The application is based on r. 44 of our Admiralty Rules, which reads as follows:-

"44. Where any judgment has been given in the absence of either of the parties in accordance with the provisions of Rules 41 and 43 hereof, any party affected by such judgment may apply to the Court or Judge to set aside the judgment and the Court or Judge may set aside the judgment on such terms as to the payment of costs or otherwise as shall appear to be just".

Applications under r. 203 may be made orally or in writing.

Rule 44 of our Admiralty Rules is similar to 0.13, r. 10, and 0.27, r. 15, of the old English Rules whereby a discretionary power is given to the Court to set aside the judgment obtained on default of appearance. Our r. 44 has to be interpreted and applied as the said English rules.

The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence. The rule as to affidavit of merits could, in no doubt rare but appropriate cases, be departed from —(*Evans* v. *Bartlam*, [1937] A.C. 473, at p. 480, per Lord Atkin).

Lord Denning in *Burns* v. *Kondel*, [1971] Ll. L. Rep. Volume 1, 554, said with regard to the Rules of the Supreme Court, Order 13, r. 9, which reads: "The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order".-

"We all know that in the ordinary way the Court does not set aside a judgment in default unless there is an affidavit showing a defence on the merits. That does not mean that the defendant must show

Admiralty Jurisdiction, as in force on the day preceding the Independence Day, subject to any amendments which might be effected by any law of Cyprus, and that since Rules of Court are a species of legislation and, therefore, the provisions of Section 29 (2) (a) extend to them as well, the Rules of the Supreme Court which were in force and applied in the Admiralty Division of the High Court of Justice of England on the day preceding the Independence Day are the ones applicable by this Court in the exercise of its admiralty jurisdiction to the extent contemplated by Rule 237 of the Cyprus Admiralty Rules of 1893.

Our Rules 116 and 117 read:-

> "116. Evidence on an application for an order and at the hearing of an action shall in general be given by the oral examination of witnesses; but the mode or modes in which evidence shall be given, either on any application or at the hearing of an action, may be determined either by consent of the parties, or by direction of the Court or Judge.
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> 117. The Court or Judge may order any person who has made an affidavit in an action to attend for cross-examination thereon before the Court or Judge, or the Registrar, or a Commissioner specially appointed.
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> Any such order, if made by a Judge, shall be final".

This is an application for an order. Evidence in an application, according to Rule 116, shall, in general, be given by oral examination but the mode or modes of evidence, both of an application and of an action, are within the discretion of the Court. The English Order 38, r. 1. of the old English Rules does not apply. The provision in the Civil Procedure Rules, Order 48.4 "any facts relied upon in opposition which are not apparent on the face of the proceedings shall be set out in one or more affidavits accompanying the notice of opposition" is not applicable, neither 0.39, r. 1. The matter is ex-

a good defence on the merits He need only show a defence which discloses an arguable or triable issue"

(See, also, *Ioannis Kotsapas & Sons* v. *Titan Construction and Engineering Co*, 1961 C.L.R. 317 On the expressions "prima facie case" and "arguable case" useful reference may be made to *Sidnell* v. *Wilson & Others* [1966] 1 All E R. 681, at p. 686, and *Land Securities Plc.* v *Receiver for the Metropolitan Police District*, [1983] 2 All E R 254)

The Court in the present application has to be satisfied by the defendants that they have disclosed an arguable or triable issue and no more.

Rule 44 gives a discretion untrammelled in terms: it does not even require an affidavit as a condition and the discretion may be exercised on any proper material, though in practice an affidavit is generally required The filing of an affidavit is not a rule of law but only a general indication of convenience in practice to help the Court in exercising the discretion The primary consideration is whether the applicant has merits in the sense of triable or arguable issue to which the Court should pay heed Where this is shown the Court will not desire to let a judgment pass on which there has been no proper adjudication as a default judgment is not stricto senso a proper adjudication but a judgment obtained by a failure of the defendant to follow the rules of procedure laid down for the speedy determination of disputes, an important factor in the administration of justice.

Where no provision is contained in the Cyprus Admiralty Rules of 1893, under r. 237 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

In *Asimenos* v *Paraskeva*, (1982) 1 C.L.R 145, it was held that since the law to be applied in the exercise of its Admiralty Jurisdiction by virtue of Section 29 (2) (a) of the Courts of Justice Law, is the law applied by the High Court of Justice in England in the exercise of its

haustively covered by r. 116 of the Cyprus Admiralty Rules. As there is no consent of the parties in this case, the question posed is within the unfettered discretion of the Court. A discretion necessarily involves a latitude of individual choice according to the particular circumstances.

The parties filed affidavits as to facts. The two deponents were cross-examined. Mavrokordatos, the Director of the applicant-defendant company, with the leave and on the directions of the Court gave further oral evidence. It would be injudicious to exercise my discretion not to direct that Periklis Demetriou gives oral evidence. This does not transgress the scope of the inquiry in this application earlier on described.

It is hereby directed that Periklis Demetriou gives evidence on the limited issue applied for.

Before concluding, I stress the need for amending and redrafting the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction. The rules that served this jurisdiction for almost a hundred years are out-modelled and antiquated and necessarily do not take account of the developing needs of the administration of justice.

*Application granted.*