1986 October 17

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 155(4) OF THE CONSTITUTION AND S. 3 OF THE COURTS OF JUCTICE (MISCELLANEOUS PROVISIONS) LAW, OF 1964,

AND

IN THE MATTER OF AN APPLICATION BY:
1. JULIA S. HADJISOTERIOU,
2. J.U.E.L. (HOTEL) CO. LTD.,
FOR AN ORDER OF CERTIORARI,

AND

IN THE MATTER OF THE DECISION/ORDER/HEARING DATED 27.3.85, OF THE DISCTRICT COURT OF LIMASSOL AND HIS HON. HADJIHAMBIS, D.J. IN THE ACTION NO. 1251/85 BETWEEN:
1. JULIA STELIOU HADJISOTERIOU,
2. J.U.E.L. (HOTEL) LTD.,

Plaintiffs,

AND

1. ANDREAS IOANNOU,
2. ANDREAS MARNEROU,
3. MARNEROS AND IOANNOU HOTEL ENTERPRISES LTD.,

Defendants.

(Civil Application No. 34/85).

Prerogative Orders—Certiorari—Error of law—Meaning of.

Civil Procedure—Irregularity—Ord. 64, rule 1 of the Civil Procedure Rules—Ex parte application for an interim order—Failure to specify reliance on section 9 of the Civil Procedure Law, Cap. 6—A mere non compliance with the rules easily remediable—Distinction between

proceedings, which are null and void, and proceedings which are merely irregular.

Civil Procedure—Order obtained ex parte—Discharge of—Right of person affected to apply for setting aside such order—The application should be made by summons—The Civil Procedure Rules, Ord. 48, rule 8(4), Ord. 48, rule 9, Ord. 48, rule 8(1), and Ord. 47, rule 8(3)—Question whether in a proper case such application may be made ex parte left open—The Civil Procedure Law, Cap. 6, section 9(1). 5 10

Civil Procedure—The Civil Procedure Law, Cap. 6—Section 9—The prerequisites of its application.

Words and Phrases: "Any person affected may apply by summons" in Order 48, rule 8(4) of the Civil Procedure Rules. 15

The trial Judge, upon an ex parte application, which was filed on the 22.3.85 by the defendants in the action, discharged an interim order, which the plaintiffs had earlier obtained upon an ex parte application filed by them. 20

The said interim order had been made returnable on the 16.3.85, whereupon the defendants opposed it. The notice of opposition was filed on the 19.3.85, but the hearing, which was fixed on the 21.3.85, was adjourned to the 29.3.85. 25

It should be noted that on the 26.3.85, when the defendants' said ex parte application was due to be heard, counsel for the plaintiffs appeared before the trial Judge in order, as it is stated in the latter's ruling delivered on the 27.3.85, "to expose his views and assist the Court". 30

As a result of the said discharge order the plaintiffs, having obtained leave, filed the present application for an order of certiorari quashing such discharge order.

The grounds upon which the present application is based are that: (a) The trial Judge wrongly and in excess of power discharge the previous order on the basis that section 9 of Cap. 6 empowered him to do so and con- 35

trary to Order 48 rule 8(4) of the Civil Procedure Rules, and (b) The reasons given for discharging the Order, namely that there existed "Urgent and peculiar circumstances" and that the plaintiffs' application for interim order was not based on section 9 of Cap. 6 are wrong.

Held, granting the application: (1) Any possible non compliance by the plaintiffs in the action with Order 48, rule 2 of the Civil Procedure Rules through a failure to specify reliance of their application for the interim order on section 9 of Cap. 6 cannot be treated as a fundamental irregularity such that would render the proceedings a nullity. The irregularity in question can easily be covered by the provisions of Order 64, rule 1—which corresponds to the old English Order 70, rule 1—as being a mere non compliance with the rules, which is easily remediable.

(2) Order 48, rule 8(4) provides that a person affected by an order made ex parte may apply by summons to set it aside. This rule does not give a choice to an applicant of applying either by summons or ex parte. The word "may" refers to the verb "apply" and not to the words "by summons". In other words the expression "any person affected may apply by summons" conveys the notion of giving a right to such a person of whether to apply or not but if he does exercise the right to apply, the procedure to be followed is by means of a summons.

(3) In the light of the said Order 48, rule 8(4), but also of Order 48, rule 8(1), Order 48, rule 9 Order 47, rule 8(3) of the Civil Procedure Rules the defendants' application for the discharge of the interim order could not be made ex parte. The question whether in a proper case such application can be made ex parte is left open.

(4) In any event the prerequisites of section 9 of Cap. 6 had not been complied with, because there was no proof of urgency as is required by section 8(1), and, also, because the procedure prescribed by section 9(3), requiring service of the order, was not complied with.

(5) In the circumstances this is a proper case for issuing an Order of certiorari as there exists an error of

law on the face of the proceedings rendering the discharge order invalid.

Application granted.

Cases referred to:

In Re Pritchard (deceased) [1963] 1 All E.R. 873; 5

Harkness v. *Bell's Asbestos and Engineering Ltd.* [1966] 3 All E.R. 843;

Spyropoulos v. *Transavia Holland N.V. Amsterdam* (1979) 1 C.L.R. 421;

R. v. *Medical Appeal Tribunal Ex parte Gilmore [1957]* 1 Q.B. 574; 10

R. v. *President of the District Court Famagusta, Ex parte Loukia K. Marouletti* (1971) 1 C.L.R. 226;

In re Rousias Co. Ltd. (1981) 1 C.L.R. 703;

R. v. *Preston, ex parte Moore* [1975] 2 All E.R. 807. 15

Application.

Application by applicants for an order of certiorari for the purpose of quashing an order of the District Court of Limassol in Civil Action No. 1251/85 dated 27.3.1985 given ex parte whereby a previous order by the same Court 20 given ex parte on the 13.3.1985 was discharged.

Chr. Clerides, for the applicants.

C. Melas with *Chr. Demetriou (Mrs.)*, for the respondents.

Cur. adv. vult. 25

A. LOIZOU J. read the following judgment. By the present application the applicants seek an order of certiorari for the purpose of quashing an order of the District Court of Limassol dated 27th March, 1985, and given ex parte, by virtue of which a previous order by the same 30 Court given ex parte on the 13th March, 1985 was discharged on the ground that such application of the 13th

March, 1985, was not based on section 9 of the Civil Procedure Law, Cap. 6.

The factual background to this application appears in the decision on the application for leave to apply for the present application, which leave was granted on the 14th May, 1985, (see (1985) 1 C.L.R. 387 pp. 389-390), but it is essential to refer to certain facts again and highlight certain aspects which are relevant to the present application.

The applicants who by a contract of lease dated 30th April, 1984 let their premises, known as the Limassol Palace Hotel, to the respondents, filed in the District Court of Limassol action No. 1251/85, against the aforesaid respondents claiming a breach of the terms of the contract of lease in that the tenants/respondents effected certain structural and other alterations to the premises in question. Upon filing the said action on the 12th March, 1985, the applicants/plaintiffs applied ex parte seeking an interim order against the defendants preventing them from carrying out any building work or other construction work in relation to the leased premises and ordering them to put an end to any such works. The application was granted by the learned trial Judge on terms as to security and the relevant order was made returnable on the 16th March, 1985 whereupon the defendants opposed same. On the 19th of that month the defedants filed their notice of opposition supported by an affidavit of even date. Its hearing was fixed on the 21st March, 1985, but was adjourned to the 23rd March, 1985, with a view to settlement and thereafter to the 29th March, 1985.

On the 22nd March, 1985, however, the defendants applied ex parte for an order cancelling and or discharging the interim order granted ex parte on the 13th March, 1985. This was adjourned to the 23rd March, 1985, in view of the fact that the application of the 13th March, 1985, was fixed on that date; however, on the 23rd the defendants' application was adjourned to the 26th March, 1985, whereupon counsel for the applicants to whose knowledge it had come that the application was fixed on that date appeared, as put by the trial Judge in his ruling of the 27th March, 1985, "in order to expose his views

and assist the Court". The learned trial Judge ultimately for the reasons given in his ruling discharged, as already mentioned the order made ex parte on the 13th March. 1985 and in respect of which there were pending the proceedings before him and fixed for hearing on a later date. 5

The grounds upon which the present application is based are that:

1. The District Court wrongly and in excess of power discharged its previous order dated 13th March, 1985 by way of an ex parte application dated 22nd March, 1985 on the basis that section 9 of Cap. 6 empowered it to do so and contrary to Order 48, rule 8(4) of the Civil Procedure Rules. 10

2. The reasons given by the District Court for discharging its previous order i.e. that there existed "urgent and peculiar circumstances" and that the application of the 13th March, 1985, was not based on section 9 of Cap. 6 are wrong, 15

Because the District Court failed to take into consideration 20

(a) on granting the order that the application was not based on section 9.

(b) that it gave directions for an opposition to be filed in respect of the application of the 13th March, 1985. 25

(c) that it was acting as an appeal Court from its own decision.

(d) that the matter of urgency had been considered by a direction that the hearing of the application be fixed for the 29th March, 1985. 30

Counsel for the applicants in his address has argued that the learned Judge was wrong in Law in deciding that it is an essential prerequisite of an ex parte application to specify that it is based on section 9 of Cap. 6 and that 35

failure to do so is fatal to the extent that it can be discharged on this very ground.

He argued that the application could sufficiently be based and could stand on the grounds already stated 5 therein, section 9 being of a technical nature, thus any such failure to specify that section was a mere irregularity that could be covered and remedied by Order 64, rule 1 of the Civil Procedure Rules.

Order 64, rule 1, of our Civil Procedure Rules which 10 provides as follows:

> "Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or Judge shall so direct, but such proceedings may 15 be set aside either wholly or in part as irregular or amended, or dealt with in such manner and upon such terms as the Court or Judge shall think fit."

As stated in the marginal note thereof Order 64, rule 1, *corresponds to the Old English Order 70, rule 1*. It is 20 pointed out in the note thereto at p. 1986 of the Annual Practice 1958, Vol. 1:

> "*Effect of the Rule,—A distinction is to be drawn* between proceedings which are null and void, and proceedings which are *merely irregular in the* sense 25 that they involve noncompliance with any of the R.S.C. *or with any rule of practice. In both cases* an application should generally be made to the Court *to set the proceedings aside. But rules 1 and 2 of* this Order do not apply to the first class of case, but 30 only to the second (see the cases cited in the following (n.)). In the first class of case the party is entitled ex debito justitiae to have the proceedings set aside without conditions, for they are a nullity, though the Court retains its discretion as to the costs 35 of the application and may refuse them, or, if it awards them, may do so on terms (as, for example, that the party consents not to bring any action. *(Anlaby* v. *Praetorius* [1888], 20 Q.B.D. at p. 769)). In the second class of case rules 1 and 2 apply: the

proceedings are valid though irregular and the Court has an unlimited discretion as to what order it will make in the circumstances both as to costs and otherwise; and furthermore it will not set aside the proceedings if the application is not made within reasonable time, or the party applying has taken any fresh step after knowledge of the irregularity (r. 2)." 5

In *Re Pritchard (deceased)*, [1963] 1 All E.R. 873, Upjohn L. J. said at p. 881:

"I am not so sure that it is so difficult to draw a line between irregularities, by which I mean defects in procedure which fall with R.S.C., Ord. 70, and true nullities, though I agree that no precise definition of either is possible." 10

After reviewing examples of nullities and irregularities in decided cases he said at pp. 882 - 883:- 15

"I do not think that the earlier cases or the later dicta on them prevent me from saying that in my judgment the law when properly understood is that R.S.C., Ord. 70, applies to all defects in procedure unless it can be said that the defect is fundamental to the proceedings. A fundamental defect will make it a nullity. The Court should not readily treat a defect as fundamental and so a nullity and should be anxious to bring the matter within the umbrella of Ord. 70 when justice can be done as a matter of discretion, still bearing in mind that many cases must be decided in favour of the party entitled to complain of the defect ex debito justitiae.... it cannot be a completely legal test, for until one has decided whether the proceeding is a nullity, one cannot decide whether it is capabe of waiver. 20 25 30

The authorities do establish one or two classes of nullity such as the following. There may be others, though for my part I would be reluctant to see much extension of the classes. (i) Proceedings which ought to have been served but have never come to the notice of the defendant at all; .... (ii) Proceedings which have never started at all owing to some funda- 35

mental defect in issuing the proceedings; (iii) Proceedings which appear to be issued, but fail to comply with a statutory requirement:..."

As a result of the aforesaid decision in *Re Pritchard*, Order 70, rule 1 was substituted by R.S.C. (Rev.) 1962 Order 2, rules 1 and 2, where the distinction between nullities and mere irregularities has disappeared, at any rate as regards to failure to comply with the requirements of the rules such being now treated as a mere irregularity. (See *Harkness* v. *Bell's Asbestos and Engineering Ltd*., [1966] 3 All E.R. 843 C.A.

This present position, however, of the Law in England does not affect the position in Cyprus where the old Order 70, rule 1 is still relevant.

As regards the present case, in my view, any possible noncompliance with Order 48, rule 2 through a failure to specify reliance on section 9 of Cap. 6 cannot be treated as a fundamental irregularity such that would render the proceedings in question a nullity. In any case, the respondents duly appeared before the Court on the date the order was made returnable (16.3.85), opposed the order on the 19.3.85, their opposition being based inter alia on section 9 of Cap. 6, the hearing of the opposition was fixed on the 21.3.85 and then on the 23.3.85, but for reasons which do not appear on the record of the trial Court it was thereafter adjourned to the 29.3.85.

In the circumstances I cannot find that the irregularity in question constitutes a fundamental defect but is such that can easily be covered by Order 64, rule 1 as being a mere non compliance with the Rules which is easily remediable. (See also the case of *Spyropoulos* v. *Transavia Holland N.V. Amsterdam* (1979) 1 C.L.R. 421 at 431-2).

The second argument of the applicants is that the learned Judge wrongly discharged the order of the 13th March, 1985, which had been given ex parte, by way of an ex parte application instead of by summons, by relying on section 9(1) of Cap. 6.

Section 9(1) provides:

"Any order which the Court has power to make may, upon proof of urgency or other peculiar circumstances, be made on the application of any party to the action without notice to the other party."

It is stated in the decision of the District Court: 5

"The question which I have to ask myself, therefore, is whether the order which Mr. Melas invites the Court to make is: in the first place, an order which the Court has power to make irrespective of the mode in which it may be made. Turning to the Civil Procedure Rules, 0.48, r.8(4) provides that: 10

'Any person (other than the applicant) affected by an order made ex parte may apply by summons to have it set aside or vary such order on such terms as may seem just.' 15

To my mind, this provision clearly empowers the Court to deal with an application by the defendants in this case who are persons affected by the order made ex parte, and the question for consideration is whether the provision that the application must be made by summons precludes an application ex parte to the same effect. Nowhere in section 9, read in context and in terms, is there anything to limit its provisions to what Mr. Clerides submitted was its effect, that is, to order which the Court can make under that law. On the contrary, the Civil Procedure Law. Cap. 6, which is described as a law relating to the powers of the Courts in civil actions and to the execution of judgments in such actions, seems to be to be a general law providing a procedure that may be followed in any given case, and the express provision of s. 9(1) that any order which the Court has power to make may, upon proof of urgency or other peculiar circumstances, be made on the application of any party to the action without notice to the other party, clearly empowers the Court to deal with applications to set aside orders made ex parte." 20 25 30 35

And further down:

"Though I would not necessarily rely, in arriving at my conclusion on the practice and procedure pre- 40

vailing in England and since there are express provisions in Cyprus, nevertheless I am all the more confident about my conclusion considering that ex parte applications to discharge ex parte orders are a
5 proper procedure in England and, indeed, elementary justice on the basis of equality between the parties requires that, if the plaintiff can get an order ex parte, there should be nothing in principle to prevent the defendant getting a discharge of that order ex parte."

10 I cannot agree that Order 48, rule 8(4) gives a choice to an applicant of applying either by summons or ex parte. Its relevant wording is to my mind such as to give to a person affected the right to apply and the word "may" refers to the verb "apply" that follows it and not to the words
15 "by summons" that follow the verb "apply". In other words the expression "any person affected may apply by summons" conveys the notion of giving a right to a person affected to apply or not if he wishes, but if he does exercise such right the procedure to be followed is by means of summons.
20 Otherwise the word "may" would have been replaced by the word "shall," which would mean that every person affected would be obliged to apply in any event, and not that it was obligatory, if he did decide to apply, to do so by summons.

25 Order 48, rule 8(1) prescribes the applications which may be made ex parte and in none of those enumerated an application to set aside or vary an order made ex parte is provided as capable of being made ex parte. On the contrary Order 48, rule 8(4) provides that the person affected
30 by an Order made ex parte may apply by summons. In other words, a distinction is made of the means by which an applicant desiring to have an order made ex parte set aside will apply, namely the means of summons. Moreover in Order 48, rule 8(3) it is provided that the Court or
35 Judge dealing with an application made ex parte may direct that it be made by summons with notice to such persons as the Court or Judge may think fit. And finally under rule 9, thereof the following provision is made:

"Saving the powers conferred on the Courts and
40 Judges by section 3 of the Courts of Justice (Supple-

mentary Provisions) Law, Cap. 12, and section 8 of the Civil Procedure Law, Cap. 7, to make temporary orders without notice under the circumstances and in the manner mentioned and provided in the said sections, all applications other than those mentioned in rule 8 of this Order shall be made by summons supported by affidavits of the facts relied upon with this qualification that, unless required by the Court or Judge, the undermentioned applications (and any others in which an affidavit is expressly dispensed with) need not be accompanied by affidavit-"

It may be that in a proper case, though I leave the matter open, such applications may be made ex parte but in the present instance I am inclined to the view, in the light of the express provisions of Order 48, rule 8(4) that the application to discharge the interim order of the 13th March, 1985, ought to have been made by summons.

In any event I find that the prerequisites to section 9 of Cap. 6 have not been complied with. In the first place, there was no proof of urgency as is required by section 9(1), such that would justify the granting of the order ex parte two days before the interim order was due to come up for hearing. None appears in the affidavits filed in support of the ex parte application and there does not appear to exist any that would render it imperative for the application in question to have been heard on the 26th instead of the 29th March. Nor do I consider that the nature of the case was such that a further continuance until the 29th March of the interim order which had been in force until 27th, would result in any irreparable damage to the respondents.

A further point for consideration is that, assuming that section 9 was applicable, the procedure prescribed therein, that is by sub-section (3) thereof, was not followed. Section 9 provides as follows:

"No such order made without notice shall remain in force for a longer period than is necessary for service of notice of it on all persons affected by it and enabling them to appear before the Court and object to it; and every such order shall at the end of

that period cease to be in force, unless the Court, upon hearing the parties or any of them, shall otherwise direct; and every such order shall be dealt with in the action as the Court thinks just."

5 Such requirement of service of the order given ex parte was not complied with, as the order of the 27th was not served on the applicants. And the fact that Mr. Clerides appeared does not dispense with the requirement of service because he appeared quite by chance at the hearing of 10 the 26th, not for the purpose of opposing the order but in an attempt to put before the Court that such ex parte application could not have been properly entertained.

There was therefore an essential ingredient of the law not satisfied by the failure to comply with the prerequisites 15 and provisions of section 9 of Cap. 6, which would have amounted anyway to abuse of the process of the Court, even if there was some indication of urgency which in any event did not exist, assuming of course that section 9 was applicable. Consequently there is in my view a good 20 ground for granting certiorari, namely an error of law.

It was stated in the case of *R.* v. *Medical Appeal Tribunal, Ex parte Gilmore* [1957] 1 Q.B. 574 at p. 582:

"It is now settled that when a tribunal come to a conclusion which could not reasonably be enter- 25 tained by them if they properly understood the relevant enactment, then they fall into error in point of law: see *Edwards (Inspector of Taxes)* v. *Bairstow* [1956] A.C. 14. When the primary facts appear on the record, an error of this kind is sufficiently ap- 30 parent for it to be regarded as an error on the fact of the record such as to warrant the intervention of this Court by certiorari."

And in the case of *R.* v. *President of the District Court Famagusta, Ex parte Loukia K. Marouletti* (1971) 1 35 C.L.R. 226 at pp. 243-4:

"Certiorari lies to correct error of law where revealed on the face of an order or decision, or irregularity, or absence of, or excess of, jurisdiction where

> shown. The control is exercised by removing an order or decision, and then quashing it. Certiorari will not issue as the cloak of an appeal in disguise, and it does not lie to bring up on order or decision of re-hearing of the issue raised in the proceedings."

In the case of *In re Rousias Co. Ltd.*, (1981) 1 C.L.R. 703, certiorari was granted quashing an order of the District Court issued without the procedure prescribed by law having been followed, the Court having found that there existed "on the face of the proceedings an error of law vitiating the validity of the complained of order."

Also relevant is what was stated in the English case of *R. v. Preston Supplementary Benefits Appeal Tribunal, Ex parte Moore* [1975] 2 All E.R. 807, at p. 810, by Lord Denning M.R.:

> "The two cases before us arise out of applications for an order of certiorari. They are brought under the established power of the High Court to supervise inferior tribunals. The High Court can quash any decision of an inferior tribunal for error of law which appears on the face of the record. The 'record' is generously interpreted so as to cover all the documents in the case. An 'error of law' is also interpreted generously so as to include a wrong interpretation of an Act or a wrong application of it to the facts of the case."

In the circumstances I find that this case is a proper case for granting an order of certiorari as there exists an error of law on the face of the proceedings rendering such order invalid.

For all the reasons stated above I hereby grant an order of certiorari quashing the order of the 27th March, 1985.

Application granted.