

1987 May 25

[PIKIS J]

SEKAVIN S A OF PIRAEUS, GREECE,

Plaintiffs,

v

- 1 THE SHIP «PLATON CH» NOW LYING AT THE
PORT OF LIMASSOL
- 2 GREYHOUND SHIPPING CORPORATION OF
MONROVIA, LIBERIA, THROUGH THEIR
ATTORNEYS IN CYPRUS, MONTANIOS & MONTANIOS,
- 3 THE MARSHAL OF THE ADMIRALTY COURT OF LIMASSOL,

Defendants

(Admiralty Action No 214/86)

5 *Admiralty — Practice — Service on defendant outside the jurisdiction — Leave for — Disclosure of cause of action a condition precedent to leave — Such disclosure is solely dependent on the objective implication of facts disclosed in the affidavit — The Cyprus Admiralty Jurisdiction Order, 1893 — Rule 24 — Order granting leave and obtained upon ex parte application set aside upon defendants' application based on rule 211 on ground of non disclosure of a cause of action*

10 *Contract — Quasi contract — The Contract Law, Cap 149, section 70 — Reproduces common Law in respect of quasi contractual liability of recipient of goods or services supplied or rendered not gratuitously — Outright sale of bunker oils to ship — Defendants assumed possession of ship as mortgagees some time after delivery — No cause of action against defendants*

15 Upon ex-parte application the plaintiffs in this action obtained leave to serve notice of the writ of summons upon defendants 2 outside the jurisdiction By means of the present application defendants 2 seek to set aside the Order granting the aforesaid leave on the ground that the affidavit in support of the ex-parte application did not disclose a cause of action, cognizable in law against the defendants

20 The facts founding plaintiff's claim against defendant 2 are as follows
Plaintiffs supplied a quantity of fuel oil bunkers for consumption by the defendant ship Platon Ch The delivery was made on 8 9 86 in Syros, Greece,

where the vessel was at bay. The delivery was receipted by a Master's certificate and the terms were evidenced by an invoice dated 15 9 86. On 25 9 86 defendants 2 assumed possession and management of the vessel in exercise of their powers as mortgagees. The vessel was eventually arrested and sold to satisfy the judgment and claims against her. The Marshal was joined as a party to this action because of his involvement in the seizure and sale of the vessel. 5

Counsel for the plaintiffs submitted that a cause of action is disclosed in virtue of s 70 of Cap 149.

Held, granting the application (1) Rule 24 of the Cyprus Admiralty Jurisdiction Order 1893 makes disclosure of a cause of action against a defendant outside the jurisdiction a condition precedent to leave. The disclosure of a cause of action is solely dependent on the objective implications of the facts as disclosed in the affidavit in support of the application for leave and not on the merits of the factual situation or plaintiff's belief in the existence of a cause of action. The facts must give rise to a prima facie or arguable case. The authors of the White Book, 1958 edn p 162 adopt the following test to decide whether the joinder of a foreign defendant is a proper one namely «supposing both defendants had been within the jurisdiction, would they have been proper parties to the action?» 10
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(2) The inescapable inference in this case is that there was an outright sale of the oil bunkers by the plaintiffs to defendants 1. The property in the bunkers passed to the purchasers.

(3) The fact composing the plaintiffs' claim are wholly outside the ambit of s 70 of Cap 149, which reproduces the common law principle of quasi contractual liability of the recipient of goods or services supplied or rendered not gratuitously. In this case nothing was ever delivered to the defendants. Even after the possession of the ship by the mortgagees, they would not be liable for necessaries supplied to the ship, unless the Master in ordering them acted as their agent. 25
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*Application granted with
costs against the plaintiffs*

Cases referred to

Jadranka Slobodna Providba v Photos Photades and Co (1965) 1 C L R 58. 35

Chemische Fabrik Vormals Sandoz v Badische Anilin and Sod Fabrik [1904] 90 L T 733,

E. Philippou Ltd v Compass Insurance Co Ltd (1987) 1 C L R 344,

Massey v Heynes, 21 Q B D 338,

The Troubadour, LT 1867 Vol XVI, p 176 40

Application.

Application by defendants 2 for an order setting aside the order of the Court dated 17 2 1987 authorising service of the writ of summons upon defendants outside the jurisdiction

5 *E Montanios*, for applicants - defendants 2

E Lemonaris, for respondents - plaintiffs

Cur adv vult

PIKIS J read the following judgment This is an application by defendants 2, (hereafter the defendants), a foreign corporation to
 10 set aside an Order of the Court dated 17th February, 1987, authorising service of the notice of the writ of summons upon defendants outside the jurisdiction The Order was given on an ex parte application of the plaintiffs dated 29th January, 1987,
 15 founded on facts deposed to in an affidavit of Stelios Skoufars, an advocate practising in association with Mr Lemonaris, counsel for plaintiffs

Defendant's written motion to set aside the Order rests on r 211 of the Cyprus Admiralty Jurisdiction Rules empowering a party affected by an Order to seek its rescission or variation Moreover,
 20 they rely on the inherent powers of the Court whereby a party to judicial proceeding should in recognition of a natural right, be afforded an opportunity to be heard in the matter (See also Article 30 3 (a) (b)) About the right of the defendants to move the Court for a review of the Order of 17 2 87 there is no controversy

25 Rescission of the Order is principally sought for failure on the part of the plaintiffs to disclose in the affidavit supporting their application, a cause of action against the defendants, cognizable in law Whatever complexion one may put upon the facts supporting their application for leave to serve notice outside the jurisdiction,
 30 they do not disclose a case against the defendants separately or jointly with any of the other two co-defendants R 24* makes disclosure of a cause of action against a defendant outside the jurisdiction a condition precedent to leave In *Jadranska Slobodna Plovidba v Photos Photiades & Co* ** it was indicated that the

* *Cyprus Admiralty Jurisdiction Rules*

** (1965) 1 C L R 58

ambit of r. 24 is similar to that of Ord. 11 r.1 of the Old Rules of the English Supreme Court, and like considerations should govern the exercise of the discretionary power of the Court to allow service outside the jurisdiction. Adopting the observations of Lord Davie in *Chemische Fabrik Vormals Sandoz v. Badische Anilin and Sod Fabriks** they drew attention to the fact that the disclosure of a cause of action is solely dependent on the objective implications of the facts set forth in the affidavit and not on the examination on the merits of the factual situation. Belief in the existence of a cause of action is not of itself sufficient. The facts must give rise to the existence of a prima facie or arguable case in order for the Court to exercise its discretion in favour of the proponent of service outside jurisdiction. A similar view respecting the presence or absence of a cause of action was taken by this Court in *E. Philippou Ltd. v. Compass Insurance Co. Ltd.*,** though in slightly different context.

On a review of the relevant case law pertaining to the exercise of the discretion of the Court under Ord. 11 r.1(g) the authors of the White Book*** adopt the following test to decide whether the joinder of a particular foreign defendant is a proper one, namely «supposing both defendants had been within the jurisdiction, would they have been proper parties to the action?»**** The nature of the discretionary power of the Court and the circumstances of its application are also debated in British Shipping Laws, Admiralty Practice.*****

Next we shall review the facts founding plaintiff's claim against defendants. They are disclosed in the affidavit supporting their application and to the extent they rest on documentary proof, such evidence is disclosed in an earlier affidavit of the plaintiffs referred to by the defendants in the affidavit sworn to in support of the present motion. Plaintiffs supplied a quantity of fuel oil bunkers for consumption by Platon Ch., the first defendants in this action. Delivery was made on 8.9.86 at the island of Syros, Greece, where the vessel was at bay. The delivery was accepted by a Master's Certificate and the terms were evidenced by an invoice of 15th

* (1904) 90 L T. 733 p 735

** (1987) 1 C L.R. 344

*** 1958 Edn. p 162

**** Test suggested by Lord Esher. *MR. Massey v. Haynes* 21 Q B D p 338

***** Volume 1 paras 483 and 492

September, 1986. Whatever gloss may be put upon the circumstances of this transaction, the inescapable inference is that it was an outright sale by the plaintiffs to defendants 1. No rights were reserved in favour of plaintiffs over the fuel oil supplied; on
5 the contrary, the terms of payment reinforce the view that it was an outright sale. As a result, the property in the bunkers passed to the purchasers, the ship, defendants 1 in the action.

On 25th September, 1986, the defendants assumed possession and management of the vessel in exercise of their rights as
10 mortgagees.* At that time the vessel was at the Port of Constanza Romania wherefrom she sailed to the port of Limassol, Cyprus. In Cyprus proceedings were taken by the defendants against the vessel pursuant to their rights as mortgagees. The vessel was arrested and subsequently sold to satisfy the judgment and claims
15 against her. The Marshal was joined as a party to these proceedings because of his involvement in the seizure and sale of the vessel. The joinder of that party is, therefore, unconnected with the claim made against the defendants.

The sole question calling for decision is whether the facts
20 supporting the order disclose a cause of action against the defendants separately or in conjunction with the claim raised against defendants 1 in circumstances that make the defendants a proper or a necessary party to these proceedings.

Counsel for the plaintiffs submitted that this is the effect of the
25 facts deposed to in the affidavit of Mr. Skoufaris of 29.1.87. Specifically a cause of action, he argued, is disclosed against the defendants in virtue of the provisions of s. 70 of the Contract Law Cap. 149. The reliefs sought against them under prayers A & B are designed, the first to make the defendants accountable for the
30 value of the bunkers as beneficiaries of the oil supplied, and the second to obtain a declaration that they remain the owners of the unconsumed fuel oil stored on the vessel, coupled with an Order directing the defendants to restore the bunkers to the plaintiffs. It is helpful to reproduce the provisions of s.70 Cap. 149 considering
35 that this is the only legal provision relied upon as validating the cause of the plaintiffs.

* See section 31(2)(3) Merchant Shipping (Registration of Ships, Sales and Mortgages) Law, 45/63

Section 70 reads -

«Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore the thing so done or delivered »

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By and large, the section reproduces the common law principles of quasi contractual liability of the recipient of goods or services supplied or rendered non-gratuitously, whereupon an obligation is cast on the beneficiary of the goods or services to make reasonable compensation for their value (quantum meruit), or restore them

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The facts composing the claim of the plaintiffs against defendants are wholly outside the letter and spirit of s 70 To begin, the goods were never delivered to the defendants, they were delivered to defendants 1 under and in accordance with a contract of sale Nothing was ever delivered to the defendants, they came under no contractual or quasi contractual obligation to the plaintiffs As counsel for the defendants pointed out in argument even after the assumption of possession by the mortgagees they would not be liable for necessaries supplied to the ship unless the Master in ordering them acted as their agent *

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Having carefully reflected on every aspect of the claim of the plaintiffs as disclosed in the affidavit supporting the application for service outside the jurisdiction, no cause of action in the sense earlier referred to was disclosed against the defendants For that reason the basic -requisite for service outside the jurisdiction under R 24 is missing Consequently, the Order must be set aside and so I direct Further, the plaintiffs are adjudged to pay the costs of the present proceedings

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*Application granted
Costs by plaintiffs*

* *The Troubadour, The Law Times Reports 30th March 1867 Volume XVI p 176*