

1987 June 15

[TRIANTAFYLIDIS, P., MALACHTOS AND STYLIANIDES, JJ]

MAJOR THOMAS BROMLEY JOHNSON,

Appellant-Applicant,

v.

FELIX JOHN CLEWETT POLE,

Respondent.

(Civil Appeal No. 6650).

Civil Procedure — Ex parte application for an interlocutory injunction, dismissal of — Appeal — The notice of appeal should be served upon the defendant — The Civil Procedure Rules, Ord. 35, rules 17, 3 and 5.

5 *Constitutional Law — Equality — Constitution, Art. 28 — 0.35, r.5 of the Civil Procedure Rules — Not contrary to Art. 28.*

Construction of Statutes — Enactments regulating procedure — Usually construed as mandatory.

Words and Phrases: «Party» in 0.35, r.5 of the Civil Procedure Rules — Means a litigant.

10 The preliminary issue raised in this appeal is whether the notice of appeal should be served upon the defendant. The appeal is directed against the dismissal of an ex-parte application for an interlocutory injunction, otherwise known as «Mareva Injunction» by the District Court of Nicosia.

15 Held: (1) The rule audi alteram partem is well rooted in our judicial system, but for the issue promptly and effectively of some orders under certain circumstances specified by Law there is a deviation from this rule and orders nisi are made ex-parte. By definition of «an ex-parte application», the party against whom the order is sought, is absent.

20 (2) The right of appeal is created by legislative authority and its exercise is governed by the Law including the rules of Court. The Court of Appeal has power to make any order which ought to have been made and to make such further or other orders as the case may require (Section 25 of Law 14/60 and Ord. 35, r.8 of the Civil Procedure Rules). The fact that all appeals are by way of rehearing does not assimilate the procedure and the proceedings before
25 the Appeal Court with that of the inferior Court.

(3) Ord 35, r 17* (as amended by the Rules of Court (No 2) (1953) of the Civil Procedure Rules provides for an appeal from a refusal by the Court below of an ex parte application. All appeals shall be brought by a written notice of appeal and Form 28 is prescribed by Ord 35, r 3. It commences with the words «Take notice that the plaintiff hereby appeal». Ord 35, rule 3** provides that the notice of appeal shall be served upon all parties «directly affected by the appeal». Enactments regulating the procedure in Court are usually construed as imperative.

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(4) The defendant will be directly affected by this appeal. Is he a party? The word «party» means a litigant in Court. The defendant is a litigant and though the ex parte application was not served on him, he was a party thereto.

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(5) The argument that Ord 35, r 5 in so far as it relates to appeal from a refusal of an ex-parte application violates the principle of equality (Art 28 of the Constitution) has no merit. No difference of treatment is provided by r 5.

(6) In the light of the above this Court directs that the notice of appeal should be served on the defendant as respondent.

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Order accordingly

Cases referred to

Nemtsas Industries Ltd v S and S Maritime Lines Ltd and Others (1976) 1 C L R 302,

Bell v Clubbs, [1891-1892] 8 T L R 296,

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Gerling - Konzern Allgemeine Versicherung A G (No 2) v The Ship «Dimitrakis» and Another (1976) 1 C L R 408,

Gilooly v Gilooly [1950] 2 All E R 1118,

The Queen v The Registrar of Greenwich County Court [1885] 15 Q B D 54,

Grapulin v Cartons and Comugated Papers Ltd (1961) S R (N S W) 348,

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Hunter v Hunter (1876) 24 W R 504,

Pumell v Great Western Railway Co [1876] 1 Q B D 636,

Anton Pillar K G v Manufacturing Processes Ltd and Others [1976] 1 All E R 779

Preliminary issue.

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Preliminary issue as to whether notice of the appeal against the dismissal of an ex parte application for an interlocutory

* Quoted at p 315

** Quoted at p 315

injunction should be served on the defendant

L. Papaphilippou, for the appellant

Cur adv vult

5 *TRIANTAFYLLIDES, P* The judgment of the Court will be delivered by Mr Justice Stylianides

10 *STYLIANIDES J* When this appeal was called on for hearing, the defendant was absent and the Court inquired whether there was due service of notice upon him. It was stated to the Court that on the directions of counsel of the appellant neither notice of appeal nor a notice of the date of hearing was served on the defendant

Preliminary issue was taken whether notice of the appeal should be served upon the defendant

15 The appeal is directed against the dismissal of an ex-parte application for interlocutory injunction, otherwise known as «Mareva Injunction», by the District Court of Nicosia in Action No 6957/83

20 It was submitted by counsel for the appellant that as the proceedings before the District Court were on an ex-parte application, the appeal also must preserve the same character and this Court to hear and determine the appeal in the absence of the defendant as otherwise the effect and object of an ex-parte application is defeated. If the defendant is served with notice of appeal and takes part in the appeal proceedings, then he may take
25 such measures that may derogate the effectiveness of any order that this Court may make in the exercise of its jurisdiction and thus the appellant would be deprived of the fruits of his success, and any Mareva injunction that may be issued would be ineffective. If
30 the defendant is served with notice of appeal, the rights of the appellant would be prejudiced and the injunction would be deprived of its particular peculiarities, that is, urgency and surprise. It was further argued that the defendant is not «a party directly affected by the appeal» as the only party in the proceedings before the Court below was the appellant

35 Mr Papaphilippou further submitted that r 5 of O 35 of the Civil Procedure Rules requiring service of the notice of appeal in so far as it relates to appeal from refusal of ex-parte application is contrary to Article 28 of the Constitution as it violates the

principle of equality and non discrimination.

We find no merit in this submission. No difference of treatment is provided by r. 5.

The application, which was refused by the District Court, was based on Section 32 of the Courts of Justice Law, 1960 (No. 14 of 1960) and Sections 4 and 9 of the Civil Procedure Law, Cap. 6 the English case-law on Mareva injunction and the decision of this Court in *Nemitsas Industries Ltd. v. S. & S. Maritime Lines Ltd. and Others*, (1976) 1 C.L.R. 302. 5

The relevant parts of these Sections read as follows:- 10

«32.(1) Subject to any Rules of Court every Court, in the exercise of its civil jurisdiction, may, by order, grant an injunction (interlocutory, perpetual or mandatory) or appoint a receiver in all cases in which it appears to the Court just or convenient so to do, notwithstanding that no compensation or other relief is claimed or granted together therewith: 15

Provided that an interlocutory injunction shall not be granted unless the Court is satisfied that there is a serious question to be tried at the hearing, that there is a probability that the plaintiff is entitled to relief and that unless an interlocutory injunction is granted it shall be difficult or impossible to do complete justice at a later stage.» 20

«4.(1) The Court may at any time during the pendency of any action therein make in the action an order for the sequestration, preservation, custody, sale, detention, or inspection of any property, being the subject of the action or an order for preventing any loss, damage, or prejudice which but for the making of the order might be occasioned to any person or property, pending a final judgment on some question affecting such person or property or pending the execution of the judgment.» 25

«9.(1) 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.» 30

Any Court in determining a dispute or in granting a remedy by virtue of the power vested in it, normally hears both parties. The rule audi alteram partem is well rooted in our system of 35

administration of justice. For the issue, however, promptly and effectively of some orders under certain circumstances specified by Law there is a deviation from this rule and orders nisi are made ex-parte without the Court having the opportunity to hear the other party. By definition of «an ex-parte application», the party against whom the order is sought, is absent.

An appeal is directed against the decision of the first instance Court. The right of appeal is created by legislative authority and its exercise is governed by the Law including the Rules of Court.

10 The Court of Appeal has power to give any judgment and make any order which ought to have been made and to make such further or other orders as the case may require - (See s.25 of the Courts of Justice Law, 1960 (No. 14 of 1960) and 0.35, r. 8, of the Civil Procedure Rules).

15 The fact that all appeals are by way of rehearing does not assimilate the procedure and the proceedings before the Appeal Court with that of the inferior Court.

20 The Civil Procedure Rules Order 35, r. 17, before its amendment by the Rules of Court (No. 2), 1953, provided that where an ex-parte application has been refused by the Court below, an application for a similar purpose may be made to the Court of Appeal ex-parte within 4 days from the date of such refusal, or within such enlarged time as a Judge of the Court below or of the Court of Appeal may allow.

25 By the Rules of Court (No. 2), 1953, the said rule was substituted by the present rule which reads:-

30 «17. Where an ex-parte application has been refused by the Court below, an appeal shall lie to the Court of Appeal. Such appeal shall be brought within 4 days from the date of the refusal of the Court below or within such enlarged time as a Judge of the Court below or of the Court of Appeal may allow, and the provisions relating to appeals from interlocutory orders shall apply».

35 All appeals shall be brought by written notice of appeal filed, and Form 28 is prescribed by r. 3 of 0.35.

This form was used by the appellant. It commences with the words «Take notice that the plaintiff hereby appeals from the judgment».

Mr. Justice Hawkins in *Bell v. Clubbs*, 8 T.L.R. (1891-1892) 296, at p. 298, said with regard to forms:-

«It was very convenient to have forms, which, if followed, should be sufficient. But it did not require a servile adherence to the forms provided, for this might do infinite mischief and make forms traps instead of aids». 5

Rule 5 of Order 35 corresponds to r. 2 of O.58 of the Rules of the Supreme Court in England up to 1956 - (See Annual Practice, 1955, p. 1247). The new English r. 3 of O.59 is differently worded and provides for service on all parties to the proceedings in the Court below who are directly affected by the appeal - (See The Supreme Court Practice, 1982, p. 927). 10

In *Gerling-Konzern Allgemeine Versicherungs A.G. (No.2) v. The Ship «Dimitrakis» and Another*, (1976) 1 C.L.R. 408, the appellants applied for, ex-parte, and obtained, on the same date, an order under s. 30 of the Merchant Shipping (Registration of Ships, Sales and Mortgages) Law, 1963 (Law 45/63) prohibiting any dealing with the defendant ship until the determination of the action; but, after counsel for the defendants had been heard, the Judge discharged the said Order, on November 16, 1976. Then, on that date another ex-parte application was made for an order restraining any dealing with the defendant ship; this time the application was made under s.32 of the Courts of Justice Law, 1960 (No. 14 of 1960). The trial Judge refused to make such an order ex-parte and, as a result, the plaintiff filed an appeal. The Court of Appeal in determining the issue whether the appeal should be heard ex-parte, without giving an exhaustive definition of what is a party «directly affected» by an appeal, in the sense of rule 5 of Order 35, in the light of the circumstances and the history of the proceedings decided that the defendants were parties directly affected by the appeal. Reliance was placed by our Supreme Court on the case of *Gillooly v. Gillooly*, [1950] 2 All E.R. 1118. 15
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In *Gillooly* case it was decided that a spouse, who has not defended a divorce petition, had a right to appear and respond to an appeal to the Court of Appeal. Bucknill, L.J., said at p. 1119:- 35

«By r.2:

‘The notice of appeal shall be served upon all parties directly affected by the appeal ...’.

A notice of appeal was quite properly served on the wife. The fact that she had not appeared did not take her out of the category of a party. In *Re Evans* [1983] 1 Ch 252 Lindley L.J. said at p 264 -

5 'The defendant has not appeared and it has been contended that he therefore is not a party to the action but I think that he became such when he was served

The wife in this case was served with the petition and with the notice of appeal. Is she directly affected? She is still the husband's wife and does not cease to be so until the decree absolute is made. The result of this appeal if successful will be that a decree nisi may be made against her followed by a decree absolute and she will cease to be a wife and to have the rights which she has as a wife. It is quite impossible to argue that she is not a party directly affected by the appeal. I think therefore that we were right in allowing counsel for the wife to address us on the merits »

The point where an ex-parte application has been refused in any proceedings without the other side having been already served at all with notice of such proceedings and an appeal has been made against the refusal of the ex-parte application the other side should be deemed to be a party directly affected by the appeal was left entirely open

25 The word «party» means a litigant in the Court - (*The Queen v The Registrar of Greenwich Country Court* [1885] 15 Q B D 54 57 *Grapulin v Cartons & Corrugated Papers Property Ltd* (1961) S R (N S W) 348 at pp 350 351)

The English decisions deal with «parties directly affected by the appeal». In *Hunter v Hunter* (1876) 24 W R 504 C A by an order in an administration action a fund was directed to be paid to A, one of three claimants, B, another claimant appealed, but only served notice of the appeal on A. It was held by the Court of Appeal that B must also serve notice on C the remaining claimant, though he did not appeal

35 In *Pumell v Great Western Railway Co* [1876] 1 Q B D 636, it was held that an unsuccessful defendant who appeals must serve notice of appeal against a successful co-defendant if the claim against the defendants is alternative

We have to construe our rules which do not have an English

counterpart with regard to appeals from judgments or rulings in ex-parte applications.

The case of *Anton Piller K.G. v. Manufacturing Processes Ltd. and Others*, [1976] 1 All E.R. 779, referred to by counsel is of no assistance.

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Rule 5 of O.35 reads:-

«5. The notice of appeal shall, within the appropriate period prescribed by rule 2 of this Order, be served together with an office copy of the judgment or order appealed from upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Court of Appeal may direct notice of the appeal to be served on all or any parties to the action or other proceedings, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may be just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties».

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Enactments regulating the procedure in Courts are usually construed as imperative - (Maxwell on Interpretation of Statutes, 12th Ed., p.320).

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The defendant will be directly affected by the appeal. Any decision will affect him. Is he a party? He is the defendant. He is a litigant and though the ex-parte application by its nature was not served on him, he was a party thereto. Even in an ex-parte application there are two parties - the applicant and the other litigant, the respondent. The only difference in an ex-parte application is that the presence of the respondent before the District Court is not required and the application is dealt with by the Court in his absence and without hearing him.

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The words of Rule 5 are mandatory. In an appeal against an order dismissing an ex-parte application for interlocutory injunction, the defendant is a party directly affected by the appeal and he should be served with a notice of appeal.

For the foregoing reasons we direct that notice of the appeal should be given to the defendant as respondent and then the appeal should take its normal course.

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Order accordingly