1987 December 15

[SAVVIDES J.]

THE CYPRUS POTATO MARKETING BOARD

Plaintiffs,

v.

1. BELLAM SHIPPING CO LTD
2. THE SHIP M.S. «SELANDIA»

Defendants

(Admiralty Action No. 102/86)

Admiralty — Practice — Writ of Summons — Renewal of — Discretion should be exercised with caution — Review of authorities on the point

Admiralty — Practice — Action in rem — Service of — Can only be effected within the jurisdiction — The Cyprus Admiralty Jurisdiction Order 1893 Rule 16

This is a mixed action, in personam against defendant 1 as owner of the defendant 2 ship and in rem against the ship defendant 2.

The writ of summons was issued on 12th May 1986 and was subsequently renewed on 12th May 1987 on an application dated 11th May 1987, for a period of six months which expired on the 11th November 1987. Prior to its expiration counsel for applicants filed the present application.

The plaintiffs having obtained leave for substituted service by double registered post on defendant 1, tried to effect service in such a manner, but the letter was returned unclaimed with the notice «refuse» endorsed on it. Eversince the applicants spared no efforts to find the address of defendant 1. After the inquiries they came to know, from information contained in the Lloyds register of shipowners, that the defendant's 1 address is not in Denmark but in Sweden.

Regarding defendant 2 ship, it has not arrived in Cyprus since the institution of the action but according to the contention of counsel for applicants it is expected to arrive in Cyprus within the next few months.

Held *granting the application* (1) Though the renewal of the writ of summons is a matter within the discretion of the Court such discretion should be exercised with caution.

(2) In this case and as to service of the writ of summons for a claim in personam against defendant 1 counsel for applicants has shown a good cause why the writ of summons has not been served on defendant 1. As regards defendant 2, service could not have been effected on her once she has not called at any port within the jurisdiction (Order 16 of the Cyprus Admiralty Jurisdiction Order, 1893).

Application granted.

Cases referred to

Nigerian Produce Marketing Co. Ltd. and Another v. Sonora Shipping Co. Ltd and Another (1979) 1 C.L.R. 395;

Churair and Sons v. Snatiren Shipping (1980) 1 C L R. 183.

Hewett v Barr (1981) L.J. Reports New Series, Vol. 60 Q.B 268.

Battersby v. Anglo-American Oil Co. Ltd. [1944] 2 All E R. 387;

Holman v George Elliot and Co. Ltd. [1944] 1 K.B. 591; [1944] 1 All E.R. 639

Steven v Services Window and General Cleaning Co Ltd. [1967] 1 All E R 984.

Howels v Jones, The Times 11.4.75;

Moore v. Burton and Motor Insurers Bureau (1978) 128 New Law Journal 513.

The Virgo [1978] 2 Lloyds Law Rep. 167;

The Berny [1979] 1 Q B. 80;

Helene Roth Case [1980] 1 Lloyds Law Rep. 477.

Application.

Application by the plaintiffs for the renewal of the writ of summons against both defendants.

A. Indianos, for plaintiffs - applicants.

Defendants absent.

Cur. adv. vult.

SAVVIDES J. read the following decision. By this ex-parte application the applicants-plaintiffs apply for the renewal of the writ of summons against both defendants.

This is a mixed action, in personam against defendant 1 as owner of the defendant 2 ship and in rem against the ship defendant 2.

The writ of summons was issued on 12th May, 1986, and was subsequently renewed on 12th May, 1987, on an application dated 11th May, 1987, for a period of six months which expired on the 11th November, 1987. Prior to its expiration counsel for applicants filed the present application.

The material facts relied upon in support of the application as appearing in the affidavit sworn on behalf of the applicants and also in the address in support of the application are briefly as follows:

Efforts were made by counsel for plaintiffs to serve the writ on defendant 1 in Denmark outside the jurisdiction as early as the 31st May, 1986, in compliance with an order of the Court granting leave for substituted service by double registered letter. Such letter which is exhibit 1 was returned unclaimed with the notice «refuse» endorsed on it. Ever since the applicants spared no efforts to find the address of defendant 1. After inquiries they came to know, from information contained in the Lloyds register of shipowners, that the defendant's 1 address is not in Denmark but in Sweden.

Regarding defendant 2 ship, it has not arrived in Cyprus since the institution of the action but according to the contention of counsel for applicants it is expected to arrive in Cyprus within the next few months. In the affidavit of counsel for applicants in support of the application it is stated under para. 5 that: «If the writ of summons is not renewed then the plaintiffs' action will be statute-barred against the defendants and is therefore just and equitable that the application be granted.»

The question of renewal of the writ of summons especially in an action in rem has been dealt with by me, inter alia, in Admiralty Action 174/76 *Nigerian Produce Marketing Co. Ltd. and Another v. Sonora Shipping Co. Ltd. and Another* (1979) 1 C.L.R. 395 and *Churair and Sons v. Snatiren Shipping* (1980) 1 C.L.R. 183 in both of which I had the opportunity to expound on the principles which may guide the Court in exercising its discretion in granting an application for the renewal of the writ of summons.

Though the renewal of the writ of summons is a matter within the discretion of the Court such discretion should be exercised

with caution. The manner in which the discretion of the Court should be exercised has been considered in a series of English cases. In *Hewett v. Barr* (1891) L.J. Reports New Series vol. 60 Q.B. 268 Lord Esher M.R. at p. 269 had this to say:

«The principle of that rule with regard to amendments of pleadings applies still more strongly when the Court is asked to allow the renewal of a writ where, by acceding to the application, the Court would deprive a defendant of an existing right to the benefit of the Statute of Limitations.»

KAY, L.J. made the following observations in the same case (p. 269):

«I should be sorry that the Court should hold that under no circumstances could such an application as that which is now made be granted in such a case as the present. As at present advised, I am disposed to think that Order LXIV rule 7, might be so construed as to give the Court power, under exceptional circumstances, to enlarge the time for applying to renew the writ. It might under certain circumstances - for instance, where after every kind of effort had been made to serve a writ, by accident or mistake no application to renew the writ had been made within the twelve months - be very hard that the plaintiff should lose all remedy because in the meantime the period fixed by the Statute of Limitations had expired.»

It should be noted that in the above case the application for renewal of the writ of summons was made after the expiration of the period of twelve months for service.

In *Battersby v. Anglo - American Oil Co. Ltd.* [1944] 2 All E.R. 387, Lord Goddard in delivering the judgment of the Court on appeal, allowing the appeal against an order renewing a writ of summons on an application made after its expiration stated the following at p. 391:

«We conclude by saying that even when an application for renewal of a writ is made within 12 months of the date of issue, the jurisdiction given by Ord. 64, r. 7, ought to be exercised with caution. It is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course, on an application which is necessarily made ex parte. In every case care should be taken to see that the renewal will not prejudice any right of defence then existing,

and in any case it should only be granted where the Court is satisfied that good reasons appear to excuse the delay in service, as, indeed, is laid down in the order The best reason, of course, would be that the defendant has been avoiding service, or that his address is unknown and there may well be others But ordinarily it is not a good reason that the plaintiff desires to hold up the proceedings while some other case is tried, or to await some future development It is for the Court and not for one of the litigants to decide whether there should be a stay, and it is not right that people should be left in ignorance that proceedings have been taken against them if they are here to be served While a defendant who is served with a renewed writ can, no doubt, apply for it to be set aside on the ground that there was no good reason for the renewal his application may very possibly come before a master or judge other than the one who made the order, and who will not necessarily know the grounds on which the discretion was exercised »

In *Holman v George Elliot & Co Ltd* [1944] 1 K B 591, [1944] 1 All E R 639 it was held by Mackinnon, L J at p 640, that

«The sole question is, first of all, whether there is a discretion in the Court under R S C , Ord 64, r 7, to enlarge the time fixed for the service of a writ under R S C Order 8 r 1 and secondly, if there is such a discretion, whether the Judge exercised it rightly in this case I think it is not accurate to say that *Doyle v Kaufman* laid down as a settled rule that the Court had no power to extend the time within the rule I think the true view is, as was indicated by Kay, L J , in a subsequent judgment in *Hewett v Barr* that there is a discretion in appropriate circumstances, though no doubt *Doyle v Kaufman* points out circumstances in which it would be wrong for the Court to exercise that discretion in favour of an applicant plaintiff That there is such a discretion I think has been recognised in subsequent cases, such as *Mabro v Eagle Star and British Dominions Insurance Co , Ltd* , where again this rule about depriving a defendant of an accrued defence under the statute of limitations was relied upon as a reason why no order should be made Greer, L J , sums up the matter at the end of his judgment by saying

'Whether the matter is one of discretion or not, it appears to me inconceivable that we should make an order which would

have the effect I have mentioned. It has been the accepted practice for a long time that amendments which would deprive a party of a vested right ought not to be allowed'».

In *Stevens v. Services Window and General Cleaning Co. Ltd.* [1967] 1 All E.R. 984 it was held that:

«The fact that at the date when an extension of the validity of the writ was granted it had not expired did not render inapplicable the principle that good cause, viz., good reason to excuse the delay, must be shown in order to justify the granting of an extension; in the present case good cause had not been shown, and the extension granted by the registrar would be set aside.»

Reference to the above cases was made by me in the *Nigerian Produce* case (supra) in which I have also dealt with the question of exceptional circumstances and hardship to the plaintiff as expounded in a line of English cases referred to therein.

The grounds recognized by the Courts as justifying renewal have been considerably extended during recent years. See *Howells v. Jones* (C.A.) The Times 11/4/75, *Moore v. Burton and Motor Insurers Bureau* (1978) 128 New Law Journal 513; *The Virgo* [1978] 2 Lloyds Law Reports 167.

The question of renewal of the writ of summons in an action in rem was dealt with in the *Berny* [1979] 1 Q.B. 80 in which Brandon, J. in granting an order for the renewal of the writ of summons in an action in rem had this to observe at p. 103:

«In my opinion, when the ground for renewal is, broadly, that it has not been possible to effect service, a plaintiff must, in order to show good and sufficient cause for renewal, establish one or other of three matters as follows: (1) that none of the ships proceeded against in respect of the same claim, whether in one action or more than one action, have been, or will be, present at a place within the jurisdiction during the currency of the writ; alternatively (2) that, if any of the ships have been, or will be, present at a place within the jurisdiction during the currency of the writ, the length or other circumstances of her visit to or stay at such place were not, or will not be, such as to afford reasonable opportunity for

effecting service on her and arresting her; alternatively (3) that, if any of the ships have been, or will be, present at a place within the jurisdiction during the currency of the writ, the value of such ship was not or will not be, great enough to provide adequate security for the claim, whereas the value of all or some or one of the other ships proceeded against would be sufficient, or anyhow more nearly sufficient, to do so.»

The principles laid down therein were followed in the *Helene Roth* case, [1980] 1 Ll. LR. 477 in which an application to set aside the renewal of the writ of summons and service of it, and the unconditional release of the arrested ship was refused.

I revert now to the facts of the present case.

It is correct that service could not have been effected on defendant 2 once she has not called at any port within the jurisdiction of the Court so that service could be made as provided by Order 16 of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction. On the question of service in an action in rem we read the following in the British Shipping Laws Vol. 1, Admiralty Practice, p. 28:

«A consideration which may lead a plaintiff to sue in personam is that service of a writ in rem can only be effected within the jurisdiction. This means that although a writ in rem and a warrant of arrest may be issued even if the res is not within the jurisdiction, in order for either to be effective the res to be proceeded against must be, or come, within the jurisdiction unless service is accepted by a solicitor, whereas service of a writ in personam can often be effected abroad provided that the conditions laid down in the Rules of the Supreme Court are satisfied.»

As to service of the writ of summons for a claim in personam against defendant 1 counsel for applicants has shown a good cause why the writ of summons has not been served on defendant 1.

On the facts before me I find that in the present case good cause has been shown for granting the application. This, however, does not in any way preclude the defendants after service is effected to apply to the Court to have the order renewing the writ and service thereof set aside on good cause shown.

In the result the application is granted and I make an order renewing the writ of summons for a further period of six months from today. No costs.

Application granted
No order as to costs.