1987 January 20

[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,

Defendants

(Admiralty Action No 214/86)

Admiralty—Practice—Whether an action in rem can be combined in the same writ with an action in personam—Affirmative answer given—Rule 14 of the Cyprus Admiralty Jurisdiction Order, 1893—Ambit

Admiralty—Practice—Joinder of defendants—Gap in our rules filled by Rule 237 of the Cyprus Admiralty Jurisdiction Order, 1893, making applicable the practice of the Admiralty Division of the High Court of England as in force in 1960—Order 16, r 4 of the English Rules in force at the time

Admiralty—Service of a writ on legal entities—Rules 20 and 21 of the Cyprus Admiralty Jurisdiction Order, 1893—More likely such service is regulated by rule 21 and not by rule 20—If Rule 20 had been applicable, service would have been effected in accordance with section 372 of the Companies Law, Cap 113, which appears to fall short of the provision of Article 30 3(a) of the Constitution

Admiralty—Practice—Defendant out of the jurisdiction—Leave of the Court a condition precedent to service out of the jurisdiction—Factors to be taken into consideration in granting leave—Rules 23 and 24 of the Cyprus Admiralty Jurisdiction Order, 1893

Admiralty—Practice—Service—Breach of rules regulating service—Effect of breach

Constitutional Law—Right of every litigant to be informed of the proceedings against him—Constitution, Article 30 3(a)

The plaintiffs combined in the same writ an action in rem against the ship

«PLATON CH» with an action in personam against a foreign corporation, mortagees of the vessel The latter applied to have the writ struck out for irregularity and sought to set aside service thereof effected on the law office of Montanios and Montanios on behalf of the second defendants

As regards the issue relating to the service of the writ, the plaintiffs argued that a notice dated 25 9 86 and given to the Registrar of ships pursuant ot s 31(2)(e)(iii) of Law 45/63, whereby the Registrar was informed that Messrs Montanios and Montanios assumed management of the ship and were authorised to accept notices in connection with such management, is sufficient to entitle the plaintiffs to look to defendants 2 as physically present in Cyprus, represented by the said firm

This line was pursued notwithstanding that the said management of the ship ended on 27 9 86, when she was arrested, and that the action was instituted against the second defendants «through their attorneys in Cyprus, Messrs Montanios and Montanios »

Held (A)(1) Rule 14 of the Admiralty Rules does not contemplate a different process for the initiation of an action in rem and an action in personam There are no material differences between the particulars required under the two actions or any other difference making combination of the two actions in one writ inherently injurious or antagonistic to the ends of Justice

(2) The absence of any specific rules as to joinder of parties in our Admiralty Rules is filled by Rule 237, making applicable the rules of practice of the Admiralty Division of the High Court of England as in force in 1960 The English Rule at that time was Order 16,r 4 This rule allows joinder of any number of defendants against whom a right to relief is alleged to exist, whether jointly or severally or in the alternative Bearing in mind the relief sought in this case, damages for which the defendants are allegedly jointly or severally liable the joinder was in principle feasible

(3) Assuming that the combination was irregular, the irregularity did not strike at the root of the proceedings and could be remedied by an appropriate order of the Court

(B)(1) If a writ is addressed to a legal entity Rule 20 of the Admiralty Rules provides that service must be effected in the manner provided by law for service of legal process upon such entity Section 372 of the Companies Law, Cap 113 provides that «a document may be served on a company by leaving it or sending it by post to the registered office of the company » It is, however, doubtful that this rule applies to service of judicial proceedings If that were the case it would appear to fall short of the provisions of Article 30 3(a) of the Constitution, safeguarding as a fundamental human right, the right of every litigant to be informed of proceedings against him

(2) More likely, service of admiralty proceedings upon legal entities is regulated by Rule 21, which, authorises, inter alia, service by «leaving an office copy of the writ with the President or other head officer, or the clerk, treasurer or secretary of the corporation....». Montanios and Montanios hold none of the above positions in the defendant company.

(3) Neither Rule 20 nor Rule 21 regulate service upon a person out of the jurisdiction. Such service is specifically regulated by Rule 23*. As it appears from the word «shall» in the said Rule the leave of the Court is a condition precedent to such service. In the light of the provisions of Rule 24 this is perfectly understandable. Service does not depend on either the transaction by the defendant of business in Cyprus or the availability of an agent. The Court must consider in granting leave a variety of factors including the all important one of the probability of the defendant being traced by the means adopted to bring the proceedings to his notice.

(4) This being the law the service in question was wholly irregular Departure from the rules regulating service has been held in England to render null the service. More so in Cyprus, in view of Article 30.3(a) of the Constitution.

Order that the service on defendants 2 be set aside. Costs against the plaintiff.

Cases referred to:

Asimenos and Paraskeva v. Chrysostomou and Another (1982) 1 C.L.R. 145,

Pitria Shipping v. Georghiou (1982) 1 C.L.R. 358;

Lysandrou v. Schiza and Another (1979) 1 C.L.R. 267;

Spyropoullos v. Transavia (1979) 1 C.L.R. 421;

Evagorou v. Christodoulou and Another (1982) 1 C.L.R. 771;

N.P. Lanitis Ltd. v. Panayides (1986) 1 C.L.R. 490;

Hadjichambis v. Attorney-General (1986) 1 C.L.R. 386;

Altertext Inc. v. Advanced Data [1985] 1 All E.R. 395.

Application.

Application for an order striking out the writ of summons for irregularity and for an order setting aside service of the writ of

* *Quoted at p.76 post.*

summons effected upon the law Office of Montanios and Montanios on behalf of the defendants.

E. Lemonaris, for the plaintiffs-respondents.

E. Montanios, for defendants 2 - applicants.

Cur. adv. vult.

PIKIS, J. read the following judgment. The plaintiffs combined in the same writ an action in rem, against the Ship «PLATON CH», with an action in personam, against Greyhound Shipping Corporation of Monrovia, Liberia, a foreign Corporation, mortgagees of the vessel. The latter applied to have the writ struck out for irregularly combining the two species of admiralty actions in the same writ and sought to set aside service thereof effected upon the law Office of Montanios & Montanios on behalf of the defendants. In an affidavit, sworn to by E. Montanios, a partner in the law Office of Montanios & Montanios, it is asserted their office was never authorised to accept service on behalf of Defendants No.2. Examination of the facts relevant to the authority of the law Office of Montanios & Montanios, leads to the inference that such authority, as they possessed, in connection with the mortgage, was confined to that indicated in the notice of 25th September, 1986, addressed to the Registrar of ships pursuant to the provisions of s.31(2)(e)(iii) of the Merchant Shipping (Registration of Ships, Sales and Mortgages) Law 45/63. By this notice the Registrar was informed they assumed management of the ship, then lying at Constanza, Rumania, and were authorised to accept notices in connection therewith, that is, the management of the ship. Counsel for the plaintiffs submitted the above notice entitled them to look to Defendants No.2 as physically in Cyprus, represented by Montanios & Montanios; therefore, they could serve them with the writ of summons. In fact, the action against Defendants No.2, as it appears from the title of the action, was raised against the defendants «through their attorneys in Cyprus, Messrs. Montanios & Montanios....». This line was pursued notwithstanding the fact that assumption of management ended on 27/9/86 when the ship was sailed to Cyprus whereat the vessel was arrested and placed in the custody

of the Marshal, the third defendant, by virtue of an order of the Court of 27/9/86. And, despite the fact that Montanios & Montanios had no general authorisation to represent them in any proceedings brought against Defendants No.2, or a special one authorising them to accept service on their behalf in this case. The relationship of the firm of Montanios & Montanios with Defendants No.2, other than that specifically indicated in the notice of 25/9/86 was, it appears, that of advocate and client, established by specific retainer in the particular case. Moreover, this firm of advocates was not the only one retained by Defendants No.2 for the transaction of their legal business; other advocates, too, were engaged for the same purpose.

In relation to the validity of the writ of summons or the regularity of the process employed, counsel for the applicants argued the joinder of the two actions was impermissible, an inference derived from the combined effect of Rules 7, 11, 14 and 15, of the Cyprus Admiralty Rules. Attention was drawn to rule 14 envisaging different forms of summons for the initiation of actions in rem and in personam and, rule 11 stipulating different time limits for appearance to actions in rem and in personam. Nonetheless counsel acknowledged that combined actions are accepted by the Registry without demur, an occurrence repeated often enough to merit the characterisation of «practice». A similar practice obtained in England before its discontinuance or abolition by a Practice Direction* of 1979. Before its judicial discouragement or abolition the jurisdic validity of the practice was never tested before the Court**; consequently, its existence is of limited value as a guide to the interpretation of corresponding provisions of the Cyprus Admiralty Rules.

For his part Mr. Lemonaris submitted the Admiralty Rules impose no formal constraint on the joinder of the two actions in one writ, a course apt in a proper case to avoid multiplicity of proceedings, save costs and, generally, be beneficial to the administration of justice. Respecting service he invoked in support of its validity the provisions of Ord.5 r.7 of the Civil Procedure

* *[1979] 2 All E.R. 155.*

** *(See, Annual Practice 1976, p.1113).*

Rules, and argued the notice of 25/9/86 was equivalent to authorisation to the law firm of Montanios & Montanios to transact any business on their behalf in connection with this case.

COMBINATION OF AN ACTION IN REM AND AN ACTION IN PERSONAM IN ONE WRIT OF SUMMONS — VALIDITY OF THE COURSE FOLLOWED:

A writ of summons is the process by which an admiralty action can be raised before a court of law. Unlike the Civil Procedure Rules the Admiralty Rules make no alternative provision for the initiation of an admiralty action before a competent Court. Under the Civil Procedure Rules originating summons is an alternative means of instituting a judicial cause before a court of law where specific provision to that end is made in the law*. Action by originating summons is a species of a judicial proceeding different from an action raised by a writ of summons.

Rule 14 of the Admiralty Rules does not contemplate a different process for the initiation of an action in rem and an action in personam; its ambit is confined to sanctioning different forms of a writ of summon for the initiation of the two kinds of Admiralty actions. Examination of the details of the two forms reveals no material difference between the particulars the plaintiffs are required to furnish under the two actions or any other difference that would make a combination of the two actions in the same writ inherently injurious or antagonistic to the ends of justice. The Admiralty Rules make no provision for the joinder of parties in the same action. Joinder of actions and parties in the same proceeding is an important facet of the administration of justice. We can, therefore, presume the makers of the Rules intended the gap to be filled by Rule 237, making applicable rules of practice of the Admiralty Division of the High Court of England as in force in 1960**. The relevant English rule applicable at the time was Ord. 16 r.4, allowing the joinder of any number of defendants in

* *(See Definition of Action in Ord.1 r.2 - Civil Procedure Rules, and under s 2 - Courts of Justice Law 14/60).*

** *(See, Decisions of the Full Bench in Assimenos and Paraskeva v. Chrysostomou and Another (1982) 1 C L.R. 145; Pitna Shipping v. Georghiou (1982) 1 C.L.R. 358.*

the same action against whom a right to relief is alleged to exist, whether jointly or severally, or in the alternative. English cases on its interpretation suggest the above Rule is liberally interpeted to validate joinder whenever common questions of law or fact fall to be determined *. Bearing in mind the nature of relief sought in this case, damages for which the defendants are allegedly jointly and severally liable, the joinder was in principle feasible. Furthermore, supposing the combination, contrary to my decision, was in any sense irregular, the irregularity did not strike at the root of the proceedings and could be remedied by an appropriate order of the Court. Only on rare occasions would the Court declare proceedings instituted in breach of the rules as invalid, though there is power to do so under Ord.70 r.1 of the relevant English Rules. Unless, of course, the proceedings are void ab initio, a matter that need not be explored in these proceedings in the absence of -

(a) any suggestion of breach of the rules of natural justice, or

(b) a stipulation making employment of the specific forms approved in Rule 14 of the Admiralty Rules, a condition precedent to the validity of the proceedings**.

In my judgment the combination of the two actions in one writ was neither irregular nor impermissible having regard to the nature of the relief sought.

SERVICE OF A WRIT OF SUMMONS ON A PARTY OUT OF CYPRUS:

Article 30.3(a) of the Constitution safeguards as a fundamental human right, the right of every litigant to be informed of proceedings against him. Rules regulating service of judicial proceedings upon defendants, those, in particular, enacted before 1960 as the Admiralty Rules, must be applied in a way conforming to the above article of the Constitution and in a manner effectively safeguarding the protected right. Personal service is the norm

*(See, White Book 1958, p.1986 et seq.).

** See, inter alia, Lysandrou v. Schiza and Another (1979) 1 C.L.R. 267, Spyropoullos v Transavia (1979) 1 C.L.R 421; Evagorou v. Christodoulou and Another (1982) 1 C L R 771; N.P. Lanitis Ltd. v. Panayides (1986) 1 C L.R 490; Hadjichambis v. Attorney-General (1986) 1 C.L.R. 386;

where proceedings are directed against physical persons. If addressed to a legal entity, a corporation or a company, Rule 20 of the Admiralty Rules provides service must be effected in the manner provided by law for service of legal process upon them. The relevant provisions of the Companies Law are those of s.372 providing «a document may be served on a company by leaving it or sending it by post to the registered office of the company.» It is doubtful whether this rule applies to service of judicial proceedings. If that were the case it would appear to me to fall short of complying with the provisions of Article 30.3(a). More likely, Rule 21 regulates service of admiralty proceedings upon legal entities. This rule authorises, inter alia, service by «leaving an office copy of the writ with the President or other head officer, or the clerk, treasurer or secretary of the corporation...». Montanios & Montanios hold none of the above positions in the company. The second part of Rule 21 is inapplicable in this case for its application is confined to proceedings against public companies.

Neither Rule 20 nor Rule 21 purport to deal with service upon a foreign defendant. Such service is specifically regulated by a separate rule of the Admiralty Rules, notably Rule 23. It provides:

> «Where the person to be served is out of Cyprus application shall be made to the Court or Judge for an order for leave to serve the writ of summons or notice of the writ.»

The leave of the Court is made, as it appears to me from the employment of the word «shall», a condition precedent to service upon a foreign defendant be it a person or a legal entity. It is perfectly understandable that this should also be so in view of the provisions of Rule 24 making leave of the Court for service out of the jurisdiction dependent on satisfaction of the Court with regard to -

(a) the existence of a good cause of action,

(b) the propriety of the action being tried in Cyprus,

(c) amenity to locate and serve the defendant and, lastly,

(d) his nationality.

It is abundantly clear service is not dependent on either the transaction by the defendant of business in Cyprus as such, or the

availability of an agent. The Court must have regard to a variety of factors including the all important one of the probability of the defendant being traced by the means adopted to bring the proceedings to his notice. Rules 23 and 24 reproduce with the necessary statutory ramifications the principle that «... a foreign defendant is, prima facie, not subject to the jurisdiction of the Court.» (Per *Scott, J., in Altertext Inc. v. Advanced Data* [1985] 1 All E.R. 395, 398, letter 'B').

This being the law the service was wholly irregular and, more importantly, void because it was effected in a manner contrary to that specified by the Rules. Departure from the Rules regulating service has been held in England to render null the service effected in breach thereof. More so in Cyprus, in view of the provisions of Article 30.3(a) of the Constitution.

In the result, I direct that service be set aside. To that extent the application succeeds. The plaintiffs shall pay the costs of these proceedings.

Order accordingly.