1988 June 30

(STYLIANIDES, J.)

THE CYPRUS POTATO MARKETING BOARD,

Plaintiffs,

v.

1. THETIS SHIPPING CO. PTE. LTD.,
2. THE SHIP M.S. BEITEIGEUZE,

Defendants.

(Admiralty Action No. 138/87).

Admiralty — Writ of summons — Renewal of — Principles applicable — The old English Rules, Order 8, Rule 1 — Whether, if the application for renewal is filed after the expiration of twelve months from the issue of the writ, the writ can still be renewed by relying on Order 64 Rule 7 of the same Rules, governing the general power of the Court to enlarge or abridge the time — Question determined in the affirmative.

Admiralty — The Admiralty Jurisdiction Order, 1893, Rule 237 — The English Rules made applicable thereunder are those in force on 15.8.60, i.e. the day preceding Independence Day.

The writ was issued on 4th June 1987, and is directed against two defendants. The action against defendants 1 is in personam and against defendant 2 is in rem.

By means of this ex parte application which was filed after expiration of twelve months as from the issue of the said writ — which has not been served on the defendants — the applicants — plaintiffs seek the renewal of the writ for a period of six months as from 3.6.88.

Rule 237 of the Admiralty Jurisdiction Order reads as follows:

> «In all cases not provided by these Rules, the practice of the Admiralty Division of the High Court of Justice of England, so far as same shall appear to be applicable, shall be followed».

Held, granting the application (1) The English Rules that are applicable in virtue of the said Rule 237 are those in force in England on the day preceding the Independence Day of Cyprus (Asimenos v Paraskeva (1982) 1 C L R 145)

2) As our Rules are silent in respect of the matter in issue, such matter is governed by the said English Rules and, in particular, Order 8, Rule 1*

3) It is clear that any application thereunder has to be made before expiration of the period of 12 months as from the issue of the writ This is not what happened in this case

4) The question is whether this application can be saved by relying on Order 64 Rule 7** of the same English Rules The authorities show that it is settled that by the application of the two rules the Court has power to renew a writ even if the application is made after the expiration of the twelve months

5) The applicant has to satisfy the Court that there was sufficient reason or good cause to excuse the delay in service It is only in exceptional cases that the effective start of litigation should be postponed, especially when the end of the twelve months period extends beyond the limitation period, and, above all, when the application for renewal was made after the expiration of the said period of 12 months

Reasonable efforts to effect service or an agreement to defer service or delay, induced or contributed to, by the defendant are good causes

6) On the facts of this case, the renewal is justified

Application granted
No order as to costs

Cases referred to

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

Shelton v Brown Bayleys Steelwords [1953] 2 All E R 894,

E Ltd v C and Another [1959] 2 All E R 468,

Holman v George Elliot and Co Ltd [1944] 1 All E R 639,

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* *Quoted at p 400 post.*
** *Quoted at p 400 post.*

Battersby and Others v Anglo-American Oil Co Ltd and Others [1944] 2 All E R 387,

«*Berny*» [1979] 1 Q B 80,

«*Helene Roth*» [1980] 1 Ll L R 477

Application

Ex parte application for the renewal of the writ of summons for a period of six months as from 3rd June, 1988.

I Christodoulou (Mrs) for C Indianos, for applicants - plaintiffs

Cur. adv vult

STYLIANIDES J read the following decision By this ex-parte application applicants-plaintiffs apply for the renewal of the writ of summons for a period of six months as from 3rd June, 1988

The writ was issued on 4th June, 1987, and is directed against two defendants The action against defendants 1 is in personam and against defendant 2 is in rem

The application is based on Rule 237 of the Cyprus Admiralty Jurisdiction Order 1893 and Order 8 Rule 1 of the English Rules (the old Rules of the Supreme Court) Rule 237 reads as follows·

> «In all cases not provided by these Rules, the practice of the Admiralty Division of the High Court of Justice of England, so far as same shall appear to be applicable, shall be followed»

In *Asimenos v Paraskeva* (1982) 1 C.L R 145 it was held by the Full Bench of this Court that since after the Independence of Cyprus and as contemplated by the Constitution, the Courts of Justice Law, 1960 (Law 14/60) was enacted by virtue of section 19(a) of which the Supreme Court shall have jurisdiction as the Court of Admiralty vested with and exercising the same powers and jurisdiction as those vested in or exercised by the High Court of Justice in England in its Admiralty jurisdiction on the day immediately preceding Independence Day, that since the law to be applied in the exercise of such jurisdiction is, by virtue of section 29(2)(a) of the Courts of Justice Law, the law applied by the High Court of Justice in England in the exercise of its Admiralty Jurisdiction, as in force on the day preceding the Independence

Day, subject to any amendments which might be effected by any law of Cyprus; and that since Rules of Court are a species of legislation and, therefore, the provisions of section 29(2)(a) extend to them as well, the Rules of the Supreme Court which were in force and applied in the Admiralty Division of the High Court of Justice of England on the day preceding the Independence Day are the ones applicable by this Court in the exercise of its admiralty jurisdiction to the extent contemplated by rule 237 of the Cyprus Admiralty Rules of 1893.

The Cyprus Admiralty Rules of 1893 are silent on the issues raised in this application. The material part of Order 8 Rule 1 of the Rules of the Supreme Court obtaining in England on 15th August, 1960, provides:

> «No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the court or a judge for leave to renew the writ; and the court or judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ...»

It is clear that any application under Order 8 Rule 1 has to be made before the expiration of the relevant period, and in this case no such application was made. Accordingly reliance has to be placed on R.S.C. Order 64 Rule 7, which is a general rule, which provides:

> «A court or a judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by an order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed...»

At a time in the development of the English Law the opinion prevailed that after the expiration of twelve months the writ was a nullity.

In *Sheldon v. Brown Bayleys Steelwords* [1953] 2 All E.R. 894 it was said at p. 896:

«I do not regard it as strictly accurate to describe a writ which has not been served within twelve months as a nullity. It is not as though it had never been issued. It is something which can be renewed. A nullity cannot be renewed. The court can grant an application which results in making it just as effective as it was before the twelve months period has elapsed.»

In *E. Ltd. v. C. and Another* [1959] 2 All E.R. 468 at p. 469 it was said:

«In my judgment there is no lack of jurisdiction in me to grant this application under the two rules in combination, if in my discretion I think fit; and the only relevance of the question whether the application is to be treated as a whole under Ord. 64, r.7, or whether it is partly under Ord. 8, r.l, is that in Ord. 8, r.1, the discretion is qualified by the words 'if satisfied that reasonable efforts had been made to serve such defendant, or for other good reasons' and Order 64, rule 7 is not so qualified. But as the words 'or for other good reasons' are in themselves very wide, I doubt if it makes much difference whether I proceed under the one rule, or partly under one and partly under the other.»

In *Holman v. George Elliot Co. Ltd.* [1944] 1 All E.R. 639 Mackinnon, L.J. said at p. 640:

«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., Ord. 8 r. l; 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 of a long time that amendments which would deprive a party of a vested right ought not to be allowed».

In *Battersby and Others v. Anglo-American Oil Co. Ltd. and Others* [1944] 2 All E.R. 387 it was said by Lord Goddard 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.»

It is settled that by the application of the two rules (Order 8 Rule 1 and Order 64 Rule.7) the Court has power to renew a writ even if the application is made after the expiration of the twelve months.

The plaintiff-applicant has to satisfy the Court that there was sufficient reason or good cause to excuse the delay in service.

The rules of Court provide twelve months - a not ungenerous time, it might be thought - within which the plaintiff can hold up proceedings by not serving his writ. Surely, beyond that period the same public policy requires that the Court should ensure that it is only in really exceptional cases that the effective start of litigation should be yet further delayed, especially where the twelve months allowed for service extends beyond the end of the limitation period; and, above all, where the application is not made until after the period of twelve months, and with it the validity of the writ, has expired.

If the Court is satisfied that reasonable efforts have been made to serve the defendant with the writ, the extension of which is sought by the application, this is good cause. Exceptional cases, justifying a departure from the general rule, might well arise where there has been an agreement between the parties, express or implied, to defer service of the writ; or where the delay in the application to extend the validity of the writ has been induced, or contributed to, by the words or conduct of the defendant or his representative.

In «*Bemy*» [1979] 1 Q.B. 80 Brandon J. said 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 circumstance 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 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.»

See also «*Helene Roth*» [1980] 1 Ll.L.R. 477.

In the present case the application is supported by affidavit in which it is deposed that in spite of repeated efforts the writ of summons has not yet been served on the defendants. Defendant 2 is a ship. The service is effected within the jurisdiction. A ship is sailing from one port to another and it is only when it is within one of our harbours or within the jurisdiction that service can be effected.

The plainfiffs are under a duty to pursue their action diligently. If, due to their inaction, the validity of a writ expires, it is not necessarily unjust that the plaintiff should lose his right to proceed.

Having regard to the facts as set down in the affidavit and the circumstances of this particular case, I am satisfied that there are good reasons for exercising my discretion in favour of granting the application. The writ is hereby renewed for six months as from 4th June, 1988.

Let there be no order as to costs.

Application granted.
No order as to costs.