1989 June 10

(STYLIANIDES, J.)

SOUTHFIELDS INDUSTRIES LTD.

Plaintiffs,

v.

1. M/V «ADRIATICA K» UNDER CYPRUS FLAG, THROUGH THEIR OWNERS, DEFENDANTS, 2,
2. LEMAN NAVIGATION CO. LTD.,
3. ANMAR SHIPPING CO. LTD, THROUGH THEIR AGENTS IN CYPRUS M & A SHIPPING CO. LTD.,

Defandants.

(Admiralty Action No. 288/85).

Admiralty — Law applicable — The Courts of Justice Law, 1960 (Law 14/60) sections 19(a) and 29(2)(a) — It is that applied by the High Courts of Justice in England, in the exercise of its admiralty jurisdiction, on the day preceding Independence Day — Therefore, The Bills of Lading Act, 1855 is applicable in Cyprus.

Admiralty — Practice — Rules applicable — The Cyprus Admiralty Jurisdiction Order, 1893, Rule 237 — The Rules of Court applied in the Admiralty Division of the High Court of Justice of England on the day preceding Independence day are to the extent contemplated by Rule 237 applicable in Cyprus in virtue of section 29(2)(a) of the Courts of Justice Law, 1960 (Law 14/1960).

Carriage of Goods by Sea — Bill of Lading — Consignee of the goods or endorsee of the bill of lading — Rights transferred to them by reason of the consignment or indorsement limited to those under the contract, as expressed in the bill of lading.

Bill of lading — Effect — As between the shipper and the shipowner when there exists a charterparty or when there is no charterparty — Effect as between shipowner and consignee or indorsee — Review of authorities.

Admiralty — Practice — Pleadings — Striking out on ground that they are unnecessary and tend to prejudice, embarrass or delay the fair

trial of the action — Order 19 Rule 27 of the English Rules of Court — The purpose of Rule 17 is limited to the enforcement of the Rules of pleading contained in Order 19 — When the case of the applicant is that the Petition does not disclose a reasonable cause of action, the practice is to base the application on O 19 R 17 and on O 25 R 4 of the same Rules — The rules apply only in plain and obvious cases — If there is a serious point of law requiring serious discussion this summary procedure is not available

The principles applied by the Court in this case appear sufficiently in the hereinabove headnotes. The application by defendants 1 and 2 to strike out part of the petition was, at the end, dismissed, on the ground that the issues raised by the paragraphs sought to be struck out are such as to require consideration and discussion

Application dismissed.
No order as to costs

Cases referred to:

Stylianou v. The Fishing Trawler «Narkissos» and Two Others (1965) 1 C.L.R. 291

Ship «Glonana» and Another v. Brenli (1982) 1 C.L.R. 409

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

Fraser v. Telegraph Construction Co [1872] L.R. 7 Q.B. 566,

Clyn Mills & Co. v. East and West India Dock Co [1882] 7 App. Cas. 591

Leduc & Co. v. Ward and Others [1886-90] All E.R. Rep. 266 (20 Q.B.D. 475),

The «Ardennes» 84 Ll. L. Rep. 340,

Jadranska Slobodna Plovidba v. Photos Photiades & Co. (1965) 1 C.L.R. 58,

Archangelos Domain Limited v. Adriatica Societa Per Azione Di Navigatione through their Cyprus Agents Messrs A. L. Mantovani & Sons Ltd (1978) 1 C.L.R. 439,

Knowles v. Roberts, 38 Ch. D. 270,

Rasam v. Budge [1893] 1 Q.B. 571,

Liardet v. Hammond Electric Light Co., 31 W.R. 710,

Mudge v. Penge U.D.C., 85 L.J. Ch. 814,

Davy v. Garrett, 7 Ch. D. 473;

Hubbock & Sons v Wilkinson [1895-9] All E.R. Rep. 244;

Kemsley v. Foot [1951] 1 All E.R. 331;

Willoughby v. Eckstein [1936] 1 All E.R. 650;

Margarine Union v. Cambay Prince S.S. Co. [1967] 3 All E.R. 775.

Application.

Application by defendants 1 and 2 for striking out paragraphs 4, 5, 6, part of paragraph 7, paragraphs 8, 9, 10, 18 and part of paragraph 23, set out in the appendix to this decision on the ground that they are irrelevant, unnecersary and tend to embarrass and delay the fair trial of the action.

St. McBride, for the applicants-defendants 1 and 2.

M. Montanios, for the respondent-plaintiff.

Cur. adv. vult.

STYLIANIDES J. read the following decision. By this application by summons the defendants 1 and 2, the ship and the owners thereof, apply that paragraph 4, 5, 6, part of paragraph 7, paragraphs 8, 9, 10, 18 and part of paragraph 23, particularly set out in an Appendix, which is an integral part of this Decision, be struck out on the ground that they are irrelevant, unnecessary and tend to embarrass and delay the fair trial of the action.

The plaintiffs opposed this application.

The plaintiffs, a local company raised this action, as set out in the writ of summons and the petition, as consignees, holders of the Bill of Lading for the carriage of 163 pallets STC 420.000 6 1/2 OZ white glass like bottles from Piraeus port to Limassol port C and F. The shipper was Yioula Glassworks SA of Greece.

In the writ of summons the claim is for damages for loss suffered by the Plaintiffs due to the delay in the transport and delivery by the Defendants of the aforesaid cargo due to breach of contract of affreightment and/or agreement of carriage of goods by sea and/or negligence and/or fraud and/or misrepresentation of the defendants 3 to the shippers. Defendants 3 are described as agents, at the material time, of defendant 1 ship.

It is the contention of counsel for the applicants that the

respondents are consignees and/or endorsees of the Bill of Lading and that the sole evidence as to the contract of affreightment is to be found in the Bill of Lading itself. The consignee is not entitled to adduce evidence outside the terms of the Bill of Lading. That a right of action in tort is not transferred to the consignee or endorsee. That the duty of care does not lie on the shipowner towards anyone who was not the owner of the goods at the time when the tort of negligence in the performance of the contract was committed. That the plaintiffs did become the holders of the Bill of Lading and therefore owners of the goods long after the alleged facts in the paragraphs sought to be struck out. That an action in tort should not be joined in an action for damages for breach of contract of affreightment.

Counsel for the respondents on the other hand contended that striking out is ordered by the Court only in plain and obvious cases. That the Bills of Lading Act is not applicable in Cyprus. That «Yioula», who appeared shipper in the Bill of Lading, shipped the goods on behalf of the plaintiffs as their agent and they stated this fact to defendants 3. That under the common law, which is the law applicable, facts which took place before the execution of the Bill of Lading are evidence of the contract. That the claim is based not only on breach of contract of affreightment but, also, on misrepresentation and fraud. That the part of the petition sought to be struck out is necessary for the latter cause of action and the Court at this stage should not go into a detailed examination to determine matters which may affect the cause of action and the course of the case.

It was submitted by counsel for the respondents that the law applicable in this country is confined to the law set out in section 29(1) of the Courts of Justice Law, 1960 and, therefore, the Bills of Lading Act is not applicable.

This Court derives its jurisdiction from the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law No. 33/64) and in particular from section 9(a) which, as regards Admiralty Jurisdiction, brings into play the provisions of section 19(a) and section 29(2)(a) of the Courts of Justice Law, 1960 (Law No. 14/60).

Section 29(2)(a) of Law 14/60 makes specific provision for the Admiralty Jurisdiction, that the law applicable is the law «applied by the High Court of Justice in England, in the exercise of

its admiralty jurisdiction, on the day preceding Independence Day» as it might be «modified by any law of the Republic», subject always to any overriding provisions of the Constitution - *(Costas Stylianou v. The Fishing Trawler «Narkissos» and Two Others* (1965) 1 C.L.R. 291; *Ship «Gloriana» and Another v. Breidi* (1982) 1 C.L.R. 409).

Rule 237 of the Admiralty Jurisdiction Rules provides:-

«237. 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 the same shall appear to be applicable, shall be followed».

Since Rules of Court are a species of legislation, the provisions of section 29(2)(a) extend to them as well. The Rules of 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 above - (*Asimenos v. Paraskeva* (1982) 1 C.L.R. 145).

The Bills of Lading Act, 1855 is applicable in this country. Section 1 reads as follows:-

«1. Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself».

In *Fraser v. Telegraph Construction Co.* [1872] L.R. 7 Q.B. 566 Blackburn, J. said at p. 571:-

«The bill of lading, notwithstanding some case that Mr. Cohen referred to in the Common Pleas, must be taken to be the contract under which goods are shipped, and until I am told different by a court of error, I shall so hold».

In *Clyn, Mills & Co. v. East and West India Dock Co.* [1882] 7 App. Cas. 591, Lord Selborne said at p. 596:-

«Everyone claiming as assignee under a bill of lading must be bound by its terms, and by the contract between the shipper of the goods and the shipowner therein expressed.

The primary office and purpose of a bill of lading although by mercantile law and usage it is a symbol of the right of property in the goods, is to express the terms of the contract between the shipper and the shipowner».

In *Leduc & Co. v. Ward and Others* [1886-90] All E.R. Rep. 266 (20 Q.B.D. 475), an action by an endorsee for a loss of the goods during a deviation from the voyage, Lord Esher, M.R., said at p. 268:-

«The question in this case is, what is the contract contained in the bill of lading? It was suggested that a bill of lading is, in all circumstances, nothing but a receipt for the goods, and contains no contract, except that the goods, have been received by the shipowners and are to be delivered by them at the place named. This is an instrument which has received one construction from the mercantile world and the courts for more than a hundred years. Where there is a charterparty, the bill of lading is only a receipt for the goods, because all the terms of the contract of carriage, as between the shipowner and the charterer, are containing in the charterparty, and the bill of lading is only given to enable the charterer to deal with the goods during transmission. But even where there is a charterparty, although the bill of lading is only a receipt as between the charterer and the shipowner, it is more than a receipt as between the endorsee and the shipowner; it contains the contract between them».

And at p. 269:-

«It seems to me impossible to say that a bill of lading does not contain the terms of the contract of carriage».

Fry, L.J., said at p. 270:-

«In my view, a very large portion of the argument which we have heard in this case is concluded by the provisions of the Bills of Lading Act, 1855. The plaintiffs entered into a contract with merchants abroad for the purchase of goods to be shipped from a foreign port. The substance of that contract was that the vendors were to deliver shipping documents to the purchasers, and that the purchasers were to pay the price in exchange for the documents. The Bills of Lading Act provides by s.1, that ...».

After he recites the section he continues:-

«Those words appear to me to be applicable to the present case. The plaintiffs are endorsees of a bill of lading to whom the property in the goods therein mentioned has passed on or by reason of the endorsement. The legislature have declared that there is a contract in the bill of lading, and that the benefit of that contract is vested in the endorsees. It seems to me to be impossible in the face of that section for the court to say that a bill of lading contains no contract.»

And further down:-

«... I prefer to rest my judgment on the view that the provision of the statute making the contract contained in the bill of lading assignable is inconsistent with the idea that anything which took place between the shipper and shipowner, not embodied in the bill of lading, could affect that contract .

... as I have said, where a statute has made the benefit of a contract assignable to a third party, it is inconsistent with the policy of the statute to allow anything which took place between the parties to the contract, but which is not embodied in it, to affect the contract».

In *The «Ardennes»* 84 Ll. L. Rep. 340 at p. 345 we read:-

«*Leduc & Co. v. Ward and Others,* 20 Q.B.D. 475, on which Sir Robert so strongly relied, was a case between shipowner and indorsee of the bill of lading, between whom its terms are conclusive by virtue of the Bills of Lading Act, 1855, so that no evidence was admissible in that case to contradict or vary its terms. Between those parties the statute makes it the contract».

In *Jadranska Slobonda Plovidba v. Photos Photiades & Co.* (1965) 1 C.L.R. 58 a clear and distinctive differentiation was made between the shipper on the one side and those who acquire a right under the Bills of Lading Act, 1855. At p. 65 it was said:-

«Where a bill of lading has been held to be the contract it was either so by reason of section 1 of the Bill of Lading Act, 1855 (as in the case of *Leduc v. Ward* 20 Q.B.D. 475) or the parties appear to have agreed that it should be so.

It appears to be well settled that a bill of lading is not in itself

the contract between the shipowner and the shipper of goods, though it has been said to be excellent evidence of its terms»

In *Archangelos Domain Limited v Adriatica Societa Per Azione Di Navigatione through their Cyprus Agents Messrs A L Mantovani & Sons Ltd*, (1978) 1 C L R 439, Mr Justice Hadjianastassiou, after reviewing the English Case Law on the subject, held that the Bill of Lading is not in itself the contract between the shipowner and the shippers of goods though it is an excellent evidence of its terms At p 467 he clearly adopted the *Leduc s* case and said -

«That was a case between shipowner and endorsee of the bill of lading, between whom its terms are conclusive by virtue of the Bills of Lading Act, 1855 so that no evidence was admissible in that case to contradict or vary its terms Between those parties the statute makes it the contract»

The law with regard to consignees/endorsees is well settled The rights to sue transferred to the endorsee/consignee are limited to those under the contract, as expressed in the Bill of Lading

Order 19 of the English Rules provides for pleading generally Rule 27 reads -

«27 The Court or a Judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action, and may in any such case, if they or he shall think fit, order the costs of the application to be paid as between solicitor and client»

This is the rule on which the defendants-applicants rely upon, they seek to strike out the paragraphs set out in the Appendix to this Decision on the ground that they are unnecessary and they tend to prejudice, embarrass, or delay the fair trial of the action They based this contention on two legs -

That the plaintiffs-respondents are consignees and their rights are those derived from the Bill of Lading, and

That no cause of action in tort can be raised against the defendants by the consignees

In the course of the address, learned counsel for the applicants submitted that no cause of action is disclosed by these paragraphs

The petition may be divided into two:-

1. A claim for breach of contract of affreightment, as evinced in the Bill of Lading; and

2. A claim for fraud or misrepresentation exercised by defendants 3, the agent of the defendants-applicants on the shipper, who allegedly was acting for the shipment as agent of the present plaintiffs.

Rule 27 of Order 19 is a general provision for enforcing the rules set out in Order 19. Its ambit of operation is limited.

The Court refrains from dictating to parties how they should frame their case. The parties, however, must not offend against the rules of pleadings, which are laid down by the law.

Bowen, L.J., in *Knowles v. Roberts*, 38 Ch. D p. 270, said:-

> «The rule that the Court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass, and delay the trial of the action, it then becomes a pleading which is beyond his right».

Wholly immaterial matter which raises irrelevant issues, which may involve expense, trouble and delay, are struck out, as they will prejudice the fair trial of the action - (see *Rassam v. Budge*, [1893] 1 Q.B. 571; *Liardet v. Hammond Electric Light Co.*, 31 W.R. 710; *Mudge v. Penge U.D.C.*, 85 L.J. Ch. 814, C.A.; 32 T.L.R. 354, 417; *Davy v. Garrett*, 7 Ch. D. 473).

Applicants' counsel argued that the paragraphs sought to be struck out did not disclose a cause of action and further that a cause of action in tort could not be joined in this action, raised by a consignee of the Bill of Lading.

The general practice in England is: such applications to be based on both Order 19, rule 27 and Order 25, rule 4, if the matter does not require careful consideration and inquiry, but it can be disposed rather summarily.

Order 25, rule 4 reads:-

«25.4. The Court or a Judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just».

Order 25 abolished demurrers and substituted a more summary process for getting rid of pleadings which show no reasonable cause of action or deffence.

In *Hubbuck & Sons v. Wilkinson* [1895-9] All E.R. Rep. 244, it was said at p. 247:-

«The application is made under R.S.C., Ord. 25, r. 4. Order 25 abolished demurrers, and substituted a more summary process for getting rid of pleadings which show no reasonable cause of action or defence. Two courses are open to a defendant who wishes to raise the question whether, assuming a statement of claim to be proved, it entitles the plaintiff to relief. One method is to raise the question of law as directed by Ord. 25, r.2; the other is to apply to strike out the statement of claim under Ord. 25, r.4. The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression, 'reasonable cause of action' in r. 4, shows that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases».

This was repeated by the Court of Appeal in *Kemsley v. Foot* [1951] 1 All E.R. 331; p. 333, where it was said:-

«The type of case appropriate for application under these rules was considered, among other cases, in *London Corpn. v. Horner* and *Hubbuck & Sons v. Wilkinson, Heywood & Clark*, a decision of this court. These cases are referred to in the ANNUAL PRACTICE under R.S.C., Ord. 25, r.4 and counsel for the plaintiff at one time submitted that so strick a principle did not apply to R.S.C., Ord. 19, r. 27. An

examination of the latter case makes it, I think, clear that, although the application, as here, was under both rules, it was R.S.C., Ord. 19, r.27, that was substantially in question. The effect of the cases is accurately summarised in the ANNUAL PRACTICE, and I think applies to both rules. They should be applied only in plain and obvious cases, and, if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under R.S.C., Ord. 25, r.2. Counsel for the third and fourth defendants relied on these cases, but he delivered a full argument on the merits, to which counsel for the plaintiff replied. The court must, of course, go into the merits to some extent to see whether the point is one for serious discussion».

A statement of claim is embarrassing if it raises a claim which the plaintiff is not entitled to make - (*Knowles v. Roberts*, (supra)).

Allegations in a petition, which, even if proved, do not disclose a cause of action in law, are struck out under Order 25, rule 4 and Order 19, rule 27. It is not a matter of discretion, as it is not right to call upon the defendant to justify a plea which discloses no cause of action - (*Willoughby v. Eckstein* [1936] 1 All E.R. 650).

The plaintiffs-respondents as consignees under the Bill of Lading have their rights in contract, including the right to sue for an antecedent tort, which are given to them by virtue of the provisions of the Bills of Lading Act, 1855 - (*Margarine Union v. Cambay Prince S.S. Co.* [1967] 3 All E.R. 775, p. 795 (letters F-G)).

The averments in the paragraphs sought to be struck out differ from the contents of the Bill of Lading.

It is alleged that the shipper was the agent of the plaintiffs, who were actually the owners of the goods before their shipment and that defendants No. 3 (the agent of defendants-applicants) made representation not very consistent with the dates, etc., set out in the Bill of Lading.

The issue raised by the part of the petition sought to be struck out is not within the compass of rule 27, Order 19. This is not an application, either under Order 25, rule 4, or under Order 25, rule 2. The issue raised in the aforesaid paragraphs and in argument before me requires consideration and inquiry. It is not a plain case of not adhering to the rules set down in Order 19. It is in effect a

demurrer that cannot be disposed in the present application as framed and in virtue of the rule relied upon.

For the foregoing, the application is dismissed.

No order as to costs.

Application dismissed.
No order as to costs.

APPENDIX

(The paragraphs of the petition sought to be struck out are paragraphs 4, 5, 6, 8, 9, 10, 18 in whole and the parts of paragraphs 7 and 23 which are in brackets).

«4. By an agreement made on or about 18.4.85 between the Plaintiffs and Yioula Glass-Works S.A. of Athens (hereinafter called 'Yioula') by or through Yioula's agent in Cyprus Handsome Trading Ltd. acting for and on Yioula's behalf, Yioula agreed to manufacture and sell to the Plaintiffs and the Plaintiffs agreed to buy 400,000 pieces of 12oz white glass like bottles (hereinafter called 'the goods') cost and freight Limassol liner terms, for shipment from Piraeus to Limassol. The said agreement between the Plaintiffs and Yioula was made partly orally and partly in writing.

5. In performance of the said agreement, the Plaintiffs had an irrevocable documentary established in favour of Yioula through the National Bank of Greece, S.A., Nicosia Branch (525) on or about 24.4.85.

6. It was a term of the agreement between the Plaintiffs and Yioula that the goods should be delivered to the Plaintiffs not later than 21.7.85 as they would be needed for the Plaintiffs' manufacturing purposes on 22.7.85.

7. (In performance of the said agreement) Yioula delivered on 15.7.85 a part of the goods to the Defendants 3, who were acting on their own account and/or for and on behalf of defendant and/or her owners for carriage on Defendant 1 from Piraeus to Limassol on 16.7.85, (informing Defendants 3 that shipment was urgent both for themselves and the Plaintiffs for and on whose behalf the goods were being shipped. Defendants 3 thereupon informed Yioula that there

was a delay and Defendant 1 would not leave Piraeus for Limassol until 17.7.85).

8. On 17.7.85 Defendants 3 informed Yioula that Defendant 1 would not set sail for Limasol until 19.7.85 and represented to Yioula that it would proceed from Piraeus to Limassol on that day and with all convenient and/or reasonable dispatch and would be at Limassol on 21.7.85. In reliance upon the said representations and acting upon the faith and truth of the same and induced thereby Yioula agreed with Defendants 3 to ship all the Plaintiffs' order which was ready by then for carriage from Piraeus to Limassol and allowed Defendant 1 to load the said goods.

9. The Plaintiffs have since discovered and the fact is that the said representations were untrue.

10. Defendants 3 made the said representations fraudulently and either well knowing that they were false and untrue or recklessly not caring whether they were true or false.

18. On or about 22.7.85 Yioula learned from Defendants 3 that Defendant 1 had not set sail for Limassol on 19.7.85 and was still at Piraeus. Defendants 3 assured them and/or undertook that Defendant 1 would leave directly for Limassol on 23.7.85.

23. The plaintiffs say that if Defendant 1 had proceeded on 19.7.85 and/or with all convenient and/or reasonable dispatch as was expressly and/or impliedly agreed in the bills of lading (and/or represented and/or undertaken by Defendants 3 and/or otherwise), Defendant 1 would have arrived at Limassol on or about 21.7.85 and that the delay of 12 days was wrongful and/or unjustifiable and/or unreasonable and/or in breach of contract and/or representation and/or undertaking».