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To: Transport Industry Operators

BVI or Malta?

The Hong Kong High Court issued a Judgment on 9/4/2018 dealing with a cargo total loss case in which a NVOC in Malta was wrongly sued (because it had the same name as that of the correct NVOC in BVI). [HCAJ 65/2016], [2018 HKCFI 699]

Introduction
This was an application by Summons dated 13 October 2017 (Summons) by which Cargo Container Line Ltd (CCL BVI) applied to set aside the Concurrent Amended Writ and service of the same on it, to discharge the Order granting leave for the service of the Concurrent Amended Writ out of jurisdiction and to dismiss the Action.

What happened was that the cargo interests had issued the Writ on the last day before the expiration of limitation period. By a mistake, the Writ was issued against a company with the same name as CCL BVI but was incorporated in Malta instead of the BVI.

The issue in this application was whether the amendment of the Writ, by substituting the Malta address with the BVI address, constituted the substitution of a new party.

Background
Pursuant to 6 bills of lading that CCL BVI issued (Bills of Lading), CCL BVI contracted to carry cargoes (Cargoes) on the vessel "MOL COMFORT" (Vessel). Although it was clear from the Bills of Lading that the carrier was "Cargo Container Line Ltd", those documents did not provide the address of that company or any information as to its whereabouts. On 17 June 2013, the Vessel sank during the course of a voyage across the Indian Ocean.

The cargo interests claimed damages for breach of the contracts of carriage contained in or evidenced by the Bills of Lading. Clause 20 of the terms of the Bills of Lading (Terms) specified that the contracts of carriage are governed by Hong Kong law and any dispute is subject to the exclusive jurisdiction of the Hong Kong Courts.

A one-year limitation period existed pursuant to the Terms and Article III, r 6 of the Hague-Visby Rules (applicable to the Bills of Lading by virtue of clause 6(1)(A) of the Terms) for the cargo interests to commence any claim relating to the loss of the Cargoes. The parties agreed various time extensions for the cargo interests to commence any proceedings relating to the loss of the Cargoes, up until and including 17 August 2016.

By a Writ of Summons dated 17 August 2016, the cargo interests commenced the proceedings against Cargo Container Line Ltd of "147/1 St Lucia Street, Valetta VLT 04, Malta" (Malta Address). On 5 May 2017, the cargo interests applied for leave to issue and serve a Concurrent Writ of Summons on CCL of the Malta Address (CCL Malta) out of the jurisdiction in Malta. On 12 May 2017, the cargo interests obtained an order (1st Order) to issue a Concurrent Writ of Summons

against CCL Malta and to serve it on the same at the Malta Address or elsewhere in Malta. After an attempt was made to serve the Concurrent Writ of Summons on CCL Malta, the cargo interests received a telephone call from its insurer informing the cargo interests that CCL Malta operated only in the Eastern Mediterranean and not in the Far East.

The cargo interests then made various efforts to ascertain the address of CCL BVI, including making enquiries with CCL BVI's solicitors in the UK. By an email dated 31 July 2017, CCL BVI's UK solicitors stated that the cargo interests' claims were time barred, and that the carrier under the Bills of Lading was incorporated in BVI with the registered office address at "PO Box 3340, Road Town, Tortola, BVI".

On 31 July 2017, the cargo interests amended the Writ of Summons pursuant to O 20, r 1 of the RHC (without the court's leave) to correct the defendant's address from the Malta Address to a BVI address. Two orders dated 3 August 2017 were obtained by the cargo interests pursuant to an ex parte application. The first one set aside the 1st Order. The second order gave leave to issue a Concurrent Amended Writ of Summons and to serve it on CCL BVI out of the jurisdiction at Ernst & Young Trust Corp (BVI) Ltd, PO Box 3340, Barclays House, Road Town, Tortola, BVI or elsewhere in the BVI. Subsequently, the Concurrent Amended Writ of Summons was served on CCL BVI in the BVI.

CCL Malta, despite the identity of its name with CCL BVI, was a separate legal entity with different directors and shareholders.

CCL BVI's case

CCL BVI advanced a number of propositions :

(1) The amendment of the Writ involved the substitution of CCL BVI as the defendant to the proceedings in place of CCL Malta;
(2) Such amendment was made after the expiry of limitation period under the Hague-Visby Rules, and the expiry of such limitation period had the effect of extinguishing the cargo interests' causes of action against CCL BVI.
(3) If a claim was time barred, then any leave to serve a concurrent writ of summons out of the jurisdiction should be set aside, because there was no serious issue to be tried.

The lynchpin of these propositions rested in the contention that the amendment of the Writ was not merely a correction of the address of the defendant but substituting of a new party.

Analysis

It could not be seriously doubted that the cargo interests had all along intended to sue the carrier under the Bills of Lading, namely, CCL BVI. Plainly, it was a mistake that CCL Malta was sued instead of CCL BVI.

According to the evidence of the cargo interests, the mistake arose when a search was made about the address of "Cargo Container Line Ltd" on the day the Writ was issued. CCL BVI suggested that the mistake should not have been made because, inter alia, the cargo interests could have asked CCL BVI's solicitors to confirm its identity before the Writ was issued. However, the Judge was inclined to agree with the cargo interests that fault was not a relevant consideration in the application in question.

The CCL BVI submitted that the evidence filed by the cargo interests in support of the 1st Order demonstrated that the cargo interests intended to sue CCL Malta. The Judge thought the evidence simply reflected the fact that the cargo interests were labouring under a mistaken belief. The Judge did not believe that there was any further mileage in that point.

To resolve the issue in question, the Judge first considered whether there was any rule which inhibited the amendment of the address of the defendant in the Writ. None had been suggested.

Giving a wrong address of the defendant in a writ is not an irregularity which justifies the setting aside of the writ or its service, unless the defendant has been misled or prejudiced: *Hong Kong Civil Procedure 2018*, Vol 1, rubric 6/1/12.

The mistake over the address of CCL BVI had, somewhat fortuitously, resulted in a wrong party (CCL Malta) being sued under the Writ. Did the amendment of the address mean that a new party was sued in place of the wrong one? One might argue that even the amendment of a wrongly spelled name would result in substituting a non-existing party (assuming that there was no entity by the misspelled name) with a new party. CCL BVI did not suggest that a misspelled name could not be amended after the expiry of limitation period.

Neither the cargo interests nor CCL BVI had managed to find any authority on whether the amendment of the address of the defendant might or might not result in the substitution of a new party.

The question in the case in question was: where there was no need to amend the name of the defendant but only the address, might the amendment be said to be substituting CCL Malta with CCL BVI?

The cargo interests relied upon the *Sardinia Sulcis* test (*The Scardinia Sulcis* [1991] 1 Lloyd's Rep 201), which was set out in the judgment of Lloyd LJ at p 207 :

> "The 'identity of the person intending to sue' is a concept which is not all that easy to grasp, and can be difficult to apply to the circumstances of a particular case, as is shown by the fact that in two of the cases to which I have referred there has been a dissenting judgment.
> In one sense a plaintiff always intends to sue the person who is liable for the wrong which he has suffered. But the test cannot be as wide as that. Otherwise there could never be any doubt as to the person intended to be sued, and leave to amend would always be given. So there must be some narrower test. In *Mitchell v Harris Engineering* the identity of the person intended to be sued was the plaintiff's employers. In *Evans v Charrington* it was the current landlord. In *Thistle Hotels v McAlpine* the identity of the person intending to sue was the proprietor of the hotel. In *The Joanna Borchard* it was the cargo-owner or consignee. In all these cases it was possible to identify the intending plaintiff or intended defendant by reference to a description which was more or less specific to the particular case. Thus if, in the case of an intended defendant, the plaintiff gets the right description but the wrong name, there is unlikely to be any doubt as to the identity of the person intended to be sued. But if he gets the wrong description, it will be otherwise."

The Judge agreed with the cargo interests that the general endorsement of the Writ had identified the cargo interests' causes of action as those against the contract carrier under the Bills of Lading. Accordingly, there could be no doubt as to the party intended to be sued, namely, CCL BVI.

Further, the cargo interests relied on the following dicta of Hobhouse J (as he then was) which was quoted with approval by Philips J (as he then was) in *The Anna L*, col.1 :

> "As Mr Justice Hobhouse pointed out in *The Jay Bola* there are two types of 'amendment to correct the name of a party'. The amendment may effectively substitute one party for another in the action or it may merely clarify by (for instance) correction of spelling, initials, title or corporate status the name that the plaintiff had intended to plead from the outset. In the latter case the amendment will clarify the name of an existing party, O 15, r 5 will be no bar to the amendment and there will be no need for the plaintiff to rely on O 20, r 5."

In *The Anna L*, the address of the defendants was wrongly stated to be one at Monte Carlo when it should be an address in Gibraltar. This was treated as a "lessor irregularity" which could be

remedied by applying O 2, r1(2) (non-compliance with Rules).

Accordingly, the cargo interests submitted that, given that there was no ambiguity over the intended defendant, the amendment of the address stated in the Writ was only one to clarify its identity. Such amendment did not introduce a new party in substitution of the existing one. There was considerable force in the submissions.

What the arguments boiled down to was that the correctly named defendant with a wrong address happened to be a different entity. The Judge did not believe that the law should depend on a matter of accident. If the combination of the right name with a wrong address did not disclose an existing entity, it was unlikely that the application in question would arise.

Conclusions
The Judge believed that the cargo interests' submissions should prevail. Accordingly, the Judge dismissed the Summons.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

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