SUN MOBILITY
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To: Transport Industry Operators

**BVI or Malta? (II)**

The Hong Kong Court of Appeal issued a Judgment on 4 October 2019 upholding the High Court's Decision dated 9 April 2018 (reported in our Chans advice/208). [CACV593/2018][2019HKCA1101]

*Introduction*

In its Decision of 9 April 2018, the High Court refused to set aside the concurrent amended writ of summons and service on Cargo Container Line Ltd (CCL BVI).

The High Court held that the issue – whether the entity named in the amendment was different from the existing one – was simply one of fact. 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. Given that there was no ambiguity over the intended defendant, the amendment of the address stated in the writ was only to clarify its identity and did not introduce a new party in substitution of the existing one. The High Court rejected the contention that the cargo interests had not in the circumstances sued the correct party.

CCL BVI appealed against the High Court's Decision.

*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 were governed by Hong Kong law and any dispute was 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. CCL Malta, despite the identity of its name with CCL BVI, was a separate legal entity with different directors and shareholders.

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 BVI's arguments*

CCL BVI took issue with the holding that the cargo interests had intended to sue CCL BVI all along. CCL BVI contended that it was clear the cargo interests had intended to sue CCL Malta and had in fact sued CCL Malta when it issued the writ against the entity with the address in Malta.

CCL BVI further submitted that it was insufficient the statement of claim specified that the cargo interests intended to sue the contractual carrier. The High Court erred in attaching importance to the fact that the general endorsement of the writ had identified the cargo interests' causes of action as those against the contractual carrier under the bills of lading and that there could be no doubt as to the party intended to be sued, namely, CCL BVI. It was not a matter of the cargo interests' intention to sue the carrier, but which legal entity was *in fact sued*. It made no difference that the cargo interests' error in commencing the action against CCL Malta was an accident. The situation in the case in question was the same as in these cases:

(1) The plaintiffs in *The Jay Bola* intended to bring an action against the contractual carrier under the bill of lading which was an owner's bill (under which the contractual carrier is the current owner of the vessel) but the writ was issued against the former owner of the vessel instead of the current owner when the bill of lading was issued. It was conceded by the plaintiffs that the action started by the writ naming the former owner did not suffice to stop time running under the Hague-Visby Rules (at 340d to e).
(2) In *Win's Marine Trading Co v Wan Hai Line (HK) Ltd & Anr* [1999] 3 HKC 701, the plaintiff mistakenly sued the agent instead of the contractual carrier who issued the bill of lading and the court refused leave to join the carrier as a defendant after the time bar had expired.
(3) In *The Leni* [1999] 2 Lloyd's Rep 48, the wrong plaintiff was named arising from confusion involving group companies. It was held that a suit had not been brought within the meaning of the Hague-Visby Rules.

CCL BVI argued that as the cargo interests had sued the wrong defendant (CCL Malta) by mistake, they would need to substitute the correct defendant (CCL BVI) to proceed with the action. The change of the specified corporate entity as the defendant had to involve the substitution of a party, rather than the correction of a misnomer. The fact that the two entities have the same name was

immaterial. They were nonetheless two separate legal entities, and the commencement of an action against one entity was not the same as the commencement of an action against the other. There was substitution of a party where there was change of the specified entity:

(1) In *Mitchell v Harris Engineering Co Ltd* [1967] 2 All ER 682, a personal injuries action was brought against a company incorporated in England when the plaintiff's employer was a company incorporated in Northern Ireland. In seeking to amend the writ by changing the English company to the Irish company, the plaintiff acknowledged that he was substituting a party.
(2) In *Insight Group Ltd & Anr v Kingston Smith (a firm)* [2013] 3 All ER 518, the action was brought against a firm of chartered accountants which was a limited liability partnership but the firm had not yet become an LLP when the relevant acts were committed. The court allowed the partnership to be substituted as the defendant.

<u>*Discussion*</u>

As the general endorsement of the writ had made clear that the action was brought against the contractual carrier who had issued the bills of lading particularised in the schedule annexed, the Court of Appeal agreed with the High Court there could be no doubt that CCL BVI was intended to be sued in that the bills of lading were issued by it.

Further, applying the test of Lloyd J in *The Sardinia Sulcis and Al Tawwab* [1991] 1 Lloyd's Rep 201 at 207, it was plain that the cargo interests had not intended to sue CCL Malta. The relevant extract in *The Sardinia Sulcis* read as follows:

> "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."

As the above passage from *The Sardinia Sulcis* made clear, "intended" in this context is not the subjective intention of the plaintiffs but what a reasonable person would have understood by reference to the description in the writ. Devlin LJ said this in *Davies v Elsby Brothers Ltd* [1961] 1 WLR 170 at 176:

> "It is a general principle of English law, not merely applicable to cases of misnomer, that the intention which the framer of the document has in mind when he brings it into existence is not material. … In English law as a general principle the question is not what the writer of the document intended or meant but what a reasonable man reading the document would understand it to mean …".

Who the plaintiffs had intended to sue is relevant to the consideration of the two types of amendment and which type of amendment the case in question would come under. The two types of amendment were first mentioned by Brandon LJ in *Liff v Peasley* [1980] 1 WLR 781 at 803 in his discussion of the "relation back" theory:

> "There is no reason to quarrel with the general proposition that an amendment of a writ or pleading relates back to the original date of the document amended … This seems to me to be an entirely sensible proposition so long as the amendment concerned does not

> involve the addition of a new party, either as plaintiff or defendant, but involves only the modification, by addition, deletion or substitution, of pleas or averments made between existing parties in respect of a cause or causes of action already raised. Where, however, the amendment concerned involves the addition of a new party or the raising of a new cause of action, it appears to me to be unrealistic and contrary to the common sense of the matter to treat it as relating back in the same way."

In *The Joanna Borchard* [1988] 2 Lloyd's Rep 274 at 280 to 281, Hirst J founded on the above as his alternative reasoning and held that the amendment of the plaintiff's name in the writ (by adding "(1975)" before the word "Ltd", and changing the place of incorporation from the Netherlands to Israel; no entity by the name and description as originally stated in fact existed) fell squarely within the first type of amendments described and did not involve the addition or substitution of a new party.

Coming back to the question whether the amendment of the defendant's address from Malta to the BVI was correcting a misnomer or substituting a new party, the cargo interests referred the court to the test propounded by Devlin LJ in *Davies v Elsby Brothers Ltd* at 176. It is as follows:

> "How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: 'Of course it must mean me, but they have got my name wrong,' then there is a case of mere misnomer. If, on the other hand, he would say: 'I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries,' then it seems to me that one is getting beyond the realm of misnomer."

CCL BVI laid much emphasis on the fact that there was in existence a separate legal entity by the same name incorporated in Malta, hence CCL Malta was sued as it was the entity named in the writ with the address in Malta. The Court of Appeal was of the view that just because there were two entities in existence to which the writ could refer, an amendment to correct the error does not necessarily mean the substitution of a party rather than correcting a misnomer.

Notwithstanding two entities in existence, the courts could come to different conclusions in applying the test in *Davies v Elsby Brothers Ltd*. In *Beardmore Motors Ltd v Birch Bros (Properties) Ltd* [1959] Ch 298 at 304, Harman J based his decision not solely on the fact that there were two existing companies but also on the state of mind of the applicants who, he said, were not under any misapprehension. Harman J could not hold that the amendment of "Birch Bros Ltd" to "Birch Bros (Properties) Ltd" was correcting a misnomer. In *J Robertson & Co Ltd*, having taken into account the reasonable knowledge of the common resident agent who acted for both companies and what he would have learned from the document served on him, Walsh J came to the conclusion that the error was a misnomer as the resident agent (or any other officer with any knowledge of the affairs of the companies) would have known that the document was not meant for the company that was named by mistake.

Applying the test in *Davies v Elsby Bros Ltd*, the Court of Appeal agreed with the High Court that this was clearly a case of a misnomer and not the substitution of a party. The endorsement of claim pleaded a claim for damages for the breach of the contracts of carriage evidenced by the bills of lading set out in Schedule A annexed thereto. It was not in dispute that the bills of lading were issued by CCL BVI. Looking at the writ as a whole, had CCL BVI been served with the writ before the amendment was made to the address, it could not reasonably say "I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries". The only reasonable reaction from CCL BVI must be: "Of course it must mean me, but they have got my address wrong".

It followed that the suit was brought within the time permitted by the Hague-Visby Rules, as

extended by agreement of the parties. The incorrect statement in the writ as to the defendant's address was an irregularity which did not nullify the proceedings and was insufficient to warrant the setting aside of the writ (*The Anna L* at 383).

For the above reasons, the Court of Appeal dismissed CCL BVI's appeal.

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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