[2016] EWHC 1843 (Admlty)
Claim No. AD 2015 - 000122

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMIRALTY COURT
Before Registrar Kay QC

B E T W E E N

LEAH GILES

Claimant

and

POLARCUS DMCC

Defendant

Appearances:
For the Claimant: Mr. James Bell instructed by CFG Solicitors
For the Defendant: Mr. Steward instructed by Hill Dickinson LLP

Hearing date: 14th June 2016
Handed down 20th July 2016

JUDGMENT

Introduction

1. This hearing arises from an application, dated the 26th February 2016, made by the presently named Defendant, Polarcus DMCC, seeking to strike out the claim under CPR Part 3.4 or for summary judgment against the Claimant. By way of response, by an application dated 8th March 2016, the Claimant seeks permission to correct the name of the Defendant to Polarcus Ltd pursuant to CPR Part 17.4 or to substitute a new party pursuant to CPR Part 19.5.

2. The claim concerns an incident on the 5th October 2012 when the Claimant, who was serving onboard the "POLARCUS ADIRA" ("the vessel") suffered an injury to her dominant right hand. The Claimant was employed onboard the vessel as a trainee mechanic. Her employment commenced following a letter received on the 11th March 2016 from a company named Polarcus Ltd. which is based in the Cayman Islands ("the Company"). Her terms of employment are set out in the Agreement dated the 5th May 2012 which was made with Polarcus Ltd. By the terms of the Agreement it is subject to English Law and jurisdiction. After the incident the Claimant remained in her employment until 20th May 2013 when she sent an e-mail notifying her resignation.

3. On the 11th July 2014 the Claimant's solicitors sent a letter of claim to Polarcus DMCC, as the Claimant's employers. On the 10th September 2014 Gard (UK) Ltd P&I acting for Gard P&I (Bermuda) insurers of the vessel responded to the letter of claim. On the 11th September 2014 the Claimant's solicitors requested that Gard (UK) provide a copy of the contract of employment and confirm the English jurisidiction. On the 18th March 2015 Hill Dickinson, instructed by Gard (UK) on behalf of Polarcus DMCC, Dubai, United Arab Emirates, wrote to confirm English jurisdiction and sent a copy of the contract of employment. A copy of the letter from Polarcus Ltd to the Claimant dated the 11th March 2012 was not provided (it had not been requested).

4. On the 1st October 2015 the Claim Form was issued. Polarcus DMCC was named as the Defendant. It is said that the period of limitation expired on the 5th October 2015. On the 7th October 2015 Hill Dickinson acknowledged receipt of the Claim Form but stated that they were not instructed to accept service. On the 16th October 2015 Hill Dickinson confirmed that they were not instructed to accept service. On the 12th December 2015 the Claimant's solicitor wrote to Hill Dickinson seeking clarification that the correct Defendant was Polarcus Ltd in the Cayman Islands. At that point consideration was being given as to whether substitute Polarcus Ltd in place of Polarcus DMCC with a view to obtaining permission to serve out of the jurisdiction upon Polarcus Ltd. Subsequently Hill Dickinson emailed to confirm that it had instructions to accept service. This must have been on behalf of the named Defendant as, on the 11th February 2016, Hill Dickinson sent an email to the Claimant's solicitors attaching an Acknowledgment of Service.

5. On the 26th February 2016 the Defendant named in the Claim Form, Polarcus DMCC made an application to strike out or to be given summary judgment in respect of the claim. On the 8th March 2016 the Claimant applied for an order seeking permission to amend the claim form to name Polarcus Ltd as the Defendant.

6. There are therefore two distinct questions which need to be answered: (i) whether it is appropriate to allow the application made by Polarcus DMCC and (ii) whether it is appropriate to allow the Claimant to either correct the presently named Defendant from Polarcus DMCC to Polarcus Limited pursuant to CPR Part 17.4 or to substitute Polarcus Limited in place of Polarcus DMCC. No application was made to add Polarcus Limited pursuant to the provisions set out in CPR Part 19.5.

7. The Particulars of Claim are dated the 12th January 2016. In that document the party named as Defendant was Polarcus Limited despite the fact that the Claim Form named Polarcus DMCC and no permission had been obtained to substitute the originally named

Defendant. On the 27th January 2016 the Claimant purported to amend the Claim Form pursuant to CPR Part 17.1.1 to increase the sum claimed from £10,000 to £131,987.75.

The case for each party

8. The first application was made by the named Defendant, Polarcus DMCC, for the claim against it to be struck out or for summary judgment in its favour. On this aspect Mr. Steward submitted:
    a. The Particulars of Claim do not mention Polarcus DMCC at all;
    b. No grounds are disclosed for bringing a claim against Polarcus DMCC;
    c. The use of the name Polarcus Ltd in the Particulars of Claim is an illegitimate attempt to substitute that company in place of Polarcus DMCC after the limitation period had expired;
    d. No Particulars of Claim have been served on Polarcus DMCC and it is too late to do so now without the consent of another party or the permission of the court. because the last date for doing so pursuant to CPR Part 7.4(2) was 31st January 2016.
    e. There should be summary judgment because no case has been put forward against Polarcus DMCC.

9. Mr. Bell's submissions, made for the Claimant concentrated upon the issue of substitution. It appeared that he relied upon the premise that providing substitution is allowed the existing Particulars of Claim are adequate. With respect to the issues relating to the Claimant's application Mr. Bell has submitted that the use of the wrong name should be regarded as a genuine mistake because:
    a. Although the fee earner made a mistake as to name of the party to be sued it is clear from the correspondence that she intended to sue the Claimant's employer;
    b. It is apparent from the Claim Form as originally issued that the intention was to sue the Claimant's employer;
    c. From the evidence available it appears that the mistake was genuine;
    d. The mistake did not mislead the Defendant or the insurers. There was no reasonable doubt as to the intended Defendant;
    e. The nature of the error must also be considered in the light of what Lord Phillips said in *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701; [2008] 1 WLR 585, and what he described as the generous test propounded by Lloyd LJ in *The Sardinia Sulcis* [1991] 1 Lloyd's Rep 201.

10. With respect to the issues relating to substitution Mr. Steward, for the Defendant, submitted that:

a. (i) there were a number of possible defendants as there was a potential claim in contract but there could also be a claim against the vessel's operators, Polarcus DMCC or against the owner of the vessel, Polarcus Adira AS; (ii) the claim form issued stated that the vessel was "*owned and operated by the Defendant who employed the Claimant*"; (iii) the Claim Form was incorrect because Polarcus DMCC neither owned nor employed the Claimant although Polarcus DMCC did operate the vessel; (iv) the Claim Form did not contain a description of a single party but several descriptions; (v) in fact, the Claim Form was not deficient but nonetheless what the Claimant seeks to do is to add a party and for the existing Defendant to be removed;

b. The Claimant and her solicitors have always been aware that the Claimant's employer was Polarcus Ltd. That was communicated to the Claimant by letter on the 11th March 2012, was set out in the contract of employment which was sent to the Claimant's solicitors on the 18th March 2012 and appears in the witness statement of Mr. Barstow. If the Claimant intended to sue the employer they had the necessary information to name the correct Defendant;

c. Although the Claimant's case is now that it was intended to sue the employer there is no explanation as to why Polarcus Ltd was not named as Defendant and the Claimant appears to have deliberately named Polarcus DMCC because it was under the mistaken belief that Polarcus DMCC, as the vessel's operator, would be liable notwithstanding that the name of Polarcus Ltd was in the contract and because Gard would be the paying party in any event. That is not a mistake within the meaning of CPR 17.4 or 19.5;

d. Applying the *Adelson* principles it is apparent that there is no justification for a substitution because the Claimant's solicitors: (i) either did or should have understood the group structure; (ii) were not misled by any statement that Polarcus DMCC was the employer; (iii) were in possession of ample material naming Polarcus Ltd as the employer;

e. The court should not exercise its discretion in favour of a substitution because the Claimant's solicitors missed the time bar, failed to act timeously and failed to act with any urgency. In this respect Mr. Steward invited the court to note: (i) that Claimant's solicitors are a firm specialising in personal injury claims and should be aware of the relevant time bars; (ii) the claim was issued just inside the time limit; (iii) the Claimant's solicitors did not attempt to inform Messrs Hill Dickinson of the alleged mistake until 21st December 2015 and then the communication failed because the recipient's email address was incorrect; (iv) nothing more was done until 18th January 2016, shortly before the expiry of the validity of the claim form when Hill Dickinson were asked whether they would

accept service, upon which point Hill Dickinson responded that they would take instructions. At the same time the Claimant's solicitors indicated that the intended to make an application to substitute the party named as defendant; (v) on the 27th January 2016 Hill Dickinson confirmed that they were instructed to accept service on behalf of Polarcus DMCC but gave no indication that they would consent to the substitution; (vi) despite the assertion by the Claimant's solicitor, Mr. Barstow, that he thought that the substitution would be dealt with by consent he took no steps to agree a substitution or otherwise make Polarcus Ltd a party to the claim.

Consideration of the principles applicable to striking out and summary judgment.

11. ***Striking out.*** *Taylor v. Midland Bank Trust Co. Ltd (No.2)* [2002] WTLR 95 supports the proposition that, in a suitable case, an application for summary judgment may be combined with an application to strike out under CPR Pt 3.4 or the court may treat a defendant's application to strike out as if it were an application for summary judgment. It provides:

> "Power to strike out a statement of case - 3.4 (2) *The court may strike out a statement of case if it appears to the court – (a) That the statement of case discloses no reasonable grounds for bringing or defending the claim; (b) That the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; (c)That there has been a failure to comply with a rule, practice direction or court order*."

12. The White Book contains the following guidance: "The statements of case which are suitable for striking out on ground (a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides (*Harris v Bolt Burdon* [2000] L.T.L. Feb 2, 2000, C.A.). A claim or defence may be struck out as being not a valid claim or defence as a matter of law (*Price Meats Ltd. v Barclays Bank PLC* [2000] 2 All ER (Comm) 346, ChD. However, it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact (*Farah v. British Airways, The Times,* January 2000 referring to *Barratt v.Enfield B,C,* [1989] 3 W.L.R. 83, HL, [1999] E All E.R. 193). A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence (*Bridgeman v. McAlpine-Brown* [2000]

LTL January 19, CA). An application to strike out should not be granted unless the court is certain that the claim (or defence) is bound to fail (*Hughes v. Colin Richards & Co.* [2004] EWCA Civ. 266; [2004] P.N.L.R. 35, CA).

13. The Civil Procedure Rules Part 24.2 provides: **"*Grounds for summary judgment*** *The court may give summary judgment against a claimant or defendant on the whole of a claim or a particular issue if–(a) it considers that– (i) that claimant has no real prospect of succeeding on the claim or issue; or (ii) that defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial.***"**

14. The leading authorities which provide guidance on how CPR Pt 24 is to be applied are set out in the White Book. They are: *Swain v Hillman* [2001] 1 All E.R. 91 (CA), *Royal Brompton Hospital NHS Trust v Hammond (No.5)* [2001] EWCA Civ 550 (CA), *Three Rivers DC v Bank of England (No.3) (Summary Judgment)* [2001] UKHL 16; [2003] 2 A.C. 12; [2001] All E.R. 513; [2001] Lloyd's Rep. Bank. 125 (HL), *ED&F Man Liquid Products v. Patel* [2003] EWCA Civ 472, *Trustees of Sir John Morden's Charity v Mayrick* [2007] EWCA Civ 4 (CA), *Nigeria v. Santolina* [2007] EWHC Civ 437 (Ch), *Apvodedo NV v. Collins* [2008] E.W.H.C. 775 (Ch) and *Easyair Ltd. (t.a Openair) v. Opal Telecom Ltd* [2009] EWHC 339 (Ch). The authorities demonstrate that:

    a. Although the Court should not conduct a mini trial or adopt the standard of proof, ie a balance of probabilities which would be used at a trial, the court should consider the evidence which can reasonably be expected to be available at the trial. It has been said that the rule "is designed to deal with cases which are not fit for trial at all";

    b. the test of "no real prospect of succeeding" requires the judge to take an exercise of judgment; he must decide whether to exercise the power to decide the case without a trial and give summary judgment;

    c. it is a discretionary power;

    d. the court must carry out the necessary exercise of assessment but not by conducting a trial or a fact finding exercise;

    e. it is the assessment of the case as a whole which must be looked at;

f. accordingly, "the criterion which the judge has to apply under CPR Pt 24 is not one of probability; it is the absence of reality".

15. In *Easyair Ltd t/a Openair v Opal Telecom Ltd* [2009] EWHC 339 Lewison J., as he then was, provided a helpful summary:

    a. The court must consider whether the Claimant has a "real" as opposed to a "fanciful" prospect of success*: Swain v Hillman* [2001] 2 All ER 91;

    b. A "realistic" case is one that carries some degree of conviction. This means a case that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

    c. In reaching its conclusion the court must not conduct a "mini−trial": *Swain v Hillman*;

    d. This does not mean that the court must take at face value and without analysis everything that a party says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

    e. However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

    f. Where a summary judgment application gives rise to a short point of law or construction the court should decide that point of law if it has before it all the evidence necessary for a proper determination and provided the parties have (as here) had sufficient time to address the point in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim.

16. A significant feature of the court's powers to strike out or make an order for summary judgment is that the power is discretionary. It is therefore apparent that the power should be exercised bearing in mind the overall objective set out in CPR Part 1. As a result the

court will not usually strike out a statement of case or make an order for summary judgment in cases where it is apparent that the deficiency complained of is capable of being rectified by an amendment of a relevant statement of case. However the nature of the amendment to be made and whether such an amendment may be made within the CPR is a feature which the court will need to consider when exercising its discretion.

Consideration of the principles applicable to CPR Parts 17.4 and 19.5.

17. CPR Part 17.4 provides: '*(1) This rule applies where–(a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and (b) a period of limitation has expired under– (i) the Limitation Act 1980; (ii) the Foreign Limitation Periods Act 1984; or (iii) any other enactment which allows such an amendment, or under which such an amendment is allowed… (3) The court may allow an amendment to correct a mistake as to the name of a party, but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question…*'

18. CPR Part 19.5 provides "*(1) This rule applies to a change of parties after a period of limitation under – (a) The Limitation Act 1980 . . . (2) The court may add or substitute a party only if (a) the relevant limitation period was current when the proceedings were started; and (b) the addition or substitution is necessary. (3) The addition or substitution of a party is necessary only if the court is satisfied that- (a) the new party is to be substituted for a party who was named in the claim form in mistake for a new party; (b) the claim cannot be properly carried on by or against the original party unless the new party is added or substituted as claimant or defendant; or (c) . . . .*"

19. The authorities demonstrate that the court only has jurisdiction to permit the change of the name of a party under Part 17.4 or the substitution or addition of a party under Part 19.5, if a relevant limitation period has expired, or where it is reasonably arguable that it has. Once it is established that such a limitation period has expired the onus is upon the applicant to satisfy the court that the relevant conditions specified in one or other of the rules are met. It is only if those conditions are met that the court may then exercise its discretion as to whether or not to make an order. In other words the discretion does not arise unless the claim is subject to a limitation period and the applicant can bring itself within one or other of the rules referred to. It is therefore necessary to consider: (i) whether there is a relevant limitation period, (ii) the inter-relationship and applicability of CPR Parts 17.4 and 19.5, (iii) whether this case falls within either or both of the rules and (iv) if it does whether, on the facts of this case, it would be appropriate to exercise the court's discretion in favour of the applicant.

20. With respect to the inter-relationship of Parts 17.4 and 19.5 it is to be noted that although they both deal with mistakes as to the name of a party intending to sue or to be sued the latter does specify that the mistake must not be such as to cause any reasonable doubt as to the party intending to sue or intended to be sued.

The limitation period

21. In the present case the alleged injury occurred on the 5th October 2012. The Claimant was aware of the nature of the injury and must have been aware of the fact that she was entitled to make a claim from the outset. That being so the regular limitation period for the injury would start to run from the date of the injury. There is no suggestion that this is a case in which an extension to the permitted limitation period would be usually allowed and both parties, for these purposes, accept that the relevant limitation period was three years so that the limitation period would have expired on the 5th October 2015.

22. The rules set out in CPR Parts 17.4 and 19.5 only apply to claims where a period of limitation has expired, in this case under the Limitation Act of 1980. In the present case it appears to be common ground that the proviso as to the expiry of the time limit is fulfilled.

The correlation between CPR 17.4 and CPR Part 19.5

23. This aspect may arise in cases where the application to amend is made pursuant to CPR 17.4 **or** CPR 19.5 but not both in the alternative. In my view the operation of one or other of CPR Parts 17.4 and 19.5 should never be disregarded in a case of this type because many of the authorities concerned with the type of issues facing the court in the present case are concerned with one or other of the rules and some with both. This includes the decision of Lord Phillips in *Adelson v Associated Newspapers* [2007] EWCA Civ 701; [2008] 1 WLR 585 which has provided a definitive account of the principles to be applied.

24. Although the *Adelson* case was primarily concerned with CPR Part 19.5 Lord Phillips has provided a helpful consideration of the interrelationship between the two rules and their origins in s.35 of the Limitation Act 1980 and the 1964 RSC Ord. 20, r.5 dealing with amendments to correct the name of a party which provided: "*notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.*" (RSC O.20, r. 5(3)). Having considered the views expressed by Millett LJ in *Yorkshire Regional Health Authority v. Fairclough Building Ltd* [1966] 1 WLR 210 at 219 and Hobhouse LJ on *Payabi v Armstel Shipping Corpn* [1992] QB 907 at 924 Lord Phillips observed: "*In the light of this history*

when interpreting the provisions of the Civil Procedure Rules in respect of the substitution of parties, which closely follow the form of the relevant parts of section 35 of the 1980 Act, it is necessary to have regard to the jurisprudence in relation to Ord 20,5".

25. With respect to RSC O.20,r.5 Lord Phillips observed: "*The wording of Ord 20,r.5 suggests that the following requirements must be satisfied before an amendment can be made under that rule: (i) A mistake must have been made. (ii) The mistake must be genuine. (iii) The mistake must not have been misleading or such as to cause the any reasonable doubt as to the identity of the person intending to sue, or as the case may be, intended to be sued. The following questions arise in relation to this rule: (i) What is the nature of the mistake? (ii) Who is it who must be responsible for the mistake? (iii) What criteria govern whether the mistake is misleading and, in particular, must the court be satisfied that, despite the mistake the person intended to be sued should have been aware of the person intending to sue and that he was the person intended to be sued? (iv) Can an amendment under the rule have the effect of substituting a new party? . . . Most of the problems in this area arise out of the difference, sometimes elusive, between an error in the identification and an error of nomenclature. An error of identification will occur where a claimant identifies an individual as the person who has caused him an injury, intends to sue that person, describes him in the pleadings by the correct name, but then discovers that he has indentified the wrong person as the person who has injured him. An error of nomenclature occurs where the claimant identifies the correct person as having caused him injury, but describes him in the pleadings by the wrong name. A problem arises in distinguishing between the two types of error where the claimant knows that attributes of the person he wishes to sue . . . but has no personal knowledge of the identity of that person. If on inquiry he is correctly informed that a named third party has those attributes and he commences an action naming that third party as defendant but describing in the pleading the attributes of the person intended to be sued, is the case one of misnomer of the person intended to be sued or error of identification? . . .The rule . . . envisages that there will be a person intended to be sued. The mistake envisaged in relation to the defendant will be one under which the name used for the defendant is not the appropriate name to describe to describe the person that the claimant intends to sue. Thus the rule envisages a defendant identified by the claimant but described by a name which is not correct. In either case the mistake that the rule envisages is one of nomenclature, not of identification.*

26. Lord Phillips then considered other relevant authorities. As to *Mitchell v Harris Engineering Co Ltd* [1967] 2 QB 703 in which the judge at first instance held that there was a genuine mistake made by the junior clerk who issued the writ which was not

misleading or caused any reasonable doubt as to the person intended to be sued and that the test was "*what would a reasonable person receiving this writ, accompanied by the statement of claim, understand from it in regard to the person intended to be sued?*" Lord Phillips observed: "*While the judgments did not focus expressly on the nature of the mistake, this case can be placed into the category of misnomer rather than misidentification. The person intending to sue was in no doubt as to the identity of the person that he intended to sue and the clerk, acting on his behalf, simply made a mistake as to the defendant's name. The agent of the company intended to be sued was served with the proceedings, was aware of the mistake and was under no misapprehension as to the identity of the intended defendant.*"

27. As to the decision in *The Sardinia Sulcis* [1991] 1 Lloyd's Rep 201. That was a case in which the vessel was damaged by another, the *Al Tawwab*. The charterers of the latter vessel paid for the damage and became subrogated to the owners' rights against the owners of the *Al Tawwab*. The charterers brought the proceedings in rem in the name of the owners of the *Sardinia Sulcis* but by the time they did the owners had assigned their rights to another company. The issue was whether the name of the company to whom the rights had been assigned could be substituted for that of the original owners. It was held that there could be such a substitution. Lord Phillips referred to the judgment of Evans LJ and the following observations made by him that: "*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 particular case. . . 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 a narrower test. In Mitchell v. Harris [1967] 2QB 703 the identity of the person intended to be sued was the plaintiff's employers. In Evans v Charrington [1983] QB 810 it was the current landlord. In Thistle Hotels v Mc Alpine (unreported) 6 April 1989 the identity of the person intending to sue was the proprietor of the hotel. In The Joanna Borchard [1988] 2 Lloyd's Rep 274 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 about the identity of the person intended to be sued. But if he gets the wrong description, it will be otherwise.*" As Lord Phillips observed this was 'the test in *The Sardinia Sulcis*'. In the same case Stocker LJ said: "*can the intending plaintiff or defendant be identified by reference to a description which is specific to the particular case, - eg landlord, employer, owners, or shipbrokers? If the identification of the person intending to sue or be sued*

appears from such specific description any amendment is one of name, where it does not it will in many if not all cases involve the description of another party rather than simply the name.

28. At paragraph 43 of the judgment in *Adelson* Lord Phillips said: "*These authorities have led us to the following conclusions about the principles applicable to Order 20,r 5. (i) The mistake must be as to the name of the party in question and not as to the identity of that party. Such a mistake can be demonstrated where the pleading gives a description of the party that identifies the party, but gives the party the wrong name. In such cases a 'mistake as to name' is given a generous interpretation. (ii) The mistake will be made by the person who issues the process bearing the wrong name. The person intending to sue will be the person who, or whose agent, has authorised the person to issuing the process to start proceedings on his behalf. (iii) The true identity of the person intending to sue and the person intended to be sued must be apparent to the latter although the wrong name has been used. (iv) Most if not all cases seem to have proceeded on the basis that the effect of the amendment was to substitute a new party for the party named.*

29. Having considered the effect of Ord. 20, r,5 the Court then considered the effect of CPR Parts 17.4 and 19.5. In paragraph 44 of the judgment Lord Phillips states: "*The statutory authority for them is section 35 of the 1980 Act which, as we have explained was intended to reflect the provision of Ord 20, r 5. What is puzzling is that those who have drafted the rules have dealt with a mistake in relation to the name of the party both in CPR r 17(3) and in CPR r19.5(2)(3). The former rule uses language similar to Ord 20, r 5. The latter does not. It seems to us that you have to read CPR rr 17.4 and 19.5 together to give full effect to Ord 20,5. Nevertheless s. 35 and CPR r 19.5(3) in contrast to CPR r 17.4(3) and Ord 20, r 5 do not specify that the mistake must not be such as to cause any reasonable doubt as to the party intending to sue or be sued.* Lord Phillips then considered the decisions in those cases which post date the CPR.
    a. In *Gregson v Channel Four Television Corpn* [2000] CP Rep. 60, an amendment to substitute the correct name of the Defendant for the incorrect but similar name initially pleaded was allowed. Where the misnaming of a Defendant was a genuine mistake as to the name of a party which was not one which could cause reasonable doubt as to the identity of the party in question the application was properly made pursuant to CPR Part 17.4(3) not CPR Part 19.5(2)(3) as the amendment did not involve substituting a new party.
    b. In *Horne-Roberts v Smith Kline Beecham plc* [2002] 1WLR 1662 the relevant manufacturer of the drug in dispute was mistakenly named as Merck rather than SmithKline Beecham. The Court of Appeal allowed the substitution pursuant to

s.35(3) of the 1980 Act and CPR Part 19.5 applying the *Sardinia Sulcis* test. Lord Phillips observed that it was not clear whether the description of the defendant as the manufacturer of the vaccine appeared in the pleading, although it is clear that Merck's solicitors were aware of it, nor was it clear whether those acting for SmithKline were aware that a claim had been made erroneously naming Merck as defendant in respect of that batch of vaccine.

c. In *Parsons v George* [2004] 1WLR 3264 the Court of Appeal, also applying the *Sardinia Sulcis* test, allowed a substitution where the Claimant had relied upon the Landlord and Tennant Act 1954 but named the wrong defendant. In that case Dyson LJ observed that the solicitors served also acted for the landlord and must have understood that the claimants were intending to apply for a new lease from the competent landlord.

d. In *Kesslar v Moore & Tibbits* [2005] PNLR 286 the Court of Appeal allowed the substitution of a party under CPR Part 19.5(3)(a) in circumstances where in suing for the negligence of a solicitor the Claimant erroneously named the firm which had taken over the firm of which the solicitor had been a partner although the solicitor herself had not joined the firm named. An amendment was allowed to substitute the name of the allegedly negligent solicitor and her partner at the time of the alleged negligence. In that case Buxton LJ stated: "*The best source for what the claimant actually intended is to be found in the points of claim. At most the error made there was in identifying the proper way of interpleading a person whom they had always intended to sue."*

e. With respect to the decision of Jacob LJ in *Morgan Est (Scotland) Ltd v Hanson Concrete Products Ltd* [2005] 1WLR 2557 Lord Phillips has expressed the view that because Jacob LJ's approach to his decision was made by a two judge court without the court having been referred to the legislative history of the 1980 Act, it was obiter and should not be followed.

f. With respect to *Weston v Gribben* [2007] CP Rep 10 Lord Phillips analysed the decision of the Court of Appeal as one made in the light of the decision of Jacob LJ in the *Morgan Est* case. Lloyd LJ approached the matter on the basis of an alternative test suggested in the course of argument and held that the claimant could not satisfy the test. In any event Lloyd LJ was not satisfied that there was a mistake made as alleged by the claimant.

30. The conclusion as stated by Lord Phillips in paragraphs 55 to 57 of the judgment was:

"*55. CPR r 19.5(3)(a) makes it a precondition of substituting a party on the ground of mistake that: 'the new party is to be substituted for a party who was named in the claim form in mistake for the new party.' It is clear from this language that the*

person who has made the mistake must be the person responsible, directly or through an agent, for the issue of the claim form. It is also clear that he must be in a position to demonstrate that, had the mistake not been made, the new party would have been named in the pleading.

56. The nature of the mistake required by the rule is not spelt out. This court has held that the mistake must be as to the name of the party rather than the identity of the party, applying the generous test laid down in The Sardinia Sulcis. The 'working test' suggested in West v Gribben [2007] CP Rep 10, in as much as it extends wider than the Sardinia Sulcis test should not be relied upon.

57. Almost all the cases involve circumstances in which (i) there was a connection between the party whose name was used in the claim form and the party intending to sue, or intended to be sued and (ii) where the party intended to be sued, or his agent, was aware of the proceedings and of the mistake so that no injustice was caused by the amendment. In the SmithKline case [2002] 1WLR 1662, however, Keene LJ accepted that the Sardinia Sulcis test could be satisfied where the correct defendant was unaware of the claim until the limitation period had expired. We agree with Keene LJ's comment that, in such a case, the court will be likely to exercise its discretion against giving permission to make the amendment."

31. In my view the guidance given by Lord Phillips leads me to the conclusion that the inter-relationship between Parts 17.4 and 19.5 is such that they should be read together in the light of RSC Ord. 25 so that even though an application is made pursuant to CPR Part 17.4 nonetheless it would always be proper to consider the possible effect of CPR Part 19.5 or *vice versa.* That appears to be so although the wording of the two rules is different insofar as Part 17.4 is concerned with correcting the name of a party where there has been a mistake as to nomenclature whereas Part 19.5 is concerned with the substitution or addition of a party. To the extent that there is a difference in approach this arises because the wording of CPR Part 17.4(3) provides that the mistake is one which must not cause a "*reasonable doubt as to the identity of the party in question*" whereas CPR Part 19.5 does not include this proviso however, as Lord Phillips observed, the knowledge of the intended defendant is a matter to be considered when exercising the court's discretion. It therefore seems to me that the proposed defendant's knowledge as to whether he was the person to be sued is always a matter to be considered either by reason of the express wording of CPR Part 17.4(3) or because of the approach indicated by Lord Phillips. In the light of his observations I consider that the question of whether there was a reasonable doubt as to identity of the party intended to be named is one which must be decided in all the circumstances bearing in mind the need set out in CPR Part 1, to come to a just decision.

Consideration of the circumstances of the present case

The Application by Polarcus DMCC to strike out the claim

32. Although both parties appear to assume that it is appropriate to consider the Claimant's application for permission to substitute Polarcus Ltd in place of Polarcus DMCC which is the party named in the Claim Form in my view the appropriate and convenient order in which to consider the two applications is in accordance with the the order in which they were made. This is because it appears to me that there have been a number of misunderstandings on the part of the Claimant's advisers which have led to a number of procedural errors with respect to the claim and, in my view it is necessary to consider the procedures adopted in order to unravel what has become a somewhat muddled state of affairs in a manner which is commensurate with the CPR.

33. At the centre of the situation which has given rise to misunderstanding is the need to understand the relationship between the Claimant and various legal entities within the corporate arrangement of a number of associated companies, which may be referred to for the purposes of this decision as the "Polarcus Group" because the majority of the group have "Polarcus" as part of their names. The evidence demonstrates that this claim involves an alleged injury to a lady who was injured whilst she was acting as a member of the crew of a vessel, POLARCUS ADIRA. That vessel was owned at the material time by a company named Polarcus Adira AS. At the material time the vessel was actually operated by a company named Polarcus DMCC. The Claimant's employment was evidenced by an Agreement which was entered into between the Claimant and Polarcus Ltd., whose address was given on the face of the Agreement as being Polarcus DMCC in Dubai. Mr. Steward relied upon these matters in the course of his submissions and therefore they are not in dispute between the parties. It was also apparent that the three companies are all separate legal entities but form part of a large group. According to the evidence available Polarcus Ltd, a company registered in the Cayman Islands is at the apex of the diagram provided in evidence which demonstrates the interrelationship of the companies within the group. The other companies are subsidiary members of the Polarcus Group. However it is understood that Polarcus DMCC is the company which operates the various ships which are owned by single ship companies or, at least, is the operating manager of "POLARCUS ADIRA".

34. As Mr. Steward put it in his skeleton argument ". . . *.this claim is not a simple claim for breach of an employment contract. It is a claim for personal injury suffered onboard a ship. There are, in such cases, multiple potential defendants: there may be a claim for a breach of contact but there could equally be a claim against a vessel's operator (here,*

Polarcus DMCC) or against the owner of such a vessel (here, Polarcus Adira AS). In my view that is a correct appreciation of a situation where a person may enter into a contract with company A to be employed onboard a ship owned by company B which is actually operated by company C. That is what appears to have happened in the present case.

35. In this case the Claim has been brought against the operator of the ship. The description contained in the Claim Form refers to the vessel as being owned and operated by the Defendant. In fact that is only partially correct but providing that the Defendant named in the Claim Form is sufficiently described in the particulars of claim there is no reason to consider that there is procedural impropriety providing that there are grounds for bringing a claim against the named party. In my view, as the Mr. Steward accepts that it would be possible to bring a claim against the operator of the vessel, there is no basis for arguing that the Claim Form should be struck out simply because it partially misdescribes the Defendant.

36. The next question is whether the Claim should be struck out because the Particulars of Claim served do not name Polarcus DMCC. The reason for this is that the Claimant's solicitors had realised that the contract of employment had been made not between the Claimant and Polarcus DMCC but between the Claimant and Polarcus Ltd and wished to substitute Polarcus Ltd as Defendant in place of Polarcus DMCC. However it is trite that once a period of limitation has expired the Claimant may not replace one name with another without the permission of the court which permission will depend upon the provisions of CPR Part 17.4 or 19.5 having been complied with. At the time when the Claimant served the Particulars of Claim which named Polarcus Ltd as Defendant no such permission had been given and the application for permission has yet to be considered. It follows that the service of the Particulars of Claim are procedurally irregular insofar as they name Polarcus Ltd. as the Defendant. The only Defendant to the claim at the time the particulars were served was Polarcus DMCC so that, for present purposes, it is appropriate to treat the present Particulars as though they contain Polarcus DMCC as Defendant rather than Polarcus Ltd. Such an approach is in keeping with the usual approach of the courts that a procedural irregularity should not stifle an otherwise potentially valid claim. The courts will frequently allow such an amendment to save a claim from being struck out.

37. The application is made not by Polarcus Ltd but by the named Defendant Polarcus DMCC. The question is whether the Particulars of Claim fail to set out grounds for bringing a claim against Polarcus DMCC. Although there are discrepancies with respect to such matters as where the Defendant is said to reside these are all, in my view, matters which may be corrected by amendment. In paragraph 3(b) of the Particulars of Claim the

Defendant is described as "*The owner and/or operator and/or otherwise responsible for the vessel known as Polarcus Adira, onboard which the Claimant was working at the time of the index accident*". As stated above Polarcus DMCC is responsible for operation of the vessel so that part of the Particulars of Claim is accurate and stands alone as a ground for bringing the claim.

38. Mr. Steward also submits that Polarcus DMCC did not employ the Claimant and this is an additional reason for striking out the Particulars of Claim and the claim as a whole against Polarcus DMCC. This gives rise to an interesting question as Polarcus Ltd, which did enter into the Agreement, neither owned nor operated the Polarcus Adira at the relevant time. In these circumstances it is difficult to see how Polarcus Ltd can be truly said to have employed crew members on a vessel they neither owned nor operated. It is, of course, common practice for crewing agencies to recruit masters and crew for vessels owned by others but, in such circumstances it must be realistically arguable that the recruiters are acting for either the owners or the operators of a vessel. If the owners are a single ship company which is actually operated by another company it is, in my view, prima facie arguable that the real principal to the employment contract is the operator. In this case it follows that Polarcus DMCC may well be the proper party to be sued for the personal injury received by a crew member both in contract and in tort. Whether or not the claim as an employer may be made good against Polarcus DMCC in contract must depend upon the evidence which will be considered at the trial.

39. A further interesting question arising from the Claim Form relates to whether operation of the *Polarcus Adira* is subject to the operation of (i)The Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997 ("HSW 97"), and/or (ii) The Merchant Shipping and Fishing Vessel (Personal Protective Equipment Regulations 1999 ("PPE 99") and/or (iii) The Merchant Shipping and Fishing Vessels (Provision and Use of Work Equipment) Regulations 2006 ("PUWER 06"). It is contended that these are applicable to British Registered Ships and despite the fact that the *Polarcus Adira* is registered in the Bahamas nonetheless the operation of the ship is subject to those provisions by reason of the fact that Agreement contains an exclusive choice of law clause. I do not presently need to consider the merits of this contention but it is obvious that only the owner or operator can be responsible for whether a ship is operated in accordance with statutory regulations.

40. It follows that where, in paragraph 18 of the Particulars of Claim, it is contended that there have been breaches of the Regulations referred to above these are allegations which can only refer to failures by the party which has the actual running of the vessel. These are all matters which are put forward as being breaches of statutory duty and or in

negligence. Aside from a brief assertion that "*There was an implied term of the agreement that the Defendant would at all material times protect the health and safety of the Claimant and provide her with a safe working environment*" the Particulars of Claim contain no particulars with regard to the breaches of contract alleged. It is also to be noted that the Particulars of Claim provide no proper particulars establishing the basis for the suggested term to be implied into the Agreement. In these circumstances it seems plain that the existing Particulars of Claim are far better suited to a claim brought in tort and for breach of duty than they are for a claim in contract. That being so it would appear that Polarcus DMCC is the appropriate Defendant for the purposes of this claim and, in my view, providing that those parts of the Particulars which can only refer to Polarcus Ltd are amended to properly refer to Polarcus DMCC it seems to me that the present claim should be allowed to continue against Polarcus DMCC.

Consideration of the Claimant's application for the alteration or substitution of the Defendant's name.

41. By its application the Claimant seeks to substitute Polarcus Ltd as defendant to the claim in place of Polarcus DMCC. For that to be considered it is necessary for the Claimant to demonstrate that the provisions of CPR Part 17.4 or 19.5 are applicable. Under CPR Part 17.4 "*the court may only allow an amendment to correct a mistake as to the name of a party, but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question"*. Under CPR Part 19.5: the Court must be satisfied that "*(a) The new party is to be substituted for a party who was named in the claim form in mistake for the new party; (b) the claim cannot properly be be carried on by or against the original party unless the new party is added or substituted as claimant or defendant* ...". In either case there must have been a mistake in naming the original party. In *Adelson* the question arose as to whether the claimant should be allowed to add new claimants which were part of a trading group. At paragraph 67 of the judgment Lord Phillips observed: "*It is common ground that the allegation in the particulars of claim that the second claimant was a trading company was erroneous. The judge concluded that this error reflected a mistaken belief that the second claimant was a trading company and that, if this mistake had not been made, it is probable that the second, third and fourth claimants would have been added in the original pleading. No evidence was adduced as to how the error came to be made or what would have been done had the error not been made.* .... and at paragraph 69 he said: "*If those responsible for the particulars of claim had knowledge of the corporate structure of the La Vegas Sands Group and of the part played by each company in the group activities and deliberately decided to sue in the name of the second claimant alone, the fact that this decision may have been mistaken will not bring the case within CPR 19.5. To do this the claimants*

must establish that those responsible for the particulars of claim were under a mistake as to the group structure or the roles played by the members of the group, and, but for that mistake, would have included as claimants the third and fourth claimant. That is the very minimum that they need to achieve if they are to have an arguable case that a mistake of name within the Sardinia Sulcis test occurred".

42. In the present case it has been submitted that the mistake occurred when the claim form was issued and Polarcus DMCC was named as the appropriate defendant rather than, as now submitted, Polarcus Ltd. However I was informed that the person who was responsible for issuing the original claim form is no longer a member of the firm acting for the Claimant. That person has not provided a statement stating that there was an error as to the nomenclature of the defendant named or how or why such error occurred. The court is simply invited to conclude that since the original contract was made between the Claimant and Polarcus Ltd the latter was the appropriate defendant and there must have been a mistake in naming Polarcus DMCC in the claim form. The problem facing the Claimant in the present case is that there is no evidence from the person responsible for issuing the claim form that such a mistake was made and therefore the evidence falls short of what Lord Phillips regarded as necessary to support the application.

43. Further the test in *The Sardinia Sulcis* illustrates that the mistake must be a genuine mistake as to nomenclature rather than a mistake as to the identity of the defendant. This may be demonstrated where the name of the party sued is wrong but the description of the party sued as set out in the claim form is accurate. In the present case the description provided for the named defendant included that it was the operator of the vessel in question. As Polarcus DMCC was the operator of the vessel the description does not demonstrate a misnomer of the named Defendant. On the contrary the name and the description used coincide and it cannot be said that the description illustrates that a mistake was made in relation to the name of the party rather than as to its identity. In my judgment, applying the principles set out by Lord Phillips on *Adelson*, it follows that this is not a case where substitution can be allowed.

44. There remains the question of whether the Claimant should be allowed to add Polarcus Ltd as a defendant to the present claim. In my view this should not be permitted in the present case for the following reasons:
    a. The application has not been made upon the basis of adding Polarcus Ltd as an additional party but only for substitution;
    b. The claim form has been issued against Polarcus DMCC which is the acknowledged operator of the vessel and there is no evidence that this was not a

deliberate decision made on the part of the Claimant's advisers. If that was as a matter of a mistake made by them it does not, as Lord Phillips observed in *Adelson* bring the case within CPR Part 19.5;

c. In any event for a party to be added under CPR Part 19.5 the court must be satisfied that the claim cannot be properly be carried on by or against the original party unless the new party is added as defendant. In my view it is not necessary to add Polarcus Ltd to allow the claim to be properly brought by the Claimant against Polarcus DMCC. The claim may be brought against that company in tort as operators of the vessel and although it may, from the Claimant's point of view, have been preferable to have added Polarcus Ltd as signatory to the Agreement, the question as to whether Polarcus DMCC was in fact the employer of the Claimant is still open, provided that the Particulars of Claim are sufficiently particularised to allow that aspect to be considered by the court. As I have already indicated I take the view that the Claimant should be allowed an opportunity to amend its Particulars of Claim to allow that aspect to be raised;

d. In coming to that conclusion I bear in mind that, as Mr. Steward accepted, the objection taken by Polarcus DMCC is a technical one and that in the interests of the overriding objective genuine claims should not be frustrated where irregularities can be corrected and that, insofar as errors in procedure may have been made, they were not made by the Claimant herself.

Conclusion

45. For the reasons set out above I have concluded that the application made by Polarcus DMCC should be dismissed and that the Claimant's application to substitute Polarcus Ltd in place of Polarcus DMCC should also be dismissed. However the Claimant should be given the opportunity to amend her Particulars of Claim with respect to her case against Polarcus DMCC more fully. This will require an application to amend which will be considered when it is made. Further directions with respect to this aspect may be given when this judgment is handed down.

Dated this 20th day of July 2016