Federal Court  Cour fédérale

Date: 20110224

Docket: T-1054-10

Citation: 2011 FC 217

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, February 24, 2011

PRESENT: Mr. Richard Morneau, Prothonotary

ADMIRALTY ACTION *IN REM* AND *IN PERSONAM*

BETWEEN:

SHELL CANADA ENERGY
and
VATANA PHAISAL ENGINEERING CO. LTD.
and
BOUSTEAD INTERNATIONAL HEATERS LTD.

Plaintiffs

and

GENERAL MPP CARRIERS
and
U-SHIP MARITIME SERVICES INC.
and
THE SHIP "SCL THUN"
and
THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "SCL THUN"
and
THE SHIP "WISDOM"
and
THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "WISDOM"

Defendants

REASONS FOR ORDER AND ORDER

[1] There are two motions in the case at bar.

[2] The first motion filed in the Court record is a motion by Wisdom GmbH and Co. KG (hereinafter Wisdom GmbH) under Rules 399, 477 and 479 of the *Federal Courts Rules* (the Rules) (the motion by Wisdom GmbH).

[3] Wisdom GmbH is the owner of the ship "Wisdom" (the Ship Wisdom). In short, in its motion, Wisdom GmbH is challenging the service of the amended statement of claim against it effected on or about September 22, 2010, and asking that it be set aside. In its motion Wisdom GmbH is also asking that the order of this Court, dated September 13, 2010, be set aside. That order was the basis on which the plaintiffs had relied to effect service on September 22, 2010.

[4] The style of cause used by the Plaintiffs and Rule 477 form the basis of the challenge by Wisdom GmbH.

[5] In their reply record to this motion, the plaintiffs are seeking the dismissal of this motion and, alternatively, are asking the Court to consider any error on their part in the style of cause to be an irregularity within the meaning of Rules 56 *et seq*., and are asking that this irregularity be addressed by way of Rule 59(*b*).

[6] The second motion was brought by the plaintiffs. In fact, following the motion brought by Wisdom GmbH, the plaintiffs brought a motion under Rules 75 to 77. Aside from the fact that it refers to different rules, the motion brought by the plaintiffs (the plaintiffs' motion to amend) essentially relies on the same position they asserted in their reply record to the motion brought by Wisdom GmbH.

[7] A reply record to this motion was submitted by Wisdom GmbH. In that reply record, Wisdom GmbH referred to and included the transcript of the examination of one of the counsel for the plaintiffs who essentially swore an affidavit supporting the plaintiffs' position in response to the motion brought by Wisdom GmbH or in support of the plaintiffs' motion to amend (the affidavit or cross-examination of Mr. Ross).

Facts

[8] It appears that on June 30, 2010, namely, the last day within the one-year limitation period, the plaintiffs brought an action following alleged damages to a cargo of goods during maritime transport.

[9] The style of cause used by the plaintiffs at the time was:

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[10] On August 27, 2010, the defendants General MPP Carriers and U-Ship Maritime Services Inc. were served with an amended statement of claim dated August 26, 2010 (the amended statement of claim). On the same day, the plaintiffs faxed a copy of this amended statement of claim to Wisdom GmbH in Germany.

[11] A few days later, on August 30, 2010, an original copy of this amended statement of claim was sent by courier to Wisdom GmbH in Germany. It was received on September 1, 2010.

[12] However, given that, in principle, the personal service of the amended statement of claim on Wisdom GmbH in Germany had to be carried out in accordance with the Hague Convention,

the plaintiffs filed an *ex parte* written motion, dated September 8, 2010, seeking an extension of time to serve the amended statement of claim.

[13] By order dated September 13, 2010 (the order dated September 13, 2010), the Court granted the extension:

ORDER

> **CONSIDERING** the motion of the plaintiffs to extend the delays to serve proceedings on the defendant, the owners of the Ship "Wisdom", Wisdom GmbH and Co. KG;
>
> **AFTER** having heard the plaintiffs' representations;
>
> **THE COURT ORDERS AS FOLLOWS:**
>
> 1. **GRANTS** the present motion;
> 2. **EXTENDS** the delay to serve proceedings on the owners of the Ship "Wisdom" by three (3) months from the date of the present Order;
> 3. **THE WHOLE WITHOUT COSTS.**

[14] On September 22, 2010, Wisdom GmbH was served the amended statement of claim in Germany.

[15] On December 1, 2010, Wisdom GmbH filed its motion.

Analysis

[16] Rule 477 reads as follows:

477. (1) Admiralty actions may be *in rem* or *in personam*, or both.	**477.** (1) Les actions en matière d'amirauté peuvent être réelles ou personnelles, ou les deux à la fois.
(2) The style of cause of an action *in rem* shall be in Form 477.	(2) L'intitulé d'une action réelle est libellé selon la formule 477.
(3) The style of cause of an action *in personam* shall be as provided for in subsection 67(2).	(3) L'intitulé d'une action personnelle est le même que celui prévu au paragraphe 67(2).
(4) In an action in *rem*, a plaintiff shall include as a defendant the owners and all others interested in the subject-matter of the action.	(4) Dans une action réelle, le demandeur est tenu de désigner à titre de défendeurs les propriétaires du bien en cause dans l'action et toutes les autres personnes ayant un intérêt dans celui-ci.

[17] It is clear from Rule 477, particularly subsections 477(2) and (4), as well as from Form 477, that Wisdom GmbH is right when it claims the wording in the following style of cause could only, on the last day of the limitation period (on June 30, 2010), have instituted an *in rem* action against the Ship Wisdom and not an *in personam* action against Wisdom GmbH:

THE SHIP "WISDOM"
and
THE OWNERS AND ALL OTHERS INTERESTED
IN THE SHIP "WISDOM"

[18] With regard to the order dated September 13, 2010, at paragraph 6 of its notice of motion, Wisdom GmbH argued the following:

> 6. In the present instance, the *ex parte* Order [the order dated September 13, 2010] which purportedly was to allow for the extension of service of the Amended Statement of Claim as if there existed an action *in personam* against the Wisdom GmbH & Co. KG was improperly granted as the form of service provided therein, i.e. personal service on Owners in Bremen Germany, is not permitted by the Rules for an action purely *in rem*.

[19] It should be noted in passing, and inasmuch as the following aspect has been or continues to remain at issue between entities involved, that the service effected on September 22, 2010, cannot be considered as having been validly effected on the Ship Wisdom since the ship was not in Canada at that time.

[20] As to the existence of an *in personam* action against Wisdom GmbH, the plaintiffs argued by way of Mr. Ross's affidavit that they had always intended to view and to treat Wisdom GmbH as a personal defendant in the matter.

[21] It seems to me from the outset that even if we were to grant that the plaintiffs' intention is pertinent, the intention to institute an action against Wisdom GmbH must be limited and assessed as of the last day of the limitation period, namely, June 30, 2010, the date on which the statement of claim was filed.

[22] It appears that Mr. Ross became involved in the matter at a later date, namely, once the statement of claim had been issued.

[23] Furthermore, what Mr. Ross' cross-examination principally revealed was that the intention to institute an *in personam* action against Wisdom GmbH on June 30, 2010, was possibly a matter of concern for the plaintiffs that had not been disclosed directly to Mr. Ross. His version on this point constitutes hearsay and must be assigned little weight here. Furthermore, no affidavit from the plaintiffs themselves was produced.

[24] Moreover, on June 30, 2010, and as was stated by Wisdom GmbH at paragraphs 22 and 23 of its written representations in its reply record to the plaintiffs' motion to amend (and reproduced below), the wording of the amended statement of claim makes no reference to Wisdom GmbH. On the contrary, ownership of the Ship Wisdom seems to be attributed to the personal defendants correctly named under Rule 67 in the style of cause:

> 22. (…) the only connection between Wisdom GmbH & Co. KG and the Plaintiffs established in the Statement of Claim is the allegation of carriage by the ship "Wisdom" of the allegedly damaged cargo in question. There is no mention whatsoever of Wisdom GmbH & Co. KG, nor of any specific fault alleged *in personam*, nor of any other detail which would connect Wisdom GmbH & Co. KG to the Plaintiffs, aside from the ownership of the vessel.
>
> 23. Third, and most tellingly, paragraph 4 of the Statement of Claim, Plaintiffs allege as follows:
>
> > "At all material times herein, General MPP Carriers and U-Ship Maritime Services Inc. were the **owners**, operators, man[a]gers and/or charterers of the M.V. "SCL THUN" and M.V. "WISDOM" respectively." [Emphasis added]
>
> - **Statement of Claim, para. 4**

[25] When all is said and done, on June 30, 2010, it seems reasonable to me to concur with what Wisdom GmbH stated at paragraph 31 of its written representations against the amendment.

> 31. Accordingly, there is simply no evidence before the Court to suggest that Plaintiffs intended to properly institute an *in personam* action against Wisdom GmbH & Co. KG. The Plaintiffs therefore intended to, and did in fact, properly institute an *in rem* action, and only an *in rem* action against the ship "Wisdom", in addition to an action *in personam* against General MPP Carriers and U-Ships Maritime Services Inc.

[26] The fact that the style of cause above makes reference to the fact that the action was both *in rem* and *in personam* does not enhance the situation in favour of the plaintiffs' argument.

[27] Accordingly, subsequent actions taken by the plaintiffs when they made various attempts to send the amended statement of claim to Wisdom GmbH at the end of August 2010 cannot salvage the situation.

[28] The same applies for the order dated September 13, 2010. When it issued the order, the Court could not directly or indirectly create a right of *in personam* action against Wisdom GmbH.

[29] This is not a question of allowing the plaintiffs to correct a misnomer or irregularity in the style of cause. I cannot allow the plaintiffs to resort to Rules 56 *et seq*. to try to address the situation.

[30] Ultimately, as Wisdom GmbH noted at paragraph 21 of its written representations against the amendment:

> 21. To accept Plaintiffs' position would necessarily lead to the conclusion that any time a party follows the nomenclature "Owners and all others interested in the Ship (*Name*)", it is actually instituting both an action *in rem* and *in personam*. It is respectfully submitted that this position is untenable both by the inherent difference between such actions, and by way of the specific wording of Rule 477.

[31] Rule 399 reads as follows:

399. (1) On motion, the Court may set aside or vary an order that was made	**399.** (1) La Cour peut, sur requête, annuler ou modifier l'une des ordonnances suivantes, si la partie contre laquelle elle a été rendue présente une preuve *prima facie* démontrant pourquoi elle n'aurait pas dû être rendue :
(*a*) *ex parte*; or	*a*) toute ordonnance rendue sur requête *ex parte*;
(*b*) in the absence of a party who failed to appear by accident or mistake or by reason of insufficient notice of the proceeding,	*b*) toute ordonnance rendue en l'absence d'une partie qui n'a pas comparu par suite d'un événement fortuit ou d'une erreur ou à cause d'un avis insuffisant de l'instance.
if the party against whom the order is made discloses a *prima facie* case why the order should not have been made.	
(2) On motion, the Court may set aside or vary an order	(2) La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants :
(*a*) by reason of a matter that arose or was discovered subsequent to the making of the order; or	*a*) des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue;

(*b*) where the order was obtained by fraud.	*b*) l'ordonnance a été obtenue par fraude.
(3) Unless the Court orders otherwise, the setting aside or variance of an order under subsection (1) or (2) does not affect the validity or character of anything done or not done before the order was set aside or varied.	(3) Sauf ordonnance contraire de la Cour, l'annulation ou la modification d'une ordonnance en vertu des paragraphes (1) ou (2) ne porte pas atteinte à la validité ou à la nature des actes ou omissions antérieurs à cette annulation ou modification.

[32] In these circumstances, I do not find the motion by Wisdom GmbH under this rule to be late.

[33] Thus, for the foregoing reasons, there is reason to consider that Wisdom GmbH disclosed, within the meaning of subsection 399(1) of the Rules, a *prima facie* case why the order dated September 13, 2010, should not have been made.

[34] Accordingly, the motion by Wisdom GmbH will be allowed with costs, which the Court will set at $2,000, and the order dated September 13, 2010, will be set aside and the service of the amended statement of claim effected on or about September 22, 2010, will also be set aside. All of the remedies sought by the plaintiffs in their reply record to this motion will be dismissed.

[35] As for the plaintiffs' motion to amend, it relies on Rules 75 to 77. These rules read as follows:

75. (1) Subject to subsection (2) and rule 76, the Court may,	**75.** (1) Sous réserve du paragraphe (2) et de la règle

on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.

76, la Cour peut à tout moment, sur requête, autoriser une partie à modifier un document, aux conditions qui permettent de protéger les droits de toutes les parties.

(2) No amendment shall be allowed under subsection (1) during or after a hearing unless

(2) L'autorisation visée au paragraphe (1) ne peut être accordée pendant ou après une audience que si, selon le cas :

(*a*) the purpose is to make the document accord with the issues at the hearing;

a) l'objet de la modification est de faire concorder le document avec les questions en litige à l'audience;

(*b*) a new hearing is ordered; or

b) une nouvelle audience est ordonnée;

(*c*) the other parties are given an opportunity for any preparation necessary to meet any new or amended allegations.

c) les autres parties se voient accorder l'occasion de prendre les mesures préparatoires nécessaires pour donner suite aux prétentions nouvelles ou révisées.

76. With leave of the Court, an amendment may be made

76. Un document peut être modifié pour l'un des motifs suivants avec l'autorisation de la Cour, sauf lorsqu'il en résulterait un préjudice à une partie qui ne pourrait être réparé au moyen de dépens ou par un ajournement :

(*a*) to correct the name of a party, if the Court is satisfied that the mistake sought to be corrected was not such as to cause a reasonable doubt as to the identity of the party, or

a) corriger le nom d'une partie, si la Cour est convaincue qu'il s'agit d'une erreur qui ne jette pas un doute raisonnable sur l'identité de la partie;

(*b*) to alter the capacity in which a party is bringing a proceeding, if the party could have commenced the proceeding in its altered capacity at the date of commencement of the proceeding, unless to do so would result in prejudice to a party that would not be

b) changer la qualité en laquelle la partie introduit l'instance, dans le cas où elle

compensable by costs or an adjournment.	aurait pu introduire l'instance en cette nouvelle qualité à la date du début de celle-ci.
77. The Court may allow an amendment under rule 76 notwithstanding the expiration of a relevant period of limitation that had not expired at the date of commencement of the proceeding.	**77.** La Cour peut autoriser une modification en vertu de la règle 76 même si le délai de prescription est expiré, pourvu qu'il ne l'ait pas été à la date du début de l'instance.

[36] All things considered, I am of the opinion that this motion should be assessed more specifically on the basis of Rules 76(*a*) and 77.

[37] In this case, for the foregoing reasons, I cannot accept that the plaintiffs' motion is merely about the correction of a name or the correction of a mere technicality. In this case it involves adding a party to the action, namely, a personal defendant, after the limitation period had expired. To allow such an addition would cause irreparable harm to Wisdom GmbH.

[38] It appears to me that the matter under review must follow this Court's reasoning at paragraphs [8] to [16], and more particularly at paragraphs [12] and [16], of *Canadian Red Cross Society v. Air Canada*, 2001 FCT 1012, 211 F.T.R. 94:

> [8] Therefore, it cannot be determined that the action of the Red Cross also interrupted the limitation period with regards to Alpha.
>
> [9] In my view, the appropriate reasoning and the conclusion to draw can be found in *Newfoundland Steamships Ltd. et al. v. Canada Steamship Lines Ltd. et al.* (1979), 107 D.L.R. (3d) 84, a decision of the Federal Court of Appeal.

[10] In that case, some plaintiffs listed specifically in an appendix to their statement of claim in which they had described themselves in the style of cause as "those persons interested in the cargo laden on board the ship ‘Fort St. Louis'" sought to add, after the expiry of the limitation period, the names of additional plaintiffs whose identity was not known at the time the action was commenced.

[11] Mr. Justice Pratte, who set aside the decision of the judge below granting the amendment, made the following analysis:

> The Judge below, nevertheless, rendered the judgment against which this appeal is directed and granted the application for reasons that he summarized as follows [90 D.L.R. (3d) 79 at p. 83, [1979] 1 F.C. 393]:
>
> On the whole, therefore, I am of the opinion that this is not a case where the claims of any new parties, appearing in the appendix, now sought to be substituted for the former appendix, are really new claimants whose claims are prescribed but rather that they are included in the designation of persons interested in the cargo on the ship. It is merely the substitution of new particulars which have since come to light for former particulars and, moreover, in the great majority of the cases merely adds the name of the shipper as well as the consignee, or conversely, provides defendants with greater details from which to check the claims. It is not necessary to decide at this stage of the proceedings whether the claimant should be the shipper or the consignee but justice requires that whoever suffered the loss should be compensated for it, provided that the total amount of the claim does not exceed $509,443.28 (which includes surveyors and adjusters fees) sought for the "Plaintiff cargo interest for distribution as their interests may appear" as stated in conclusion of the original statement of claim.
>
> This judgment, in my respectful opinion, must be set aside.
>
> It is common ground that the prescription of the plaintiffs' claim was governed by the law of Quebec where the cause of action arose (see s. 38 of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.)).

The plaintiffs' claim was based either entirely on delict, as found by the Judge below, or, as argued by the plaintiffs' counsel, both on delict and contract. In either case, the statement of claim asserted a delictual claim which was subject to a prescription of two years (art. 2261 of the *Quebec Civil Code*) after the expiry of which the debt (in so far as it was founded on delict) was absolutely extinguished (art. 2267 *Civil Code*). In these circumstances, the Judge could not authorize the addition of new plaintiffs to the action unless he came to the conclusion that the commencement of the action in 1975 had interrupted the prescription of the claims of those new plaintiffs as well as of those who were named as plaintiffs in the original action: see *Leesona v. Consolidated Textile Mills* (1977), 82 D.L.R. (3d) 56 at p. 62, [1978] 2 S.C.R. 2 at p. 11, 35 C.P.R. (2d) 254.

It is argued, however, that the plaintiffs were not really seeking to add new parties to the action; they merely wanted, it is said, to particularize the description of the plaintiffs in the style of cause ("THOSE PERSONS INTERESTED IN THE CARGO etc. ..."). I do not agree. Had the plaintiffs been merely described as "those interested in the cargo ...", it is certainly arguable that the action would have been irregularly instituted and would not, for that reason, have interrupted the prescription. But this point need not be decided since, in this case, the plaintiffs were not described in that vague and general way: the style of cause as well as para. 3 of the statement of claim contained an express reference to annex A as containing the names of all those having an interest in the cargo. The action, in my opinion, was commenced in the name of the persons enumerated in annex A and the effect of the judgment under attack is clearly, in my view, to authorize that new plaintiffs be added to the action.

The decision of the Supreme Court of Canada in the *Leesona* case does not, in my opinion, support the decision of the Trial Division. Here the plaintiffs were not seeking to correct a misnomer or to overcome a mere technicality; they wanted to amend the statement of claim so as to add new parties whose identities had been unknown to all persons concerned

> at the time of the commencement of the action. That, in my view, could not be done because I do not see how the action commenced in 1975 could have interrupted the prescription of claims of persons who were not parties to that action.
>
> In the exercise of its discretion under Rule 424, the Court cannot, even in order to achieve a fuller measure of justice, disregard the effect of prescription. This is, in my view, what the Trial Division has done here.
>
> [Emphasis added]

[12] In this case, as in *Newfoundland*, it cannot be argued that the plaintiffs are seeking to correct a misnomer or to overcome a mere technicality. Nor is this a case where fairness requires the court's intervention to ensure that procedure does not prevail over substance.

[13] An example of such a situation is the *Leesona*, cited by Pratte J.A. in *Newfoundland Steamships*, where, despite the expiry of the limitation period, the Supreme Court allowed the defendant to correct its company name in order that the style of cause reflect the parties' intentions that the action be brought against the operating company and not the holding company.

[14] In *Pateman v. Flying Tiger Line* [1987] 3 F.C. 613, upheld on appeal as to the result in (1988) 89 N.R. 155, a decision the Red Cross relied on heavily, an insurer, which had become legally subrogated to the rights of the insured, sought to add the name of the insured as a plaintiff to the action in damages it had brought pursuant to the Act and the Convention. Notwithstanding the expiry of the two-year limitation period under article 29 of the Convention, the insurer was allowed to make the change in order to prevent a potential challenge to its status in the action by the defendants.

[15] It is clear from the reasons stated at the beginning and at the end of *Pateman* that the Court considered the insurer and the insured to constitute a single party in the action and that there was a blatant need to remedy the situation if the action was to proceed on the merits unhindered by procedural requirements.

[16] The situation in this case is distinctly different from that in *Leesona*, *Pateman* and in similar cases mentioned in either of those decisions.

[39] Thus, while I am aware of the liberal attitude expressed in the case law with regard to amendments (see, *inter alia*, *Canderel Ltd. v Canada*, [1994] 1 F.C. 3 (C.A.) and *VISX Inc. v Nidek Co.*, [1998] FCJ No 1766), in this case, I do not think it would be fair or in the interests of justice to allow the plaintiffs to serve and file a re-amended statement in order to include Wisdom GmbH as a personal defendant in the style of cause.

[40] Accordingly, the plaintiffs' motion to amend will be dismissed, with costs, which the Court also sets at $2,000.00.

ORDER

1. The motion by Wisdom GmbH is allowed with costs, which the Court sets at $2,000, and the order dated September 13, 2010, is set aside, and the service of the amended statement of claim effected on or about September 22, 2010, is also set aside. All of the remedies sought by the plaintiffs in their reply record to this motion are dismissed;

2. The plaintiff's motion to amend is dismissed, with costs, which the Court sets at $2,000.

"Richard Morneau"
Prothonotary

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1054-10
STYLE OF CAUSE:	SHELL CANADA ENERGY ET AL. and GENERAL MPP CARRIERS ET AL.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	February 21, 2011
REASONS FOR ORDER:	PROTHONOTARY MORNEAU
DATED:	February 24, 2011

APPEARANCES:

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