IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-1033
[2022] NZHC 3120

BETWEEN	SILVER FERN FARMS LIMITED First Plaintiff
	SILVER FERN FARMS (UK) LIMITED Second Plaintiff
AND	A.P. MØLLER MAERSK Defendant

CIV-2016-004-189

BETWEEN	ALLIANCE GROUP LIMITED First Plaintiff
	AGRITRADE SAS Second Plaintiff
AND	A.P. MØLLER MAERSK Defendant

Continued …

Hearing:	13 June 2022 and further memoranda filed 1 July 2022
Appearances:	A Colgan for the Plaintiffs G K Rippingale for the Defendant
Judgment:	28 November 2022

JUDGMENT OF GAULT J

This judgment was delivered by me on 28 November 2022 at 4:00 pm pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Continued …

CIV-2016-004-191

BETWEEN	CMP CANTERBURY LIMITED First Plaintiff
	ANZCO FOODS (UK) LIMITED Second Plaintiff
AND	A.P. MØLLER MAERSK Defendant

CIV-2016-004-194

BETWEEN	AFFCO NEW ZEALAND LIMITED First Plaintiff
	GARRA INTERNATIONAL LIMITED Second Plaintiff
AND	A.P. MØLLER MAERSK Defendant

[1] In these four proceedings the plaintiffs seek an interlocutory order amending / correcting the name of the defendant.

[2] Amendment is opposed on a limitation ground, namely that any liability of the proposed new defendant has already been extinguished by operation of Article III(6) of the Amended Hague Rules (Hague-Visby or Hague Rules),[1] an international convention relating to international contracts for carriage by sea, given effect to under the Maritime Transport Act 1994.[2]

[3] Article III(6) relevantly provides:

> … the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen.

Factual background

[4] The plaintiffs, exporters of containerised chilled meat cargo, arranged shipping of their goods through Maersk Line. Up until early 2015, bills of lading had been issued on a Maersk Line form describing the carrier as "A.P. Møller – Maersk A/S trading as Maersk Line".

[5] In early February 2015, the plaintiffs arranged cargo to be carried on board the vessel *Maersk Alexandra* from various New Zealand ports bound for various overseas markets. The bills of lading were signed by the carrier "Maersk Line A/S".[3]

[6] The *Maersk Alexandra* broke down en route, which affected delivery of the chilled meat.

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1 The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels on 25 August 1924, as amended by the Protocol signed at Brussels on 23 February 1968 and by the Protocol signed at Brussels on 21 December 1979.

2 Maritime Transport Act 1994, ss 208 and 209 and sch 5.

3 In the case of the cargos that are the subject of proceeding CIV-2016-004-191 and CIV-2016-004-194, contracts of carriage were entered into but no bill of lading on a Maersk Line form was issued.

[7] Maersk Line A/S is a wholly owned subsidiary of A.P. Møller – Maersk.[4] Both entities are incorporated and headquartered in Denmark.

Procedural background

[8] Between February and May 2016, the plaintiffs filed proceedings naming A.P. Møller – Maersk (trading as Maersk Line) as the defendant.[5] In each instance, the plaintiffs claimed that the defendant:

(a) had entered into the relevant contract with the plaintiffs for carriage of their cargo, as evidenced by the bill of lading issued (or to be issued) by the defendant;[6]

(b) took possession of the relevant cargo for carriage; and

(c) breached the contract of carriage and duties in tort and bailment, giving rise to losses.

[9] In August 2018, the defendant filed statements of defence in each of the proceedings, followed by amended statements of defence in November 2018. In each instance, these:

(a) admitted, in respect of instances where a Maersk Line bill of lading had been issued, that the relevant bill of lading had been issued by or on behalf of A.P. Møller – Maersk trading as Maersk Line, and that, by written contract of carriage, the defendant had agreed to carry the relevant cargo in each instance;

(b) admitted that the defendant had received the relevant cargo for carriage; and

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4 In about late 2019, Maersk Line A/S changed its name to Maersk A/S.

5 Initially, three of the proceedings were filed in the District Court: CIV-2016-004-189, CIV-2016-004-191 and CIV-2016-004-194. It is common ground that the one year limitation period in the Hague Rules was extended and therefore I can ignore whether any of the proceedings were initially filed more than one year after delivery should have occurred.

6 Pleading also that by virtue of the Maritime Transport Act 1994, the Hague-Visby Rules apply to the contract.

(c) denied the alleged breaches and raised affirmative defences in reliance on the written terms of the contract of carriage as well as the Hague Rules.

[10] After statements of defence had been filed (and three of the proceedings transferred from the District Court), directions were made that the proceedings were to be case managed together with two other proceedings, which related to the carriage of chilled meat cargo on board another vessel, *Maersk Bratan*.[7] As there was some overlap in the legal issues to be decided, it was agreed that the trial of the *Maersk Bratan* proceedings would be heard first.

[11] One of the two *Maersk Bratan* proceedings also named A.P. Møller – Maersk (trading as Maersk Line) as the sole defendant.

[12] On 29 October 2020, shortly before the scheduled start of the trial in the *Maersk Bratan* proceedings, the defendant's solicitors emailed the plaintiffs' solicitors identifying that the proceeding in question was brought against A.P. Møller – Maersk, whereas the relevant bills of lading had been issued by Maersk Line A/S.

[13] After further correspondence, on 10 November 2020 the parties filed a joint memorandum of counsel stating:

> The circumstances of the claim as pleaded (in both the statement of claim and statement of defence) clearly identify the intended defendant as the entity who issued the bills of lading and was party to the corresponding contracts of carriage.
>
> In the circumstances, the parties agree that the error ought to be corrected by adjusting the name of the defendant from "A.P. Møller – Maersk (trading as Maersk Line" to "Maersk A/S (formerly called Maersk Line A/S)" under High Court Rule 4.54 (change of name) and Rule 1.9 (amendment of defects and errors).

[14] The Court subsequently made orders giving effect to this amendment in the *Maersk Bratan* proceedings.

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7 CIV-2016-004-1250 and CIV-2016-404-1811.

[15] On 24 November 2020, the plaintiffs' solicitors wrote to the defendant's solicitors to identify that substantially the same issue was present in each of the four *Maersk Alexandra* proceedings. The plaintiffs sought the defendant's agreement that the appropriate course would be to adjust the name of the defendant in each of the four proceedings as had been done in the *Maersk Bratan* proceedings.

[16] The defendant's solicitors did not respond.

[17] On 24 July 2021, the plaintiffs' solicitors wrote to the defendant's solicitors repeating the request.

[18] The defendant's solicitors only responded after the *Maersk Bratan* proceedings were resolved in January 2022.

[19] This name issue was raised with the Court in a joint memorandum of counsel dated 8 March 2022 seeking various directions by consent, including timetable directions in relation to the issue in case agreement could not be reached. On 11 March 2022, directions were made by consent. Relevantly:

(a) these four proceedings were consolidated and are to be heard together;

(b) timetable directions were made for the parties to file memoranda (and any supporting material) in relation to the name issue;[8]

(c) the close of pleadings date was fixed at 30 June 2022;[9] and

(d) providing for a seven day fixture to be allocated.[10]

[20] By memorandum of counsel dated 1 April 2022, the plaintiffs sought an order to correct what they say is a "misnomer" by amending the name of the defendant in each of the four proceedings under r 1.9 of the High Court Rules 2016 (amendment of defects and errors).

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8 Confirming there was no need for a formal interlocutory application.
9 Counsel for both parties seek a variation to extend the close of pleadings date.
10 A fixture has been allocated, beginning in July 2023.

[21] By memorandum of counsel dated 19 April 2022, the defendant indicated that it did not consent to this proposed "correction". Its position was that the plaintiffs are seeking more than a name correction; they are seeking for a different company to be substituted for the existing defendant in circumstances where the cause of action against the new defendant has been extinguished by the effect of the Maritime Transport Act 1994 and the amended Hague Rules. The defendant submitted that the proposed substitution of the new defendant in these circumstances is not available under r 1.9 and that, if the plaintiffs intended to pursue joinder of Maersk A/S, an application should be made under r 4.56 (striking out and adding parties), which would be opposed.

[22] By reply memorandum dated 4 May 2022, counsel for the plaintiffs maintained that the defendant's name could be adjusted under r 1.9.

[23] On 9 May 2022, following a mention in the Duty Judge list, Harland J recorded in a minute that the plaintiffs did not intend to file an application under r 4.56. However, by memorandum of counsel for the plaintiffs dated 12 May 2022, counsel clarified that the plaintiffs' position was that they did not intend to file an application under r 4.56 before determination of the request for orders under r 1.9. They wished to reserve their position (including in respect of any subsequent application under r 4.56) in the event the Court declines to makes the orders sought under r 1.9. By memorandum of counsel dated 17 May 2022, the defendant agreed that was the plaintiffs' position at the mention, but the defendant repeated its position that if the plaintiffs wished to be heard on the r 4.56 issue at the 13 June 2022 hearing, they should file an application in advance. The defendant submitted it is consistent with the objective of the High Court Rules – to achieve a just, speedy and inexpensive determination of interlocutory matters – for the plaintiffs to file any application on the r 4.56 issue and be heard at the 13 June 2022 hearing, rather than wait to file a subsequent application in the event that the r 1.9 orders are not granted.

[24] On 23 May 2022, Harland J issued a further minute recording the parties' respective positions and stating that the plaintiffs could not be forced to file an application under r 4.56 in advance of the 13 June 2022 hearing.

[25] In the event, although no application was filed under r 4.56, the parties addressed both rr 1.9 and 4.56 at the hearing. It would not be consistent with the objective of the Rules to deal with these matters sequentially. Although a formal application may have been preferable, the issues were sufficiently canvassed in the earlier memoranda and in the submissions filed before the hearing for no prejudice to arise.

Issues

[26] Although there is an issue as to whether the New Zealand authorities relating to substitution of parties after expiry of a limitation period should be distinguished in this case, it is convenient and consistent with the parties' approach to examine the issues in the following sequence:

(a) whether the misdescription in the statement of claim is a "misnomer" as that term is used in the New Zealand authorities;

(b) if so, whether substitution should nevertheless be refused on the basis of the "substantive" limitation period in the Hague Rules.

New Zealand authorities

[27] Generally, the Court will not add a party where the effect would be to defeat limitation rules.[11] In *Cowan v Martin*,[12] the Court of Appeal said that permission to amend turns on whether the misdescription in the statement of claim is a mere misnomer or a misidentification. If the case is one of misnomer, then no limitation question arises. The correction has effect from the date the proceedings were filed.[13] If, however, the error is a misidentification, any amendment would run afoul of the rule that the Court will not allow an amendment if the result is to deprive a party of a limitation defence.

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11 *Registered Securities Ltd (in liq) v Jensen Davies & Co Ltd* [1999] 2 NZLR 686 (CA) at 691.

12 *Cowan v Martin* [2014] NZCA 593 at [56].

13 As indicated, I deal separately below with the defendant's submission that the legal position is different in relation to the "substantive" limitation period in the Hague Rules.

[28] In *Cowan*,[14] the Court of Appeal said that the leading New Zealand authority is the decision of the Court of Appeal in *Registered Securities Ltd (in liq) v Jensen Davies & Co Ltd*,[15] which confirmed the rule to be applied was that laid down in the English Court of Appeal decision of *Davies v Elsby Bros Ltd*.[16] That rule is that an amendment may be allowed to correct a misnomer but should not be permitted where the effect of the amendment would be to substitute a new defendant.

[29] There is a two-stage test. The first stage is to consider whether or not there has been a misnomer. If so, it is then necessary to consider whether prejudice to the respondent/intended defendant is such that notwithstanding the policy that a plaintiff should not be shut out from access to the courts, the application should be refused.

[30] The stage one enquiry requires the Court to examine the statement of claim to see whether the description of the circumstances giving rise to the claim is so clear and detailed that it must displace any inference arising from the misdescription. If so, the misdescription will be a misnomer.

[31] The test is an objective one in the sense that it is not what the drafter of the statement of claim intended or meant that matters, but what a reasonable person receiving the document would understand it to mean. Although objective, the reasonable person receiving the document is vested with the same knowledge of the facts as is possessed by the other party.[17]

[32] The cases refer to the importance of examining the document to see whether it was clearly intended to be addressed to an entity not within the description of the defendant.[18] They also refer to looking at the document as a whole.[19]

[33] Whether or not there is another entity to whom the description might refer is a relevant factor in determining whether what has occurred is, in fact, a misnomer.[20]

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14 *Cowan v Martin* [2014] NZCA 593 at [58].
15 *Registered Securities Ltd (in liq) v Jensen Davies & Co Ltd* [1999] 2 NZLR 686 (CA) at 691.
16 *Davies v Elsby Bros Ltd* [1961] 1 WLR 170 (EWCA). A petition for leave to appeal to the House of Lords was dismissed: [1961] 1 WLR 519.
17 *Cowan v Martin* [2014] NZCA 593 at [61].
18 *Registered Securities Ltd (in liq) v Jensen Davies & Co Ltd* [1999] 2 NZLR 686 (CA) at 693.
19 At 694.
20 *Davies v Elsby Bros Ltd* at 176.

However, whether or not the party actually cited exists could not be a determinative factor given the test, as Venning J said in *Watercare Services Ltd v Affco Ltd*.[21]

[34] In relation to the second stage prejudice enquiry, such prejudice would need to be of at least a substantial if not an overwhelming nature to displace the policy that a plaintiff should not be shut out from access to the courts. The prejudice must arise beyond the issue of the limitation period.[22]

Misnomer or misidentification

Pleadings and submissions

[35] The parties focused on the statement of claim in CIV-2016-404-1033. It is common ground that the pleadings are materially the same for present purposes. The opening paragraphs in that statement of claim stated:

> 1.1 The plaintiffs and the defendant are duly incorporated companies.
>
> …
>
> (3) The defendant carries on business as an international carrier of cargo by sea for reward, and was at all material times the owner and/or charterer and/or responsible for operation of the vessel *Alexandra*.
>
> 1.2 On or about 8 February 2015 the first plaintiff entered into a contract [on] its own behalf and on behalf of the second plaintiff for carriage of the plaintiffs' cargo comprising five containers ("**FCL's**") of chilled lamb product ("**cargo**") from Auckland, New Zealand to Felixstowe, United Kingdom on board the defendant's vessel ("**contract**"):
>
> (1) The contract was evidenced by bill of lading NAEU565971406 signed and issued at Auckland on or about 8 February 2015 by "*Maersk Line New Zealand Branch*", on behalf of or as agent for the defendant.[23]
>
> (2) By virtue of the Maritime Transport Act 1994, the Hague-Visby Rules apply to the contract.
>
> …

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21 *Watercare Services Ltd v Affco Ltd* HC Auckland CIV-2003-404-004207, 2 June 2004 at [31].

22 *Cowan v Martin* [2014] NZCA 593 at [64].

23 I note that in CIV-2016-004-191 this paragraph states that the "contract was on the defendants [sic] bill of lading terms, to have been given the bill of lading number 565980715".

> 1.4 The defendant accepted the cargo at Auckland on or about 8 February 2015 in sound condition (including having sufficient remaining shelf life to make the sea voyage to within the anticipated time) and loaded it onto its vessel, *Alexandra* (v502N), at Auckland on or about 10 February 2015 bound for Felixstowe.

[36] In response, the defendant pleaded in its statement of defence and amended statement of defence:

> 1.2 In respect of paragraph 1.2, it:
>
> …
>
> (2) admits that on or about 8 February 2015, A.P. Møller – Maersk trading as Maersk Line issued the bill of lading.
>
> …
>
> 1.4 In respect of 1.4, it:
>
> (1) says that on or about 8 February 2015 it received a sealed container at Auckland said to contain the lamb cargo …

[37] The plaintiffs' breach of contract cause of action alleges breach of the terms of the contract incorporated by application of the Hague Rules. These terms impose obligations on the "carrier". "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper. Mr Colgan, for the plaintiffs, submitted that only the contracting carrier is a party to the contract and subject to the Hague Rules for that reason.

[38] Mr Colgan submitted there is no doubt that the statement of claim intended that the defendant be the contracting carrier. He also pointed to the defendant's pleading in response. He acknowledged the objective test but submitted the statement of defence shows that the defendant understood the plaintiffs' statement of claim which supports the conclusion that a reasonable person vested with the same knowledge would have done the same.

[39] Ms Rippingale, for the defendant, submitted the statement of claim is not clear, containing several descriptions of the defendant which do not all relate to Maersk A/S (formerly Maersk Line A/S):

(a) Paragraph 1.1(3) refers to the defendant as the "owner and/or charterer and/or responsible for operation of the vessel", and A.P. Møller – Maersk was the charterer.

(b) Paragraph 1.2 refers to the "defendant's vessel".

(c) Paragraph 1.2(1) contains the error, where it states that the bill of lading was signed by "*Maersk Line New Zealand Branch*", whereas the bill of lading was in fact signed by "Maersk Line A/S" (now Maersk A/S).

(d) Paragraph 1.2(1) goes on to say that the bill of lading was signed "on behalf of or as agent for the defendant", which was not clearly a mistake and could have related to the named defendant, A.P. Møller – Maersk.

[40] Ms Rippingale submitted it was not clear there was a misnomer. Rather, she submitted, there was no uncertainty about the entity being sued – the plaintiffs intended to sue A.P. Møller – Maersk; their mistake was in thinking that A.P. Møller – Maersk was the carrier under the relevant bills of lading as well as the charterer of the vessel. She submitted that the agents of the defendant also did not realise the mistake and responded to the proceedings as if it were the carrier as well as the charterer. She submitted that the defendant made the same mistake so the statement of defence is of limited relevance. She also submitted that where there is a co-existing entity with the defendant's name, an application under r 4.56 is the appropriate course.

Discussion

[41] Having examined the statements of claim, I consider the description of the circumstances giving rise to the claim is sufficiently clear that a reasonable person receiving the document would understand it to be addressed to the carrier, that is Maersk Line A/S (now Maersk A/S), and not the named defendant A.P. Møller – Maersk. My reasons are as follows.

[42] First, the claim is clearly intended to be against the carrier. That is clear from the reliance on the Hague Rules in paragraph 1.2(2) and the contract cause of action, and also the pleaded allegation that the defendant accepted the cargo in paragraph 1.4.

This is notwithstanding the alternative descriptions of the defendant in the introductory paragraph 1.1(3), the defendant's reliance on Fixture Notes indicating that A.P. Møller – Maersk was the charterer, and the reference to the "defendant's vessel" in paragraph 1.2. Reference to the defendant's vessel is explicable, as Mr Colgan submitted, since the carrier is responsible even if it does not own the ship or employ the crew (and the ship owner may well be unknown). These are non-delegable duties. Also, as Mr Colgan submitted, it is not plausible that the plaintiffs were seeking to sue the charterer. The plaintiffs have no contractual relationship with the charterer. The plaintiffs' reference to the New Zealand Branch acting as agent is neutral in terms of identifying the principal.

[43] Secondly, the plaintiffs' mistake is explicable given that up until early 2015, bills of lading had been issued on a Maersk Line form describing the carrier as A.P. Møller – Maersk A/S trading as Maersk Line.

[44] Thirdly, the statement of defence admitted the relevant allegations. It cannot be assumed that the agent (the New Zealand Branch) mistakenly responded as if A.P. Møller – Maersk was the carrier as well as the charterer given that the branch signed bills of lading both before and after the change on the forms and that the carrier Maersk Line A/S is a wholly owned subsidiary of A.P. Møller – Maersk.

[45] Fourthly, the same change was made by consent in the *Maersk Bratan* proceedings.

[46] Ms Rippingale referred to *Allan Scott Wines & Estates Holdings Ltd v Lloyd*,[24] but I consider that case turned on its particular facts rather than departing from the test stated by the Court of Appeal. In that case, Miller J acknowledged that a reasonable person in the position of the intended defendant would readily have appreciated that the plaintiff had made a mistake in the pleading but on balance considered the case was properly characterised as one of misjoinder on the basis there was no evidence that the pleading was drawn to the intended defendant's attention. On the contrary, the Judge said, all concerned proceeded on the basis that the named defendant was the

[24] *Allan Scott Wines & Estates Holdings Ltd v Lloyd* (2006) 18 PRNZ 199 (HC).

correct defendant. The plaintiff sued that company by its proper name and registered office.[25]

[47] I consider this case is more factually similar to *Watercare Services Ltd v Affco Ltd*,[26] where Venning J was driven to the conclusion (also involving two companies in a group) that the claim was against a defendant operating a plant that was discharging waste, but the plaintiff sued the operator under the wrong name. That was a misnomer.[27]

[48] For these reasons, I consider the misdescription in each of the statements of claim is a misnomer.

"Substantive" limitation period

[49] The further issue is whether the legal position stated in the Court of Appeal authorities referred to above applies to the limitation period in the Hague Rules.

[50] At the hearing, Ms Rippingale relied on cases from England and Hong Kong for the proposition that a misnomer cannot be corrected where the time bar under the Hague Rules had expired.[28] These decisions draw a distinction between limitation periods that extinguish a right (which they treat as being substantive in nature) and those that bar a remedy (which they treat as being procedural in nature), holding that statutory limitation periods are to be treated as "procedural" and the Hague Rules limitation as "substantive". Mr Colgan submitted the New Zealand Court of Appeal cases apply equally to limitation under the Hague Rules. He submitted the English cases that reject the approach of treating the correction as having effect from the date the proceedings were filed are based on the English Court Rules. In any event, he submitted, we should not distinguish between "substantive" and "procedural" limitation provisions. I requested further submissions on this issue, which the parties helpfully provided subsequent to the hearing by way of a joint memorandum.

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25 *Allan Scott Wines & Estates Holdings Ltd v Lloyd* (2006) 18 PRNZ 199 (HC) at [52].

26 *Watercare Services Ltd v Affco Ltd* HC Auckland CIV-2003-404-004207, 2 June 2004.

27 At [38].

28 *Zainalabdin Payabi v Armstel Shipping Corporation (The "Jay Bola")* [1992] QB 907, [1992] 2 Lloyd's Rep. 62; *Transworld Oil (USA) Inc v Minos Compania Naviera SA (The "Leni")* [1992] 2 Lloyd's Rep. 48 (QB); *Win's Marine Trading Co v Wan Hai Lines (HK) Ltd* [1999] 3 HKC 701, [1999] HKCFI 1037.

Plaintiffs' position

[51] Mr Colgan submitted that the approach in the English and Hong Kong cases cited is based on a traditional common law approach of distinguishing more generally between "rights" and "remedies" and has been the subject of criticism – especially so far as it relates to limitation periods. He submitted this is because, regardless of the form of limitation period, it inevitably affects a substantive right. As a right with no remedy is of no real value, all limitation periods can be more appropriately characterised as being matters of substance.[29] On this basis, he submitted, it has been argued that the traditional approach (in particular, the old common law rule that limitation statutes are to be treated as procedural) is outdated.[30] By contrast, the "modern" approach is to characterise limitation provisions based on their nature, rather than their form. This abandons the traditional distinction and treats all limitation periods as substantive in nature. In Canada, he submitted, the Supreme Court has long since done away with the traditional approach, finding that the principles underpinning it are out of place in the modern context.[31] In Australia, although the modern approach has been codified in some limitation statutes, the High Court of Australia has endorsed the approach that the application of any limitation period, whether barring a remedy or extinguishing a right, should be taken to be a question of substance and not procedure.[32]

[52] Mr Colgan submitted that, although the issue does not appear to have been decided in New Zealand, the weight of reason and scholarship would militate against adopting the traditional approach, citing the authors of *The Conflict of Laws in New Zealand* who have described the traditional common law distinction between "rights" and "remedies" as "unhelpful and outdated",[33] saying that it has been "rightly criticised"[34] and can lead to "arbitrary and difficult results in the context of limitation periods".[35] Mr Colgan also submitted that s 55 of the Limitation Act 2010 provides

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29 Citing *John Pfeiffer Pty Ltd v Rogerson* [2000] 3 CLR 503 (HCA) at [188], in turn citing Deane J in *McKain v R W Miller and Co (SA) Pty Ltd* [1991] 174 CLR 1 (HCA).

30 *Tolofson v Jensen* [1994] 3 SCR 1022 at 1070 per La Forest J.

31 At 1066-1074.

32 *John Pfeiffer Pty Ltd v Rogerson* at [97]-[100] per Gleeson CJ.

33 Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [4.208]-[4.209].

34 At [4.199].

35 At [4.217].

that foreign limitation statutes are to be treated as substantive regardless of their form. He acknowledged that this provision does not directly apply to this case, but submitted it supports the view that there is no real mischief to an approach that treats all limitation periods as matters of substance.[36]

[53] He submitted this Court has previously discussed the substance/procedure distinction in *Waterhouse v Contractors Bonding Ltd*.[37] Potter J noted the "modern approach" but ultimately followed a traditional approach, refusing to strike out the plaintiff's claim on the basis that the Limitation Act 2010 was not intended to be retrospective. Mr Colgan submitted that commentary suggests this should not be understood as an endorsement of the "traditional" approach more generally, again citing *The Conflict of Laws in New Zealand*.[38]

[54] Mr Colgan submitted that to apply the reasoning in *The "Jay Bola"* would require commitment to an unhelpful view of limitation periods based on the now outdated separation between the barring of remedies and the extinguishment of rights. He submitted that the result that might follow from doing so in these proceedings demonstrates the arbitrary nature of such an approach.

[55] He submitted that where the correct approach is to treat all limitation periods as substantive in nature, there is no real basis on which to distinguish this case from the other New Zealand authorities involving correction of a misnomer. That is to say, the limitation periods in issue in those cases can each be understood to involve a limitation provision which, if allowed to operate, would have the effect of extinguishing a substantive right.

[56] On that basis, he submitted it must be the case that correction of the misnomer is possible in these proceedings notwithstanding the limitation the defendant would seek to rely on arises under the Hague Rules. He also noted that civil law jurisdictions – accounting for the majority of Hague signatories – do not apply a substance/procedure distinction in respect of limitation periods, citing *Tolofson v*

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36 Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [4.218].

37 *Waterhouse v Contractors Bonding Ltd* [2012] NZHC 566 at [61]-[77].

38 Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* at [4.219].

Jensen.[39] He submitted that when limitation periods are treated as matters of substance across all cases, this avoids arbitrary and inconsistent results, which is consistent with the approach of the Australian Courts in striving to avoid technicality prevailing over merit, citing *Nikolay Malakhov Shipping Co Ltd v Seas Sapfor Ltd*.[40]

[57] He acknowledged it is not strictly necessary for the Court in this case to find that all limitation periods or the Hague Rules in particular are substantive. This is on the basis that the New Zealand and English cases do not arise from the same rules of civil procedure.

Defendant's position

[58] Ms Rippingale agrees that at least the limitation period in the amended Hague Rules should be treated as substantive. She submits that as a result it is not within the jurisdiction of the High Court Rules, which regulate court procedure, to amend or substitute parties where a substantive limitation period has extinguished the underlying right.[41]

[59] She submitted that the scope of the High Court Rules is to govern practice and procedure.[42] They may not affect substantive rights or recognise a substantive right where none exists at law.[43] She submitted this is the procedure and substance distinction that is relevant to this application.

[60] She submitted the cases regarding misnomer and substitution under r 4.56 have concerned limitation periods under the Limitation Acts 1950 and 2010, which bar the remedy without extinguishing the underlying right.[44] She acknowledged that this type of limitation period can appropriately be characterised as procedural and therefore subject to the jurisdiction of the High Court Rules.

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39 *Tolofson v Jensen* [1994] 3 SCR 1022 at 1069-70.

40 *Nikolayi Malakhov Shipping Co Ltd v Seas Sapfor Ltd* [1998] 44 NSWLR 371 at 395 per Sheller JA.

41 The defendant does not agree that all limitation periods are, or should be, treated as substantive, citing *Dorchester Finance Ltd v Deloitte* [2012] NZCA 226, [2012] NZCCLR 15 at [33]-[37].

42 Senior Courts Act 2016, s 146(1).

43 *Kenton v Rabaul Stevedores* (1990) 2 PRNZ 156 (HC) at 163-164.

44 *Dorchester Finance Ltd v Deloitte* at [35].

[61] She submitted, however, that allowing an amendment or substitution of the defendant where a limitation period has extinguished the plaintiff's claim against the proposed defendant must be regarded as affecting substantive rights (as the plaintiffs accept). Therefore, it would be *ultra vires* the High Court Rules to permit a proceeding to be brought against the proposed defendant outside the timeframe by way of amending or substituting the defendant.

[62] She submitted this is the approach taken in *The "Jay Bola"*, which found that procedural rules of court could be used to amend parties where a limitation period only prevented access to a remedy, but not where a limitation period had extinguished the underlying substantive right as it would be *ultra vires* the court rules. She submitted the court rule at issue in *The "Jay Bola"* allowed for amendments to pleadings in circumstances that are very similar to what would be a misnomer in New Zealand, and therefore the Court's analysis is applicable to the present case. Order 20 (r 5(3)) provides:

> An amendment to correct the name of the party may be allowed under paragraph (2) notwithstanding that it is alleged that the affect 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.

[63] On that basis, Ms Rippingale submitted that the Court should follow the approach in *The "Jay Bola"*, and find that it is not within the jurisdiction of the High Court Rules to allow for amendment or substitution of parties in the context of the time bar in the amended Hague Rules, which has extinguished the plaintiffs' claim against the proposed defendant.

[64] She submitted that the additional authorities the plaintiffs rely on concern the distinction between procedural and substantive law for the purpose of conflict of laws, where (broadly speaking) matters of procedure are governed by the law of the forum and matters of substance are governed by the *lex causae* ('substantive law'). She submitted it is in this context that "arbitrary and difficult results" are said to have arisen.[45] However, she submitted, as is noted by those authors, that the use of the

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[45] Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [4.198].

terms "substance" and "procedure" are particular to conflict of laws and do not necessarily reflect their use for domestic purposes, including whether a particular limitation period would be considered a matter of court procedure rather than a matter of substantive law in New Zealand.[46]

[65] In relation to the plaintiffs' submission that all limitation periods should be considered substantive, Ms Rippingale submitted that if limitation periods are treated as substantive in the context of conflict of laws, then limitation periods are part of the substantive law and not the law of the forum. This rule only decides what limitation periods should apply. It does not decide the effect of an applicable limitation period on the underlying right. Therefore, she submitted, the authorities referred to by the plaintiffs are not directly relevant to the present issue, which concerns the scope of the jurisdiction to amend or substitute parties under the High Court Rules.

Discussion

[66] As indicated in *The "Jay Bola"*, English law regards the time-bar in the Hague Rules as one of a special kind which extinguishes the claim such that it simply ceases to exist.[47] Accordingly, amendment of the defendant's name in that case depended on a doctrine of "relation back", that is treating the amendment as dating back to the filing of the original claim (consistent with the New Zealand approach to misnomer referred to above).

[67] In *The "Jay Bola"*,[48] Hobhouse J referred to the relevant English Rules of Court, provisions of the Limitation Act 1980 and earlier English cases, particularly *Ketteman v Hansel Properties Ltd*,[49] which indicated that the source of any relation back had to be the Limitation Act 1980. He considered that the Court of Appeal case of *Evans Constructions Co Ltd v Charrington & Co Ltd*[50] could not stand with the

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46 Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [4.198].

47 *Zainalabdin Payabi v Armstel Shipping Corporation (The "Jay Bola")* [1992] QB 907, [1992] 2 Lloyd's Rep. 62 (QB) at 69, citing *Aries Tanker Corporation v Total Transport Inc* [1977] 1 WLR 185 (HL) at 188.

48 At 74.

49 *Ketteman v Hansel Properties Ltd* [1987] AC 189 (HL), approving the dicta of Brandon LJ in *Liff v Peasley* [1980] 1 WLR 781 (EWCA).

50 *Evans Constructions Co Ltd v Charrington & Co Ltd* [1983] 1 QB 810 (EWCA).

House of Lords decision in *Ketteman*, except possibly as an exceptional (misnomer) case, but in any event did not consider the theory of relation back in connection with substantive defences.[51] Hobhouse J concluded that the Rule of Court not linked with the Limitation Act (Ord. 20, r. 5) cannot deprive a party of a substantive defence.[52]

[68] On the other hand, in *Nikolayi Malakhov Shipping Co Ltd v Seas Sapfor Ltd*, the New South Wales Court of Appeal concluded by majority (after trial, there having been no appeal at the joinder stage) that a mistake in naming the correct defendant was amenable to correction under the relevant Court Rules despite the intervening expiry of the limitation period in the Hague Rules.[53] The majority declined to follow English law.[54]

[69] At least in relation to limitation under New Zealand's Limitation Act 1950 or Limitation Act 2010, *Cowan* and *Registered Securities Ltd* provide for relation back in the case of misnomer. In New Zealand, those Court of Appeal authorities prevail over the *ultra vires* concern raised in *The "Jay Bola"* even if the Rules of Court are comparable.[55] However, those Court of Appeal authorities do not address limitation under the Hague Rules. Nor does the High Court of Australia's treatment of all limitation periods as "substantive" for conflict of laws purposes assist in the present context. In the present context, the question is whether the Rules of Court may allow substitution of a defendant after the expiry of a substantive (extinguishing) limitation period in the case of a misnomer. Counsel advise there is no New Zealand authority.

[70] Even if depriving a party of a "substantive" limitation defence gives rise to a possible *ultra vires* issue (which may be doubted given that procedural Court Rules

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51 *Zainalabdin Payabi v Armstel Shipping Corporation (The "Jay Bola")* [1992] QB 907, [1992] 2 Lloyd's Rep. 62 (QB) at 75.

52 At 76.

53 *Nikolayi Malakhov Shipping Co Ltd v Seas Sapfor Ltd* [1998] 44 NSWLR 371 at 395-396 per Sheller JA and at 419 per Cole JA. The relevant NSW Court Rule included provision for relation back, but its vires did not appear to depend on an empowering Limitation Act provision.

54 Not following *Aries Tanker Corporation* and doubting *The "Jay Bola"*.

55 The Court of Appeal in *Registered Securities Ltd (in liq) v Jensen Davies & Co Ltd* [1999] 2 NZLR 686 (CA) at 691 was aware when applying *Davies v Elsby Bros Ltd* that the position in England had subsequently been amended in the Rules of Court.

can deprive parties of substantive defences in various ways[56]) or is otherwise materially different from statutory limitation (which may also be doubted given *Nikolayi Malakhov Shipping*), I consider that in relation to the immediate issue of joinder the High Court Rules are not depriving a party of a substantive defence so as to give rise to an *ultra vires* issue. Joinder is procedural. It does not of itself preclude a limitation defence being raised. It would be different where the limitation issue is effectively determined at the joinder stage, which may be appropriate where sufficient material is before the Court. However, that would not be appropriate here. The Court does not have all the necessary factual information and the point was not fully argued. Indeed, Ms Rippingale indicated that even if the pleadings in these proceedings are amended, it may be open to the defendant to raise limitation at trial and that English law may be the governing law of the contract. My decision is limited to permitting a pleading amendment to correct a misnomer; it is not a determination of the limitation defence.

[71] For these reasons, I do not consider the proposed amendment gives rise to substantial prejudice in relation to the limitation period. Further, I do not consider that Ms Rippingale's reference to other possible issues such as the solicitor-client relationship obligations to retain and discover documents and company audit and reporting requirements, make out such prejudice to displace the policy that plaintiffs should not be shut out from access to the courts. Mr Colgan said that the named defendant has conducted the defence as the contracting carrier.

[72] Therefore, I consider that the plaintiffs should be permitted to amend the statements of claim in these proceedings as sought.

Close of pleadings date

[73] Counsel jointly seek a variation to extend the close of pleadings date. Although their joint memorandum following the hearing suggested 31 October 2022, in the circumstances I extend the close of pleadings date to 19 December 2022.

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[56] For example, striking out a defence for serious procedural non-compliance. Contrast *Kenton v Rabaul Stevedores Ltd* (1990) 2 PRNZ 156 (HC) which held that s 51 of the (former) Judicature Act 1908 only authorised rules regulating practice and procedure and so did not authorise purporting to give substantive rights.

Result

[74] I make orders:

(a) amending the name of the defendant in each of the four proceedings from A.P. Møller – Maersk to Maersk A/S; and

(b) extending the close of pleadings date to 19 December 2022.

[75] If costs cannot be agreed, memoranda not exceeding three pages may be filed within 25 working days and I will determine costs on the papers.

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Gault J

Solicitors:
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