Sumitomo Shoji Kaisha Ltd et al (*Plaintiffs*) *v.* **First Steamship Co. et al** (*Defendants*)

Jackett P.—Ottawa, September 23, 1970.

Admiralty—Practice—Damage to cargo—Non-resident defendants—Service of writ of summons ex juris—Application to renew writ—Whether sufficient reason for non-service shown—Adm. R. 17(2)—Whether cause of action against chartering agent—Adm. R. 20(b)

The shipper and the consignee of goods carried aboard the ship *Ever Faith* from Tokyo to New Westminster in September 1968, issued a writ of summons on September 24, 1969, alleging damage to the goods by the negligence of one or more of the four defendants. Two defendants, the carrier and the chartering agent for the ship, resided outside Canada, and two, the shipowner and the ship's agent, resided in Canada. The two non-resident defendants were notified of the proceedings by the others' solicitor, who informed plaintiffs that he was awaiting entry of appearance on their behalf by their insurer's solicitors. On September 23, 1970, no appearance having been entered for the non-resident defendants, plaintiffs applied to renew the writ of summons and for leave to serve the non-resident defendants *ex juris*.

Held, dismissing the application, no sufficient reason for plaintiffs' failure to serve the non-resident defendants had been shown, as Admiralty Rule 17(2) required.

Held also, although the carrier was *prima facie* liable under the terms of the bill of lading which it issued, thus warranting an order for service *ex juris* under Rule 20(*b*), no cause of action either in contract or in tort was indicated against the chartering agent.

APPLICATION.

D. L. D. Beard for the plaintiffs

C. C. I. Merritt, Q.C., for the defendants First Steamship Co. Ltd and Vanport Shipping Agency Ltd.

No one for the defendants Tokyo Shipping Co. Ltd and Gannett Freighting Incorporated.

JACKETT P.—This is an application in writing for an order

1. Renewing the writ of summons herein for a further period of one year up to and including the 24th day of September, 1971.

2. Granting leave to the plaintiffs to issue a writ of summons for service on the defendants, Tokyo Shipping Co. Ltd and Gannett Freighting Incorporated who are said to be carrying on business in Tokyo, Japan and New York, New York, U.S.A. respectively.

3. That service of the notices of the said writ of summons, statement of claim and of the order upon the defendants, Tokyo Shipping Co. Ltd and Gannet Freighting Incorporated by serving an officer or director of the said corporations at their places of business in Tokyo, Japan and New York, New York, U.S.A. shall be good and sufficient service of the said writ of summons, statement of claim and of this order upon the said defendants, Tokyo Shipping Co. Ltd and Gannett Freighting Incorporated,

and what is desired, therefore, is an order extending the time for service of the writ of summons on the two defendants who are not, apparently, resident in Canada.

To obtain an order extending the time for service under Rule 17(2), the plaintiffs must show that the writ has not been served "for any sufficient reason".

Before dealing with that application, it will be convenient to deal first with the application for leave to serve *ex juris*.

As is usual in these cases, the facts as pleaded by the statement of claim are alleged in such a general and imprecise way and allegations of fact are so mixed up with assertions of legal conclusions that it is very difficult to decide exactly what causes of action are being put forward.

Read with the affidavit filed, it would seem reasonably clear that a claim is being made against the defendant, Tokyo Shipping Co. Ltd., as the carrier by whom a bill of lading was issued for the carriage of goods shipped by one of the plaintiffs from Japan to the other plaintiff in Canada, which goods were delivered in Canada in a damaged condition. Assuming that there is evidence available that a duly executed bill of lading was issued in the form of Exhibit "D" to the aforesaid affidavit (which is said by the affidavit to be a "copy of the ocean bill of lading issued by Tokyo Shipping Co. Ltd." but, in fact, does not purport to be a copy of anything more than an unexecuted draft of a bill of lading), I am of opinion that there is sufficient evidence of a *prima facie* claim by the plaintiffs against Tokyo Shipping Co. Ltd. for breach of contract in delivering such goods in a damaged condition and that such breach is a breach of a term of the contract that ought to have been "performed" within Canada. This is, therefore, subject to the production of evidence concerning execution of the bill of lading, a proper case for an order for service *ex juris* under Rule 20(*b*) of the Admiralty Rules.

As far as the claim against Gannett Freighting Incorporated is concerned, however, I find no allegations in the statement of claim or facts established by the affidavit that indicate any cause of action either in tort or in con-

tract. Paragraph 5 of the statement of claim says that this company was the "chartering agent" of the vessel *Ever Faith* on which the goods in question were carried. Paragraph 12 of the statement of claim reads as follows:

> 12. The Plaintiffs state that the above damages were caused by the negligence of all of the above named Defendants or any one or more of them arising out of the improper handling and stowage and forwarding of the cargo above outlined in transit from Kinuura, Japan to New Westminster, British Columbia, in that they:
>
> (*a*) failed to take proper precautions when loading the said shipment at Kinuura to ascertain and ensure that no damage would occur during the loading operations;
>
> (*b*) failed to ascertain that the shipments were adequately protected from loss or damage during the handling and in the loading operations;
>
> (*c*) failed to take proper precautions and ensure that the cargo would be properly stowed so that the same would not become damaged during the voyage;
>
> (*d*) failed to stow the cargo properly to protect it from damage in transit;
>
> (*e*) allowed the cargo to become wet during the said voyage; thereby causing the shipment of steel pipe to be rusted;
>
> (*f*) in the alternative, they handled the cargo improperly resulting in the damages suffered.

Without expressing any opinion as to whether this is a sufficient allegation of facts constituting a cause of action based on negligence on the part of a carrier or other person who actually handled the goods during the course of loading, carriage and unloading (a question concerning which I have doubt having regard to the general terms employed), in my view, it is quite inadequate to even suggest a cause of action in tort against a person whose only connection with the matter is that he is alleged to have been the "chartering agent" of the vessel. An allegation that a person is an "agent" does not, as far as I know, by itself, justify making him a defendant to an action either in tort or in contract. In the absence of special statute or some very special rule of law, an action in contract must be brought against a contracting party and an action in tort must be brought against the person who committed the tort either personally or vicariously.

I return now to the application to extend time for service. As already indicated, this can only be granted where "for any sufficient reason a writ has not been served on a defendant within the time limited for service". In this case the writ of summons was issued on September 24, 1969, and the first step towards service of the two defendants in question was the filing of this application on September 21, 1970. What has transpired since, according to the affidavit, may be summarized as follows:

(*a*) on September 24, 1969, the claim was placed before the defendant, Vanport Shipping Agency Limited, as agents for the vessel;

(*b*) on October 8, 1969, Vanport wrote to the solicitors for the plaintiffs declining the claim "according to the covering bill of lading";

(*c*) on or about October 31, 1969, the writ of summons and the statement of claim were served on Vanport;

(*d*) on May 28, 1970, Vanport filed a defence taking the position *inter alia* that it had no liability in contract or tort "and had no dealings with the plaintiffs and did not procure or in any way assist or participate in the loading or carriage of the cargo" but was only the agent of the defendant, First Steamship Co. Ltd., at the port of Vancouver;

(*e*) on September 14, 1970, the plaintiffs' solicitor spoke to a solicitor for Vanport who indicated that he would be entering an appearance for First Steamship Co. Ltd. "but as yet has not received any instructions to enter an appearance on behalf of the defendants, Tokyo Shipping Co. Ltd and Gannett Freighting Incorporated".

On these facts, there does not appear to have been any "reason" why the foreign defendants were not served. The solicitor does state that, from February 5, 1970, he was awaiting an entry of appearance "concerning the remaining defendants" by the solicitors who act "on behalf of the Protection and Indemnity Club for the vessel, S. S. *Ever Faith,* but he does not state the facts that brought about such "awaiting". He also states that he had been negotiating with those solicitors "since that time" and that, on June 16, 1970, it was "our understanding" that one of those solicitors was still awaiting news "as to whether or not he could appear for the remaining defendants". Finally, he says:

> 18. On discussing the matter with Mr. Morrison on September 14th, 1970 he indicated that those remaining defendants, Tokyo Shipping Co. Ltd. and Gannet Freighting Incorporated have been notified as to the matters in dispute and of the claim for some time but as yet has not received instructions to enter an appearance on their behalf. It is therefore necessary that we proceed and obtain a renewal of the writ for a further period of time so that the plaintiffs can properly effect service of the remaining defendants in Tokyo, Japan and New York, New York, U.S.A. respectively.
>
> 19. The reason for the delay in effecting service of the writ was the fact that we expected Messrs. Bull, Housser and Tupper to appear on behalf of all defendants. He has advised and I do verily believe that he cannot obtain these instructions.

The question that has to be considered is whether anywhere in these facts is to be found "any sufficient reason" for not serving the writ of summons on the foreign defendants. (I discuss this on the basis that a good cause of action has been alleged.) The situation is that the alleged cause of action is a failure to deliver goods in good order in September, *1968* (or a tort committed before that time). The writ of summons was issued in September, *1969*. The solicitors for the plaintiffs have since that time been dealing with lawyers for an insurer who, as far as is alleged, protects only the parties for whom he has filed appearances. No action has been taken by the plaintiffs to communicate to the foreign defendants that they are being held liable for the damages complained of. There is no evidence that there was any reason, much less any *sufficient* reason, for not taking steps to serve these defendants immediately after the writ of summons was issued.

The practice, that seems to be current, whereby the solicitors for the plaintiff deal with the solicitors for an insurer who cannot undertake to

appear for the defendants but takes the responsibility of notifying the defendants is satisfactory if it results in a voluntary appearance by the defendants and, doubtless, it is economical. It does not, however, establish a "reason" for not serving the defendants within the twelve months stipulated by the Rules.

I have expressed the view before, and I remain to be convinced that it is wrong, that there is no justification for issuing a writ and leaving it lie without service on a defendant while negotiating with somebody else. The rules of court contemplate, and the justice of the matter requires, that, when an action is commenced, the appropriate papers be communicated to the defendants. The law is designed to put some limit on the length of time that can be allowed to elapse before facing a person with a lawsuit.

For the above reasons, I do not grant any of the orders sought, but the applicants have leave to renew their applications either orally or in writing.