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ONTARIO ADMIRALTY DISTRICT

BETWEEN:

BILTMORE HATS LIMITED PLAINTIFF,

AND

CANADIAN PACIFIC RAILWAY COMPANY, CANA-
 DIAN PACIFIC STEAMSHIPS LIMITED, MARCH
 SHIPPING AGENCY LIMITED AND ZIM ISRAEL
 NAVIGATION COMPANY LIMITED .. DEFENDANTS.

*Shipping—Admiralty—Practice—Misjoinder of Party—Order adding defend-
 ant set aside.*

Held: That no person in whose favour the limitation period has run
 should be added as a defendant to an action.

APPLICATION to have order adding defendant set
 aside.

The application was heard before Mr. A. S. Marriott,
 Q.C., Surrogate Judge in Admiralty at Toronto.

D. L. D. Beard for plaintiff.

J. A. Bradshaw for defendant Zim Israel Navigation
 Company Limited.

G. C. Butterill for defendants Canadian Pacific Rail-
 way Company and Canadian Pacific Steamships Limited.

Per MARRIOTT, Q.C., Surrogate Judge in Admiralty:

This is an application by the defendant Zim Israel Navigation Company Ltd., hereinafter referred to as Zim for an order setting aside the order made by me on the 8th day of June, 1962, adding the said defendant as a party to this action on the ground that at the time the said order was made the time within which an action could properly be brought against the said defendant had expired.

The cause of action arose through the alleged failure of the defendants or one of them to deliver at the end of July, 1960 a quantity of hat fur shipped from Spain and consigned to the plaintiff at Guelph, Ontario. When the goods were eventually delivered in October of that year the plaintiff had already purchased fur from other sources necessary for its fall business and rejected the goods in question. It then commenced this action on the 11th of July, 1961 claiming damages resulting from the alleged breach of contract and making as defendants in the first place Canadian Pacific Railway Company, Canadian Pacific Steamships Limited and March Shipping Agency Limited. From the statements of defence delivered by those defendants the plaintiff concluded that the applicant and others should be added as defendants and the order in question was made *ex parte* as against them. To summarize, the cause of action arose at the end of July 1960; the action was commenced July 11th, 1961 and the order in question made on 8th of June, 1962.

I understand it is agreed that pursuant to the terms of the bills of lading which incorporate the Hague Rules, that the statutory period of limitation applies, which for convenient reference are set out in Section 6 of Article III of *English Carriage of Goods by Sea Act*, (1924), to be found in Carver's *Carriage of Goods by Sea* 10th ed. p. 191. It is as follows:

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

The chief ground relied on as a defence to this application is that a fair and proper interpretation of the wording of this section is that the carrier can be properly added as a defendant so long as an action has been commenced

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against somebody for the same relief within one year after the date the goods should have been delivered. It is sought to obtain support for this interpretation by pointing out that the wording of the limitation section does not read "unless suit is brought *against them* within etc."; the implication being that there is no limitation period against the carrier or ship so long as an action has been brought against someone within the limitation period.

Having regard to the fact that the purpose of the section is to provide a limitation period within which an action against a carrier or ship must be brought I think that on the face of it, it is beyond question that the limitation period could only apply to an action brought against a carrier or ship and not against somebody else. It was applied in this sense in *Jensen v. Matsen Navigation Co. et al.*¹ While it is true that some statutory limitation periods are framed more directly, as for example, s. 10(1) of the *Public Authorities Protection Act*, R.S.O. 1960 c. 318, others such as s. 43 of *The Medical Act*, R.S.O. 1960 c. 234 are framed in somewhat the same language as the section in question here, and I think there can be no question that the relevant date for commencement of the action would be when it was commenced against the person entitled to the benefit of the limitation period.

It is further contended by counsel for the plaintiff that the goods having eventually been delivered in Ontario that it would not have been reasonable for it to sue the owner of the ship in the first place. However, it seems to me that in such cases before all the facts are known the plaintiff should consider all persons against whom it has any possible claim for relief and should make them all parties. From the bills of lading it knew that the goods were carried on the ship *Shomrow* and there is of course no difficulty in obtaining information as to the owner of the ship from Lloyd's Register of Shipping. That the plaintiff knew this appears clear from paragraph 10 of the affidavit filed in support of the application for the order in question. Furthermore, the action was not commenced until about two weeks prior to the expiration of the limitation period, and therefore no margin was left within which to correct the proceedings. See *Davies v. Elsbay Brothers Ltd.*²

¹ 70 F. Supp. 1020.

² [1961] 1 W.L.R. 170.

Another point raised by counsel for the plaintiff was that under the circumstances of this case there is a legal question as to who the shipper is and whether or not this particular owner, the defendant Zim, entered into a contract or carriage with the shipper to qualify it as a carrier. However, that may be it is to be noted that the plaintiff has as one alternative sued the defendant Zim as owner of the *S.S. Shomrow* and thus appear to claim relief against Zim as the carrier within the meaning of the statute.

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Having then found that the defendant is entitled to rely on the limitation section as a defence it follows as being the well-settled practice that the Court should not add a person as a defendant in whose favour the limitation period has run; *Lattimor v. Heap*¹; see also the other cases cited in the Ontario Annual Practice (1963) p. 171. That it is the appropriate and recognized practice in Admiralty actions to strike out the addition of a party in such circumstances is clear from the decision of the United States Federal Court in *Jensen v. Matsen Navigation Co. et al.* (*supra*), a case almost on all fours with this.

Originally the application was to have been brought before the District Judge in Admiralty but as he was not available, on consent I heard the application, and also as I made the original order I am setting aside an order made by myself which I think I have power to do in any event under Rule 89.

In the result an order will go setting aside the order adding Zim Israel Navigation Company Ltd. as a party defendant. No order as to costs.

These reasons replace those issued on February 26, 1963.

Order accordingly.

¹ [1940] O.W.N. 580.