PARTIES:	MANNIN PTY LTD
	v
	METAL ROOFING AND CLADDING PTY LTD
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP14 of 1996
DELIVERED:	26 September 1997
HEARING DATES:	6 March 1997
JUDGMENT OF:	Martin CJ, Kearney and Priestley JJ

CATCHWORDS:

Practice - Northern Territory - practice under *Supreme Court Rules* - application to substitute plaintiff - whether r36.01 applicable - whether mistake in name, or substitution, involved

Supreme Court Rules, r36.01 and r9.06
Bridge Shipping Pty Ltd v Grand Shipping SA and anor (1991) 103 ALR 607, applied
Dee Jay Engineering Pty Ltd v Moline Management Pty Ltd (unreported, Supreme Court (Mildren J), 2 August 1996), distinguished
The "Al Tawwab" [1991] 1 Lloyd's Rep 201, followed
McInnes v Wingecarribee Shire Council (1988) 64 LGRA 137, approved
International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India [1996] 1 All ER 1017, approved
Tomsimmat & Associates Pty Ltd v G & R Investments Pty Ltd (1993) 25 1PR 545, approved
The "Aiolos" [1983] 2 Lloyd's Rep 25, followed

REPRESENTATION:

Counsel:

Appellant:	A. Wyvill
Respondent:	S.R. Southwood

Solicitors:

Appellant:	James Noonan
Respondent:	Morgan Buckley

Judgment category classification:	C
Judgment ID Number:	kea97021
Number of pages:	41

kea97021

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA AT DARWIN

No. AP14 of 1996

BETWEEN:

MANNIN PTY LTD
Appellant

AND:

METAL ROOFING AND CLADDING PTY LTD
Respondent

CORAM: MARTIN CJ, KEARNEY AND PRIESTLEY JJ

REASONS FOR JUDGMENT

(Delivered 26 September 1997)

MARTIN CJ:

I have had the benefit of the draft reasons of Kearney J. in this matter and agree with his Honour that the appeal must be dismissed. However, acknowledging his Honour's detailed consideration of the issues, I think that my reasons slightly differ from his and it is better that I state them for myself. I am guided by what was said by McHugh J. in the *Bridge Shipping* case, but bear in mind that that case concerned whether there was a mistake by a

plaintiff as to the name of a defendant, where as here we are concerned with whether there was a mistake made by a plaintiff as to the name of a plaintiff.

The only evidence in the case was that of the solicitor, Mr Winter. It was not challenged. Notwithstanding the language that he used, the evidence does not really suggest that he made a mistake, rather he acted in accordance with instructions which he had received "to attempt to recover from the defendant ... the loss of profits that would be suffered by the plaintiff ...". At the time those instructions were given the business of the supermarket had not commenced. The solicitor says that he mistakenly believed when he drafted the Statement of Claim that Mannin Pty Ltd would be the company that would conduct the business, but if there was such a mistake then it was made upon the instructions of Mr McElwee. It must be inferred that at the time the instructions were given, Mr McElwee intended that Mannin Pty Ltd would conduct the business on its own account, and that it was later decided that Eire Pty Ltd would do so. Mr Winter deposes that the change of plan was not conveyed to him.

It is claimed that when the writ was issued Mannin Pty Ltd was not conducting the business, but that Eire Pty Ltd was doing so. If there was a mistake, it goes beyond a misnomer, misdescription, typographical or clerical error. On the material available, Mannin Pty Ltd must have known that it was not entitled to the relief it sought relating to lost profit. It could not have made a mistake. It was not conducting the business. The amendment seeks to

substitute Eire Pty Ltd for Mannin Pty Ltd as a party seeking damages for the loss.

This is not a case in which Mannin Pty Ltd was mistakenly described or named as the entity which had lost the business profit. It was deliberately nominated by Mr McElwee as that entity. If there was a mistake, it was in the belief that Mannin Pty Ltd was the entity entitled to the relief, that it had a legal right, where in fact it did not have such a right. That is far different from making a mistake as to name. Mannin Pty Ltd must be taken to have known that at the time the proceedings were commenced it had no right to the profits of the business, but it had failed to convey that to the solicitor, notwithstanding that it had previously instructed the solicitor that it would suffer that loss. The solicitor was permitted to issue the writ on the basis that that company was conducting the business. Whether Mannin Pty Ltd can be taken to have known that Eire Pty Ltd was conducting the business is not clear on the material available, but it is clear that it knew that Mannin Pty Ltd was not.

The mistake was not a mistake in name, it was a mistake in the joinder of the plaintiff as a party because it had wrongly instructed its solicitors that it had a right of action against the defendant for the loss of profits.

KEARNEY J:

This is an application for leave to appeal from an interlocutory judgment of 4 October 1996 in proceedings no.8 of 1993, dismissing the appellant's application of 23 July under r36.01 to add Eire Pty Ltd as a second plaintiff.

Background

(a) Proceedings no.8 of 1993

On 21 January 1993 the appellant instituted proceedings no.8 of 1993 against the respondent claiming damages for breach of contract. In its Statement of Claim it pleaded the following matters:

(1) that in June 1990 it had contracted to purchase from the respondent a prefabricated building in kit form, to be used in the construction of a supermarket by the plaintiff at Timber Creek;

(2) that it was a term of this contract that all the building materials comprising the prefabricated building, would be delivered by the respondent in Darwin by 27 July 1990;

(3) that the respondent was in breach of the contract, in that it failed to deliver the materials as it was contractually obliged to do;

(4) that by letter dated 15 November 1990 the appellant had made time of the essence of the contract, by requiring the respondent to deliver all the then-outstanding building materials to Timber Creek, by 24 November 1990;

(5) that the respondent having failed to deliver those materials by 24 November 1990, the appellant then terminated the contract and acquired from other sources the building materials it still required; and

(6) that as a result of the respondent's breach of contract, the appellant suffered loss and damage, totalling $89,229.51.

The appellant proceeded to particularise this loss, in par7. By far the largest element was its claim for $78,000 in par.7(iii), for "loss of profit for the

[appellant] being unable to operate the supermarket". This loss was for the 39 weeks between 1 October 1990 (when the supermarket should have opened had the materials all been delivered by 27 July 1990) and 29 June 1991 (when allegedly it in fact opened for business).

(b) Proceedings no.23 of 1995

Some 2 years later, in proceedings 23 of 1995 instituted on 7 February 1995 by Eire Pty Ltd as first plaintiff and Stamen Investments Pty Ltd as second plaintiff against the respondent as defendant, the plaintiffs claimed damages for negligence. Eire Pty Ltd has the same shareholders and directors as the appellant. The plaintiffs alleged in their Statement of Claim that:

(1) the second plaintiff owned Lots 13 and 20 in the Town of Timber Creek;

(2) the respondent was in the business of fabricating and supplying buildings in kit form;

(3) the appellant had entered into a contract with the respondent as described at item (1) on p1;

(4) the plaintiffs intended that, upon completion of the supermarket, the first plaintiff would lease it from the second plaintiff, and operate the business of the supermarket;

It will be recalled that the appellant had claimed damages in proceedings no.8 of 1993 on the self-same basis, that *it* had been unable to operate the supermarket. The two claims cannot stand together; the matter is explained at pp4-6. The plaintiffs continued, alleging that:

(5) by entering into the contract with the appellant (as per item (1) on

p2), the respondent owed a duty of care to the plaintiffs (particularised as requiring the delivery of the various building components on time, or within a reasonable time); and

(6) in breach of that duty of care the respondent negligently failed to deliver the components for the prefabricated building by 27 July 1990, or within a reasonable time thereafter.

The components not delivered on time were alleged to have been delivered between August 1990 and 29 April 1991. The plaintiffs went on to plead their damages, viz:

(7) By reason of the respondent's negligence, the plaintiffs had suffered damages (as particularized) in terms of loss of profit, due to the supermarket not opening for trading until 29 June 1991.

The first plaintiff claimed for loss of profits at $76,640, alleging that it had "lost the opportunity to trade the supermarket" for 39 weeks from 1 October 1990 to 29 June 1991. The second plaintiff claimed for loss of rental from the first plaintiff for that period, amounting to $15,851.00. The plaintiffs also sought an extension of time under s44 of the *Limitation Act* "to commence and maintain these proceedings". The respondent took the limitation point in its Defence.

The application of 23 July 1996

By Summons of 23 July 1996 in proceedings no.8 of 1993 the appellant sought leave to amend its Statement of Claim (outlined, p1) under r36.01 by:

(1) adding 'Eire Pty Ltd' as a second plaintiff in the proceedings, with the appellant thereby becoming the 'first plaintiff';

(2) adding new pars8-10 by which it would plead matters which

generally followed the lines of items (4)-(6) of the Statement of Claim in proceedings no.23 of 1995 (p1), though the reference here was only to 'Eire Pty Ltd'; and

(3) adding a claim that Eire Pty Ltd had suffered damages along similar lines to those specified in item (7) in proceedings no.23 of 1995 (p3), except that unlike the date of 29 June 1991 specified in item (7) it was pleaded that the supermarket did not open until 1 October 1991, and the loss of profit claimed was accordingly for a period of 12 months (not 9 months) from 1 October 1990 to 1 October 1991, and was claimed at $154,000 (not $76,640).

In this proposed amended Statement of Claim the appellant would maintain its claim for damages for breach of contract, but would no longer include as an item of damages its claim (p2) for a loss of profit of $78,000 from "being unable to operate the supermarket"; Eire Pty Ltd would claim damages for negligence in that regard, in the sum of $154,000.

The application was supported by the affidavit of Mr Winter of 22 July 1996; he had been the appellant's solicitor "on various matters" from 1982 until 1994. He deposed that the appellant had been incorporated prior to 1982. In that year he established a family trust for his clients, Mr & Mrs McElwee, the directors and shareholders of the appellant; the trustee company was Stamen Investments Pty Ltd. In 1989 he had arranged for the acquisition or incorporation of Eire Pty Ltd. In par5 he deposed that about 1989 he "became aware that Stamen had purchased the land and Eire had purchased and was conducting the Timber Creek Wayside Inn business on part of the land." This is clearly the land on part of which the supermarket was erected in 1991. He deposed in par6 that he was first instructed "in or about February 1991 … to

recover from the [respondent] the costs associated with purchasing substitute materials, down time for labour, travelling time and for the loss of profits that would be suffered *by the [appellant]* as a result of the delay in completion of the construction of the supermarket" (emphasis added). It can be seen that Mr Winter's client nominated the appellant as suffering the loss of profits. Mr Winter deposed in par7 that at his client's request he had "therefore included a claim for loss of profits in the writ"; hence the claim for $78,000 (p2).

He nevertheless said that he had been mistaken in believing when he drafted the Statement of Claim that the appellant was the entity which would have conducted the business of the supermarket during the period for which loss of profits were claimed. I note that the building had not been completed, and the supermarket had not commenced to trade, when Mr Winter was first instructed in February 1991; it was subsequently said to have been completed, and to be trading as at 29 June 1991 (see p3) or 1 October 1991 (p4); the Statement of Claim was not filed until 21 January 1993. Mr Winter appeared to have had in mind this lapse of time between his initial instructions in February 1991, the commencement of trading on 29 June (or 1 October) 1991, and his institution of proceedings on 21 January 1993, some 2 years in all, when he deposed in par7:

> "As I had received no information from the client to suggest otherwise [before he drafted the Statement of Claim], I had no reason to consider, and *I never considered, that some other entity [than the appellant] may*

have been proposed to conduct the business of the supermarket." (emphasis added)

It will be recalled (see p5) that Mr Winter's initial instructions of February 1991 were to claim for loss of profits suffered by the *appellant;* he *never* received any later instructions to the contrary. He deposed in par8 that it was not until November 1993, some 10 months after issuing the writ, and "after making numerous requests for information and documentation regarding the claim for loss of profits" that he first ascertained at a meeting with his client's accountant that Eire Pty Ltd was (and presumably always was to have been) the operator of the supermarket, not the appellant. He said that it was only then, in November 1993, that he realized "that the Statement of Claim [of 21 January 1993] did not accord with the facts, in that it pleaded [the appellant] as the operator of the supermarket". So it was in November 1993 that he first realized that his earlier belief, based on his client's instructions, was mistaken. He deposed further in par8:

> "*At no stage prior to this time* [that is, in the period of almost 3 years between February 1991 and November 1993] *had Mr McElwee* [his client] *or anyone else told me that it was Eire rather than Mannin that was proposed to conduct the business of the supermarket*. Had I known at the time that I settled the original writ and statement of claim that Eire was the company that would have carried on the business of the supermarket during the period of delay I would have included it as a second plaintiff and varied the statement of claim accordingly." (emphasis added)

The chronology of events after November 1993 appears from the affidavit of 10 September 1996 by Mr Tranthem, a solicitor in the employ of the current solicitors for the appellant and Eire Pty Ltd, viz:

> "3. On 21 July 1994, Mr Winter sought advice from counsel concerning the supermarket loss of profits claim.
>
> 4. On 23 August 1994, counsel's advice was provided.
>
> 5. On or about 8 September 1994 Mr Winter advised the [appellant] that it should seek independent advice in respect of the question of the supermarket loss of profits claim.
>
> 6. On or about 22 December 1994, Philip and Mitaros commenced to act for the [appellant].
>
> 7. On 7 February 1995, Eire Pty Ltd commenced separate proceedings [no.23 of 1995] against the [respondent]. …
>
> 8. Between February 1995 and March 1996, discussions took place between the parties concerning the basis of Eire's claim to an extension of time for Eire to commence the proceedings [no.23 of 1995]it had commenced against the [respondent]. During these discussions the [respondent] formally required particulars of the basis of Eire's claim to an extension of time under section 44 of the Limitation Act. These particulars were provided on or about 2 April 1996.
>
> 9. On 20 March 1996, Eire instructed James Noonan to consider the prospects of an application under Order 36 in these proceedings [no.8 of 1993]".

The decision of 4 October 1996

It is convenient first to set out, as far as material, the *Supreme Court Rules* - Orders 9 and 36 - relevant to the determination of the application of 23 July. Order 9 deals with the joinder of claims and parties. Rule 9.02 provides for the joinder of parties:

"(1) Two or more persons may be joined as plaintiffs … in a proceeding -

(a) where -

(i) if separate proceedings were brought by … each of them, a common question of law or fact would arise in all the proceedings; and

(ii) all rights to relief claimed in the proceeding (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions; or

(b) subject to subrule (2), where the Court, before or after the joinder, gives leave to do so.

(2) The Court shall not give leave under subrule (1)(b) unless it is satisfied that the joinder -

(a) will not embarrass or delay the trial of the proceeding;

(b) will not prejudice a party; or

(c) is not otherwise inconvenient."

Rule 9.06 provides for the addition, removal and substitution of parties:

"At any stage of a proceeding the Court may order that -

(a) a person who is not a proper or necessary party, whether or not he was one originally, cease to be a party;

(b) any of the following persons be added as a party:

…

(ii) a person between whom and a party to the proceeding there may exist a question arising out of, or relating to or connected with, a claim in the proceeding which it is just and convenient to determine as between that person and that party as well as between the parties to the proceeding; or

(c) a person to whom paragraph (b) applies be substituted for one whom paragraph (a) applies."

Rule 9.11(3)(a) provides:

> "Where an order is made under rule 9.06 … adding or substituting a person as *defendant* -
>
> (a) the proceeding against the new defendant commences on the amendment of the filed originating process …". (emphasis added)

Rule 9.12 provides inter alia for the consolidation of proceedings, or their trial at the same time.

Order 36 deals with amendment generally. For example, it deals with the situation where a party seeks to correct a mistake in a material matter in its Statement of Claim, such as the name or description of a party. Subrules 36.01(1) and (3)-(6) provide:

> "(1) For the purpose of determining the real question in controversy between the parties to a proceeding or of correcting a defect or error in a proceeding or of avoiding multiplicity of proceedings, the Court may at any stage order that a document in the proceeding be amended or that a party have leave to amend a document in the proceeding.
>
> …
>
> (3) An endorsement of claim or pleading may be amended under subrule (1) notwithstanding that the effect is to add or substitute a cause of action arising after the commencement of the proceeding.
>
> (4) A mistake in the name of a party may be corrected under subrule (1) *whether or not the effect is to substitute another person as a party*.
>
> (5) Where an order to correct a mistake in the name of a party has the effect of substituting another person as a party, the proceeding shall be taken to have commenced with respect to that person on the day the proceeding commenced.
>
> (6) The Court may, notwithstanding the expiration of a relevant limitation period after the day a proceeding is commenced, make an order

> under subrule (1) where it is satisfied that any other party to the proceeding would not by reason of the order be prejudiced in the conduct of his claim or defence in a way that could not be fairly met by an adjournment, an award of costs or otherwise." (emphasis added)

Subrule 36.01(6) accords closely with s48A of the *Limitation Act*. It may be noted that r36.01 refers to "mistake in the name" and nowhere mentions "description" or "misdescription" or "identity."

The application of 23 July came on for hearing before Angel J. The appellant submitted that its application was to amend the Statement of Claim under r36.01(4) 'to correct a mistake in the name of a party', the precise correction sought being 'the addition of Eire Pty Ltd as a plaintiff'. It relied, in particular, on the decision in *Dee Jay Engineering Pty Ltd v Moline Management Pty Ltd* (unreported, Supreme Court (Mildren J), 2 August 1996). Importantly, it founded on Mr Winter's mistake; see pp4-6. It submitted that when instituting proceedings no.8 of 1993 on 21 January 1993 he had intended, as regards the claim for loss of profit under par7(iii), to sue in the name of the entity which was intended to conduct the business of the supermarket. He was however mistaken at that time as to the *identity* of that entity; it was in fact intended to be Eire Pty Ltd, and not the appellant as he believed. The appellant and Eire Pty Ltd now sought to correct that mistake in *identity*, by substituting Eire Pty Ltd for the appellant in proceedings no.8 of 1993, though only in relation to the claim for loss flowing from the delayed opening of the supermarket. The appellant would remain in the action as a

plaintiff in its own right, to prosecute such of its claims for damages for breach of contract as were *not* related to that mistake in identity.

I observe that the appellant and Eire Pty Ltd sought to substitute in this way under r36.01(4) so as to gain the advantage of r36.01(5), rather than seeking to utilize Order 9; they would thus avoid the prospect - see r9.11(3)(a) which relates only to a defendant, *Cockerill v Westpac Banking Corp.* (1991) 32 FCR 36 and the discussion in *Timor Transport Pty Ltd (In liq) v Murlroam Pty Ltd* (1992) 2 NTLR 102 at 112 - of Eire Pty Ltd being faced with a limitation defence. It is the usual practice to refuse leave under r9.06 to add or substitute a plaintiff, once the limitation period applying to the claim against the defendant has expired; see *Creedon v Measey Investments Pty Ltd* (1990) 69 NTR 19 at 29-30. On the other hand, under r36.01(5), an amendment which corrects the *name* of a party under r36.01(4), relates back to the date of the issue of the writ. It is accordingly the significant fact that the limitation period had expired, which lies at the root of the application of 23 July under r36.01(4). If the application is open to be made under r36.01, whether it is granted is a discretionary matter in which the factors in r36.01(6) require consideration.

The respondent contended that at all material times Mr Winter intended only that the *purchaser* of the prefabricated building sue the defendant; that is, he intended that the appellant, and only the appellant, would sue, not Eire Pty

Ltd. He had made no mistake as to the *identity* of the proper plaintiff, the purchaser. His only mistake lay in what is now seen to be his wrong belief at the time that the purchaser of the building, the appellant, could recover as an element of the damages it claimed for breach of contract, a loss of profit arising from its inability to operate the supermarket due to the delay; that was *not* 'a mistake in the *name* of a party', which was what r36.01(4) was limited to, but a mistake as to the extent of the *liability* of the respondent to the appellant.

The respondent observed that the Statement of Claim pleaded only a breach of contract; and that proceedings in negligence had already been instituted (by other entities, including Eire Pty Ltd) in proceedings no.23 of 1995. It submitted that the appellant was here really seeking to *add* a new party, Eire Pty Ltd, of an entirely different description to the appellant; that is, to add as a party the entity which it now contended was to have operated the supermarket during the period of the delay alleged. Such an addition fell to be dealt with under r9.06(b).

The respondent submitted that the decision in *Dee Jay Engineering Pty Ltd* (supra) was distinguishable, because there the plaintiff's solicitors' mistake was as to the identity of the plaintiff; they had always intended to sue in the name of the owner of the tank but had made a mistake as to the identity of that owner - they were in fact the persons sought to be added; in contrast,

Mr Winter always intended that the purchaser of the building be the plaintiff, and he made no mistake in identifying the appellant as that purchaser.

It can be seen that the parties disagreed as to the categorization of Mr Winter's mistake. The plaintiff classified it as a mistake, as regards the claim in par7(iii), in the *name* of the intended supermarket trader; the respondent classified it as a mistake as to the extent of the respondent's *liability* to a correctly identified plaintiff, the appellant.

In an oral judgment his Honour noted the background to the proceedings, the appellant's claim therein for loss of profits arising from the delay in opening the supermarket, Mr Winter's apparent mistake at the time he drafted the Statement of Claim that the appellant was the entity which was to have carried on the supermarket business, and continued:

> "… the application is pursuant to Rule 36.01, allegedly to correct the name of a party. *It seems to me* upon a consideration of this matter that *there is no misnomer or mistake in the name of a party, or misdescription of a party, such as to enable the present application to be brought pursuant to Order 36.01.*
>
> *What is sought here is the addition of a party* with a different description, and with a different cause of action, to the existing plaintiff. In these circumstances *it cannot be said that the party suing remains 'the same in all but name or description if the amendment were allowed'; see per Dawson J in the Bridge Shipping case,* 66 ALJR 76 at 81 and also *Smart v Stuart* 83 NTR 1 at 6.
>
> It seems to me *it cannot be said that* from this statement of claim, as presently pleaded, *there is no doubt that the proprietor of the supermarket [Eire Pty Ltd] intended to sue for the alleged losses arising out of the delay in completion of the supermarket.*

The description of the present plaintiff [the appellant] as opposed to its identity, is as purchaser of the prefabricated building. *The present plaintiff* [the appellant] *identifies by a particular description; that is, [as] the person who contracted to purchase the prefabricated building. There was no mistake as to the name of the person who answers that description*. It is not possible to identify the intending plaintiff [Eire Pty Ltd] by reference to a description specific to the case presently pleaded in the statement of claim. The present plaintiff [the appellant] has not pleaded [in its statement of claim] a wrong name, nor has the present plaintiff [the appellant] pleaded the correct description of the intending plaintiff [Eire Pty Ltd].

The effect of the proposed amendment - that is, adding a new plaintiff [Eire Pty Ltd] with a different cause of action - *is not to correct '[a mistake in] the name of a party' within the meaning of those words in Order 36.01*.

In *Smart v Stuart* 83 NTR at 1 Mildren J said this [at 12]:

> "In considering whether there was "a mistake in the name of a party" within the meaning of O36.01(4) [of the *Supreme Court Rules* (Vic.), identical in effect with r36.01(4)] McHugh J [in *Bridge Shipping Pty Ltd v Grand Shipping SA and anor* (1991) 103 ALR 607; 66 ALJR 76] at ALR 628; ALJR 88-9, applied the test laid down by Lloyd LJ in *The "Al Tawwab"* [1991] 1 Lloyd's Rep 201 at 207:
>
> > "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 some narrower test. In *Mitchell v Harris Engineering* [1967] 2 QB 703 the identity of the person intended to be sued was the plaintiff's employers. In *Evans Construction Co. Ltd v Charrington & Co. Ltd.* (1983) 1 QB 810 it was the current landlord. In *Thistle Hotels Ltd v Sir Robert McAlpine & Sons Ltd* [Court of Appeal (Eng.), 6 April 1989, unreported] 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 as to the identity of the person intended to be sued. But if he gets the wrong description, it will be otherwise." (emphasis added)

> As the Chief Justice pointed out in *Smart v Stuart* [at 3], the rule is equally applicable as between plaintiffs and defendants; and *that passage*, it seems to me, which was approved by McHugh J speaking for the majority in *Bridge*, *is applicable here if one applies it to a plaintiff*, as opposed to a defendant.
>
> So for those brief reasons it seems to me the application must be dismissed, and with costs. The appropriate course is either to seek to join the company Eire in the present proceedings by a summons under Order 9 … Or alternatively to join the other action [no.23 of 1995] to which Eire is already a party [with proceedings no.8 of 1993]. … you cannot employ Order 36.01, as is sought here." (emphasis added)

I note that in *Smart v Stuart* (supra) the plaintiff, wrongly described as a personal representative, was permitted to correct that misdescription under r36.01, in the circumstances of the case. In *The "Al Tawwab"* (supra), where the plaintiff's solicitors intended that the owner of a damaged vessel at the time the writ issued be the plaintiff, but mistook its name, the owner of the parent company of the plaintiff was allowed to substitute for the plaintiff. In the circumstances, it was held that there was no reasonable doubt as to the identity of the intended plaintiff. Stocker LJ at 209 noted that the "difficult question" was "to decide whether the application to amend involves the identity of the party suing or only the name of such party", and, like Lloyd LJ, considered the test was -

> "… can the intending plaintiff … be identified by reference to a description which is specific to the particular case - e.g. landlord, employer, owners or shipowners? If the identification of the person intended to sue … 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. The nature of the claim will usually provide the answer to the problem."

This test resonates in the approach of the majority in *Bridge Shipping* ((supra) at p30.

The submissions on appeal

Mr Wyvill of counsel for the appellant submitted that in effect his Honour had wrongly held (p14) that in the claim as pleaded the 'particular description' of the appellant as 'the person who contracted to purchase the prefabricated building' was a *complete* description of *all* the capacities in which it sued, and so wrongly concluded that Order 36 was not available because there was no 'mistake in the name of a party' to be corrected. Further, his Honour had wrongly followed (p13) the approach of Dawson J in *Bridge Shipping* (supra) at 81. In so far as his Honour's conclusion rested on that approach, it was erroneous, because the 'broader approach' to r36.01(4) as stated by McHugh J is to be preferred. The Rules of Court considered in *Bridge Shipping* (supra) are identical in effect with those set out at pp8-10.

Par7(iii) of the Statement of Claim claims "loss of profit for the [appellant] being unable to operate the supermarket" as one of the particulars of damages claimed. Mr Wyvill submitted that this should be characterized as a claim for loss of profits by the operator of the supermarket. The belief which Mr Winter had at the time was not only as to the character of the appellant as a contracting party, a correct belief, but also as to its character as

the entity which had suffered the various losses particularised, a mistaken belief as regards the loss particularized in par7(iii). Mr Wyvill submitted that there was jurisdiction under r36.01(4) to correct the latter mistake. Adapting to the case of a plaintiff the terminology of the majority in *Bridge Shipping* (supra) (p29), where the mistake related to a defendant, he submitted that as regards the claim in par7(iii) Mr Winter intended to sue by reference to the ownership of the business of the supermarket, a 'property' of the intending plaintiff which he then believed, mistakenly, was unique to the appellant, whereas it was unique to Eire Pty Ltd.

Mr Wyvill submitted that *Dee Jay Engineering Pty Ltd* (supra) showed that the jurisdiction under O36 is not excluded by the fact that the application is to add, rather than substitute, a party; or by the fact that the new plaintiff may have a different cause of action to the original plaintiff.

Mr Southwood of counsel for the respondent supported generally the judgment and reasoning of Angel J (pp13-15).

The *Bridge Shipping* case: what's in a name?

It is instructive to examine what was said about r9.06 and 36.01(4) in *Bridge Shipping* (supra); I turn first to Dawson J's approach.

The facts in *Bridge Shipping* (supra) are set out at p25. Dawson J considered that the "seeming overlap between r9.06 and r36.01 is somewhat confusing", but was to be explained by history. His Honour turned to the origin of both Rules in O16 of the former Rules of Court (Vic) and said:

78 "Although r2 of O16 [of the former Rules] referred only to plaintiffs, it gave partial expression to the inherent jurisdiction of the Court to deal with misnomer or misdescription by amendment, the same principle being applicable in the case of plaintiffs and of defendants: *Alexander Mountain & Co (Suing as a Firm) v Rumere Ltd* [1948] 2 KB 436. *What is important is the distinction between the correction of a misnomer or misdescription,* which was something dealt with by r2 (now reflected in r36.01), *and the addition or substitution of parties* for the parties originally joined, which was something dealt with by r11 (now reflected in rr9.05, 9.06 and 9.07). *The correction of a misnomer or misdescription does not involve the substitution of a new party except in a technical or formal sense, since the party after the correction is the same person as was misnamed or misdescribed. I*n such a case, at least as a matter of theory, no question of defeating a statute of limitations arises." (emphasis added)

It can be seen that his Honour confined Order 36 strictly to "the correction of a misnomer or misdescription" of a party which nevertheless remained thereafter "the same person", while "the addition or substitution of parties" in any real sense was to be dealt with by Order 9. His Honour treated 'misnomer' and 'misdescription' as virtually indistinguishable in meaning, whereas the majority (p28) assigned a broader meaning to 'description'. Dawson J clearly sought to maintain the basic distinction between Orders 9 and 36, but recognized that:

79 "… the line between the correction of a misnomer or misdescription

and the substitution of a different party is not always easy to draw. The mere fact that the existing name is an accurate description of an existing person may be decisive [against the case being one of misnomer]."

The last observation appears to be a reference to what Walsh J said in *J. Robertson & Co Ltd (in liq.) v Ferguson Transformers Pty Ltd* (1970) 44 ALJR 441 at 443, a case in which a finding of misnomer was later reversed. Dawson J then cited by way of illustration of the point the facts and decision in *Davies v Elsby Brothers Ltd* [1961] 1 WLR 170; see Devlin LJ at 176. His Honour next made very explicit his view as to the scope of r36.01(4), already referred to (p18):

79 "Although r36.01(1) derives some of its wording from the old O16, r2 - which dealt with actions brought by mistake in the name of the wrong plaintiff - *its generality expresses the inherent jurisdiction of the court to amend defects or errors*, the jurisdiction which lay behind the single instance [the substitution or addition of a plaintiff where the original plaintiff was named by mistake] covered by O16, r2. *It is in that way only that [r36.01(1)] deals with the amendment of parties*. The addition, removal or substitution of parties is dealt with elsewhere, in r9.06. *In providing that a mistake in the name of a party may be corrected whether or not the effect is to substitute another party as a party, r36.01(4) is intended to serve the limited purpose of avoiding the difficulty where the formal effect of the correction of a misnomer or misdescription is to substitute another person as a party.* But *it does not otherwise authorise the addition or substitution of a party*. That must be done under r9.06." (emphasis added)

His Honour is here reading the concluding words in r36.01(4), emphasized at p9, as serving the 'limited purpose' of allowing correction of a mistaken name even where correcting it means that, formally, the identity of a plaintiff or defendant changes. Thus, as his Honour observed, it authorized the amendment of the name of a plaintiff from "Rainbow Spray Irrigation Pty Ltd" to

"Rainbow Spray Sales Pty Ltd", in *Rainbow Spray Irrigation Pty Ltd v Hoette* [1963] NSWR 1440; the amendment from "Philips Electrical Pty Ltd" to "Philips Industries Pty Ltd" in *J. Robertson & Co Ltd (in liq.)* (supra); and from "WJ Daniel & Co (a firm)" to "WJ Daniel & Co Ltd", in *Whitlam v WJ Daniel & Co Ltd* [1962] 1 QB 271. Each case however would depend on its own facts. Dawson J's view was that the concluding words of r36.01(4) do not enlarge the jurisdiction under r36.01; that jurisdiction remains limited to the correction of a mistaken name, and does not extend to the substitution of a party "except in a technical or formal sense", since the correction of a misnomer or misdescription may have that "formal effect". Contrast the wider interpretation of the concluding words in r36.01(4) in the majority approach (pp27-8). It can be seen that Dawson J's approach tends to preserve, as far as may be, a clear dichotomy between r9.06 and r36.01.

His Honour referred to the limits upon the exercise of the inherent jurisdiction "which lies behind the relevant paragraphs of r36.01", to the purposes of r36.01(5) and (7), and reiterated:

> 79 "But *the amendment* of the parties for which O36 provides *is restricted to an amendment to correct a mistake in the name of a party*. True it is that *the correction* of the mistake *may result in the substitution of another person as a party*, but this is permissible only if it is the result of the correction of an error in the naming of the true party." (emphasis added)

His Honour continued:

> 80 "It is, as I have endeavoured to explain, the inherent jurisdiction to

> correct a misnomer or misdescription which lies behind the relevant paragraphs of r36.01. Otherwise, the addition, removal or substitution of parties is dealt with by r9.06, with more stringent restrictions [contrast r9.11(3)(a) with r36.01(6)] where the amendment is sought after the expiry of a relevant period of limitation."

His Honour then referred to *Evans Constructions Co Ltd v Charrington & Co Ltd* [1983] QB 810, and accepted "entirely" the approach of Donaldson LJ at 821:

> "In applying 020, r5(3) it is, in my judgment, important to bear in mind that there is a real distinction between suing A in the mistaken belief that A is the party who is responsible for the matters complained of and *seeking to sue B, but mistakenly describing or naming him as A and* thereby ending up suing A instead of B. *The rule is designed to correct the latter* and not the former *category of mistake*." (emphasis added)

This emphasizes the distinction between a mistake as to the liability of the person sued (a mistake as to identity), and a mistake as to the name or description (but not the identity) of the person *intended* to be sued. It also indicates the importance of properly categorizing the mistake relied on.

Donaldson LJ went on to say at 821:

> "Which category [of mistake] is involved in any particular case depends upon the intentions of the person making the mistake, and [those intentions] have to be determined on the evidence in the light of all the surrounding circumstances."

I observe that O20 r5(3) of the Rules in England, a useful provision in the present type of case, has no precise counterpart in the wording of r36.01, though its provisions are to be found in the Rules of Court in several Australian States; see, for example, Pt.20 r4(1) and (3) of the NSW Rules. It

spells out the conditions which must be met to obtain leave to amend, where the correction of a mistake in the name of a party after a period of limitation has expired is alleged to have the effect of substituting a new party: the mistake must not be misleading, and not such as to cause any reasonable doubt as to the *identity* of the person intended to be made a party. No such pre-conditions to the grant of leave are to be found in r36.01(4); contrast (pp9-10) the pre-conditions in subrule 36.01(6). Importantly, the majority in *Bridge Shipping* (supra) considered that r36.01(4) and (6) - despite the language - did not have a "more restricted meaning" than O20 r5(3); see p27.

In *Evans Constructions Co Ltd* (supra) the majority in the Court of Appeal (Donaldson and Griffiths LJJ) allowed substitution of a respondent under O20 r5, outside the statutory time limit for bringing proceedings, on the basis that the plaintiff's solicitor had intended to serve the notice on its landlord, "but had made a genuine mistake [when naming the landlord] of a character to which O20 r5(3) can apply". Dawson J did not consider that this followed from what Donaldson LJ had said (p21); his Honour preferred the approach of Waller LJ, dissenting, and said:

80 "*A mistake in the name* of a party *is not*, to my mind, *the same thing as a mistake in the identity* of that party. In other words, one may intend to sue the landlord but be mistaken in the belief that X is the landlord. That is not to mistake the name of X, but to mistake the identity of the landlord." (emphasis added)

In this passage lies the crux of the difference between Dawson J's conception of the scope of r36.01(4), and that of the majority (p28). Dawson J expanded on his view, stating -

81 "… *that Evans Constructions thought that Charrington was liable because it thought that it was the landlord is not to the point.* No doubt a plaintiff ordinarily sues because he believes he has a claim and a defendant is sued because the plaintiff believes that he is the person liable. *If the claim lies in someone else* or if the defendant is not liable but someone else is, *that does not convert the mistake into a mistake in the name of the party joined*. It is not a question of giving the rule a narrow or a wide construction. Giving the rule its widest construction, *the question remains whether there was a mistake in name, not a mistake in the joinder of a particular party for some other reason."* (emphasis added)

His Honour gives no countenance to a misdescription which cannot be narrowly characterized as "a mistake in name". It can be seen that on this approach the application of 23 July lies outside the scope of r36.01(4), even if Mr Winter intended to sue in the name of the operator of the supermarket, because his mistake would be categorized as going to identity, not to name. The majority consider that while the mistake must be in the name, such a mistake exists where a plaintiff's solicitor mistakes the name of the person who *uniquely answers* the *particular description* by which he intends to sue (p29). Mistake in name encompasses a mistake in identity, in these circumstances; see, for example, *Seas Sapfor Ltd v Far Eastern Shipping Co.* (1996) 39 NSWLR 435.

Dawson J then cited, as illustrative of the distinction he drew, what was said in *Mitchell v Harris Engineering Co Ltd* [1967] 2 QB 703. In that case the plaintiff's solicitors issued a writ against H.E. Co. (Leeds) Ltd., instead of the plaintiff's employer, an associated company H.E. Co. Ltd; it was served after the limitation period expired. An application to substitute the name of the employer was held to be "an amendment to correct the name of a party" within O20 r5(3), since there had been a genuine mistake which did not mislead the true defendant. Dawson J concluded his analysis:

81 "It may sometimes be difficult to determine whether there is a mistake in name or a mistake in identity. When that is so and an amendment is sought under r36.01, the question can only be resolved by asking whether, in all the circumstances, it can reasonably be said that the party whose name is sought to be amended would remain *the same in all but name or description if the amendment were allowed*. If so, then there is a misnomer or misdescription and the rule applies notwithstanding that, as a matter of formality, the amendment results in the substitution of another entity. *If* not, and *the effect of the amendment would be,* not to correct the name of the party, but *to alter the identity of the party, then that rule does not apply*.

In the present case it is, to my mind, quite clear that there was no mistake made by Bridge Shipping in the name of the third party which it joined. It joined Grand Shipping and intended to join Grand Shipping. It did so because Grand Shipping was the owner of the "*Green Sand*" and it assumed that the owner was also the carrier. It was wrong in this, but it made no mistake about Grand Shipping's name. *Its mistake was in the identity of the carrier*. Rules 36.01(1) and (4) were, therefore, not available to Bridge Shipping." (emphasis added)

His Honour draws no distinction between "name" and "description". It can be seen that in his judgment if Bridge had intended to sue the carrier (and not the owner), but had wrongly identified the carrier as Grand (instead of Rainbow), it could not rely on r36.01(4) to substitute Rainbow for Grand, because that

would be the substitution of a different party stemming from a mistake in identity, and could only be done under r9.06. Contrast the majority view (p30).

The phrase first emphasized on p24 is that cited by Angel J at p13. It can be seen that Dawson J would confine r36.01(4) to correcting mistakes as to name, and not as to identity. McHugh J (with whom Brennan and Deane JJ agreed), construed r36.01(4) very differently. His Honour set out the facts in *Bridge Shipping* (supra), as follows:

85 "In May 1986, the vessel "*Green Sand"* left Brazil en route to Melbourne. On board were 32 containers of tobacco owned by Phillip Morris Ltd. That company had engaged the appellant, Bridge Shipping Pty Ltd (Bridge), to arrange for the carriage of those containers to Melbourne. Bridge employed another company to arrange the carriage of the goods and was unaware of the identity of the carrier. On 12 May 1986, the ship's master issued bills of lading in respect of the containers. The bills did not name the carrier. When the vessel arrived in Melbourne, a number of containers were missing and the contents of others were damaged.

On 8 January 1987, Phillip Morris Ltd issued a writ claiming damages against Bridge. Bridge sought contribution or indemnity from the person responsible for the damage. The solicitor for Bridge conducted a search of the Lloyd's Register. The search revealed that the registered owner of the vessel was Grand Shipping SA (Grand). Bridge then issued a third party notice against Grand. It was not until 29 September 1987 when Grand delivered its defence to the third party claim that the solicitor for Bridge discovered that, by a bareboat charter agreement made in Tokyo in 1984, Grand had chartered the "*Green Sand*" to Rainbow Line SA (Rainbow) and that Rainbow had been the carrier of the tobacco.

The defence to the third party proceedings was not delivered until after the time for suing Rainbow for indemnity or contribution had expired. In an attempt to overcome this difficulty Bridge made an application under O36.01 to substitute Rainbow as a party for Grand. However, Master Brett refused the application. King J dismissed an appeal from the

Master's decision. An appeal to the Full Court of the Supreme Court of Victoria (Crockett, Kaye and Southwell JJ) against the decision of King J was unanimously dismissed."

His Honour then set out the "competing interpretations" of O36.01, viz:

85 "*Bridge contends that the case is within O36.01(4) because the mistake which it made was a mistake as to which person or corporation fell within the description of the carrier of the tobacco.* Bridge says that the mistake which it made was *not* a mistake as to the category of persons who were subject to the legal liability. If, for example, Bridge had mistakenly sued the wharfinger, thinking it was liable, and now wished to sue the carrier, it concedes that there would not be a mistake "in the name of a party". But Bridge contends that, since it has made a mistake as to the name of the carrier, it has made a "mistake in the name of a party" within the meaning of O36.01(4). In the Full Court, Crockett J, with whose judgment Kaye and Southwell JJ agreed, held that the class of mistake with which the subrule deals is more limited. His Honour said:

> "I should have thought that the better view is that the rule as to correction of a mistake in the name of a party was intended to (and, in fact, must) be confined to mere cases of misnomer, misdescription, typographical or clerical error and the like. That is to say, cases in which there was no merit in the joined defendant's being able to claim immunity from action nor hardship to him by his inability to rely on a time bar. Accordingly, despite O36 in general being remedial in its operation, subr(5) [sic] [subr(4)] should, I consider be strictly construed."

[Crockett J] went on to say:

> "It [Bridge] never intended to sue Rainbow. That was because it made an error as to who was the carrier. That mistake was not one as to the name of the person it intended to sue. *It was a mistake as to the identity of the person sued. That is not a mistake of the kind that should allow Rainbow to be deprived of its time-bar defence. Nor should the rule be construed so as to permit such a deprivation."* (emphasis added)

It can be seen that this accords closely with Dawson J's approach (p23) to the scope of r36.01(4). McHugh J commented:

85 "If the reasoning of the Full Court in the present case is correct, the enactment of O36.01 has made little, if any, difference to the pre-1986 position."

His Honour then dealt at 85-87 with the history of r36.01, noting that the pre -1986 position on amendment was as stated by Devlin LJ in *Davies v Elsby Brothers Limited* (supra), to the effect that a plaintiff would not be permitted to amend if the defendant would thereby be deprived of his limitations defence and the amendment involved the addition of a party and not the mere correction of a misnomer. His Honour discussed the effect of O20 r5(3) in England, and the corresponding Part 20 r4(3) in New South Wales, and referred to their "similarity" to O36.01; I have already touched on the differences (pp10, 22). He then dealt with the construction of r36.01:

> "Having regard to the history of O20, r5(3) of the English Rules, it is obvious, as the English Court of Appeal pointed out in *Mitchell v Harris Engineering* [1967] 2 QB 703 that the subrule was intended to overcome the decision in cases such as *Davies. There is no reason why its Australian counterparts should be given a more restricted meaning.* Consequently, *in so far as cases* in Queensland and the judgment of the Full Court of the Supreme Court of Victoria in the present case *suggest that such a rule applies only to misnomers* and that *Davies* is still a relevant decision, *they were wrongly decided and should be overruled.* The more difficult decision, however, is to determine the scope of such rules and in particular O36.01(4)." (emphasis added)

It can be seen that his Honour's approach, unlike that of Dawson J (p23), was that the scope of r36.01(4) extended beyond the mere correction of a misnomer; the difference in wording between r36.01(4) and (6), and those

Rules in Australia which follow O20 r5(3), was clearly not regarded as significant. McHugh J then discussed the scope of O36.01(4), viz:

88 "The concluding words of [r36.01(4)] "whether or not the effect is to substitute another person as a party" enable a plaintiff to substitute one person for another person as a party to the action. *Those words also imply that the fact that the plaintiff intended to sue the person who was sued does not prevent the subrule applying provided that there was a mistake in the name of the person sued*." (emphasis added)

The words emphasized on their face go no further than the construction of r36.01(4) favoured by Dawson J (p18), but there is no mention of the substitution of another party being limited only to a 'formal' consequence of correcting a misnomer. His Honour continued:

88 "Moreover, *a plaintiff may make "a mistake in the name of a party*" not only because the plaintiff mistakenly believes that a certain person, whom the plaintiff can otherwise identify, bears a certain name, but also *because the plaintiff mistakenly believes that a person who answers a particular description bears a certain name*." (emphasis added)

Here his Honour, following Lloyd LJ in *The "Al Tawwab"* (pp14, 15), clearly departs from Dawson J's approach; by using answering to a 'particular description' as the hallmark of an intended defendant, he treats misidentification of the person of that description as amounting to a mistake in the name of the intended defendant, because the person sued lacked the hallmark. McHugh J illustrated this type of mistake in the passage emphasized below:

88. "Thus, a plaintiff may make a mistake "in the name of a party" because, although intending to sue a particular person whom the plaintiff knows by sight, the plaintiff is mistaken as to that person's name. Equally, *the*

plaintiff may make a mistake "in the name of a party" because, although intending to sue a person whom the plaintiff knows by a particular description, eg the driver of a certain car, the plaintiff is mistaken as to the name of the person who answers that description." (emphasis added)

Dawson J would regard the latter example as outside the scope of r36.01(4), as amounting to an error in identity, not in name. McHugh J then set out in a vital passage the unifying thread which rendered both types of mistake examples of mistake as to name within r36.01(4), viz:

88 "In both cases, the plaintiff knows the person intended to be sued by reference to some property or properties which is or are peculiar to that person, but is mistaken as to the name of that person. In the first case, the properties which identify the person are personal characteristics; *in the second case, they are the properties which are of the essence of the description of that person. But for the purpose of subr(4) that distinction is irrelevant*. In both cases, the plaintiff was mistaken only as to the name of the person intended to be sued. There is no warrant for treating subr(4) as dealing only with the case where the properties which identify the party are inherent properties. That is, there is no warrant for treating subr(4) as dealing only with the case where the plaintiff says: "The person I wish to substitute as a party is that entity which I identified by certain inherent properties peculiar to it but whose name I mistakenly believed was X." *The subrule applies* equally to the case *where* the plaintiff says: "*The person I wish to substitute as a party is that entity which I identified by reference to certain properties which are true of it and of no one else and whose name I mistakenly believed was X*." In both cases, a mistake in the name of the party has occurred and can be seen to have occurred only because the person sued does not have or is not identified by some property or properties which is or are peculiar to the person intended to be sued and to no one else." (emphasis added)

It can be seen from this analysis that if it were found *as a fact* that Bridge had intended to join the carrier of the tobacco, but in doing so had mistakenly believed that Grand was that carrier (instead of Rainbow), McHugh J would hold - as he did (p30) - that r36.01(4) enabled Rainbow to be substituted for

Grand; the "property" of Rainbow, "peculiar to [it] and to no one else" for the purposes of this case, would be the fact that it was the carrier of the tobacco. Contrast the view of Dawson J at p24 that r36.01(4) does not apply in such a situation. McHugh J concluded:

88 "Order 36.01(4) is a remedial rule and should be given a beneficial interpretation. It is proper to give it the widest interpretation which its language will permit *(Holmes v Permanent Trustee Co of New South Wales Ltd* (1932) 47 CLR 113 at 119). *It should be interpreted to cover not only cases of misnomer,* clerical error *and misdescription but also cases where the plaintiff, intending to sue a person he or she identifies by a particular description, was mistaken as to the name of the person who answers that description.* In my opinion, *Evans v Charrington* and [*Lloyd Steel (Aust) Pty Ltd v Jade Shipping SA* (1985) 1 NSWLR 212] were correctly decided.

To give the rule the meaning for which Bridge contends does not mean that a person can sue *any* person and then at a later time substitute another person for the original defendant. *The rule imposes three limitations on a person's right to amend.* First, there must be a mistake. Secondly, the mistake must be "in the name of a party". Thirdly, the court may only make the order where it is satisfied that any other party to the proceeding would not by reason of the order be prejudiced in the conduct of his or her claim or defence in a way that could not be fairly met by an adjournment, an award of costs or otherwise: O36.01(6)." (emphasis added)

The third limitation, found in r36.01(6), may be contrasted with the far more specific limitation in O20 r5(3) at pp21-22. As to the case before the Court, however, his Honour concluded that Bridge failed on the facts, viz:

88 "The conclusion that Bridge impliedly intended to sue the carrier is inconsistent with the terms of the statement of claim, with the inferences to be drawn from that document, and with the affidavit evidence of Bridge's solicitor seeking to explain the mistake.

If Bridge had intended to sue the carrier and had mistakenly believed that the name of the carrier was Grand, it would follow that Bridge had made a mistake "in the name of a party"."

…

89 "The statement of claim in the present case does not indicate that Bridge sued Grand because it believed that Grand was the carrier but was mistaken as to the name of the carrier. To the contrary, the allegation in par3 that Grand was "the owner of the vessel" at all material times indicates that Bridge intended to sue Grand because it believed that Grand was the owner of the vessel."

…

"Bridge made no mistake as to description of the party which it wished to sue. It intended to sue the owner and did so. Bridge's mistake was not one of misnomer, clerical error or misdescription. Nor was it one where, intending to sue a person whom it identified by a particular description, it was mistaken as to the name of the person who answered that description."

…

The mistake which Bridge made was that it believed that it had rights against the owner of the vessel. But that was not a mistake "in the name of a party"."

It can be seen that in his Honour's judgment Bridge failed *on the facts* to bring its application within the scope of r36.01(4), because it had not established that it had intended to sue the carrier but had mistaken its name. In Dawson J's judgment (p22), even if Bridge had established those factual matters, it would not have brought itself within the scope of r36.01(4).

Toohey J in a separate judgment also considered, like the majority, that there was "no justification for giving [O36.01] a narrow operation".

His Honour said:

83 "… to spell out the boundaries of the provision is far from easy … a

wrong assessment of one person among several as the person liable in respect of the plaintiff's claim is not a "mistake in the name of a party". … The question is whether there was a mistake in the name … *that question must be answered by reference to all the circumstances including the state of knowledge and belief of the plaintiff and the plaintiff's intentions, judged by reference to the circumstances. …*

84 Where an application under O36.01(4) is resisted, *the task* for the Court *is to characterise the mistake which the applicant claims to have made.* In the present case, if Bridge Shipping intended, by its third party notice, to join the carrier of the goods in the proceeding and wrongly concluded Grand Shipping to be the carrier, it is but a short step to conclude that Bridge Shipping made a mistake in the name of the third party. Even on that approach, it would not be right to say that it was a mere case of a misnomer. It was more than that, but it was still a "mistake in the name of a party" within O36.01. But if, as the material before us shows, Bridge Shipping intended to join Grand Shipping as a third party because it understood no more than that Grand Shipping was the owner of the ship and that the bill of lading had been issued on its behalf, the situation was not one of mistake in the name of the third party. Bridge Shipping was right in its understanding that Grand Shipping was the owner of the ship. It was wrong in its understanding that the bill of lading had been issued on behalf of Grand Shipping. Put another way, Bridge Shipping's mistake was as to the existence of a charter to Rainbow Line; it did not know that there had been a bareboat charter. The solicitor's mistake was, as counsel for Grand Shipping contended, "the incorrect assumption that there was no person interposed between the third party he had sued - the owner of the vessel - and those who were responsible for issuing the bill of lading and having care of the cargo and carrying it". *Bridge Shipping joined Grand Shipping as owner of the ship, not as carrier of the goods.* And, so far as the evidence reveals, that was Bridge Shipping's intention.

The application was not to correct a mistake in the name of a party by substituting another person as a party (O36.01(4)); it was an application to substitute a person who ought to have been joined as a third party in the first place: O9.06(c)." (emphasis added)

It can be seen that Toohey J's approach to O36.01(4) was in general accord with that of the majority, which is binding on this Court.

Conclusions

The court has "very ample jurisdiction to grant amendments … leaving it to the discretion of the court to decide when justice requires that such an amendment should or should not be granted": see *McInnes v Wingecarribee Shire Council* (1988) 64 LGRA 137 at 144, per Priestley JA.

Here the appellant relies wholly on a mistake by Mr Winter, who caused the writ to issue. This approach accords generally with what Evans LJ said in *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India* [1996] 1 All ER 1017 at 1026:

> "When it is said that the wrong plaintiff has been named, this must be taken as a reference to the intention of the persons who caused the writ to be issued, rather than of the person in fact named. Those persons in the present case were the trustee and his legal advisers."

In terms of what Donaldson LJ said in *Evans Constructions Co Ltd* (supra) at 821 - see p21 - and what Toohey J said in *Bridge Shipping* (supra) at pp31-32, to categorize that mistake the question to be answered is: what were Mr Winter's intentions at the time he caused the writ to issue, assessing the evidence of those intentions in the light of the then surrounding circumstances, including his then state of knowledge and belief? His decision to nominate the appellant as plaintiff is to be assessed in light of matters as they then stood. As Bryson J said in *Tomsimmat & Associates Pty Ltd v G & R Investments Pty Ltd* (1993) 25 1PR 545 at 551:

> "Whether a decision or event is a mistake must in my opinion be judged according to the facts and circumstances which existed when it happened, and not according to the wisdom of hindsight."

The evidence is that Mr Winter acted strictly in accordance with the instructions of his client Mr McElwee, clearly the directing mind and will of both the appellant and Eire Pty Ltd. These were to sue for "the loss of profits that would be suffered by the appellant" (p5). Mr Winter never received any further instructions varying those initial instructions, before he issued the writ in January 1993. In particular, he received no instructions to sue for that loss in the name of Eire Pty Ltd. See pp4-6.

In my opinion, the claim to correct a mistake in the name of a party under r36.01(4) fails on the facts. Mr Winter made no mistake as to his client's instructions as to the identity of the proposed supermarket trader, at the time he caused the writ to issue. There is no evidence from the client or from anyone other than Mr Winter, as to those instructions or that identity. As far as Mr Winter's instructions went, the claim for loss of profits he was instructed to make was an element of the loss suffered by the appellant in its capacity as purchaser of the building materials. It may be that the client Mr McElwee was mistaken in instructing Mr Winter to that effect; however, no evidence has been advanced of mistake by the client, the appellant does not seek to rely on any such mistake, and Mr Winter did not mistake the instructions he received.

If, as is now suggested, the appellant cannot recover for loss of profits, Mr Winter's mistake at the time was as to the extent of the liability in damages of the respondent to the appellant; such a mistake is an error of law as to the appellant's rights, not a mistake as to name within r36.01(4). It is the same type of mistake as was made by the plaintiff-insurer in *Central Insurance Co Ltd v Seacalf Shipping Corporation (The "Aiolos")* [1983] 2 Lloyd's Rep 25: as Oliver LJ put it at 31, it was "an erroneous belief that the plaintiff, because he was in fact what he was thought to be … had as a result of that certain legal rights which he did not in fact have."

The decision in *Dee Jay Engineering Pty Ltd* (supra) is distinguishable, because Mr Winter made no relevant mistake as to his instructions on the identity of the entity to claim for loss of profits, and no mistake by his client is relied on.

In my respectful opinion his Honour erred at p13 in applying the test for r36.01(4) formulated by Dawson J in *Bridge Shipping* (supra) at 81, that the plaintiff must remain "the same in all but name or description if the amendment were allowed" (p24). That is not a test under the majority approach in *Bridge Shipping* (supra) at 88; see p28. The appellant could have succeeded, as far as concerned the claim for loss of profits, had Mr Winter intended that the plaintiff be the entity which would have operated the

supermarket, and had he then mistaken his instructions as to the identity of that entity. However, his Honour rightly applied at pp14-15 the approach of the majority in *Bridge Shipping* (supra).

An immediate practical problem in applying the test in *Bridge Shipping* (supra) is that unlike the examples mentioned at p15 - landlord, employer, owners or shipowners - the "particular description" relied on here is "the *intended* operator of the supermarket". Analyzing the situation in accordance with that test, the mistake relied on by the appellant was solely that of Mr Winter. For the appellant to succeed, the conclusion which had to be drawn was that Mr Winter intended in January 1993 that the claim for loss of profits be made by the entity to have operated the supermarket during the period of delay. That conclusion cannot be drawn from Mr Winter's affidavit, from which the state of his then knowledge and belief are to be inferred. Such a conclusion is inconsistent with his affidavit (pp4-6), and the terms of the statement of claim (p1). Those terms indicate that in accordance with his instructions his intention was that the purchaser of the supermarket, the appellant, would be the plaintiff; he acted in accordance with that intention. The mistake upon which the instructions to Mr Winter appear to have proceeded at the time was that the appellant had the right to claim for loss of profits against the respondent. That was not a "mistake in the name of a party". Mr Winter made no relevant mistake, as far as concerns r36.01(4). The appellant's case therefore fails to meet the first of the "three limitations"

(p30) on the right to amend under r36.01(4), specified by McHugh J in *Bridge Shipping* (supra) at 88; there was no mistake.

Since the application does not fall within the compass of r36.01(4), the question of the exercise of the discretion under that provision does not arise; nor does the question whether a substituted plaintiff may rely on a new claim. I observe that it may be that to deal with amendments, particularly where a limitation period has expired, consideration should be given to replacing r36.01 with the more detailed common form amendment provision found, for example, in Part 20 of the *Supreme Court Rules* of New South Wales.

In the result I respectfully agree with the decision of Angel J that the application of 23 July be dismissed, for the reasons I have endeavoured to state. Accordingly, I consider that the application for leave to appeal from the judgment of 4 October 1996 should be dismissed, with costs.

PRIESTLEY J:

I agree that this application for leave to appeal should be dismissed with costs.

The application was based on Order 36 sub-rules (1) and (4) and for it to succeed the applicant had to show there had been "*a mistake in the name of*" the plaintiff.

The proceedings had been brought in the name of the plaintiff by the plaintiff's solicitor, on the instructions of the plaintiff's directors. The evidence does not show that at the time of giving the instructions the instructions were in any respect mistaken by the givers or misunderstood by the solicitor. It may be events between the giving of the instructions and the commencement of the proceedings meant that the instructions should have been changed; however, they were not. Acting on his unchanged instructions the solicitor commenced the proceedings. I do not think these circumstances disclose any mistake having been made in the name of the plaintiff.

Order 36 sub-rule (4) (with its benign effect upon the limitation question) therefore gave no basis for the application which was in my opinion rightly refused by Angel J.

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