

1983 January 26

[SAVVIDES, J.]

WILLIAMS AND GLYN'S BANK LIMITED,

Plaintiff.

v.

THE SHIP "MARIA" NOW LYING AT THE PORT
OF LARNACA,

Defendant.

(Admiralty Action No. 59/82).

Company—Foreign (English) Company—Change of name through re-registration by virtue of the provisions of the English Companies Act, 1980—Change of the name does not affect or renders defective the legal proceedings which were instituted in the original name of the plaintiff—Section 19(4) of the Companies Law, Cap. 113 and section 18(4) of the English Companies Act, 1948. 5

Practice—Writ of summons—Amendment—Action commencing in the name of the proper plaintiff whose name had to be subsequently amended due to a change in its description effected after the institution of the action—Application for amendment correctly based on Order 28 of the English Rules—Order 16, rule 2 not applicable. 10

Practice—Misnomer—Correction of, a matter within the inherent jurisdiction of the Court—Court should not allow people to take advantage of a misnomer when every one knows what was intended. 15

When the above action was originally filed the name of the plaintiff was described as "Williams and Glyn's Bank Limited of London". As a result of the enactment in England of the Companies Act, 1980, any public company which was limited by shares or by guarantee had to be re-registered as a public Company and the word "Limited" had to be substituted by the word: "public limited company". The plaintiff, in compliance with the provisions of the said Act, was re-registered as a public company of limited liability and a certificate of registration dated 10.3.1982 was issued describing the plaintiff as "Williams and Glyn's Bank Public Limited Company". As a result of 20 25

such change the plaintiff applied to have its name as described in the writ of summons amended accordingly to correspond with the correct description of the name as mentioned in the certificate of re-registration issued in England.

5 Counsel for the defendant ship raised a preliminary objection that the application should be dismissed on the ground that it was made on behalf of a person, namely, "Williams and Glyn's Bank Limited" who ceased to exist as a body corporate as from 10.3.82 and that as from such date a new body corporate came
10 into existence namely, "Williams and Glyn's Bank plc", which is a different legal person to that of the applicant or the original plaintiff in this action. Counsel for the defendant further contended that the application was wrongly based on Order 28 of the English Rules as it should have been based on Order 16.
15 rule 2 which is the only rule applicable in cases of amendment for misnomer and that once such Order has not been relied upon in support of the application it should be dismissed.

Held, that this Court is satisfied, on the material before it, that
20 the plaintiff company has never ceased to exist and that by operation of law, the plaintiff being "an old company as defined in the Law" had to be re-registered under the 1980 Act, as a result of which its original description had to be amended to correspond with its description according to the certificate of re-registration such description being "Williams and Glyn's
25 Bank plc."; that the change of such name does not affect or render defective the present legal proceedings which were instituted in the original name of the plaintiff (see section 19(4) of our Companies Law, Cap. 113 and section 18(4) of the English Companies Act, 1948); accordingly the preliminary objection
30 must fail.

(2) That a perusal of Orders 16 and 28 and the notes thereto in the Annual Practice, makes it abundantly clear that whereas Order 16 provides as to who should be the proper parties in civil proceedings and regulates the proceedings and the
35 procedure where a new party has to be added or substituted or where the proceedings are brought in the name of the wrong party as plaintiff or defendant, Order 28 regulates matters pertaining to any necessary amendments of the writ of summons, the indorsement of the writ of summons or the pleadings: that

the present case is not one of adding a new party or where the action was brought in the name of the wrong plaintiff but a case where the action commenced in the name of the proper plaintiff whose name had to be subsequently amended due to a change in its description effected after the institution of the action; and, that therefore, Order 16, rule 2, is not applicable in the circumstances of the present case and counsel for the applicant correctly based this application on Order 28; that irrespective of the provisions of the Rules, correction of a misnomer especially in the circumstances of the present case is a matter within the inherent jurisdiction of the Court and that a Court "should not allow people to take advantage of a misnomer when everyone knows what was intended" (See *Nittan v. Solent Steel* [1981] L1. L.R. Vol. 1, p. 633 at p. 637, per Lord Denning M.R.); that, therefore, the application will be granted and an order for the amendment of the writ of summons will be made accordingly.

Application granted.

Cases referred to:

- Spyropoulos v. Transavia Holland N.V.* (1979) 1 C.L.R. 421; 20
Alexander Mountain Co. v. Rumere Ltd. [1948] 2 All E.R. 144;
and on appeal [1948] 2 All E.R. 482 at p. 485;
Nittan v. Solent Steel [1981] L1. L.R. Vol. 1 p. 633;
Ayscough v. Bullar, 41 Ch. D. 341;
White v. L.G.O. Co. [1914] W.N. 78; 25
Charlotte [1908] P. 206;
Duke of Buccleuch [1892] P. 204;
Kendall v. Hamilton, 4 App. Cas. 504;
Pearlman (Veneers) S.A. (Pty) Ltd. v. Bernhard Bartels [1954]
 1 W.L.R. 1457. 30

Application.

Application by plaintiff for an order of the Court that certain amendments be made to the writ of summons.

M. Montanios with *P. Panayi (Miss)*, for the applicant-plaintiff. 35

M. Eliades with *A. Skordis*, for the respondent ship.

H. Solomonides for *L. Papaphilippou*, for the intervener.

Cur. adv. vult.

SAVVIDES J. read the following decision. The plaintiff instituted this action against the defendant ship claiming to enforce a loan agreement and a mortgage against her in the sum of U.S. dollars 7,202,465.

5 On the application of the plaintiff the defendant ship was arrested on the 26th February, 1982 whilst lying at the port of Larnaca. On or about the 9th March, 1982 the ship was moved to the port of Limassol, in compliance with directions made by this Court on the application of the Marshal and with the consent of all parties concerned, for safety purposes, and ever since she has been lying outside the port of Limassol.

This action is, in fact, one of a series of actions brought against the defendant ship, most of them being actions by the officers and members of the crew and in a number of them judgments have already been given. Also, a number of interlocutory applications have been made in this action, most of which have been determined and a number is still pending for trial.

By the present application which was filed on 3.11.82, the plaintiff Bank applies for an order of the Court that certain amendments be effected on the writ of summons and, in particular, in respect of the description of the plaintiff's name and the locus of the defendant ship as originally mentioned on the writ of summons. This application is related to another application filed on behalf of the defendant ship on 26.10.82 which was also fixed for hearing on the same day, whereby a prayer is made for an order of the Court setting aside the writ of summons and/or for an order of the Court striking out the plaintiff as a party in the present action and/or dismissing the action. When both applications came up for hearing before this Court, by consent of the parties it was agreed that the present application of the plaintiff should be heard first, as the result of same may dispose of the application filed on behalf of the defendant ship.

I shall first deal briefly with the facts of the case which preceded the filing of the present application. The plaintiff, a public company of limited liability, is a bank and instituted this action against the defendant ship whereby it claims:

(1) U.S. dollars 7,202,465 together with interest thereon as from 16.2.82 to payment, payable to the plaintiff under

a loan agreement dated 12.10.78 and a mortgage on the said ship dated 23.5.77.

- (2) The possession of the defendant ship and for an order for the appraisalment and sale of same.

When the action was originally filed the name of the plaintiff was described as "Williams and Glyn's Bank Limited of London" and the defendant ship was described as "The ship 'Maria' now lying at the port of Larnaca". Subsequent to the filing of the action, as already mentioned, the ship, having been arrested, was moved to the port of Limassol and, as a result, the description of the ship as "lying at the port of Larnaca" did not correspond to reality. Furthermore, as a result of the enactment in England of the Companies Act 1980, any public company which was limited by shares or by guarantee had to be re-registered as a public company and the word "limited" had to be substituted by the words "public limited company". According to the affidavit sworn on behalf of the plaintiff dated 11.11.82, which is before me, and a copy of a certificate of re-registration annexed thereto, the plaintiff, in compliance with the provisions of the said Act, was re-registered as a public company of limited liability and a certificate of registration was issued describing the plaintiff as "Williams and Glyn's Bank Public Limited Company". As a result of such change, the plaintiff applied to have its name as described in the writ of summons amended accordingly to correspond with the correct description of the name as mentioned in the certificate of re-registration issued in England.

At the commencement of the hearing of this application counsel for the respondent raised a preliminary objection that the present application should be dismissed on the ground that it was made on behalf of a person, namely, "Williams and Glyn's Bank Limited" who ceased to exist as a body corporate as from 10.3.82 and that as from 10.3.82 a new body corporate came into existence, namely, "Williams and Glyn's Bank plc", which is a different legal person to that of the applicant or the original plaintiff in this action. As such objection was in substance raising matters which were in issue in the main application, that is, whether the plaintiff who instituted this action, and who is the applicant in these proceedings, is the same legal person as the one mentioned in the certificate of re-registration

of 10.3.82, I decided to leave such preliminary objection to be heard together with the main issue before me after hearing full argument from counsel on both sides.

5 In the course of the hearing counsel for the defendant agreed as to the amendment of the description of the defendant ship, which appeared on the writ of summons and all subsequent proceedings, by striking out the words "now lying at the port of Larnaca", which were following the name of the defendant ship, and an order to that end was made accordingly.

10 Counsel for the applicant in arguing this application submitted that the amendment is a formal one and was necessitated in view of the change in the description of the name of the plaintiff as a result of the provisions of the English Companies Act, 1980, which came into force on 23.6.81, and in particular, in respect
15 of section 8, in consequence of which the word "limited" following the name of a public company had to be substituted by the words "public limited company", the abbreviation of which under section 78(3) of the Act is "plc" as against the abbreviation of the word "limited" by "Ltd.", as a result of which
20 plaintiff had to apply for re-registration under the amended Law. By such re-registration, counsel contended, the applicant has not lost its legal entity but the case is one of misnomer created by a change in the legislation which necessitated an amendment of the writ of summons as applied for. In support
25 of his argument that "Williams and Glyn's Bank Limited" and "Williams and Glyn's plc" is the same legal entity, he referred to the contents of the affidavit sworn on behalf of the applicant and the exhibits annexed thereto with particular reference to the contents of exhibit 'B' attached to the supplementary
30 affidavit of Miss Panayi dated 11.11.82 to the effect that in a similar action in personam brought in England by the same plaintiff against the owners of the defendant ship, a similar amendment was necessitated and effected by consent. The nexus between the two names appears from the amendment by
35 consent made in such action where the word "limited" was substituted by the word "plc". There is power vested in the Court, counsel submitted, under the Cyprus Admiralty Rules and the English Rules applicable in admiralty proceedings in Cyprus to order such an amendment.

40 Counsel for the respondent ship, on the other hand, argued

that the present application was made by a person who ceased to have a legal entity and in consequence it has to be dismissed on this ground. This was, in fact, the preliminary objection which was left to be decided together with the main issue. Dealing with the substance of the opposition, he contended that the application is groundless and it is based on Order 28, rule 12 of the English Rules which is not applicable in the present case. Order 28, rules 1-12, counsel submitted, do not apply in the case of "nuisance" which is what is alleged in this application. The case of misnomer is covered by Order 16, rule 2 of the English Rules and such rule is not relied upon by the applicant in support of his application. As to the various exhibits which were before the Court and, in particular, Action No. 691/82 of the High Court of Justice in England, copy of which was annexed to the affidavit sworn on behalf of the applicant, counsel for the respondent contended that such an exhibit could not and should not be taken into consideration as it refers to an action against a certain company for which there is no evidence either of its existence or status or has any relation with the defendant in this action. As to the certificate of re-registration, exhibit 'A' to the supplementary affidavit of Miss Panayi, he submitted that such certificate was only a proof of registration of a public limited Company, a company which came into existence after the institution of the present action. Finally, counsel contended that the present case is not one of misnomer but of change of parties and substitution of one party by another, for which a proper application should have been made and not an application for an amendment for misnomer as in the present case and concluded by submitting that there is no evidence, that the original plaintiff and the one appearing in the certificate of re-registration is the same one.

Counsel for the applicant in his reply contended that Order 28, rule 12 is so wide and gives full power to the Court to allow any necessary amendments but in any event if Order 16, rule 2 is found as applicable, it can be relied upon though not expressly referred to in the application.

Though the intervener was represented in these proceedings, no opposition was filed on his behalf and counsel appearing for him stated that the reason for not filing an opposition, was because the intervener was adopting all along the course followed by the defendant.

5 The English Companies Act 1980 which necessitated the re-registration of the plaintiff as a public limited company and to which reference has been made by counsel for applicant, extended and amended the law relating to companies and dealings in company securities. It was enacted to give effect to the proposals put forward in the White Paper "The Conduct of Company Directors" (Cmnd. 7037) and to the European Community Second Directive on Company Law, Dir. 77/91/EEC, Vol. 42A, Supp., Div. III, title Companies.

10 Part 1 of the Act which comprises of sections 1-13, provides fresh classification of companies and deals with registrations and re-registrations of companies and related matters. Sections 1-4 deal with definition of public and private companies and the requirements as to the constitution of a new public or private
15 company and their registration. Section 8 deals with steps required to be taken by the old public companies (i.e. companies which on the appointed day (22nd December, 1980)) were or had applied to be incorporated as public companies, under the existing law, to determine their status under the new classification of companies.
20

Sub-sections (1), (2), (3) and (4) of section 8 define what an "old public company" is, and the necessary steps to be taken for re-registration of such company. They read:

25 "(1) In this Act 'old public company' means a company limited by shares or a company limited by guarantee and having a share capital in respect of which the following conditions are satisfied, that is to say -

30 (a) the company either existed on the appointed day or was incorporated after that day pursuant to an application made before that day;

(b) on that day, or, if later, on the day of the company's incorporation, the company was not, or, as the case may be, would not have been, a private company within the meaning of section 28 of the 1948 Act
35 (meaning of private company); and

(c) the company has not since the appointed day or the day of the company's incorporation, as the case may be, either been re-registered as a public company or become a private company.

(2) The references in the Companies Acts 1948 to 1976 and, after the end of the transitional period, in this Act other than this Part to a public company or a company other than a private company shall, unless the context otherwise requires, include references to an old public company; and references in the Companies Acts to a private company shall be construed accordingly. 5

(3) An old public company may (either before or after the end of the transitional period) be re-registered as a public company if - 10

- (a) the directors pass a resolution, complying with subsection (4) below, that it should be so re-registered; and
- (b) an application for the purpose in the prescribed form and signed by a director or secretary of the company is delivered to the registrar, together with the documents mentioned in subsection (5) below; and 15
- (c) at the time of the resolution, the conditions specified in subsection (11) below are satisfied.

(4) The resolution referred to in subsection (3) above must alter the company's memorandum so that it states that the company is to be a public company and make such other alterations in it as are necessary to bring it in substance and in form into conformity with the requirements of this Act with respect to the memorandum of a public company". 20 25

The applicant prior to the expiration of the time prescribed by the Act for taking the necessary steps for re-registration of a public company, applied and was in fact so re-registered on 10.3.1982 and a new certificate of registration was issued with the words "public limited company" added to its previous name in the place of the word "limited". 30

It has been strongly contested by counsel for respondent that there is any nexus between the original plaintiff in these proceedings as mentioned in the writ of summons and the company as re-registered under the new Act. Such nexus, however, is apparent from the evidence contained in the affidavits of Miss Panayi and the various appendices thereto filed in support of 35

this application. Dealing with such appendices, counsel for the respondent submitted that the applicant failed to adduce any evidence as to the contents of one of such appendices that Laertis Shipping Enterprises Special Shipping S.A. against whom Action 691/82 was brought in the High Court of England and judgment obtained in favour of the plaintiff in this action, were the owners of the defendant ship and in consequence any evidence contained in exhibit 'A' to the affidavit of Miss Panayi dated 3.11.1982 is not admissible. When pointed out to counsel for the respondent that in a previous affidavit attached to the application made by defendant on 29th June, 1982 for "setting aside the proceedings in this action and/or staying the proceedings until the proceedings before the High Court of England with the same subject matter, are determined", it was admitted that action 1982 - W. - No. 691, was brought in England in personam against the owners of the defendant ship, his answer was that the contents of such affidavit should be ignored as the application to which it was attached, was not pursued and was withdrawn. I find myself unable to agree with the contention of counsel for the respondent that the contents of an affidavit which is in the file of the case and which contains material admissions should be ignored. It is material which supports the allegations contained in the affidavit on behalf of the applicant that Action No. 691/82 in the High Court of England was brought against the owners of the defendant ship and that the plaintiff in that action was the same as the one in the present action. The amendment of the name effected by consent in that action, is part of the evidence that Williams and Glyn's Bank Ltd. of London and Williams and Glyn's plc. of London is the same company, having only been re-registered under the provisions of the new Act.

The question of misnomer has been recently dealt with by our Supreme Court in *Spyropoulos v. Transavia Holland NV.* (1979) 1 C.L.R. 421, which was a case in which the proceedings were instituted in the name of a company in a somewhat abbreviated form which subsequently changed by an amendment of its Memorandum and Articles of Association: The Court, after referring to the English authorities on the matter, had this to say at page 434 (per A. Loizou, J.):

"The respondents placed before the trial Court sufficient

material to justify it grant the application. There all along existed a company with which the appellant had contracted. The proceedings were instituted in the name of that company in a somewhat abbreviated form, but as it was before it was changed by an amendment of its memorandum and articles of association. The original misnomer could definitely be amended under the Rules. The change of the name of the company could not render the company under its previous name as non-existent, so as to bring the case within the principle of the case of *Tetlow v. Orela* [1920] 2 Ch. 24".

And at page 436:

"The former Order 16, rules 2, 5, 8, 11 and 39 were knit together without any material change in substance and as pointed out in the Notes to this Order, the Supreme Court Practice, 1976, p. 177, after referring also to Order 20 and Order 2, states, 'These are all provisions designed to save rather than to destroy, to cure that which is capable of cure' (*Pontin v. Wood* [1962] 1 Q.B. 594 at p. 609); and under heading 'Mistake as to plaintiff or defendant - Misnomer or substitution' (15.6.14 at p. 184) it is stated 'The question is no longer whether the amendment sought is the correction of a mere misnomer or the substitution of a new party, but whether in all the circumstances of the case the mistake was genuine and was not misleading or raised any reasonable doubt as to the proposed plaintiff or defendant. Each case must depend upon its own facts.' Among the authorities given are those of *Alexander Mountain* (supra), *Ettablissement Boudelot v. R.S. Greham & Co. Ltd.*, [1953] 2 Q.B. 271, C.A. *Whittam v. W.J. Daniel & Co. Ltd.*, [1961] 3 All E.R. 796, C.A. which referred to the omission of the word 'Limited' from the title of the defendant company".

Alexander Mountain & Co. v. Rumere Ltd. [1948] 2 All E.R. p. 144 to which reference is made in the above judgment, was a case in which Lord Goddard, C.J. held that there was no power under R.S.C. Order 16, rule 2, to amend the writ by substituting the executrix as plaintiff, being a case where the sole proprietor of a business which he carried on under the name of "A.M. & Co" died and after his death his executrix who continued to carry on the business under the same trading

name brought an action in the name of "A.M. & Co." as a firm, the action being on a contract made by A.M. during his lifetime. On appeal, at page 482 of the same volume, it was held that while the action did not fall within R.S.C. Order 16.
5 rule 2 as having been commenced in the name of the wrong person as plaintiff, the case might properly be treated as one of misnomer and the writ amended by substituting the executrix as plaintiff. At page 485 of the judgment of the Court of Appeal, the following appears to have been stated
10 by Cohen, L.J.:

"This was the position up to the passing of the Civil Procedure Act, 1833, s. 11 of which abolished pleas in abatement for misnomer altogether. It gave the defendant the right, instead of pleading in abatement, 'to cause the declaration to be amended, at the cost of the plaintiff, by inserting the right name, upon a judge's summons founded on an affidavit of the right name'. This Act is now itself repealed, and all pleas in abatement are finally abolished by R.S.C. Ord. 21, r. 1. A plaintiff, whether an individual or a corporation, is, of course, still required to bring his action in this proper name. There does not appear to be any specific rule of course dealing with the matter, nor do the rules of court deal with misnomer in any way. It, therefore, appears that R.S.C. Ord. 72, r. 2, applies; i.e., 'the present procedure and practice' (i.e., the practice in force when the rules of 1883 were framed) remains in force, and the defendant by summons, supported by affidavit, could compel the plaintiff to amend. If he does not do so, and the matter proceeds to trial, it is submitted that the misnomer can then be amended, and that in no circumstances could the misnomer affect the substantive judgment which the Court is called upon to pronounce".

In a recent case of the Court of Appeal in England *Nittan v. Solent Steel* [1981] Ll. L.R. vol. 1, pag 633, Lord Denning.
35 M.R. had this to say at page 637 as to the power of the Court to deal with misnomers:

"In this court, we are very used to dealing with misnomers. We do not allow people to take advantage of a misnomer when everyone knows what was intended".

40 Under the provisions of section 18(4) of the English Compa-

nies Act, 1948, which has been incorporated verbatim in our Companies Law, Cap. 113, section 19(4), provision is made as to the effect in legal proceedings of the change in the name of a company as follows:

"A change of name by a company under this section shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name".

Section 18 deals with the position arising when a change of the name occurs, either by special resolution with the approval of the Board of Trade or on the directions of the Board of Trade in the circumstances provided therein. (Such section was copied by the drafters of our Companies Law, Cap. 113 and embodied in section 19 with the substitution of the word "Board of Trade" by the word Council of Ministers.

On the material before me I am satisfied that the plaintiff company has never ceased to exist and that by operation of law, the plaintiff, being "an old company as defined in the law" had to be re-registered under the 1980 Act, as a result of which its original description had to be amended to correspond with its description according to the certificate of re-registration such description being "Williams and Glyn's Bank plc". The change of such name does not affect or render defective the present legal proceedings which were instituted in the original name of the plaintiff. (See section 19(4) of our Companies Act, Cap. 113 and section 18(4) of the English Companies Act, 1948 (supra)).

I come now to the last contention of counsel for respondent that the application was wrongly based on Order 28 of the English Rules, as it should have been based on Order 16 rule 2 which is the only rule applicable in cases of amendment for misnomer, and that once such Order has not been relied upon in support of the application, this application should be dismissed.

Rule 2 of Order 16 of the English Rules, as in force in 1960

(the ones applicable under rule 237 of our Admiralty Rules) provides as follows:

5 “Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a Judge may, if satisfied that it has been so commenced through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just”. (see Annual Practice 1960, Vol. 1, p. 325).

15 It is headed “Action in name of wrong plaintiff.” It is one of the rules of Order 16 which deal with the position as to who may be joined as parties in the proceedings, the effect of instituting proceedings in the name of wrong plaintiff or defendant, misjoinder and nonjoinder of parties, position of parties under disability and other similar provisions for the purpose of ensuring that the proper parties in an adjudication are before the Court.

20 In the notes in the Annual Practice, 1960 at p. 326 under the heading, “Cases” examples are given of cases where Order 16 rule 2 was applicable all of which refer to the addition or substitution of a party. Some of the cases mentioned are: *Ayscough v. Bullar*, 41 Ch. D. 341 (where there was a doubt as to the plaintiff’s title to sue and another plaintiff had to be added), *White v. L. G. O. Co.* (1914) W.N. 78 (where in an action for nuisance it was found necessary after the institution of the action to add the tenant as a party), *The Charlotte* [1908] P. 206 (an action for damages caused by collision, where the legal owners of the cargo at the time of the collision were added). *The Duke of Buccleuch* [1892] P. 204 (where in an action by owners of ship and cargo for damages, an owner of part of the cargo was substituted for a plaintiff who was merely his agent).

35 Order 28, rule 12 of the same Rules, reads as follows:

 “The Court or a Judge may at any time, and on such terms as to costs or otherwise as the Court or Judge may think just, amend any defect or error in any proceedings, and

all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings". (See Annual Practice, 1960 Vol. 1, p. 637).

Rule 12 of Order 28, is one of a series of Rules dealing with all cases of amendment of the indorsement or the pleadings or any kind of amendment. Order 28 is headed, "Amendment of Indorsement. Different kinds of Amendment. General principles. Amendment of party's own pleading". Rule 12 is supplementary to rule 1 of Order 28. It gives to the Court a general power for amendment in addition to the powers under rule 1. Rule 1 of Order 28 reads as follows:

"The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties".

In the explanatory notes under Order 28, rule 1 in the Annual Practice 1960 Vol. 1 at p. 621 under the heading "Scope of the rule" it reads as follows:

"Thus by rr. 1 and 12 of this Order the Court, or a Judge, at any time and in such manner and on such terms as may be just, may amend any defect or error in any proceedings and make all such amendments in any indorsement or pleading as may be necessary; while by r. 11 of this Order, he may at any time correct any clerical mistake in any judgment or order, or any error therein arising from any accidental slip or omission".

Further, in the notes at page 623, under the heading "Parties", a clear distinction is drawn between the scope of Order 28 and Order 16, to the effect that in the case of a mere misnomer Order 28, rules 1 and 12 come into operation, whereas in the case of addition of new parties either as plaintiffs or defendants, then Order 16 is the one to apply. The notes read as follows:

"The statement of claim and the writ should correspond in the names of the parties, in the number of the parties, and in the characters in which they sue and are sued"; a

mere misnomer may be corrected in the statement of claim, but the writ should be amended before judgment. The plaintiff can always discontinue the action against any of the defendants by notice in writing under 0.26, r. 1 (q.v.). But if either party desires to add a new plaintiff or a new defendant, he must apply 0.16, rr. 11 and 12 (*Kendall v. Hamilton*, 4 App. Cas. 504)".

A reference is made in the same page as to the power of the Court under this rule, to the case of *Pearlman (Veneers) S.A. (Pty) Ltd. v. Bernhard Bartels*, [1954] 1 W.L.R. 1457, C.A. where the plaintiffs had obtained judgment and the Court held that there was jurisdiction to amend the proceedings including the judgment to describe the defendant as Josef Bartels, trading as Bernhard Bartels, on the ground that there had been simply a misdescription.

Also, at page 634, in the notes of the Annual Practice 1960, explaining the scope of Order 28, rule 11, which deals with clerical mistakes and accidental omissions, reference is made to the following case where corrections have been made under such rules, or *the inherent powers of the Court* (as stated therein):

"*Pearlman (Veneers) S.A. (Pty) v. Bernhard Bartels*, [1954] 1 W.L.R. 1457, C.A. (Change of title to correct misdescription); *Re Army and Navy Hotel*, 31 Ch. D. 645 (error in name of company in winding-up order corrected)."

A perusal of Orders 16 and 28 and the notes thereto in the Annual Practice, makes it abundantly clear that whereas Order 16 provides as to who should be the proper parties in civil proceedings and regulates the procedure where a new party has to be added or substituted or where the proceedings are brought in the name of the wrong party as plaintiff or defendant, Order 28 regulates matters pertaining to any necessary amendments of the writ of summons, the indorsement of the writ of summons or the pleadings. The present case is not one of adding a new party or where the action was brought in the name of the wrong plaintiff but a case where the action commenced in the name of the proper plaintiff whose name had to be subsequently amended due to a change in its description effected after the institution of the action. Therefore, Order 16, rule 2 is not applicable in the circumstances of the present case, (see

Alexander Mountain & Co. v. Rumere Ltd. on appeal [1948] 2 All E.R. 482 at p. 482) and counsel for applicant correctly based this application on Order 28. Irrespective, however, of the provisions of the Rules, correction of a misnomer especially in the circumstances of the present case is a matter within the inherent jurisdiction of the Court. Using the words of Lord Denning M.R. in *Nittan v. Solent Steel* (supra) a court "should not allow people to take advantage of a misnomer when everyone knows what was intended". 5

Before concluding on this matter, I wish to mention that in England the matter has now been regulated by a practice direction dated 18th October, 1981 which was issued as a result of the change of companies' names by the Companies Act, 1980. Such practice direction, reads as follows: 10

"After the existing paragraph (3) in direction 13 of the Masters' Practice Directions (see *The Supreme Court Practice* (1982), vol. 2 p. 215, para. 914) there shall be added a new sub-paragraph: 15

'Where a company has been required to re-register its name with the words 'public limited company', or their equivalent in Welsh (section 2(2) of the Companies Act 1980) or 'p.l.c.' or 'c.c.c.' the alternative in Welsh, (section 78(3)(b) and (d)), the above procedure will not be followed but opportunity should be taken by the parties to have these words or initials added in substitution for the existing registered description at the next step taken in the action after re-registration, e.g. at the summons for directions, as a term of settlement or at the trial.'" (see [1982] 1 W.L.R. 258; [1982] 1 All E.R. p. 384). 20 25

The procedure referred to was in respect of private companies whereby in accordance with a previous direction, if a limited company changed its name after commencement of proceedings by or against it, a written notice of the change of name should be filed with the action department of the central office or at the district registry and a copy served on all other parties and that in the title of the proceedings the new name thereafter should be substituted and the former name be mentioned in brackets. 30 35

In the result, the application is granted and an order is

made accordingly. Amended writ of summons and amended petition to be filed within two days and copies of same to be delivered to the other side.

5 As to costs, having taken into consideration the fact that
when the application came up for hearing before the Court
counsel for the respondent-defendant consented to one of the
amendments sought, that is in respect of the description of
the defendant ship, for which the respondent was not to blame,
10 I allow only one-half of the costs of this application in favour
of the plaintiff against the defendant, such costs to be assessed
by the Registrar, and I make an order for costs accordingly.

Application granted.