Shipping

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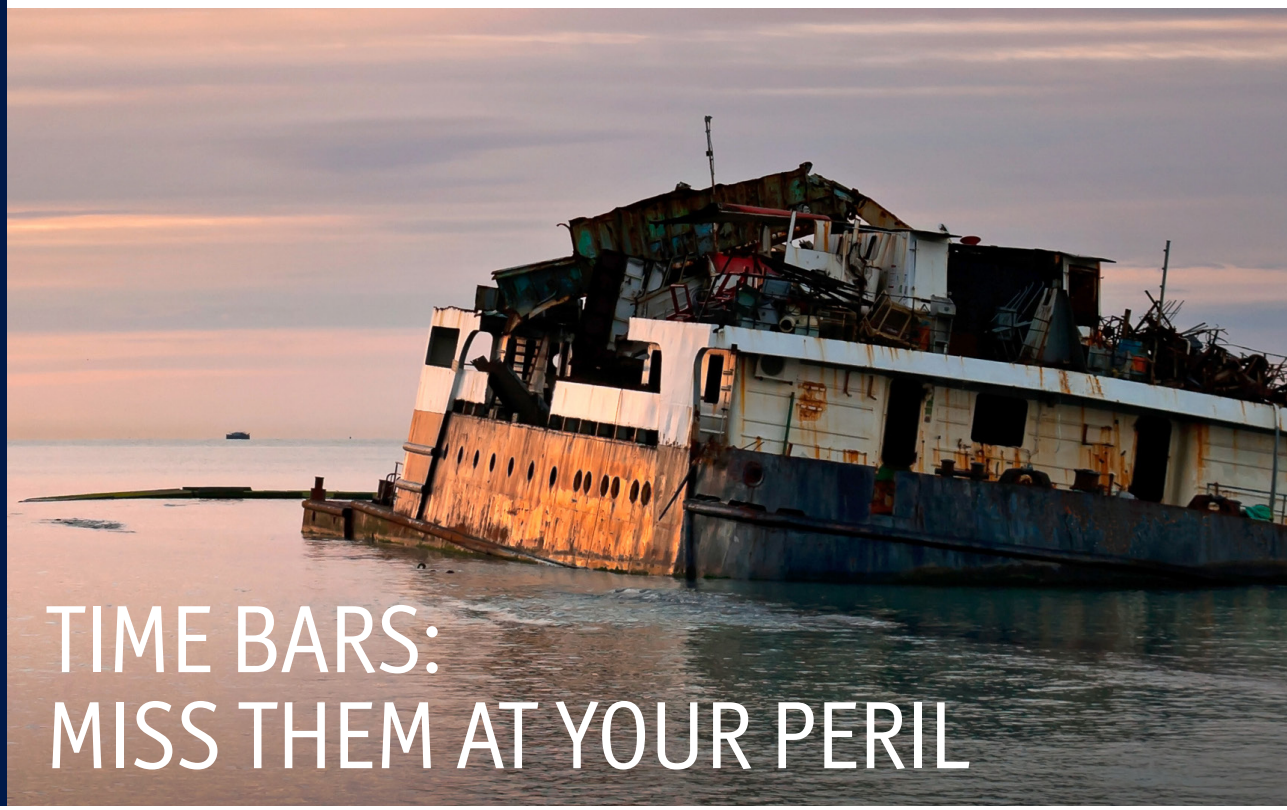

TIME BARS: MISS THEM AT YOUR PERIL

On 15 October 2015, the English Court of Appeal handed down judgment in the matter of *Stolt Kestrel BV v Sener Petrol Denizcilik Ticaret AS (STOLT KESTREL c/w NIYAZI S)*. At the same time the Court of Appeal also heard an application by the claimant in the matter of *CDE S.A. v Sure Wind Marine Limited (SB SEAGUARD c/w ODYSSÉE)* for permission to appeal to the Court of Appeal from a decision of the Admiralty Registrar, Mr Jervis Kay QC (see previous update: http://www.hfw.com/Beware-of-time-bars-April-2015).

The matters were heard together because they both involved issues in relation to when the two year time limit for collision claims pursuant to section 190(3) of the Merchant Shipping Act 1995 (MSA 1995) can be extended.

In *SB SEAGUARD c/w ODYSSÉE* Mr Kay QC at first instance dismissed the claimant's application for an extension of the time to bring *in personam* proceedings, finding that there was no good reason for a discretionary extension under section 190(5) of the MSA 1995.

In *STOLT KESTREL c/w NIYAZI S*, at first instance Justice Hamblen refused a series of requests by the claimants to:

- Extend the validity of the *in rem* claim form (which had been issued in time) on the basis that the claim form issued was a *"hybrid" in rem/in personam* claim form.
- Obtain an order for permission to serve the *in rem* claim form out of the jurisdiction.
- Extend the time to commence *in personam* proceedings, per section 190(5) of the MSA 1995.
- Serve the *in personam* proceedings out of the jurisdiction.

The Court of Appeal's judgment is a detailed and comprehensive look at the authorities and the procedure that underpins admiralty collision claims. The following points can be identified from the judgment:

- Section 190(3) of the MSA bars the remedy but does not extinguish the claim. In contrast to Article III rule 6 of the Hague Visby Rules which extinguishes the claim if the suit is not brought within one year of delivery of goods

or the date the goods should have been delivered. When *in personam* proceedings are commenced after the expiry of the relevant period it is of no relevance that the *in rem* proceedings were brought in time.

- There is no such thing as a hybrid claim form. Proceedings in respect of *in rem* and *in personam* claims must be commenced separately, using the correct claim forms.
- Section 190(6) of the MSA is applicable only to *in rem* proceedings. This provision allows for a mandatory extension of time in circumstances where *"there has not been during any period allowed for bringing proceedings any reasonable opportunity of arresting the defendant ship within (a) The jurisdiction of the court, or (b) The territorial sea of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business."* Both the Court of Appeal and the Admiralty Court agreed that the language was clear and referred only to *in rem* proceedings.

  In rem claim forms cannot be served out of the jurisdiction. Lord Justice Tomlinson in the leading judgment considered that the application to serve an *in rem* claim form out of the jurisdiction *"ignores all of the learning concerning the nature of an Admiralty action in rem."* An order under PD 61 paragraph 3.6(7) for alternative service may only be made when the property against which the claim is made is within the jurisdiction of the court.
- Section 190(5) of the MSA provides that a discretionary extension of time may be allowed in respect of either *in rem* or *in personam* claims *"to such extent and on such conditions"* as the court sees fit.

Prior to this judgment, there were diverging views as to whether the court should apply a single stage test, involving the court deciding whether an extension of the time bar complies with the *"overriding objective"* set out in CPR 1.1 and 1.2 to act justly, or the two stage test set out in *The Al Tabith*[1] involving an analysis of whether there was a good reason why the claim had not been commenced within the time limit, and if so whether it would be proper for the court to exercise its discretion.

The Court of Appeal, on analysis of the relevant authorities, found that *The Al Tabith* was correctly decided and is good law. The Court of Appeal did not agree that *The Igman*[2] was clear authority that the correct test to be applied was a one stage test, and instead found that the Court of Appeal in *The Igman* had considered that there was a good reason why the *in personam* proceedings had not been issued in time.

The Court summarised that *"whether there was a good reason for failing to commence proceedings in time does not involve the exercise of discretion but it is nonetheless an evaluative exercise in which it is for the decision-maker to decide what weight to attribute to the various considerations."*

Comment

This judgment handed down by the Court of Appeal is a clear and strong reminder to those involved in maritime claims to make sure that they understand fully admiralty procedure and how to commence a claim properly. There are clear and important distinctions between *in rem* and *in personam* claim forms, and in particular in the way in which they can be served effectively.

The court will show no sympathy towards mistakes due to forgetfulness, carelessness or lack of understanding.

EDWARD NEWITT, PARTNER

The court will show no sympathy towards mistakes due to forgetfulness, carelessness or lack of understanding. As Lord Justice Tomlinson wrote in his judgment *"it is axiomatic that a firm of solicitors holding itself out as competent to practise in this field should be aware that there is no such thing as a hybrid or combined in rem/in personam claim form."*. It is therefore crucial that the idiosyncrasies of admiralty procedure are understood and followed.

HFW acted for the successful defendants in both matters. Edward Newitt and Alex Kemp acted for the *NIYAZI S* and Paul Dean and Gabriella Martin for Sure Wind Marine Limited.

1 [1995] 2 Lloyd's Rep 339

2 27 May 1993 unreported



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