RISK WATCH

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COLLISION TIME BARS – MORE JUDICIAL GUIDANCE

The English High Court has recently considered two separate applications by parties who failed to commence proceedings with the two year prescription period for claims arising out of a collision.

On 15 October 2015 the Court of Appeal handed down a combined judgment in the cases of *Stolt Kestrel BV v Sener Petrol Denizcilik Ticaret AS ('STOLT KESTREL' c/w 'NIYAZI S') and CDE S.A. v Sure Wind Marine Limited ('SB Seaguard'c/w 'Odyssee')* [2015] EWCA Civ 1035.

The matters were heard together because they both involved the application of the two year time limit for collision claims pursuant to section 190(3) of the Merchant Shipping Act 1995 (MSA 1995).

STOLT KESTREL c/w NIYAZI S

This case was reported in *Claims and Legal* in August 2014 as a first instance decision: http://www.britanniapandi.com/assets/Uploads/documents/Risk-Watch-Claims-and-Legal-Vol-6-No1.pdf

The claimant's ship *STOLT KESTREL* was struck by *NIYAZI S* on 10 October 2010 at Stanlow, near the Port of Liverpool, England. At the time of the collision *NIYAZI S* was owned by Sener Petrol Deniscilik Ticaret AS ('the Defendant). Following the collision, *NIYAZI S* remained in UK territorial waters until 14 October 2010. There is no evidence that *NIYAZI S* called within the jurisdiction after that date. On 5 June 2012 *NIYAZI S* was sold by the Defendant to Delmar Petroleum Co. Ltd. ('Delmar') and was renamed *FAVOUR*.

The Claimant issued an *in rem* claim form against *NIYAZI S* on 9 October 2012. It is common ground that the collision claim gives rise to a maritime lien against the ship which survives any changes of ownership. On 18 September 2013 the Claimant provided a schedule of damages together with supporting documentation to the Defendant.

On 13 November 2013 the Defendant expressed its view, in email communication, that the *in rem* claim was time barred because a claimant only has 12 months from the date of issue to serve the claim form for an *in rem* claim on the ship in accordance with the English Civil Procedure Rules ('CPR'). The Defendant also referred to the Claimant's error of procedure in failing to issue an *in rem* and an *in personam* claim at the same time. On 11 December 2013 the Claimant issued an *in personam* claim form.

The Admiralty Court refused requests by the Claimant to:

1) issue an order permitting service of the *in rem* claim form out of the jurisdiction; and
2) extend the time to commence *in personam* proceedings by arguing that the bringing of the *in rem* proceedings within time 'stopped the time-bar running' also in the *in personam* proceedings, as the claim form issued on 9 October 2012 was a 'hybrid' or combined *in rem/in personam* proceedings.

The Claimant appealed and the Court of Appeal confirmed the following points:

1) The only type of claim form which may be served out of the jurisdiction in collision proceedings is an *in personam* claim form, not an *in rem* claim form.
2) There is no such thing as a 'hybrid' or combined claim form. If it is desired to commence proceedings both *in rem* and *in personam* then separate claim forms must be issued. The timing of the issuing of *in rem* proceedings is of no relevance to the issue of whether *in personam* proceedings are commenced within time.
3) The Claimant has to show that there was good reason for not commencing proceedings within time. Mere carelessness has never been a good reason for an extension of time.

The appeal was dismissed.

SB SEAGUARD c/w ODYSSEE

On 17 April 2011 a collision occurred between the Defendant's ship, *SB SEAGUARD* and the Claimant's yacht, *ODYSSEE* off the coast of Ramsgate, England. After the collision took place, the claims handler representing the owners of *ODYSSEE* entered into negotiations with the P&I Club in which *SB SEAGUARD* was entered. However, the negotiations 'never produced any result' and the time bar was not protected.

Under section 190(3) of the MSA 1995, the parties had until 17 April 2013 to bring a claim. The Claimant did not issue proceedings until 23 December 2013. On 20 January 2014 the Claimant made an application under section 190(5) of the MSA 1995 for an extension of the time limit to bring *in personam* proceedings.

The Claimant argued that their claims handler had been 'lulled into a false sense of security' by the Defendant and the court should therefore apply a one-stage test under CPR7.6(3) to determine the result of the application, specifically, whether an extension complies with the 'overriding objective' to act justly, as set out in CPR1.2.

The Defendant, however, submitted that the appropriate test was the two-stage test laid down by the Court of Appeal in *The Al Tabith [1995] 2 Lloyd's Rep 336* as follows:

1) Whether there is a justifiable good reason why the claim had not been commenced within the time limit, and
2) If the first stage is satisfied, whether there are special circumstances why the Court should exercise its discretion to extend the time limit.

The Admiralty Court found that there was no good reason for a discretionary extension under section 190(5) of the MSA 1995. The application for an extension of the time limit was dismissed. The Claimant applied to the Court of Appeal for permission to appeal.

The Court of Appeal confirmed that the test applicable to the exercise of the court's discretion to extend the period for bringing a collision action has two stages. At the first stage the claimant will ordinarily have to show that there was good reason for not commencing proceedings in time. If, and only if, the claimant succeeds at stage one in establishing good reason, the court proceeds to stage two, which is a discretionary exercise involving value judgments. The Court of Appeal held that the Claimant failed to demonstrate that there was such a 'good reason' and accordingly affirmed the decision of the Admiralty Court and refused permission to appeal.

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DELIVERY AGAINST A PIN CODE RATHER THAN A DELIVERY ORDER

The High Court case *'Glencore v MSC Mediterranean Shipping Co',* LLR[2015] Vol 2, concerned release of cargoes against a PIN number instead of a delivery order.

The carrier, MSC, had issued a bill of lading (b/l) to Glencore which provided: 'If this is a negotiable Bill of Lading one original duly endorsed b/l must be surrendered by the Merchant to the carrier in exchange for the goods or a delivery order.' In this case the cargo was cobalt briquettes.

With effect from 2011 there was a new mechanism put in place by the port of Antwerp, for those who wanted to use it, which was intended to improve and speed up cargo delivery. It replaced the ship's delivery order with a PIN number and was called Electronic Release System (ERS). Under ERS the b/l holder at the discharge port would present the b/l to the ship and instead of receiving a ship's delivery order, as provided for in the b/l, he would receive an email containing a PIN code. Using that PIN code, the b/l holder would be able to go to the terminal warehouse and obtain access to the cargo in the relevant container.

Glencore's agent in the port of Antwerp was Steinweg to whom MSC had written to advise them that they would issue a PIN code instead of a delivery order for the subject cargo. Steinweg raised no objection. Steinweg had previously used this system for a large number of deliveries and the system had worked well. However, in May 2012, Steinweg used the PIN code to release two containers only to find that they were missing. An unauthorised party had obtained the PIN code and had already removed the cargo.

Glencore sued MSC, arguing that it was in breach of its b/l contract because it had failed to either deliver the cargo or issue a delivery order as provided for in the b/l. In reply it was argued that Steinweg, on behalf of Glencore, had, by their conduct, agreed to operate a system whereby delivery orders were not issued and therefore Glencore should be taken to have varied the terms of the b/l contract. Such an argument, if it were to succeed , would also have to establish an implied term that MSC, having provided PIN codes, were thereby taken to have fulfilled their responsibilities for delivery of the cargo.

The Court did not agree. They found that Steinweg was the agent of Glencore only for very defined tasks relating to delivery and did not have the authority to commit Glencore to the ERS procedure. Further, there was no evidence that Glencore agreed, either expressly or impliedly, that it would be content for the goods to be delivered to anyone who presented the correct PIN code.

MSC also submitted that there was no evidence that the cargo would not have been misappropriated under the old paper system but this argument was dismissed by the Court. The Court pointed out that Glencore's case was that the breach was: MSC failing to deliver neither the cargo nor a delivery order; it was not that the use of PIN codes was a breach and Glencore were not relying on the unauthorised use of PIN codes as a causative breach of the misdelivery.

STEVEDORE DAMAGE: CHARTERERS RELYING ON THE 24 HOUR NOTICE OF DAMAGE CLAUSE

In a recent London arbitration decision ((2015) 926 LMLN 4) the tribunal took a commercial approach to the interpretation of an owner's obligation to notify charterers of damage to the ship caused by stevedores. This is a welcome continuation of the commercial approach typically adopted by London arbitration tribunals.

The ship loaded a cargo of logs in New Zealand for carriage to China and the ship suffered stevedore damage during cargo operations. The charterparty contained a common clause stating that charterers were liable for all damage to the ship caused by stevedores, provided that the master notified charterers within 24 hours of discovering the damage ('Clause 64'). The charterparty also contained a clause that was specific to the carriage of logs. In essence, this clause stated that charterers were responsible for damage to the ship caused by stevedores during the loading and discharging of logs ('the Protective Clause'). The clause contained no requirement that charterers be notified of the damage within a set time.

Charterers tried to avoid paying for the costs of repair of the stevedore damage on the grounds that owners failed to comply with the notice requirements under Clause 64. Owners brought arbitration proceedings, challenging that defence and relying on the terms of the Protective Clause.

The tribunal decided that charterers' defence failed to consider the influence of the Protective Clause. The Protective Clause dealt specifically with the carriage of logs and had to be given full effect. As a consequence, the Protective Clause prevailed over the notice requirement contained in Clause 64, which addressed general claims arising from stevedore damage.

The tribunal avoided a strict interpretation of the charterparty and gave weight to the Protective Clause which was specifically incorporated into the contract to address the carriage of logs. In the absence of the Protective Clause, the tribunal are likely to have dismissed owners' claim.

This decision highlights the benefit of including clear clauses in charterparties which set out what happens in the event of damage to the ship arising from the carriage of particular types of cargo.