



# Campbell Johnston Clark

## INTRODUCTION

Cargo damage: commencing proceedings on the correct form and jurisdiction – (1) *LD COMMODITIES RICE MERCHANTS LLC* (2) *LD COMMODITIES MEA TRADING DMCC v The Owners and/or Demise Charterers of the Vessel “STYLIANI Z”* [2015].

This recent judgment of the Admiralty Court, in which CJC acted for the Vessel’s Owners, shows the dangers of failing to comply with time bars, service provisions and the attention to detail required in issuing a claim in the correct forum/jurisdiction.

## BACKGROUND

A cargo of 17,700 m/t of bagged rice was due to be loaded on board the M.V. STYLIANI Z (the “Vessel”) at Lake Charles, Louisiana, USA from 20 August 2012. During loading operations a rain storm hit Lake Charles. Before the Vessel’s holds could be closed approximately 3,000 m/t of cargo was rain damaged. This cargo was subsequently discharged from the Vessel and sold for salvage value only.

The owners of the cargo (the “Claimants”) subsequently issued proceedings in the Admiralty Court for damages and loss sustained in the amount of US\$1.3 million.

Pursuant to the terms of the contract of carriage entered into between the Claimants and the Vessel’s Owners, any cargo claim issued was required to be brought within one year of the date the damage was suffered. The Claimants had subsequently requested, and been granted, a series of voluntary extensions of time by the Vessel’s Owners within which to bring their claim.

By way of background, 2 types (or *species*) of claim may be issued in the Admiralty Court:

*in rem* claims. This encompasses claims made directly against the *res* (i.e. the relevant asset), which in this case would have been the Vessel; or

*in personam* claims, now referred to in the English Civil Procedure Rules (the “CPR”) as “*other admiralty claims*”. This encompasses all other types of claims issued directly against a defendant(s).

Whilst *in rem* and *in personam* claims are both within the jurisdiction of the Admiralty Court it must be appreciated that they are different species of claim and therefore subject to distinct procedural guidelines. In this respect the CPR provides:

An *in rem* claim must be issued on claim form ADM1.

An *in personam* (or “other”) claim is commenced on the issuance of claim form ADM1A.

A claimant has 4 months from the date of issue to serve the claim form for an *in personam* claim on a defendant within the jurisdiction (or on the defendant’s solicitors within the jurisdiction, if those solicitors are instructed for the purpose of accepting service).

A claimant has 12 months from the date of issue to serve the claim form for an *in rem* claim on the *res* (or on the *res*/defendant’s solicitors within the jurisdiction, if those solicitors are instructed for the purpose of accepting service).

The Claimants’ claim form (the “Claim Form”) was issued on form ADM1A and subsequently sent by email by way of notice to the Vessel’s Owners’ P&I Club. This notice did not purport to be formal service of the Claim Form (and in any event could not be deemed as such in normal circumstances in any event).

The Claimants thereafter failed to formally serve the Claim Form within the 4 month deadline for service of an *in personam* claim as a result of their solicitors’ mistaken belief that an *in rem* claim had been commenced (the claim form for which could be served up to 12 months after the date of issue).

It was not realistically open to the Claimants to issue a new claim form and therefore, in effect, re-start the proceedings; any such attempt would be challenged where (as discussed above) the contract of carriage contained a one year time bar for issuing claims - the last extension of time granted by the Vessel’s Owners had lapsed.

Therefore, approximately 8-9 months after the date the Claim Form was issued, and on realising the mistake, the Claimants amended the Claim Form in manuscript to an ADM1 (*in rem*) form. In other words, they crossed out the A on the form (ADM1A) and made some additional, minor, amendments to the wording used on the form in order that it complied (insofar as this was possible) with the wording used on a standard ADM1 form.

Pursuant to CPR 17.1(1) a party may amend his statement of case without obtaining the permission of the Court if the claim form has not been served on any party to the claim. Therefore the Claimants sought to serve the manuscript amended Claim Form on The Vessel’s Owners without recourse to the Court.

The Vessel’s Owners subsequently applied to the Court challenging:

the amendments made to the Claim Form; and/or

the Court’s jurisdiction to hear the claim where the *in personam* Claim Form was served out of time.

## **The Parties' Submissions**

The parties' submissions as to the approach the Court should adopt varied substantively from the outset. In essence:

The Vessel's Owners submitted that a strict interpretation of the CPR should be adopted. An *in personam* claim form had been issued which had not been served within the four month deadline.

The Claimants submitted that a broader and more permissive approach should be adopted. Form should not triumph over substance if the overriding objective of the Court, and a potentially otherwise meritorious claim, would be stifled as a result.

## **JUDGMENT OF THE ADMIRALTY REGISTRAR**

The presiding Admiralty Registrar, Jervis Kay QC, considered the prevalent issues raised and held as follows:

*Question 1:* what species of claim had been issued?

*Decision:* the clear distinction between *in rem* and *in personam* proceedings should be maintained. The Admiralty Registrar referred to the judgment of Hamblen J in *The "Stolt Kestrel" v "Niyazi S"* [2014] where it was held that it was not possible for a party to issue a hybrid claim form and held that, notwithstanding the purported amendments made to the Claim Form prior to service, the Claim Form was one issued *in personam*.

*Question 2:* how should the parties' submissions as to strict form vs substance be reconciled?

*Decision:* the Court should not exercise its discretion pursuant to CPR 3.10 to correct the deficiencies in the Claim Form (i.e. to treat the claim as one issued *in rem* rather than *in personam*). The Admiralty Registrar referred to the judgment of *Vinos v Marks & Spencer* [2001] and held that where there is an unqualified specific provision in the CPR (in this case relating to the type of claim form required to issue an *in rem* claim) a general provision should not, in normal circumstances, be taken to override the specific provision.

*Question 3:* was it possible for the Claimants to amend the Claim Form, and therefore the substance of the claim, from an *in personam* form to an *in rem* form?

*Decision:* the Admiralty Registrar held that CPR Part 17 could not be used to amend the Claim Form to one *in rem*. The *in personam* Claim Form (as issued) had lapsed after the deadline for service passed. It was not possible to amend a claim form that had already lapsed (i.e. a form that was already dead). The Claimants were required to revive the Claim Form (i.e. to obtain an extension of time for service) before seeking to amend it. They had not done this and, in any event, such an applica-

tion would be unlikely to succeed as the Claimants had not taken all reasonable steps to serve the Claim Form within the 4 month period for service – as was required to obtain an extension of time pursuant to CPR 7.6(3).

Further, the Admiralty Registrar held that the amendment sought by the Claimants was not really an amendment in nature. The Claimants had sought to use the amendment provisions in the CPR to commence a new and different species of claim – this was not permissible.

## **SUMMARY**

The judgment illustrates the procedural perils of commencing proceedings in the Admiralty Court and, more particularly, the distinction between commencing *in rem* and *in personam* proceedings as there are significant differences in the deadlines for service.

Parties must adhere to the procedural rules when commencing or defending claims. The judgement shows that, depending on the facts of the case, the Court can adopt a strict interpretation of the CPR. Arguments on fairness, equity and/or the court's overriding objective will not necessarily rescue a party in procedural default.

Allen Marks (Director) and Alex Hudson (Associate) acted on behalf of the successful Owners and can be contacted with any enquiries.



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