RISK WATCH

CLAIMS AND LEGAL

Britannia

The Britannia Steam Ship Insurance Association Limited

CLAIMS AND LEGAL is a supplement for Members' claims handlers and legal departments

Volume 6: Number 1: August 2014

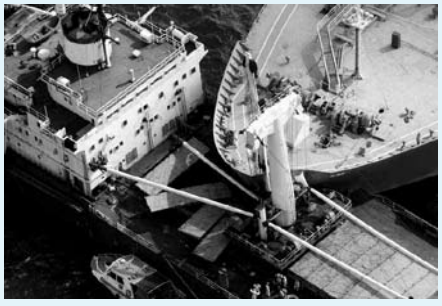
PROTECTING TIME IN COLLISION CASES

Time extensions for claims in rem, in personam and against sister ships arising from a collision were the subject of a decision in the recently reported case of the owners of the vessel *STOLT KESTREL* v The owners of the vessel *NIYAZI S* – QBD (Admlty Ct) [2014] EWHC 1731

The collision occurred in UK waters on 10 October 2010. On 9 October 2012, the claimants issued an in rem claim form.

One year later, the *NIYAZI S* had not called within the jurisdiction so the in rem claim form had not been served. The claimants applied to the court for an extension of time within which to serve the in rem claim form, and sought permission to serve it out of the jurisdiction. The court granted orders in this regard on 7 October 2013. Shortly after, in December 2013, the claimants applied for permission to amend the in rem claim form to include 4 sister ships of the *NIYAZI S*, and also issued an in personam claim form against the owners of the *NIYAZI S*. On 13 December 2013 the claimants applied for an extension of time which to serve the in personam claim form.

The defendants applied to set aside the time extension for service of the in rem writ, and for an order that claims in personam, and against sister ships, were time barred. It was accepted that the *NIYAZI S* and all 4 sister ships had remained outside UK jurisdiction since the in rem claim form was issued on 9 October 2012. However, the defendants argued there had been an opportunity to arrest the *NIYAZI S* between the date of collision and its departure from UK waters on 14 October 2010.



Three questions were posed to the court:
1) whether there should be a an extension of time for service of the in rem claim on *NIYAZI S*;
2) whether there should be an extension of time for bringing the in personam claim against owners of the *NIYAZI S*;
3) whether there should be an extension of time for inclusion of the sister ships in the in rem claim.

On the first question the court held that there should be a mandatory extension of the time allowed for serving the in rem proceedings on the *NIYAZI S* because there had been no reasonable opportunity for arresting the defendant ship applying section 190(6) of the Merchant Shipping Act. The court did not think that the period immediately after the collision up to the date that the *NIYAZI S* left UK waters (10-14 October 2010) had given the claimants a reasonable opportunity to arrest the ship. However, the order which had granted permission to serve the in rem claim form out of the jurisdiction was set aside as this can only be ordered where 'the property against which the claim is brought… is within the jurisdiction of the court' (which was not the case here).

The in personam claim against owners of the *NIYAZI S* was held to be time barred, and that a time extension for this claim should have been obtained, or proceedings commenced, within the 2 year time limit applicable to liabilities arising out of the collision. Protecting the time bar in the in rem proceedings did not protect time in the personam proceedings.

As for the third question, the court allowed time to be extended for the 4 sister ships to be joined to the in rem action on the basis that there had been no reasonable opportunity to arrest either the *NIYAZI S* or her sister ships in the time since the in rem claim had been issued. The Merchant Shipping Act enable a sister ships to be regarded as a defendant ship in the same way as the ship involved in the collision.

ORIGINAL DOCUMENTS NEEDED?

A recent arbitration award provided owners with some comfort in the context of an apparently strict requirement to provide original documents in support of a demurrage claim.

Clause 33 of an amended Asbatankvoy charterparty provided:

'a) Owners agree that charterers shall be released from all liability for payment of demurrage, unless a written or email invoice is received within 90 days upon completion of discharge thereby followed by the claim to be submitted to charterers in writing with fully certified original supporting documents, such shall include but not be limited to original signed notice of readiness within 90 days of completion of discharge.

b) Notwithstanding the above, any freight, deadfreight, demurrage and/or charges or expenses under this Charter shall be deemed waived, extinguished and absolutely barred if such claim is not received by charterer or owner, as the case may be, in writing with original supporting documentation if obtainable within ninety (90) days from the date of final discharge of the cargo on the voyage with respect to which said claim arises'.

Only photocopies were enclosed with the demurrage invoice submitted to charterers. Charterers argued that as the requirement for original documents was clearly defined and that owners had failed to provide these within the 90 days, the owners' claim was time barred.

Owners submitted that the applicable principle should be the certainty with which charterers had received, within 90 days, all the necessary information to assess whether they were liable for demurrage and that the 'strict' requirement should be subordinate.

(Continued overleaf)

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ORIGINAL DOCUMENTS NEEDED? (CONTINUED)

The arbitrators agreed with owners, considering that in interpreting this clause due regard must be had to technological developments in communications, virtually all communications in chartering and operating vessels now taking place by e-mail and scanned copies of documents are almost invariably accepted. Further, requiring sight of original documents would be a retrograde step.

The arbitrators concluded that since charterers had been properly informed about the demurrage claim and had received copies of all the appropriate documents within the 90 day period, the demurrage claim was valid and was not time barred.

The arbitrators acknowledged that their decision ran contrary to the certainty principle but explained that the owner is also entitled to be certain that it has been properly submitted and that if there are any discrepancies or doubts these be raised earlier rather than later so that arrangements could be made to resolve these before the trail has grown cold.

LEAKING CONTAINERS: IS PURCHASER LIABLE FOR THE CLEAN UP BILL UNDER CERCLA?

In APL Co. LTD v. Kemira Water Solutions (February 25, 2014), the United States District Court (S.D. NY) held that the defendant Kemira, the end purchaser and consignee of water treatment chemicals, was liable for the five million US dollars clean up and response costs resulting from chemicals leakage as a result of improper packaging.

Kemira purchased ferrous chloride from Fairyland, a Taiwanese chemical supplier. In the purchase agreement, Kemira specified the use of bulk bags to transport the material. Kemira was the consignee and arranged for the cargo's clearance through US Customs.

Fairyland contracted with APL to transport the shipment of the ferrous chloride.

The ferrous chloride was transported on two separate containerships. During the journey, the chemicals leaked out of the bags and shipping containers. It damaged containers and cargo, spilled into the ship's bilges, and contaminated the ports where the containers were discharged. Shortly after the leaks were discovered Fairlyand disappeared leaving the carriers to fund the costs of the clean up. APL and its insurers paid for the cleanup and response costs totaling approximately five million US dollars and subsequently sought contribution from Kemira under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

To establish Kemira's liability under CERCLA, APL had to prove that:
1) there had been a release or threatened release of hazardous materials at a facility;
2) it had incurred response costs;
3) the response costs were necessary and consistent with the National Contingency Plan (NCP); and
4) the defendant was a potentially responsible party (PRP).

The Court determined that:
1) the bulk bags at issue were facilities under 42 U.S.C. § 9601(9)(B);
2) response costs were incurred;
3) the clean up operations were necessary and substantially consistent with the NCP; and
4) Kemira was a 'responsible party' by virtue of being an operator of a facility (the leaking bulk bags of ferrous chloride).

The Court held that the total clean up and response costs incurred by APL were therefore recoverable from Kemira under CERCLA.

Kemira argued that these costs incurred by APL were divisible and capable of apportionment. The Court found that Kemira was not entitled to any relief from the joint and several liability provisions of CERCLA under the divisibility doctrine because Kemira failed to meet its burden of proving that any portion of the harm and costs incurred by APL was divisible. It was stated in the ruling that 'these incidents were caused by a single, indivisible harm: Kemira's specification and requirement of improper packaging of the ferrous chloride in the purchase agreement'.

Kemira, therefore, became liable for the total costs of the clean up under CERCLA, as ruled by the Court.