Neutral Citation Number: [2015] EWHC 3445 (Admlty)

Case No: AD-2015-000056

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMIRALTY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/11/2015

Before :

MR JUSTICE MALES

- -

Between :

THE FORMER OWNERS OF THE MOTOR VESSEL "MELISSA K" NOW NAMED "JASMINE I"	**Claimants**
- and -	
THE FORMER OWNERS OF THE MOTOR TANKER "TOMSK" SUBSEQUENTLY NAMED "PURE ENERGY" AND NOW NAMED "THAYER"	**Defendants**

- -
- -

Miss Vasanti Selvaratnam QC and Mr Ravi Aswani (instructed by **Campbell Johnston Clark**) for the **Claimants**
Mr Richard Sarll (instructed by **Keates Ferris**) for the **Defendants**

Hearing date: 18th November 2015

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE MALES

Mr Justice Males :

Introduction

1. The principal issue on these applications is whether liability for a maritime collision has been compromised by the claimants' acceptance of the defendants' offer to settle liability on the basis that each party was 50% to blame, leaving quantum now to be determined. In outline, the claimants say that it has been so compromised because, despite the expiry of an agreed extension for the issue and service of a claim form, the defendants' offer remained open for acceptance. The defendants say that it has not because the offer only remained open for acceptance if proceedings had been issued and served before expiry of the extension and, as this did not happen, the offer lapsed and no valid service of proceedings has been or could now be effected.

The facts

The collision

2. Although both vessels have since been sold and changed their names, on 18 April 2012 the claimants' vessel was called "MELISSA K" and was registered in Panama while the defendants' vessel was called "TOMSK" and was registered in Liberia. On that date the two vessels collided in fog in the entrance to the port of Tuapse in the Black Sea as "TOMSK" was entering the port and "MELISSA K" was departing. Both vessels were damaged, although it appears that "MELISSA K" came off worse.

3. "MELISSA K" was repaired immediately after the collision at a cost of approximately US $370,000. Together with a claim for loss of income during the period of repairs, the collision gives rise to a claim by the claimants of about US $800,000 exclusive of interest and costs. "TOMSK" was repaired at her next scheduled docking in May and June 2012 at a cost of approximately US $28,000. There is (now, at any rate) no claim for loss of income, although such a claim was foreshadowed at an earlier stage.

Security

4. On the day after the collision, on 29 April 2012, the North of England P&I club, in which "TOMSK" was entered, provided security to the claimants in the form of a Letter of Undertaking. In consideration of the claimants' agreement to refrain from arresting the "TOMSK", the North of England undertook to pay on demand such sums as might be due from the defendants either by agreement between the parties or by a final unappealable judgment of the English court, up to a maximum liability of US $720,000, inclusive of interest and costs.

5. The claimants' P&I insurers were RaetsMarine Insurance B.V. of Rotterdam. On 2 May 2012, RaetsMarine provided security to the defendants, also in the form of a Letter of Undertaking. This too was in consideration of the defendants'

agreement to refrain from arresting the "MELISSA K", and was stated to respond to the parties' agreement, a final unappealable arbitration award (although there is no arbitration agreement between the parties), or a final unappealable judgment of the English court. The maximum liability under this Letter of Undertaking was US $200,000.

6. The position, therefore, was that each party had been provided with security (although if their claim is valid in the full sum now claimed, the claimants appear to be under secured); each party had agreed not to arrest the other's vessel; and it was contemplated that any litigation of the claims would be in England. In accordance with section 190(3) of the Merchant Shipping Act 1995 and in the absence of any extension under section 190(5) or (6) or by agreement, proceedings had to be brought (i.e. issued) within two years from the date of the collision – that is, by 28 April 2014. In the event of proceedings *in rem*, the claimant would then have a further 12 months after the date of issue within which to serve the claim form: CPR 61.3(5).

The First Extension Agreement and the Collision Jurisdiction Agreement

7. On 23 April 2014, shortly before the expiry of the two year limitation period, a mutual extension of time (i.e. for the commencement of proceedings) up to and including 28 October 2014 was agreed between the North of England and the claimants' Turkish lawyers, Doğu Law Office of Istanbul. I infer that although the claimants are a Panamanian company, the "MELISSA K" interests were Turkish.

8. One of the terms of this First Extension Agreement was that a Collision Jurisdiction Agreement be concluded. Accordingly on 25 April 2014 the parties signed a standard form ASG2 Collision Jurisdiction Agreement providing that each party's claim would "be determined exclusively by the English Courts in accordance with English law and practice". It provided also that:

> "The undersigned confirm that, within 14 days of receiving a request to do so, they will instruct solicitors in England or Wales to accept service of the other party's proceedings (including any limitation proceedings) on behalf of their respective clients/principals. …"

9. Accordingly it was possible for either party to serve proceedings on the other by making a request for solicitors to be instructed to accept service. Either party could then be confident that proceedings could be served within 14 days.

The Second Extension Agreement

10. On 22 October 2014 Doğu Law Office wrote to the North of England requesting a further time extension. The North of England responded that:

> "We have recommended to our Members that they agree a mutual time extension to 28 April 2015 for issue and service of the respective claim forms and we will keep you informed of their reply ..."

11. On 24 October 2014 the North of England wrote again, stating:

> "Pursuant to the Collision Jurisdiction Agreement dated 25th April 2014 and subject only to like agreement on behalf of Owners of 'Melissa K' we hereby agree to a mutual extension of time up to and including 28 April 2015 for issue and service of each ship's claim form upon the other.
>
> Please kindly confirm agreement on behalf of Owners of 'Melissa K'."

12. On the same day, Doğu Law Office provided this confirmation:

> "Thanks for this confirmation and I am pleased to confirm that the agreed time extension is now in force."

13. This Second Extension Agreement introduced for the first time a deadline for service of any claim form as well as issue. It constituted an agreed abridgment of the time for service pursuant to CPR 2.11. It is the claimants' case that this was an unusual feature of such agreements but, be that as it may, the terms of the agreement were perfectly clear: in order for service to be valid, any claim form had to be not only issued but also served before the deadline of 28 April 2015.

The defendants' offer to settle liability

14. On 26 March 2015 the North of England sent to RaetsMarine and Doğu Law Office a letter containing a pre-action offer to settle liability which was expressed to be made "in accordance with CPR Part 61.4(10) – (12) and/or Part 36". I shall refer to it as "the Offer". It stated:

> "We are instructed by our Members, owners of Tomsk, to settle liability on the basis of Tomsk being 50% and Melissa K being 50% to blame for the collision.
>
> The costs of determining liability are to be payable in the same proportion.
>
> This offer will remain open for acceptance for 21 (twenty one) days following receipt of this letter. On the expiry of that period, unless the Court orders otherwise, the offer will remain open for acceptance on the same terms except that, in addition, your clients shall pay all of our Members' costs from the date of expiry until acceptance.
>
> For the avoidance of doubt, after commencement of trial this offer can only be accepted with the permission of the Court in accordance with Civil Procedure Rules ('CPR') Part 61.4(12)(d) and/or as provided under rule 36.9(3)(d) of the CPR."

15. The Offer was sent under cover of an email which stated:

> "Liability
>
> 'Tomsk' has proposed liability at 50/50 and 'Melissa K' has proposed liability at 85/15 in their favour. We have reviewed the evidence and argument carefully and, for the following reasons, we believe that the Admiralty Court, London will itself decide that 50/50 is the correct apportionment.
>
> ...
>
> We attach a pre-action Part 61/Part 36 offer of liability alone at 50/50 in the form prescribed by Civil Procedure Rules. ...
>
> We are also instructed to advise you that unless this offer is accepted, no further time-extensions will be granted. If this offer is accepted before expiration of the present time-extension on 28th April 2015 then we are instructed to agree a mutual three-month time extension until 28th July 2015 during which time the parties can address the quantum of each claim.
>
> If the offer on liability is accepted, we will seek instructions to travel to Istanbul to negotiate quantum in good faith and without delay."

16. The email therefore made clear that the deadline of 28 April 2015 for issue and service of proceedings was a final deadline which would not be extended unless the Offer was accepted before the deadline.

Expiry of the deadline

17. On 13 April 2015 RaetsMarine advised that they were still discussing the Offer with the claimants. It appears that they were anxious to know the likely quantum of any claim by the defendants before making up their mind whether to accept and asked that the defendants "serve and support their claim". It is clear, however, that this did not mean service of court proceedings, and merely sought information about the claim by the "TOMSK" which the claimants might face. By now the claimants were running out of time to make a request for the defendants to instruct solicitors. As the defendants had 14 days within which to do so, the time was about to come when service could no longer be effected before the deadline if the defendants chose to use the full 14 day period.

18. On 16 April 2015 Mr Eamon Moloney of the North of England explained the current position as he saw it:

> "1. TOMSK are not obliged to present their claim at present, although I am encouraging them to do so.

> 2. The TOMSK Part 61/36 offer does not have an automatic expiry date. It remains in force unless withdrawn by TOMSK or by order of the Court.
>
> 3. The relevance of the 21 day period referred to in the Part 61/36 offer is that MELISSA K is potentially liable for 100% of TOMSK's liability costs from that time.
>
> 4. The Part 61/36 letter is deemed received on and takes effect from, the day the e-mail copy was sent (CPR 2.26 refers). The 21 day period therefore ended on 16 April 2015.
>
> The Part 61/36 offer only refers to the % liability of each vessel. The quantum of both claims is still to be negotiated.
>
> The present position is:
>
> 5. The Claim of MELISSA K becomes time-barred on 28th April 2015.
>
> 6. If MELISSA K issues and serves a claim form by that date, her claim is preserved and the claim of TOMSK can be presented as a counter-claim in that action.
>
> 7. If MELISSA K agrees to 50/50 apportionment of liability before 28th April 2015:
>
> > a. TOMSK will agree a final, mutual time extension to 28th July 2015 in which the quantum of both claims can be addressed.
> >
> > b. North will seek instruction to travel to Istanbul to negotiate the quantum of both claims in good faith and without delay."

19. Paragraphs 1 to 4 of this email confirmed that the Offer would remain in force unless withdrawn by the defendants or by order of the court. On the other hand, paragraphs 5 to 7 set out a clear warning that if proceedings were not served (and not merely issued) by 28 April 2015, the claimants' claim would be time barred, but that this consequence could be avoided by acceptance of the Offer before that date. In fact, although the email does not say so, and it may be that Mr Moloney had not focused on this point, by this date it was already too late for proceedings to be served by 28 April 2015 if the defendants used the full 14 days to which they were entitled before nominating their solicitors in response to any request to do so. Clearly, however, Mr Moloney was not seeking to take unfair advantage of a time bar which would enable the North of England to avoid payment under their Letter of Undertaking. On the contrary he was encouraging the claimants to preserve their claim by accepting the Offer before the deadline, as he continued to do.

20. On 21 April 2015 the North of England provided some information about the quantum of the defendants' claim, advising that the repair estimate had been some

US $21,000, to which some further relatively minor expenses would need to be added, and that although there was believed to be a loss of use claim, the North of England had so far seen no evidence that the collision repairs had extended the time required for the vessel's stay in dock.

21. The claimants did not accept the Offer at this stage. Instead they made a counter offer, in RaetsMarine's email of 24 April 2015:

> "Our Clients and their H&M are willing to settle liability on both vessels being 50% liable for the collision, but solely under the condition that a time extension is granted till 28/07/2015 and that within this period all parties need to reach a deal on quantum, failing which the 50-50 deal on liability is no longer standing/valid.
>
> Please confirm, provide by Monday 27/04/2015 lunchtime Istanbul the additional time extension until 28/07/2015 and make suggestions for a meeting in Istanbul."

22. Although in some ways not very different from what the Offer had proposed, this counter had the effect that if agreement on quantum was not reached within the proposed further extended deadline of 28 July 2015, the 50/50 settlement of liability would no longer stand. This message demonstrated (or was reasonably to be understood as demonstrating) awareness on the part of the claimants of the imminent deadline. Hence the request for an extension until 28 July 2015. The defendants were not to know from this message, even if it was the case, that nobody on the claimants' side had appreciated that the deadline was a deadline for service as well as issue of proceedings. If that was so, it can only have been because RaetsMarine and Doğu Law Office had not read the documents with sufficient care.

23. On 26 April 2015 the North of England rejected this counter offer, making the suggestion that if the claimants were concerned about the possibility of a much more substantial claim from the defendants than hitherto indicated, they could if they wished (a) protect their position by "accepting our proposal in respect of liability and the additional three month extension for negotiation of quantum" and (b) making their own "pre-action Part 36/61 offer in respect of the quantum of the Tomsk claim." Implicitly, if the Offer was not accepted, there would be no extension and the existing deadline would remain in place.

24. The claimants did not take up this suggestion. Instead, on 27 April 2015, the day before the deadline of 28 April 2015, they instructed English solicitors, Campbell Johnston Clark ("CJC"), for the first time. CJC wrote on that day to the North of England saying:

> "We are advised that the mutually extended time-bar for commencing legal proceedings expires tomorrow and no further time extension has been agreed, hence our instructions to promptly issue."

25. It appears that the solicitors were not aware that the Second Extension Agreement required service as well as issue of proceedings by 28 April 2015. The evidence is that neither RaetsMarine nor Doğu Law Office had appreciated this point, despite the clarity of the Second Extension Agreement and the terms of Mr Moloney's email of 16 April 2015. It is not clear whether the emails comprising the Second Extension Agreement were even provided to CJC at this stage. However, it appears that CJC's ignorance of the need for service as well as issue was not apparent to Mr Moloney at the time.

26. The email continued by explaining that "the current stumbling block" was "the lack of available information in respect of a possible loss of use claim by the "TOMSK". While the claimants "may be prepared to accept 50/50% liability" if the "TOMSK" claim was only of the order of US $30,000, "the same is not necessarily true of, say, a US $500,000 claim". CJC therefore proposed that "a mutual time extension is agreed until 28 July 2015" to allow time for further negotiation. Some attempt was then made on 28 April 2015 to arrange a meeting on the afternoon of the following day but it proved impossible to find a mutually convenient time. The matter rested with Mr Moloney's email sent at 18.08 hours on 28 April 2015 recognising that it had proved impossible to find a time to meet and stating that "I will wait to hear from you."

27. There was no mention in the exchanges on 27 and 28 April 2015 of the need for service of proceedings prior to expiry of the now imminent deadline.

28. In the event CJC issued (but did not serve) an *in rem* claim form on 28 April 2015, presumably before the latest exchanges referred to above.

Acceptance of the Offer

29. The deadline of 28 April 2015 having passed, the North of England wrote to Doğu Law Office and RaetsMarine on 12 May 2015 to inquire as to their intentions in respect of the claim:

> "We write to ask your intentions in respect of the claim of "Melissa K" following passing of the 28 April 2015 time bar for issue and service of claim forms.
>
> We do not know if a claim form has been issued on behalf of "Melissa K" but whether or not, time for service of any such has now passed. Under the Collision Jurisdiction Agreement dated 25 April 2014 (attached), the parties were to appoint solicitors in England or Wales to accept service of proceedings within 14 days of receiving a request to do so. Under the current time extension (also attached), claim forms were to be issued and served by 28th April 2015. We reminded you of this in our e-mail timed 16.40 on 16th April 2015.
>
> If 'Melissa K' did issue a claim form on or before 28th April 2015, we have no record of your request to appoint solicitors to accept service on behalf of 'Tomsk'. Since

> there has been no obstacle to service under the Collision Jurisdiction Agreement and within the agreed limitation period, 'Melissa K' now appears unable to satisfy the requirements of CPR 7.6(3)(b) for an extension of time for service.
>
> We see no grounds for an application to extend time for service to be made without notice to us but if you do follow that route, please place this message and attachments before the Court and inform them that we prefer any such application to be made on notice to us.
>
> For the avoidance of doubt, no claim form has been issued on behalf of 'Tomsk'."

30. On the same day CJC formally requested the North of England to instruct solicitors to accept service in accordance with the Collision Jurisdiction Agreement.

31. This was followed by CJC's acceptance (or as the defendants say, purported acceptance) of the Offer on behalf of the claimants on 15 May 2015 (to which I shall refer as the "Acceptance Letter"):

> "**Notice of Acceptance of Part 36 offer.**
>
> This letter constitutes formal acceptance on behalf of the Melissa K interests of the Part 36 Offer served on behalf of your Member on 26 March 2015.
>
> We propose that the parties now endeavour to agree quantum within six months of the date of this letter, i.e. by 15 August 2015, failing which the question of quantum is to be referred to the Admiralty Registrar.
>
> We should be grateful if you would kindly acknowledge receipt of this letter."

32. By an email dated 20 May 2015 the North of England did the two things which they had been requested to do, namely to nominate solicitors and to acknowledge receipt of the Acceptance Letter. They did so in these terms:

> "We write further to your e-mail of 12th May 2014 (below) and your letter of 15th May.
>
> Service of Proceedings
>
> Pursuant to para #B of the Collision Jurisdiction Agreement dated 25th April 2014, our Members have appointed Keates Ferris (Jonathan Kemp) (ric) to accept service of proceedings. This appointment is without prejudice to our Members' position that time for service of proceedings has passed. Any application to extend time will be opposed and

> we repeat our advice of 12th May that any such application on behalf of your clients should be made on notice. …
>
> Liability
>
> Notwithstanding that your clients' claim is time-barred by reason of failure to serve proceedings within the agreed time, we acknowledge receipt of their acceptance of our Members' pre-action Part 36/61 offer dated 26 March 2015 to agree liability for the collision at 50/50. You will appreciate that, under these circumstances, our Members are not willing to address issues of quantum."

33. Although the claimants' written submissions appeared on one reading to suggest that this email acknowledged the validity of the claimants' acceptance of the Offer, no such argument was pursued orally. It is clear that the email did no such thing. The appointment of solicitors to accept service was expressly without prejudice to the position that time for service had passed and merely avoided the time and cost involved if the claimants had to attempt service by other means, while the acknowledgment of receipt of the Acceptance Letter was expressly on the basis that the letter had not been effective because the claim was now barred.

Service of proceedings

34. After making amendments to reflect the vessels' name changes since 2012 CJC served the claim form on Keates Ferris, the solicitors nominated by the defendants, on 24 June 2015. The defendants filed an Acknowledgment of Service on 8 July 2015 in which they indicated an intention to challenge the jurisdiction of this court.

The present applications

35. I have to deal with two applications. The claimants apply for an order confirming that liability for the collision has been settled upon the claimants' acceptance of the Offer dated 26 March 2015 and seek directions for the further conduct of the matter; alternatively they seek a mandatory extension of time for the bringing of proceedings against the TOMSK pursuant to section 190(6) of the Merchant Shipping Act 1995, alternatively a discretionary extension pursuant to section 190(5); in the yet further alternative they seek an order pursuant to CPR 3.10 remedying any error of procedure which they may have made.

36. The defendants apply for a declaration that the claim form has not been validly served and is now incapable of being validly served and/or that the court has no jurisdiction to try the claim; alternatively they seek an order that the claim be struck out pursuant to CPR 3.4(2) and/or that the defendants be granted summary judgment on the claim.

Has liability been effectively settled by acceptance of the Offer?

37. The principal issue raised by these applications is whether the claimants were entitled to accept the Offer even after expiry of the 28 April 2015 deadline for

issue and service of the claim form. If they were, that must be because the deadline had ceased to have effect or was overridden by the Offer, or because reliance on the deadline was waived, in which case there would be no difficulty in concluding that the Acceptance Letter resulted in a binding settlement of liability, that the proceedings have been validly served, and that directions should now be given for quantum to be determined by the Registrar. On the other hand, if the Offer was no longer capable of acceptance after the deadline, it must follow that there has been no binding settlement of liability, that the proceedings have not been validly served, and that unless the claimants can obtain an extension of time so as to validate their service of proceedings, it is now too late for valid service to be effected. As jurisdiction over a defendant is dependent on service, that would mean that the court has no jurisdiction to try this claim. Although the claimants say, correctly, that limitation is a defence which has to be pleaded and not a matter which goes to the court's jurisdiction, the claim form in this action was issued in time so that no question of limitation arises. The question is whether it has been or can be validly served, which is a question which goes to the exercise of jurisdiction over the defendants.

The parties' submissions

38. In summary Miss Vasanti Selvaratnam QC and Mr Ravi Aswani on behalf of the claimants submitted that:

a. The Offer was an offer made under Part 36 of the Civil Procedure Rules, which constitute a self contained code pursuant to which an offer may be accepted at any time unless the offeror has served notice of withdrawal of the offer on the offeree (see CPR 36.9(2)).

b. As no notice of withdrawal had been served, the Offer therefore remained open for acceptance on 15 May 2015, the date when it was accepted, so that there was then a binding settlement of liability on the basis of 50/50 responsibility for the collision.

c. The fact that the Offer was intended to remain open for acceptance after the 28 April 2015 deadline for service of proceedings was further demonstrated by (i) the statement that it would remain open for acceptance after 21 days from receipt of the letter (i.e. after 16 April 2015), by which time it would be too late for the claimants to serve proceedings before the deadline, and (ii) the further statement that it could even be accepted after commencement of the trial with the permission of the court.

d. Any doubt as to the true construction of the Offer on this point should be resolved in such a way as to render it an effective Part 36 offer, which a time limited offer would not be (see *C v D* [2011] EWCA Civ 646, [2012] 1 WLR 1962).

e. It was an implied term of the offer that, in the event of acceptance, neither party would act in a way that would make it impossible for the quantum of each party's claim to be determined by the court if agreement on quantum could not be reached.

f. Alternatively the defendants have waived any right to rely on the 28 April 2015 deadline as a result of the exchanges set out above.

39. In response, and again in summary, Mr Richard Sarll on behalf of the defendants submitted that:

a. The Second Extension Agreement provided in clear terms that any proceedings had to be both issued and served by 28 April 2015, failing which any claim would be barred.

b. This agreement was unaffected by the Offer which, on its true construction, would only remain open for acceptance after 28 April 2015 if proceedings had been issued and served before the deadline.

c. While it is possible for an offer to settle liability in a collision claim at stated percentages to be made on terms which have the effect of foregoing a defendant's right to rely on other defences such as limitation or the absence of valid service, there was nothing in the terms of the Offer here which had that effect.

d. There was no waiver of the defendants' right to rely upon the deadline.

Part 61 and Part 36

40. CPR 61.4(10) to (12) are specific provisions dealing with offers to settle liability in collision claims in the Admiralty Court at stated percentages, while CPR 36 is concerned with offers to settle across the whole range of civil proceedings. The applicable rules are different in each case and the consequences of an offer made under CPR 61.4 (10) to (12) are different from those of an offer made under CPR 36. For example, a claimant who obtains a judgment which is more advantageous to him than his own Part 36 offer will be entitled, unless such a result would be "unjust", to interest at an enhanced rate, indemnity costs and interest on costs, also at an enhanced rate, from the expiry of "the relevant period", together with an additional amount up to £75,000: CPR 36.14. Those consequences do not apply in an Admiralty collision action when a claimant beats his offer made under CPR 61.4 (10) to (12): *MIOM 1 Ltd v Sea Echo ENE* (No 2) [2011] EWHC 2715 (Admlty), [2012] 1 Lloyd's Rep 140 at [16]. Moreover, while CPR 36.3(2)(a) expressly allows a Part 36 offer to be made before the commencement of proceedings, CPR 61.4(10) refers to an offer made by "a party to a claim to establish liability for a collision claim" which at least implies that proceedings will have been commenced by the time when the offer is made. Further, while a Part 36 offer can be withdrawn by service of "notice of withdrawal" (CPR 36.9(2)), there is no equivalent provision in CPR 61.4 (10) to (12) which provides that in order to be within the rule an offer must remain open unless the court orders otherwise and (by necessary implication) that it cannot be unilaterally withdrawn.

41. These differences mean that, as was common ground between the parties here, an offer cannot at one and the same time be an offer made under CPR 61.4 and a Part 36 offer. Here the Offer was described as being made "in accordance with CPR Part 61.4(10) – (12) and/or Part 36". In that respect it was like the offer considered

in the *MIOM 1* case, which was said to be made "pursuant to Parts 61 and 36 of the CPR" (see [7]). Teare J held at [14] that:

> "It is unnecessary to consider CPR 36 because Part 61 is the rule which deals with offers in Admiralty collision actions."

42. That reasoning applies equally here. Accordingly I reject the claimants' submission that the Offer was a Part 36 offer to which CPR 36.9(2) applied. Moreover, if it is correct that CPR 61.4(10) deals only with an offer made after proceedings have commenced, the Offer was not strictly an offer made in accordance with the provisions of CPR 61.4 (10) to (12) either. Nevertheless it was clearly intended to be an offer made in accordance with those provisions, not only because it said so but because it included each of the requirements set out in CPR 61.4(12). One of those requirements is that it is a term of the offer that after the expiry of 21 days the offer will remain open for acceptance, unless the court orders otherwise, on the same terms except that the offeree should pay all the costs from that date until acceptance. The effect of such a term is at least broadly similar to CPR 36.9(2), save that the latter provision allows notice of withdrawal to be served.

43. That the Offer was at least intended to be made in accordance with the provisions of CPR 61.4 (10) to (12) is relevant to its construction, to which I now turn.

Construction of the Offer

44. The correct approach to the construction of an offer made or intended to be made under Part 36, which applies equally to an offer made or intended to be made under CPR 61.4(10) to (12) (see *MIOM 1* at [10]) appears from the decision of the Court of Appeal in *C v D* [2011] EWCA Civ 646, [2012] 1 WLR 1962. In that case an offer was expressed to be "open for 21 days from the date of this letter" and was "intended to have the consequences set out in" CPR 36. If that meant that the offer was no longer open for acceptance after 21 days, it would not be in accordance with CPR 36, which does not apply to a time limited offer. On the other hand, if it meant that the offer was open in the sense that it could not be withdrawn for 21 days and remained open thereafter unless expressly withdrawn, it would comply with CPR 36.

45. The Court of Appeal adopted the latter construction, applying a principle that an offer stated to be made in accordance with CPR 36 should so far as reasonably possible be construed as complying with CPR 36 (see Rix LJ at [52] to [55], Rimer LJ at [75] and Stanley Burnton LJ at [84]). This principle was an aspect of two more general principles of construction: first, the principle stated in cases such as *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896 that the meaning of a contractual document is what the parties using those words against the relevant background would reasonably have been understood to mean; and second, the principle that words should where reasonably possible be understood in a way which renders them effective rather than ineffective.

46. Rimer LJ put the matter in these terms at [75]:

> "In the present case, therefore, it is not of utility to consider the meaning of the offer paragraph in isolation from the context in which the offer was made. Whatever else may be in dispute, there is no dispute that the offer was intended to comply with Part 36. It was expressly stated to be an 'Offer to Settle under CPR Part 36' that was 'intended to have the consequences set out in Part 36….' Of course, that does not mean that it did in fact comply with Part 36 and therefore must, come what may, somehow be shoehorned into the confines of its four corners: a stated bid to attain a particular goal does not also mean that the goal has been attained. The answer to the critical question still turns on how the reasonable man would read the offer. The relevance, however, of the claimant's expressed intention to make its offer a Part 36 offer is that, if there are any ambiguities in it raising a question as to whether the offer does or does not comply with the requirements of Part 36, the reasonable man will interpret it in a way that is so compliant. That is because, objectively assessed, that is what the offeror can be taken to have intended. That is also in line with the principle of construction to which Rix LJ referred in paragraph [55]."

47. Thus the true meaning of an offer is to be ascertained applying ordinary principles of construction without attempting to shoehorn it into some particular category, at any rate if the shoe would then pinch unacceptably. Those principles include the importance of taking account of the relevant background and context, including where appropriate the fact that an offer is intended to be effective in accordance with CPR 36 or CPR 61.4(10) to (12) and should if reasonably possible be given such effect. Ultimately, however, the question is how the reasonable person would read the offer, taking account of the background and context.

48. In the present case there are three features of the background which the reasonable recipient of the Offer would need to take into account.

49. The first such feature is the Second Extension Agreement. As explained above, that agreement included a clear deadline of 28 April 2015 for service of any claim form. That was a binding and mutual agreement. It applied to a claim by the "TOMSK" as well as by the "MELISSA K". It was a sensible commercial agreement which would enable both parties (and their respective P&I insurers) to close their books if proceedings had not been served by the stipulated deadline. It would be possible for an offer to be made which demonstrated an intention to depart from that agreement, but if that were intended it would usually be expected that some other agreement about the time for commencement of proceedings would be put in its place. The claimants' case is that the Offer had the effect that there was no deadline in place for issue or service of proceedings and that it could be accepted "at any time" regardless of issue or service of proceedings. That in my judgment would be an uncommercial result. It is not what a reasonable person reading the Offer against the background of the Second Extension Agreement would have understood.

50. The second feature is the covering email to which the Offer was attached. As set out above, this stated among other things that:

> "We are also instructed to advise you that unless this offer is accepted, no further time-extensions will be granted. If this offer is accepted before expiration of the present time-extension on 28th April 2015 then we are instructed to agree a mutual, three-month time extension until 28th July 2015 during which time the parties can address the quantum of each claim.
>
> If the offer on liability is accepted, we will seek instructions to travel to Istanbul to negotiate quantum in good faith and without delay."

51. This made it crystal clear that the Offer was not intended to displace the terms of the Second Extension Agreement in any way and that the deadline remained in place and would not be extended unless the Offer was accepted before its expiry. Faced with this, Miss Selvaratnam argued that the Offer had to be read in isolation, without regard to the covering email, but that is unrealistic. No reasonable recipient of the Offer would read it in that way. The Offer and its covering email must be read together.

52. The third feature is the stated intention that the Offer was made "in accordance with CPR Part 61.4(10) – (12) and/or Part 36". The question arises whether effect can be given to this intention consistently with the continuing validity of the Second Extension Agreement. If so, such a construction would satisfy the effectiveness principle discussed in *C v D* and, in the absence of any good reason to the contrary, should be adopted. If not, the question arises whether the need to give effect to that stated intention can properly be regarded as overriding the offeror's other stated intention that the deadline contained in the Second Extension Agreement should remain in force, or whether that would amount to shoehorning an offer into CPR 61.4 (10) to (12) which could not reasonably be made to fit there.

53. Putting to one side the objection that an offer cannot be made in accordance with both CPR 61.4(10) to (12) and Part 36, and thus that on any view the stated intention could not be fully achieved, in my judgment the Offer was consistent with the requirements of CPR 61.4(10) to (12) and with the continuing validity of the Second Extension Agreement. How a reasonable person would understand the Offer must be assessed at the date when it was made. At that stage there was still plenty of time, in the event that they did not wish to accept the Offer, for the claimants to request the defendants to instruct solicitors so that service of proceedings could be effected before the now final deadline. The covering email put the claimants on notice that before this deadline expired they should either accept the Offer or issue and serve proceedings. If they accepted the Offer, a three month extension would be agreed. But proceedings would still need to be issued and served within that further extension if no agreement on quantum was reached within that period. If they issued and served proceedings, the Offer would remain open for acceptance thereafter and, in accordance with the term required by CPR 61.4(12)(d), could not be withdrawn without the permission of the court. But if

they neither accepted the Offer nor served proceedings, the covering email made it clear that it would be too late to do so thereafter.

54. In my judgment that is the clear effect of the Offer, read as a whole and in the light of the relevant background. In my view this is in accordance with the requirements of CPR 61.4(10) to (12) so far as applicable. If those provisions are capable of applying to a pre-action offer, it must be open to the parties to continue to require proceedings to be issued and served in accordance with the applicable limitation period and procedural rules together with any extensions of time agreed for those steps to be taken. That is what a reasonable person would expect. The statements in the Offer that it would remain open for acceptance after 21 days from receipt of the letter and that it could be accepted after commencement of the trial with the permission of the court are consistent with this. They assume that proceedings will have been validly issued and served. But even if that is wrong, and the continuing validity of the deadline is not consistent with the requirements of CPR 61.4(10) to (12), it is so clear here that the defendants intended the deadline to continue in force that to construe the Offer as not having that effect would indeed constitute unacceptable shoehorning.

55. I reach this conclusion as a matter of the construction of the Offer read in the light of the relevant background, without deriving much assistance from three cases cited by the parties. These were *Lubovsky v Snelling* [1944] 1 KB 44, *The Sauria & The Trent* [1957] 1 Lloyd's Rep 396 and *The Pamela* [2013] EWHC 2792 (Admlty), [2013] 2 Lloyd's Rep 596. These cases demonstrate that it is possible for an agreement to settle liability to amount to an agreement not to rely on any limitation defence, but that this is not necessarily so, and that examples can be found of cases falling on each side of the line. What matters, however, are the terms of the particular agreement (or offer) as they would be understood by reasonable parties with knowledge of the relevant background.

56. If, as I have concluded, the effect of the Offer was that it would no longer be open for acceptance after 28 April 2015 if no proceedings had been served, nothing happened thereafter to vary the terms proposed. In particular, the statement in paragraph 2 of Mr Moloney's email dated 16 April 2015 that "the TOMSK Part 61/36 offer does not have an automatic expiry date. It remains in force unless withdrawn by TOMSK or by order of the Court" did not have such an effect. On the contrary the email as a whole reiterated in clear terms the need for proceedings to be served by 28 April 2015 if the Offer was not accepted by that date. As with the statement in the Offer itself, the statement in this email that the Offer would remain in force was predicated on such proceedings having been served.

Waiver

57. The claimants contend that by continuing to correspond with the claimants in relation to settlement at a time when it was clear that service of the claim form could not take place by 28 April 2015 the defendants clearly and unequivocally represented that they would not rely upon any rights they might have had to raise a limitation defence against the claimants. They rely in particular on the exchanges immediately prior to the deadline, set out at [23] to [27] above. In fact, although the claimants put their case in terms of waiving reliance on a limitation defence, there is no limitation defence. The proceedings were commenced in time.

What is in issue is whether the defendants can rely on the failure to serve them before the expiry of the agreed deadline.

58. I would reject the claimants' waiver argument. Up to and including the North of England's email of 26 April 2015 (see [23] above) the defendants were continuing to make clear their intention to rely on the deadline if proceedings were not served and the Offer was not accepted by the 28 April 2015 deadline. This had been clearly stated and there was every reason to believe that it was understood on the claimants' side even if in fact it was not. The exchanges which then followed on 27 and 28 April 2015 were at best (from the claimants' point of view) inconclusive. The defendants continued to urge the claimants to accept the Offer and had proposed a way in which the claimants could do so while still achieving some protection in the event of a higher than anticipated claim by the "TOMSK". The claimants' solicitors had sent a message which could have indicated that they were not aware of the need for service (since it referred only to issue), but it is understandable in my view that this was not immediately picked up by the North of England. Messages were then sent which sought unsuccessfully to arrange a meeting. It was implicit in these that if a meeting could be held on 29 April 2015 (i.e. the day following the deadline) there might still be something to talk about, but this proved impossible. The final message on 28 April 2015, stating that "I will wait to hear from you", was at least consistent with an expectation that the Offer would finally be accepted during the remaining hours of that day and (at most) indicated a willingness to continue discussions in the very short term, with the onus clearly on the claimants to follow this up – which they did not do. However, in the light of all that had gone before I cannot regard these exchanges as constituting a general extension of time for service of proceedings in sufficiently unequivocal terms to give rise to a waiver.

59. Moreover, there is no evidence of any reliance on any such waiver. By 27 and 28 April 2015 it was already too late for the claimants to effect valid service even if the defendants had repeated their reliance on the agreed deadline for service. The claimants' evidence does not address the question what they would have done if the defendants had done so. When I asked Miss Selvaratnam what the claimants could have done, her only suggestion was that the claimants would have served the claim form on the North of England and then applied to have this service validated retrospectively. There is no evidence that this is what the claimants would in fact have done and, in the absence of evidence, this is mere speculation. In any case I see no reason to think that such an application for retrospective validation would have been successful.

60. I conclude, therefore, that unless the claimants can obtain an extension of time for service, or can obtain relief under CPR 3.10 for an error of procedure, the defendants are entitled to the declaration which they seek.

Extension of time under section 190 of the Merchant Shipping Act 1995

61. The applications which the claimants make are for a mandatory extension of time pursuant to section 190(6) of the Merchant Shipping Act 1995, alternatively a discretionary extension pursuant to section 190(5). Section 190(5) and (6) are concerned with extensions of time for the bringing of proceedings, but the claimants do not need such an extension of time. They have brought proceedings

within the agreed extension by issuing a claim form on 28 April 2015. What they need is an extension of time for service of that claim form so as to validate the invalid service which they effected on 24 June 2015, an application which (if it had been made) would have been governed by CPR 7.6. Mr Sarll accepted that the claimants would have been entitled to an extension of time for service of the claim form, albeit that they had not strictly speaking made that application, if they had been able to satisfy the requirements of CPR 7.6. His submission was that it was impossible for them to do so.

62. There is a relationship between the provisions of section 190(5) and (6) and the rules which govern the extension of time for service of a claim form. Thus in *The Espanoleto* [1920] P 223 it was held that an extension of time for service would be given in circumstances where the claimant would satisfy the requirements for an extension of time to bring proceedings under what was then section 8 of the Maritime Conventions Act 1911. This approach has been adopted in more recent cases, e.g. *The Baltic Carrier* [2001] 1 Lloyd's Rep 689. The rationale is obvious. If it would be possible for a claimant to issue new proceedings with the benefit of an extension under section 190, an extension of time for service may as well be granted without requiring the claimant to take an unnecessary step. It is therefore relevant, when deciding whether to extend the time for service of a claim form, to consider whether the requirements of section 190(5) or (6) are satisfied.

63. Accordingly I consider this question before returning to consider CPR 7.6.

A mandatory extension under section 190(6)

64. Section 190(6) provides:

> "Any such court, if satisfied that 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,
>
> shall extend the period allowed for bringing proceedings to an extent sufficient to give a reasonable opportunity of so arresting the ship."

65. It is common ground that there was no reasonable opportunity to arrest the vessel within any relevant jurisdiction at any material time. The claimants submit that they are therefore entitled to a mandatory extension of time pursuant to this subsection. I do not accept this. In my judgment section 190(6) is concerned with cases where jurisdiction needs to be founded by an arrest of the vessel. It has no application to a situation in which a jurisdiction agreement has been concluded enabling proceedings to be served whenever a party chooses to do so and where the parties have each agreed, as they had in this case, not to arrest the other party's vessel. The relevance to "any reasonable opportunity of arresting the defendant

ship" must refer to an opportunity of which the claimant could have taken advantage, not to an opportunity of which the claimant had agreed not to take advantage.

66. I find support for this conclusion in *Stolt Kestrel B.V. v Sener Petrol Denizcilik Sicaret AS* [2015] EWCA Civ 1035 at [48] and [49] where the Court of Appeal approved Hamblen J's observation that "The rationale of the extension granted [under section 190(6)] is the lack of a reasonable opportunity to arrest the defendant ship. That has no application to an *in personam* claim." Tomlinson LJ added that "it would be bizarre if a claimant should be excused from acting diligently in issuing and serving proceedings *in personam* by the circumstance that there has been no opportunity to arrest the wrongdoing vessel, or a sister ship thereof". Although the issue in that case was different (whether the subsection could apply to claims *in personam*), this reasoning applies equally here. It would be bizarre if a claimant was entitled to a mandatory extension as a result of a lack of opportunity to arrest the vessel in circumstances where the existence of a jurisdiction agreement and contractual security render the possibility of arrest entirely irrelevant.

67. Miss Selvaratnam sought to avoid this conclusion by pointing to CPR 61.6 which provides:

> (1) This rule applies if, in a claim *in rem*, security has been given to—
>
> a. obtain the release of property under arrest; or
>
> b. prevent the arrest of property.
>
> (2) The court may order that the—
>
> a. amount of security be reduced and may stay the claim until the order is complied with; or
>
> b. claimant may arrest or re-arrest the property proceeded against to obtain further security.

68. She argued that as the claimants are under secured for their full claim they would have been entitled to avail themselves of this provision to arrest the vessel in order to obtain further security and that the absence of a reasonable opportunity to do so was therefore relevant. I would doubt whether this provision applies in a case where a party had accepted contractual security in exchange for a valid promise not to arrest the vessel, at any rate unless there are other features of the case which make it just for the claimant to resile from its promise (cf. *The Prinsengracht* [1993] 1 Lloyd's Rep 41, where Sheen J said that a second arrest after security had been given to the satisfaction of the claimant would ordinarily be vexatious or oppressive, although there would be some cases where it would be allowed). However, whether or not that is so, the short answer to Miss Selvaratnam's reliance on CPR 61.6(2)(b) is that, even when it applies, a claimant has no entitlement to arrest without first obtaining the permission of the court. This the claimants never did. Accordingly they would never have been entitled to arrest the "TOMSK" if that vessel had called within the jurisdiction.

69. For these reasons section 190(6) has no application in this case.

A discretionary extension under section 190(5)

70. Section 190(5) provides:

> "Any court having jurisdiction in such proceedings may, in accordance with rules of court, extend the period allowed for bringing proceedings to such extent and on such conditions as it thinks fit."

No rules of court have been made pursuant to section 190(5).

71. In the *Stolt Kestrel* case [2015] EWCA Civ 1035 at [72] to [92] the Court of Appeal reaffirmed that a two stage approach applies to the exercise of discretion under this section. The first question is whether there is a good reason for the grant of an extension of time. Ordinarily this means that a good reason must be shown why proceedings have not been brought within the two year limitation period (or, as the case may be, why a claim form has not been served within its initial period of validity). In that regard carelessness or the making of a mistake by the claimant or its advisers will not usually constitute a good reason. It is only if such good reason can be shown that the second question arises, which is whether as a matter of discretion to grant the requested extension. This involves, among other things, weighing the balance of hardship to the claimant if an extension is refused against the hardship to the defendant if it is granted.

72. Miss Selvaratnam relied on what, to my mind, was a ragbag of factors which, she said, constituted a good reason for granting an extension of time in the present case. However, the plain fact is that the claimants in this case could have both issued and served a claim form at any time prior to the agreed deadline if they had wished to do so. The deadline was clearly stated in the Second Extension Agreement. Jurisdiction was agreed and the claimants had only to ask for the defendants to appoint solicitors to accept service. The claimants reminded them of the approaching deadline in the covering email to the Offer and of the need for service of the claim form by that deadline in Mr Moloney's email of 16 April 2015, but the defendants or their advisers did nothing. Instead they left it to the last possible moment to instruct English solicitors and then failed to draw the Second Extension Agreement to their attention.

73. In these circumstances the application under section 190(5) fails at the first hurdle. There is no good reason for the grant of an extension.

CPR 7.6

74. Mr Sarll submitted that section 190(5) and (6) do not apply in any event and that the applicable regime for an extension of time for service of a claim form is that contained in CPR 7.6. In principle this must be right although, as explained above, the considerations which apply under section 190(5) and (6) are at least relevant. Mr Sarll submitted further that the requirements under CPR 7.6(3) (which is the applicable rule in the present case as the application is made after expiry of the abridged time for service) are more rigorous than under section 190(5) as they

include a requirement that "(b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so".

75. At any rate in the circumstances of this case I am not persuaded that this is more onerous than the requirement to show good reason as the first stage in the two stage test explained in the *Stolt Kestrel* case [2015] EWCA Civ 1035. In my view it amounts to much the same thing. I find it difficult to envisage a case where there is a good reason for the grant of an extension (i.e. a good reason why proceedings have not been brought within the two year limitation period or why a claim form has not been served within its initial period of validity) so that the claimant would succeed at the first stage under section 190(5) but where the claimant would nevertheless fail to show that it had taken all reasonable steps to serve a claim form but had been unable to do so. It is therefore unnecessary to determine what approach the court should take if such a hypothetical case exists. Be that as it may, it is clear in the present case that the claimants have not taken all reasonable steps to serve the claim form in time and any application under CPR 7.6 must therefore fail.

Error of procedure

76. Finally the claimants rely on CPR 3.10 which provides:

> "Where there has been an error of procedure such as a failure to comply with a rule or practice direction—
>
> (a) the error does not invalidate any step in the proceedings unless the court so orders; and
>
> (b) the court may make an order to remedy the error."

77. The argument is that the claimants' failure to serve proceedings by 28 April 2015 was an "error of procedure", specifically (as Miss Selvaratnam put it) a failure to comply with CPR 2.11, which can be remedied under CPR 3.10. However, CPR 2.11 does not require the parties to do anything. It merely permits them to vary the time specified for the doing of any act, as they did in this case by agreeing on 28 April 2015 as the deadline for service.

78. It is clear, however, that CPR 3.10 cannot be used to circumvent the requirements of CPR 7.6(3) (or, I would add, of section 190(5) of the Merchant Shipping Act 1995). In *Vinos v Marks & Spencer Plc* [2001] 3 All ER 784 May LJ said at [20]:

> "The general words of r.3.10 cannot extend to enable the court to do what r7.6(3) specifically forbids, nor to extend time when the specific provision of the rules which enables extensions of time specifically does not extend to making this extension of time. What Mr Vinos in substance needs is an extension of time – calling it an error does not change its substance. … The first question for this court is not whether Mr Vinos should have a discretionary extension of time, but whether there is power under the CPR to extend the period for service of a claim form if the application is made after

> the period has run out and the conditions of r7.6(3) do not apply."

79. The answer to that question was No. The same answer must be given here.

Conclusions

80. For the reasons given above:

a. The claimants' application for an order confirming that liability for the collision has been settled is dismissed.

b. So too are the claimants' applications for an extension of time and for the remedying of an error of procedure.

c. There will be a declaration that the claim form has not been validly served and that the court has no jurisdiction to try this claim.

d. The defendants' application for the striking out of the claim and/or for summary judgment does not arise.