Neutral Citation Number: [2015] EWCA Civ 1035

Case No: A3/2014/1832
& A3/2014/1829

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
QUEENS BENCH DIVISION, ADMIRALTY COURT
MR JUSTICE HAMBLEN
2013 FOLIO 1622

And

Case No: A3/2015/1427

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEENS BENCH DIVISION, ADMIRALTY COURT
ADMIRALTY REGISTRAR JERVIS KAY QC
2014 FOLIO 68

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/10/2015

Before:

PRESIDENT OF THE QUEENS BENCH DIVISION
SIR BRIAN LEVESON
LORD JUSTICE TOMLINSON
and
LORD JUSTICE CHRISTOPHER CLARKE

- -

Between:

Stolt Kestrel BV	**Appellant**
- and -	
Sener Petrol Denizcilik Ticaret AS	**Respondent**

AND

Between:

CDE S.A.	**Claimant**
- and -	
SURE WIND MARINE LIMITED	**Defendant**

- -
- -

Vasanti Selvaratnam QC and Neil Henderson (instructed by **MFB Solicitors**) for the **Appellant**
Robert Bright QC and Richard Sarll (instructed by **Holman Fenwick Willan LLP**) for the **Respondent**

And

John Kimbell QC (instructed by **Weightmans LLP**) for the **Claimant**
Chirag Karia QC (instructed by **Holman Fenwick Willan LLP**) for the **Defendant**

Hearing dates: 30 June & 1 July 2015
- -

Approved Judgment

Lord Justice Tomlinson:

Introduction

1. We have heard together an interlocutory appeal against a decision of Hamblen J sitting in the Admiralty Court and an application for permission to appeal against a decision of the Admiralty Registrar, in three collision actions in the Admiralty Court. Two of the actions, one in rem and one in personam, relate to the same collision, that between the *Niyazi S* and the *Stolt Kestrel* at Stanlow near the Port of Liverpool on 10 October 2010. The third action, brought in personam, relates to the collision between the *SB Seaguard* and the *Odyssée* in Ramsgate Harbour on 17 April 2011. The claims in question are of relatively low value by the standards of the Admiralty Court, but raise important questions of Admiralty practice and procedure. I shall deal first with the appeal in the *Stolt Kestrel* and then with the application for permission to appeal in the *Odyssée*. As it happens the latter application serves to illuminate the approach to one issue which arises in the appeal, the principles governing applications made under section 190(5) of the Merchant Shipping Act 1995 ("the MSA") for an extension of time for bringing proceedings.

Stolt Kestrel – the facts and the action in rem

2. On 10 October 2010 *Stolt Kestrel* was berthed port side to at Stanlow.

3. At 03.32 on 10 October *Stolt Kestrel* was struck by *Niyazi S*, to which I shall refer hereafter as "the Vessel", and sustained structural damage to the starboard side between frames 33-105. At the time of the collision the Vessel was owned by Sener Petrol Denizcilik Ticaret AS to which I shall refer hereafter as "Sener".

4. On 30 October 2010 a letter of undertaking was issued by Sener's P&I Club, The Standard Club, in favour of the owners of *Stolt Kestrel* to whom I shall refer hereafter as "the Claimant". The letter of undertaking was in the sum of $300,000 inclusive of interest and costs. The letter of undertaking did not address the issue of jurisdiction.

5. On 11 January 2011 quantum documents were provided to The Standard Club by the Claimant's P&I Club, Gard.

6. On 5 June 2012 the Vessel was sold by Sener to Delmar Petroleum Co Limited ("Delmar") and was renamed *Favour*. It is not suggested that the sale of the Vessel, valued at approximately US$7.5 million, was in any way motivated by the exposure to the outstanding modest claim, in respect of which Sener in any event enjoys insurance cover afforded by its Club. Delmar is a Nigerian company. In her new ownership *Favour* has apparently traded exclusively offshore West Africa.

7. On 8-9 October 2012 Mr Doe of the Standard Club agreed a verbal one year time extension with Mr Chard of Gard and indicated a willingness to agree to an indefinite time extension. The latter indication was never followed up and no-one suggests that it was a binding commitment. It is unclear to me whether any reliance was at the time or is now placed on the verbal one year extension of time and as it happens the point is academic. The critical proceedings were not issued until 11 December 2013, two months beyond the one year extension, if such it was.

8. On 9 October 2012 the Claimant issued an in rem claim form in respect of the collision damage. The action was said to be an Admiralty claim in rem against

> "*Niyazi S* of the Port of Istanbul."

It identified the Claimant, correctly, as

> "The Owners and/or Bareboat Charterers of the Vessel 'STOLT KESTREL'
>
> Stolt Kestrel BV
>
> Westerlan 5
>
> 3016CK Rotterdam."

However the Defendant was identified not just as "The Owners and/or Bareboat Charterers of the Vessel '*Niyazi S*'" but also as

> "SENER PETROL DENIZCILIK TICARET AS
>
> MURSEL PASA CADDESI 243
>
> BALTKARABAS MAH
>
> FATIH
>
> 34087 ISTANBUL, TURKEY."

It was irregular to give in the claim form the name of the Owners or Bareboat Charterers of the Defendant vessel – see below. As it happens of course Sener were no longer the owners of the vessel. It is not suggested that the Claimant's solicitors were at fault in not having ascertained the change of ownership, although I should be surprised if the information was not in fact readily available. However nothing turns on that. Because collision damage attracts a maritime lien the Claimant was entitled to bring proceedings against the Vessel as defendant irrespective of the change of ownership. The Claimant was also entitled to bring proceedings in personam against Sener as the owner of the colliding vessel at the time when the cause of action arose, because the cause of action arose within inland waters of England or Wales or within the limits of a port in England or Wales – Senior Courts Act 1981 section 22(1) and 22(2)(b).

9. Whether the claim was brought in rem or in personam, proceedings brought in respect thereof were subject to a time limit. Section 190 of the MSA provides:-

> "Time limit for proceedings against owners or ship
>
> 190.
>
> (1) This section applies to any proceedings to enforce any claim or lien against a ship or her owners –

> (a) in respect of damage or loss caused by the fault of that ship to another ship, its cargo or freight or any property on board it; or
>
> (b) for damages for loss of life or personal injury caused by the fault of that ship to any person on board another ship.
>
> (2) The extent of the fault is immaterial for the purposes of this section.
>
> (3) Subject to subsections (5) and (6) below, no proceedings to which this section applies shall be brought after the period of two years from the date when-
>
> (a) the damage or loss was caused; or
>
> (b) the loss of life or injury was suffered
>
> (4) Subject to subsections (5) and (6) below, no proceedings under any of sections 187 to 189 to enforce any contribution in respect of any overpaid proportion of any damages for loss of life or personal injury shall be brought after the period of one year from the date of payment.
>
> (5) 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.
>
> (6) 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."

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

10. Issue of the claim form just described was effective to bring proceedings in rem against the Vessel within time. However including Sener's name on this in rem claim form did not amount to the issue or bringing of proceedings in personam against Sener. This conclusion has nothing to do with the fact that Sener was no longer correctly described as the owner of the Vessel. In personam proceedings must be brought separately by an in personam claim form – see below. Inclusion of Delmar's

name, had that been done, would have been equally ineffective to institute proceedings in personam against that company.

11. The case handler at the Claimant's solicitors was aware of the time limit. The reason why she did not issue an in personam claim form is because she wrongly believed that the claim form in rem which she had caused to be issued was a hybrid claim form which included an in personam claim against Sener since Sener was named in the claim form.

Admiralty jurisdiction and procedure

12. It is convenient at this point to set out some of the provisions which govern the bringing of proceedings in the Admiralty Court. The action in rem is distinctive in that it enables a ship to be arrested to compel the provision of security and, if security is not forthcoming, to enable the Admiralty Court to sell the vessel free of all encumbrances to satisfy the claims against the ship. Furthermore, it is a vehicle which provides the Court with jurisdiction to deal with the res upon arrest or, following an acknowledgment of service, a vehicle which enables the court to exercise jurisdiction in personam over the person who has acknowledged service.

13. The starting point as regards procedure is CPR Part 61 – Admiralty claims. CPR 61.1 defines "claim in rem" as meaning "a claim in an admiralty action in rem". No definition is given of a "claim in personam", which the draftsmen of the CPR prefer to describe as "Other claims" – see paragraph 12.1 of PD 61.

14. Paragraph 3 of PD 61 is concerned with claims in rem. Paragraph 3.1 provides that "A claim form in rem must be in Form ADM1". By contrast, paragraph 21.3 of PD 61 provides in respect of "Other claims" that they "must be in Form ADM1A". PD 61 also provides:-

> "**3.2**
>
> The claimant in a claim in rem may be named or may be described, but if not named in the claim form must identify himself by name if requested to do so by any other party.
>
> **3.3**
>
> The defendant must be described in the claim form.
>
> **3.4**
>
> The acknowledgment of service must be in Form ADM2. The person who acknowledges service must identify himself by name."

The contrast between paragraphs 3.2 and 3.3 is important. The claimant in a claim in rem may be either named or described, in the latter case typically as "the owners of the vessel X" or "the owners of cargo lately laden on board the vessel Y". The defendant must simply be described. Typically, the description will be "the Owners and/or Bareboat Charterers of the vessel Z". It is apparently the practice of the Admiralty and Commercial Court Registry to insist also on the inclusion of an address for both

claimant and defendant, and the Registry refuses to issue a claim form without this information being included. The evidence was that the reason for this is that it allows the Registry to trace the parties should the matter become dormant and the Registry receive no satisfactory response from the solicitors on the record. It was for that reason that the case handler at the Claimant's solicitors included both the name and the address of Sener on the in rem claim form, as herein described, presumably under the belief that Sener was the defendant to the action. The practice of the Registry however provides no justification for naming the defendant on an in rem claim form, which is I believe contrary to the usual practice. Indeed, the identity of the defendant to an action in rem will often not become apparent until the person or company who or which acknowledges service identifies himself or itself by name. By contrast, PD 61.2 prescribes, unsurprisingly, that the defendant to an admiralty claim form in personam must be named in the claim form. All such claims proceed in accordance with Part 58 (Commercial Court).

15. The note in the Admiralty section of the White Book at 2D – 143 (Volume 2 page 723) is as follows: "If it is desired to commence proceedings both in rem and in personam separate claim forms must be issued. See Practice Direction (Admiralty: Writ)." This reflects the Practice Direction reported at [1996] 1 WLR 127 and an earlier Practice Direction to the same effect at [1979] 1 WLR 426. This latter provides:-

> "(1) The practice of allowing a writ in an action in rem and a writ in an action in personam to be combined in one document and issued as a single writ will no longer be followed.
>
> (2) The appropriate prescribed forms must be used and if it is desired to commence proceedings both in rem and in personam separate writs must be issued."

It is my, possibly imperfect, recollection of the discontinued practice to which reference is there made that such writs were clearly marked "Admiralty action in rem against the vessel X and in personam against the Owners of the vessel X" who I think were then usually named. The hybrid nature of the writ as being both in rem and in personam was thus clearly indicated and emphasised. The later, 1996, Practice Direction reproduces the substance of paragraph (2) above and continues:-

> "Where the defendants are described in the writ as "the owners of the ship X", any acknowledgment of service in addition to stating the description appearing in the writ shall also state the full name of the persons acknowledging service and the nature of their ownership. In the event of there being insufficient space on the acknowledgment of service form itself, such additional information shall appear on a separate document to accompany and be lodged with the acknowledgement of service form."

That latter direction is now reflected in PD 61 paragraph 3.9 which reads:-

> "**3.9**

> Where the defendants are described and not named on the claim form (for example as 'the Owners of the Ship X'), any acknowledgment of service in addition to stating that description must also state the full names of the persons acknowledging service and the nature of their ownership."

16. According to CPR 61.3(5) an in rem claim form must be served within 12 months after the date of issue. That rule is specific to in rem claims. By contrast, paragraph 12.2 of PD 61 provides in respect of "Other claims" that they will "proceed in accordance with part 58". Therefore, the period for service of an in personam claim form is either four months for service within the jurisdiction or six months for service out of the jurisdiction as per CPR 7.5(1) and (2), which CPR part 58 does not amend.

17. Paragraph 3.6 of PD 61 sets out the various ways in which an in rem claim form may be served, viz

> "(1) On the property against which the claim is brought by fixing a copy of the claim form –
>
> (a) on the outside of the property in a position which may reasonably be expected to be seen;…
>
> (2) If the property of a person will not permit access to it, by leaving a copy of the claim form with that person;
>
> (3) Where the property has been sold by the Marshall, by filing the claim form at the court;
>
> (4) Where there is a notice against arrest on the person named in the notice as being authorised in service
>
> (5) On any solicitor authorised to accept service;
>
> (6) In accordance with any agreement providing for service of proceedings; or
>
> (7) In any other manner as the court may direct under rule 6.15 provided that the property against which the claim is brought or part of it is within the jurisdiction of the court."

Subject to an argument about PD 61 paragraph 3.6(7) with which I must deal hereafter, it is axiomatic that a claim form in rem may not be served out of the jurisdiction. Indeed, it is the presence of the res within the jurisdiction which is a necessary although not sufficient foundation for the exercise by the court of jurisdiction over it.

18. CPR 61.4 contains special provisions relating to collision claims. CPR 61.4(7) provides:

> "(7) A claim form in a collision claim may not be served out of the jurisdiction unless

> (a) The case falls within section 22(2)(a), (b) or (c) of the Senior Courts Act 1981; or
>
> (b) The defendant has submitted to or agreed to submit to the jurisdiction; and
>
> the court gives permission in accordance with section IV Part 6."

19. Cross-reference to the stated sections of the Senior Courts Act 1981 makes good the proposition that 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, although the limitation is not confined to claim forms in rem in collision actions. This is because sections 22(1) and (2) of the Senior Courts Act 1981 provide:-

> "**22** Restrictions on entertainment of actions in personam in collision and other similar cases.
>
> (1) This section applies to any claim for damage, loss of life or personal injury arising out of—
>
> (a) a collision between ships; or
>
> (b) the carrying out of, or omission to carry out, a manoeuvre in the case of one or more of two or more ships; or
>
> (c) non-compliance, on the part of one or more of two or more ships, with the collision regulations.
>
> (2) The High Court shall not entertain any action in personam to enforce a claim to which this section applies unless—
>
> (a) the defendant has his habitual residence or a place of business within England or Wales; or
>
> (b) the cause of action arose within inland waters of England or Wales or within the limits of a port of England or Wales; or
>
> (c) an action arising out of the same incident or series of incidents is proceeding in the court or has been heard and determined in the court."

20. As I mentioned above, the presence of the res within the jurisdiction is a necessary but not sufficient foundation for the exercise of the jurisdiction in rem. Proceedings in rem can only be issued if the court has jurisdiction to entertain them. The Admiralty Court's jurisdiction in rem is set out in section 21 of the Senior Courts Act 1981. Relevant to this case is section 21 (3) which provides "In any case in which there is a maritime lien… an action in rem may be brought in the High Court against that ship…" As I have already indicated, collision damage attracts a maritime lien.

21. CPR 61.5(1) provides for the unique feature of a claim in rem, namely the availability of arrest: "In a claim in rem – (a) a claimant; and (b) a judgment creditor may apply to have the property proceeded against arrested". By contrast, there is no similar provision in respect of "Other claims". PD 61 sets out the procedure for applying for arrest.

The conduct of the in rem action and the bringing of proceedings in personam

22. On 18 September 2013 the Claimant's solicitors, More Fisher Brown ("MFB"), provided a quantum schedule and supporting documents to The Standard Club. There followed a number of requests by MFB to The Standard Club regarding authority to accept service of the Claim Form and whether solicitors had been authorised to accept service. Sener's solicitors, Holman Fenwick Willan ("HFW"), responded on 30 September 2013 stating that they would be in contact once they had had an opportunity to consider the papers. On 1 October 2013 HFW advised MFB that they had recommended that their clients concede liability "at 100% in favour of your client. We expect instructions overnight".

23. By application (Application 1) dated 3 October 2013 the Claimant made an application on paper for an order extending the validity of the in rem claim form issued on 9 October 2012 by eight months and for an order for permission to serve that claim form out of the jurisdiction. The evidence in support of the application referred to the fact that on issuing the claim form the Claimant was not aware that the Vessel had been sold and renamed and also to the fact that since issue of the claim form the Vessel had traded exclusively offshore West Africa. On 8 October 2013 Eder J gave permission to amend the description of the defendant on the claim form so that it now read:

> "The Owners and/or Bareboat Charterers of the Vessel "*Niyazi S*" (now named "*Favour*"), Sener Petrol Denizcilik Ticaret AS, Mursel Pasa Caddesi 243, Baltkarabas Mah, Fatih, 34087, Istanbul, Turkey"

Eder J also extended the time in which the claim form might be served by eight months up to 9 June 2014 and gave permission to serve the claim form on Sener and Delmar out of the jurisdiction.

24. On 11 October 2013 HFW advised MFB that as the 12 month period for serving the claim form had expired, the claim was now time-barred. On 15 October 2013 MFB served on HFW a copy of Application 1 and associated documents, including the claim form and a sealed copy of Eder J's order. HFW replied on 13 November 2013 expressing their view that the in rem claim form was no longer capable of valid service because the extension of time for service had been obtained on the erroneous basis of allowing time for service out of the jurisdiction. HFW further pointed out that the in rem claim form could neither be served out of the jurisdiction nor served on the registered owners. They pointed out that an in rem claim form may not be served in personam. They referred to MFB's error of procedure in failing to issue at the same time both an in rem claim form and an in personam claim form.

25. By further application (Application 2) dated 10 December 2013 the Claimant applied on paper for permission to amend the claim form to add four sister ship defendants

and for an eight month extension of time in which to serve the amended claim form. This application was issued with supporting evidence referring to the fact that the Vessel and her sister ships had not been within the jurisdiction since the in rem claim form was issued and to those provisions of the MSA justifying a mandatory extension of time for service, section 190(6) and/or a discretionary extension of time for service section 190(5), CPR 7.6 and/or CPR 3.10. An Order to the effect requested was made by Flaux J. on 23 January 2014.

26. On the same day as Application 2 was issued the Claimant also issued an Admiralty in personam claim form, in form ADM1A, marked "not for service out of the jurisdiction", naming Sener as First Defendant and Delmar as Second Defendant.

27. By an application (Application 3) dated 13 December 2013 issued in both actions the Claimant applied for an order for an extension of time under MSA section 190(5) and/or section 190(6) and CPR 7.6(3)(b) for commencing the in personam proceedings and for permission to serve the in personam claim form out of the jurisdiction upon both Sener and Delmar.

28. It is common ground that the Vessel and her sister ships have remained out of the jurisdiction since the in rem claim form was issued on 9 October 2012 and there is no evidence that any of the vessels have at any time called within the jurisdiction since the date of the collision. Following the collision the Vessel remained in UK territorial waters until 22.59 on 14 October 2010.

29. By a cross-application (Application 4) dated 4 March 2014 Sener applied for: (1) orders setting aside (i) each of the orders extending the validity of the in rem claim form previously granted to the Claimant by Eder J and Flaux J (ii) that part of the order of Flaux J giving permission to add the sister ships; and (2) a stay of the in personam claim on the grounds that it is time-barred.

The decision below and the challenges thereto

30. Hamblen J had to determine Applications 3 and 4. He summarised the principal issues to be determined as follows:-

> "(1) Whether there should be (i) a mandatory extension of time or (ii) a discretionary extension of time for the bringing of the in rem proceedings.
>
> (2) Whether there needs to be and, if so, whether there should be (i) a mandatory extension or (ii) a discretionary extension of time for the bringing of the in personam proceedings.
>
> (3) Whether there needs to be and, if so, whether there should be (i) a mandatory extension or (ii) a discretionary extension of time for the joinder of the sister ships to the in rem proceedings."

The decision below

31. That part of Application 1 before Eder J which sought an extension of time for service of the in rem claim form did not rely upon section 190(6) or the lack of a reasonable

opportunity to arrest the Vessel during the currency of the claim form, but it was sensibly accepted that it was open to the judge to make an order under that sub-section extending the period allowed for bringing proceedings if the relevant conditions were in fact satisfied. If a mandatory extension of time for bringing proceedings is available it must follow that an extension of time for service of existing proceedings should be granted.

32. Hamblen J determined that there had been no reasonable opportunity since the collision to arrest the Vessel in this jurisdiction. There is no appeal against that factual determination. The judge refused permission to Sener to run a belated case to the effect that the Vessel might have been arrested at Terneuzen in the Netherlands, thus in the territorial sea of the country to which *Stolt Kestrel* belongs, and where the Claimant resides and has its principal place of business. There is no appeal against that ruling. It followed that the Claimant was entitled to a mandatory extension of time for service of the in rem claim form. Time was extended until 9 June 2015. There is no appeal against that ruling. Hamblen J would have granted a discretionary extension under section 190(5) had the jurisdiction under section 190(6) been unavailable. At paragraph 53 he observed:-

> "In my judgment there was good reason for the Claimant not to arrest the vessel immediately following the collision. It needed time to investigate the matter, consider the position, instruct solicitors and decide what steps should be taken. Further, there is no evidence to suggest that it should have been apparent to the Claimant at the outset that neither the vessel nor any sister ship was likely to call within the jurisdiction during the two year limitation period. Thereafter there was no opportunity to arrest the vessel."

33. On 11 May 2015 Hamblen J granted a further extension of 12 months to 9 June 2016 for service of the in rem claim form. That order has not so far as I am aware been appealed although the judge reserved the costs of the application to this court.

34. However Hamblen J in his Order of 23 May 2014 set aside the permission granted by Eder J to serve the in rem claim form out of the jurisdiction on Sener in Turkey. He did not set aside the like permission granted to serve Delmar in Nigeria, presumably because Delmar had not applied for it to be set aside. However that order cannot stand if the order so far as concerns service upon Sener cannot stand. The Claimant appeals against this part of Hamblen J's order, but only on the very limited ground that the grant of permission in this form is justified pursuant to PD61 paragraph 3.6(7).

35. Next, Hamblen J turned to the issue whether there needs to be and, if so, whether there should be: (1) a mandatory extension; or (2) a discretionary extension of time for the bringing of the in personam proceedings. He determined that the in personam proceedings against Sener were not the same proceedings as the in rem proceedings against the Vessel initiated on the issue of the in rem claim form. He rejected an argument that the bringing of the in rem proceedings in time "stopped the time-bar running" for the bringing of in personam proceedings. It followed that an extension of time was required if the in personam proceedings were to be rendered as brought in time. The Claimant appeals against this determination, albeit in reliance on an argument not foreshadowed below, that the circumstance that the sister ship

proceedings have been brought within (extended) time has "protected the claim" from becoming time-barred if sought to be pursued in personam.

36. Next Hamblen J determined that a mandatory extension of time in respect of the in personam proceedings is unavailable because section 190(6) only applies to in rem proceedings. The Claimant appeals against that determination.

37. Turning to the question of a discretionary extension under section 190(5) Hamblen J said this:-

> "33 It was common ground that the discretion under s. 190(5), MSA 1995 should be exercised by applying the two-stage test set out by the Court of Appeal in *The Al Tabith* [1995] 2 Lloyd's Rep 336. As stated by Hirst LJ at p342:
>
> "At stage one the Court must consider whether good reason for an extension has been demonstrated by the plaintiff, which is essentially a question of fact. If, and only if, the plaintiff succeeds at stage one in establishing good reason does the Court proceed to stage two, which is a discretionary exercise involving value judgments including, where appropriate the balance of hardship, which then enters the arena for the first and only time."
>
> 34 In considering what will be a good reason the Court of Appeal expressly approved the following italicised passage from the first instance judgment of Sheen J [1993] 2 Lloyd's Rep 214 at p219:
>
> *"It seems to me that plaintiffs who seek to establish that there is good reason to extend the normal period of limitation must show that their failure was not merely due to their own mistake. It cannot be a good reason for extending the time limit that the defendants are unable to show that there would be any specific prejudice to them in conducting their defence. At the end of two and a half years, it would be virtually impossible to show such prejudice."*
>
> 35 Hirst LJ commented on this passage as follows at p342:
>
> "It follows that in my judgment Mr Justice Sheen's ratio in the italicised passage quoted above was, despite Mr. Charlton's criticisms, sound in law as a matter of general principle. Furthermore, the first sentence of this italicised passage, which lies at the very heart of the learned Judge's reasoning and which states categorically that the plaintiffs must demonstrate that their failure was not merely due to their own mistake, is unimpeachable. Mere carelessness has never been a good reason for an extension (see note 6/8/4 in The Supreme Court Practice 1993)."

> 36 In *The "Pearl of Jebel Ali"* [2009] 2 Lloyd's Rep 484 Teare J observed at [37] that what is a good reason cannot be defined and must depend on all the circumstances of the case. On the facts of that case the reason was a misunderstanding by the Admiralty Manager of a firm of solicitors of the meaning (as it was held to be) of an agreement expressed in "unusual and clumsy terms". Teare J held that this was not "culpable" even if it was a "mistake" and decided that good reason had been shown."

38. Hamblen J held that the mistake here made in failing to issue an in personam claim form in time was culpable. His reasoning was as follows:-

> "76 The Claim Form issued in this case was in Form ADM1 and it was headed "Admiralty claim in rem". In my judgment it should have been clear to Ms Hunter-Davies that the Claim Form she was issuing was an in rem Claim Form and that including the name of the Defendant owner did not change that. There is no such thing as a hybrid or combined in rem/in personam Claim Form. Separate Claim Forms are required for both in rem and in personam proceedings as PD61 makes clear. This should have been known by Ms Hunter-Davies regardless of whether she was aware of the 1979 Practice Direction, although I consider that she should have been aware of any relevant Practice Direction. What the Registry may have said does not change matters. The relevant requirements are as set out in PD61 and the 1979 Practice Direction. In any event it would appear that all the Registry required was the inclusion of an address, not the Defendant owner's name. Whilst I am prepared to accept that Ms Hunter-Davies's mistake was explicable, for all these reasons I am unable to accept that it was excusable and I find the mistake to be culpable."

The Claimant has not sought permission to appeal this finding, but Miss Vasanti Selvaratnam QC on its behalf attempted nonetheless to persuade us that it was unjustified. This challenge is hopeless as well as impermissible. Without needing to personalise the matter, 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. In the face of what was, with justification, described by Mr Robert Bright QC for Sener as a "litany of mistakes" made by the Claimant's solicitors, the Judge's appraisal was if anything generous. On the misconceived footing that the claim form issued on 9 October 2012 contained a claim brought in personam, it required to be served within six months from issue. No attempt was made so to do. Then one week before the one year validity of the in rem claim form expired the solicitors for the Claimant sought leave to serve it out of the jurisdiction on both Sener and Delmar. I suppose that that could be said to be consistent with the initial error in thinking that the in rem claim form contained a claim in personam, at any rate so far as concerns Sener. But I struggle to understand what cause of action the solicitors can have thought the Claimant enjoyed as against Delmar, and, as I have already indicated, any Admiralty practitioner should surely appreciate that an Admiralty claim form in rem

cannot be served out of the jurisdiction, since it is the presence of the res within the jurisdiction that renders it amenable to the exercise of that jurisdiction.

39. Hamblen J next turned to consider how his discretion should be exercised in the light of the agreed test requiring first demonstration of a good reason for an extension of time. He expressed his conclusions thus:-

> "77 The Claimant also sought to rely on a number of other matters in support of its case on good reason, namely:
>
> (a) It contends that there is no defence to the claim;
>
> (b) The Defendant, through its P&I Club and HFW, encouraged MFB and their clients to believe that quantum would be dealt with consensually;
>
> (c) Standard stated that they were willing to agree an indefinite extension of time for the bringing of the claim;
>
> (d) The underlying claim is not time barred as time was protected by the issue of the in rem Claim Form on 9 October 2012 and is still valid for service pursuant to the Orders of Eder J and/or Flaux J;
>
> (e) The in personam Claim Form was issued within one month of HFW having alerted MFB to their view that MFB had committed an error of procedure in not issuing a separate in personam Claim Form;
>
> (f) If, as the Claimant contends appears likely, the vessel and her sister ships seek to evade service by not calling within the jurisdiction, the in personam Claim Form is the only means whereby the underlying claim can be served on the Defendant;
>
> (g) Significant prejudice will be caused to the Claimant if its claim for USD400,000 plus ongoing interest and costs cannot be pursued;
>
> (h) MFB's error is no more culpable than HFW's error in failing to appreciate until it was pointed out to them by MFB that the claim attracts a maritime lien;
>
> (i) The overriding objective of dealing with cases justly strongly favours an extension of time for the issue and service of the in personam Claim Form on the Defendant out of the jurisdiction.
>
> 78 In my judgment, most of these matters are relevant to the second stage of discretion rather than the first stage of whether there was good reason for not issuing the in personam Claim Form in time.

> 79 Even if points (b) and (c) were made out (and they were disputed), they were not the reason why the in personam Claim Form was not issued in time. This is not one of those cases where a party was lulled into a false sense of security because of discussions with the other party. MFB appreciated, notwithstanding those discussions, that a Claim Form needed to be issued, and did so. The error was in failing to issue an in personam Claim Form as well, rather than failing to issue a Claim Form at all. Point (d) is similarly not relevant to the reason for that failure.
>
> 80 Point (e) is correct, but MFB had had nearly a year to consider and seek to regularise the position before the point was raised by HFW. In fact nothing seems to have happened between the issue of the in rem Claim Form on 9 October 2012 and the provision by MFB of quantum documentation on 18 September 2013.
>
> 81 As to point (h), the fact HFW may also have been mistaken about a different matter does not help to explain or excuse the error which MFB made.
>
> 82 The other points made are only relevant to the balance of hardship and the exercise of discretion.
>
> 83 For all these reasons I am not satisfied that good reason has been shown for the failure to issue the in personam Claim Form within the known two year limit or until 14 months later. Had good reason been shown it is likely that I would have exercised my discretion to extend time, largely for the reasons given by the Claimant and in particular: (i) although the claim has not been admitted, it is clearly a strong claim (as has been acknowledged) in relation to which the only issue is likely to be quantum; (ii) the Defendant, its Club and solicitors were engaged with the claim within the two year limit; (iii) the Club indicated a willingness for time to be extended, and (iv) unless an extension is granted, there is a real risk that the Claimant will not be able to pursue its claim."

40. The Claimant appeals this determination on two grounds, which have become known as Grounds 3(a) and 3(b). Ground 3(a) contends that Hamblen J was wrong to regard the "*Al Tabith*" as meaning that none of the factors set out at paragraph 77(a)-(h) were relevant to the demonstration of good reason for an extension of time.

41. I should mention in this regard, although it is only a small point, that the judge made no finding that there has been or that there is a conscious attempt to evade service by ensuring that neither the vessel *Favour* nor her sisters (the other ships of which Sener were the owners on 23 January 2014 when permission was granted to amend the claim form by adding the sister ships) call within the jurisdiction. There was no

evidence to support such a finding. It was a matter of some surprise and disappointment that the contention was made in this court (and apparently also below) that service was being deliberately "evaded". There was no evidence to suggest that the vessels were employed in anything other than a normal trading pattern. It was suggested that an inference of deliberate evasion could be derived from a letter written by Sener's solicitors on 13 November 2013. I have already referred to that letter above. That letter merely sought to point out that the in rem claim form was no longer capable of service as the extension of its validity for service had been procured for the inadmissible reason of allowing time for service out of the jurisdiction. I would also point out that this letter was written before the application was made to amend the claim form by adding the names of the sister ships.

42. I should also point out that the point made at paragraph 77(d) is logically incoherent. If an extension of time is required, it is because the proceedings to which it relates are otherwise out of time. The fact that the claim in rem may still be pursued against the colliding vessel, now in different ownership, is as the judge pointed out of no relevance to the failure to issue an in personam claim form against Sener in time. Equally in my view it is in itself of little or no relevance to the exercise of discretion, if that falls to be considered. I agree with the judge, at paragraph 83 of his judgment, that it is relevant that Sener, its Club and its solicitors were "engaged with the claim within the two year time limit" but it carries the Claimant little further to demonstrate that it had issued an in rem claim form in time, a fortiori where it did so after a change in ownership. Of course, the sale agreed between Sener and Delmar may well include terms as to an indemnity in respect of claims attaching to the Vessel outstanding from Sener's period of ownership made after sale, but that is speculation and not in itself, in my view, a good reason why an extension of time should be granted for the bringing of in personam proceedings against Sener after expiry of the time limit.

43. Ground 3(b) of the Claimant's appeal is the contention that, if the decision in the "*Al Tabith*" does have the effect that the factors set out in paragraph 77(a) to (h), or such of them as are properly made out, are irrelevant to the demonstration of good reason for an extension of time, then this court should reconsider that decision as it was reached without citation of previous Court of Appeal authority, in particular "*The Igman*", 27th May 1993, unreported. The Claimant did not reserve this point before Hamblen J, nor did it before him contend that the "*Al Tabith*" had been decided per incuriam although we were informed that permission to appeal was sought by the Claimant from Hamblen J on this basis.

44. The judge turned finally to the issues surrounding the joinder of the sister ships as defendants to the in rem proceedings. Applying the logic and the learning summarised at paragraph 35 above, Hamblen J determined that an extension of time was required if the sister ship defendants were to be added to the proceedings. Proceedings against the wrongdoing ship are not the same as sister ship proceedings. He derived support for his conclusion in this context from observations of Mocatta J in "*The Preveze*" [1973] 1 Lloyds Rep 202. The judge next resolved against Sener an argument to the effect that "the defendant ship" in section 190(6) MSA means and can only mean the wrongdoing ship. Since there had been no opportunity to arrest either the wrongdoing ship or any of the sister ships, notwithstanding that the latter had not before 23 January 2014 been joined, he determined that a mandatory extension of time for the bringing of proceedings against the sister ships was both appropriate and indeed

required. He therefore declined to set aside the joinder of the sister ship defendants. Sener does not pursue an appeal against this aspect of the decision, notwithstanding the judge gave it permission so to do.

45. It is worth noting at this stage therefore that the proceedings against the sister ships have been brought in time by virtue, and by virtue alone, of the extension of time for bringing of proceedings granted pursuant to section 190(6). The fact that the proceedings are brought in time has nothing to do with the doctrine of relation back introduced by section 35(1) of the Limitation Act 1980, a point which Ms Selvaratnam ultimately conceded in reply. Relation back is not a general rule of English law and it has no application to proceedings for which a time limit is prescribed by section 190(3) of the MSA.

46. The relevance of the sister ship proceedings on this appeal is therefore simply the Claimant's reliance on them as "protecting the claim" from becoming time-barred if sought to be pursued in personam – see paragraph 35 above. This is a curious argument. Time as extended by the Club on behalf of Sener expired on 9 October 2013. Application to join the sister ships was not made until 10 December 2013 and joinder not ordered until 23 January 2014. It is difficult to understand on what basis, assuming the argument to be otherwise well founded, in rem proceedings brought in this manner could have retrospectively rendered as timely either an in personam claim form issued after 9 October 2013 or, specifically, the in personam claim form issued on 11 December 2013. By those dates it was no longer possible to bring proceedings within two (or three – see paragraph 7 above) years from the date of accrual of the cause of action.

The Appeal

Ground 1

47. Under this head the Claimant contends that the judge was wrong to regard section 190(6) as applicable only to in rem proceedings.

48. The judge's reasoning on this point was as follows:-

> "60 The Defendant submits that s190(6) is clearly addressed at in rem proceedings and has no application to in personam proceedings.
>
> 61 As the Defendant points out, this sub-section obliges the Court upon the fulfilment of the cited conditions to ″extend the period allowed for bringing proceedings to an extent sufficient to give a reasonable opportunity of so arresting the ship." In referring to ″arresting the ship″ the sub-section is surely concerned only with the extension of time for in rem proceedings. By contrast, the ship cannot be arrested by way of an in personam claim form.
>
> 62 The Claimant submits that, as the title to s.190 makes clear, the section is concerned with both in rem and in personam

> claims and throughout the section any reference to "proceedings" is referring to both.
>
> 63 It is correct that section 190 is concerned with the "Time limit" for both in rem and in personam proceedings. However, that does not in itself mean that "proceedings" in s.190 must always be referring to both in rem and in personam proceedings, regardless of content and context. The section must be interpreted intelligently rather than mechanically.
>
> 64 I agree with the Defendant that s.190(6) is clearly concerned only with in rem proceedings. The rationale of the extension granted thereunder is the lack of a reasonable opportunity to arrest the defendant ship. That has no application to an in personam claim. One brings an in personam claim by serving the claim form on the person, not the res. One cannot arrest by way of an in personam claim.
>
> 65 The fact that there may have been no reasonable opportunity to arrest the ship is not relevant to and does not justify a failure to serve in personam proceedings. As such, it cannot justify an extension of time for so doing, still less a mandatory extension.
>
> 66 On the Claimant's case it would be entitled to a mandatory extension of time for service of its in personam claim form regardless of the ease of service and for reasons unrelated thereto. This cannot sensibly have been the purpose of s.190(6).
>
> 67 In my judgment s.190(6) is referring to and only applies to in rem proceedings. It follows that the Claimant is not entitled to a mandatory extension of time in respect of the in personam proceedings."

49. I agree with this reasoning and I cannot improve upon it. As a matter of straightforward statutory interpretation the points made by the judge are simply unanswerable. The words of the statute are very clear and do not admit of their application to claims in personam. Moreover I agree with Sener 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. If the wrongdoing vessel were to become a total loss for whatever reason, the owner at the time of the wrongdoing would potentially be at risk of suit for evermore. It would be astonishing if either the framers of the Brussels Collision Convention of 1910 or Parliament which gave the Convention the force of law by enacting the Maritime Conventions Act 1911 intended this extraordinary consequence, and plainly neither did.

Ground 2

50. Ground 2 contends that Hamblen J was wrong to hold that the in personam claim form was time-barred, and should have held that the bringing of proceedings in rem

protected time for the purpose of bringing proceedings in personam, by analogy with the reasoning of Hobhouse J in "*The Nordglimt*" [1987] 1 QB 183.

51. Strictly speaking Hamblen J did not hold that "the claim was time-barred" but rather that the in personam proceedings were brought after the period of two (or three) years from the accrual of the cause of action, and therein lies the fallacy in the Claimant's argument. Section 190(3) of the MSA is a provision which bars the remedy while leaving the underlying claim in existence. Article III rule 6 of the Hague-Visby Rules by contrast, which is the provision with which Hobhouse J was concerned in *The Nordglimt*, is a provision which extinguishes the claim if suit is not brought within one year after delivery of the goods or the date when the goods should have been delivered.

52. This court has very recently had to consider a similar point arising in relation to Article 16 of the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea. That Convention is now given the force of law in the United Kingdom by section 183 of the MSA. Article 16 provides:-

> "ARTICLE 16
> *Time-bar for actions*
>
> 1. An action for damages arising out of the death of or personal injury to a passenger or for the loss of or damage to luggage shall be time-barred after a period of two years.
>
> 2. The limitation period shall be calculated as follows:
> a) in the case of personal injury, from the date of disembarkation of the passenger;…
>
> 3. The law of the court seized of the case shall govern the grounds of suspension and interruption of limitation periods, but in no case shall an action under this Convention be brought after the expiration of a period of three years from the date of disembarkation of the passenger or from the date of when disembarkation should have taken place, whichever is later.
>
> 4. Notwithstanding paragraphs 1, 2 and 3 of this Article, the period of limitation may be extended by a declaration of the carrier or by agreement of the parties after the cause of action has arisen. The declaration or agreement shall be in writing."

In *South West Strategic Health Authority v Bay Island Voyages* [2015] EWCA Civ 708 I discussed this issue in the following terms:-

> "22 I turn then to the second question, the nature of the time bar, as to which I have already foreshadowed my view, in respectful disagreement with the judge, that the language of Article 16 is not such as to extinguish the right on which the claim is based. Looked at through the prism of the English authorities, the language is without doubt the classic language

of limitation, by which I mean in this context remedy-barring as opposed to right extinguishing. ”

23 *Aries Tanker Corporation v Total Transport Limited* [1977] 1 WLR 185 was concerned with the question whether a claim by voyage charterers against shipowners for short delivery of cargo carried by sea could be set off against a claim by the shipowners for unpaid freight. The voyage charterparty, the relevant contract of carriage, included the Hague Rules which provide, by Article III rule 6: -

> “In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered…”

24 The claim for unpaid freight was made more than one year after delivery of the goods and in the interim no suit (action or arbitration) had been brought by the charterers in respect of the short delivery. The availability of the set-off depended therefore upon the effect of the Hague Rules time bar. Did it simply bar the remedy, leaving the claim itself in existence, or did it extinguish the claim? At page 188 Lord Wilberforce, with whom the other members of the House of Lords agreed, said this:-

> “The contract contemplates the possibility of a cross-claim by the charterers in respect of loss or damage to the cargo and it expressly provides by incorporation of article III, r. 6 of the Hague Rules that the carrier and the ship shall be discharged unless suit is brought within one year after the date of delivery or the date when delivery should have been made. This amounts to a time bar created by contract. But, and I do not think that sufficient recognition to this has been given in the courts below, it is a time bar of a special kind, viz., one which extinguishes the claim (cf. article 29 of the Warsaw Convention 1929) not one which, as most English statutes of limitation (e.g. the Limitation Act 1939, the Maritime Conventions Act 1911), and some international conventions (e.g. the Brussels Convention on Collisions 1910, article 7) do, bars the remedy while leaving the claim itself in existence. Therefore, arguments to which much attention and refined discussion has been given, as to whether the charterer's claim is a defence, or in the nature of a cross-action, or a set-off of one kind or another, however relevant to cases to which the Limitation Act 1939 or similar Acts apply, appear to me, with all respect, to be misplaced. The charterers' claim, after May 1974 and before the date of the writ, had not merely become unenforceable by action, it had simply ceased to exist, and I fail to understand how a claim which has ceased to exist can be introduced for any

> purpose into legal proceedings, whether by defence or (if this is different) as a means of reducing the respondents' claim, or as a set-off, or in any way whatsoever. It is a claim which, after May 1974, had no existence in law, and could have no relevance in proceedings commenced, as these were, in October 1974. I would add, though this is unnecessary since the provision is clear in its terms, that to provide for the discharge of these claims after 12 months meets an obvious commercial need, namely, to allow shipowners, after that period, to clear their books.""

Laws and Kitchin LJJ agreed.

53. As already foreshadowed section 190 of the MSA is derived from the 1910 Collision Convention which was in turn enacted into law in the UK by the Maritime Conventions Act 1911, now replaced by provisions in the MSA. Article 7 of the Convention provides:-

> "Actions for the recovery of damages are barred after an interval of two years from the date of the casualty.
>
> The period within which an action must be instituted for enforcing the right to obtain contribution permitted by paragraph 3 of Article 4, is one year from the date of payment.
>
> The grounds upon which the said periods of limitation may be suspended or interrupted are determined by the law of the court where the case is tried.
>
> The High Contracting Parties reserve to themselves the right to provide, by legislation in their respective countries, that the said periods shall be extended in cases where it has not been possible to arrest the defendant vessel in the territorial waters of the State in which the plaintiff has his domicile or principal place of business."

54. This Article was enacted into UK domestic law by section 8 of the Maritime Conventions Act 1911, which provides:-

> "**8.** No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel, whether such vessel be wholly or partly in fault, or in respect of any salvage services, unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused or the salvage services were rendered, and an action shall not be maintainable under this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries unless

> proceedings therein are commenced within one year from the date of payment:
>
> Provided that any court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of court, extend any such period, to such extent and on such conditions as it thinks fit, and shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within which the jurisdiction of the court, or within the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business, extend any such period to an extent sufficient to give such reasonable opportunity.

No rules of court were made pursuant to the proviso in the second limb of section 8.

55. The MCA 1911 has now been superseded by the MSA. I have already set out the relevant provision, section 190.

56. It should be noted in passing that section 190(6)(b) of the MSA represents the area in which the High Contracting Parties reserved to themselves the right to legislate for a mandatory extension of time. Inability to arrest the wrongdoing vessel (or perhaps a sister) within the jurisdiction of the court is not dealt with in the Convention, although it is provided for by section 8 of the MCA 1911 and now by section 190(6)(a) of the MSA. The discretionary power to extend time, formerly contained in the first part of section 8 of the MCA, and now contained in section 190(5) of the MSA, is also not derived from the 1910 Brussels Collision Convention. English law has no provisions pursuant to which time limits may be suspended or interrupted, although section 33 of the Limitation Act 1980 allows for the disapplication of time limits: *Higham v Stena Sealink Ltd*. [1996] 1 WLR 1107.

57. *The Aries* thus stands as direct authority for the proposition that section 190(3) of the MSA bars the remedy whilst leaving the claim in existence. It is with the availability of the remedy that section 190(3) of the MSA is concerned. As Hamblen J rightly observed, the two year time limit in section 190(3) of the MSA applies to the proceedings which are being brought. The relevant proceedings being brought which are here under consideration are those commenced by the issue of the in personam claim form. These are not the same proceedings as the in rem proceedings.

58. In *The Nordglimt* Hobhouse J was concerned with the claim by the receivers of cargo carried on board the *Nordkap* for shortage of and damage to the cargo which was carried on terms which included the Hague-Visby Rules. Within the one year period allowed the claimants commenced in Belgium an action in personam against the owners of the *Nordkap*, the contractual carriers. Over two years later the claimants commenced an action in rem and issued a warrant for the arrest of the vessel *Nordglimt*, a sister ship, claiming damages on the same facts. The *Nordglimt* was arrested and released on provision of security. On the shipowners' application to have the action in rem struck out and the warrant of arrest set aside on the ground that their liability to the plaintiffs had been discharged under Article III rule 6 of the Hague-Visby Rules as the proceedings had not been brought within one year of the date of delivery of the goods and that the court lacked jurisdiction to hear the action in rem by

virtue of the provisions of the Civil Jurisdiction and Judgments Act 1982, Hobhouse J held that "suit had been brought" for the purposes of Article III rule 6 by the in personam action in Belgium, and that accordingly the defendant owners had not been discharged from liability. It is immediately apparent that that reasoning has no application where one is concerned, as here, with a provision which bars the remedy. Here the question is simply whether the relevant proceedings, those begun by the issue of the in personam claim form, were brought after the expiry of the relevant period. They were. It is nothing to the point that different proceedings were brought in time.

59. Ms Selvaratnam also submitted that the decisions of the Court of Appeal in *The Deichland* [1990] 1 QB 361 and of the House of Lords in *The Indian Grace* (No.2) [1998] AC 878 demonstrate that irrespective of the form of claim form, be it in rem or in personam, in reality it is the same party being sued, the owner of the vessel named in the claim form. On that reasoning therefore it is argued that proceedings had been brought against Sener in time.

60. This argument is misconceived for a number of reasons, principally because it again fails to focus on the relevant proceedings, those begun by the in personam claim form, which on no showing have been brought in time. So far as concerns the in rem claim form as originally issued it is wrong for a further reason. The identity of the personal defendant to an in rem claim, whether natural or corporate, if there is to be one, is not known until there is an acknowledgement of service – see the discussion at paragraphs 12 and 15 above. If there is no acknowledgment of service an in rem action may proceed against the res alone. By the time of the issue of the in rem claim form here Sener were no longer the owners of the Vessel. Had the Vessel been arrested so as to found jurisdiction – security had already been provided – Sener might have acknowledged service pursuant to a contractual obligation owed either to Delmar or to their P&I Club. Equally however and perhaps more likely Delmar might have acknowledged service with a view to protecting their ability to claim an indemnity in respect of the consequences of the arrest. Certainly it could not be regarded as axiomatic that Sener would become a defendant to the action.

61. It was to meet this point that Ms Selvaratnam relied on the sister ship proceedings. All but one of the sister ships were owned by Sener on the date of their joinder as defendants, and so far as I know still are in their ownership. This however does not assist the argument. The proceedings against the sister vessels were no more proceedings against Sener than was the original in rem claim form. Were a sister vessel to be arrested, Sener might or might not acknowledge service of the proceedings. Moreover, if it did acknowledge service, only then would Sener become a defendant to the proceedings. The sister ship proceedings were only brought on 23 January 2014. It is accepted that they do not relate back to the date of issue of the in rem claim form. The sister ship proceedings are proceedings for the bringing of which an extension of time has been granted, but that does not assist with the enquiry whether the in personam proceedings have been brought in time.

62. Furthermore Ms Selvaratnam is not in my judgment right to suggest that *The Deichland* and the *Indian Grace (No.2)* have swept away the traditional learning on the nature of an Admiralty action in rem. Another point with which Hobhouse J had to deal in the *Nordglimt* was the suggestion that the English Court should decline jurisdiction over the in rem proceedings pursuant to Article 21 of what was then the

1978 Brussels Jurisdiction Convention, because that action was between the same parties as the Belgian action. Hobhouse J explained the position as follows:-

> "…The defendants [in an Admiralty action in rem] are customarily described as 'the owners of the ship' and the writ is addressed to 'the defendants and other persons interested in the ship'. Since the latter part of the last century, the form of the writ has been used to support an argument that an action in rem is an action against the owners of the ship, but in every case that argument has been rejected. The most convenient statement is that of Fletcher Moulton LJ in *The Burns* [1907] P 137 at 149–150:
>
> > "I am, therefore, of opinion that the fundamental proposition of the argument of the appellants' counsel fails, and that the action in rem is an action against the ship itself. It is an action in which the owners may take part, if they think proper, in defence of their property, but whether or not they will do so is a matter for them to decide, and if they do not decide to make themselves parties to the suit in order to defend their property, no personal liability can be established against them in that action. It is perfectly true that the action indirectly affects them. So it would if it were an action against a person whom they had indemnified. The decision of an action against a person whom the London County Council had indemnified might affect the London County Council, but that fact would not make the action an action brought against them within the meaning of the Public Authorities Protection Act. The only possible support, in my opinion, for the proposition put forward by counsel for the appellants is to be found in the language of the writ itself by which the action in rem is now commenced; but I am of opinion that this ought not to weigh with us. If the old form of warrant is looked at by which the arrest of a ship used to be made, the language in no way supports the contention of the appellants. On the contrary, it is evident from the language of that warrant that the process was regarded then as being directed against the ship itself. That old form was abandoned, and a new form of writ was employed, by direction of those who were responsible for drawing up the Forms under the Judicature Act. I think it was in 1883 that the rule was passed which directed the present form of writ to be issued in Admiralty actions in rem. The direction itself shews that, whether the language was felicitous for the purpose or not, the writ was intended to apply to the old-established Admiralty action in rem, and was not intended to have the effect of creating a new type of action or altering the nature of the action; and when we turn to the form which was at the same time prescribed for the writ of possession in an Admiralty action in rem, where there had been a default

> of appearance, we find that the language is quite suitable, and shews that the proceeding is against the ship itself."

> Unless and until anyone appears to defend an action in rem, the action proceeds solely as an action in rem and any judgment given is solely a judgment given against the res. It is determinative and conclusive as against all the world in respect of the rights in the res but does not create any rights that are enforceable in personam. An action in rem may be defended by anyone who has a legitimate interest in resisting the plaintiff's claim on the res. Such a person may be the owner of the res but equally it may be someone who has a different interest in the res which does not amount to ownership, or again it may be simply someone who also has a claim in rem against the res and is competing with the plaintiff for a right to the security of a res of an inadequate value to satisfy all the claims that are being made on it. It will also be appreciated both from what I have said and from a general understanding of the law of maritime liens that the owner or other person defending the action may be under no personal liability to the plaintiff.

> In the present case it is alleged that the owners of the Nordglimt are under a personal liability to the plaintiffs, but that is not part of the essential character of an action in rem as such. Unless and until a person liable in personam chooses to defend an action in rem, the action in rem will not give rise to any determination as against such person of any personal liability on his part, nor will it give rise to any judgment which is enforceable in personam against any such person.

> The consequence of this is that in my judgment on the correct interpretation of art 21 of the 1968 convention, an Admiralty action in rem is not at the time of its inception an action between the same parties as an action in personam. It will only become an action between the same parties when and if a shipowner, liable in personam, chooses to appear in the action and defend it. It is from that moment, and not before, that the action first acquires the character of an action between the plaintiff and the shipowner; it will also be appreciated that it only acquires that character as the result of an act of the shipowner, and that such a consequence does not inevitably follow from the act of the plaintiff in starting the action in rem."

63. *The Deichland* was concerned with another provision of the 1968 Brussels Convention, Article 2, which provides that:-

> "Subject to the provisions of this Convention, persons domiciled in a contracting state shall, whatever their nationality, be sued in the courts of that State."

The demise charterers of *The Deichland*, in January 1986 the contractual carriers of a cargo of steel coils from Glasgow to La Spezia, were domiciled in Germany. The plaintiff shippers alleged that the coils were damaged in transit by reason of the demise charterers' breach of contract. In January 1987 the plaintiffs issued a writ in rem in respect of the alleged damage and in November 1987 the writ was served on Deichland at Erith. As at the date of issue of the writ the vessel was still demise chartered to the German demise charterers but by the date of service of the writ the demise charter had come to an end. No-one acknowledged service. The vessel was not arrested. The demise charterers' P&I Club sent a letter to the plaintiffs guaranteeing damages up to £54,000 in consideration of the plaintiffs refraining from arresting the vessel. Relying on Article 2, which in effect provided that they were not to be sued otherwise than in the jurisdiction of their domicile, the demise charterers sought a declaration that the English Court had no jurisdiction over them in respect of the claim. Sheen J dismissed the application, holding that the demise charterers were not defendants to the action in rem so long as it remained simply an action in rem and for so long as they declined to submit to the jurisdiction of the court by entering an appearance, now an acknowledgment of service. The Court of Appeal allowed the demise charterers' appeal, but it is important to note the limited manner in which it did so. Neill LJ expressly noted the special characteristics of an English admiralty action in rem and cast no doubt upon the traditional analysis. He concentrated rather upon the proper construction of Article 2 of the Brussels Convention and said this at page 374:-

> " It is true that in the present case the vessel is no longer chartered to Deich and that the jurisdiction to entertain the action in rem is based on the provisions of section 21 of the Act of 1981. But looking at the reality of the matter it is Deich who is interested in contesting liability and against whom the plaintiffs would wish to proceed in personam if an appearance is entered. The position might have been different if the parties to the 1968 Convention and to the Accession Convention had had no knowledge of the Admiralty jurisdiction of the High Court, but it is quite clear from paragraphs 121 and 122 of Professor Schlosser's report on the Accession Convention (Official Journal 1979 No. C. 59, p. 71) that detailed consideration was given to the exercise of jurisdiction in maritime matters by the courts of the United Kingdom.
>
> In these circumstances I find it impossible to conclude that on the proper construction of articles 2 and 3 of the 1968 Convention Deich is not being "sued" in these proceedings even though at this stage the proceedings are solely in rem. Deich is liable to be adversely affected by the result of the proceedings and wishes to contest the merits of the plaintiffs' claim. By English law an Admiralty action in rem has special characteristics though, as has been seen, these characteristics were modified by the Act of 1956 in line with the 1952 Convention. I do not consider, however, that the rules relating to such actions and governing the rights of a plaintiff to levy execution can affect the substance of the matter when the court

> is faced with an international Convention designed to regulate the international jurisdiction of national courts."

To like effect is the judgment of Sir Denys Buckley at pages 389/90:-

> " What article 2 of the 1968 Convention says is that persons domiciled in another contracting state shall be sued in the courts of that state, which imports, in my opinion, that they shall not be sued elsewhere. Can Deich accurately be said to be "sued" in the instant action? It is true that in an action in the High Court which is exclusively in rem against a ship, the plaintiff cannot recover any relief against the party who could be made liable on the same ground of complaint in an action in personam unless that party elects to enter an appearance to the writ in rem. If he does enter such an appearance unconditionally he becomes liable in that action as though it had been commenced in personam. This is a peculiarity of our rules of procedure and practice. The underlying complaint, however, is the same whether the action be framed in personam or in rem. To use an English term, the cause of action - that is to say those essential facts all of which the plaintiff must establish, if disputed, to support his right to the judgment of the court (*Read v. Brown* (1888) 22 Q.B.D. 128, 131, *per* Lord Esher M.R.) - must be the same. The issue of a writ in rem makes available to the claimant, that is to say the plaintiff, different and more limited remedies in some respects from those which would become available to him in an action in personam founded on the same complaint, but the object of each type of action is to recover, or to obtain security for, compensation for one and the same complaint: see also *Letang v. Cooper* [1965] 1 Q.B. 232, *per* Diplock L.J., at pp. 242 et seq. Moreover any relief obtained by a plaintiff in an action in rem only will be just as truly at the expense of the party against whom the underlying complaint is made as relief against that party in an action in personam would be. In reality, distinguished from formal aspects, the instant action is, in my judgment, as much a suit against Deich as would be an action in personam against it founded on the same complaint. It is, I suggest, for this underlying reason that, if the owner or charterer of a ship against which an action in rem is brought enters an appearance to the writ, the action thenceforward and without being reconstituted or amended proceeds as though it were an action in personam against that owner or charterer and had been so ab initio.
>
> Reference to the statement of claim in this action makes very clear that the basis of the action against *The Deichland* consists of alleged breaches of covenant and/or duty on the part of Deich and other alleged defaults on its part. The cause of action alleged is precisely that which would be alleged in an action in

> personam against Deich in respect of the same ground of complaint.
>
> The 1968 Convention is a document binding on all contracting states and its language should consequently, in my judgment, not be construed by reference to domestic considerations of English law. The United Kingdom was not a contracting state when the Convention first became operative. Consequently I think that the word "sued" in article 2 of the Convention should be liberally interpreted in a sense consistent with the policy of the Convention and the intention of the original contracting states. The mere act of giving the Convention the force of law in the United Kingdom cannot, in my opinion, alter the intent and effect of article 2 so ascertained.
>
> The function of the Act of 1982 is to implement the 1968 Convention in the United Kingdom, that is, to give it the force of law in the United Kingdom. So this appeal, in my judgment, depends primarily not upon the Act of 1982 or English law but upon the true interpretation of the 1968 Convention and in particular of article 2 of it.
>
> In these circumstances and for these reasons I would hold that in this action the plaintiffs are seeking to "sue" Deich, and are "suing" Deich, within the meaning and intent of article 2 of the 1968 Convention and so of the Act of 1982. The contrary conclusion reached by the judge and supported in this court by the plaintiffs seems to me to conflict with the policy of the Convention, which I take to be that (save where otherwise provided in the Convention) disputes of a litigious character between parties domiciled in different contracting states shall be resolved in the courts of the state in which that party is domiciled against whom a complaint is made."

64. It is plain therefore that *The Deichland* is simply a decision on the proper interpretation of Article 2 of the Brussels Convention. It casts no doubt upon, indeed it reinforces, the traditional analysis of the nature of an Admiralty action in rem.

65. The same is true mutatis mutandis of the decision of the House of Lords in the *Indian Grace (No.2).* This case was concerned with section 34 of the Civil Jurisdiction and Judgments Act 1982 ("the CJJA") which provides:-

> "No proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England or, as the case may be, in Northern Ireland."

A cargo of munitions belonging to the Republic of India was carried from Sweden to Cochin in the *Indian Grace*, owned by the India Steamship Company, who I will call the owners. In the course of the voyage a fire occurred in one hold which was extinguished with water. Some of the cargo was jettisoned. A much greater part was damaged. The Republic brought proceedings in personam against the owners in Cochin in respect of the jettisoned cargo. Judgment was obtained in a relatively small amount, the sterling equivalent of £7,200. Whilst that action was proceeding the Republic issued an Admiralty writ in rem and served it on a sister ship belonging to the owners whilst she was at Middlesbrough. The claim put forward by that writ was in respect of the damage to cargo and was about 360 times the size of the claim for the jettisoned cargo, about £2.6 million. The same cause of action was therefore asserted as had been asserted in Cochin. The owners entered an appearance and thereby submitted to the jurisdiction of the English Admiralty Court. The owners sought an order pursuant to section 34 of the CJJA to the effect that the Republic was precluded from pursuing the action in rem having obtained the Cochin judgment in personam. It was held by the House of Lords that, quoting from the headnote, "although the judgment in personam in Cochin had not yet been obtained when the action in rem had been begun in England, an action that was continued was "brought" within the meaning of section 34 of the Act of 1982; that an action in rem was in reality an action against the owner of the ship and should not be allowed to proceed where a foreign judgment in personam had been obtained on the same cause of action; and that, the plaintiffs' claim in the Admiralty Court having been "brought" on a cause of action in respect of which judgment had been given in their favour in the Cochin Court in proceedings "between the same parties, or their privies" within the meaning of section 34, their action was, subject to the issue of estoppel, barred." The House of Lords went on to hold that the Court of Appeal had been entitled to hold that the owners were not estopped by convention or acquiescence from relying on section 34.

66. The relevant ratio of this decision is, in my respectful view, very limited. It is to be found in Lord Steyn's speech at page 913 C to the following effect:-

> "It is now possible to say that <u>for the purposes of section 34</u> an action in rem is an action against the owners from the moment that the Admiralty Court is seised with jurisdiction. The jurisdiction of the Admiralty Court is invoked by the service of a writ, or, where a writ is deemed to be served, as a result of the acknowledgment of the issue of the writ by the defendant before service: *The Banco* [1971] P. 137. From that moment the owners are parties to the proceedings in rem." (Emphasis supplied.)

67. The decision should, in my view, be regarded as one on the proper interpretation of section 34 of the CJJA. It is true that at page 911 Lord Steyn said that the view of Hobhouse J in *The Nordglimt* that at the date of its commencement an action in rem was not between the same parties as an in action in personam "was always a very narrow view, and that given the decision of the European Court of Justice in *The Maciej Rataj (The Tatry)* the decision in *The Nordglimt* is no longer good law" and that "his [Hobhouse J's] analysis can no longer be supported." However I would make two points in that regard. Firstly, the European Court of Justice in *The Tatry* [1999] QB 515 was concerned with the proper interpretation of Article 21 of the Brussels

Convention. The question posed of the Court and its answer are set out as follows at pages 535/6, paragraphs 46-48:-

> "46. The national court's second question is whether a subsequent action has the same cause of action and the same object and is between the same parties as a previous action where the first action, brought by the owner of a ship before a court of a contracting state, is an action in personam for a declaration that that owner is not liable for alleged damage to cargo transported by his ship, whereas the subsequent action has been brought by the owner of the cargo before a court of another contracting state by way of an action in rem concerning an arrested ship, and has subsequently continued both in rem and in personam, or solely in personam, according to the distinctions drawn by the national law of that other contracting state.
>
> 47. In article 21 of the Convention, the terms "same cause of action" and "between the same parties" have an independent meaning: see *Gubisch Maschinenfabrik K.G. v. Palumbo (Case 144/86)* [1987] E.C.R. 4861, 4874, para. 11. They must therefore be interpreted independently of the specific features of the law in force in each contracting state. It follows that the distinction drawn by the law of a contracting state between an action in personam and an action in rem is not material for the interpretation of article 21.
>
> 48. Consequently, the answer to the second question is that a subsequent action does not cease to have the same cause of action and the same object and to be between the same parties as a previous action where the latter, brought by the owner of a ship before a court of a contracting state, is an action in personam for a declaration that that owner is not liable for alleged damage to cargo transported by his ship, whereas the subsequent action has been brought by the owner of the cargo before a court of another contracting state by way of an action in rem concerning an arrested ship, and has subsequently continued both in rem and in personam, or solely in personam, according to the distinctions drawn by the national law of that other contracting state."

The court was thus concerned with the status of an action in rem when it was continuing, following entry of appearance by the owner of the arrested vessel, as both an action in rem and an action in personam. The court was not concerned with the character of an action in rem at its inception when the writ, now claim form, is issued. Second, both *The Tatry* and *The Indian Grace*, as was *The Deichland*, were concerned with claims for loss of or damage to cargo carried by a ship. Such a claim does not give rise to a maritime lien, and the Admiralty jurisdiction in rem is only available in respect of vessels owned or demise chartered at the date of issue of the claim form by the person who would be liable on the action if brought in personam. It is easier in such a case to assimilate an action brought in rem to an action brought in personam against a

person who is necessarily the owner or demise charterer of the vessel at the date of issue of the claim form, because that person would be expected to acknowledge service of a writ in rem and enter a personal appearance in order to defend the claim. This reasoning underpins the decisions in *The Deichland* and *The Indian Grace*. Collision damage however attracts a maritime lien, as graphically illustrated by the circumstance that the current action in rem was properly brought against the vessel notwithstanding her change of ownership between the date of collision and the date of issue of the claim form. I note that at page 908 of his speech in *The Indian Grace* Lord Steyn said:-

> "…This case is not concerned with maritime liens. That is a separate and complex subject which I put to one side."

With all appropriate deference therefore I would respectfully suggest that it is not easy to reconcile Lord Steyn's eschewing of consideration of the special nature of a maritime lien with his assertion that the traditional analysis of the nature of an Admiralty action in rem as expounded by Hobhouse J in *The Nordglimt* can no longer be regarded as good law. Lord Steyn's reasoning simply does not address a case such as the present.

68. Lord Steyn's speech has been subjected to powerful extra-judicial criticism by Nigel Teare QC, now as Teare J the current Admiralty Judge – see [1998] LMCLQ 33. He suggests, as I have done above, that the decision should be regarded as one only on the ambit of section 34 of the CJJA 1982, whilst acknowledging the apparent width of the manner in which Lord Steyn expressed himself.

69. As noted above, before Hamblen J it was not suggested that the sister ship proceedings had any relevance to the question whether the in personam action against Sener was brought in time. For the reasons I have already given even if the sister ship proceedings could, as from the joinder of the sister ships, be regarded as an action brought against Sener, that would be of no avail in showing that proceedings in personam had been brought against Sener within two (or three) years after accrual of the cause of action, even were that a relevant enquiry. It is not a relevant enquiry. The relevant enquiry is whether the in personam claim form was issued in time. It was not. I would however respectfully suggest that, for the reasons I have given, *The Indian Grace* is an insubstantial foundation for the suggestion that, for the purposes of section 190(3) of the MSA, an Admiralty claim form in rem issued against one or more ships in the beneficial ownership of or demise chartered to the person, real or corporate, who would be liable if sued in personam, is of itself without more properly to be regarded as proceedings brought against that person.

70. In her reply Ms Selvaratnam suggested that it was clear even before *The Indian Grace* that the naming of the sister ships would "implead" their owners in the following proceedings and she relied on a passage in the speech of Lord Atkin in *The Cristina* [1938] AC 485 to the following effect:-

> "These being the facts I come to the conclusion that when the plaintiffs issued a writ in which they constituted as defendants the steamship or vessel *Cristina* and all persons claiming an interest therein, in the body of which the same ship and all persons claiming an interest therein were commanded within eight days to cause an appearance to be entered for them in the

> Probate, Divorce, and Admiralty Division, and on which they indorsed the claim to have possession adjudged to them of the said steamship or vessel *Cristina*, they were directly impleading the Spanish Government, whom they knew to be the only persons interested in the *Cristina* other than themselves, and from whom they desired that possession should be taken after it was adjudged to them."

With respect this simply does not help because the sister ships were in the present case simply joined too late. Ms Selvaratnam did not however explain what she meant by "implead". Furthermore, the vessel was in that case arrested and the Spanish Government entered a conditional appearance which would presuppose service of the writ. Mr Teare dealt with these points in the article to which I have made reference above, and I can do no better than cite the relevant passage:-

> "Lord Steyn relied heavily on the sovereign immunity cases, in particular the decision of the House of Lords in *The Cristina.* He said:
>
> The proposition that the foreign sovereign is directly impleaded as a defendant by service on his vessel is therefore conclusively established. That proposition must carry with it the legal consequence that the sovereign is a party to the action in rem.
>
> Lord Steyn added that the sovereign immunity cases were not cited to Hobhouse J., in *The Nordglimt* and that he did not mention them. However, Clarke J., did deal with them at first instance in *The Indian Grace (No. 2).* Lord Steyn did not comment on Clarke J.'s treatment of them.
>
> There is no doubt that the sovereign immunity cases established that the court will not permit an Admiralty action *in rem* to proceed against the vessel where the owner is a foreign sovereign. In *The Cristina* the House of Lords held that an action *in rem* against a vessel owned by a foreign Sovereign impleaded the foreign sovereign. Lord Steyn concluded from that proposition that the sovereign must be a party to the action *in rem.* At first instance in *The Indian Grace (No. 2)* Clarke J. did not consider that that conclusion could be drawn. Perhaps it all depends on what is meant by "impleading".
>
> It is noteworthy that there is no suggestion in the speeches of the House of Lords in *The Cristina* that the analysis of an action *in rem* found in *The Dictator, The Gemma* and *The Dupleix* was erroneous in stating that the owner became a party after he has entered an appearance. On the contrary, Lord Wright referred to those cases and remarked that the modern writ *in rem* was "directed against the ship" and stated that "under the modern and statutory form of writ *in rem* a defendant who appears becomes subject to liability *in*

> *personam.* Thus the writ *in rem* becomes in effect also a writ in personam."
>
> Lord Wright concluded that, because the sovereign owner of a ship is commanded by the writ to appear or let judgment go by default, he is called upon to sacrifice either his property or his independence. He was therefore directly "impleaded". This was the sense in which the term was used; it was not used in the sense of being party to an action such that judgment might be given against the party. Given his acceptance of the analysis of the action *in rem* set out in *The Dictator*, it is submitted that it would be wrong to conclude that Lord Wright (or Lord Atkin) considered that an owner who did not appear was party to the action *in rem.* If so, it is submitted that Lord Steyn was wrong to conclude that an owner is a party to an action *in rem* before appearance. By contrast, Clarke J., at first instance, distinguished between being impleaded and being party to an action. It is submitted that he was right to do so."

I respectfully agree. *The Cristina* is of no relevance not least because there has been here no service of the claim form on any of the sister ships, but also because as I have already pointed out, the sister ships were joined too late to enable the argument erroneously founded on *The Cristina* to be advanced.

Ground 3(a)

71. The argument here was that even if the judge was right to regard himself as bound by the "*Al Tabith*", as was common ground before him, he was nonetheless wrong to focus on the reasons why an in personam claim form was not issued in time and to leave out of account, in his evaluation of the question whether an extension of time should be granted, the factors set out at paragraph 77(a)-(h) of his judgment. I regret that I do not understand this argument. The Court of Appeal in the *Al Tabith* held that establishing a good reason for the failure to issue the writ in time is an essential element in the demonstration of a good reason for an extension of time. The judge simply applied that approach. In my judgment this ground of appeal has no independent life of its own.

Ground 3(b)

72. Mr John Kimbell QC assumed the burden of arguing this point in the context of both the appeal and the application for permission to appeal. His argument may be summarised as follows:-

> (i) The Court of Appeal in the *Al Tabith* fell into error by transplanting into the discretion afforded by section 8 of the Maritime Conventions Act 1911, now section 190(5) of the MSA, the approach adopted under the then R.S.C Order 6 rule 8 when consideration was given to the question whether the validity of a writ for service should be extended. That approach required demonstration of good reason for an extension, and ordinarily the showing of a good reason for failure to serve the

> writ during its original period of validity would be a necessary step towards establishing good reason for grant of an extension;
>
> (ii) The decision in the *Al Tabith* is not binding on us because reached without consideration of the prior decision of the Court of Appeal in *The Igman*;
>
> (iii) As a matter of statutory construction section 190(5) MSA calls for an unfettered one stage exercise of discretion. In the consideration of the question whether an extension should be granted the claimant is accordingly entitled to have all relevant factors taken into account, including those relevant to the balance of hardship or prejudice consequent upon a decision to grant or to refuse an extension of time.

This had, maintained Mr Kimbell, been the invariable approach of the Admiralty Court between 1913 and 1993.

73. Mr Kimbell submitted that the power to extend time under O.6 r.8 is conceptually distinct from that given by section 190(5) MSA, in that in the first case the jurisdiction of the court has been invoked, and it is not surprising that an onus is placed upon he who invokes it to get on with the proceedings. This it is suggested is different from simply allowing the time within which proceedings may be brought to expire. That is of course true, and indeed in *Waddon v Whitecroft* [1988] 1 WLR 309 Lord Brandon said, at page 315:-

> "I would readily accept that there may be cases in which the court's discretion under *R.S.C., Ord. 6, r. 8* to extend the period of validity of a writ already issued, and its other discretion under section 33 of the Limitation Act 1980 to extend the primary period of limitation, may fall to be exercised either in favour of or against an applicant on very similar grounds. I do not accept, however, that this will necessarily be so in all or even a majority of cases. The reasons for not serving a writ which has been issued before the expiry of the primary period of limitation, and the reasons for not issuing a writ at all within that period, may differ widely. I do not think, therefore, that it would be right to lay down any general principle that a judge deciding an application for extension of the period of validity of a writ in a personal injury case should be obliged to deal with the matter in precisely the same way as if he were deciding an application for extension of the primary period of limitation."

There may well be different considerations to take into account. In particular, in the case of allowing the time limit to expire, it may often be the case that the claimant has not taken legal advice, whereas in the case of a failure to serve proceedings, almost invariably, certainly in this class of litigation, it will be lawyers who bear the responsibility to effect service.

74. All that notwithstanding, it was Lord Brandon who as Brandon J observed in *The Owenbawn* [1973] 1 Lloyds Rep 56 at 59:-

> "I was referred to a large number of authorities relating to two matters. The first matter is the renewal of a writ under the appropriate rule, and the other matter is the extending of time under section 8 of the Maritime Conventions Act, 1911. It seems clear that, whether the Court in a case of this kind is asked to renew a writ, or whether it is asked to extend the time under section 8, very similar considerations apply. It has been helpful to see how the Court has dealt with applications of both kinds over the years."

75. In the *Al Tabith* at first instance Sheen J said this:-

> "*It seems to me that plaintiffs who seek to establish that there is good reason to extend the normal period of limitation must show that their failure was not merely due to their own mistake. It cannot be a good reason for extending the time limit that the defendants are unable to show that there would be any specific prejudice to them in conducting their defence. At the end of two and a half years, it would be virtually impossible to show such prejudice. Mr Charlton invited me to consider the balance of hardship. If balance of hardship could constitute good reason for extending a time limit, that time limit would always be extended.*"

76. The argument addressed to the Court of Appeal in the *Al Tabith* by Mr Timothy Charlton QC was in essence the same as that advanced by Mr Kimbell and Ms Selvaratnam here. Ground 1 of the Notice of Appeal in the *Al Tabith* read:-

> "The Learned Judge was wrong to refuse to look at the "balance of hardship" when considering whether in all the circumstances of the case, there was good reason to grant the plaintiffs the extension of time for commencement of the proceedings which they seek."

77. Hirst LJ dealt with this argument as follows between pages 340 – 342:-

> " It is not presently in dispute that the same "good reason" test applies under s. 8 of the 1911 Act as is regularly applied when deciding whether or not to extend the validity of a writ under O. 6, r. 8 (see per Mr. Justice Brandon, in *The Owenbawn*, [1973] 1 Lloyd's Rep. 56 at p. 59 and per Mr. Justice Sheen in *The Zirje*, [1989] 1 Lloyd's Rep. 493 at p. 497).
>
> The correct approach under O. 6, r. 8 has been laid down authoritatively in four recent House of Lords' cases. In *Kleinwort Benson Ltd. v. Barbrak Ltd.*, (sub nom. *The Myrto*) (No. 3), [1987] 2 Lloyd's Rep. 1; [1987] A.C. 597, the leading

speech, with which the other members of the Appellate Committee agreed, was given by Lord Brandon of Oakbrook.

Having reviewed the history of O. 6, r. 8 and the earlier authorities, he held at p. 13, col. 1; p. 622C that there must be implied into O. 6, r. 8, as a matter of construction:

> …a condition that the power to extend shall only be exercised for good reason.

He then proceeded at p. 13, col. 2; p. 622H:

> The question then arises as to what kind of matters can properly be regarded as amounting to "good reason". The answer is, I think, that it is not possible to define or circumscribe the scope of that expression. Whether there is or is not good reason in any particular case must depend on all the circumstances of that case, and must therefore be left to the judgment of the Judge who deals either with an ex parte application by a plaintiff for the grant of an extension, or with an inter partes application by a defendant to set aside an extension previously granted ex parte... The decision whether an extension should be allowed or disallowed is a discretionary one for the Judge who deals with the relevant application. *Jones v. Jones* shows that, in exercising that discretion, the Judge is entitled to have regard to the balance of hardship. In doing so, he may well need to consider whether allowing an extension will cause prejudice to the defendant in all the circumstances of the case. Once a Judge has exercised his discretion, it is only on very limited grounds, too well known for it to be necessary for me to set them out here, that an Appellate Court would be justified in interfering with his decision.

In the second case, *Waddon v. Whitecroft Scovell Ltd.*, [1988] 1 W.L.R. 309, the leading speech, with which the other members of the Appellate Committee agreed, was also delivered by Lord Brandon.

Having referred to the *Kleinwort Benson* case, Lord Brandon stated as follows in the key passage in his speech:

> In *Kleinwort Benson's* case the House, after reviewing a long line of authorities on the present RSC, Ord. 6, r. 8 and its predecessor, laid down the following principles as applicable to the exercise of the court's discretion on an application for extension of the validity of a writ in cases where questions of limitation of action are involved. (1) On the true construction of

> Ord. 6, r. 8 the power to extend the validity of a writ should only be exercised for good reason. (2) The question whether such good reason exists in any particular case depends on all the circumstances of that case. Difficulty in effecting the service of the writ may well constitute good reason but it is not the only matter which is capable of doing so. (3) The balance of hardship between the parties can be a relevant matter to be taken into account in the exercise of the discretion. (4) The discretion is that of the judge and his exercise of it should not be interfered with by an appellate court except on special grounds the nature of which is well-established.

Lord Brandon then proceeded to review the various grounds on which the decision of the first instance Judge, Mr. Justice Michael Davies, were criticized, two of which are presently relevant. First, at p. 314G, he said:

> The second ground of appeal was that what a plaintiff had to show was good reason for an extension of the original period of validity of the writ, and not good reason for failure to serve it during that original period, and that Michael Davies J. had wrongly confused these two different matters. While it may be possible to visualise a case in which establishment of the second matter is not a necessary step to establishment of the first, I do not find it easy to do so. In the present case at any rate it seems to me that the two matters are inextricably bound together. That is the approach which Michael Davies J. appears to have adopted and I cannot see that he erred in doing so.

Then at p. 317H:

> The seventh ground of appeal was that Michael Davies J. did not take into account the balance of hardship between the parties, although *Kleinwort Benson's* Case showed that this was a proper matter for consideration. Here again I think that there is some misconception as to the effect of that part of the decision in that case. This House was not saying that balance of hardship could of itself constitute good reason for extending the validity of a writ. What it was saying was that, where there were matters which could, potentially at least, constitute good reason for extension, balance of hardship might be a relevant consideration in deciding whether an extension should be granted or refused. In the present case Michael Davies J. found, rightly as I think, that there were no matters which could, even potentially, amount to good reason for extension. In those circumstances the question of balance of hardship did not arise.

Thirdly, in *Baly v. Barrett*, [1988] N.I. 369, the leading speech, with which the other members of the Appellate Committee agreed, was again delivered by Lord Brandon who stated as follows at p. 417A:

> In the *Waddon* case the House corrected an apparent misunderstanding of principle (3) above by emphasising that the question of the balance of hardship between the parties can only arise if matters amounting to good reason for extension, or at least capable of so amounting, have first been established. In that case the balance of hardship between the parties may be a relevant factor in the exercise of the court's discretion. But, if no matters amounting to good reason for extension, or capable of so amounting, have been established, the effect of principle (1) is that there is no room for the exercise of discretion at all, and the question of the balance of hardship between the parties does not therefore arise.

Fourthly, the principle was restated yet again, in identical terms, by the House of Lords in *Dagnell v. Freedman*, [1993] 1 W.L.R. 388, citing the previous three authorities.

…

First and foremost, on the main point of principle, in my judgment the House of Lords' line of authority quoted above is fatal to Mr. Charlton's submission that there is a one-stage and not a two-stage process. The correct two-stage test was placed beyond any shadow of doubt by Lord Brandon in the key passage in the *Waddon* case, as explained in *Baly v. Barrett*.

At stage one the Court must consider whether good reason for an extension has been demonstrated by the plaintiff, which is essentially a question of fact. If, and only if, the plaintiff succeeds at stage one in establishing good reason does the Court proceed to stage two, which is a discretionary exercise involving value judgments including, where appropriate, the balance of hardship, which then enters the arena for the first and only time.

It follows that in my judgment Mr. Justice Sheen's ratio in the italicized passage quoted above was, despite Mr. Charlton's criticisms, sound in law as a matter of general principle. Furthermore, the first sentence of this italicized passage, which lies at the very heart of the learned Judge's reasoning and which states categorically that the plaintiffs must demonstrate that their failure was not merely due to their own mistake, is unimpeachable. Mere carelessness has never been a good

> reason for an extension (see note 6/8/4 in The Supreme Court Practice 1993)."

What Hirst LJ refers to as the italicised passage is that which I have set out at paragraph 75 above.

78. Both Rose and Russell LJJ, the other members of the court in the *Al Tabith*, approached the case in the same manner. Rose LJ pointed out that the want of any realistic defence is, in the absence of an admission of liability, an obvious reason for starting proceedings within the prescribed period rather than a good reason for not doing so. There being no good reason to grant an extension, i.e. no good reason why a writ had not been issued in time, the question of hardship did not arise. Russell LJ said:-

> "The sole operative cause of the delay in issuing the writ was, in my judgment, the human error of Mr Dawson. He was not induced to make the mistake by any active or passive conduct on the part of the defendants.
>
> Wherever the balance of hardship lies, it is, in my view, immaterial, unless and until the plaintiff overcomes the first hurdle which confronts him, namely of demonstrating some legally excusable lapse responsible for the delay. A lapse such as mere forgetfulness, as in this case, is not in my view capable of being regarded as legally excusable."

79. I do not accept Mr Kimbell's suggestion that the jurisdiction under section 8 of the Maritime Conventions Act 1911 was exercised consistently in the manner he suggests. The two very earliest cases which he cited to us do not bear out his argument. In *The James Westoll* [1923] P 94, in fact decided in 1913, Lord Parker of Waddington seems to have focused exclusively on the absence of good reason for making a claim in time. It is true that he points out that if the court were to permit a statute barred claim to proceed, it is "quite possible that the defendant "might suffer serious inconvenience and injustice." But that is simply a general statement as to the usual effect of overriding a statutory time bar. The court there made no attempt to weigh the relative balance of hardship or prejudice. It was simply axiomatic that because there was no good reason shown why the action had not been issued in time, and because to override the time bar might well prejudice the defendant, no extension would be granted. The other members of the court, Lord Sumner and Warrington J, agreed with Lord Parker. I do not think that this is far removed from the approach in the *Al Tabith*.

80. *The Kashmir* [1923] P 85 was a particularly hard case. Argument was addressed to the judge, Hill J, concerning the relative hardship which would be caused in the event that time was or was not extended but the judge, citing *The James Westoll*, expressed his conclusion upon a very short ground:-

> "…one starts with the fact that the defendant has obtained his limitation, and it must not be interfered with unless there is good reason. The only reason alleged in the present case for interfering is that the plaintiff, though she knew of the loss of

> her son, did not know that the loss gave her any cause of action. It seems to me that that is a wholly insufficient ground for depriving the defendants of a right which they had otherwise acquired, especially after so long an interval."

The Court of Appeal, Lord Sterndale MR, Warrington and Younger LJJ, upheld his decision, whilst noting that the facts in the case before them could not have been more different from those which obtained in *The James Westoll*. Again that looks to me very like the application of a two stage test, requiring first demonstration of good reason for the failure to issue proceedings in time. The hardship to the plaintiff in *The Kashmir* was very considerable.

81. The approach to the exercise of the jurisdiction has no doubt developed over time, and it seems to me natural, inevitable and desirable that it should have been influenced by decisions in other cognate areas. As the citation from the judgment of Hirst LJ in the *Al Tabith* shows, the 1980s and 1990s was a period in which the jurisdiction under Order 6 rule 8 was examined by the House of Lords on no less than four occasions. It would be extraordinary, particularly in light of the lead given by Brandon J in *The Owenbawn*, if the manner of exercise of the jurisdiction under section 8 of the Maritime Conventions Act 1911 had not been influenced by this learning. Moreover in *Dagnell v Freedman* [1993] 1 WLR 388 it was emphasised by the House of Lords that the approach mandated by that learning is not inflexible. Although good reason for justifying extension of the validity of the writ had to be shown, it was <u>normally</u> (my emphasis) impossible so to do without first showing good reason for the failure to serve the writ during its initial validity. Furthermore, the two stage enquiry does not involve two watertight compartments. As Waite LJ put it in *Lewis v Harewood* [1997] P.I.Q.R.P 58, at P 60:-

> "A judge exercising the discretion to extend time, at the suit of a party seeking an extension of time for service after the validity of the proceedings has expired and after expiry of any relevant limitation period, has to conduct the inquiry in two stages. He must first be satisfied, at stage one, that there is good reason to extend time, and also that the plaintiff has given a satisfactory explanation for his failure to apply before the validity of the proceedings expired. If he is not so satisfied, that is the end of the application and stage two will never arise. If he is so satisfied, then he must go on, at stage two, to a general exercise of a discretion involving a consideration of all the circumstances including the balance of prejudice or hardship. Matters relevant at stage two are not, however, irrelevant at stage one. There is a degree of overlap, and a judge addressing the inquiry at stage one is entitled and bound to take into account any matters which appear to him to be relevant to the issues of good reason and satisfactory explanation, notwithstanding that the same matters will also be relevant (assuming it arises at all) to the exercise of his discretion at stage two."

82. Order 6 rule 8 has of course now been replaced by CPR 7.6. CPR 7.5(2) provides "the general rule is that a claim form must be served within four months after the date of issue." CPR 7.6 provides:-

> "**7.6**
>
> (1) The claimant may apply for an order extending the period for compliance with rule 7.5.
>
> (2) The general rule is that an application to extend the time for compliance with rule 7.5 must be made –
>
> (a) within the period specified by rule 7.5; or
>
> (b) where an order has been made under this rule, within the period for service specified by that order.
>
> (3) If the claimant applies for an order to extend the time for compliance after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if –
>
> (a) the court has failed to serve the claim form; or
>
> (b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and
>
> (c) in either case, the claimant has acted promptly in making the application."

83. In *Hashtroodi v Hancock* [2004] 1 WLR 3206 at paragraph 35 of the judgment of the Court Dyson LJ emphasised that even where there is no reason for the failure to serve in time other than incompetence of the claimant's legal representatives, that is not an absolute bar to relief although it is a powerful reason for refusing to grant an extension of time. On the facts of that case, it was decisive.

84. Against this background I turn to the decision in *The Igman*. The leading judgment in that case is a long extempore judgment delivered by Evans LJ which is, with respect, not at all easy to follow. That case concerned a collision between the "*Malandrinon*" and "*The Igman*". The P&I Club in which *Malandrinon* was entered gave a letter of guarantee which included the following:-

> "In consideration of your refraining from arresting or detaining the vessel "*Malandrinon*" owned by Wildvalley Shipping Company SA or any other vessel in the same or associated ownership management possession or control anywhere in the world…
>
> We further undertake that when requested to do so we will irrevocably instruct solicitors in England to accept service of proceedings issued in the English High Court of Justice

> Admiralty Court on behalf of the owners of the MV "*Malandrinon*"."

Subsequent to the collision the *Malandrinon* was sold by Wildvalley Shipping Company and renamed the "*Atilim 2*". Shortly before the time bar expired, both sides issued proceedings. The solicitors for *The Igman* issued an in rem claim form in which the defendant was named as "the owners of the ship "*Atilim 2*" (formerly named "*Malandrinon*"). Their opponent solicitors, Messrs Clydes, objected that they were not bound by the letter of guarantee to accept service because (i) they did not act for the current owners of the *Atilim 2*; and (ii) the claim form was in rem, whereas the letter of guarantee contemplated a claim form in personam. The solicitors for *The Igman* therefore issued a fresh in personam claim form and duly sought an extension of time pursuant to the discretionary limb of section 8 of the Maritime Conventions Act 1911. They also sought leave to counterclaim out of time in the respondents' action. The questions for the court were amongst other things (i) whether there needed to be any in personam claim form or whether the in rem claim form would suffice and (ii) supposing that there needed to be a fresh in personam claim form, whether time could be extended for its commencement.

85. The first point to note is that there was no challenge in the Court of Appeal to the basis upon which the judge below, Sheen J, had approached the exercise of his discretion. He had directed himself by reference to the decision of the House of Lords in *The Myrto*.

86. Secondly, Evans LJ concluded that the causative error by the claimants' solicitors, if there was one, was the failure to appreciate that Clydes, the respondents' solicitors, might take the point which they did on their obligation to accept service of the in rem writ. Evans LJ regarded this error, if such it was, as "a technicality only" – Hoffmann LJ called it "a matter of such high technicality." Put another way, if the solicitors were at fault they were not culpable and good reason was shown why they had not issued an in personam writ within the time allowed.

87. Having reached that conclusion, Evans LJ went on to ask:-

> "Overall, as regards the question of discretion, it seems to me essential to have regard to what I will call "the justice of the case" with particular need for reference to the question whether the appellants show a good reason for an extension in this case. In substance it seems to me that the court has to ask itself: does the appellants' error merit the consequences which a refusal would imply, taking account also of the respondents' position and their interests? In my judgment it does not, and the extension should be granted.
>
> I would give greater weight than the learned judge did in particular to the fact that the appellants' error, if there was one, was a technicality only."

In expressing himself in this way Evans LJ was proceeding to the second stage of the enquiry. At this stage he was balancing all the considerations, having regard to what he called "the justice of the case". The judge had evidently given little or no weight to the highly technical nature of the error. Evans LJ accordingly considered it appropriate to grant an extension, in fact an extension in which to serve a counterclaim, although as he pointed out it made no real difference whether such an extension was granted or an extension of time within which to issue an in personam claim form.

88. As it happens Evans LJ also went on to conclude that on the true construction of the Club letter of guarantee the respondents' solicitors Messrs Clyde and Co had been obliged, on behalf of Wildvalley Shipping Company SA, to accept service of the in rem writ notwithstanding the change of ownership. He pointed out that technically it might be necessary to extend the time for service of that writ, so that it could now be served on Messrs Clydes, but that that was not necessary because of an undertaking given to the court by Clydes that they would accept service in the event that the court determined that they had been obliged so to do. In the light of this finding as to the proper construction of the letter of guarantee, the previous part of the reasoning in the judgment of Evans LJ is strictly unnecessary to his decision. The other two members of the court however did not express a view as to the proper interpretation of the letter of guarantee. Hoffmann LJ said "…assuming that the writ was not in the proper form, the appellant's mistake was a matter of such high technicality that I think that it would be a reproach to the administration of justice in the Admiralty Court if such a slip, assuming it to have been one, should deprive the appellants of what appears on the face of it to be a promising cause of action. In my judgment the learned judge misdirected himself by not taking into account this, as it seems to me, vital feature of the case." Russell LJ adopted a similar approach.

89. In conclusion I do not consider that *The Igman* is authority, and certainly not clear authority, for the application of a one stage test different from that prescribed by the House of Lords in relation to Order 6 rule 8. The case can be explained simply on the basis that the assumed error was not culpable, on the contrary was of the highest technicality, and afforded good reason for the failure to issue an in personam writ in time.

90. In *The Pearl of Jebel Ali* [2009] 2 Lloyd's Rep 484 the court was referred to both the *Al Tabith* and *The Igman*, albeit reference to the latter case would seem to have been for the purpose of showing that counsel experienced in this field, Mr Peter Gross QC, as he then was, had not argued in that case that counterclaims were not caught by section 8 of the Maritime Conventions Act 1911. Notwithstanding reference to *The Igman* it was, according to Teare J, "common ground" in the case before him that the discretion conferred on the court by section 190(5) of the MSA, although expressed in unfettered terms, "should be exercised in the principled manner explained by the Court of Appeal in the *Al Tabith*." The judge continued:-

> "First, the court must consider whether there is good reason for an extension of time. Secondly, if there is good reason, the court must consider whether it is appropriate to exercise its discretion in favour of extending or refusing to extend time. That two-stage test reflected the approach to applications to extend the validity of a writ pursuant to the former RSC Order 6 rule 8. In *The Owenbawn* [1973] 1 Lloyd's Rep 56 Brandon J

said at page 59 that "very similar considerations" apply whether the court is asked to renew a writ or extend time under the Maritime Conventions Act. Similarly, in *The Zirje* [1989] 1 Lloyd's Rep 493, Sheen J said at page 497 that the "good reason" test should be applied "by parity of reasoning" to applications to extend time under the Maritime Conventions Act. He said the same in *Asianic International Panama SA v Transocean Ro-Ro Corporation (The Seaspeed America)* [1990] 1 Lloyd's Rep 150 at page 153. That approach was not in dispute in *The Al Tabith and The Alanfushi.*

36. However, in *The Baltic Carrier and The Flinterdam* [2001] 1 Lloyd's Rep 689 David Steel J noted that the relevant rule for extending or renewing a claim form is now CPR Part 7.6. The case before him concerned an application to extend time for the commencement of proceedings pursuant to section 190 of the 1995 Merchant Shipping Act in circumstances where a claim form had been issued within time but had been allowed to expire. David Steel J noted that section 8 of the 1911 Act had been used in the past to permit the extension of the validity of an existing claim form as well as extending time so as to validate the issue of a claim form out of time and that "the practice which accordingly has developed is to treat applications pursuant to the discretionary power accorded by virtue of section 190 on similar principles to applications to extend the validity of the claim form pursuant to the relevant Rules of Court". Having referred to CPR Part 7.6 he described the discretion as unfettered subject to the express limitations in the rule that the applicant must have taken all reasonable steps to serve the claim form and must have acted promptly in making the application.

37. In form the discretion conferred by section 190 of the Merchant Shipping Act 1995 is, like its predecessor, an unfettered discretion. However, the discretion under section 8 of the 1911 Act was always exercised in a principled manner by requiring there to be "special circumstances which create a real reason why the statutory limitation should not take effect"; see *The William Gray and The Llandovery Castle* (1920) 2 Ll L Rep 273. In *The Hesselmoor and The Sergeant* [1951] 1 Lloyd's Rep 146 Willmer J reviewed the authorities and summarised their effect as being that there must be "some good and substantial reason for the exercise of the Court's discretion in favour of allowing the action to proceed". In *The Seaspeed America* [1990] 1 Lloyd's Rep 150 Sheen J saw no difference between "a real reason" (as in *The Llandovery Castle*) and "a good reason". I consider that the discretion conferred by section 190 of the Merchant Shipping Act 1995 should be exercised in the same principled manner because, if time is extended, the statutory limitation will not take effect. There must therefore be

> good reason for extending time. What is a good reason cannot be defined. Whether there is or is not a good reason must depend upon all the circumstances of the case; see *The Myrto (No 3)* [1987] AC 597 at page 622 per Lord Brandon.
>
> 38. The present case is not one in which a claim form was issued in time but not served in time. Rather, it is one in which a claim form was not issued within time by one ship and an extension of time is sought pursuant to section 190 of the Merchant Shipping Act 1995 to permit a counterclaim to be made in the claim issued within time by the other ship. In such a case the first of the two express limitations in CPR 7.6 (that all reasonable steps to serve the claim form have been taken) can have no application because a claim form was not issued within time (see para 29 of David Steel J's judgment in *The Baltic Carrier)*. The second express limitation (that the applicant has acted promptly in making the application) can apply and in any event would be a consideration to bear in mind when exercising the discretion conferred by section 190 of the Merchant Shipping Act 1995."

Teare J went on to find that there was a good reason for an extension of time because the solicitor acting for the owners of *Pearl of Jebel Ali* had misunderstood the terms of a muddled agreement not in standard form. His misunderstanding was not culpable. The judge therefore went on to consider as stage two of the inquiry whether discretion should be exercised in favour of the owners of *Pearl of Jebel Ali*.

91. The approach of Teare J was very similar to that followed by David Steel J in *The Baltic Carrier*, albeit the latter was as noted a case in which a claim form had been issued in time but had been allowed to expire without service. David Steel J first concluded that the threshold requirements of CPR 7.6 had been satisfied and then turned to the issues material to the exercise of discretion. I agree with Mr Bright that the authorities on CPR 7.6 make it clear that the starting point is to determine and evaluate the reason why the claimant did not do what he ought to have done within time. If applied here by analogy, it is relevant to test the conduct of the Claimant by reference to its mistaken belief that the claim form issued in October 2012 was an in personam claim, or at any rate that it included a claim in personam. The Claimant nonetheless took no steps to attempt to serve in personam, or indeed any other steps to pursue a claim in personam, for another 12 months. The Claimant here can derive no comfort from the change in the rules in 1999. As was the case in *Hashtroodi v Hancock*, the errors here on the part of the Claimant's solicitors were "particularly egregious" and there was "nothing sufficient to outweigh the complete absence of any reason which might go some way to excuse the failure to serve in time" – see per Dyson LJ at paragraph 35.

92. For all these reasons I would reject Ground 3(b) of the appeal. In my judgment the *Al Tabith* was correctly decided and was rightly applied by the judge here as indeed it was by Teare J in the *Pearl of Jebel Ali*.

Ground 4

93. Ground 4 seeks to salvage the grant of permission by Eder J to serve the in rem claim form out of the jurisdiction on Sener in Turkey. That order is said to be justified as permitting a form of alternative service pursuant to PD 61 paragraph 3.6(7). Obviously, this is not an argument relied upon in the paper application made to Eder J.

94. The first variant of ground 4 suggests that Hamblen J could have ordered alternative service of the in rem claim form upon Sener because it could be shown that the Vessel had been within the jurisdiction of the court after the cause of the action arose. Advisedly, as I think, this argument was not put to Hamblen J. Firstly, the argument ignores all of the learning concerning the nature of an Admiralty action in rem, extraordinarily so considering the change of ownership which had occurred by the time of issue of the claim form. Secondly, as pointed out by the judge in the context of the argument which was put to him, an order under PD 61 paragraph 3.6(7) may only be made when the property against which the claim is made, here the Vessel, is within the jurisdiction of the court. Neither when Eder J was asked to make the order permitting service out of the jurisdiction nor when Hamblen J was invited to uphold that order was the Vessel within the jurisdiction.

95. The second limb of Ground 4 reads:-

> "Hamblen J erred in law in holding that he had no power to order alternative service of the in rem claim form upon Sener to take effect prospectively in the event it could later be established that *Niyazi S* or one of her sister ships called within the jurisdiction."

This is an astonishing proposition, which again ignores the proviso to paragraph 3.6(7) which requires that the Vessel be in the jurisdiction before an order for substituted or alternative service can be made.

96. The purpose behind the use of the present tense in the proviso is remarked upon by Derrington & Turner, 'The Law and Practice of Admiralty Matters' (2007) at paragraph 6.19:

> "Substituted service is not generally appropriate in the case of an in rem proceedings for two reasons. The first is that the property must be within the jurisdiction to be susceptible to the jurisdiction of the court [citing *The Freccia del Nord* [1989] 1 Lloyd's Rep 388] and substituted service has the potential to subvert that connection. The second reason stems from the traditional view that the in rem jurisdiction is not invoked until the writ is served on the ship and the warrant is executed [citing *The Banco* [1971] P 137, 153, *The Good Herald* [1987] 1 Lloyd's Rep 236, 238.]."

97. As for Ms Selvaratnam's contention that paragraph 3.6(7) of PD 61 has "no utility" unless she is right in her construction of the Practice Direction, this is incorrect. It is of utility whenever a defendant vessel is within territorial waters, yet it is impractical

physically to serve the *in rem* claim form on the ship. This is a relatively common occurrence, in particular where a vessel does not make fast alongside a shore berth, but remains at anchorage where it may be difficult or dangerous to effect service: see paragraph 49 of the judgment of Hamblen J below, referring to the Claimant's own evidence as to the information received from the Admiralty Marshal and to the observations of Brandon J in *The Berny* [1977] 2 Lloyd's Rep 533, at 548 col 1. Mr Bright invited consideration also of a collision within the 12 mile limit between an innocent and a guilty vessel, with the latter sinking or taking on water; suppose that salvors are engaged in refloating the vessel, and there is a concern that she will be refloated and immediately towed away, before an in rem claim form can be served. In such circumstances, the utility of the provision for substituted service is that it is not necessary to undertake risky and/or expensive operations to affix the claim form upon the ship. Rather, the owners' representatives can, with appropriate permission granted pursuant to paragraph 3.6(7), be served with process.

98. For all these reasons I would dismiss the appeal.

The application for permission to appeal in the *Odyssée*

99. I can deal more shortly with the application for permission to appeal in this case.

100. I take the facts very largely, with gratitude, from the Applicant's skeleton argument.

101. The *Odyssée* is a catamaran yacht built in France in 2006. It was said to have been purchased in 2007 by a Mr Nobili, a Belgian citizen, but it is owned by the Claimant company, CDE S.A. At all material times it was insured with a Belgian insurer, ESA Euroship Allianz.

102. The *SB Seaguard* is a 26 metre support craft owned and operated by an English company, Sure Wind Marine Limited. The *SB Seaguard* was at all material times entered with the Shipowners' P&I Club.

103. On 16 April 2011 Mr Nobili sailed the yacht into Ramsgate Harbour and moored at a visitor's pontoon.

104. On the evening of 17 April the *SB Seaguard* hit the *Odyssée* whilst she was still moored at the visitor's berth. The *Odyssée* sustained substantial damage.

105. Between March 2012 and October 2013 there were extensive communications between the parties. The impression given was that the *SB Seaguard's* Club would settle the claim after the repairs had been completed, once a "final statement" with supporting invoices had been submitted.

106. On behalf of the Applicant, the matter was dealt with by Mr Yves de Ruyter, an experienced claims handler who had spent his entire career in the insurance industry and was the managing director of a company that manages claims on behalf of ESA Euroship Allianz, the insurers of the *Odyssée*. Mr de Ruyter was based in Belgium. For the Respondent the matter was handled by Mr McCooke, a claims handler at the Shipowners' P&I Club.

107. It was said that during these discussions the Shipowners' P&I Club had encouraged the Applicant and its insurers not to instruct solicitors. By way of example, in an email of 5 October 2012 Mr McCooke wrote:-

> "I do not believe that there is anything to be gained by appointing a solicitor to "attack the owner of the SB Seaguard", and would hope that we can continue our dealings on this unfortunate incident in good faith, as has been and remains our intention from the outset."

108. The repairs to the *Odyssée* were complicated. They were not completed until late March 2013. They cost €275,000.

109. The two year time limit for bringing a claim against the *SB Seaguard* expired on 17 April 2013.

110. The parties appear to have taken no notice of the time bar and in May 2013 a meeting took place, the purpose of which was for the surveyor appointed by the Shipowners' P&I Club to inspect the repair work. Mr de Ruyter was simply unaware of the two year limitation period applicable to collision cases. Mr McCooke does not appear to have appreciated that the time bar had expired until some time later.

111. In September 2013 Mr de Ruyter submitted the final claim statement to the Shipowners' P&I Club.

112. On 21 October 2013 Mr McCooke emailed Mr de Ruyter informing him that the claim had been considered but that "unfortunately the claim is now time barred under English law".

113. An in personam claim form was issued on 23 December 2013. On 20 January 2014 an application was made for an extension of time in accordance with section 190(5) of the MSA.

114. The Admiralty Registrar conducted a contested oral hearing of the application for an extension of time. The hearing extended over two days. The Applicant was represented by Mr Richard Sarll and the Respondent by Mr Chirag Karia QC. Mr de Ruyter gave oral evidence and was cross-examined. Ironically it was on this occasion Mr Sarll who was arguing for a one-stage test. In his reserved judgment the Admiralty Registrar records Mr Sarll's submission, after citation of the *Al Tabith, Hashtroodi v Hancock, Collier v Williams* [2006] 1 WR 1945, *Hoddinott v Persimmon Homes (Wessex) Limited* [2008] 1 WLR 806, *The Pearl of Jebel Ali* and *The Baltic Carrier* as being:-

> "d. The test applicable to CPR 7.6 is wholly different from that applicable to RSC O.6 r.8 so that it is not necessary to show a "good reason" for ordering an extension of time but, pursuant to CPR Part 7.6, the court is simply required to "act justly" in accordance with the overriding objective.
>
> e. Therefore the proper test applicable to section 190 MSA 1995 is not a two stage test but a one stage test which would

> allow the court an unfettered discretion to extend time guided by the overriding objective but subject to provisions of CPR Part 7.6(3)."

115. Apparently Mr Sarll referred the Admiralty Registrar to the decision in *The Igman*, not in support of his argument just summarised but in order to explain to the Registrar that the Appellants in *The Stolt Kestrel* were seeking to argue before this court that the test should be as applied in *The Igman*.

116. At paragraph 7 of his judgment the Admiralty Registrar posed to himself three questions**:-**

> **"*The issues posed by the parties' arguments*.**
>
> 7. It seems to me that an appropriate approach to the issues raised is as follows:
>
> a. What test is to be applied when considering an application to extend time for the commencement of proceedings under s.190 of the Merchant Shipping Act 1995? Is it a two stage test, as held in *The Al Tabith* and which was accepted in *The Pearl of Jebel Ali* and other more recent cases or a single stage test based solely upon the overriding objective and the requirement to do justice? Is it still necessary to show a *good reason* for allowing the application or has that requirement disappeared with the alteration of the rules from RSC 0.6,r.8 to the provisions of CPR Part 7.6?
>
> b. Assuming that the test requires that the applicant shows a good reason, was there a good reason for the claim form not having been issued within the limitation period set out in s.190 of the Merchant Shipping Act?
>
> c. Assuming that the Claimant's single stage approach is correct, are the circumstances in this case such that it would be proper to allow an extension of time?"

117. After extensive discussion of the authorities the Registrar concluded that he should apply the same test as that approved in *The Al Tabith* and subsequently followed in *The Pearl of Jebel Ali*. He continued:-

> "***Whether there was a good reason***
>
> 31. Since the "good reason" test is to be applied those cases which have given indications as to what may or may not amount to a good reason are still valid and, at least, persuasive. These include:
>
> a. *The Mouna* [1991] 2 Lloyd's Rep 221, a claim for cargo damage, in which the plaintiffs failed to serve the writ before it expired during which time negotiations had continued. The Court of Appeal (Glidewell L.J and Bracewell J) held that

> the mere fact of negotiations was not, of itself, a good reason for extending the time for the service of the writ and although conduct by one party might lead to the view that an agreement to extend the time for the service of the writ might be inferred in the absence of such agreement something less was not sufficient.

b. In *The Al Tabith* the Court of Appeal also held that the following matters cannot constitute "good reason" for an extension: (a) Carelessness or mistake by the claimant or those acting for it; (b) That the claimant has an "open and shut" case and the defendant has no defence, unless the defendant has formally admitted liability; (c) That negotiations are ongoing; (d) that the defendant was equally oblivious of the expiry of the limitation period and carried on negotiating. Furthermore it was decided that in the absence of a clear agreement to extend time proof would be needed that the defendant had "actively misled" the claimant. Anything less will not operate as a good reason.

32. In my view the Claimant has failed to demonstrate that there was a "good reason" for failing to commence proceedings in time:

> a. Mr. De Ruyter was unaware of the two year limitation period applicable to collision cases. This arose, I think, because he appears to have been comparatively inexperienced in shipping matters. He asserted that there would be at least a 10 year limitation applicable in Belgium which, to my mind, demonstrated his lack of maritime experience as it was the Brussels Convention of 1910 which brought s.8 of the MCA 1911 into existence and, not surprisingly, Belgium was a signatory to that Convention.
>
> b. He also candidly stated that if he had been aware that there was a two year limitation period he would have ensured that proceedings were commenced in good time. As a matter of simple logic it must follow that his lack of knowledge was not the sole reason for the failure to commence proceedings. In my view lack of the requisite knowledge of the law whether by a lawyer or a lay person cannot amount to a good reason.
>
> c. Furthermore Mr. De Ruyter could, and, in my opinion, should have taken legal advice at an earlier stage. If he had done he would have been advised of the two year time limit unless his lawyers were negligent. In my view it follows that Mr. De Ruyter was at fault in failing to take advice at a sensible stage and this also contributed to the failure to commence proceedings in good time.

> d. The fact that negotiations were continuing is irrelevant unless the conduct of the defendant was such as to amount to an actual agreement that time would be extended or that the Defendant would not take the time bar point. It is quite clear that no such agreement could have been made for the simple reason that Mr. De Ruyter was himself unaware that there was a time bar.
>
> e. There is no duty upon a defendant to warn or remind a claimant that time for commencing proceedings is running out or that, if it does, the defendant intends to rely upon it, see *The Mouna* at p. 229.
>
> f. Insofar as Mr. De Ruyter sought to suggest that he was lulled into a false sense of security by those acting for the defendant, in particular Mr. McCooke, that suggestion is fallacious as it cannot be said that he was lulled into a false state of security about a situation of which he was totally unaware. There is no suggestion that Mr. McCooke's conduct led Mr. De Ruyter to believe that time would be extended or that no limitation point would be taken. He could not possibly have been influenced into any such belief because that would have required a knowledge of the existence of the time bar which he simply did not have.
>
> 33. For the reasons set out above I consider that it is incumbent upon the Claimant to establish a "good reason" and that it has failed to do so."

118. The Registrar thus had no reason to consider how he would have exercised his discretion at the second stage of the inquiry, had that been necessary, but he regarded as "notable" that there was a very significant delay between 21 October 2013 when the Respondent raised the limitation defence and 20 January 2014 when the Applicant filed its application under section 190(5) of the MSA. After further consideration of authority bearing on that issue the Registrar continued:-

> "36. In my view the delay before issuing the application for an extension of 3 months is outside what can be regarded as generally acceptable unless there are strong grounds for excusing the delay. Having considered the witness statement of Mr. Glynn-Williams dated the 15th September 2014 I agree with Mr. Karia's submission that it demonstrates that the Claimant failed to act promptly and did not demonstrate the degree of urgency required. I was particularly struck by the following: (i) there is no satisfactory explanation as to why Mr. De Ruyter's principals thought it was necessary to instruct Dutch lawyers with respect to a collision which occurred in English waters, (ii) there is no satisfactory explanation as to why it took so long to instruct English lawyers to advise and act, (iii) it took over two months before the Claim form was

> issued and (iv) there is no satisfactory explanation as to why the application notice was not issued until a month later.
>
> 37. Had it been necessary to proceed to the second stage of the test set out in *The Al Tabith* I would, in any event, have concluded that it would not be just to allow the Defendant's application. Thus if I had held that Mr. Sarll's approach to the nature of the test to be applied was correct, namely that the Court should exercise a wide discretion to act fairly unhindered by the two stage test provided for in *The Al Tabith*, I do not think that it can be seriously argued that the Court should entirely disregard the evidence as to why the Claimant failed to commence proceedings in time. In my view that would be a relevant part of the background necessary for the consideration of the discretion proposed by Mr. Sarll. Had that been the correct test then, for the reasons I have already given the lack of a satisfactory reason for the failure combined with the Claimant's failure to issue the necessary application promptly would have caused me to come to the same conclusion, namely that the application should be dismissed."

119. Mr Karia submitted that the application for permission to appeal should fail simply on the basis that the Registrar had in any event indicated how he would have exercised his discretion at stage two had it been appropriate to do so. I do not agree with that submission, because with all respect to the Registrar he does not appear to have considered all of the relevant factors in his evaluation, confining himself to the combined effect of the lack of a good reason for the failure to issue proceedings in time and the delay in issuing the necessary application once it became apparent that the time limit point was taken. It would have been necessary to balance those considerations against the circumstance that the Applicant would be deprived of a substantial claim to which the Respondent appeared to have no answer and which the Respondent had given every indication would be met.

120. It follows however from what I have said already in relation to the appeal in the *Stolt Kestrel* that the Registrar in my view adopted the correct approach to the application before him which he regarded as failing at the first stage. The question whether there was good reason for failing to commence proceedings in time does not involve the exercise of a 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. Another decision-maker on another day might have come to a different conclusion, but I do not consider that the decision reached by the Registrar was outside the ambit of reasonable decision-making. The Registrar directed himself appropriately by reference to the authorities. Furthermore the Registrar had the advantage which we do not that he saw and heard Mr de Ruyter give his evidence and be cross-examined thereon. Our disadvantage is two-fold – the recording machine was not activated while Mr de Ruyter was giving his evidence so that no record is available thereof. The judge's decision is carefully reasoned and it is not suggested that he failed to have regard to relevant factors or placed reliance on irrelevant factors, simply that he attributed weight thereto in a manner with which the Applicant, not unnaturally,

disagrees. I do not consider that there is any real prospect of this court interfering with the Registrar's assessment and I would accordingly refuse permission to appeal.

Lord Justice Christopher Clarke:

121. I agree.

President of the Queens Bench Division Sir Brian Leveson:

122. I also agree.