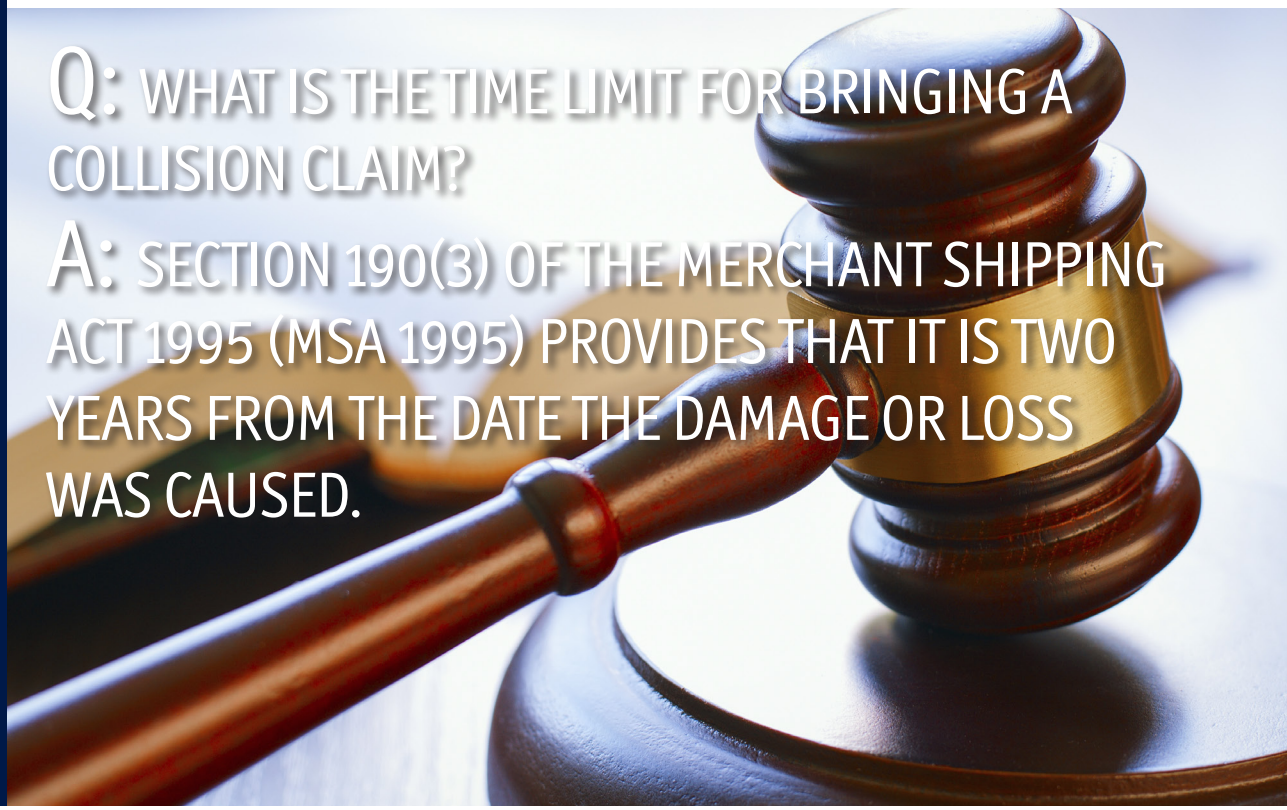
Shipping

April 2015



Q: WHAT IS THE TIME LIMIT FOR BRINGING A COLLISION CLAIM?

A: SECTION 190(3) OF THE MERCHANT SHIPPING ACT 1995 (MSA 1995) PROVIDES THAT IT IS TWO YEARS FROM THE DATE THE DAMAGE OR LOSS WAS CAUSED.

What happens if the time bar is missed?

In the recent case of *CDE S.A. v Sure Wind Marine Limited* (*SB SEAGUARD* c/w *ODYSSÉE*) which was handed down on 14 April 2015, the Claimant's application for an extension of time was dismissed.

Background

The background to the case is relatively straightforward. On 17 April 2011, the Defendant's vessel, the *SB SEAGUARD* collided with the Claimant's catamaran yacht, *ODYSSÉE* which was moored alongside in Ramsgate Harbour. Under section 190(3) of the MSA 1995, the parties had until 17 April 2013 to bring a claim.

After the collision took place, the claims handler representing the owners of *ODYSSÉE* entered into negotiations with the P&I Club with which the *SB SEAGUARD* was entered, but the negotiations "never produced any result" and the time bar passed without being protected. Neither party had monitored the time bar, but on 21 October 2013, the P&I Club advised that the claim was time-barred.

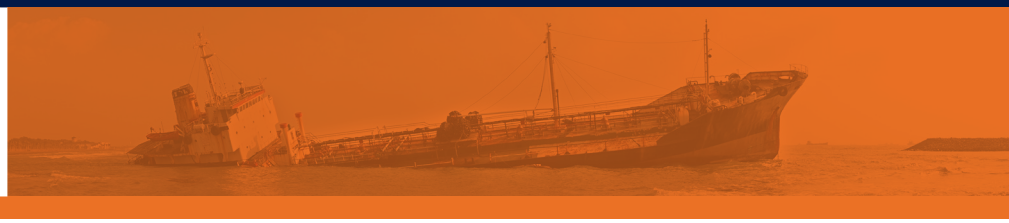
The Claimant finally issued a claim form on 23 December 2013, and on 20 January 2014 made an application under section 190(5) of the MSA 1995 for an extension of the time limit.

Application for an extension of the time limit

One-stage test

The Claimant submitted that under CPR Part 7.6, the Court should apply a one–stage test to determine whether to extend the time bar under section 190(5) MSA 1995. This one-stage test involves the Court deciding whether an extension of a time bar complies with the "overriding objective" set out in CPR1.1 and 1.2 to act justly (as opposed to the threshold of "good reasons" previously applicable prior to the introduction of the Civil Procedure Rules).

Under the premise that the single discretion approach is correct, the Claimant argued that it was "just" for the Court to extend the time limit, since the Claimant allegedly had no idea that the Defendant would rely on the time bar defence, and moreover it was alleged that the Defendant had tried to persuade the Claimant that lawyers were unnecessary. The Claimant's claims handler genuinely had no idea that a time bar existed, and had been "*lulled into a false sense of security*" by the Defendant.



The Claimant also submitted that the application was made reasonably promptly and should be allowed.

Two-stage test

The Defendant submitted that the common law establishes a strong precedent for following a two-stage test in deciding whether to grant a time extension. The two-stage test is set out in the *AL TABITH*[1] and involves determining:

- Whether there was a good reason why the claim had not been commenced within the time limit.
- Only if the first stage is satisfied, whether it would be proper for the Court to exercise its discretion to extend time.

The AL TABITH determined that the following did not constitute "good reasons" for failing to issue a claim form:

- Carelessness.
- The defendant does not have a good defence (unless there has been a formal admission of liability).
- Negotiations are continuing, unless it was shown that the claimant was actively misled.
- The defendant was unaware that time was about to expire but continued negotiating.

The Defendant submitted that there was no "good reason" why proceedings had not been commenced within the time limit. It was not the Defendant's obligation to advise the Claimant on how to prosecute the claim against it. The fact that negotiations were continuing was not a good reason. Moreover, the Defendant did not dissuade the Claimant from instructing lawyers. The Defendant had merely tried to prevent unnecessary costs in relation to specific issues that could be settled between the parties.

The Defendant also asserted that the Claimant's delays in filing its claim form and application for an extension of the time bar were persuasive reasons why it would not be proper for the Court to exercise its discretion under the second limb of the two stage test (or, should the one-stage test under CPR 7.6(3) be applied, under the one-stage test).

"Good reasons" for an extension of time

Admiralty Registrar Jervis Kay QC dismissed the Claimant's application for an extension of the time limit and ordered that the Claimant's claim be dismissed.

Registrar Kay QC, after analysis of the authorities, held that the two-stage test applied and that the Claimant had failed to establish a "good reason" for the Court to extend the time limit applicable. The Court reasoned that:

- The fact that negotiations were continuing is irrelevant.
- There is no duty upon a defendant to warn or remind a claimant that time for commencing proceedings is about to expire.
- Lack of requisite knowledge of the law cannot amount to a "good reason" for extending time.
- The Claimant's claims handler should have taken legal advice at an earlier stage.
- It cannot be said that one can be "lulled into a false sense of security" about a situation of which one is totally unaware.

The Court also said that, for the avoidance of doubt, the application would have failed under a one-stage test. As the decision in *Mitchell v News Group Newspapers Ltd.*[2] has shown, the courts will generally not tolerate a failure to act promptly unless that failure is trivial. Registrar Jervis Kay QC considered that there were no satisfactory reasons for the delays in filing the claim form and the application for two and three months respectively after the time bar defence was raised.

Comment

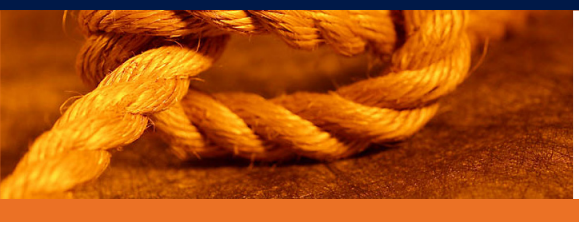
The question as to whether to apply a one-stage or two-stage test in respect of an application for an extension of the time bar under Section190(5) of the MSA 1995 is a contested area of law, but the Claimant's application for leave to appeal was refused.

It cannot be said that one can be "lulled into a false sense of security" about a situation of which one is totally unaware.

EMILIE BOKOR-INGRAM, ASSOCIATE

1 [1995] 2 Lloyd's Rep 336 (CA)

2 [2014] 1 WLR 795



...the courts will generally not tolerate a failure to act promptly unless that failure is trivial.

PAUL DEAN, PARTNER

What is clear is that *SB SEAGUARD* serves as an important reminder to those in the industry to be aware of time bars in collision claims, and to take the appropriate steps to protect the position of those intending to bring a potential collision claim. It is also a reminder that if a time bar is missed, prompt action is needed. In addition, if time bars are missed, an applicant has to show a "good reason" why there has been a failure to commence proceedings in time. The Court has held that a "good reason" does not include carelessness, mistake or ongoing negotiations. In the absence of a formal agreement, the claimant will have to show that the defendant "actively misled" the claimant – a high threshold indeed.

Paul Dean, Partner and Emilie Bokor-Ingram, Associate acted for the successful Defendant.

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