Neutral Citation Number: [2015] EWHC 3060 (Admlty)

Case No: AD-2014-000018

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

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 28/10/2015

Before :

MR. JUSTICE TEARE

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Between :

(1) LD COMMODITIES RICE MERCHANDISING LLC **(2) LD COMMODITIES MEA TRADING DMCC**	**Claimants**
- and -	
THE OWNERS AND/OR DEMISE CHARTERERS OF THE VESSEL STYLIANI Z	**Defendants**

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Michael Nolan QC (instructed by **Gateley PLC**) for the **Claimants**
John Russell QC (instructed by **Campbell Johnston Clark Limited**) for the **Defendant/Owner**

Hearing date: 7 October 2015 (with further written submissions received dated 19 and 22 October 2015)

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Judgment

Mr. Justice Teare :

1. A claimant with an admiralty claim may issue a claim form *in rem* or a claim form *in personam*[1]. In this case the Claimants intended to issue a claim form *in rem* but used the form appropriate for issuing a claim form *in personam*. That, together with the fact that the claim form was served after the expiry of the four months permitted for service of a claim form *in personam* but within the 12 months permitted for service of a claim form *in rem*, has led to the

[1] CPR 61 does not in terms mention claims *in personam* but PD 61 at paragraph 12 refers to "other claims", namely, "claims which, before the coming into force of Part 61, would have been called claims *in personam*." Rather than refer to "other claims" I have continued to refer to claims *in personam* in this judgment because that description makes clear the type of Admiralty claim to which reference is being made.

Admiralty Registrar holding that the court has no jurisdiction over the Claimant's claim. This is an appeal by the Claimants, with leave, from the decision of the Admiralty Registrar.

2. The Claimants are members of the Louis Dreyfus Group and claim damages in the sum of about US$1.3m in respect of wet damage caused to nearly 3000 mt of their cargo of rice as it was being loaded on board the Defendants' vessel STYLIANI Z at Lake Charles in August 2012.

3. By a letter of undertaking dated 20 September 2012 the North of England P&I Club provided security in respect of the claim and agreed, if requested, to appoint solicitors to accept service of *in rem* or *in personam* proceedings in the English High Court.

4. Although no bill of lading was issued in respect of the cargo which was discharged at Lake Charles and sold by way of salvage the Claimants proceeded on the basis that there was a one year time period pursuant to the Hague Rules or the US Carriage of Goods by Sea Act for the commencement of suit and on 29 August 2013 sought a three month extension until 3 December 2013. In their email they presumed that the owners of the vessel were Ionia Shipping SA. The extension was granted by the Club but nothing was said as to who the owners were. On 29 November 2013 the Claimants sought a further extension until 3 March 2014 which was also granted.

5. On 24 February 2014 the Claimants instructed Gateley LLP to issue proceedings. Mr. Messent of Gateleys was informed by the Claimants that it was thought Ionia Shipping SA were the registered owners but that had not been confirmed. A search carried out through Lloyds List Intelligence suggested another company was the owner and so Mr. Messent decided to issue a claim form *in rem* (which only requires the defendants to be described, not named).

6. His unchallenged account of what then happened is as follows:

> "As I recall, I searched for and completed the Claim Form online, then printed it for issue. Unfortunately by mistake I clicked on the wrong form so used the general admiralty claim form (ADM1A) rather than the form for actions *in rem* (ADM1). .... In retrospect, I accept that my error in selecting the wrong from should have been obvious to me, and indeed I find it very difficult to understand how the mistake was made. "

7. When completing the claim form he described the defendants as "The Owners and/or Demise Charterers of the vessel STYLIANI Z." The form required him to insert the name and address of the Defendant (which he recalls surprised him) and he inserted the name of Ionia Shipping Overseas SA with an address c/o Dalomar Shipping in Greece. The claim form was dated 28 February 2014. At 1743 that day he emailed the Claimants with a copy of the claim form which he described as an "*In Rem* Claim Form issued this afternoon as discussed."

8. On 3 March 2014 the Claimants forwarded the email and a copy of the claim form to the North of England P&I Club. The Claimants invited the Club to revert within the week failing which they said they would request Mr. Messent to approach the Club seeking the appointment of solicitors and thereafter would effect service. The Club responded on 5 March 2014 seeking, amongst other matters, further details of the claim. The Claimants replied on 13 March 2014 and sought certain information and documentation.

9. On 21 March 2014 the Claimants asked the Club to nominate solicitors for the purpose of accepting service. On 27 March 2014 Campbell Johnson Clark ("CJC") informed the Claimants that they had instructions to accept service.

10. On 20 May 2014 Mr. Messent emailed CJC seeking, amongst other matters, certain documentation. On 6 June CJC said that they would aim to revert by 22 June 2014.

11. On 30 June 2014 the four months permitted for service of the *in personam* claim form expired.

12. Mr. Messent sent a reminder on 14 July 2014. On 16 July 2014 CJC explained why they were confident that their clients bore no liability for the alleged loss but also pointed out that the claim form had not been served within four months of issue and therefore that the claim was time barred.

13. On the same day Mr. Messent pointed out that in the case of an *in rem* claim form the time for service was modified and that service would follow "in early course".

14. Thereafter he instructed counsel and was made aware that he had used the wrong court form. On 15 August 2015 he amended the claim form in manuscript to read as if it were an *in rem* claim form. In particular he added the words that it was an "Admiralty claim *in rem* against the ship STYLIANI Z", deleted the name and address of the Defendants and changed the reference to form ADM1A to a reference to form ADM1. However, the description of the Defendants and the brief details of the claim remained the same.

15. On 2 October 2014 Mr. Messent informed CJC that the Particulars of Claim had now been settled by counsel. He provided copies of the Amended Claim Form and the Particulars. He explained that

> "although the defendants were correctly entered by description for the purposes of the intended *in rem* proceedings, I inadvertently used the *in personam* form. As you will see, the Claim Form has accordingly been amended to the correct format."

16. On 6 October 2014 the Amended Claim Form and Particulars were served.

17. On 24 October 2014 the Defendants challenged the jurisdiction of the court because the *in personam* claim form had not been served within four months and applied for an order disallowing the amendment.

18. The application was heard on 3 February 2015 and further written submissions were provided on 12 March 2015. In addition to resisting the application to disallow the amendment Mr. Michael Nolan QC, on behalf of the Claimants, relied upon CPR 3.10 which gives the court power to remedy errors of procedure. In the alternative he submitted that the sending of the Claim Form to the Defendant's P&I Club on 3 March 2014 should be treated as good service pursuant to CPR 6.15.

19. On 21 July 2015 the Admiralty Registrar disallowed the amendment and held that, since the claim form was in *personam* and had not been served within four months of issue, service should be set aside. He dismissed the Claimants' applications pursuant to CPR 3.10 and CPR 6.15.

20. Before considering Mr. Nolan's submissions on this appeal it is necessary to have in mind the key characteristics of an Admiralty action *in rem*. Although it has been held by the House of Lords that for the purposes of section 34 of the Civil Jurisdiction and Judgments Act 1982 an action *in rem* is an action against the owners of the ship from the moment that the Admiralty Court is seized with jurisdiction (see The Republic of India v India Steamship Co. Ltd. (No.2), the Indian Grace [1998] AC 878 at p.913 per Lord Steyn) an Admiralty action *in rem* nevertheless has a characteristic which distinguishes it from an Admiralty action *in personam*. That characteristic is that the *in rem* claim form may be served within the jurisdiction on the vessel named in the claim form as the vessel against which the action is brought (by fixing a copy of the claim form on the outside of the vessel in a position which may be reasonably expected to be seen). The action may then proceed to trial even though the owners of the vessel are out of the jurisdiction and have not been served personally with the proceedings or acknowledged service of proceedings. The vessel may also be arrested by the Admiralty Marshal and when judgment is given (or *pendente lite*) the vessel can be sold by the Admiralty Court and the judgment satisfied from the proceeds of sale. In practice, in the great majority of cases, the owners' P&I Club will provide security for the claim and instruct solicitors to accept service so that the action will proceed in a manner indistinguishable from an action *in personam*. But that practice should not obscure the distinguishing characteristics of an action *in rem*. They are reflected in the CPR. CPR 61.3 provides that a claim form *in rem* must be served within 12 months after the date of issue whereas a claim form *in personam* must, pursuant to CPR 7.5, be served within 4 months after the date of issue. This difference reflects the circumstance that a claimant *in rem* may have to wait for a period in excess of 4 months for the vessel to come within the jurisdiction.

21. In Stolt Kestrel v Niayazi S [2014] 2 Lloyd's Reports 483 at paragraph 73 Hamblen J. said that the distinction between *in rem* and *in personam* proceedings is clearly set out in PD 61. He had in mind that a claim form *in rem* had to be in Form ADM1 (see PD 61 paragraph 3.1) and that the defendant must be described in the claim form (see PD 61 paragraph 3.3, for example, as "the Owners of the Ship X") whereas a claim form *in personam* had to be in Form ADM1A (see PD 61 paragraph 12.3) and the defendant

must be named in the claim form (see PD 61 paragraph 12.5, for example, as "X Company Limited".)

22. Notwithstanding these differences between an action *in rem* and an action *in personam* the underlying causes of action are the same whether the claim is enforced *in rem* or *in personam*. Those causes of action were described in the following way both in the claim form as issued and as amended in August 2014:

> "The Claimants' claim is for damages for breach of a written and/or oral contract and/or contracts and/or duty and/or negligence on the part of the Defendant and/or its servants and/or agents in and about the loading, custody and care of a consignment of rice loaded on board the vessel STYLIANI Z at Lake Charles, Louisiana, USA in or about August 2012."

CPR 3.10

23. CPR 3.10 provides as follows:

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

24. Mr. Nolan submitted that there was an error of procedure when Mr. Messent, instead of using form ADM1 to issue the Claimants' *in rem* claim, used form ADM1A. That error, which was corrected before the claim form was served, was inadvertent and had neither misled the defendants nor caused them any prejudice. The claim form, which had been sent to the Defendants' P&I Club shortly after it was issued, informed the Defendants that a claim for cargo damage was being brought against them. In those circumstances the error should be remedied. That would further the overriding objective by ensuring that the claim for cargo damage could be justly determined rather than dismissed without consideration of its merits.

25. Mr. John Russell QC, on behalf of the Defendants, submitted that the Claimants had issued an *in personam* claim and that their error was a failure to serve that claim form within 4 months. CPR 7.6 governs the court's discretion to extend time for service and any such application could not succeed because the Claimants had not taken all reasonable steps to serve the claim form within 4 months. CPR 3.10 cannot be used to avoid the strict requirements of CPR 7.6. If there was an error in issuing *in personam* proceedings by mistake the court should not remedy that error pursuant to CPR 3.10 because to do so would fail to give any or any sufficient weight to (a) the important distinction between claims *in rem* and claims *in personam* and (b) the strict approach required where a claim form has not been served within the period of its

validity. In addition the Defendants had a legitimate expectation that if the claim form were not served in time the underlying claim would be time barred and were the error to be remedied they would lose the ability to rely on the time bar and would suffer prejudice.[2] Finally, Mr. Messent's mistake was culpable and there had been delay in attempting to remedy the situation and in attempting to effect service.

26. There is no doubt that Mr. Messent intended to issue a claim form *in rem*. He told the Claimants on 28 February 2014 shortly after the claim form had been issued that he had issued an "*in rem* claim". There is also no doubt, in my judgment, notwithstanding Mr. Nolan's arguments to the contrary, that he in fact issued an *in personam* claim form. He used form ADM1A, which is headed Claim Form (Admiralty claim) and is the form required for *in personam* claims. It was not headed Claim Form (Admiralty claim *in rem*) and did not proclaim itself to be an action against the ship STYLIANI Z as form ADM1 requires. It is true that the form described the Defendants (which is suggestive of an *in rem* claim) but I do not regard that as sufficient to show that he had in fact issued an *in rem* claim. It is essential that an Admiralty action *in rem* proclaims that it is an action against a named ship for that is the essential feature of such an action which distinguishes it from an action *in personam*.

27. Mr. Russell submitted that an error of procedure within CPR 3.10 must be shown objectively and cannot be established merely by reference to Mr. Messent's subjective intention. This submission was primarily based upon what Dyson LJ said in Steel v Mooney [2005] 1 WLR 2819 but in addition it was said that in other cases (Cala Homes v Chichester [2000] PLCR 205, The Goldean Mariner [1990] 2 Lloyd's Reports 215, Thurrock v Secretary of State for the Environment [2001] CP Rep.55 and Hannigan v Hannigan [2000] 2 FCR 650) the error was objectively clear.

28. In Steele v Mooney the claimant's solicitor had made an application for an extension of the four months period allowed "for service of the particulars of claim and supporting documentation." The solicitor had not in terms sought an extension of time for service of "the claim form". At paragraph 28 Dyson LJ said:

> "The applications for an extension of time were clearly intended to be applications for an extension of time for service of the claim form, but by mistake they referred

[2] It is to be noted that there is in fact no agreement that the claim was subject to a Hague Rules one year time bar, notwithstanding that it was assumed that it was and for that reason time extensions were sought and granted. No bill of lading was issued and so the Claimants, in response to the Defendants' suggestion that the claim is now time barred, have now suggested the possibility that there may in fact be no such time bar. However, that issue cannot be resolved on this application and the court must, it seems to me, proceed on the basis that, if the court remedies the Claimants' error, the Defendants will lose the opportunity to argue that the time is time barred.

> to the wrong, albeit closely related, documents ie the particulars of claim. Our reference to what was intended is not to Ms. Watkins' subjective state of mind. It is to what she must be taken to have intended on an objective assessment of the terms in which the applications were expressed and all the surrounding circumstances."

29. This passage must be read with other passages in the judgment. Thus Dyson LJ said that errors of procedure may take many forms and are not confined to failures to comply with a rule or practice direction. A party may take a procedural step which is permitted by the rules and practice directions but which he takes in error; see paragraphs 18 and 20. An "error of procedure" in CPR 3.10 should not be given an artificially restrictive meaning. A broad common sense approach was required; see paragraphs 21 and 22.

30. I consider that in paragraph 28 Dyson LJ was saying that in the case before the court Ms. Watkins' intention could be objectively determined from the terms in which her application was expressed and from the surrounding circumstances. I do not consider that he was saying that in every case a subjective intention was irrelevant when seeking to establish that there had been an error or procedure. If that were so then the scope of CPR 3.10 would be artificially restricted.

31. In the present case Mr. Messent issued a claim form *in personam*, which he was permitted to do. But he did so in error. There was unchallenged evidence that he intended to issue a claim form *in rem*. That appears to me to be an error of procedure within CPR 3.10. and the sort of error contemplated by Dyson LJ in paragraph 20 of his judgment in Steele v Mooney as being within CPR 3.10.

32. The Admiralty Registrar, in paragraph 23 of his judgment, concluded that there was no error of procedure. He said

> "………there are important distinctions between *in rem* and *in personam* proceedings and the process by which they are commenced. These differences are substantial and the failure to issue the proceedings in the proper form is sufficiently important for it not to be excused as being merely 'procedural'."

33. I am unable to agree with this approach. Mr. Messent's error was to use a form which he did not intend to use. That is, it seems to me, an error of procedure. Of course it had important and substantial consequences, in particular the claim form had to be served within 4 months rather than within 12 months. But it remains an error of procedure. In Steele v Mooney at paragraph 18 Dyson LJ said:

> "……the rules provide a detailed code of the procedural steps that parties to litigation may and/or must take and the procedural steps that the court can make. These steps and decisions will sometimes affect

> the parties' substantive rights, but that does not alter the fact that they are procedural in character."

34. The Admiralty Registrar also held that PD 61 para.3.1 was a specific code dealing with the specialist jurisdiction of the Admiralty Court and should not be overruled by general provisions contained within other rules such as CPR 1 or CPR 3.10. He derived support for this approach from the guidance given by the Court of Appeal in Vinos v Marks & Spencer [2001] 3 AER 784. In that case there had been a failure to serve a claim form within the four months allowed for service. CPR 7.6 provides for the extension of time for service of a claim form but the claimant could not obtain an extension of time for service pursuant to that rule. The claimant therefore sought an order pursuant to CPR 3.10 rectifying his error in failing to serve the claim form within the time allowed for service. The Court of Appeal held that the general words of CPR 3.10 could not enable a court to do that which CPR 7.6 expressly forbade or to extend time when the specific provisions of CPR 7.6 did not permit an extension of time. In my judgment the principle of construction engaged in that case (that general words do not derogate from specific words) is not engaged in the present case. There is no specific code in the CPR, whether in CPR 61 or PD 61, dealing with the circumstances in which the court may rectify a claimant's error in issuing an *in personam* claim form instead of an *in rem* claim. PD 61 para.3.1 merely provides that a claim form *in rem* must be in Form ADM1.

35. The Admiralty Registrar having erred in principle in the above two ways this court must itself consider whether the court's discretion to remedy Mr. Messent's error or procedure should be exercised.

36. Mr. Nolan submitted that CPR 3.10 was a most beneficial provision which should be given wide effect. He relied upon the observations of Lord Brown to that effect in Phillips v v Symes [2008] 1 WLR 180 at paragraphs 31-33 and on the observations of Popplewell J in Integral Petroleum SA v SCU-Finanz AG [2014] EWHC 702 (Comm) at paragraphs 22-43 (and see also Stoute v LTA Operations Ltd. [2015] 1 WLR 79 at paragraph 36 per Underhill LJ.).

37. I was also referred to other cases, not in the Admiralty context, in which the wrong form had been used to commence proceedings and the court had corrected the error pursuant to CPR 3.10. Two of them were considered by the Court of Appeal. The first such case arose in the context of family law, Hannigan v Hannigan [2000] 2 FCR 650. In that case a widow wished to institute proceedings under the Inheritance Act 1975 on the basis that the disposition of her husband's estate did not provide her with reasonable financial provision. Counsel advised that proceedings be issued using CPR practice form N208 (the Part 8 claim form). Such proceedings had to be commenced within six months of the grant of probate. That period expired on 11 June 1999. On 10 June 1999 the solicitor issued the claim but used CCR form N208 which had been in use under the old County Court Rules 1984 which had been superseded. However, the form used set out the nature of the claim and stated that CPR part 8 applied to the claim. The executors of the husband's will applied to strike out the claim on the basis that it had been issued on the wrong form and that there had been a number of other errors too.

That application succeeded but on appeal that decision was overturned. Brooke LJ said at paragraph 35 that the matter fell within CPR 3.10.

38. At paragraph 20 Brooke LJ said that the claim form contained all the information the defendants needed to understand what was being claimed so that the complaint was about form, not substance. The judge below had failed to take that into account and the sanction he imposed was disproportionate to the irregularities he was considering; see paragraph 33. Brooke LJ accepted that the solicitor's mistake was due to his culpable lack of familiarity with the new rules. But he said, at paragraph 36:

> "One must not lose sight of the fact that the overriding objective of the new procedural code is to enable the court to deal with cases justly, and this means the achievement of justice as between the litigants whose dispute it is the court's duty to resolve. In taking into account the interests of the administration of justice, the factor which appears to me to be of paramount importance in this case is that the defendants and their solicitors knew exactly what was being claimed and why it was being claimed when the quirky petition was served on them. The interests of justice would have been much better served if the defendants' solicitors had simply pointed out all the mistakes that had been made in these very early days of the new rules and Mrs. Hannigan's solicitor had corrected them all quickly and agreed to indemnify both parties for the expense unnecessarily caused by his incompetence."

39. Brooke LJ also referred at paragraph 37 to the "potentially valuable limitation point" but said that the strategy of the defendants had led to the incurring of expense over technicalities which was out of all proportion in relation to what was really in dispute. The result of the judge's order was the "antithesis of justice". At paragraph 38 he said:

> "Mrs. Hannigan's claim would be struck out in its infancy without any investigation into its merits and the defendants would receive a completely unjustified windfall simply because of a number of technical mistakes made by a solicitor in the very early days of a new procedural regime."

40. Brooke LJ concluded that to strike out the claim would be a "totally disproportionate response to the errors that were made".

41. The second case arose in the context of planning law. In Thurrock Borough Council v Secretary of State for the Environment [2001] CP Rep 55 the claimant council wished to challenge a decision of an inspector who had set aside two enforcement notices. Under section 288 of the Town and Country Planning Act 1990 a challenge could be made as of right to the validity of an order within six weeks of the date of the decision. Under section 289 an

application for permission to appeal from the decision could be made to the High Court within 28 days of the date when notice of the decision was given to the applicant. In the event the council included both forms of challenge within a single application for permission to appeal pursuant to section 289. That application was served and filed on 5 April 1990, 26 days after the date of the inspector's decision. Thus it appears the inspector's decision was made on or about 10 March 1990. When the matter came on for hearing on 19 May 1990 (which must have been after the six weeks allowed for a section 288 challenge had elapsed) the claimants applied for permission to amend the claim to substitute an application for statutory review under section 288. That application was allowed and an appeal against that decision was dismissed.

42. Brooke LJ said, at paragraph 27, that the amendment did not have the effect of adding a new claim because in substance the claim was for the relief available under section 288 of the Act. He then asked whether the council was to be denied the right to straighten out the formalities of their claim because they had launched it erroneously under the wrong section of the Act. He said that a denial would "greatly inhibit the power of the court to deal with their case justly". In dismissing the appeal Brooke LJ applied the same principles which he had set out in Hannigan v Hannigan where he had said that "in taking into account the interests of the administration of justice, the factor which appears to me to be of paramount importance in this case is that the defendants and their solicitors knew exactly what was being claimed and why it was being claimed…"

43. These cases establish that the court's approach, when asked to remedy the error of a claimant who, by an error of procedure, has issued the wrong originating process, should be as follows:

i) The court's discretion should be used so as to further the overriding objective to deal with a case justly.

ii) In determining what is just the court must take account of all the circumstances of the case.

iii) In particular, it is necessary to consider whether, notwithstanding the claimant's error, the defendants were made ware of the nature of the claim which the claimant wished to bring.

iv) The order made by the court should not be disproportionate to the claimant's error of procedure.

v) The fact that the claimant's error was culpable is a relevant matter to take into account but will not necessarily be a bar to the court remedying the error.

vi) The fact that the defendants would be able to argue that any fresh issue of proceedings in the correct form would be time-barred is a relevant matter to take into account but will not necessarily be a bar to the court remedying the error.

44. Neither of the cases which establish those principles concerned admiralty proceedings whether *in rem* or *in personam*. Nor did they concern a case where the claimant's error was not objectively apparent to the defendant. By contrast, in the present case and so far as the Defendants' P&I Club was concerned, the Claimants had issued an *in personam* claim form. It did not know that Mr. Messent's intention had been to issue an *in rem* claim form. For these reasons Mr. Russell submitted that the two cases can be distinguished. I agree that they can. However, the two cases nevertheless establish certain principles underlying the court's discretion pursuant to CPR 3.10. In deciding whether to exercise that discretion the court must have regard to those principles but have well in mind the circumstances of the instant case.

45. The Admiralty Registrar, when considering how he would have exercised his discretion, appears to have only considered the question whether Mr. Messent's error was excusable. He held that it was not and concluded that that could not amount to a good reason to exercise the court's discretion. This was too narrow an approach and was wrong in principle.

46. The course of events between February and October 2014 may be summarised as follows:

    i) Mr. Messent issued proceedings before the (assumed) one year time bar, as extended, had expired.

    ii) Mr. Messent had decided to issue proceedings *in rem* because he was unsure of the name of the Defendants and for the purposes of an *in rem* claim needed only to describe them as the Owners of the STYLIANI Z. By a mistake, which he accepts he ought never to have made, he printed out an Admiralty claim form *in personam*. Although he filled it in (including giving the name and address of the Defendants which "somewhat surprised" him) he failed to observe his mistake. Thereafter, although he was in communication with the Defendants' P&I Club, he still failed to observe his mistake. Thus, even when it was pointed out to him in July 2014 that he had failed to serve the claim form within the four months allowed for service of a claim *in personam* he pointed out that the time for service of an *in rem* claim was modified by CPR 61.3(5). His mistake was culpable.

    iii) He provided the Claimants with a copy of the claim form and they forwarded it to the Defendants' P&I Club. Thus the P&I Club was aware that proceedings had been issued in time. The P&I Club knew the nature of the cargo claim being advanced against its member. A claim form *in rem* would not have told the P&I Club anything more about the claim than was set out in the claim form *in personam*. The cause of action in both cases is the same.

    iv) Although Mr. Messent failed to serve the claim form within four months (a fact stressed by Mr. Russell) this failure resulted from his initial error in not appreciating that he had issued the wrong claim form. This was not a case of a solicitor, knowing he must serve within

four months, failing to take appropriate steps to serve within that period.

v) The issue of a claim form *in personam* gave rise to a legitimate expectation on behalf of the Defendants that if the claim were not served within four months the Defendants would be able to argue that it could not be validly served and that the underlying claim would then be time barred. To that extent the Defendants would suffer prejudice were the court to remedy Mr. Messent's error.

vi) However, were the court to refuse to remedy Mr. Messent's error, the Claimants' claim, assuming there to be a time bar, would never be considered on its merits.

vii) Mr. Messent was advised by counsel in about July that he had issued the wrong claim. He did not immediately issue an application for an order remedying the error pursuant to CPR 3.10. Instead, he sought to remedy the mistake by amending the claim form prior to service. The amended claim form was not served until October 2014. It is not apparent why it was not served in August 2014.

viii) When the amended claim form was served in October 2014 the Defendants were in exactly the same position as they would have been in had a claim form *in rem* been issued in February 2014 and served, within the 12 month period for service, in October 2014.

47. I have not found it easy to decide how to exercise the discretion conferred on the court by CPR 3.10. There is a clear distinction between an *in rem* and *in personam* claim form which is of particular importance with regard to service. Mr. Messent's mistake ought never to have been made. As a result of that mistake he had only four months in which to serve the claim form instead of the 12 months which he thought he had. The Defendants are entitled to rely upon the rules of court which regulate the conduct of proceedings *in personam*. They are not required to enquire what Mr. Messent's subjective intent was (even if, as here, they are provided with a copy of an email from Mr. Messent which refers to the issue of an *in rem* claim form). The Defendants appreciated that the claim form had to be served within four months and when the claim form was not served within four months took the time bar point, as they were entitled to do. All these matters suggest that the court ought not to remedy Mr. Messent's error. A refusal to remedy Mr. Messent's error in such circumstances would reflect and recognise that an Admiralty action *in rem* is a different form of action from an Admiralty action *in personam* and would enforce the rules regarding service of an Admiralty claim form *in personam*. Such an approach would encourage practitioners to conduct litigation efficiently in accordance with the rules of court.

48. On the other hand, a refusal to remedy Mr. Messent's error will, if there is a time bar, result in the merits of the Claimants' cargo claim never being considered by the court. Moreover, the fact that the wrong claim form was used has not deprived the Defendants of any information about the claim which they would have been given had the correct claim form been used. They

are in exactly the same position, so far as information about the claim is concerned, as they would have been in had a claim form *in rem* been issued in February 2014 and served in October 2014. Such service would have been within time. The time bar defence to which they can now lay claim is an unexpected windfall caused by Mr. Messent's error.

49. By remedying the error the claim the court will be able, in the event that the claim is not settled, to determine the claim on its merits. A refusal to remedy the error would mean that the Claimants would be deprived of a trial on the merits because their solicitor, although he had properly commenced the action within time, had used the wrong court form when doing so. Whilst remedying the error will deprive the Defendants of a time bar defence that defence only arose because the wrong court form was used by the Claimants' solicitor. These matters suggest that the court ought to remedy Mr. Messent's error, albeit on appropriate terms as to costs which reflect that error.

50. Having considered the circumstances of this case and the guidance given by the Court of Appeal in the cases to which I have been referred I have reached the conclusion that the just order, and one that promotes the overriding objective, is to remedy Mr. Messent's error of procedure, for these reasons:

i) Notwithstanding the real and clear distinction between an *in rem* and an *in personam* claim form it was a matter of indifference to the Defendants whether the Claimants issued a claim form *in rem* or *in personam*. Their P&I Club had agreed to instruct solicitors to accept service of either claim form.

ii) The Claimants issued a claim form before the time bar, assuming there was one, had expired.

iii) Mr. Messent's error in issuing a claim form *in personam* instead of an *in rem* claim form which he had intended to issue must have been the result of inadvertence.

iv) After the claim form had been issued the Claimants forwarded a copy of it to the Defendants' P&I Club. The Club was therefore aware that proceedings had been issued within time and were also aware of the nature of the claim, namely, a claim for cargo damage caused by breach of contract and/or duty. The Club was not aware that the Claimants had intended to issue a claim form *in rem*. But had a claim form *in rem* been issued the same causes of action would have been relied upon, as indeed they were when the claim form was amended from an *in personam* to an *in rem* claim form.

v) Upon the issue of the claim form *in personam* the Defendants did not act to their detriment in any way.

vi) Although the Defendants were entitled, once the Defendants had failed to serve the claim form within 4 months, to argue that the underlying claim was now time barred, that was the result of Mr. Messent's fortuitous act of inadvertence in issuing a claim form *in personam* and

in failing to observe that it was such a claim form. The availability of the time bar defence was a windfall to the Defendants.

vii) In those circumstances a refusal to remedy the error of procedure would not be proportionate to Mr. Messent's culpable inadvertence because, assuming there was a time bar, the merits of the claim would never be considered.

viii) To remedy Mr. Messent's error on terms that the Claimants pay the costs of the application and the Defendants' reasonable opposition thereto would be a proportionate response to Mr. Messent's error.

ix) Whilst the court's discretion to extend the time for service of a claim form after that time has passed is subject to what Mr. Russell described a "strict approach" the Claimants are not seeking such an extension of time in the present case. They are seeking an order remedying the Claimants' earlier error of procedure in issuing an *in personam* rather than an *in rem* claim as had been intended.

x) Whilst there was an unexplained delay in service until October 2014 and, it may be added, in applying for relief pursuant to CPR 3.10 (that application was only made in response to the Defendant's application to disallow the amendment of the claim form) I do not consider that such delay was such as to justify the refusal of an order remedying Mr. Messent's error. He sought to remedy the matter himself in August 2014 by amending the claim form and served the amended claim form well within the 12 months allowed for service of an *in rem* claim form.

xi) Ultimately, the court must decide this application in such a way as will further the overriding objective of dealing with the case justly. One aspect of dealing with a case justly is to decide it in accordance with the rules of the court, in this case, those which regulate the issue and service of Admiralty claim forms *in rem* and *in personam*. Where there has been an error of procedure which was culpable and ought never to have happened it can be said, with force, that the court ought not to remedy the error because the court should enforce its rules and thereby encourage careful rather than sloppy practice in the conduct of proceedings. But if by so doing the defendant receives a windfall, namely, the benefit of a time bar defence as a result of inadvertence by the claimant's solicitor, it can also be said, with force, that a refusal to remedy the error causes an injustice out of proportion to the fault of the solicitor. In deciding which course best serves the overriding objective of dealing with the case justly these two conflicting arguments have to be weighed in the balance. I have sought to do so and have concluded that remedying the error but with an appropriate order as to costs is the course which best serves the overriding objective of dealing with the case justly. Such an order not only enables the case to be dealt with on its merits, rather than ended prematurely by the operation of a fortuitous time bar, but also recognises that the Claimants' solicitor made an error which he ought never to have made by making an appropriate order as to costs.

51. For these reasons I have decided to allow the appeal and to remedy the Claimants' error of procedure on terms that the Claimants pay the costs of the application and the Defendants' reasonable opposition thereto.

CPR 17

52. CPR 17.1 allows a party to amend a statement of case (which includes a claim form, see CPR 2.3) at any time before it has been served. CPR 17.2 provides that the court may disallow the amendment. The Admiralty Registrar disallowed the amendment made by the Claimants for two main reasons; first, because there can be no valid amendment once the time for service has expired; and second, because changing an *in personam* claim into an *in rem* claim would not be the amendment of a claim form but the commencement of a new and different kind of claim which would circumvent the mandatory provisions of CPR Part 61.

53. In the light of my decision on CPR 3.10 it is unnecessary to deal with the question whether the amendment was properly disallowed. I shall therefore express my conclusions shortly.

54. CPR 17.1 provides that a party may amend his statement of case "at any time before it has been served on any other party." It does not state that any party may amend his statement of case "at any time before the time limited for service." In my judgment it is not possible to construe CPR17.1 as if it did state that.

55. Where a party amends his claim form before it has been served but after the time limited for service he will usually need to obtain an extension of time for service. In the present case that does not arise. The effect of the amendment is to amend the claim form so that it is an *in rem* claim form. The time for service of such a claim form had not expired before it was served in October 2014. The important question, therefore, is whether the power to amend can be used to change an *in personam* claim form into an *in rem* claim form. Changing the claim from *in personam* to *in rem* is probably unprecedented and the submission that such a change in the nature of the proceedings is something more than mere "amendment" is attractive. However, "amendment" can be used to add or substitute a new claim (see CPR 17.4(2)) and so "amendment" is not restricted to the alteration of the details of an existing claim. It can include the making of a new claim. I consider that "amendment" should not be given a restricted meaning but should cover any alteration to the wording of a claim form.

56. However, it must be a very rare case in which a court would allow an amendment of a claim form *in personam* so that it reads as an *in rem* claim where the amendment is made after the time for service of an *in personam* claim form had expired. In the usual case where a claimant issues an *in personam* claim form and intends to issue such a claim form he surely cannot, once four months from issue have expired, gain himself a further eight months in which to serve by amending the claim form so that it reads as an *in rem* claim. But the present case is most unusual, perhaps unprecedented. Mr. Messent intended to issue an *in rem* claim but by inadvertence issued an *in personam* claim. Whether his later amendment of the claim form should be allowed depends upon whether the amendment will enable the court to deal justly with the claim in accordance with the overriding objective; see Thurrock v Secretary of State for the

Environment (above). Essentially for the reasons which I have given when considering the application pursuant to CPR 3.10 I consider that it would. There is no change to the underlying cause of action. It is true that a claim *in rem* is different from a claim *in personam,* which difference is reflected in the manner and time of service, but the claim *in rem* arises out of precisely the same facts as the claim *in personam* and, by analogy with CPR17.4(2), may nevertheless be allowed. The fact that allowing the amendment deprives the defendant of an opportunity to advance a time bar defence is not, in the present case, a reason for disallowing the amendment because such a defence was a windfall resulting from Mr. Messent's inadvertence. In all the circumstances of the case, which I have set out in this judgment when dealing with the application pursuant to CPR 3.10, I consider that allowing the amendment will enable the case to be dealt with justly.

CPR 16.5

57. As with the question of the amendment it is unnecessary to consider the appeal against the Admiralty Registrar's refusal to hold that the Claimants' email to the Defendants' P&I Club dated 3 March 2014 amounted to good service. I shall therefore express my conclusions shortly.

58. CPR 6.15 provides that the court may order that steps already taken to bring the claim to the attention of the defendants by an alternative method are good service.

59. The Admiralty Registrar appears to have held that before the court will exercise this power there must be an exceptional case. It is accepted by Mr. Russell that this approach was in error; "exceptional circumstances" is the test under CPR 6.16, not CPR 6.15. However, the Admiralty Registrar also held that in circumstances where the email of 3 March 2014 did not purport to be service and indeed was inconsistent with an intention to serve it would not be appropriate to treat it as good service.

60. The email of 3 March 2014 informed the Club that proceedings had been issued. The attachment to the email contained a copy of the claim form. However, the email went on to say that unless something positive was received "we will be required to request Andrew [Messent] approach the Association for appointment of solicitors ...and thereafter effect service..." Thus the email did not purport to be service and expressly contemplated that service would take place at a later date. I agree with the Admiralty Registrar that it would not be appropriate to order that a step taken to bring the claim form to the attention of the Defendants is good service where the terms in which that step was taken were to the effect that it was not service and that service would occur at a later date.

Conclusion

61. I allow the appeal with regard to CPR 3.10 and CPR 17 but dismiss the appeal with regard to CPR 6.15. I shall ask counsel to draw up an appropriate order.

Postcript

62. After I had prepared this judgment I was provided by Mr. Russell with a copy of the judgment of the Court of Appeal in The Stolt Kestrel [2015] EWCA Civ 1035. Mr. Russell submitted that the Court of Appeal has reaffirmed the fundamental differences

between Admiralty claims *in rem* and those *in personam*. He further submitted that "the distinction supports the Owners' case that neither CPR 3.10 nor CPR 17.1 can (as a matter of jurisdiction), alternatively should (as a matter of discretion), be used to convert an *in personam* claim into an *in rem* claim. *A fortiori* this must be the case when the time for service of the *in personam* proceedings has expired and the defendants have an arguable time bar defence."

63. I do not consider that the distinction between an action *in rem* and action *in personam* (to which I referred in paragraphs 20-21 of this judgment and to which Tomlinson LJ referred in paragraphs 12-17 of his judgment in The Stolt Kestrel) leads to the conclusion that, as matter of jurisdiction, neither CPR 3.10 nor CPR 17 can be used to convert an *in personam* claim form into an *in rem* claim form. There is nothing in CPR 61 or PD 61 which, on its proper construction, excludes the operation of CPR 3.10 or CPR 17 in the same way as CPR 7.6 excludes the operation of CPR 3.10 in the manner explained by the Court of Appeal in Vinos v Marks & Spencer [2001] 3 AER 784. However, I do accept the alternative submission that the clear and well known distinction between a claim form *in rem* and a claim form *in personam* is a relevant matter to be taken into account by the Court when deciding whether it is appropriate to remedy an error of procedure pursuant to CPR 3.10 or to disallow an amendment pursuant to CPR 17.2. I have taken that distinction into account in my judgment in this case; see paragraphs 47 and 50 (i), (iv) and (vi). I have also taken into account that Mr. Messent's inadvertent error in issuing an *in personam* claim form when he intended to issue an *in rem* claim form was culpable. It was a mistake which should never have been made. But, having considered all the other circumstances of the case and borne in mind the guidance given by the Court of Appeal as to the exercise of the court's discretion, I considered that, notwithstanding the clear distinction between an *in rem* claim form and *in personam* claim form, an order remedying the error and/or allowing the amendment (on terms as to costs) was consistent with the overriding objective of dealing with the case justly and in a proportionate manner.

64. Mr. Russell further noted that in The Stolt Kestrel there was no mention of CPR 3.10 or CPR 17 as a possible route round the claimant's error in that case. I agree that there was no such mention of those rules in that case. Mr. Nolan has suggested that the facts of that case may provide an explanation as to why it was not mentioned. But whether they do or not I do not consider that that the absence of any mention of CPR 3.10 or CPR 17 in that case assists the court in deciding what order, on the facts and circumstances of the present case, would or would not be consistent with the overriding objective of dealing with the case justly.

65. Mr. Russell further submitted that the decision of the Court of Appeal assisted in showing that the claim form issued in the present case was *in personam*, that Mr. Messent's error was culpable and that the application pursuant to CPR 6.15 should be dismissed. I need not comment on those further submissions because I have held that the claim form issued was *in personam*, that Mr. Messent's error was culpable and that the application pursuant to CPR 6.15 must be dismissed.