'What are the legal and practical consequences for maritime carriers and their insurers arising from Feest v South West Strategic Health Authority [2015] EWCA?'

1. Maritime Carriers – whether merchantmen or passenger ships – have long enjoyed special consideration under international conventions and rules when it comes to limitation of liability and limitation of time for bringing suit. Ships, we have been led to believe, are different – and that is an old legal debate I shall briefly return to later. Injured passengers must bring their claims against a maritime carrier under the Athens Convention within two years rather than the three years if the injury were on English soil - and so maritime carriers and their insurers can close their books two years after an incident. Or can they? And does the High Street solicitor who misses the 2 year time bar have an escape route? It is that time bar issue and its context and ramifications that I will be looking at today, particularly in the light of the CA decision in Feest which held that the Athens Convention 2 year time limit does <u>not</u> apply to Contribution claims and that a Civil Liability Contribution Act claim <u>may</u> be pursued against a maritime carrier after the expiry of the 2 year time bar.

2. So this is a talk about the Athens Convention – that is the Athens Convention (Carriage of Passengers and their Luggage) 1974. I hope that won't lead to a glazing of eyes and a rush for the exits. I am actually going to talk about a few things other than slips, trips, keel-overs and nicked handbags – indeed, given that I am a shipping lawyer not a personal injury lawyer, I am going to be talking as little as possible about personal injury. [Sometimes, though, we charterparty chaps need to be reminded that there is another world out there.] And my focus is on the two year Convention time bar (Article 16.1 – which may in some circumstances be extended to three years under 16.3).

> ***ARTICLE 16: Time-bar for actions***
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> *1. Any 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*

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 when disembarkation should have taken place, whichever is later.

3. I will be looking at:

   (1) The scope of the Convention time bar and its application in English case law, in particular the Feest case.

   (2) What Feest was really about and what are its implications?

   (3) Should ships be different? Appetite for change?

4. By way of further introduction I should say that I tried to get some feedback from some leading UK P&I clubs and PI solicitors about the impact of the Feest case, so that I could speak to you with some authority. My in-tray has not exactly overflowed, though I would like to pay tribute to John Strange of Thomas Cooper whose perceptive remarks have been very helpful. One respondent thought that the CA had held that the Athens Convention <u>does</u> apply to Contribution claims: I fear that he would have got a rude shock (had I not put him right) if he had been hit by a passenger claim many years after the event.

(1) The scope of the Convention time bar and its application in English case law, in particular the Feest case

5. First, what is the context for our claims? Broadly speaking, we are talking about passengers on

   - Ferries
   - Cruise ships
   - Leisure craft
   - Transport craft for the offshore industry

And, for what it is worth, we are talking about "luggage" as well as PI, and you may be interested to know that that includes your car when you are on a ferry journey.

6. Secondly, to what claims does the Convention apply? Article 14 provides:

> "*No claim for damages for the death of or personal injury to a passenger, or for the loss of or damage to luggage, shall be brought against a carrier or performing carrier otherwise than in accordance with this Convention*."

7. Further, though the Convention is concerned with international carriage, by Order in Council[1] it has been extended to all domestic sea carriage, i.e. where the places of departure and destination are within the UK.

8. On the face of it that looks very wide indeed and I think it is fair to say that shipowners and their insurers tend to look on the Convention as something of a complete code, giving them confidence that the exclusions, limitations of liability and time bars apply to all claims and claims of whatever nature so long as they involved personal injury or luggage. And they had a good victory in a case called *Higham v Stena* in 1998 ([1996] 2 Lloyd's Rep. 26) in which the claimant unsuccessfully tried to get round Article 16 by saying that the Article 16.3 "suspension or interruption" provision brings in s.33 of the Limitation Act which gives the Court the power to disapply a time bar if it would be equitable to do so.

9. But - though I can start with a few basic propositions - it is not quite so simple. Here are those basic propositions'

   (1) The expression "a carrier or performing carrier" does indeed cast the net very wide, to include contractual carriers. This means – as was held *obiter* in *Lee v Airtours* [2004] 1 Lloyd's Rep. 682 (HHJ Hallgarten QC) – that tour operators and suchlike will be carriers if they enter into a contract of carriage with a passenger. But do they? – sometimes yes, sometimes no. If they don't then as we shall see the *Feest* case becomes relevant.

   (2) A passenger is a person carried in a ship under a contract of carriage. Pretty obvious, that, but it of course means that it doesn't apply to guests or employees.

[1] *Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order* 1987 [SI 1987 No.160]

(3) A ship is defined as a sea-going vessel, excluding an air-cushion vehicle (i.e. hovercraft). A RIB is – or at least may be - a ship (*The Sea Eagle* [2012] 1 Lloyd's Rep. 37 and *Feest*). A banana raft is not (*McEwan v Bingham*, 2011); nor is a jet-ski (*Steedman v Scofield* [1992] 2 Lloyd's Rep. 163).

10. So is the Convention a complete code governing all liability of sea carriers to whomsoever owed in respect of the carriage of passengers and their luggage? That was the first point decided in *Feest* and the answer was 'no'.

11. Which brings me to 'Feest'. Dr Feest was badly injured on a boat trip during a corporate team building exercise organised by her employers, SWSHA: the boat trip was in the Bristol Channel on the 9 metre RIB *Celtic Pioneer* operated by Bay Island Voyages. Her solicitors missed the two year Convention time bar against the boat owners and commenced an action against her employers one day before the expiry of the 3 year Limitation Act time bar. So it was nearly four years after the event that the employers then commenced a part 20 claim under the Civil Liability Contribution Act against the boat owners. The boat owners – for whom I acted on appeal to HHJ Havelock-Allan QC and in the CA – contended first, that the Convention applied to a contribution claim and so this claim was time-barred; secondly, that the Article 16 time bar was one which 'extinguished the right' of the Claimant, thus precluding the bringing of a Contribution Act claim.

12. Let's not dwell on the first of those issues, which is a point of construction, interesting but in the context of time bars recondite: I won before the Judge – who considered it a solecism to say that a difference between a claim for damages and a claim for contribution to a claim for damages were different creatures - and lost in the CA.

13. The second is of more general interest to commercial lawyers as it turned on the interpretation – or as I argued, characterisation – of an international convention. [So you see it was indeed not really a personal injury case] Section 1(3) of the Contribution act permits contribution claims to be brought where the original claim is timebarred

unless that time bar is one which **extinguished the right** on which the original claim was based.

> ***1.— Entitlement to contribution***
>
> *...*
>
> *(3) A person shall be liable to make contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred,* ***unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based.***

14. Pausing here, you may wonder – if you don't know – what is the equivalent to Article 16 in the Warsaw and Montreal Conventions? Both use the language of the right to damages being extinguished but both when enacted into English law were given express carve outs in relation to contribution claims. The Hague-Visby Rules are of course similar: "liability is discharged" after one year but then Article 6 bis preserves a right to bring contribution claims.

15. So was the Athens Convention Article 16 time bar one which barred the remedy or one which extinguished the right?

16. The words were not a good starting point for me: for an English lawyer "shall be time-barred" appear to be remedy barring; contrast "*shall be discharged from all liability"* in the Hague Rules. We argued that for international jurists, the draftsmen and users of the Athens Convention, the so-called 'English rule' - which makes this distinction between barring remedies and extinguishing rights – was incomprehensible; that those jurists would interpret the provisions as right extinguishing. We appeared to be supported by some powerful stuff from the Law Commission in its papers which led to the Foreign Limitation Periods Act 1984. But the CA took the view that there was no international consensus on the meaning of the provision.

17. For those who are fascinated by conflicts of laws, I recommend reading the judgement; for now, however, I can give you only a soupcon. Judge Havelock-Allan was persuaded that we should not adhere to the English rule in this international conventions context, that the 1984 Act – though concerned with a limitation period in foreign law and not in substance a conflicts of law case – was an important step in the retreat in English law from the English rule. He was persuaded by reference to a number of Canadian and Australian cases that the trend in those jurisdictions is to regard a bar on an action as equivalent to extinction of the claim, following, to quote from the Canadian Supreme Court case of *Tolofsen*, the continental view that "all statutes of limitation destroy substantive rights". Absent the English rule he would have construed both 16(1) and 16(3) as right extinguishing provisions.

18. The CA approached the issue differently. They were not persuaded to view the interpretation of an international convention as if it were a question of characterisation. They did not find the 1984 Act or the Commonwealth cases as being of any assistance [34]. They could find no interpretation of general international acceptation and relied heavily on a CMI publication by Prof Berlinghieri to conclude that there was no corpus of international understanding whereby Article 16 should be regarded as extinguishing the right of action. So they interpreted it through the prism of the English authorities and English law and concluded that the language was without doubt remedy barring.

19. What I think we can take from the judgement in *Feest* is that the CA were readily persuaded to interpret an international convention in a traditional English way – notch it up as a victory for the English rule, indeed. And it appears, with respect, that we do not have a CA – well not this court anyway - of forward thinking international jurists who are prepared to carry on with the work of the Law Commission in the field of recognition of foreign law to apply it to interpretation of international conventions.

20. And the practical implications with regard to maritime passenger carriers?

(1) The first is not about time bars. It is that a contribution claim, being outside the Convention (the first point decided by the CA), circumvents its limitation of liability provisions. So there is the potential for unlimited liability through a contribution claim. This is not within the ambit of my talk, but is potentially very important.

(2) [Time bars] You are not safe and sound just because the 2 year bell has tolled. There is always potential for a contribution claim to emerge from the woodwork.

(3) That potential may arise in a number of situations:

(a) A cruise ship or ferry where –

(i) the tour operator or travel agent has not contracted as carrier, and

(ii) there is an independent cause of action against the tour operator.

How likely is that? Not at all unlikely, I should have thought, so it is surprising that the issue in *Feest* had apparently not arisen before.

(b) The offshore industry, where –

(i) Oil field workers will be passengers, and

(ii) The workers' employer is unlikely to be the boat operator, and

(iii) It may be that a small boat operator will not benefit from any knock for knock agreements.

How likely is that? To my mind (i) and (ii) will be common but that it will most usually be the case that the boat will be chartered on knock for knock terms, meaning that a contribution claim by the employers as charterers would be bound to fail against the boat operators.

(c) The leisure boat industry, as in *Feest*. But how often will an individual have been booked onto a boat by a third party – e.g. an employer – against whom there may be an independent cause of action for PI? Very rare, I should have thought.

21. So what are the ramifications? *Feest* is, it has to be said, a rare example of a maritime carrier not enjoying the benefit of limitation (time). Further – and this may have been missed by the insurance industry – if Dr Feest's injuries had been more serious, the route of the contribution claim could deprive the carrier of the right to limit his liability. That means that a maritime carrier should make sure that any intermediary with whom it contracts agrees that it will itself contract with passengers as 'carrier'.

22. Is the decision likely to cause uproar and calls for change? – maybe not, but if it does then what is the case for taking the Athens Convention out of the contribution Act regime?

23. This to my mind revives the debate that Ships are Different – a debate eloquently pursued in the 1990s in articles in the LMCLQ by Lord Mustill and Sir David Steel[2], and worth rereading. Why should ships and shipowners enjoy special rights to limit liability which are not available to landlubbers? Conversely, if they are entitled to limit their liability, surely they should have special consideration with regard to time for bringing suit? It is not just the <u>weight</u> of claims they may have to meet after a catastrophe that justifies their special status but also the need in an international insurance industry to have certainty in closing claims. English litigants have, after all, always got the option of suing their negligent high street solicitors for missing the 2 year time bar in the first place.

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[2] [1993] LMCLQ 490-501 (Mustill), [1995] LMCLQ 77-87 (Steel)