



T-1552-97

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ADMIRALTY ACTION *IN REM* AGAINST THE SHIPS
"PACIFIC SHORE", "IVORY C", "D'YERMAK'ER",
"MIHAMAWEST", "QUEPASA", "SILVER SEEKER", "WANDERER'Y",
"US-QUABACH", "GRIZZLY KING", "SILVER TIDE", "GALLEY BAY",
"MISS INA", "VICTOR", "DIANNA TINA", "SEA WIFE", "WINDSWEPT",
"WISHING WELL", AND OTHERS

Between:

STATE OF ALASKA, ALASKA MARINE HIGHWAY
SYSTEM, ALASKA DEPARTMENT OF
TRANSPORTATION AND
PUBLIC FACILITIES,

Plaintiffs,

- and -

JOHN A. DOE, JOHN B. DOE, JANE A. DOE,
JANE B. DOE, AND OTHER PERSONS UNKNOWN,
AND VARIOUS SHIPS OBSTRUCTING NAVIGATION
IN PRINCE RUPERT, BRITISH COLUMBIA INCLUDING
"PACIFIC SHORE", "IVORY C", "D'YERMAK'ER", "MIHAMAWEST",
"QUEPASA", "SILVER SEEKER", "WANDERER'Y", "US-QUABACH",
"GRIZZLY KING", "SILVER TIDE", "GALLEY BAY", "MISS INA",
"VICTOR", "DIANNA TINA", "SEA WIFE", "WINDSWEPT",
"WISHING WELL", AND OTHERS INCLUDING THOSE SHIP
AND THEIR OWNERS AND MANAGING OWNERS LISTED
ON SCHEDULE "A" HERETO,

Defendants.

REASONS FOR ORDER

RICHARD, J.

NATURE OF PROCEEDING

Rule 401 Motions

These reasons arise out of two motions by different sets of applicants. The applicants to the first motion, filed September 17, 1997, are listed in Appendix 1. The applicants to the second motion, filed September 19, 1997, are listed in Appendix 2.

Relief Sought

The motions seek the following Orders:

1. An Order pursuant to Rule 321 that the hearing of this motion proceed on short service; and short leave pursuant to Rule 320;
2. An Order pursuant to Rule 401 granting leave to the Applicants to file a conditional appearance for the purpose of objecting to irregularities in the commencement of the proceeding, the subsequent amendment of the Statement of Claim, service of the Statement of Claim, and whether the proceeding is a proper and valid *in rem* proceeding;
3. An Order pursuant to Rule 401 and Section 50 of the *Federal Court Act* granting a stay of proceedings until such objections can be raised and disposed of;
4. An Order pursuant to Rules 401 and 1716 declaring that the action was invalidly commenced as against the Applicants, and that any purported service of the Statement of Claim or Amended Statement of Claim on these Applicants is invalid and of no force and effect;
5. An Order pursuant to Rule 401 declaring that this Court does not have *in rem* jurisdiction in these proceedings; and,
6. An Order pursuant to Rule 327.1 fixing the time for the hearing of items 4 and 5, *supra*.

Grounds

The grounds of these motions are:

- (a) It is necessary and proper for a conditional appearance to be filed because of irregularities in the commencement and purported amendment of this proceeding, and to allow the Applicants the opportunity to challenge the validity of the *in rem* proceeding;
- (b) It is in the interest of justice that the action against the Applicants be stayed until the validity of the commencement of this proceeding, the

amendment of this proceeding, and the validity of the *in rem* proceeding are determined by this Court;

- (c) The amendments of August 21, 1997 purporting to add the parties listed in schedule "A" were invalid and contrary to the Rules of this Court and consequently of no force and effect;
- (d) The action was filed in an *in rem* proceeding only. As a result the addition of any *in personam* claim or proceeding is invalid and contrary to the Rules of this Court and therefore of no force and effect;
- (e) This Court is without *in rem* jurisdiction as the claims being advanced do not come within the provisions of Section 22 of the *Federal Court Act*.

Material in Support

There were no affidavits filed in support of the motions. The applicants and respondents relied on the court record.

STATEMENT OF CLAIM

The following allegations of fact are set out in the statement of claim:

3. The "Malaspina", a passenger and motor vehicle ferry that operates between Prince Rupert, B.C. and the States of Alaska and Washington, is a major link in the land and sea transportation routes between British Columbia, the State of Alaska and the State of Washington, and regularly carries up to approximately 330 passengers and approximately 75 automobiles and trucks.

4. The individual Defendants, or some of them, are the owners or operators of various ships, many of which are Canadian commercial fish boats, including but not limited to the Defendant ships.

5. On Saturday, July 19, 1997, the Defendants, wrongfully and with intent to cause damage to the Plaintiffs, while the "Malaspina" was at the ferry terminal in Prince Rupert, B.C. positioned various ships including the Defendant ships, and other objects directly in the path, or near, of the "Malaspina", thereby preventing the "Malaspina" from leaving the terminal, for Alaska. The Defendants, or some of them, also prevented the embarkation and disembarkation of passengers and vehicles from the "Malaspina" and other of the Plaintiffs' ships, thereby causing further impediment to the ordinary operations of the "Malaspina" and other ships in the Plaintiffs' ferry system. These actions of the Defendants are collectively referred to herein as the "blockade".

6. At the time the blockade began, there were approximately 328 passengers and 71 vehicles on board the "Malaspina". The blockade forced the cancellation of that voyage, and other voyages of the "Malaspina", and caused major disruption of the Plaintiffs' ferry system.

7. Despite numerous requests by the Plaintiffs, the Defendants have refused to end their blockade.

8. The Defendants, by the blockade, have created a public nuisance and also trespassed against the Plaintiffs.

9. By placing ships and other objects in positions that prevent the departure of the "Malaspina" from its terminal, the Defendants are interfering with the public right of navigation, and causing particular harm to the Plaintiffs.

10. The blockade was the result of a conspiracy by the Defendants to interfere with the contractual rights of the Plaintiffs.

11. As a result of the aforesaid wrongful acts of the Defendants, the Plaintiffs have suffered and continue to suffer damages including, but not limited to, loss of use of the "Malaspina", disruption to their transportation service, loss of income, damage to the reputation of their tourist industry, and general damages.

BACKGROUND

The applicants seek leave to file a conditional appearance on the basis that:

- (a) there is irregularity in the proceedings in the joinder and service of all of the persons listed in Schedule "A" to the Amended Statement of Claim;
- (b) the Court's jurisdiction over the original *in rem* claims as pleaded is challenged.

The applicants seek a stay of proceedings to allow these objections to be dealt with, and an order fixing the time for the hearing to determine the substantive issues.

The proceedings are styled solely as an *in rem* proceeding. The original statement of claim named 14 vessels and John A. Doe, John B. Doe, Jane A. Doe and Jane B. Doe. The style of cause also contains references to "others", who are not identified in any way in the statement of claim or amended statement of claim.

On August 21, 1997, the plaintiffs filed an amended statement of claim under Rule 421 of the *Federal Court Rules*. By filing the amended statement of

claim the plaintiffs purported to add 180 vessels and 227 individuals and companies as defendants in the action.

The plaintiffs advance claims that the defendants, on July 19, 1997, blockaded a vessel owned by the State of Alaska, while it was at a terminal in Prince Rupert, British Columbia.

TEST FOR CONDITIONAL APPEARANCE

Rule 401 of the *Federal Court Rules* provides:

A defendant may, by leave of the Court, file a conditional appearance for the purpose of objecting to:

- (a) any irregularity in the commencement of the proceeding;
- (b) the service of the statement of claim or declaration, or notice thereof, on him;
- (c) the jurisdiction of the Court, and an order granting such leave shall make provision for any stay of proceedings necessary to allow such objection to be raised and disposed of.

Rule 401 contemplates a two-stage procedure whereby the applicant obtains leave and a stay of proceedings at an initial hearing and the merits of the objection to jurisdiction are argued at a subsequent hearing. The applicants' motions are at the initial stage.

In *Antares Shipping Corp. v. "Capricorn"*¹ Mr. Justice Le Dain stated that leave to file a conditional appearance is not a matter of right. The principal consideration which should govern the exercise of the discretion under Rule 401 is whether the defendant has *prima facie* raised sufficient doubt as to the regularity of the proceedings or the jurisdiction *rationae personae* of the Court that justice requires that the defendant be allowed to appear in a manner so as to avoid any waiver of these objections. An objection to the Court's jurisdiction *rationae materiae* can be made at any stage of the proceedings, and the Court may, therefore, properly deny leave to file an appearance to contest it.

¹ *Antares Shipping Corp. v. "Capricorn" (The)*, [1977] 2 F.C. 320 (C.A.)

IRREGULARITIES (R. 401 (a) and (b))

The plaintiffs have purported to add as defendants all those ships and persons who are listed in Schedule "A" to the amended statement of claim and who were not originally named as parties in the statement of claim. The plaintiffs filed their amended statement of claim pursuant to Rule 421. They did not seek or obtain an order of the Court that these defendants be added. The applicants object that the proceedings were improperly commenced against them.

The plaintiffs also take the position that if they served, in July, persons who were not named as defendants in the statement of claim, but were added later, in August by the amended statement of claim, the 60 day period for filing their defence pursuant to the order of Madam Justice Reed of July 28, 1997, runs from the original date of service even though they were not served with the amended statement of claim. The applicants object that any purported service of the statement of claim on any defendant prior to that defendant being named as a defendant is invalid.

Given the decisions in this Court in *Larden v. Canada* (1995), 60 C.P.R. (3d) 98 and in *Montres Rolex S.A. v. Lifestyles Imports Inc. et al.* (1989), 23 C.P.R. (3d) 436, these objections meet the test in *Anteres* for granting leave.

A further irregularity claimed by the applicants is that the style of cause does not specify that it is an *in personam* proceeding as well as an *in rem* proceeding. This is not required by the Rules or the Forms and would result in form prevailing over substance. Under Rule 1002(7), proceedings *in rem* may be joined in the same action with proceedings *in personam*.

JURISDICTION OF THE COURT (R. 401(c))

The following is an outline of the grounds for the challenge to the validity of the *in rem* proceedings:

- (a) no action *in rem* lies in the absence of a corresponding action *in personam* against a ship owner, and the pleadings do not disclose the facts necessary to sustain individual causes of action against ship owners;
- (b) no action *in rem* lies against a collectivity of vessels; and
- (c) no action *in rem* lies based upon conspiracy where, by definition, damage must stem from the conspiracy, and not from the individual acts of the conspirators.

The applicants allege that pleadings do not disclose any allegation of damage caused by a ship, sufficient to sustain an action *in rem*. Also, plaintiffs in this case have threatened to arrest all of the vessels named as defendants. The plaintiffs seek to do so without pleading any individual act done by any individual vessel or owner, presumably, by reliance upon the generalized allegation of conspiracy.

STAY OF PROCEEDINGS

The applicants seek a stay of proceedings, pursuant to Rule 401 of the *Federal Court Rules*, or alternatively Section 50(1) of the *Federal Court Act* which provides, in part:

The Court may, in its discretion, stay proceedings in any cause or matter,...

- (b) where for any other reason it is in the interest of justice that the proceedings be stayed.

The applicants claim that a stay is necessary as the plaintiffs are threatening to take default judgment. Also, the plaintiffs are threatening to arrest vessels commencing October 15, 1997. If, as submitted by the applicants, the Court does not have *in rem* jurisdiction in this action, the plaintiffs would, by arresting ships, be obtaining the benefit of the challenged jurisdiction.

A stay in favour of all defendants is sought for two reasons. Firstly, the plaintiffs are advancing a claim of conspiracy against all of the defendants. To allow the plaintiffs to proceed against unrepresented defendants in a conspiracy case where serious issues are raised with respect to the jurisdiction of the Court

would be fundamentally unfair for the applicants. Secondly, the circumstances indicate that it is likely that many of the defendants will seek representation in the near future. These circumstances, it is alleged, favour the grant of a global stay, pending the resolution of the jurisdiction issues.

STATUTORY PROVISIONS - FEDERAL COURT ACT

Subsection 22(1) reads:

22.(1) The Trial Division has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.

Paragraph 22(2)(d) reads:

22.(2) Without limiting the generality of subsection (1), it is hereby declared for greater certainty that the Trial Division has jurisdiction with respect to any one or more of the following:...

(d) any claim for damage or for loss of life or personal injury cause by a ship either in collision or otherwise

Subsection 2(1) states:

2.(1) In this Act,

"action for collision" includes an action for damage caused by one or more ships to another ship or ships or to property or persons on board another ship or ships as a result of carrying out or omitting to carry out a manoeuvre, or as a result of non-compliance with law, even though there has been no actual collision;

Subsection 43(2) reads:

43.(2) Subject to subsection (3), the jurisdiction conferred on the Court by section 22 may be exercised *in rem* against the ship, aircraft or other property that is the subject of the action, or against any proceeds of sale thereof that have been paid into court.

The *Federal Court Act* paragraph 22(2)(d) gives jurisdiction not only in respect to damage by a ship "in collision" but "in collision or otherwise".

In Canada, damage by a ship has been very broadly interpreted.

Mr. W. Tetley wrote in Maritime Liens and Claims²:

"The courts now accept that ships may do damage otherwise than through physical contact with their hulls, pollution being the major example. (p. 168)

....

The damage lien is founded upon the fault of or breach of duty by those in control of the ship. It is their negligence in respect to the ship which results directly or consequently in the damage lien. (p. 168)

....

The damage lien encompasses both direct and consequential damages. Thus the cost of repairs, the loss of earnings due to the ship being detained, salvage expenses, liability to harbour authorities for wreck removal, and the liability which the damaged ship incurs due to resulting pollution, are all covered by the maritime lien for damage done by a ship. (p. 170)

....

It is an artificial distinction to separate the act of the ship's crew from the act of the ship, when both are concerned with the ultimate goal of navigating the ship. Liens are a means for promoting safe and legal navigation and securing the rights of persons harmed. (p. 173)

ORDER

I exercise my discretion to allow the Schedule "A" defendants to the amended statement of claim, listed in Appendix 1 and Appendix 2, to file a conditional appearance for the purpose of objecting to the alleged irregularity in the commencement of the proceeding against them by adding them as a party under Rule 421(1) and the consequential irregularity of the service on them of the statement of claim. Pursuant to paragraph 401(c) of the *Rules* the proceedings against such defendants are stayed pending the disposition of such objection by a judge of the Trial Division.

The hearing of the objection shall take place on Friday, October 24, 1997, commencing at the hour of ten o'clock in the forenoon at the Federal Court of Canada, located at 700 West Georgia Street, 16th Floor, Toronto Dominion Tower, in the City of Vancouver, British Columbia, subject to any further order of the presiding judge.

² William Tetley, Maritime Liens and Claims, Business Law Communications Ltd., London, 1985.

Any defendants named in Schedule "A" to the amended statement of claim who were not parties to the two motions before me may make an application for leave to file a conditional appearance, for the purpose of maintaining their objection to the two alleged irregularities identified in this order and participate in the hearing fixed for October 24, 1997, provided a motion under Rule 401 is filed by them on or before October 17, 1997, subject to any further order of the presiding judge.

Counsel for the parties before me have requested and obtained the appointment of a case management judge. Pursuant to subsection 50(1) of the *Federal Court Act* the action is stayed until October 31, 1997, unless the case management judge, or another judge of this Court, orders otherwise. The plaintiffs have offered an undertaking to take no further steps in the matter for 14 days, if the application under R. 401 is denied, to allow the holding of a case management conference. In the interest of justice and given the circumstances, my order under section 50 of the *Federal Court Act* is for a longer period.

The balance of the motions for leave are denied. The applicants have failed to show any further irregularity or lack of jurisdiction of this Court.

(Sgd.) "John D. Richard"

Judge

September 25, 1997
Vancouver, British Columbia

APPENDIX 1

Applicants to the first motion, filed September 17, 1997, are as follows:

Kim Anthony Olsen, Kim Anthony Olsen as owner of the "*Disruptor*", Michael Sharko as owner of the "*Pacific Shore*", Ronald Joseph Beanland as owner of the "*Sea Wife*", John Stevens as owner of the "*Wishing Well*", Aberdeen Fishing Corp. as owner of the "*Windswept*", John Hodanic, Robert Burkosky, Robert Burkosky as owner of the "*B.C. Maid II*", Clinton Young as owner of the "*Christie Lee*", Renee Dumont as owner of the "*Daniel D. No. 1*", Viet UU Le as owner of the "*David*", Nick Stevens, Jeff Goldie, Charles Wilman as owner of the "*Lady Kelly*", Gjan Fishing Co. Ltd. as owner of the "*Lucky Jo Jean*", Eric Taylor as owner of the "*Miss Dover*", Richard Frey as owner of the "*Miss Gina*", James MacVeigh, Michael Sharko, Leslie J. Fowler as owner of the "*Reefer*", Kerry Brown as owner of the "*Sea Hustler*", Charlie MacDonald, David Kaufman, David Kaufman as owner of the "*Silver Mine*", Marcotte Enterprises Ltd. as owner of the "*Sun Mariner*", Lloyd Etzerza, Alan Mearns, Alan Mearns and Heather Mearns as owners of the "*Tiara V*", Rick Dunaway, James Chislett as owner of the "*Tosha*", Gary Switzer, Frank Hudson as owner of the "*Val Pam Too*", Noringseth Fish Co. Ltd. as owner of the "*Viking Sun*", Modestus Nobels as owner of the "*Vonnie Dee*".

APPENDIX 2

Applicants to the second motion, filed September 19, 1997, are as follows:

British Columbia Packers Limited, as owners of the "*Western Princess*" and as part-owner of the "*Western Sunrise*", Canadian Fishing Company as part-owner of the "*Canadian Shore*", the "*Salli J. Rogers*" and the "*Cape Freeman*", G. Cook & Sons Fishing Ltd. as owner of the "*Fraser Sunrise*", Garden City Enterprises Co. Ltd. as part-owner of the "*Canadian Shore*", Lasqueti Fishing Co. Ltd. as part-owner of the "*Lasqueti Storm*", West Point Fishing Co. Ltd. as part-owner of the "*Lasqueti Storm*", North Delta Seafoods Ltd. as owner of the "*Viking Joy*", Pacific Faith Fishing Co. Ltd. as owner of the "*Pacific Faith*", Pacific Pearl Fishing Company Ltd. as owner of the "*Western Eagle*", Ritchie Fishing Company Ltd. as part-owner of the "*Savage Fisher*", North Ridge Fishing Ltd. as part-owner of the "*Savage Fisher*", Taaska Fishing Co. Ltd. as owner of the "*Taaska*", Bernice C. Fishing Ltd. as owner of the "*Bernice C*", and S. & J. Fishing Co. Ltd. as owner of the "*Lasqueti Spirit*".

NOTE:

At the opening of the hearing counsel for B.C. Packers Limited et al. informed the Court that S. & J. Fishing Co. Ltd. had not yet been served and consequently he was not appearing on their behalf.

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT NO.: T-1552-97

STYLE OF CAUSE: STATE OF ALASKA ET AL.
- and -
JOHN A. DOE, ET AL.

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: September 22, 1997

REASONS FOR ORDER OF RICHARD J.

DATED: September 25, 1997

APPEARANCES:

Mr. David McEwen	for Plaintiff
Mr. Shawn Neylan	for Defendants Kim Anthony Olsen et al.
Mr. Peter Bernard Mr. Peter Swanson	for Defendants B.C. Packers Ltd. et al.

SOLICITORS OF RECORD:

McEwen Schmitt Vancouver, BC	for Plaintiff
Ladner, Downs Vancouver, BC	for Defendants Kim Anthony Olsen et al.
Campney & Murphy Vancouver, BC	for Defendants B.C. Packers Ltd. et al.

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