



SEMAPHORE

Newsletter of the Maritime Law

Association of Australia and New Zealand



Schnarr v Markle 2023 FC 1004

In this case, the Canadian Federal Court considered several procedural issues, namely the staying and enjoining of limitation proceedings, as well as the plaintiff's presumptive right to limit liability. In considering these matters, the Court reinforced the importance under Canadian admiralty law of restricting all issues related to limitation of liability to a single forum where possible.

On 6 December 2021, Jeff Schnarr (the Plaintiff) commenced this action (cause number T-1860-21), seeking the establishment of a limitation fund pursuant to c. 6 of the Marine Liability Act, S.C. 2001 (the Act). The Plaintiff applied to constitute the limitation fund in respect of a collision between two pleasure crafts on 31 August 2019 (the Incident), seeking a declaration also (without admission of liability) that he was entitled to limit his liability to C\$1 million plus interest to the date of the fund's constitution, amongst other orders. The Plaintiff was the owner of a 45-foot 1996 Searay 450 Sundance Caterpillar vessel (the Vessel), of which he was also the operator on the date of the Incident.

In the Statement of Claim, the Plaintiff named Larry Markle, Athelie Markle, Elri Oosthuizen and Caleb Lambert as defendants (the Defendants). The Plaintiff alleged that Mr Markle owned the 17-foot Bayliner Capri vessel with which the Vessel collided, that Ms Markle was the operator and that Mr Oosthuizen and Mr Lambert were aboard as passengers.

On 22 August 2022, the Defendants filed a statement of defence denying liability, as well as a counterclaim seeking the dismissal of the Federal Court action and their costs (or, alternatively, to have their costs thrown away with respect to the Ontario Superior Court action, if the Federal Court action continued). On 25 August 2022, Mr Markle and Ms Markle (the Markle Defendants) filed a statement of defence and counterclaim, denying liability for the Incident and, in the counterclaim, seeking the dismissal of the Federal Court action and their costs (or, alternatively, to have their costs thrown away with respect to the Ontario Superior Court action, if the Federal Court action continued). The Markle Defendants also outlined their claim for damages, costs and interests.

On 17 November 2022, the Plaintiff filed a notice of motion, supported by his affidavit and the affidavit of his solicitor. Relevantly, the Plaintiff deposed that the Vessel weighed less than 300 gross tons. In his notice of motion, the Plaintiff also applied under s 33(1)(c) of the Act to enjoin any person from commencing or continuing proceedings in any court, tribunal, or authority other than the Federal Court in relation to the Incident.

The Plaintiff also deposed in his affidavit that, on 30 June 2021, he was served with a statement of claim filed in the Ontario Superior Court of Justice by the Markle Defendants (as plaintiffs), and that on 25 August 2021, he was served with a claim filed in the Ontario Small Claims Court. These proceedings were distinct from the Federal Court proceedings (cause numbers T-1837-22 and T-1860-21). Cause number T-1837-22 referred to a second action commenced by the Plaintiff against the Markle Defendants on 8 September 2022, seeking an order for contribution and indemnity for any damages awarded against him in respect of the action commenced in T-1860-21.

On 30 November 2022, the Defendants filed a notice of motion to stay this action and related contribution action in T-1837-22. The notice of motion was supported by two affidavits sworn by Mr Markle and Mr Bruce Kelly (of Morell Kelly Professional Corporation, a law firm). Mr Markle deposed that the Defendants would prefer a jury trial.

In the affidavit of Ms Heather Farr, affirmed on 30 January 2023, Ms Farr (a law clerk with the law firm Shillington McCall LLP, lawyers for the Markle Defendants) also deposed that the Markle Defendants were agreeable to have the Ontario small claims matter consolidated with the Ontario Superior Court action.

Three issues, therefore, arose from the notices of motion filed before the Court:

- first, whether a limitation fund should be established
- second, whether the Federal Court proceedings should be dismissed or stayed
- third, whether the proceedings in any other court should be enjoined.

Issue 1 – Limitation Fund

The Defendants agreed that a limitation fund should be established pursuant to the Act, which incorporated by reference the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC 1976).

The Court considered the definitions of “ship”, “shipowner” and “maritime claim” under ss 24-25 of the Act and art 1.2 of the LLMC 1976. The Court also noted that art 11 of the LLMC 1976 provided for the constitution of a limitation fund, and that s 32 of the Act described the procedure to be followed when a limitation fund was constituted under art 11 of the LLMC 1976. Importantly, s 32(1) of the Act provided that the Admiralty Court alone had “exclusive jurisdiction with respect to any matter relating to the constitution and distribution of a limitation fund”. Section 2 of the Act defined “Admiralty Court” to mean the Federal Court.

The Court also considered art 9.1 of the LLMC 1976 on the aggregation of claims, concluding that the combined effect of arts 9 and 11 of the LLMC 1976 was that only one fund was established to answer all aggregate claims arising from any one distinct occasion.

The Court accepted the Plaintiff’s assertion that the Vessel weighed less than 300 gross tons in the absence of evidence to the contrary. Due to this fact, s 29(a) of the Act applied, which stipulated that the maximum liability for maritime claims arising on any distinct occasion involving a ship under 300 gross tons was C\$1 million in respect of claims for loss of life or personal injury. The Plaintiff proposed that a guarantee bond be filed in the amount of C\$1 million plus interest pursuant to s 33(5) of the Act, with the Court to determine the form of the guarantee.

In these circumstances, and as the Plaintiff was the owner of the Vessel, the Court agreed that a limitation fund should be established in this case. Time limits for filing defences or claims against the limitation fund remained to be set.

Issue 2 – Dismissal or Stay of Federal Court Proceedings

The Court referred to s 50(1) of the Federal Courts Act, RSC, 1985, c F-7 which granted the authority to stay proceedings in the Federal Court, as well as the case *Canadian Pacific Railway Co v Sheena M (The)*, [2000] 4 FC 159 (FCTD) on the differences between staying and enjoining proceedings.

The Court here determined that the two-part test elucidated in *Mon-Oil Ltd v Canada* (1989), 26 CPR (3d) 379 (FCTD) should be applied as this was a case of seeking a stay of the Court’s own proceeding, as set out in the Defendants’ motion for a stay. Applying this test, the Court had to consider two questions:

- first, would the continuation of the action cause prejudice to the Defendants
- second, would the stay cause an injustice to the Plaintiff?

In considering these questions, the Court observed that the Federal Court had full jurisdiction over the Defendants’ claims, and that the Defendants could fully pursue their claims in the Federal Court. As such, the Defendants’ submissions that it was preferable to avoid duplication and inconsistency was not persuasive in proving that the Defendants would be prejudiced by the Court denying a stay of proceedings. Moreover, a stay of proceedings *would* cause an injustice to the Plaintiff by restricting his ability to advance his limitation action. The Court noted that there was a presumptive right to limit liability, and that the primary purpose of the limitation regime under the Act was to avoid multiple proceedings.

Although the Plaintiff could raise limitation as a defence in the Ontario action, he could only address the constitution of the limitation fund in the Federal Court proceedings. Both the constitution and distribution of limitation funds were matters exclusively within the Federal Court's jurisdiction.

The Court held that the limitation action should not be stayed, either on an interlocutory or permanent basis.

Issue 3 – Enjoining of Proceedings in Any Other Court

The Plaintiff was seeking an order under s 33 of the Act enjoining the Defendants (and other persons) from commencing or continuing proceedings before any court other than the Federal Court in respect of the Incident. Section 33 was also the origin of the Federal Court's power to enjoin the commencement or continued prosecution of proceedings in other courts on the same subject matter.

The Court noted that s 33 was framed very broadly, allowed for the Court to take "any steps it considers appropriate". Such broad drafting served the overarching policy aim of restricting limitation proceedings to a singular forum in the interests of expediency.

The Court noted that the applicable test for enjoining proceedings under s 33 of the Act was that of "appropriateness", which incorporated the element of suitability. After considering several case authorities, the Court concluded that it was appropriate that the proceedings outside the Federal Court be enjoined to enable adjudication in the Federal Court of all issues relating to the Incident, including liability issues. The subject matter of both the Ontario and Federal Court proceedings was the Incident, liability, and any limitation of that liability.

In the Court's view, depriving the Defendants of the option to have their claims considered by a jury was outweighed by the inconvenience, expense and repetition that would be required by determination of the issue of limitation in the Federal Court, and then determination of the issue of liability in the Ontario Superior Court of Justice. The Defendants' personal injury and property damage claims could be pursued in the Federal Court, such as through filing counterclaims. It was more efficient to determine all the issues relative to the Incident in the Federal Court. Further, as noted by the Court, only the Federal Court had jurisdiction over the constitution and distribution of a limitation fund.

Ultimately the Court allowed the Plaintiff's motion to enjoin the defendants, and any other person, from commencing or continuing proceedings before any court other than the Federal Court, against the Plaintiff in respect of the Incident.

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September 2023

