

Federal Court of Canada
Trial Division



Section de première instance de
la Cour fédérale du Canada

Date: 20001005

Docket: T-1780-98

MONTREAL, QUEBEC, THE 5th DAY OF OCTOBER 2000

PRESENT: RICHARD MORNEAU, PROTHONOTARY

Admiralty action *in rem* against the ship "ASL SANDERLING"

Between:

**SAPPORO KANIHONKE CO. LTD. and
ORION SEAFOOD INTERNATIONAL INC.**

Plaintiffs

AND

**OCEANEX INC., OCEANEX (1997) INC.,
THE SHIP "ASL SANDERLING",
HER OWNERS AND ALL OTHERS
INTERESTED IN THE "ASL SANDERLING",
and ROBERT HERRING, MASTER OF THE "ASL SANDERLING"**

Defendants

REASONS FOR ORDER AND ORDER

RICHARD MORNEAU, PROTHONOTARY:

[1] This is a motion brought by the defendant Robert Herring, against whom an action has been brought in his capacity as master of a ship on which a fire damaged a variety of cargo in containers on the ship's deck.

[2] In his motion, the defendant Herring asked that the direction to attend his examination for discovery be set aside. He also asked, under section 50 of the *Federal Court Act*, R.S.C. 1985, c. F-7, as amended (the Act), for an order of stay of proceedings in this case to give him time to file a motion for summary judgment to exclude him as a defendant in this case.

[3] This Court could not set aside the direction to attend since at the moment the defendant Herring is actually named as an individual defendant in the style of cause and the plaintiffs thus have the right to proceed once with his examination for discovery.

[4] According to counsel for the defendant Herring, the plaintiffs added the defendant Herring to the action solely to gain a strategic advantage. In his opinion, the case would reveal at that point that Master Herring could not be accused of having any personal involvement, and consequently, there is no reasonable cause of action against him. The plaintiffs allegedly included him as a defendant simply to be able to examine more than once the ship's owners, specifically Oceanex Inc. and Oceanex (1997) Inc., and, at the same time, be able to examine for discovery the representative of the ship's owners of their choice, all of which goes against the provisions of the Rules. According to Master Herring's counsel, it is very rare for plaintiffs to include the name of the master of the ship in the style of cause in this type of case. Naturally the plaintiffs deny that Master Herring's name was included for strategic reasons. In their opinion, the documents and facts in the case allow them to include

Master Herring as a defendant. They claim that many of the allegations in paragraph 15 of their statement of claim also involve the personal involvement of the master.

[5] It seems to me that Master Herring should raise the issue before the court today primarily through a motion to strike out his name as a defendant. As long as Master Herring is named in the case as an individual defendant, the Court cannot, under the present disputed circumstances, set aside the direction to attend. Rules 235 and 237 as well as the case law cited by the defendant Herring involve situations that are not at all applicable to the case at bar.

[6] The name of the defendant Herring has been specified in the statement of claim since March 24, 1999, and thus it is entirely reasonable that he would be summoned to an examination for discovery.

[7] Furthermore, the defendant Herring is also seeking a stay of proceedings under section 50 of the Act to give him time to file a motion for summary judgment to have the plaintiffs' action against him dismissed. That motion would be on the grounds that the action is time-barred with respect to the defendant and, possibly, for the reasons raised in paragraph [4] *supra*.

[8] This remedy is subject to the analysis that the Supreme Court described as follows in

RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, at 334:

Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

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[9] Even if it is admitted for argument's sake that the defendant Herring's position raises a serious question to be tried, it does not seem to me that it would cause the defendant irreparable harm to have to be subject to an examination for discovery. Furthermore, for the past year the defendant Herring has been saying that he intends to file a motion for summary judgment without ever doing so. Even if the various obstacles that the plaintiffs may have raised to block, or at least delay, the filing of said motion are considered for an instant, given the amount of time that has passed it would be unreasonable to further delay the progress of this case in the hope that this motion would eventually be filed.

[10] For these reasons, this motion brought by the defendant Herring is dismissed with costs.

Richard Morneau

Prothonotary

Certified true translation

Monica F. Chamberlain

FEDERAL COURT OF CANADA
NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT NO.: T-1780-98

STYLE OF CAUSE: Admiralty action *in rem* against the ship "ASL SANDERLING"
Between:
SAPPORO KANIHONKE CO. LTD. and
ORION SEAFOOD INTERNATIONAL INC.
Plaintiffs

ENTERED - ENTRE
JUDGMENT AND ORDER BOOK
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ORDRE
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AND

OCEANEX INC., OCEANEX (1997) INC., THE SHIP "ASL SANDERLING", HER OWNERS AND ALL OTHERS INTERESTED IN THE "ASL SANDERLING", and ROBERT HERRING, MASTER OF THE "ASL SANDERLING"
Defendants

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: August 28, 2000

REASONS FOR ORDER BY RICHARD MORNEAU, ESQ., PROTHONOTARY

DATE OF REASONS FOR ORDER: October 5, 2000

APPEARANCES:

Mr. A. Barry Oland

Mr. Louis Buteau

DUPLICATE
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NOV 20 2001
TORONTO

for the Plaintiffs

for "ASL SANDERLING" and the Defendants Oceanex

SOLICITORS OF RECORD:

Oland & Co.
Vancouver, B.C.

Sproule, Castonguay, Pollack
Montreal, Quebec

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for the Plaintiffs

for "ASL SANDERLING" and the Defendants Oceanex