

ONTARIO ADMIRALTY DISTRICT

1948
 Feb. 21
 Mar. 1

BETWEEN:

SARNIA STEAMSHIPS LIMITED PLAINTIFF;

AND

DOMINION FOUNDRIES AND }
 STEEL LIMITED } DEFENDANT.

Shipping—Canada Shipping Act, 24-25 Geo. V, c. 34, s. 647—Rule 200, Exchequer Court Rules and Orders in Admiralty—Prescription—Motion to set aside order granting leave to commence action and writ of summons issued pursuant to such order.

Pursuant to s. 647 of the Canada Shipping Act, 24-25 Geo. V, c. 44, plaintiff obtained an *ex parte* order on January 26, 1948, granting leave to commence an action against defendant for damages occasioned by a collision between plaintiff's ship and one owned by defendant on October 29, 1945.

Defendant now moves to have the *ex parte* order and writ of summons issued pursuant to leave granted by that order, set aside.

Held: That in the absence of good and sufficient cause, or special circumstances for the exercise of the Court's discretion, the defendant should not be deprived of its defence of the statutory limitation of two years.

2. That rule 200 of the General Rules and Orders of the Exchequer Court in Admiralty refers only to the enlarging or abridging of times prescribed by the rules or by orders made under the rules; the order here in question was not made pursuant to rule 200 but to s. 647 of the Canada Shipping Act.

MOTION by defendant to set aside an *ex parte* order granted pursuant to s. 647 of the Canada Shipping Act.

The motion was heard before the Honourable Mr. Justice Barlow, District Judge in Admiralty for the Ontario Admiralty District, at Toronto.

F. J. Hughes, K.C. for the motion.

W. T. Cook contra.

BARLOW D. J. A. now (March 1, 1948) delivered the following judgment:

An application by the defendant to set aside an *ex parte* order dated the 26th day of January, 1948, granting leave to the plaintiff to commence an action against the defendant for damages occasioned by a collision between the SS.

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Frank Wilkinson owned by the plaintiff and *Corvette K-133* owned by the defendant, which collision occurred on the 29th day of October, 1945, in the Cornwall Canal, and to set aside the writ of summons issued pursuant to leave granted by the said order.

The motion quite properly was argued as a substantive motion.

The application for the *ex parte* order was made pursuant to sec. 647 of The Canada Shipping Act, 24-25 Geo. V, (1934) cap. 44, which section is as follows:

647. No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or for damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel, whether such vessel be wholly or partly in fault, unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused, and an action shall not be maintainable under this Part of this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries unless proceedings therein are commenced within one year from the date of payment:—

Provided that any court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of court, extend any such period, to such extent, and on such conditions as it thinks fit, and shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court, or within the territorial waters of the country to which the plaintiff's ship belongs, or in which the plaintiff resides or has his principal place of business, extend any such period to an extent sufficient to give such reasonable opportunity.

The action would be barred by the above limitation on the 29th day of October, 1947, unless leave were granted pursuant to the said section.

The material shows that prompt notice was given by the plaintiff to the defendant as owner of the *Corvette K-133* of the claim to be made and that certain letters were exchanged by the solicitors for the plaintiff and for the defendant in March, 1947, when the defendant's solicitors wrote to the plaintiff's solicitor repudiating liability.

On the 11th August, 1947, the plaintiff's solicitors wrote the defendant's solicitors suggesting a discussion as to settlement. In reply on the 13th August, 1947, the defendant's solicitors wrote the plaintiff's solicitors as follows:

August 13, 1947.

Messrs. McMillan, Binch, Wilkinson & Co.,
Barristers etc.,
38 King Street West,
Toronto, Ontario.

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Dear Sirs:

We acknowledge receipt of your letter of August 11.

I have gone over this file carefully on several occasions. I find nothing in it. We are always glad to see your firm, but there is no use having a conference in this matter.

Yours very truly,

HUGHES AGAR THOMPSON & AMYS,
Per: (F. J. Hughes).

This clearly indicated to the plaintiff's solicitors that they must proceed by action.

The two-year limitation period expired on the 29th October, 1947, without any proceedings having been taken. On the 26th of January, 1948, the plaintiff obtained the *ex parte* order for leave to proceed. This is not a case where the plaintiff did not know whom to sue and could not find *Corvette K-133*. The said *Corvette* was at the dock of the defendant at Hamilton from the 5th November, 1945 until the 16th May, 1946. Furthermore the plaintiff knew that the defendant was the owner of the *Corvette* and could have commenced action *in personam* as it has now done, because, as set out above, the plaintiff shows in the material filed that it gave prompt notice to the defendant of the collision and of its claim.

The defendant should not be deprived of its defence of the statutory limitation of two years unless good and sufficient cause is shown. The plaintiff contends that the words of sec. 647 "in accordance with the rules of court" refer to rule 200 of the Admiralty Court Rules. This rule is as follows:—

200. The judge may enlarge or abridge the time prescribed by these rules or forms or by any order made under them for doing any act or taking any proceeding, upon such terms as to him shall seem fit, and any such enlargement may be ordered after the expiration of the time prescribed.

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This rule, in my opinion, does not assist the plaintiff. It only refers to the enlarging or abridging of times prescribed by the rules or by orders made under the rules. The order here in question was not made pursuant to this rule, but pursuant to sec. 647 of The Canada Shipping Act quoted above.

There do not appear to be any cases in our Court on this particular section of The Canada Shipping Act, but there are some English cases based on the English section, which has an identical wording with sec. 647. *The Llandoverly Castle*, (1) is almost identical with the case at bar. See page 125 where Hill, J. says, with respect to an application similar to the one at bar, and under a like section of the English Act, “. . . the discretion can only be used in favour of a plaintiff if there are special circumstances which create a real reason why the statutory limitation should not take effect.”

After having carefully considered the facts above set out, I am unable to find in the case at bar such special circumstances as would be a valid basis for the exercise of my discretion in favour of the plaintiff. The plaintiff, at all times, knew the owner of the *Corvette* and could have brought an action *in personam* as it has now done. The *Corvette* in question was at the defendant's dock in Hamilton until May, 1946.

The plaintiff knew finally and definitely in August, 1947, that the defendant repudiated all liability. This was over two months before the limitation period expired. Furthermore, the onus is upon the plaintiff to show that it is entitled to the exercise of the Court's discretion.

I am unable to find in the material, any sufficient circumstance which would justify me in depriving the defendant of the statutory limitation. See also *H.M.S. Archer* (2); *The P.L.M. 8* (3); *The Kashmir* (4).

The motion must succeed. The *ex parte* order and the writ of summons issued pursuant thereto will be set aside, with costs.

Judgment accordingly.

(1) (1920) P. 119.
 (2) (1919) P. 1.

(3) (1920) P. 236.
 (4) (1923) P. 85.