

**Date: 20061023**

**Docket: T-1155-06**

**Citation: 2006 FC 1259**

**Ottawa, Ontario, October 23, 2006**

**Present: The Honourable Mr. Justice Blanchard**

**BETWEEN:**

**BOULET LEMELIN YACHT INC.**

**Plaintiff**

**and**

**THE PACESHIP SAILBOAT  
LICENSED AS 13D 6732  
and THE OWNERS AND ALL OTHERS  
INTERESTED IN THE SAILBOAT  
LICENSED AS 13D 6732  
and JOHANNE CARON**

**Defendants**

**AND BETWEEN:**

**JOHANNE CARON**

**Plaintiff by Counterclaim**

**and**

**BOULET LEMELIN YACHT INC.,  
LOMBARD INSURANCE COMPANY**

**Defendants by Counterclaim**

## **REASONS FOR ORDER AND ORDER**

1. Introduction

[1] This is a motion by Johanne Caron, defendant in the main action, for an order:

- staying the main action brought by Boulet Lemelin Yacht Inc. (hereinafter Boulet Lemelin) on the ground of *lis pendens* with an action in the Court of Québec;
- exempting this proceeding from the application of sections 294 to 299 of the *Federal Courts Rules* (the Rules);
- for preservation.

2. Factual context

[2] On August 8, 2002, the defendant's boat suffered serious damage when the defendant's spouse, Yves Ste-Marie, struck a rock, which caused a sizeable leak.

[3] The boat was insured at that time by Lombard Insurance Company (hereinafter Lombard), the co-defendant by counterclaim. The estimated value of the boat was \$28,500.

[4] The defendant's spouse reported the accident to Lombard on August 9, 2002.

[5] On August 28, 2002, the sailboat was left at the boatyard owned by the plaintiff, Boulet Lemelin.

[6] The defendant gave the plaintiff a mandate to restore the sailboat, and once that was completed, to improve its appearance by repainting the non-submerged part of the hull. This mandate was performed at the end of July 2003, and an invoice for \$4,025.88 was sent to the defendant. This sum remains unpaid.

[7] In 2004, more work was done by the plaintiff on the submerged part of the boat.

[8] The work was completed by the end of 2004, but the defendant has continually refused to take possession of her boat, because she believes that delays in restoring the boat as well as improperly storing it have destroyed its market value.

[9] Lombard paid the plaintiff \$22,000 for work done relating to the accident.

[10] On February 7, 2005, the defendant gave the plaintiff a copy of a notice of default that she had sent to Lombard. This document set out the defendant's intention to abandon her boat, as the Court understands at this stage, either to Boulet Lemelin or to Boulet Lemelin in conjunction with Lombard. The notice of default also demanded that they pay the invoice issued by the plaintiff for the painting it had done.

[11] On August 17, 2005, the defendant brought an action in the Court of Québec, District of Chicoutimi, against Lombard Insurance Company, seeking payment of \$32,500 in insurance proceeds for the damage to her boat.

[12] On November 30, 2005, Lombardimpleaded the plaintiff.

[13] On April 7, 2006, an examination of the plaintiff was held, and an excerpt from the examination is filed in support of this motion, as Exhibit R-2. According to the defendant Caron, this excerpt contains an admission by the plaintiff that there was more damage under the paint.

[14] On July 7, 2006, the plaintiff, Boulet Lemelin, brought a simplified action *in rem* in this Court against the sailboat and its owner, Johanne Caron. Essentially, the plaintiff is claiming \$4,025.88 plus interest against the defendant for the work involved in painting her boat.

[15] On August 17, 2006, the defendant brought a motion in the Court of Québec for leave to amend, which was scheduled to be heard on September 18, 2006, but was adjourned. The amendments sought by the defendant would make Boulet Lemelin the co-defendant with Lombard. From this perspective, the defendant imputes certain faults and damages to Lombard, including faults in preserving the boat.

[16] On August 23, 2006, the defendant brought a counterclaim in this Court, claiming monetary relief, damages and exemplary damages from the plaintiff. It should be noted that the counterclaim involves not only the plaintiff in this Court, but also the defendant in the Court of Québec, i.e. Lombard. The counterclaim essentially seeks:

- \$7,200 from Lombard for failing to provide a rented sailboat as set out in the contract of insurance;

- \$5,000 from the co-defendants for unnecessary travel expenses and expert fees incurred because of their recklessness;
- \$28,500 from Lombard as payment in full of the insured value;
- \$10,000 from the co-defendants for moral damages and various troubles; and
- \$10,000 in exemplary damages from the co-defendants for unlawfully and intentionally infringing her right to enjoy her property within a reasonable time frame.

[17] Thus, the defendant is claiming a total of \$60,700 in her counterclaim.

[18] As of this date, the defendant boat remains in the plaintiff's boatyard.

### 3. Jurisdiction of the Court

[19] In this Court, the defendant argues that she abandoned her property and, therefore, under subsection 43(3) of the *Federal Courts Act* (the Act), the Court lacks jurisdiction over the plaintiff's action *in rem*.

**43.** (1) Subject to subsection (4), the jurisdiction conferred on the Federal Court by section 22 may in all cases be exercised *in personam*.

(2) Subject to subsection (3), the jurisdiction conferred on the Federal 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 from its sale that have been paid into court.

(3) Despite subsection (2), the jurisdiction conferred on the Federal Court by section 22 shall not be exercised *in rem* with respect to a claim mentioned in paragraph 22(2)(e), (f), (g), (h), (i), (k), (m), (n), (p) or (r) unless,

**43.** (1) Sous réserve du paragraphe (4), la Cour fédérale peut, aux termes de l'article 22, avoir compétence en matière personnelle dans tous les cas.

(2) Sous réserve du paragraphe (3), elle peut, aux termes de l'article 22, avoir compétence en matière réelle dans toute action portant sur un navire, un aéronef ou d'autres biens, ou sur le produit de leur vente consigné au tribunal.

(3) Malgré le paragraphe (2), elle ne peut exercer la compétence en matière réelle prévue à l'article 22, dans le cas des demandes visées aux alinéas 22(2)e), f), g), h), i), k), m), n), p) ou r), que si, au moment

at the time of the commencement of the action, the ship, aircraft or other property that is the subject of the action is beneficially owned by the person who was the beneficial owner at the time when the cause of action arose.

où l'action est intentée, le véritable propriétaire du navire, de l'aéronef ou des autres biens en cause est le même qu'au moment du fait générateur.

[20] Without ruling on the ownership of the boat, the Court rejects this argument on the ground that subsection 43(3) of the Act does not oust the Court's jurisdiction under paragraph 22(2)(c) of the Act in claims in respect of hypothecations or charges, as is the case here.

#### 4. Issues

[21] In order to dispose of the motion brought by the defendant Caron, the Court must determine:

- whether an order of preservation is warranted;
- whether, in this case, there is *lis pendens* between the action in Federal Court and the action in the Court of Québec; and
- whether this action should be exempt from the application of sections 294 to 299 of the Rules.

#### 5. Analysis

##### A. *The preservation order*

[22] The defendant boat was not arrested, and therefore is not under the control of the Federal Court. Section 490 of the Rules is the provision generally used to obtain an order of preservation in admiralty cases. However, an order under this provision can only be made if the boat is under the control of the Court.

[23] Section 377 of the Rules sets out the general power of the Court to make an order of preservation. It provides as follows:

**Preservation of property**

**377.** (1) On motion, the Court may make an order for the custody or preservation of property that is, or will be, the subject-matter of a proceeding or as to which a question may arise therein.

**Conservation des biens**

**377.** (1) La Cour peut, sur requête, rendre une ordonnance pour la garde ou la conservation de biens qui font ou feront l'objet d'une instance ou au sujet desquels une question peut y être soulevée.

**Interim order**

(2) Rule 374 applies to interim orders for the custody or preservation of property referred to in subsection (1), with such modifications as the circumstances require.

**Ordonnances provisoires**

(2) La règle 374 s'applique, avec les adaptations nécessaires, aux ordonnances provisoires pour la garde ou la conservation de biens.

[24] It has been established that the applicable test in making an order under section 377 is the same test used in granting an interlocutory injunction (*Société pour l'administration du droit de reproduction mécanique des auteurs, compositeurs et éditeurs v. Trans World Record Corp.*, [1977] 2 F.C. 602).

[25] In applying this test, the following criteria must be met:

- (a) has the applicant demonstrated a *prima facie* case, or at least a serious question to be tried?
- (b) has the applicant demonstrated that unless the injunction is granted, it will suffer irreparable harm that is not susceptible to, or is difficult to compensate in damages?
- (c) with which party does the balance of convenience lie? (*Perini America Inc. v. Alberto Consani North Aneruica Inc.* [1992] F.C.J. No. 908)

[26] Essentially, under the first criterion, the applicant must establish that there is a serious question to be tried in the main action. The second criterion will be met if the applicant establishes

that an award of damages will not compensate him adequately. Finally, the third criterion considers the balance of convenience. It must be noted that these three conditions are cumulative.

[27] The evidence before the Court concerning the boat's condition can be summarized from the affidavits of Ms. Caron and her spouse. Ms. Caron states in her affidavit that:

- the value of her boat, the main evidence in both the Federal Court and the Court of Québec actions, is in jeopardy, without providing particulars;
- it is natural to protect whatever the market value of the sailboat might be;
- the experts who inspected the boat found several inches of water inside, but she does not describe the consequences this might have;
- certain components, such as the anchor, were not put away, and are therefore at risk of being stolen, but she does not give sufficient details for an assessment of the risks associated with this fact; and
- the boat continues to deteriorate every day.

[28] For his part, Yves Ste-Marie states that:

- before the winter of 2004-2005, he saw three or four inches of water in the boat, which is very damaging; and
- the defendant Caron sent a notice of abandonment to the insurer, since the boat could no longer be repaired without incurring huge expenses.



[29] I am of the view that the defendant in this case has not demonstrated she will suffer harm that cannot be compensated by an award of damages if a preservation order is not granted. Based on the evidence, it would seem that the property has already been damaged, and that the defendant acknowledged this by stating her intention to abandon the boat. Given the cumulative nature of the test for a preservation order, I will not review the other two conditions, other than to note that if the order were granted, and the plaintiff had to take the necessary steps to preserve the property at its own expense, the plaintiff would incur significant costs to protect property that, according to the defendant, has no market value.

B. *Staying the action on the ground of lis pendens*

[30] The defendant contends that this Court should make an order suspending the main action until the Court of Québec delivers its judgment, in order to avoid the risk of inconsistent judgments. The statutory basis of this motion is subsection 50(1) of the Act, which provides that the Court may stay an action on the ground that the claim is being proceeded with in another court or jurisdiction.

This subsection reads as follows:

**Stay of proceedings authorized**

**50.** (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter

- (a) on the ground that the claim is being proceeded with in another court or jurisdiction; or
- (b) where for any other reason it is in the interest of justice that the proceedings be stayed.

**Suspension d'instance**

**50.** (1) La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire:

- a) au motif que la demande est en instance devant un autre tribunal;
- b) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

[31] In *White v. E.B.F. Manufacturing Ltd.*, [2001] F.C.J. No 1073, Mr. Justice Jean-Eudes Dubé of the Federal Court reviewed the criteria for exercising the discretionary power under paragraph 50(1)(a) of the Act. He identified the following:

1. Would the continuation of the action cause prejudice or injustice (not merely inconvenience or extra expense) to the defendant?
2. Would the stay work an injustice to the plaintiff?
3. The onus is on the party which seeks a stay to establish that these two conditions are met.
4. The grant or refusal of the stay is within the discretionary power of the judge.
5. The power to grant a stay may only be exercised sparingly and in the clearest of cases.
6. Are the facts alleged, the legal issues involved and the relief sought similar in both actions?
7. What are the possibilities of inconsistent findings in both Courts?
8. Until there is a risk of imminent adjudication in the two different forums, the Court should be very reluctant to interfere with any litigant's right of access to another jurisdiction.
9. Priority ought not necessarily be given to the first proceeding over the second one or, vice versa. (Emphasis added)

[32] The grounds for the stay motion are based essentially on the fact that should the Court of Québec grant Ms. Caron's motion to amend, there is likely to be *lis pendens* between it and certain parts of the action before this Court.

[33] The Court cannot speculate on the possible outcome of a motion before a provincial court. The Court must determine whether there is, in fact, *lis pendens* in the current situation, that is, without considering the amendments that the defendant wants to make in her proceeding in the Court of Québec.

[34] The main action commenced by the plaintiff is an action *in rem*, which falls within the exclusive jurisdiction of the Federal Court. Although the Federal Court shares its maritime law jurisdiction with the provincial courts, British Columbia is the only province whose superior court can hear an action *in rem*. An action *in rem* is distinguished from an action *in personam* in that it enables a claimant to proceed against the ship, which can be considered a debtor, and this type of action may also result in a judicial sale of the ship. (See Edgard Gold, Aldo Chircop and Hugh Kindred, *Maritime Law*, Toronto, Irwin Law, 2003, pages 9 and 754.)

[35] Since the proceeding that was commenced in the Federal Court is not available in the Court of Québec, I am of the view that there is no *lis pendens* regarding the main action. Moreover, the plaintiff is not a party to the provincial court action at this time.

[36] The counterclaim essentially seeks damages against Lombard and Boulet Lemelin on the ground that the latter was negligent in its work on, and preservation of, the boat. The motion initiating the proceedings in the Court of Québec, on the other hand, seeks performance of the contract of insurance between Lombard and the plaintiff by counterclaim.

[37] Accordingly, I am of the view that the pending action, as it stands, in the Court of Québec does not create *lis pendens* with the action before this Court.

C. *Exempting the application of sections 294 to 299 of the Rules*

[38] The parties agree that sections 292 and following should not apply to this case. However, it is clear from section 292 that this regime is mandatory, and therefore the parties cannot avoid its operation on consent. This section reads as follows:

**292.** Unless the Court orders otherwise, rules 294 to 299 apply to any action in which

- (a) each claim is exclusively for monetary relief in an amount not exceeding \$50,000, exclusive of interest and costs;
- (b) in respect of an action in *rem* claiming monetary relief, no amount claimed, exclusive of interest and costs, exceeds \$50,000;
- (c) the parties agree that the action is to be conducted as a simplified action; or
- (d) on motion, the Court orders that the action be conducted as a simplified action.

**292.** Sauf ordonnance contraire de la Cour, les règles 294 à 299 s'appliquent à toute action dans laquelle:

- a) chaque réclamation vise exclusivement une réparation pécuniaire d'au plus 50 000 \$, intérêts et dépens non compris;
- b) s'il s'agit d'une action réelle visant en outre une réparation pécuniaire, chaque réclamation est d'au plus 50 000 \$, intérêts et dépens non compris;
- c) les parties conviennent de procéder par voie d'action simplifiée;
- d) la Cour, sur requête, ordonne de procéder par voie d'action simplifiée.

[39] To determine whether an action is to be conducted as a simplified action, each claim must be reviewed independently. The following claims are to be heard by the Court in this matter:

- The plaintiff's action *in rem* in this Court seeks payment of an account in the amount of \$4,025.88. Its claim thus meets the requirements of paragraph (b).
- In her counterclaim, the defendant Caron seeks payment in the amount of \$25,000 against the plaintiff and the co-defendant. This claim thus meets the requirements of paragraph (a).

- The defendant Caron also seeks the sum of \$60,700 against the co-defendant, jointly or otherwise with the defendant, which is \$10,700 more than the limit specified in paragraph (a).

[40] To the extent that the requirements of section 292 are not met, I am of the view that the motion should be granted, and that this case should be exempt from the application of sections 294 to 299 of the Rules.

[41] When the motion was heard, the plaintiff asked the Court to order costs in the amount of \$770 payable forthwith, arguing that this matter was an abuse of process. In my view, this request should not be granted, given the circumstances and the evidence that has been adduced.

[42] Accordingly, the motion will be granted in part. This case will be exempt from the application of sections 294 to 299 of the Rules. In all other aspects, the motion will be dismissed with costs payable by the defendant, Johanne Caron. Costs will be in the cause and are fixed in the amount of \$500.

**ORDER**

**THE COURT ORDERS THAT:**

1. The motion is granted in part, in that this matter is exempt from the application of sections 294 to 299 of the Rules.
2. In all other aspects, the motion is dismissed.
3. Costs are fixed in the amount of \$500 and will be in the cause.

“Edmond P. Blanchard”

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Judge

Certified true translation  
Mary Jo Egan, LLB

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1155-06

**STYLE OF CAUSE:** *Boulet Lemelin Yacht Inc. v. The Paceship Sailboat  
Licensed as 13D 6732 et al.*

**PLACE OF HEARING:** Québec, Quebec

**DATE OF HEARING:** October 5, 2006

**REASONS FOR ORDER AND ORDER BY:** The Honourable Mr. Justice  
Blanchard

**DATED:** October 23, 2006

**APPEARANCES:**

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Marc Lemaire	FOR THE DEFENDANT Lombard Insurance Company
Johanne Caron	representing herself

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