Federal Court  Cour fédérale

Date: 20220520

Docket: T-2049-19

Citation: 2022 FC 749

Ottawa, Ontario, May 20, 2022

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

KEVIN O'LEARY AND LINDA O'LEARY

Plaintiffs/
Defendants by Counterclaim

and

ROSA RAGONE, ANTONIO RAGONE AND PAULA BRITO

Defendants/
Plaintiffs by Counterclaim

and

RICHARD RUH AND IRV EDWARDS

Third Parties

ORDER AND REASONS

I. Overview

[1] This decision addresses a motion presented by the Estate of Susanne Brito, David Owen, Liam Owen, Ruby Owen, Cash Owen, Allison Poltash and Alexander Poltash [the Moving Parties], who wish to pursue claims against a limitation fund constituted in this action under the provisions of the *Marine Liability Act*, SC 2001, c 6 [the *MLA*].

[2] On July 3, 2020, this Court issued an Order [the July Order] prescribing the process for determining the Plaintiffs' action for limitation of their liability under the *MLA*. The July Order prescribed the method for the Plaintiffs to constitute a limitation fund under the *MLA* [the Limitation Fund] and identified the steps that the Defendants and other claimants were required to take in order to assert claims against the Limitation Fund.

[3] A dispute has developed between the Plaintiffs and the Moving Parties as to whether the steps the Moving Parties have subsequently taken to assert their claims against the Limitation Fund comply with the July Order. The Moving Parties therefore seek the Court's determination that these steps comply with the July Order or, in the alternative, an extension of time to take the steps necessary to achieve such compliance.

[4] As explained in more detail below, I have concluded that the Moving Parties have not complied with the July Order but that, in the particular circumstances canvassed in these Reasons, it is in the interests of justice that the deadline for compliance be extended to permit the Moving Parties to pursue their claims against the Limitation Fund.

II. **Background**

[5] On August 24, 2019, two vessels were involved in a collision on Lake Joseph in Seguin Township, Ontario [the Collision], which tragically resulted in the death of two individuals, Susanne Brito and Gary Poltash [the Deceased]. The Deceased were aboard a vessels owned by the Third Party, Irv Edwards, and operated by the Third Party, Richard Ruh. The other vessel was owned and/or operated by Kevin and Linda O'Leary, the Plaintiffs in this action.

[6] Part 3 of the *MLA* provides for the potential limitation of liability for various categories of maritime claims. For vessels of the size involved in the Collision, being of less than 300 gross tonnage, the limit is $1,000,000 for each vessel. On December 19, 2019, the Plaintiffs commenced the within action by way of a Statement of Claim seeking limitation of their liability with respect to the Collision [the O'Leary Limitation Action]. Similarly, on March 6, 2020, the Third Parties to this action, Richard Ruh and Irv Edwards, issued a Statement of Claim bearing Court File No. T-354-20, also seeking to limit their liability with respect to the Collision [the Ruh/Edwards Limitation Action].

[7] The O'Leary Limitation Action named three Defendants, Rosa Ragone, Antonio Ragone, and Paula Brito. They are, respectively, the mother, stepfather and sister of the Deceased, Susanne Brito, and were named as Defendants because they had by that time commenced actions in the Ontario Superior Court of Justice.

[8] By the time the Ruh/Edwards Limitation Action was filed, a larger group of dependents of the Deceased had commenced actions in the Ontario Superior Court of Justice, as a result of which the Ruh/Edwards Limitation Action named a larger number of defendants, including the Moving Parties. In addition to the Estate of the Deceased, Susanne Brito, the Moving Parties are Ms. Brito's husband and children and the children of the Deceased, Gary Poltash.

[9] The July Order, issued upon motion by the Plaintiffs with the consent of the Defendants, set out a procedure and deadlines for various steps in the O'Leary Limitation Action. Of particular significance to this motion, the July Order included the following paragraphs:

> 3. Any claim in respect of the Incident which may be subject to limitation of liability shall be asserted either: (a) by way of a Defence, Defence and Counterclaim, or Defence and Crossclaim in these actions (a "Defence"), or (b) by way of a Notice of Claim in this action, regardless of whether the claim is also asserted by way of a separate action before this Court.
>
> ….
>
> 11. On or before August 7, 2020, any person named as a Defendant in this action may:
>
> a) serve and file a Defence; and/or
>
> b) serve and file a Notice of Claim against the Limitation Fund of the O'Learys supported by affidavit setting out the facts on which the person filing the Notice of Claim claims to be entitled to share in the distribution of the O'Learys' Limitation Fund.
>
> 12. On or before September 22, 2020, any person, other than a current Defendant, who claims to have incurred loss or damage, as a result of the Incident may:
>
> a) serve and file a Defence; and/or
>
> b) serve and file a Notice of Claim against the Limitation Fund of the O'Learys supported by affidavit setting out the facts on which the person filing the Notice of Claim claims to be entitled to share in the distribution of the O'Learys' Limitation Fund.
>
> 13. Any current Defendant who has not filed either a Defence or Notice of Claim supported by an affidavit by August 7, 2020, and any other claimant who has not filed either a Defence or Notice of Claim supported by an affidavit by September 22, 2020, shall be barred from disputing the O'Learys' right to limit their liability pursuant to the MLA and from claiming against the O'Learys' Limitation Fund. For greater certainty, even if a limitation period established by any statute in respect of a claim against the O'Learys' Limitation Fund has not expired, no claim shall be filed in respect of the Limitation Fund after September 22, 2020.

[10] I also note that a comparable Order, also dated July 3, 2020, was issued in the Ruh/Edwards Limitation Action. In compliance therewith, the Defendants and the Moving

Parties served and filed an Amended Statement of Defence and Counterclaim in the Ruh/Edwards Limitation Action on August 4, 2020, and on August 6, 2020, they served and filed affidavit evidence in that proceeding.

[11] In compliance with the July Order in the present action, the O'Leary Limitation Action, the Defendants also served an Amended Statement of Defence and Counterclaim dated August 4, 2020, and subsequently filed that document in this Court File No. T-2049-19. However, although the Moving Parties are represented by the same counsel as the Defendants, they did not file a Defence, Notice of Claim, or supporting affidavit in this Court File No. T-2049-19. Rather, on August 5, 2020, they filed a Statement of Claim commencing a new action bearing Court File No. T-885-20 [the Moving Parties' Action], and they subsequently filed affidavits in that action.

[12] At the commencement of examinations for discovery in September 2021, the Plaintiffs' counsel advised as to their position that Moving Parties had not filed a pleading in the O'Leary Limitation Action, as required by the July Order, and reserved the right to take the position that the Moving Parties' claims against the Limitation Fund were therefore barred. As a result, the Moving Parties subsequently filed the within motion on February 18, 2022, seeking relief to allow them to pursue their claims against the Limitation Fund.

[13] In support of their arguments, the Moving Parties rely upon an affidavit sworn by their counsel, Mr. Nick Todorovic, and the Plaintiffs respond based upon an affidavit sworn by their counsel, Mr. Rui Fernandes. Both deponents were cross-examined on their affidavits and the transcripts filed with the Court. Consistent with Rule 82 of the *Federal Courts Rules*, SOR/98-

106 [the Rules], which provides that, except with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit, this motion was argued by co-counsel, not by Messrs. Todorovic and Fernandes.

III. **Issues**

[14] The Moving Parties identify the issues before the Court as follows:

A. Whether the Statement of Claim in the Moving Parties' Action should be deemed a Notice of Claim and be deemed to be served and filed in accordance with the July Order; and

B. In the alternative, whether the July Order should be varied to extend the deadline, for serving and filing a Defence and/or serving and filing a Notice of Claim supported by affidavit, to 30 days from the date of the Court's Order in this motion.

IV. **Analysis**

A. *Whether the Statement of Claim in the Moving Parties' Action should be deemed a Notice of Claim and be deemed to be served and filed in accordance with the July Order*

[15] As I understand the first issue raised by the Moving Parties, they argue that the Statement of Claim they filed in Court File No. T-885-20 meets the requirements of the July Order to file a Notice of Claim, and they are seeking a declaration to this effect from the Court. For the reasons explained below, I find no merit to this argument.

[16] I appreciate that a Notice of Claim is not a form prescribed by the Rules or by the July Order. Rather, this is the name frequently employed by maritime law practitioners to describe a pleading filed by a claimant against a limitation fund, a ship or other *in rem* property, security therefor, or the proceeds of sale thereof, in circumstances where the claimant is not otherwise a party to the proceeding in which competing claims will be adjudicated. In the absence of a clear prescription as to the form a Notice of Claim must take, it could be argued that a Statement of Claim could serve as a Notice of Claim, if it sufficiently pleads the claim being asserted. The fact that a Statement of Claim bears a different moniker would not, in my view, necessarily be fatal to such an argument.

[17] However, it is clear from paragraph 3 of the July Order that the Notice of Claim must be filed "…in this action, regardless of whether the claim is also asserted by way of a separate action before this Court." In my view, this language leaves no room for an argument that a pleading in another proceeding, which has not been filed in the O'Leary Limitation Action (Court File No. T-2049-19) complies with the requirements of the July Order.

[18] In other words, if the Moving Parties had commenced their action in Court File No. T-885-20, by filing their Statement of Claim in that proceeding, and then also served and filed that same document in the O'Leary Limitation Action (Court File No. T-2049-19), they might have a viable argument that it should be treated as a Notice of Claim for purposes of asserting a claim against the Limitation Fund in compliance with the July Order. However, there is no evidence or argument before the Court suggesting that the Moving Parties attempted to file their Statement of

Claim in Court File No. T-2049-19. Therefore, the Moving Parties have not asserted their claim against the Limitation Fund in a manner which complies with the July Order.

B. *In the alternative, whether the July Order should be varied to extend the deadline, for serving and filing a Defence and/or serving and filing a Notice of Claim supported by affidavit, to 30 days from the date of the Court's Order in this motion*

[19] The Moving Parties' alternative position is that the Rules afford bases for the Court to grant relief from failure to comply with the terms of the July Order. While they invoke Rules 57 and 60, I agree with the Plaintiffs' position that these provisions of the Rules do not apply to the circumstances of this motion.

[20] Rather, the applicable provision is Rule 8(1), which allows the Court to extend or abridge a period provided by the Rules or fixed by an Order. The Moving Parties' arguments on this motion focus significantly on this Rule, as do the responding arguments of the Plaintiffs, and I have identified no material divergence between the parties' positions on the test to be applied. As explained by the Federal Court of Appeal in *Canada (Attorney General) v Hennelly*, 1999 CanLII 8190 (FCA) [*Hennelly*] at para 3, when deciding whether to grant an order for an extension of time, the Court will consider whether the applicant for the extension has demonstrated: (a) a continuing intention to pursue their proceeding; (b) that the proceeding has some merit; (c) that no prejudice to the respondent arises from the delay; and (d) that a reasonable explanation for the delay exists.

[21] As explained in *Heddle Marine Service (NL) Inc v Kydy Sea (Ship)*, 2019 FC 1140 at paras 30-31, in which Justice Pamel applied Rule 8 to a motion for an extension of time to file documents in pursuit of a claim against the proceeds of sale of a ship, the factors identified in *Hennelly* do not constitute an exhaustive list of considerations. Nor is the failure of a positive response to one of those factors necessarily determinative. The weight to be given to each factor depends on the circumstances of each case. In the end, the overriding consideration is that justice be done.

[22] Before proceeding to the individual *Hennelly* factors, it is necessary to consider the evidence in the affidavits of Mr. Todorovic and Mr. Fernandes surrounding communications between them following the issuance of the July Order.

[23] Mr. Todorovic deposes that he, his clerk, and his articling student were unable to find a Notice of Claim form in the Rules and that he therefore spoke with Mr. Fernandes, on or about July 17, 2020, about how the Moving Parties' claims would be filed. Both Mr. Todorovic and Mr. Fernandes refer to this conversation in their affidavits, but their evidence diverges. Mr. Todorovic's affidavit states as follows:

> 23. On or about July 17, 2020, I spoke with Mr. Fernandes about how he would like to receive the claims of the Claimants. Mr. Fernandes advised that the Claimants who wished to share in the distribution of the O'Leary Limitation Fund could file and serve a Statement of Claim. Mr. Fernandes advised that I should note the Court File Number of the O'Leary limitation action with the Statement of Claim.

[24] In contrast, Mr. Fernandes' affidavit states as follows:

> 24. On July 17, 2020, I had a general conversation with Mr. Todorovic about the July 3 Order and next steps. At no time during this call did I advise Mr. Todorovic that commencing a new Federal Court action by way of a Statement of Claim would be acceptable. At no time during this call did I advise Mr. Todorovic that filing a Statement of Claim would fulfil the requirements of a Defence or a Notice of Claim as set out in the July 3 Order. I advised Mr. Todorovic that claimants who wish to share in the distribution of the O'Leary Limitation Fund could file and serve a Notice of Claim within the O'Leary Limitation Action or a Defence, Defence and Counterclaim, or Defence and Crossclaim to the O'Leary Limitation Action. I further advised Mr. Todorovic that he should contact Abigail Grimes, registry officer for the Federal Court, if he required further assistance with the procedure for filing claims against limitation funds.

[25] Obviously, the two parties to this conversation remember it differently. While both were cross-examined on their affidavits, there is little in the cross-examination transcripts that assists the Court in resolving the divergence. However, the Court can infer, from Mr. Todorovic's explanation that he struggled to identify a form of Notice of Claim, that he is not well acquainted with the practice of maritime law in the Federal Court, at least in relation to its processes for adjudicating competing claims against maritime assets. Based on this inference, it appears to me most probable that Mr. Todorovic and Mr. Fernandes were "talking past each other" and that, while Mr. Fernandes did not suggest following a process that departed from the July Order, Mr. Todorovic remained confused as to how to comply.

[26] As such, the evidence of Mr. Todorovic's communications with Mr. Fernandes does not particularly assist the Moving Parties. Rather, in my view, the most compelling factual aspect of the Moving Parties' position is that, within the period prescribed by the July Order, Mr. Todorovic not only served and filed the Statement of Claim in the Moving Parties' Action but, more significantly, also served upon the Plaintiffs and filed affidavits that Mr. Todorovic

describes as setting out the facts on which the Moving Parties asserted entitlement to share in the distribution of the Limitation Fund [the Moving Parties' Affidavits].

[27] It would have been helpful to the Court if the record in this motion included copies of the Moving Parties' Affidavits. The Moving Parties' Motion Record includes only an Affidavit of Service, confirming service upon Mr. Fernandes on September 17, 2020, of the affidavits of David Owen, Allison Poltash and Alexander Poltash. (The Affidavit of Service also confirms service of an affidavit of Pauline New, Gary Poltash's spouse, who the Moving Parties' counsel advised at the hearing of this motion was no longer pursuing her claim.) However, the Plaintiffs' counsel have not taken issue with Mr. Todorovic's description of the Moving Parties' Affidavits and, if that description was inaccurate, the Plaintiffs could have included copies in their own Motion Record in order to demonstrate that.

[28] I therefore accept Mr. Todorovic's evidence that, within the time prescribed by the July Order for service and filing of affidavits setting out the facts on which claimants against the Limitation Fund asserted their entitlement, the Moving Parties swore, served and filed affidavits of this nature. Of course, as with their Statement of Claim, they filed their affidavits in the wrong Court file (T-885-20 instead of T-2049-19). However, I can discern no purpose for affidavits of this nature, filed at the commencement of the Moving Parties' Action, other than an effort to assert claims against the Limitation Fund (and possibly also the limitation fund that had been constituted in the Ruh/Edwards Limitation Action). Against that factual backdrop, I will now turn to consideration of the *Hennelly* factors.

(1) Continuing Intention to Pursue the Proceeding

[29] The Plaintiffs take issue with the fact that the Moving Parties have failed to swear their own affidavits, attesting to an intention to pursue claims against the Limitation Fund, and instead rely upon Mr. Todorovic's evidence. However, the facts canvassed immediately above clearly demonstrate such an intention.

[30] The record also demonstrates that the Moving Parties participated in the steps that have subsequently occurred in this proceeding, including case management conferences, examinations for discovery, and a mediation. The Plaintiffs argue that, as those steps also applied to the Ruh/Edwards Limitation Action, the Moving Parties' participation cannot necessarily be construed as related to the O'Leary Limitation Action. I find no basis in the record to conclude that the Moving Parties participated in these steps solely for purposes of pursuing claims against the limitation fund constituted in the Ruh/Edwards Limitation Action. Nor can I identify any logical reason why they would assert claims and pursue litigation steps in relation to that limitation fund and not in relation to the Limitation Fund in the O'Leary Limitation Action.

[31] In my view, this factor of the *Hennelly* analysis strongly favours the Moving Parties.

(2) Merit of the Proceeding

[32] The Plaintiffs emphasize that liability for the Collision has yet to be determined and apportioned. Indeed, in a September 14, 2021 decision resulting from the prosecution of Linda O'Leary for operating a vessel carelessly contrary to the *Small Vessel Regulations*, SOR/2010-91

made under the *Canada Shipping Act*, SC 2001, c 26, the Ontario Court of Justice found Ms. O'Leary not guilty and made a number of factual findings in her favour in support of the acquittal [the Prosecution Decision]. The Plaintiffs note that the Moving Parties have not submitted any contrary evidence on this motion. Neither have they adduced evidence establishing their relationships to the Deceased, as would be required to establish their claims under the *MLA*.

[33] The Plaintiffs' arguments are well taken. The Moving Parties' submissions on this element of the *Hennelly* test are effectively bald assertions to the effect that the Deceased died in the Collision, a cause of action therefore exists for their dependants under the *MLA*, and that cause of action has merit. The evidentiary foundation for this element of the test is weak. The Plaintiffs' liability for the Collision is contested and, in responding to the Moving Parties' claims, they may seek to rely upon the acquittal and favourable factual findings in the recent Prosecution Decision.

[34] However, the fact that the Collision occurred and resulted in the tragic fatalities is of course uncontested, and the Prosecution Decision involved a different standard of proof than will be involved in adjudicating the civil liability of the parties to the Collision. Moreover, because there are other claims against the Limitation Fund, the process of adjudicating and apportioning liability will take place regardless of whether the Moving Parties' claims are included in the process. While the Moving Parties' relationships to the Deceased may not be formally admitted, I do not understand them to be active points of controversy. Obviously, the categories and

quantum of damages sought by the Moving Parties would require evidence, but I would not expect this level of detail to be adduced in a motion for an extension of time.

[35] In my view, there is therefore sufficient merit to pursuing adjudication of the Plaintiffs' liability and any resulting entitlements of the Moving Parties to satisfy this element of the *Hennelly* test.

(3) Prejudice Arising from the Delay

[36] The Plaintiffs argue that both they, and claimants against the Limitation Fund who complied with the July Order, would suffer prejudice if the requested extension is granted.

[37] Considering first the claimants other than the Moving Parties, the Plaintiffs refer to the Defendants as well as four others who filed Notices of Claim with supporting affidavits. These others are Jose and Mario Brito (respectively the father and brother of the Deceased, Suzanne Brito), Murray Wohlmoth (a passenger on the vessel owned by Mr. Edwards), and Mr. Edwards himself. In Mr. Fernandes' affidavit, he deposes to concern that these claimants will suffer prejudice if the extension of time is granted, as their proportional share of the Limitation Fund would decrease (in the event the Plaintiffs are held liable).

[38] Mathematically, this concern is valid. Assuming that the quantum of provable claims for which the Plaintiffs are apportioned liability exceeds the $1 million in the Limitation Fund, the addition of the Moving Parties claims, if also proven, would necessarily reduce the recovery of

other claimants. However, it is noteworthy that none of the other claimants are opposing this motion. Mr. Todorovic states as follows in his affidavit:

> 41. On January 7, 2022, I attended a conference call with counsel of the remaining claimants (with the exception of counsel for the O'Leary claimants), who advised that they always believed the Claimants to be claimants to share in the O'Leary Limitation Fund, and took no issue with acknowledging the claims of the Claimants.

[39] This paragraph is not particularly precise in identifying with which claimants' counsel Mr. Todorovic spoke. However, at the hearing, the Moving Parties' counsel submitted that this paragraph refers to Jose and Mario Brito, Mr. Wohlmoth and Mr. Edwards. I also note that these claimants were served with the Moving Parties' Motion Record and declined to participate in the motion, which supports the Moving Parties' representation that these claimants are not opposed to the requested relief.

[40] The other claimants against the Limitation Fund are the Defendants, Rosa Ragone, Antonio Ragone, and Paula Brito. As previously noted, the Defendants and the Moving Parties share the same counsel, who advised at the hearing that the Defendants do not take issue with the requested relief. The Court raised for counsel's consideration whether there was a divergence in the interests of the Defendants and the Moving Parties. Counsel confirmed that any conflicts have been waived by his clients and emphasized that the Defendants and the Moving Parties have been content to have their claims advanced together since before the need for this motion arose. With the benefit of those representations, and noting that the Defendants and several of the Moving Parties are all members of Susanne Brito's family, the Court is satisfied that the Defendants have made an informed decision not to oppose this motion.

[41] As such, none of the potentially competing claimants against the Limitation Fund is asserting prejudice resulting from this motion. I therefore turn to the prejudice that the Plaintiffs assert they will suffer if the motion is granted. They argue that their potential liability is expanded if the Moving Parties are permitted to pursue their claims against the Limitation Fund. Of course, this argument is premised on the quantum of provable claims for which the Plaintiffs are apportioned liability not exceeding the $1 million in the Limitation Fund, which is a different premise than that of the Plaintiffs' last argument. At this stage in the litigation, it is not possible for the Court to know the quantum of provable claims. While there is at least a theoretical possibility that, if the extension of time is granted, that may ultimately result in increased liability of the Plaintiffs, this is currently a relatively speculative assertion.

[42] Moreover, this exposure is no more than the Plaintiffs would have faced had the Moving Parties' claims been filed timely in accordance with the July Order. The Plaintiffs assert that they are prejudiced as a result of the delay in filing of the claims, because they have proceeded in this litigation on the understanding that, not having complied with the July Order, the Moving Parties would not be claiming against the Limitation Fund. However, the facts do not support such a conclusion. As explained earlier in these Reasons, the evidence establishes that, within the time prescribed by the July Order for service and filing of affidavits setting out the facts on which claimants against the Limitation Fund asserted their entitlement, the Moving Parties swore affidavits of this nature and served them upon the Plaintiffs. While those affidavits bore the style of cause of, and were filed in, the wrong proceeding, the nature of those affidavits is such that the Plaintiffs were alerted to the Moving Parties' intention to claim against the Limitation Fund.

[43] In arriving at that conclusion, I am conscious that the requirement to file claims in the relevant proceeding, as provided by the July Order and as is typical in orders of that nature, exists for a reason. Parties interested in the limitation proceeding should be able to identify developments in the proceeding, including the identities of claimants and particulars of their claims, by consulting the Court file for that proceeding. They should not have to mine the Court Registry for other proceedings in which such claims may have been filed. This requirement is particularly protective of the interests of claimants who join the litigation at different stages within the applicable deadline and therefore do not necessarily have the benefit of being served with all other claims. However, as explained above, in the present case there are no competing claimants opposing the Moving Parties' motion. With respect to the Plaintiffs, it is clear from the record that the Plaintiffs were served with the Moving Parties' Affidavits.

[44] Furthermore, the Plaintiffs have provided very little detail in support of their assertion that they would suffer prejudice as a result of strategic decisions made in the litigation since the expiry of the deadlines in the July Order. The parties have been engaged in case management and conducted discovery examinations in which the Moving Parties participated, and there was a subsequent mediation in which settlement was not achieved. I appreciate that the confidential nature of the mediation process precludes the Plaintiffs from disclosing details of the positions taken during the mediation. However, in the absence of any substantive explanation of strategic decisions made by the Plaintiffs in reliance on a conclusion that the Moving Parties' claims would not be advanced, I find that the prejudice factor in the *Hennelly* analysis favours the Moving Parties.

(4) Reasonable Explanation for the Delay

[45] This is the *Hennelly* factor that most favours the Plaintiffs. The Moving Parties' explanation for the delay in filing their claims against the Limitation Fund is effectively that their counsel was unfamiliar with this aspect of the practice of maritime law and did not understand what was required by the July Order. While I accept that this is the explanation, the jurisprudence is not particularly sympathetic to explanations of this nature (see, e.g., *Cotirta v Missinnipi Airways*, 2012 FC 1262 [*Cotirta*] at para 13).

[46] The Plaintiffs also rely on jurisprudence to the effect that the explanation given for the delay must justify it for the entire period in question and that any laxity or failure to pursue an application as diligently as could reasonably be expected will strongly militate against the granting of an extension (see *Lesly v Canada (Citizenship and Immigration)*, 2018 FC 272 [*Lesly*] at paras 20-21). The Plaintiffs' counsel advised the Moving Parties' counsel in September 2021 of the Plaintiffs' position that the Moving Parties claims against the Limitation Fund had not been properly filed. However, the present motion to extend the applicable deadline was not filed until February 2022. In submissions, the Moving Parties point to the intervening mediation as an explanation why the motion was not filed more quickly. I give some weight to this point but, particularly given the jurisprudential treatment of circumstances where the need for an extension arises from errors by counsel, overall I do not find the Moving Parties' submissions on this factor of the *Hennelly* analysis compelling.

(5) Interests of Justice

[47] Having canvassed the *Hennelly* factors individually, I turn to consideration of the result that should flow from those factors, taking into account the overriding requirement to be attentive to the interests of justice. As explained above, other than the Moving Parties' explanation for the delay, the *Hennelly* factors favour granting the extension. The interests of justice also present very differently in the present case than in a case such as *Cotirta*, where counsel failed to take any steps between initiating a proceeding and the Court considering on status review whether the proceeding should be dismissed for delay (see para 2). In the case at hand, the Moving Parties' counsel took steps to assert their claims, albeit without following the correct procedure, as a result of which little (if any) prejudice resulted from counsel's error. I therefore find that the interests of justice favour granting the requested relief.

[48] In so concluding, I am conscious of the Plaintiffs' argument that granting this relief would diminish the certainty of the July Order, and similar orders made under the *MLA* in other matters, and set a precedent for future claimants who fail to comply with such orders, in this proceeding and others, to still bring forth their claims. The Plaintiffs argue that such a precedent would send shockwaves through the maritime industry.

[49] The Plaintiffs' point surrounding the importance of deadlines, whether imposed by the Rules or Orders of this Court, is compelling. As noted in *Lesly* at para 18, time limits applicable to proceedings in this Court are not whimsical. However, as my decision to grant the Moving Parties the requested extension of time turns very much on the particular and unusual facts of this

case, as canvassed above in these Reasons, I do not agree that it creates precedential concerns of the sort the Plaintiffs raise.

[50] Before concluding my analysis, I note that I am conscious of relatively recent decisions in *Koch v Borgatti*,(6 January 2022), T-198-21 (FC) and *Borgatti v Koch*, (6 January 2022), T-558-21 (moving party Brudek) [the Borgatti Decisions], in which my colleague, Justice St-Louis, dismissed somewhat similar motions for extensions of time to file claims against a limitation fund. The Borgatti Decisions turned significantly on the Court's treatment of the Order in that case, which had prescribed the steps and deadlines for claiming against the fund, as a peremptory order, resulting in the application of an elevated test to obtain relief from noncompliance. The Borgatti Decisions are currently under appeal in Court File No A-22-22.

[51] The facts underlying the Borgatti Decisions, including the terms of the Order being considered, differ from those in the case at hand. Moreover, the parties to the present motion made no submissions on the potential application of the Borgatti Decisions to this motion or on whether the July Order should be characterized as a peremptory order. I have therefore decided the present motion based on the Rule 8 jurisprudence and the parties' submissions thereon.

V. **Form of Order and Costs**

[52] The Moving Parties seek an Order varying the deadline in paragraph 12 of the July Order, for serving and filing a Defence and/or serving and filing a Notice of Claim against the Limitation Fund supported by affidavit, to 30 days from the date of the Order. Other than opposing the motion more generally, the Plaintiffs have not taken issue with the particular period

of 30 days by which the Moving Parties wish to extend the deadline. I consider this period appropriate, although I note that the deadline also appears in paragraph 13 of the July Order. To achieve internal consistency, my Order will provide for the requested extension to apply to the deadline in both paragraphs.

[53] At the hearing of the motion, the Moving Parties' counsel advised that they were not seeking costs if successful on the motion. I consider this disposition of costs appropriate, and my Order will so provide.

ORDER IN T-2049-19

THIS COURT ORDERS that:

1. This motion is granted in part.

2. The deadline of September 22, 2020, in paragraphs 12 and 13 of this Court's Order dated July 3, 2020, for serving and filing a Defence and/or a Notice of Claim against the Limitation Fund supported by affidavit, is extended to 30 days from the date of this Order.

3. No costs are awarded on this motion.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2049-19
STYLE OF CAUSE:	KEVIN O'LEARY AND LINDA O'LEARY V ROSA RAGONE, ANTONIO RAGONE AND PAULA BRITO v RICHARD RUH AND IRV EDWARDS
PLACE OF HEARING:	HEARD VIA VIDEOCONFERENCE
DATE OF HEARING:	APRIL 25, 2022
ORDER AND REASONS:	SOUTHCOTT, J.
DATED:	MAY 20, 2022

APPEARANCES:

Andrea Fernandes	FOR THE PLAINTIFFS/ Defendants by Counterclaim
J. Patrick Brown	FOR THE MOVING PARTIES

SOLICITORS OF RECORD:

Fernandes Hearn LLP Toronto, Ontario	FOR THE PLAINTIFFS/ Defendants by Counterclaim
McLeish Orlando Toronto, Ontario	FOR THE MOVING PARTIES