Federal Court of Appeal  Cour d'appel fédérale

Date: 20200505

Docket: A-351-18

Citation: 2020 FCA 83

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
WOODS J.A.

BETWEEN:

ING BANK N.V., IAN DAVID GREEN, ANTHONY VICTOR LOMAS AND PAUL DAVID COPLEY IN THEIR CAPACITIES AS RECEIVERS OF CERTAIN ASSETS OF THE DEFENDANTS O.W. SUPPLY & TRADING A/S, AND O.W. BUNKERS (UK) LIMITED, AND OTHERS

Appellants

And

CANPOTEX SHIPPING SERVICES LIMITED, NORR SYSTEMS PTE. LTD., OLDENDORFF CARRIERS GMBH & CO K.G., STAR NAVIGATION CORPORATION S.A., MARINE PETROBULK LTD., O.W. SUPPLY & TRADING A/S, O.W. BUNKERS (UK) LIMITED

Respondents

Heard at Vancouver, British Columbia, on November 18, 2019.

Judgment delivered at Ottawa, Ontario, on May 5, 2020.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRING REASONS BY: WOODS J.A.
DISSENTING REASONS BY: PELLETIER J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20200505

Docket: A-351-18

Citation: 2020 FCA 83

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
WOODS J.A.

BETWEEN:

ING BANK N.V., IAN DAVID GREEN, ANTHONY VICTOR LOMAS AND PAUL DAVID COPLEY IN THEIR CAPACITIES AS RECEIVERS OF CERTAIN ASSETS OF THE DEFENDANTS O.W. SUPPLY & TRADING A/S, AND O.W. BUNKERS (UK) LIMITED, AND OTHERS

Appellants

And

CANPOTEX SHIPPING SERVICES LIMITED, NORR SYSTEMS PTE. LTD., OLDENDORFF CARRIERS GMBH & CO K.G., STAR NAVIGATION CORPORATION S.A., MARINE PETROBULK LTD., O.W. SUPPLY & TRADING A/S, O.W. BUNKERS (UK) LIMITED

Respondents

REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] The appellants appeal the decision of the Federal Court (Russell J.) in respect of the interpretation of the contractual relationships between Canpotex Shipping Services Limited (Canpotex), O.W. Bunkers (U.K.) Limited (OW) and Marine Petrobulk Limited (Petrobulk).

[2] This is the second time that the appellants seek this Court's intervention in respect of the three motions for summary judgment made pursuant to Rules 108 and 216 of the *Federal Courts Rules*, SOR/98-106 (the *Rules*), in the action in T-109-15 (See *ING Bank N.V. v. Canpotex Shipping Services Limited*, 2017 FCA 47 rev'g 2015 FC 1108).

[3] Before the Federal Court, Canpotex sought summary judgment that its payment into court extinguished any liability it may have in respect of the purchase and delivery of bunker fuel to two vessels that it had chartered — the M/V "Ken Star" and the M/V "Star Jing". ING Bank N.V. (ING) and Ian David Green, Anthony Victor Lomas and Paul David Copley (the Receivers) also sought summary judgment that ING was entitled to all the funds deposited by Canpotex in accordance with the Order of Prothonotary Lafrenière (as he then was) dated March 27, 2015. Finally, Petrobulk sought summary judgment that it is entitled to the funds held in trust minus the markup ($5,575.75 USD) due to OW, and invoiced in addition to the price of the bunkers charged by Petrobulk, as the actual physical supplier of those bunkers in Vancouver, British Columbia.

I. Factual Background

[4] The details of the factual background to this dispute are set out in paragraphs 3 to 26 of the Federal Court reasons under review (the Reasons) (2018 FC 957) and need not be reproduced herein. It is sufficient to briefly summarize them as follows.

[5] On October 22, 2014, as was its practice, Canpotex contacted OW, an international trader of bunker fuel, for its spot purchases. OW is part of what is referred to as the OW Bunker Group. OW then contracted with Petrobulk, one of only two suppliers physically delivering bunkers to deep sea vessels in Vancouver. OW confirmed to Canpotex that Petrobulk would be the actual supplier when it accepted the order. This was not the first time that OW dealt with Petrobulk in respect of Canpotex's spot purchases. In fact, this had occurred about 50 times in the last year.

[6] Before Canpotex paid OW, and before OW paid Petrobulk, the OW Bunker Group declared bankruptcy. ING, a secured creditor of the bankrupt companies, with the support of the Receivers, seeks payment of the full amount owed for the bunkers, stating that Petrobulk should file a claim as an unsecured creditor in the bankruptcy because it has no contractual relationship with Canpotex.

[7] Ordinarily, if a supplier goes bankrupt after the product has been delivered, it is still entitled to the payment for the product. However, in this case, Petrobulk says that Canpotex is also contractually liable to pay its invoices for the bunkers it actually supplied and delivered.

[8] The determination of this appeal therefore rests on the interpretation of the terms of the two contracts involved, including particularly the unusual section L.4 in OW's General Terms and Conditions of Sale (OW GTCs).

II. Procedural History and Section L.4

[9] In a first decision issued in 2015, the Federal Court found that the terms and conditions that apply to the contract between Canpotex and OW were those set out in Schedule 3 to the 2014 Fixed Price Agreement between Canpotex and O.W. Supply and Trading A/S, also part of the OW Bunker Group.

[10] After summarily dismissing the argument raised by the appellants in respect of the lack of privity of contract between Canpotex and Petrobulk (2015 FC 1108 at paras. 132-133), the Federal Court went on to construe section L.4 of the aforementioned terms and conditions, together with the terms and conditions applicable to Petrobulk's bunker supply (Petrobulk STCs). It concluded that Canpotex was contractually bound to pay Petrobulk the sum of $648,917.40 USD, together with admiralty interest thereon, and that the balance of the funds presently held in trust, pursuant to the order of March 27, 2015 had to be paid to ING ($5,575.75 USD plus admiralty interest). The Federal Court also held that upon payment of the abovementioned sums, any and all liability of Canpotex and the two vessels to Petrobulk or OW in respect of the bunkers supplied by Petrobulk on October 27, 2014 would be extinguished.

[11] Finally, the Federal Court granted costs in favour of Canpotex and Petrobulk in the action and the motions, adding that a portion of the said costs could be deducted from any amount to be paid to ING from the funds held in trust. The appellants appealed.

[12] In its decision on the said appeal, our Court identified four questions; however, it only dealt with the first three. Indeed, after concluding that the Federal Court had erred in finding that the terms and conditions set out in Schedule 3 of the Fixed Price Agreement applied in this case, our Court held that it would not be appropriate for it to construe the OW GTCs that did indeed apply to determine whether Canpotex was contractually liable to pay Petrobulk. Our Court gave several reasons for not doing so. First, the parties' arguments before it were based on the terms and conditions set out in Schedule 3 of the Fixed Price Agreement. Second, our Court identified differences between section L.4 referred to by the parties and the Federal Court and the one which indeed applied. The Court was not willing to discuss whether those differences would have an impact on the ultimate question of Canpotex's contractual liability to Petrobulk. It expressly noted that it would benefit from an interpretation by the Federal Court should the matter be the subject of a further appeal (2017 FCA 47 at paras. 128-131). Hence, the Federal Court decision was quashed and the matter was sent back for reconsideration in light of our Court's reasons.

[13] Upon reconsideration, and in the decision that is the subject of the present appeal, the Federal Court noted that in accordance with our Court's decision, the only claims that could give rise to interpleader relief under Rule 108 were the contractual claims advanced by OW and

Petrobulk. Thus, the only question to be resolved was whether OW (and thus, ING) or Petrobulk is contractually entitled to the funds in trust (Reasons at paras. 34-37).

[14] The Federal Court then proceeded to construe the appropriate version of section L.4 in the OW GTCs in light of the evidence before it, and the Petrobulk STCs. To do so, the Federal Court assumed that apart from which version of section L.4 applied, our Court found no objection to the balance of its analysis and other conclusions (Reasons at para. 30). This presumably included its summary dismissal of ING's argument that there was no privity of contract between Canpotex and Petrobulk (2015 FC 1108 at para. 133). The Federal Court focused on the most material differences between section L.4 it had considered in its first decision, and section L.4 in the OW GTCs.

[15] The appellants' main argument before the Federal Court was that this version of section L.4 was not engaged in this case because Petrobulk did not "insist" that the OW's buyer be bound by its own terms and conditions (see paragraph 16 below). The appellants further argued that even if section L.4 was found to be engaged, Petrobulk would still have no contractual claim to the funds in trust because, among other things, no matter how broadly Petrobulk's terms defined "Customer", Canpotex was not a party to the contract between OW and Petrobulk. For the appellants, only OW could be sued under the said contract. The appellants submitted that if section L.4 was triggered, it would merely vary the terms of the OW-Canpotex contract as was necessary to ensure consistency with the OW-Petrobulk contract (see Reasons at para. 64 where all the appellants' arguments are summarized).

[16] Although it is somewhat unusual to reproduce a contractual provision at this stage of my reasons, it is necessary to reproduce at least part of it to better understand the decision of the Federal Court. The most relevant portion of L.4 is reproduced below:

> L.4 (a) These Terms and Conditions are subject to variation in circumstances where the physical supply of the Bunkers is being undertaken by a third party *which insists that the Buyer is also bound by its own terms and conditions.* In such circumstances, these Terms and Conditions shall be varied accordingly, and *the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party.*
>
> (My emphasis)

[17] The Federal Court dealt in detail with all the arguments relating to the word "insist" in subsection L.4 (a) (Reasons at paras. 72-124). It concluded as follows:

> [123] In my view, the meaning of "insist" will always be defined and/or modified by reference to the context in which it is used and the way that parties do business. In the present case, because OW UK and Canpotex accepted [Petrobulk's] STCs, insistence did not require [Petrobulk] to negotiate further and force its STCs upon OW UK and/or Canpotex. This is simply another way of saying that the meaning of "insist" will always be a matter of degree in each case, and the degree required will always be in proportion to the degree of resistance encountered from the other side. In the present case, [Petrobulk] insisted, required or demanded that its terms would apply to the bunker deliveries. The wording in the Confirmations, when viewed objectively, conveys a clear insistence that [Petrobulk's] STCs will apply to the sale of the bunkers. The words used were that:
>
> > The acceptance of this Confirmation and Marine Petrobulk's Standard Terms and Conditions *shall* be deemed final unless objected to by Buyer within three business days of receipt of this Confirmation.
> >
> > (My emphasis)
>
> [124] There is clear insistence here. The fact that an objection could be raised does not make this into an offer to negotiate, and both OW UK and Canpotex by their action or inaction showed that they fully understood and accepted this. No objection was raised in the present case. The insistence remained in place and OW UK and Canpotex agreed to contract on [Petrobulk's] terms. There was nothing more that [Petrobulk] needed to do, or could have done, in the circumstances

> because there was no resistance to [Petrobulk's] demand, request or insistence that its STCs were "final."

[18] The Federal Court thus found that in the circumstances of this case, section L.4 was engaged. As mentioned, even though our Court is silent on the issue, the Federal Court rejected the appellants' position that it had to reconsider all of its findings on the contractual relationship, including more particularly the issue of privity of contract. Hence, as a result of these findings, it concluded that the payments out of funds in trust, and the extinguishment of liabilities between Canpotex, OW and Petrobulk would remain the same as in its first decision, insofar as the contractual issues were concerned.

[19] With respect to the costs, given that the scope and quantum may be complex, and the parties could not agree, the matter was dealt with in a separate order following written submissions. This order was issued on January 22, 2019 (2019 FC 89), and is the subject of a distinct appeal in file A-54-19, which was also heard before this panel. It will be the subject of a separate set of reasons and judgment.

III. Issues

[20] The main issue before us is whether the Federal Court erred in finding that Canpotex was contractually bound to pay Petrobulk on the basis that section L.4 was engaged and that Canpotex was a party to the contract with Petrobulk.

[21] Ancillary questions were raised by the respondents, such as whether on the basis of *ITO-Int'l Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752, 28 D.L.R. (4th) 641; *London*

Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299, 97 D.L.R. (4th) 261; *Morris v. Martin*, [1965] 2 All E.R. 725, [1965] 3 W.L.R. 276, this Court should relax the application of the concept of privity of contract in this case. I do not intend to comment on those cases that involved proceedings in tort or bailment. They are not really on point as the matter before us is whether Canpotex was contractually bound to pay Petrobulk. Moreover, this is a unique and odd case, involving a very unusual contractual provision in OW GTCs.

[22] There is also a dispute as to what standard of review should apply in respect of the Federal Court's interpretation of the contracts at issue. Although I will address this point, I do not believe that it is determinative. My conclusion would be the same whether I review the meaning of section L.4 on the basis of correctness or palpable and overriding error.

[23] The appellants also argued that the Federal Court erred in assuming that, except for the fact that it had considered the wrong version of section L.4, our Court had endorsed its other findings and conclusions, including relating to contractual relationships, particularly those in respect of Petrobulk STCs, which continued to apply on reconsideration. I will deal briefly with this issue, considering that in my view, it also is not determinative.

[24] Finally, privity is only an issue if the contracts before the Federal Court could not properly be construed as requiring Canpotex to pay Petrobulk, be it as a result of the contract evidenced by the terms of OW GTCs as varied by Petrobulk STCs, or simply as a party to the contract entered into with Petrobulk on the basis of the authority given to OW by Canpotex.

IV. Analysis

A. *Standards of Review*

[25] The standards of review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 apply to the issues before us. In my view, the main issues raises various questions of mixed fact and law subject to the standard of palpable and overriding error.

[26] The parties have not argued that the Federal Court used the wrong principles of interpretation, which might be considered as an extricable error of law. ING simply disagrees with the Federal Court's application of these general principles in this case.

[27] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 at para. 50 [*Sattva*], the Supreme Court of Canada held that generally, the interpretation of a contract is a question of mixed fact and law subject to the standard of the palpable and overriding error. A few years later, in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23 at para. 39 [*Ledcor*], the Supreme Court of Canada noted that there was an exception to this general principle. Contractual interpretation may still be reviewed as a pure question of law if the required interpretation involved a standard form contract, the interpretation at issue had precedential value and there was no meaningful factual matrix specific to the parties to help the interpretative process (*Ledcor* at para. 46).

[28] In the present appeal, although Petrobulk STCs are in play, the parties raised no issues with their interpretation *per se*. The OW GTCs are a standard form. However, as mentioned, the

section at issue, L.4, is quite unusual. In fact, the parties before us acknowledged that they had never seen anything like it. The OW Bunker Group is in bankruptcy and this form has not been used in the last three years.

[29] There is no evidence that it would be used again as such. There are no other cases in Canada where our decision could have precedential value. Moreover, the interpretation of the OW GTCs, as varied by the Petrobulk STCs, if L.4 (a) applies, is specific to these two general terms and conditions, and how they interact. To say that the exception applies here would unduly water down the general principle set out in *Sattva*. Thus, the general principle should apply, and the interpretation of section L.4 will be reviewed on the palpable and overriding error standard.

[30] That said, in my view, the standard of review applicable to the interpretation of section L.4 (a) itself would not change my conclusion. I find that the Federal Court correctly construed the words of that provision, particularly the verb “insist”, on which ING put much emphasis in its memorandum and before us.

[31] I ought to make it clear that once the wording of L.4 (a) has been properly construed, it is undisputed that its application in this case is subject to the deferential standard. *Sattva* and *Ledcor* are no longer relevant when the issue is whether or not, on the facts of this case, Petrobulk is a third party “that insist[ed] that the Buyer is also bound by its own terms and conditions”.

B. *Effect of the 2017 FCA Decision*

[32] Before reviewing section L.4 and its potential application in this case, I will briefly comment on the assumption made by the Federal Court with respect to our Court's decision in 2017. I agree with the appellants that our Court did not endorse the findings of the Federal Court in respect of privity of contract or its interpretation of Petrobulk's STCs. These were only relevant to the fourth issue that was before our Court, an issue that it did not deal with. As mentioned earlier, our Court expressly noted that it would not be appropriate for it to deal with any of the arguments raised by the parties under this heading. Thus, it obviously could not have considered the privity argument without having first properly interpreted the contracts at issue.

[33] Thus, the Federal Court erred in assuming that our Court had endorsed those findings (Reasons at para. 42). That said, the Federal Court, who had already heard the parties' arguments on all such issues in 2015, could still choose to adopt what it had already decided. In fact, it appears to have done so. For example, at paragraph 80 of the Reasons, it expressly refers to paragraphs 130-137 of its previous decision dealing with its views as to how Canpotex had become bound on a joint and several basis with OW to pay Petrobulk the full purchase price for the bunker delivered to the vessels. The Federal Court notes that the wording of section L.4 in OW GTCs reinforces its previous finding as to the intent of both OW and Canpotex assessed objectively. There is no issue that all such matters, if challenged, can now be reviewed by this Court in the present appeal.

[34] Sometimes, our Court will add a sentence expressly stating that nothing in its reasons should be read as an endorsement of specific findings of the Court below. This may make things clearer in certain cases, especially when the appeal is dismissed or granted in part only. Nevertheless, except when our Court expressly says something to the contrary, when a Federal Court decision is quashed in its entirety, it is not necessary to add such a sentence, for the effect is clear. The previous decision no longer stands. The Federal Court must deal with the summary trial motions afresh. It is thus open to the Federal Court in such cases to do whatever it feels appropriate in the circumstances concerning all matters before it in respect of which our Court had not given any specific directions in its reasons.

C. *Interpretation of section L.4 in OW GTCs*

[35] I now turn to the interpretation of L.4 (a) and its application. Under this heading, I will consider whether the Federal Court erred in finding that L.4 was in play. This will require construing the condition precedent to its application; specifically, I must consider the meaning of the words “insists that the Buyer is also bound”. Second, I must determine if the appellants have established that the Federal Court erred in finding that that this condition was met.

[36] Next, if L.4 was indeed in play, as found by the Federal Court, I will consider its effect on the relationship between Canpotex, OW and Petrobulk in order to determine if the Federal Court erred in concluding as it did in respect of the distribution of the funds held in trust.

(1) Was section L.4 in play?

[37] There is no evidence of any foreign law applicable to this contract that would differ from Canadian law. In fact, it was not argued that the Federal Court or this Court had to apply any principles of interpretation other than those set out in *Sattva* (Reasons at paras. 77-78 and the appellant's memorandum of fact and law at paras. 43-44). This is somewhat surprising because, if as argued by ING, L.4 did not apply here, the OW GTCs are subject to English Law, pursuant to section P.1 of the said OW GTCs.

[38] It is worth noting that, contrary to what happened in respect of the 2014 Fixed Price Agreement referred to in the first Federal Court decision, the OW GTCs last revised in May 2013 used for spot purchases were not the subject of any negotiation whatsoever. They were incorporated by reference in the OW Sales Order Confirmations, and were available on OW's website.

[39] The first point of contention is the meaning of the words "which insists that the Buyer is also bound by its own terms and conditions" (my emphasis) in L.4 (a) (see paragraph 16 above).

(a) *The meaning of the words "insists that the Buyer is also bound"*

[40] It is acknowledged by the parties that the word "insists" is not a term of art, which has any special meaning in the industry; it does not refer to a specific course of action or model of carrying on business.

[41] Its meaning must thus be considered with reference to the contract as a whole, giving the words of subsection L.4 (a) their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. There is nothing that informs as to the meaning of "insists" in L.4 except that, the sentence where the verb "insists" is used, is followed by a sentence stating, among other things, that "the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party" (my emphasis) (See para. 16 above).

[42] The only other clause in OW GTCs in which the word "insist" is used is section C.5. It reads as follows:

> If the party requesting Bunkers is not the Owner of the Vessel, the Seller shall have the right… to insist as a precondition of sale that a payment guarantee is provided by the Owner… [I]f such payment guarantee is not received upon request thereof from the Seller to the Owner…
>
> (My emphasis)

[43] In the abovementioned paragraph, it is quite clear in my view that the verb "to insist" in its ordinary and grammatical sense means "to demand or to request firmly". Nowhere in the foreign case law provided by the parties in respect of disputes relating to the OW Bunker Group was section C.5 expressly considered, even though it was obviously relevant to do so to determine the meaning of the verb "insist".

[44] After carefully considering the said foreign case law, I agree with the Federal Court that the most persuasive interpretation of the ordinary and grammatical meaning to be given to the word "insist" in subsection L.4 (a) is the one adopted in *NCL Bahamas Ltd v. OW Bunker USA*

Inc., 280 F. Supp. (3d) 324 (Dist. Ct., D. Conn 2017), remanded 745 Fed. Appx. 416 (2d Cir. 2018) [*NCL*]. Although the Federal Court focused on the Senior District Judge's decision (Reasons at paras. 114-118), I find that the brief reasons of the U.S. Court of Appeals of the 2nd Circuit as to the meaning of the word "insist" in the context of L.4 (a) are particularly apposite. In the U.S. Court of Appeals' view, the meaning of "insist" is not obscure: it means "demand", "require" or "impose", and all these verbs come within the ordinary meaning of the word "insist", as defined in dictionaries referred to by the Court of Appeal. They all require that a firm stand be taken by the third party. This interpretation is certainly consistent with the use of "insist" in section C.5.

[45] I note that the appellants argue that the words "impose" and "insist" are not used interchangeably, because each word must be given a different interpretation. This is somewhat surprising, considering that before the District Court and the U.S. Court of Appeals, OW USA, another regional affiliate in the OW Bunker Group, using the same OW GTCs (and its expert on English Law) argued that the word "insist" meant "imposed". In my view, the words "upon request thereof" in section C.5 and "imposed" in subsection L.4 (a) do inform the meaning of "insist". Be that as it may, I agree with the Federal Court that these words do not refer to a particular model of contractual negotiation, and one said model need not be adopted to find insistence (Reasons at paras. 96 and 100).

[46] There is nothing further in the parties' dealing that would shed light on the meaning of this verb, except that as mentioned by the Federal Court, Petrobulk took the same stand in all 49 instances in which it supplied Canpotex and OW during the first nine months of 2014; that is,

that its STCs, which expressly included Canpotex as a "Customer" who was jointly and severally liable under the said STCs, would apply to each such supply (Reasons at para. 87).

[47] Having considered the word "insist" as used in section C.5 and subsection L.4 (a), and in the overall context, I am satisfied that the Federal Court did not err in understanding it as meaning "require" or "demand something forcefully, not accepting refusal" (Reasons at paras. 117-118).

[48] I do not subscribe to the appellants' argument that the Federal Court did not make a distinction between Petrobulk's (the third party in this case) "wishes" and whether it "insisted" that OW Buyer be bound by its STCs. The Federal Court was well aware of this argument (see Reasons at paras. 62 and 88) and on a proper reading of its reasons, it did not make such an error.

[49] The next words of import in L.4 (a) are those describing what the third party must be insisting on. In that respect, L.4 (a) states: "insists that the Buyer is <u>also bound</u> by its own terms and conditions" (my emphasis). In this case, there is no dispute that Canpotex (as well as the owners of the vessels) is a Buyer within the meaning of those words, and that Petrobulk STCs are clear that Canpotex comes within the ambit of "Customer" as defined. As will be discussed later on, Petrobulk STCs expressly provide that Canpotex, as a Customer, would be jointly and severally liable with OW to pay the price of the bunker (see sections 1-2 and subsection 11(d) of the STCs).

[50] I also note that, contrary to what is stated in clause C.5 of OW GTCs, subsection L.4 (a) does not expressly spell out that the demand or request be made to a specific party. Rather, the focus in subsection L.4 (a) is only on what is insisted upon. I agree with the Federal Court that there is nothing in L.4 (a) that requires Petrobulk to make its demand directly to Canpotex in that respect. If this were so, one would expect from a sophisticated party like OW, wording similar to that used in C.5 where it is specified that the request must be from the Seller to the Owner of the Vessel.

(b) *Did the Federal Court err in finding that Petrobulk insisted?*

[51] I will now consider if the Federal Court made a palpable and overriding error in concluding, on the basis of all the evidence before it, that Petrobulk had indeed insisted that the Buyer of OW be also bound by its STCs and that thus, L.4 (a) was in play.

[52] In respect of that question, the foreign case law referred to by the parties is not particularly helpful, for I agree with Canpotex, Petrobulk and the Federal Court that they all involved distinguishing features, and none applied the standard of review that I am bound to apply.

[53] As noted by the Federal Court, everything about the application of the verb “insist” in L.4 (a) depends on the particular circumstances of any given case. On a fair reading of the Reasons, it is evident that what the Federal Court was looking for was insistence that the Buyer <u>also</u> be bound by its terms. In order to make this determination, the Federal Court looked at the exchange

between the parties, specific provisions in Petrobulk STCs, and the parties' course of dealing over time.

[54] This is exactly what the U.S. Court of Appeals had directed the District Court to do in *NCL*. Thus, this decision is not helpful to the appellants' case, who chose to simply rely on the fact that the matter was ultimately remanded to the District Court. The parties did not provide this Court with the second decision of the District Court, if any exists. I could not find such a decision myself, but I did notice that EKO, the physical supplier of the bunkers, whose terms were at issue in *NCL*, was the same physical supplier involved in *Cocket Marine Oil DMCC v. ING Bank N.V. & Anchor*, [2019] EWHC 1533 (Comm). In neither case does the court refer to the specific terms of EKO. There is no real indication that EKO's terms included as a party bound by its contract the company who was attempting to rely on its jurisdiction clause. In those cases, the contractual relationships were also more complex as they involved intermediary suppliers within the meaning of "Supplier" in OW GTCs that were not the physical suppliers referred to in L.4 (a).

[55] In this case, it is clear that the definitions and other specific terms in Petrobulk STCs played a crucial role in the Federal Court's conclusion that Petrobulk had insisted that Canpotex (a Buyer under OW GTCs) be also bound by its terms and conditions.

[56] I have not been persuaded that the Federal Court made a palpable and overriding error in concluding that L.4 (a) was in play.

(2) <u>What is the effect of subsection L.4 (a) on the relationships between Canpotex, OW and Petrobulk?</u>

[57] This leaves only the issue of what is the effect of L.4 (a) on the relationships between OW, Canpotex and Petrobulk, and who is entitled to the funds in trust.

(a) *What is the effect of L.4 on the contractual relationship between Canpotex and OW?*

[58] There is no dispute that there is a contract between Canpotex and OW, and that this contract is varied when L.4 (a) is in play. I am now considering what effect it has. First, I will discuss the meaning of the words "terms and conditions" in L.4 (a) and its impact on the terms of the contract between OW and Canpotex. This will enable me to address the argument put forth by ING that the variations provided for in L.4 (a) are limited and do not include all the Petrobulk STCs, particularly those relating to payment or liability for payment such as section 11 (see appendix).

[59] Subsection L.4 (a) contains a general and unqualified reference to the third party's "own terms and conditions". The opening words of subsection L.4 (b) — "Without prejudice or limitation to the generality of the foregoing"— are also unambiguous. Thus, the variation generally set out in subsection L.4 (a) is expressly described as not limited in any way by the provisions listed in subsection L.4 (b) (see appendix). Rather, in respect of some specific issues listed therein, paragraphs L.4 (b)(i) to (ii[i]) provide clarifications or additional instructions as to how the incorporation will operate.

[60] For example, in respect of the time set for the doing of any act in both documents, the shorter time limit will prevail (L.4 (b)(i)), while additional exclusion of liability clauses in the STCs are simply added, and the law and jurisdiction selection clause(s) of the third party will be incorporated (and presumably supersede it if irreconcilable) the one in section P of OW GTCs.

[61] Finally, L.4 (c) states that it is further agreed that the rights of the buyer against the Seller cannot exceed the rights of the supplier against the third party.

[62] This subsection is difficult to understand because a third party under L.4 (a) could fall under the definition of Supplier when this word is used with a capital 'S' as a defined term if it is instructed by or on behalf of the Seller. In my view, this clause, where the word "supplier" is not capitalised, could have been meant to distinguish between a supplier who does not undertake to physically supply the bunkers and the third party who necessarily does. As explained in the hearing, and is apparent in the foreign case law before us, more than one OW Group affiliate may be involved in the supply chain. For example, in *NCL*, referred to at paragraphs 44 and 54 above, OW Bunker USA and OW Bunker Malta were involved as well as the actual supplier, EKO. There may have been more variations in the way the OW Group operated. Be that as it may, this clause, as worded, would definitely apply when OW is not directly bound by contract to the third party who physically supplies the bunker, and the rights of an intermediary supplier who contracted with the third party are more limited under this contract.

[63] I note that L.4 appears under the heading "Exemptions and Force Majeure", and that this could lead to the conclusion that the expression "own terms and conditions" in L.4 (a) are limited

to those terms and conditions exempting OW or the Buyer from liability. While headings are part of the overall contract that I must consider, I do not believe that in this case the heading warrants such a conclusion.

[64] Indeed, the wording of L.4 militates against such a conclusion. If the reference to "terms and conditions" in L.4 (a) is limited to exemptions clauses, it would be absurd to add paragraph L.4 (b) (ii), whose sole purpose is to specify that any additional exclusion of liability clauses (i.e. exemptions clauses) contained in the said third party's terms and conditions shall be incorporated mutatis mutandis, and this, after stating at the beginning of L.4 (b) such paragraphs were not meant to limit the generality of L.4 (a). Moreover, law and forum selection clauses are not exemptions. Paragraph L.4 (b) (ii[i]) does not fit under the heading *per se*. Finally, clauses providing for time limits for doing any act (performance issues) are not exemptions either.

[65] Although, in my view, L.4 could have been put under its own heading, I can understand the logic of putting it under "Exemptions and Force Majeure" because as mentioned paragraph L.4 (b) (ii) does add exclusion of liability clauses that may be found in the third party's general terms and conditions. As noted by the majority of the Supreme Court of Canada in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 [*Tercon*], OW's argument overlooks the fact that it is commercially sophisticated and that sophisticated parties can draft very clear exclusion clauses when they are minded to do so (see paragraphs 73, 62 of Tercon).

[66] I am satisfied that the terms of the contract between OW and Canpotex are to be found in the OW GTCs and Petrobulk STCs, read and interpreted together. With respect to those provisions of the STCs which are not expressly spelled out or dealt with in L.4 (b) and (c) (see for example section F.1 of the OW GTCs, which requires taking four representative samples, while subsection 8 (c) of the STCs refers to two representative numerically sealed samples), the Court will be left to construe the result of the incorporation according to general rules of interpretation, as there are no specific directions in that respect.

[67] Although not ideal, this is not unusual, especially when one considers that the OW GTCs were drafted without any particular set of terms or conditions of a third party in mind. My review also indicates that there appears to be many terms that are similar and probably often used in the industry (see for example D.3 and D.4 in the GTCs vs. 7 (c) and (d) in the STCs).

[68] I therefore conclude that clauses in Petrobulk STCs such as section 11 entitled “Payment Terms” (particularly subsection 11(d)), together with the other provisions stating that the OW Buyers were liable to pay Petrobulk’s invoice if OW did not, are within the ambit of L.4 (a). Such provisions will have an impact on provisions found in the OW GTCs, such as section I.2, to which the appellants refer in their memorandum.

[69] They say that pursuant to that clause, payment of OW invoices shall be made without any set-off, counterclaim, deductions, etc. to the bank indicated on OW invoices. It is not clear what the words “respective invoice(s)” in I.2 refers to. I note that a similar provision is found at subsection 11 (a) of the STCs.

[70] It would make no sense, when the OW GTCs and the STCs are read together to understand that this clause was meant to apply to an actual amount paid by Canpotex for the bunkers, pursuant to express clauses incorporated in OW GTCs, making them liable to pay the third party should OW fail to do so.

[71] As mentioned, it is not the fact that OW went bankrupt that makes this case unusual. This was certainly the occasion for the dispute to arise, but what makes this case different is the effect of section L.4 on the terms of the contract between Canpotex and OW.

[72] In this instance, the fact that Canpotex chose to deal with an entity like OW, because of its general knowledge of the bunker market prices, and the international fluctuations, does not mean anything more than that Canpotex was ready to pay extra for this service. When Canpotex authorized OW to incorporate into its contract the terms and conditions of the third party, it was clearly running a risk. Here, as found by the Federal Court, the STCs made Canpotex jointly liable to pay the third party's invoice for those specific bunkers. This was not disputed. What was disputed is whether Canpotex was also a party to Petrobulk's contract with OW. Thus, if there was a contractual relationship between Canpotex and Petrobulk, it may well be that if Canpotex had already paid OW, it would still have to pay Petrobulk if OW did not pay its invoice. But that is not the case before us. This variation provided for at L.4 (a) does not affect OW's right to be paid for its service in arranging for the bunker delivery ($5,575.75 USD) as was argued by appellants (memorandum at paragraph 76). Rather it operates as a direction to pay Petrobulk in the event that OW did not meet its own obligation to pay Petrobulk's invoice within the time provided for in the STCs.

[73] Once Canpotex received a notice to pay from the third party on the basis that OW did not pay it within the prescribed time period, the OW GTCs, as varied by the STCs, in fact authorized Canpotex to pay the said third party at the bank account set out at section 11 of the STCs (now part of the varied OW GTCs) the amount of the third party invoice, and the balance to the bank account of OW. To conclude otherwise would mean that no effect whatsoever is given to the terms of the STCs that make Canpotex jointly liable for the payment of Petrobulk's invoice, which terms were clearly imposed on OW, and as such, were accepted by Canpotex as provided for in L.4 (a) and therefore incorporated.

[74] OW knew or ought to have known that Petrobulk STCs were unambiguous. Petrobulk was not relying only on the credit of OW; OW agreed to those terms with full knowledge of the terms of its own GTCs. It cannot now say that Petrobulk accepted the risk of non-payment by OW and that an important part of the STCs were simply not included in the GTCs.

[75] I conclude that at this stage, ING is not entitled to claim under the OW contract the full amount of the funds held in trust. This is a somewhat unique situation created by an unusual provision, which incorporates two sets of general terms and conditions that were not originally drafted to be read together. But in my view, it is what commercial parties to such an intricate contract would have objectively intended in this case. Contrary to what the appellants argued, the Court is not rewriting OW's contract, it is only giving effect to the clause written by OW.

[76] There is no need to decide whether Petrobulk could sue under OW's contract for as will be explained, in my view, the Federal did not err when it concluded that Petrobulk could sue

Canpotex on the basis of its own contract with its Customer as defined in the STCs. I note however that under English law a third party to whom a contract grants a benefit can sue to enforce that obligation under the Contracts (Rights of Third Parties) Act 1999 (UK).

(b) *What is the relationship between Petrobulk and Canpotex if any?*

[77] The appellants argued that Canpotex was not a party to the contract with Petrobulk, even if Petrobulk insisted that Canpotex as an OW Buyer be also bound by its STCs. According to the appellants, the only effect of subsection L.4 (a) is to vary the terms of the contract between OW and Canpotex. As mentioned earlier, in their view, the variation would not include anything about a joint liability for the payment of Petrobulk. I have addressed under subsection (a) above my conclusion on the effect of the variation in this case and the terms of the OW-Canpotex contract. I will now deal with the other argument which was accepted by the Federal Court — that Canpotex was contractually bound to Petrobulk.

[78] I understand that the Federal Court accepted that the last portion of L.4 (a) "the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party" confirms, when read in the context of the factual matrix in evidence before it, that Canpotex agreed to also be bound by those terms vis-à-vis Petrobulk (the third party) as this is exactly what those terms provided for (Reasons at paras. 87-88).

[79] At the hearing before us, Canpotex and Petrobulk submitted that these words when read in context and considering the factual matrix, gave authority to OW (akin to a limited mandate or

agency) to bind Canpotex vis a vis Petrobulk, as well as vary the terms and conditions set out in OW's contract accordingly. I agree.

[80] Indeed, the appellant's argument that the only effect is an incorporation of the STCs (or part thereof) seemed attractive because a plain reading of the clause could support it. It offered an easy solution to this appeal. However, like the Federal Court, I quickly realized that this would require the Court to assume that the objective intent of OW was really to disregard and ignore the terms and conditions on which it contracted with Petrobulk. On the facts before us, this would be absurd considering that OW itself made it clear that L.4 (a) only comes into play because Petrobulk *insists that the Buyer (here Canpotex) be also bound by its STCs.* The first purpose of this provision is to give effect to the terms imposed by the third party (Petrobulk) and ensure that its Buyer would be bound by them. The secondary purpose is to ensure that its own GTCs are not at odds with the terms imposed by the third party and do not give more rights to Canpotex than those it would have under the STCs.

[81] Had there been no reference to the third party insisting that the Buyer be also bound by its STCs in L.4 (see for example the clause in the Fixed price agreement between OW and Canpotex reproduced in the appendix), I may well have concluded that the only purpose of L.4, was to ensure that OW would not find itself prejudiced by discrepancies between its GTCs and what was agreed with the physical supplier. For example, if the GTCs provided that the delivery should take no longer than 24 hours and the physical supplier's own terms provided for 36 hours, OW could be in breach of its obligation without any breach by the actual supplier.

[82] But on the wording before us, OW could not have the benefit of such variation unless the third party insisted that the Buyer also be bound by its own STCs. If the third party does not insist, OW may find itself between two seats so to speak. One must assume that there was another commercial reason to include such a condition. The Court cannot simply presume that this is simply bad drafting; OW was a sophisticated commercial party.

[83] So how would Canpotex as a reasonable Buyer objectively construe this clause? Certainly, in the shipping business, it would make commercial sense for the third party (an actual bunker supplier) to insist to be contractually bound, not only to OW, but also to OW Buyers including Canpotex as charterer and the party benefitting from the supply. Indeed, it would make no commercial sense for Petrobulk to insist that Canpotex, as an OW Buyer, also be bound by its STCs, otherwise than as contractually bound to it. OW would need to have its Buyer consent to be so bound; thus, it makes commercial sense for OW, in such circumstances to ensure that Canpotex accepts to be bound in a manner that gives full effect to those terms, and to also want to vary its own GTCs to preserve its own contractual relationship with Canpotex as well as ensure that there is no contradiction between its own terms (OW GTCs) and the terms imposed on OW and Canpotex as its Buyer by Petrobulk STCs.

[84] Although there is no doubt that subsection L.4 (a) will vary the terms and conditions of the contract between OW and Canpotex, in my view, it also confirms that when the third party "insists that the Buyer is also bound by its own terms and conditions", Canpotex agrees and accepts that OW would bind it to the terms imposed by such a party, which in this case, clearly requires that it be bound as a Customer under Petrobulk's contract. Simply varying the terms of

the OW contract would not be sufficient to give full effect to the terms and conditions imposed by the third party.

[85] There is no general principle of law precluding OW from entering into a contract with the actual supplier on its own behalf as well as on behalf of its buyer when the said buyer has agreed and accepted that it could do so under its own contract with OW.

[86] Whether clauses such as the one before us would effectively bind any party other than Canpotex — for example, the owner of the vessel — is not a question that needs to be answered here. It may be that, despite section C.6 of the OW GTCs (Warranty of Authority – see appendix), Canpotex never advised the said owner of the OW GTCs or was not authorized to bind the vessel and her owner. It may well be that the owner would not be bound. However, this does not negate the effect of these clauses on Canpotex, who accepted to be bound by the OW GTCs, including L.4 (a). Canpotex has raised no objection with respect to the fairness and reasonability of construing the deeming provision as a grant of authority to OW to bind it vis-à-vis the actual supplier of the bunker. In fact, at the hearing before us, it supported this interpretation.

[87] In my experience, it is not unusual for suppliers of necessaires (anywhere in a supply chain) to add various clauses that will include a warranty of authority and a lien because in the shipping industry the vessel is the most tangible security for payment, and suppliers will invariably try to bind the owner and the vessel. Whether such clauses will be enforceable depends on the context, the law applicable (maritime liens arise by operation of law), and the

forum in which these matters are litigated. In my view, when considering the contract as a whole, these type of clauses have limited weight in informing the effect of L.4 (a) in respect of Canpotex and its relationship with OW and Petrobulk.

[88] I conclude that the Federal Court did not err when it found that there was no need for direct negotiation between Canpotex and Petrobulk for Canpotex to be bound to Petrobulk (Reasons at para 87). Canpotex agreed and accepted to be bound by the third party STCs. It was at the very least implicit that OW had the authority to bind Canpotex to Petrobulk when this was required to give full effect to its STCs.

[89] Canpotex was thus contractually liable jointly and severally with OW to pay for the bunkers actually delivered by Petrobulk. OW did not pay for them within the prescribed time period; Petrobulk was entitled to seek payment from Canpotex, for the OW bankruptcy did not release a joint debtor like Canpotex.

[90] Again, although this may be unusual, there is nothing conceptually wrong with the fact that Canpotex would be a party to two contracts, for both are harmonized by the variation provided for in L.4 (a). Both provide for Canpotex's responsibility to pay the third party should OW fail to do so.

V. Conclusion

[91] I therefore conclude that the Federal Court did not make any error that would justify this Court's intervention in its ultimate conclusion as to who was entitled to the funds held in trust.

[92] I propose to dismiss the appeal with costs to the respondents. As mentioned at the beginning of these reasons (paragraph 19), a separate set of reasons will be issued in respect of the appeal in file A-54-19.

"Johanne Gauthier"

J.A.

WOODS J.A. (Concurring Reasons)

[93] I agree entirely with the reasons of my colleague, Justice Gauthier. I wish to add a brief comment concerning the issue of privity of contract between Canpotex and Petrobulk.

[94] In her reasons, Justice Gauthier determined that there was privity of contract on the basis that OW had been given authority to bind Canpotex to Petrobulk. This is a reasonable inference to make.

[95] The Federal Court also determined that there was privity, but it did so on a different basis. At paragraph 87 of its reasons, the Federal Court stated:

> … The consistent course of dealings (49 previous transactions) between Canpotex, OW UK and MP reveals that all three parties understood and accepted that the bunkers would be supplied by MP who could "insist" to OW UK that Canpotex be contractually bound. Canpotex did not require direct negotiations with MP and agreed to accept and assume responsibility for obligations that MP insisted to OW UK should be incorporated into the sale and purchase of these bunkers to these Vessels.

[96] In my view, it was appropriate for the Federal Court to consider that the course of dealings among these parties, among other things, supported a finding of privity of contract between Canpotex and Petrobulk. The standard of review to be applied to this determination is palpable and overriding error. There is no such error.

"Judith Woods"

J.A.

PELLETIER J.A. (Dissenting Reasons)

[97] I have read my colleague's reasons in draft. With respect, and for the reasons set out below, I cannot agree.

I. Standard of Review

[98] I note my colleague's reference to *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 and *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23. Unlike my colleague, I believe that the Federal Court's decision in this case may well have precedential value. The effect of the Federal Court's decision is that the contractual language used in one or both of these contracts allows an unsecured creditor in an insolvency to defeat the claim of a secured creditor. This is not something that will go unnoticed in the commercial world.

[99] The issue is not whether OW will use these terms again (unlikely, since it is bankrupt) but whether others, in reliance on the Federal Court's reasons, will incorporate similar language into their contractual documents.

[100] As a result, I conclude that this case does have precedential value and that the standard of review is correctness.

II. Analysis

[101] It is perhaps useful to dwell for a moment on the nature of the transactions in issue here. Canpotex needed fuel for its vessels. OW agreed to supply that fuel, either from its own stores or from a third party's. Since OW does not maintain a fuel depot at Vancouver, it bought the fuel from Marine Petrobulk (MP) who delivered it to Canpotex's vessels.

[102] OW's insolvency before it paid MP has the latter scrambling to obtain payment directly from Canpotex. Its task is made more complicated by the fact that OW assigned its accounts receivable to ING. ING resists MP's claim, stating that it is entitled to the purchase price under the contract between Canpotex and OW.

[103] MP relies on section L.4 of the Canpotex/OW contract, which incorporates some or all of the terms of the OW/MP contract into the Canpotex/OW contract if MP "insists" that they be so incorporated. For the purposes of my analysis, I am prepared to assume the position most favourable to MP. Therefore, I assume that MP insisted and, as a consequence, some or all of the terms of the OW/MP contract were incorporated into the Canpotex/OW contract.

A. *Privity of contract*

(1) Canpotex/OW Contract

[104] Even if one assumes that the incorporated terms require Canpotex to pay MP rather than OW, the fact remains that MP is still a stranger to the Canpotex/OW contract. There is nothing in

the Canpotex/OW contract which would make MP a contracting party. As a result, the doctrine of privity of contract applies and an action by MP to enforce that contract would fail. Therefore, MP is not entitled to the funds in Court on the basis of the Canpotex/OW contract.

[105] I agree with my colleague that, in its first decision, this Court did not decide whether privity of contract was a bar to MP's claim. In its first decision (2015 FC 1108 (FC Decision No. 1)), the Federal Court did not so much decide the issue of privity as decide that it did not arise because in its view, Canpotex and MP were parties to the same contract. Our Court did not consider this issue because of its conclusion that the Federal Court had based its decision on the wrong contract.

[106] The doctrine of privity of contract is judge-made law and has been modified in certain circumstances to allow third parties to claim the benefit of a contract made by others: *New Zealand Shipping Co. v. A. M. Satterthwaite & Co. (The "Eurymedon")*, [1975] A.C. 154, [1974] 1 All E.R. 1015 (P.C.); *ITO-Int'l Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752 at 782-800, 1986 CanLII 91; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 at 447-50, 1992 CanLII 41; *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, 1999 CanLII 654 at para. 30, [1999] 3 S.C.R. 108. This is not a case where the parties negotiated a benefit for a third party. Canpotex and OW negotiated their contract for their mutual benefit. The incorporation of clauses from the OW/MP contract was not meant to benefit MP but to assist OW in satisfying its contractual obligations to Canpotex.

[107] While the doctrine of privity has often been criticized, it has not been abrogated: see *1196303 Inc. v. Glen Grove Suites Inc.,* 2015 ONCA 580 at paras. 93-104, 49 B.L.R. (5th) 1. This is not a case in which this Court should embark on such an exercise. The consequences of modifying or abrogating the doctrine of privity of contract are many and far-reaching. If that task is to be undertaken, it should be assumed by the legislature.

[108] As a result, I conclude that the doctrine of privity precludes MP from claiming the benefit of the Canpotex/OW contract, no matter how many terms from the OW/MP contract it incorporates.

[109] That said, I would simply add that it is not obvious to me that section L.4 has the effect which my colleague gives it. It does not seem unlikely that sophisticated parties, as these were, would agree that Canpotex should not have any greater rights against OW than the latter had against its vendor, as provided in section L.4 (c). This would ensure that OW was not caught by inconsistent conditions between the two contracts into which it had entered. I regard section L.4 (b) as attempting to achieve the same result so the parties to the two contracts were on the same footing with respect to various other matters as specified in that clause and matters of a similar nature.

[110] Furthermore, one should not presume that OW would enter into contracts whose effect was to impair ING's security with all the consequences that typically flow from such conduct. Similarly, one should not assume that Canpotex would be party to arrangements whose effect was to prefer one of OW's creditors (MP) to another (ING).

[111] The clauses upon which MP relies are clauses inserted into OW's standard form contract for OW's own benefit, not for the benefit of its customers or third parties like MP. MP ignores this simple fact in its attempt to use those clauses to re-characterize OW's role in these transactions to that of a broker whose role was to facilitate a contract of purchase and sale between Canpotex and MP in return for a commission.

[112] It has long been held, in the tax context that it is not the function of the courts to re-characterize *bona fide* legal relationships on the basis of "economic realities": see *MacDonald v. Canada*, 2020 SCC 6 at para. 38; *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622 at para. 39, 1999 CanLII 647; *Tsiaprailis v. Canada*, 2005 SCC 8 at para. 39, [2005] 1 S.C.R. 113. This is all the more true for private transactions which have no public interest component as tax transactions do.

(2) OW/MP Contract

[113] MP next turns to its own contract in support of its claim on the funds in Court. It relies on the definition of "Customer" in its agreement with OW, which includes "any party benefitting from consuming the Marine Fuel, and any other party ordering the Marine Fuel". This definition is broad enough to include Canpotex. The difficulty with this argument is that Canpotex is not a party to that contract. Once again, the doctrine of privity prevents contracting parties from imposing liability on a third party without its consent. This argument fails as well.

B. *Agency*

[114] The only other way in which MP could succeed is if the contract between OW and MP is, in law, a contract between Canpotex and MP. This argument requires that OW have acted as Canpotex's agent when it contracted with MP. My colleague refers to this possibility at paragraphs 79 and 85 of her reasons when she speaks of Canpotex authorizing OW to negotiate with MP on its behalf.

[115] The trial judge found that he did not need to decide if OW was Canpotex's agent: see FC Decision No. 1 at para. 136.

[116] MP seeks to construe the final words of section L.4 (a) of the Canpotex/OW contract as authorizing OW to enter into the MP contract for and on behalf of Canpotex, in other words, as Canpotex's agent. MP's reliance upon these words to achieve this result is misconceived. Section L.4 (a) reads as follows:

> (a) These Terms and Conditions are subject to variation in circumstances where the physical supply of the Bunkers is being undertaken by a third party which insists that the Buyer is also bound by its own terms and conditions. In such circumstances, these Terms and Conditions shall be varied accordingly and the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party. (my emphasis)

[117] When the underlined words above are read in context, it is apparent that they refer to the acceptance of terms incorporated into the Canpotex/OW contract. This is not the same thing as authorizing OW to conclude a contract with MP. In the first case, Canpotex agrees to some modification of its contractual terms with OW, but it nonetheless limits its contractual relations

to OW itself. In the second case, Canpotex would agree to be bound to a different party on terms unknown to it. The two are not the same.

[118] The better argument against agency is that Canpotex already had a contract for the supply of fuel on terms acceptable to it. It did not need to authorize OW to bind it to a second contract for the same fuel on conditions unknown to it.

III. Conclusion

[119] I would allow ING's appeal with costs. I would set aside the Federal Court's judgment and I would order that the funds held in trust be paid to ING together with admiralty interest.

"J.D. Denis Pelletier"

J.A.

Appendix

Extracts only

OW BUNKER GROUP
TERMS AND CONDITIONS OF SALE FOR MARINE BUNKERS
EDITION 2013

[…]

B. DEFINITIONS

"Seller" means OWB; any office, branch office, affiliate or associate of the OWB Group; being the legal entity within the OWB Group, whose name is included in the Order Confirmation, sent to the Buyer.

"Buyer" means the vessel supplied and jointly and severally her Master, Owners, Managers/Operators, Disponent Owners, Time Charterers, Bareboat Charterers and Charterers or any party requesting offers or quotations for or ordering Bunkers and/or Services and any party on whose behalf the said offers, quotations, orders and subsequent agreements or contracts have been made;

"Supplier" means any party instructed by or on behalf of the Seller to supply or deliver the Bunkers;

[…]

OFFERS, QUOTATIONS AND PRICES

[…]

C.5 If the Party requesting Bunkers is not the Owner of the Vessel, the Seller shall have the right (but will not be obliged) to insist as a precondition of sale that a payment guarantee is provided by the Owner. The Seller shall have the right (but will not be obliged) to cancel any agreement with the Buyer at any time, if such payment guarantee is not received upon request thereof from the Seller to the Owner. The Seller's decision to forego obtaining a payment guarantee under this Clause C.5 shall have no effect on Seller's right to a lien on the Vessel for any Bunkers supplied under this Agreement.C.6 The Buyer warrants that it is authorized as agent to order Bunkers for the Vessel, and that the Seller has a lien on the Vessel for any Bunkers supplied under this Agreement. If the party requesting Bunkers is not the Owner of the Vessel, Buyer assumes the sole responsibility for communicating the terms and conditions of this Agreement to the Owner of the Vessel prior to the date of delivery.

[…]

I Payment – Maritime Lien

1.1 Payment for the Bunkers and/or the relevant services and/or charges shall be made by the Buyer as directed by the Seller within the period agreed in writing.

1.2 Payment shall be made in full, without any set-off, counterclaim, deduction and\or discount free of bank charges to the bank account indicated by the Seller on the respective invoices(s).

[…]

L. EXEMPTIONS AND FORCE MAJEURE

[…]

L.4 (a) These Terms and Conditions are subject to variation in circumstances where the physical supply of the Bunkers is being undertaken by a third party which insists that the Buyer is also bound by its own terms and conditions. In such circumstances, these Terms and Conditions shall be varied accordingly and the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party.

(b) Without prejudice or limitation to the generality of the foregoing, in the event that the third party terms include:

(i) A shorter time limit for the doing of any act, or the making of any claim, then such shorter time limit shall be incorporated into these terms and conditions.

(ii) Any additional exclusion of liability clause, then same shall be incorporated mutatis mutandis into these.

(ii[i]) A different law and/or forum selection for disputes to be determined, then such law selection and/or forum shall be incorporated into these terms and conditions.

(c) It is acknowledged and agreed that the buyer shall not have any rights against the Seller which are greater or more extensive than the rights of the supplier against the aforesaid Third Party.

Fixed Price Agreement – Schedule 3

L.4 a) These Terms and Conditions are subject to variation in circumstances where the physical supply of the fuel is being undertaken by a third party. In such circumstances, these terms and conditions shall be varied accordingly, and the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party on the Seller.

MARINE PETROBULK LTD.
STANDARD TERMS AND CONDITIONS
FOR SALE AND DELIVERY OF MARINE FUELS

Except as may otherwise be negotiated by the parties and agreed to in writing, the following terms and conditions shall apply to all sales and delivery of marine fuels and related products of whatever type or grade by Marine Petrobulk to any Customer as defined below:

1. DEFINITIONS

[…]

"Customer" means the customer under each Agreement, including the entity or entities named in the Confirmation, together with the Vessel, her master, owners, operators, charterers, any party benefitting from consuming the Marine Fuel, and any other party ordering the Marine Fuel.

[…]

2. CUSTOMER'S WARRANTY OF AUTHORITY

Customer, if not the owner of the Vessel. expressly warrants that he has the full authority of the owner of the Vessel to act on behalf of the owner and the Vessel in entering into this Agreement, and in particular has the authority of the owner to contract on the owner's personal credit and on the credit of the Vessel. For the purposes of entering into this Agreement for bunkering the Vessel, Customer is deemed to be In [*sic*] possession and control of the Vessel. Customer further warrants that he has given or will give notice of the provisions of this clause and Clause 10 herein to the owner. If the Marine Fuel is ordered by an agent, manager or broker then such agent, manager or broker, as well as the principal, shall be bound by, and liable for, all obligations as fully and as completely as if the agent were itself the principal, whether such principal is disclosed or undisclosed, and whether or not such agent, manager or broker purports to contract as agent, manager or broker only. Notwithstanding anything to the contrary in this Agreement, principal and agent, manager or broker shall each be deemed to be a Customer for purposes of this Agreement all of whom shall be jointly and severally liable as Customer under each Agreement.

[…]

11. PAYMENT TERMS

(a) Payment for Marine Fuels, transportation and other applicable charges shall be made in full (without deduction, setoff, counterclaim, discount or bank fee) in immediately available US funds by electronic transfer, quoting Marine Petrobulk's invoice number and Customer's name via:

Final Beneficiary Marine Petrobulk Ltd.

HSBC Bank Canada
Suite 200, 885 West Georgia Street
Vancouver, BC Canada
USD Account No [. . .]
Swift No: [. . .]

Routing Bank: HSBC Bank USA
New York, New York
Account of HSBC Bank Canada
ABA No. [. . .]

(b) if at any time before delivery, Customer's credit or that of the Vessel or her owner is deemed by Marine Petrobulk, in its sole discretion, to be impaired, Marine Petrobulk may require Customer to (i) pay cash before delivery, (ii) provide satisfactory security, and/or (iii) effect immediate payment of all outstanding accounts for previous deliveries of Marine Fuels by Marine Petrobulk. If Customer fails to comply with these requirements, Marine Petrobulk will have the right to cancel delivery and to terminate this Agreement without liability or penalty.

(c) if not required to be paid in advance or upon delivery of the Marine Fuels, all payments for Marine Fuels are due within thirty (30) days following the date of delivery. Interest at the rate of 1.5% per month (18% per year) must be paid on all overdue amounts.

(d) Notwithstanding any other terms of this Agreement and without in any way diminishing Marine Petrobulk's reliance on the credit of the Vessel and the credit of her owner, if Customer is acting on behalf of a principal or principals, disclosed or undisclosed, or on behalf of an agent on behalf of another principal or principals, disclosed or undisclosed, or on behalf of an agent on behalf of another principal or principals, Customer shall in any event be jointly and severally liable for the due and proper performance of this Agreement.

(e) Customer agrees to pay any and all expenses, legal fees and court costs incurred by Marine Petrobulk:(i) to collect and obtain payment of any amount due to Marine Petrobulk, [i]ncluding but not limited to legal fees and court costs associated with enforcing a maritime lien, right in rem, attachment, right of arrest, or other available remedy in law, equity or otherwise; and (ii) to recover any damages or losses suffered by Marine Petrobulk as a result of any breach by Customer of any provision of the Agreement.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGEMENT OF THE HONOURABLE JUSTICE RUSSELL DATED SEPTEMBER 28, 2018, DOCKET NO. T-109-15

DOCKET:	A-351-18
STYLE OF CAUSE:	ING BANK N.V.et al. v. CANPOTEX SHIPPING SERVICES LIMITED et al.
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	NOVEMBER 18, 2019
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRING REASONS BY:	WOODS J.A.
DISSENTING REASONS BY:	PELLETIER J.A.
DATED:	MAY 5, 2020

APPEARANCES:

Michael Feder, Q.C. Patrick Williams	FOR THE APPELLANTS
David McEwen, Q.C.	FOR THE RESPONDENTS CANPOTEX SHIPPING SERVICES LIMITED, NORR SYSTEMS PTE. LTD., OLDENDORFF CARRIERS GMBH & CO K.G., STAR NAVIGATION CORPORATION S.A

H. Peter Swanson	FOR THE RESPONDENT MARINE PETROBULK LTD.,

SOLICITORS OF RECORD:

McCarthy Tétrault LLP Vancouver, BC	FOR THE APPELLANTS
Alexander Holburn, Beaudon + Lang LLP Vancouver, BC	FOR THE RESPONDENTS CANPOTEX SHIPPING SERVICES LIMITED, NORR SYSTEMS PTE. LTD., OLDENDORFF CARRIERS GMBH & CO K.G., STAR NAVIGATION CORPORATION S.A.
Bernard LLP Vancouver, BC	FOR THE RESPONDENT MARINE PETROBULK LTD.