Federal Court  Cour fédérale

Date: 20150923

Docket: T-109-15

Citation: 2015 FC 1108

Ottawa, Ontario, September 23, 2015

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

CANPOTEX SHIPPING SERVICES LIMITED,
NORR SYSTEMS PTE. LTD.,
OLDENDORFF CARRIERS GMBH & CO. K.G. AND
STAR NAVIGATION CORPORATION S.A.

Plaintiffs

And

MARINE PETROBULK LTD.,
O.W. SUPPLY & TRADING A/S,
O.W. BUNKERS (UK) LIMITED,
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

Defendants

JUDGMENT AND REASONS

I. INTRODUCTION

[1] There are three motions for summary judgment pursuant to Rules 108 and 216 of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*] before the Court. Pursuant to an Order of Prothonotary Lafrenière (March 27, 2015), Canpotex Shipping Services Limited [Canpotex] paid USD$661,050.63 into trust which was to be treated as the equivalent to a payment into Court. Canpotex seeks summary judgment that its payment into Court has extinguished any liabilities against Canpotex. ING Bank [ING] and Ian David Green, Anthony Victor Lomas and Paul David Copley [Receivers] seek summary judgment that ING is entitled to the funds. Marine Petrobulk Ltd [MP] seeks summary judgment that it is entitled to the funds.

II. BACKGROUND

[2] On February 14, 2014, Canpotex and O.W. Supply & Trading A/S [OW Trading] entered into a contract for the time-to-time purchase of marine bunkers by Canpotex from OW Trading, for vessels that Canpotex charters [Fixed Price Agreement]. The contract was not signed until sometime in June 2014.

[3] On October 3, 2014, Canpotex time chartered the vessel MV Star Jing. The vessel is owned by the Plaintiff, Olendorff Carriers GmbH & Co KG, a company incorporated in Germany and with its head office in Germany. The contract provides that Canpotex will pay for all fuel and will not allow any liens against the vessel.

[4] On October 7, 2014, Canpotex time chartered the vessel MV Ken Star which is owned by the Plaintiff, Star Navigation Corporation SA, a company incorporated in Liberia with its head office in Greece. The contract provides that Canpotex will pay for all fuel and will not allow any liens against the vessel.

[5] On October 22, 2014, Canpotex ordered marine bunkers from the Defendant, O.W. Bunkers (UK) Limited [OW UK], a subsidiary of OW Trading. The marine bunkers were to be delivered to the MV Ken Star.

[6] On October 22, 2014, Canpotex also ordered marine bunkers from OW UK to be delivered to the MV Star Jing.

[7] Both sales order confirmations show that the physical supplier of the fuel was to be the Defendant, MP, a British Columbia bunker fuel supply company.

[8] The parties disagree about whether the Fixed Price Agreement, OW UK's general terms and conditions, or MP's standard terms and conditions governed the fuel purchases.

[9] On October 27, 2014, MP provided the marine bunkers for use on the MV Ken Star and MV Star Jing [collectively, the Vessels] in Vancouver.

[10] On October 27, 2014, OW UK invoiced Canpotex for the marine bunkers – USD$375,525.000 for the MV Ken Star and USD$278,968.15 for the MV Star Jing. The invoices indicated that payment was due to OW UK by November 26, 2014.

[11] On October 28 and 29, 2014, MP invoiced OW UK for the marine bunkers supplied – USD$372,300.00 for the MV Ken Star and USD$276,617.40 for the MV Star Jing.

[12] Pursuant to an agreement of December 19, 2013, OW Trading, and certain subsidiaries including OW UK, assigned all rights, interest and title in their third party and intercompany receivables to ING. Receivables from the sale of marine bunkers were specifically assigned to ING. Canpotex was notified of the assignment in December 2013.

[13] On November 7, 2014, OW Trading filed for bankruptcy; OW UK, and other related subsidiaries, filed for bankruptcy shortly thereafter.

[14] On November 12, 2014, ING appointed the Receivers as receivers of OW Trading and OW UK's receivables.

[15] On December 12, 2014, Charles Christopher Macmillen [Administrator] was appointed administrator of OW UK.

[16] On December 22, 2014, the Administrator, the Receivers and ING entered into a cooperation agreement, pursuant to which money owed in relation to OW UK receivables would be paid into ING accounts.

[17] OW UK never paid MP's invoices.

[18] On December 22, 2014, MP demanded payment of USD$648,917.40 from Canpotex for the marine bunkers that MP had supplied to the Vessels. MP claimed it had a maritime lien in accordance with its contract with OW UK and would arrest the Vessels unless Canpotex paid the invoices.

[19] On January 8, 2015, the Receivers demanded payment from Canpotex for the amount owing under the OW UK invoices. The Receivers advised that if payment was not forthcoming, they reserved the right to exercise all powers available to them, including the arrest of the Vessels.

[20] Canpotex does not dispute that it owes the sum of USD$654,493.15 under the OW UK invoices. It says that it has held back the funds because it has received competing demands for them and does not want to expose the Vessels to any liability or liens.

[21] On April 2, 2015, in accordance with the March 27, 2015 Order of Prothonotary Lafrenière, Canpotex paid USD$661,050.63 (the principal amount owed under the OW UK

invoices plus admiralty interest) [Funds] into the United States [US] trust account of its solicitor. Prothonotary Lafrenière's Order deemed this deposit to be a payment into the Court.

[22] On June 22, 2015, the Plaintiffs brought a motion for a declaration establishing:

a) Which of the Defendants is entitled to all, or part, of the Funds;

b) The specific entitlement of each Defendant to receive part, or all, of the Funds;

c) Payment out in accordance with a) and b);

d) That any and all liability of the Plaintiffs and the Vessels to the Defendants in respect of the marine bunkers supplied to the Vessels on October 27, 2014 in Vancouver is extinguished upon payment out of the Funds; and,

e) That the Plaintiffs recover the costs of the action from one of the Defendants or the Funds.

[23] On June 22, 2015, ING and the Receivers brought a motion for:

a) A declaration that the Funds be paid to ING in satisfaction of Canpotex's debt to OW UK; and,

b) Costs of the proceedings.

[24] On June 22, 2015, MP brought a motion for:

a) Judgment in the Canadian equivalent of MP's invoices for the supply of the marine bunkers – USD$372,300.00 for the MV Ken Star and USD$276,617.40 for the MV Star Jing;

b) A declaration that MP is entitled to the Funds;

c) Interest on the funds at admiralty rates; and,

d) Costs of the proceedings.

III. ISSUES

[25] The Plaintiffs say that the following matters are at issue in this proceeding:

1. Which of the Defendants is entitled to all, or part, of the Funds, including each Defendant's specific entitlement; and,
2. Whether payment of the Funds will extinguish all of the Plaintiffs' liability arising out of the marine bunkers supplied to the Vessels.

[26] ING says the sole issue in this proceeding is the appropriate disposition of the Funds.

[27] MP says that, in addition to the appropriate disposition of the Funds, the Court must also determine whether, if MP is not entitled to the Funds, its maritime lien in relation to the bunker supply should be extinguished.

IV. STATUTORY PROVISIONS

[28] The following provisions of the *Federal Courts Rules* are applicable in this proceeding:

Interpleader	**Interplaidoirie**
108. (1) Where two or more persons make conflicting claims against another person in respect of property in the possession of that person and that person	108. (1) Lorsque deux ou plusieurs personnes font valoir des réclamations contradictoires contre une autre personne à l'égard de biens qui sont en la possession de celle-ci, cette dernière peut, par voie de requête ex parte, demander des directives sur la façon de trancher ces réclamations, si :
(a) claims no interest in the	a) d'une part, elle ne revendique aucun droit sur ces

property, and

(b) is willing to deposit the property with the Court or dispose of it as the Court directs,

that person may bring an ex parte motion for directions as to how the claims are to be decided.

biens;

b) d'autre part, elle accepte de remettre les biens à la Cour ou d'en disposer selon les directives de celle-ci.

Directions

(2) On a motion under subsection (1), the Court shall give directions regarding

(a) notice to be given to possible claimants and advertising for claimants;

(b) the time within which claimants shall be required to file their claims; and

(c) the procedure to be followed in determining the rights of the claimants.

…

Directives

(2) Sur réception de la requête visée au paragraphe (1), la Cour donne des directives concernant :

a) l'avis à donner aux réclamants éventuels et la publicité pertinente;

b) le délai de dépôt des réclamations;

c) la procédure à suivre pour décider des droits des réclamants.

…

Summary Trial

…

Procès sommaire

…

Adverse inference

(4) The Court may draw an adverse inference if a party fails to cross-examine on an affidavit or to file responding or rebuttal evidence.

Conclusions défavorables

(4) La Cour peut tirer des conclusions défavorables du fait qu'une partie ne procède pas au contre-interrogatoire du déclarant d'un affidavit ou ne dépose pas de preuve contradictoire.

Dismissal of motion

(5) The Court shall dismiss the motion if

(a) the issues raised are not suitable for summary trial; or

(b) a summary trial would not assist in the efficient resolution of the action.

Rejet de la requête

(5) La Cour rejete la requête si, selon le cas :

a) les questions soulevées ne se prêtent pas à la tenue d'un procès sommaire;

b) un procès sommaire n'est pas susceptible de contribuer efficacement au règlement de l'action.

Judgment generally or on issue

(6) If the Court is satisfied that there is sufficient evidence for adjudication, regardless of the amounts involved, the complexities of the issues and the existence of conflicting evidence, the Court may grant judgment either generally or on an issue, unless the Court is of the opinion that it would be unjust to decide the issues on the motion.

Jugement sur l'ensemble des questions ou sur une question en particulier

(6) Si la Cour est convaincue de la suffisance de la preuve pour trancher l'affaire, indépendamment des sommes en cause, de la complexité des questions en litige et de l'existence d'une preuve contradictoire, elle peut rendre un jugement sur l'ensemble des questions ou sur une question en particulier à moins qu'elle ne soit d'avis qu'il serait injuste de trancher les questions en litige dans le cadre de la requête.

Order disposing of action

(7) On granting judgment, the Court may make any order necessary for the disposition of the action, including an order

(a) directing a trial to determine the amount to which the moving party is entitled or a reference under rule 153 to

Ordonnance pour statuer sur l'action

(7) Au moment de rendre son jugement, la Cour peut rendre toute ordonnance nécessaire afin de statuer sur l'action, notamment :

a) ordonner une instruction portant sur la détermination de la somme à laquelle a droit le requérant ou le renvoi de cette

determine that amount;

(b) imposing terms respecting the enforcement of the judgment; and

(c) awarding costs.

…

Types of admiralty actions

477. (1) Admiralty actions may be *in rem* or *in personam*, or both.

…

Defendants in action in rem

(4) In an action in rem, a plaintiff shall include as a defendant the owners and all others interested in the subject-matter of the action.

…

Defence of action in rem

480. (1) An action in rem against a ship or other thing named as a defendant in the action may be defended only by a person who claims to be the owner of the ship or thing or to be otherwise interested therein.

détermination conformément à la règle 153;

b) imposer les conditions concernant l'exécution forcée du jugement;

c) adjuger les dépens.

…

Types d'action

477. (1) Les actions en matière d'amirauté peuvent être réelles ou personnelles, ou les deux à la fois.

…

Défendeurs dans une action réelle

(4) Dans une action réelle, le demandeur est tenu de désigner à titre de défendeurs les propriétaires du bien en cause dans l'action et toutes les autres personnes ayant un intérêt dans celui-ci.

…

Défense dans une action réelle

480. (1) Dans une action réelle, la défense pour le compte du navire ou d'une autre chose cités comme le défendeur ne peut être déposée que par la personne qui prétend en être le propriétaire ou détenir tout autre droit sur ceux-ci.

[29] The following provisions of the *Marine Liability Act*, SC 2001, c 6 [*MLA*] are applicable in this proceeding:

Maritime Lien	**Privilège maritime**
Definition of "foreign vessel"	**Définition de « bâtiment étranger »**
139. (1) In this section, "foreign vessel" has the same meaning as in section 2 of the Canada Shipping Act, 2001.	139. (1) Au présent article, « bâtiment étranger » s'entend au sens de l'article 2 de la Loi de 2001 sur la marine marchande du Canada.
Maritime lien	**Privilège maritime**
(2) A person, carrying on business in Canada, has a maritime lien against a foreign vessel for claims that arise	(2) La personne qui exploite une entreprise au Canada a un privilège maritime à l'égard du bâtiment étranger sur lequel elle a l'une ou l'autre des créances suivantes :
(a) in respect of goods, materials or services wherever supplied to the foreign vessel for its operation or maintenance, including, without restricting the generality of the foregoing, stevedoring and lighterage; or	a) celle résultant de la fourniture — au Canada ou à l'étranger — au bâtiment étranger de marchandises, de matériel ou de services pour son fonctionnement ou son entretien, notamment en ce qui concerne l'acconage et le gabarage;
(b) out of a contract relating to the repair or equipping of the foreign vessel.	b) celle fondée sur un contrat de réparation ou d'équipement du bâtiment étranger.

Services requested by owner

(2.1) Subject to section 251 of the Canada Shipping Act, 2001, for the purposes of paragraph (2)(a), with respect to stevedoring or lighterage, the services must have been provided at the request of the owner of the foreign vessel or a person acting on the owner's behalf.

Service demandé par le propriétaire

(2.1) Sous réserve de l'article 251 de la Loi de 2001 sur la marine marchande du Canada et pour l'application de l'alinéa (2)a), dans le cas de l'acconage et du gabarage, le service doit avoir été fourni à la demande du propriétaire du bâtiment étranger ou de la personne agissant en son nom.

Exception

(3) A maritime lien against a foreign vessel may be enforced by an action in rem against a foreign vessel unless

(a) the vessel is a warship, coast guard ship or police vessel; or

(b) at the time the claim arises or the action is commenced, the vessel is being used exclusively for non-commercial governmental purposes.

Exceptions

(3) Le privilège maritime peut être exercé en matière réelle à l'égard du bâtiment étranger qui n'est pas :

a) un navire de guerre, un garde-côte ou un bateau de police;

b) un navire accomplissant exclusivement une mission non commerciale au moment où a été formulée la demande ou a été intentée l'action le concernant.

Federal Courts Act

(4) Subsection 43(3) of the Federal Courts Act does not apply to a claim secured by a maritime lien under this section.

Loi sur les Cours fédérales

(4) Le paragraphe 43(3) de la Loi sur les Cours fédérales ne s'applique pas aux créances garanties par un privilège maritime au titre du présent article.

[30] The following provisions of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*] are applicable in this proceeding:

Navigation and shipping	**Navigation et marine marchande**
22. (1) The Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.	22. (1) La Cour fédérale a compétence concurrente, en première instance, dans les cas — opposant notamment des administrés — où une demande de réparation ou un recours est présenté en vertu du droit maritime canadien ou d'une loi fédérale concernant la navigation ou la marine marchande, sauf attribution expresse contraire de cette compétence.
Maritime jurisdiction	**Compétence maritime**
(2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:	(2) Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), elle a compétence dans les cas suivants :
…	…
(m) any claim in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance of the ship, including, without restricting the generality of the foregoing, claims in respect of stevedoring and lighterage;	m) une demande relative à des marchandises, matériels ou services fournis à un navire pour son fonctionnement ou son entretien, notamment en ce qui concerne l'acconage et le gabarage;

V. ARGUMENT

A. *Plaintiffs*

[31] The Plaintiffs say they have no interest in the determination of which of the Defendants is legally entitled to the Funds. The Plaintiffs merely wish to be relieved of any liabilities related to the marine bunker supply.

[32] The Plaintiffs submit that if the Court can find the necessary facts on a motion for summary trial, then judgment should be granted: *Inspiration Management Ltd v McDermid St Lawrence Ltd* (1989), 36 BCLR (2d) 202 [*Inspiration Management*]; *Louis Vuitton Malletier SA v Singga Enterprises (Canada) Inc*, 2011 FC 776. Absent serious issues of credibility, the Court should generally determine legal issues, particularly where summary trial will dispose of all the issues in the action: *0871768 BC Ltd v Aestival (The)*, 2014 FC 1047 at paras 57-61. The Plaintiffs say there are no material facts in dispute, and the action turns purely on the legal question of whether Canpotex can be liable to pay for the bunkers twice.

[33] The Plaintiffs submit that they have satisfied the requirements of Rule 108 of the *Federal Courts Rules*. The affidavit evidence clearly establishes that Canpotex is facing conflicting claims in respect to the marine bunkers supplied to the Vessels. The Receivers and MP both demand payment in respect of the same supply of the same marine bunkers. Both parties have advised that they will exercise their rights to arrest the Vessels.

[34] The Plaintiffs say that if Canpotex pays either the Receivers or MP, to the detriment of the other, it would do so at its own peril: *G&N Angelakis Shipping Co SA v Compagnie National Algerienne de Navigation (The "Attika Hope")*, [1988] 1 Lloyd's Rep 439 (Comm Ct) [*Attika Hope*]; *Rio Tinto Shipping (Asia) Pte Ltd v Korea Line Corp*, 2008 FC 1376 [*Rio Tinto*]. For example, in *Attika Hope*, the plaintiff faced competing claims for the payment of freight. One party was the owner of the vessel, and the other party was the assignee of the rights of the charterer. The plaintiff paid the freight to the owner of the vessel. The Court ultimately held that the assignee of the rights of the charterer was in fact entitled to the freight. It held that the plaintiff had paid the owner of the vessel at its own peril and was required to make a second payment to the assignee. The Plaintiffs bring this motion to extricate themselves from being in the position of having to make multiple payments.

[35] The Plaintiffs say that the jurisprudence regarding Rule 108 is limited, but in *Rio Tinto*, above, the Federal Court granted the plaintiff's request to interplead an amount that was subject to competing and/or conflicting claims in respect to payment of freight for the carriage of cargo.

[36] The Plaintiffs point out that there are motions similar to the present motion, which involves the Defendants, in both the United States (USDC SDNY 14 Civ 9262) and the UK (*Stena Bulk AB v Copley*, [2015] 1 Lloyd's Rep 280 at 281 [*Stena Bulk*]). In *Stena Bulk*, the plaintiff similarly faced competing claims from a supplier and intermediary. An Admiralty Court Registrar granted the plaintiff's motion to pay the claimed funds into court despite the fact that the Admiralty Court had no specific rule analogous to Rule 108 of the *Federal Courts Rules*.

[37] The Plaintiffs also respond to some of the Defendants' claims in their Statement of Defence. First, the Defendants claim that the Receivers' claim and MP's claim are not identical. The Plaintiffs say that, while this is technically correct, the underlying supply of bunkers is exactly the same in both claims. The only meaningful difference in the amounts claimed is that OW UK added its mark-up to the MP invoices before submitting them to Canpotex.

[38] Second, the Plaintiffs reject the Defendants' claim that there is a difference between the *in rem* claims against the Vessels themselves and the *in personam* claims, such that the losing party may be permitted to arrest the Vessels and recover their account in an *in rem* action. The Federal Court of Appeal has held that an *in rem* action is only a "procedural device" which allows a claimant to obtain security for its *in personam* claim: *Westshore Terminals Limited Partnership v Leo Ocean, SA*, 2014 FCA 231 at para 92. In this case, one Defendant will be paid out and its *in rem* claim will cease to exist. The other Defendant is not entitled to anything more than the funds, so that their *in rem* claim should also be barred.

[39] The Plaintiffs say that the Defendants' argument seems to be that, because an arrest would initially affect the ship owner, the *in rem* claim would be different from the *in personam* claim. However, the charter relationship vests the property of the marine bunkers in the charterer during the length of the charter: Terence Coughlin et al, *Time Charters*, 6th ed (London: informa, 2008) at 260. The *in rem* proceeding, then, would be a claim against the charterer and not the owner: *Norwegian Bunkers AS v Boone Star Owners Inc*, 2014 FC 1200 at para 90 [*Norwegian Bunkers*]. In addition, the Federal Court has held that an intermediary who has not paid an actual physical supplier of goods or services to a vessel is not entitled to make an *in rem* claim against

the vessel where the goods and services were supplied: *Balcan Ehf v Atlas (The)*, 2001 FCT 1328 [*Balcan*].

[40] The Plaintiffs, again, assert that they claim no interest in which of the Defendants is entitled to the Funds. However, they do not want the losing Defendant to be able to circumvent the Court's order by arresting the Vessels in another jurisdiction. The Federal Court is clearly the correct jurisdiction. The MP standard terms and conditions provide that the Federal Court is the proper jurisdiction, and MP's standard terms and conditions are incorporated into the OW UK contract. The parties have also attorned to the Federal Court's jurisdiction.

[41] Third, the Plaintiffs say that the issue of whether a Canadian maritime lien under s 139 of the *MLA* would flow from the purchase of bunkers by a charterer rather than by the owners of the Vessels is irrelevant in this proceeding. MP, as an unpaid physical supplier, has a statutory right of action *in rem* pursuant to s 22(2)(m) of the *Federal Courts Act*.

[42] Fourth, the Plaintiffs say that the affidavit evidence is clear that the Fixed Price Agreement was to govern the purchase of the marine bunkers. Regardless, the choice of law and forum clauses are very similar in the Fixed Price Agreement and in OW UK's general terms and conditions. The Plaintiffs say that, regardless of which version is used, it is clear that MP's standard terms and conditions were incorporated into either agreement.

[43] Fifth, the Plaintiffs say that "full justice and equity" call for dismissal of the *in rem* claims: *NM Paterson & Sons Ltd v Birchglen (The)*, [1990] 3 FC 301 (TD) [*Birchglen*]. MP says

that a lien claim can only be extinguished upon payment or security including interest and costs. However, the Court has held that a lien claimant's *in rem* claim is defeated if it has not paid for the goods and services which it supplies to the vessel. In *Birchglen*, the Court held that (at 311):

> … courts appear to adopt a fairly discretionary or pragmatic approach on the question and whether or not a maritime lien continues or is revived or is extinguished when security has been put up, is determined according to the facts of each particular case and of the requirements that full justice and equity be applied. The Plaintiffs say that full justice and equity calls for dismissal of all *in rem* claims because they have paid the Funds into Court and are allowing the Court to dispose of the Funds.

[44] Sixth, both this Court and the Federal Court of Appeal have held that the Court has the jurisdiction to grant declaratory judgment, even though a cause of action does not exist, so long as the plaintiff seeks some relief which could be of value: *Morneault v Canada (Attorney General)*, [2001] 1 FC 30 (CA); *Gariepy v Canada (Administrator of the Federal Court)*, [1989] 1 FC 544 (TD). The Plaintiffs submit that a declaration extinguishing the Defendants' *in rem* rights is critical to the interpleader proceedings. Without a declaration extinguishing the *in rem* claims, the Plaintiffs face the prospect of having to pay twice for the same delivery of marine bunkers.

B. *Defendants – ING and Receivers*

[45] ING says that the only issue in this summary trial motion is the appropriate disposition of the Funds. ING says that the Funds represent a debt that Canpotex owes to OW UK. OW UK's rights to the Funds have been assigned to ING, and there are no valid competing claims to the Funds.

[46] ING agrees that the parties entered into the Fixed Price Agreement on February 14, 2014. However, ING says that no purchases were ever made under this agreement. The marine bunker purchases which are the subject of this proceeding were made on a spot basis and so are outside of the terms of the Fixed Price Agreement.

[47] ING says that OW UK's sales order confirmations say that the supply of the marine bunkers was governed by the OW UK standard terms and conditions. The documentary evidence makes clear that the Fixed Price Agreement did not apply to the sale of the marine bunkers to the Vessels because: the Fixed Price Agreement was with OW Trading, but the marine bunkers were supplied by OW UK; the sales confirmations indicated that the supply was governed by the OW UK standard terms and conditions; the OW invoices refer to the OW UK general terms and conditions; and, the Fixed Price Agreement specifies that a specific sales order confirmation is to be used for sales under the Fixed Price Agreement – that particular sales order confirmation was not used in this sale.

[48] ING also says that the Plaintiffs have not met the test for Rule 108 interpleader. Rule 108 contemplates a single person interpleading a single item of property which is subject to conflicting claims. In contrast, in the present case there are four Plaintiffs, each of whom is subject to separate liabilities, on different legal bases, in different amounts owed to different parties. The Plaintiffs face multiple claims arising from separate obligations attached to several items of property. Canpotex acknowledges that the Funds are the money owing under the OW UK invoices. Canpotex is exposed to two claims from two different sources: the debt owed to OW UK which has been assigned to ING; and to the Vessels' owners due to their charter

contracts. These are not the same obligation. Canpotex could have purchased fuel directly from MP, but in purchasing through OW UK it secured certain advantages, while also assuming the risk of multiple liabilities.

[49] Interpleader does not apply where the allegedly competing claims are "based on separate and distinct causes of action." See *British Columbia v Gonclaves*, [1995] BCJ No 2365 (QL) at paras 15, 19 (SC) [*Gonclaves*]; *Farr v Ward* (1837) 2 M&W 844 [*Farr*]; *City of Morgan Hill v Brown* (1999), 71 Cal App 4th 1114 at 1122 (6th Dist) [*Morgan Hill*].

[50] MP has no direct claim against Canpotex and does not have a claim to the debt owed under the OW UK invoices. MP has a claim against OW UK and may have an *in rem* claim against the Vessels. The distinction between contractual and lien claims led the Singapore High Court to refuse interpleader in another claim arising from the OW Trading and OW UK bankruptcy: *Kamil Norwid Shipping Co Ltd v ING Bank N.V. and Transocean Oil Pte Ltd*, High Court of Singapore, April 24, 2015 at para 8 [*Kamil*].

[51] It remains an open question at the Federal Court as to whether a maritime lien under s 139 of the *MLA* can attach to a purchase from a charterer as opposed to an owner: *Norwegian Bunkers*, above, at para 80. But, even if MP can assert a maritime lien, the lien is limited to the Vessels *in rem* and does not constitute a direct claim against Canpotex.

[52] MP also cannot claim a contractual lien against Canpotex because it has no contractual relationship with Canpotex. The lack of privity was a barrier to a similar claim in India arising

from the OW Trading and OW UK bankruptcy: *Gulf Petrochem Energy Pvt Ltd v MT Valor*, Bombay High Court, April 15, 2015 at para 13 [*Gulf Petrochem*].

[53] ING acknowledges that the OW UK general terms and conditions provide that Canpotex is deemed to have read and accepted the terms and conditions imposed by a physical supplier and that the terms vary the OW UK contract. However, this is only the case when the physical supplier insists that the buyer be bound. MP did not insist on the application of its terms to Canpotex. Nonetheless, even if the terms were incorporated, that does not give rise to an independent contractual relationship between Canpotex and MP. In addition, MP's standard terms and conditions state that they only apply to the sale and delivery of marine fuel to a customer. The fuel was sold by MP to OW UK. Canpotex did not purchase the fuel from MP.

[54] Even if MP has a direct claim against Canpotex, it does not have a claim to the Funds which are the money owing under the OW UK invoices. Canpotex is required to pay that debt in full to OW UK. There is no basis in law for relieving the Plaintiffs of their liabilities to any of the Defendants or for extinguishing the Defendants' *in rem* rights.

C. *Defendant – MP*

[55] MP claims that it is entitled to the Funds both in contract, including a contractual lien, and pursuant to a maritime lien under s 139 of the *MLA*.

[56] MP says its contractual claim is based upon the following factors:

a) OW UK acted as agent for Canpotex in purchasing the bunkers;

b) MP contracted under its standard terms and conditions;

c) MP's standard terms and conditions define "customer" as including "charterer," which includes Canpotex as charterer of the Vessels; and,

d) MP's standard terms and conditions provide that a "customer" is liable for all obligations as a vessel owner would be.

[57] MP says these circumstances either lead to a direct contractual relationship, or to a finding that Canpotex is directly liable as principal.

[58] MP's standard terms and conditions also provide that MP can assert a lien against the vessel or other assets "beneficially owned or controlled" by the customer. The Funds are clearly an asset beneficially owned or controlled by Canpotex. See DC Jackson, *Enforcement of Maritime Claims*, 4th ed (London: LLP, 2005) [*Enforcement of Maritime Claims*] at 469. In contrast, OW UK has no lien rights. OW UK did not pay for the maritime bunkers and therefore has no right *in rem*: *Balcan*, above.

[59] MP also says that it has a statutory maritime lien in accordance with s 139 of the *MLA* and that it satisfies all of the statutory requirements: MP is a British Columbia (Canadian) company; the Vessels are foreign vessels; and, the bunkers were supplied to the Vessels for their operation: see *Norwegian Bunkers*, above, at paras 75, 77-78, 80. As the Funds are meant to replace the property to which the lien attaches, MP has a valid and enforceable maritime lien to the Funds.

[60] MP asserts that whether its valid and enforceable maritime lien is characterized as a special legislative right or as a traditional maritime lien, it ranks in priority relative to any of OW

UK's claims: William Tetley, *Maritime Liens and Claims*, 2d ed (Montreal: Blais, 1998) at 884-892; *Royal Bank of Scotland v Golden Trinity (Ship)*, 2004 FC 795 at para 111 [*Royal Bank of Scotland*].

[61] OW UK lacks an *in rem* claim against the Vessels or any contractual rights against the Funds. In *Balcan*, the Court found that no *in rem* right of action with respect to a necessaries claim can arise where the claimant has failed to supply necessaries to a ship (above, at paras 12, 16, 19). Similarly, OW UK has neither paid for nor supplied the bunkers to the Vessels. It is therefore not in the position of a necessaries claimant, and has no *in rem* right against the Vessels. The same submissions apply to the s 139 maritime lien.

[62] MP's maritime lien takes priority over any of OW UK's *in personam* claims against the Plaintiffs. A maritime lien arises without registration or formality and goes everywhere with a vessel: *Holt Cargo Systems Inc v ABC Containerline NV (Trustee of)*, 2001 SCC 90 at para 26. Even if OW UK had a valid mortgage or right *in rem*, a maritime lien still ranks higher: *Royal Bank of Scotland*, above, at para 111.

[63] If OW UK's claims ranked higher than MP's claim, which MP denies, then equity dictates that the priorities be re-ordered so that MP is paid and not OW UK. The Court should not depart from the list of priorities except in special circumstances and if necessary to prevent an obvious injustice: *Royal Bank of Scotland*, above, at para 118. A reordering to prioritize MP's claim would be appropriate in this case because: MP actually supplied the bunkers; OW UK did not pay for the bunkers; OW UK was only ever supposed to receive a small percentage payment

for arranging the supply of the bunkers; OW UK is bankrupt and has no intention of paying MP for the bunkers and any funds they receive will be pooled and paid on a percentage basis; and, MP has a s 139 maritime lien against the bunkers. If OW UK is paid, the Plaintiffs may have to pay twice (once to OW UK through this action, and twice if MP asserts its maritime lien to obtain payment from the Vessels' owners). MP says that it would also be inequitable to pay the Funds to OW UK because it did not fulfil its obligation to pay for the marine bunkers. A payment to OW UK could result in MP being out-of-pocket for the full value of the bunkers it supplied.

[64] MP also submits that it would be inappropriate for the Court to extinguish its maritime lien before MP is paid in full for the bunkers. The Federal Court has held that the Court has adopted a "fairly discretionary or pragmatic approach on the question and whether or not a maritime lien continues or is revived or is extinguished when security has been put up, is determined according to the facts of each particular case and of the requirements that full justice and equity be applied": *Birchglen*, above, at 311. In *Birchglen*, security was put up and the plaintiff wished to have the maritime lien extinguished. Here, Canpotex has only paid the Funds into Court because it faced competing claims, not as security for MP's maritime lien. If the Funds are security for the maritime lien, then OW UK has no right to the funds because OW UK has no rights *in rem*. A maritime lien can only be extinguished upon payment or lapse of time. There is no legal or equitable basis for extinguishing an otherwise valid maritime lien.

D. *Canpotex's Reply*

[65] Canpotex says that, but for the OW UK bankruptcy, it would have paid the OW UK invoices, OW UK would have paid the MP invoices, and the Receivers would have had a right to the OW UK mark-up. It is only because of the bankruptcy that both the Receivers and MP claim that Canpotex is responsible for full payment under both invoices. The Defendants say that Canpotex can be required to pay for the bunkers twice because the *in personam* and *in rem* claims are different. Canpotex says that acceptance of this position leads to an unjust result.

[66] Canpotex first distinguishes the case law that ING relies upon. It says that in *Kamil*, above, the Singapore High Court said that whatever the difference between *in personam* and *in rem* rights may be in accordance with the law of Singapore, it was clear that the Federal Court of Appeal has held that, in Canada, *in rem* proceedings are mere procedural devices.

[67] Canpotex also distinguishes the *Greatorex v Shackle*, [1895] 2 QB 249 [*Greatorex*] case referred to in the *Kamil* decision. That decision stands for the proposition that an order for interpleader will not be granted if the competing claims arise out of separate contracts: *John D Wood & Co v Dantata*, [1985] 2 EGLR 44 [*Dantata*]; *LJ Hooker Ltd v Dominion Factors Pty Ltd*, [1963] SR (NSW) 146. The *Greatorex* decision has no application to this proceeding because the subject matter at issue arises from the same chain of supply contracts, not two separate and distinct contracts.

[68] Canpotex also distinguishes the *Gulf Petrochem*, above, case. It says that the decision was made in the context of two motions to set aside arrests of vessels by physical suppliers. The applicant claimed that there was no privity of contract between the vessel owners and the physical suppliers. The decision turned on the fact that there is no maritime lien for the supply of bunkers in India. In the first motion, the Court found no tortious or statutory liability (such as s 139 of the *MLA*) and so no basis to arrest the vessel. In the second motion, the Court did not set the arrest aside because there was an arguable case that the owners were privy to the contract. Canpotex says that this does not reflect Canadian law.

[69] Canpotex also says that interpleader decisions based on American interpleader statutes have doubtful utility for the interpretation of the Canadian common law of interpleader. Regardless, *Morgan Hill*, above, says that the scope of American interpleader has broadened and enlarged to allow interpleader "even though one claimant seeks part of the fund and the other claimant seeks the entire fund amount" and that the "remaining restriction against independent liability is construed so that it is rarely an obstacle to the remedy" (at para 6). Similarly, *Farr*, above, was decided when the interpleader remedy was restricted and also involved an unusual fact situation. Canpotex says that modern interpleader applies to cases where "two or more persons severally claim delivery of the same property, payment of the same debt or rendering of the same duty, under different titles or in separate interests, from another person, and the latter did not know to which of the claimants he ought to deliver the property, pay the debt or render the duty": *Halsbury's Laws of England*, vol 16, 4th ed (London, UK: Butterworths, 1980) at 666-668.

[70] In Canada, interpleader only requires that a plaintiff be: "a neutral stakeholder with no beneficial interest in the property"; and, be at the risk of two conflicting claims against the fund or property or some parts of it. See Frederick M Irvine et al, *British Columbia Practice*, 3rd ed (LexisNexis Canada, 2006), rule 10-3 at 2-4 [*British Columbia Practice*]. The conflicting claims may be for all or some of the funds or property at issue: *Reading v School Board for London* (1886), 16 QBD 686; *Hoffman Bros Ltd v Carl E Miller Construction Ltd*, [1963] 2 OR 435 [*Hoffman Bros Ltd*]. Also, the conflicting claims may arise from different causes of action and can include claims where no actions have been brought: *Savage v First Canadian Financial Corp* (1996), 27 BCLR (3d) 21 [*Savage*]; *Lam v University of British Columbia*, 2013 BCSC 2142.

[71] Canpotex also says that the *Gonclaves*, above, decision has no application to the present proceeding. In *Gonclaves*, the Master denied a request for an interpleader order because the plaintiff was exposed to a greater liability than the amount they wished to pay into Court. The Master denied the request because it would not "clear up all, or substantially all, of the issues between the parties" (at para 16).

[72] Canpotex also submits that Canpotex is the sole party facing the competing claims arising from the same transaction. The Vessels' owners were added as Plaintiffs to meet the technical or procedural objection that the Court cannot grant a declaratory judgment in favour of parties not before the Court.

[73] Canpotex says that its reply submissions broadly apply to MP's Memorandum of Fact and Law as well. Specifically, Canpotex says that there is no authority for MP's claim that the Funds were not paid by the Vessels' owners and so are not security for MP's alleged maritime lien. Canpotex says that an *in rem* proceeding brought against a vessel is brought against the owner and all others interested in the vessel: *Federal Courts Rules*, Rules 477(4); 480(1). Canpotex is responsible for both the purchase of fuel and preventing any lien, so it is the party who must provide security for the Vessels.

E. *ING and Receivers' Reply*

[74] ING submits that the only fact in issue is which terms and conditions governed the supply of the marine bunkers to the Vessels. ING submits that the OW UK standard terms and conditions governed the sale. Nothing in the Fixed Price Agreement suggests that it applies to spot purchases. OW UK also told Canpotex that it was not prepared to have the Fixed Price Agreement apply to spot purchases.

[75] ING says that this is not an appropriate case for interpleader because there are multiple claims arising from multiple obligations. MP has no direct claim against Canpotex. The Funds should be paid to ING.

[76] ING says that the Plaintiffs' submissions rely upon decisions involving interim orders which address procedural rather than substantive issues. These decisions do not reflect the decisions of the various courts on the actual availability of interpleader relief.

[77] The Plaintiffs are also improperly trying to merge three distinct obligations into one liability: Canpotex's debt owed to OW UK; any *in rem* liability of the Vessels; and, Canpotex's *in personam* contractual liability to the Vessels' owners.

[78] ING distinguishes the *Norwegian Bunkers*, above, case where the Court only rejected an argument that an *in rem* right could be enforced without the owner itself being personally liable (at paras 80-82). In that case, the owners were not held personally liable because they had rebutted the presumption that the bunkers were supplied on the credit of the ship (at paras 84, 91). However, the owners were held liable under a maritime lien arising under Brazilian law which would not necessarily arise under Canadian law (at para 83). The charterers were found to have a vested property interest in the bunkers (at para 90). They obtained this interest from a company who had sold fuel to the charterers after obtaining it from a physical supplier (at para 30). In the present proceeding, ING says that title was passed from MP to OW UK. That title remains with OW UK because the bunkers have not been paid for.

[79] ING also distinguishes the *Balcan*, above, case. Canpotex relies on the case for the point that an intermediary who has not paid the physical supplier is not entitled to an *in rem* claim against the vessel. *Balcan* does not articulate any general principle about the validity of a claim arising under contract or any lien arising from a contract, and so it has no application to this proceeding.

[80] In response to MP, ING submits that OW UK was not acting as an agent for Canpotex when it purchased fuel from MP. The test for agency in a chain of supply context involves the

consideration of several factors, including: the express terms of the contract; control by the alleged principal; pricing terms; and, payment history. See *Dan Gamache Trucking Inc v Encore Metals Inc*, 2008 BCSC 343 at paras 46, 53, 58-60. Nothing in the terms of contract between OW UK and Canpotex created an agency relationship. Canpotex did not exercise control over how OW UK performed the contract. Canpotex paid a price to OW UK which was not dependent on the amount charged by MP. Canpotex was not aware of the terms between OW UK and MP's sale. MP's standard practice was to bill OW UK and be paid by Canpotex. All of these factors are inconsistent with the argument that OW UK was acting as agent for Canpotex.

[81] ING also submits that MP has neither a contractual nor a statutory lien against the Funds. MP relies upon its standard terms and conditions for its contractual lien but Canpotex never saw nor accepted those terms. In addition, the s 139 of the *MLA* lien can only attach to the Vessels – not to any and all of a charterer's property.

F. *MP's Reply*

[82] MP says that the Funds should be paid to MP because payment to MP will extinguish both MP's claim and OW UK's liability to MP. OW UK will then only have a claim for its mark-up and not for the price of the bunkers.

[83] If the Court orders payment to OW UK, then no order should be made to impact MP's alternate claims against the Vessels and their owners. MP has a valid contractual claim against the Vessels' owners and a maritime lien against the Vessels. There is no legal basis for the Court to extinguish either claim in the absence of payment. There has not been any security put up for

the claims. The sum of money has been interpleaded to satisfy two competing claims. There is nothing to suggest that MP's maritime lien is not valid or enforceable.

[84] If the Funds are paid to MP, there is no likelihood that OW UK will be able to assert a s 139 maritime lien or any statutory right *in rem*: *Balcan*, above. OW UK's liability to MP would be extinguished so its loss would be limited to its mark-up on the sale of the bunkers. No order extinguishing OW UK's claim, except as against Canpotex, would be necessary.

[85] In response to ING and the Receivers' position, MP says that ING's submissions on the contractual relationship between Canpotex and OW UK have nothing to do with MP's claim to the Funds. MP did not contract to either the Fixed Price Agreement or the OW UK general terms and conditions. MP contracted only upon its own standard terms and conditions. There is no doubt that Canpotex is subject to MP's standard terms and conditions as a "customer." Canpotex knew that MP was providing the bunkers.

[86] In addition, OW UK's general terms and conditions define "buyer" in substantially the same way as MP's standard terms and conditions define "customer." As a result, OW UK must be taken to have known that the broad definition meant that they were contracting on not only their own behalf, but also on Canpotex's behalf. In doing so, OW UK must have been acting as Canpotex's agent. OW UK's claimed right against the Vessels' owners could only be based upon the broad definition of "buyer" in its general terms and conditions. OW UK cannot assert that it requires parties with whom it contracts to do so on joint and several bases, but deny MP the same argument under its standard terms and conditions.

[87] MP says that it has a direct contractual relationship with Canpotex, but that, even if it did not, then clearly OW UK contracted with MP as agent for Canpotex. OW UK contracted with MP solely to supply bunkers for Canpotex. MP highlights the following points in establishing this agency relationship: OW UK was never the end user of the bunkers; MP's standard terms and conditions expressly contemplate that the party requesting bunkers may not be the end user; neither the Fixed Price Agreement nor OW UK's general terms and conditions deny the creation or existence of an agency relationship between OW UK and Canpotex when purchasing bunkers from a third party; the Fixed Price Agreement makes clear that MP's standard terms and conditions are applicable against Canpotex; the Fixed Price Agreement makes clear that a third party contract may create direct rights between Canpotex and MP; and, there is no direct evidence disputing MP's evidence regarding the transaction at issue. MP does not need to pursue recovery from OW UK as Canpotex's agent. MP can pursue recovery directly from the principal. See *Lang Transport Ltd v Plus Factor International Trucking Ltd* (1997), 32 OR (3d) 1 (CA).

[88] While it was not involved in the transaction between Canpotex and OW UK, MP says that it supports Canpotex's submissions. OW UK's evidence surrounding the transaction is defective or inappropriate in several ways. Specifically, MP complains that Mr. Mortensen's affidavit is not based upon firsthand knowledge of the negotiations between Canpotex and OW UK, and appears to be based simply upon his review of the documentation. His comments on the interpretation of the contract terms offend the parole evidence rule. Other portions of his affidavit are more properly characterized as argument, not evidence. The lack of evidence from anyone directly involved from OW UK should lead to an adverse inference. See *United States Polo Assn v Polo Ralph Lauren Corp* (2000), 286 NR 282 (FCA); *Van Duyvenbode v Canada*

(Attorney General), 2009 FCA 120; *Canada (Attorney General) v Quadrini*, 2010 FCA 47; *Manuge v Canada*, 2012 FC 499.

[89] MP also submits that ING and the Receivers lack a valid assignment to support their claim to the Funds. Their reliance on case law is inapplicable to this proceeding where both the Fixed Price Agreement and MP's standard terms and conditions include provisions which do not permit any assignment. In addition, both the Fixed Price Agreement and OW UK's general terms and conditions have an implied term that payment to OW UK is subject to OW UK being either the owner or supplier of the bunkers with the ability to control title to the bunkers. OW UK's failure to pay MP deprives OW UK of any right to claim against Canpotex for payment. See *Balcan*, above.

VI. ANALYSIS

A. *Preliminary Issues*

(1) Rule 108 – Availability of Interpleader

[90] ING contends that the Plaintiffs do not meet the test to interplead property into Court under Rule 108. Canpotex and MP say that this matter has already been decided by Prothonotary Lafrenière and ING cannot raise the issue again before me.

[91] A motion under Rule 108 is usually made *ex parte*, but in the present case all relevant parties filed motion records and Prothonotary Lafrenière heard from counsel for Canpotex, MP and ING who agreed to the terms of the Prothonotary's Order of March 27, 2015.

[92] The Prothonotary's Order of March 27, 2015, orders Canpotex to deposit the sum of USD$654,493.15 plus admiralty interest of USD$6,557.48 (for a total of USD$661,050.63) into trust to be treated as the equivalent of a payment into Court. This was done to allow the Court to hear "the respective claims to the Trust Funds… on or before July 17, 2015…."

[93] The Prothonotary's Order was made pursuant to Rule 108 and could not have been made unless the Prothonotary decided that Canpotex's motion involved "two or more persons" making "conflicting claims against another person in respect of property in the possession of that person" and that the conditions for interpleader had been satisfied. There is no indication in the Prothonotary's Order that the Court was left to decide anything under Rule 108 other than the respective claims to the Funds, although it would appear from the recitals to the Order that the Court should also consider, in conjunction with those claims, MP's "right to assert a Maritime lien against the Plaintiff's vessels" because it was determined at the oral hearing before the Prothonotary that it was "premature to make a full and final determination of Marine PetroBulk's right to assert a Maritime lien against the Plaintiff's vessel, and that an interpleader application is not the proper forum to make such a determination in a summary way." So the Prothonotary's Order dealt with and accepted an "interpleader application" under Rule 108.

[94] ING says that the only issue before me is who, as between ING and MP, is entitled to the Funds. But when Canpotex commenced this proceeding in January 2015, it sought to interplead funds and to extinguish all liability arising from the supply of marine bunkers to the Vessels, including all *in rem* claims against the Vessels. It also seems to me that the Prothonotary's Order,

in addition to accepting that the Funds can be interpleaded, also contemplates that the Court will address the lien situation.

[95] Hence, it seems to me that Prothonotary Lafrenière's Order of March 27, 2015, read in context, allows Canpotex to interplead the Funds and leaves the Court to decide their allocation as between ING and MP. This necessarily involves the extinguishment of Canpotex's liability arising from the supply of the bunkers (otherwise there would be no point to the interpleader) as well as the consideration of any liens that ING and MP can lay claim to against the Funds or the Vessels.

[96] ING did not seek to appeal Prothonotary Lafrenière's Order and, in fact, agreed to its terms. Consequently, I think that the issue of Canpotex's right to interpleader under Rule 108 has already been decided so that ING's arguments before me on the inappropriateness of interpleader in this context are misplaced. Those arguments should have been made before Prothonotary Lafrenière and, if ING objected to the terms of the Prothonotary's Order, it could have appealed that Order. I don't think they can be raised now.

[97] Clearly, ING is seeking to preserve the debt that Canpotex owed to OW UK in the event that the Court decides that the Funds are to be paid to MP. In my view, that bridge has already been crossed. ING has already accepted that the Court should decide the allocation of the Funds issue pursuant to interpleader proceedings under Rule 108. In my view, that acceptance necessarily involves the concession that these are suitable proceedings for interpleader under Rule 108.

[98] If I am wrong on this finding, then I find in the alternative that the facts and the governing jurisprudence support Canpotex's position that this is a suitable case for interpleader.

[99] ING says that this is not an appropriate case for interpleader, because there are multiple claims arising from multiple obligations and, in particular, MP does not have a claim directly against Canpotex who deposited the Funds.

[100] I think the facts and the legal realities before me suggest otherwise. There are no competing claims to *all* of the Funds, but MP and ING both claim a portion of the Funds that represents the debt payable to MP for the marine bunkers that MP supplied to the Vessels. This is a debt for which, as I discuss later, both Canpotex and OW UK are jointly and severally liable. If Canpotex discharges that debt to MP from the Funds, then it is a debt that OW UK will not have to pay. As a legal consequence, OW UK and ING cannot then compel Canpotex to pay OW UK the same amount as the discharged debt. A portion of the Funds also represents the sum owed by Canpotex to OW UK under the agreements of October 22, 2014 (both of which contemplated that MP would be the physical supplier) for OW UK's services which means, in effect, OW UK's mark-up for finding and dealing with MP. If MP is paid from the Funds, then OW UK and ING will only be out of pocket for the mark-up. The reality is that OW UK and ING are seeking to be reimbursed for a sum of money they have not paid and will never pay. This is a sum of money for which, under the terms and conditions by which MP agreed to supply the bunkers to the Vessels, Canpotex and OW UK were joint and severally liable.

[101] If no bankruptcy had occurred and OW UK had informed Canpotex that, under the terms of the agreement for supply of the bunkers, OW UK had the right not to pay MP the purchase price and still claim the full amount from Canpotex, including the purchase price portion, I don't think that either party would have said that this reflected their mutual understanding of the agreement between them. There is no evidence before me that OW UK has ever conducted business on this basis with Canpotex or any other client. In my view, bankruptcy cannot change that mutual understanding and agreement, and ING cannot now, in effect, claim a windfall for something that it has failed to do under the contractual arrangements by which Canpotex and OW UK are bound.

[102] ING says that Canpotex has exposed itself to double jeopardy in this case because of the way it chose to do business through OW UK rather than dealing directly with MP, the physical supplier of the bunkers. I don't think that either Canpotex or OW UK intended to do business in a way that would expose Canpotex to double jeopardy. In my view, there is no evidence before me to support this position and it would not have been in the interests of either party. It is, of course, in the interests of ING, but ING's interest are very different from those of either Canpotex or OW UK when they dealt with each other to arrange for the fuel bunkers to be delivered to the Vessels. ING cannot insert its present interests as a guide to the contractual terms at issue. ING is pursuing its rights as a creditor.

[103] Interpleader under Rule 108 is available where "two or more persons make conflicting claims against another person in respect of property in the possession of that person…." Both MP and ING are pursuing that portion of the Funds that represents monies owed to MP for the

delivery of the marine bunkers to the Vessels. In my view, these are conflicting claims. I adopt the words of Justice Forbes in *Dantata*, above, that:

> The true position, both in law and in common sense, it that…the two claims must be examined to see whether their subject-matter is or is not the same and interpleader may be appropriate where the subject-matter is found to be the same.

[104] In the present case, it is my view that the contractual arrangements entered into by Canpotex, OW UK and MP for the supply of marine bunkers to the Vessels render the subject matter of the competing claims between MP and ING the same. MP and ING both claim entitlement to that portion of the Funds which represents the amount claimed by MP for the supply of marine bunkers to the Vessels.

[105] What relevant case law we have on point suggests the following:

a) Interpleader requires a neutral stakeholder with no beneficial interest in the property who is at risk of two conflicting claims against the property or fund or some part of it. See *British Columbia Practice*, above.

b) The conflicting claims may be for all of the property of the fund or only a portion of it. See *Hoffman Brothers Ltd*, above;

c) The conflicting claims may arise from different causes of action. See *Savage*, above; and,

d) That justice requires the use of the proceedings.

[106] ING has cited various decisions from different jurisdictions which, either because of their specific facts situations, or different legal contexts, I find do not help to interpret Rule 108. Both law and common sense suggest to me that the subject matter of the present claims is the same and that justice requires the intervention of interpleader to ensure that Canpotex does not have to

pay twice for the marine bunkers that MP supplied to the Vessels, and that ING does not receive a windfall to which OW UK was not contractually entitled.

[107] In supplemental submissions after the hearing of this matter, ING had drawn the Court's attention to the recent decisions of Caproni J. of the United States District Court for the Southern District of New York in *UPT Pool Ltd et al v Dynamic Oil Trading (Singapore) Pte Ltd et al* (SDNY July 21, 2015) [*UPT Pool*], and Chong J. in *Precious Shipping Public Co Ltd et al v OW Bunker Far East (Singapore) Pte Ltd*, [2015] SGHC 187 [*Precious Shipping*].

[108] As regards *UPT Pool*, I accept ING's argument that the statements of Caproni J in the July 21st order were essentially *obiter dicta*. However, I have not relied upon those words in my reasons so that Caproni J's later clarification of the significance of her July 21st order does not impact my conclusions.

[109] As regards *Precious Shipping*, I note the grounds relied upon by Chong J. for rejecting interpleader in that case, but I don't find the case persuasive for denying relief under Rule 108 in a Canadian context where, as I will later address, it seems to me that s 139 of the *MLA* provides MP with a maritime lien in the circumstances of this case and where the respective rights, and liabilities of Canpotex, MP and OW UK are defined in some detail under the contractual terms that governed the supply of bunkers to the Vessels. In the present circumstances, Canpotex is facing both contractual *in personam* claims and maritime lien claims arising out of the same supply of bunkers to the Vessels by MP. In *Precious Shipping*, the physical suppliers of the

bunkers did not have a case for relief against the purchasers of the bunkers under the laws of Singapore.

B. *The Mortensen Affidavit*

[110] MP has asked the Court to strike paragraphs 7-13 of Mr. Mortensen's affidavit of March 17, 2015 on the grounds that these paragraphs contain opinion and hearsay. ING says that paragraphs 9 and 10 of the affidavit are "close to the line," but also says that it does seek to rely on them. ING says that the rest of the Mortensen affidavit is properly before this Court.

[111] Rule 81 of the *Federal Courts Rules* provides as follows:

81. (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.	81. (1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.
(2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.	(2) Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.

[112] The present motion is made under Rules 108, 64 and 216, so that we are dealing with summary judgment.

[113] Mr. Mortensen says in his affidavit (para 6) that:

> OWST entered into the General Terms for Fixed Price Trading with Canpotex Shipping Services Limited (**Canpotex**) on 14 February 2014 (the **Fixed Price Agreement** or **FPA**) for the supply of fuel to vessels owned and/or managed by Canpotex. Although I was not involved in the negotiation of this agreement, my role as Head of the Quality Support Department at OWBT requires me to have an understanding of the bunker supply arrangements for all OWB offices and the internal policies of those offices. Through my experience in this role, I am familiar with the FPA entered into by OWST and Canpotex and am able to comment on the purpose of it and its terms so far as I do so in this affidavit.

[114] Mr. Mortensen says that he was not involved in the negotiations that are relevant to the issue before me of what terms were intended to govern the supply of marine bunkers to the Vessels. As this issue is central to the matter of the allocation of the Funds that is before me, Mr. Mortensen says very little that is of assistance to the Court in his affidavit. I have no problem with paragraph 8 of the affidavit in that it speaks to Mr. Mortensen's personal experience with the OWB Group, but it really tells me nothing that assists with identifying the key facts that underlie the present dispute and entitlement to the Funds. Also, I see nothing controversial about paragraph 7, although Mr. Mortensen does not tell us how he knows this and, in any event, it does not assist the Court to determine what contractual terms governed the supply of bunkers to the Vessels.

[115] In my view, paragraphs 9 to 13 of the Mortensen affidavit are totally inappropriate in that they are nothing more than an unsubstantiated opinion on the very issue that the Court is now called upon to determine: "I have been asked to comment on whether the terms of the FPA entered into with Canpotex applied to the Contracts. They did not." This categorical opinion does not recite the full facts that are required to make it and is, in any event, simply telling the Court what conclusions it should come to. This kind of opinion is not admissible under Rule 81 because the Court is not confined to facts within Mr. Mortensen's personal knowledge. The most that can be said is that Mr. Mortensen's affidavit is based solely upon his belief, but Rule 81(2) says that where an affidavit is made upon belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts. The relevant contractual terms in this dispute were negotiated by Mr. Keith Ball for Canpotex (Mr. Ball has provided evidence) and representatives of the OW Group, none of whom have provided evidence in these proceedings. In particular, Mr. Ball makes it clear in his affidavit of March 23, 2015 (para 9), that he dealt with Mr. Robert Preston on the crucial issue of which terms would cover all bunker purchases by Canpotex with the OW Group:

> It was Canpotex's understanding that the Contract, and specifically the Terms, would cover all bunker purchases by Canpotex with the OW Group, including both fixed price transactions and spot purchases. Canpotex would not have entered into the Contract if the Terms noted therein did not apply to spot purchases, and made that point clear to OW UK through its discussions with Robert Preston.

[116] The Court has no affidavit from Mr. Preston or anyone else from the OW Group involved in the negotiations of the contractual terms at issue in these proceedings. In addition, I have been given no explanation as to why ING has not provided direct evidence of the contractual terms from someone who can speak to them. That being the case, I think I must not only strike

paragraphs 9 to 13 of the Mortensen affidavit, but must also draw a negative inference from ING's failure to provide direct evidence from someone in the OW Group who was involved in the negotiation of the supply terms with Mr. Ball.

C. *Rule 216*

[117] None of the parties dispute that this is an appropriate case for summary trial under Rule 216, and the Court is of the view that the findings of fact necessary to reach a decision are readily ascertainable.

[118] Under Rule 216 of the *Federal Courts Rules*, a judge should give judgment if he or she can find the facts as he or she would upon a trial, regardless of complexity or conflicting evidence, unless to do so would be unjust. The Court should consider the following factors (*Inspiration Management*, above, at paras 48, 53): the amount involved; the complexity of the matter; its urgency; any prejudice likely to arise by reason of delay; the cost of taking the case forward to a conventional trial in relation to the amount involved; the course of the proceedings and any other matters that arise for consideration.

[119] In my view, there is adequate evidence before me to allow me to dispose of this matter summarily. The cost of taking the matter to a full trial, bearing in mind the amounts involved, also suggest that this matter should be determined summarily. There is also some urgency in that the allocation of the Funds should be determined as soon as possible so as to avoid costs associated with the maintenance of the trust.

D. *Entitlement to Funds*

(1) Terms and conditions governing supply of marine bunkers to the Vessels

(a) *Agreement between Canpotex and OW*

[120] This is the nub of the dispute. Mr. Ball's affidavit sworn on behalf of Canpotex supports the following general sequence of events:

a) Effective February 14, 2014, Canpotex and OW Trading entered into a contract setting out general terms and conditions in relation to the purchase of marine bunkers by Canpotex, from OW Trading, on a "time to time" basis in respect of Vessels chartered by Canpotex. The Contract was actually signed in June 2014. However, the terms were all agreed as of February 14, 2014;

b) The negotiations leading to the Contract were conducted between Mr. Ball on behalf of Canpotex, and Robert Preston and Serge Laureau on behalf of the OW Group. Mr. Preston was the Managing Director of OW UK, and Mr. Laureau was a member of OW Trading. Mr. Preston was responsible for all spot purchases, while Mr. Laureau was responsible for fixed price contracts for future deliveries;

c) The negotiations leading to the Contract extended from 2012 to February 2014. During those negotiations, it was agreed between Mr. Ball and Mr. Preston that Schedule 3 to the Contract dealing with the General Terms and Conditions (GTC) for deliveries of bunkers applied to both spot purchases and fixed price agreements;

d) The GTCs included the following:

i. Schedule 3, Term H.1 provides that title in the marine bunkers delivered shall remain vested in the seller until full payment has been received by the seller of all amounts due in connection with the respective delivery;

ii. Schedule 3, Term H.5 provides that the seller shall have a right of lien over the bunkers delivered and can arrest/attach the vessel supplied the bunkers and/or any sister ship or assets of the buyer;

iii. Schedule 3, Term L.4 provides that terms and conditions of the Contract are subject to variation in circumstances where the physical supply of the fuel is being undertaken by a third party. In said circumstances, the terms of the Contract are varied and the buyer shall be deemed to have read and accepted the terms and conditions imposed by the third party seller;

e) On or about October 3, 2014, Canpotex entered into an agreement whereby it agreed to a time charter for the vessel, the MV Star Jing. That Charterparty provided in paragraph 2 that Canpotex would pay for all fuel, and in paragraph 18, that Canpotex would not allow any liens against the vessel;

f) On or about October 7, 2014, Canpotex entered into an agreement whereby it agreed to a time charter for the vessel, the MV Ken Star. That Charterparty provided in paragraph 2 that Canpotex would pay for all fuel, and in paragraph 18, that Canpotex would not allow any liens against the vessel;

g) On or about October 22, 2014, Canpotex ordered marine bunkers from OW UK to be delivered to the MV Ken Star. The OW UK Sales Order Confirmation in respect of the aforementioned is appended as Exhibit "B" to Mr. Ball's first affidavit. That document shows that the physical supplier was to be MP;

h) On or about October 22, 2014, Canpotex ordered marine bunkers from OW UK to be delivered to the MV Star Jing. The OW UK Sales Order Confirmation in respect of the aforementioned is appended as Exhibit "C" to Mr. Ball's first affidavit. That document shows that the physical supplier was to be MP;

i) The bunkers referred to above were ordered solely at the request of Canpotex, and not at the request of, or on behalf of, the registered and/or disponent owners of the Vessels; and,

j) The underlying Sales Order Confirmations from MP to OW UK are attached as part of Exhibit "D" to the first affidavit of Mr. Ball. They state as follows:

> This sale is subject to Marine Petrobulk's Standard Terms and Conditions, as revised May 2013, which is hereby incorporated in full in this Confirmation. (These Standard Terms and Conditions are hereafter referred to as "STC")

k) The MP STCs were provided by MP to OW UK. However, OW UK did not bring those STCs to the attention of Canpotex. The STCs of MP were first delivered to Canpotex by the solicitor for MP on December 22, 2014;

l) On or about October 27, 2014, pursuant to the above-referenced orders and while both Vessels were chartered by Canpotex, MP provided marine bunkers for use on the Vessels at Vancouver;

m) On October 28 and 29, 2014 respectively, MP invoiced OW UK in respect of the marine bunkers supplied to the Vessels, as follows:

   i. US$372,300.00 in respect of the MV Ken Star;

   ii. US$276,617.40 in respect of the MV Star Jing;

n) On or about October 27, 2014, OW UK invoiced Canpotex in respect of the marine bunkers provided by MP to the Vessels, as follows:

i. US$375,525.00 in respect of the MV Ken Star;

ii. US$278,968.15 in respect of the MV Star Jing;

o) The OW UK Invoices set out certain terms and conditions, including that payment, was to be made by Canpotex to OW UK by November 26, 2014;

p) As OW UK did not pay the MP invoices, by correspondence dated December 22, 2014, MP demanded payment from Canpotex in the amount of US$648,917.40 for the marine bunkers supplied to the Vessels. MP advised that as it had a maritime lien in respect of the marine bunkers supplied, and that it would arrest the Vessels unless Canpotex paid those invoices. The correspondence is appended as Exhibit "H" to Mr. Ball's first affidavit; and,

q) By email dated January 8, 2015, demand was made on behalf of the Receivers to the customers of OW UK in respect of amounts due and owing for marine bunkers. The email reported that if payment was not forthcoming, the Receivers reserved the right to exercise all powers available to them, which may include the arrest of customer's Vessels. A copy of this email is appended as Exhibit "I" to Mr. Ball's first affidavit.

[121] MP relies upon Mr. Ball's evidence and the affidavit of Mr. Anthony Brewster, president of MP, sworn April 8, 2015, for the following points:

a) On October 22, 2014, MP was contacted by Giorgia of O.W. Bunkers, apparently on behalf of OW UK, requesting whether MP could provide marine bunkers to two Vessels, the MV Ken Star (IMO # 9619593) and MV Star Jing (IMO # 9644823) both scheduled to be in the port of Vancouver in late October 2014;

b) In response, MP replied to Giorgia at O.W. Bunkers the same day confirming details of the planned bunker stem including quantities and pricing. Both confirmations expressly referenced that the sale is subject to MP's Standard Terms and Conditions, as revised May 2013. Specifically each confirmation provided expressly as follows:

> This sale is subject to Marine Petrobulk's Standard Terms and Conditions, as revised May 2013, which is hereby incorporated in full in this Confirmation. 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.

c) MP's Standard Terms and Conditions include, *inter alia*, the following:

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 owners 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 of the Vessel, Customer is deemed to be in 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 and 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.

10. LIENS

In agreeing to deliver Marine Fuels to the Vessel or Customer's delivery vessel, Marine Petrobulk is relying upon the faith and credit of the Vessel (or Customer's delivery vessel) and the personal credit of the owner of the Vessel (or Customer's delivery vessel), both of which are pledged by Customer in accordance with the authority given Customer and referred to in Clause 2 here. Customer acknowledges and agrees that Marine Petrobulk has and can assert a maritime lien on the Vessel or Customer's delivery vessel, and may take such other action or procedure against the Vessel, Customer's delivery vessel and any other vessel or asset beneficially owned or controlled by Customer, for all sums owed to Marine Petrobulk by Customer. Marine Petrobulk shall not be

bound by any attempt by any person to restrict, limit or prohibit its lien attaching to the Vessel and, in particular, no wording placed on the bunker delivery receipt or any similar document by anyone shall negate the lien hereby granted. Marine Petrobulk is entitled to rely on any provisions of law of the flag state of the Vessel, the place of delivery or where the Vessel is found and shall, among other things, enjoy full benefit of local rules granting Marine Petrobulk maritime lien on the Vessel and/or providing for the right to arrest the Vessel. Nothing in the Agreement shall be construed to limit the rights or legal remedies that Marine Petrobulk may enjoy against the Vessel or Customer in any jurisdiction.

16. APPLICABILITY, ENTIRE AGREEMENT AND MODIFICATION

Each sale of Marine Fuel shall be confirmed by a Confirmation. The Confirmation shall incorporate the Standard Terms and Conditions by reference and the Confirmation and the Standard Terms and Conditions together constitute the entire agreement between the parties with respect to the subject matter of the Agreement, and except where specified herein, supersedes any and all other prior and contemporaneous negotiations and agreements, whether oral or written, between them relating to the subject matter hereof. The Agreement will prevail notwithstanding any variance with the terms and conditions of any acknowledgment or other document submitted by Customer. This Agreement may not be added to, modified, superseded or otherwise altered by Customer unless confirmed in writing by Marine Petrobulk. All additions, deletions or revisions to the terms of this Agreement by Marine Petrobulk from time to time will be provided to Customer, and Customer is deemed to accept such revised terms by its acceptance of delivery of Marine Fuels, following such written notice by Marine Petrobulk. If there is any conflict between these Standard Terms and Conditions and the terms and conditions of a Confirmation, the terms and conditions of such Confirmation shall prevail.

d) Purchase order confirmations were provided by OW UK confirming acceptance of the planned bunker stem for both the Vessels. The Purchase order confirmations make no objection to the Standard Terms and Conditions as referenced in the Confirmation quoted above;

e) No objection of any sort to the application of the Standard Terms and Conditions was ever provided by or on behalf of the OW Group of companies;

f) Pursuant to that agreement (i.e. provision of bunkers based on the Standard Terms), MP delivered marine bunkers to the Vessels at the Port of Vancouver on or about October 27, 2014;

g) Following MP's delivery of marine bunkers to the Vessels, MP invoiced OW UK for the marine bunkers in the amount of USD$372,300.00 for the MV Ken Star; and USD$276,617.40 for the MV Star Jing;

h) By letter dated December 22, 2014, MP demanded payment in the amount of USD$648,917.40 from Canpotex for the supply of marine bunkers to the Vessels. Attached to that letter were MP's invoices, purchase order confirmations, bunker receipts and MP's Standard Terms and Conditions;

i) Despite demand MP has not been paid for the bunkers supplied to either the MV Ken Star or the MV Star Jing;

j) MP is a British Columbia company;

k) The supply of bunkers to the Vessels took place in the Port of Vancouver, within Canada;

l) The subject Vessels, MV Ken Star or the MV Star Jing, are foreign owned and flagged Vessels. The MV Ken Star is a Liberian flagged vessel with ownership controlled in Greece. The MV Star Jing is a Singapore flagged vessel with ownership controlled in Singapore; and,

m) None of the OW Group of companies has paid for the bunkers supplied by MP.

[122] ING takes the position that the supply of marine bunkers to the Vessels by MP was governed by the OW Bunker Group Standard Terms and Conditions of Sale for Marine Bunkers, Edition 2013 based upon the following facts and arguments:

a) In October 2014, Canpotex place two orders with OW UK for the supply of bunkers to the MV Star Jing and the MV Ken Star;

b) OW UK confirmed these orders on Sales Order Confirmations (Confirmations), which are Exhibits B and C respectively referred to in the Affidavit of Keith J. Ball #1, made January 29, 2015 (Keith Ball Affidavit #1);

c) The Confirmations specify that the supply of marine bunkers under the Confirmations will be governed by the OW Bunker Group Standard Terms and Conditions of sale for Marine Bunkers, Edition 2013 (OWB 2013 T&Cs). The OWB 2013 T&Cs are attached as Exhibit A to the Affidavit of Claus Mortensen, made March 17, 2015 (Claus Mortensen Affidavit);

d) OW UK contracted separately with the Defendant, MP to fulfil this order. MP supplied the Vessels with the bunkers that had been ordered;

e) OW UK invoiced Canpotex for the marine bunkers to the Vessels. Copies of those invoices are attached as Exhibit E to the Keith Ball Affidavit #1 (OW invoices). Similarly, MP invoiced OW UK for the marine bunkers to the Vessels;

f) From the emails exchanged between Mr. Ball and representative of the OW Groups, it is apparent that Canpotex had indeed expressed the wish during negotiation of the FPA to have one set of terms and conditions apply to both spot purchases and purchases under the FPA;

g) It is equally apparent that the OW Group was not prepared to have one set of terms apply to both spot purchases and purchases under the FPA – and that it told Canpotex as much;

h) Nothing in the FPA renders it applicable, on its face, to spot purchases;

i) On cross-examination on his affidavits, Mr. Ball was asked to produce any records he had to show that the OW Group ever changed its position from that set out in the written emails between the parties. No such records have been produced; and,

j) Contrary to the suggestion in Canpotex's Memorandum (at para 61), the fact that OW UK referred Canpotex in its order confirmation to the governing terms and conditions posted on its website, which were thought to be the same as those that are "well known to you and remain in your possession" suggests that it was *those* (posted) terms that applied, and not those attached as Schedule 3 to the FPA.

[123] As the above facts and assertions make clear, the crucial issue here is whether Canpotex and the OW Group ever agreed that Schedule 3 to the Contract dealing with General Terms and Conditions would apply to deliveries of marine bunkers that were spot purchasers (as the two deliveries at issue were) as well as fixed price agreements.

[124] ING concedes that the emails exchanged between Mr. Ball and representatives of the OW Group show that Canpotex wanted to have one set of terms and conditions apply to both spot purchasers and fixed price agreements, but says this was resisted by the OW Group and no agreement was ever reached to this effect. I think that ING is correct when it points out that no records have been produced by Canpotex to suggest that the OW Group ever changed its position

and agreed that the general terms and conditions negotiated for the fixed price agreement would also apply to spot purchasers. However, there is oral evidence that this did, in fact, occur.

[125] The evidence for such an agreement comes from Mr. Ball. In his affidavit of March 23, 2015, Mr. Ball opines as follows:

> 5. In or around 2001, Canpotex began purchasing bunker fuel from the OW Group. Since 2002, Canpotex has placed its orders for bunker fuel exclusively, through OW UK.
>
> 6. In or around June 2012, Canpotex began negotiating with the OW Group to finalize the Contract with the goal being, *inter alia*, to obtain an agreement that covered all of Canpotex's dealings with the OW Group, including both fixed price and spot purchases of bunker fuel.
>
> 7. The Contract is based on various negations [sic] between Canpotex and representatives of the OW Group, including both OW UK, O.W. Risk Management, and OW Trading between June of 2012 and February of 2014. The negotiation of the Contract specifically included revisions to the OW Group's Standard Terms and Conditions regarding the sale of Marine Bunkers (the "Terms"). A copy of the Terms is appended as Schedule 3 to the Contract. The Contract is the only contractual documents between the OW Group and Canpotex.
>
> 8. Following execution of the Contract, all of Canpotex's bunker fuel orders were placed with OW UK through its representative Robert Preston, Managing Director, and Giorgia Franchini, Bunker Trader. It is my understanding, and I verily believe it to be true, that the latter two individuals handled Canpotex's account with the OW Group.
>
> 9. It was Canpotex's understanding that the Contract, and specifically the Terms, would cover all bunker purchases by Canpotex with the OW Group, including both fixed price transactions and spot purchases. Canpotex would not have entered into the Contract if the Terms noted therein did not apply to spot purchases, and made that point clear to OW UK through its discussions with Robert Preston.

[126] Mr. Ball was cross-examined on these crucial issues. As the transcript of the cross-examination shows, Mr. Milman, legal counsel for ING, does a very thorough job of testing Mr. Ball on the above-noted paragraphs from his affidavit. The record is not entirely satisfactory because, as Mr. Milman repeatedly points out, we have no written confirmation that the OW Group agreed that Schedule 3 would apply to spot purchases and, in particular, to the two spot purchases that are the subject matter of these proceedings. Nevertheless, Mr. Ball is adamant and consistent that he and Mr. Preston of OW UK agreed that Schedule 3 would apply to the marine bunkers that MP supplied to the Vessels.

[127] The following sequences from the transcript address the point:

> Q I'm trying to follow through on these emails because what I get out of these emails, and you can correct me if I'm wrong, but it seems to me that you raised this with OW, that is that you wanted those terms and conditions in your fixed-price agreement to apply to all sales including spot sales. And they said we don't want to do that; right?
>
> A We wanted the general terms and conditions of the fixed-price contract to cover our spot sales as well, not the credit support annex or not the general terms for fixed-price trading, just the schedule 3 to apply to both spot fixtures and as schedule 3 in the fixed-price agreement.
>
> Q I see. So it was only part of the fixed-price agreement that would apply to the spot sales?
>
> A That's correct. Not the entire agreement, no.
>
> Q Well, anything else, other than schedule 3?
>
> A No. Because the rest of the agreement was only relevant to fixed price, but schedule 3 and what are the general terms and conditions govern the actual delivery of the fuel, which is why we wanted it to cover -- be applicable in both cases, because whether it's under a spot purchase or a fixed-price agreement, there's still an element of delivering the fuel and

that's what the general terms and conditions really govern, so that's why it was important for us.

Q So your difference with the OW people at the time was that you wanted those terms and conditions in schedule 3 to apply to both your fixed sales and your spot sales?

A That's correct.

Q And in the emails that we're looking at, they said no to that?

A Originally they said no to that, that's correct.

Q Right. And you said they came back later after these emails and said something else?

A That's correct.

Q And that was Mr. Preston orally?

A I know for sure I had discussions with Mr. Preston about it because when we eventually submitted our amendments and they submitted it to their -- those amendments to their outside legal counsel, a law firm called Plesner in Copenhagen. Their outside legal counsel sent an email back to us saying they couldn't change the fixed-price terms and I sent an email to Robert saying:

> We've been talking about this for months now that we have been past this and now I get this email saying, after a number of months now we can't do this.

Q Yes

A And he replied that he would speak to the risk management group about it.

Q Yes. And then what happened?

A Then they eventually agreed to our amendments.

Q Did you get -- in what form did you hear of that agreement? Did you get an email?

A Well, we have the signed agreement.

Q But in your view the agreement makes that clear?

A Well, it's clear that the final agreement shows what amendments were all captured in that.

Q In your fixed-price trading; right?

A In the schedule 3.

Q Yes. But it's part of a fixed-price agreement. That's what I'm getting at. Where do you get this idea that the OW group agreed to have schedule 3 applied to the spot trading?

A In my discussions with Robert Preston.

Q All right. That's not in writing anywhere, as far as you know?

A I don't have anything -- I'm not able to provide you with something.

Q Do you think that's in the fixed-price agreement, that idea?

A That it would cover both spot and -

Q Yes.

A In the fixed-price agreement itself?

Q Yes

A No, not that I'm aware of.

Q Could you be mistaken about that? What Mr. Preston said to you?

A No.

…

Q Is it possible, Mr. Ball, that what happened here was you had that misunderstanding right the way through?

A No. It's not possible.

Q You think that Mr. Preston made it clear to you that your schedule 3 would apply to your spot sales?

A Yes.

…

Q Paragraph 9:

> It was Canpotex's understanding that the contract and specifically the terms would cover all bunker purchases by Canpotex with the OW group, including both fixed-price transactions and spot purchases.

And I want to stop there and ask you, you say that was your understanding, but can you say whether you know if that was OW' s understanding or not?

A At the time the contract was signed?

Q Yes.

A Yes.

Q And how do you know that?

A As I mentioned before, I had a number of discussions with Robert Preston about it.

Q All right.

A Because, again, from the onset, it did not make -- it did not make sense for us to have two sets of terms and conditions covering essentially the same type of transaction which was the delivery of the fuel. The fixed price part of it was different, versus spot, but the actual delivery of the fuel is where the general terms and conditions really apply to. So from our standpoint, it didn't make sense to have a set of terms and conditions that apply to spot purchases and now we have different terms and conditions that apply to the delivery under a fixed-price agreement.

Q And why didn't that make sense to you?

A Because we were dealing with the same entity and we were dealing with a number of different market places, jurisdictions.

Q Yes, but couldn't you have different terms applying to your spot purchases and your fixed-price purchases?

A We could have, but it wouldn't have made sense to us.

Q Why?

A For the reasons I just outlined.

…

Q So are you saying you never would have completed that fixed-price agreement discussion and signed a contract unless you had clarity on the fact that the schedule 3 terms and conditions would apply to your spot purchases as well?

A We were insisting that the schedule 3 amendments also applied to our spot sales.

Q That was one of the most important things about that agreement for you, I gather?

A I don't know how I would put it on levels of importance, but it was as the majority of our business was on a spot basis, it was pretty important to us.

Q And yet you didn't put that in writing?

A I can't say whether or not I did. I'm not able to provide you something to show that I did or not.

Q You don't remember putting that in writing?

A I can't recall.

…

Q Sorry, maybe I misunderstood you. I'm talking about now the transactions that we were just looking at that are confirmed in Exhibits B and C.

A Yes.

Q And that are the subject of these proceedings and I think you agreed with me that those are not covered by the language of 1.1, that we've been looking at. They weren't intended to be covered by that paragraph?

A Well, they were never to be intended to be fixed-price purchases.

Q Right. They're spot purchases?

A That's correct.

Q Right. But then you started to say something about schedule 3; right? And that's what I was asking you about. How do you make the connection at least in this document between schedule 3 and the *Star Jing* and *Ken Star* deliveries that we're dealing with? How does one know that that schedule 3 set of terms applied to those?

A We had agreed – on the general terms and conditions that would cover out spot sales.

Q That was you and Mr. Preston?

A Yes.

Q Was anybody else privy to that, that you know of?

A I can't say.

[128] It seems to me that the situation is not entirely satisfactory, but Mr. Ball is clear that he had Mr. Preston's and OW's agreement that the two spot purchases from MP that are the subject of these proceedings would be subject, *inter alia*, to Schedule 3. ING has crossed-examined Mr. Ball closely on this and, in my view, he has confronted and responded to the challenge clearly. Mr. Milman asked him if he might be mistaken and he explained why he is not mistaken. On the other side, ING has produced no evidence from anyone involved in the negotiations - particularly Mr. Preston - which says that Mr. Ball was mistaken. Even without drawing a negative inference under Rule 81(2) I think I would have to find on the record before me, on the civil standard applicable in this case, that the bunker purchases at issue were subject to Schedule 3 of the General Terms and Conditions, and that Schedule 3 applied to deliveries of both fixed price agreements and spot purchases. The negative inference supports this conclusion but is not, strictly speaking, necessary.

[129] The principal consequences of this finding are that, in accordance with Schedule 3:

a) Term H.1 provides that title in any marine bunkers delivered remains vested in the seller until full payment has been received by the seller of all amounts due in connection with the respective delivery;

b) Term H.5 provides that the seller shall have a right of lien over any bunkers delivered and can arrest/attach the vessel to which the bunkers are supplied and/or any sister ship or assets of the buyer; and

c) Term L.4 provides that the terms and conditions of contracts between Canpotex and OW UK are subject to variation in circumstances where the physical supply of the fuel is provided by a third party. In these circumstances, the terms of the contract between Canpotex and OW UK are varied and the buyer is deemed to have read and accepted the terms and conditions imposed by the third party seller, in this case MP.

(2) Supply Terms

[130] MP supplied the marine bunkers directly to the Vessels on MP's Standard Terms and Conditions, as revised May 2013. This was made clear in the confirmations that MP provided to OW on October 22, 2014. Both of the confirmations are clear on this issue and specify as follows:

> This sale is subject to Marine Petrobulk's Standard Terms and Conditions, as revised May 2013, which is hereby incorporated in full in this Confirmation. 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.

[131] The relevant MP Standard Terms and Conditions are set out in paragraph 121(c) above.

[132] The record before me shows that OW UK provided purchase order confirmations for the supply of bunkers to both Vessels. No objection was raised to the Standard Terms and Conditions, and no objection has even been raised. So it is clear that OW UK understood and

accepted that MP would supply the bunkers to the Vessels on MP's Standard Terms and Conditions. It is also clear from Schedule 3 of the General Terms and Conditions between Canpotex and OW UK that Canpotex and OW UK understood and agreed that their contractual arrangements would be varied where the physical supply of the fuel was undertaken by a third party such as MP, and that the buyer was deemed to have read and accepted the terms and conditions imposed by the third party. Consequently, I conclude that both Canpotex and OW UK were bound by MP's General Terms and Conditions for the supply of the marine bunkers to the Vessels that are the subject of this dispute.

[133] Given the clear import of the documentation between MP and OW UK, I cannot accept ING's argument that OW UK contracted with MP on OW's Standard Terms and Conditions. It is, of course, understandable why ING would now want that to be the case, but ING cannot assert greater rights against Canpotex and/or MP that were enjoyed by OW UK, and the record is clear that OW UK accepted that the marine bunkers would be supplied to the Vessels on MP's Standard Terms and Conditions. ING is looking for a technical way out of the consequences of this agreement between MP and OW UK but, in my view, ING cannot assert contractual rights or equities that OW UK did not have.

(3) Consequences - Contractual

[134] As MP's Standard Terms and Conditions make clear, "Customers" are bound and the agreement "will prevail notwithstanding any variance with the terms and conditions of any acknowledgement or other document submitted by the Customer" (para 16). What is more, the agreement "may not be added to, modified, superseded or otherwise altered by Customer unless

confirmed in writing by Marine Petrobulk" (para 16). The definition of "Customer" in paragraph 1 clearly includes Canpotex as either a "charterer" or a "party benefitting from consuming the Marine Fuel." There is no evidence before me to suggest that MP's Standard Terms and Conditions have been added to, modified, superseded or otherwise altered in any way either by OW UK or Canpotex, in this case. Consequently, it is my view that I am obliged to identify and apply MP's Standard Terms and Conditions to the issues before me in this case.

[135] On the record before me, the evidence shows that on or about October 22, 2014 Canpotex, as charterer, ordered the marine bunkers from OW UK to be delivered to the Vessels, and that on October 22, 2014, MP was contracted by OW UK to provide the marine bunkers to the Vessels. MP provided confirmation to OW UK on the same day. Paragraph 2 of MP's Standard Terms and Conditions provides as follows:

> … 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 such 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.

[136] In my view, the agreement is clear that Canpotex and OW UK were jointly and severally liable to pay MP the full purchase price for the marine bunkers delivered to the Vessels. This is so even though MP initially invoiced OW UK for the purchase price. In my view, this liability arises irrespective of whether OW UK acted as agent, broker or manager for this supply of the bunkers. The definition of "Customer" under s 1 of the MP's Standard Terms and Conditions captures both Canpotex and OW UK as Customers, and s 2 also deems any principal, agent, manager or broker to be a Customer, "all of whom shall be jointly and severally liable as

Customer under each Agreement." Read in the context of the whole clause and agreement, these words, in my view, cannot possibly mean that joint and several liability only arises if there is a principal/agent, broker or manager relationship. The clause simply brings such parties within the meaning of "Customer" if there is such a relationship, and it is all customers who are jointly and severally liable "under each Agreement." On the facts before me, this means that joint and several liability extends to MP and OW UK because they both meet the definition of "Customer" either under s 1, or under s 2 if there is an agency manager or broker relationship. The Court does not have to decide if a principal/agent relationship exits in this case between Canpotex and OW UK. In the normal course, Canpotex would be responsible for the full purchase price and OW UK would be entitled to its mark-up. In the event of OW UK's bankruptcy and failure to pay the purchase price for the marine bunkers to MP, the Standard Terms and Conditions make it clear that MP can look to Canpotex and compel payment of the full amount. In the event that Canpotex does pay the full amount then it is not contractually obliged to also pay OW UK the purchase price because OW UK has breached its obligations to pay for the bunkers. The reality is that, if Canpotex pays MP for the bunkers the full purchase price will have been paid directly by Canpotex rather than indirectly though OW UK. Canpotex's direct payment will fall within the terms of MP's Standard Terms and Conditions by which Canpotex, OW UK and MP are bound. These terms and conditions are deemed (paragraph 16) to supersede all prior negotiations and agreements. There is no residual contractual obligation that requires Canpotex to also pay the purchase price to OW UK after it has paid MP, and it would be bizarre and unconscionable if there were. In my view, MP's Standard Terms and Conditions clearly contemplate a situation such as the present where, if OW UK goes bankrupt and cannot pay the full purchase price for the bunkers, then MP can look to Canpotex for payment on the basis of joint and several liability.

[137] My conclusion is that Canpotex is directly liable to MP for the full purchase price of the marine bunkers delivered to the Vessels by MP and that, upon payment of that purchase price to MP, Canpotex is not obliged, contractually or otherwise, to pay any amount representing the purchase price for the marine bunkers to OW UK or the Receivers.

(4) Consequences – Lien Claims

[138] MP claims both a contractual lien and a maritime lien under s 139 of the *MLA*, to the Funds that Canpotex has placed in trust.

[139] Paragraph 10 of MP's Standard Terms and Conditions by which Canpotex, OW UK and MP are bound, makes it clear that MP has a lien claim for all sums owed by Canpotex, as customer, to MP. The paragraph reads in relevant part as follows:

> …Customer acknowledges and agrees that Marine Petrobulk has and can assert a maritime lien on the Vessel or Customer's delivery vessel, and may take such other action or procedure against the Vessel, Customer's delivery vessel and any other vessel or asset beneficially owned or controlled by Customer, for all sums owed to Marine Petrobulk by Customer. Marine Petrobulk shall not be bound by any attempt by any person to restrict, limit or prohibit its lien attaching to the Vessel and, in particular, no wording placed on the bunker delivery receipt or any similar document by anyone shall negate the lien hereby granted…

[140] It is clear from paragraph 10 that MP has a lien against the Vessels in this dispute. What is less clear is whether it grants a lien in the Funds as being an "asset beneficially owned or controlled" by Canpotex. When paragraph 10 is read as a whole, it is my view that the lien can be asserted "on the Vessel or Customer's delivery vessel," and that what can be asserted against "any other vessel or asset beneficially owned or controlled by Customer" is "such other action or

procedure" as may yield "all sums owed to Marine Petrobulk by Customer." It is not clear whether the contractual lien extends beyond the Vessels to any asset beneficially owned by Canpotex. It might be argued that the Funds have been put up to replace the *res*, because Canpotex is legally obliged to other parties to ensure that no liens attach to the Vessels. Whether this means that MP now has a lien claims against the Funds, however, is unclear.

[141] The same issue arises with the s 139 lien claim which, under s 139(2) of the *MLA* is granted "against a foreign vessel." In *Norwegian Bunkers*, above, Justice Gagné left the following question unanswered:

> [77] The defendants argue that this interpretation is not consistent with the history and purpose of section 139 of the Act. It was enacted to place Canadian ship suppliers in a more equitable position relative to their American counterparts. The parliamentary debates preceding the enactment of the section testify to that effect:
>
> > [...] These are Canadian companies that supply ships that call at Canadian ports with everything from fuel to water, to food and equipment that is being purchased. Today these businesses do not have the same rights as American businesses who supply the same ship in their own port. Not even our own courts here in Canada will do this. That is because American ship suppliers benefit from a lien in American law which can be enforced in Canadian courts.
> >
> > These Canadian businesses have been telling the government for some time that they also need the same protection. This Conservative government is delivering that protection to them. (*House of Commons Debates*, 40th Parl, 2nd Sess, No 18 (25 February 2009) at 1605 (Brian Jean — Parliamentary Secretary to the Minister of Transport, Infrastructure and Communities, CPC))
>
> [78] In *Comfact Corp. v. "Hull 717" (The)*, 2012 FC 1161 (F.C.), Justice Harrington further confirms that the purpose of the

> section's introduction was to remedy the unfair situation of Canadian ship suppliers:
>
> > [31] [...] [T]he mischief which gave rise to so much complaint related to the unfortunate position Canadian necessaries men found themselves in as compared to American necessaries men who arrested a ship in Canada, the principle of "presumption of coherence" is applicable [...]
>
> …
>
> [80] Whether a Canadian maritime lien would flow from the purchase of bunkers by a charterer rather than by the owner is a question that remains to be decided (*The Nordems, FC*, at paras 27 - 28; *Cameco Corp. v. "MCP Altona" (The)*, 2013 FC 23 (F.C.), at paras 49 - 54).

[142] I am prepared to accept that a maritime lien under s 139 does flow to MP because all of the statutory requirements are met in this case. MP is a Canadian company carrying on business in Canada and has supplied goods to the foreign Vessels for their operation. But whether a s 139 maritime lien in the Vessels can extend to the Funds in this case does not, in my view, automatically follow. The Funds were put up by Canpotex so that neither MP nor OW UK would asset liens and arrest the Vessels. This doesn't mean that they replace the *res*.

[143] What is clear, I think, is that ING has no lien or security interest against the Vessels or any asset beneficially owned by Canpotex, including the Funds, so that once Canpotex pays MP the purchase price for the bunkers supplied to the Vessels from the Funds, ING has no claims against Canpotex or any asset Canpotex or the other Plaintiffs own or control.

[144] Given this situation, I don't think it is necessary for me to decide whether MP has a contractual or a s 139 maritime lien in the Funds. As noted in *Enforcement of Maritime Claim*s, above, at, para 17.3:

> The primary purpose of a "lien" is to confer a proprietary interest in an asset as security for a judgment or a claim, the claim itself being based on one of a number of substantive and recognized legal relationships. As a proprietary interest, the "lien" is enforceable against third parties.

[145] In the present case it seems to me that ING has no contractual or lien right to assert against the Funds or the Vessels, and that MP is entitled to the disputed portion of those funds as a function of contract law and equity. In *Balcan*, above, Balcan pursued a necessaries claim under s 22(2)(m) of the *Federal Courts Act* in a situation where Balcan had not paid for the necessaries. The Court concluded that Balcan was not in the position of a necessaries claimant (para 19) so that Balcan had no *in rem* right of action because no such action could arise where a claimant fails to supply necessaries to a ship. In the present case, OW UK did not supply the marine bunkers and, in addition, OW UK has not paid for the marine bunkers that were supplied by MP to the Vessels. Consequently, based upon the reasoning in *Balcan*, I do not see how ING can now assert any *in rem* claims against the Vessels or the Funds. MP has supplied the marine bunkers to the Vessels under MP's Standard Terms and Conditions which supersede any contractual arrangements to the contrary between Canpotex and OW UK. MP is contractually entitled to payment for the bunkers from Canpotex. ING, standing in the shoes of OW UK, is not entitled to any payment representing the purchase price of the bunkers because MP was not paid that purchase price and, under the Standard Terms and Conditions, has thus triggered a direct liability for Canpotex to pay it. This being the case, I don't think I need to consider any priority position based upon lien rights between MP and the OW Group of companies.

[146] I do agree with MP, however, that MP has both a contractual and an s 139 maritime lien in the Vessels that is not extinguished until such time as MP receives payment in full for the marine bunkers delivered to the Vessels.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. Canpotex shall pay to the Defendant, Marine Petrobulk Ltd, the sum of USD$648,917.40 together with admiralty interest thereon;
2. The Defendant, Marine Petrobulk Ltd, shall be paid the above amount from the Funds presently held in trust pursuant to the Order to March 27, 2015;
3. Canpotex shall pay (subject to the costs payable in accordance with paragraph 5 of this Order set out below) to the Defendants, 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 (U.K.) Limited, and others, an amount equal to the mark-up payable to O.W. Bunkers (U.K.) Limited for the supply by Marine Petrobulk Ltd of bunkers to the Vessels, together with the maritime interest payable thereon. The balance of the Funds held in trust shall be applied against this amount after Marine Petrobulk Ltd has been paid in full in accordance with paragraphs 1. and 2. above;
4. Upon payment in accordance with paragraphs 1., 2. and 3. above, any and all liability of the Plaintiffs and the Vessels to the Defendants in respect of the marine bunkers supplied to the Vessels on or about October 27, 2014 in Vancouver, British Columbia together with any and all liens, is extinguished;
5. The Defendants, 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 (U.K.) Limited, and others shall pay the costs of the Plaintiffs and the Defendant, Marine Petrobulk Ltd, for this action and

motion which costs may be deducted and paid from the amount payable to 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 (U.K.) Limited, and others from the Funds held in trust in accordance with paragraph 3. above; and,

6. Any balance remaining of the Funds held in trust after payments and costs are made as set out above shall be returned to Canpotex.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-109-15
STYLE OF CAUSE:	CANPOTEX SHIPPING SERVICES LIMITED, NORR SYSTEMS PTE. LTD., OLDENDORFF CARRIERS GMBH & CO. K.G. AND STAR NAVIGATION CORPORATION S.A. v MARINE PETROBULK LTD., O.W. SUPPLY & TRADING A/S, O.W. BUNKERS (UK) LIMITED, 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
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JULY 16, 2015
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	SEPTEMBER 23, 2015

APPEARANCES:

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