

Canpotex Shipping Services Limited v. Marine Petrobulk Ltd., 2015 FC 1108 (CanLII)

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Background Facts:

In 2014, Canpotex Shipping Services Limited (“Canpotex”) and O.W. Supply & Trading A/S (“OW Trading”) entered into a contract for the time-to-time purchase of marine bunkers for vessels chartered by Canpotex (the “Fixed Price Agreement”). Pursuant to the Fixed Price Agreement, Canpotex negotiated modified General Terms and Conditions to apply in respect of the purchase of bunkers under same (the “Amended OW GTCs”).

In early October of 2014, Canpotex time chartered the M/V Star Jing and the M/V Ken Star (collectively, the “Vessels”). The time charter agreements provided that Canpotex would pay for all fuels and not allow any liens against the Vessels.

On October 22, 2014, Canpotex ordered marine bunkers from O.W. Bunkers (UK) Limited (“OW UK”) to be supplied to the Vessels in Vancouver, BC, Canada. The sales order confirmation provided by OW UK in relation to the bunkers indicated that the physical supplier of the fuel was to be Marine Petrobulk Ltd. (“MP”).

On October 27, 2014, MP provided the bunkers to the Vessels. MP subsequently invoiced OW UK for the bunkers on October 28 and 29, 2014, in the amount of USD\$648,917.40.

On October 27, 2014, OW UK invoiced Canpotex for the bunkers supplied in the amount of USD\$654,493.15. OW UK’s mark-up on the bunkers was USD\$5,575.75.

On November 7, 2014, OW Trading filed for bankruptcy in Danish courts, with OW UK and other related subsidiaries filing shortly thereafter. In December of 2014, an agreement was reached pursuant to which money owing in relation to OW UK receivables would be paid into ING accounts.

OW UK never paid MP’s invoices. As a result, on December 22, 2014, MP demanded payment from Canpotex for the bunkers supplied to the Vessels. MP claimed it had a

maritime lien and threatened to arrest the Vessels if not paid. A similar demand for payment was made on behalf of ING shortly thereafter, along with the threat of arresting the Vessels.

On March 27, 2015, Canpotex proceeded with a motion in the Federal Court seeking, *inter alia*, to pay the disputed amount owing in respect of the bunkers into Court. The Court, with the consent of the parties, allowed Canpotex to interplead the amount owing pursuant to OW UK's invoice, plus admiralty interest, into the trust fund of its solicitors (the "Funds"). The Funds were to be held pending a hearing as to the party entitled to same.

On June 22, 2015, the matter proceeded to a hearing in the Federal Court of Canada before the Honourable Mr. Justice Russell. Canpotex sought summary judgment that its interpleading of the Funds had extinguished any liabilities in respect of the bunkers at issue. Both ING and MP sought summary judgment regarding entitlement to the Funds. Both ING and MP alleged that if the Funds were ordered payable to the other claimant, their *in rem* rights against the Vessels would remain unaffected.

Held:

MP would be paid from the Funds the amount owing for the bunkers it supplied, and ING would be paid OW UK's mark-up from the Funds. Upon payment, any and all liabilities of Canpotex and the Vessels, and any lien rights, would be extinguished.

Decision:

At the outset of the hearing, ING argued that Canpotex had not met the test for interpleader pursuant to Rule 108 of the *Federal Court Rules*. Conversely, both Canpotex and MP argued that this matter had been decided in the previous hearing before the Federal Court.

In addressing the matter, Mr. Justice Russell concluded that the issue of Canpotex's right to interplead had already been decided at the previous hearing. As a result, ING's argument on the inappropriateness of interpleader was misplaced. In any event, the Court found in the alternative that the matter was an appropriate case for interpleader.

In support of its decision, the Court reviewed the relevant case law regarding interpleader and noted the following points at paragraph 105:

1. 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;
2. the conflicting claims may be for all of the property of the fund or only a portion of it;
3. the conflicting claims may arise from different causes of action; and
4. that justice requires the use of the proceedings.

The Court stated that the contractual arrangements entered into by Canpotex, OW UK and MP for the supply of marine bunkers to the Vessels rendered the subject matter of the competing claims between MP and ING the same. MP and ING both claimed entitlement to that portion of the Funds which represented the amount claimed by MP for the supply of marine bunkers to the Vessels. Therefore, the matter was appropriate for interpleader.

The entitlement of MP and ING to the Funds was dependent upon the terms of the agreements between the parties. In this regard, the Court concluded that the applicable General Terms and Conditions under which Canpotex purchased bunkers from OW UK, were the Amended OW GTCs. The Amended OW GTCs contained a term such that the terms and conditions of the contract were subject to variation where the physical supply of the fuel was being undertaken by a third party. In said circumstances, the terms of the contract were varied and the buyer was deemed to have read and accepted the terms and conditions imposed by the physical seller.

As a result, it was concluded that both Canpotex and OW UK were bound by MP's Standard Terms and Conditions ("MP's STCs") for the supply of the bunkers, and that MP's STCs were to apply in addressing the issues before the Court. Based on MP's STCs, and the definition of "Customer", both Canpotex and OW UK were jointly and severally liable to pay MP the full price of the bunkers.

In rendering its decision, the Court stated at paragraph 136:

"In the event of OW UK's bankruptcy and failure to pay the purchase price for the marine bunkers to MP, the [MP's STCs] make it clear that MP can look to Canpotex to compel payment of the full amount. In the event 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 obligation 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 through OW UK. Canpotex's direct payment will fall within the terms of [MP's STCs] by which Canpotex, OW UK and MP are bound."

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"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 STC's] 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."

MP and ING both claimed lien rights in respect of their claims. The Court was prepared to accept that that MP did have a maritime lien under s. 139 of the *Marine Liability Act* (S.C. 2001, c. 6) against the Vessels. However, the Court was unclear if this lien could extend to the Funds. In this regard, it was queried if the Funds were a replacement of the *res*, given that they were paid by Canpotex, and not the Owners of the Vessels.

Given the decision of the Court, this issue did not need be decided as any lien claim MP had would be extinguished upon payment of the amount due to it.

Conversely, the Court held that ING had no lien or security interest against the Vessels or any asset beneficially owned by Canpotex, including the Funds. The Court cited a previous decision of *Balkan ehf. v. Atlas (The)*, 2001 FCT 1328, wherein it was held that an intermediary who has not paid the actual physical supplier of goods or services to a vessel is not entitled to make an *in rem* claim against the vessel to which the goods or services were supplied. Based on the fact that OW UK did not supply and pay for the bunkers at issue, ING could not assert any *in rem* claims against the Vessels or the Funds.