Federal Court of Appeal  Cour d'appel fédérale

Date: 20170310

Docket: A-462-15

Citation: 2017 FCA 47

CORAM: **NADON J.A.**
DAWSON J.A.
WEBB J.A.

BETWEEN:

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

Appellants

and

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

Respondents

and

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

Respondents

Heard at Vancouver, British Columbia, on June 16, 2016.

Judgment delivered at Ottawa, Ontario, on March 10, 2017.

REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	DAWSON J.A. WEBB J.A.

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REASONS FOR JUDGMENT

NADON J.A.

I. Introduction

[1] On October 27, 2014, at the request of the respondent Canpotex Shipping Services Limited (Canpotex) marine fuel (the bunkers) was delivered to two vessels, namely the M.V. *Star Jing* and the M.V. *Ken Star* (the Vessels), lying in the Port of Vancouver, British Columbia. The dispute now before us in this appeal seeks an answer to the question: "Who is entitled to payment in respect of the delivery of the aforesaid bunkers?"

[2] The contenders for payment are the respondent Marine Petrobulk Ltd. (Petrobulk) and the appellants ING Bank N.V. (ING), Ian David Green (Green), Anthony Victor Lomas (Lomas) and Paul David Copley (Copley), in their capacities as Receivers of certain assets of O.W. Supply & Trading A/S (OW S&T) and O.W. Bunkers (U.K.) Limited (OW UK) (referred to hereafter as the appellants). Confronted with a demand for payment from both Petrobulk and the appellants, Canpotex commenced proceedings in the Federal Court seeking a determination with regard to the entity it should pay and, upon payment to that entity, a declaration that its liability in regard to the delivery of the bunkers was extinguished.

II. Facts

A. *The Parties*

[3] At all material times, Canpotex was the time charterer of the Vessels. Pursuant to the terms and conditions of the Charter Parties, in the New York Produce Exchange Form, entered into between Canpotex and the owners of the Vessels, it was Canpotex's responsibility to

provide and pay for all bunkers required by the Vessels (clause 2 of the Charter Parties) and to ensure that no lien or encumbrance incurred by it and its agents would have priority over the title and interest of the owners of the Vessels (clause 18 of the Charter Parties).

[4] At all material times, Norr Systems Pte. Ltd. (Norr) was the registered owner of the M.V. *Star Jing*, Oldendorff Carriers GmbH & Co K.G. (Oldendorff) was its disponent owner and Star Navigation Corporation S.A. (Star) was the owner of the M.V. *Ken Star* (these entities shall hereafter be referred to as the Shipowners).

[5] With respect to the O.W. group of companies (OW Group), their activities included, *inter alia*, the supply, sale and trading of bunkers worldwide. More particularly, the business of OW UK, one of the entities of the OW Group, consisted primarily in the selling and arranging of delivery of bunkers to customers of the OW Group.

[6] The other party to these proceedings is Petrobulk, a British Columbia company whose business consists of the selling and providing of bunkers to deep sea vessels in and around the port of Vancouver.

B. *The Bunker Purchases*

[7] On February 14, 2014, Canpotex and OW S&T agreed on the terms of a fixed price trading agreement (the Fixed Price Agreement or the Agreement) that was to govern Canpotex's purchase of bunkers on a "time to time" basis in respect of vessels chartered by Canpotex. The negotiations leading to the Fixed Price Agreement were conducted between Keith Ball, on behalf

of Canpotex, and Messrs. Robert Preston and Serge Laureau, on behalf of the OW Group. The contract was signed in June, 2014.

[8] The purpose of the Fixed Price Agreement was, as I understand it, to allow Canpotex the option of purchasing bunkers at a set price over a set period when market rates were favourable. Because Canpotex never viewed market conditions as favourable during the relevant period, it never locked in the price of bunkers and hence made no purchases under the Agreement. In fact, such purchases never occurred as the OW Group went into bankruptcy in November, 2014.

[9] On October 22, 2014, Canpotex placed two orders with OW UK for the supply of bunkers to the Vessels in the Port of Vancouver. There is no dispute between the parties that those orders were "spot purchases" as opposed to fixed price transactions falling under the Fixed Price Agreement.

[10] Later that day, OW UK sent Canpotex two sales order confirmations (the OW UK Confirmations) which provided that the purchases were subject to the OW Group's General Terms and Conditions of sale which were incorporated in the confirmations and made accessible by way of a URL link. The OW UK Confirmations further indicated that OW UK had made arrangements with a third party, namely Petrobulk, for the physical delivery of the bunkers at the Port of Vancouver. There were no further negotiations between Canpotex and the OW Group following the OW UK Confirmations.

[11] On October 22, 2014, following an inquiry from OW UK as to whether Petrobulk could provide bunkers to the Vessels in the Port of Vancouver, Petrobulk confirmed to OW UK that it was prepared to deliver the bunkers to the Vessels. Petrobulk's written confirmations made it clear to OW UK that its services were subject to its own Standard Terms and Conditions of sale and delivery (Petrobulk's Standard Terms and Conditions), which were incorporated in its confirmations (the Petrobulk Confirmations).

[12] Also on October 22, 2014, OW UK sent to Petrobulk purchase order confirmations in regard to the delivery of the bunkers to the Vessels.

[13] On October 27, 2014, Petrobulk delivered the bunkers to the Vessels in the Port of Vancouver. On that day, OW UK invoiced Canpotex in respect of the bunkers provided by Petrobulk to the Vessels for a total amount of USD $654,493.15 due on November 26, 2014. On October 28 and 29, 2014, Petrobulk invoiced OW UK in respect of the bunkers which it delivered to the Vessels for a total amount of USD $648,917.40. The difference between the two amounts constitutes OW UK's mark up for its services.

C. Bankruptcy of the OW Group

[14] On December 19, 2013, OW S&T and a number of its subsidiaries, including OW UK, assigned their receivables from the sale of bunkers to ING. Canpotex was notified of this assignment during the month of December 2013.

[15] On November 7, 2014, OW S&T filed for bankruptcy and OW UK did the same shortly thereafter. On November 12, 2014, ING appointed Green, Lomas and Copley (the Receivers) as receivers of the OW Group's receivables. On December 12, 2014, Charles Christopher Macmillan was appointed administrator of OW UK (the Administrator) in the English bankruptcy proceedings.

[16] Pursuant to a cooperation agreement entered into by ING, the Receivers and the Administrator on December 22, 2014, it was agreed that all monies owing to OW UK assigned to ING would be collected by ING and payment to it would satisfy the debtors' obligations to OW UK.

[17] On December 22, 2014, by reason of OW UK's failure to pay its invoices, Petrobulk requested payment from Canpotex of the amount owed to it following its delivery of the bunkers on October 27, 2014. In making its request for payment, Petrobulk made Canpotex aware of its Standard Terms and Conditions. Further, Petrobulk indicated to Canpotex that it had a contractual lien against its assets and a maritime lien against the Vessels.

[18] On January 8, 2015, the Receivers requested payment from Canpotex of USD $654,493.15 and advised Canpotex that, unless payment was made, they would exercise all of their rights including the arrest of the Vessels.

III. The Proceedings

[19] On January 23, 2015, Canpotex filed a statement of claim in the Federal Court seeking, *inter alia*, directions from the Court pursuant to Rule 108 of the *Federal Courts Rules*, SOR/98-106 (the Rules). More particularly, Canpotex sought an order granting it leave to deposit into Court the sum of USD $654,493.15 and an order declaring that, upon deposit into Court of the aforesaid funds, its liability in respect of the supply of the bunkers to the Vessels would be extinguished.

[20] Further to filing its statement of claim, Canpotex filed a motion on February 11, 2015, pursuant to Rule 108(1) and (2), seeking an order allowing it to deposit into Court the sum of USD $654,493.15 plus admiralty interest from November 26, 2014 to the date of the deposit and a declaration that upon said deposit, its liability in respect of the supply of the bunkers to the Vessels was extinguished.

[21] Canpotex's motion was heard by Prothonotary Lafrenière (the Prothonotary) who, on March 27, 2015, ordered Canpotex to deposit the sum of USD $654,493.15, plus admiralty interest from November 26, 2014 to March 31, 2015 in the sum of USD $6,557.48, for a total sum of USD $661,050.63 (the Trust Funds) into the U.S. Trust account of its solicitors. This deposit was to be "treated as the equivalent of a payment into Court" (paragraph 2 of the Prothonotary's order).

[22] The Prothonotary further ordered that the hearing of the claims against the Trust Funds should be held no later than July 17, 2015 "subject to the availability of the Court and counsel of

record" and that, pending the hearing, no proceedings were to be commenced nor were any claims to be made against the Vessels or their owners in respect of the bunkers supplied to the Vessels on October 27, 2014.

[23] On April 2, 2015, Canpotex deposited the Trust Funds in its solicitors' U.S. Trust account in compliance with the Prothonotary's order.

[24] On April 14, 2015, the statement of claim filed by Canpotex on January 23, 2015 was amended by consent of all interested parties. More particularly, the Shipowners were added as plaintiffs to the action and the appellants Green, Lomas and Copley, in their capacities as Receivers, were added as defendants.

[25] On June 19, 2015, Canpotex and the Shipowners filed a motion seeking judgment, pursuant to Rules 216, 64 and 108(1) and (2), declaring which entity, Petrobulk and/or ING, was entitled to all, or part, of the Trust Funds and also declaring that any and all liability of Canpotex and the Shipowners, following payment out of the Trust Funds, was extinguished.

[26] On June 22, 2015, Petrobulk filed a motion, pursuant to Rules 108 and 216, seeking judgment in regard to its unpaid invoices totalling USD $648,917.40 in connection with its delivery of the bunkers on October 27, 2014, and a declaration that it was entitled to payment out of the Trust Funds.

[27] Also on June 22, 2015, the appellants (who shall hereafter be referred to as ING) filed a motion, pursuant to Rules 108 and 216, seeking judgment in regard to the unpaid invoices of OW UK totalling USD $654,493.15 in connection with the bunker delivery, and a declaration that it was entitled to be paid out of the Trust Funds.

[28] Petrobulk's and ING's claims against the Trust Funds were heard by Mr. Justice Russell (the Judge) on July 16, 2015 (2015 FC 1108). On September 23, 2015, the Judge disposed of the claims against the Trust Funds in the following way:

A. He ordered Canpotex to pay to the respondent Petrobulk USD $648,917.40 together with admiralty interest on that sum.

B. He ordered that Petrobulk be paid the aforesaid sum from the Trust Funds.

C. He ordered Canpotex to pay ING an amount equal to the mark up payable to OW UK for the supply by Petrobulk of the bunkers to the Vessels on October 27, 2014 together with maritime interest payable thereon.

D. He ordered that, following payment of the aforesaid sums, any and all liability of Canpotex, the Vessels and their owners in respect of the bunkers supplied to the Vessels on October 27, 2014 would be extinguished together with any and all liens.

E. Finally, he ordered ING to pay the costs of the respondents.

[29] The appeal before us is an appeal of the Judge's decision of September 23, 2015. For the reasons that follow, I would allow the appeal with costs herein and below, and I would return the matter to the Judge for reconsideration in light of these reasons.

IV. The Prothonotary's Order

[30] At paragraphs 21 and 22 of these reasons, I summarized the Prothonotary's order. Consequently, I need not say anything further in that regard, other than to point out that there is a dispute between the parties as to the meaning and significance of his order. In brief, the respondents take the position that the Prothonotary made an order allowing interpleader relief for both Canpotex and the Shipowners in regard to the sums owed in connection with the delivery of the bunkers. ING, on the other hand, takes the position that the Prothonotary made no such order and that, consequently, Canpotex and the Shipowners are not entitled to interpleader relief in the circumstances of this case.

[31] Part of the difficulty in resolving this dispute lies in the fact that the Prothonotary did not give any reasons for his order other than a statement, to which I will return later in these reasons, found at pages 2 and 3 of his order, that it was "premature to make a full and final determination of Marine Petrobulk's right to assert a maritime lien against the [Shipowners'] vessels, and that an interpleader application is not the proper forum to make such a determination in a summary way".

V. The Federal Court's Decision

[32] After setting out the relevant facts and the relevant statutory provisions, the Judge summarized the parties' respective arguments in support of their claims against the Trust Funds. He then proceeded to discuss the issues before him. First, he dealt with three preliminary issues, namely: the availability of interpleader; the affidavit of Claus Erik Mortensen, the head of OW S&T's quality support department; and whether the matter before him was an appropriate case for summary trial under Rule 216. He then turned to the main issue, entitlement to the Trust Funds.

A. *Availability of Interpleader Relief*

[33] First, the Judge held that the availability of interpleader relief had been decided by the Prothonotary. In other words, it was his view that the Prothonotary had dealt with and accepted Canpotex's motion as falling within the ambit of Rule 108. Consequently, as ING had not appealed the Prothonotary's order, it was now too late for it to challenge the availability of interpleader relief. At paragraph 97 of his reasons, the Judge wrote as follows:

> [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.

[34] However, the Judge went on to decide, in the alternative, that the matter before him was suitable for interpleader. Paragraph 104 of his reasons captures his rationale for that conclusion and I hereby reproduce it:

> [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.

B. *The Mortensen Affidavit*

[35] The issue before the Judge was whether he should strike paragraphs 7 to 13 of Mr. Mortensen's affidavit on the grounds that these paragraphs constituted opinion and hearsay. After reviewing the affidavit and considering the parties' submissions, the Judge struck paragraphs 9 to 13 of the affidavit which, in his view, were "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" (paragraph 115 of the reasons).

[36] In addition to striking paragraphs 9 to 13 of Mr. Mortensen's affidavit, the Judge drew an adverse inference against ING for failing to call as a witness someone from the OW Group who had been involved in the negotiation of the Fixed Price Agreement.

C. *Rule 216*

[37] The Judge indicated there was no dispute between the parties as to whether the matter before him was an appropriate one for summary trial under Rule 216. After a brief review of the requirements of Rule 216, the Judge indicated, at paragraph 119 of his reasons, why he believed that proceeding by way of a summary trial was appropriate in the circumstances:

> [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*

[38] The Judge first addressed the matter of which terms and conditions applied to Canpotex's spot purchases of the bunkers. The parties agreed that the bunker purchases were not made under the Fixed Price Agreement previously negotiated by Canpotex and the OW Group. However, there was disagreement as to whether Schedule 3 of the Fixed Price Agreement, entitled "Terms and Conditions of sale for Marine Bunkers", also applied to Canpotex's spot purchases. The language of Schedule 3 differs from the terms that would otherwise apply–the OW Group's General Terms and Conditions. In particular, clause L.4 of the two sets of terms differs as follows:

Fixed Price Agreement, Schedule 3	**OW Group's General Terms and Conditions**
L.4 a) These Terms and Conditions are subject to variation in circumstances where the physical supply of the fuel is being undertaken by a third party. In such circumstances, these terms and conditions shall be varied accordingly, and the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party on the Seller.	**L.4 a)** These Terms and Conditions are subject to variation in circumstances where the physical supply of the Bunkers is being undertaken by a third party which insists that the Buyer is also bound by its own terms and conditions. In such circumstances, these Terms and Conditions shall be varied accordingly, and the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party.
[emphasis added]	[emphasis added]

[39] After considering the evidence, particularly that of Mr. Keith Ball, the Judge concluded that Schedule 3 of the Fixed Price Agreement also applied to spot purchases made by Canpotex. Consequently, those terms and conditions applied to the bunker purchases of October 2014. The Judge was also of the view that, by reason of clause L.4 of Schedule 3 of the Fixed Price Agreement, the terms of contract between Canpotex and OW UK were subject to variation when the physical supply of the bunkers was provided by a third party. In such circumstances, Canpotex would be deemed to have read and accepted the terms and conditions imposed by the third party, "on the Seller" i.e. the OW Group.

[40] The Judge then turned his attention to Petrobulk's Standard Terms and Conditions, noting that the Petrobulk Confirmations had made it clear that its Standard Terms and Conditions applied to its provision of the bunkers and that acceptance of its confirmations, and of its Standard Terms and Conditions, would be deemed final unless the Buyer, OW UK, objected within three business days of receipt of the confirmations.

[41] The Judge then went on to find that OW UK had raised no objections with regard to the application of Petrobulk's Standard Terms and Conditions and that it had "understood and accepted that MP would supply the bunkers to the Vessels on MP's Standard Terms and Conditions" (paragraph 132 of the reasons). The Judge also indicated that both Canpotex and OW UK clearly understood that their contractual relationship "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" (paragraph 132 of the reasons). This led the Judge to conclude that Canpotex and OW UK were

bound by Petrobulk's Standard Terms and Conditions with regard to the delivery of the bunkers to the Vessels on October 27, 2014.

[42] The Judge then reviewed Petrobulk's Standard Terms and Conditions and concluded that Canpotex and OW UK were jointly and severally liable to pay to Petrobulk the full purchase price of the bunkers. At paragraph 136 of his reasons, the Judge wrote the following:

> [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 [presumably the Judge meant Canpotex and not 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….

[43] The Judge also held that by reason of clause 10 of its Standard Terms and Conditions, Petrobulk had a contractual lien on the Vessels for the amount owed to it for the supply of the bunkers. However, he expressed doubt as to whether Petrobulk's contractual lien could be exercised against the Trust Funds.

[44] The Judge then turned to section 139 of the *Marine Liability Act*, S.C. 2001, c. 6 (the *MLA*) and concluded that Petrobulk met the statutory requirements of that provision and hence that it had a maritime lien which could be exercised against the Vessels for non-payment of the delivery price of the bunkers. His rationale for that conclusion is found at paragraph 142 of his reasons where he says:

> [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 [sic] liens and arrest the Vessels. This doesn't mean that they replace the *res*.

[45] Finally, at paragraph 145 of his reasons, the Judge held that ING had no contractual or lien right against the Trust Funds or the Vessels and that consequently Petrobulk was entitled to payment out of the Trust Funds "as a function of contract law and equity". He further stated that, on the basis of the Federal Court's decision in *Balcan ehf v. The Atlas*, 2001 F.C.T. 1328, [2001] F.C.J. No. 1820, ING could not assert any *in rem* claims against the Vessels or the Trust Funds because the OW Group had not physically supplied the bunkers to the Vessels.

[46] Hence, in the Judge's view, Petrobulk was contractually entitled to be paid out of the Trust Funds. He therefore ordered that Petrobulk be paid their due from the Trust Funds and that ING be paid the mark up owed to OW UK. He then extinguished both Canpotex's and the Shipowners' liability in regard to the bunker delivery of October 27, 2014, as well as any and all liens.

VI. Issues

[47] The appeal raises, in my view, the following questions:

A. Did the Judge err in deciding that interpleader relief was available?

B. Did the Judge err in striking parts of the Mortensen affidavit and in drawing an adverse inference against the appellant?

C. Did the Judge err in deciding that Schedule 3 of the Fixed Price Agreement applied to the bunker purchases?

D. Did the Judge err in finding that Canpotex and OW UK were jointly and severally liable to pay MP for the delivery of the bunkers?

VII. Analysis

[48] Before addressing the first issue, a few words regarding the applicable standard of review are necessary. As this is an appeal from a decision of the Federal Court, the standards enunciated by the Supreme Court in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Housen*), are applicable. Thus, questions of law are subject to a standard of correctness while questions of fact are subject to the palpable and overriding error standard. With respect to mixed questions of fact and law, they will also be subject to the palpable and overriding error standard except where there exists an extricable question of law in which case the applicable standard will be that of correctness.

[49] I now turn to the first issue.

A. *Did the Judge err in deciding that interpleader relief was available?*

[50] I begin by setting out Rule 108(1) and (2) pursuant to which the Prothonotary made his order of March 27, 2015:

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 property, and	*a*) d'une part, elle ne revendique aucun droit sur ces biens;
(*b*) is willing to deposit the property with the Court or dispose of it as the Court directs,	*b*) d'autre part, elle accepte de remettre les biens à la Cour ou d'en disposer selon les directives de celle-ci.
that person may bring an ex parte motion for directions as to how the claims are to be decided.	
Directions	**Directives**
(2) On a motion under subsection (1), the Court shall give directions regarding	(2) Sur réception de la requête visée au paragraphe (1), la Cour donne des directives concernant :
(*a)* notice to be given to possible claimants and advertising for claimants;	*a*) l'avis à donner aux réclamants éventuels et la publicité pertinente;
(*b*) the time within which claimants shall be required to file their claims; and	*b*) le délai de dépôt des réclamations;
(*c*) the procedure to be followed in determining the rights of the claimants.	*c*) la procédure à suivre pour décider des droits des réclamants.

[emphasis added] [Non souligné dans l'original]

[51] On Canpotex's motion for interpleader relief, the Prothonotary ordered, after directing Canpotex to deposit the Trust Funds into its solicitors' U.S. Trust account, that there be a "hearing of the respective claims to the Trust Funds". The Prothonotary further ordered that pending such hearing, no one could institute proceedings or make any claims against the Vessels or the Shipowners in connection with the delivery of the bunkers on October 27, 2014.

[52] As they did before the Judge, the parties continue to disagree as to what the Prothonotary decided. ING argues that the Prothonotary did not grant interpleader relief since he did not extinguish Canpotex's liability, but merely ordered that the Trust Funds be paid into Court. ING contends that interpleader relief is not available in this case since, at the time of the hearing before the Prothonotary, the evidence had not yet been settled. Consequently, it submits that the claims against Canpotex were simply put over for consideration at a full hearing. With respect to the merits of the issue, ING takes the position that the respondents do not meet the Rule 108 test for interpleader as they are not a single person interpleading a single item of property. In addition, ING contends that while Canpotex may in the future be indirectly exposed to multiple claims, those claims do not constitute conflicting claims within the meaning of Rule 108.

[53] Canpotex and the Shipowners say that the issue as to whether interpleader relief is available was decided by the Prothonotary's order which left only for consideration the issue of potential liens against the Vessels and the appropriate division of the Trust Funds. Thus, they contend that the doctrine of issue estoppel precludes ING from relitigating the availability of

interpleader. In the alternative, they say that interpleader is available in this case since there are conflicting claims for the same sum of money, the only difference between OW UK's and Petrobulk's claims being the mark up charged by OW UK for its services.

[54] Although I am not entirely certain of the respondents' specific contention in regard to whose liability the Court should extinguish, it appears that they not only seek the extinguishment of Canpotex's liability, but also that of the Shipowners. I come to this view because of paragraphs 62 and 74 of their memorandum of fact and law where they say:

> 62. As the argument had been raised by the Defendants that the *in rem* claims could not be extinguished by a declaratory judgment without the shipowners participating in the action, the shipowners and disponent owner were joined as Plaintiffs. As is clear from the charterparties, those parties are entitled to indemnities from Canpotex, and any *in rem* claim for unpaid bunkers would have had to be defended by Canpotex. The new parties were added to avoid having to address a peripheral point; however, it is clear that whether proceedings were brought *in personam*, or *in rem*, they would be directed to, and defended by, Canpotex. [internal citation omitted]
>
> 74. In this case, not only were the bunkers supplied in Canada, but the parties agreed that the proper law was Canadian law, and the appropriate forum was the Federal Court. It is respectfully submitted that in allowing interpleader relief in this case, the Trial Judge correctly applied Rule 108 and the Order extinguishing all *in rem* rights in precisely the same way as was done by this Court in previous jurisprudence.

[55] That view finds support in the fact that the Judge ordered the extinguishment of both Canpotex's and the Shipowners' liability in respect of the bunker delivery.

[56] Petrobulk argues that the Prothonotary's order clearly decided that interpleader relief was available in this case. In the absence of an appeal from that order, it says that the Judge was correct to hold that it was no longer open to ING to reargue this issue. In any event, Petrobulk

says that the Judge correctly concluded that this was a proper case for interpleader under Rule 108.

[57] The true meaning of interpleader was encapsulated by the Court of Appeal of California, Sixth Appellate District, in *City of Morgan Hill v. Brown*, 71 Cal. App. 4th 1114 at 1122 (Sixth 1999), 84 Cal. Rptr. 2d 361, when it said that "[t]he purpose of interpleader is to prevent a multiplicity of suits and double vexation." The Court then went on to say, citing *Pfister v. Wade*, (1880) 56 Cal. 43 at 47, that "[t]he right to the remedy by interpleader is founded, however, not on the consideration that a [person] may be subjected to double liability, but on the fact that he is threatened with double vexation in respect to one liability."

[58] To the same effect, but in more expansive terms, are the words of Mr. Justice Chong of the Singapore High Court in *Precious Shipping Public Company Ltd v. O.W. Bunker Far East (Singapore) Pte Ltd*, [2015] S.G.H.C. 187, where at paragraphs 59 and 60, he sets out his understanding of interpleader:

> 59 In other words, interpleader proceedings exist to assist applicants who want to discharge their legal obligations (to pay a debt, deliver up property etc.) but do not know *to whom* they should do so.…
>
> 60 The applicant in an interpleader summons is caught between the devil and the deep blue sea — if he discharges his obligation to one claimant, he exposes himself to suit from the other. In such a situation, the relief of interpleader comes to his aid by compelling the real claimants to present their cases in order that the court can determine which one of the competing claimants has the legal entitlement to call on the enforcement of the applicant's admitted liability. The applicant, having disclaimed any interest in the subject matter of the dispute, "drops out" and is released from the proceedings (see *De La Rue* at 173). In other words, the object of an interpleader is the determination of the *incidence of liability*; *ie*, it serves to identify the person to whom the applicant is liable. It follows from this that interpleader relief is not available where the applicant is separately liable to both claimants (see *Farr v. Ward* [1837] 150 ER 1000)

> because there is no controversy in such a case: there are two obligations both of which the applicant is legally bound to discharge.
>
> [italics in original]

[59] Chong J. then goes on to explain what constitute competing claims [as Rule 108 uses the expression "conflicting claims" that is the expression which I will use hereafter] which will give rise to interpleader relief. First, in his view, the claims must be claims pertaining to the same subject matter. Second, such claims must be mutually exclusive. In other words, a determination of the interpleader proceedings will extinguish the unsuccessful conflicting claims. Third, the claims must be such that "the applicant must face an actual dilemma as to how he should act" (paragraph 67 of Chong J.'s reasons).

[60] With the above in mind, it seems to me that the only claims that are "conflicting" and thus can give rise to interpleader relief under Rule 108 are the contractual claims advanced by OW UK and Petrobulk. In my view, Petrobulk's assertion of a maritime lien, based on section 139 of the *MLA*, is not a conflicting claim within the meaning of Rule 108 as that claim is a claim against the Vessels, and hence against the Shipowners, and not against Canpotex. In other words, the Shipowners' liability to Petrobulk on account of section 139 of the *MLA* constitutes a separate and distinct cause of action. The fact that the Shipowners may ultimately have a claim against Canpotex, based on the terms of the Charter Parties, does not transform the section 139 claim into a conflicting claim.

[61] I now turn to the question of whether it was open to ING to raise the availability of interpleader relief even though it did not appeal the Prothonotary's order. As I indicated earlier,

the Judge was of the view that it was too late for ING to challenge Canpotex's right to interpleader relief. In order to decide whether the Judge was correct in so finding, I must now return to the Prothonotary's order.

[62] I have no doubt that the Prothonotary was of the view that Canpotex was entitled to interpleader relief. That is why he ordered Canpotex to deposit the Trust Funds into its solicitor's trust account. However, the Prothonotary clearly did not make any order of interpleader with respect to the Shipowners as they were not parties to the proceedings when he made his order. Thus, the issue of interpleader determined by the Prothonotary was limited to Canpotex's liability.

[63] On my understanding of the Prothonotary's order, it is my view that the Trust Funds would have to be paid either to OW UK, by reason of its agreement with Canpotex to supply bunkers to the Vessels, or to Petrobulk whose position was, leaving aside its assertion of a maritime lien, that both OW UK and Canpotex were contractually liable to it for the sums owed in connection with its delivery of bunkers. These claims, I am satisfied, fell under the Prothonotary's order as OW UK and Petrobulk were, in effect, claiming the same amount under the same contract. That, in my respectful view, is the extent of the Prothonotary's order. Consequently, pursuant to his order, either OW UK or Petrobulk was entitled to the Trust Funds by reason of its contractual claims, save for the small portion representing OW UK's mark up which, without doubt, was owed to OW UK and hence payable to ING.

[64] If I am correct in my view of the matter, Canpotex is entitled to the extinguishment of its liability only in regard to the contractual claims. If, as the Judge concluded, Petrobulk is contractually entitled to payment out of the Trust Funds, Canpotex's contractual liability to both Petrobulk and OW UK will be extinguished upon payment of the Trust Funds to Petrobulk. As a consequence, there will be no reason for Petrobulk to pursue its claim based on section 139 of the *MLA*.

[65] If, however, that determination is wrong and it is determined that OW UK is the party contractually entitled to payment of the Trust Funds, Canpotex's contractual liability will be extinguished but Petrobulk's section 139 claim will remain alive. As I indicated earlier, the section 139 claim, if founded, gives Petrobulk a right to arrest the Vessels owned by the Shipowners and to have the Vessels sold if its claim is not satisfied. In such circumstances, the Shipowners are the parties that would have to pay Petrobulk the amount due in respect of the bunkers in order to prevent the sale of their assets. Canpotex does not own the Vessels nor is it directly liable to Petrobulk in regard to the section 139 maritime lien. The fact that Canpotex may have to indemnify the Shipowners because of its obligations under the Charter Parties does not transform Petrobulk's maritime lien claim into a conflicting claim under Rule 108 in regard to which Canpotex's liability can be extinguished.

[66] Therefore, in my respectful view, what the Judge had to decide, and he did, was who, as between OW UK and Petrobulk, was contractually entitled to the Trust Funds under the contractual arrangements with Canpotex.

[67] A few additional remarks must be made before turning to the second issue.

[68] Although the Judge appears to have understood that the Prothonotary's order regarding interpleader relief concerned Canpotex's liability only, he nonetheless dealt with the Shipowners' liability which, in the end, he also extinguished. In my view, as I have already indicated, the Shipowners' liability arising from Petrobulk's assertion of a maritime lien under section 139 of the *MLA* did not fall under the rubric of conflicting claims and, consequently, no order of interpleader had been made by the Prothonotary in regard to such claim. In any event, as I also remarked earlier, the Shipowners were not parties to the proceedings when the Prothonotary made his order.

[69] It is not clear to me why the Shipowners were added as parties shortly after the Prothonotary's order. At paragraph 62 of its memorandum of fact and law, the respondent Canpotex says that the Shipowners were added as parties because ING had argued before the Prothonotary "that the *in rem* claims could not be extinguished by declaratory judgment without the shipowners participating in the action". Be that as it may, the Shipowners were not a party when the matter appeared before the Prothonotary, and consequently his order allowing interpleader could not have been made in regard to their liability.

[70] In his order, the Prothonotary made a brief reference to Petrobulk's maritime lien claim at pages 2 and 3 thereof when he stated 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 [Canpotex's] vessels, and that an interpleader application is not the proper forum to make such a determination in a summary way". I am not entirely certain what the Prothonotary had in mind

when he made that statement, but I am certain that he did not view Petrobulk's maritime lien as a conflicting claim within Rule 108.

[71] However, because the section 139 claim was not a conflicting claim under Rule 108, it should not, in my respectful view, have been dealt with in the context of interpleader relief. In other words, that claim should have either proceeded separately or waited for the outcome of the Judge's determination of the contractual claims against Canpotex.

[72] Although he does not say so in express terms, the Judge appears to have recognized that Petrobulk's section 139 claim gave Petrobulk no rights against the Trust Funds. At paragraph 142 of his reasons, where he concludes that Petrobulk has a valid maritime lien under section 139 of the *MLA*, the Judge says that:

> 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 [sic] liens and arrest the Vessels. This doesn't mean that they replace the *res*.

He completed his thoughts on this point at paragraph 144 where he stated that "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."

[73] There can be no doubt that the Trust Funds did not replace the *res* as the section 139 claim was not a conflicting claim; it constituted a separate cause of action against the Vessels and the Shipowners. Consequently, it is my opinion that, to the extent that the Judge could make any determination regarding the section 139 claim, he could not extinguish the Shipowners' liability. Nor could he do so in regard to Petrobulk's assertion of a contractual lien against the

Shipowners. In any event, it is clear from paragraph 144 of the Judge's reasons that he did not decide whether Petrobulk had a contractual or a section 139 maritime lien against the Trust Funds.

[74] Hence, in my respectful view, it was wrong for the Judge to extinguish Canpotex's and the Shipowners' liability in regard to the section 139 claim. All that the Judge could do was to extinguish Canpotex's liability in regard to the contractual claims asserted by OW UK and Petrobulk.

[75] Needless to say, it necessarily follows that if the Judge's determination of the contractual claims is correct, then Petrobulk, having been paid out of the Trust Funds, will not pursue its section 139 claim against the Vessels and the Shipowners. In other words, Petrobulk's claim having been satisfied by the Trust Funds, there will remain no grounds for it to pursue that claim. There will be no issue remaining for litigation.

[76] However, to make myself perfectly clear, it was not open to the Judge on the interpleader application to extinguish the Shipowners' liability and that of Canpotex arising out of its obligations under the Charter Parties. I now turn to the second question at issue in this appeal.

B. *Did the Judge Err in Striking Parts of the Mortensen Affidavit and in Drawing an Adverse Inference Against the Appellants?*

[77] ING argues that the Judge erred in striking paragraph 11 and Exhibit A from the Mortensen affidavit, Exhibit A being the OW Group's General Terms and Conditions of sale for marine bunkers. More particularly, ING says that in paragraph 11 of his affidavit, Mr. Mortensen

simply identified the OW UK Confirmations as exhibits to Mr. Ball's first affidavit dated January 29, 2015, stated that the OW UK Confirmations had incorporated the OW Group's General Terms and Conditions by reference, and that he had attached a copy of those terms as they were posted at the material time on the OW Group's website. In ING's view, Mr. Mortensen was qualified to testify to these matters as he was familiar with the forms and procedures of the OW Group.

[78] ING also argued that the Judge was wrong to draw an adverse inference against it because of its failure to provide direct evidence with regard to the negotiations of the Fixed Price Agreement. The Judge was of the view that ING should have filed the evidence of a witness from the OW Group involved in those negotiations and, more particularly, that ING should have provided the evidence of someone with personal knowledge of the contractual negotiations in order to rebut Mr. Ball's evidence.

[79] All of the respondents take the position that Mr. Mortensen was qualified to testify with regard to the usual practices of the OW Group and hence, to identify and produce into the record the OW Group's General Terms and Conditions. Therefore, there is no real issue before us with regard to the Judge's exclusion of paragraph 11 and Exhibit A of Mr. Mortensen's affidavit.

[80] Paragraph 11 of Mr. Mortensen's affidavit was part of a series of paragraphs (9 – 13) that the Judge considered "totally inappropriate" as they constituted, in his view, "an unsubstantiated opinion on the very issue" before him (paragraph 115 of the reasons). For ease of reference, I reproduce paragraph 11 of the Mortensen affidavit:

> 11. As set out in the body of the Star Jing and Ken Star Sales Order Confirmations, the terms and conditions that governed the [marine bunker purchase contracts] were the OWB Group standard Terms and Conditions of sale for Marine Bunkers, Edition 2013 (the **OWB 2013 T&Cs**). These standard terms and conditions were the basis on which companies within the OWB Group, including OWB UK, generally dealt with third party customers (and often each other, when supplies were sourced through OWB sourcing centres). These terms and conditions were published on the OWB website. A copy is attached and marked as Exhibit A.
>
> [emphasis in original]

[81] In my view, the fact that the two admissible sentences found at the end of paragraph 11 were struck along with Mr. Mortensen's inadmissible statements seems immaterial to the final outcome of the appeal since those statements pertain to uncontentious matters. Similarly, as the admissibility of the OW Group's General Terms and Conditions is not contested by the respondents, the fact that the Judge struck from the record the last sentence of paragraph 11 of the Mortensen affidavit and hence struck Exhibit A has no practical consequence in this appeal.

[82] Thus, it is my view that the OW Group's General Terms and Conditions are part of the record before us on this appeal.

[83] I now turn to the adverse inference made by the Judge against ING by reason of its failure to provide direct evidence from someone in the OW Group who was involved in the negotiations of the Fixed Price Agreement with Mr. Ball. On this issue, there is no agreement between the parties.

[84] In addressing this issue, it is important to bear in mind that at paragraph 128 of his reasons, the Judge held that, even without drawing a negative inference, he would have

concluded that the bunker purchases were subject to Schedule 3 of the Fixed Price Agreement. He expressed his view in the following terms:

> [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.

[85] ING argues that the Judge erred in overlooking the fact that it is an arms-length creditor of the OW Group and that it bears no evidentiary burden with regard to proving the applicability of Schedule 3 of the Fixed Price Agreement to spot purchases.

[86] Canpotex and the Shipowners say that it was open to the Judge to draw the adverse inference in that ING failed to produce a witness with personal knowledge of the facts in issue, adding that even if ING bore no evidentiary burden in regard to the Fixed Price Agreement, it still had the obligation to put its "best foot forward".

[87] As for Petrobulk, it submits that the Judge had the discretion to make the adverse inference "as there was no evidentiary justification for the Appellants [ING] not providing direct evidence from someone at OW involved in the transactions with Canpotex" (paragraph 46 of Petrobulk's memorandum of fact and law).

[88] Rule 81(2), on which the Judge relied for the drawing of the inference against ING, reads as follows:

Affidavits on belief	**Poids de l'affidavit**
(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.

[89] In application of that rule, the Judge was of the view that its requirements were met in that neither Mr. Preston nor Mr. Laureau, the two persons involved in the negotiations of the Fixed Price Agreement on behalf of the OW Group, were called to give evidence. Further, the Judge was satisfied that ING had provided no reason justifying its failure to provide the evidence of someone involved in the negotiations leading to the Fixed Price Agreement.

[90] In my view, it was wrong for the Judge to draw an adverse inference against ING. Before drawing the inference, the Judge had to decide whether Mr. Ball's testimony should be considered. As it turned out, he did consider it. In my respectful opinion, the Judge was mistaken in that conclusion as Mr. Ball's evidence was clearly in breach of the parol evidence rule. Further, I am satisfied that had the Judge conducted a proper contractual interpretation of the Fixed Price Agreement and of the documents surrounding the spot purchases, i.e. the OW UK Confirmations and the OW Group's General Terms and Conditions incorporated in the Confirmations, he would not have considered Mr. Ball's evidence.

[91] I will now turn to the third question at issue in this appeal and explain why I believe the Judge should not have considered Mr. Ball's evidence and why, in consequence, he erred in determining that Schedule 3 of the Fixed Price Agreement applied to the bunker purchases at issue in these proceedings.

C. *Did the Judge Err in Deciding that Schedule 3 of the Fixed Price Agreement Applied to the Bunker Purchases?*

[92] The Judge held, primarily on the basis of Mr. Ball's oral evidence, that Schedule 3 of the Fixed Price Agreement applied to the bunkers delivered on October 27, 2014, and hence, that the terms and conditions found therein constituted the basis upon which he would determine the contractual relationship between OW UK, Canpotex and Petrobulk.

[93] At paragraph 123 of his reasons, the Judge began his analysis of whether Canpotex and the OW Group ever agreed that all of Canpotex's bunker purchases, whether they fell under the Fixed Price Agreement or not, would be subject to Schedule 3 of the Fixed Price Agreement.

[94] The Judge found, at paragraph 124 of his reasons, that although Canpotex wanted Schedule 3 to apply to all of its bunker purchases, the OW Group was not prepared to agree to that request. The Judge wrote as follows:

> 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.

[95] This led the Judge to review Mr. Ball's affidavit of March 23, 2015 and, more particularly, paragraphs 5 to 9 thereof. The Judge then turned, at paragraph 126 of his reasons, to Mr. Ball's cross examination by counsel for ING. The Judge's review of portions of that cross examination, at paragraph 127 of his reasons, led him to remark that "Mr. Ball is clear that he had Mr. Preston's and OW's agreement that the two spot purchases from MP [Petrobulk] that are the subject of these proceedings would be subject, *inter alia*, to Schedule 3", adding that Mr. Ball had been thoroughly cross examined by counsel for ING and that he had "confronted and responded to the challenge clearly" (paragraph 128 of the reasons). The Judge then went on to note that ING had not called anyone from the OW Group who had been involved in the negotiations of the Fixed Price Agreement to provide evidence in response to that of Mr. Ball. Thus he drew a negative inference against the OW Group, as discussed above. As a consequence, the Judge concluded that Canpotex's bunker purchases were subject to Schedule 3 of the Fixed Price Agreement, and most importantly, to clause L.4 thereof.

[96] In my respectful view, the Judge erred in concluding that Schedule 3 of the Fixed Price Agreement, and more particularly clause L.4 thereof, applied to the bunkers delivered to the Vessels on October 27, 2014.

[97] I begin by saying that I do not have much doubt that were it not for Mr. Ball's evidence, the Judge would necessarily have concluded that Schedule 3 of the Fixed Price Agreement did not apply to the bunker purchases at issue in these proceedings. Instead, the Judge would have concluded, in my respectful view, that the OW Group's General Terms and Conditions were applicable to the bunker purchases. A brief review of the relevant documents, and more

particularly of the relevant provisions found in those documents, will demonstrate the soundness of this proposition.

[98] Following Canpotex's request for bunkers on October 22, 2014, OW UK confirmed to Canpotex, by way of the OW UK Confirmations, that bunkers would be delivered to the Vessels in the Port of Vancouver. The Confirmations made it clear that the OW Group's General Terms and Conditions would apply to the bunker purchases. The Confirmations provide for the following:

> TERMS:
>
> The sale and delivery of the marine fuels described above are subject to the OW Bunker Group's Terms and Conditions of sale(s) for Marine Bunkers. The acceptance of the marine bunkers by the vessel named above shall be deemed to constitute acceptance of the said general terms applicable to you as "Buyer" and to OW BUNKERS (UK) LIMITED as "Seller".
> The fixed terms and conditions are well known to you and remain in your possession. If this is not the case, the terms can be found under the web address:
> ….
>
> OTHERWISE:
>
> Any errors or omissions in above Confirmation should be reported immediately.
>
> PLEASE INFORM US BY RETURN IF ABOVE NOMINATION DETAILS ARE NOT IN ACCORDANCE WITH YOUR UNDERSTANDING.
>
> [emphasis added]

[99] The above terms are clear and unambiguous. They provide that the bunker purchases and their delivery to the Vessels are subject to the OW Group's General Terms and Conditions. The terms further provide that Canpotex is aware of those terms. I should also add that at no time whatsoever did Canpotex indicate to OW UK that its bunker purchases, contrary to what was

indicated in the OW UK Confirmations, would be subject to different terms and, more particularly, to Schedule 3 of the Fixed Price Agreement.

[100] I now turn to the Fixed Price Agreement which is formally entitled "General Terms for Fixed Price Trading". To repeat myself, there is no dispute between the parties that the spot purchases of October 22, 2014 were not subject to the Fixed Price Agreement. The only issue before us concerns the applicability of Schedule 3 of the Fixed Price Agreement to those spot purchases.

[101] Clause 13.1 of the Fixed Price Agreement is particularly relevant. It reads:

> 13.1 [The FPA], the [FPA Terms in Schedule 3] and the Annex constitute the entire agreement and understanding of the Parties with respect to its subject matter. Each of the parties acknowledges that in entering into these Terms it has not relied on any oral or written representation, warranty or other assurance (except as provided for or referred to in these Terms) and waives all rights and remedies which might otherwise be available to it in respect thereof.

[102] Thus, the terms of the Fixed Price Agreement represent the entire agreement, and hence, neither party can rely on anything outside of those terms to modify or amend the Agreement.

[103] In my view, the conclusion that Schedule 3 of the Fixed Price Agreement does not apply to the bunker purchases at issue is inevitable because of several factors: the bunker purchases of October 22, 2014 were not subject to the terms of the Fixed Price Agreement; the terms of the Fixed Price Agreement, as they appear in the Agreement, constitute the entire agreement; that any oral or written representations, not found within the terms of the Fixed Price Agreement, are not part of that Agreement; that the OW UK Confirmations of October 22, 2014 make it clear

that the bunker purchases at issue were subject to the OW Group's General Terms and Conditions; and that Canpotex did not object to the application of the OW Group's General Terms and Conditions at any time following its receipt of the OW UK Confirmations.

[104] This view is, in my respectful opinion, totally in accordance with the principles of contractual interpretation recently enunciated by the Supreme Court in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (*Sattva*), where the Court held that contractual interpretation was no longer a question of law, but rather a question of mixed fact and law. At paragraph 47 of his reasons for a unanimous court, Rothstein J. indicated that the purpose of contractual interpretation was "to determine 'the intent of the parties and the scope of their understanding'", adding that in order to accomplish that task, the decision maker had to read the contract as a whole, "giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract".

[105] At paragraph 57 of his reasons, Rothstein J. further indicated that although "surrounding circumstances" were to be considered in interpreting a contract, these circumstances must "never be allowed to overwhelm the words of that agreement", adding that contractual interpretation was to "be grounded in the text and read in light of the entire contract". He further said that courts were not to use surrounding circumstances "to deviate from the text such that the court effectively creates a new agreement" (paragraph 57).

[106] At paragraph 58, Rothstein J. went on to say that there were limits to the use of "surrounding circumstances" in that such circumstances should consist only of objective evidence pertaining to background facts existing at the time of the institution of the contract, i.e. "knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting."

[107] Rothstein J. then went on to make the point that the examination of surrounding circumstances was subject to the parol evidence rule. At paragraphs 59 and 60 of his reasons, he provided the following explanation:

> [59] It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing. To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties. The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract.
>
> [60] The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.
>
> [emphasis added, internal citations omitted]

[108] With those principles in mind, I now turn to Mr. Ball's evidence. I begin with his affidavits. In the first one, sworn January 29, 2015, he says, at paragraph 2, that on February 14, 2014, Canpotex and the OW Group "entered into a contract setting our general terms and conditions in relation to the purchase of marine bunkers by Canpotex". The contract referred to

by Mr. Ball is the Fixed Price Agreement. He also says, at paragraph 3, that Schedule 3 of the Fixed Price Agreement was also meant to apply to Canpotex's spot purchases of bunkers.

[109] In the second affidavit, sworn March 23, 2015, Mr. Ball offers more particulars in regard to the Fixed Price Agreement and its applicability to spot purchases. After stating that Canpotex had been purchasing bunkers from the OW Group since 2001, he stated that OW UK had become the exclusive supplier of bunkers to Canpotex by 2002. He then explains, at paragraph 6, that commencing June, 2012, Canpotex began negotiations with the OW Group "to finalize the Contract" and that Canpotex's goal was "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". In other words, as I understand that statement, Canpotex intended through the Fixed Price Agreement to subject all of its bunker purchases, spot or otherwise, to the terms of the Fixed Price Agreement.

[110] Mr. Ball then states, at paragraph 7, that during the course of Canpotex's negotiations with the OW Group, the OW Group's General Terms and Conditions were customized. These customized terms and conditions, according to Mr. Ball, became Schedule 3 to the Fixed Price Agreement. Mr. Ball ends paragraph 7 by saying "The Contract [the Fixed Price Agreement] is the only contractual document between the OW Group and Canpotex." There is no dispute between the parties that in the case of spot purchases there were no documents other than the OW UK Confirmations. The original OW Group's General Terms and Conditions continue to exist as a stand-alone document generally applicable to spot purchases.

[111] Then, at paragraph 9 of his affidavit, Mr. Ball makes the following statement:

> 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.
>
> [emphasis added]

[112] In my opinion, the Judge should not have considered the above statement as Mr. Ball simply sets out therein Canpotex's subjective intentions in regard to the Fixed Price Agreement. The parol evidence rule, as explained by Rothstein J. in *Sattva* at paragraph 59, is clearly meant to exclude this type of evidence.

[113] I now turn to Mr. Ball's cross examination. At paragraph 127 of his reasons, the Judge sets out portions of Mr. Ball's cross examination which, in his view, demonstrate Mr. Ball's credibility when he says that "he and Mr. Preston of OW UK agreed that Schedule 3 would apply to the marine bunkers that MP [Petrobulk] supplied to the Vessels" (paragraph 126 of the reasons).

[114] Mr. Ball's testimony can be briefly summarized as follows. On at least three occasions, during the course of the negotiations leading to the Fixed Price Agreement, Mr. Ball approached his counterparts at the OW Group with the proposal that Schedule 3 of the Fixed Price Agreement be applicable to Canpotex's spot purchases. On all of these occasions, the OW Group's response was negative. Mr. Ball even received an email from the OW Group's lawyers to the effect that it was not possible to make the change which he was proposing.

[115] Mr. Ball then testified that sometime between the OW Group's three original refusals and the conclusion of the Fixed Price Agreement in February, 2014, Mr. Preston and the OW Group's risk management group agreed to his proposal that Schedule 3 of the Fixed Price Agreement be applicable to Canpotex's spot purchases. When asked if he had a signed document to that effect, he answered that he did not have anything and that he was unable to provide any document supporting his testimony that the OW Group had finally agreed to his proposal. He also conceded that there was nothing in the Fixed Price Agreement which made Schedule 3 applicable to Canpotex's spot purchases.

[116] Further, during the course of his cross examination, Mr. Ball was asked whether Canpotex would have entered into the Fixed Price Agreement had the OW Group not agreed to make the spot purchases subject to Schedule 3. The following questions and answers, found at page 54, Line 14 to Line 32 of the transcript of the cross examination (Volume 1, Appeal Book, page 142) provide his answer to the question:

> 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.

[117] It is clear from Mr. Ball's testimony, and in particular, from the above questions and answers that although the applicability of Schedule 3 to Canpotex's spot purchases was an issue of some importance to Canpotex, he was unable to produce any written support for the agreement which he says he concluded with Mr. Preston. It is also clear from his testimony that there is nothing in the Fixed Price Agreement to support his contention that the OW Group agreed that Schedule 3, and not its General Terms and Conditions, would constitute the terms governing Canpotex's spot purchases. In the end, Canpotex signed the Fixed Price Agreement and nothing therein subjects Canpotex's spot purchases to Schedule 3.

[118] It is not entirely clear to me whether Mr. Ball is saying that his oral agreement with Mr. Preston forms part of the Fixed Price Agreement or whether it constitutes a term of the spot contracts. In trying to understand Mr. Ball's evidence and in determining the nature of that evidence, it is important to emphasize that his evidence pertains exclusively to the negotiations of the Fixed Price Agreement between 2012 and February, 2014. It is in the context of those discussions that he says that he sought the OW Group's consent to the applicability of Schedule 3 to Canpotex's spot purchases. However, when one considers the words of the Fixed Price Agreement and those of the spot contracts, as evidenced by the OW UK Confirmations, there is nothing in those documents which can support the view that Schedule 3 applies to Canpotex's spot purchases.

[119] It is significant that the Judge, in arriving at his conclusion on this point, does not refer to, nor does he give any consideration to, the words used by the parties in the Fixed Price Agreement and in the OW UK Confirmations. In concluding as he did, the Judge gave consideration only to Mr. Ball's evidence and, in particular, to his oral evidence. That evidence, which he found credible, is the determinative factor in the conclusion which he reached. The words used by the parties in their transactions play no part in the Judge's reasoning.

[120] In my respectful opinion, the Judge should not have considered Mr. Ball's evidence. More particularly, his evidence could not be used to, in effect, replace the words used by the parties. In other words, to paraphrase what Mr. Justice Rothstein said at paragraph 57 of his reasons in *Sattva*, Mr. Ball's evidence could not serve to either "overwhelm the words of" the Fixed Price Agreement or of the spot contracts or "to deviate from the text such that the court effectively creates a new agreement".

[121] In many respects, the purpose of Mr. Ball's evidence is to put forward Canpotex's subjective intentions in entering into the Fixed Price Agreement. This is manifest when one considers paragraph 9 of Mr. Ball's second affidavit which I have reproduced at paragraph 112 of these reasons. The substance of that paragraph was repeated by Mr. Ball on many occasions during the course of his cross examination. Mr. Justice Rothstein in *Sattva* made it clear that evidence of a party's subjective intentions could not be used in determining the meaning of a contractual agreement. In other words, as Mr. Justice Rothstein enunciated at paragraph 59 of his reasons in *Sattva*: "[t]he parol evidence rule precludes admission of evidence outside the words

of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing."

[122] Canpotex and the OW Group negotiated the Fixed Price Agreement over a period of almost two years. They finally agreed to the terms of that Agreement in February, 2014 and they signed the Agreement in June of that year. As I have already made clear, there is nothing in the Fixed Price Agreement which supports the view that Schedule 3 thereof applies to Canpotex's spot purchases. To now say, as Canpotex does, that, notwithstanding the terms of the Fixed Price Agreement, the parties agreed to apply Schedule 3 to Canpotex's spot purchases is clearly what the parol evidence rule was intended to guard against. At paragraph 59 of his reasons in *Sattva*, Mr. Justice Rothstein states the purpose of the rule in the following terms:

> The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract.

[123] In my respectful view, if ever there was a situation where the parol evidence rule should be given effect, this is the perfect situation. I would add that I am totally satisfied that Mr. Ball's evidence does not fall within the rubric of "surrounding circumstances" which Mr. Justice Rothstein, at paragraph 58 of his reasons in *Sattva*, defined as "objective evidence of the background facts at the time of the execution of the contract". The substance of Mr. Ball's evidence has nothing to do, in my respectful view, with background facts relevant to the interpretation of the Fixed Price Agreement or, for that matter, the spot contracts.

[124] In my view, it was an error on the part of the Judge to consider Mr. Ball's evidence. That error is, in my respectful opinion, the result of the Judge's failure to interpret the Fixed Price Agreement and the spot contracts in light of the relevant principles enunciated by the Supreme Court in *Sattva*. The Judge did not expressly interpret the contracts at issue. Instead, he simply reviewed Mr. Ball's evidence, accepted it, and found that an agreement had been reached between Mr. Ball and Mr. Preston. In accepting Mr. Ball's evidence and in finding that Schedule 3 applied to the spot contracts, the Judge added a term to the Fixed Price Agreement notwithstanding the fact that clause 13.1 makes it clear that the terms of the Fixed Price Agreement are to be found exclusively within the Agreement.

[125] I therefore conclude that in failing to apply the relevant principles of contractual interpretation, the Judge erred in law. Although the Supreme Court in *Sattva* held that contractual interpretation was a question of mixed law and fact, the Judge's error, in my view, constitutes an extricable error in principle subject to the standard of correctness (*Housen* at paragraph 37; *MacDougall v. MacDougall*, [2005] O.J. No. 5171, 262 D.L.R. (4th) 120 at paragraph 30; *General Motors of Canada Ltd. v. Canada*, 2008 FCA 142, [2008] F.C.J. No. 663 at paragraph 31). The Judge also made a palpable and overriding error in considering Mr. Ball's evidence and in using it, in effect, to add a term to the Fixed Price Agreement or to vary its terms.

[126] Because of the conclusion which I have reached in regard to Mr. Ball's evidence and in regard to the manner in which the Judge arrived at his conclusion on the issue of whether Schedule 3 applied to the spot contracts, I need not make any determination with regard to the quality of Mr. Ball's evidence. I would only say that I would have had great difficulty in finding

his evidence credible. For example, how can one accept his evidence that Canpotex would not have entered into the Fixed Price Agreement if Schedule 3 had not been made applicable to Canpotex's spot contracts when the Fixed Price Agreement signed by Canpotex contains no provision which gives effect to the purported agreement between Mr. Ball and Mr. Preston? Not only does the Fixed Price Agreement contain no term to that effect, there is no other document, i.e. e-mail, fax, memo etc. that supports Mr. Ball's evidence.

[127] I therefore conclude that Schedule 3 of the Fixed Agreement does not apply to the bunker purchases of October 22, 2014. Consequently, the terms applicable are those found in the OW Group's General Terms and Conditions. Hence, clause L.4 of those General Terms and Conditions is the relevant L.4 and not the one found in Schedule 3.

[128] Because of his conclusion that Schedule 3 applied to the bunker purchases at issue, the Judge did not turn his mind to the OW Group's General Terms and Conditions, and consequently, he did not examine clause L.4 of those terms. The parties are in agreement that clause L.4 of the OW Group's General Terms and Conditions differs from the one found in Schedule 3 in that the clause requires that the third party "insists". The Judge did not address the meaning of the word "insists" and he made no finding as to whether Petrobulk had insisted that Canpotex be bound by its terms and conditions.

[129] Although the parties have not pointed to any other difference between the two L.4 clauses, I see two additional differences which may be material. It is useful to again reproduce the two L.4 clauses which can already be found at paragraph 38 of these reasons:

Fixed Price Agreement, Schedule 3	**OW Group's General Terms and Conditions**
L.4 a) These Terms and Conditions are subject to variation in circumstances where the physical supply of the fuel is being undertaken by a third party. In such circumstances, these terms and conditions shall be varied accordingly, and the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party on the Seller.	**L.4 a)** These Terms and Conditions are subject to variation in circumstances where the physical supply of the Bunkers is being undertaken by a third party which insists that the Buyer is also bound by its own terms and conditions. In such circumstances, these Terms and Conditions shall be varied accordingly, and the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party.
[emphasis added]	[emphasis added]

[130] The first additional difference that I see between the two clauses is found in the sixth and seventh lines of the L.4 clause of the OW Group's General Terms and Conditions where the words "the Buyer is also bound by its own terms and conditions" appear. Those words do not appear in L.4 of Schedule 3. The other difference is found in L.4 of Schedule 3 where the words "on the Seller" appear at the end of the clause. These words are absent in L.4 of the OW Group's General Terms and Conditions. Whether these differences have an impact or not on the ultimate determination is not a question which I intend to answer as I am satisfied that the proper remedy in the circumstances of this case is to return the matter to the Judge for reconsideration.

[131] Because the Judge made no finding in respect of the OW Group's General Terms and Conditions, and in particular with regard to clause L.4 thereof, the appeal before us was argued exclusively on the basis of clause L.4 of Schedule 3. The parties did not make any arguments as to the meaning of clause L.4 of the General Terms and Conditions, except for a brief submission

by Petrobulk that it had insisted that Canpotex be bound by its Standard Terms and Conditions. Consequently, it is my view that it would not be wise for us to make the determination which should be made by the Judge. Should the matter return to us in a further appeal, we would also, it goes without saying, benefit from the Judge's view on the meaning of clause L.4 of the OW Group's General Terms and Conditions and its effect on the relationship between OW UK, Canpotex and Petrobulk.

VIII. Conclusion

[132] I would therefore allow the appeal with costs herein and below, I would set aside the Federal Court's decision, and I would return the matter to the Judge for reconsideration in light of these reasons.

"M Nadon"

J.A.

"I agree.
Eleanor R. Dawson J.A."

"I agree.
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-462-15

(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE RUSSELL DATED SEPTEMBER 23, 2015 (DOCKET NUMBER: T-109-15))

STYLE OF CAUSE:	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 v. CANPOTEX SHIPPING SERVICES LIMITED, NORR SYSTEMS PTE. LTD., OLDENDORFF CARRIERS GMBH & CO K.G., AND STAR NAVIGATION CORPORATION S.A. and MARINE PETROBULK LTD., O.W. SUPPLY & TRADING A/S, O.W. BUNKERS (UK) LIMITED
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 16, 2016
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	DAWSON J.A. WEBB J.A.
DATED:	MARCH 10, 2017

APPEARANCES:

Warren B. Milman Joel V. Payne	FOR THE APPELLANTS
David F. McEwen Q.C. Jason D. Lattanzio	FOR THE RESPONDENTS CANPOTEX SHIPPING SERVICES LIMITED, NORR SYSTEMS PTE. LTD., OLDENDORFF CARRIERS GMBH & CO K.G., AND STAR NAVIGATION CORPORATION S.A.

H. Peter Swanson Megan Nicolls	FOR THE RESPONDENT MARINE PETROBULK LTD.

SOLICITORS OF RECORD:

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