Federal Court of Appeal | Cour d'appel fédérale

Date: 20200505

Docket: A-54-19

Citation: 2020 FCA 84

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

BETWEEN:

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

Appellants

and

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

Respondents

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

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

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: PELLETIER J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] The appellants challenge the Order of the Federal Court (per Russell J.) dated January 22, 2019 (2019 FC 89), quantifying the costs awarded in its decision dated September 28, 2018

(2018 FC 957). The 2018 decision is also the subject of an appeal in file A-351-18. These two appeals were consolidated pursuant to an Order of Webb J.A. dated March 6, 2019. A separate set of reasons were issued in A-351-18 (2020 FCA 83).

[2] The procedural history in this file is set out in my reasons in 2020 FCA 83 and need not be repeated here; it is well known to the parties.

[3] In *ING Bank N.V. v. Canpotex Shipping Services Limited*, 2017 FCA 47, our Court dealt with a first appeal in respect of a 2015 decision of the Federal Court (First Decision issued after the first phase of the proceedings) on the summary trial motions also at issue before us in A-351-18. It made the following judgment:

> The appeal is allowed with costs herein ***and below***, the decision of the Federal Court dated September 23, 2015 (2015 FC 1108) is set aside, and the matter is returned to Russell J. for reconsideration in light of the Court's reasons.
>
> (my emphasis)

[4] Despite this, in its decision dated September 28, 2018 (Second Decision issued after the second phase of the proceedings), the Federal Court awarded costs to the respondents in this appeal for both phases of the summary trials, to be assessed in accordance with the midpoint of Column III of Tariff B. In addition, in accordance with paragraph 420 of the *Federal Courts Rules*, SOR/98-106 (the *Rules*), it granted double costs to the plaintiffs before it (respondents in this Court) against the appellants (other than the OW companies) (all defendants before the Federal Court), calculated from April 15, 2015. It also granted double costs to Petrobulk (a defendant before the Federal Court) against the appellants (other than the OW companies),

calculated from April 28, 2015. Finally, the Federal Court granted $1,000.00 to the plaintiffs and the same to Petrobulk as costs on the motion to fix the costs.

[5] It appears that the Federal Court purported to overrule our Court's judgment because it could not understand that costs before the Federal Court could be granted to the appellants in 2017, given that its decision was quashed, and the matter was sent for reconsideration. Our Court could thus not know who would ultimately be successful on the summary trial motions. Furthermore, the appellants had not sought, in their appeal before our Court, their costs below in the event that the Federal Court decision was quashed and the matter was returned for reconsideration.

[6] I understand that the Federal Court considered that the judgment of our Court granting costs below was so clearly a mistake that it chose to effectively disregard that portion of the judgment. Another factor considered by the Federal Court was the fact that Rule 420 was in play, a matter which was unknown to our Court in 2017 as issues with respect to costs had not been addressed by the parties on appeal, considering that costs to the Federal Court were not asked for if the matter was remitted for reconsideration.

[7] There is no doubt that the Federal Court erred in doing so. The judgment of our Court was clear and could not be set aside or overturned, let alone by the Federal Court. Even this panel cannot intervene to modify the said judgment.

[8] In fact, the only practical way that this judgment could have been modified was by way of a timely motion under Rule 397 to the panel who issued it.

[9] Given that this Court's error was manifest in the respondent's view, the remedy was to ask the Court to correct its error pursuant to Rule 397(2). This was not done.

[10] This means the Federal Court only had the power to award costs to the respondents in respect of the reconsideration proceedings, i.e. the second phase of the proceedings. This is not what it did at paragraphs 1 and 2 of its Order.

[11] Furthermore, there is no evidence that the Rule 420 offer, which was considered by the Federal Court, and was made in advance of the first trial, could be relied upon once the 2015 judgment was issued.

[12] Our Court's jurisprudence (*CIBC World Markets Inc. v. Canada*, 2012 FCA 3, 426 N.R. 182; *WIC TV Amalco Inc. v. ITV Technologies Inc.*, 2005 FCA 253, 2005 CarswellNat 1920) is unambiguous: an offer made before trial does not have any effect on the costs of an appeal. To benefit from Rule 420, the offering party must renew its offer before the hearing of the appeal. Once the 2015 judgment was issued, its effect pursuant to Rule 420 was spent.

[13] It would make no sense for an offer which has lapsed after the First Decision was issued, to be somehow revived simply because a new trial, be it summary or otherwise, is ordered. The whole purpose of Rule 420 is to induce the recipient of an offer to consider it at the earliest

possible date. The penalty for not doing so is quite heavy. It would certainly lead to unfairness if a party does not clearly know that the offer is still on the table when a new trial, be it summary or otherwise, starts. In these circumstances, it could not give its careful consideration to the said offer.

[14] Moreover, there was no ground for the Federal Court to distinguish this case from the situation in *Eagle Resources Ltd. v. MacDonald*, 2006 ABCA 49, 380 A.R. 333 on the basis that the matter before it was not a full summary trial, but only a reconsideration of the differences between the wording of the clause L.4 it had examined in 2015, and the clause L.4 in the OW GTCs. As explained in my reasons in the appeal A-351-18, this was an error. The Federal Court's 2015 decision was quashed in its entirety, and the summary trial motions had to be considered afresh. The fact that the Federal Court chose to rely on some of its earlier findings is of no moment.

[15] In light of the above, the offers made in 2015 could not trigger the application of Rule 420 in respect of the "second phase of the proceedings" without being made afresh.

[16] In light of these determinative errors, our Court must intervene, even if it rarely does so in matters involving costs.

[17] I would allow the appeal in part with costs to the appellants. The Order of the Federal Court dated January 22, 2019 should be amended to read as follows:

THIS COURT ORDERS that:

1. The Plaintiffs shall have their costs for the second phase of the proceedings leading to the Second Decision to be paid by the Defendants (other than Marine Petrobulk LTD (MP) and the OW companies) and calculated and assessed in accordance with the mid-point of Column III of Tariff B;

2. MP shall have its costs for the second phase to these proceedings leading to the Second Decision to be paid by the Defendants (other than MP and the OW companies) and calculated and assessed in accordance with the mid-point of Column III of Tariff B;

3. As adjudged by the Federal Court of Appeal in its judgment in *ING Bank NV v Canpotex Shipping Services Limited*, 2017 FCA 47, the Defendants other than MP shall have their costs for the first phase of the proceedings leading to the First Decision calculated and assessed in accordance with the mid-point of Column III of Tariff B;

4. Each party shall bear its own costs on the motion to fix the costs.

"Johanne Gauthier"

J.A.

“I agree
J.D. Denis Pelletier J.A.”

“I agree
Judith Woods J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE RUSSELL DATED January 22, 2019, DOCKET NO. T-109-15

DOCKET:	A-54-19
STYLE OF CAUSE:	ING BANK N.V. et al. v. CANPOTEX SHIPPING SERVICES LIMITED et al.
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	NOVEMBER 18, 2019
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	PELLETIER J.A. WOODS J.A.
DATED:	MAY 5, 2020

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