Federal Court  Cour fédérale

Date: 20100325

Docket: T-1914-08

Citation: 2010 FC 332

Ottawa, Ontario, March 25, 2010

PRESENT: The Honourable Mr. Justice Harrington

ACTION *IN REM* AND *IN PERSONAM*

BETWEEN:

WORLD FUEL SERVICES CORPORATION

Plaintiff

and

**THE SHIP "NORDEMS" AND
THE OWNERS AND ALL OTHERS INTERESTED IN
THE SHIP "NORDEMS", AND
REEDEREI "NORD" KLAUS E. OLDENDORFF
GMBH AND
PARTENREEDEREI m.s. "NORDEMS" AND
PARKROAD CORPORATION**

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is no simple action on account for unpaid bunkers supplied to the ship Nordems, at the instance of her now bankrupt time charterer Parkroad Corporation. The questions which arise in these cross-motions for summary judgment are whether the owners and managers of the Nordems are also personally liable, and even if they are not, whether the Nordems is liable *in rem*.

[2] The answer lies in the differences in Canadian maritime law between a statutory right *in rem* and a maritime lien, privity of contract, agency, as well as the relevance of a choice of law clause in identifying the proper law of a contract.

[3] By offer and acceptance apparently communicated in Korea, Parkroad Corporation, the Korean sub-time charterer of the Cyprus flag bulk carrier m.s. Nordems contracted with either the plaintiff, an American corporation, or its affiliate, World Fuel Services (Singapore) Pte Ltd., a Singapore corporation, for the purchase of bunkers which were taken onboard in South Africa. Parkroad went bankrupt without paying for same.

[4] Thereafter, the plaintiff arrested the m.s. Nordems in Baie Comeau. The ship was released on bail furnished by her owners. Although named as a defendant, Parkroad has not appeared.

[5] The plaintiff's case is that Parkroad contracted not only on its own behalf, but also on behalf of the ship and her owners. The provisions of the contract deem it to have been made in the United States. It is expressly governed by American law which creates a maritime lien over the ship, even should it be that her owners and managers are not personally liable.

[6] The defendant German owners and managers deny that they were in a contractual relationship with the plaintiff. They deny that Parkroad had actual or ostensible authority to purport to contract on their behalf and to purport to contract on the credit of the ship. Whatever the proper law governing the non-contractual relationship between them and the plaintiff may be (there are

several possibilities), that law is not the law of the United States and has not been alleged and proven to differ from Canadian domestic maritime law. Under Canadian maritime law, a necessaries man does not enjoy a maritime lien, and only has an action *in rem* if the owners are personally liable. Although there is a presumption under our law that necessaries are furnished on the credit of the ship, that presumption is rebuttable, and has been rebutted in this case.

[7] The owners take the further position that if per chance United States law should apply, it does not give the plaintiff a maritime lien on the m.s. Nordems in the circumstances of this case. There was insufficient American flavour to the underlying transaction. They add that the plaintiff has no standing to sue. It is merely acting as a front man for World Fuel Services (Singapore) Pte Ltd. in an effort to bolster the American aspects of the transaction.

[8] Each side has moved for summary judgment in support of its respective contentions. Although the provenance of some of the documents before the Court is somewhat sketchy, those documents, together with the mutual understanding of the parties, allow the Court to come to a conclusion.

[9] Two primordial findings of fact drive my analysis of the legal issues in this case. Parkroad had no actual authority from the owners or managers of the Nordems to contract for the supply of bunkers on their behalf, or on the credit of the ship. They were expressly prohibited from so doing. However, World Fuel Services Corporation had no actual knowledge of that fact. The importance of these findings is that, briefly put, the maritime law of the United States, the law selected by World Fuel Services Corporation and Parkroad to govern their contract, is such that a necessaries man is

presumed to have contracted on the credit of the ship. That presumption can only be rebutted by establishing that the necessaries man had actual knowledge that the contracting party did not have authority to bind the ship. If that presumption is not rebutted, American law creates a maritime lien on the ship. On the other hand, under Canadian maritime law, apart from a few exceptions which are not relevant here, a necessaries man does not enjoy a maritime lien. Under sections 22 and 43 of the *Federal Courts Act*, he has a statutory right *in rem* against the ship, but only if her owners are personally liable. As in American law, there is a presumption that the necessaries were ordered on the credit of the ship. However it is not necessary to establish actual knowledge of lack of authority on the part of the necessaries man to rebut that presumption.

[10] I consider it useful at the outset to highlight some of the distinctions between a maritime lien and an ordinary action *in rem*, which I usually refer to as a statutory right *in rem*, and explain why our choice of law rules make Canada a popular forum for American necessaries men who extend credit to time charterers.

[11] There are a number of important distinctions between a maritime lien and a statutory right *in rem*. Only one is relevant in this case, that being that a maritime lien may exist even though the owners of the ship are not personally liable. A maritime lien arises at the moment of the transaction, be it for instance a collision, while a statutory right *in rem* only comes into existence when proceedings are instituted, or perhaps only when the action *in rem* is served on the ship (this issue was extensively reviewed in the light of English statutes by Mr. Justice Brandon in the “Monica S”, [1968] P. 741, [1967] 3 All E.R. 740, [1967] 2 Lloyd’s Rep. 113). The maritime lien travels with the ship into the hands of third-party purchasers for value. However a potential action *in rem* is defeated

by a legitimate change of ownership, although the original owners, of course, if personally liable in the first place, remain liable.

[12] In the event of a marshal's sale by which all blemishes on the ship, including maritime liens, are transferred to the fund thereby created (*Osborn Refrigeration Sales and Services Inc. v. Atlantean I (the)* (1982), 7 D.L.R. (4th) 395, 52 N.R. 10 (F.C.A.)) and if the fund so generated is not sufficient to satisfy all creditors, maritime lien holders enjoy a high priority. They outrank mortgage creditors, who in turn outrank ordinary creditors. The holder of a maritime lien is, generally speaking, a secured creditor in bankruptcy proceedings while the holder of a statutory right *in rem*, at least a right *in rem* which has not been perfected prior to the bankruptcy, is not.

[13] Three cases which review these issues, and their historical bases, are the decisions of Mr. Justice Le Dain in *Marlex Petroleum Inc. v. The Ship Har Rai and the Shipping Corporation of India Ltd.*, [1984] 2 F.C. 345, 1984 AMC 1649, aff'd without additional reasons at [1987] 1 S.C.R. 57, of Mr. Justice Stone in *Imperial Oil Ltd. v. Petromar Inc.*, 2001 FCA 391, [2002] 3 F.C. 190, 2002 AMC 536, and of Mr. Justice Binnie in *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, 2001 SCC 90, [2001] 3 S.C.R. 907 (the *Brussel*).

[14] It has also been well established, in cases to which I shall refer, that if our choice of law rules lead us to the conclusion that the transaction is governed by another system of law, and that law has been proven to differ from ours, we will give effect to it. Canada is an attractive forum to necessaries men who enjoy a maritime lien under the proper law of their transaction in that in ranking priorities our law gives the necessaries men the status of a maritime lien, a status which a

Canadian necessaries man does not enjoy. This is not the situation in England. See *Bankers Trust International Ltd. v. Todd Shipyards Corp. (the Halcyon Isle)*, [1981] A.C. 221 (P.C.), [1980] 2 Lloyd's Rep. 325, 1980 AMC 1221. In England, priorities are considered to be a matter of procedure to be governed by the *lex fori*, rather than a matter of substance. This point is discussed in Dicey, Morris & Collins, *The Conflict of Laws*, 14th ed. (London: Sweet & Maxwell, 2006) at para. 7-033 in support of their rule 17 which provides "All matters of procedure are governed by the domestic law of the country to which the Court wherein any legal proceedings are taken belongs (*lex fori*)." Thus in a competitive worldwide market an American necessaries man runs less risk in extending credit.

[15] Canadian domestic law was amended last year to give necessaries men carrying on business in Canada a maritime lien against a foreign ship. The services must have been provided at the request of the owner or a person acting on his behalf. There is no indication that the case law pertaining to the rebuttable presumption of authority has been overridden. (*An Act to Amend the* Marine Liability Act *and the* Federal Courts Act *and to make consequential amendments to other Acts*, S.C. 2009, c. 21, s. 139))

[16] I mention these distinctions because it is difficult to extract the general principles set out in the wealth of jurisprudence which touch upon the issues in this case. Many are such that the proper law was so obvious the Court did not need to embark on a choice of law analysis. Many deal with priorities arising from a marshal's sale which did not generate sufficient funds to satisfy all creditors. Others deal with the effect of a private sale. A prime example is the *Lanner* (*JP Morgan Chase Bank v. Lanner (The)*, 2006 FC 409, [2007] 1 F.C.R. 289, 2006 AMC 812, rev'd in *Kent*

Trade and Finance Inc. v. JP Morgan Chase Bank, 2008 FCA 399, 305 D.L.R. (4th) 442, 388 N.R. 39). This was a priorities case. In first instance, Madam Justice Gauthier held that the necessaries man only had a statutory right *in rem* and so did not outrank a mortgage. The Federal Court of Appeal came to the conclusion that the necessaries man, under the applicable foreign law, did have a maritime lien and so had priority over the mortgage creditor. In this case it does not matter if World Fuel Services has a maritime lien or only a statutory right *in rem*. In either case it is entitled to judgment and full payment from the bail. If it has neither, the action *in personam* against the owners of the Nordems and the action *in rem* against the ship shall be dismissed.

RULES PERTAINING TO SUMMARY JUDGMENT

[17] During the course of these proceedings, Rules 213 and following of the *Federal Courts Rules* which deal with summary judgments were amended, but these amendments do not affect the outcome herein. The factual evidence consisted of the affidavit of Rüdiger Knust, a senior executive of the defendant Reederei "Nord" Klaus E. Oldendorff GmbH, the ship's managers. He set out some general underlying principles of time charters, for instance that it is usually the time charterer who orders and pays for bunkers, but as well testified to some facts which might be considered hearsay, and produced some documents to which the Nordems' owners and managers were not party. However, plaintiff's counsel does not contest the accuracy of Mr. Knust's statements, and does not object to the documents he produced, including the sub-time charter to Parkroad. Mr. Knust was not cross-examined.

[18] On the other hand, the plaintiff did not even make use of a witness to produce its documents. The Court was informed that they were identified in an affidavit of documents served upon the defendants. Counsel for the defendants not only did not object to their production, but even relies on some of them in support of defendants' motion for dismissal of the action.

[19] The only other evidence before the Court is that of United States law. The defendants, who filed their motion first, submitted an affidavit from Michael Marks Cohen, a prominent New York attorney most knowledgeable in these matters. The plaintiff countered with an affidavit from another well-known American attorney, Stephen Simms of Baltimore. Both attorneys readily made the point that there is a divergence of opinion among various United States Circuit Courts of Appeals and brought to the Court's attention all that could possibly be brought to bear on the subject. The Court found their expert evidence most helpful, in the event that American law should apply.

THE CHARTERPARTIES

[20] A shipowner may trade a ship for his own account, or charter her to others. There are various types of charterparties, the prime attributes of which are conveniently set out in *Scrutton on Charterparties and Bills of Lading*, 21th ed. (London: Sweet & Maxwell, 2006) at 55-61. The various charterparties to which the Nordems was subject were all time charters. The shipowner employs the master and crew and through them maintains possession of the ship, which trades on the commercial orders of the time charterer. A time charter is to be contrasted with a charter by demise, the most common form of which is a bareboat charter, wherein the master and crew are servants of the charterer who has actual physical possession of the ship.

[21] By time charter made in Oslo, 9 May 2007, in the well-known New York Produce Exchange Form (NYPE93), the owners of the Nordems, Partenreederei m.s. Nordems of Hamburg, time chartered the Nordems to AS Klaveness Chartering of Oslo for a period of between 34 and 37 months in charterers' option, delivery to take place the following day. Clause 7 provided, among other things, that the charterers were to provide and pay for all bunkers. Clause 23 went on to say:

> The Charterers will not directly or indirectly suffer, nor permit to be continued, any lien or encumbrance, which might have priority over the title and interest of the Owners in the Vessel. The Charterers undertake that during the period of this Charter Party, they will not procure any supplies or necessaries or services, including any port expenses and bunkers, on the credit of the owners or in the Owner's time.

[22] The charterparty called for arbitration at London, with disputes to be governed by English law.

[23] The charterparty allowed the charterers to subcharter, which they did. In fact, there is a string of seven sub-time charters, the last being from Cosco Oceania Chartering Pty Ltd. of Australia to Parkroad Corporation of South Korea. The only sub-charter filed in court is the one made in Taipei, 25 October 2007, between Cosco and Parkroad, also in the New York Produce Exchange Form. The time charter period was to be a minimum of 11 and a maximum of 13 months at charterers' option. The delivery date was not specifically set out. The charterparty contains the identical boiler plate printed clauses relating to the payment of bunkers and the prohibition of lien. This charterparty was also subject to English law and English arbitration.

[24] Mr. Knust's information, which was not contested, is that Parkroad took delivery of the Nordems at Irago, Japan, on 25 February 2008. Notwithstanding the terms of the subcharter, Cosco informed the owners that Parkroad redelivered on 30 October 2008. It is noteworthy that at no time during the course of the Parkroad subcharter, or thereafter prior to her arrest at Baie Comeau, did the Nordems call at an American port.

THE DELIVERY OF THE BUNKERS

[25] The first of the documents filed by the plaintiff is an email dated 15 October 2008 from Daniel Park of World Fuel Services Seoul to operation@parkroad.co.kr, which actually confirms the revision of an earlier order with the quantity increased. The seller was identified as "World Fuel Services," with payment on 30 days credit. The buyer was identified as "ms Nordems and/or master and/or owners, Messrs. Parkroad Corporation." The bunkers were to be physically delivered by Chevron South Africa (Pty) Ltd. at Cape Town. The email went on to say:

> All sales are on the credit of the VSL. Buyer is presumed to have authority to bind the VSL with a maritime lien. Disclaimer stamps placed by VSL on the bunker receipt will have no effect and do not waive the seller's lien. This confirmation is governed by and incorporates by reference seller's general terms and conditions in effect as of the date that this confirmation is issued. These incorporated and referenced terms can be found at www.wfscorp.com. Alternatively, you may inform us if you require a copy and same will be provided to you.

[26] Corporate records indicate that World Fuel Services Seoul is actually part of World Fuel Services (Singapore) Pte Ltd.

[27] The bunker delivery receipt on Chevron's letterhead shows delivery of 500.001 metric tons at Cape Town on 16 October 2008. The master stamped the receipt as follows: "This service/supply

is for the account of vessel's Time Charterers, Messrs. Parkroad Corp. On behalf of vessel's owner, I herewith declare that neither owner nor vessel are responsible for payment of this service/supply." I consider this disclaimer meaningless as it apparently was issued after the bunkers were accepted on board. At least, there is no evidence that the stamp was not placed on the receipt until after the fact.

[28] Thereafter, on 20 October 2008, "World Fuel Services", a division of "World Fuel Services (Singapore) Pte. Ltd." issued an invoice addressed to "ms Nordems and/or her owners/operators and Parkroad Corporation" at an address in South Korea, in the amount of US$304,905.97. The addressees were directed to wire transfer funds to Chicago for the account of World Fuel Services.

[29] The first correspondence directly addressed to the defendants Partenreederei m.s. "Nordems" and Partenreederei "Nord" Klaus E. Oldendorff GmbH was on 8 December 2008 bearing the caption "IMMINENT ARREST OF M/V NORDEMS." The letter was directed to the attention of the Finance Director, carbon copy to Chartering Department, with the following email address: chartering@reederei-nord.de. The correspondence was on the letterhead of World Fuel Services Corporation, Miami, and threatened arrest unless payment was made forthwith.

WORLD FUEL SERVICES GENERAL TERMS AND CONDITIONS

[30] The plaintiff has produced an 11-page document titled *The World Fuel Services Corporation Marine Group of Companies – General Terms and Conditions*. These terms and conditions apply to a group of companies said to be headquartered in Miami, including World Fuel Services (Singapore) Pte. Ltd., and their respective subsidiaries and/or affiliates and/or branch

offices. The recital of various subsidiaries, affiliates and branch offices indicates that this group of companies carries out business in a good part of the world.

[31] Clause 7, which deals with payment, states that unless otherwise provided, sales are on a cash in advance or irrevocable letter of credit basis. In this case the confirmation gave 30 days' credit, and so was subject to credit approval by the seller's credit department in Miami. "[a]nd it is agreed that contract formation has occurred in Florida."

[32] Clause 8, which deals with credit and security, provides that product is sold on the credit of the ship, as well as the promise of the buyer to pay therefore. And "the Buyer warrants that the Seller will have and may assert a maritime lien against the Receiving Vessel for the amount due for the Products delivered." If the contract was via an agent, then that agent, as well as its principal, is fully bound by the obligations imposed by the contract. Subclauses d. and e. go on to say:

> 1. Buyer acknowledges the Seller has relied on vessel ownership listings provided in Lloyd's Register of International Shipowning Groups (Lloyd's Register – Fairplay Ltd.) and/or Fairplay World Shipping Directory (Fairplay Publications Ltd.) and/or www.seasercher.com and/or any other available resource to establish and/or confirm same. If Buyer is listed or otherwise indicated as the registered, beneficial or group fleet owner of any vessel listed in Lloyd's, Buyer warrants and agrees that all other vessels listed in the same beneficial ownership shall be construed as true sisterships in the same beneficial ownership.
>
> 2. All sales made under these terms and conditions are made to the registered owner of the vessel, in addition to any other parties that may be listed as Buyer in the confirmation. Any bunkers ordered by an agent, management company, charterer, broker or any other party are ordered on behalf of the registered owner and the registered owner is liable as a principal for payment of the bunker invoice.

[33] Clause 15 requires that all communications be sent to the attention of the particular seller at the Miami address. Interestingly enough, it also provides that "no ambiguity in any provision of the General Terms or Confirmation shall be construed against a party by reason of the fact it was drafted by such party or its counsel."

[34] Finally, clause 17 provides that the general terms, and each sale, are governed by the laws of the United States and the State of Florida, without reference to conflict of law rules. Nevertheless the seller is entitled to assert its right of lien or attachment in any country in which it finds the vessel.

[35] These general terms and conditions, and confirmation of order, attempt to cover every possible permutation and combination which may arise in the delivery of bunkers to a ship. They recognize the possibility that the bunkers may have been ordered by and on the account of a charterer who had no authority to bind the ship or her owners. Indeed, if the plaintiff relied upon Lloyd's Register of Shipping, it would have known perfectly well that Parkroad was not the owner of the Nordems and that the owners could be found at an address in Germany. It knew, or ought to have known, that Parkroad was not the ship's port agent, as another was identified in the order confirmation. Furthermore, it accepted orders from Parkroad with respect to other ships which according to Lloyd's have no connection whatsoever to the owners of the Nordems.

[36] The contract brings to mind what Mr. Justice Idington had to say about a contract of carriage evidenced by a bill of lading in *Vipond v. Furness Withy & Co.* (1916), 54 S.C.R. 521 at 524-5:

> It was clearly intended thereby, that the carrier should run no risk, and the unfortunate shipper should, if possible, bear all the risks, of every kind that the long experience of generations of carriers have discovered might be run by them in the course of their business. It seems clear from reading this wonderful instrument that so soon as a new risk had been discovered, some new words were introduced into the form of bills of lading used by these carriers. Thus there had grown as quaint and complex a document as legal knowledge of decided cases and mariners' experience could suggest, well suited to entrap the unwary shipper tempted to accept a through rate and shut his eyes to all implied therein.

[37] As to the defendants' assertion that the party which contracted with Parkroad was not World Fuel Services Corporation but rather World Fuel Services (Singapore) Pte. Ltd., there is simply not enough information in the record to allow me to dismiss the action on that basis. Given the credit provisions and the general terms and conditions, I will proceed on the basis that World Fuel Services Corporation of Miami is a proper plaintiff, but that it does not lie in the mouth of World Fuel Services (Singapore) Pte. Ltd. to later claim that it is the contracting party, and is not bound by the judgment herein.

THE PROPER LAW

[38] The conflict of law rules which determine the proper law of the relationship between World Fuel Services and the ship Nordems and her owners are those of the forum, i.e. those which form part of Canadian maritime law. As stated by Chief Justice Laskin in *Tropwood A.G. v. Sivaco Wire & Nail Co.*, [1979] 2 S.C.R. 157 at 166-7:

> What is raised by the appellant, shortly put, is whether it is open to the Federal Court, in exercising its jurisdiction in the matter brought before it, to determine, pursuant to conflict of law rules of the forum, a choice of law rule to govern the determination of the suit. In the present case, the Federal Court has jurisdiction over the appellant and over the cause of action and there is a body of law which it can apply. It is my opinion that this body of law embraces conflict rules

> and entitles the Federal Court to find that some foreign law should be applied to the claim that has been put forward. Conflicts rules are, to put the matter generally, those of the forum. It seems quite clear to me that s. 22(3) of the Federal Court Act, which I have already referred to, envisages that the Federal Court, in dealing with a foreign ship or with claims arising on the high seas may find it necessary to consider the application of foreign law in respect of the cause of action before it.

[39] It is well established and was reiterated by the Federal Court of Appeal in *Imperial Oil* and in the *Lanner,* above, and the authorities cited therein, that barring the application of principles of public policy, parties to a contract are free to expressly chose the governing law. Otherwise the Court must weigh the factors which connect the case to one system of law or another. Although American law gives a maritime lien in circumstances where Canadian domestic maritime law does not, our sense of public policy is not offended (The *Har Rai*, above).

[40] There are two points which must be kept in mind. The first is that the Court will apply its own domestic law unless satisfied that another law is applicable, a law which must have been alleged and proven as a fact to be different. As the only foreign law alleged is American law, strictly speaking the Court does not have to determine the proper law, but rather only if American law is the proper law. The second point is that it may not even be necessary to determine whether American law is applicable at all. If, as stated earlier, the owners of the Nordems are party to the World Fuel Services contract, or if they have not rebutted the weaker presumption under our law that the bunkers were supplied on the credit of the ship, it does not matter which substantive law applies. World Fuel Services would be entitled to judgment even if it only has a statutory right *in rem*.

THE LAW OF AGENCY

[41] Therefore, my point of embarkation is to determine whether under the common law of agency, which forms part of Canadian maritime law (*Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683, 1989 AMC 2798), the owners of the Nordems are bound by the contract purportedly made on their behalf by Parkroad. If so, that is the end of the matter. If not, then the issue becomes whether the presumption that the necessaries were supplied on the credit of the ship has been successfully rebutted.

[42] As noted by Professor G.H.B. Fridman in the *Law of Contract in Canada*, 5th ed. (Toronto: Thomson-Carswell, 2006) at 114:

> A contract is a personal matter between the parties who are privy to its making; only such a party can acquire rights or be subjected to liabilities under it.

Although that principle has been relaxed when it comes to stipulations which benefit third parties (*Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108, 1999 AMC 2840), it still holds true when it comes to efforts to burden a third party. Of course, the owners of the Nordems are not a third party at all if Parkroad was acting as their agent.

[43] Did Parkroad lie to World Fuel Services? Of course it did. Had it paid for the bunkers upfront no one would have been the wiser. As Professor Fridman notes at page 152: "What is meant by authority? This concept breaks down into various categories, namely, expressed, implied, usual, customary and apparent or ostensible authority" (footnote omitted). It is clear that the owners of the Nordems did not expressly authorize Parkroad to order bunkers on their credit or on the credit of the

ship. On the contrary, Parkroad was expressly prohibited from so doing through the chain of charterparties.

[44] However, lack of actual authority is not the end of the matter. The actions of the parties must be considered. It would be enough to establish that the necessaries man knew it was dealing with a time charterer as principal, rather than as an agent. The decision of Mr. Justice Collier in *Westcan Stevedoring Ltd. v. Armar (The)*, [1973] F.C. 1232 (T.D.), is often cited. However in this case, the general terms and conditions of the contract provide that Parkroad was contracting both as a principal and as an agent for the owners. This concept is well known in maritime law, and forms the basis of the *Himalaya* Clause in bills of lading wherein the carrier not only contracts on its own behalf, but also on behalf of its servants, agents and subcontractors. The validity of such clauses was upheld by the Supreme Court in the *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, 1986 AMC 2580 (the *Buenos Aires Maru*) and in *London Drugs v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299.

[45] I believe the answer lies in two cases: the decision of Mr. Justice Marceau, speaking for the Federal Court of Appeal, in *Mount-Royal/Walsh Inc. v. Jensen Star (The)*, [1990] 1 F.C. 199, 99 N.R. 42, and the decision of the Supreme Court of Canada in *Chartwell Shipping*, above.

[46] The *Jensen Star* is usually cited to dismiss the proposition that a demise charterer is the beneficial owner of a ship within the meaning of section 43 of the *Federal Courts Act*. However, it also dealt with the supply of necessaries to the Jensen Star while under demise charter. At pages 216 and following, Mr. Justice Marceau referred to a number of decisions rendered since the Federal

Court came into existence and noted that a statutory right *in rem* requires the owner to be personally liable. He was of the view that under our system the protection of the shipowner overrides protection of the necessaries man.

[47] He noted the *prima facie* presumption that necessaries are supplied on the credit of the ship and her owner, and set out three possibilities at pages 216 and 217:

> […] Is it not a fact that there are three possibilities which have to be reckoned: the owner may have contracted himself, or he may have authorized someone to contract on his personal credit, or he may have expressly or implicitly authorized a person, in possession and control of a ship, to contract on the credit of the ship (rather than on the entirety of his personal assets). But, I essentially agree that liability as a result of some personal behaviour and attitude on the part of the owner is required. Would that mean, though, that a judgment in rem cannot be rendered without being accompanied by a judgment in personam against the owner? If it were so, the whole notion of a distinct action in rem would be defeated, it seems to me, and to my knowledge no one has ever contended that such could be the case (Comp D.C. Jackson, Enforcement of Maritime Claims, 1985, at p. 59). (emphasis added)

[48] In that case the individual who ordered the work done on the ship was an officer of both the owners and the demise charterers, a related corporation. Mr. Justice Marceau thereby found "the involvement required for the validity of the action *in rem*, involvement which consisted in acting through its president in such a manner as to authorize tacitly Jensen Shipping to contract on the credit of the vessel and engage, to that extent, its personal liability." There is nothing of that sort here. Thus the mere fact of entering into a demise charter does not give the charterer actual or ostensible authority.

[49] According to its contract with Parkroad, World Fuel Services relied on commercial registries, such as *Lloyd's Register of Shipping*, to identify the owners of ships. I directed during the hearing that the relevant entries from the Register at the time be produced. The owners are stated to be Partenreederei m.s. Nordems. The contract clearly demonstrated World Fuel Services' own experience that the person ordering bunkers may not have actual authority to bind the ship. Had it followed the general provisions of its contract, which was not to extend credit, it would either have been paid or would not have delivered the bunkers at all.

[50] In my opinion it was on notice and should have verified with the owners whether or not Parkroad had authority. In *Chartwell Shipping*, above, the necessaries were ordered by a party which declared itself to be an agent, but which did not identify its principal. The Court held that the agent was not personally liable and was of the view that the necessaries man, in that case a stevedore, was put on inquiry. In this case we are dealing with the reverse situation, but the same principle holds true.

[51] I therefore conclude that under domestic Canadian maritime law the owners of the Nordems, much less her managers, are not personally liable and so the action would be dismissed *in rem* and *in personam*.

DOES AMERICAN LAW APPLY

[52] Having come to this stage, it is now necessary to consider whether our conflict rules direct us to American law and, if so, whether that law gives World Fuel Services a maritime lien on the Nordems. As aforesaid, since the owners of the Nordems are not in a contractual relationship with

World Fuel Services, the choice of law clause therein has less significance than otherwise. I think it fair to say that based on the facts set out in the various cases, the Courts have not been entirely consistent in the manner in which they ascertain the proper law. I must emphasize our choice of law rules direct us to foreign substantive law, without renvoi, i.e. not to the conflict rules of that jurisdiction. See Dicey, above at pp.73 and ff.

[53] What factors then connect this case to the United States? The plaintiff's best case is that it is an American corporation and that because credit was extended the contract was deemed to have been made in the United States. Payment was to be made to a bank in the United States. The contract with Parkroad was governed by American law, with non-exclusive American jurisdiction. On the other hand, the bunkers were ordered in South Korea and delivered in South Africa to a Cypriot flag ship, owned and managed out of Germany. At no relevant time did the Nordems ply American waters, and the ship was arrested in Canada.

[54] A convenient starting point for the proposition that Canada will give effect to a foreign maritime lien even in circumstances where there is no such lien under our domestic law is the decision of the Supreme Court in *Strandhill (The) v. Walter W. Hodder Co.*, [1926] S.C.R. 680, 1927 AMC 244. No choice of law analysis was required as the plaintiff carried on business in the United States, and furnished necessaries to the appellant ship in an American port under a contract made with the owner in the United States. The ship was thereafter sold which required the Court to determine whether the plaintiff enjoyed the maritime lien "droit de suite" against the ship in her new ownership.

[55] In *Todd Shipyards Corp. v. Altema Compania Maritima S.A.* (the Ioannis Daskalelis), [1974] S.C.R. 1248, [1974] 1 Lloyd's Rep. 174, 1973 AMC 176, the plaintiff, an American corporation, repaired the defendant ship at the behest of her owners in the United States. The ship was subsequently arrested and sold in Canada. It was held that Todd Shipyards had a maritime lien which had priority over the mortgagee.

[56] In the *Har Rai,* mentioned earlier, by contract made in the United States, the plaintiff supplied bunkers to a foreign flag ship in an American port. The ship was under charter and, in fact, the delivery of the bunkers was arranged by the charterers' agent. The plaintiff did not actually know that the *Har Rai* was under charter and that the charterparty contained a prohibition of lien clause. Again the Court did not consider it necessary to carry out a choice of law analysis. The plaintiffs enjoyed a maritime lien under American law and effect thereto was given in Canada.

[57] However such an analysis was carried out by Mr. Justice Stone in *Imperial Oil*, above. The facts were such that there were only two possible proper laws, those of the United States or those of Canada. The two ships in question were Canadian-flagged, owned by a Canadian corporation and under demise charter to another Canadian corporation. On the other hand, the demise charterers' managers were American and contracted with an American bunker supplier on terms subject to American law. The bunkers were supplied in Canada. For the most part, the ships traded in the Great Lakes, i.e. in both Canada and the United States.

[58] The Court determined that absent a contract with the shipowner (as opposed to one with the charterer) which contains a choice of law clause (which is the case here), the proper law is not the

law of the contract but rather the law with which the transaction has the closest and most substantial connection. Canada was selected as having closer connections to the transaction, taking into account ship registration, flag, ownership, possession in Canada by a Canadian demise charterer, operation of the vessels from a base in Canada, and the actual supply of the fuel in Canada.

[59] In reviewing the jurisprudence, Mr. Justice Stone noted at para. 28: "When the place of contracting is the same as the place of performance, the court may find it practically impossible to apply any other law to the contract."

[60] He also said at para. 22:

> While the present controversy involves transactions said to be connected to either Canada or the United States, it is not unusual in the marine shipping industry for fuel to be supplied to a vessel under a contract between parties located in several countries, negotiated in one country and performed in another sometimes by a person who was not a party to the original contract. Fortunately, complexities of that order are not present in the fact situation to be examined in this appeal.

Such complexities are present however in this case.

[61] Mr. Justice Stone also considered the 1953 decision of the United States Supreme Court in *Lauritzen v. Larsen*, 345 U.S. 571, 1953 AMC 1210, not that it was in any way binding, but rather because it set out a number of factors which are useful in determining the proper law. Although treated as a tort case, the *Lauritzen* approach was later applied in the United States to maritime law generally. The seven factors listed in that case were: a) the place of the wrongful act; b) the law of the flag; c) the domicile of the injured seaman; d) the allegiance of the defendant shipowners; e) the

place where the employment contract was made; f) inaccessibility of a foreign forum; and g) the law of the forum.

[62] I do not think that the decision of Mr. Justice Stone stands for the proposition that the proper law must be selected. As he mentioned, there were only two possibilities in that case, while in this there are several. The question here is whether, in all the circumstances, American law is the proper law.

[63] The issue in the *Brussel*, above, was whether the action in Canada by a necessaries man (an action in which the Brussel was sold) should be stayed as the Belgian owners of the Belgian flag Brussel had gone bankrupt in Belgium. It was clear that if Holt's claim proceeded on the merits in Belgium, it would be treated as an ordinary creditor and entitled to little or no dividend. The action was not stayed as otherwise Holt would be deprived of its maritime lien. Holt was an American corporation which rendered services to the Brussel in the United States. At para. 41, Mr. Justice Binnie, speaking for the court, said:

> "A maritime lien validly created under foreign law will be recognized and given the same priority in Canada as would be given to a maritime lien created in Canada under Canadian maritime law --- " (Emphasis added)

[64] In *Kirgan Holding S.A. v. The Panamax Leader*, 2002 FCT 1235, 225 F.T.R. 273, 2002 AMC 2917, there was no connection whatsoever with the United States save a choice of law clause between the bunker supplier and the bareboat charterer. It was held that since the bareboat charterers had complete possession and control of the ship, the plaintiff was entitled to rely on presumed authority to bind the shipowner. I find this decision difficult to reconcile with the decision of the

Court of Appeal in the *Jensen Star*. The claim for necessaries in that case succeeded not because of presumed authority on the part of the demise charterer, but rather because of the close relationship between the owners and the demise charterers and the fact that the individual who ordered the ship repairs was an officer of both. In any event, if presumed authority is based on possession of the ship, a time charterer such as Parkroad does not have possession (but see *Imperial Oil*, above).

[65] The last case to which I refer is the *Lanner*, above. Although Chief Justice Richard, speaking for the majority, stated that the choice of law clause in the supply contract should generally govern maritime transactions, the necessaries in question were ordered by the owner's manager who had authority to do all things appropriate including to arrange for bunkers. As a result, a contractual link was established between the bunker supplier and the owners. That is not the case here. He specifically refrained from commenting on the situation arising from the choice of law clause in a contract to which the shipowner was not privy.

[66] In my opinion, the non-American factors outweigh the American ones. These include the flag of the ship (Cyprus), the domicile of her owners (Germany), the place where the offer to purchase bunkers was accepted (South Korea), the place where the bunkers were delivered (South Africa), and the place where the ship was arrested (Canada). If it is necessary to choose among these laws, the proper law is that of South Africa. There are only two points of contact between the ship owner and the plaintiff. The first is South Africa where the bunkers were supplied. If a maritime lien exists, it existed from that moment. Had credit not been extended, the plaintiff would have been in position to arrest the ship then and there. Since the law of South Africa has not been alleged and proven to differ from Canadian law, the arrest would be set aside as there is no personal liability on

the part of the owners and as the presumption that the bunkers were delivered on the credit of the ship has been rebutted. The bunker receipt signed by the master does not even refer to World Fuel Services. The receipt is on the letterhead of Caltex Oil (SA) (Pty) (Ltd), with a Cape Town post office address and Cape Town telephone number. That receipt gives no indication whatsoever that the plaintiff was Caltex's unnamed principal. The second point of contact was Canada, the place of arrest.

[67] In my opinion this conclusion accords with Canadian maritime law. The different result in the decisions of the Federal Court of Appeal in *Imperial Oil* and in the *Lanner* is that in the latter there was a contract between the necessaries man and the shipowner, while in the former there was not. Absent a contract, we must tote up the points of contact. In a fact situation which has contact with several jurisdictions, pride of place must be given to the place where the necessaries were provided. In my opinion, in the circumstances of this case, that fact alone, or if necessary coupled with the place of arrest, outweighs the other factors.

THE MARITIME LAW OF THE UNITED STATES

[68] Should my analysis be wrong, and the proper law of the transaction is that of the United States, it is only appropriate that I make findings of fact, based on the evidence before me, as to the state of that law. The maritime lien given to necessaries men by American law has come up for discussion so often in our courts that we risk forgetting that our pronouncements are findings of fact based on the record, not the determination of points of law. Indeed, the American law on this subject is developing so rapidly that in the *Lanner*, above, the Federal Court of Appeal permitted fresh evidence based on cases which arose after the matter was heard in first instance. Not only is

there a division in the case law, the governing statute has been amended over time. The starting point of any analysis is the United States *Commercial Instruments and Maritime Lien Act*, 46 U.S.C. § 31341. That law creates a maritime lien on a ship in favour of a supplier who furnished her with necessaries, such as bunkers, "on the order of the owner or a person authorized by the owner." As it currently stands, persons presumed under the statute to have authority to procure necessaries include a charterer. The necessaries man has a maritime lien and is not required to prove that credit was given to the ship.

[69] Both Mr. Simms, called by the plaintiff, and Mr. Marks Cohen, called by the defendants, agree that the presumption of authority is only rebutted by establishing that the necessaries man actually knew that authority was lacking. Although American law thus encourages necessaries men to turn a blind eye to reality, our sense of public policy is not so offended as to refuse to give effect to the maritime lien provisions of the United States, should they be otherwise applicable (the *Har Rai*, above).

[70] Apart of the express terms of the statute, Mr. Simms relies on the 1992 decision of the United States Court of Appeals for the Fifth Circuit in *Liverpool & London S.S. P&I Ass'n v. m/v Queen of Leman*, 296 F. 3d 350, the 2008 decision of the Ninth Circuit in *Trans-Tech Asia v. m/v Harmony Container*, 518 F. 3d 1120, 2008 AMC 684, and the decision of the Fourth Circuit in 2009 in *Triton Marine Fuels v. m/v Pacific Chukotka*, 575 F. 3d 409, 2009 AMC 1885. These decisions appear to run contrary to the 1973 decision of the Second Circuit in *Rainbow Line, Inc. v. m/v Tequila*, 480 F. 2d 1024, 1973 AMC 1431, which is strongly relied upon by Mr. Marks Cohen.

[71] When there is a divergence of opinion and a divergence in the foreign case law, this Court is entitled to consider whether the cases cited support the propositions advanced by the experts. Furthermore, according to Castel & Walker, *Canadian Conflict of Laws*, 6th ed. (Markham: LexisNexis, 2005) at para. 7.3, and the authorities cited therein:

> Where the witness puts in materials as part of his or her evidence, the court is entitled to examine these materials, and where there is conflicting evidence as to the interpretation to be placed upon the materials, the court may scrutinize them and form its own conclusion on them (footnotes omitted).

[72] Dealing with these cases in chronological order, the issue in the *Tequila* was whether a breach of a charterparty by the shipowner gave rise to a maritime lien in favour of the charterer with priority over a ship mortgage. The Court noted that maritime liens arise separately and independently from the agreement of the parties, and that rights of third parties cannot be affected by the contract. It held, following *Lauritzen*, that virtually all points of contact in the transactions giving rise to the dispute as to the priority status of the charterer, as opposed to the mortgagee, were with the United States. The only British contacts were registration and nominal ownership of a ship whose real owners were American.

[73] In the *Queen of Leman*, it was held that under American law unpaid maritime insurance premiums give rise to a maritime lien. The ship had been arrested and sold in the United States. The insurance contract was governed by English law which did not provide a maritime lien. In holding that the underwriters had a maritime lien, the Court primarily relied upon the terms and conditions of the ship's entry in the protection and indemnity association. It held:

> We interpret the P&I rules to provide generally for the choice of English substantive law, but to except from this choice of law the substantive issue of whether a maritime lien exists in the first place.

> Under the contract, that question, like the enforcement of such a lien, is to be determined by the law of the local jurisdiction. We therefore conclude that in this case the P&I rules call for the application of United States substantive law to determine the existence of maritime liens.

[74] I did not find this reasoning helpful in a situation such as the present in which the ship was arrested in Canada, a jurisdiction which does not give a necessaries man a maritime lien.

[75] In the *Harmony Container*, in which Mr. Simms acted for the successful bunker supplier, the ship flew the Malaysian flag and was owned by a Malaysian corporation. They chartered her to a Taiwanese corporation which operated her in a loop which included regular calls in California. The charterers' manager contacted a bunker intermediary who obtained the quote from Trans-Tech of Singapore. The bunkers were delivered in South Korea. Thereafter the charterers went bankrupt without settling the bill. The ship would have been arrested in Long Beach had the new owners not voluntarily provided U.S. security. As in the present case, the bunker supply contract incorporated American law.

[76] The Court selected the proper law as if there were no choice of law clause and came to the view that Malaysian law governed contract formation. It considered the place where the bunkers were delivered was somewhat fortuitous. It went on, however, to find that Malaysian law permitted the selection of another law and then gave effect to American law, including the maritime lien, without determining whether under Malaysian law the shipowner was party to the contract. It expressly preferred the decision of the *Queen of Leman* over that of the *Tequila*.

[77] In the *Pacific Chukotka*, a foreign corporation provided bunkers on the order of a subcharterer at a foreign port. Under the head charter the owners had required that all bunkers were to be purchased for the charterer's account, at its own expense, and specifically provided that the charterer had no authority to create, incur or permit a maritime lien . The bunker supply contract, as might be expected, called for the application of American law and identified the buyer as the ship and her master, owners, managing owners, operators, managers, disponent owners, charterers and agents, jointly and severally. The owner's argument that it was not privy to and not bound by the choice of law provision in the bunker contract was dismissed. The Court emphasized that this argument ignored the fact that this was an *in rem* action asserting a maritime lien against the ship, rather than an *in personam* claim against the owners. The inquiry was not whether the parties to the supply contract had authority to bind the owners, but whether they had authority to bind the ship.

[78] The Court also noted the split of authority between the Second Circuit's position in the *Tequila*, above, and the position of the Fifth Circuit in the *Queen of Leman*, above, and the Ninth Circuit in the *Harmony Container*, above. The Fourth Circuit preferred the decisions of the Fifth and Ninth Circuits.

[79] Mr. Marks Cohen makes the point, which I consider persuasive, that American law would not apply of its own force, but rather through a choice of law process in a contract to which the owners of the Nordems were not party. Another most significant point is that in the cases relied upon by Mr. Simms, the ships were either arrested or security was provided in the United States in order to prevent their arrest. If this matter were to proceed in a United States court, the presence of the ship by way of arrest would be lacking. The court would be limited to declaring whether or not a

United States maritime lien attached. The *Queen of Leman* places considerable emphasis on the law of the place where rights can be enforced, which in this case is Canada.

[80] Furthermore, in the *Harmony Container* and *Pacific Chukotka*, there were other American contacts, apart from the arrests or right of arrest in the United States. In the *Harmony Container*, the Court was not concerned with the potential extraterritorial application of American law because apart from security posted in the United States, the ship regularly sailed into California.

[81] In the *Pacific Chukotka*, the subcharterer, although incorporated in the Cayman Islands, had its principal place of business in the State of Washington. The ship, owned by Green Pacific, traded to various ports, including those in the United States.

[82] The Court stated:

> Green Pacific first argues that the choice-of-law provision in the Bunker Confirmation cannot bind Green Pacific or its property without its knowledge or consent. Green Pacific's argument, however, ignores the fact that this case involves an *in rem* action asserting a maritime lien against the Vessel, rather than an *in personam* claim against Green Pacific as the Vessel's owner. As such, the relevant inquiry is not whether the parties to the supply contract had authority to bind the Vessel owner, but whether the parties had the authority to bind the *Vessel*. In the case of a maritime lien, the vessel itself is viewed as the obligor, regardless of whether the vessel's owner is also obligated. *See Amstar Corp. v. S/S ALEXANDROS T.*, 664 F. 2d 904, 908-09 (4th Cir. 1981); see also Black's Law Dictionary 943 (8th ed. 2004) ("[The maritime lien] arises by operation of law and exists as a *claim upon the property*, secret and invisible.") (quoting Griffith Price, *The Law of Maritime Liens* 1 (1940)) (emphasis added).

[83] I prefer the opinion of Mr. Marks Cohen over that of Mr. Simms. There must be more than an American choice of law clause in a contract to which the owners are not privy in order for American courts to give effect to a maritime lien. Three key elements were missing: a) the bunkers were not supplied in the United States; b) the ship never traded to the United States; and c) the ship was not arrested in the United States.

[84] With respect, a step was missing in the *Pacific Chukotka* analysis. The United States statute did not apply of its own force, but rather by way of a choice of law clause in a contract to which the owners were not party. On the general principles of agency applicable in the United States, I accept that absent other connecting factors the court has to first find the owners were bound by the contract before applying American substantive law. I find as a matter of fact that the *Tequila* reflects American law.

[85] I am called, as a matter of fact, to determine what American law is, not what an American Court would decide if the Nordems had been arrested in the United States rather than in Canada. An American Court would apply its own conflict of law rules, just as a Canadian Court applies its conflict of law rules. Mr. Simms did not make that distinction. He pointed out that in the *Tequila* the Second Circuit's decision turned on a choice of law analysis, which concluded there was a U.S. based maritime lien for breach of a charterparty. He added

> "Here, in this situation of a provision of necessaries (bunkers) to the Vessel on a charterer's order, through a contract incorporating United States law, there is only one nation's law to apply, that of the United States, to conclude that World Fuel holds an *in rem* maritime lien against the Vessel."

Even if Mr. Simms is right when it comes to predicting what a Court in the United States would do, his opinion is of no relevance as Canadian choice of law rules do not direct us to the laws of the United States. It is not enough that there be a contract. There must be a contract to which the owners are privy, absent other sufficient factors connecting the transaction to the United States.

[86] In summary, the shipowners were not party to the World Fuel Services contact and are not bound by its terms. Parkroad had no actual or ostensible authority to contract on their behalf or on the credit of the ship. The presumption that the bunkers were supplied on the credit of the ship has been successfully rebutted. United States law is not the proper law. Even if it were, it did not create a maritime lien on the ship or impose personal liability on her owners or managers. The action *in rem* and the action *in personam* against them fail.

JUDGMENT

THIS COURT ORDERS that:

1. The motion for summary judgment of Partenreederei m.s. Nordems and Reederei "Nord" Klaus E. Oldendorff GmbH is granted;

2. The motion for summary judgment by World Fuel Services Corporation is dismissed;

3. The action is dismissed as against all defendants except Parkroad Corporation; and

4. The defendants, other than Parkroad Corporation, are entitled to one set of costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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John O'Connor	FOR THE DEFENDANTS EXCEPT FOR PARKROAD

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