Federal Court of Appeal  Cour d'appel fédérale

Date: 20110225

Docket: A-148-10

Citation: 2011 FCA 73

CORAM: **LÉTOURNEAU J.A.**
NADON J.A.
TRUDEL J.A.

BETWEEN:

WORLD FUEL SERVICES CORPORATION

Appellant

and

THE SHIP "NORDEMS"
and
THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "NORDEMS"
and
REEDEREI "NORD" KLAUS E. OLDENDORFF GMBH
and
PARTENREEDEREI ms "NORDEMS"
and
PARKROAD CORPORATION

Respondents

Heard at Montreal, Quebec, on December 16, 2010.

Judgment delivered at Ottawa, Ontario, on February 25, 2011.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal from a decision of Harrington J. of the Federal Court (the "Judge"), 2010 FC 332, dated March 25, 2010, who allowed a motion for summary judgment brought by the respondents Partenreederei ms "Nordems" and Reederi "Nord" Klaus E. Oldendorf GMBH, and dismissed a similar application brought by the appellant World Fuel Services Corporation. As a

result, the Judge dismissed the appellant's Statement of Claim with costs as against all the respondents other than the respondent Parkroad Corporation ("Parkroad").

[2] Although the action brought against the respondents, an action for non-payment in the sum of US $328,282.09 (invoiced amount of US $304,905.97 plus administration fees and interests totalling US $ 23,282.12) for the supply of 500 metric tonnes of fuel oil (the "bunkers") to the Cyprus-flag bulk carrier ms "Nordems" (the "ship" or the "vessel") at Cape Town, South Africa, appears to be a straightforward matter, it is nothing of the sort. As the Judge points out in the first paragraph of his Reasons, the matter before him, and now before us in this appeal, raises difficult issues, namely, the liability of the owners of the vessel for the supply of the bunkers and whether, irrespective of liability on the part of the owners, the vessel itself is liable *in rem* for the amount sought by the appellant.

[3] More particularly, the appeal once again brings to the fore the very important differences between Canadian maritime law and American maritime law with regard to the rights of suppliers of necessaries – which include the supply of bunkers – seeking to assert their unsatisfied claims against the vessel to which the necessaries were supplied (see our recent decision in *Kent Trade & Finance v. JP Morgan Chase Bank*, [2009] 4 F.C.R. 109 (C.A.)("*The Lanner*"). The action instituted by the appellant results from the type of transaction which Stone J.A. accurately described at paragraph 22 of his Reasons in *Imperial Oil v. Petromar Inc.*, 2001 FCA 391, [2002] 3 F.C. 190 ("*Imperial Oil*"), where he wrote:

> [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.

[4] The appellant submits that the Judge erred in a number of ways. First, it says that the Judge was wrong to conclude that it did not have a claim *in personam* against the shipowners or *in rem* against the vessel. Second, it submits that the Judge erred in holding that American law did not govern the bunker supply contract. Lastly, the appellant says that the Judge erred in finding that American law, if applicable, did not grant a maritime lien in the circumstances of this case.

THE FACTS

[5] I now turn to a brief summary of the facts, which are mostly uncontested and which reveal complexities of the type which Stone J.A. referred to in *Imperial Oil*.

[6] At the relevant time, the ship was owned by the respondent Partenreederei ms "Nordems" (the "shipowners") and managed by the respondent Reederi "Nord" Klaus E. Oldendorf GMBH (the "managers"), both German entities. As to the respondent Parkroad, a South Korean entity, it was, at all times material herein, a sub-time charterer of the vessel.

[7] Also at the relevant time, the seller of the bunkers was either World Fuel Services (Singapore) Pte Ltd. ("World Fuel Singapore"), a Singapore corporation and a subsidiary of the appellant, a Florida corporation, or the appellant itself. I have used the word "or" because there is a dispute between the parties as to whether the appellant is entitled to bring this action and, hence, this appeal. At paragraph 37 of his Reasons, the Judge dealt with that issue in the following terms:

> [37] As to the defendants' assertion that the party which contracted with Parkroad was not World Fuel Services Corporation [the Appellant] 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.

[8] The bunkers were supplied to the vessel on October 15 and 16, 2008, following an exchange of e-mails between Parkroad and World Fuel Services Seoul, a division of World Fuel Singapore. The e-mail sent to Parkroad confirming the sale of the bunkers informed it that the sale was "on the credit of the VSL [vessel]" and that it was "presumed to have authority to bind the VSL with a maritime lien". The e-mail further provided that "disclaimer stamp placed by VSL on the bunker receipt will have no effect and do not waive the seller's lien". Finally, the e-mail informed Parkroad that the sale was made subject to the seller's general terms and conditions which, *inter alia*, provided that the sale would be governed by the laws of the United States and the State of Florida.

[9] The bunker delivery receipt is on a Caltex Oil (SA)(Pty)(Ltd.) ("Caltex") letterhead and shows delivery of 500.001 metric tonnes on October 16, 2008. The following stamp was apposed thereon by the master of the vessel:

> 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.

[10] On October 20, 2008, an invoice in the sum of US $304,905.97 was issued by World Fuel Services Seoul and directed to the vessel, its owners and to Parkroad at an address in South Korea,

presumably Parkroad's business address, and calling for payment to be made at the appellant's bank located in Chicago, Illinois, U.S.A.

[11] Some time after the supply of the bunkers, Parkroad became bankrupt and did not pay for them. As a result, the vessel was arrested on December 12, 2008 at Baie Comeau, Quebec. The shipowners posted bail for the release of their ship and proceeded to defend the action taken against them and their ship. Parkroad, needless to say, has not sought to defend the action against it.

[12] A few words concerning the charterparties pursuant to which the vessel was operated will be useful.

[13] On May 9, 2007, the shipowners and AS Klaveness Chartering of Oslo, Norway, entered into a time charterparty agreement, in the 1992 New York Produce Exchange Form. Pursuant thereto, the vessel was time-chartered for a period of between 34 and 37 months in the charterer's option and the charterer was given the right to, *inter alia*, sub-charter the vessel. As a result, the vessel was sub-chartered on seven occasions, the last sub-charter being that in favour of Parkroad, which took delivery of the vessel in Japan on February 25, 2008, and redelivered it on October 30, 2008, to its contracting party, Cosco Oceania Chartering Pty Ltd. ("Cosco") of Australia.

[14] It is of importance to note that the head charterparty and that between Cosco and Parkroad both contained a clause relating to the payment of bunkers and the prohibition of liens. More

particularly, the clause expressly prohibited the charterers from taking bunkers on the credit of the shipowners and, hence, on the credit of their ship. The relevant clause reads as follows:

> 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.
>
> [Emphasis added]

[15] I also point out that both of the charterparties called for arbitration in London and provided that all disputes were to be governed by English law.

DIFFERENCES BETWEEN CANADIAN AND AMERICAN LAW

[16] Before turning to the Judge's Reasons, it will be useful to say a few words concerning the differences between our law and that of the United States with regard to the rights of suppliers of necessaries. It will also be useful to briefly set out the arguments made by the parties before the Judge, which arguments are essentially the same in this appeal.

[17] The differences between our law and that of the United States are of crucial importance in this appeal since Canadian maritime law, contrary to American maritime law, does not create a maritime lien in favour of a supplier of necessaries. Further, under Canadian maritime law, personal

liability of the shipowner is required for a successful action *in rem* by a supplier of necessaries, whereas, under American law, personal liability of the shipowner is not required for such an action to be successful.

[18] Also of relevance is the fact that under American law, a charterer is presumed to have authority from the owner of the ship to subject the ship to a maritime lien for necessaries, in the absence of the supplier's actual knowledge of a prohibition of lien clause in the charter party. In other words, there exists a presumption that a necessaries man has contracted on the credit of the ship, which presumption can only be rebutted by showing that the necessaries man knew that his contracting party was not authorized to bind the ship. Failing rebuttal of the presumption, the supplier of necessaries can enforce his maritime lien on the ship.

[19] Although there is also a presumption under Canadian maritime law that necessaries were ordered on the credit of the ship, our law does not go as far as requiring actual knowledge of lack of authority on the part of the supplier for a successful rebuttal of the presumption. This is why the Judge, in the course of his Reasons, characterized the presumption under Canadian law as a "weaker presumption" (paragraph 40 of Judge's Reasons).

[20] These principles – elaborated during the course of the 19th and 20th centuries by English, Canadian and American courts – were fully discussed by our Court in a number of recent decisions, namely: *Imperial Oil,* at paragraphs 23 to 27; *The Lanner*, at paragraphs 8, 9, 20, 21, 22 and 23; *Mount-Royal/Walsh Inc. Jensen Star (The)*, [1990] 1 F.C. 199, 99 N.R. 42 ("*Mount-Royal*") at

pages 214 to 217; and in *Marlex Petroleum Inc. v. "Har Rai" (The)*, [1984] 2 F.C. 345 (C.A.), affirmed [1987] 1 S.C.R. 57 ("*The Har Rai*"), at paragraphs 3 to 11.

[21] Hence, if American maritime law is the law of the transaction at issue, the appellant's chances of success in recovering its claim against the ship are dramatically increased.

THE PARTIES' CONTENTIONS

[22] Before the Judge, the appellant took the position that Parkroad had contracted, not only on its behalf but also behalf of the shipowners and their ship. The appellant further argued that the contract was deemed, by reason of its terms and conditions, to have been entered into in the United States and that it was subject to American law. As a result, the appellant had a maritime lien over the ship in regard to its unpaid claim, irrespective of whether or not the shipowners are personally liable.

[23] As to the shipowners, they first argued that they were not bound by the contract entered into by Parkroad and the appellant, adding that there could be no doubt that Parkroad did not have actual or ostensible authority to contract on their behalf or on the credit of their ship. The shipowners further asserted that the law which governed their relationship and that of their ship with the appellant was not the law of the United States and that as no other law had been alleged, their relationship with the appellant was subject to Canadian maritime law. Consequently, in their view, since a supplier of necessaries does not have the benefit of a maritime lien for its claim under

Canadian maritime law, the appellant was required to demonstrate that they were liable in order to succeed *in rem* against the vessel.

[24] Finally, the shipowners argued that even if the laws of the United States were applicable, they did not, in the circumstances of this case, give the appellant a maritime lien over the vessel.

[25] With the above in mind, I now turn to the Judge's decision.

THE FEDERAL COURT DECISION

[26] After setting out the relevant facts and the parties' respective positions, the Judge began a discussion with regard to the law governing the relationship between the appellant and the shipowners and their ship. He referred to the Supreme Court of Canada's decision in *Tropwood A.G. v. Sivaco Wire & Nail Co.*, [1979] 2 S.C.R. 157 ("*Tropwood*"), where the Court made it clear that the conflict rules that were to be used to determine the law that applied to the relationship at issue were those of the forum (*Tropwood* at pages 166-167).

[27] The Judge further indicated that parties to a contract were entitled to choose the law governing their relationship, unless the forum's principles of public policy prevented such choice. He added that the fact that American law, contrary to Canadian maritime law, gave a maritime lien to suppliers of necessaries did not offend Canada's sense of public policy. For this proposition, the Judge referred to this Court's decision in *The Har Rai*. He then stated that failing a choice of law by

the parties, the Court's task was to weigh the factors which linked the transaction to one or more jurisdictions.

[28] This led the Judge to say that unless it was demonstrated that a law other than Canadian maritime law applied, which law had to be proven as a fact, Canadian maritime law would govern the relationship between the parties. Because only American law had been alleged by the appellant, the relationship between the parties was either subject to that law or to Canadian maritime law. He then went on to say, at paragraph 40 of his Reasons:

> [40] … 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*.

[29] Consequently, the Judge proceeded to determine the shipowners' liability and that of their ship under Canadian maritime law. In other words, he sought to determine whether the shipowners were bound by contract to pay for the bunkers and, if not, whether the presumption that the necessaries were ordered on the credit of the ship had been rebutted.

[30] After stating that it was beyond doubt that Parkroad did not have actual authority from the shipowners or its managers to take on bunkers on their behalf or on the credit of the ship, since the terms of the relevant charterparties expressly prohibited Parkroad from doing so, the Judge indicated that lack of actual authority was not fatal to the appellant, adding that the conduct of the parties had to be examined. As an example, the Judge stated that it would be sufficient for the

shipowners to show that the supplier of necessaries was aware that it was dealing with a time charterer as a principal rather than as an agent of the shipowners. However, the Judge found that the appellant did not have actual knowledge of the fact that Parkroad was expressly prohibited by the terms of the relevant charter party from procuring necessaries on the credit of the shipowners and their ship.

[31] The Judge then turned to two decisions which, in his view, provided the answer to the question of whether the shipowners were contractually bound to pay for the bunkers. The first decision is that of this Court in *Mount-Royal*, wherein necessaries were supplied to the ship "Jensen Star" while under demise charter.

[32] At pages 216 and 217, Marceau J.A., writing for a unanimous Court, concluded, after reviewing the relevant case law, that an action *in rem* for necessaries could not succeed without personal liability on the part of the ship's owners. In so concluding, Marceau J.A. elaborated on the circumstances which might lead to personal liability on the part of a shipowner with regard to the supply of necessaries to its ship:

> Most of the decisions of the Trial Division of this Court rendered since 1970 have taken the view that the involvement of the owner in the supplying of the necessaries has to be complete and direct enough to entail his personal liability. These decisions repeat, in effect, that an action *in rem* is sustainable only if the owner is personally liable for the amount claimed. [citations omitted]. Some doubts have occasionally been expressed as to the validity of this view (for instance *Thorne Riddell Inc.* [*Thorne Riddell Inc. v. Nicolle N. Enterprises Inc.*, [1985] 2. F.C.31 (T.D.)]… , *Western Stevedoring Co. v. Ship "Anadolu Guney" Cargo et al.* (1988), 23 F.T.R. 117 (F.C.T.D.), and of course the decision under attack here), but I believe that it is basically indisputable. To contend that an action *in rem* could be sustained even in the absence of any personal liability on the part of the owner would go

> against the whole idea behind the system which is, again, the protection of the owner. A claim against a ship cannot be viewed apart from the owner; it is essentially a claim against the owner. It may be that the terms in which the principle has been put in many decisions was somewhat too broad. This personal liability of the owner could exist, I suggest, only in relation to the vessel, that is to say only to the extent to which the proceeds of sale of the vessel may be applied to the claim; in other words, a liability to be satisfied strictly out of the *res* (see in that respect the interesting decision of the Privy Council in *Foong Tai & Co. v. Buchheister & Co.*, [1908] A.C. 458 (P.C.)) 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]

[33] In *Mount-Royal*, the work which led to the claim against the vessel had been requested by an officer of both the owners of the ship and of its demise charterer, a corporation related to the shipowners. As a result, our Court held, on its understanding of the law as explained by Marceau J.A. in the above passage, that the demise charterer had authority from the shipowners to contract on the vessel's credit and, thus, to render the shipowners liable for the work done to their ship.

[34] The Judge then turned to the facts before him and found that the appellant was aware or ought to have been aware that Parkroad was not the owner of the ship. Consequently, it ought to have taken steps to ascertain whether Parkroad had authority from the shipowners to contract on their behalf or to bind their ship. The Judge formed that opinion after reviewing the seller's general

terms and conditions, in regard to which he made the following remarks at paragraph 35 of his Reasons:

> [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.

[35] Based on his careful review of the seller's general terms and conditions, more particularly of clauses 8(d) and (e) thereof, which provide that in contracting with the buyer, the seller "has relied on vessel ownership listings provided in *Lloyd's Register of International Shipowning Groups*… and any other available resource to establish and/or confirm same", the Judge found that the appellant's practice, in dealing with clients requesting a supply of bunkers, was to rely on commercial ship registries, such as *Lloyd's Register of Shipping*, in order to identify the ownership of the vessel to which it was being asked to provide the bunkers. Further, the Judge's examination of *Lloyd's Register of Shipping* revealed that the respondent Partenreederei ms "Nordems" was the owner of the vessel. This led him to state at paragraph 49 of his Reasons:

> [49] … 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.

[36] Thus, in the Judge's view, the appellant was on notice that Parkroad might not have authority to bind the shipowners or their vessel and, as a result, should have verified with the shipowners whether Parkroad had such authority. In further support of that view, the Judge referred to the Supreme Court's decision in *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683 ("*Chartwell*.") and made the following comments in regard thereto at paragraph 50 of his Reasons:

> [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.

[37] As a result, the Judge concluded that if Canadian maritime law was the governing law, it necessarily followed that the appellant's action – both *in rem* and *in personam* – had to be dismissed, since neither the shipowners nor the managers were personally liable for the supply of the bunkers. The Judge then turned to the question of the applicable law.

[38] He first stated that because the shipowners were not a party to the bunker supply contract with the appellant, the U.S. choice of law clause had "less significance than otherwise", adding that the case law was not consistent "in the manner in which they ascertain the proper law" (paragraph 52 of Judge's Reasons).

[39] He then proceeded to determine those factors having a connection to the United States, which he found to be as follows:

> [53] … 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.

[40] The Judge then reviewed a number of Canadian decisions where the courts had given effect to a foreign maritime lien, notwithstanding that in the circumstances of the case, the claimant would have had no such lien under Canadian maritime law. In that regard, he referred to the Supreme Court of Canada's decisions in: *Strandhill (The) v. Walter W. Hodder Co.*, [1926] S.C.R. 680, 1927 AMC 244 ("*The Strandhill*"); 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 Ioannis Daskalelis*"); and to this Court's decision in *The Har Rai*, noting however that in none of these cases had it been necessary for the court to carry out a choice of law analysis.

[41] He then turned to the decisions of this Court in *Imperial Oil* and *The Lanner* where a choice of law analysis was undertaken by the Court. With respect to *Imperial Oil*, the Judge observed that the Court found that, in the absence of a contractual relationship between a shipowner and a supplier of necessaries containing a choice of law clause, the law governing the transaction was not the law of the contract, but rather the law which had the closest and most substantial connection thereto. He also noted that in *Imperial Oil*, our Court had given serious consideration to the United States Supreme Court's decision in *Lauritzen v. Larsen*, 345 U.S. 571, 1953 AMC 1210, a tort case where that Court listed seven factors which it found useful in determining the proper law. Amongst the

factors were the law of the flag, the allegiance of the shipowner, inaccessibility of a foreign forum and the law of the forum.

[42] With respect to our decision in *The Lanner*, the Judge pointed out that Chief Justice Richard, writing for the majority, had held that generally speaking, a choice of law clause in a supply contract would govern the transaction. This led the Judge to say that in that case, contrary to the situations before him and before the Court in *Imperial Oil*, the bunkers had been ordered by the shipowners' manager, who was so authorized by the shipowners. Thus, in the Judge's view, "a contractual link was established between the bunker supplier and the owner" (paragraph 65 of Judge's Reasons). The Judge ended his remarks concerning *The Lanner* by stating that Richard C.J. had left it open as to what weight should be given to a choice of law clause in a contract to which the shipowner was not a party.

[43] Following his review of the authorities, the Judge then proceeded to determine what he characterized as "the non-American factors", which led him to conclude that "the non-American factors outweigh the American ones". He wrote as follows at paragraph 66 of his Reasons:

> [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.
>
> [Emphasis added]

[44] As a result of these findings, the Judge concluded that the applicable law would have been that of South Africa. However, because such law had neither been alleged nor proven to be different from Canadian maritime law, our law was the applicable law and the arrest of the vessel could not stand. In other words, because the shipowners were not personally liable with regard to the supply of bunkers and because they had succeeded in rebutting the presumption of liability, the arrest could not stand and the action, both *in rem* and *in personam*, had to be dismissed. The Judge noted that his conclusion was in accord with Canadian maritime law, adding that the somewhat contradictory conclusions reached by our Court in *Imperial Oil* and *The Lanner* found an explanation in the fact that, in *The Lanner*, there was a contract between the supplier and the shipowners, whereas in *Imperial Oil*, as in this case, no such arrangement could be found. The Judge concluded that part of his Reasons by stating at paragraph 67 that where no contract existed between the supplier and the shipowners, "we must tote up the points of contact", i.e. add them up to determine the proper law of the transaction.

[45] The Judge then went on to determine, although this was not necessary in light of his conclusion that the transaction was governed by Canadian maritime law, whether American law, if applicable, would grant the appellant a maritime lien. After consideration of the expert evidence

before him with regard to the state of the law in the United States, the Judge answered that question in the negative because of his view that American law required more than a U.S. choice of law clause in a contract in order to confer a maritime lien upon a supplier of necessaries. In reaching this conclusion, the Judge relied on his findings that the bunkers had not been supplied in the United States, that the ship had not traded in the United States and that it had not been arrested in that country. Because these key elements were missing, the Judge was satisfied that American law would not grant the appellant a maritime lien over the vessel.

[46] The Judge concluded his Reasons, at paragraph 86, with the following remarks:

> [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.

ANALYSIS

[47] In my view, the Judge made no reviewable error in finding that the shipowners were not a party to the supply contract, that the presumption had been rebutted and that American law did not govern the transaction at issue. Consequently, it is not necessary for us to determine whether American law would grant the appellant a maritime lien on the vessel, were it the proper law of the transaction. My reasons for reaching these conclusions are as follows.

(a) Whether the appellant had a valid claim *in personam* or *in rem* under Canadian maritime law:

[48] I begin with the question of whether the appellant has a valid claim *in personam* or *in rem* under Canadian maritime law. The only argument it puts forward on this question is that the Judge erred in his analysis of what is required to rebut the presumption and that he erred in concluding that the shipowners had rebutted the presumption.

[49] The appellant argues that the presumption applies, whether the ship is under a time or demise charter, and that it can only be rebutted by proof that the supplier of necessaries had actual notice that the charterer was not authorized to pledge the credit of the ship or that the supplier did not look to the ship for satisfaction of its claim. This proposition leads the appellant to say that, in the circumstances of this case, the presumption applies and that it has not been rebutted.

[50] The appellant goes on to say that it is not clear whether the Judge accepted that the presumption applied. In making that point, it refers to the Judge's Reasons at paragraphs 9, 40, 48 and 64. In my view, there is no basis for that position. It is clear, on my review of the Judge's Reasons, that he was of the opinion that the presumption applied, but that it had been rebutted by the shipowners. At paragraph 86 of his Reasons, which I have reproduced herein at paragraph 46, he clearly says that the shipowners have rebutted the presumption. Hence, it cannot be said that he did not consider that the presumption applied.

(b) The presumption under Canadian maritime law:

[51] I now turn to the appellant's specific argument that the Judge failed to apply the proper test in determining whether the presumption had been rebutted. In the appellant's view, when this test is properly applied, the only possible conclusion is that the presumption has not been rebutted. In my view, this argument is flawed.

[52] First, I am satisfied that the presumption on which the appellant relies is not the presumption it can invoke under Canadian maritime law. In my view, what the appellant asserts as the applicable presumption is the one which it would be entitled to rely on if American law were applicable. In effect, under U.S. law, there exists a legislative presumption that a charterer has authority to bind the shipowner's vessel for necessaries. That presumption can only be rebutted by proof that the supplier had actual knowledge of lack of authority on the part of the person requesting the supply of necessaries. Hence, in such circumstances, American law will confer on the supplier a maritime lien which will allow him to arrest the vessel so as to enforce his claim. In other words, the supplier of necessaries does not have to demonstrate that it relied on the credit of the ship or that it made a reasonable inquiry with regard to the authority of the person ordering the necessaries (*The Commercial Instruments and Maritime Liens Act*, 46 U.S.C., sections 30341 *et seq.*; for a full discussion of the history of the presumption under American law, see Gilmore and Black, *The Law of Admiralty*, 2d ed. (Mineola, New York: The Foundation Press, Inc., 1975), pages 670 *et seq.*).

[53] That presumption, as the Judge clearly explained in his Reasons, is not the presumption on which the appellant can rely under Canadian maritime law. It is, as the Judge noted, a "weaker

presumption". In order to properly understand the presumption available under Canadian maritime law, it is crucial to remind ourselves that, under our law, there can be no *in rem* action and, hence, no arrest, for a claim of necessaries unless it can be shown that the shipowners are liable *in personam*. To paraphrase the words of Marceau J.A. in *Mount-Royal*, there must be liability resulting from the acts or omissions of the shipowners or resulting from their behaviour or attitude.

[54] I must emphasize that the bunkers were not ordered either by the master of the ship or by an agent of the shipowners. They were ordered by Parkroad, a sub-time charterer who was expressly prohibited from taking on necessaries on the credit of the shipowners and their ship. The relevant question, in my view, is whether, in the circumstances of this case, behaviour or conduct on the part of the shipowners could have led the appellant to believe that Parkroad was authorized to purchase the bunkers on their behalf or on the credit of their ship.

[55] Professor William Tetley, in his *Maritime Liens and Claims*, 2d ed. (Montreal: Éditions Yvon Blais, 1998) deals with this issue at chapter XVI of his learned work. He starts with the proposition that neither the time charterer nor the voyage charterer, contracting in its own name, can bind the ship for necessaries, unless authorized by the shipowners to do so. In support of that proposition, Professor Tetley refers, *inter alia*, to the passage of Marceau J.A.'s Reasons in *Mount-Royal* (reproduced at paragraph 32 of these Reasons) where our former colleague makes it clear that a shipowner can, expressly or implicitly, authorize someone, i.e. a charterer, to contract on the credit of its ship.

[56] Professor Tetley then discusses the situation where a shipowner may have led a supplier of necessaries to believe that the time charterer had authority to bind its ship, when in fact, the time charterer did not possess such authority. In that occurrence, Professor Tetley says that "[T]he shipowner (or demise charterer) may be held liable personally on contracts made by these ostensible 'agents', on the ground that the latter persons have been 'held out' to the supplier as being parties duly empowered to bind the credit of their would-be 'principals' (i.e. the shipowner or demise charterer)" (*Maritime Liens and Claims*, page 570).

[57] Professor Tetley then goes on to state, again at page 570, that in determining whether there was a "holding out", i.e. whether the shipowners, by their acts and omissions, led the supplier of necessaries to believe that the person purchasing the bunkers was authorized by them to do so, the court will have to "… consider the facts and balance the purported 'holding out' by the owner or demise charterer against the duty to inquire of the supplier". In support of a possible duty to inquire on the part of the supplier, Professor Tetley refers to *Cann v. Roberts*, (1874) 30 L.T.R. 424, an English decision where the Court held that suppliers were not entitled to rely on the master's authority to bind the shipowners where, by reasonable inquiry, they would have been in a position to ascertain the master's lack of authority. I wish to point out here that prior to 1971, U.S. law imposed on a supplier of necessaries a duty to inquire as to a buyer's authority to bind a vessel. That duty was removed with the enactment, in 1971, of *The Commercial Instruments and Maritime Liens Act* (see Gilmore and Black, pages 670 *et seq.*).

[58] Professor Tetley then concludes his discussion of this issue at page 572 by making the following remarks:

> Neither the time nor the voyage charterer is regarded as the servant or agent of the shipowner. Therefore, assuming there is no question of "holding out", there would seem to be no need for the owner to notify suppliers that such a charterer, in contracting with them, does not bind the owner's personal credit. Moreover, the supplier's duty to inquire is another argument available to the owner and ship.
>
> [Emphasis added]

[59] In my view, Professor Tetley's exposition of the law is correct. With this in mind, I now turn to the question of whether or not, on the facts of the case, the Judge erred in concluding that the presumption had been rebutted by the shipowners.

(c) Whether the Judge erred in concluding that the presumption had been rebutted:

[60] As I have already indicated, I am of the opinion that the Judge did not make any error in concluding as he did. First, there can be no doubt in my mind that the appellant knew or ought to have known that Parkroad was not the owner of the ship. The appellant had access, as its seller's general terms and conditions reveal and the Judge so found, to publications such as *Lloyd's Register of Shipping*, which would have allowed the appellant to determine the ownership of the vessel. In other words, these publications showed that the ship was owned by the respondent Partnerreederei ms "Nordems" and not by Parkroad. Consequently, the appellant was on notice and should have taken steps to verify whether Parkroad had authority to bind the vessel.

[61] In the event, there is no evidence that the appellant made any attempt to contact the shipowners so as to ascertain whether Parkroad was authorized to purchase bunkers on their behalf. The only possible inference is that the appellant did not make such an attempt or, if it did, it did not want to know.

[62] I am also unable to detect from the evidence any conduct or behaviour on the part of the shipowners which could have led the appellant into thinking that Parkroad was somehow authorized by them to purchase bunkers on their behalf.

[63] It is also of some significance that the appellant dealt at all times with Parkroad only. As proof of this, I note that the invoice for the supply of bunkers, although addressed also to the shipowners, was sent to Parkroad only and not to the shipowners. In fact, there was no contact between the appellant and the shipowners until the time when the appellant began giving serious consideration to a possible arrest of the ship, at which time the appellant knew that Parkroad was either bankrupt or that, in any event, it would not likely be able to satisfy its claim. In fact, as the Judge found, the first correspondence sent by the appellant to the shipowners is dated December 8, 2008, i.e. 4 days prior to the arrest of the vessel at Baie Comeau.

[64] Finally, there is some significance, in my view, to the fact that the e-mail confirming the sale of the bunkers to Parkroad indicated that "disclaimer stamps placed by VSL on the bunker receipt will have no effect and do not waive the seller's lien". This supports the view that the appellant had

reason to believe that Parkroad may not have been the owner of the vessel, which should have prompted it to inquire.

[65] To conclude, although there exists under Canadian law a presumption that necessaries are supplied on the credit of the ship, this presumption is rebuttable. Whether this presumption is rebutted must be determined by a proper assessment of all relevant facts, including whether the supplier made reasonable inquiries to ascertain the authority of the person requesting the necessaries. I would add to this that the extent to which a supplier must make inquiries will depend on the particular circumstances of the case. In determining whether the duty to inquire has been met, we should be mindful of the fact that modern technology makes it much easier for a supplier to obtain, in a timely manner, the type of information which it requires to make an assessment as to whether or not a charterer, or other person, has authority from the shipowner to bind the ship.

[66] In the matter before us, I am satisfied that the Judge did not err when he held that the appellant ought to have inquired with regard to Parkroad's authority to bind the ship. The Judge carefully reviewed all of the relevant evidence on this question and his conclusion that the presumption had been successfully rebutted by the shipowners should not be set aside. He made no error of principle, nor did he make any error in his assessment of the facts in light of the relevant principles.

[67] I now turn to the question of whether the Judge erred in determining that the transaction was not subject to American law and that, as a result, the governing law was Canadian maritime law.

(d) Whether the Judge erred in determining that the transaction was not governed by American law:

[68] The appellant submits that the Judge misdirected himself as to the appropriate test for determining the applicable law. More particularly, the appellant says that the Judge failed to give sufficient weight to the choice of law clause in the bunker supply contract and failed to give appropriate weight to the other factors which connected the claim to the United States. Finally, the appellant says that the Judge gave disproportionate weight to the place where the bunkers were supplied to the vessel.

[69] The appellant then says that the law applicable to a particular transaction is the law of the place with the closest and most real and substantial connection to the transaction. In its view, although the Judge appears to have accepted this as the correct test, he did not actually apply it. Rather than attempting to determine which jurisdiction had the closest and most substantial connection to the transaction, the Judge sought to determine whether the non-American factors outweighed the American ones.

[70] The appellant also says that the Judge misdirected himself with regard to what he referred to as the "points of contact" (the Judge uses that expression on two occasions in his Reasons: first, at paragraph 66, where he refers to the "points of contact" between the shipowner and the plaintiff; and at paragraph 67, where he says "we must tote up the points of contact", i.e. points of contact with several jurisdictions). In the appellant's submission, the proper approach is not that of weighing points of contact between the shipowners and the appellant, but rather to consider each

relevant factor and to give it the weight it deserves so as to ultimately decide which jurisdiction has the closest and most real and substantial connection with the transaction.

[71] I will address first the appellant's submission that the Judge failed to give appropriate weight to the choice of law clause. In fact, the appellant says that the Judge gave this factor no weight whatsoever. In order to determine this question, I must turn to our decisions in *Imperial Oil* and *The Lanner*, where similar issues were addressed by this Court.

[72] In *Imperial Oil*, the two vessels, both Canadian-registered ships, were owned by a Canadian company, Imperial Oil. The vessels were operating under demise charter to Socanav, a Canadian operator. Socanav, as demise charterer, appointed Star, an American company, to manage its vessels. As part of its duties, Star was entrusted with the responsibility of purchasing bunkers for the vessels. As a result, Star entered into a contract with Petromar, an American company, to supply bunkers to the vessels. In turn, Petromar entered into a contract with Exxon, an American company, pursuant to which Exxon agreed to sell and deliver bunkers to customers solicited by Petromar. Both of these contracts were entered into in the United States and provided that their "construction, validity and performance… shall be governed by the laws applicable in the State of New York, to the exclusion of any other legal system".

[73] Also noteworthy, in *Imperial Oil*, is the fact that the ships traded in the Great Lakes, i.e. both in Canada and in the United States, and that Exxon had supplied bunkers to the two vessels at the ports of Montreal and Sarnia. In the event, Petromar paid Exxon for the bunkers, but did not

receive payment of its invoices from either Star or Socanav. It is also of interest to note that when it supplied the bunkers to the ships, Petromar was aware that they were owned by Imperial Oil and not by Socanav.

[74] Thus, as in the present matter, there was no contract between the suppliers and the shipowners. The only contracts were those entered into between Petromar and Exxon and between Petromar and Star.

[75] In *Imperial Oil*, the Trial Judge held that the transactions were governed by American maritime law and that, as a result, Petromar was entitled to a maritime lien in regard to its unpaid claims. In so concluding, the Trial Judge determined that the proper test was to apply the law which had the closest and most substantial connection with the transaction, which led him to weight a number of factors, including the two contracts pursuant to which the bunkers were supplied to the vessel. In the Trial Judge's view, that factor was the most significant factor, since both contracts had been concluded in the United States and they both contained a U.S. choice of law provision.

[76] In appeal before our Court, the shipowners argued that the Judge had given disproportionate weight to the two contracts between Petromar and Star and between Petromar and Exxon, and that he had failed to give any weight to many connecting factors linking the transaction to Canada.

[77] After reviewing the authorities concerning both the concept of maritime lien and the conflict of law principles, Stone J.A. turned to the facts before him and stated that the Trial Judge had

selected the correct test, i.e. that the applicable law was that with the closest and most substantial connection to the transaction, adding that that approach was the one favoured by "maritime conflict of laws textwriters" (*Imperial Oil*, paragraph 30).

[78] Stone J.A. then noted, at paragraph 35 of his Reasons, the fact that the Trial Judge had considered the contracts entered into the United States between Petromar and Star and between Petromar and Exxon to be the most significant factor in determining the applicable law. Stone J.A. then drew attention to the fact that neither Imperial Oil nor Socanav were parties to these contracts, adding, however, that it was logical to assume that Star had been authorized by Socanav to order the bunkers on its behalf, since it had been agreed between Socanav and Imperial Oil that the procurement of necessaries would be the responsibility of the demise charterer.

[79] At paragraph 37 of his Reasons, Stone J.A. made the following remarks:

> [37] While the Trial Judge was correct in considering and weighing the United States contracts as a factor, and while that factor carries considerable weight, I am not persuaded that it is the most significant factor. …

[80] Stone J.A. then proceeded to determine which law had the closest and most substantial connection to the transactions. He reviewed the relevant factors and concluded that the jurisdiction which had the closest and most substantial connection to the transactions was Canada. His reasoning, as it appears at paragraphs 36 and 38 of his Reasons, is as follows:

> [36] … <u>I accept that it would be unwise to single out one factor as controlling but, rather, that all connecting factors be considered and evaluated in order for legitimate state interests to be accommodated.</u> To my mind, in the present case the places of delivery in Canada should be accorded somewhat greater weight when viewed in the

> context of the several other factors connecting the transactions to Canada. [Emphasis added]
>
> …
>
> [38] The factors linking the transactions to Canada included vessel registration, flag, ownership, possession in Canada by demise charterer, operation of the vessels from a base in Montreal, and actual supply of the lubricants in Canada. Among these several factors the one that, in my view, is deserving of significant weight is that the operations of Socanav, the demise charterer, was based in Canada at the time the marine lubricants were supplied and it was Canada, where the vessels traded and were based, that was most economically benefited by the lubricants. In the United States, the base of operations of the shipowner was regarded by the Supreme Court in *Hellenic Lines, supra*, at 309, as "another factor of importance" to be assessed. This factor has been weighed ever since in appropriate cases by the courts of that country. Thus in the *M/V TENTO, supra*, involving a claim for a maritime lien by an American supplier of fuel oil in Italy by arrangement with the charterer of a Norwegian vessel, Circuit Judge Kennedy stated, at 1193:
>
> > In a subsequent decision, the Supreme Court declared that the factors in the *Lauritzen* were not exhaustive. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 309, 90 S. Ct. 1731, 1734, 26 L. Ed. 2d 252 (1970). The vessel's "base of operations," that is, the shipowner's centre of management and the location most benefited economically by the business of the vessel, is also relevant. *Id.* at 309, 90 S. Ct. at 1734.
>
> These views were later adopted in a case involving the supply of bunker oil in South Africa by a London based supplier to a vessel whose owners were also based in *London: Forsythe International U.K. Ltd. v. M/V RUTH VENTURE*, 633 F. Supp. 74 (D. Or. 1985), at 77.

[81] In the factual context before him, Stone J.A. concluded that the American contracts, although deserving considerable weight, were not the most significant factor because of his view that the other factors all pointed to Canada as the jurisdiction with the closest and most substantial connection to the transactions.

[82] I should note that nowhere does Stone J.A. specifically say that the U.S. choice of law provisions are to be given any weight. Rather, what he says is that the American contracts, so described because they were entered into in the United States between American companies, are deserving of weight.

[83] I now turn to our decision in *The Lanner*, where Richard C.J. held that the U.S. choice of law clauses found in two of the three bunker contracts were determinative of the issue. With regard to the third contract, which did not contain a U.S. choice of law provision but contained a arbitration clause providing that any dispute arising thereunder would have to be submitted and determined in accordance with Washington State law, Richard C.J. held that the arbitration clause was "indicative of the proper law of the contract" (paragraph 31 of his Reasons).

[84] As I have already indicated, the bunkers in *The Lanner* had been purchased at the request of the shipowners' manager who had full authority to purchase them. I should also point out that the vessel had been supplied at Halifax, Nova Scotia, at Pointe-à-Pierre, Trinidad, and at Singapore. I again emphasize the fact that Richard C.J. left open the question of what weight a choice of law clause should be given when the shipowners were not personally liable for the supply of the bunkers to their ship. In other words, what weight should be given to a choice of law provision found in a contract to which the shipowners were not party?

[85] In my view, a situation where a shipowner, as in *The Lanner*, has contracted with a supplier and has agreed to the insertion of a U.S. choice of law clause in the contract, poses no difficulty to

giving, as Richard C.J. did, prime consideration to the law chosen by the parties. However, where, as here and in *Imperial Oil*, there is no contract between the shipowners and the supplier of necessaries, and the shipowners have not, by their attitude and conduct, misled the supplier into believing that the purchaser was authorized to act on their behalf, I am inclined to the view that the choice of law provision should not be given any weight.

[86] In his Reasons in *Imperial Oil*, at paragraphs 28 and 29, Stone J.A. refers to Professor J.-G. Castel's work, *Canadian Conflicts of Laws*, 4th ed. (Toronto: Butterworths, 1997), more particularly at paragraphs 448 and 452 thereof, where Professor Castel states that the proper law of the contract will usually be the law selected by the parties to govern their contract. However, where there is no express selection or where no selection can be inferred, the applicable law will be that with which the transaction has the closest and most real connection.

[87] Thus, Richard C.J.'s disposition of the issue before him in *The Lanner* is clearly in accordance with the above principles. However, where, as here, the shipowners are not a party to the supply contract, it cannot be said that they have agreed to the U.S. choice of law provision found in the contract between the appellant and Parkroad. Clearly, they have not.

[88] This conclusion leads me to say that had Stone J.A. been of the view that the U.S. choice of law provisions in the American contracts were, *per se*, deserving of weight, he would have said so. In my view, he did not say so because he was not of that view. As I indicated earlier, he was of the opinion that the American contracts were relevant, a proposition with which I have no difficulty. By

that, I mean that I have no difficulty in considering as a factor the fact that, in *Imperial Oil*, the supply contracts had been entered into in the United States between American companies. However, these contracts were only one factor among many.

[89] Consideration of the American contracts in *Imperial Oil* as a factor cannot mean, as the appellant seems to suggest, that the choice of law provisions in those contracts were treated or ought to have been treated as if they were part of contracts to which the shipowners were privy. Put another way, the American contracts were a factor, among many, relevant to a determination of the proper law of the transactions, the purpose of this exercise being the determination not of the proper law of the American contracts, but of the law governing – if I may describe it in the following terms – the non-contractual relationship between the supplier of necessaries and the ship. Clearly, in these circumstances, the choice of law provisions were not relevant to that exercise because of a lack of privity of contract.

[90] The Judge was of the view that because the shipowners were not a party to the contract with the appellant, the choice of law clause had "less significance than otherwise" (paragraph 52 of Judge's Reasons). At paragraph 67 of his Reasons, he expanded on that by saying that "[a]bsent a contract, we must tote up the points of contact". In other words, the proper law is determined not by reference to the choice of law provision, but by an attempt to determine, on the basis of the facts and events of the case, which jurisdiction has the closest and most substantial connection to the transaction. In my view, the Judge made no reviewable error in the way he dealt with the choice of law provision found in the contract between the appellant and Parkroad.

***(e) Whether the Judge failed to give proper weight to the factors connecting the transaction* to the United States and whether he gave too much weight to the place of supply:**

[91] I now turn to the appellant's submission that the Judge failed to give proper weight to the other factors connecting the transaction to the United States and that he gave too much weight to the place of supply. Subsumed in this argument is the appellant's view that the Judge erred in failing to consider each relevant factor by reason of his approach, which consisted of toting up the points of contact between it and the shipowners.

[92] These arguments, in my view, are without merit. The Judge clearly understood the relevant test and he made no discernible error in applying the test to the facts before him. At paragraph 58 of his Reasons, the Judge, after referring to Stone J.A.'s Reasons in *Imperial Oil*, adopted the correct test, observing 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".

[93] He then weighed the factors connecting the transaction to the United States and those connecting it to other jurisdictions, which led him to conclude that the relevant factors did not point to the United States. His use of the expressions "non-American factors" and "American factors", which the appellant criticizes, is clearly not an error, because he could only conclude, on the evidence before him, that the proper law was either American or Canadian law, no other law having been alleged nor proven.

[94] In my opinion, one must look very hard to find any link connecting the transaction to the United States. Other than the seller's general terms and conditions, which deem the contract between the appellant and Parkroad to have been made in the United States and made subject to the laws of that country, there is nothing whatsoever in the evidence connecting the transaction with the United States.

[95] The evidence is that the vessel, registered in Cyprus, owned by German owners, was supplied in South Africa by Caltex, a South African company, following a request for a supply of bunkers made by World Fuel Korea, a Division of World Fuel Singapore. To this, I would add that the vessel was arrested in Canada, not in the United States. Thus, a fair examination of the evidence does not disclose any real or substantial connection to the United States.

[96] The Judge, having carefully considered all the factors, held that the United States could not possibly be the jurisdiction having the closest and most substantial connection to the transaction. He added that were it necessary for him to choose the jurisdiction with the closest and most substantial connection to the transaction, he would have chosen South Africa. Specifically, he said that in a situation such as the one before him, where there was a link with more than one jurisdiction, "pride of place must be given to the place where the necessaries were provided" (paragraph 67 of Judge's Reasons). Hence, as the law of South Africa had not been alleged nor proven, the governing law was that of Canada and, as a result, the appellant's action *in rem* and *in personam* failed.

[97] In my view, the Judge's findings that the United States was not the jurisdiction with the closest and most substantial connection to the transaction and that, in the circumstances of the case, the choice had to be South Africa, were clearly open to him. I have not been persuaded that in so concluding, the Judge made a palpable and overriding error.

[98] Consequently, as I indicated earlier, we therefore need not address the issue of whether United States law, on the facts of the case, would have allowed the appellant to exercise its rights against the ship. Additionally, we need not address the issue of whether the appellant or World Fuel Singapore was the proper party to bring the action and, hence, the appeal.

Disposition

[99] For these reasons, I would dismiss the appeal with costs in favour of the respondents other than the respondent Parkroad.

"M. Nadon"

J.A.

"I agree.
Gilles Létourneau J.A."

"I agree.
Johanne Trudel J.A. »

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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