Governor and Company of the Bank of Scotland v. Nel (The), [1999] 2 FC 578

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T-2416-97

The Governor and Company of the Bank of Scotland (*Plaintiff*)

v.

The Owners and all Others Interested in the Ship *Nel* and **Ocean Profile Maritime Limited** (*Defendants*)

Indexed as: Governor and Company of the Bank of Scotland v.* Nel *(The) (T.D.)

Trial Division, Hargrave P."Vancouver, January 5, 1999.

Maritime law " Whether bailment or sale of goods " Canada shipping agent as ad hoc necessaries supplier " Application to recover from sale price of ship value of bunkers " Supplier agreeing to sell bunkers to shipping agent " Bunkers delivered to ship " Agent not issuing invoice, but obtaining authorization from ship's owner to deduct price of bunkers from freight " Ship sold by Court-approved sale before voyage " That no invoice issued consistent with bailment, rather than sale " Indicating intention to delay transfer of property in bunkers " Placing of bunkers on board not consistent with absolute appropriation, given Canserv's contrary intention " Seller's intention paramount " Considering terms of agreement between Canserv, ship's owner, conduct of those involved, surrounding circumstances, Canserv showing satisfactory manifest intention, contemporary with making of bunker supply agreement with owners, to delay passing of property in bunkers " No evidence of unconditional sale.

This was an application to recover from the sale price of the *Nel* the value of bunkers (US$89,550) provided to it. Marine Petro Bulk Ltd. was unwilling to supply bunkers, essential to the ship and indeed for the preservation of the ship as a going concern, on the credit of the owners of the *Nel*, but it did agree to sell them to Vancouver shipping agent, Canpotex Shipping Services Ltd. (Canserv). The bunkers were put on board the *Nel* in October 1997, and the ship was sold pursuant to a court-approved sale in December 1997. Canserv did not issue any invoice selling the bunkers to the *Nel* or her owner, but obtained authorization from the owner of the *Nel* to deduct the price of the bunkers from freight. Its professed intent was to sell the bunkers to the owner of the *Nel* only when the freight was paid. In a December 30, 1997 claim affidavit, Canserv made a separate claim for other necessaries against the proceeds from the sale of the ship.

The issue was whether property in the bunkers passed from Canserv to the shipowner.

Held, Canserv was entitled to recover the value of bunkers aboard the *Nel* at the time of her Court-approved sale.

The Canadian supplier of bunkers has only a statutory right *in rem*, as opposed to a maritime lien, putting it at a great disadvantage in relation to other claimants. In the result there is usually, on any judicial sale of a ship, little or nothing left to reimburse a Canadian necessaries supplier. To protect themselves, Canadian necessaries suppliers ought to carefully structure their transactions when a vessel owner is unknown to them, or when a vessel owner may be in financial difficulty, so that there may be no transfer of title until the goods have been paid for. Such structuring of transactions is not always achieved since, as a practical commercial matter, suppliers do not always assume shipowners to be financially weak.

There was an onus on Canserv to show a manifest intention that property in the bunkers was not intended to pass until freight came to hand to pay for the bunkers, sufficient to displace the rules for the passing of property in goods contained in the B.C. *Sale of Goods Act*. Section 23 thereof, if applied, could leave Canserv as a mere unpaid vendor. A manifest intention is a plainly displayed intention, made clear by a written or oral contract, or by action or behaviour. It must be obvious to a reasonable person considering the transaction, at the time, with knowledge of all the relevant facts. That no invoice was issued was consistent with bailment, rather than sale. It was an indication that there was an intent to delay transfer of property in the bunkers. The placing of bunkers on board the *Nel* did not bring about their absolute appropriation to the shipowner, given Canserv's contrary intention. It is the seller's intention that is paramount. Taking into account the terms of the agreement between Canserv and the owners of the *Nel*, the conduct of those involved and the surrounding circumstances, Canserv had demonstrated a satisfactory manifest intention, contemporary with the making of the bunker supply agreement with owners, to delay the passing of property in the bunkers until it had the freight in hand. There was no evidence, by cross-examination or otherwise, showing an unconditional sale. Property in the bunkers had not passed to the owner of the *Nel*.

statutes and regulations judicially considered

Sale of Goods Act, R.S.B.C. 1979, c. 370.

Sale of Goods Act, R.S.B.C. 1996, c. 410, ss. 8, 22, 23, 24.

cases judicially considered

applied:

James v. The Commonwealth (1939), 62 C.L.R. 339 (Aust. H.C.).

distinguished:

NEC Corp. v. Steintron Int. Electronics Ltd. (1985), 59 C.B.R. (N.S.) 91 (B.C.S.C.); *George Smith Trucking Co. v. Golden Seven Enterprises Inc.* 1989 CanLII 2666 (BC CA), (1989), 55 D.L.R. (4th) 161; [1989] 3 W.W.R. 554; 34 B.C.L.R. (2d) 43 (B.C.C.A.).

referred to:

Saetta, The, [1993] 2 Lloyd's Rep. 268 (Q.B. (Adm. Ct.)); *Bank of Credit and Commerce International S.A. v. Aboody*, [1990] 1 Q.B. 923 (C.A.).

authors cited

Atiyah, P. S. *The Sale of Goods*. London: Pitman, 1969 reprint.

Benjamin's *Sale of Goods*, 5th ed. by A. G. Guest. London: Sweet & Maxwell, 1997.

Charlesworth, John. *Mercantile Law*, 11th ed. London: Stevens & Sons, 1967.

Fridman, G. H. L. *Sale of Goods in Canada*, 4th ed. Toronto: Carswell, 1995.

APPLICATION to recover from the sale price of the *Nel* the value of bunkers provided by a Vancouver shipping agent. Application allowed.

appearances:

Peter Bernard for plaintiff.

John Bromley for claimant Canpotex Shipping Services Ltd.

solicitors of record:

Campney & Murphy, Vancouver, for plaintiff.

Sproule, Castonguay, Pollack, Montréal, for claimant Alfa Bunkering Co. Ltd.

McEwen, Schmitt & Co., Vancouver, for claimants Petro Marine Products and Ashland Chemical Inc.

Edwards, Kenny & Bray, Vancouver, for claimants Aktina S.A., Bureau Veritas and Mariner's Medical Clinic.

Gottlieb & Pearson, Montréal, for claimant HBI International.

Bromley, Chapelski, Vancouver, for claimant Canpotex Shipping Services Ltd.

Giaschi & Margolis, Vancouver, for claimant Legend Marine Singapore Pte Ltd.

Bull, Housser & Tupper, Vancouver for claimant Shell Canada Limited.

Owen, Bird, Vancouver for claimant Sait Communications S.A.

A.B. Oland Law Corporation, Vancouver, for claimant Pacific Pilotage Authority.

The following are the reasons for order rendered in English by

Hargrave P.: The applicant on this motion is a Vancouver shipping agent, Canpotex Shipping Services Ltd. (Canserv), agent for the *Nel*,[1] who happens in this instance to be an *ad hoc* bunker supplier who now seeks to retrieve the price of those bunkers, US$89,550. Canserv looks to a fund of the same amount, created and held in a notionally separate account, representing bunkers aboard ship when the ship was sold pursuant to a court ordered sale.

The Canadian supplier of bunkers, unlike bunker suppliers in some other jurisdictions, (most usually here in Vancouver, American suppliers of bunkers), has only a statutory right *in rem*, as opposed to a maritime lien. This ranking of a Canadian bunker supplier, or indeed any Canadian necessaries supplier, puts such a supplier at a great disadvantage, for ahead of such a Canadian supplier come various categories of claimants, including those holding conventional maritime liens, American necessaries suppliers (including bunker fuel suppliers) with statutory liens and marine mortgage holders. In the result there is usually, on any judicial sale of a ship, little or nothing left to reimburse a Canadian necessaries supplier.

To protect themselves Canadian necessaries suppliers ought to carefully structure their transactions when a vessel owner is unknown to them, or when a vessel owner may be in financial difficulty, so that there may be no transfer of title until the goods have been paid for. Such a structuring of a transaction is not always achieved for, as a practical commercial matter, suppliers do not always fashion every transaction on the assumption that the shipowner is weak financially. Moreover, a necessaries supplier usually does not have either the means or the time to make detailed inquiries of the credit worthiness of an offshore shipowner. Thus there are many hard cases involving Canadian necessaries suppliers who may be done out of substantial sums. Such hard cases often make reasons difficult to write: on the one hand a supplier, here a shipping agent who in this instance became a bunker supplier, has provided goods essential to the ship and indeed for the preservation of the ship as a going concern, yet, on the other hand, a claimant with a maritime lien or a mortgage, the latter being the case here, is entitled to rely upon well-established priorities and both may, as here, look to Sale of Goods legislation for principles setting out transfer of title and thus the benefit of either sale price reimbursement to a supplier, or the value of the goods going to some other claimant, as the case may be.

In the present instance the *Nel* was sold in December of 1997. The sale price, US$5,000,000, was apportioned US$89,550 for fuel oils, representing the price of bunker oil, marine gas oil and lighterage, all sold and supplied by Marine Petro Bulk Ltd., to Canserv, but put aboard the *Nel* in October of 1997. Canserv now claims from the sale price the value of the bunkers, bunkers which were required by the *Nel* for a voyage from Vancouver to Tunisia.

In this instance Marine Petro Bulk Ltd. was clearly unwilling to supply bunkers on the credit of the owners of the *Nel*, but were prepared to sell them to the Vancouver agent for the *Nel*, Canserv. Canserv and Marine Petro Bulk Ltd. agreed to such a transaction, the bunkers being put aboard the *Nel* on October 18, 1997, but the actual sale of the bunkers by Marine Petro Bulk Ltd. being to Canserv. Canserv had earlier obtained authority from the owner of the *Nel*, Leond Maritime Inc., to deduct the price of the bunkers from freight. However the voyage of the *Nel*, under the ownership of Leond Maritime Inc., did not come about: rather the ship was, as I have said, disposed of by a court-approved sale, with a new owner undertaking the voyage.

The question, even reduced to its simplest element, whether property in the bunkers passed from the hands of Canserv to the shipowner, is not an easy one to analyse. Certainly Canserv was aware that its principal, the owner of the *Nel*, was not, in the eyes of a professional necessaries supplier, a good credit risk, and indeed that supplier, Marine Petro Bulk Ltd., would not sell the bunkers to that owner, but only to Canserv. Yet there must be an intent to delay the passing of property, an intent sufficient to displace the rules for the passing of property in goods contained in section 23 of the British Columbia *Sale of Goods Act*, R.S.B.C. 1996, c. 410 (the *Sale of Goods Act*) which, if applied, could leave Canserv as a mere unpaid vendor, all property in the goods having escaped its grasp.

Canserv, for its part, did not issue any invoice selling the bunkers to the *Nel* or her owners, but rather took authorization from the owner of the *Nel* to counter a portion of the freight which, had all gone as planned, would have flowed through Canserv to the owners. Canserv took this precaution, one would expect, after learning that Marine Petro Bulk Ltd. viewed the credit of the *Nel*'s owners as suspect and because, in the words of Mr. Rod Hansen, operation supervisor of Canserv:

As the owner were (*sic*) not known to me, Canserv was not prepared to grant credit to the owners, and would not sell the Bunkers to the owners without payment being received. [Paragraph 10 of Hansen affidavit of 30 December 1997.]

As a result Mr. Hansen deposes that he:

. . . on behalf of Canserv, agreed to the Marine Petro Bulk Ltd. terms as I intended to sell the Bunkers to the owners when the freight was paid. I intended to deduct the purchase price from the freight.

Yet has Canserv done enough to establish a retention of property in the bunkers? The relevant sections of applicable Sale of Goods Acts are often here quoted to establish that where specific or ascertained goods are sold, property passes to the buyer when the parties intend it to and that the intention must be gathered from the terms of the contract, the conduct of the parties and overall, the circumstances of the case: see for example sections 22 and 23 of the *Sale of Goods Act* (*supra*), and standard Sale of Goods texts including *Benjamin's Sale of Goods*, 5th ed., Sweet & Maxwell, 1997, at page 223; Charlesworth on *Mercantile Law*, 11th ed., Stevens & Sons, 1967, at page 173; Atiyah on *The Sale of Goods*, Pitman, 1969 reprint, at page 106 and following and Fridman on *Sale of Goods in Canada*, Carswell, 4th ed., at page 72 and following.

Often a standard form bunkers supply agreement, used by a bunker supplier regularly in the trade, contains a provision which clearly retains, in the seller, all property in the bunkers

following delivery and until payment, with the shipowner merely being a bailee of the seller: see for example *Saetta, The*, [1993] 2 Lloyd's Rep. 268 (Q.B. (Adm. Ct.)), at page 270. In such a situation property in goods may not pass to the buyer. Here Canserv, a firm not in the business of dealing with bunkers, through necessity became both an owner and then a seller of bunkers to the *Nel* and may, given the circumstances, have had the right idea, that of reserving title, but did not document the transaction as clearly as would a professional supplier of bunkers. This failure to document the transaction is, of course, not a bar to a finding of a sale with a conditional passing of property, for a contract may be written, oral or a combination of both (section 8 of the *Sale of Goods Act*).

I now turn to the professed intent of Canserv. Essentially Canserv's Mr. Hansen says that Canserv would not sell the bunkers to the shipowner on its credit, but intended to sell the bunkers to the owner of the *Nel* only once the freight was paid. This is to some degree corroborated in the December 30, 1997 claim affidavit by Mr. Garry Tincher, assistant general manager of Canserv, in which he makes a separate claim for other necessaries against the sale proceeds from the ship, which items Canserv paid for:

3. Acting as agent for the owners of the vessel, Canserv advanced various funds to the suppliers of goods and services to the vessel. Canserv did this without any obligation to do so, because it believed that it would be paid out of the freight that was payable for the shipment of the cargo. Canserv would not have paid for the goods and services on any other basis, and at all times was acting solely as agent for the owners.

A list exhibited to the Tincher affidavit sets out $47,670.60 worth of port disbursements provided by Canserv, as shipping agents, on behalf of the owner of the *Nel*, but bunkers are not among the items. The Tincher affidavit thus corroborates the view set out by Mr. Hansen as to the credit rating of owners. Mr. Tincher says that Canserv was of the belief that it would be paid out of freight. The absence of bunkers from the list of goods and services supplied in October and November of 1997 implies that those items were to be treated in a different manner from the bunkers.

The Bank of Scotland's mortgage security includes bunkers aboard ships, of course subject to a determination of priorities. Counsel for the Bank of Scotland, which might well fall heir to the value of the bunkers if they in fact passed to owners and thus became part of the general fund of the sale price, suggests there is some inconsistency between the Hansen and Tincher affidavits, with, on the one hand, Mr. Tincher being prepared to look to freight for reimbursement for 28 small port disbursements and on the other hand, Mr. Hansen being prepared to supply bunkers without condition only when paid for out of freight. I do not read that inconsistency into the two affidavits. Moreover, 26 of the 28 items making up the Tincher claim are services, which could hardly either be supplied conditionally or retrieved from the shipowner as bailee. It is the evidence of Canserv that it treated port disbursements differently from bunkers for the onward voyage.

The October 17, 1997 response of owners, to apparent telephone advice of conditional supply of bunkers, is not particulary helpful, but neither is it inconsistent. Leond Maritime Inc. merely confirm the amount of bunkers supplied and conclude:

Payment: deductions from the freight payment of MV "Nel".

While this exchange between Canserv and Leond Maritime Inc. is rather simple and casual, I accept that it is normal in the industry. This exchange occurred the day before the bunkers were put aboard the *Nel*.

That no invoice was issued by Canserv is relevant, for it is consistent with a bailment rather than a sale.

Counsel for Canserv makes the point that there was no cross-examination on Canserv's affidavit evidence and thus it is uncontradicted. But I do not draw a great deal from this fact, for the affidavit evidence is clear to begin with. The success of Canserv depends upon whether, given its factual evidence, I may find an intention to delay passage of property, with the owner being a mere bailee of the goods, until Canserv was in a position to take payment from the freight. Of course it is always open to an opposing party to show, by cross-examination or by other evidence, an unconditional sale, but that did not happen here.

Counsel for the Bank of Scotland submits that Canserv's view of the transaction is a reconstruction which ought not to be believed and that I ought not to give credence to any telephone call from Canserv to the owners of the *Nel* whereby Canserv refused to supply bunkers outright and without condition. In effect this is an attack on the Hansen affidavit, yet the Bank of Scotland presents no hard evidence to counter Mr. Hansen's version of the transaction: it is thus a somewhat speculative attack. The October 17, 1997 telex from the owners of the *Nel* to Mr. Graeme Tobb, of Canserv, does confirm a telephone conservation of some sort and the clear instructions to deduct the price of bunkers from freight. This telex does not necessarily imply a conditional sale, but it is not inconsistent with a conditional sale.

Counsel for the Bank of Scotland also submits that the Canada Customs Ships Stores Declaration of October 18, 1998 made by Marine Petro Bulk Ltd., which gives tax relief to an owner or a charterer when fuel is used on a foreign voyage, is evidence of an appropriation of the bunkers to the owner. I do not see how the master of the *Nel*, merely by signing a tax relief declaration certifying that the bunkers were received aboard the ship and that the bunkers qualify as ships stores, under some customs classification number apparently unknown to the master, can unilaterally appropriate another's goods. The master is bound by whatever terms governed the supply of the bunkers. This is also clear from subsection 23(7) of the *Sale of Goods Act* (*supra*) which provides that a buyer may not appropriate unascertained or future goods, so that property passes, without the assent of the seller.

Still dealing with section 23 of the *Sale of Goods Act*, being the rules for passage of property, counsel touched on subsection 23(9). That rule requires a seller to reserve a right of disposal if he or she wishes to avoid a deemed unconditional disposal of goods. That provision does not apply if there is a different intention as to the passage of property: see subsection 23(1) of the *Sale of Goods Act*.

Counsel for the Bank of Scotland also referred to the concept, set out in Fridman (*supra*), at page 337, that once a seller loses possession of the goods and the buyer has acquired possession, the seller has no real remedies, remedies which I would characterize as *in rem* remedies, but may only make a claim for money. But of course that presupposes that there has been a passage of property under the *Sale of Goods Act* and not a contrary intention resulting in something less, for example a mere bailment of the goods to the shipowner for holding aboard the ship until payment, or some other event, triggers a passing of property.

Counsel for the Bank of Scotland, on this same line of argument, referred me to *NEC Corp. v. Steintron Int. Electronics Ltd.* (1985), 59 C.B.R. (N.S.) 91 (B.C.S.C.). There the practice and the conduct of the seller was such that the goods were appropriated and property in the goods passed to the buyer when placed on pallets for shipment. Here, because of a contrary intent, there was no such absolute appropriation of bunkers to the owner of the *Nel* merely by placing the bunkers aboard the *Nel*. In the *Steintron* case there was much past practice and procedure by which the conduct of the parties and the circumstances clearly showed a removal from inventory when the goods were placed on a pallet for shipment to the purchaser. Here there is no past practice to look to. Nor was the placing of the bunkers aboard ship consistent with any absolute appropriation, given the contrary intention on the part of Canserv. Granted, it may be difficult to remove bunkers from a ship, but Canserv would not necessarily have to take that step. The *Nel* was a going concern at the time the bunkers were put aboard, subject to the owner, or a charterer, putting up money to pass property in and release the bunkers for use by the ship. Indeed, as pointed out by Mr. Justice Dixon in *James v. The Commonwealth* (1939), 62 C.L.R. 339 (Aust. H.C.), at page 381, it is the intention of the seller that is paramount:

. . . it must be steadily borne in mind that the intention of the seller is paramount, that is, assuming that the terms of the contract of sale leave it to him to make the appropriation.

Here, there is every indication that Canserv was going to make the appropriation of property, to the buyer, once Canserv had the freight in hand and could thus obtain payment.

The case of *George Smith Trucking Co. v. Golden Seven Enterprises Inc.* 1989 CanLII 2666 (BC CA), (1989), 55 D.L.R. (4th) 161 (B.C.C.A.), cited by counsel for the Bank of Scotland, is not inconsistent with the notion of reservation of the passing of property. That case was decided on a previous version of the British Columbia *Sale of Goods Act* [R.S.B.C. 1979, c. 370): despite a change of the wording of the new British Columbia *Sale of Goods Act*, the *Smith Trucking* case would still be applicable in an appropriate circumstance. *Smith Trucking* dealt with the reservation of the right of disposal in an instance where there was clearly an unconditional appropriation of goods to the contract. At issue was only whether there was a residual reservation of a right of disposal of the goods by reason of the holding back by the seller of various documents, including an invoice and necessary export documents, for only by payment of the price in full would the buyer obtain those documents and then be able to export the goods. Thus the *Smith Trucking* case concerns a point very different from that at issue here. Here there was no clear and absolute appropriation of the bunkers to the owners of the *Nel*, but rather a conditional contract delaying the passing of property, as is allowed under section 22 of the British Columbia *Sale of Goods Act*. Thus the issue of a reservation of a right of disposal, under section 24 of the British Columbia *Sale of Goods Act*, does not arise. Here I would make it clear that I do not look upon the act of not invoicing the owners of the *Nel* for the bunkers as a reservation of a right of disposal, but rather as an indication that there was an intent to delay transfer of property in the bunkers.

To sum up all of this, there is an onus on Canserv to show a reservation on the passing of property. I must find a satisfactory manifest intention, on the part of Canserv, that property in the bunkers was not intended to pass until freight came to hand to pay for the bunkers.

A manifest intention is an evident intention, a plainly displayed intention, made clear by a written or oral contract, or by action or behaviour. It must be such that it is obvious to a reasonable person considering the transaction, at the time, with knowledge of all the relevant

facts: see for example *Bank of Credit and Commerce International S.A. v. Aboody*, [1990] 1 Q.B. 923, at page 965, the Court of Appeal there quoting the reasons of the trial Judge.

Taking into account the terms of the agreement between Canserv and the owners of the *Nel*, the conduct of those involved and the surrounding circumstances, Canserv, despite good argument on the part of counsel for the Bank of Scotland, has shown a satisfactory manifest intention, contemporary with the making of the bunker supply agreement with owners, to delay the passing of property in the bunkers. Here I think there is also the opportunity of a transfer of onus and that it is open to a party challenging the conditional nature of a sale and purchase agreement to provide hard evidence, including evidence by way of cross-examination, to the contrary. There is no such evidence.

In the result Canserv did not transfer property in the bunkers to the owner of the *Nel* and is therefore entitled to the proceeds of the bunkers and any accrued interest.

If the parties are unable to come to agreement as to costs, they may speak to that aspect.

[1] Nothing hinges on the fact that Canserv was agent for both owner and voyage charterer.