Shipping

October 2015

THE OW BUNKER COURT OF APPEAL JUDGMENT AND COMMENTARY ON RECENT MULTI-JURISDICTIONAL DEVELOPMENTS

On 22 October 2015, the English Court of Appeal (CA) handed down its decision[1] in the latest twist of the OW Bunker (OW) saga. The CA unanimously rejected the owners' appeal, but only to the extent of holding that the failure by OW to transfer title in the bunkers does not release the owners from their obligation to pay for them. In other words, the decision is on the somewhat limited basis that the Sale of Goods Act 1979 (SOGA) does not afford a defence to owners against a claim by OW for the price under the supply contract.

The implications of the CA decision are still under consideration, but it seems that the saga may not yet be over. In addition, it is currently unclear whether the decision will be appealed to the Supreme Court.

Background

The unfolding drama follows the appeal of Mr Justice Males' decision[2] by the owners of the *RES COGITANS*, in which he upheld the arbitration tribunal's finding that OW were entitled to payment for bunkers – even where OW had not paid for and did not own property in them.

Central to the decision was the finding that the OW bunker supply contract was not a contract for the sale of goods falling within SOGA, and therefore did not require the transfer of property/title in the goods as consideration for the price. Instead it was a contract for the supply of goods, falling outside of SOGA, with a licence to use them in consideration for OW ensuring that the purchaser had no liability to the physical bunker suppliers, Rosneft, in conversion – entitling OW to claim the price of the goods as a straightforward contractual debt.

The judge attempted to answer an owner's concerns about the risk of double jeopardy, in other words, an owner's risk of having to pay both OW and also the physical suppliers of the bunkers for the same bunker supply. His solution, was to decide that owners had no liability to the physical bunker supplier if it could be said they had authorised owners, expressly or impliedly to

1 [2015] EWCA Civ 1058

2 *(1) PST Energy 7 Shipping LLC (2) Product Shipping and Trading SA versus (1) OW Bunker Malta Limited (2) ING Bank N.V.* [2015] EWHC 2022 (Comm)

consume the bunkers. Alternatively, if no such authorisation existed, then OW's claim would fail for complete lack of consideration. In other words, on this analysis either OW or the physical supplier only would be entitled to payment. However, the judge recognised the limits of this solution and the reality that the risk of double jeopardy remained, given that an owner could be found potentially liable and subject to ship arrests in other jurisdictions that had not adopted the same legal analysis.

The decision was therefore regarded as an unwelcome development for owners and charterers, as well as by physical bunker suppliers who, as a matter of English law, seemed to potentially have no right to claim against a shipowner in conversion.

As such, Males' decision was a catalyst for a spate of vessel arrests by ING as OW's assignees, seeking security for its claims in jurisdictions such as India and elsewhere.

The CA decision

The CA hearing took place over one day on 17 September 2015, before Lord Justices Moore-Bick, Longmore and McCombe.

The central issue for consideration was restricted to the question of whether the bunker supply contract between owners and OW fell within the definition of a sale of goods for the purposes of SOGA and whether therefore OW could sue for the price under SOGA section 49 (1).

Rosneft, as an interested party, who had supplied the bunkers in question to the ship, also filed written submissions in support of its position that it is entitled to be paid for the provision of bunkers.

The owners' arguments before the CA included, amongst others:

1. Reliance on the language of the bunker supply contract, indicating that it was a sale of goods and the parties' relationship is that of a "buyer" and "seller".
2. That there was an implied term in the bunker supply contract that OW had to perform all the necessary obligations under its contract with its own supplier.

A sale of goods or something else?

Lord Justice Moore-Bick, in the leading judgment, accepted that the language of the contract did indeed suggest that it was a sale of goods, but that it was necessary to carefully identify the obligations which the parties had undertaken. In this regard, he considered that the critical terms are found in the agreement for 60 days' credit, providing that property is not to pass until they have been paid for in full, and that owners had the right to use the bunkers for propulsion of the vessel from the moment of delivery.

He went on to say that this entailed that the majority of bunkers would have been consumed by the time payment became due, ultimately accepting that both the commercial background and the terms of the contract made it clear that owners had not contracted for the transfer of property in the whole of the bunkers. Instead, Lord Justice Moore-Bick considered that owners had in fact contracted for the delivery of bunkers, rather than the transfer of property, which they could use immediately and pay for when the credit period expired and therefore not the transfer of property. From the supplier's point of view the consumption of bunkers before payment would result in an ever diminishing form of security provided by the retention of title clause.

Whilst it was accepted that the authorities supported the owners' argument that the courts had consistently regarded contracts with retention of title clauses as contracts for the sale of goods for the purposes of SOGA, even in cases where the buyer is given a licence to use or dispose of goods, these were distinguished on the basis that none of the cases addressed head on the question of property passing retrospectively at a time when the goods ceased to exist – namely after the bunkers had been consumed.

An implied term

The CA did not accept that the implied term could exist, being uncertain of precisely what the implied term consisted of, and there was no need to imply such a term as it did not accurately reflect the essential nature of the contract.

The saga continues...

Lord Justice Moore-Bick said that on its face it would seem that, in the arbitrators' view, the owners were liable to pay for the bunkers as they had received what they had bargained for - however this liability was not formally one of the issues for decision.

Lord Justice Moore-Bick did however consider that it was unnecessary for the judge to find that he was required to reach the conclusion on the assumed facts that OW had successfully obtained Rosneft's permission to consume the bunkers, and he was wrong to do so. While it seems that the CA did not accept Mr Justice Males' line of reasoning on this point, it is not clear and therefore the point appears to be still open.

This issue may ultimately have to be revisited on another occasion, whilst the implications will need to be considered more fully, determining whether it can be used to allow owners to ultimately defend liability to pay.



It may be arguable that if Rosneft's permission was not obtained by OW, then OW could not have provided what the owners contracted for, namely permission to consume the bunkers. As such, OW's claim for the contract price may be held to have failed on the alternative basis that it did not provide its side of the bargain.

The CA has invited further submissions from the parties as to how to give effect to their decision. In the meantime, given the widespread importance of the decision, it seems to us that there may well be an application for leave to appeal to the Supreme Court. We shall report when we have further news. Meanwhile the owners' continue to remain exposed to the risk of paying twice.

A commercial approach?

In recent months it has been debated whether English law is providing a commercial solution by upholding OW/ING's entitlement to claim the full invoice amount, when in reality their loss is confined to such profit on the transaction made on the on-sale of the bunkers supplied by physical suppliers. On the other hand, it is arguable that owners/charterers received the bunkers contracted for from OW and OW are therefore entitled to the payment of their debt for the services provided, notwithstanding the underlying position with the physical suppliers down the chain, who must now queue up to claim against OW in the insolvency proceedings. Were OW not insolvent, the physical suppliers would have little difficulty obtaining payment, with the net result being that OW would keep only the margin as profit, the commercial solution favoured.

In other jurisdictions, we have seen a more commercial approach to the problem adopted. For example, the Canadian courts upheld a decision[3] in which time charterers who had ordered bunkers from OW were discharged from their obligation to pay OW, by paying the physical bunker suppliers. This was on the basis that OW had breached its own obligation to pay for the bunkers, noting it would be "bizarre and unconscionable" to reach a different finding. Central to that decision is the finding that the physical bunker supplier's terms and conditions bound both OW and the time charterer.

In Israel[4] the court held that payment to the physical bunker supplier was found to discharge the obligation to pay OW, under section 59 of the Israeli Agreement Act. That decision is currently being appealed to the Israeli Supreme Court.

In Antwerp, the court lifted a ship arrest[5] on the basis that the owner had paid the contracting OW entity, discharging the obligation to pay the physical supplier which was no longer entitled to proceed against the vessel. That decision too is subject to a pending appeal decision.

The US courts also may well apply equitable principles to the outcome of the numerous ongoing actions sparked by interpleader proceedings, suggesting that a "commercial" outcome may well be on the cards.

However, in OW consolidated proceedings for interpleader relief before the Singapore High Court[6], the court was not persuaded by physical suppliers' arguments that the purchasers were liable to them in conversion because owners had consumed the bunkers for which physical suppliers had not received payment. Observing that OW's terms and conditions allowed the bunkers to be consumed before the physical suppliers were paid and that the physical suppliers had delivered the bunkers to the vessel, so must have plainly intended for the bunkers to be consumed before they were paid. For these reasons, the court held that no claim in conversion may lie – namely by the physical suppliers against owners. This finding is therefore in line with the legal reasoning applied in the English courts.

US interpleader proceedings – available without an involvement of a US entity?

In a further development, we understand that US lawyers have recently managed to obtain interpleader relief for an owner, even in circumstances where there was no US entity involved[7]. This was not previously thought to be possible and will considerably expand the number of cases in which US interpleader relief might be available, to be backed-up by a US court order restraining an arrest worldwide. It seems that the interpleader relief was granted because the clauses in both the OW and the physical supplier contracts provided for US jurisdiction for maritime lien claims. Whether a foreign court will recognise the US restraint order will remain a consideration.

Further satellite litigation

Further satellite litigation in the wake of the OW bankruptcy has included the question of whether the existence of a lien is to be decided by the procedural, the place of the arrest or *lex fori*, or substantive law, the law provided for in the underlying contract.

3 *Canpotex v OW Bunker* [2015] FC FC 1108

4 File No. 12 -02 – 45897 O.W. Bunker V. M/V Emanual Tomasos

5 The *RAMONA*

6 *Precious Shipping Public Company Ltd and others v OW Bunker Far East (Singapore) Pte Lte and others* [2015] SGHC 187

7 *Modion Maritime Management SA v O.W. Bunker Malta Limited, 14 CIV – The STEAFNOS T*



The English law position is that the nature of a maritime lien is procedural, following the decision of the Privy Council in *The HALCYON ISLE*[8].

However, departing from this position in a recent decision[9] of the Federal Court of Australia, a bunker trader successfully relied on a term in their sale contract that provided, among other things, that for a vessel stemmed in any port outside the US a maritime lien in accordance with the laws of the US and the State of Florida could be enforced in any country where the vessel was present.

This decision has been reported recently in our Arrest of the *SAM HAWK* briefing[10] and is currently being appealed.

Confused?

The fallout from the collapse of OW has had massive ramifications for the industry and considerable uncertainty remains.

What does seem certain in the meantime is that the world's maritime courts will continue to be kept busy by the numerous OW bunker actions for the foreseeable future. In this regard, we shall report when we have further news.

8 *HALCYON ISLE* [1981] AC 221

9 *Reiter Petroleum v The SAM HAWK* [2015] FCA 100

10 http://www.hfw.com/Arrest-of-the-SAM-HAWK-October-2015

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