OW Bunker bankruptcy – update from England and Wales

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OW Bunker bankruptcy
For background information, please refer to the previous article in the ***Standard Bulletin, December 2014***, published shortly after the bankruptcy was announced.

An important test case[1] has recently been handed down by the High Court in London concerning the bankruptcy of the OW Bunker group (OWB) and, most importantly, who an owner or time charterer should pay for bunkers previously supplied to the ship. The club has previously issued a web alert concerning the recent *Res Cogitans* decision, but it is worth remembering the broad facts and findings of the case.

Overview

The owner in this case was essentially trying to avoid the danger of a double payment for bunkers supplied to the ship, by seeking to knock OWB and the assignee bank (ING) out of the equation and instead pay the physical bunker supplier directly. It did so by arguing that the supply contract previously entered into with OWB was a contract to which the Sale of Goods Act 1979 (SOGA) applied. The owner's argument in this case was that, given the bunkers were consumed before payment became due under any of the contracts in the bunker supply chain, no property in the fuel supplied ever passed to OWB. If correct, and if SOGA applied, then this would have meant that OWB/ING never became entitled to the contractual purchase price and hence had no claim against the owner, the reason being that because the bunkers had been consumed before the price became payable, there was no property in the bunkers to pass – it had been extinguished.

Court decision

On appeal to the English High Court, the judge considered first the statutory definition of a contract of sale as found in SOGA. For the purpose of this case, the crucial wording was found in section 2(1), which states that it is *'...a contract by which the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration, called the price'*. The judge then identified two requirements of fundamental importance to this case:

- One party has to have agreed to transfer property in the goods to the other.
- There has to be a link between the transfer of property and the price. It has to be shown that the buyer is paying money for title in the goods and not some other benefit.

In the judge's view, there was a combination of four factors in this case which rendered it likely that the parties here accepted that title would never, in fact, be transferred. These were: (i) the retention of title clause(s) in the bunker supply chain; (ii) the fairly generous credit period(s) granted before payment was due; (iii) the fact that the owner here was granted permission to consume the bunkers; and (iv) the fact that the fuel would very likely be consumed prior to expiry of the credit period(s) such that the property would cease to exist.

That inevitably leaves the question of what, if it was not a sale, was the owner actually paying for here? The judge found it amounted to a contract whereby OWB would supply bunkers which the owner would immediately be entitled to burn, in return for which the owner would pay OWB in accordance with the agreed payment regime. As such, it was found that OWB and ING were entitled to recover the sums under their supply

contracts as a debt due under a contract not subject to SOGA. This was the case notwithstanding that OWB never paid for the same bunkers up the line, under its own respective contract with the end physical bunker supplier.

As a consequence of the *Res Cogitans* decision, the owner in this case was left with the unpalatable prospect of having to pay both OWB and ING (who have *'a straightforward case in debt'*) and the physical suppliers, who may have *in rem* claims and be able to arrest in other jurisdictions. The judge recognised this, but said that these factors did not affect the English law position and, in his own words:

'...the risk of an adverse decision in a foreign court which views matters differently from English law is typical of the risks which a shipowner undertakes as it trades its vessel around the world'.

Considerations

The decision in *Res Cogitans* is not only disappointing for the owner, but surprising as well, not least as the English Court accepted that the contract was drafted as a contract of sale and there were numerous indications that the parties themselves understood it to be a sale contract. In addition, it is not easy to reconcile the decision regarding title to bunkers with the wider practice under time charters where, on delivery and redelivery of a ship, owners and charterers purchase and sell the bunkers remaining on board (ROB). If the bunker purchaser (typically a time charterer, just before redelivery of the ship) does not obtain title from the supplier, then how can ownership of the bunkers be transferred to the owner?

Pending the decision of the Court of Appeal, it is important to realise that the *Res Cogitans* decision will not necessarily affect all OWB/ING claims. It should not be forgotten that the decision was based on a number of assumed facts, which may not apply to other claims. For example, it may not be the case (or be possible to show) that all parties accepted that bunkers or lubes were supplied for consumption before the expiry of the credit period(s). Linked to this, or alternatively, the intermediate supply contracts may be on materially different terms regarding say, payment, risk and/or title. They may also be subject to a foreign law. It is therefore good practice to obtain all intermediate sale contracts wherever possible, in case there are points of difference between the claim(s) in hand and the (assumed) facts in the *Res Cogitans* decision.

Next steps

The *Res Cogitans* decision has been appealed by the owner (ING/OWB's application to cross-appeal was rejected) and it is understood that the case will be heard by the Court of Appeal in mid-September. Given there are hundreds, if not thousands, of other claims involving similar facts, it is hoped that the Court of Appeal's judgment will be handed down as swiftly as possible thereafter.

In the meantime, the High Court is expected to determine shortly various interpleader claims. This may deliver further bad news for shipowners, albeit not unexpected, if such decisions go the same way as the judgment handed down by the Singapore High Court in *Precious Shipping v. OW Bunker Far East & Others [2015] SGHC 187.* See pages 13–14 for further details of this decision.

1 PST Energy 7 Shipping LLC & Anor v. OW Bunker Malta Ltd & Anor (Res Cogitans) [2015] EWHC 2022 (Comm)