

OW Bunker – *The Res Cogitans* decision



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A recent decision by the English Supreme Court has surprised many in the maritime industry. This article looks at this test case in the OW Bunker saga and discusses how this may affect other owners and time charterers facing competing claims for bunker supply payment.

Introduction

On 11 May 2016, the English Supreme Court handed down its judgment¹ confirming that, in this test case, OW Bunker was entitled to recover the price of bunkers delivered to a subject ship, regardless of the fact that property in the bunkers had not been transferred (due to non-payment of the bunkers down the contractual supply chain by OW Bunker). This is a surprising and rather disappointing decision for owners and time charterers.

Background

In November 2014, the OW Bunker group filed for bankruptcy. As a result, OW Bunker has been unable to pay many of its physical bunker suppliers for supplies made to ships prior to the insolvency. ING Bank has also asserted a right to recover, as assignees, any debt owed to OW Bunker in respect of the supply of bunkers to ships. Since then, many owners and time charterers have faced competing claims from ING Bank and from the unpaid physical supplier for the price of the same bunkers supplied to the ship prior to the insolvency.

The Res Cogitans was selected as a test case to determine whether ING Bank's claims would fail because they are subject to Section 49(1) of the Sale of Goods Act 1979 (SoGA). This requires under English law that property (title) in the goods (the subject of a sale contract) must pass to the buyer if the seller is to maintain a claim for the contract price so agreed.

Facts of *The Res Cogitans* case

On 4 November 2014, OW Bunker supplied bunkers to the *Res Cogitans* on terms that included a retention of title clause, under which property in the bunkers could not pass to the owner until it had made payment to OW Bunker in full. However, the owner did have the right to use the bunkers from the moment of their delivery.

OW Bunker arranged the bunker stem under a contract with its parent company, OW Bunker AS. OW Bunker AS had entered into a back-to-back contract with Rosneft Marine (UK) Limited (Rosneft) for the supply. Rosneft, in turn, contracted with its Russian affiliate, RN-Bunker Limited, for the physical supply of the bunkers.

On 17 November 2014, after the collapse of the OW Bunker group, Rosneft sought payment directly from the shipowner for the bunkers so supplied, on the grounds that

¹ [2016] UKSC 23

Rosneft remained the owner of those bunkers according to its own retention of title clause. At that time, part of the bunker supplied to the ship had already been consumed. In addition, OW Bunker also claimed the price of the bunkers from the shipowner, even though Rosneft retained title in the bunkers supplied. The shipowner rejected both claims as it had no contract with Rosneft and as OW Bunker was incapable of passing title to the shipowner which, the shipowner argued, is a pre-requisite for a claim for the price of goods under SoGA.

Previous decisions

The arbitration tribunal, the English Commercial Court and the English Court of Appeal have all held that this bunker supply contract is not a contract of sale to which SoGA applies. ING Bank's claim for the contract price was not, therefore, defeated under Section 49(1) of SoGA, even though OW Bunker could not pass legal title in the bunkers to the owner. It was instead held that ING Bank had a simple claim in debt which was not contingent on property in the bunkers passing to the owner.

The decision of the Supreme Court

The English Supreme Court has agreed that the bunker supply contract here did not come within SoGA. It has held that the bunker supply contract is *similar* to a sale contract, so would be subject to similar implied terms as to description, quality and fitness for purpose, but its essential nature is such that it could not be regarded as an agreement to transfer property (title) in goods to the purchaser for a price. Instead, the contract in question is an agreement with two different aspects.

First, it permits consumption of the bunkers prior to payment, but without property passing to the shipowner. Second, in respect of the bunkers that remain unconsumed, there is an

agreement to transfer property in those unconsumed bunkers to the shipowner in return for payment of the contract price. So far as the shipowner is concerned, according to the Supreme Court, what matters is having the right to consume the bunkers prior to payment and that, once it has paid, the owner then acquires property to the bunkers remaining on board.

This leaves open the question of whether, in any particular case, there might be a breach of this implied undertaking. Perhaps crucially, the Supreme Court did not address the issue of a potential double payment having to be made to the physical bunker supplier due to a separate in rem action being brought against the ship, as no claim had yet been advanced by the physical supplier (RN-Bunker Limited) in this matter.

Conclusion

The decision of the Supreme Court in *The Res Cogitans* represents a significant departure from the industry's traditional understanding of contracts for the provision of bunkers. It may also have ramifications under time charter arrangements more generally, particularly at the time of delivery and redelivery when property in bunkers is commonly intended to pass from one party to another. Those purchasing bunkers may now wish to review the terms of their bunker supply contracts to minimise the risk they may face of being forced to pay the same debt twice.

The problems currently faced by owners and time charterers following the collapse of the OW Bunker group involve a variety of scenarios. Each case should be reviewed on its own individual facts to determine the impact this Supreme Court decision may have, assuming of course that these supply contracts are subject to English law and jurisdiction.