SOUNDINGS

'Bunkers not for sale' - the Supreme Court holds that standard form bunker supply contracts are not sale of goods contracts

PST Energy 7 Shipping LLC and another v. OW Bunker Malta Ltd and another (RES COGITANS) [2016] UKSC 23

The demise of the OW Bunker group of companies in November, 2014, has provoked litigation worldwide. The Association has supported the owner of the RES COGITANS in its efforts to avoid having to pay twice for fuel supplied to the ship. This has now culminated in a decision by the Supreme Court in favour of the bunker supplier.

A licence to consume

The Supreme Court has decided that the relevant bunker supply contract was not a sale of goods within the English Sale of Goods Act 1979. The court has held that the contract was instead a licence to consume outside of the statute which did not require OW to transfer or be able to transfer property in the fuel. This interpretation has come as a surprise to many within the industry. The average bunker contract is similar in nature to a sale contract and most buyers of bunkers have believed that they were entering into a contract for the purchase of goods. The Supreme Court recognised that the contract was 'closely analogous to a sale.' Nevertheless, the Supreme Court has held that the relevant contract should be seen as a 'sui generis' transaction, i.e. a unique contract which is not a contract of sale:

> *"… in its essential nature, it offered a feature quite different from a contract of sale of goods – the liberty to consume all or any part of the bunkers supplied without acquiring property in them or having paid for them. The obligation on the part of [OW] to be able to pass the property in respect of any bunkers not so consumed against payment of the price for all the bunkers cannot make the agreement as a whole a contract of sale."*

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Ramifications

This judgment has attracted widespread interest throughout the maritime community. It will have significant ramifications both in terms of other disputes between Members and OW and also in the context of future bunker contracts. It is recommended that Members consider revising such contracts in order to address the issues flowing from this decision.

In some cases owners and charterers will now have to consider paying OW for the bunkers bought from them, at least in the case of disputes that involve English law. It is possible that third party physical suppliers who have not been paid by OW may seek to take action against Members' ships, owner Members or charterers in certain jurisdictions, particularly if a maritime lien is available. This judgment may leave owners and charterers exposed to the risk of having to pay twice for bunkers.

In order to avoid this type of situation in the future, many ship operators will now seek to revise their supply contracts, where possible. Of course, this is subject to the parties' relative negotiating positions and many bunker suppliers will insist on using their own terms and conditions. However, where possible, buyers may wish to consider incorporating an express term confirming that the seller has a right to transfer title before it can claim payment. It will not be sufficient simply to state that the contract should be treated as a contract for the sale of goods as this may not ensure that the seller has to pass title in the goods to the buyer before becoming entitled to claim the price. If possible, the buyer should try to include in the contract an indemnity from the contractual supplier in respect of any claim by a physical supplier against the buyer or the ship and a right to withhold payment, if payment has not already been made, and to pay any physical supplier direct in such circumstances. A provision allowing the buyer to terminate the contract upon the insolvency of the contractual supplier would also be advisable. Another protective measure we recommend is to require the contractual supplier to obtain written confirmation from the physical supplier confirming that it has been paid and that it has no claim over the bunkers or the ship. It is understood that some bunker suppliers have been prepared to provide such confirmation in practice.

The following is a suggested clause that could be used in bunker contracts:

"In the event that the Bunkers purchased by the Buyer from the Seller are not physically supplied by the Seller but by a third party Physical Supplier, the following provisions apply notwithstanding anything else in this contract, including any terms relating to set-off or deduction:

(i) The Seller must, as a condition precedent to any obligation or liability on the Buyer's part, obtain the right to transfer title to any Bunkers consumed or unconsumed. The Seller agrees to indemnify the Buyer in relation to any losses, delays or other damages suffered as a result of any failure by the Seller to comply with this clause whatsoever.

(ii) The Seller must, as a condition precedent to any obligation or liability on the Buyer's part, pay for the Bunkers supplied, prior to the due date for payment under this contract and must provide the Buyer with written confirmation from the Physical Supplier confirming that:

(a) the Physical Supplier has received payment in full for the Bunkers supplied by them;

(b) the Physical Supplier has no objection to the Buyer making payment to the Seller for the Bunkers; and

(c) the Physical Supplier has no claim whatsoever against the Buyer or the ship in relation to payment for the Bunkers.

(iii) In the event that either (i) or (ii) above are not complied with the Buyer shall be entitled to withhold payment to the Seller or, where payment has already been made, reclaim such payment from the Seller. The Buyer's payment obligations shall be suspended until the provisions in sub-clauses (i) and (ii) are complied with."

Where bunkers are purchased by a charterer, owners may wish to include certain provisions in their charterparties to protect against any action being taken by a physical supplier against the ship. Although, in many cases, owners may have an indemnity against the charterer under the terms of the charterparty, an owner may still be exposed to direct claims from the physical supplier. Owners should therefore consider including in their charterparties a provision requiring the charterer to obtain a written confirmation as envisaged in sub-clause (ii) above from its bunker supplier or an indemnity in the event of a claim by the physical supplier. Owners should also try to include the BIMCO Bunker Non-Lien Clause for Time Charterparties. This clause is intended to protect owners from attempts by physical suppliers to exercise a maritime lien by requiring time charterers to inform their counterparty, the bunker seller, at the outset that any bunkers ordered are being supplied for their account and that no lien can be placed on the ship. Although this provision may not be effective in all jurisdictions, it is thought to provide an additional layer of protection.

Conclusion

Although the judgment is disappointing, it does at least bring finality to an issue that has caused much speculation and uncertainty in the industry. Owners and charterers can now take steps to settle their current OW disputes in line with the Supreme Court decision as appropriate and protect themselves against future claims by revising the terms of their bunker contracts.

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