COURT OF APPEAL: BUNKER SUPPLIERS WHO COULD NOT TRANSFER PROPERTY IN BUNKERS ENTITLED TO PRICE

(1) PST Energy 7 Shipping LLC and (2) Product Shipping & Trading S.A. v. (1) O.W. Bunker Malta Ltd and (2) ING Bank N.V [2015] EWCA Civ 1058

By Nick Shepherd of Ince & Co.

In a judgment handed down on 22 October 2015, the Court of Appeal has upheld the Commercial Court decision of 14 July 2015 that a contract for the sale of goods, where there is a credit period and a retention of title ("ROT") clause, coupled with an express (or even implied) right to consume the goods during the credit period, is not a contract of sale within the scope of the Sale of Goods Act 1979 ("SOGA"), at least so far as bunkers are consumed during the credit period.

BY NICK SHEPHERD

This decision made in the context of a standard form bunker supply contract has wide reaching consequences for the manufacturing, petrochemical, building supplies and any other industry where consumable goods are sold on credit terms, together with a ROT clause and a right to use the goods pending payment.

The Court of Appeal accepted that the language of the contract suggested "*that the parties were thinking in terms of a sale and purchase of the bunkers that were to be supplied under the contract*", but also ruled that it is necessary to identify carefully the obligations which the parties have undertaken to determine whether the contract falls within the scope of SOGA.

The Court held that the essential nature of the contract was an agreement under which bunkers are to be delivered to the Owners as bailees with a licence to use them for the propulsion of the vessel, coupled with an agreement to sell any bunkers remaining at the date of payment, in return for a money consideration which in commercial terms can properly be

described as the price. In the Court's view, the Owners did not contract for the transfer of property in the whole of the bunkers, and only contracted for the delivery of a quantity of bunkers which they had an immediate right to use but for which they would not have to pay until the expiry of the credit period.

Significantly, the Court of Appeal held that the licence to use the bunkers was coupled with an agreement to sell any quantity remaining at the date of payment in return for the agreed price. Since the contract provided for the transfer of property in any remaining bunkers, it was to that extent a contract for the sale of goods to which SOGA applies. This was a departure from the reasoning of the arbitrators and Males J in the Commercial Court, both of whom rejected a hybrid contract analysis.

Section 12(1) of SOGA provides that it is an implied condition of a contract for the sale of goods that the seller has the right to sell the goods or will have such right at the time when property is to pass. An inability to transfer property in the goods at the agreed time is usually regarded as amounting to a breach of condition and a total failure of consideration, as a result of which the seller cannot recover the contract price. The Court of Appeal concluded nonetheless that the transfer of property in the remaining bunkers was not an essential subject matter of the contract unless (contrary to all expectations) the quantity remaining represented such a large proportion of the quantity originally delivered that there could be said to have been a total failure of consideration.

Given the considerable importance of this decision for the maritime sector and other industries where consumable goods are sold on credit, it is likely to be appealed to the Supreme Court.

The background facts

On 4 November 2014 O.W. Bunker Malta Ltd ("OWBM") supplied bunkers to the *Res Cogians* pursuant to a contract incorporating the OW Group's standard terms and conditions. Those terms include a ROT clause under which property in the bunkers was not to pass to the Owners until they had made payment in full, coupled with a right to use the bunkers for the vessel's propulsion from the moment of delivery. The agreed credit period was 60 days.

OWBM arranged the bunker stem under a contract made with its parent company, O.W. Bunker AS ("OWBAS"), which had in turn contracted with Rosneft Marine (UK) Ltd ("RMUK") to supply the bunkers at the Russian port of Tuapse. RMUK in turn contracted with its Russian affiliate, RN-Bunker Ltd ("RNB"), to make the physical supply. The contract between OWBAS and RMUK incorporated RMUK's standard terms which were subject to English law, provided for payment to be made 30 days after delivery and also included a ROT clause. The RMUK terms did not, however, expressly allow the Owners to use the bunkers.

On 7 November 2014, the OW Group filed for bankruptcy. This constituted an event of default under a financing agreement the OW Group had entered into with ING Bank. ING assert a right to recover as assignee any debt owed by the Owners to OWBM in respect of the supply of the bunkers.

On 17 November 2014, RMUK (recognising that it was unlikely to be paid by OWBAS) sought payment from the Owners for the bunkers on the ground that it remained the Owner of the bunkers. Part of the bunkers supplied to the vessel had been consumed by the time the 30-day period of credit allowed under RMUK's terms expired and the whole of them had been consumed by the time the 60-day period of credit allowed under OWBM's terms expired.

The Owners' case

The Owners contend that they were not obliged to pay OWBM/ING for the bunkers supplied to the vessel since RMUK had not been paid for such bunkers and so retained property in the bunkers pursuant to the ROT clause in their contract with OWBAS. On the premise that the bunker supply contract was a contract for the sale of goods to which SOGA applies, the Owners contend that ING/OWBM could not maintain a claim for the price pursuant to s.49(1) of SOGA. That section requires that property in the goods has passed to the buyer for the seller to be able to maintain a claim for the price.

Additionally, since OWBM never acquired property in the bunkers and could not transfer such property to the Owners in breach of the implied condition at s.12(1) of SOGA (described above), this provided the Owners with a complete defence to a claim for the contract price. In essence, the Owners

argued that OWBM/ING were seeking payment for goods that never belonged to them.

The dispute was initially dealt with in London arbitration proceedings. Among other findings, the Tribunal held that the bunker supply contract was not a contract of sale to which SOGA applies, further that OWBM/ING had a straightforward claim in debt that was not subject to any requirement as to the passing of property in the bunkers to the Owners.

On appeal, Males J of the Commercial Court upheld that finding.

The Court of Appeal decision

The appeal to the Court of Appeal was restricted to whether the contract in question was a contract for the sale of goods within s.2 of SOGA and, if not, the scope of any implied term into the contract.

In the Court's view, the essential benefit that the Owners had contracted to pay for was a licence to use the bunkers for the vessel's propulsion from the time that they were placed on board the vessel and not for the transfer of property in the bunkers. Due to the combination of the credit period, the ROT clause and the right to consume pending payment, the parties contemplated that a large part, if not all, of the bunkers would or might be consumed within the credit period and as a result would cease to exist before the time at which property in the bunkers was to pass from the seller to the buyer.

The Court of Appeal held that whatever label attached to the contract (and there was nothing inapt about describing it in commercial terms as a contract for the sale of goods), its essential nature was not one for the transfer of property in the whole of the bunkers to the Owners, but for the delivery to them of a quantity of bunkers which they had an immediate right to use and for which they would not have to pay until the expiry of the credit period.

Having found that the contract was outside the scope of SOGA and thus not subject to the implied terms set out in SOGA, Males J held that as a matter of necessary implication the contract imposed on OWBM an obligation to ensure that the licence which it gave the Owners to use the bunkers was or became binding on whichever entity in the supply chain was or would become the owner of the goods.

The Owners submitted that if the contract could not be brought within SOGA, the Judge ought to have held that it was subject to an implied term that OWBM had performed all the obligations arising under its contract with its own supplier, in particular by paying for the goods on expiry of the relevant period of credit.

In the Court of Appeal's view, there is no need to imply a term of that kind, since it does not accurately reflect the essential nature of the contract. The Owners' bargain was for the right to consume the goods before property has passed to them and, if they obtain an effective licence to do so binding on the various parties in the supply chain, that should afford them with sufficient protection and the wider implied term postulated by the Owners was both unnecessary and inappropriate.

Comment

This is a very disappointing decision for the maritime industry. When entering into a bunker supply contract, most shipowners and charterers would reasonably believe that they are entering into a contract for the sale and purchase of goods where there is a common intention for ownership of the bunkers to pass from the seller to the buyer.

If the essential nature of the contract was that the buyer would acquire only a licence/ permission to use the bunkers, it is surprising that this is not expressed in much clearer terms in the bunker supply contract. The judgment does not address why the parties are presumed to have intended that the permitted consumption would turn what on its face appears to be a contract of sale into a radically different arrangement. Commercially, it is doubtful that shipowners and charterers would knowingly agree to pay the amounts involved in bunker purchases for a mere licence to use the bunkers.

This decision is not peculiar to the OW Terms & Conditions since they are based on the BIMCO standard terms used throughout the bunker industry. If the decision is not reversed, it seems likely that the standard industry forms will have to be amended to make it clear that the permitted consumption of bunkers during the credit period is not intended to take the transaction outside the scope of SOGA. In our experience, purchasers of bunkers are already taking measures aimed at achieving that outcome or equivalent protection. This includes asking suppliers to agree to ad hoc clauses to that effect and/or requir-

ing bunker traders to provide documentary evidence that the physical suppliers have been paid before such traders are entitled to payment from the purchaser.

The hybrid contract analysis with two different regimes applying in respect of the same bunker stem depending upon the time at which the bunkers are consumed is difficult to reconcile with the terms of the bunker supply contract. These do not expressly cater for such an outcome. It is not explained in the judgment why the implied terms under SOGA should apply in relation to the unconsumed part of the bunkers when the protection afforded by the legislation (not only s.12 but also s.25 and other provisions) is actually most necessary in relation to the consumed part.

Whether the protection afforded under SOGA is available to the buyer now depends on pure serendipity, such as the quantity of bunkers ROB before the vessel bunkers, and the length and speed of voyages performed during the credit period. The transaction falls within SOGA if the vessel bunkers and immediately thereafter spends a long time in port due to congestion, but is outside if the vessel performs a long laden voyage shortly after bunkering. Such commercial uncertainty seems unlikely to reflect the parties' true intentions.

The implied term found by the Court of Appeal also creates scope for considerable uncertainty. The overwhelming majority of physical and intermediate suppliers' contracts are governed by foreign law, most commonly the law of the place of supply. This leads to a situation where the purchaser's (Owners') liability to the contract supplier (OWBM) is heavily dependent upon the terms of a contract to which the purchaser is not a party, that is governed by foreign law and is subject to the vagaries of that jurisdiction. Again, that seems unlikely to reflect the parties' true intentions.

These issues and others will need to be considered by the Supreme Court if permission to appeal is granted.

AUSTRALIA PERMITS ARREST OF VESSEL ON FOREIGN MARITIME LIEN CLAIM

By Nathan Cecil of Holding Redlich

In a decision delivered on 11 September 2015, the Federal Court of Australia has upheld the arrest of the "Sam Hawk" in respect of a claim for a foreign maritime lien arising from the supply of bunkers to the vessel.

This decision is significant because it reverses the prior law in Australia and paves the way for the recognition and enforcement in Australia of foreign maritime liens, even where such liens do not exist independently under Australian law.

The practical effect of this decision is that the claims in respect of which vessels can be arrested in Australia has now expanded significantly, meaning that Australia is an even more arrest and enforcement-friendly jurisdiction.

BY NATHAN CECIL

The facts

The "Sam Hawk" was owned by SPV Sam Hawk Inc (Owners) and time chartered to Egyptian Bulk Carriers (Egyptian Bulk). The charter party contained a 'no lien' clause. Egyptian Bulk entered into a bunker supply contract with Reiter Petroleum, of Canada, to stem the vessel in Istanbul, Turkey. The bunker supply contract was expressly subject to Canadian law, purported to grant a contractual maritime lien over the vessel and was also said to be subject to U.S. law in relation to the existence of a maritime lien for the supply. Reiter Petroleum entered into a separate arrangement for the supply with KPI Bridge Oil, with the ultimate physical supplier being Socar Marine. Owners were not privy to or a named party to the supply arrangements.

However, Owners did ask Egyptian Bulk for the identity of the bunker supplier and were given Socar Marine's details. Prior to the supply, Owners sent a 'no liability' notice to Socar Marine, advising that Owners accepted no liability to pay for the supply and payment was the sole responsibility of Egyptian Bulk. Socar Marine refused to sign and return the notice. However, the Master of the bunker barge did accept, sign and return an identical notice prior to stemming the bunkers.

Egyptian Bulk did not pay for the bunkers, as a result of which Reiter Petroleum arrested the vessel at

Albany, Western Australia. Owners provided security for the release of the vessel under protest and commenced these proceedings, seeking that the arrest be struck out and the security returned.

The law

Australian law does not recognise a maritime lien for the supply of necessaries, including bunkers. Prior to this case, following the Privy Council decision in the "Halcyon Isle" ([1981] AC 221) the existence of a maritime lien was held to be a matter of procedure, which was to be determined under Australian law for any claims commenced in Australia. However, a recent High Court of Australia case held that matters which relate to a party's rights, such as the grant of a maritime lien and right to arrest a vessel, are matters of substance, not procedure. As such, questions as to the scope of those rights fall to be determined by the proper law of the relevant contract, transaction or circumstances, which may not be Australian law. In resolving these questions of substance, Australian law may recognise and give effect to rights existing under foreign law.

Indeed, Reiter Petroleum claimed that the proper law of the supply was U.S. (the choice of law for questions relating to maritime liens) or Canadian (the law of the contract) law and that each granted a maritime lien over the vessel, regardless of the fact that the supply was made for Charterer's account.

Whilst Owners contested the validity of the claims for lien under U.S. and Canadian law, the Court held that such issues were ultimately matters for final hearing. Owners' arguments were not strong enough to warrant the summary dismissal of the proceedings.

Unless resolved by agreement, the matter will proceed to a final hearing in the usual way, at which time we will know whether Reiter Petroleum's claims for a maritime lien are held to be valid.

Consequences for bunker suppliers and Owners

Regardless of the final outcome, this decision means that Australian courts will uphold the arrest of a vessel in Australia in respect of an arguable claim based on a foreign maritime lien. Whilst the ultimate success of any such claim will depend on the particular circumstances in each case, this decision means that the circumstances in which bunker suppliers can arrest vessels in Australia, at least in order to obtain security for an arguable claim, have now been significantly increased.

As a result, bunker suppliers should consider Australia an even more friendly jurisdiction in which to seek security and enforce claims and Owners should be prepared to face an increase in such actions.