PST ENERGY 7 SHIPPING LLC AND ANOTHER V. OW BUNKER MALTA LTD AND ANOTHER (RES COGITANS) [2016] UKSC 22

In a judgment handed down on 11 May 2016, the Supreme Court has upheld the Court of Appeal decision dated 22 October 2015 and confirmed that bunker suppliers who were unable to transfer property in bunkers supplied to a ship were nonetheless entitled to the price of the bunkers from the ship-owners (the "Owners").

The bunker supply contract in question provided for a credit period and incorporated a retention of title ("ROT") clause. The Supreme Court concluded that it was not a contract of sale within the scope of the Sale of Goods Act 1979 ("SOGA"). Therefore, the implied term under s. 12(1) SOGA, which 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, did not apply. S. 49(1) SOGA, which requires that property in the goods has passed to the buyer if the seller is to maintain a claim for the price, also did not apply.

BY PAUL HERRING

Many standard bunker industry forms will now have to be revised to make it clear that the permitted consumption of bunkers during the permitted credit period is not intended to take the transaction outside the scope of SOGA or to provide that the seller is not entitled to payment until the other suppliers in the chain have been paid. However, this decision

has far-reaching consequences, beyond the maritime sector and bunker supply contracts, for a number of other industries that may also need to amend their standard terms and conditions as a result.

The background facts

On 4 November 2014, O.W. Bunker Malta Ltd ("OWBM") supplied bunkers to the Res Cogitans 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 asserted 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 history of the proceedings

Both the arbitral tribunal and the Commercial Court held that the bunker supply contract was not a contract of sale to which SOGA applies. OWBM/ING had a straightforward claim in debt that did not require property in the bunkers to have passed to the Owners.

On appeal, the Court of Appeal also concluded that the contract was outside the scope of SOGA and so not subject to the implied terms under SOGA, although it did contemplate that the contract would or might be a contract of sale within SOGA to the extent that payment was made at a time when any part of the bunkers remained unconsumed.

The Supreme Court decision

The nature of the bunker supply contract

The Supreme Court agreed with the lower courts' findings that the contract was not one of sale within s.2 SOGA, with the result that the Owners could have no possible defence under s. 49 SOGA to the claim for the price. While the bunker supply contract was similar to a sale contract and would contain similar implied terms as to description, quality and fitness for purpose to those implied in any conventional sale, its essential nature was such that it could not be regarded as a straightforward agreement to transfer the property in the bunkers to the Owners for a price.

The Supreme Court stated that the contract was in substance an agreement with two aspects: first to permit consumption of the bunkers prior to any payment and without any property ever passing in the bunkers consumed; second, but only if and so far as bunkers remained unconsumed, to transfer the property in the remaining bunkers to the Owners in return for the Owners paying the price for all the bunkers, whether consumed before or remaining at the time of payment. All that mattered to the Owners was that they should have and had the right to consume the bunkers in the vessel's propulsion system as and when they did so prior to payment, and that, upon payment, they would acquire the property in, and thereby an absolute right to dispose of or use as they wished, any remaining bunkers.

The Supreme Court further found that the bunker supplier's obligation to be able to pass the property in respect of any bunkers not consumed against payment of the price for all the bunkers could not make the agreement as a whole a contract of sale. Contrary to the Court of Appeal's analysis, therefore,

the contract could not be analysed as a contract of sale to the extent that it provided for the transfer of property in any part of the bunkers remaining at the time of payment.

Implied term

The Supreme Court, in agreement with the Court of Appeal, held that there was no need for an implied term that OWBM had a duty to pay its supplier timeously so that it could pass title to the Owners. The only implied undertaking that was required in this case was that OWBM were legally entitled to permit the Owners to use the bunkers for the vessel's propulsion prior to payment. OWBM did not need to have title to the bunkers for this and there was no claim before the Court that OWBM did not have the right to permit such use.

What if it had been a contract of sale within SOGA?

In view of these conclusions, the Supreme Court did not strictly need to consider the position if the contract had been classified as a contract of sale within s. 2 SOGA. Nonetheless, as the point was fully argued before the Court and has general significance, the Supreme Court addressed it. In *FG Wilson (Engineering) Ltd v. John Holt & Co. (Liverpool) Ltd* [2013] EWCA Civ 1232, the Court of Appeal concluded that, where goods are delivered under a contract of sale, but title is reserved pending payment of the price, the seller cannot enforce payment of the price by an action. The issue before the Supreme Court was whether, in the case of a contract of sale within SOGA, s. 49 is a complete code that excludes any action for the price outside its terms.

S. 49(2) partially relaxes the strictness of s. 49(1) by allowing the seller to enforce its payment where the price is payable on a certain day and the seller is ready and able at the same time to deliver to the buyer the goods and property in them. However, s. 49 does not focus on the position where delivery is made, title is reserved but the price is agreed to be paid, even though not on a particular "day certain". Nor does s. 49 provide for a situation where the buyer is permitted to dispose of or consume the goods or they are at the buyer's risk and are destroyed or damaged, for example by perils of the sea or by fire. The Supreme Court cited previous authorities that held the price might be recoverable in such circumstances and concluded that there is some scope for claims for the price in other circumstances than those covered by s. 49.

In this case, the contract provided for the bunkers to remain the seller's property but at the buyer's risk as regards damage or destruction. The contract also provided by its express terms for the bunkers to be destroyed by use for the Owners' commercial benefit. By analogy with the cited authorities, the price must be recoverable in those circumstances. Effectively overruling *FG Wilson v. John Holt* on this point, therefore, the Supreme Court held that s. 49 was not a complete code of situations in which the price may be recoverable under a contract of sale.

Comment

This is a disappointing decision for the maritime industry and one that has an unwelcome outcome for those regularly entering into bunker supply contracts. Prior to the *Res Cogitans* litigation, most ship-owners and charterers buying bunkers believed they were entering into a contract for the sale and purchase of goods under which ownership of the bunkers was intended to pass from the seller to the buyer. The fact that the Supreme Court has taken a different view will come as a surprise to the industry.

Clearly, standard industry forms, and not only those relating to bunker supply contracts, will have to be amended to take into account the ramifications of the Supreme Court decision, in order to protect the position of those purchasing bunkers from bunker traders in the future.