



## OW BUNKER TEST CASE: THE *RES COGITANS* – FORTHCOMING SUPREME COURT HEARING

**On 12 February 2016<sup>1</sup>, we reported that the Supreme Court had granted an application for PST Energy 7 Shipping LLC to appeal the Court of Appeal's decision in the controversial *RES COGITANS* dispute.**

The Supreme Court Justices, Neuberger, Clarke and Hodge gave permission to appeal the decision, which will be heard on an expedited basis over 1–2 days from Tuesday, 22 March 2016 before the following high-profile panel:

- Lord Mance
- Lord Clarke
- Lord Sumption
- Lord Hughes
- Lord Toulson

It is possible to view a live stream of the hearing at <https://www.supremecourt.uk/live/court-02.html>

1 <http://www.hfw.com/OW-Bunker-test-case-February-2016>

### The question

By way of reminder, the central issue for determination is whether the relevant bunker supply contract falls within the Sale of Goods Act 1979 (SOGA), by which the seller had agreed to transfer property in the bunkers to the buyers in return for payment. The lower courts and arbitration tribunal decided that SOGA did not apply. This was principally because the 60 day credit period and retention of title clause meant that the parties contemplated the consumption of bunkers before title could pass and therefore the contract could not amount to a “sale of goods” for the purposes of SOGA. This finding meant that OW Bunker was entitled to claim payment for the bunkers, without having first paid the third party physical bunker suppliers. It also gives rise to the curious and arguably unsatisfactory result that SOGA could potentially apply to bunkers remaining on board upon the expiry of the credit period, but not to those already burned. *Continued overleaf*



By deciding that SOGA did not apply to the contract, owners were prevented from relying on the argument that, because property in the bunkers did not pass, the obligation to pay for the bunkers did not arise under section 49 (1) SOGA, potentially a complete defence to OW's claim.

Unsurprisingly, the Supreme Court panel is not unfamiliar with SOGA disputes and retention of title clauses.

Lord Hughes, for example, determined the case of *Fairfax Gerrard Holdings Ltd v Capital Bank Plc* [2007] EWCA Civ 1226 concerning the issue of whether a company specialising in the purchase and sale of machines had authority to pass title of the machine in question, before going into liquidation.

Lord Clarke, also considered in *Michael Gerson (Leasing) Ltd v Wilkinson* [2001] Q.B. 514 the right to acquire title in goods from a seller in possession under SOGA, section 24 and the time at which property is to pass under section 17.

Of interest is the fact that both Lord Clarke and Lord Mance were part of the Supreme Court panel of Judges in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50. In that decision it was decided that the unambiguous language of a contract is to take effect. It is therefore perhaps relevant to note that in the *RES COGITANS* Court of Appeal decision, Lord Justice Moore-Bick, accepted that the language of the bunker supply contract, suggested that the parties were thinking in terms of a "sale and purchase" of the bunkers. Whether an argument based on contractual interpretation along these lines might be enough to convince the Supreme Court that SOGA applies is unclear. However, it is certain that the outcome of the Supreme Court decision will be of significant interest within the maritime industry and beyond.

We shall be following the Supreme Court hearing and reporting on its outcome in due course.

The Supreme Court Justices' biographies can be accessed at <https://www.supremecourt.uk/about/biographies-of-the-justices.html>

### **RES COGITANS – procedural history**

- 5 November 2014, OW Bunker & Trading A/S ceases trading.
- 16 April 2015, London Arbitration Award issued.
- PST appeals the Arbitration Award to the High Court under s. 69 Arbitration Act 1996 (point of law).
- 7 July 2015, start of High Court trial before Mr Justice Males.
- 14 July 2015, High Court decision handed down.
- 15 July 2015, Mr Justice Males grants permission for PST to appeal his decision to the Court of Appeal.
- 17 September 2015, Court of Appeal hearing, comprising of Lord Justices Moore-Bick, Longmore and McCombe.
- 22 October 2015, the Court of Appeal, hands down its decision.
- 11 February 2016, the Supreme Court Lord Justices, Neuberger, Clarke and Hodge grant permission to appeal the Court of Appeal decision to the Supreme Court.
- 22 March 2016, start of Supreme Court hearing, before Lord Justices Mance, Clarke, Sumption, Hughes and Toulson.



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