Shipping

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OW BUNKER TEST CASE: THE *RES COGITANS* SUPREME COURT JUDGMENT HANDED DOWN TODAY

In the climax of the *RES COGITANS* dispute, the Supreme Court has today handed down its eagerly awaited judgment, in which it unanimously rejected the appeal of PST Energy 7 Shipping LLC.

The three central questions to be determined by the Supreme Court Justices, Lord Neuberger, Lord Mance, Lord Clarke, Lord Hughes and Lord Toulson, were as follows:

1. Is the relevant bunker supply contract a contract of sale of goods within the meaning of s.2(1) of the Sale of Goods Act 1979 (SOGA 1979)?

2. If not, was it an implied condition of the contract that OWB would perform its obligations to its supplier, in particular by paying for the goods timeously?

3. Should the Court of Appeal decision in *F G Wilson (Engineering) Ltd v John Holt & Co (Ltd)*[1] (The Caterpillar Decision) be overruled? In that decision, the Court of Appeal held that the seller cannot enforce payment under s.49(1) SOGA 1979, in circumstances that title was reserved pending payment.

In short, the Supreme Court answered these questions as follows:

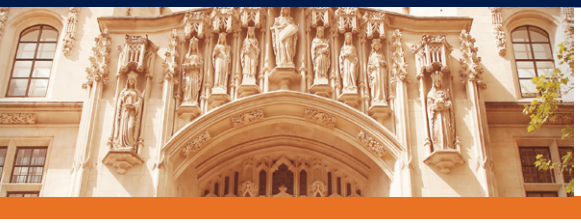
1. The relevant bunker sale contract cannot be regarded as a straightforward agreement to transfer the property in bunkers, to which s.2 (1) SOGA 1979 would apply, but is a *'sui generis'*, or unique, type agreement to permit consumption of the bunkers prior to payment and to transfer the property in any remaining bunkers at the end of the credit period.

2. OW Bunkers (OWB) only implied undertaking was to obtain permission to allow owners to use the bunkers for propulsion prior to payment.

3. s.49 (1) SOGA is not to be regarded as a complete code for situations in which the price might be recoverable, overruling The Caterpillar Decision on that point, had it been necessary to do so.

Lord Mance also clarified that, even if OWB would have been obliged to transfer property in any bunkers remaining at the end of the credit

1 [2014] 1 WLR 2365



period, the contract was still not to be regarded as one of sale.

In other words, Lord Justice Moore-Bick's suggestion in the Court of Appeal decision, that SOGA 1979 could apply to those bunkers remaining on the expiry of the credit period, was not accepted.

As such, OWBs claim is to be regarded as a straightforward debt claim, to the extent that permission to allow consumption of bunkers prior to payment has been obtained by OWB from physical suppliers, significantly strengthening OWB/ING's position.

The next fight in the courts may well be over the high amount of interest claimed by ING/OWB on the unpaid bunker supplies. In the meantime, we suspect that many Owners and Charterers will be under significant pressure to settle the claims of ING/OWB, whilst still potentially facing the risk of double jeopardy for claims by an unpaid physical supplier.

In light of the Supreme Court decision, ship operators would be wise to very carefully consider the wording of their future bunker supply contracts, how best to protect their position in case of a similar insolvency of an intermediate bunker supplier and the significant problems that can create.

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