

***“A sale by any other name”***

# **OW Bunkers and the English Courts**

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**AMTAC Seminar**

**(1) PST Energy 7 Shipping LLC**  
**(2) Product Shipping and Trading S.A**

**v**

**(1) O.W. Bunker Malta Limited**  
**(2) ING Bank N.V.**

***“RES COGITANS”***

- London arbitration (Bruce Harris, David Farrington, Ian Kinnell QC), Interim Award, 16.04.15
- High Court (Males J) [2015] EWHC 2022 (Comm), 14.07.15
- Court of Appeal (Moore-Bick LJ, Longmore LJ, McCombe LJ) [2015] EWCA Civ. 1058, 22.10.15
- Supreme Court ? (CA refused permission; petition to SC filed last week)

PST Energy 7 / Product Shipping & Trading  
("Owners")

-> Sales Order Confirmation dated 31.10.14

OW Bunker Malta ("OWBM")

-> contract 31.10.14

OW Bunker & Trading ("OWBAS") (Denmark)

-> contract 31.10.14

Rosneft Marine (UK) ("RMUK")

RN Bunker ("RNB") (Russia)

-> physical supply 04.11.14

# CONTRACT TERMS

## OW Bunker Group terms:

- English law
- credit – payment 60 days after delivery
- permission to use bunkers from time of delivery for purposes of propulsion
- retention of seller's title: property not to pass until bunkers paid for in full

## Rosneft Group terms:

- English law
- credit – payment within 30 days
- retention of title
- no express permission to use bunkers before payment

# FURTHER FACTS

- Bunkers - consumption before payment
- Collapse of OWBAS: 06.11.14
- Assignment to ING
- Payment for the bunkers?
- Competing demands on Owners by RMUK / OWBM-ING: November 2014
- Commencement of arbitration by Owners seeking declaration not obliged to pay OWBM-ING: December 2014
- Bunkers would no longer exist at time payment fell due, so title to them could not be transferred

# OWNERS' CASE

-> OWBM could not sue for the price or for damages since it was never in a position to transfer title to the bunkers to Owners

1. The contract was “a contract for the sale of goods”
  - indicia
  - parties' intention
2. Sale of Goods Act 1979 (“SOGA”) applies, but requirements for “action for price” in the Act not satisfied

*s.49: “Where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.”*

3. Breach of condition / total failure of consideration

# OWBM'S CASE

-> OWBM had done everything which it was required to do under the contract, i.e. supply the bunkers, therefore entitled to payment

1. Simple claim in debt, not action for price or for damages
2. Not a “contract for the sale of goods” for purposes of SOGA 1979

*s.2(1): “A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.”*

3. Parties did not intend that title would be transferred since it was accepted that the bunkers would or could be consumed before seller itself had title to them

# DECISION

-> Failure of OWBM to transfer title did not release Owners from obligation to pay OWBM for the bunkers

- necessary to identify carefully and give effect to the the substance of what the parties agreed
  - indicia of a sale of goods contract not decisive of what the parties had agreed
  - not appropriate to “shoehorn” contract into the form of contract to which SOGA applies
  - retention of title until payment provision, allied with contractual intention or understanding that bunkers would be consumed before payment lead to conclusion that transfer of property not of the essence of what was agreed
  - essence of contract was delivery of goods to Owners as bailees with licence or right to consume them immediately for propulsion of vessel in return for money consideration (“the price”) payable on a stipulated date
- notion of retrospective transfer of title upon payment for goods that have ceased to exist as at the time of payment is a nonsense



## Not a typical sale of goods contract, but what was it?

- Tribunal, [51]:

*“Stripped of all unnecessary detail, the deal between the parties was that OWBM would ensure delivery of the bunkers, the use of which would be immediately available to the Owners, who would pay for them according to OWBM’s invoice.*

*Such an agreement does quite obviously resemble in some respects a contract of sale, but its terms and their performance do not to any extent rely on property or title or their transfer.”*

- Males J: “bunker supply contract”
- CA: “contract for the sale of goods” but not one to which SOGA applies

# CONSEQUENCES

## In this case:

- No defence to OWBM's claim that OWBM not able to transfer title
- Owners potentially liable to OWBM
- Owners also potentially liable to RMUK

## More generally

- depends on facts of particular contractual terms and particular circumstances:
  - the length of the credit period
  - the likelihood that the goods would be consumed before expiry of credit period
  - SOGA or comparable principles may still apply in respect of goods to which title can be transferred at date of payment
- impact on sale and purchase of bunkers between owners and time charterers on commencement and completion of charters?
- significance beyond bunker contracts?
- significance for applicability of other protections in SOGA, including implied terms as to quality, fitness for purpose, etc.
- query effectiveness of ROT clauses as security for sellers/suppliers
- likely impact on perception of counter-party risk and usual practices, especially in relation to credit terms
- justice of payment going to intermediate traders rather than ultimate suppliers?

# OTHER STRATEGIES – INTERPLEADER RELIEF?

## Singapore

*Precious Shipping Public Company Ltd & Others v O.W. Bunker Far East (Singapore) Pte Ltd and other matters* [2015] SGHC 187 (High Court), 21.07.15

## New York

*UPT Pool Ltd v Dymanic Oil Trading (Singapore) Pte Ltd and other matters* (US District Court for SDNY), 01.07.15

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