"RES COGITANS" - UK SUPREME COURT DECISION

In a unanimous judgment published on 11 May 2016, the UK Supreme Court (**SC**) dismissed the Owners' appeal from the Court of Appeal decision dated 22 October 2015. Owners have now lost at every stage of their legal challenge to ING's claim to be paid the agreed price of bunker supply receivables assigned to it (as security agent) as part of the security package for a US$ 700 million loan made to the OWB Group. The SC judgment is final and unappealable.

Summary

The SC unanimously dismissed the Owners' appeal, ruling that:

(a) The contract between OWBM and the Owners was not one of sale but *sui generis*;

(b) It was subject only to the implied promise that OWBM supply the bunkers to the Owners on terms permitting their use for propulsion of the vessel before payment; and

(c) The Owners have no defence to OWBM/ING's claim to the agreed price.

Additionally, the SC ruled that if the contract was one of sale, section 49 of the Sale of Goods Act 1979 (**SOGA**) was not a bar to a claim for payment of the agreed price.

The facts

The bunkers in this case were supplied to the *Res Cogitans* in the Russian port of Tuapse in the Black Sea on 4 November 2014. They were ordered on 31 October 2014 by the Owners. The immediate bunker supplier was OW Bunker Malta Ltd (**OWBM**) which in turn obtained the bunkers under a contract with its parent company, OW Bunker & Trading A/S (**OWBAS**), which was at the time the world's largest bunker supplier and is now insolvent. OWBAS in turn obtained the supply from Rosneft Marine (UK) Ltd which itself obtained them from an associate, RN-Bunker Ltd, which had facilities in Tuapse and made the actual delivery. On 6 November 2014, OWBAS announced that it was applying to the court in Aalborg for restructuring. ING is the security agent for a syndicate of lenders which financed the OW Bunker Group and claims as assignee of any claim which OWBM has against the Owners.

OWBM's supply contract with the Owners described itself as being for sale and delivery ex barge of 110 mt of gasoil at a price of USD 848 per mt and 1000 mt of fuel oil at a price of USD 359 per mt (a total of USD 443,800), with *"Payment within 60 days from date of delivery upon presentation of invoice"* and was expressly subject to the OW Bunker Group's general terms and conditions.

Not a sale contract but "sui generis"

The agreement with Owners was not a straightforward agreement to transfer property in the bunkers for a price. The contract was *sui generis*, offering in its essential nature a feature quite different from a sale of goods contract - namely, the liberty to consume all or part of the bunkers without acquiring title or having paid for them. Permitting the use of the bunkers for the propulsion of a vessel is a vital and essential feature of the bunker supply business. Owners' submissions to the effect that SOGA applied made no legal or commercial sense. The Owners were only interested in being able to use the bunkers for propulsion prior to payment and to have absolute rights over the remaining bunkers after payment.

No implied term

The contract was not subject to any implied term to the effect that OWBM would perform or had performed its obligations to its supplier, in particular by paying for the bunkers timeously. The Owners' argument

asserting such a term was rejected. There was, the SC ruled, no basis nor was there any need for any implied term of the nature claimed for.

Bunkers remaining at end of credit period

Owners are liable to pay the agreed price for the entire supply whether or not consumed. In any event, the SC stated that where Owners kept on consuming after the due date for payment, the permission to consume extended beyond the credit period absent withdrawal of this permission. Whilst it might have been open to Owners at the time of payment to terminate the contract by reason of OWBM's inability to pass title, Owners would have had to stop consuming the bunkers. SOGA did not apply to the transfer of title in the bunkers unconsumed at the end of the credit period because that approach was dividing up a single agreement covering the supply of all the bunkers.

Section 49 SOGA not a complete code

Following an analysis of the case law including pre 1893 decisions, the SC concluded that section 49 SOGA was not a complete code of situations in which the price might be recoverable under a contract of sale overruling, in this respect, the Court of Appeal decision in *Caterpillar*. Accordingly, in the present case even if SOGA had applied, the contract price was still recoverable by virtue of the express terms of the contract because of the complete consumption of the bunkers.

11 May 2016