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The nature of a contract for supply of bunkers: “Res Cogitans” [2015] EWHC 2022 (Comm)

The recent High Court judgment is noteworthy as the Court considered whether a contract for supply of bunkers subject to English law was a contract for the sale of goods to which the Sales of Goods Act 1979 applied. Bunker supply contracts are usually agreed on standard form terms and entail a chain of contracts each with a retention of title clause in favour of the supplier as well as provisions that the vessel is entitled to consume the bunkers pending payment of the price by the Owners of the vessel within an agreed number of days.

The Court found that a supply contract is not in fact a contract for the sale of goods and accordingly that the Sale of Goods Act 1979 did not apply. Instead, the contract is for the delivery of bunkers to the vessel which the owner of the bunkers consented to the vessel consuming pending payment of the price. A claim for the price of the bunkers is, accordingly, a straightforward claim in debt and is not subject to the passing of property.

BACKGROUND

On 31 October 2014 the Owners of the vessel placed an order for the supply of bunkers to the vessel with OW Bunkers Malta Ltd (“OWBM”), a company of the OW Bunker group. The order was confirmed on the same date and the Sales Order Confirmation named OWBM as seller with a delivery date of on or about 3 November 2014. Payment of the price of the bunkers was to be made within 60 days from the date of delivery upon presentation of OWBM’s invoice. Further, the transaction was subject to the OW Bunker Group 2013 Terms and Conditions for the sale of Marine Bunkers (the “OWB terms”).

OWBM placed an order for the supply of the bunkers with its Danish parent company, OW Bunker & Trading A.S. (OWBAS). The contract between OWBM and OWBAS was also subject to the OWB terms. OWBAS, in turn placed an order with Rosneft, while Rosneft placed an order with its Russian subsidiary, RN-Bunkers Ltd (“RN-Bunkers”). RN Bunkers physically supplied the bunkers to the vessel at Tula in the Black Sea on 4 November 2014.

The OWB terms stipulated that English law and London arbitration applied to the contract. Further, the OW terms contained a retention of title clause whereby the seller of the bunkers retained title and property in the bunkers until full payment of the price and the buyer of the bunkers is in possession of the bunkers solely as bailee and is entitled to use the bunkers for the purpose of propulsion of the vessel. The material clause provided as follows:

“H. Title

H.1 Title in and to the Bunkers delivered and/or property rights in and to such Bunkers shall remain vested in the Seller until full payment has been received by the Seller of all amounts due in connection with the respective delivery. The provisions in this section are without prejudice to such rights as the Seller may have under the laws of the governing jurisdiction against the Buyer or the Vessel in the event of non-payment.

H.2 Until full payment of the full amount due to the Seller has been made and subject to Article G.14 hereof, the Buyer agreed that it is in possession of the Bunkers solely as Bailee for the Seller, and shall not be entitled to use the Bunkers other than for the propulsion of the Vessel, nor mix, blend, sell, encumber, pledge, alienate, or surrender the Bunkers to any third party or other Vessel.”

The contract between OWBAS and Rosneft among other terms provided as follows:

“10. Risk/Title

Risk in the Marine Fuels shall pass to the Buyer once the Marine Fuels have passed the Seller’s flange connecting the Vessel’s bunker manifold with the delivery facilities provided by the Seller. Title to the Marine Fuels shall pass to the Buyer upon payment for the value of the Marine Fuels delivered pursuant to the terms of Clause 8 hereof. Until such time as payment is made, on behalf of themselves and the Vessel, the Buyer agreed that they are in possession of the Marine Fuels solely as Bailee for the Seller [...].”

Payment from OWBAS to Rosneft was due at the latest 30 days after delivery of the bunkers and by no later than 4 December 2014. Payment by Owners to OWBM in the sum of US\$443,800 was due by no later than 60 days after delivery i.e. by 3 January 2015. Rosneft paid RN Bunkers for the bunkers on 18 November 2014. The other parties did not make payment. On or about 6 November 2014 OWBAS filed for the commencement of an in-court restructuring procedure following the discovery of a major fraud committed by senior employees of its Singapore subsidiary.

ING, as assignee of OWBM’s right to payment of the price of the bunkers, claimed payment of the price due under the contract between OWBM and Owners. Rosneft also claimed the price of the bunkers from Owners in light of OWBAS’s insolvency (however, Rosneft did not participate in the proceedings). Owners denied liability to pay the price of the bunkers to ING.

Owners argued that the supply contract was a contract for the



sale of goods to which the Sale of Goods Act 1979 (the “Act”) applies and that accordingly ING’s claim for the price of the bunkers was subject to the requirements of section 49 of the Act being satisfied, namely that the property in the goods had to pass to the buyer or the price to be payable on a day certain irrespective of the date of delivery of the goods. As neither condition had been satisfied Owners were not liable to pay the price. Further, because OWBA has not paid Rosneft, OWBA never acquired property in the bunkers and that in turn OWBM did not own the bunkers on the date that payment was due from Owners to OWNM. Alternatively, Owners argued that even if the supply contract was not subject to the Act, terms equivalent to section 12 must be implied and that OWBM was in breach of the obligation to pass the property in the bunkers to Owners at the time of payment.

ING contented that the supply contract between OWBM and Owners was not subject to the Act. Alternatively, that if the Act applied, section 49 had been satisfied.

The dispute was referred to arbitration.

THE ARBITRATION AWARD

The arbitrators found for ING in that the supply contract was not a contract of sale to which the Act applies and that as a consequence, ING did not have to bring its claim within the requirements of section 49 of the Act. Instead, ING’s claim for the price of the bunkers was a straightforward claim in debt which was not subject to any requirement as to the passing of property in the bunkers to Owners at the time of payment.

Further, the arbitrators found that if the contract was subject to the Act a claim for the price could only be maintained if the conditions of section 49 were satisfied - which they were not under the circumstances. In particular, terms that property would pass to Owners at the moment that the bunkers were consumed could not be implied into the contract nor could OWBM pass title in the bunkers to Owners in accordance with section 25 of the Act because the bunkers would have been consumed and would not exist as goods at the time that payment was made by Owners. The presence of a retention of title clause reinforces the finding that the contract was not one for the sale of goods because the contract does not to any extent rely the property or title of the goods passing to the buyer. Accordingly, OWBM could not pass title to Owners in reference to consumed/no longer existent goods because the effect of consumption of the bunkers was to extinguish any property in them.

Lastly, that the provision for payment of the price to be made by Owners within a fixed period after delivery did not satisfy the second requirement of section 49 of the Act that “*the price is payable on a day certain*”.

Owners appealed.

THE COMMERCIAL COURT JUDGMENT

The Court, at first glance, considered that the contract appeared to be a contract of sale, however, the determination of the nature of the contract would depend on an analysis of the obligations that the parties had undertaken. The Court considered what the parties had agreed to and in particular whether their agreement fell within the definition of a contract of sale as set out in the Act. Section 2 of the Act defines what is meant by a “*contract for the sale of goods*”. Section 2 provides as follows:

“(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 [...].*

(4) *Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale.*

(5) *Where under a contract of sale the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled the contract is called an agreement to sell.*

(6) *An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.”*

The Court further considered that in order to qualify as a contract of sale within the scope of the Act, four conditions must be satisfied. First, the contract must be for “*goods*”. Second, one party, the seller, must undertake an obligation to transfer the property in the goods to the other party, the buyer. Third, there must be a money consideration payable by the buyer to the seller. Fourth, there must be a link between the transfer of title and the money consideration, such that the consideration for the payment is the transfer of title to the buyer as distinct from some other benefit: in other words, what the buyer is paying for is title to the goods.

The Court held that while bunkers are “*goods*” and a money consideration was payable by the Owners to OWBM the combined effect of (1) the retention of title clause, (2) the period of credit before payment fell due, (3) the permission given to the Owners to consume the bunkers, and (4) the fact that some or all of the bunkers supplied were likely to be consumed before the expiry of the credit period with the consequence that property therein would cease to exist, means that the parties must be taken to have understood that it was likely that title would never be transferred to the Owners. It was possible that it would be, but not likely. It was certainly not an essential part of the transaction that it should be. Further, that the combination of features listed above means that it cannot have been the object of the contract to transfer property from OWBM to the Owners: both parties knew that this was unlikely to ever happen. Even if it did, because some bunkers remained unconsumed after 60 days, that was not a fundamental criterion to the transaction.



ING's claim for the price of the bunkers was accordingly a straightforward claim in debt which was not subject to any requirements of the passing of property in the bunkers. The Court further found that Rosneft knew that it was selling the bunkers to a trader for resale to an end user, the vessel, which had placed an order with the OWB group company. Further, that Rosneft had permitted OWBAS to resell the bunkers and Owners to consume the bunkers pending payment.

COMMENT

Interestingly, the Court reached the decision that bunker supply contracts are not contracts for the sale of goods to which the Act applies. The decision has wide implication for the shipping industry and gives rise to numerous ancillary issues such as whether Charterers acquire title to the bunkers upon purchase and whether, in turn, Owners acquire title to the bunkers upon redelivery of time chartered vessels when Charterers have yet to make payment to the bunker supplier.

As considered by the Court, bunker supply contracts are largely agreed on standard terms which include a retention of title clause in favour of the seller and clauses permitting the vessel to consume the bunkers before payment becomes due in accordance with the agreed credit period. The decision also appears to pave the way for Owners prospectively facing claims for the price of the bunkers from multiple parties in the supply chain (such as Rosneft) as a matter of the law of jurisdictions other than England and Wales and, as a consequence, offers little protection to Owners who are presently facing claims from multiple suppliers in respect of the price of the bunkers supplied by OW bunkers.

The Commercial Court judgment may not, however, be the final word on the issue as Owners were granted leave to appeal, which has been heard with judgment expected before the end of the year [watch this space for a further update].



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