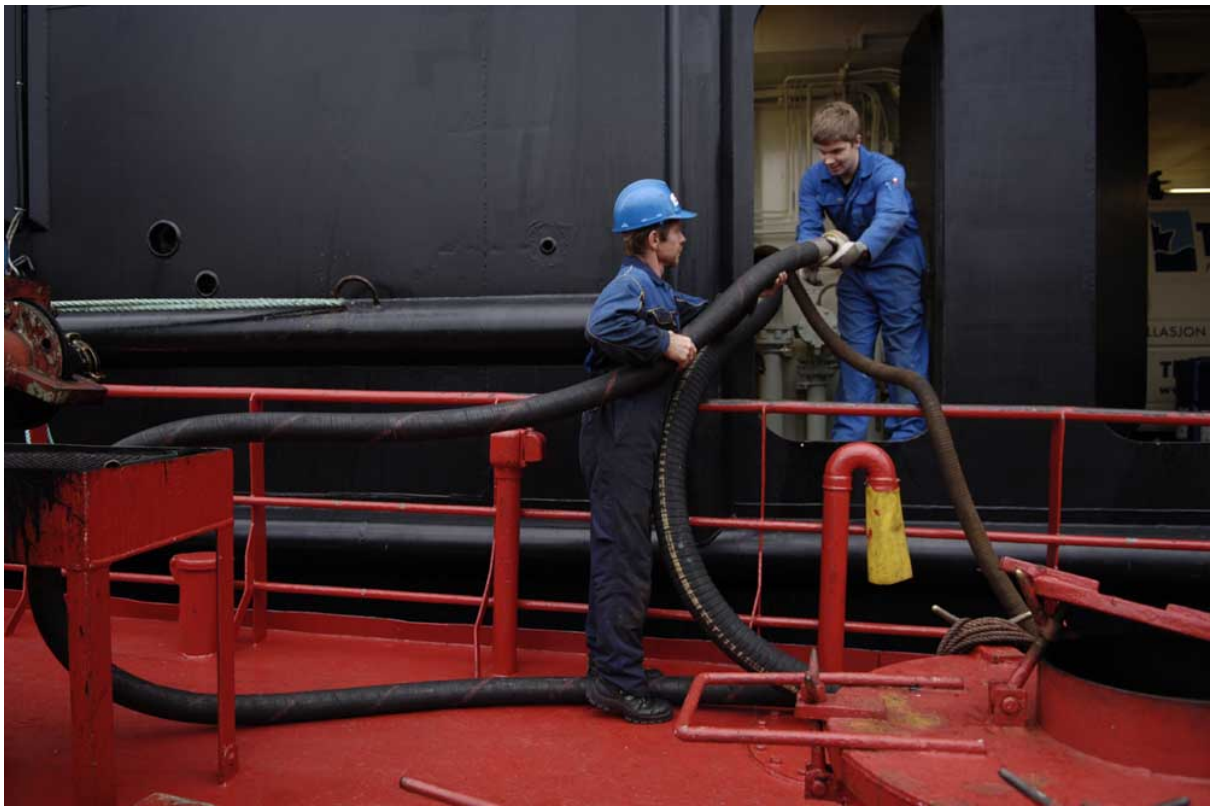

Gard Alert: OW Bunker – English Supreme Court upholds previous decisions that ING can recover payment from shipowners

In a judgment handed down on 11 May 2016, the shipowners' appeal was unanimously dismissed by the Supreme Court.

Published 13 May 2016

There were three issues for resolution before the Supreme Court which had arisen out of a series of preliminary issues taken to arbitration to obtain guidance between shipowners and ING on how to resolve payments in the light of the OW Bunker's insolvency.

1. Was the OW Bunker Malta Limited (OWBM) bunker supply contract (the Contract), a contract of sale falling within the meaning of s 2 (1) of the Sale of Goods Act (the Act)?

2. If the Act did not apply, was the Contract nevertheless subject to an undefined implied term? In effect, shipowners wished to contend it was a precondition for making payment that OWBM would itself have performed its own obligations to physical suppliers, in particular by paying for the bunkers on time, so as to protect shipowners from adverse third party claims.

3. If the Act did apply, was it essential for OWBM to have acquired title in the bunkers before they could demand payment of the price, or whether a previous Court of Appeal decision in
FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd [2014] 1 WLR 2365
(the
Caterpillar
case) to this effect was wrong and should be overruled, thereby entitling OWBM to demand payment under the 60 day credit term in any event.

The Supreme Court concluded that on the agreed assumed facts put before the arbitration tribunal:

1. The Contract between OW Bunker and the shipowners was not one of sale of goods, but was for the supply of bunkers for immediate consumption in the propulsion of the vessel. Commercial parties were entitled to have flexibility in their dealings with each other and the courts should recognise certain contracts contained trade understandings and general principles – such contracts might often be described as
sui generis
(in a class of their own).

2. The Contract did contain specific terms as to quality and quantity. It also permitted expressly the consumption of bunkers supplied prior to payment. And, it was not subject to any implied term regarding payment by OWBM of any supply contract entered into by them earlier in the supply chain.

[3.] The shipowners would have no defence to OWBM's claim for payment of the agreed price, even if the Act did apply. The interim measures adopted since the OW Bunker's insolvency, which recommended express incorporation of the Act in bunker agreements will not solve any similar payment issue in future, but do ensure implied terms as to quality and fitness for purpose contained in the Act will apply, should these measures not be adequately set out expressly in trading conditions.

This decision, taken together with various recent US court findings that the physical supplier does not retain a lien when he supplies to a bunker trader rather than a vessel owner, has moved the debate forward. It reflects modern day bunker trading practices, and demonstrates the continuing willingness of courts to adapt to commercial realities. Trade law does not become inflexible simply by its codification into a Sale of Goods statute as was contended for by those representing the shipowners of the RES COGITANS in this case.

Physical suppliers should not be permitted to treat the vessel as a form of credit guarantor, especially when they take a decision to engage with a trader, who then files for insolvency. Counterparty risk is ever present in most markets, and makes due diligence in pre-contract discussions, and some forms of credit insurance ever more pressing. Comments made by both English and US courts serve to curtail the previously feared width and scope of the physical suppliers' *lien* over the vessel for the supply of necessaries when intermediate bunker traders are involved. Differences in approach remain an issue for shipowners in a number of jurisdictions.

While the outcome may be disappointing for some, the Supreme Court decision has the benefit of providing an element of certainty in this matter. The following links provide access to the full judgment and Supreme Court's press release . A more detailed Gard Insight will follow.