

# RETENTION OF TITLE CLAUSES - DECISION BY THE ENGLISH COURT OF APPEAL IN PST ENERGY 7 SHIPPING LLC V OW BUNKER MALTA LTD

*Posted on December 1, 2015*

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**Date Published: 1 December 2015**

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## Summary

PST Energy 7 Shipping LLC ("**PST**"), the owners of the vessel, the "Res Cogitans" ("**Vessel**"), and OW Bunker Malta Limited ("**OWB Malta**") entered into a standard form contract for the supply of fuel (bunkers) ("**Bunker Contract**"), containing a retention of title clause and an acknowledgement that the bunkers might be consumed before payment. To the parties' knowledge, the bunkers were likely to be consumed, before payment was made, with the result that there would be no title or property in the bunkers to pass at the time of payment.

On 22 October 2015, the English Court of Appeal ("**Court of Appeal**") upheld a decision of the English Commercial Court that the bunker sale was not a contract for the transfer of property in the goods and was therefore not within the definition of 'contract of sale' under section 2 of the Sale of Goods Act 1979 ("**Act**"). Therefore, OWB Malta was not obliged to comply with section 49 of the Act in order to maintain an action for the price.

Consequently, the unpaid sellers, OWB Malta, could sue for payment as a debt, even where OWB Malta had failed to pass the property in the bunkers to PST. OWB Malta was also not subject to an implied term requiring it to either have the right to sell the bunkers and pass the property in them or to obtain such a right by the date where the property in the bunkers was to pass on payment for them.

## Background Facts

On 4 November 2014, PST ordered bunkers for the Vessel from OWB Malta, which was part of the OW Bunker group of companies ("**OWB Group**"), on 60 days' credit and subject to the OW Bunker Group's 2013 standard terms ("**OWB Terms**"). The OWB Terms contained a retention of title clause but expressly acknowledged that PST was entitled to use the bunkers "for the propulsion of the Vessel" before full payment was made. It was also envisaged that a significant quantity of the bunkers would be burnt prior to payment.

OWB Malta arranged the bunker supply under a contract made with its parent company, OW Bunker AS ("**OWBAS**") on the OWB Terms, which in turn ordered the bunkers from Rosneft Marine (UK) Ltd ("**RMUK**") on 30 days' credit and subject to RMUK's standard terms ("**RMUK Terms**").

The RMUK Terms contained a retention of title clause, but not the acknowledgement contained in the OWB Terms. RMUK then sub-contracted the supply of bunkers to the physical supplier, RN Bunker Ltd ("**RNB**") which physically supplied bunkers to the Vessel. RNB was later paid by RMUK, at which point title to the bunkers was passed to RMUK, but RMUK had not been paid by OWBAS, and OWBAS had not been paid by OWB Malta.

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On 7 November 2014, the OWB Group filed for bankruptcy. This constituted an event of default under a financing agreement entered between the OWB Group and ING Bank NV (“**ING**”) in which OWB Malta’s right to payment was assigned to ING and ING asserted its right to recover any debt owed by PST to OWB Malta in respect of the supply of the bunkers.

On 17 November 2014, RMUK sought payment from PST for the bunkers on the ground that it remained the owners of the bunkers. Part of the bunkers supplied to the Vessel had been consumed by the time the 30 day period of credit allowed under the RMUK Terms had expired and the whole of the bunkers had been consumed by the time the 60 day period of credit allowed under the OWB Terms had expired.

## **PST’s Case**

PST argued that they were not obliged to pay OWB Malta/ING for the bunkers supplied to the Vessel since RMUK had not been paid for the bunkers and so retained property in the bunkers in accordance with the retention of title clause in their contracts with OWBAS.

Pursuant to section 49 of the Act, which requires property in the goods is to be passed to the buyer for the seller to be able to maintain a claim for the price, PST further contended that OWB Malta/ING could not maintain a claim for the price on the premise that the Bunker Contract was a contract for the sale of goods under the Act.

Additionally, under section 12 of the Act, it is an implied condition of a contract for the sale of goods that the seller has the right to sell the goods or will have such right at the time when the property is to pass. Thus an inability to transfer property in the goods at the agreed time is usually regarded as amounting to a breach of condition and a total failure of consideration, and the seller cannot recover the contract price. Thus as OWB Malta had never acquired property in the bunkers and could not transfer such property to PST, OWB Malta was in breach of section 12 implied condition, and this provided PST with a complete defence to a claim for the contract price. In essence, PST argued that OWB Malta/ING was seeking payment for goods which did not belong to them.

The dispute was initially dealt with in London arbitration proceedings. Among the findings, the Tribunal held that the Bunker Contract was not a contract of sale in which the Act applies and that OWB Malta/ING had a straightforward claim in debt that was not subject to any requirement as to the passing of property in the bunkers to PST. On appeal, this finding was upheld by Males J of the English Commercial Court.

## **Legal Issues and Decision**

The key legal issues before the Court of Appeal was whether the Bunker Contract, which described PST as “the buyer” and OWB Malta as “the seller”, was a contract of sale of goods within the meaning of the Act and, if not, was within the scope of any implied term into the contract.

On its surface, the Bunker Contract bore the characteristics of a contract for the sale of goods which would

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fall within the scope of the Act, and it appeared that was what the parties had intended. However, the Court of Appeal held that although the language of the Bunker Contract was full of references to sale, the effect of the permission given to consume the bunkers, coupled with the credit period, was that the contract was not, in essence, a contract for the transfer of property in the bunkers, but for the delivery to PST of a quantity of bunkers which PST had an immediate right to use and for which they would not have to pay until the expiry of the credit period.

Moore-Bick LJ held that regardless of the label one attaches to the contract, its essential nature was in his view “reasonably clear”. The essential benefit of the Bunker Contract was for a license to use the bunkers for the Vessel’s propulsion from the time that they were placed on board the Vessel and not for the transfer of property in the bunkers. This was due to the combination of the credit period, the retention of title clause, and the right to consume pending payment, the parties had contemplated that a large part, if not all, of the bunkers, would or might be consumed within the credit period and as a result would cease to exist at the date of the payment (the date at which title would have otherwise passed).

In addition, any residual fuel sold under the Bunker Contract would be sold subject to the “incidents” of the Act, including the implied condition under section 12 that the seller has (or will have) the right to sell the goods at the time when the property is to pass. The Court of Appeal went on to provide that while the failure to pass title in the residual fuel would, in principle, constitute a breach under section 12, such breach would not (save for exceptional circumstances), entitle an owner/ operator to treat the contract as discharged unless it represented such a large proportion of the total quantity delivered that it could be said to have been a total failure of consideration.

## Comments

The latest Court of Appeal judgement has wide ramifications for the maritime and energy industry as the OWB Terms were based on the Baltic and International Maritime Council (BIMCO) Standard Terms used throughout the bunker industry.

The Court of Appeal appears to be of the view that the Bunker Contract was a ‘hybrid contract’, which granted both a mere license to the operator/owner to consume the fuel immediately after supply and a contract of sale (with an implied condition as to title under the Act) for any residual bunkers remaining on the ship at the time where payment falls due.

If the decision of the Court of Appeal is to be upheld, protection provided by the Act would depend on the individual circumstances such as the length and speed of the journey performed during the credit period, and the number of residual bunkers before the vessel bunkers. In essence, a transaction falls within the Act if the vessel bunkers and immediately remains docked throughout the credit period, but falls beyond the Act if the vessel undergoes a long journey shortly after bunkering.

Such an outcome was not adequately addressed by the Court of Appeal, particularly as to why the parties are presumed to have intended that the permitted consumption would turn the contract, from what

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appears to be a contract of sale, into a radically different arrangement. It is doubtful that ship owners and charterers would knowingly pay the large amounts involved in bunker purchases for a mere license to use the bunkers and for the vessels to remain at the port for extended periods of time.

Pending a decision from the English Supreme Court, the judgment has important ramifications beyond bunker supplies and shipping, potentially affecting industries in which goods are routinely supplied on terms that include a retention of title clause, a credit period, and a right to use the goods during that period

Bunker buyers who purchase from intermediaries may now be required to either pay upfront or give some form of security to the physical supplier directly, rather than buying through credit or through intermediaries. Physical suppliers of bunkers will also need to appreciate that retention of title clauses may provide no effective securities when they sell through intermediaries on credit, and they will need to find new ways of protecting themselves against the risk of non-payment, or otherwise demand payment upfront. Parties should carefully consider how their obligations are drafted in a contract which the parties consider a contract of sale, and whether it is necessary to expressly include in their contracts some of the statutory provisions provided by the Act.

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