To the Supreme Court, **and beyond**

Ioannis Alexopoulos, of Bryan Cave, reports on the latest position with the OW Bunkers case, which is now set to head to the UK's Supreme Court

On 11 February 2016 the UK's Supreme Court gave permission to Product Shipping & Trading SA to appeal the Court of Appeal's decision of October 2015, thus creating a further opportunity to clarify an area of law which has been troubling the industry for more than 15 months. The Supreme Court is planning to expedite the case and will be hearing it on 22 March 2016.

Back in November 2014, OW Bunker and Trading AS (OW), the world's largest supplier of marine fuel, filed for bankruptcy after losing about US$275 million due to a major fraud committed by senior employees in its Singaporean subsidiary. It has since transpired company executives and the owners (Swedish private equity fund, Altor) may have known about the wrongdoings and the suspect invoicing practices, leading the Danish State Prosecutor, in early January this year, to announce the launch of a criminal investigation. Institutional investors have already issued class action proceedings in Denmark and further action by retail investors may be in the offing.

Leaving aside the investors' woes, OW's bankruptcy has had a major impact on its customers and their insurers. It left hundreds of shipowners in uncertainty as to who they should pay for bunkers already supplied and, in most cases, consumed. For some of the very large fleets, the amount involved in outstanding invoices run into tens of millions of dollars. OW was acting as an intermediary between the shipowners and the physical suppliers, the latter being paid by OW who would be paid by the shipowners. The terms of the various contracts in the chain which often involved a succession of physical suppliers, were not usually "back to back". In practice the shipowner had a primary obligation to pay OW. OW were contracted to pay the various physical suppliers. The OW payment to its suppliers was lower than the payment owing to OW from the owners to allow for OW's mark-up or profit.

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However, after OW's collapse, the physical suppliers have been demanding payment directly from the shipowners, resulting in dozens of cases of ascertaining maritime liens and arresting vessels around the world. The Dutch investment bank ING was the senior creditor to OW and, as security for the loans it had advanced to OW, had received assignment of debts owed to OW. ING also threatened arrests of various vessels around the world for the same debts which would have been pursued by the physical suppliers. Shipowners all of a sudden found themselves at risk of being liable to pay twice. In this respect numerous arbitrations have been initiated across the world and some cases have reached the courts in London, the US, Canada, Singapore, Germany, Italy and Denmark.

The first case to be heard by the English courts was brought by Greek shipowner Petros Pappas's Product Shipping & Trading against OW Bunker Malta Ltd, a subsidiary of OW, and against ING bank. The hearing was on appeal from a London arbitration between the same parties. The case was heard in the first instance by Males J who delivered his judgment in July 2015 ([2015] 2 Lloyd's Rep 563). He found in favour of the bank. Pappas, supported by his freight, demurrage and defence insurer (the UK Defence Club) appealed. The Court of Appeal upheld the first instance judgment in October 2015 ([2016] 1 Lloyd's Rep 228). Males J and the Court of Appeal (with Moore-Bick, Longmore and McCombe LJJ agreeing) decided the contract between owners and OW was not one which would fall under the Sale of Goods Act 1979 and,

therefore, even though the title to the fuel had never passed to OW from the original physical supplier and, consequently, it had neither passed to the owners, the latter were not discharged from their payment obligation to OW by the fact that OW were unable to and did not transfer title before the fuel was consumed. Therefore, outstanding invoices should be paid to the OW bankruptcy estate and the bank was entitled to step in as an assignee and receive those payments, even where the payments amounted to a windfall, because they were higher than the amount of the payment that related to OW's share of the fuel price, because ING was entitled to receive such assigned payments until and up to the extinguishment of what was outstanding and due by OW to the bank.

The judges found what the owner actually agreed to pay for was not the fuel but, in effect, the permission or the license to use the bunkers immediately for propulsion, such license having been given on behalf of the physical supplier and, therefore, being binding on them as well. The situation was likened to that of someone buying dinner at restaurant; the diner does not acquire title in the food, but can consume it, even though he or she has not paid for it until after the consumption has taken place.

The Canadian approach

A different approach was taken by the Canadian Federal Court in an interpleader motion brought by the charterer Canpotex and two owners, the Greek Star Navigation Corporation and the German Oldendorff Carriers, against ING Bank as receivers for OW, and the Canadian physical supplier, Marine Petrobulk Ltd. Canpotex paid the sum owing into a trust and asked the court to find that it had discharged its obligation to pay. ING and Marine Petrobulk each asked for judgment that each were entitled to the funds.

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The Canadian judge took a common sense approach. He held, first, Canpotex should not have to pay twice and payment into a trust account was as good as payment into court and had discharged all liabilities. Secondly, that OW was not entitled to the money, because it had not paid its supplier, Marine Petrobulk and, therefore, the money owing to Marine Petrobulk should be paid to it. Thirdly, ING was not entitled to receive a windfall and therefore, was only entitled to receive the mark-up which OW would have earned. OW and ING were ordered to pay costs.

Looking towards the Supreme Court

At the moment commentators seem to welcome the probability that the Supreme Court will introduce some certainty and possibly provide guidance on the interconnected issues arising from the chain nature of the supply of bunkers. One should not forget, however, that strictly speaking this further appeal will be dealing with a limited number of points specific to the supply in question and is further limited by facts agreed at the arbitration. The real closure will come much later when the arbitrators apply the Supreme Court decision. And there is a real possibility such decision will not provide answers for the multitude of issues facing the market, involving different contractual terms, factual circumstances and applicable laws.

The saga is set to continue before the Supreme Court and beyond, but for the time being the market is faced with an intellectually and legally strong Court of Appeal judgment which appears difficult to appeal against, as well as the sensible, common sense and also legally correct approach of the Canadian Federal Court. The forecast for insurers and mariners therefore remains uncertain. ***MRI***

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