

# **MEMBER ALERT**



Shipowners Claims Bureau, Inc., Manager  
One Battery Park Plaza 31<sup>st</sup> Fl., New York, NY 10004 USA  
Tel: +1 212 847 4500  
Fax: +1 212 847 4599

[www.american-club.com](http://www.american-club.com)

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## **UPDATE ON THE OW BUNKER BANKRUPTCY: RECENT DEVELOPMENTS IN THE ENGLISH COURTS**

Reference is made to [Circular No. 37/15](#) of October 5, 2015 which provides general guidance on issues attendant upon the collapse of OW Bunkers.

On October 22, 2015, the English Court of Appeal handed down its judgment in PST Energy Shipping LLC v. OW Bunker Malta Ltd. and ING Bank N.V. [2015] EWCA 1058, on the appeal from the decision of Males J. (reported at [2015] EWHC 2022 (Comm)).

The Court of Appeal did not address the wider issues which this case raised in terms of the competing claims of OW Bunkers (OW), its assignee ING Bank NV (ING) and the unpaid physical suppliers. The argument was restricted to the question of whether, in order to enforce payment, OW had to transfer title. On the central issue relating to the Sale of Goods Act 1979, the Court of Appeal upheld the decisions of the Tribunal and the Commercial Court to the effect that the terms of the contract, which were incorporated the OW's standard terms, did not fall within the scope of the Act.

Even though the Court of Appeal accepted that the language of OW's standard terms suggested that the parties were "thinking in terms of a sale and purchase" of the bunkers that were to be supplied under the contract, the Court described the true effect of the contract as follows:

*"It is a contract under which goods are to be delivered to the owners as bailees with a licence to consume them for the propulsion of the vessel, coupled with an agreement to sell any quantity remaining at the date of payment, in return for a money consideration which in commercial terms can properly be described as the price."*

As such, the Court of Appeal held that the terms did not fall within the category of "contracts of sale of goods" as defined in the Act; OW's remedy was therefore a simple claim in debt under the contract. For this reason, the Court of Appeal dismissed the appeal to the extent of holding that the failure of OW to transfer title in the bunkers did not release the owners from their obligation to pay for those bunkers.

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The judgment noted two further points:

1. Owners did not advance an alternative argument that they were not liable to pay OW because the physical suppliers had not authorized the consumption of the bunkers. The Court felt this issue should be left to the arbitrators.
2. The physical suppliers appeared as an interested party to argue that the license to consume the bunkers pending payment did not bind them. The Court said that this point may have to be considered on another occasion.

Therefore, as a matter of English law, OW and their assignee ING do still have a right to claim payment for the bunkers. This ruling leaves owners at risk of claims from the physical suppliers if the owners pay ING.

Conversely, the Court of Appeal decision provides vessel owners with potential arguments to defend against payment or offer the expiration of the credit period under the OW invoices. Whether such arguments would succeed depends on the factual circumstances of each case. Members are recommended to contact the Managers with any queries should a situation arise that implicates these issues.

As of the issuance of this update, permission to appeal has been requested by the owners but the Court of Appeal has not yet made an order. It is thought likely that permission will be given by either the Court of Appeal or the Supreme Court.

Your Managers will provide further updates in due course.