Angara Maritime Ltd v Oceanconnect UK Ltd (The Fesco Angara)

Costas Stamatiou
Andreas Neocleous & Co LLC

Vasileios Psyrras
Andreas Neocleous & Co LLC

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Introduction

The bunkering market, which deals with the supply of marine fuel to ships, has always been one of high risk. This is as a result of several factors. Profit margins are slim, exchange rate movements can be significant and the size of each transaction is usually substantial. Last, but not least, the nature of the contractual relationships involved in such transactions and the necessity to the shipping industry for speedy service adds a further overlay of risk.

In its simplest form, a contract for the supply of bunkers will be made between the shipowner and the supplier. However, more parties may be involved depending on factors such as whether the vessel is chartered, the type of charterparty and who bears the contractual responsibility for ensuring that the vessel is adequately supplied with bunkers. Moreover, local or other agents may be entrusted with the task of arranging for the supply of the vessel with bunkers at particular ports.

In order for suppliers to secure prompt and full settlement of invoices the industry has developed its own standard terms and conditions that govern such agreements, such as wide definitions of the term "buyer" to include the instructing person and entities such as the shipowner, shipmanager, agent and captain of the vessel as well as the vessel itself. Hence the law of agency and the conduct of third parties frequently become relevant in bunkering claims.

These issues are highlighted in the recent English High Court decision in *The Fesco Angara*.[1]

Jurisdiction

The Administration of Justice Act 1956, which according to s.19(a) of the Courts of Justice Law 1960 is applicable in Cyprus, makes provision for the powers and jurisdiction vested in the High Court of Justice in England, in its Admiralty jurisdiction. Section 1 reads as follows:

> "1. Admiralty jurisdiction of the High Court
> (1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims —
> …
> (m) any claim in respect of goods or materials supplied to a ship for her operation or maintenance … ."[2]

In *Hassanein v "Hellenic Island" and/or "Island" (No.2)*,[3] it was held by the Supreme Court of Cyprus that by virtue of s.29(2)(a) of the Courts of Justice Law 1960 the sources of Cyprus admiralty law spring from the English admiralty laws as applied in England before Cyprus became independent.

As a result, admiralty law in Cyprus has generally developed in accordance with the principles and precedents applicable in England until 1960. Although the Cyprus courts are not bound by subsequent English decisions, they may still make reference to them as persuasive authorities.

Attention should also be drawn to jurisdiction clauses. It is common practice that suppliers' standard terms and conditions contain a clause to that effect. Although the issue is plain where there is no dispute as to the parties of the contract, the case is different where this is challenged. A demise charterer for example will usually contract the supply of bunkers through their agents. Thus the shipowner is no party to that contract.[4]

Ascertaining the parties

In the case of *J.Y.A. Lamaignere v Selene Shipping Agencies Ltd*[5] the court held that in determining the capacity in which a party contracts the question is essentially one of construction of the agreement of the parties. In the same case, the judge further said:

> "Prima facie, a party to an agreement is personally liable. To avoid liability he must clearly specify that he is entering into it in a representative capacity, on behalf of someone else. Nothing short will do. This position is consonant with logic as well as common sense for it would be contrary to good sense to

[1] *Angara Maritime Ltd v Oceanconnect UK Ltd (The Fesco Angara)* [2010] EWHC 619 (QB); [2011] 1 Lloyd's Rep. 61.
[2] See *Bagdik Gogoshian v Aircraft DC 6 N 19CA Now Lying at Larnaca Airport* (1981) 1 C.L.R. 73; *Kolokoudias v Varnavidou* (1988) 1 C.L.R. 566; *Coli Maritime Agencies Co Ltd v the Ship "El Sexto" Now Lying at the Port of Limassol* (1989) 1 C.L.R. 76; Konstantinos Athanasiou Gerasakis v Waft Shipping Co Ltd (1989) 1 E C.L.R. 10; *Chrysostomos Vouras v M/V Mercandia Trader II* (1991) 1 C.L.R. 894.
[3] *Hassanein v "Hellenic Island" and/or "Island" (No.2)* (1994) 1 C.L.R. 578.
[4] See *Andromeda Marine SA v OW Bunker & Trading A/S (The Mana)* [2006] 2 Lloyd's Rep. 319 QBD.
[5] *J.Y.A. Lamaignere v Selene Shipping Agencies Ltd* (1982) C.L.R. 227.

> require a contracting party to enter into an agreement with a person unknown to him and one about whom he had no opportunity to inquire."[6]

Indeed written documents must and will be construed as a whole; nevertheless by their wording they may make an agent a party to the contract.[7]

In the recent case of *A/S Dan Bunkering Ltd v FG Hawkes (Western) Ltd*[8] the High Court of England considered whether a letter of guarantee for bunker orders purportedly signed by the principal was provided with its authority. The guarantee was given by the agent to the supplier of bunkers (Dan). The court first considered whether the agent had actual or ostensible authority[9] to sign the guarantee and held that based on the evidence presented there was actual authority, and if not actual at least implied authority based on the course of dealings, as a result of which the principal was liable for the contracts of supply of bunkers. The court further said that for ostensible authority to exist there must be a representation to this end by the principal to the contracting party: mere representations by the agent will not suffice to support a claim against the principal.[10]

In the case of *Island Oil Ltd v Masri Shipping and Trading Ltd*,[11] the claimants were claiming payment for the supply of bunkers. The question before the Admiralty Court was whether the defendants were acting only as agents and not principals. The claimants' action failed because they had asked the defendants to confirm under what capacity they were acting and in their reply the defendants confirmed that they had ordered the bunkers in their capacity as owners' agents.

In order to avoid any misunderstandings, suppliers should be sure to identify who the principal is. On the other hand it is prudent for agents to provide such details whether asked to do so or not, in order to avoid unnecessary trouble at a later stage.

It is apparent that whether acting as agent or supplier, parties must be cautious as to whether they have capacity to enter into contracts and to what extent. An agent should not go beyond the limits of what it has actually been authorised to do; otherwise it risks incurring liability.[12] A supplier must double-check that an agent is acting within its authority since for anything beyond that the claim will stand only against the agent.

Section 190 of the Cyprus Contract Law, Cap.149 provides in para.(1) that:

> "In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them."

Paragraph (2) presumes that such contract will exist:

> "(a) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad; (b) where the agent does not disclose the name of his principal; (c) where the principal, though disclosed, cannot be sued."

Section 193 of the Contract Law further provides that "in cases where the agent is liable, a person dealing with him may hold either him or his principal, or both of them, liable".[13]

In the case of *Iakovos Georgiades v The Bernoulli Trading Co Ltd*[14] the court held that:

> "(a) so long as the Applicant had never disclosed that he was acting as an agent or the name of the principal, the Court at first instance was right in determining that article 190 of the Contract Law, Cap 149 was applicable, by virtue of which the Applicant was personally responsible against the Respondent. The fact that the invoices were issued in the name of the hotel would not alter the status; and (b) the existence of a registered commercial brand did not impose an obligation upon the Respondent to file a claim against that commercial brand but simply enabled it, if it so desired, to do so."[15]

Where a person makes a contract in his own name without disclosing either the name or the existence of a principal, he is personally liable on the contract to the other contracting party, though he may be in fact acting on a principal's behalf.[16]

It stems from the above that good practice requires that there is clear communication—and in most cases this is of greatest importance to the agent and the supplier—as to the capacity of each party to conclude the supply of bunkers.

[6] With regard to the joint and several liability of an agent see also the English case of *Middle East Tankers & Freighters Bunker Services SA (Offshore) v Abu Dhabi Container Lines PJSC* [2002] 2 Lloyd's Rep. 643 QBD.
[7] *Gadd v Houghton* (1875–76) L.R. 1 Ex. D. 357 CA; *Universal Steam Navigation Co Ltd v James McKelvie & Co* [1923] A.C. 492 HL at 499; *Lavan v Walsh* [1964] I.R. 87; *Electrosteel Castings Ltd v Scan Trans Shipping & Chartering Sdn Bhd* [2002] EWHC 1993 (QB); [2002] All E.R. (Comm) 1064.
[8] *A/S Dan Bunkering Ltd v FG Hawkes (Western) Ltd* [2009] EWHC 3141 (Comm).
[9] The court referred to the case of *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 Q.B. 480 CA as the leading authority where the principles in relation to actual and ostensible authority were stated (and later approved by the House of Lords in *Armagas Frost Ltd v Mundogas SA (The Ocean Frost)* [1986] 1 A.C. 717 HL).
[10] To this end, in another High Court case regarding the provision of guarantee and authority—*Addax BV Geneva Branch v Coral Suki SA* [2005] EWHC 2681 (Comm)—it was again held that there was no ostensible authority. In his judgment MacKie QC said: "Addax was also well aware of the distinct identity between on the one hand Coral and on the other Wizard and Marona. If Addax wished Wizard or Marona to guarantee Coral's obligations it knew that the course to take was to ask. If guarantees or other supports had been agreed they would have been promptly and carefully documented. The measure of introducing the guarantee wording into contract confirmations without communicating this directly to Wizard was inadequate and of course there was always the risk that once notified of the change that Wizard would reject it."
[11] *Island Oil Ltd v Masri Shipping and Trading Ltd* (1996) 1A C.L.R. 194.
[12] See how the courts treated liability in *William Fleming, The v Equator, The* (1921) 9 Ll. L. Rep. 1.
[13] *Pavlos Evagelides Contracting as Isiro Hotel Association v Nicos Kosmas, Inos Karagiorgis, Theodora Mikellides* (1998) 1B C.L.R. 932.
[14] *Iakovos Georgiades v The Bernoulli Trading Co Ltd* (1994) 1 C.L.R. 629.
[15] See further *Iakovos Georgiades* (1994) 1 C.L.R. 629 at 632–633. See also in support *Pavlos Evagelides* (1998) 1B C.L.R 932; and *Prokopis Prokopiou v Timvioi Bros Ltd* (2007) 1B C.L.R 903.
[16] See also *Efthimiou v Philippides Spring Co Ltd* (1996) 1B C.L.R. 1107.

Where the existence—but not the identity—of the principal is disclosed, whether the agent may still be liable will depend upon the terms in which the agent contracted.[17] In such cases there is no rigid rule as to whether the agent is to be treated as a party to the contract. In written contracts it seems that non-disclosure of the principal's name makes it more probable the agent will be treated as party to it, whether alone or together with his principal.[18]

Regardless of trade practices, it is a question of fact, and in the case of written contracts, of construction, in each particular case whether it was intended that the agent should or should not be personally liable and entitled to sue. But where there are simply oral communications then custom of trade may dictate the capacity of the parties.[19]

Where the agent makes the contract in his own name without disclosing the fact that he is acting on behalf of another, the agent is entitled to sue and can be found liable to be sued on that contract, because he is then to all appearances the real contracting party.[20]

Problems may also arise where although a principal is identified it may not be the actual shipowner. Contracts of bareboat or time charters of a vessel would fall into this category. This was the case in *The Yuta Bondarovskaya*,[21] where an action against the bareboat charterers failed since the vessel was demise chartered and subsequently time chartered. The court held that the bareboat charterers were not liable for the bunkers provided since they were not party to the contract, nor had they given authority to the time charterer to buy bunkers on their behalf. There was no actual, apparent, implied or ostensible authority whatsoever and the time charter was clear that the time charterer would be responsible for the provision and payment of bunkers. Bareboat charterers were not responsible in personam.

Since it is usual for time charters and bareboat charters to impose an obligation on the charterer to supply bunkers for the vessel, suppliers need to be aware of who is presented as principal and to realise that they will not be able to claim against the original shipowner (or bareboat charterer as the case may be).

In the case of *Outbound Travel Co Ltd v Hydrofoil Vessel Kolhida III*[22] the claim failed since the provision of material and services was for the time charterer of the vessel and not the shipowners.[23]

Bunker suppliers may also find themselves in a very complex situation where bunkers are sold to a third party by the initial purchaser. Under art.30(2) of the Cyprus Sales of Goods Law,[24] a third party who buys goods, such as bunkers, in good faith and without knowledge that the supplier has not been paid, will acquire good and clean title to the goods (in this case bunkers), irrespective of the liens or other rights attached to the goods as a result of the initial sale by their original supplier.

The recent English High Court case of *Fesco Angara*[25] clearly illustrates such risk. The vessel was chartered under a 12-month time charter. The charterparty provided that redelivery of the vessel would take place with about the same quantity of bunkers and the owners would reimburse the charterers the value of the bunkers.

The charterers purchased bunkers from a supplier but without paying for them. The supplier's standard terms and conditions contained a "retention of title" clause. Eventually the charterers went into administration. The vessel was redelivered to the owners early with bunkers remaining on board, for which the owners credited the charterers in their final account. The unpaid bunker supplier claimed payment from the owners. On the basis of s.25(1) of the Sale of Goods Act 1979, which is identical to art.30(2) of the Cyprus Sales of Goods Law, the owners denied liability for payment for the bunkers. In its judgment the court found in favour of the owners of the vessel.[26]

Liens arising from the supply of ship bunkers

Under Cyprus law, the supply of goods and material (such as the supply of bunkers) does not confer a maritime lien[27] per se. In *Hassanein v The Ship "Hellenic Island"* the court clearly stated that "as regards the second question that is whether under Cyprus Law the supply of fuel gives rise to a maritime lien, it is also common ground that it does not do so".[28]

Another important aspect of the nature of a lien explained above is with regard to the priority attached to such rights. Liens of the same nature will rank among themselves pari passu. The issue of priority among liens will be determined according to the *lex fori*. Thus, under

[17] The case of *Tecoma Travel & Tours v Vasos Ioannou Ltd* (2007) C.L.R. 399 is relevant in this respect.
[18] *Transcontinental Underwriting Agency Srl v Grand Union Ins Co Ltd* [1987] 2 Lloyd's Rep. 409 QBD; *Seatrade Groningen BV v Geest Industries Ltd (The Frost Express)* [1996] 2 Lloyd's Rep. 375 CA (Civ Div).
[19] *N&J Vlassopulow Ltd v Ney Shipping Ltd (The Santa Carina)* [1977] 1 Lloyd's Rep. 478 CA (Civ Div).
[20] *Allen v F.W. O'Hearn & Co* [1937] A.C. 213 PC (Canada) at 218.
[21] *Yuta Bondarovskaya, The* [1998] 2 Lloyd's Rep. 357 QBD.
[22] *Outbound Travel Co Ltd v Hydrofoil Vessel Kolhida III* [1996] 1A C.L.R 310.
[23] Also the provisions of s.3(4)(a) of the Administration of Justice Act 1956 were not satisfied.
[24] Law 10(I)/94 art.30(2), as amended: "Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if there was no lien or any other right."
[25] *The Fesco Angara* [2010] EWHC 619 (QB); [2011] 1 Lloyd's Rep. 61.
[26] It is worth mentioning that the claim also failed on bailment (on the basis that the owners were acting as bailee for the bunkers supplier).
[27] See *Hassanein v The Ship "Hellenic Island"* (1989) 1 C.L.R. 406.
[28] It is worth mentioning that certain jurisdictions such as France, the US and Egypt—see the case of *Hassanein* (1989) 1 C.L.R. 406—consider that the supply of goods and materials gives rise to a maritime lien.

Cyprus law, maritime liens were held to rank in priority before mortgages,[29] the second being described as a special type of statutory lien.

With respect to statutory liens, in the case of *Pilefs Ltd*[30] the Supreme Court held that necessaries[31] have no prior claim over mortgages because a lien for necessaries is a statutory lien and does not attach until the institution of an action in rem. It follows that a statutory lien for bunkers will rank after all other maritime liens and mortgages. In this instant case the necessaries were supplied to the vessel about five months prior to the registration of the mortgage but the lien was only attached to the vessel by an action in rem long after the mortgage was entered into. Considering that both mortgages and claims for necessaries are considered statutory liens the priority between them will eventually depend on which was first registered.

There has been an instance where under specific circumstances a statutory lien ranked ahead of a mortgage regardless of the date of registration. This was the Cyprus case regarding the vessel *Sapphire Seas*,[32] in which the mortgagee claimed the remaining amount due under a loan agreement by an action in personam and a decision in favour of the mortgagee was delivered (judgment by consent), giving the mortgagee priority over other creditors. The in rem creditors applied to the court[33] for a caveat against the auctioned price of the vessel and contesting the priority given to the mortgagee. The Admiralty Court of Cyprus held that an in rem decision is binding against everyone while an in personam decision is inter partes and its scope is to determine the legal relation between the parties and respective rights inter se. The mortgagee obtained a judgment by consent, and therefore could not secure an in rem decision. In such a case the secured creditor will be estopped and cannot subsequently establish an action in rem.[34]

Conclusions

Agents, brokers and especially bunker suppliers must be very careful in the way they conduct their business. Commercial haste may sometimes transform small oversights into losses of hundreds of thousands of euros.

Agents and brokers must always communicate in a clear way their capacity and clarify the extent of their liability, if any. Suppliers should not merely rely on their standard terms and conditions, but must always pay attention to the way communications are exchanged.

Moreover, it is prudent for all sides to conduct at least a basic form of due diligence to verify the standing and capacity of each other (including the power and authority of the persons that they communicate with and/or execute contracts).

[29] *Commercial Bank of the Near East v The Ship Pegasus III* (1978) 1 C.L.R. 597.
[30] *Pilefs Ltd v Commercial Bank of the Middle East Ltd* (1983) 1 C.L.R. 376. For a more recent case where these principles are adopted see *Union Bank of Norway v the Vessel "Jet Princess" No.1* (1990) 1 C.L.R 182.
[31] The old wording that was used to describe goods and materials.
[32] There have been three main actions against the vessel with numerous intermediate applications and respective decisions between 1996 and 2002. Further to *Dimitriou Pambos v The Vessel S.S. SAPPHIRE SEAS (No.1)* (2000) 1C C.L.R 1680 and *The Governor and the Company of the Bank of Scotland v The Vessel "SAPPHIRE SEAS"* (2002) 1C C.L.R 1563, consider also *Dimitriou Pambos v The Vessel SS Sapphire Seas (No.2)* (2000) 1C C.L.R. 1795; *Dimitriou Pambos v The Vessel Ss Sapphire Seas (No.3)* (2000) 1C C.L.R. 1799; *The Governor and the Company of the Bank of Scotland v The Vessel "Sapphire Seas", under Panamanian flag* (2000) 1C C.L.R. 1821; *The Governor and the Company of the Bank of Scotland v The Vessel "Sapphire Seas"* (2001) 1B C.L.R. 955.
[33] *Dimitriou Pambos v The Vessel SS Sapphire Seas (No.1)* (2000) 1C C.L.R. 1680.
[34] *The Governor and the Company of the Bank of Scotland v The Vessel "Sapphire Seas"* (2002) 1C C.L.R. 1563; the fact that the claim of the bank was based on a mortgage, which according to its lawyers, includes accumulatively the right to an action in rem and in personam, is not enough to lead the court to issue a new decision. It was up to the bank to pursue the claim of both these separate rights and has not done so. To the contrary, it pursued the definitive settlement of its claim through a judgment by consent.