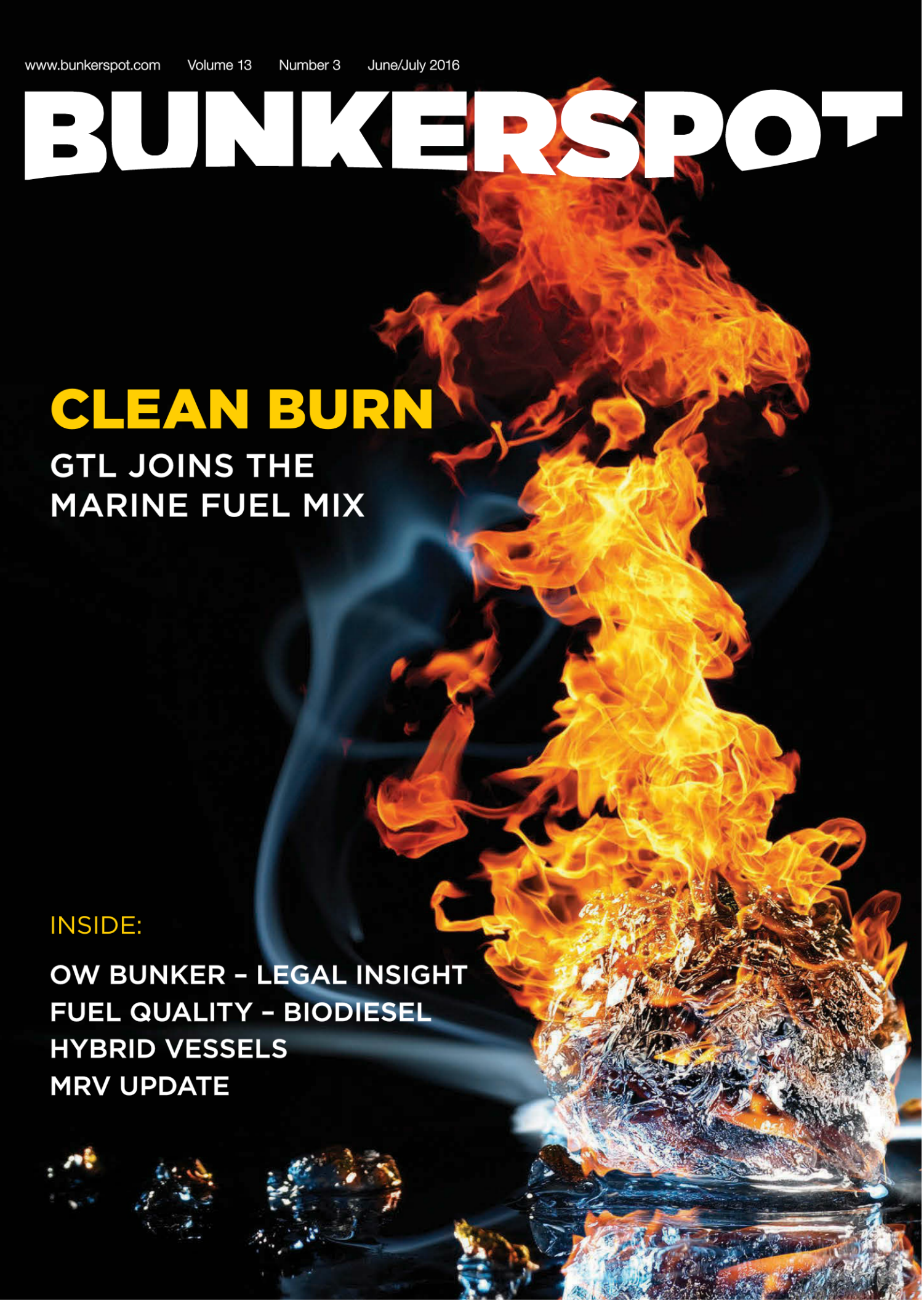
www.bunkerspot.com Volume 13 Number 3 June/July 2016

BUNKERSPOT



CLEAN BURN

GTL JOINS THE MARINE FUEL MIX

INSIDE:

Due payment

With more than a passing reference to the ruminations of Descartes, Steve Simms of Simms Showers considers the recent judgment of the UK Supreme Court in relation to the *Res Cogitans* case, and finds that there is still considerable food for thought as to who should receive payment for the bunkers delivered

A feature of admiralty and maritime law is that many of its most famous precedents are remembered by the names of the ships involved with them. The exact situation of the ship usually has been long forgotten but the name of the ship alone immediately brings the precedent to mind. In US maritime law, for example, there is the *Himalaya* clause (about bills of lading) and the *Pennsylvania* rule (about presumption of fault). In English maritime law there is the *Halcyon Isle* (on choice of law) or, going back even further, to the *Peerless* (on contract formation).

The UK Supreme Court opened its much-anticipated 11 May 2016 *Res Cogitans*[1] opinion by commenting that:

> *Despite the significance of her name in Cartesian philosophy, the vessel* Res Cogitans *depends on bunkers. The parties' submissions have in compensation lent a degree of metaphysical complexity to commonplace facts. We are told that many similar cases worldwide await our decision with interest.*

On the face of it, the Supreme Court's opinion is about bunkers, who gets paid for them (writes the Court, the ING lenders' consortium, which paid nothing for the bunkers), who must pay (the vessel owners/managers, even though title to the bunkers had never passed to them) and how many times they must pay (the Court concludes, at least twice, not only to ING but also to the intermediate trader Rosneft Marine – which itself already had paid the physical supplier).

Long after the facts of *Res Cogitans,* like those of other maritime law opinions, have passed into history, the Supreme Court's decision may be remembered to be not so much about bunkers but rather about a collision: of the *Res Cogitans* with its 'sister ship', *Epistemology* (the science of how one obtains reliable knowledge), or even more critically, between the historic equitable principles of admiralty and the historically unbending principles of law.

As the OW Bunker litigation continues throughout the world, the next years will prove which ship survived the collision.

Philosopher René Descartes (1596-1650) remains the world's most influential sceptic. As one of the still-essential set of ideas in Western philosophy, Cartesian philosophy urges that we discover truth by reasoning from things we know inherently. That truth starts with confirming our own existence, which Descartes wrote to be,

> *Ego sum* res cogitans*, id est dubitans, affirmans, negans, pauca intelligens, multa ignorans, volens, nolens, imaginans etiam et sentiens...*

In translation 'I am a thinking (conscious) thing, that is, a being who doubts, affirms, denies, knows a few objects, and is ignorant of many...'.

Res Cogitans – the now-ironic name of the vessel which received, consumed and (at least up to the Supreme Court's decision) whose owners/managers hadn't paid for bunkers provided through two OW entities (Malta and Denmark) – means 'a thinking thing (as the mind or soul).'

Descartes offers no recorded thought about bunkering or about whether any ship (even one named *Res Cogitans*) could think. The Supreme Court's decision, as well as the three prior decisions leading to it (arbitrators, High Court and Court of Appeal), however, have prompted much thought among those in the bunkering industry, their shipowning and chartering customers, and their banks and investors. So from that standpoint, Descartes could confirm that because the industry is thinking, it exists. With the Supreme Court's decision, the industry, its

customers and financiers must keep thinking.

Descartes observes that reliance on sensation and perception leads to wrong ideas. In 1637, he published a series of essays presenting rules of thought to ensure firm foundations of knowledge. Still laboured through by philosophy students today, Descartes' *Discourse on the Method* introduces the series and states his first rule:

> *The first was never to accept anything for true which I did not clearly know to be such; that is to say, carefully to avoid precipitancy and prejudice, and to comprise nothing more in my judgment than what was presented to my mind so clearly and distinctly as to exclude all ground of doubt.*

Does the Supreme Court's opinion survive Descartes' first rule of epistemology? Or (as the opinion seems to suggest) is there a bunkering exception to Cartesian philosophy?

The opinion observes at its beginning that:

> *The essential problem arises from the insolvency of the OW Bunker Group and the concerns of vessel owners that they may be exposed to paying twice over, once to their immediate bunker supply group now insolvent, and again to the ultimate source of the bunkers who may claim rights under a reservation of title or maritime lien. The concerns stem from what are understood to be fairly typical conditions on which bunkers are supplied worldwide.*

Although the conditions may be 'typical', should there be any doubt that:

- Those physically supplying bunkers to which they retain title and/or hold a maritime lien, should be paid for those bunkers?
- Those receiving and using the bunkers, should pay those with title to the bunkers and/or who hold a maritime lien for them?
- There should be only one payment for one delivery of bunkers?
- Those re-selling bunkers but not holding title, should receive only their commission for those sales?
- Those receiving payment for the bunkers, receive as fiduciaries and agents for the entity holding title and/or the maritime lien for the bunkers?

Descartes probably would say, 'non' (he was French). That is because we know inherently that one should not have to pay twice for the same thing. We know inherently that one should not receive value for that which one has not provided value in the first place.

The Supreme Court was arguably constrained by the genesis of the opinions presented to it. That is, an opinion was presented to it (which the Supreme Court refers to as 'admirably analytical'), developed first in an extensive arbitration, which the High Court (trial court) and then the Court of Appeal in further separate opinions both affirmed.

The underlying opinions thus narrowed to what seemed to the Supreme Court only to be an issue of law: did only the UK Sale of Goods Act apply for recovery by ING? If so, the *Res Cogitans*' owners/managers never received title to the bunkers and the Sale of Goods Act says they don't have to pay until they received title. But, as solely an issue of law, the Court held that because of the OW bunker contract's title retention (allowing the bunkers to be consumed before payment caused title passage), the bunker contract was unique (*sui generis*) and not only for a sale of goods. Eyes firmly on its path of law, the Court went further, writing that as a matter of law, even if the bunker contract was a sale of goods, the Sale of Goods Act was not a sole means of recovery.

Some might say that the Court relied more on its senses and perceptions to reach the opinion. That is, with three underlying opinions each narrowing on pure analysis of law, how (notwithstanding the wider issues) could the Court decide otherwise?

> 'The [Supreme Court's] opinion thus repeatedly mentions ''the common law'' and legal genesis of the Sale of Goods Act. Absent entirely from it is any consideration of admiralty or its inherent equitable principles - even though - the opinion most essentially is about maritime commerce'

The opinion thus repeatedly mentions 'the common law' and legal genesis of the Sale of Goods Act. Absent entirely from it is any consideration of admiralty or its inherent equitable principles, even though, the opinion most essentially is about maritime commerce.

Historically in the English system of justice, courts of law, and courts of admiralty and chancery had been separate. The law initially was what the King decreed, evolving to the 'common law', which was, in essence, principles which courts derived from the decrees. Separate from the courts of law, admiralty courts dealt with maritime commerce and were subject first to the Lord High Admiral and then to the King. Because maritime commerce frequently had to address different legal systems (other than English) and commercial realities (to keep commerce flowing based on common sense results fitted to the circumstance, rather than a 'one size must fit all' law decree), admiralty became known as a more flexible system of decision, focused on equity – essentially, doing what is right. In parallel were the courts of chancery, which were also supposed to apply equity in land-based matters.

Admiralty and the equitable principles evolved from it thus allows more than law for properly-applied Cartesian philosophy and epistemology. Considering a marine salvage case, for example, the UK Court of Appeals[2] considered admiralty law comments that '[w]e should, therefore, eschew our common law notions and seek for the principles of the maritime law. The Court of Admiralty has always encouraged those who go to the rescue of others in distress. This is high policy.'

Thus, the court observes: 'that is very different from the common law. A doctor who tries to save a patient gets paid, even though the patient dies. But [in admiralty] a salvor, who tries to save a ship, gets nothing if the ship is lost.' In 1867 and years before, Dr Lushington (considered to be one of the leading English jurists deciding admiralty cases) wrote (as might have Descartes) in an admiralty case,[3] that:

> *In my mind the principle is this, that no man can profit by his own wrong. This is a rule founded in justice and equity, and carried out in various ways by the tribunals of this country, and never, so far as I am aware, departed from by an English court.*

As declared by the United States' own Supreme Court, the same principles apply in the admiralty law of the United States, inherited from English admiralty law. '[C]ourts of admiralty… are not governed by the strict rules of the common law, but act upon enlarged principles of equity.' *The Ship Virgin v. Vyfhius*, 33 U.S. 538, 550 (U.S. 1834).[4]

So, for example, in a situation pertinent

'With the bunker industry and its customers and financiers becoming a collective ''res cogitans'', what should be the ultimate result not only of the Supreme Court's opinion but of the many, similar situations with OW where there are unpaid physical suppliers, intermediate traders, and the owners' or charterers' conundrum of having to pay twice or more, for the same supply?'

to the situation of ING's demands of owners and charterers (and now even, of traders 'upstream' from OW, which had bought through OW entities in turn buying from physical suppliers), the US appeals court in admiralty, in *Gulf Oil Trading Co. v. Creole Supply*, 596 F.2d 515, 520 (2d Cir. 1979), where Second Circuit affirmed subordination of a bank's ship mortgage. The bank inequitably and unjustly had attempted to destroy other claims. The Court upheld a monetary award against the bank considering the equitable principle of unjust enrichment, writing as follows:

> *When justice requires it, quasi-contract will serve as the remedy for unjust enrichment... The remedy requires no finding of consent, for it can support a recovery quite opposed to the defendant's intention to pay... When the retention of the benefit without payment is unjustified... the remedy lies in quasi-contract... When there is no Res to restore, money damages are awarded to prevent unjust enrichment.*
> Id. at 520.

Canada's courts also inherited the English (and Cartesian) admiralty principles, including equity, as the Canada Federal Court confirmed recently in its OW-related decision in *Canpotex Shipping Services Limited, et al. v. Marine Petrobulk Ltd., et al.*, 2015 FC 1108, p.65 (Sept. 23, 2015)[5], concluding that:

> *In the present case it seems to me that ING has no contractual or lien right to assert against the Funds or the Vessels, and that [the physical supplier, MP] is entitled to the disputed portion of those funds as a function of contract law and equity... In the present case, OW UK did not supply the marine bunkers and, in addition, OW UK has not paid for the marine bunkers that were supplied by MP to the Vessels... Consequently... I do not see how ING can now assert any in rem claims against the Vessels or the Funds. MP has supplied the marine bunkers to the Vessels under MP's Standard Terms and Conditions which supersede any contractual arrangements to the contrary between [the charterer] Canpotex and OW UK. MP is contractually entitled to payment for the bunkers from Canpotex. ING, standing in the shoes of OW UK, is not entitled to any payment representing the purchase price of the bunkers because MP was not paid that purchase price and, under the Standard Terms and Conditions, has thus triggered a direct liability for Canpotex to pay it.*

As a 'res cogitans', the Canadian judge in *Canpotex* thus reached the conclusion that inherently makes sense: each entity involved in the bunker transaction receives that it should receive and pays what it should pay. This begins with the physical supplier receiving payment for the bunkers it supplied, and ends with the charterer not paying twice for them. It also results in ING (claiming through OW) receiving what it should receive: its commission over and above the physical supplier's charge for the bunkers.

Thus the result in Canpotex properly applies admiralty law and its equitable (Cartesian) principles: in the collision between the *Res Cogitans* and its 'sister ship', *Epistemology*, both remain afloat.

The Cartesian challenge to the Supreme Court's opinion also grows as one considers a fact which the Court mentioned but then left, and a fact inherent to the parties' entire contractual situation which the Court overlooked altogether.

First, the Supreme Court confirms that OW's sales terms and conditions (which were common both to the ultimate 'seller', OW Malta – OWBM, and intermediary, OW Denmark – OWBBAS, controlled so that:

> *What is clear is that the Owners accepted that, until full payment to OWBM, they would not acquire title or property rights in the bunkers, but would hold them as bailees for OWBM, subject only to a right to use them for the propulsion of the vessel* Res Cogitans *herself.*

The OW sales terms had a relatively limited title retention clause (paragraph H.2) providing that 'the Buyer agreed [sic] that it is in possession of the Bunkers solely as Bailee for the Seller, and shall not be entitled to use the Bunkers other than for the propulsion of the Vessel.'

The intermediate trader, Rosneft's (which had paid for the physical supply) title retention, as the Court observed, however, states that:

> *Until such time as payment is made, on behalf of themselves and the Vessel, the Buyer agrees that they are in possession of the Marine Fuels solely as Bailee for the Seller. <u>If, prior to payment, the Seller's Marine Fuels are commingled with other Marine Fuels on board the Vessel, title to the Marine Fuels shall remain with the Seller corresponding to the quantity of the Marine Fuels delivered</u>* (emphasis added).

Significantly, this is a term identical[6] to the title retention of the 2015 BIMCO Bunker Terms paragraph 10(b) – which itself has been carried over for nearly 20 years through those Terms' prior versions and which appears as standard today in many bunker trader and supplier sales terms:

> *(b) Title to the Marine Fuels shall pass to the Buyers upon payment for the value of the Marine Fuels delivered, pursuant to the terms of Clause 8 (Payment) hereof. Until such time as payment is made, on behalf of themselves and the Vessel, the Buyers agree that they are in possession of the Marine Fuels solely as bailee for the Sellers. If, prior to payment, the Sellers' Marine Fuels are commingled with other marine fuels on board the Vessel, title to the Marine Fuels shall remain with the Sellers corresponding to the quantity of the Marine Fuels delivered. The above is with-*

out prejudice to such other rights as the Sellers may have under the laws of the governing jurisdiction against the Buyers or the Vessel in the event of non-payment.

With this is OW's sales terms Clause L.4, which states:

(a) These Terms and Conditions are subject to variation in circumstances where the physical supply of the Bunkers is being undertaken by a third party which insists that the Buyer is also bound by its own terms and conditions. In such circumstances, these Terms and Conditions shall be varied accordingly, and the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party.

Inherent to the Supreme Court's opinion was its recognition that OW's sales terms (including title retention) controlled. Accepting this so inherently – whether one properly applies epistemology, or admiralty, or equity, or even the restrictions of pure law analysis – the Court (and those before it) thus should not have entirely skipped over the Rosneft term (which continues Rosneft's claims to subsequent bunkers). The particularly notable fact of the OW Term L.4 is that it incorporates 'third party' terms to the OW contract even though 'the Buyer (here the *Res Cogitans*' owners/managers) may have never (at least at the time of supply) seen the terms. Certainly by the word 'shall', however, it is beyond (at least as Descartes would accept) correct argument, that Rosneft did anything but 'insist' that its terms bound its bunker buyers, that is, the OW entities and *Res Cogitans'* owners/managers.

'Owners/charterers contracting with ING should (and again Descartes would say, ''correctement'') only pay once for one supply, and, the payment distributed as all should receive it: suppliers, for their supply, and traders moving ''upstream'' for each of their respective agreed commissions'

Consequently, with the bunker industry and its customers and financiers becoming a collective *'res cognitans'*, what should be the ultimate result not only of the Supreme Court's opinion but of the many, similar situations with OW where there are unpaid physical suppliers, intermediate traders, and the owners' or charterers' conundrum of having to pay twice or more, for the same supply?

First, starting with unpaid physical suppliers, or, Rosneft or other traders which have paid them, inherently (as the *Canpotex* court concluded) they should be paid. But, by whom?

Arguably, if ING ultimately is paid as the result of the *Res Cogitans* decision, ING will be collecting Rosneft's money, whether that is in payment for a direct claim against owners/managers, Rosneft's maritime lien, or, for the physical bunkers aboard the vessel into which (by Rosneft's recognised sales term) Rosneft's claim continued. Yes, Rosneft might try to arrest the *Res Cogitans* or to attach its bunkers. But, a suit against ING employing the equitable (and admiralty) principles of unjust enrichment, constructive trust, or even agency, might be more readily available.

Second, should owners/charterers have to pay twice? Again no, applying admiralty and equity principles – and confirmed by the OW sales terms which all (even ING) agree control. Owners/charterers contracting with ING should (and again Descartes would say, 'correctement') only pay once for one supply, and, the payment distributed as all should receive it: suppliers, for their supply, and traders moving 'upstream' for each of their respective agreed commissions.

Those such as intermediate traders paying physical suppliers (where, for example, ING/OW has threatened those traders' vessel owner/charterers' customers with arrest) also should be credited with payment, owing ING/OW the commission over the physical supply price, that the trader had agreed to receive.

In connection with the Supreme Court decision, questions have been raised to the BIMCO committee which drafted the BIMCO Bunker Terms 2015, about whether the committee should modify the Terms' title retention provisions. This mainly would be to accommodate owners/charterers concerned with the double payment problems that the Supreme Court's decision now apparently presents.

The present BIMCO title retention term – particularly considering its continuation of suppliers' title into after-acquired bunkers (replacing those consumed) should not be changed. It is in various forms nearly identical to the present term, and has duration known widely among suppliers, traders and their customers. The term is not the problem, the Supreme Court's decision is, as it did not apply historical admiralty and equity principles. Applying those principles properly (including the fact that OW's own sales terms further confirm they should be applied), each entity in the bunker sale transactions receives what it should receive – is secured for what it should be secured – and not more.

The *Res Cogitans* and 'sister ship' *Epistemology* collision will take years to resolve. Courts, and industry participants which hold patiently to the historical and Cartesian principles of admiralty and equity, however, should properly resolve it so that both 'ships' and the larger industry continue robustly as they have historically. Wherever they are placed in the chain of a bunker supply, each participant should – if not for anything but their own continued existence – pay direct thought to ensuring that each makes and receives the payment that each knows inherently, each should make and receive, and no more.

'Ego sum res cogitans...' As long as our industry and courts continue to think, not turning to sensation and perception, our industry will continue not only to exist but to benefit each of our members as it – inherently – should.

1. PST Energy 7 Shipping LLC and another (Appellants) v O W Bunker Malta Limited and another (Respondents), [2016] UKSC 23, copy on line at http://www.bailii.org/uk/cases/UKSC/2016/23.html

2. The Tojo Maru, [1969] 3 All ER 1179 (Lord Denning)

3. The Capella (Cargo Ex), [1861-1873] All ER Rep 433 (1867, Dr Lushington, J.)

4. See also The Kalfarli, 277 F. 391, 394-404 (2d Cir. 1921) (extensive discussion of the operation of equity in admiralty law); Smith v. Seaport Marine, Inc., 981 F. Supp. 2d 1188 (S.D. Ala. 2013), aff'd Jurich v. Compass Marine, Inc., 764 F.3d 1302 (11th Cir. 2014). ('Admiralty jurisdiction and maritime law are firmly grounded in principles of equity').

5. This decision presently is on appeal to the Canada Federal Court of Appeal, No. A-462-15, see http://cas-cdc-www02.cas-satj.gc.ca/fca-caf/IndexingQueries/infp_RE_info_e.php?court_no=A-462-15

6. At the time of writing, a copy of the Rosneft UK terms can be accessed at http://rosneftmarine.com/wp-content/uploads/2012/04/RNMUK-GTC-210312-copy.pdf

Steve Simms is a Principal of Simms Showers LLP.

Email: jssimms@simmsshowers.com
Tel: +1 410 783 5795