

ING Bank wins latest round in OW Bunker case

Court decision may set precedent for other appeals pending in bankruptcy

Michael Angell
Stamford

A US federal appeals court dealt a blow to marine-fuel suppliers seeking damages related to the OW Bunker collapse.

The decision may help break the logjam of similar cases in the US and around the world, allowing ING Bank to recoup some of the \$700m it loaned to the now bankrupt marine-fuels supplier.

Last week, a US federal appeals court upheld a lower court decision denying a maritime lien that a bunker fuel supplier asserted in an attempt to arrest a Technip-owned ship.

Radcliff/Marine Services went after the 33,800-gt *Deep Blue* (built 2001) because the company was not paid \$700,000 for bunker fuel it supplied the vessel on behalf of the US subsidiary of OW Bunker.

ING fought that claim, saying OW Bunker originally held the lien as it had a contract with Technip, and Radcliff was just serving as a subcontractor. ING, the fuel supplier's largest secured creditor, took

over the liens of OW Bunker as a result of the bankruptcy in 2014.

Almost all lower courts in the US have sided with ING in similar cases. But this is ING's first appellate-level win in the OW Bunker case.

Seward & Kissel partner Bruce Paulsen, who represented ING, says the appellate court decision

could have persuasive authority in the 15 other cases on appeal across US courts.

"We've litigated around the country in various lower courts," Paulsen said.

"In every case but one, ING has won the issue of whether a physical supplier has a lien."

The US decision could also affect the many cases

now pending globally as OW Bunker's terms and conditions say US maritime law applies.

"There are many, many litigations occurring globally," Paulsen said. "I expect that litigants the world over will be looking at this decision to see what US law is."

In affirming the lower court decision, federal appellate judges Ed Carnes and Leigh May dismissed Radcliff's argument that it was

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LEGAL WRANGLE: ING Bank took over the liens of OW Bunker as a result of the bankruptcy in 2014. Left, Technip's *Deep Blue* has been involved in the latest US appeals court battle

Photos: OW Bunker and Technip

"working on order of the owner" when it supplied bunkers to the *Deep Blue*.

Citing other federal appellate cases, Radcliff's attorneys tried to argue that once the chief engineer of the *Deep Blue* accepted the bunkers, "a lien arises in favour of the supplier."

But the appeals court said that OW Bunker — as general contrac-

tor for Technip — actually had the lien when the "subcontractor renders performance on the general contractor's behalf".

In its appeal, Radcliff's lawyers also argued that OW Bunker could not have a lien since the subcontractor was not yet paid. But the appeals court said there was nothing in case law that required a contractor to be current in its accounts

payable before asserting a lien.

Paulsen says the law is well established regarding where physical suppliers stand in supply contracts.

"If you hire me to be a contractor and I have a subcontractor and he does the job, I have satisfied my contract with you, even though someone else put the fuel on the ship," Paulsen said.