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### The broader picture

The central issue in *The Res Cogitans* was the relationship, and the effect of the particular terms of the contract, between a supplier of goods and the party receiving and consuming them. However, the particular context (the supply of bunkers to a shipowner) has wider significance; for “any claim in respect of goods or materials supplied to a ship for her operation of maintenance” falls within admiralty jurisdiction<sup>20</sup> and attracts the possibility of an action *in rem* against, and therefore arrest of, the ship supplied and/or a sister ship.<sup>21</sup> Where goods have been supplied on credit through a chain of suppliers, under terms whereby title has been reserved and there are differences between the contractual and the actual suppliers to a vessel, there is the possibility of multiple claims in different jurisdictions and by different procedures. The possible ramifications of this decision will therefore need greater consideration if, as is anticipated, there is an appeal to the Supreme Court.

Liron Shmilovits\*

## OF BUNKERS AND RETENTION OF TITLE: WHEN IS A SALE NOT A SALE?

### *The Res Cogitans*

In July 2015 eyebrows were discreetly raised at the news of Males J’s determination that an agreement to bunker a ship on reservation of title terms was not a contract for the sale of goods. On the other hand, it was noted that permission to appeal the decision had been very smartly given, and not a great deal more notice was taken at the time. But, now that the Court of Appeal has agreed with Males J, the case is worth at least a second look.

*PST Energy 7 Shipping LLC v OW Bunker Malta Ltd (The Res Cogitans)*<sup>1</sup> was part of the fallout from the collapse of the OWB group, previously one of the world’s biggest bunker suppliers. Put in its simplest terms and cutting where necessary through the corporate thicket, in November 2014 OWB bunkered PST’s tanker *Res Cogitans* at a port in Russia. The bunkers were supplied on 60 days’ credit and under a reservation of title clause. That clause made explicit what would probably have been implicit anyway, namely that the shipowners could consume the bunkers in the ordinary way even while the suppliers remained unpaid. OWB had itself got the bunkers on 30 days’ credit from Rosneft; this was again on reservation of title terms, though without any explicit licence to consume. Not having been paid by OWB, Rosneft understandably insisted that the bunkers still belonged to it and demanded that PST pay it direct. At the same time, however, PST also faced contractual demands for payment from OWB (or rather their bankers, but nothing

20. Senior Courts Act 1981, s.20(1)(m).

21. *Ibid.*, s.21.

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1. [2015] EWCA Civ 1058.

turns on this). Unattracted by the prospect of having to pay twice over for the same fuel oil, PST brought pre-emptive arbitration proceedings against OWB, claiming that it did not have to pay them, because OWB had not had title to the bunkers when it supplied them. PST pointed out entirely correctly that under the Sale of Goods Act 1979, s.12, a buyer need not pay for goods in respect of which his seller had neither title nor the power to convey. It also argued that, under s.49 of the 1979 Act, no right to payment arose until title had been transmitted from seller to buyer and that, if (as both parties envisaged might well be the case) the bunkers had been consumed before the 60 days' credit was up, then in the nature of things no title to them could ever pass.

To this apparently open-and-shut case OWB made an unexpected and ingenious riposte. Sections 12 and 49 were, they said, beside the point, because the supply of the bunkers was not a sale of goods at all. The essence of a contract for the sale of goods was a transfer of title from seller to buyer. Since both parties envisaged that there would be no, or hardly any, bunkers left by the time fixed for payment and transfer of ownership 60 days later, this essential feature was absent. Instead, the contract fell to be categorised as one for the provision on 60 days' credit of a licence to burn bunkers: since this licence had been furnished and the 60 days had passed, OWB had a straightforward right to sue in debt for the price.

The arbitrators agreed with OWB. So, in a closely reasoned judgment, did Males J.<sup>2</sup> He admitted<sup>3</sup> that supplies of bunkers had always been assumed to be sales of goods; nevertheless, the matter had to be looked at strictly in accordance with the Sale of Goods Act definitions. Under these, a contract for the sale of goods had to be "a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price".<sup>4</sup> If at the time fixed for transfer of the property the subject matter was likely to have been consumed, then, he said, it had to follow that this criterion was unsatisfied, since one could not own, let alone convey, something that did not exist. Furthermore, while it was entirely possible to infer a promise (indeed a condition) that PST could consume the bunkers without fear of liability to Rosneft, in the circumstances this obligation had been satisfied: Rosneft must be taken implicitly to have consented to the goods supplied by them being consumed by anyone to whom OWB delivered them.<sup>5</sup>

PST appealed on the issue of the applicability of the Sale of Goods Act. Moore-Bick LJ, delivering the leading judgment (with which Longmore and McCombe LJJs agreed), essentially followed the reasoning of Males J on this point. The parties' acceptance that anything more than a minimal quantity of goods supplied would not exist when property fell to be transferred was fatal to the contention that this was a contract to sell goods.<sup>6</sup> As regards the question whether PST had indeed obtained an effective licence binding on Rosneft, he preferred not to decide the point, since it had not been directly in issue. Any

2. [2015] EWHC 2022 (Comm).

3. *Ibid.*, [29–34].

4. Sale of Goods Act 1979, s.1(1).

5. See [2015] EWHC 2022 (Comm), [49–53].

6. [2015] EWCA Civ 1058, [20–34].

questions of PST's liability to Rosneft, or a possible right not to pay OWB if there was such liability, thus had to be left to another day.

One suspects that this whole debacle will in due course be satisfactorily resolved by agreement.<sup>7</sup> However entertaining to law professors, academic argument in court on the proper classification of sale of goods contracts and the incidence of the right to payment is hardly cost-effective for the parties, especially where the entire sum in play is not much more than US\$0.5 million.

Nevertheless, it is suggested that, despite its apparent logic and acceptance at Court of Appeal level, the holding that the contract here was not a contract of sale is problematical.

One point is that sales on reservation of title terms of consumable goods are commoner than one might think, and hence the potential problem of the non-applicability of the Sale of Goods Act more serious than immediately apparent. For instance, building materials such as cement or bitumen immediately come to mind as commodities almost invariably supplied on reservation of title terms to those who intend to use them quickly, and certainly well before payment is due. Again, almost every wine merchant in the kingdom incorporates a reservation of title clause when selling wine on credit to thirsty customers, who may well be expected to drink it before they have to settle the bill. It would, one suspects, come as some surprise to Messrs Jewson or Berry Bros & Rudd that they are apparently not in the business of selling goods at all: that ss13–15 of the Sale of Goods Act do not apply to them (even if equivalent terms might be implied at common law<sup>8</sup>); and that that they are not obliged under s.12 of the Sale of Goods Act to provide good title to what they supply, but merely to provide consent to concreting or a licence to tipple.

But the objection is not only pragmatic. Turning to the issue of strict law, the matter seems equally doubtful. To begin with, one matter which was actually essential to the exclusion of the Sale of Goods Act was dealt with surprisingly briefly. In connection with the reservation of title clause agreed between it and OWB, PST argued that it must be implicit in that clause that, despite its general wording, ownership would pass to it once it actually consumed the bunkers. If right, this point was a knock-out, since there would then be a distinct agreement to deliver not only possession but title to existent goods. Males J, however, rejected it very shortly (and the Court of Appeal agreed). However convenient such a term as to passing of title might be, it could not, said Males J, stand with the express provision for retention of title pending payment after 60 days.<sup>9</sup> But this contention, superficially plausible, is much less convincing than it seems when looked at closely. The whole reason why it was said in *The Res Cogitans* that the Sale of Goods Act did not apply, it will be remembered, was that no

7. It is noteworthy that Rosneft essentially made common cause with PST in their claim not to have to pay OWB: see [2015] EWCA Civ 1058, [15].

8. This can only be at common law. The case cannot come under the Supply of Goods and Services Act 1982, since that Act requires "a contract under which one person transfers or agrees to transfer to another the property in goods"—exactly the feature the lack of which was said by Moore-Bick LJ to oust the Sale of Goods Act. This also has implications for exception clauses. In commercial sales, s.6 of the Unfair Contract Terms Act 1977 will not apply (though s.3 will); in consumer sales ss 9–14 of the Consumer Rights Act 2015 will not govern.

9. [2015] EWHC 2022 (Comm), [67].

title could pass in non-existent goods. But this argument cuts both ways. If one cannot *transmit* title in non-existent goods, it is equally true that one cannot *retain* it either. And, if this is right, then the retention of title clause between OWB and PST was far from being a clear express agreement contradicting an otherwise sensible implied term. On the contrary: in so far as it might be read *au pied de la lettre* as referring to bunkers of which nothing was left save acrid blue smoke hanging over the seven seas, it was a nonsense. The idea that any reasonable businessman (whose view, of course, is vital to questions of the interpretation of contracts<sup>10</sup>) would read it as reserving title to non-existent goods incapable of ownership by anybody is, to say the least, curious. It is hard to avoid the conclusion that, *pace* Males J, the only businesslike interpretation of it was to limit its effect to the period when there were goods available to which the seller could retain title.

If it is correct, the above point neatly gets rid of the “no sale” point and avoids the need for further argument on the matter. But let us assume that it is not, and that properly construed the contract between OWB and PST did unequivocally state that no property passed for 60 days. Even here, it is submitted that the Court of Appeal’s argument in favour of disapplying the Sale of Goods Act is less than convincing. True, if there is no question of property ever passing, then there is a strong case for there to be no sale. But this was not the case here. This was not a case where the goods supplied *must* be consumed before property passed, but rather a case where they *might* be. Indeed, had any bunkers been left unconsumed and unpaid-for on board the *Res Cogitans* after the 60 days were up, no one seems to have doubted that—subject to any prior rights of Rosneft—OWB would have been the owner of them in the ordinary way. If so, the proper analysis of the decision is that it was actually a case where the parties *did* envisage that property would pass, but where on the facts they did so conditionally (the condition being that the goods had not been previously consumed). It was actually on this conditionality—that both parties envisaged the possible non-existence of at least part of the goods at the time fixed for the passing of property—that Males J and the Court of Appeal relied in order to come to the conclusion which they reached. Moore-Bick LJ indeed made the point explicit. The degree of likelihood that the condition would be satisfied was, he thought, beside the point. Even if the period of credit had been short and the likelihood of bunkers remaining unconsumed on board correspondingly high, the contract would still not have been one for the sale of goods because there was no expectation of a transfer of title to all the bunkers supplied.<sup>11</sup>

Can this be right? It is respectfully submitted that it cannot. However close the tie in theory between sales and an intent to transfer property, there is no indication that such intent has to be unconditional in order for a contract to count as one of sale. On the contrary: there are plenty of examples of contracts which are indubitably contracts for the sale of goods, but where the promise to transfer ownership is accepted by all

10. *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–913 (Lord Hoffmann); *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101, [14] (Lord Hoffmann).

11. [2015] EWCA Civ 1058, [19].

parties to be conditional.<sup>12</sup> A straightforward instance is cases where under the contract the transfer of risk takes place before the passing of property—a category, incidentally, which comprises all cif contracts.<sup>13</sup> If the goods in such a case are destroyed after risk passes but before ownership can be, the price is payable notwithstanding the seller's inability to transfer property in something that no longer exists.<sup>14</sup> Put in plain English, this means that in such a case the seller's duty to transfer property is conditional on the continued existence of the goods. It has never been suggested that for that reason such contracts are not contracts for the sale of goods, or that a high likelihood of loss makes any difference.<sup>15</sup> Nor, it is suggested, is there any difficulty in applying s.12 of the Sale of Goods Act to cases of this sort. Although normally goods sold cif and then lost at sea have to be paid for, it seems inconceivable that this would continue to apply where the seller had no title to them in the first place. True, the seller would be relieved by the loss of the goods of the duty to provide actual title: but, if he could not have provided title even if the goods had not been destroyed, then it would remain open to the buyer to argue that the seller would never have been in a position to fulfil his own fundamental obligation and hence had lost any right he might have had to enforce it against the buyer.

Does all this mean that the owners of the *Res Cogitans* should escape liability to pay OWB after all? Not necessarily. Even if s.12 of the 1979 Act applied, it would still be relevant to ask, as Males J did and as the Court of Appeal would have if the matter had been properly raised, whether Rosneft implicitly consented to the bunkers being resold by OWB for consumption. If they did, then OWB would have satisfied their duty to have a "right to sell the goods" under s.12 of the 1979 Act; if not, then OWB would rightly be denied payment. But at least the question would be asked and answered in the context anyone other than a contrary lawyer would expect it to appear in: namely, the law of sale of goods.

Andrew Tettenborn\*

12. As, arguably, the Sale of Goods Act 1979 says when it provides in s.1(3) that a contract of sale "may be absolute or conditional". If the essence of a contract of sale is transfer of title, presumably this means that in at least some cases the duty to transfer title will not be unconditional.

13. See *Ross T Smyth v Bailey* [1940] 3 All ER 60.

14. Eg *Castle v Playford* (1870) LR 5 Ex 165; *Martineau v Kitching* (1872) LR 7 QB 436; *Manbre Saccharine Co Ltd v Corn Products Ltd* [1919] 1 KB 198; L Sealy, "Risk in the Law of Sale" [1972B] CLJ 225, 237. This, it should be noted, also seems to be an exception to the rule in s.49 that payment is due only on or after passing of property, thus disposing of any possible argument that s.49 applies notwithstanding contrary agreement; cf Sealy, *ibid*, 237–238.

15. For example, if goods need urgently to be shipped across pirate-infested seas with relatively small chances of safe arrival.

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