Neutral Citation Number: [2015] EWCA Civ 1058

Case No: A3/2015/2335

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mr. Justice Males
[2015] EWHC 2022 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 October 2015

Before :

LORD JUSTICE MOORE-BICK
Vice-President of the Court of Appeal, Civil Division
LORD JUSTICE LONGMORE
and
LORD JUSTICE McCOMBE

- -

Between :

(1) PST ENERGY 7 SHIPPING LLC **(2) PRODUCT SHIPPING & TRADING S.A.**	**Claimants/ Appellants**
- and -	
(1) O.W. BUNKER MALTA LTD **(2) ING BANK N.V.**	**Defendants/ Respondents**

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Mr. Stephen Cogley Q.C., Mr. Jeremy Richmond and Miss Liisa Lahti (instructed by **Ince & Co. LLP**) for the **appellants**
Mr. Robert Bright Q.C., Mr. Marcus Mander and Miss Clara Benn (instructed by **Allen & Overy LLP**) for the **respondents**

Hearing date: 17th September 2015

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Approved Judgment

Lord Justice Moore-Bick :

1. On 4th November 2014 the first respondents, O.W. Bunker Malta Ltd ("OWBM") supplied 1,000 metric tons of fuel oil and 100 metric tons of gasoil ("the bunkers") to the vessel *Res Cogitans* at Tuapse pursuant to a contract which incorporated its standard terms of business. Those terms provided for payment 60 days after delivery and included a retention of title clause under which property was not to pass to the vessel's owners or managers until the bunkers had been paid for in full. Despite that, however, the contract also expressly provided that from the moment of delivery the vessel was entitled to use the bunkers for the purposes of propulsion.

2. OWBM had obtained the bunkers under a contract with the ultimate parent company of the group, OW Bunker & Trading A/S ("OWBAS"), which had in turn obtained them from another bunker supplier, Rosneft Marine (UK) Ltd ("RMUK"). RMUK had itself obtained the bunkers from one of its associated companies, RN-Bunker Ltd ("RNB"), which had facilities at Tuapse and made the delivery to the vessel. The contract between OWBAS and RMUK incorporated RMUK's standard terms which provided for payment to be made 30 days after delivery and also included a retention of title clause. It did not, however, expressly allow the owners to use the bunkers for the purposes of the propulsion of the vessel pending payment.

3. On 6th November 2014 OWBAS announced that it was applying to the court in Aalborg for restructuring. The commencement of those proceedings constituted an event of default under a financing agreement which the group had entered into with the second respondent, ING Bank N.V. ("ING"), and as a result, ING asserted a right to recover as assignee the debt, if any, owed by the appellants to OWBM in respect of the supply of the bunkers.

4. On 17th November 2014 RMUK, having become aware that it might not receive payment from OWBAS, asserted that it remained the owner of the bunkers and indicated that it would seek payment from the appellants, who are the owners and managers respectively of the vessel. (Since their positions are the same as far as the present proceedings are concerned, I shall refer to them together simply as "the owners".) The owners have paid neither OWBM nor RMUK. Part of the bunkers supplied to the vessel at Tuapse had been consumed in the propulsion of the vessel by the time the 30-day period of credit allowed under RMUK's terms expired and the whole of them had been consumed for that purpose by the time the 60-day period of credit allowed under OWBM's terms expired.

5. In early December 2014 the owners began arbitration proceedings against OWBM and ING seeking a declaration that they were not bound to pay either of them for the bunkers supplied to the vessel at Tuapse, or, in the alternative, damages for breach of contract, on the grounds that OWBM had been unable to pass title in the bunkers to them. In the event, the tribunal agreed to determine as preliminary issues a number of questions formulated by the parties. They included the following:

    (i) whether OWBM had property in the bunkers at any material time (Issue 1);

    (ii) whether the retention of title clause in OWBM's terms prevented property in the bunkers from passing to the owners (Issue 3);

(iii) whether OWBM could recover the price of the bunkers under section 49(1) of the Sale of Goods Act 1979 (Issue 4);

(iv) whether OWBM had any other claim under the contract (Issue 6(a));

(v) whether the Sale of Goods Act 1979 applied to the contract between OWBM and the owners (Issue 9).

6. By an interim award published on 16th April 2015 the arbitrators determined all but one of the preliminary issues. They held that the effect of OWBM's terms, in particular the combination of the retention of title clause and the clause giving the owners the right to use the bunkers for the propulsion of the vessel in advance of payment, was that it did not undertake to transfer property in the bunkers to them and that therefore the contract was not one for the sale of goods within the meaning of the Sale of Goods Act. As a result, OWBM could not recover the price of the goods under section 49 of the Act, but was entitled to recover the sum due as a simple debt.

7. The owners appealed by agreement of the other parties to the proceedings in relation to five questions of law which in one form or another raised the question whether the contract between themselves and OWBM was a contract for the sale of goods, and therefore subject to the Sale of Goods Act 1979, and if not, whether it was an implied term of the contract that OWBM would be able to pass title in the bunkers to them at the time when they were delivered or consumed.

8. OWBM and ING also appealed by agreement in relation to a number of questions of law, on which they sought to rely as providing an alternative basis for upholding the arbitrators' conclusion that they were entitled to recover payment from the owners. Since they share the same position in relation to the present appeal, it is convenient to refer to them both simply as OWBM.

9. The matter thus came before Males J., who affirmed the arbitrators' decision. He rejected the owners' argument that the contract was one for the sale of goods, holding that it was necessary to look behind the language of the contract to ascertain exactly what the parties had undertaken to do. He held that OWBM had not undertaken to transfer property in the bunkers delivered to the vessel because both parties had specifically envisaged that some, if not all of them, were likely to have been consumed in the vessel's engines before the time for payment had come. When that happened they ceased to exist and it became impossible to transfer property in them. He analysed the position as follows:

> "46. In these circumstances the question arises, as already mentioned, what was the consideration for the money payment which the Owners agreed to make if it was not the transfer of title? In my judgment the true nature of the parties' bargain was that OWBM would deliver or arrange for delivery of the bunkers, which the Owners would be immediately entitled to use for the propulsion of the vessel."

10. In paragraph 55 of his judgment he expressly approved the arbitrators' reasoning in paragraph 51 of the award where they had said:

> "51. Stripped of all unnecessary detail, the deal between the parties was that OWBM would ensure delivery of the bunkers, the use of which would be immediately available to the Owners, who would pay for them according to OWBM's invoice.
>
> Such an agreement does quite obviously resemble in some respects a contract of sale, but its terms and their performance do not to any extent rely on property or title or their transfer."

11. In the light of his decision on the central issue concerning the nature of the contract the judge found it unnecessary to determine the other questions raised by OWBM. He gave the owners permission to appeal in relation to the questions raised by their appeal, but refused OWBM permission to appeal in relation to the questions raised by its appeal. In substance, therefore, the judge restricted the appeal to this court to the question whether the contract between the owners and OWBM was a contract for the sale of goods within the meaning of section 2 of the Sale of Goods Act 1979 and whether OWBM could sue for the price under section 49(1).

12. Shortly before the hearing of the appeal OWBM filed a respondent's notice seeking to uphold the judge's decision on a number of additional or different grounds. The owners argued that, having been refused permission to appeal in relation to the issues raised by its own appeal, OWBM was not entitled to raise the same points by way of a respondent's notice. We declined to resolve that question, because by the time the matter came on for hearing it had already become clear that there would not be time to hear argument on the wide range of issues that OWBM wished to pursue. At the outset of the hearing, therefore, we indicated that we would hear argument only on the question whether OWBM was bound to transfer title in the contract goods and would give our decision on that question before deciding on what, if any, further questions it would be appropriate to hear argument. Accordingly, this judgment deals only with the questions raised by the owners' appeal. The parties will have an opportunity in due course to make submissions about the future conduct of the appeal.

13. Before turning to consider the parties' submissions on the central question before us it may be helpful to refer in a little more detail to the commercial background and to the salient features of OWBM's standard terms. For the purposes of their interim award the arbitrators were asked to assume the existence of a number of facts. They included the following:

> "6. It is well-known in the industry . . . that many bunker suppliers sell on terms including retention of title clauses along the supply chain . . .

> 7. It is well known by shipowners and charterers that suppliers of bunkers are frequently sub-sellers, and that the terms on which bunkers are sold frequently include retention of title clauses.
>
> . . .
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> 18. RMUK was aware that the OWB T&Cs would include or were likely to include both a retention of title clause and an express provision that, prior to payment, Owners would be in possession of the Bunkers as bailee[s] and would not be entitled to consume them other than for the propulsion of the Vessel.
>
> 19. RMUK was aware that OWB Malta was supplying the Bunkers to the Vessel for consumption.
>
> 20. RMUK was aware that the Bunkers might be being purchased for immediate use and might accordingly be wholly or partly consumed during the period of 30 days' credit which RMUK had granted to OWBAS. Such consumption might also occur before the expiry of any contractual credit period agreed between Owners and (the relevant) OWB company. This happened in respect of the present stem the subject matter of this arbitration."

14. The standard terms and conditions of the OW Bunker group, on which OWBM contracted with the owners in this case, are described as "Terms and Conditions of sale for Marine Bunkers" and are couched in language redolent of a contract for the sale of goods. In particular, the parties are described as "Seller" and "Buyer" respectively and there are references to "sale" and "purchase". The important terms for the purposes of this appeal are contained in section H which deals with title. It includes the following provisions:

> "H Title
>
> H.1 Title in and to the Bunkers delivered and/or property rights in and to such Bunkers shall remain vested in the Seller until full payment has been received by the Seller of all amounts due in connection with the respective delivery. . . .
>
> H.2 Until full payment of the full amount due to the Seller has been made . . . 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, nor mix, blend, sell, encumber, pledge, alienate, or surrender the Bunkers to any third party or other Vessel."

The nature of the contract

15. Mr. Cogley Q.C., whose submissions were supported by written submissions served by RMUK pursuant to the order of Vos L.J., submitted that the language used by the parties to express their agreement made it clear that they intended the contract to be one for the sale of goods and their relationship to be that of buyer and seller. It followed that they intended the contract to be governed by the Sale of Goods Act 1979. The contract should be understood, he submitted, as an agreement to sell under which property was to pass to the owners at a future date, in this case on payment. The fact that by that time the goods might have ceased to exist (and had in fact done so) did not matter, because the effect of the contract was that property passed retrospectively and was to be treated as having been in the owners from the date of delivery. It followed, he said, that OWBM could recover the price of the goods only if it had transferred property in them to the owners, but since it never did obtain property in the bunkers (because it did not pay RMUK), it could not transfer it to the owners. It was therefore unable to recover the price.

16. Mr. Bright Q.C. submitted that the judge's analysis, and that of the arbitrators, was correct. It is quite natural, he submitted, for commercial parties to describe a contract of this kind as one of sale, since it involves the delivery of goods to the owners for their immediate use in return for payment at a future date of a specified sum of money. However, neither party envisaged property in the goods to which the contract related (or at any rate the majority of them) would be transferred to the owners, because they assumed that some or all of them would or might have been consumed, and would therefore have ceased to exist, by the time payment fell due.

17. I accept that the language of OWBM's standard terms, reflected in the order confirmation and invoice, suggests that the parties were thinking in terms of a sale and purchase of the bunkers that were to be supplied under the contract, but I agree with the judge that in order to decide whether the owners have been relieved of any liability to pay the agreed sum to OWBM it is necessary to identify carefully the obligations which the parties have undertaken. Mr. Cogley set out to establish that the Sale of Goods Act applied to this contract and from there to argue that OWBM could not recover the sum alleged to be due because it had not transferred property in the goods to the owners. In my view, however, that is to approach the question from the wrong end. The first question is 'What have the parties undertaken to do?' If one party has agreed to transfer property in goods to another in return for a money payment, the contract will be one for the sale of goods and the incidents described in the Sale of Goods Act will apply to it. One of those is that the contract will be subject to an implied condition that the seller has a right to sell the goods or will have such a right at the time when property is to pass (section 12(1)). An inability to transfer property at the agreed time amounts to a breach of condition and a total failure of consideration. As a result the seller cannot recover the price, or, if he has already received payment, the buyer may recover it: see *Rowland v Divall* [1923] KB 500, to which the judge referred. If, however, the transfer of property is not of the essence of

the contract, it is necessary to ask oneself, as the judge did, what was the essential benefit for which the owners agreed to pay.

18. Mr. Cogley's submission that the owners had contracted for the transfer of title to the bunkers and that the contract was therefore an agreement to sell within the meaning of section 2(1) of the Sale of Goods Act derived its force almost entirely from the descriptive language used in OWB's standard terms, but it paid little heed to their detailed provisions, in particular those of section H. In support of his argument Mr. Cogley drew our attention to the recent decision in *Arnold v Britton* [2015] UKSC 36, [2015] 2 W.L.R. 1593, in which the Supreme Court cautioned against making too free a use of business common sense and commercial context in order to give to a contract a meaning that its language cannot properly bear. I entirely accept that it is no part of the court's function in the guise of interpretation to remake the parties' contract in a way that seems to improve its operation or mitigate unfortunate consequences for one or other party. However, that is not what the court is being invited to do in this case. The question is simply whether the characterisation by the parties of the contract as one of sale adequately reflects the substance of the obligations to which it gives rise. Just as it is no part of the court's function to remake the parties' contract in the guise of interpretation, so it is no part of the court's function to shoehorn their contract into a category to which it does not properly belong in order to impose on them consequences which they did not intend. I agree with the judge, therefore, that, however the parties have described the transaction, it is necessary to ascertain what each of them has actually undertaken to do.

19. Mr. Cogley sought to support his analysis by reference to the position that would exist if instead of 60 days the period of credit had been 5 days. In such a case, he argued, only a small proportion, if any, of the bunkers could be expected to have been consumed before the time for payment arrived and so the contract would obviously be an agreement to sell with property to pass on payment. In my view this example is apt to mislead, mainly because it confuses an agreement to sell the whole contract quantity with an agreement to sell only part. Whenever the contract provides that property is to pass on payment and that anything more than a minimal part of the goods may be consumed before payment is due, the parties necessarily contemplate that part of the goods may not exist at that time. In truth, therefore, it is not an agreement to sell the nominal contract quantity, but an agreement to sell whatever remains at the time of payment. It may be that in some circumstances, for example, where the parties contemplate that the overwhelming majority of the goods will continue to exist at the date when property is to pass, that the ability to transfer property in the remainder will be of fundamental importance and an inability to do so will amount to a total failure of consideration or a breach which goes to the root of the contract, but that is not this case. In some circumstances, therefore, the commercial context may be of importance in deciding what the parties have undertaken to do, but in the present case I do not think it necessary to look far beyond the terms of the contract themselves, although the commercial context as set out in the assumed facts supports the conclusion to which, in my view, the terms of the contract themselves point.

20. The critical terms, in my view, are to be found in the agreement for 60 days credit and in clauses H.1 and H.2, which provide that property in the bunkers is not to pass until they have been paid for in full but that the owners have the right to use them for the

propulsion of the vessel from the moment of delivery. Insofar as the commercial context has any bearing on the interpretation of these provisions, it is to be found in the fact that the parties contemplated that a large part, if not all, of the bunkers would or might be consumed within 60 days of delivery and as a result would cease to exist. As I have pointed out, the extended period of credit for which the contract provided made it more than usually likely that the majority of the bunkers would have been consumed by the time payment became due.

21. In paragraph 42 of his judgment the judge identified the essential constituents of the contract as follows:

> "42. . . .the combined effect of (1) the retention of title clause, (2) the period of credit before payment fell due, (3) the permission given to the Owners to consume the bunkers, and (4) the fact that some or all of the bunkers supplied were likely to be consumed before the expiry of the credit period with the consequence that property therein would cease to exist, means that the parties must be taken to have understood that it was likely that title would never be transferred to the Owners. It was possible that it would be, but not likely. It was certainly not an essential part of the transaction that it should be. As Atkin LJ said in the well-known case of *Rowland v Divall* [1923] KB 500, "the whole object of a sale is to transfer property from one person to another". In the present case, however, the combination of features listed above means that it cannot have been the object of the contract to transfer property from OWBM to the Owners: both parties knew that this was unlikely ever to happen. Even if it did, because some bunkers remained unconsumed after 60 days, that was not fundamental to the transaction."

22. He continued:

> "43. . . . It stands to reason that what the Owners were paying for was not a title which they were never going to get, but something else."

23. The judge then turned to consider what the owners had agreed to pay for and said:

> "46. . . . In my judgment the true nature of the parties' bargain was that OWBM would deliver or arrange for delivery of the bunkers, which the Owners would be immediately entitled to use for the propulsion of the vessel."

24. In an attempt to rebut that analysis Mr. Cogley drew our attention to the decision in *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] 1 Ch. 25, in which the plaintiff sold a quantity of resin to the defendant for use in the manufacture of

chipboard. The contract contained a reservation of title clause, but both parties contemplated that the resin would be used in the process of production before it had been paid for, as indeed occurred. He pointed out that all those involved in that case treated the contract as one for the sale of goods and therefore as governed by the Sale of Goods Act. That may be true, and it is right to acknowledge that at page 35 D-E Bridge L.J. described the contract as "essentially one of sale and purchase, subject only to the reservation of title clause, whatever its effect may have been." However, he did so in the course of rejecting the sellers' argument that the contract was simply one of bailment (*ibid*). The issue before the court was not the same as that which arises in this case; the only question for decision was whether the supplier had obtained title to the chipboard into which the resin had been incorporated. The court held that it had not. It would have been surprising, however, if the seller had not been entitled to recover the amount due under the contract and there is nothing in the decision which suggests that it was unable to do so. That question simply did not arise. I do not consider, therefore, that the case supports Mr. Cogley's submission. The decision is important for another reason, however. As Bridge L.J. made clear, the resin ceased to exist when it was incorporated into the new product and property in it ceased to exist at the same time, because it is not possible to own something that does not exist: see page 35G. That has serious implications for Mr. Cogley's submission that property in the whole of the bunkers passed to the owners at the time of payment, despite their prior consumption.

25. Mr. Cogley also referred to other decisions involving retention of title clauses, in particular, *Clough Mill Ltd v Martin* [1985] 1 W.L.R. 111, *Armour v Thyssen Edelstahlwerke A.G.* 1986 S.L.T. 452, 1989 S.L.T. 182, [1991] 2 A.C. 339 and *Chaigley Farms Ltd v Crawford, Kaye & Grayshire Ltd* [1996] BCC 957. He submitted that in each of those cases the courts had treated the contract as one for the sale of goods, despite the existence of a retention of title clause and the parties' knowledge that the goods would or might be consumed before payment had been made.

26. In *Clough Mill v Martin* the plaintiff supplied a quantity of yarn to a company called Heatherdale Fabrics Ltd on terms that the goods were to remain its property until paid for in full, although Heatherdale was granted the power to sell the goods or use them for the purpose of manufacturing products. The contract also provided that if any payment were overdue the plaintiff could recover or resell the goods and enter Heatherdale's premises for that purpose. When the defendant was appointed receiver of Heatherdale the plaintiff informed him that it wished to repossess the unused yarn and asked to be allowed to collect it. The defendant refused on the grounds that the retention of title clause amounted to a charge to secure payment and was void for non-registration. On appeal, this court (Sir John Donaldson M.R. Oliver and Robert Goff L.JJ.) held that property in the yarn had not passed to Heatherdale, which could not therefore have created a charge in favour of the plaintiff. Robert Goff L.J., and to a lesser extent Oliver L.J., assumed that the contract under which the yarn had been supplied was a contract for the sale of goods to which the Sale of Goods Act applied. It was not necessary, however, for the court to consider questions of the kind that arise in this case. In particular, the court did not have to consider an argument that the company was not liable to pay for the goods it had consumed.

27. In *Armour v Thyssen* the defendant supplied steel to a manufacturing company under a contract which contained a retention of title clause. The contract was governed by German law. The plaintiffs, who had been appointed as receivers, brought proceedings against the supplier seeking a declaration that property in the steel had passed to the company, despite the fact that payment had not been made. The suppliers argued that the retention of title clause, which was valid under German law, was effective to prevent title passing, either because the steel in question had been in Germany when the contract had been entered into so that German law was the lex situs, or because the passing of title was governed by German law as the proper law of the contract. The receivers agreed that the passing of property was governed by the lex situs, but argued that, once the goods reached Scotland, Scots law governed the question and that the retention of title clause was ineffective under Scots law. They also argued that cutting the steel into strips in preparation for use in manufacture had created a new species of goods, title to which vested in the company.

28. The Lord Ordinary, Lord Mayfield, held that property had passed from the supplier to the company, but that in any event the cutting of the steel into strips in preparation for its use had resulted in the creation of a new species of goods, title to which vested in the company which had produced them. The decision was upheld on appeal by the Second Division, although doubts were expressed about the conclusion that cutting the steel into strips had resulted in the creation of goods of a different nature.

29. In the House of Lords the decision was reversed. Lord Keith, with whom Lord Griffiths, Lord Oliver, Lord Goff and Lord Jauncey all agreed, referred to sections 17 and 19 of the Sale of Goods Act 1979, which concern the time at which property passes under a contract for the sale of goods, and held that property passed when the parties agreed that it should pass and therefore not until the goods had been paid for. When rejecting the proposition that the retention of title clause made the transaction one in the form of a contract of sale which was intended to operate by way of security within the meaning of section 62(4) of the Sale of Goods Act, Lord Keith described the contract as "a genuine contract of sale", but he was not addressing the question which we are required to consider.

30. In *Chaigley Farms* the plaintiff supplied live animals to an abattoir under a contract which contained a retention of title clause. Both parties contemplated that the animals would or might be slaughtered before they had been paid for. When receivers were appointed over the abattoir the plaintiffs sought to enforce the retention of title clause in order to recover the remaining live animals and butchered meat which they alleged were their property. Garland J. held that the clause related only to live animals and that when they were slaughtered the plaintiffs' title to them was extinguished.

31. These authorities certainly tend to support Mr. Cogley's submission that the courts have consistently regarded a contract for the sale of goods which contains a retention of title clause as a contract of sale falling within the scope of the Sale of Goods Act 1979, even in cases where the buyer is given a licence to use or dispose of the goods before he has paid for them. However, as the judge pointed out, in none of those cases was the court concerned with the question whether the contract provided for property to pass retrospectively at a time when the goods or part of them had ceased to exist. The judge regarded *Armour v Thyssen* as authority for the proposition that a contract of sale containing a retention of title clause can fall within the Sale of Goods Act, but he noted that it was not a case in which the goods had been or were likely to be

consumed in a manufacturing process before payment fell due and did not consider that it determined the issue he had to decide. Mr. Cogley submitted that he ought to have regarded the decision as binding authority for the proposition that a contract of this kind is always to be regarded as an agreement to sell the whole of the contract quantity, with the consequence that unless the seller is able to transfer property in the goods he cannot recover the price.

32. In the light of these authorities Mr. Cogley submitted that the contract in the present case was properly to be understood as an agreement to sell the full contract quantity of bunkers on terms that property was to pass on payment, even if they had been consumed in whole or in part by the time payment fell due. The difficulty with that submission, however, is that in a case such as the present it is no longer possible to transfer property in goods once they have ceased to exist: see *Borden v Scottish Timber*; and even if the goods have been only partly consumed, it is not possible to transfer title in the whole of the goods covered by the contract. Another approach might be to treat the contract as one for the sale of all the goods with the risk of loss passing to the buyer at the time of delivery, but that does not assist Mr. Cogley either. The consumption of the goods in a manner contemplated by the contract cannot properly be regarded as loss due to the occurrence of a risk and in any event the seller can still pass property only in those goods which remain in existence at the time of payment. Mr. Cogley sought to answer that objection by submitting that, on payment in full, title passed retrospectively from OWBM to the owners, alternatively that OWBM became estopped from denying that property in the bunkers had been vested in the owners at the time when they were consumed. In my view that is an artificial analysis which reflects neither the terms of the contract nor commercial reality.

33. On this point also I agree with the judge. Whatever label one attaches to the contract (and I see nothing incongruous in describing it in commercial terms as a contract for the sale of goods), its essential nature is in my view reasonably clear. 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. That may not satisfy the definition of a contract of sale of goods in section 2(1) of the Sale of Goods Act, but there is no reason why the incidents of a contract of sale of goods for which the Act provides should not apply equally to such a contract at common law, save to the extent that they are inconsistent with the parties' agreement. The difficulties in the present case stem entirely from the owners' attempt to establish that the consideration for the payment of the price was the transfer of property in the whole of the goods to which the contract related, despite the fact that that does not correspond to the express terms of the contract relating to the use of the goods and the passing of title. The commercial background and the terms of the contract make it clear that what the owners contracted for was not the transfer of property in the whole of the bunkers, but the delivery of a quantity of bunkers which they had an immediate right to use but for which they would not have to pay until the period of credit expired. From the suppliers' point of view the retention of title clause provided an ever diminishing degree of security for the payment of what was due to them. Since the contract provided for the transfer to the owners of property in any part of the bunkers remaining at the time of payment, it was to that extent a contract for the sale of goods to which the Act, including the implied condition in section 12, applied. A failure to

pass title to any residue remaining at the time of payment would therefore involve a breach of contract, but it would not be one which entitled the owners to treat the contract as a whole as discharged, unless (contrary to all expectations) it represented such a large proportion of the quantity originally delivered that there could be said to have been a total failure of consideration.

34. For these reasons I agree with the judge that the transfer of property in the bunkers from OWBM to the owners was not the essential subject matter of the contract and that a failure to transfer property in the bunkers, all of which had been consumed when the period of credit expired, did not relieve the owners of the obligation to pay for them.

Implied term

35. The judge held that as a matter of necessary implication the contract imposed on OWBM an obligation to ensure that the licence which it gave the owners to use the bunkers immediately upon delivery was or became binding on whichever entity in the supply chain was or would become the owner of the goods. Mr. Cogley submitted, however, that an implied term to that effect was unworkable. He argued that if the contract could not be brought within the Sale of Goods Act, the judge ought to have held that it was subject to an implied term that OWBM had performed all the obligations arising under its contract with its own supplier.

36. I have to say that I had some difficulty in understanding the precise content of the implied term for which Mr. Cogley contended. In the grounds of appeal it is said that the judge ought to have held that the contract was subject to an implied term equivalent to that contained in section 12(1) of the Sale of Goods Act, but that imposes on the seller an obligation to ensure that he has a right to sell the goods at the time when property is to pass. It does not help one to identify when or in respect of what goods that is intended to occur. At one point in the course of argument in response to a question from the Bench Mr. Cogley said that it was an implied term, based on the retention of title clause, that at the time of delivery of the bunkers OWBM had paid for them and that title to the goods had passed to it. However, that is plainly not what the parties contemplated, since it is common knowledge in the industry that bunkers are normally sold on 30 days' credit and no one would have expected OWBM to pay its own supplier on or before delivery. Later, when asked to repeat his submission, Mr. Cogley said that it was an implied condition of the contract that OWBM would comply with its obligations to the party above it in the chain (in this case OWBAS), in particular by paying for the goods on expiry of the relevant period of credit. In my view there is no need to imply a term of that kind, which does not accurately reflect the essential nature of the contract. Under a contract of this kind the owners bargain for the right to consume the goods before property has passed to them and if they obtain an efective licence to do so binding on the various parties in the supply chain, an implied condition of the kind postulated by Mr. Cogley is both unnecessary and inappropriate.

Owners' liability to pay for the bunkers

37. As the judge pointed out in paragraph 49 of his judgment, the arbitrators held that the transfer of property in the bunkers was not fundamental to the parties' contract and that the Sale of Goods Act therefore did not apply. They also held that OWBM had a

claim under the contract to recover the price of the goods (Issue 6) and that on the basis of the assumed facts OWBM did not appear to be in breach of any implied term, whether analogous to that contained in section 12 of the Sale of Goods Act or otherwise (Issue 13). In substance (although they did not express themselves in quite this way), the arbitrators held that the owners had got substantially what they had agreed to pay for and that they had failed to identify any breach of contract on the part of OWBM. On the face of it, therefore, it would seem that in the arbitrators' view the owners were liable to pay for the bunkers. It may be that that was assumed to be a necessary consequence of deciding the preliminary issues as they did, but the owners' liability to pay was not formally one of the issues for decision and it may be that other matters have been raised in the arbitration which have a bearing on that question.

38. In those circumstances I think the judge was wrong, strictly speaking, to hold that it was necessary for him to decide whether on the assumed facts OWBM had succeeded in obtaining the permission of RMUK for the owners to consume the bunkers, (or, as I would prefer to put it, whether OWBM effectively authorised the owners to consume the bunkers so as to bind RMUK and any other suppliers in the chain). The owners' case before the arbitrators was that they were not liable to pay OWBM because the contract was one for the sale of goods and property in the goods had not passed to them. They do not appear to have advanced the alternative argument that, if the nature of the contract was that for which OWBM contended, they were not liable to pay because they had not been authorised to consume the bunkers in a manner which bound RMUK and other suppliers in the chain. Whether they should be allowed to do so at this stage is probably a matter that ought to have been left to the arbitrators.

39. In the event, however, having formed the view that it was necessary for him to decide the question, the judge held that RMUK was bound by the licence to use the bunkers for the propulsion of the vessel given to the owners by OWBM in its standard terms. The owners did not seek to challenge that aspect of the judge's judgment; their grounds of appeal and skeleton argument were directed entirely to the issues surrounding the construction of the contract between themselves and OWBM.

40. The submissions filed by RMUK, on the other hand, were directed primarily to the question whether it was bound by the licence to consume the bunkers pending payment contained in clause H.2. RMUK's position in these proceedings, in which it is described as an interested party, is not entirely clear and may have to be considered on another occasion. It is enough for present purposes, however, to say that, although Mr. Bright Q.C. touched on this aspect of the case and identified the propositions on which he would rely, we did not hear Mr. Cogley on this question and I therefore prefer to express no view on it.

41. For these reasons I would dismiss the appeal to the extent of holding that the failure of OWBM to transfer title in the bunkers does not release the owners from their obligation to pay for them. If my Lords are in agreement, I would invite submissions from counsel about the appropriate way in which to give effect to our decision.

Lord Justice Longmore :

42. I agree with my Lord's judgment.

43. I only add that section 2(1) of the Sale of Goods Act 1979 to which my Lord refers in paragraph 33 of his judgment provides:-

> "A contract of sale of goods is 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."

Section 49(1) relates to an action for the price and provides:-

> "Where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods."

These sub-sections complement one another by providing that the Act applies to a contract to transfer property in goods and that an action for the price is maintainable once property is transferred.

44. That does not mean that there cannot be comparable agreements which may, as my Lord says in the same paragraph, be described in commercial terms as contracts for the sale of goods but are contracts to which the 1979 Act does not apply. The delivery of bunkers with a licence to consume them is just such a contract. Once the bunkers were delivered, the owners incurred an obligation to pay and were not released from that obligation by the fact that OWBM were unable to (and did not) transfer title before they were consumed.

Lord Justice McCombe :

45. I agree with both judgments.