PST Energy 7 Shipping LLC and another (Appellants) *v* O W Bunker Malta Limited and another (Respondents)

before

Lord Neuberger, President
Lord Mance
Lord Clarke
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

11 May 2016

Heard on 22 and 23 March 2016

Appellants	*Respondents*
Jonathan Crow QC	Robert Bright QC
Stephen Cogley QC	Marcus Mander
Julian Kenny QC	Clara Benn
Liisa Lahti	(Instructed by Allen
(Instructed by Ince & Co LLP)	& Overy LLP)

LORD MANCE: (with whom Lord Neuberger, Lord Clarke, Lord Hughes and Lord Toulson agree)

Introduction

1. 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.

2. 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.

3. The bunkers in this case were supplied to the vessel in the Russian port of Tuapse in the Black Sea on 4 November 2014. They were ordered on 31 October 2014 by the appellants, who are respectively owners and managers of the vessel and can be treated as one and referred to simply as the Owners. The immediate bunker supplier was the first respondent, OW Bunker Malta Ltd ("OWBM"), which obtained the bunkers under a contract with its parent company, OW Bunker & Trading A/S ("OWBAS"), another member of the OW Bunker Group, which was at the time the world's largest bunker supplier and is now insolvent. OWBAS in turn obtained them from Rosneft Marine (UK) Ltd ("RMUK"), which itself obtained them from an associate, RN-Bunker Ltd ("RNB"), which had facilities in Tuapse and made the actual delivery. On 6 November 2014, OWBAS announced that it was applying to the court in Aalborg for restructuring. The second respondent, ING Bank NV ("ING") financed the OW Bunker Group and claims as assignees of any claim which OWBM has against the Owners.

OWBM's contract with the Owners

4. OWBM's supply contract with the Owners described itself as being for sale and delivery ex barge of 110 mt of gasoil at a price of USD 848 per mt and 1000 mt of fueloil at a price of USD 359 per mt (a total of USD 443,800), with "Payment within 60 days from date of delivery upon presentation of invoice". But it was expressly subject to the OW Bunker Group's general terms (said in OWBM's printed Sales Order Confirmation to be "well known to you" and to be published on OWBM's website).

5. The general terms start with the following "General Introduction":

"A.1 This is a statement of the terms and conditions according to which the International OW Bunker Group (hereinafter called 'OWB') will sell marine bunkers.

A.2 These conditions apply to all offers, quotations, orders, agreements, services and all subsequent contracts of whatever nature, except where otherwise is expressly agreed in writing by OWB."

Clause P.1 provides for the agreement to be governed by English law and for arbitration in London of all disputes arising in connection with it.

6. Clause G.12 under the heading Delivery provides:

"Delivery shall be deemed completed and all risk and liabilities, including loss, damage, deterioration, depreciation,

contamination, evaporation or shrinkage to the Bunkers delivered and responsibility for loss, damage and harm caused by pollution or in any other manner to third parties shall pass to the Buyer from the time the Bunkers reach the flange/connecting pipe line(s)/delivery hoses provided by the Seller on the barge/tank truck/shore tank."

Clauses H.1 and H.2 provide in summary that "until full payment" of all amounts due to OWBM, title and property rights were reserved to OWBM and "the Buyer" was 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 full wording of clauses H.1 and H.2 is as follows:

"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 and subject to article G.14 hereof, 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 "Vessel" is defined by clause B.1 of the terms as meaning

"the Buyer's Vessel, Ship, Barge or Off-shore Unit that receives the supply/bunkers; either as end-user or as transfer unit to a third party."

7. It is unnecessary to consider whether the recognition in clause B.1 that the vessel might serve as a "transfer unit to a third party" fits with the prohibition in clause H.2 of sale, alienation or surrender of the bunkers to any third party or other vessel. That situation is not in question here. 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.

RMUK's contract with OWBAS

8. OWBAS's purchase from RMUK priced the gasoil and fueloil at respectively USD 333 per mt and USD 830 per mt (a total of USD 416,000), and required "payment within 30 days from date of delivery against hard copy of invoice". The purchase was subject to RMUK's terms and conditions, clause 10 of which provided, inter alia:

"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. 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."

There was no express provision regarding consumption, but on the facts being assumed for the purposes of this case, RMUK was aware that the bunkers were being purchased for resale at a profit, that the OW Bunker Group's terms would be likely to include provisions to like effect to clauses H.1 and H.2 set out in para 6 above and that the bunkers were being purchased for immediate use and might be wholly or partly consumed within both the 30-day credit period allowed by RMUK and the 60-day credit period allowed by OWBM. Having contracted to supply the bunkers to OWBAS, RMUK then entered into a contract with RNB, under which RNB agreed to sell the bunkers to RMUK for delivery in accordance with the contract between RMUK and OWBAS.

The assumed facts

9. On the assumed facts, the Owners availed themselves of the right to consume the bunkers in the vessel's propulsion - and did so both within and, quite probably after, the 30 and 60-day periods allowed for payment under the contracts between respectively RMUK and OWBAS and OWBM and the Owners. The bunkers were in the event totally consumed without any payment ever being made by OWBM or OWBAS to RMUK. RMUK on the other hand paid RNB in accordance with its contract with RNB on 18 November 2014. On the day before doing so, RMUK, having become aware that it might not receive payment from OWBAS, sent a "Demand of Payment" to the Owners, asserting that it remained the owner of the bunkers and requesting immediate payment

from the Owners of USD 416,000, the amount which it had invoiced to OWBAS. The Supreme Court was given no indication that RMUK has since then taken any formal steps to pursue this claim against the Owners.

The proceedings to date

10. By the end of November 2014, the Owners had commenced arbitration proceedings claiming a declaration that they had no liability to pay OWBM and/or ING for the bunkers. The parties agreed to submit a raft of detailed preliminary issues to the arbitrators (David Farrington, Ian Kinnell QC and Bruce Harris), and for the purposes of such issues agreed a series of assumed facts. The arbitrators, after a four-day hearing, wrote an admirably analytical award dated 16 April 2015, giving their reasons for answers to each of such issues set out in its appendix 1 and holding inter alia that, on the assumed facts, OWBM/ING would be entitled to payment.

11. The parties having agreed that this award on preliminary issues should be the subject of appeals on both sides without leave pursuant to section 69(2)(a) of the Arbitration Act 1996, Flaux J gave directions accordingly on 8 May 2015, and the matter came on 7 to 9 July 2015 before Males J, who with notable speed produced his judgment on 14 July 2015. He dismissed the Owners' appeal, but went on, obiter, to express his opinion on an appeal by OWBM/ING, which would only have arisen for decision had the Owners' appeal succeeded. Males J then gave the Owners permission to appeal to the Court of Appeal, while refusing OWBM/ING permission to go to the Court of Appeal on their cross-appeal. The Court of Appeal (Moore-Bick V-P, Longmore and McCombe LJJ) on 22 October 2015 dismissed the Owners' appeal. The Supreme Court granted permission to appeal on 11 February 2016.

The issues and the award in more detail

12. The arbitrators were evidently invited to treat the assumed facts as accepting that all the bunkers were used within the 60-day credit period allowed by OWBM to the Owners (see para 42 and footnote 18 to their award). But their reasoning was wide enough to cover what the Supreme Court has been told may be the actual position, which is that at most that part of the bunkers were so used, with any remainder being used later. Addressing OWBM's cross-claim for the price, the arbitrators noted that section 2(1) of the Sale of Goods Act 1979 provides that:

"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."

Further, section 49 provides that:

"(1) 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.

(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract."

The arbitrators noted in footnote 7 to para 31 of their award that, if the contract was one of sale, then, according to authority binding on them, section 49(1) precluded recovery of the price of goods in circumstances where the property in goods had not passed to the buyer.

13. The authority to which they were referring is *F G Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd* (often referred to as "*Caterpillar*") [2014] 1 WLR 2365. This is an authority the correctness of which OWBM/ING would, if necessary, wish to challenge in the Supreme Court on this appeal. It is in dispute whether it is open to them to do so, in the light of the issues as addressed to and answered by the arbitrators as well as in the light of Males J's refusal of permission to OWBM/ING to cross-appeal from his judgment to the Court of Appeal. Because of this dispute, it will be necessary to give an account of the arbitrators' reasoning, award and answers to the preliminary issues which is fuller than it would otherwise have been.

14. Having rejected section 49(1) as a basis for recovery of the price, the arbitrators considered and rejected three other ways in which OWBM suggested that it could recover the price of the bunkers if treated as sold within the Sale of Goods Act: (i) under section 49(2), as being "payable on a day certain irrespective of delivery"; (ii) under section 50, as damages for non-acceptance; and (iii) on the basis that property passed for or in a nanosecond, as and when the bunkers went up in smoke. These being points raised by OWBM's cross-claim, for which permission to appeal was refused by Males J, none of them is before the Supreme Court.

15. Taking stock, the arbitrators considered that they could now answer certain of the agreed preliminary issues. They could answer issues 1, 2 and 3 to the effect that, on the assumed facts, OWBM never had property in the bunkers at any material time, and that the retention of title clause in its terms (in any event) prevented property passing to the Owners. On that basis, issue 4 then required the arbitrators to determine

"what is the consequence in respect of any claim that OWBM may seek to assert:

(a) for the price under section 49 or section 50 of SOGA 1979; or

(b) otherwise under the Contract; or

(c) in bailment; or

(d) in restitution; or

(e) in tort?"

They held that they could answer issue 4(a) to the effect that "No such claim could succeed", and issue 8, asking whether section 49(2) applied, with a simple "No".

16. On that basis, the arbitrators said (para 45) that it was now convenient to turn attention to issue 4(b). This, they said,
"concerns the possibility that [OWBM/ING] have a contractual claim falling outside constraints of [the Sale of Goods Act], and involves looking again at the contractual relationships between the parties, and in particular at that between OWBM and the Owners."
In answering this issue, the arbitrators said (para 46):
"If, as we believe we must, we accept that section 49 of SOGA rules out the possibility of a claim against the Owners for the price of the bunkers supplied to the Vessel, and, as seems more obviously the case, that section 50 offers no alternative, does this also rule out the possibility of there being some other contractual remedy against the Owners arising out of their failure to pay OWBM's invoice? The Owners have suggested that the answer to this question is 'Yes'. We do not agree. Whether or not one chooses to describe the contract between these two parties as a 'hybrid contract' is, we consider, probably neither here nor there (although we would prefer to describe it - and no doubt others like it - as sui generis), but to suggest that the remedies that may follow from the failure to comply with its terms are solely and irrevocably those within the gift of SOGA appears to us to be unacceptable and quite unreal."

17. In the next para (para 47), they continued:

"If all had gone in accordance with the parties' expectations (and, of course, the Owners had had previous dealings with OWB Group companies), the Owners would have paid OWBM's invoice within the 60-days credit period. We are quite confident, that, when they did so, it would not have crossed anyone's mind to enquire what bunkers had been consumed meanwhile in order to determine whether the invoice was being paid wholly or in part under a contract of sale (in respect of unconsumed bunkers), or otherwise (in respect of consumed bunkers). Regardless of the situation on board the Vessel, both parties would in our opinion understand that payment was being made simply in accordance with the express terms of the contract, which would have been the case. There is in our view no challenge to the provisions of SOGA or their effect in reaching the conclusion that we have unhesitatingly reached that, on the assumed facts, once the 60-days period of credit had elapsed the Owners were in breach of contract, the remedy for which was a claim in debt. We have seen nothing in the authorities to suggest that this simple and straightforward conclusion is incorrect."

18. The arbitrators concluded that this reasoning enabled them to answer issues 4(b) and 6(a). Issue 6(a) was whether "to the extent not resolved by the determination of issue 4" OWBM/ING had a claim under the contract. However, they added "we have to say that we find the relationship (if any) between issues 4 and 6 somewhat unclear" (para 48). They went on to say that "we believe that we can at this point also tackle issue 9". Before doing so they addressed issue 5, rejecting OWBM's case that their supply to the Owners contained various implied terms, now no longer relied on. Turning to issue 9, this asks:

"Did [the Sale of Goods Act] apply to the Contract between the Owners/OWBM in any event and if not what is the effect on the parties' respective claims?"

The arbitrators gave the straightforward answer: "No, and none".

19. In the light of this answer, the arbitrators concluded that they

could deal shortly with issues 10 to 13, saying (para 53):
"As to Issue 10, OWBM was not required to own or to have property in the bunkers at the time of delivery because the contract between OWBM and the Owners did not require this. There was no 'modification' of the requirements of SOGA because SOGA did not apply and its terms were not engaged. As to Issue 11, there was no such requirement. As to Issue 12, no terms were implied into the contract by virtue of section 12 of SOGA. And, finally, as to Issue 13, in so far as there were no such implied terms as suggested, there were none to be breached. It is unclear what, if any, other breaches of contract by OWBM are alleged, but none appears to have been established."

20. Issues 10 to 13 and the answers given read as follows:

"10. Do the OWBM T&Cs, on a true and proper construction, modify the requirements of section 12 of SOGA 1979 such that OWBM was required to own or have property in the Bunkers at the point of delivery?
ANSWER: The OWBM T&Cs did not modify section 12 of SOGA 1979, but, under the Contract between the Owners and OWBM, OWBM was not required to own or have property in the Bunkers at the point of delivery, and section 12 did not apply.
11. If not, what is the requirement imposed by the Contract, on a true and proper construction, regarding the title OWBM is required to pass to the Owners?
ANSWER: There was no such requirement.
12. What terms were implied into the Contract by virtue of section 12 SOGA?
ANSWER: None, because section 12 did not apply.
13. Is OWBM in breach of Contract, and in particular the implied terms referred to at Issue 12 above (or any of them) and if so in what way?
ANSWER: As there were no terms implied into the Contract by virtue of section 12 SOGA, there were none to be breached. No other breaches were specified, and on the basis of the Assumed Facts, none appears to have been established."

The proceedings in court in more detail

21. Males J in dismissing the Owners' appeal held that OWBM's contract to supply bunkers to the Owners was not a contract to which the Sale of Goods Act applied, but was a contract containing a condition whereby OWBM undertook that the Owners would have the lawful right to use any bunkers which they in fact used pursuant to the liberty they were given by its terms (paras 48 and 52). He held that it was not subject to any further condition as regards the passing of property in any bunkers used. OWBM/ING's cross-appeal, to recover the price under section 49 of an equivalent sum by way of damages, did not on this basis arise, but Males J nonetheless expressed some views on it, obiter. He thought (paras 66 and

74) that if the Act applied, that could only be because OWBM undertook, in the terms of section 2(1), "to transfer the property in goods to the buyer", that it had failed to do so and was therefore (subject to two now immaterial arguments) in breach of the implied term contained in section 12(1), and that that would represent a total failure of consideration which, applying *Rowland v Divall* [1923] 2 KB 500, would provide the Owners with a defence to a claim for the price. Apart from this problem, he said that he would, however, have disagreed with the arbitrators on one point relating to the cross-claim, in that in his view the credit terms would have satisfied the language of section 49(2). Having expressed these views, he refused permission, as already stated, in respect of the Owners' cross-appeal.

22. The issues argued before the Court of Appeal were thus effectively limited to two: (1) Was the contract a contract of sale within the meaning of section 2(1) of the Sale of Goods Act? (2) If not, was it subject to any implied term that OWBM would perform or had performed its obligations to its supplier, in particular by paying for the bunkers timeously? Like the judge, the Court of Appeal was bound by the *Caterpillar* decision, so that it could have done no more than hold that section 49 of the Sale of Goods Act barred any claim to the price by OWBM if the contract was subject to the Act, even if that point was open and had arisen, for consideration.

23. The Court of Appeal agreed substantially with the judge in answering the two main questions before it in OWBM/ING's favour. However, as appears from the following key passage in its reasoning, it also contemplated that the contract would or might be a contract of sale pro tanto to the extent that payment was made at a time when any part of the bunkers remained unconsumed. Moore-Bick V-P, giving the main judgment, with which the other members of the court agreed, said:

"33. … 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 1979 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."

The issues before the Supreme Court

24. The issues on the Owners' appeal to the Supreme Court remain as argued before the Court of Appeal and set out in para 22 above. But, in seeking to uphold the decisions of the courts below, Mr Robert Bright QC for OWBM/ING submits that it is open to OWBM/ING to rely on a point which was not open to his clients in those courts. That is that the decision of the Court of Appeal in the *Caterpillar* case, mentioned in para 13 above, was wrong and should be overruled. The correct position is, he submits, that, even though a contract is categorised as one of sale within the Sale of Goods Act, section 49 should not be read as excluding all possibility of claims to the price of goods sold, if the contract so provides, even though the circumstances cannot be brought within either of subsections (1) and (2). Whether this submission is open to OWBM/ING is, as I have stated in para 13 above, in dispute.

25. For the Owners, Mr Jonathan Crow QC makes five basic, though over-lapping, submissions about the nature of the contract. This, he submits, is a matter of substance, not form. Second, it must be determined at the date when the contract is made. Third, it depends on what the parties then agreed, not what happened subsequently or what they expected they might do subsequently. Fourth, the question must be answered once and for all, and fifthly it must be answered by reference to the statutory test set out in section 2(1) of the Act, not by "reverse engineering", by which Mr Crow meant: not because the consequences of recognising the contract as one of sale within the statutory definition might seem unpalatable.

Analysis of the nature of the contract

26. Mr Crow's first proposition is well-established and needs no great elaboration: see eg *Stoneleigh Finance Ltd v Phillips* [1965] 2 QB 537 (CA). An agreement may also be in substance a contract of sale, even though it has ancillary aspects, eg for after-sales services, which do not involve the passing of property and are not by themselves sale. Here, Mr Crow is able to point out that the basic form and language of the contract is that of sale. That is true, as far as it goes. But clauses A.1 and A.2 make clear that sale may here be used in an expanded sense, since the general terms are to apply to all agreements and services and all subsequent contracts "of whatever nature", and "Buyer" is under clause B.1 a defined term which includes "any party requesting offers or quotations for or ordering Bunkers *and/or Services*" (emphasis added). Even apart from that, however, clauses H.1 and H.2 make clear that the contract has special

features. First, they expressly provide not only for retention of title pending payment, but also expressly that, until such payment, the "Buyer" is to be in possession of the bunkers "solely as Bailee for the Seller". After going on to provide that the Buyer "shall not be entitled to use the bunkers", the terms introduce the qualification "other than for the propulsion of the Vessel".

27. The qualification clearly reflects a reality. Bunker suppliers know that bunkers are for use. If they grant relatively long credit periods combined with a reservation of title pending payment in full, it is unsurprising that they do so combined with an express qualification authorising use in propulsion, since standard terms prohibiting any use would be uncommercial or in practice, no doubt, simply ignored. Mr Crow vigorously resisted the introduction of any such considerations, on the basis that they are speculative and that the nature of a contract cannot change according to the level of certainty with which parties are to be taken to have expected that bunkers supplied might or might not be used in propulsion before payment for them was made. But OWBM's (and RMUK's) contractual terms and the assumed facts (particularly paras 13, 20 and 30) - together with an admissible modicum of commercial awareness on the court's part about how ships operate (and in particular how owners strive to keep them operating) and about the value of credit and the likelihood that full advantage of it will be taken - all point in one direction. They demonstrate that the liberty to use the bunkers for propulsion prior to payment is a vital and essential feature of the bunker supply business.

28. In these circumstances, OWBM's contract with the Owners cannot be regarded as a straightforward agreement to transfer the property in the bunkers to the Owners for a price. It was in substance an agreement with two aspects: first, to permit consumption prior to any payment and (once the theory of a nanosecond transfer of property is, rightly, rejected) without any property ever passing in the bunkers consumed; and, second, but only if and so far as bunkers remained unconsumed, to transfer the property in the bunkers so remaining to the Owners in return for the Owners paying the price. But in this latter connection it is to be noted that the price does not here refer to the price of the bunkers in respect of which property was passing, it refers to the price payable for all the bunkers, whether consumed before or remaining at the time of its payment.

29. A contract of sale may under section 2(3) of the Act be either absolute or conditional; and under section 2(6) "An agreement to sell becomes a sale when … the conditions are fulfilled subject to which the property in the goods is to be transferred". Mr Crow submits on this basis that the contract can be regarded as an agreement to transfer property, conditional on the bunkers remaining unburned when payment is made.

The difficulties with this submission are that:

i) it categorises the whole agreement by reference to only one possibility relating to only one part of the bunkers covered by the agreement, namely the possibility of at least some bunkers surviving unused, after 60 days or whenever payment is made. Sections 2(3) and (6) can readily be applied where there is a condition regarding the passing of property to which all the goods covered by an agreement are subject, but that is not the case here;

ii) it ignores the fact that there is no condition governing the transfer of property in the bunkers used before payment - the property in bunkers consumed never passes and is never agreed to be passed; and

iii) it focuses on the agreement to pass property in the bunkers surviving at the time of payment, when the agreement was a single contract to pay a single "price" for all the bunkers sold not later than 60 days after delivery, whatever had happened to such bunkers in the meantime; the agreement is a single agreement which cannot sensibly be treated as divisible. As the arbitrators said, aptly, in para 47 of their award quoted in para 17 above, in the ordinary course when Owners paid OWBM's invoice after 60 days:

"it would not have crossed anyone's mind to enquire what bunkers had been consumed meanwhile in order to determine whether the invoice was being paid wholly or in part under a of sale (in respect of unconsumed bunkers), or otherwise (in respect of consumed bunkers)."

30. Mr Crow sought to avoid some of these difficulties by submitting at one point that the agreement could be analysed as one of sale, under which OWBM undertook that at the date of payment they would transfer property in any bunkers then remaining and that they could and would also have transferred property in any bunkers already consumed, had they not been consumed. That submission certainly has a metaphysical aspect. But it makes in my view neither legal nor commercial sense. All that mattered for the Owners was that they should have and had the right to consume the bunkers in the vessel's propulsion as and when they did so prior to payment, and that upon payment they would acquire the property in, and thereby an absolute right to dispose of or use as they wished, any remaining bunkers.

31. For similar reasons to those given in the preceding three paragraphs, I would also reject the Court of Appeal's suggestion in para 33 of its judgment, quoted in para 23 above, that the contract can be analysed

as a contract of sale to the extent that it provided for the transfer of property in any part of the bunkers remaining at the time of payment. That is again to divide up a single agreement covering the supply of all the bunkers (gasoil and fueloil) at a single price for each, irrespective of what had happened to them. However, I fully accept that, viewing in isolation the position of any bunkers remaining at the time of payment, the transaction relating to them is closely analogous to a sale. I also accept that, both as regards bunkers consumed and as regards any bunkers remaining at the time of payment, the contract, although not one of sale, would contain similar implied terms as to description, quality, etc to those implied in any conventional sale.

32. The above analysis is consistent with the approach taken by the Court of Appeal in the somewhat complicated case of *Harry & Garry Ltd v Jariwalla* [1988] WL 1608652. The English buyers, Harry & Garry, had under contracts of sale received a quantity of sarees which they found defective and in respect of which they had not yet accepted the relevant bills of exchange, by reference to which, it appeared, the Indian sellers, the Jariwallas, had however already succeeded in raising some monies in India. In these circumstances, Harry & Garry agreed to accept the bills, so acquiring property in the sarees, while the Jariwallas agreed either to arrange the cancellation of the bills or to take back and pay for the sarees. Under this agreement, 2,494 sarees were then selected as sarees which the Jariwallas would, as they did, take back physically, and it was agreed that the Jariwallas would pay £46,763.45 for such sarees, with property being retained by Harry & Garry until this full amount was paid. Through a Mr Shah, the Jariwallas sold some 411 of these sarees, evidently with the consent of Harry & Garry despite the reservation of title. Harry & Garry sued for the full £46,763.45 agreed to be paid.

33. In the court below, Judge Harris had seen the contract as being one of sale, and on that basis held that, since the circumstances did not fall within section 49(2), a claim for the price was precluded. In the Court of Appeal, Harry & Garry's appeal was allowed. Kerr LJ, giving the main judgment, noted that section 49(1) was in terms inapplicable, because of the reservation of title. But he went on to say of the judge's approach that:

"It would be ironical if that were the correct analysis. One would be driven to the conclusion that although these goods had been delivered and had been accepted, the only remedy open to the plaintiffs, if indeed they were sellers of these goods, would apparently have been a claim for damages for non-acceptance under section 50, there being no other provision of the Act which would have given the plaintiffs any remedy. With all due respect to the judge, no doubt influenced as he was by the complexity of this case and the arguments which were addressed to him, I cannot agree with that analysis for two reasons. First, in my view this was not a contract for the

sale of goods within the terms of the 1979 Act. It was not, to quote section 2(1) of the Act, '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'. Like many other contracts in complex situations, this was a sui generis transaction. In effect, what the Jariwallas agreed was that if the bills of exchange were accepted, which was their great concern, they would either have them cancelled or they would take the goods back and pay for them.

When it then came to the specific agreement about the 2,494 selected sarees, I think the nature of the agreement was that in consideration of the plaintiffs' allowing them to take that consignment away and seeking to dispose of it as agents for the plaintiffs, who remained the owners of it, they agreed again either to perform the first part of the option, to have the bills of exchange cancelled at any rate to the extent of the value of those selected goods, or to pay the sum of £46,763.45p. That was the nature of the agreement. Taking it on its own or taking it, as I think one should, as part of the agreement made on 23 December, I do not think it was a contract for the sale of goods to which the Act applied."

34. As with the buy back contract in *Harry & Garry*, so here, in my opinion, the relevant agreement is, in Kerr LJ's words, "Like many other contracts in complex situations, … a sui generis transaction", not a contract of sale. As I have already indicated, that does not mean that its terms, as regards undertakings as to description and quality, would not be modelled on those applying in the sale of goods. But, in its essential nature, it offered a feature quite different from a contract of sale of goods - the liberty to consume all or any part of the bunkers supplied without acquiring property in them or having paid for them. The obligation on the part of OWBM to be able to pass the property in respect of any bunkers not so consumed against payment of the price for all the bunkers cannot make the agreement as a whole a contract of sale.

35. Mr Crow drew our attention to first instance cases where the relationship between the suppliers of bunkers and charterer customers under a reservation of title was assumed to fall within the Sale of Goods Act, for the purposes of analysing whether, on the termination of the charter, the vessel's owners had acquired title under section 25(1) of that Act: *Forsythe International (UK) Ltd v Silver Shipping Co Ltd* [1994] 1 WLR 1334, *Angara Maritime Ltd v Oceanconnect UK Ltd* [2010] EWHC 619 (QB); [2011] 1 Lloyd's Rep 61. In neither case was the nature of the contract or the present issue questioned or directly addressed. Similarly, it was simply assumed that the transaction was one of sale within the Act in the appellate authorities of *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25 (CA) and *Armour v Thyssen Edelstahlwerke AG* [1991] 2 AC 339 - the former case concerning an unsuccessful attempt to trace title

reserved in resin into chipboard manufactured using it, the latter concerning a successful attempt to reclaim steel supplied subject to a reservation of title. I add that, even if on analysis these two cases could and should have been analysed as sui generis, like the present, it is difficult to think that could have had any effect on their outcome. None of these cases therefore really assists the resolution of the present appeal.

36. I also add (with further reference to the Court of Appeal's suggestion mentioned in para 31 above) that, even if the contract were (contrary to my above analysis) to be analysed as a contract of sale when made in that it contemplated the transfer of property in any bunkers unused at the date of payment, I do not see how this could assist the Owners. OWBM could not owe any obligation to transfer property in bunkers consumed before payment. The contract would be subject to a resolutive condition subsequent whereby it would cease to be a contract of sale as and to the extent that the Owners exercised their contractual right to consume the bunkers in the vessel's propulsion, and would cease entirely to be a contract of sale if and when all such bunkers were consumed before payment.

37. For the reasons I have given, the arbitrators were correct, in my opinion, in concluding that the contract was not one of sale within section 2 of the Sale of Goods Act, with the result that the Owners could have no possible defence under section 49 to the claim for the price.

The Owners' alternative ground of appeal

38. I turn in this light to the Owners' alternative ground of appeal, which is that there must, as a matter of obviousness and necessity, have been an implied term of the contract relating to performance of obligations in the contractual chain above OWBM, by virtue of which OWBM obtained the bunkers it supplied to the Owners. In the Court of Appeal at least initially and in the written case, this is put extremely briefly as an implied duty on OWBM to perform its obligations by making timeous payment to its supplier. The real reason why OWBM could not have passed any title to the Owners appears, however, to have been that OWBAS became insolvent and never paid RMUK. The Owners' formulation of an implied term in their case would not address this. Not surprisingly, the matter was therefore put differently and more widely in the Court of Appeal, which was however left in the end in understandable uncertainty about the precise content of the alleged implied duty. For similar reasons to those given by Moore-Bick LJ in para 36, I share the Court of Appeal's conclusion that there is no basis or need for any such implied duty, however it is put.

39. In short, the essential nature of the bargain is as I have stated in para 28 of this judgment. As a result**,** OWBM's only implied undertaking as regards the bunkers which it permitted to be used and which were used

by the Owners in propulsion prior to payment was that OWBM had the legal entitlement to give such permission. In order to be so entitled, OWBM did not need to have or acquire title to the bunkers. It merely needed to have acquired the right to authorise such use under the chain of contracts by virtue of which it had obtained the bunkers. As regards bunkers in existence at the time of any payment, OWBM would of course have to have had or at least be able to pass title. Had they been unable to do so, then, maybe, the Owners could have treated OWBM as in breach of condition and terminated the contract, though they would at the same time have had to refrain from further use of the bunkers. OWBM would then have been unable to maintain a claim for the whole price, and would have had to assert either a contractual or a restitutionary claim (it is unnecessary to consider which) to pro rata payment for the bunkers consumed. But none of this is relevant, and for that reason it was not explored in submissions. What happened was quite different. No payment was ever tendered by the Owners. The Owners simply continued to use the bunkers under the contractual liberty until they were all consumed. So far as material, no basis appears for treating the contractual liberty as ending with the 60-day period for payment, if payment was not then made; so long as the contract remained in force, the liberty would continue on its face until payment or complete consumption of all the bunkers supplied. The issues before the court do not involve any claim that OWBM had no right to permit such use, or that the Owners are or may be exposed to any risk of double exposure, either by reason of RMUK's claim (never so far as appears formally pursued) or on any other basis. On the presently assumed facts, therefore the Owners are simply liable for the price, albeit under a contract sui generis, which is not one of sale.

The position if the contract had been one of sale

40. In view of the above conclusions, the position if the contract had been classified as a contract of sale within section 2 of the Sale of Goods Act cannot and does not arise. The Owners' case was that, if the contract was one of sale, then section 49 would preclude any claim by OWBM/ING for the price of the bunkers used. OWBM/ING challenge this analysis and the Court of Appeal decision in *Caterpillar* which currently supports it. Since the point was fully argued and has general significance, I propose to say something on it.

41. First, however, I should briefly address the preliminary question, very specific to this particular case, whether it would, if necessary, even have been open to OWBM to challenge the correctness of the Court of Appeal's decision in *Caterpillar*. Not without some doubt, I conclude that it would have been. This is because of the way in which the arbitrators addressed issue 4(b), as set out in paras 16-18 above. They answered it in their reasons *before* and on the face of it *independently of*

their conclusion under issue 9 that the Sale of Goods Act did not apply to the contract. Further, their reasons appear to postulate that the Sale of Goods Act could apply but that a contractual claim for payment (albeit not for a "price") could still be maintained - otherwise why the references to section 49 ruling out a claim for the price, to section 50 offering no alternative, and to their conclusion presenting no challenge to the Sale of Goods Act?

42. On that basis, was the Court of Appeal correct in *Caterpillar* to conclude that, where goods are delivered under a contract of sale, but title is reserved pending payment of the price, the seller cannot enforce payment of the price by an action? In *Caterpillar* the goods had been agreed to be sold and were delivered by F G Wilson to John Holt & Co (Liverpool) Ltd ("Holt Liverpool") which it was known would on-deliver them to its subsidiary, John Holt plc ("Holt Nigeria"), a Nigerian company. The majority (Patten and Floyd LJJ) held that, under the relevant terms, Holt Liverpool (not having paid the price to F G Wilson) had delivered the goods to Holt Nigeria as fiduciary agents for F G Wilson, and that property had in this situation continued in law to reside in Holt Liverpool until such delivery, whereupon it had passed directly from F G Wilson to Holt Nigeria without Holt Liverpool ever acquiring it. Longmore LJ, although he had dissented on the passing of property, gave the principal reasoned judgment on the question which arose from the majority's conclusion that property had not passed. This was whether F G Wilson could sue Holt Liverpool for the price. He concluded, after reviewing the authorities, that section 49 constituted a code, which precluded any action for the price outside its terms.

43. The authorities included what Longmore LJ saw as two inconsistent previous Court of Appeal decisions, one *Otis Vehicle Rentals Ltd v Cicely Commercials Ltd* [2002] EWCA Civ 1064, the other the case of *Harry & Garry*, discussed above on another aspect and which Longmore LJ's judgment records was unearthed by the industry of counsel appearing in *Caterpillar*.

44. Section 49(1) enables an action for the price where the seller has transferred property, with or without delivery, and the buyer has failed to pay the price due. Conversely, the authorities cited by Longmore LJ establish that, where property has not passed, a seller cannot sue for the price of goods, delivery of which the buyer has refused to accept either physically (*Atkinson v Bell* (1828) 8 B & C 277; *Otis Vehicle Rentals*, cited above) or by refusing to take up the shipping documents (*Stein Forbes & Co v County Tailoring Co* (1916) 115 LT 215*; Muller, Maclean & Co v Leslie & Anderson* (1921) 8 Lloyd's List Law Rep 328; *Plaimar Ltd v Waters Trading Co Ltd* (1945) 72 CLR 304) or by failing or refusing to make the necessary shipping arrangements (*Colley v Overseas Exporters*

[1921] 3 KB 302).

45. An established common law exception (see *Dunlop v Grote* (1845) 2 Car & K 153) now reflected in section 49(2) of the Act exists where the price is payable on a day certain, in which case the seller may enforce its payment, provided that he is ready and able at the same time to deliver to the buyer the goods and property in them: *Otis Vehicle Rentals*, para 16 per Potter LJ. In *Caterpillar*, Longmore LJ expressed the view that a "price payable on a day certain" would embrace a situation where the price was expressed to be payable within 30 days of the date of the invoice. If so, it would embrace the situation under RMUK's contract with OWBAS or OWBM's contract with the Owners, whereby the price was payable within respectively 30 or 60 days of delivery. This was also Males J's view, differing on the point from the arbitrators.

46. Leaving section 49(2) aside, the question of principle is whether section 49 excludes any claim to recovery of a price outside its express terms. The majority of the High Court of Australia in *Minister for Supply and Development v Servicemen's Co-operative Joinery Manufacturers Ltd* (1951) 82 CLR 621 can be read as accepting that similar statutory language did not exclude all such claims. However, whilst Latham CJ, one of the majority, made no express reference to section 49(2), he did refer to *Dunlop v Grote*, cited above, and to *Benjamin on Sale*, 7th ed (1931), p 861, which both deal with a price payable on a day certain. It is not clear that he necessarily intended to go further.

47. In *Colley v Overseas Exporters*, cited above, McCardie J undertook a detailed examination of the pre-1893 Sale of Goods Act position at common law, concluding that there had been only two established counts available for recovery of the price of goods sold, both dependant on property passing and so falling within what became section 49(1). Section 49(2) was a limited exception. Support for this can be found in the illuminating discussion and judgments in *Laird v Pim* (1841) 7 M & W 474, to which McCardie J also referred. In that case, the defendant, having contracted to purchase and having been given possession of a plot of land, had refused to complete a conveyance or pay for it. During the proceedings, the analogy with the non-acceptance of goods was drawn, and at one point Parke B pointed out that, since the land was still the plaintiff's at law, the plaintiff might bring ejectment. The plaintiff made clear however that it was not claiming the price of the whole purchase money, but "only for the damages sustained by the non-performance of the contract" (p 479). To this counsel for the defendant responded (p 483) that "Unless the defendants are bound to pay the purchase-money, no damages can be recovered for the non-payment of it: the plaintiff, therefore, must shew not only that the defendants did not pay, but also that they were bound to pay". But this argument failed. Parke B said (p 485) that the

plaintiff was

"substantially in the same situation, for the purpose of recovering the money, as if all had been done on his part which he engaged to do. It does not follow that he shall recover the whole purchase-money, but he is in the same situation for the purpose of recovering damages for the non-payment of the price, as if all had been done by him."

48. That approach, if adopted, at least answers the problem which Longmore LJ found in paras 55-56 in *Caterpillar* about accepting a claim for damages for non-payment of money or seeing any remedy whatever open to the seller. I add three observations. First, it would seem to me that the non-performance in a case like *Laird v Pim* could just as well be described in terms of failure to accept a transfer of the title to property, as failure to pay its price. Second, if described as a claim for failure to pay the price, the judgments in *Sempra Metals Ltd v Inland Revenue Comrs* [2008] AC 561 mean, I believe, that a claim for damages for non-payment of money could quite readily be accommodated in the modern law. Third, in *Laird v Pim*, the damages might have had to be reduced to take account of the prospect of recovery of the property - the law report does not address their measure more precisely than I have already indicated. In the present case, bearing in mind the complete consumption of the bunkers, there would be no difference between the agreed price and the damages for non-payment of the price that would follow on the approach taken in *Laird v Pim*.

49. Nonetheless, there is artificiality about treating the seller's claim as being for damages, after delivery was made albeit under retention of title, and particularly so where the buyer is authorised to consume the goods as here. Part of the thinking behind the rule in section 49(1) is no doubt, as Longmore LJ observed (para 43), that

"It would have been thought unfair to a buyer if, before delivery had occurred, the goods had perished or been damaged and yet the price was payable, unless the goods were actually his property, see *Simmons v Swift* (1826) 5 B & C 857. It would also be odd if a seller's creditors on bankruptcy could both seize goods still on his premises and sue the buyer for the price."

However, it will be noted that both these rationales focus on situations where delivery has not been made, and, as appears from the judgments in *Simmons v Swift*, the real significance attached by the court

> to the fact that property had not passed in *Simmons v Swift* was that it meant that the goods were still at the risk of the sellers. The oddity mentioned by Longmore LJ would not have existed, if the goods had been at the buyer's risk.

50. Section 49(2) relaxes only partially the strictness of section 49(1), and it depends on the price being "payable on a day certain". These are words which can no doubt be construed liberally, as Longmore LJ was minded to, but are not of indefinite expansion. Further, the main focus of section 49(2) may well have been on cases where delivery has not been made - hence the phrase "irrespective of delivery". Section 49 does not focus on the position existing where delivery is made, title is reserved but the price is agreed to be paid, albeit not on a particular "day certain". Even less does it focus on the position where all these features are present and the buyer is permitted to dispose of or consume the goods or they are at the buyer's risk and are destroyed or damaged. The question is whether in all these cases an action for the price is excluded, and the seller is forced to look around for other means of redress.

51. The Court of Appeal, in an alternative reason for its judgment in *Harry & Garry,* did not think so. Kerr LJ, now approaching the case on the hypothesis that the buy back contract was subject to the Sale of Goods Act, said this:

"In any event, however - and this is the second reason why I differ from the judge - it is clear from the authorities to which we were referred that even in the realm of contracts for the sale of goods there can be situations in which a seller may be entitled, under the particular terms of the contract, to claim a sum which is in effect the price of the goods, even though he cannot bring himself within the terms of section 49.

In that connection we were helpfully referred by Mr Bartlett to another section of the Act and a number of authorities. I can deal with them quite shortly. First, section 55 of the Act makes it clear that the provisions of the Act are not exhaustive, but that the parties may enter into agreements which negative or vary the rights, duties or liabilities which would otherwise arise under a contract of sale by virtue of the Act. Secondly, Mr Bartlett referred to a part of the speech of Lord Diplock in *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, 501, in which he points out that the Sale of Goods Act is not an exhaustive code within which every transaction of the nature of a sale of goods must necessarily be brought, but that it is open to parties, if they have done so by the terms of their agreement, to create situations which, while being contracts for the

sale of goods, are not governed exclusively by the terms of the Act.
It is true that in *Colley v Overseas Exporters* [1921] 3 KB 302, 310, McCardie J expressed the obiter view that section 49(2) was an exhaustive statement (together with subsection (1)) of situations in which a seller is entitled to sue for the price. But that was clearly not the view of Wright J as expressed in *Shell-Mex Ltd v Elton Cop Dyeing Co Ltd* (1928) 34 Commercial Cases at p 39, where he referred to what is now section 55 of the 1979 Act and the particular terms of the contract. He concluded that on its true construction the sellers were not entitled to recover the price, but without regard to the fact that on no view could the case have been brought within section 49."
Kerr LJ went on to state that that had been the view of the majority of the High Court of Australia, in *Minister for Supply and Development v Servicemen's Co-operative Joinery Manufacturers Ltd*, before concluding:
"If, contrary to the primary view which I have expressed, this transaction recorded in the form of the document of 31 December 1982 was indeed a sale by the plaintiffs to the Jariwallas, then in my view, having regard to the agreement as a whole which the judge has found, it would still be open to the plaintiffs to sue for the £46,000-odd once a reasonable time had elapsed and it had become clear - all of which has now happened - that they were not going to be relieved from the bills of exchange. Accordingly, I would allow this appeal to the extent of judgment for the plaintiffs for £46,763.45p, with the appropriate interest."
52. Like Longmore LJ in *Caterpillar* (para 53), I am unconvinced that the solution to the present problems is found in section 55 or in Lord Diplock's dicta in *Ashington Piggeries*. Both concern the negativing or variation of any "right, duty or liability [which] would arise under a contract of sale of goods by implication of law", into which category it is difficult to fit the statutory provisions of section 49. I am also unconvinced that Wright J's judgment in *Shell-Mex* is of present assistance, and I have already questioned whether both members of the majority in the High Court of Australia in the *Minister of Supply* case were necessarily speaking of situations outside section 49(2).
53. Nevertheless, the 1893 Act was rooted in and intended to reflect common law authority, developed in an era when freedom of contract and trade were axiomatically accepted as beneficial. Certainly, a court could not now recognise a claim for the price in a case falling squarely within section 50, and it should be cautious about recognising claims to the price of goods in cases not falling within section 49. But I consider that this leaves at least some room for claims for the price in other circumstances than those covered by section 49.
54. *Harry & Garry* is on its facts such a case. Title being reserved to Harry & Garry, the Jariwallas were nonetheless permitted to take

possession under the buy back contract, and to dispose of some of the sarees of which possession was taken back. It seems entirely natural and appropriate that Harry & Garry should be entitled to recover for the price of all the sarees so taken back, on condition of course that they were ready and willing to transfer title in the remaining sarees to the Jariwallas in return.

55. Another case covered by authority is that where the goods are at the buyer's risk, but property has not passed. This situation was addressed in two successive cases in 1872: *Castle v Playford* (1872) LR 7 Ex 98 and *Martineau v Kitching* (1872) LR 7 QB 436. In the former, the contract for the sale of ice was for cash on delivery at the rate of 20s a ton as weighed on arrival and delivery in the United Kingdom, but it was agreed that the buyer should "take upon himself all risks and dangers of the seas". The vessel was lost. The court (Cockburn CJ, Willes, Blackburn, Mellor, Brett and Grove JJ) found it unnecessary to decide whether property had passed. Whether or not it had, the true construction of the contract was from the buyer's viewpoint, in Cockburn CJ's words, at p 99:

"I will engage, when it arrives, to pay you according to what may be its value; and if, in the meantime, while it is upon the seas, it shall perish through the perils of the seas, I will undertake to pay you for it according to what may be estimated to have been its fair value at the time of going down."

Blackburn J giving the other reasoned judgment said, at p 100:

> "Now here, the ship and cargo have gone to the bottom of the sea; but in the cases of *Alexander v Gardner* (1835) 1 Bing NC 671, and *Fragano v Long* (1825) 4 B & C 219, it was held, that if the property did perish before the time for payment came, the time being dependent upon delivery, and if the delivery was prevented by the destruction of the property, the purchaser was to pay an equivalent sum. In the present case, when the ship went down there would be so much ice on board, and, in all probability, upon an ordinary voyage so much would have melted; and what the defendant has taken upon himself to pay is the amount which, in all probability, would have been payable for the ice."

The two judgments define the sum payable in very slightly different ways, but both treat it as a sum payable

for the goods under the contract terms.

56. Three months later the second case came before Cockburn CJ, Blackburn, Lush and Quain JJ in the Queen's Bench Division. Sugar was agreed to be sold, with the price payable "Prompt at one month; goods at seller's risk for two months", to be kept at the seller's premises and drawn down by the buyers as wanted. After two months and after only some of the sugar had been drawn down by the buyers, a fire destroyed the rest. The buyer having disputed his liability to pay for the undelivered sugar which had been burned in the fire, the seller brought an action "to recover the price of [the] sugars sold" and the question was whether the sellers were so entitled (see pp 436, 441, para 21; and p 445). The court held that they were. Cockburn CJ did so on the basis that property had passed. But Blackburn, Lush and Quain JJ found it unnecessary to decide this, and they all decided the case on the basis that after two months the risk had passed. Blackburn J put the matter thus, at p 455:

"[A]ssume that [property] had not passed. If the agreement between the parties was, 'I contract that when you pay the price I will deliver the goods to you, but the property shall not be yours, they shall still be my property so that I may have dominion over them; but though they shall not be yours, I stipulate and agree that if I keep them beyond the month the risk shall be upon you;' and then the goods perish; to say that the buyer could then set up this defence and say, 'Although I stipulated that the risk should be mine, yet, inasmuch as an accident has happened which has destroyed them, I will have no part of that risk, but will throw it entirely upon you because the property did not pass to me,' is a proposition which, stated in that way, appears to be absolutely a reductio ad absurdum; and that is really what the argument amounts to. If the parties have stipulated that, if after the two months the goods remain in the sellers' warehouse, they shall, nevertheless, remain there at the buyer's risk, it would be a manifest absurdity to say that he is not to pay for them; and I think the case of *Castle v Playford* is a clear authority of the Court of Exchequer Chamber, that where the parties have stipulated that the risk shall be on one side, it matters not whether the property had passed or not. The parties here have by their express stipulation impliedly said, after the two months the goods shall be at the risk of the buyer, consequently it is the buyer who must bear the loss."

57. The price may therefore be recovered in respect of goods undelivered which remain the seller's property but are at the buyer's risk and are destroyed by perils of the seas or by fire. The present situation is in my opinion a fortiori. The price of bunkers, which remain the seller's property but which are both (i) at the buyer's risk as regards damage or

destruction (clause G.12) and (ii) also permitted by the express terms of the contract to be destroyed by use for the Owners' commercial benefit, must be equally recoverable. I add that I do not suggest that this is the limit of the circumstances outside section 49 in which the price may be recoverable. The decision in *Harry & Garry* itself was that the price was recoverable for all the 2,494 sarees agreed to be bought back, although only 411 of them had been disposed of by the buyers with the seller's permission. The precise limits of such circumstances - and the significance which may in particular attach to the use of retention of title clauses in combination with physical delivery of the goods and the transfer of risk - must be left for determination on some future occasion. I would only add that, when that occasion arises, much benefit will be obtained (as I have done in writing this judgment) from the perceptive discussion by Professor Louise Gullifer in her article *The interpretation of retention of title clauses: some difficulties* (2014) LMCLQ 564. She also addresses some critical remarks to the other issue in the *Caterpillar* case, that is the interpretation of Holt Liverpool's role as one of agency on behalf of F G Wilson in parting with the goods to Holt Nigeria. That issue does not arise here, but may well merit further consideration in another case in this court.

58. It follows from what I have said that, had the contract been one of sale, I would have held, over-ruling the *Caterpillar* case on this point, that section 49 is not a complete code of situations in which the price may be recoverable under a contract of sale, and that, in the present case, the price was recoverable by virtue of its express terms in the event which has occurred, namely the complete consumption of the bunkers supplied.

Conclusion

59. In the result**,** I conclude that, on the assumed facts:

(i) the contract between OWBM and the Owners was not one of sale, but sui generis;

(ii) that it was not subject to any such implied term or terms, regarding performance by OWBM (or OWBAS) of any supply contract higher up the chain, as the Owners have alleged - though it was no doubt subject to an implied promise by OWBM that OWBM was entitled (in consequence of whatever were the arrangements under which the bunkers had been obtained directly or indirectly from whoever was interested in them) to supply them to the Owners on terms permitting their use for the propulsion of the vessel before payment; and

(iii) that the Owners have no defence to OWBM's claim to the agreed price.

60. Had I concluded on the other hand that the contract was one of sale, I would, again on the assumed facts, have held that section 49 of the Sale of Goods Act was also no bar to a claim by OWBM to payment of the agreed price.