IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHCR 6

Suit No 971 of 2018 (Summons No 5470 of 2018)

Between

Mitsubishi Corp RTM International Pte Ltd

… *Plaintiff*

And

Kyen Resources Pte Ltd

… *Defendant*

JUDGMENT

[Commercial transactions] – [Sale of goods] – [Rights of unpaid seller] – [Retention of title clause]

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v
Kyen Resources Pte Ltd

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Elton Tan Xue Yang AR
5, 27 December 2018

5 March 2019 Judgment reserved.

Elton Tan Xue Yang AR:

Introduction

1 The dispute in this case concerns the interpretation and effect of a retention of title clause. A retention of title clause (also known as a reservation of title or *Romalpa* clause) is a clause reserving property in the goods to the seller, notwithstanding the delivery of the goods to the buyer, until the buyer has made full payment. By dissociating transfer of title from delivery of the goods, the clause provides the seller with security against the buyer's non-payment and, more crucially, the buyer's insolvency. It has therefore become an essential and ubiquitous feature in contracts for the credit sale of goods.

2 In 2016, the UK Supreme Court delivered its judgment in *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another* [2016] AC 1034 ("*The Res Cogitans*"). That decision, which concerned a contract for the

supply of bunkers, has been said by a leading textbook to have caused a "profound disturbance of the law": Michael Bridge gen ed, *Benjamin's Sale of Goods* (Sweet & Maxwell, 10th Ed, 2017) ("*Benjamin*"), preface at viii. Chief amongst the perceived difficulties with *The Res Cogitans* was the court's finding that a contract contemplating the buyer's consumption of goods before property in the goods passes to the buyer (which would only occur upon full payment to the seller) is not a contract to which the UK Sale of Goods Act 1979 (c. 54) ("the UK SOGA") applies. The result was that certain contracts which had for decades been thought to be governed by the UK SOGA were now to be treated as a wholly new class of contract unregulated by statute.

3 In the present case, the plaintiff seller sold aluminium ingots to the defendant buyer. The contract, which contained a retention of title clause, permitted the defendant to on-sell the goods pending payment and required the defendant to hold any sale proceeds for the plaintiff. As it turned out, the defendant on-sold the goods to a third party shortly after it received each shipment. The defendant failed to pay and the plaintiff sued for various remedies, including the price of the goods. The plaintiff sought to enter judgment for the price upon the defendant's admission that it had not made payment. Relying on the UK Court of Appeal's decision in *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd* [2013] EWCA Civ 1232 ("*FG Wilson*"), the defendant responded that a construction of the retention of title clause was required to determine if property to the goods had passed or if s 49 of the Sale of Goods Act (Cap 393, 1999 Rev Ed) ("the SOGA") (which is *in pari materia* to the UK SOGA) otherwise prevented the plaintiff from seeking the price. The questions of law and construction were then put before me by way of an application for determination of these questions under O 14 r 12 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules of Court").

4 The issues raised in the parties' arguments are similar to those that confronted the courts in *The Res Cogitans* and the earlier decision of *FG Wilson*. The central question is whether a seller can bring an action for the price of unpaid goods where, as the result of a retention of title clause, property in the goods did not pass to the buyer at the time of the sale and the goods were thereafter on-sold to a third party.

Facts

5 The plaintiff, Mitsubishi Corporation RTM International Pte Ltd ("the Plaintiff"), and the defendant, Kyen Resources Pte Ltd ("the Defendant"), are both companies incorporated in Singapore in the business of metals trading.[1] The Plaintiff is the global headquarters of the mineral resources and metals trading business of the Mitsubishi Corporation.[2]

The Contract

6 The parties entered into a contract dated 19 October 2017 ("the Contract") for the sale of approximately 12,000mt of "primary unalloyed aluminium, conforming to Aluminium Association specifications for P1020A (AL 99.7% min, FE 0.20% max, SI 0.10% max)" ("the Goods") from the Plaintiff to the Defendant. The supply was to take place over 12 months from January to December 2018, with approximately 1,000mt supplied each month.[3] The payment term in the Contract ("the Payment Clause") required payment to be made by the Defendant in the following manner: "100% net cash via wire transfer within 30 working days after Seller's presentation of the documents".[4]

1 Statement of Claim at para 1.

2 Affidavit of Chen Xi dated 2 October 2018 ("Chen Xi's affidavit") at para 7.

3 Statement of Claim at para 4; affidavit of De Sousa Adrien Sylvain dated 19 November 2018 ("De Sousa's affidavit") at p 8.

7 The Contract also incorporated the Plaintiff's "General Terms and Conditions for Contract of Sales". Those terms include the following retention of title clause ("the ROT Clause"), which is central to the dispute:

> Title
>
> ***Seller shall retain title to and ownership of the Goods of each delivery until the final payment for such delivery has been received in full by Seller*** *in accordance with the terms and conditions of this Contract.* Until such final payment has been received in full by Seller: (a) the Buyer shall hold the Goods as bailee for the Seller, keep the Goods free from any charge, lien or other encumbrance, store the Goods in such a manner that they are clearly identifiable as the property of the Seller and, if required by the Seller, deliver the Goods up to the Seller; and (b) ***if the Buyer sells the Goods, the Buyer's right to receive payment pursuant to such sale of the Goods will be held in trust for the Seller and any proceeds of such sale will be the property of the Seller****, and the Buyer will hold the proceeds of any such sale on account of the Seller and keep the proceeds separately from its own money.* The Buyer acknowledges that the Seller may be entitled under applicable law to register its interest in the Goods as a security interest and may be required, for that purpose to make filings and take other action to perfect or continue the perfection of such security and the buyer agrees to cooperate with the Seller in connection with the same.
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> [emphasis added in italics and bold italics]

8 The Contract further provides that "Buyer shall pay 100% of Seller's final invoice (or provisional invoice where applicable) for the Goods of each delivery in accordance with the terms of the Contract". A clause titled "Suspension, cancellation and termination" ("the Suspension/Termination Clause") gives the Plaintiff (as seller) the right to suspend, cancel or terminate the Contract if one of several specified events takes place. One such event occurs when "the Buyer breaches this Contract or fails to fulfil one or more of its obligations on time or adequately, including, failing to pay an amount owing

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[4] De Sousa's affidavit at p8.

on the due date".[5] Upon the occurrence of such event, the Defendant (as buyer) "shall become liable, and the Seller shall be entitled to make any claim against the Buyer, for any and all Losses whatsoever resulting from or connected with the Event".

9 A separate clause titled "Consequences of termination" ("the Consequences of Termination Clause") stipulates that in the event of termination of the Contract for any reason, "any amount payable by the Buyer shall become immediately due and payable in cash in full (unless otherwise agreed by the Seller)". It further provides that the Consequences of Termination Clause shall survive such termination and will continue to apply.[6]

Defendant's failure to pay

10 The Plaintiff made three shipments of the Goods to the Defendant, which received delivery of the Goods.[7] The Plaintiff issued invoices for each shipment (collectively, "the Invoices"), as follows:

(a) The first invoice (No 93771703) was dated 22 July 2018 for the amount of US$1,112,604.88 and in respect of 500.722mt of the Goods. The date of delivery of the shipment was indicated as 22 July 2018.[8] The due date for payment is indicated on the invoice as 12 September 2018, but the Plaintiff claims (and the Defendant does not dispute) that the correct due date is a day earlier (*ie,* 11 September 2018).[9]

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5 De Sousa's affidavit at p12.

6 De Sousa's affidavit at p12.

7 Statement of Claim at paras 3 and 10; Defence at paras 5 and 11.

8 De Sousa's affidavit at p19.

9 Statement of Claim at para 11(a); Defence at para 12.

(b) The second invoice (No 93771765) was dated 26 July 2018 for the amount of US$1,111,909.38 and in respect of 500.398mt of the Goods. The date of delivery was indicated as 26 July 2018 and the due date for payment was 18 September 2018.[10]

(c) The third invoice (No 93772145) was dated 17 August 2018 for the amount of $1,160,653.61 and in respect of 500.368mt of the Goods. The date of delivery was indicated as 17 August 2018 and the due date for payment as 15 October 2018.[11] The Defendant takes the position that the due date for payment is 12 October 2018,[12] but this is immaterial for present purposes since it does not dispute that the due date has passed.

11 The Defendant accepts that despite reminders and demands from the Plaintiff, it has, to date, failed to pay the outstanding price of US$3,385,167.87 under the Invoices.[13] According to the Plaintiff, the Defendant's directors at the time (Mr Victor Kuo and Mr Max Chen Xi) repeatedly stated that the Defendant was unable to make payment for the shipments. It is also undisputed that the Defendant's bank, Oversea-Chinese Banking Corporation Limited, has frozen its bank accounts and that Hyundai Corporation Singapore Pte Ltd has obtained a worldwide Mareva injunction against it in connection with a separate claim.[14]

12 On 17 September 2018, the Plaintiff purported to suspend the Contract pursuant to the Suspension/Termination Clause.[15] It claims that by way of an

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10 De Sousa's affidavit at p20.

11 De Sousa's affidavit at p21.

12 Defence at para 12.

13 Statement of Claim at para 12; Defence at para 13.

14 Statement of Claim at paras 18(a)–(c); Defence at para 19.

15 Statement of Claim at para 13; Defence at para 14.

email dated 29 October 2018, it then terminated the Contract pursuant to that same clause.[16] The Defendant denies having received that email.[17] The Plaintiff further alleges that despite multiple demands and reminders to the Defendant to deliver up the Goods to the Plaintiff, the Defendant failed or refused to do so.[18]

Commencement of proceedings

13 On 2 October 2018, the Plaintiff commenced Suit No 971 of 2018 ("the Action") against the Defendant, seeking the following remedies (as well as interest and costs):

(a) a declaration that the Plaintiff is the rightful owner of the Goods and that the Defendant holds the Goods as the Plaintiff's bailee;

(b) an order for delivery up to the Plaintiff of the Goods in the possession or control of the Defendant;

(c) a declaration that, if the Defendant has parted with, sold, charged or disposed of the Goods, the Defendant holds all traceable proceeds of the Goods ("the Traceable Proceeds") on trust for the Plaintiff;

(d) a full and true account by the Defendant of the Goods and the Traceable Proceeds;

(e) further and/or alternatively, payment of the sum of US$3,385,167.87, being the price of the Goods; and

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16 Statement of Claim at para 14; Reply at para 8.

17 Defence at para 15.

18 Statement of Claim at para 16.

(f) further and/or alternatively, damages for conversion of the Goods, breaches of the Defendant's obligations as bailee of the Goods, breaches of trust by the Defendant in respect of the Traceable Proceeds, and/or damages at large for the Defendant's breach of the Contract.

I will refer to the claims described at (a) [13(a)]–[13(d)] as "the Proprietary Claims"; (b) [13(e)] as "the Price Claim"; and (c) [13(f)] as "the Damages Claim". These are also the terms used by the parties in their submissions.

Pleadings

14 In advancing the Proprietary Claims, the Plaintiff relies on the ROT Clause.[19] The Plaintiff makes it clear that its preferred remedies are sought by way of the Proprietary Claims, rather than the Damages Claim, given that the Defendant is in serious financial difficulty and would not be able to pay any award of damages made in favour of the Plaintiff. Hence, an award in damages for wrongful interference with the Plaintiff's property rights in the Goods and/or the Traceable Proceeds would be a "manifestly inadequate remedy" because it is "unlikely to be satisfied due to the Defendant's impecuniosity".[20]

15 As mentioned at [11] above, the Defendant admits that it has not paid the price of the Goods. However, it denies holding the Goods and/or the Traceable Proceeds on trust for the Plaintiff, since the Plaintiff has failed and/or neglected to register its purported security interest in the Goods, and any trust purportedly set up over sale proceeds would be void for uncertainty.[21] The Defendant further avers that there was an understanding between the parties that

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19 Statement of Claim at para 15.

20 Statement of Claim at para 18.

21 Defence at para 16.

it may resell the Goods after receiving delivery and may use the proceeds of such sale for its own purposes, without keeping the proceeds in a separate account for the Plaintiff. This understanding "arose on account of general trade practice and/or custom in the industry", and also because the Defendant was only required to make payment to the Plaintiff after 30 working days following the Plaintiff's presentation of documents (see also [6] above).[22]

16 The Defendant contends that it had not wilfully refused to deliver up the Goods and/or Traceable Proceeds to the Plaintiff. The Defendant explains that it had not delivered up the Goods because they were no longer in its possession. It further denies that an order for delivery up of the Goods and/or Traceable Proceeds is required to vindicate the Plaintiff's property rights in those items.[23]

17 In reply, the Plaintiff observes that the Defendant has "admitted to and/or does not dispute its liability" under the Price Claim.[24] It rejects the Defendant's suggestion that the Defendant does not hold the Goods and/or Traceable Proceeds on trust,[25] and informs that it had in fact, on 30 October 2018, registered its proprietary interest in the Goods and/or Traceable Proceeds arising out of the ROT Clause with the Accounting and Corporate Regulatory Authority of Singapore.[26]

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22 Defence at para 16.

23 Defence at paras 17 and 188.

24 Reply at para 3.

25 Reply at paras 10–13.

26 Reply at para 14.

Applications

18 On 19 November 2018, the Plaintiff filed Summons No 5470 of 2018 ("the Application"), seeking entry of judgment in the sum of US$3,385,167.87 in favour of the Plaintiff against the Defendant. In other words, it sought judgment on the Price Claim. The Application was brought pursuant to O 27 r 3 of the Rules of Court, which establishes that a judgment or order may be made upon admissions of fact made by a party to a cause or matter either by his pleadings or otherwise, without waiting for the determination of any other question between the parties.

19 The Plaintiff relies on the following admissions of fact made by the Defendant in its pleadings: (a) that it entered into the Contract with the Plaintiff; (b) that the Goods were delivered to and received by the Defendant from the Plaintiff; (c) that the Invoices accurately reflect the purchase price for each of the three shipments and that the due dates for payment have passed; and (d) that it has failed to make payment of the outstanding price of US$3,385,167.87 for the Goods.[27]

20 The Defendant did not file a reply affidavit. At the hearing on 5 December 2018, counsel for the Defendant, Mr Danny Quah, informed me that the Defendant was contesting the Application and tendered written submissions. Mr Quah made two connected points.

21 First, he argued that the Plaintiff was not entitled to judgment on the Price Claim *in addition to* the Proprietary Claims and/or the Damages Claim. The reason Mr Quah gave was, in essence, that the basis of these claims were inconsistent such that the claims could not concurrently be allowed. He argued,

[27] De Sousa's affidavit at para 12.

relying on the UK Court of Appeal's decision in *FG Wilson*, that a seller (such as the Plaintiff) cannot sue for price under s 49(1) of the SOGA unless the property in the goods has passed; and in the present case, given the ROT Clause, property in the Goods might not have passed to the Defendant. If property had passed, the Defendant might be liable under the Price Claim but then could not be sued under the Proprietary Claims. If property had not passed, the Defendant would not be liable under the Price Claim but might be vulnerable to the Proprietary Claims. Mr Quah also referred to s 49(2) of the SOGA. He suggested that the provision would not apply to the Contract because the Contract did not provide for payment "irrespective of delivery". To round off the point, Mr Quah argued the Plaintiff would not be entitled to judgment on more than one of its claims because that would violate the rule against double recovery.

22 Second, Mr Quah submitted that the court could not make a determination on these matters and enter judgment on the Price Claim without construing the Contract. Specifically, what was required was a construction of the ROT Clause in order to determine if property to the Goods had passed, or if s 49 otherwise permitted or did not permit the Price Claim. Mr Quah argued that the construction of the ROT Clause was not something the court could do in the context of an O 27 r 3 application.

23 In response to Mr Quah's second point, counsel for the Plaintiff, Mr Ting Yong Hong, made an oral application under O 14 r 12 of the Rules of Court for the determination of the question of construction of the ROT Clause by way of a summary process (such oral application being permissible under O 14 r 13). Mr Quah did not object to the oral application. In the exercise of my discretion, I granted the application, having taken the view that there were no material disputes of fact relating to the point of construction (*The "Chem Orchid" and*

other appeals and another matter [2016] 2 SLR 50 at [60]) and that its determination would promote the saving of time and costs for the parties (*TMT Asia Ltd v BHP Billiton Marketing AG (Singapore Branch) and another* [2015] 2 SLR 540 at [32]). I therefore directed parties to file detailed written submissions before they returned for a fuller hearing on 27 December 2018. At the close of that hearing, I reserved my decision.

Parties' submissions

24 At the hearing on 27 December 2018, Mr Ting advanced four alternative arguments for the Plaintiff, supplemented by his written submissions.[28] I will describe the arguments in the order that Mr Ting put them before me (although this will not be the order of my subsequent analysis).

(a) First, Mr Ting contended that the SOGA does not apply to the Contract, with the result that the requirements under s 49(1) are immaterial.[29] There is accordingly no need for the Plaintiff to show that the property in the Goods has passed to the Defendant (as buyer) before the Plaintiff (as seller) may maintain an action against the Defendant for the price of the Goods. In making this argument, Mr Ting relied heavily on the recent decision of the UK Supreme Court in *The Res Cogitans*. In short, Mr Ting sought to analogise the Contract to the agreement at issue in *The Res Cogitans*, such that the former could (as the latter was in the UK Supreme Court's decision) be characterised as a *sui generis* contract that was not governed by the SOGA. The Contract is *sui generis* because it allowed the Defendant to on-sell the Goods to third parties notwithstanding that it had not made payment under the ROT Clause,

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28 Plaintiff's written submissions dated 12 December 2018 ("Plaintiff's Submissions").

29 See also Plaintiff's Submissions at paras 12–15.

with the consequence that by the time payment fell due, property in the Goods rested with third parties and could not be passed from the Plaintiff to the Defendant. I will refer to this argument as "the *Sui Generis* Argument".

(b) Second, he argued that s 49(1) of the SOGA applied to the transaction. In other words, property in the Goods has passed to the Defendant and therefore the Price Claim can be sustained under s 49(1). Mr Ting provided two reasons for this. First, he referred me to an affidavit of Mr Chen Xi, a director of the Defendant, in Summons No 4766 of 2018 (which was the Defendant's earlier application to vary an injunction ordered against it in the Action).[30] In that affidavit, Mr Chen explained that the Goods were sold to the Industrial and Commercial Bank of China ("the Sub-Buyer") in July and August 2018.[31] Mr Ting highlighted that the ROT Clause specifically envisaged that the Defendant would be able to on-sell the Goods. A sale to a sub-buyer would therefore be "a disposal with the authority of the owner", operating to pass title to the sub-buyer. Second, Mr Ting relied on s 25(1) of the SOGA, which provides, in gist, that a buyer in possession of the goods may pass good title to a sub-buyer who receives the goods in good faith and without notice of the rights of the original seller. These submissions were only advanced orally before me and were not mentioned in the Plaintiff's written submissions. I will refer to them as "the s 49(1) Argument".

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30 Chen Xi's affidavit.

31 Chen Xi's affidavit at para 8.

(c) Third, as a further alternative, Mr Ting argued that s 49(2) of the SOGA applied.[32] The thrust of his submission is the Contract provides for payment of the price "on a day certain irrespective of delivery". This enables the Plaintiff to sustain the Price Claim even though property in the Goods may not have passed. In this regard, Mr Ting relied on *FG Wilson,* the High Court's and Supreme Court's judgments in *The Res Cogitans* and commentary by Professor Michael Bridge on *The Res Cogitans*. I will refer to the submission as "the s 49(2) Argument".

(d) Fourth, Mr Ting submitted that s 49 is not a comprehensive code within which sellers must bring themselves in order to succeed in an action for the price.[33] Mr Ting also relied on *The Res Cogitans* as authority, and submitted that *FG Wilson* has been overruled in this regard by the UK Supreme Court. He also drew my attention to academic criticism of *FG Wilson* by Professor Louise Gullifer. I will refer to this final argument as "the Complete Code Argument".

25 Mr Quah made both oral and written submissions in response.

(a) In relation to the s 49(1) Argument, Mr Quah highlighted that Mr Ting had, in oral argument, taken the position that title to the Goods had in fact passed to the sub-buyer. He argued that the passing of title entailed that the Plaintiff was no longer entitled to the proprietary remedies sought. Notably, Mr Quah did *not* dispute the applicability of s 49(1) or Mr Ting's argument that title to the Goods had passed.

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32 See also Plaintiff's Submissions at paras 16–20.

33 See also Plaintiff's Submissions at paras 21–23.

(b) In relation to the s 49(2) Argument, Mr Quah contended that under the Payment Clause, the price of the Goods could not be said to be payable on a "day certain irrespective of delivery". The Payment Clause provided for payment to be made within 30 days after the Plaintiff's "presentation of documents" which, according to Mr Quah, meant that payment could not be said to be "irrespective of delivery" since "presentation of documents requires delivery".

(c) Regarding the Complete Code Argument, Mr Quah accepted that *The Res Cogitans* overruled *FG Wilson* on whether the UK SOGA provided a "complete code" for actions on the price, but sought to distinguish *The Res Cogitans* from the present case on the basis that the intermediate bunker supplier had only brought a claim for price and had not sought proprietary relief, unlike in the present case where both types of relief were sought (in addition to the Damages Claim).[34]

(d) Finally, as to the *Sui Generis* Argument, Mr Quah referred to Professor Bridge's criticism of the UK Supreme Court's finding in *The Res Cogitans* that the contract in that case was *sui generis* such that the the UK SOGA did not apply. He urged caution in the Singapore courts adopting the holdings of the UK Supreme Court in that regard.

26 The Defendant indicated in its written reply submissions that it "has not and is not taking the position that the Plaintiff cannot maintain its claim for the Price of the Goods".[35] Notwithstanding that, the Defendant had in those same written submissions argued that the Plaintiff's reliance on *The Res Cogitans* was

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[34] See also Defendant's reply submissions dated 21 December 2018 ("Defendant's Reply Submissions") at paras 9–16.

[35] Defendant's Reply Submissions at para 3.

"entirely misplaced" and that "the Court should not grant the Plaintiff judgment on the Price of Goods at this interlocutory stage on the back of the holding in [*The*] *Res Cogitans*".[36] I therefore did not find the Defendant's position clear. When I sought clarification as to whether the Defendant was contesting the Application, Mr Quah informed me that the Defendant was "not opposing the legal entitlement", but that the court "need[ed] to decide in the round whether [the Plaintiff] [was] entitled to the Price Claim and nothing else".

Key issues

27 Broadly put, the central issue in the dispute is whether, given that the Defendant has not paid the Plaintiff for the Goods, the Plaintiff may bring an action for the price against the Defendant. The apparent obstacle faced by the Plaintiff is the ROT Clause which retains property in the Goods to the Plaintiff until the Defendant has made payment. The clause poses an obstacle because s 49(1) of the SOGA requires property in the goods to have passed to the buyer before an action for the price may be brought. The Plaintiff's response is that the action is in fact permissible under a proper reading of ss 49(1) and (2) of the SOGA (*ie,* the s 49(1) and s 49(2) Arguments). Its alternative argument is that such an action may be brought outside the SOGA (*ie,* the Complete Code Argument) and its further alternative is that the statute does not apply to the contract with the result that the s 49 requirements are inapplicable (*ie,* the *Sui Generis* Argument). If the Plaintiff were to succeed in any one of these four arguments, it would be able to maintain the Price Claim.

28 The four arguments advanced by Mr Ting for the Plaintiff provide a useful structure for my analysis. Mr Ting disclosed that his submissions were

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[36] Defendant's Reply Submissions at paras 9 and 16.

very much aligned with the issues raised in *The Res Cogitans*, which is accordingly of principal importance in the discussion below, alongside the Court of Appeal's decision in *FG Wilson* upon which Mr Quah for the Defendant relied. I will address Mr Quah's submission that I should decide both the Price Claim and the Proprietary Claims "in the round" after I explain my decision on the Price Claim.

29 When I queried if there was any local jurisprudence on the points in dispute, counsel informed me that there was none. To the best of my knowledge, that is true. Given the paucity of local case law on retention of title clauses and their relation to the SOGA, I will begin with a brief account of the law on these clauses, set against the statutory backdrop.

Retention of title clauses

Nature and purpose

30 The essence of a retention of title clause is "to reserve the property in the goods to the seller until the price is paid in full, notwithstanding that the goods are delivered to the buyer": Christian Twigg-Flesner, Rick Canavan and Hector MacQueen, *Atiyah and Adams' Sale of Goods* (Pearson, 13th Ed, 2016) ("*Atiyah and Adams*") at p406. Retention of title clauses are also commonly known as "reservation of title clauses" or "*Romalpa* clauses", following the seminal decision of the UK Court of Appeal in *Aluminium Industrie Vaassen B.V. v Romalpa Aluminium Ltd* [1976] WLR 676 ("*Romalpa*"). That decision has been said to have "greatly increased in importance" the reservation by sellers of the right of disposal of the goods: *Benjamin* at para 5-143.

31 Since *Romalpa*, retention of title clauses have become a common feature both of standard form contracts and of contracts freely negotiated: Gerard

McCormack, *Reservation of Title* (Sweet & Maxwell, 2nd Ed, 1995) at p1. Their popularity arises from their ability to provide security for the seller against the seller's non-payment. In *Clough Mill Ltd v Martin* [1984] 3 All ER 982, which concerned a clause reserving to the appellant seller the right to dispose of yarn supplied to the respondent buyer until payment in full for all the yarn was received, Goff LJ (as he then was) made the following observations on the purpose and utility of retention of title clauses (at 986):

> Now there are various points to notice about [the clause]. The first is that what is reserved by the seller is the ownership of the material, the material being the material supplied under the particular contract… *Prima facie*, in a commercial document such as this, ownership means, quite simply, the property in the goods. The second point is that the reservation of the right to dispose of the material is expressed to be until a certain event, *viz* until payment in full for all the material received by the buyer or until resale by the buyer. This shows *the purpose for which the right of disposal is reserved, which is* ***to provide the seller with security for any unpaid and overdue purchase price payable under the contract.*** *It is obvious … that* ***the possibility of insolvency is a matter which is particularly in contemplation***. … [emphasis added in italics and bold italics]

32 As described in Michael Bridge, *The Sale of Goods* (Oxford University Press, 2nd Ed, 2009) ("*Bridge*") at para 3.83, the practice of sellers reserving the right of disposal after delivery to the buyer arose because unpaid sellers found themselves at a disadvantage upon the insolvency of the buyer, given that they joined other unsecured creditors in receiving, on average, a very small insolvency dividend hardly worth the expense of lodging a proof with the liquidator or trustee in bankruptcy. *Bridge* explains that "[t]he great advantage to a seller of reserving the general property in the goods is that, until the property passes, no ownership rights vest in the buyer and therefore the goods cannot fall within a security granted by the buyer, before or after the contract of sale is concluded, to one or more creditors, or vest in the liquidator or trustee". *Prima*

facie, if the buyer becomes insolvent before the price is fully paid, the seller will be able to reclaim possession of the goods: *Atiyah and Adams* at p406.

33 Because sellers are able to retain an interest in the goods simply by inserting a retention of title clause in the contract of sale, these clauses have become of "serious concern" to creditors of manufacturing and trading companies (for whom the buying and re-selling of goods is a core business), and in particular to banks which might otherwise be secured by charges on the assets of these companies: *Benjamin* at para 5-144. The commercial consequences of retention of title clauses therefore have the potential to extend considerably beyond the immediate buyer and seller relationship.

Statutory basis

34 The statutory underpinning of retention of title clauses begins with the permissive, autonomy-centred rule in s 17 of the SOGA:

> **Property passes when intended to pass**
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> **17.**—(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer *at such time as the parties to the contract intend it to be transferred.*
>
> (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.
>
> [emphasis added]

In other words, s 17 leaves it open to the parties to determine the point in the transaction when property in the goods passes. This is entirely of a piece with Lord Mance's observation in *The Res Cogitans* at [53] that "the 1893 Act [which is the precursor of the UK SOGA] was … developed in an era when freedom of contract and trade were axiomatically accepted as beneficial".

35 Section 19(1) specifically affirms the effectiveness of retention of title clauses in providing security for sellers:

> **Reservation of right of disposal**
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> **19.**—(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, *the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled*; and in such a case, *notwithstanding the delivery of the goods to the buyer*, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the ***property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled***.
>
> [emphasis added in italics and bold italics]

The ability of the seller under s 19(1) to retain a *jus disponendi* over the goods, subject to such conditions as the parties may agree on, is consistent with the parties' entitlement under s 17(1) to decide by contract the time at which property in the goods passes.

36 Despite the ubiquity and apparent simplicity of retention of title clauses, a considerable body of English case law has developed to address various difficult questions concerning the scope, consequences and enforceability of such clauses. As Staughton J remarked in *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 1 WLR 485 at 493, "this area of the law is presently a maze if not a minefield, and one ha[s] to proceed with caution for every step of the way". The issues that have confronted the UK courts include, for instance, whether a seller's interest under a retention of title clause is a registrable charge that would be void for non-registration, whether a buyer who has yet to make payment should be regarded as a bailee of the goods, the availability of proprietary remedies where the unpaid goods have been incorporated into other goods or used to make other products, and the extent to which a seller is entitled to the resale proceeds of unpaid goods and any products

manufactured with or incorporating those goods. The ROT Clause in the present case purports to require the Defendant, if the Goods are sold, to hold the proceeds of sale on trust for the Plaintiff as the Plaintiff's property, and to keep such proceeds separately from the Defendant's own money (see [7] above). However, given that the Price Claim only pertains to the contract price of the Goods, and the question of the Plaintiff's entitlement to the sale proceeds (if any) does not fall within the scope of that claim, this aspect of the clause will not be considered in this judgment.

37 Section 49 of the SOGA is a crucial provision that identifies the circumstances in which an action for the price can be sustained. The two subsections under s 49 also lie at the heart of the present dispute.

> **Action for price**
>
> **49.**—(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.
>
> [emphasis added in italics and bold italics]

38 In summary, under s 49, an action for the price can be maintained against a non-paying buyer in two scenarios: (a) where property in the goods has passed to the buyer; or (b) where the price is payable "on a day certain irrespective of delivery", although the property in the goods may not have passed. I will further examine the meaning of "on a day certain irrespective of delivery" under s 49(2) subsequently.

39 Sections 49 and 50 are the two sections falling under the header of "Seller's Remedies" in the SOGA. While actions for the price are governed by s 49, actions for damages for non-acceptance are the subject of s 50, which provides that where a buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance. As *Benjamin* explains at para 16-004, actions for the price are claims for a debt (*ie,* a definite sum of money fixed by the contract as payable), while actions for damages under s 50 are brought against buyers who have broken their contractual obligations in some way other than by failure to pay the price. The two sections therefore do not overlap.

Two key cases

40 The parties' submissions centred on two key cases. For the Defendant, Mr Quah referred to the UK Court of Appeal's decision in *FG Wilson*, while for the Plaintiff, Mr Ting relied heavily on the more recent decision of the UK Supreme Court in *The Res Cogitans*. I will describe these decisions in turn, focusing on the aspects to which counsel drew my attention. As the reasoning in both decisions is intricate, some detail is required.

FG Wilson

41 The respondent, which was a manufacturer and seller of generator sets and spare parts, entered into a distributorship agreement with the appellant, whose business consisted predominantly in purchasing generators and spare parts from the respondent for export to Nigeria. The trading terms between the parties required the appellant to make payment "within thirty (30) days of the date of invoice" (although the time for payment was subsequently extended). When the appellant failed to pay, the respondent commenced proceedings for the sums due. The appellant responded that the goods had all been delivered to

its Nigerian subsidiary, which had become the legal owner of the goods, and that the respondent had no claim for the price under s 49(1) of the UK SOGA. In the High Court, Popplewell J granted summary judgment in favour of the respondent and the appellant appealed.

42 The retention of title clause read as follows:

> Title and risk of loss: … Notwithstanding delivery and the passing of risk in the products, *title shall not pass to buyer until seller has received payment in full for the products and all other goods or services agreed to be sold by seller to buyer for which payment is then due.* Until such time as title passes, buyer shall hold the products *as seller's fiduciary agent* and shall keep them separate from buyer's other goods. Prior to title passing buyer shall be entitled to resell or use the products in the ordinary course of business and shall account to the seller for the proceeds of sale. … [emphasis added]

The two issues on which the bulk of the Court of Appeal's analysis was spent were (a) whether, given the retention of title clause, property in the goods had passed to the appellant under s 49(1) of the UK SOGA; and (b) whether the claim for the price could only be brought pursuant to the UK SOGA. The Court of Appeal was uniform on the second issue but split on the first, with Longmore LJ disagreeing with Patten and Floyd LJJ.

43 On the first issue, the appellant argued that property had never passed to it because, pursuant to the retention of title clause, the appellant was acting as an agent for the respondent when it resold the goods to the Nigerian subsidiary. Notably, the above-mentioned clause stipulated that until title passed, the goods were to be held by the appellant as the respondent's "fiduciary agent". Longmore LJ rejected the argument, finding (at [28]) that if the appellant were regarded as the respondent's agent, then the respondent would be conferred a "potential windfall" in the event that the proceeds of the sale exceeded the price of the goods to be paid by the appellant to the respondent. The correct

understanding of the retention of title clause was that it simply provided security for the respondent. It would also be "remarkable" if the relationship of the parties was that of principal and agent with the respondent having no control of the terms on which his agent (the appellant) was reselling. Patten and Floyd LJJ disagreed. They preferred the view that the appellant's obligation to account for the sale proceeds was "the hallmark of a fiduciary relationship" (at [66]). Accordingly, title did not pass to the appellant until payment of the price, and the order below for the payment of the price was set aside.

44 On the second issue, the respondent contended that s 49 is "permissive not exclusive" and did not preclude an action for the price when the buyer has failed to pay the price under a contract of sale, even if property in the goods has not passed to the buyer: *FG Wilson* at [22]. Longmore LJ did not agree, observing (at [41]) that the UK SOGA had "taken the trouble to spell out [the] two circumstances where an action for the price [could] be maintained", by way of ss 49(1) and (2) of the UK SOGA. And if an action for the price could be maintained whenever the obligation to pay arose, then s 49 would be "largely otiose". He noted, however, controversy in the academic writings (at [43]) and the lack of a uniform position in the cases on the issue (at [45]–[52]). Longmore LJ defended s 49(1) on the basis that when it was drafted, "it was axiomatic that a seller could not sue for the price unless property in the goods had passed. 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*. … 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." [emphasis added].

45 Separately, in relation to the possibility of the payment term falling within the scope of s 49(2) (although the respondent did not rely on this subsection), Longmore LJ observed as follows:

> 44 It is no doubt true that retention of title clauses were less common in 1893 than they are today. But if a seller is happy to allow a buyer use of the goods without paying for them but wishes to ensure that he retains property in the goods and that he can sue for the price, *he only has to provide for payment to be due on a day certain.* That is what one would usually expect a seller to do; *indeed that is what FG Wilson's terms and conditions do under the heading "Prices and payments" where it is provided that the buyer is to pay within 30 days of the date of the invoice. …* [emphasis added]

46 In conclusion, Longmore LJ noted (at [55]) that there would not a claim for damages for failure to pay the price, given that English law did not normally permit such a claim. His overall analysis led him to the "somewhat unsatisfactory position of concluding that, if property had never passed to [the appellant], [the respondent would] have no claim for the price nor even a claim to damages. *That is just an inherent result of a retention of title clause and shows that it has dangers as well as benefits.*" [emphasis added]. However, given his finding that property in the goods had passed to the appellant (which was not an agent of the respondent), he would have concluded that the respondent was entitled to judgment for the price.

The Res Cogitans

47 *The Res Cogitans* concerned a chain of contracts linking five different parties. The appellant shipowners ("the Shipowners") contracted with the first respondent ("OWBM") for the supply of bunkers for their vessel. The contract contained a retention of title clause that vested title to the bunkers in OWBM until it received full payment of all amounts due in connection with the delivery of the bunkers. The clause also required the Shipowners to hold the bunkers as

bailee for OWBM pending such payment and prohibited the Shipowners from using the Bunkers other than for the propulsion of the vessel. The Shipowners were to make "[p]ayment within 60 days from date of delivery upon presentation of invoice". OWBM obtained the bunkers from its parent company ("OWBAS"), which in turn obtained the bunkers from another supplier ("RMUK"). RMUK itself was supplied by its associate ("RNB").

48 The Shipowners availed themselves of their right to consume the bunkers in the vessel's propulsion. However, no payment was ever made by OWBM or OWBAS to RMUK, which paid RNB in accordance with their contract. RMUK demanded payment from the Shipowners, who sought a declaration in arbitration that it was not liable to pay OWBM for the bunkers.

49 The arbitrators found that the contract between OWBM and the Shipowners was a *sui generis* contract and was not one of sale under s 2 of the UK SOGA. Thus, there could be no defence under s 49 of the UK SOGA (for instance, the defence that property to the bunkers had not passed to the Shipowners) to the claim for the price. In the High Court, Males J dismissed the Shipowners' appeal and the Court of Appeal dismissed the appeal from Males J's decision.

50 Lord Mance JSC delivered the unanimous decision of the UK Supreme Court, which also consisted of Lords Neuberger, Clarke, Hughes and Toulson JJSC. As Lord Mance's reasoning is of considerable complexity, it is useful to divide his reasoning into three parts, each corresponding to an issue before the Supreme Court (and each relevant to the present case).

(1) The contract for supply of bunkers as a *sui generis* contract

51 The primary issue before the Supreme Court was whether the contract between OWBM and the Shipowners was a contract of sale to which the UK SOGA would apply. Lord Mance began by making a few observations on the surrounding commercial realities (at [27]). He noted that "[b]unker suppliers know that bunkers are for use" and that standard terms prohibiting such use "would be uncommercial or in practice, no doubt, simply ignored", the "liberty to use the bunkers for propulsion prior to payment [being] a vital and essential feature of the bunker supply business". This led Lord Mance to characterise the contract as something other than an ordinary contract of sale (at [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 … 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. [emphasis added]

52 In support of his finding, Lord Mance referred to an unreported decision of the UK Court of Appeal in *Harry & Garry Ltd v Jariwalla* (unreported) 16 June 1988; [1988] CA Transcript No 516 ("*Harry & Garry*"). That case concerned an agreement that the suppliers of defective sarees would either cancel bills of exchange given to their buyers, therefore relieving the buyers of their acceptance of the bills, or to take back and repay the buyers whose interest would be secured by an agreement that the buyers would retain title in the sarees until repayment was made. The suppliers chose the second option and took back a large number of sarees for attempted sale, but in the event failed to sell the

sarees and also failed to repay the buyers. Kerr LJ (as he then was) found that the agreement was not a contract for the sale of goods to which the UK SOGA applied. Rather, "[l]ike many other contracts in complex situations, this was a *sui generis* transaction". Lord Mance adopted a similar approach, finding (at [34]) that the contract between OWBM and the Shipowners was a *sui generis* contract because 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". Given that the UK SOGA therefore did not apply to the contract, the Shipowners could not avail themselves of any defence under s 49 to the claim for price.

(2) Whether the UK SOGA is a complete code for price claims

53 Usefully, Lord Mance went on to consider the position if the contract had been a contract of sale governed by the UK SOGA. In pursuing this inquiry, he directly confronted the finding in *FG Wilson* that the UK SOGA represents a complete code which precluded any action for price outside its terms.

54 Lord Mance first observed (at [48]) that a claim for damages for non-payment of money could "quite readily be accommodated in the modern law" (citing *Colley v Overseas Exporters* [1921] 3 KB 302 ("*Colley*"), *Laird v Pim* (1841) 7 M & W 474 and *Sempra Metal Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2008] AC 561). He found that on the facts of *The Res Cogitans*, there would in fact be no difference between the agreed price and the damages for non-payment of the price, given the complete consumption of the bunkers. More significantly, Lord Mance addressed Longmore LJ's assessment that it would be unfair to buyers if, before delivery occurred, the goods perished or were damaged and yet the price was payable, unless the goods were actually the buyer's property (see [44] above). Lord Mance noted (at [49]–

[50]) that this concern would really only arise in situations where delivery had not been made and the property was at the risk of the seller. It did not apply where the buyer is permitted to dispose of or consume the goods, or if the goods are at the buyer's risk and are destroyed or damaged. He surmised as follows (at [53]):

> … 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 (*ie,* a claim for damages for non-acceptance), 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***. [emphasis added in italics and bold italics]

55 Lord Mance again drew an analogy to *Harry & Garry* (see [52] above), finding (at [54]) that it was "entirely natural and appropriate that [the buyers] 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 [suppliers] in return". After a review of other authorities, he also found (at [55]–[57]) that price actions may be sustained in respect of undelivered goods that are at the buyer's risk but which remain the seller's property, and are destroyed by perils of the seas or by fire. He concluded as follows:

> 57 … 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* 16 June 1988 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. …
>
> 58 It follows from what I have said that, had the contract been one of sale, I would have held, overruling [*FG Wilson*] on this point, that ***section 49 is not a comprehensive 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.*
>
> [emphasis added in italics and bold italics]

56 The overall result of Lord Mance's decision was that the Shipowners had no defence to the action for price because (a) the UK SOGA did not apply to the contract between OWBM and the Shipowners, since it was *sui generis*; and (b) even if the contract was a contract of sale to which the UK SOGA applied, s 49 was no bar to a claim by OWBM for the agreed price since the claim could be sustained outside the statute.

(3) The meaning of "day certain irrespective of delivery"

57 While the applicability of s 49(2) to the contract did not arise before the Supreme Court (it appears that permission to appeal on this point had not been given by Males J: see *The Res Cogitans* at [14]), Lord Mance made several important remarks in this regard. He observed (at [45]) that s 49(2) reflected an established common law exception that allowed a seller to enforce payment, provided that he is ready and able at the same time to deliver the goods to the buyer and property in them (citing *Otis Vehicle Rentals Ltd (formerly Brandrick Hire (Birmingham) Ltd v Ciceley Commercials Ltd* [2002] All ER (D) 203 at

[16]). He then commented as follows on *FG Wilson* and the applicability of s 49(2) to the contracts at hand (at [45]):

> … In [*FG Wilson*], 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. [emphasis added]

58 Later in his judgment, Lord Mance returned to the subject of s 49(2) where he made the following important observations regarding the circumstances in which s 49(2) applies (at [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(2) does not focus on the position existing where delivery is made, title is reserved but the price is agreed to be paid****, albeit not 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.* … [emphasis added in italics and bold italics]

Analysis

59 Although Mr Ting chose to advance the *Sui Generis* Argument first, I prefer to begin with his arguments on the statute, that is, the s 49(1) and s 49(2) Arguments (of which I will begin by addressing the latter). I will then turn to the Complete Code Argument and finally to the *Sui Generis* Argument.

The s 49(2) Argument

60 Mr Ting for the Plaintiff had argued that the Payment Clause, which provides that the Defendant is to make payment of "100% net cash via wire transfer within 30 working days after Seller's presentation of the documents" (see [6] above), satisfies the requirements under s 49(2) of the SOGA. In other words, the clause provides for payment "on a day certain irrespective of delivery".

61 In response, Mr Quah for the Defendant submitted that the Payment Clause was not "irrespective of delivery … because presentation of documents requires delivery. Delivery is at issue." Mr Quah's argument rests on a particular understanding of the phrase "irrespective of delivery", namely, that the time for payment stipulated in the agreement cannot depend on the occurrence of delivery. The time for payment must be capable of being ascertained independently from the time of delivery. Mr Quah did not refer me to any case authority in this regard but, as I will explain, his reading of s 49(2) is not without some jurisprudential support.

62 I do not accept Mr Quah's argument. In my view, the requirement of payment "on a day certain irrespective of delivery" does not mean that the time for payment *cannot be* dependent on or otherwise associated with delivery or the time for delivery. Rather, the phrase "irrespective of delivery" means that the time for payment *may be, but need not be* contingent on delivery or the time for delivery. Accordingly, a term requiring payment at a time that is ascertainable with reference to delivery or the time for delivery is capable of falling within the scope of s 49(2). I have reached this conclusion for three principal reasons. First, a contextual reading of s 49(2) demonstrates that the phrase "irrespective of delivery" was meant to alleviate parties from the

ordinary statutory condition that payment be concurrent with delivery. Second, the modern judicial preference has been for a less restrictive reading of s 49(2). Third, principle and policy do not support a requirement that parties must dissociate the time for payment from the seller's contractual performance of delivery in order to preserve potential claims under s 49(2).

A contextual reading of s 49(2)

63 To begin, s 49(2) must be understood in the context of the SOGA as a whole. This includes s 28, which sets out the default position regarding payment and delivery:

> **Payment and delivery are concurrent conditions**
>
> **28.** Unless otherwise agreed, *delivery of the goods and payment of the price are concurrent conditions*, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.
>
> [emphasis added]

64 In "The UK Supreme Court Decision in *The Res Cogitans* and the Cardinal Role of Property in Sales Law" [2017] SJLS 345 at 362 ("*Bridge (The Res Cogitans)*"), Professor Bridge explains why the payment clause in *The Res Cogitans* satisfied the requirement in s 49(2). In his words, *"*payment was due irrespective of delivery, in the sense that *it was not linked to delivery as a mutual and concurrent condition, which is the presumptive rule in section 28*" [emphasis added]. By stipulating that the time for payment of price is "irrespective of delivery", s 49(2) clarifies that payment need not be concurrent with delivery, which is a requirement that would otherwise apply given s 28. Therefore, s 49(2) gives effect to parties' agreement that payment is to be made before or after – and not at the same time as – delivery. The point is succinctly expressed in *Bridge* at para 11.67:

> … Under s 49(2), in essence, the dependency between the seller's duty to deliver and the buyer's duty to pay the price, presumptively established by section 28, is severed by the terms of the contract itself. The buyer's duty to pay is consequently "irrespective of delivery" and the seller's right to call upon the buyer to pay the price matures on the date that payment falls due.

This is supported by Lord Mance's observation in *The Res Cogitans* at [50] that 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." [emphasis added].

65 Put another way, the stipulation in s 49(2) that the payment of price is "irrespective of delivery" is permissive, not exclusory. It is intended to relieve parties from the default position that the day certain for payment is concurrent with delivery, but not to preclude parties from associating the time for payment with delivery if they so wish.

The position in case law

66 Although the position in the case law is not uniform, I find that recent authorities have tended toward the view I have preferred.

67 In *FG Wilson*, the payment clause provided that the appellant buyer was to pay the respondent seller within 30 days of the date of the invoice. Longmore LJ observed (at [44]) that "if a seller is happy to allow a buyer use of the goods without paying for them but wishes to ensure that he retains property in the goods and that he can sue for the price, he only has to provide for payment to be due on a day certain" (see [45] above). He remarked that not only was that "what one would usually expect a seller to do; *indeed that is what FG Wilson's*

terms and conditions do under the heading 'Prices and payments' where it is provided that the buyer is to pay within 30 days of the date of the invoice" [emphasis added]. Longmore LJ was therefore of the view that the payment term satisfied the requirements in s 49(2). In her article "The interpretation of retention of title clauses: some difficulties" (2014) LMCLQ 564 ("*Gullifer*"), Professor Gullifer highlights (at p578) that because the time for payment provided in the payment term in *FG Wilson* depended on the raising of the invoice, it therefore indirectly concerned the date of delivery, since the invoice could only be raised after delivery. Thus, although the payment term in *FG Wilson* referred to the date of the invoice, the date of delivery was also thereby put into issue. In the present case, I do not understand Mr Ting to have disputed Mr Quah's suggestion that the "Seller's presentation of the documents" as mentioned in the Payment Clause (see [6] above) means that the time for payment is tied or associated to delivery.

68 In *The Res Cogitans,* the contract between OWBM and the Shipowners required the latter to make "[p]ayment within 60 days from date of delivery upon presentation of invoice". OWBAS' contract with its supplier RMUK required the former to make "payment within 30 days from date of delivery against hard copy of invoice". By the express terms of these contracts, there can be no doubt that the time for payment was tied directly to the date of delivery. In the High Court, Males J took the view (in *obiter* comments) that the payment terms were "provision[s] for payment to be made within a *fixed period after delivery*" [emphasis added] and that this satisfied the requirement in s 49(2): *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another* [2015] EWHC 2022 (Comm) at [73]. He noted that in *Workman, Clark & Co Ltd v Lloyd Brazileno* [1908] 1 KB 968, the Court of Appeal had held that the sellers could sue the buyers for a liquidated sum in respect of a shipbuilding

contract that provided for payment of instalments based on particular stages of the construction of the ship. This, in Males J's view, accorded with Longmore LJ's approach in *FG Wilson*.

69 In the Supreme Court, Lord Mance expressed a similar opinion. He likewise referred to Longmore LJ's view that the payment term in *FG Wilson* met the requirements in s 49(2), and held (at [45]) that this approach "would embrace the situation under RMUK's contract with OWBAS or OWBM's contract with the [Shipowners], whereby the price was payable within respectively 30 or 60 days of delivery" (see also [57] above). He also recognised that s 49(2) could "no doubt be construed liberally", although the words of the provision were "not of indefinite expansion". Professor Bridge surmises that an action could therefore have been brought by OWBM against the Shipowners for the price under s 49(2), and that would have been enough to conclude the eligibility of OWBM to sue for the price had the contract been treated as one of sale: *Bridge (The Res Cogitans)* at p362. In his view, the Supreme Court's conclusion on the availability of a price action was commendable – it "simplif[ies] the law on remedies and protect[s] the seller's just expectations": *Bridge (The Res Cogitans)* at p365.

70 Section 49(2) is said to have been based on a decision of some antiquity, *Dunlop and others v Grote and another* (1845) 2 Car. & K. 153 ("*Dunlop*"): *Benjamin* at para 16-025. In *Dunlop*, the plaintiffs contracted to supply iron to the defendants, who were to pay cash for every ton delivered. Delivery was to be taken by the defendants between 3 March and end-April. The contract provided that "if delivery of the said iron should not be required by the defendants on or before [30 April] … [then] the said iron was to be paid for by the defendants on [that date]". The defendants failed to pay a portion of the sum and the plaintiffs sued for the remainder, arguing that there was a day fixed for

the payment of the money. Cresswell J agreed, holding that the plaintiffs were entitled to recover the monies "as it was agreed to be paid on a day certain". In short, despite the fact that the payment term associated the time for payment with the delivery of the iron, the court accepted that a claim for price could be maintained.

71 As I have mentioned, the cases are not all one way. For instance, in *Shell-Mex Ltd v Elton Cop Dyeing Co Ltd* (1928) 34 Com. Cas. 39, Wright J took the view (at 43) that "a day certain" was "a time specified in the contract not depending on a future or contingent event" (see also *Stein Forbes & Co v County Tailoring Co* (1916) 115 L.T. 215, *cf Polenghi v Dried Milk Co Ltd* (1904) 10 Com. Cas. 42). It has therefore been said the case law "does not throw very much light on the matter": *Bridge* at para 11.68. But if the more recent decisions in *FG Wilson* and *The Res Cogitans* are anything to go by, the modern preference appears to be for a less restrictive understanding of s 49(2).

Principle and policy

72 As a matter of principle, I do not see any clear reason why, in a situation where property has not passed, a seller cannot bring an action for price to enforce a payment term providing for price to be payable on a date ascertainable by reference to delivery. This is particularly so where delivery has in fact been made by the seller, as the Plaintiff has in the present case. If the seller has upheld his end of the bargain and delivered the goods to the buyer, it seems *a fortiori* the case that he should be able to obtain payment on the heels of his performance.

73 The objection may perhaps be that the date of delivery might be uncertain, and therefore a payment term in which the date for payment is

ascertainable by reference to delivery is inconsistent with the requirement that the price be payable "on a day certain". That argument, however, only has any traction if the date of delivery is in fact uncertain, either because the date of delivery is unclear from the terms of the contract or for some inherent reason (for instance, a term that payment be made upon the next occurrence of rainfall). But where the ascertainment of the date of delivery does not run into any such difficulties, then the maxim *certum est quod certum reddi potest* (*ie,* that is certain which may be made certain) should surely apply, such that the date of payment may also be regarded as certain. This is also the view that Professor Bridge takes in relation to the payment clause in *The Res Cogitans*: *Bridge (The Res Cogitans)* at p362.

74 Professor Gullifer has opined that it would be uncommercial to require a seller to stipulate an actual date for payment in the contract: *Gullifer* at p578. Given that payment is often contingent on delivery having been made (and understandably so), I would add that it would be unrealistic to expect this generally. Professor Gullifer further observes that such a requirement would also be unfair to the buyer, who would normally want the credit period to extend from the date of delivery. By forcibly dissociating the time for payment from that of delivery, one would restrict not only parties' freedom of contract but also buyers' ability to protect their interests by requiring payment to be made within a period after delivery.

75 For the above reasons, I find Mr Quah's approach unpersuasive. In my judgment, the Payment Clause satisfies the requirements under s 49(2) and the Price Claim may be maintained pursuant to that provision, assuming that title has not passed.

The s 49(1) Argument

76 The key question in relation to the s 49(1) Argument is, of course, whether property in the Goods has passed to the Defendant (as buyer) such that the Price Claim may be sustained under s 49(1). As described at [24(b)] above, Mr Ting had two submissions in this regard. First, he highlighted that the ROT Clause expressly envisages that the Defendant may on-sell the goods to third parties. This can be seen from the following extract from the ROT Clause:

> … if the Buyer sells the Goods, the Buyer's right to receive payment pursuant to such sale of the Goods will be held in trust for the Seller and any proceeds of such sale will be the property of the Seller, and the Buyer will hold the proceeds of any such sale on account of the Seller and keep the proceeds separately from its own money. …

Mr Ting pointed out that the Goods had, by the Defendant's admission, been on-sold to the Sub-Buyer in July and August 2018, at or shortly after the time that the Plaintiff made delivery to the Defendant. The Goods were therefore no longer in the Defendant's possession. Given the terms of the ROT Clause, the sale to the Sub-Buyer would therefore be (in Mr Ting's words) "a disposal with the authority of the owner", operating to pass title to the Sub-Buyer.

77 Mr Ting's second argument was based on s 25 of the SOGA, which provides:

> **Buyer in possession after sale**
>
> **25.** Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

Mr Ting submitted that the Sub-Buyer had good title by virtue of s 25. Consequently, "for both these reasons, title will have passed".

78 I did not understand Mr Quah to have contested the s 49(1) Argument. Mr Quah's response in this regard was simply to point out that the Plaintiff had taken the position that title to the Goods had passed to the Sub-Buyer. The passing of such title meant that the Plaintiff was not entitled to the relief sought in the Proprietary Claims. Mr Quah's decision not to dispute the s 49(1) Argument but to focus instead on the Proprietary Claims perhaps arose from the fact that a winding up application had just been filed against the Defendant, as Mr Quah informed me during the hearing on 27 December 2018. No further details of that application were furnished. Be that as it may, I will consider at a later stage Mr Quah's argument that I should "decide in the round" if the Plaintiff is entitled to the relief sought, including the Proprietary Claims.

79 I will examine, at present, the two submissions advanced by Mr Ting to establish the s 49(1) Argument. Section 49(1) clearly requires that "the property in the goods has passed to the *buyer*" [emphasis added]. It is for that reason insufficient for the Plaintiff to demonstrate that title to the Goods passed to the *Sub-Buyer* if that does not also show that title passed, at some point, to the *Defendant* (as the buyer from the Plaintiff). Put another way, in order to succeed in its argument, the Plaintiff must show that the Defendant obtained title to the Goods as a result or in the course of the sub-sale.

Disposal with the authority of the seller

80 Mr Ting's first argument, that the transfer of the property from the Defendant to the Sub-Buyer was a "disposal with the authority of the owner", receives some support from an observation in *Benjamin*. At para 5-158,

Benjamin states that although the contract between buyer and seller contains a retention of title clause, the sub-purchaser of goods from the buyer "will acquire a good title under the [UK SOGA] s. 25(1) or under the Factors Act 1889 s.2, or because *the buyer has the express or implied authority of the seller* to sell the goods in the ordinary course of business and confer a good title on sub-purchasers" [emphasis added]. A similar observation was made by Slade J in *Re Bond Worth Ltd* [1980] Ch 228 at 246, in relation to a retention of title clause permitting the sellers to retain "equitable and beneficial ownership" in the goods until full payment had been received or "until prior resale, in which case [the sellers'] beneficial entitlement shall attach to the proceeds of resale or to the claim for such proceeds". Slade J took the view that the words "until prior resale" in the retention of title clause "render[ed] the implication of [the buyers'] authority to resell [to sub-buyers] inevitable".

81 It is, however, not entirely clear to me what is meant when it is said that the sub-buyer has good title because the sub-sale was a "disposal with the authority of the owner" (or because the buyer had the "authority of the seller" to sell the goods, to use the language in *Benjamin*). This is relevant for present purposes insofar as it explains why property in the goods also came to be vested in the buyer at some point in time (if that is indeed the case).

82 In my view, there are two possible interpretations of what is meant by the buyer having the "authority of the seller" to sell the goods. First, it might be meant that the buyer sold the goods to the sub-buyer on behalf of the seller – *ie,* the buyer sold the goods as the seller's agent. But it appears extremely unlikely to me that this accords with what the parties intended. It is, in the absence of other indication, far more plausible that the parties intended to buy and sell on their own accounts as principals in the ordinary course of business (see also *Gullifer* at pp567–572). More importantly, I am unable to see how property in

the goods would have passed to the *buyer*, as opposed to the *sub-buyer*, if the former sold the goods to the latter as the seller's agent. The buyer would never have himself obtained title since what the buyer would have contracted to give the sub-buyer is the seller's title.

83 Second, it might simply have been meant that the seller agreed to let the buyer on-sell the goods, should the buyer decide to do so. It is, however, not immediately obvious why this yields the result that the sub-buyer obtained title to the goods, given the seller's retention of title pending full payment by the buyer. A possible answer is that the parties also agreed that the seller's retention of title should come to an end in the event of a sub-sale, in which event property in the goods would be permitted to pass from seller to buyer, who would then be in a position to pass title to the sub-buyer. The seller would still have security for the buyer's payment, although that security would no longer consist in the retention of title. It would instead lie in the sale proceeds, which would be held by the buyer for the seller (as reflected in the ROT Clause in the present case (see the extract at [76] above)). This, to my mind, is a plausible and commercial account of what the parties intended.

84 It is also supported by Popplewell J's reasoning in the first instance decision in *FG Wilson*, with which Longmore LJ agreed on appeal: *FG Wilson* at [25]. Popplewell J found that notwithstanding the retention of title clause, parties had agreed that property in the goods should pass to the appellant when they were delivered to the appellant's factory in Larne, Northern Ireland, for resale to the Nigerian subsidiary, or at the latest when sold on to the Nigerian subsidiary if that were later: *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd* [2012] EWHC 2477 (Comm) ("*FG Wilson (HC)*") at [58]; *FG Wilson* at [22]. The products were "specifically supplied for resale, with the

intention that title would pass down the chain to the Nigerian customers when they bought the products": *FG Wilson (HC)* at [58].

85 This analysis might be open to some doubt insofar as it appears to entail that at the moment of sub-sale (or such time as property was to be transferred to the sub-buyer), property in the goods passed in a *scintilla temporis* from the seller to the buyer and then to the sub-buyer; and in this regard I am mindful of the following remark by Lord Hoffmann in *Ingram and another (executors of the estate of Lady Ingram (deceased)) v Inland Revenue Commissioners* [1999] 1 All ER 297 at 303: "I do not think that a theory based upon the notion of a *scintilla temporis* can have a very powerful grasp on reality". I am, however, of the view that the successive passing of title does not pose any real or practical difficulty if that was what parties intended, and I find that a strong argument may be made that that was indeed what they envisioned. In *Romalpa*, it was common ground (and the Court of Appeal accepted) that the parties had agreed that the defendant buyers would be able to lawfully sell the goods in their possession despite not having yet paid the plaintiff sellers for them. Roskill LJ, who delivered the leading judgment, commented that to hold otherwise "would be to stultify the whole business purpose of these transactions": *Romalpa* at 689C. There is force in this observation, which underscores the need to adopt a reading of the contract that gives effect to the commercial intentions and expectations of the parties.

86 I should highlight for completeness that there are authorities that do not support such a reading. In *Four Point Garage Ltd v Carter* [1985] 3 All ER 12, the defendant purchased a car from a third party, which then contracted with the plaintiff to obtain the car. At the request of the third party, the plaintiff delivered the car directly to the defendant. When the third party went into liquidation without having paid the plaintiff for the car, the plaintiff commenced

proceedings against the defendant, seeking a declaration that it owned the car pursuant to a retention of title clause in the contract between itself and the third party. The defendant argued that the retention of title clause prevented the passing of title from the plaintiff to the third party, since the latter had not paid for the car, with the result that it could not have passed good title to the defendant. Brown J observed (at 14) that "[f]rom these facts it is plain … that *[the third party] never acquired good title to the motor car as between themselves and the plaintiffs since they never made payment* in regard to the motor car and thus fell foul of the *Romalpa* clause" [emphasis added]. He later found that the defendant had title pursuant to s 25 and alternatively because (applying the agency construction) the plaintiff had impliedly authorised the third party to sell the car, but none of these determinations contradicted his earlier finding that the third party never acquired good title. I note, however, that the possibility of parties having agreed that title would be passed to the third party for conveyance to the defendant upon a sub-sale (with the plaintiff's security then attaching to the proceeds of the sub-sale) was not canvassed or considered.

87 In the circumstances, and particularly in light of the fact that Mr Quah did not dispute either of Mr Ting's submissions within the s 49(2) Argument, I am satisfied that under a reasonable construction of the ROT Clause, property in the Goods passed to the Defendant (and thereon to the Sub-Buyer) when the sub-sale occurred.

Buyer in possession after sale

88 I am less confident, however, of Mr Ting's reliance on s 25 of the SOGA as a means of demonstrating that property in the Goods passed, at some point in the sub-sale, to the Defendant.

89 Section 25 was enacted as an exception to the ordinary rule of *nemo dat quod non habet* (*ie,* no one can give what they do not have). The *nemo dat* rule entailed that a buyer who did not have title was unable to pass it to a sub-buyer: *Benjamin* at para 7-069. In essence, s 25 allows a buyer of goods, who is in possession of those goods with the consent of the seller, to pass good title to a sub-buyer who receives the goods in good faith and without notice of the seller's rights. The meaning of a "mercantile agent" in s 25 is defined in s 26 as a "mercantile agent having in the customary course of his business as such agent authority either (*a*) to sell goods; (*b*) to consign goods for the purpose of sale; (*c*) or to buy goods; or (*d*) to raise money on the security of goods". It has been said that the reference to "mercantile agent" in s 25 simply means that one is to assume that the buyer is such a mercantile agent: *Newtons of Wembley Ltd v Williams* [1965] 1 QB 560 at 579.

90 It is evident that s 25 is of rather limited application. Given the requirement that the sub-buyer must not have had notice of the seller's original rights, s 25 would not allow title to pass to a sub-buyer who is aware that the buyer does not yet have title – for instance, where the sub-buyer knows that the seller retains the property in the goods under a retention of title clause pending full payment by the buyer. But in a situation where the seller has also expressly agreed that the buyer may on-sell the goods and the buyer knows this (as, indeed, it is likely to, given the ubiquity of clauses to such effect in international trade), it appears unnecessary and indeed odd that s 25 need have any application at all. In such a situation, it cannot be said that the seller has experienced some detriment that it had not both foreseen and agreed to, nor can it properly be said that the sub-buyer was acting *mala fide* in purchasing the goods despite knowing of the retention of title clause. In such a situation, the more plausible explanation as to why a sub-buyer receives good title is not the

operation of s 25, but rather the simple fact that the seller has agreed to (or "authorised") the buyer on-selling the goods. This underscores my earlier finding on Mr Ting's first submission.

91 In any event, it is clear to me that s 25 vests title in the sub-buyer by operation of law (that is, by virtue of that statutory provision), and not because the provision confers title on the buyer who then passes it to the sub-buyer. As observed in *Benjamin* at para 7-071, as a normal rule, a buyer to whom property in goods has passed under a contract of sale will be able to confer a good title by virtue of his property in them, and there will in these circumstances be no need for any reliance on s 25.

92 For the foregoing reasons, I accept that as a matter of construction of the ROT Clause, parties agreed that property in the Goods should pass to the Defendant in the event of a sub-sale (such that the Defendant might pass good title to the Sub-Buyer). I do not accept Mr Ting's alternative submission that the Defendant obtained property in the Goods through the operation of s 25, which vests title directly in a sub-buyer who receives the goods in good faith and without notice of any lien or other right of the original seller. In the result, I am prepared to find that the Price Claim may be sustained under s 49(1) of the SOGA. The upshot of my findings on s 49 is that the Price Claim may be pursued under either of its two subsections.

The Complete Code Argument

93 In the event that its arguments on s 49 fail, the Plaintiff pursues another avenue of recourse. This is Mr Ting's argument that the SOGA is not an exhaustive code for actions to recover price. In this regard, he relied on *The Res Cogitans* which in his view represents the current status of English law on the

matter, since it overruled *FG Wilson* on the point. Mr Ting also referred me to academic criticism by Professor Gullifer of the finding in *FG Wilson* that the UK SOGA is comprehensive.

94 Mr Ting's argument, as far as it goes, is incomplete. In order for the Plaintiff to succeed in the Price Claim, it is insufficient for the Plaintiff to show that the SOGA is not a complete code of the circumstances in which an action for price can be brought. It must also demonstrate that the present case is one in which an action for price can in fact be sustained outside the SOGA. In other words, the Plaintiff must show that the Price Claim satisfies such requirements that exist for actions for price outside the SOGA.

Shift in the English position

95 I have briefly described Longmore LJ's reasoning in *FG Wilson* on this issue at [41] above. In summary, Longmore LJ had three main reasons for taking the view that the UK SOGA was not a complete code:

(a) First, the statute "had taken the trouble to spell out two circumstances where an action for the price can be maintained: (1) when property has passed, and (2) if the price is payable on a day certain": at [40]. It could have provided for parties to agree that price be due and payable at any time the parties so agreed (as counsel for the respondent had argued), but it "[did] not appear so to provide".

(b) Second, if an action for price could be maintained whenever the obligation to pay arose under the contract, then s 49 would be "largely otiose". This was "a consideration which strongly suggests that section 49 intends to specify the only circumstances in which the seller may maintain action for the price": at [41].

> (c) Third, s 49 supports the idea that it would be "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… 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": at [43].

96 Lord Mance in *The Res Cogitans* did not find Longmore LJ's reasoning on unfairness to the buyer (see [95(c)] above) persuasive. That concern would only arise in situations where delivery has not been made and the goods were still at the risk of the sellers. But in a situation where the goods were at the buyer's risk, the "oddity mentioned by Longmore LJ would not have existed": at [49]. He held (at [50]) that s 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'", and "[e]ven less does [s 49] 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".

97 Put another way, it would not be unfair to the buyer if he were vulnerable to an action for the price in the following two situations: (a) where the goods had been delivered to the buyer and he was permitted under the contract to dispose of or consume the goods, which he so disposed of or consumed; or (b) where the goods were at the buyer's risk and were then destroyed or damaged. In the first situation, the disposal or consumption of the goods was pursuant to the agreement of the parties and the will of the buyer; and in the second situation, the buyer bore the risk of loss. In relation to the second situation, Lord Mance also cited with approval two decisions of some vintage, *Castle v Playford* (1872) LR 7 Ex 98 and *Martineau v Kitching* (1872) LR 7 QB 436,

which demonstrated that "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": at [57].

98 Lord Mance declined to identify the "precise limits" of the circumstances outside s 49 in which price would be recoverable, since it was unnecessary for him to do so. On the facts of *The Res Cogitans*, not only were the bunkers at the buyer's risk as regards damage or destruction (according to the terms of the contract between OWBM and the Shipowners), the express terms of the contract also permitted the bunkers to be destroyed by use for the Shipowners' commercial benefit. This was accordingly an "*a fortiori*" case for the recoverability of price by OWBM: at [57].

99 Even before the UK Supreme Court's decision in *The Res Cogitans,* Professor Gullifer had expressed serious doubts about the view that s 49 defines the only situations in which an action for the price can be brought. In her article, she opined there were a "number of good reasons why this is an extremely unsatisfactory position". The following summary aims to capture only the gist and not the intricacy of Professor Gullifer's central arguments (*Gullifer* at pp575–579):

> (a) The UK SOGA is a default code from which parties can generally deviate. It is therefore "very odd" that parties cannot provide in their contract that the seller can sue the buyer for the price in specified circumstances other than those set out in s 49.
>
> (b) Popplewell J and Longmore LJ in *FG Wilson* erred by focusing on the need for *passing of property* before the seller may sue for the price. When s 49 is read against other provisions in the UK SOGA, one sees that the evil against which s 49 really protects is a situation where

the *goods are not delivered*, but the seller still sues for the price. What the buyer really wants is delivery of the goods. Therefore, "as a matter of principle, the ability of the seller to sue for the price should relate to delivery and not to the passing of property".

(c) At least outside insolvency, a seller is likely to want to sue a non-paying buyer for the price rather than to have to repossess the goods, which may have deteriorated so they are worth less than the price. It is "most unsatisfactory" that a seller cannot have the normal choice of a secured party, which is to sue for the price or to stand on its security.

(d) It is doubtful whether, as an alternative remedy, a seller under a retention of title clause may sue for damages for non-payment of the debt. As a matter of law, it is unclear if such an action is available. In any event, an action in damages is less attractive than a claim in debt, as the rules of remoteness and mitigation apply.

Development of common law claims outside the SOGA

100 Given my finding that the Price Claim can be sustained under s 49 of the SOGA, it is unnecessary for me to express a concluded view on the difficult question of whether similar actions for the price can be brought outside the statute. But had it been necessary for me to decide the point, I would have been slow to adopt, without more detailed reflection, the sea-change in the law represented by *The Res Cogitans.*

101 The legal position in the UK appears to have crystallised since *The Res Cogitans*, and it is true that the Supreme Court's decision on this particular point has received substantial support from commentators (see the criticism of *FG Wilson* at [99] above and *Benjamin* at para 5-172 where it is remarked that

sellers' difficulties with s 49 have been "significantly eased" by the ruling in *The Res Cogitans* on this point). But it appears to me that the note of caution sounded by Longmore LJ in *FG Wilson* at [41] – where he observed that Parliament had identified only two situations in which actions for the price can be brought, although it was clearly open to Parliament to have widened the doors further – cannot be easily dismissed. This is not a view that rests on the justificatory force behind treating s 49 as exclusive (which appears to have been the focus of the court in *The Res Cogitans* and the commentaries). It is founded on a recognition that Parliament had chosen to speak on the area in question, and Parliament saw it fit to delineate precise circumstances in which actions for the price can be brought.

102 It is a well-known canon of construction that where legislation sets up a comprehensive statutory scheme in an area, this may be taken as an indication that Parliament intends that existing rights or remedies in the common law should not continue to apply in the same circumstances: Diggory Bailey and Luke Norbury, *Bennion on Statutory Interpretation* (LexisNexis, 7th Ed, 2017) ("*Bennion*") at para 25.11; see also Goh Yihan, "Where judicial and legislative powers conflict: Dealing with legislative gaps (and non-gaps) in Singapore" (2016) 28 SAcLJ 472 at para 69. The common law is "treated by implication as displaced". In *Re McKerr* [2004] 2 All ER 409 at [32], Lord Nicholls observed that the "courts [have] always been slow to develop the common law by entering, or re-entering, a field regulated by legislation. That [is] so because otherwise there would inevitably be the prospect of the common law shaping powers and duties and provisions inconsistent with those prescribed by Parliament".

103 The difficulty, as noted in *Bennion* at para 25.11, is in ascertaining whether a statute is intended to be a comprehensive scheme or if it may "coexist

with common law rights or remedies". In *Total Network SL v Revenue and Customs Commissioners* [2008] All ER (D) 160 ("*Total Network*"), Lord Mance held (at [130]) that for the statutory scheme to supersede and displace common law rights and remedies, the statute "must positively be shown to be inconsistent with the continuation of the ordinary common law remedy otherwise available".

104 If that were the test, then a case can be made for the view that s 49 is not intended to be a complete code of circumstances in which actions for the price can be brought. It has been said that when Parliament enacted s 49, its intention was "to confirm and crystallise the old law", that is, the common law represented in early cases such as *Pordage v Cole* (1669) 1 Wms. Saund. 319, *Dunlop* and the old common law forms of action of *indebitatus assumpsit*: *Benjamin* at para 16-002, citing *Colley* at 309–310 and *FG Wilson* at [43]. To the extent that s 49 was simply a codification of the existing common law, it would not appear inappropriate for the courts to continue developing the common law as long as the rights and remedies they create are not inconsistent with s 49. But I am of the view that any conclusive determination of this issue would require a closer examination of the roots of ss 49(1) and (2) and the reasons why Parliament chose to prescribe only the circumstances in those subsections as situations in which actions for the price can be maintained.

105 As mentioned at [94] above, it is not enough for the Plaintiff to canvass the possibility of actions for the price outside the SOGA. It must also show that the Price Claim satisfies the requirements governing price claims outside the SOGA. In *The Res Cogitans,* Lord Mance expressed the view that actions for price outside the UK SOGA may be brought in at least two situations: (a) where the goods had been delivered to the buyer and he was permitted under the contract to dispose of or consume the goods, which he so disposed of or

consumed; or (b) where the goods were at the buyer's risk and were then destroyed or damaged (see [97] above). Applied to the present case, it would appear that situation (a) is relevant – the Goods were delivered to the Defendant, who was permitted under the Contract to on-sell (and thereby dispose of) the Goods to third parties such as the Sub-Buyer.

106 *Benjamin* (at paras 16-003 and 16-028) has questioned whether Lord Mance's approach was too restrictive, preferring the view that "the seller should be entitled to sue for the price whenever the terms of the contract expressly or impliedly so provide". An analogy is drawn to contracts for the sale of land, in respect of which there is a general rule that a vendor cannot claim the purchase monies on the failure or refusal of the purchaser to complete the contract. That general rule can, however, be excluded "whenever the express terms of the contract show that the obligation to pay the price is not intended to be dependent upon a transfer of the title". The argument made in *Benjamin* is therefore that contracts for the sale of goods should be treated in the same way; "[a] conclusion that the terms of the contract should prevail would be more in keeping with the contracting parties' freedom to define their own obligations". But if that were so, and there were essentially no real limits to parties' ability to define the circumstances in which buyers may be sued for the price, then the continuing relevance of s 49 would truly be called into question. As Longmore LJ noted in *FG Wilson* (at [49]), "if an action for the price could be maintained whenever the obligation to pay had arisen, section 49 would be largely otiose". It might not, strictly speaking, be "inconsistent" with s 49 for the common law to permit actions for the price whenever price falls due according to contract (to apply the test in *Total Network*). But surely such a development would render s 49 all but irrelevant.

The Sui Generis Argument

107 The UK Supreme Court's finding in *The Res Cogitans* that the contract at issue was not a "contract of sale of goods" to which the UK SOGA applied is inarguably the most controversial aspect of the judgment. Lord Mance characterised the contract as a *sui generis* agreement because 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" (at [34]; see also [52] above).

108 The implications of this finding in *The Res Cogitans* have been explored by commentators. In Professor Bridge's assessment, the judgment "affects a very large number of contracts", such as a contract under which a wholesaler supplies goods on credit and reservation of title terms to a retailer, or a contract containing similar provisions under which raw materials are supplied to a manufacturer on a just-in-time basis: *Bridge (The Res Cogitans)* at p356. *Benjamin* similarly observes (at paras 1-030 and 4-001) that *The Res Cogitans* "casts doubt on the characterisation of a range of contracts that had previously been regarded as sales where they include a retention of title clause but permit the consumption (including, presumably, use in manufacturing) or disposal of the goods". According to *Benjamin* (at para 4-001):

> The test of a *sui generis* contract … is therefore capable of capturing a very large number of contracts with reservation of title clauses where the recipient is at liberty to consume of the goods prior to payment and the passing of property. A *sui generis* contract will also exist where the recipient of goods is at liberty to dispose of them before payment to a third party who in turn has a liberty to consume them. …

109 Commentators have likewise put into question the correctness of the reasoning in *The Res Cogitans*. Professor Bridge describes the judgment as "amount[ing] to a substantial upset in the established understanding of a

contract of sale", with consequences that are "not easy to predict": *Bridge (The Res Cogitans)* at p345. The "immediate significance" of the decision is that "certain supply contracts that for many decades have been thought to be contracts of sale of goods and therefore subject to the [UK SOGA] … now have been authoritatively stated not to be". The crux of Professor Bridge's criticism is that the statutory rights and protections enshrined in the UK SOGA would not, in absence of further explanation, apply to these *sui generis* contracts, leaving sellers and buyers potentially bereft of the recourse they would have enjoyed before the Supreme Court's decision. For instance, s 12(2)(*b*) of the UK SOGA (which is *in pari materia* to s 12(2)(*b*) of our SOGA) allows the implication of a term that the buyer should enjoy quiet possession of the goods. It is unclear if such a term would be implied into a *sui generis* contract: *Bridge (The Res Cogitans)* at p358. These "systemic consequences" of the decision were not considered by the Supreme Court, which "took in [its] very comfortable stride the fact that previously, in numerous reservation of title cases at first instance, in the Court of Appeal and in the House of Lords, contracts that would now be treated as *sui generis* contracts were treated as sale of goods contracts": *Bridge (The Res Cogitans)* at p364.

110 Likewise, *Benjamin* highlights that *The Res Cogitans* has caused a "profound disturbance of the law": preface at viii. The Supreme Court's decision also opens the door to a period of uncertain development in sale of goods law (*Benjamin* at para 4-001):

> … *A consequence of the surprising conclusion arrived at in* The Res Cogitans *litigation is that a body of common law parallel to the [UK SOGA] has to be laboriously developed to deal with* sui generis *supply contracts and the Act tracked section by section to see how far its provisions might be extended by analogy to such contracts.* It cannot be assumed that the entire [UK SOGA] is capable of being applied by analogy to *sui generis* contracts, partly because certain provisions of the Act, as now amended and consolidated, did not codify antecedent common law, and

> partly because certain provisions are difficult to reconcile with modern contract law. In addition, the position of *sui generis* contracts under other statutes dealing with contracts of sale has to be reconsidered. [emphasis added]

111 Given my findings on the applicability of s 49, it is also unnecessary for me to make a determination on Mr Ting's argument that the Contract in the present case is likewise *sui generis* because it permitted the Defendant to on-sell the Goods despite not having yet paid the price, such that by the time price fell due, property in the Goods rested with third parties and would not be transferred from the Plaintiff to the Defendant. While Mr Ting's reasoning bears similarity to that employed by Lord Mance in *The Res Cogitans* (the liberty to on-sell the Goods being analogous to the liberty to consume the bunkers, both being liberties to dispose of the goods supplied without property in them having yet passed), I would only observe that the Contract in the present case has nothing of the complexity of the buy-back contract at issue in *Harry & Garry*, in relation to which Kerr LJ held that "[l]ike many other contracts in complex situations, this was a *sui generis* transaction". Lord Mance found Kerr LJ's observation directly applicable to the contract between OWBM and the Shipowners: *The Res Cogitans* at [34]. It is less clear in the context of the Contract, which bears the ordinary incidents of what must be a vast number of similar contracts used by trading companies. The ramifications of any finding that the Contract is *sui generis,* such that the SOGA does not apply, would be far-reaching indeed.

112 In concluding his article (at p365), Professor Bridge queries if Singapore should follow the line taken in *The Res Cogitans*. He answers the rhetorical question in the negative: "I do hope not, so far as the case split contracts with a licence to consume from the general body of sale of goods law". That question will have to be answered in another case.

Whether the Proprietary Claims need be decided

113 As mentioned at [21], [25(a)] and [78] above, Mr Quah did not dispute that title to the Goods had passed under s 49(1) of the SOGA, but chose instead to focus on whether, if judgment for the Price Claim were entered, the court need also make a determination on the Proprietary Claims.

114 I decline to do so for the simple reason that the subject of the Application is the Price Claim, not the Proprietary Claims. If the Defendant takes the view that the Plaintiff is no longer entitled to relief under the Proprietary Claims once judgment for the Price Claim is entered – whether because judgment for both sets of claims would entail double recovery or for some other reason – it is open to the Defendant to take out the necessary application or make the necessary submission if the Plaintiff later seeks to enforce the Proprietary Claims. It is for the Defendant to chart its own course in that respect based on what it considers are the consequences of an entry of judgment for the Price Claim. I therefore make no determination on the Proprietary Claims.

Conclusion

115 For the foregoing reasons, I am satisfied that the Price Claim should be allowed. I therefore enter judgment in the sum of US$3,385,167.87 in favour of the Plaintiff as against the Defendant. Finally, I record my appreciation to counsel for their thoughtful and cogent submissions which assisted me greatly.

116 I will hear the parties on costs.

Elton Tan Xue Yang
Assistant Registrar

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