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THE UK SUPREME COURT DECISION IN *THE RES COGITANS* AND THE CARDINAL ROLE OF PROPERTY IN SALES LAW

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The decision of the United Kingdom Supreme Court in *The Res Cogitans* has had a profoundly upsetting impact on the law of sale of goods, upsetting many decades of a common understanding about the nature of a sale of goods contract. In a contract for the supply of bunker fuels, the supplier reserved the property in the goods but permitted the shipowner to consume the bunkers before payment and therefore before the property was intended to pass. This supply contract, moreover, was the fourth in a series of contracts on broadly similar terms. The contract was held not to be one of sale of goods because it did not require the property in the bunkers to pass to the shipowner. In reaching this outcome, the court remitted this type of supply contract to the common law, giving rise to a series of potential problems highlighted in this article. The litigation was sparked by the question whether the supplier could maintain a debt action for the price of the goods. In holding that the contract was not one of sale, the court was able to give the supplier its price action without being confined by the apparent limitations on such an action as laid down in the Sale of Goods Act and as expressed at earlier stages in the litigation. Dicta in the Supreme Court, however, have broadened significantly the circumstances in which a sale of goods action for the price may be maintained. Had the broader availability of the price action been decided earlier in the litigation, we should probably not have arrived at the conclusion that this contract was not one of sale of goods.

I. INTRODUCTION

In 2016, the UK Supreme Court in *The Res Cogitans*[1] handed down a judgment that has surprised many commentators and amounts to a substantial upset in the established understanding of a contract of sale. The consequences of the decision are not easy to predict and the decision itself, from a jurisdiction long associated with reaching 'commercial' decisions, suggests a preference for conceptual purity over commercial practicality. The immediate significance of the decision relates to two matters. The first is the characterisation of certain supply contracts that for many decades have been thought to be contracts of sale of goods and therefore subject to the *Sale of Goods Act*, but now have been authoritatively stated not to be. This is not a matter of dry taxonomy but has significant practical consequences. The second matter

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1 *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another* [2016] AC 1034 (UKSC) [*The Res Cogitans (SC)*].

concerns a seller's right to sue for the price of goods by way of debt proceedings, instead of pursuing a corresponding damages action in circumstances where it might or might not lie. This too is a matter of no small practical significance and indeed drove the proceedings in the case. The availability of a price action has probably been settled by the Supreme Court to such a firm extent as to render unnecessary the taxonomical surprise that the court, along with the lower courts, sprang on the legal community. These two matters are the subject of critical commentary in this article, which will seek to identify some of the adverse consequences for the law concerning sale and supply flowing from the recharacterisation exercise conducted in this litigation.

The case concerned bunkers, which are the fuel supplied to operate seagoing vessels. In the present case, there was a distribution chain from refiner to supplier to consumer (a shipowner) that ran A-B-C-D-E, where A and B were associated companies (prior supplier), C and D were associated companies (immediate supplier), and E was the consumer (shipowner). Although D was E's supplier, the bunkers were delivered directly by A to E. The contracts before the court were the D-E contract (primarily) and the B-C contract (secondarily). D had assigned its right to payment to a Dutch bank, the two of them acting jointly in the present proceedings, but the assignment issue does not play a significant role in the case and therefore may be put on one side.

The dispute out of which the decision emerges, besides giving rise to the problems which form the subject of this paper, also gave rise to global problems involving the arrest of vessels in a number of countries. These matters are not the subject of this paper. As a matter of local colour, the financial difficulties of C and D that led to the litigation were precipitated by trading out of their Singapore office, but that again is an incidental issue for our purposes.

II. What is a Sale of Goods Contract?

Before turning in greater detail to *The Res Cogitans*, it is useful to examine the treatment of property issues in the *Sale of Goods Act 1979* (UK), c 54. A sale of goods contract is defined by the Act (the United Kingdom ("UK") and Singapore Acts are almost identical and for present purposes are identical) as an agreement under which one party, the seller, transfers or agrees to transfer the property in goods for a money consideration called the price.[2] The property here means the general property (ownership) and not a special property (possession). Ownership at common law is not adjudicated upon to the extent that a successful litigant obtains an *in rem* outcome when judgment is rendered: that litigant is simply judged to have a superior right to that of the other litigant. The proceedings are located in the law of tort, with judgment almost always taking a monetary form,[3] and do not take the form of a

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2 *Sale of Goods Act 1979* (UK), c 54, s 2(1). In this article, all section numbers in the *Sale of Goods Act* refer to both the UK Act and the Singapore Act.

3 An order for specific delivery is rare, confined to unique items that cannot be procured in the market place, and may be refused even for unique items if the claimant intends to sell them on in trade: *Cohen v Roche* [1927] 1 KB 169. But it is not uncommon for a litigant to be given possession of goods as a result of interlocutory proceedings, with continuing possession solidifying if the dispute does not go to trial.

civil law proprietary action in the form of a vindication. The ownership of personalty is therefore a relative matter, which explains why the outcome of proceedings concerning ownership turns upon which litigant has the better possessory right.[4] It also explains why a good possessory title will not be impugned in proceedings on the ground that the claimant is or might be a thief.[5] According to Pollock and Wright:

> The Common law never had... any adequate process at all in the case of goods, for the vindication of ownership pure and simple. So feeble and precarious was property without possession, or rather without possessory remedies, in the eyes of medieval lawyers, that Possession usurped not only the substance but the name of Property.[6]

The *Sale of Goods Act* uses a variety of expressions in connection with property matters: (a) in defining the *quality* of the property rights that, as a matter of contract, the seller must invest in the buyer, it requires that the seller have 'a right to sell the goods';[7] (b) in defining the circumstances in which the seller can and does succeed in transferring its ownership rights in the goods, the Act refers to the 'property' in the goods;[8] and (c) in determining disputes between for example competing buyers or between an owner, deceived by a wrongdoer, and an innocent purchaser from the wrongdoer, it adjudges which of the claimants has the better 'title' (a significantly narrower use of the word than that in Article 2 of the *Uniform Commercial Code*). Curiously, and in this respect unlike the *UN Sale Convention 1980*,[9] it does not expressly impose on the seller a contractual duty to transfer the property in the goods to the buyer. If the contract itself, expressly or impliedly, imposes the duty, then a defining feature of a contract of sale is present. Otherwise, it is not a sale of goods contract.

Why does it matter whether a contract is one of sale of goods as opposed to some other type? The so-called *Imperial Sale of Goods Act 1893*[10] was a codification, or rescript, of the common law, which in only very minor respects deviated from that common law and then to accommodate Scots law. But over time, it has been amended in a reforming spirit. It was consolidated in the UK in 1979, incorporating certain reforms, and major additional reforms were introduced in the mid-1990s dealing with contractual and proprietary matters. It is this consolidated Act as amended that

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4 *Parker v British Airways Board* [1982] 1 QB 1004; *Waverley Borough Council v Fletcher* [1996] 1 QB 334.

5 *Webb v Chief Constable of Merseyside Police* [2000] QB 427 (CA); *Costello v Chief Constable of Derbyshire* [2001] EWCA Civ 381, [2001] 1 WLR 1437.

6 Frederick Pollock & Robert Samuel Wright, *An Essay on Possession in the Common Law* (Oxford: Clarendon Press, 1888) at 5. A similar view is expressed by von Jhering, as quoted in AES Tay, "The Concept of Possession in the Common Law: Foundations for a New Approach" (1956) 4 Melbourne UL Review 476 at 481: "Possession is the objective realization of ownership. . . [and] therefore, is the de facto counterpart of ownership. . . Ownership strives to realize itself in possession, and possession endeavours to justify itself as ownership."

7 *Supra* note 2, s 12 (1).

8 But in commercial practice, clauses in which the seller holds back the passing of property are referred to as reservation of title clauses. Moreover, a seller in breach of its contractual obligations concerning the quality of its property rights is often said not to have a good title.

9 *United Nations Convention on Contracts for the International Sale of* Goods, 11 April 1980, 1489 UNTS 3, art 30 (entered into force on 1 January 1988) [*UN Sale Convention 1980*].

10 *Sale of Goods Act, 1893* (UK), 56 & 57 Vict, c 71.

has been received in Singapore. If a contract falls outside this Act, it is embraced by the unreformed common law, unless it falls within the scope of a companion statute to the *Sale of Goods Act* (they exist in both Singapore and the UK).[11] These companion statutes were designed so that cognate contracts could be treated fluently alongside sale of goods contracts and not tied to the unreformed common law. As we shall see, the contract in *The Res Cogitans* has to be dealt with purely in terms of the (unreformed?) common law for lack of a statute to pick it up. The nearest cognate contracts, for example barter, still require property to pass.

III. Title Fundamentalism in Sale

I use the expression 'title fundamentalism' to draw attention to the high degree of importance attaching to property matters in the law of sale. It is this cardinal feature of the law of sale that has driven the decision in *The Res Cogitans*. It is worth adding too that the distinction between ownership and the quality of ownership rights that a seller is required to transfer to the buyer, laid out above, is not always clearly made in the case law. Briefly, more than 90 years ago, the decision of the English Court of Appeal in *Rowland v Divall*[12] held that, if a seller could not pass a good title to the buyer, this resulted in a total failure of consideration.[13] The buyer could therefore rescind the contract and recover the price paid, regardless of how much use and enjoyment the buyer received from the goods in the meantime, and regardless too of the circumstances in which the contract might or might not be terminated for breach of contract. Although the *Sale of Goods Act* contains remedies for breach of the condition that the seller have a right to sell the goods, with some limitations on the exercise of a right to reject the goods and recover the price (on their face applicable in this case),[14] this scheme of remedies did not govern a restitutionary action off the contract. The case is not entirely coherent: the court rides both horses at the same time, drawing on a breach of condition and on a total failure of consideration as though they were conjoined rather than alternative in character.[15] On the failure of consideration point, in one later case the buyer of goods obtained the free use of the goods for nearly eleven months by rescinding the contract and claiming recovery of the price.[16] If the buyer had not rescinded the contract, the seller would have had to indemnify the buyer for any damages liability that the buyer might have incurred to the true owner suing in conversion. The action of the initial wrongdoer in the chain, however, in paying outstanding hire purchase instalments to the finance company owner, would then have forestalled any such claim and liability on the part of the seller. If we are supposed to disregard factual enjoyment when total failure of consideration claims are made, we have to ask the question, who buys goods for the

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11 *Supply of Goods Act* (Cap 394, 1999 Rev Ed Sing); *Supply of Goods and Services Act 1982* (UK), c 29.

12 [1923] 2 KB 500 [*Rowland*].

13 See further M Bridge, "The Title Obligations of the Seller of Goods", in Norman Palmer & Ewan McKendrick, *Interests in Goods*, 2nd ed (UK: Routledge, 1998) at 303-327.

14 *Supra* note 2, s 35 (acceptance of the goods by the buyer).

15 There is no need to show a discharging breach when mounting what is in effect a total failure of consideration claim against a seller with a defective title: *Warman v Southern Counties Car Finance Corporation* [1949] 2 KB 576 [*Warman*] (hire purchase bailee suing only for damages and recovering all instalments previously paid).

16 *Butterworth v Kingsway Motors Ltd* [1954] 1 WLR 1286 [*Butterworth*].

abstract enjoyment of title? Do we derive greater enjoyment from driving cars that we own than from cars that we have leased on a long-term basis? Should a distinction be drawn between aesthetic goods, such as a Rembrandt painting, and mundane goods with a short shelf life like bunkers? Most goods are bought for enjoyment and use as either consumables or working chattels. A buyer who has received factual enjoyment of goods from a seller should not be regarded as having suffered a total failure of consideration.[17] Yet the modern restitution movement at its purest sees no value in the unlawful enjoyment transferred to the buyer so as to negative any total failure of consideration on the part of the seller.[18]

Note that the seller's failure in *Rowland v Divall* was to pass a good title. Did it pass the property in the goods? Indeed it did. A duty to pass good title and a duty (not stated expressly in the *Sale of Goods Act*) to pass the property in the goods are not the same thing.[19] A seller can transfer its ownership rights without giving the buyer a good title. Nevertheless, according to a famous dictum of Atkin LJ in *Rowland*, there can be no sale at all of goods that the seller has no right to sell.[20] Yet the seller in that case invested in the buyer the totality of its property rights in the goods and did not merely transfer possession on delivery: the buyer obtained from the seller the general property, and not merely the special property, in the goods. If the Atkin *dictum* were correct, then a second buyer could not acquire as against a first buyer a good title from a seller left in possession of goods under section 24 of the *Sale of Goods Act*: that section provides for a good title to pass if there is a 'sale' to the second buyer, and a sale takes place only when the property in the goods is transferred from seller to buyer.[21] The title that the buyer obtained in *Rowland* was a defective one and the buyer therefore had a claim for breach of contract because the seller had no right to sell.[22] In recognising that the buyer received something of value, we may indeed say that, out of the earth's billions of people, the buyer acquired from the seller the second best title in the world. It could not be challenged by anyone other than the true owner. At that time, English law did not permit the defendant, in a conversion action, to plead the superior title of a third party (*ius tertii*) in those instances where the defendant has interfered directly with the plaintiff's possession. As a result of a statutory reform, it now does but the rules are complex and somewhat untested

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17 *Supra* note 13.

18 In G Jones, *Goff & Jones: The Law of Restitution*, 7th ed (London: Sweet & Maxwell, 2007) at para 20-016, the argument is made that a seller S should have no right to "any recompense" for intermediate use of the car if that use was not at the seller's expense or if the seller has not been deprived of the use of a car to which it had title. If the seller had been sued by the true owner for the rental value of the car, then the seller should have a claim against the buyer, otherwise not. This approach does not as such express the matter in terms of failure of consideration, but rather builds upon the approach taken in *Warman* rather than that in *Butterworth*.

19 See Popplewell J in *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd* [2012] EWHC 2477 (Comm) [*Caterpillar*].

20 *Supra* note 12 at 507. But this *dictum* would not rule out a contract action, with the possibility of a damages action for breach of s 12(1) exceeding the recovery of the price.

21 Apart from sale, the transaction might be a pledge (obviously not the case here) or a 'disposition', but even a disposition has to transfer a property interest over and above possession: *Worcester Works Finance Co Ltd v Cooden Engineering Co Ltd* [1972] 1 QB 210.

22 *Supra* note 2, s 12(1).

to date.[23] Singapore adheres to the pre-statutory common law position. A refusal to allow the *ius tertii* defence is of a piece with relativity of title in a world of bilateral litigation.

For the reasons given, it cannot be maintained that there was a total failure of consideration in *Rowland*. There would still be a breach of the condition in section 12(1) of the *Sale of Goods Act* but the normal consequence, which is termination of the contract, itself a vehicle to recover the price, would not be available if the buyer had accepted the goods under section 35 of the Act. In this case it surely had done so, either by the effluxion of a reasonable time or by the performance of an act inconsistent with the (reversionary) ownership of the seller, which occurred when the goods were sold on to the sub-buyer. In any case, restitutionary doctrines like failure of consideration should not be brought into play when the law of contract has perfectly adequate resources to deal with what is a breach of contract.

Title fundamentalism extends into the law governing exclusion and limitation clauses. Under the *Unfair Contract Terms Act* (UK and Singapore), all clauses that exclude or limit the seller's obligation that it have a right to sell under section 12(1) of the *Sale of Goods Act* are void, regardless of the character of the contract as consumer or commercial.[24] Nevertheless, this particular prohibition has a lesser impact upon so-called limited title sales: the *Sale of Goods Act* makes separate provision for the seller's duties in this respect.[25] Here, the seller's express (or implied) obligation is to transfer only such rights as it or a third party actually has. The *Unfair Contract Terms Act* also avoids any attempt to exclude or limit this lesser obligation. Limited title transactions are there to enable sales transactions to be carried out by liquidators, trustees in bankruptcy and other court officers, but are by no means confined to such instances. In seeking to separate limited title cases and cases where the seller unlawfully limits its liability in respect of title, we are close to looking at a distinction without a difference. Title fundamentalism and commercial reality are not comfortable bedfellows. That said, and in view of the aim of the *Unfair Contract Terms Act* to remove the control of exclusion and limitation rules from the reach of scholastic and hostile rules of interpretation, as well as from the old doctrine of fundamental breach of contract, the voidness rule in the *Unfair Contract Terms Act* may fairly be regarded as the statutory ossification of that old fundamental breach doctrine, driven by the perceived fundamental character of the transfer of a good title in sale contracts.

IV. Events in *The Res Cogitans*

The owners of the *Res Cogitans*, E, placed an order for bunker fuels with D, the Maltese subsidiary of C, a Danish company. This order was passed up the chain by C to B, a UK company, which in turn transmitted the order to A, its Russian subsidiary, from whose outlet E obtained the bunkers. Each of the four supply contracts (apparently) purported to be one of sale and each contained a reservation of title clause providing that the property in the bunkers would not pass until they had been paid for. The payment period was 30 days for the B-C contract and 60 days for the D-E

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23 *Torts (Interference with Goods) Act 1977* (UK), c 32, s 8.

24 *Unfair Contract Terms Act 1977* (UK), c 50, s 6(1).

25 *Supra* note 2, ss 12(3)-12(5).

contract. As for the permitted use of the goods by each 'buyer' in the chain, under the B-C contract it was provided that C:

> agree[d] that they are in possession of the marine fuels solely as bailee for the seller. If, prior to payment, the seller's marine fuels are commingled with other marine fuels on board the vessel, title to the marine fuels shall remain with the seller corresponding to the quantity of the marine fuels delivered.[26]

The contract said nothing about the consumption of the fuels but, on the facts assumed for the purpose of the case, B knew that C was purchasing for resale and that the bunkers were needed for immediate use.[27] C therefore was not in breach of its bailment duty when onselling the bunkers. There was also a finding of fact that the industry well understood that bunkers were supplied on reservation of title terms.[28]

The D-E contract stated that E had:

> possession of the bunkers solely as bailee for the seller, and shall not be entitled to use the bunkers other than for the propulsion of the vessel, nor mix, blend, sell, encumber, pledge, alienate, or surrender the bunkers to any third party or other vessel.[29]

It was E's contention that it was not bound to pay D for the bunkers, since the property in the bunkers had not passed to it.[30] By any standard, this was an unattractive argument that must have had a substantial impact on the outcome of the litigation. E's contention, moreover, failed to separate two quite separate points: whether it was contractually bound to pay for the bunkers, and whether, if in breach of any such duty, it could be sued for the price in a debt action. In fairness to E, its worldwide position needed to be considered. Although it is hard to see how a claim brought directly by B against E for the price could have had any real prospect of success in a common law court, there are other courts to consider that are less constrained by the privity of contract rule. Moreover, liability on the part of E in the tort of conversion was an issue that might have to be addressed. Again, there is the nuisance value of such claims and the disruptive prospect of ship arrest in the various maritime jurisdictions of the world.

V. The Decision

A significant feature of this case was that the judge at first instance gave leave to appeal on limited grounds: (1) whether the contract was one of sale of goods under section 2 of the *Sale of Goods Act*; and (2) whether D could bring an action for the

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26 *The Res Cogitans (SC)*, *supra* note 1 at para 8.

27 *Ibid*.

28 *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd and another* (*The Res Cogitans)* [2015] EWHC 2022 (Comm) at para 5. [*The Res Cogitans (HC)*].

29 *The Res Cogitans (SC)*, *supra* note 1 at para 6.

30 *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd (The Res Cogitans)* [2016] 2 WLR 1072 (EWCA) [*The Res Cogitans (CA*)] at para 38.

price under section 49(1), which required the property to have passed to E.[31] Issues relating to the day certain head of the price action in section 49(2) and relief under section 50 were therefore not before the Court of Appeal. The conclusion reached at all levels, from arbitrators to first instance judge to Court of Appeal and to the Supreme Court, was that the contract was not one of sale of goods and the price was therefore not recoverable under section 49. So, if it was not a contract of sale of goods, what kind of contract was it?

Drawing on an earlier unreported case,[32] the court classified the D-E contract as a *sui generis* contract for the supply of goods, under the terms of a bailment coupled with a licence to consume the goods before payment and therefore before the property in the bunkers had passed to E. In the words of the court, E obtained "the liberty to consume all or any part of the [goods] supplied without acquiring property in them or having paid for them".[33] Now, a bailment that does not call for the goods to be returned to the bailor, or to be delivered to a third party nominated by the bailor, is an unusual type of bailment. In practical terms, a bailee who has the exclusive use of goods for the whole of their existence is in the same position as a buyer with the property in them over that same period.[34] The bailee's special property in *sui generis* cases like *The Res Cogitans* is hardly to be distinguished in substance from a general property in the goods.[35]

The court's focus was essentially on the D-E contract. It did not as such classify the B-C contract, which did not expressly give C a licence to consume. It was implicit, however, that C could onsell the bunkers, and that they were required for immediate use.[36] A permission for C to onsell the bunkers before paying B should not as such bring the contract into the *sui generis* category, unless B was permitting onsales without a reservation of title term. The permitted loss of B's ownership rights in the bunkers would be tantamount to the consumption of the bunkers by C. In this case, B must have contemplated that the bunkers would be mixed by a subsequent buyer with other bunkers in the receiving vessel. Of itself, a permission for C or a subsequent party to mix before payment should not force the conclusion that the B-C contract was a *sui generis* supply contract: B's general property in the goods would be transformed into a legal tenancy in common interest in the mixture.[37] If an undivided interest in an identified bulk can be the subject of a contract of sale,[38] a contract to sell a quantity of goods should remain a sale of goods contract, even though the goods in question, at the point when property is intended to pass, will or

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31 *Ibid* at para 11.

32 *Harry & Garry Ltd v Jariwalla* (unreported) 16 June 1988, [1988] CA Transcript No 516 (EWCA).

33 *The Res Cogitans (SC)*, *supra* note 1 at para 34.

34 This will happen in the case of bunkers as between time charterer (bailor) and shipowner (bailee): *The Span Terza (No 2)* [1984] 1 WLR 27 (HL). In this instance, however, the bailee will consume the goods under the direction of the bailor as the vessel is directed to various ports.

35 *Cf Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406 (HL), where an occupier of premises under an agreement stated to be a weekly licence was held to be a tenant because he had exclusive occupation of the premises and other characteristic features of a tenancy were present.

36 *The Res Cogitans (SC)*, *supra* note 1 at para 8.

37 *Forsythe International (UK) Ltd v Silver Shipping Co. Ltd (The Saetta)* [1994] 1 WLR 1334 (QBD) at 1338.

38 *Supra* note 2, s 61(1) ("goods", "specific goods").

may constitute an undivided interest in a bulk. But if B, as the case itself supposes, permitted C before payment to onsell on terms providing for the consumption, in full or in part, of the bunkers, whether by C or a subsequent party, then on this account the B-C contract should also have been a *sui generis* supply contract.

In the course of the various proceedings, an argument of a *scintilla temporis* character, in favour of applying the *Sale of Goods Act* to the D-E contract, was dismissed. According to this argument, the disappearance of the bunkers on consumption, when they went 'up in smoke', released the reservation of title clause (which could hardly attach to non-existent goods) and therefore allowed the property in the bunkers to pass to E.[39] Another argument, initially put forward by a commentator on the Court of Appeal decision,[40] was that a contract of sale of goods could be a conditional one,[41] with the passing of property being dependent upon the goods still being in existence at the time the reservation of title clause is lifted. So why was this not a contract requiring the seller to pass the property in the goods, conditionally upon the goods still being in existence at a future time when payment fell due, and therefore subject to the *Sale of Goods Act*? This argument was run before the Supreme Court but dismissed robustly on the ground that, as contemplated at the time of the contract, all the goods should have to have survived and not merely some of them. The argument, it was said, also paid no heed to the fate of those goods actually consumed before payment and therefore before the property in them could pass.[42] In the court's further view, this was one entire contract and not a divisible contract of two different characters, or two different connected contracts, a point that will be reverted to below.

The conclusion of the court on the conditional sale point is open to criticism for the following reasons. To turn to a nineteenth century type of case, if A contracts to sell B *ex* ship a particular cargo, on a 'to arrive basis', so that A is not liable if the cargo fails to arrive, the contract is still one of sale of goods notwithstanding the failure of the cargo to arrive and A's inability to pass the property in the cargo to B. There is no obvious reason to distinguish for present purposes between the disappearance of the goods by consumption and their disappearance by marine casualty or any reason to take account of continuing contractual liabilities in the one case but not the other. Furthermore, a contract under which the risk of loss has been transferred to the buyer remains a contract of sale, as the Supreme Court itself recognised, even if the seller no longer has goods, or a document of title representing extant goods, to deliver to the buyer. The seller cannot pass the property in non-existent goods. To that extent, many sale of goods contracts where the risk is on the buyer are conditional contracts. The conditional sale point is therefore not without merit.

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39 *Cf Kirkham v Attenborough* [1897] 1 QB 201, where the very act of a bailee receiving goods on sale or return terms, in pledging those goods effected the transfer of the general property in the goods to the bailee buyer at the same time as a special property in the same goods was transferred by the bailee buyer to the pledgee.

40 Tettenborn, "Of Bunkers and Retention of Title: When is a sale not a sale?" [2016] LMCLQ 24.

41 *Supra* note 2, s 2(3). Sections 2(5) and 2(6) go on to provide that a contract of sale is an agreement to sell if the passing of property turns upon a condition later to be fulfilled and becomes a sale when this happens.

42 *The Res Cogitans (SC)*, *supra* note 1 at paras 29-30.

VI. The Sui Generis Contract and its Proprietary Incidents

The contract, as a *sui generis* contract, was of course not subject to the condition in section 12(1) of the inapplicable *Sale of Goods Act* that the seller have a right to sell the goods. An alternative duty of the supplier was nevertheless fashioned. Since the contract was in its essential respects a bailment coupled with a licence to consume, E needed the protection of a lawful permission coming from D. This was present in the form of E being granted by D "the liberty to consume all or any part of the [goods] supplied without acquiring property in them or having paid for them".[43] So far, it seems, D had performed the equivalent of a seller's section 12(1) duty. That duty was not to be supplemented by an implied term in the *sui generis* contract, operating as a defence to payment by E, that D make timely payment to its own supplier.[44] But it was not enough that D alone give permission, for E's actions in accepting delivery and using the bunkers would amount to the tort of conversion if the same consent were not given by the owner, in this case A. Moreover, D had not acquired the bunkers directly from the owner, so the additional consent of only the owner would be insufficient for E's protection.[45] This is because a bailor (a description that also captured B and C in this chain) in certain circumstances may maintain a conversion action, for example if the goods are consumed, whether by bailee or sub-bailee, outside the terms of any permission given by the bailor. For example, if C's permission given to D to enter into dealings with E was a restrictive one, then D in ignoring those restrictions would be imposing a legal risk on E.

In resolving this issue, one awkward difficulty to be confronted as noted above is that only the B-C and D-E contracts were before the court. According to the court, there was an implied term of the contract that the supplier (D), when giving permission for the goods to be consumed, had the legal entitlement to give such permission. The entitlement of D to give permission was said in thinly painted terms to derive from "the chain of contracts by virtue of which [the supplier] had obtained the bunkers".[46] This statement does make certain safe assumptions, given the general evidence before the various courts about the terms prevailing in the bunkers trade,[47] about the terms of those contractual bailments that were not before the court.[48] E therefore was entitled to both the immediate permission of D to consume the bunkers as well as the derivative permissions of A, B and C. D was thus responsible for permission being given at every prior contractual interval in the chain. Between any two intermediate parties, that permission would have to be for the goods to be consumed by either the immediate receiver or any subsequent receiver or consumer in the chain.[49]

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43 *Ibid* at para 34.

44 *Ibid* at para 33.

45 On liability in conversion of the various parties where goods go down a disposition chain, see *The "Cherry" and others* [2003] 1 SLR (R) 471 (CA).

46 *The Res Cogitans (SC)*, *supra* note 1 at para 39.

47 *The Res Cogitans (HC)*, *supra* note 28 at para 5.

48 Namely, the A-B and C-D bailments. The court did not go through the tricky process of explaining how bailment relations could be constructed out of the various contracts when the head bailor A, delivered directly to the ultimate bailee, E.

49 *The Res Cogitans (CA)*, *supra* note 30 at para 36 where according to Moore-Bick LJ in the Court of Appeal, E bargained for an "effective licence" to consume the bunkers "binding on the various parties

Nothing was said in the Supreme Court about the intensity of D's obligation to see to it that the necessary permissions had been obtained, but it can only be a strict duty. Furthermore, the Supreme Court was silent about the classification of the term[50]—whether it was a condition of the contract or an innominate term—but it has to be a condition given the close analogy with the contract of sale,[51] and indeed given the recognition in the case that in commercial terms the two types of contract were the same.[52] The matter of when the necessary permissions at the latest needed to be obtained was not considered. This matter is at large and gives a choice of the date of the contract, the date of delivery or the date the goods are consumed. The date of delivery should be the operative date for that is when E would need to be protected from liability in conversion for accepting goods on terms permitting consumption.[53]

Since D was not undertaking to transfer a good title in the goods to the recipient, which as we have seen is a matter of fundamental importance in sale of goods, *Rowland v Divall*[54] is directly not in play. Consequently, there is an argument that a failure to give effective permission to consume the goods should not necessarily give rise to a total failure of consideration. Otherwise, this would allow E to recover a price that has been paid even if it has consumed some or indeed all of the bunkers. The first instance judge thought, however, that a breach of this term would give rise to a failure of consideration. E had bargained for a lawful right to use the goods and would not have got it.[55] If this is correct, E could refuse to pay or recover the price whether it has been or is being sued in conversion by the true owner or other bailor, and regardless of whether the goods have been surrendered to the true owner. If the *sui generis* contract, by not transferring the property in the bunkers to E, is so different from a sale of goods contract that it merits separate treatment, the judge's conclusion is a contestable one. This conclusion does show, however, that title fundamentalism has the expansive capacity to capture permission to consume in a *sui generis* supply contract.

Mention was made above of an issue concerning divisible contracts. It came up in *The Res Cogitans*. Suppose that, at the time of payment, some of the bunkers remained on board so that the property in them might pass. Did this mean that we were looking at two contracts, one for supply on a *sui generis* basis, and another for the sale of what remained in existence once payment had been made and the bar to the passing of property lifted? The Court of Appeal went for the divisible

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in the supply chain". D of course could not retrospectively bind A and B though it could bind C by a contractual provision to that effect.

50 *Ibid* at para 38, where Moore-Bick LJ in the Court of Appeal referred to an argument that the owners did not advance, namely, that if they had not been given authority to consume the bunkers they would not have had to pay for them.

51 *The Res Cogitans (HC), supra* note 28 at paras 47-48 and 62 where the first instance judge was clear that the term is a condition the breach of which he sees as giving rise to a failure of consideration.

52 *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd* [2014] 1 WLR 2365 [*FG Wilson (CA)*] at para 33.

53 The recipient may not need protection from the date of the contract since a denial if title is not *per se* a conversion: *Torts Interference with Goods Act 1977* (UK), s 11(3). This provision does not apply in Singapore but it is perhaps unlikely that the Singapore courts would follow the much-criticised case of *Oakley v Lyster* [1931] 1 KB 148 (EWCA) that prompted the statutory reform.

54 *Supra* note 12.

55 *The Res Cogitans (HC), supra* note 28 at para 48 relying "by parity of reasoning" upon *Rowland* and *Warman*.

approach without quite explaining how a *sui generis* contract could be divided into two different types of contract by subsequent events.[56] This conclusion was firmly rejected by the Supreme Court. As stated above, the test for a *sui generis* entire contract was a prospective one: it existed where E was granted by D "the liberty to consume all or any part of the [goods] supplied without acquiring property in them or having paid for them".[57] Any part must mean anything short of a *de minimis* quantity. The court at this point was adopting a prospective characterisation of the contract, so it does not and should not exclude a subsequent variation, though one cannot see any good reason why the contracting parties at a later point should be intent on a variation. Lastly, on this point, if we are dealing with only one transaction, then we have no statutory machinery for determining the passing of property in goods still in existence after payment has been made. We may have to turn to the pre-1893 common law progenitor of the passing of property rules to arrive at what should be a very straightforward solution.

VII. Consequences of the Decision

First of all, does it matter? The decision in *The Res Cogitans* affects a very large number of contracts. Any contract under which a wholesaler supplies goods on credit and reservation of title terms to a retailer is such a contract, unless it requires payment before the goods are sold on, which would be entirely uncommercial. The wholesaler is financing the retailer's cash flow. Any contract containing similar provisions under which raw materials are supplied to a manufacturer on a just-in-time basis is also a*sui generis* contract. It is unlikely that commercial parties will throw overboard reservation of title clauses in the cause of a simplified legal taxonomy.

In the 2015 supplement to the leading practitioner text,[58] there are multiple references to *The Res Cogitans* at intervals as the question is asked whether a particular rule of sale of goods applies also to *sui generis* supply contracts and, if not, whether it is wholly inapplicable or needs merely to be adapted. This case is by far the most widely cited case on the law of sale, except that it is not a case on the law of sale.

Instead of providing the full list of instances where the consequence of *The Res Cogitans* fall to be considered, particular mention can be made of the following selection of difficult issues which might arise more or less frequently:

(a) The difficulties posed by bulk carriage and storage in modern times gave rise to section 20A of the *Sale of Goods Act*, introduced in the mid-1990s, which allows in certain cases the buyer of a quantity of goods to acquire a proprietary interest in an undivided bulk. This was done to protect buyers who had paid for goods, under the terms of what was essentially a cash on delivery transaction, from the insolvency of their sellers. Although buyers still cannot acquire the general property in a quantity of goods that are part of a larger bulk, they can now to the extent of the payment that is made acquire an undivided interest, in the form of a legal tenancy in common, amounting

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56 *The Res Cogitans (CA), supra* note 30 at para 19.

57 *The Res Cogitans (SC)*, *supra* note 1 at para 34.

58 M Bridge, *Benjamin's Sale of Goods*, 9th ed (UK: Sweet & Maxwell, 2014).

to a commensurate share in an identified bulk. To take one example, it is possible that two *sui generis* receivers of goods would have a contractual interest in the remains of a bulk and yet not be able to translate that interest into a proprietary interest upon payment since they fall outside the protective provisions of section 20A. They would therefore court the risk of the bulk owner's insolvency.

(b) Section 15A was introduced in the mid-1990s to restrict rights of rejection and termination of the contract by buyers in commercial cases where the breach was so slight that it would be unreasonable to reject the goods. The section is a reaction against the exercise of rights to terminate a contract on technical grounds for a breach of condition, where the consequences of a breach, trivial or substantial, would otherwise have no part to play in defining the scope of the buyer's termination rights. This provision cannot apply to *sui generis* contracts. If the common law already embodied such a rule, then there would have been no need for the provision to be enacted. It was not enacted for the avoidance of doubt but, instead, as an alternative to an earlier tentative recommendation of the Law Commission that commercial sellers be given the opportunity to cure a tender or delivery of non-conforming goods.[59]

(c) In at least one case, statutory changes in the implied terms ran counter to established law set by the House of Lords[60] (*eg* satisfactory quality and the new requirement that goods be fit for all common purposes 'in appropriate cases' and not merely one of those purposes).[61] The unreformed law as it existed prior to reforms in the 1990s should continue to apply to *sui generis* contracts. Some of the changes made at that time, however, were of a cosmetic or clarificatory nature. There is no reason why the law as thus reshaped should not be seen as expressive of the common law and therefore applicable to *sui generis* contracts. A slightly more difficult question is whether the terms should necessarily be conditions or should be open to classification as innominate terms. If they are innominate terms, the absence of a section 15A restriction on rejection of goods would go unnoticed.

(d) The following is a particular issue for English law. The *Consumer Rights Act 2015*[62] extracted consumer-only provisions from the *Sale of Goods Act* and also disapplied most of the instances in which the Act could otherwise apply to consumer sales. Most of the *2015 Act* amounts to the package of old goods as part of an ostentatious presentation of a gift by the UK government to consumers, not unlike the way in which governments bundle together old and new spending commitments and present them as a new whole. Is a *sui generis* supply contract 'a sales contract' for the purpose of the new legislation? It would appear not to be so since there is a requirement that

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59 UK Law Commission, *Sale and Supply of Goods* (LAW COM No 160) (London: Her Majesty's Stationery Office, 1987), paras 4.16-4.21.

60 *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31 (HL).

61 *Supra* note 2, s 14(2B)(a).

62 *Consumer Rights Act 2015* (UK), c 15 [*2015 Act*].

ownership be transferred under section 5 of the *2015 Act*.[63] The language of the *2015 Act* differs slightly from that of the *Sale of Goods Act*—for example, ownership is preferred to property—but this is in aid of rendering the legislation more transparent to lay readers of the legislation. The *2015 Act* does not change the essential character of a sale contract. Consequently, the interpretation of the *Sale of Goods Act* by *The Res Cogitans* may not be directly applicable but it does appear to be unavoidable as an authority on the meaning of a sales contract in the *2015 Act*. Significant parts of the *2015 Act* do not restate the common law. It may be however that reservation of title clauses for consumer goods with a very short lifespan are not sufficiently common for this to be a real problem. But it may also be the case that traders might see an opportunity to free themselves from the *2015 Act* by reserving title to the goods while imposing no restrictions on the consumption and alienation of the goods by the consumer. The same problem should not arise under Singapore's *Consumer Protection (Fair Trading) Act*, because a consumer transaction for the purpose of the legislation is a "purchase, lease, gift, contest or other arrangement".[64] A *sui generis* supply contract should certainly be an arrangement for the purpose of the legislation.

(e) Does a *sui generis* contract require the seller to guarantee the receiver's quiet possession in the way that a seller must do in the *Sale of Goods Act*?[65] A seller is liable if disturbing the buyer's possession personally and is also liable, though how far this goes is deeply uncertain, if a third party also disturbs that possession. The judge at first instance saw no need for the receiver to be protected since the implication of a term that lawful possession to consume be given amounted to sufficient protection.[66] This argument would also strike at the need for a quiet possession warranty in contracts of sale. If a provision to this effect is necessary in contracts of sale, there is no less need for it in *sui generis* contracts. The receiver needs protection from unwarranted interference coming from a prior party in the distribution chain. The judge was also of the view that the quiet possession warranty under a contract of sale applied only where the property had passed.[67] This is a novel proposition unsupported by authority:[68] the purpose of the warranty is to protect possession, not title. In the *Sale of Goods Act*, the seller's duty is a warranty whose breach sounds only in damages. If a similar term were to be implied for *sui generis* contracts, why should this limitation be imposed on *sui generis* contracts when the modern trend towards the classification of contract terms favours treating them as innominate terms, so that in a case of sufficiently serious breach termination rights arise?

(f) Sellers and buyers in possession can pass a good title to a bona fide purchaser in certain instances under sections 24 to 25 of the *Sale of Goods Act*. The

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63 *Ibid*, s 5(1)(a).

64 *Consumer Protection (Fair Trading) Act* (Cap 52, 2009 Rev Ed Sing), s 2(1).

65 *Supra* note 2, s 12(1)(b).

66 *The Res Cogitans (HC)*, supra note 28 at para 23.

67 *Ibid*.

68 M Bridge, *Benjamin's Sale of Goods*, 9th ed (UK: Sweet & Maxwell, 2014), para 4-026 (as added by the Second Cumulative Supplement, 2015).

receiver of goods under a *sui generis* contract has not contracted to buy the goods under a contract of sale, hence these provisions have no application to such contracts. Note that sections 24 to 25 are almost identically repeated in sections 8 to 9 of the *Factors Act, 1889*[69], which contains no definition of a contract of sale. This presents the possibility of an alternative route to receiver protection under the *1889 Act* by taking a more commercial view of what constitutes a contract of sale for the purposes of the *1889 Act*. Yet case law tells us that both sets of statutory provisions should be taken together as a complete code,[70] which impedes the resolution of the issue by this means. If *sui generis* contracts were indeed caught by sections 8 to 9, a receiver of goods should be regarded as taking under a 'disposition', a somewhat vague expression that is broad enough to cover possession coupled with a licence to consume. A more difficult question is whether such protection would continue to lie if the goods have not yet been consumed when the true owner makes its claim, but that is a problem faced by those who purchase goods from buyers in possession on instalment terms whereby the property does not pass until all instalments have been paid.

(g) A potentially large problem, though how big a problem it is remains to be seen, is presented by the very licence to consume goods so as to destroy the seller's reserved property rights in them. The question is whether a court might recharacterise the reservation of title clause as a charge, on the ground that in substance this is what the reservation of title clause amounts to, given the flimsy character of the seller's reserved property rights. If the clause were to be recharacterised in this way, then the charge, in order to be opposable to insolvency representatives of a corporate buyer and competing secured creditors, would have to be registered as a company charge. It is evident that the burdens of registration are such as to make the process an impractical one for suppliers of goods. This is very much a cloud on the horizon but the issue may start to cross the minds of practitioners. For my part, I believe the problem is overstated. The hallmark of a charge is a grant back from a debtor,[71] which I cannot see in the case of a *sui generis* receiver who has no antecedent property rights in the goods. In any case, the problem may not in practical terms be a large one. Reservation of title rights to goods with a very short shelf life have limited value, except for the case of repeat supplies where title is reserved on each occasion on the terms of an all moneys clause, so that the property will never pass in any goods supplied until all indebtedness has been repaid by the buyer.[72]

VIII. A Seller's Remedies

The second major issue addressed in *The Res Cogitans* concerned the availability of an action by the seller for the price in a sale of goods case. This issue should

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69 *Factors Act, 1889* (UK), 52 and 53 Vict, c 45, ss 8, 9 [*1889 Act*].

70 *Eg*, *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 QB 210 at 220.

71 *Eg*, *Re Bond Worth Ltd* [1980] Ch 228.

72 *Armour v Thyssen Edelstahlwerke AG* [1991] 2 AC 339 (HL).

be considered alongside any damages entitlement of the unpaid seller. The buyer of goods is under a contractual obligation to accept and pay for the goods.[73] Acceptance in this case means taking delivery.[74] If the buyer is in breach of this duty of acceptance and payment, it is liable to pay the seller damages for non-acceptance.[75] The problem with the buyer's duty is that it does not match the language of the remedy made available for its breach. The buyer's duty is expressed as one conjoint duty and not as two. E, in the present case, had accepted the goods but had declined to pay for them. E had therefore not fulfilled that conjoint duty under section 27. For breach of that duty, one turns to the action for damages for non-acceptance in section 50, but section 50 requires the buyer to have wrongfully refused to accept *and* pay for the goods. The buyer here had accepted the goods. Any attempt to assert that the acceptance of the goods is conditioned by the buyer's willingness to pay—so that acceptance means acceptance in accordance with the contractual terms—makes for a difficult argument to run, especially where credit is being extended to the buyer so that acceptance and payment are dislocated. These issues with section 50 were not picked up in the case. Damages, had they been available, should essentially have amounted to the sum of the price. The arbitrators had dismissed the possibility of an action under section 50, though whether they conceived it as a damages action or a debt action is not clear from the subsequent proceedings. Section 50 can now be put on one side, apart from the observation that the long-standing common law prohibition on the recovery of damages for failing to pay a money sum[76] has in very recent times been abandoned.[77] Difficulties in suing for the price, if they are still present, which may be unlikely, can therefore be circumvented without the seller having to surmount the difficulties of section 50.

That leaves the possibility of a price action.[78] The *Sale of Goods Act* provides that the seller may sue for the price, with its advantages over a damages action,[79] in two instances. The first and most important one, in section 49(1) of the Act, is where the property in the goods has passed to the buyer. Obviously, a reservation of title clause of continuing effect bars such an action, regardless of how much factual enjoyment a buyer may have derived from the goods. This puts the unpaid seller in a dilemma, having to choose between the security of a reserved property right and the advantages of a debt action for the price.

The second instance where the price is recoverable is in section 49(2), where the price is "payable on a day certain irrespective of delivery, although the property has not passed and the goods have not been appropriated to the contract". This instance is of limited scope and has an archaic ring to it. Note first of all that the goods in the present case certainly had been appropriated to the contract, a necessary precondition to their delivery to E. To understand the language of section 49(2), one has to go

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73 *Supra* note 2, s 27.

74 It has a different meaning in section 35 when the issue is whether a buyer has lost the right to reject goods and terminate the contract.

75 *Supra* note 2, s 50.

76 *The London, Chatham and Dover Railway Co v The South Eastern Railway Co* [1893] AC 429 (HL).

77 *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners and another* [2008] 1 AC 561 (HL); *The Res Cogitans*, *supra* note 1 at para 48.

78 *Supra* note 2, s 49(1).

79 *Eg*, summary judgment in some cases; absence of any need to prove loss; non-application of rules of mitigation of damages and remoteness of damage. See *Jervis v Harris* [1996] Ch 195 at 202-203.

back to the old law of independent covenants. This provision has been fairly dormant for a number of years but has recently sprung to life. Its archaic features put one in mind of the discovery in the 1930s, by some fishermen off the east coast of South Africa, of a living fossil, the coelacanth. Some sense of the obscurity of this head of recovery was that, when the rules concerning the pleading of debt claims arising in contract (*indebitatus assumpsit*) were simplified, these so-called common counts comprised, in the case of sale contracts, goods bargained and sold and goods sold and delivered,[80] but did not include this particular head of debt recovery. The essential point of the price claim now recorded in section 49(2) was that the seller did not have to aver that, at the time the buyer's duty to pay fell due, it had passed the property in the goods to the buyer or that it was ready and willing to do so. If the seller recovered the price but then failed to perform its part, the buyer would then have a cross-action against the seller, as was laid down in one famous case concerning the sale of a cow.[81] An outcome of this sort is far removed from the mutuality of obligation that we recognise in modern contract law. The flavour of the old law is well captured by Serjeant Williams's notes to *Pordage v Cole*.[82]

In the Supreme Court, consideration was given to the question whether, if the contract had been one of sale subject to the *Sale of Goods Act*, the seller might have sued for the price. E argued that allowing a seller to recover the price under section 49(2) would open up the possibility of the seller having both the price and the goods: 'The policy of the law is that it would be wrong to allow a seller both to claim the price and to keep the goods.' This would not be an issue in those cases where the goods have been delivered, but it is a potential problem where they have not been if the rules concerning the passing of property between seller and buyer do not provide for this to happen as a matter of implied intention. If it were an action for specific performance, the contract certainly would have to remain on foot for both parties' obligations, so that the seller would remain bound to deliver. The same result should be reached in a debt action and this was held to be the case.[83] The contract has to remain on foot for the seller to recover payment because the effect of termination is to discharge primary obligations on both sides, and the duty to pay is a primary obligation.

The difficulty presented by section 49(2) might have been clarified by an earlier decision in the so-called *Caterpillar* case,[84] but was not. In that case, the seller's claim under section 49(2) failed at first instance for reasons not explicitly stated in the judgment, which was more concerned to explain why a price action could not be brought outside section 49, and the claim was abandoned on appeal.[85] Emphasis

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80 The difference turning on whether the property in the goods passed at the contract date. The two heads are preserved in amber in s 61(1) of the *Sale of Goods Act*: "sale" includes a bargain and sale as well as a sale and delivery.

81 *Nichols v Raynbred* (1615) Hob 88.

82 (1669) 1 Wms Saund 319. One of Serjeant Williams's notes refers to the seller's ability to recover the price by action even though delivery has not occurred. Where delivery has occurred, as happened in *The Res Cogitans*, we are of course dealing with an *a fortiori* case. The subject of nineteenth century pleading practice may seem dry but Uriah Heep, in conversation with David Copperfield, derived great satisfaction from reading *Tidd's Practice*.

83 The seller suing for the price was held bound to deliver the goods in *Otis Vehicle Rentals Ltd v Cicely Commercials Ltd* [2002] EWCA Civ 1064 at para 16.

84 *Supra* note 19.

85 *Supra* note 52.

was however laid upon the requirements that the payment be made on a day certain and that it be irrespective of delivery. The proper interpretation of section 49(2) has arisen at intervals in the past but, considered the facts of *The Res Cogitans* as a matter of first impression, 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. Moreover, although the precise date was not specified, payment fell due 60 days after delivery, and thus ascertained fell due on a day certain: *id certum est quod certum reddi potest*.[86] The Supreme Court in *The Res Cogitans* took this same view of the B-C and D-E contract provisions.[87] An action could have been brought by D against E for the price under section 49(2). A day certain is one that can be ascertained whether or not the date is linked to the date of delivery.

That was enough to conclude the eligibility of the supplier to sue for the price had the contract been treated as one of sale, but further points were taken about the possibility of a price action outside section 49. One question addressed by the Supreme Court was whether a common law extension might be tacked on to section 49 to provide for a price action in other instances. A slightly different way of putting this question is whether a contract might provide for the recovery of the price in circumstances where it would not otherwise be available under the Act. Debt actions, unlike actions for specific performance, are not discretionary, so a contractual provision making a price action available outside the terms of section 49 would not be forcing the hand of a court with a discretion to exercise. Telling a court in a contract how to exercise its discretion will be a futile exercise.

In the Supreme Court, the argument was dismissed that contracting parties could open up a broader prospect of price actions by departing from the restrictive conditions laid down for the price action in section 49 of the *Sale of Goods Act*. Section 55 of the Act provides that "any right, duty or liability arising under a contract of sale of goods by implication of law. . . may be negatived or varied" by express provision, course of dealing or binding usage. This argument was rejected in the *Caterpillar* case because the express requirements of the Act were not the same thing as terms implied into a contract, nor one might add is a liability the same thing as a remedy. Since the property in the case was retained by the seller under a reservation of title clause, and since the buyer had not both refused to pay and accept the goods as is required by section 50, this left the seller in the *Caterpillar* case with no monetary remedy[88] against the defaulting buyer.[89] Section 55 permitted the incidents of a contract as presumptively settled by the Act to be negatived or varied; it did not authorise the

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86 This view is attributed in *The Res Cogitans (SC)*, *supra* note 1 at para 45 (30 days after invoice) to Longmore LJ in the Court of Appeal decision of *FG Wilson (CA)*, *supra* note 52.

87 *The Res Cogitans (SC)*, *supra* note 1 at para 45.

88 The goods had been forwarded to the sub-buyer in Nigeria, so the chance of the seller recovering them was very remote.

89 In *FG Wilson (CA), supra* note 52 at para 54-55, Longmore LJ deals with the predicament of a buyer who cannot sue for the price or for damages under s 50:

> [I]f there is no realistic claim for damages for non-acceptance. . . [t]he only alternative is to suppose that there might be a claim for damages for failure to pay the price. [This]. . . immediately runs into the difficulty that English law does not normally allow a claim for damages for failure to pay money. There is, moreover, a logical difficulty in saying that [the buyers are] in breach of contract in failing to pay the price if the price is itself not due because property in the goods has never passed to them.

The interesting question is how a court could appear to condone such a position.

rewriting of section 49 of the Act. The same reason was given by the Supreme Court in *The Res Cogitans*.[90]

The Supreme Court, nevertheless, saw a possibility in a price action outside the terms of section 49: section 49 did not codify price actions. If the price of goods can be recovered in the event of their destruction when the risk is on the buyer, with the consequent inability of the seller to delivery or pass the property,[91] then it should be recoverable in this *a fortiori* case.[92] This is a conclusion that cannot bear too intensive an examination. Risk rules are notorious for trumping other inconsistent rules and should be admitted without the accompaniment of fellow travellers.

Finally, as far as an action for the price goes, if ever the reform of the *Sale of Goods Act* were put on the agenda, attention should be given to a more practical definition of the price action. Many years ago, in the early 1980s, as a member of a Uniform Law Conference of Canada committee, I advocated that the operative event for price eligibility should be the delivery of the goods. Delivery is a visible event and hence conducive to legal certainty. The delivery test was adopted in the text of the *Uniform Act*, which in the event was not enacted in any of the Canadian provinces. Article 2 of the *Uniform Commercial Code* bases price eligibility, not on the buyer's so-called acquisition of 'title',[93] but on the buyer's acceptance of the goods.[94] Acceptance here has the meaning given to it by the equivalent of section 35 of the *Sale of Goods Act*: the event in question would in most cases arise some time after delivery and is not a visible event. Prior to the intervention of the Uniform Law Conference, the Ontario Law Reform Commission had proposed a functional test based on which contracting party were better able to dispose of goods that neither party wanted.[95] This was a recipe for uncertainty and too hard on the seller who might have to take over the goods from a defaulting buyer some considerable time after the seller had delivered them. I remain of the view that delivery is the best test for an entitlement to sue for the price, whether that delivery takes a physical form or is to be found in the transfer of a document of title or an attornment by a third party bailee. This is something that might be considered in the event of the law of sale being subjected to a major revision, which is an unlikely prospect.

IX. Final Points

One of the most vaunted features of the common law, with its intense dialectical technique in forensic matters, is that it brings the sharpest of focuses to bear on particular points in the interest of truth and accuracy. Argued law is tough law. But that is also one of its weaknesses. At no point in *The Res Cogitans* does anyone appear to stand back from the matter in dispute to consider the systemic consequences of the decision: the seven difficult questions that I picked out above received no

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90 *The Res Cogitans (SC)*, *supra* note 1 at para 52.

91 Certainly the case under existing law.

92 *The Res Cogitans (SC)*, *supra* note 1 at para 57.

93 Karl Llewellyn once said: "Whoever saw a chattel's title?": "Through Title to Contract and a Bit Beyond" (1938) 15 NYU L Rev 159 at 165.

94 *Uniform Commercial Code*, art 2-749. It adds the restrictive condition that the seller, actually or prospectively, has to be unable to sell the goods at a reasonable price.

95 Ontario Law Reform Commission, *Report on Sale of Goods* (Ontario: Ministry of the Attorney General, 1979), vol 2 at 416.

consideration. There is, nevertheless, a passing reference in the Court of Appeal to applying the *Sale of Goods Act* by analogy in *sui generis* contract cases,[96] guided by the conviction that in a commercial sense these are sale of goods contracts. There seems to have been no awareness at any judicial level of the exceptional character of the decision. Moreover, the courts took in their 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,[97] contracts that would now be treated as *sui generis* contracts were treated as sale of goods contracts. The issue had not arisen in those cases, so they were simply put on one side.

It was also so unnecessary, because we should never have got to this point if the understanding of the scope of section 49(2) demonstrated by the Supreme Court in *The Res Cogitans* had been present in the earlier cases. The Supreme Court was not bound by the first instance judge's restriction on the grounds of appeal and so took on this price question. We have been on an extended voyage into the world of *sui generis* contracts that need never have been undertaken.[98]

As *The Res Cogitans* demonstrates, a statute that in its essential respects has survived for a century and a quarter has not survived unscathed. It also contains a number of archaic features that have to be silently rewritten to make sense in modern conditions.[99] The chances of modernising the *Sale of Goods Act* are slim: arguments that the law should be reformed to accord with superior legal aesthetics have no traction in the UK. But if a simple reform could be brought in, it should spell the death of *The Res Cogitans*. The following provision, which can conveniently be identified as section 2(7) of the *Sale of Goods Act* (as added), should settle the issue:

> A contract for the supply of goods is not prevented from being a contract of sale for the purposes of this Act by reason only of a permission given by the supplier for the goods or some of them to be used, consumed or disposed of before the property in them passes to the receiver of the goods upon payment.

Of course, as far as the UK goes, one would need to have optimism in abundant quantities to expect a simple reform like this to be passed. With the exit of the UK from the European Union, there will no longer be the facility for using secondary legislation to amend primary legislation without parliamentary intervention, though it would be a stretch to use that expedient in this particular case. Whether Singapore, which to date has adopted changes in UK legislation on the sale of goods, will think

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96 *The Res Cogitans (CA)*, *supra* note 30 at para 33: "[T]here is no reason why the incidents of a contract of sale of goods for which the Act provides should not apply equally to such a contract at common law, save to the extent that they are inconsistent with the parties' agreement."

97 This was discussed at length in the Court of Appeal. See *The Res Cogitans (CA)*, *supra* note 30 at paras 24-31.

98 "We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time": TS Eliot, *Little Gidding V*.

99 *Eg*, why do we speak of reserving the right of disposal in s 19 instead of reserving the property (or title) in the goods? Again, whereas the Act treats a seller in possession under s 48 as though it were a mortgagee disposing of the goods when the property has passed to the buyer, in modern times we resolve the issue by saying that the property reverts to the seller and the contract is prospectively discharged, leaving the seller free to deal with the goods as its own: *RV Ward Ltd v Bignall* [1967] 1 QB 534.

this reform is worthwhile is a different matter. As much as one might say that the remedies in the event of non-payment are now the same for sale and *sui generis* supply contracts, the decision in *The Res Cogitans* has the potential for tripping up litigants and rendering litigation excessively complicated.

Going back to the application of the *Sale of Goods Act* by analogy, this was done in the 1960s to deal with contracts, such as work and materials contracts, that at the time were not subject to a statute of their own. Prior to 1893, they were effectively tied to sale of goods contracts as part of the common law that was codified in that year. They were cut adrift by the terms of the Act but, so far as that Act replicated the common law, this was a soluble problem. The changes to the Act from the 1970s onwards were reforms that were not expressive of the common law. If they had been, they would not have been needed. Statute sits on top of the common law and derogates from it only according to its provisions. There are few signs of statute infecting the common law in private law matters at least.

Lastly, should Singapore follow the line taken in *The Res Cogitans*? For reasons stated above, 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. The Supreme Court's conclusions, if not necessarily all of its reasons, on the availability of a price action, and on the recovery of damages for failing to pay a sum of money, are a different matter. They simplify the law on remedies and protect the seller's just expectations.