Neutral Citation Number: [2015] EWHC 2022 (Comm)

Case No: 2015 Folios 569 & 580

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/2015

Before :

THE HONOURABLE MR JUSTICE MALES

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Between :

(1) PST ENERGY 7 SHIPPING LLC **(2) PRODUCT SHIPPING AND TRADING S.A.**	**Claimants**
- and -	
(1) O.W. BUNKER MALTA LIMITED **(2) ING BANK N.V.**	**Defendants**

"RES COGITANS"

- -
- -

Mr Stephen Cogley QC and Mr Jeremy Richmond (instructed by **Ince & Co LLP**) for the **Claimants**
Mr Robert Bright QC and Mr Marcus Mander (instructed by **Allen & Overy**) for the **Defendants**

Hearing dates: 7-9 July 2015

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE MALES

Mr Justice Males :

Introduction

1. As Longmore LJ observed in *Caterpillar (NI) Ltd v John Holt & Co (Liverpool) Ltd* [2013] EWCA Civ 1232, [2014] 1 WLR 2365 at [56], retention of title clauses bring dangers as well as benefits. They can also lead to what may be unforeseen results, as this section 69 appeal from maritime arbitrators illustrates. It involves the supply of bunkers to a vessel on terms which are typical of hundreds or even thousands of such transactions carried out every year. These include a chain of contracts each with a retention of title clause in favour of the supplier, a provision that payment will be due a fixed number of days after delivery, permission for the shipowner to consume the bunkers in the meanwhile as the vessel goes about its business, and awareness on the part of all concerned that the bunkers may well be wholly consumed before payment becomes due. The contract in issue in this case certainly looks like a contract of sale. Nevertheless the arbitrators have held that the effect of this combination of features is that it is not a contract to which the Sale of Goods Act 1979 applies. Conversely, if the appellant shipowners' argument is correct, the sellers will be unable to sue for the price as by the time payment becomes due, some or all of the bunkers will have been consumed with the result that property in them has ceased to exist and cannot be transferred to the shipowners, so that an action for the price under section 49 of the Act cannot be maintained.

2. In these circumstances this appeal has required an examination of the nature of a typical contract for the supply of bunkers, unfortunately against the background of the insolvency of the parent company of the OW Bunker group of companies, the world's largest seller and supplier of bunkers.

The facts

3. The hearing before the arbitrators proceeded on the basis of assumed facts which were agreed between the parties. In summary, these were as follows.

4. PST Energy 7 Shipping LLC is the owner and Product Shipping & Trading S.A. is the manager of the vessel "Res Cogitans". For present purposes it is unnecessary to distinguish between them and I shall refer to them together as the Owners. On 31 October 2014 the Owners placed an order for the supply of bunkers to the vessel with OW Bunker Malta Ltd ("OWBM"), a company which is part of the OW Bunker group, whose activities included the supply, sale and trading of bunkers worldwide. The order was confirmed by OWBM's Sales Order Confirmation of the same date, which named OWBM as "Seller" and gave a delivery date of 3 or 4 November 2014. It provided for delivery of 110 metric tons of gasoil at a price of US $848 per metric ton and 1,000 metric tons of fuel oil at a price of US $359 per metric ton; that the physical supplier of the bunkers would be "Rosneft"; that payment would be made within 60 days from the date of delivery upon presentation of OWBM's invoice; and that the transaction was to be subject to the OW Bunker Group's 2013 Terms and Conditions of sale for Marine Bunkers ("the OWB terms"). OWBM's right to payment was assigned to its bank, ING Bank N.V. ("ING"). Notice of that assignment was duly given.

5. OWBM did not itself supply the bunkers to the vessel. Instead it placed an order for their supply with its Danish parent company, OW Bunker & Trading A.S. ("OWBAS"). The contract between OWBM and OWBAS was also subject to the OWB terms. OWBAS in turn placed an order with Rosneft Marine (UK) Ltd ("Rosneft"), a United Kingdom company, while Rosneft placed an order with its Russian subsidiary, RN-Bunker Ltd. It was this last named company which physically supplied the bunkers to the vessel at Tuapse in the Black Sea on 4 November 2014. A chain of transactions such as this is common in the industry. It is well known in the industry that the terms of such transactions frequently include retention of title clauses.

6. The contract between OWBAS and Rosneft was also concluded on 31 October 2014 and was reconfirmed on 3 November 2014. It required payment to be made within 30 days of delivery and was subject to Rosneft's 2012 Marine Fuels Sales General Terms and Conditions ("the Rosneft terms"). So too was the contract between Rosneft and RN-Bunker.

7. The bunkers were duly delivered to the vessel on 4 November 2014.

8. Thus payment from OWBAS to Rosneft in the sum of US $416,000 was due by 4 December 2014 at the latest (i.e. 30 days after delivery) while payment from the Owners to ING was due by 3 January 2015 (60 days after delivery), OWBM's invoice dated 4 November 2014 in the sum of US $443,800 having been presented to the Owners on 23 December 2014. Neither payment has been made, although Rosneft paid RN-Bunker on 18 November 2014. As explained below, this means that on that date Rosneft acquired title to whatever quantity of the bunkers had not yet been consumed by the vessel.

9. On or about 5 November 2014 OWBAS uncovered a major fraud committed by senior employees in a Singaporean subsidiary, as well as apparent losses relating to unsupervised OTC trading. Preliminary estimates suggested a total loss of about US $275 million. On 6 November 2014 OWBAS announced that it expected to be insolvent and was filing for commencement of an in-court restructuring procedure at the probate court in Aalborg. Rosneft's prospect of obtaining payment from OWBAS is therefore not promising. OWBM is not currently in insolvency proceedings.

10. ING now claims payment of the sum due under the contract between OWBM and the Owners in its capacity as assignee of OWBM's rights under that contract. In that capacity it stands, in effect, in the shoes of OWBM and its claim is subject to whatever defences would have been available to the Owners if the claim had been brought by OWBM. Rosneft has also demanded payment for the bunkers from the Owners and has asserted that it retains property in them. However, it was not a party to the arbitration and is not a party to this appeal. The Owners deny liability to OWBM or ING. Their position is that they do not object to paying for the bunkers, but do not want to have to pay both ING and Rosneft. I am told that as a result of the insolvency of the OWB group there are hundreds of pending arbitrations in which the same or very similar issues arise.

The contract between OWBM and the Owners

11. The OWB terms, which are widely used in the industry, are expressly governed by English law and provide for arbitration in London. In addition to their title ("Terms and Conditions of sale") and their description of the parties as "Seller" and "Buyer", they contain numerous indications that the contract for which they provide was understood by the parties to be a contract of sale. They include a term dealing with title to the bunkers as follows:

> "H. TITLE
>
> H.1 Title in and to the Bunkers delivered and/or property rights in and to such Bunkers shall remain vested in the Seller until full payment has been received by the Seller of all amounts due in connection with the respective delivery. The provisions in this section are without prejudice to such other rights as the Seller may have under the laws of the governing jurisdiction against the Buyer or the Vessel in the event of non-payment.
>
> H.2 Until full payment of the full amount due to the Seller has been made and subject to Article G.14 hereof, the Buyer agreed that it is in possession of the Bunkers solely as Bailee for the Seller, and shall not be entitled to use the Bunkers other than for the propulsion of the Vessel, nor mix, blend, sell, encumber, pledge, alienate, or surrender the Bunkers to any third party or other Vessel.
>
> H.3 In case of non or short payment for the Bunkers by the Buyer, the Seller is entitled (but not obliged) to repossess the Bunkers without prior juridical intervention, without prejudice to all other rights or remedies available to the Seller.
>
> H.4 In the event that the Bunkers have been mixed with other bunkers on board the Vessel, the Seller shall have the right to trace its proprietary interest in the Bunkers into the mixed bunkers and/or a right of lien to such part of the mixed bunkers as corresponds to the quantity or net value of the Bunkers delivered.
>
> H.5 The provisions of this Chapter H do not prejudice or in any way limit the Seller's right to arrest/attach the Vessel and/or sister ship and/or any sister or associate ship and/or other assets of the Buyer (or the Owner of the Vessel or any other party liable), wherever situated in the world, without prior notice.
>
> H.6 Where, notwithstanding these conditions, title in and to the Bunkers delivered has passed to the Buyer and/or any third party before full payment has been made to the Seller, the Buyer shall grant a pledge over such Bunkers to the Seller. The

> Buyer shall furthermore grant a pledge over any other Bunkers present in the respective Vessel, including any mixtures of the delivered Bunkers and other bunkers. Such pledge will be deemed to have been given for any and all claims, of whatever origin and of whatever nature that the Seller may have against the Buyer. …"

12. Thus while title was to remain with the Seller until payment, express permission was given to the Buyer to consume the bunkers in the propulsion of the vessel in the meanwhile. (Although the point does not arise on this appeal, it may well be that this permission extends also to consumption of the bunkers for other legitimate purposes of the vessel if necessary, such as domestic usage, but as the point does not arise I do not decide it). The arbitrators found (in accordance with the assumed facts agreed by the parties) that:

> "47. From the outset, all parties were aware that the bunkers to be supplied would be and were supplied for consumption, and that some or all of them might well be consumed before they were paid for in accordance with the relevant credit terms. …
>
> 51. … Even at the time it was entered into – and even in the absence of the [retention of title] clause – both parties to the contract would have anticipated that some or all of the bunkers supplied would be likely to have been consumed and to have lost their identity before the expiry of the 60 days credit period. …"

13. This is in fact what happened. The assumed facts include that the bunkers were entirely consumed prior to the expiry of the 60 day credit period under the contract between OWBM and the Owners. There is no assumed fact regarding the extent to which the bunkers had in fact been consumed within the 30 day credit period in the contract between OWBAS and Rosneft, but it is an assumed fact that Rosneft was aware that the bunkers might be wholly or partly consumed during that period.

14. The OWB terms also include a provision dealing with payment and an "anti set off" clause as follows:

> "I.1 Payment for the Bunkers and/or the relevant services and/or charges shall be made by the Buyer as directed by the Seller within the period agreed in writing.
>
> I.2 Payment shall be made in full, without any set-off, counterclaim, deduction and/or discount free of bank charges to the bank account indicated by the Seller on the respective invoice(s)."

15. Although clause I.1 refers to payment for "the relevant services", no such services were required to be rendered or were in fact rendered in this case other than the supply of the bunkers.

The contract between OWBAS and Rosneft

16. The Rosneft terms are also governed expressly by English law and are subject to arbitration in London. They too clearly contemplate that the contract for which they provide is a contract of sale. They include the following clause:

> "10. Risk/Title
>
> Risk in the Marine Fuels shall pass to the Buyer once the Marine Fuels have passed the Seller's flange connecting the Vessel's bunker manifold with the delivery facilities provided by the Seller. Title to the Marine Fuels shall pass to the Buyer upon payment for the value of the Marine Fuels delivered, pursuant to the terms of Clause 8 hereof. Until such time as payment is made, on behalf of themselves and the Vessel, the Buyer agrees that they are in possession of the Marine Fuels solely as Bailee for the Seller. If, prior to payment, the Seller's Marine Fuels are commingled with other Marine Fuels on board the Vessel, title to the Marine Fuels shall remain with the Seller corresponding to the quantity of the Marine Fuels delivered. The above is without prejudice to such other rights as the Seller may have under the laws of the governing jurisdiction against the Buyer or the Vessel in the event of non-payment."

17. As set out above, the OWB terms contain an express prohibition on resale and express permission for the bunkers to be consumed in the propulsion of the vessel. The Rosneft terms do not include either of these provisions. Rosneft knew that it was (or at least might be) selling to a trader for resale to an end user and that the vessel to which its subsidiary was to deliver the bunkers would have placed an order with an OWB group company. It knew that the OWB terms would include or were likely to include a retention of title clause which permitted the vessel to consume the bunkers prior to payment and that some or all of the bunkers might well be consumed within the 30 day period before payment fell due under its contract with OWBAS. By necessary implication, in my judgment, Rosneft permitted OWBAS to resell the bunkers and contemplated that it would do so on terms which permitted the Owners to use them in the vessel's normal employment.

The parties' submissions

18. ING claims payment of US $443,800, the sum due under the contract between OWBM and the Owners. Its case is that this sum fell due for payment on 3 January 2015 and is recoverable as a debt.

19. The Owners dispute liability to pay ING on the ground that because OWBAS did not pay Rosneft for the bunkers, Rosneft retained the property in them pursuant to the retention of title clause in the Rosneft/OWBAS contract, with the consequence that OWBM never had such property and was not in a position to transfer property to the Owners. Their case in summary is that:

a. The contract is a contract of sale of goods to which the Sale of Goods Act 1979 applies.

b. ING's claim is a claim for the price which can only be maintained if one or other of the conditions in section 49 of the Act are satisfied, namely that either (1) "the property in the goods has passed to the buyer" or (2) "the price is payable on a day certain irrespective of delivery".

c. Neither condition is satisfied: the property has not passed, and the term "a day certain" means a day which is fixed or ascertainable at the date of the contract and does not depend on uncertain future events such as the date of delivery.

d. OWBAS's failure to pay Rosneft means that OWBM is in breach of the mandatory implied term in section 12 of the Act that the seller has a right to sell the goods or will have such a right at the date when property is to pass.

e. Although the consequence of the Owners' case summarised above is that OWBM (or ING) could *never* maintain an action for the price under section 49 (because even if it had paid for the bunkers so as to acquire property, that property would not have passed to the Owners), that does not mean that OWBM is without remedy: in principle it could bring a claim for specific performance of the payment obligation or in restitution, although on the facts these remedies are not available because of OWBM's failure to acquire title to the bunkers which means that it is not in a position to perform its own obligations and that the Owners have not been unjustly enriched at OWBM's expense.

f. Even if the contract is not a contract of sale of goods to which the Sale of Goods Act 1979 applies, terms equivalent to those contained in section 12 must be implied so that OWBM was in breach of an obligation to pass property in the bunkers to the Owners at the time of payment, and this affords the Owners a defence to a claim for payment.

20. In response ING contends, again in summary, that:

a. The contract between OWBM and the owners is not a contract to which the Sale of Goods Act applies.

b. Alternatively, if the Act does apply, ING's claim is not a claim for the price of goods sold within the meaning of section 49 of the Act.

c. Although it is accepted that this court is bound by the decision of the Court of Appeal in *Caterpillar* [2013] EWCA Civ 1232, [2014] 1 WLR 2365 to conclude that a claim for the price of goods sold can only be made in accordance with section 49, the conditions of that section are satisfied.

d. As to section 49(1), either (i) on the true construction of the contract(s) or by a term to be implied therein property in the bunkers passed to the Owners at the moment of consumption, or (ii) OWBM was a buyer in possession of the bunkers within the meaning of section 25 of the Sale of Goods Act, and was therefore able to pass good title to the Owners under that section.

e. As to section 49(2) a provision for payment to be made within a fixed period after delivery satisfies the requirement that "the price is payable on a day certain".

f. As an alternative to its claim to recover the sum due in debt, ING can recover an equivalent sum by way of a claim for damages, either (i) for non-acceptance of the bunkers pursuant to section 50 of the Sale of Goods Act or (ii) for breach of the obligation to pay the agreed sum.

g. The possibility of a claim for specific performance, involving as it does equitable and discretionary considerations, is not a satisfactory solution where the parties have expressly stipulated for claims in debt and damages (clauses I.1 and K.3). Nor is a claim in restitution.

The award

21. The parties' dispute was referred to arbitration before a tribunal consisting of David Farrington and Ian Kinnell QC as the party appointed arbitrators, with Bruce Harris as chairman. With commendable promptness, if I may say so, the arbitrators held a four day hearing and then produced an award dated 16 April 2015 which answered a highly detailed series of preliminary issues. The arbitrators did not need to and did not decide all of the issues summarised above. So far as relevant for present purposes, they held as follows:

a. The bunker supply contract was not a contract of sale to which the Sale of Goods Act applies.

b. Accordingly it was unnecessary for ING to bring its claim within the requirements of section 49 of the Act.

c. ING's claim to payment was a straightforward claim in debt which was not subject to any requirement as to the passing of property in the bunkers to the Owners at the time of payment.

d. However, if the contract had been a contract of sale to which the Sale of Goods Act applied, a claim for the price could only be maintained if the conditions in section 49 of the Act were satisfied.

e. Those conditions were not satisfied:

i. no term that property would pass at the moment of consumption could be implied into either the Rosneft/OWBAS or the OWBM/Owners contract;

ii. nor could OWBM pass title under section 25 of the Act; and

iii. the provision for payment to be made within a fixed period after delivery did not satisfy the requirement that "the price is payable on a day certain".

f. No claim for damages for non-acceptance of the bunkers pursuant to section 50 of the Act was available to ING as the Owners had accepted the bunkers.

22. The Owners' appeal challenges the arbitrators' conclusions (a) to (c) above. Conclusion (d) is common ground, at any rate in this court. By a cross appeal ING challenges the arbitrators' conclusions (e) and (f).

23. As it is clear that both the OWB and the Rosneft terms are drafted on the assumption that a contract for the supply of bunkers is a contract of sale, to which it would naturally be assumed that the Sale of Goods Act applies, the arbitrators' principal conclusion that the contract was outside the scope of the Act is surprising at first sight. Mr Stephen Cogley QC for the Owners described it variously as "unprecedented", "bizarre", "perverse" and "unworkable". With the possible exception of "unprecedented", which if appropriate is easily remedied, these are strong criticisms. Unless driven to do so, I would be reluctant to conclude that the conclusion of experienced maritime arbitrators is wholly uncommercial. The question, however, is whether it is correct as a matter of law. Before turning to that question, I should deal with a preliminary topic which is not controversial, but which has a major impact on the case.

Extinction of title on consumption

24. It was common ground that the effect of consumption of the bunkers was to extinguish any property in them. You cannot own something which does not exist. This is clear, if authority is needed, from the decision of the Court of Appeal in *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] 1 Ch 25, a reservation of title case in which the buyer was entitled to use the goods (resin) in the manufacture of chipboard before payment and did so with the result that the resin, as such, ceased to exist. Bridge LJ said:

> "… there is no doubt that as soon as the resin was used in the manufacturing process it ceased to exist as resin, and accordingly the title to the resin simply disappeared."

25. Templeman and Buckley LJJ gave judgments to the same effect. Templeman LJ said:

> "When the resin was incorporated in the chipboard, the resin ceased to exist, the plaintiffs' title to the resin became meaningless and their security vanished."

26. The inevitable consequence for the present case is that if, as all parties were aware and accepted might well happen, the bunkers were consumed before the date for payment fell due in accordance with the relevant credit terms, title to the bunkers would by then have ceased to exist. That would be so regardless of any intervening insolvency of OWBAS.

Was the bunker supply contract a contract to which the Sale of Goods Act applied?

The terms of the contract

27. Mr Cogley's principal submission in support of the Owners' appeal was that the contract between the parties contained in the Sales Confirmation and the OWB terms is clearly a contract of sale. It is described as such; it identifies the parties as "Buyer" and Seller" respectively; and it contains terms which use the language of sale and

which are the kind of terms which would be expected to be contained in such a contract. Effect should therefore be given to the parties' intention to conclude such a contract. Furthermore, the cases which have dealt with bunker trading have proceeded on the basis that the contracts in question are sale contracts.

28. As already indicated, I accept that the parties' contract is drafted as a contract of sale and contains numerous terms appropriate to such a contract. It is therefore a reasonable starting point that this is what the parties intended and is indeed the true nature of the contract which they have concluded. However, that is only a starting point. Ultimately the question must depend, not on the labels which the parties have used or on the form of contract which they have adopted (or adapted), but on an analysis of the obligations which they have undertaken.

The authorities

29. I accept also that there are two cases which have proceeded on the basis that a contract for the supply of bunkers to a vessel is a contract of sale. In *The Saetta* [1994] 1 WLR 1334 a time charterer ordered bunkers for the vessel but failed to pay for them. The shipowner withdrew the vessel for non payment of hire and the bunker supplier, who had the benefit of a retention of title clause, claimed damages from the shipowner for the conversion of the bunkers remaining on board when the charterparty came to an end. The issue was whether the shipowner acquired title to the bunkers on withdrawal pursuant to section 25 of the Sale of Goods Act, an issue which necessarily assumed that the Act applied, although there was no argument about this. Clarke J held that the effect of a withdrawal was not sufficient to satisfy the requirements of section 25 because there was no voluntary act by the charterer as the "buyer in possession". Accordingly, the shipowner did not acquire title and was liable in conversion. However, the conversion only took place on withdrawal when the shipowner assumed ownership of the bunkers remaining on board. It is implicit in the decision that the shipowner's consumption of the bunkers during the currency of the charterparty was not wrongful, despite the existence of a retention of title clause in the supply contract between the supplier and the charterer.

30. In *The Fesco Angara* [2010] EWHC 619 (QB), [2011] 1 Lloyd's Rep 61 the facts were similar but the time charter was terminated prematurely by the charterer giving an early notice of redelivery rather than by a withdrawal by the shipowner. Once again the principal issue was whether the shipowner acquired title to the bunkers on termination of the charterparty pursuant to section 25 of the Act, although there was no argument about whether the Act applied. HHJ Mackie QC held that the shipowner had acquired title, and therefore was not liable for conversion of the bunkers remaining on board on termination. However, he also held that the shipowner was not liable in conversion for bunkers consumed during the currency of the charterparty: it was a classic case of a sub-bailment on terms, in accordance with Lord Goff's analysis in *The Pioneer Container* [1994] 2 AC 324, whereby the supplier was taken to have consented to the shipowner's consumption of the bunkers in accordance with the terms of the charterparty.

31. I accept that these cases provide some support for the Owners' submission that a bunker supply contract with a retention of title clause in favour of the unpaid supplier is a contract to which the Act applies. In neither of them, however, was that issue actually decided.

32. Other retention of title cases also use the language of sale. There are many examples, of which *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] 1 Ch 25 is one. That was a case where it was contemplated that the resin would inevitably be destroyed in the manufacturing process within a few days, well before payment became due. However, there was no issue in the case that made it relevant to decide whether the contract in that case was a contract to which the Sale of Goods Act applied and this issue was not addressed in the judgments.

33. *Armour v Thyssen Edelstahlwerke A.G.* [1991] 2 AC 339 was a Scottish appeal to the House of Lords in which Lord Keith of Kinkel expressly applied sections 17 and 19 of the Act to the retention of title clause in considering when property was intended to pass. An issue also arose under section 62(4) which excludes from the operation of the Act "a transaction in the form of a contract of sale which is intended to operate by way of … security". It was held that the retention of title clause in question was not in itself a "transaction in the form of a contract of sale" but merely one of the terms of what was "a genuine contract of sale". The case stands, therefore, as authority, probably binding and certainly highly persuasive, that a contract containing a retention of title clause may be a contract of sale within the Act. However, that in itself is not controversial and in any event *Armour v Thyssen Edelstahlwerke A.G.* was not a case where goods were likely to be or had been destroyed in any manufacturing process prior to payment falling due. It was concerned with steel strip, most of which remained in its delivered state although some had been or was in the process of being cut into sheets.

34. I do not regard these cases or the other retention of title cases cited as determining the issue which I have to decide.

The reason why the issue arises

35. It is only because of the combination of a retention of title clause and the imminent consumption or destruction of the goods that the present issue arises. If there were no such clause, there would be no doubt that the contract in this case was a contract of sale to which the Sale of Goods Act 1979 applied. As explained by Moore-Bick J in *Glencore International AG v Metro Trading International Inc* [2000] EWHC 199 (Comm), [2001] CLC 1732 at [189], in the absence of agreement to the contrary property will normally pass upon delivery of fuel into a tank with permission to consume it:

> "… delivery of goods to another person with permission to use them in a way which will result in their consumption or destruction will normally justify the inference that property in them was intended to pass to that person. The same inference may be drawn if there is permission to dispose of them irrevocably, such as by sale to third parties, though in all these cases the parties may agree otherwise – e.g. where goods are delivered on sale or return. Much will turn, therefore, in each case on the agreement itself and the context in which it was made."

36. If there is no retention of title clause so that property passes on delivery, there is no need for any permission to consume prior to payment as the bunkers belong to the

buyer who is then free to deal with them as he wishes. In that event the problem resulting from the consumption of the bunkers so that property in them may cease to exist before payment becomes due does not arise. However, the industry has chosen instead to operate with payment on credit terms, affording security to the supplier in the form of a retention of title clause. (I was shown various standard terms, not only of individual bunker suppliers or purchasers but standard terms issued by BIMCO for industry wide use, which are all broadly to the same effect, generally with a credit period of 30 days). Such a clause does not sit easily with a shipowner's need to be able to consume the bunkers once they are on board, which therefore has to be accommodated either expressly or by necessary implication by giving permission for such use, but which has the consequence that title in the bunkers will cease to exist. This is a materially different regime from that which would apply in the absence of a retention of title clause. It should not ultimately be surprising if that regime, essentially grafted on to what otherwise would certainly be a contract of sale, leads to a materially different legal analysis of the parties' contract.

The statutory definition of a contract of sale

37. I turn, therefore, to consider what the parties have agreed in this case and, in particular whether it falls within the definition of a contract of sale contained in the Sale of Goods Act 1979.

38. The scope of the Act appears from sections 1 and 2. Section 1 provides that the Act applies to "contracts of sale of goods made on or after (but not before) 1 January 1894", while section 2 defines what is meant by "a contract of sale of goods". It provides:

> "(1) A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.
>
> (2) There may be a contract of sale between one part owner and another.
>
> (3) A contract of sale may be absolute or conditional.
>
> (4) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale.
>
> (5) Where under a contract of sale the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled the contract is called an agreement to sell.
>
> (6) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

39. Section 61, the interpretation section, explains that the term "contract of sale" includes an agreement to sell as well as a sale. It is clearly used in section 2(1) to

encompass both possibilities. In the present case it is common ground that the contract when concluded was not a "sale", but the Owners contend that it was an "agreement to sell".

40. The issue, therefore, is whether the contract between OWBM and the Owners in this case was "a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price". It is common ground that this issue must be determined as a matter of construction of the contract by reference to the situation as it existed at the date of the contract and not by reference to subsequent events such as the fact that, as matters turned out, the bunkers were wholly consumed within the 60 day credit period. However, the situation as it existed at the date of the contract includes those matters which were within the contemplation of the parties, in particular as to the likelihood of consumption of the bunkers within the 60 (or 30) day period of credit.

41. In order to qualify as a contract of sale within the scope of the Act, four conditions must be satisfied. First, the contract must be for "goods". Second, one party, the seller, must undertake an obligation to transfer the property in the goods (i.e. good title to them) to the other party, the buyer. Third, there must be a money consideration payable by the buyer to the seller. Fourth, there must be a link between the transfer of title and the money consideration, such that the consideration for the payment is the transfer of title to the buyer as distinct from some other benefit: in other words, what the buyer is paying for is title to the goods.

42. In the present case the first and third conditions present no difficulty. Bunkers are "goods" and a money consideration was payable by the Owners to OWBM. The issue is as to the second and fourth conditions. In my judgment the combined effect of (1) the retention of title clause, (2) the period of credit before payment fell due, (3) the permission given to the Owners to consume the bunkers, and (4) the fact that some or all of the bunkers supplied were likely to be consumed before the expiry of the credit period with the consequence that property therein would cease to exist, means that the parties must be taken to have understood that it was likely that title would never be transferred to the Owners. It was possible that it would be, but not likely. It was certainly not an essential part of the transaction that it should be. As Atkin LJ said in the well-known case of *Rowland v Divall* [1923] KB 500, "the whole object of a sale is to transfer property from one person to another". In the present case, however, the combination of features listed above means that it cannot have been the object of the contract to transfer property from OWBM to the Owners: both parties knew that this was unlikely ever to happen. Even if it did, because some bunkers remained unconsumed after 60 days, that was not fundamental to the transaction.

43. In those circumstances it is difficult to conclude, in my judgment, that OWBM undertook an obligation to transfer the property in the bunkers to the Owners. There is no good reason why it should undertake an obligation which both parties knew that it was unlikely to be able to perform. It is equally difficult to conclude that what the Owners were paying for was the transfer of title to them, when both parties knew that this was unlikely ever to happen. It stands to reason that what the Owners were paying for was not a title which they were never going to get but something else. I examine below what it is that the Owners were paying for.

Contract for sale of non-existent goods

44. It is certainly possible, as Mr Cogley submitted, for parties to contract to sell non-existent goods. In such circumstances the seller takes the risk that the goods do not or will not exist and that he will be unable to perform, either by delivering the goods or conveying title to them. As explained by Professor Treitel, "there may be a good contract about a non-existent subject-matter if on the true construction of the contract the risk of non-existence is thrown on one party" (*Treitel, The Law of Contract*, 13th edition, p.315). However, as this explanation makes clear, the question is not whether such a contract is possible, but whether on the true construction of the bunker supply contract between the parties, OWBM did undertake an obligation to transfer title to the bunkers to the Owners in circumstances where both parties knew that it was unlikely to be able to do so. In my judgment it did not. In any event this was not a contract for non-existent goods. The bunkers existed, were delivered on board the vessel, and were consumed. Only then did they cease to exist.

Total failure of consideration

45. Similarly there are cases where the buyer has received a practical benefit but there was nevertheless held to be a total failure of consideration so that the price was not payable (or could be recovered if already paid) because the seller was unable to transfer title. *Rowland v Divall* [1923] KB 500 is one example. The buyer got the benefit of the use of the vehicle for several months. However, that was not what he was paying for, which was a car to which he would have title and not an unlawful possession which exposed him to liability to the true owner. The hire purchase case of *Warman v Southern Counties Car Finance Corporation Ltd* [1949] 2 KB 576 is to the same effect. The plaintiff had the benefit of the use of the vehicle, but there was a total failure of consideration because the option to purchase, and thereby to acquire good title, was "the essential part" or "the whole object" of the hire purchase contract. Mr Cogley relied on these cases, submitting that the Owners here were contracting for good title to the bunkers and not merely permission to consume them. These cases undoubtedly govern the position when on the true construction of the relevant contract the seller has contracted to transfer title to the buyer, but they do not resolve the question in this case, which is whether that is what OWBM contracted to do. In my judgment it did not.

The consideration for the Owners' payment

46. In these circumstances the question arises, as already mentioned, what was the consideration for the money payment which the Owners agreed to make if it was not the transfer of title? In my judgment the true nature of the parties' bargain was that OWBM would deliver or arrange for delivery of the bunkers, which the Owners would be immediately entitled to use for the propulsion of the vessel. As Mr Robert Bright QC for OWBM submitted, the permission or licence to use the bunkers conferred by clause H.2 necessarily meant, not only that OWBM itself gave such permission but that OWBM was or would be in a position to give such permission to the Owners on behalf of whichever entity in the supply chain was or would become the owner of the bunkers. To adapt what was said in *Rowland v Divall* [1923] KB 500, what the Owners were paying for was the right to consume the bunkers and not an unlawful possession which exposed them to the risk of an action at the suit of the true owner. At the date when the bunkers were delivered that true owner was RN-

Bunker, but when Rosneft paid RN-Bunker on 18 November it became the owner of whatever bunkers then remained unconsumed. Such permission given by the owner of the bunkers would be an effective defence, at any rate as a matter of English law, to any claim against the Owners for conversion.

47. Mr Bright developed this submission in a series of steps which I have condensed slightly and would summarise as follows. First, OWBM's obligation to obtain such permission is a contractual obligation owed to the Owners which is part of an English law contract and subject to arbitration. Therefore the question whether OWBM fulfilled its promise is a question arising between OWBM and the Owners under English law, not a question to be analysed under some other system of law or in proceedings elsewhere. Second, if OWBM fulfils its promise, that is to say if it obtains the necessary permission from the owner of the bunkers, it has done all that it is required to do and is not in breach of any obligation owed to the Owners by reason of its own or others' failure to make payments to suppliers down the chain; nor is it in breach if the owner of the bunkers asserts a claim against the Owners or a foreign court decides that such a claim is justified. In the event of a claim by the owner of the bunkers, the Owners can defend that claim armed as they are with the permission which OWBM has secured for them, while the risk of an adverse decision in a foreign court which views matters differently from English law is typical of the risks which a shipowner undertakes as it trades its vessel around the world. Third, OWBM's obligation to obtain the necessary permission is an intermediate term and not a condition going to the root of the contract. Thus if OWBM fails to obtain the necessary permission, it is in breach of the contract but, at least in circumstances where the Owners have had the benefit of consuming the bunkers, there is no total failure of consideration such as to afford the Owners a defence to a claim for payment of the sum due to OWBM. Fourth, on a correct analysis of the assumed facts, OWBM did obtain the necessary permission from the owner of the bunkers so as to afford the Owners a defence as a matter of English law to any claim against them.

48. I accept the first and second of these submissions which follow, in my judgment, as a matter of the true construction of the contract. I do not accept the third submission. It seems to me, by parity of reasoning with cases such as *Rowland v Divall* [1923] KB 500 and *Warman v Southern Counties Car Finance Corporation Ltd* [1949] 2 KB 576, that if OWBM fails to obtain permission from the true owner of the bunkers for their consumption by the vessel, the Owners do not receive what they agree to pay for, which is a lawful right to use the bunkers and not an unlawful possession which exposes them to liability to the true owner. There would then be a total failure of consideration, just as there was in these two cases.

Permission from Rosneft

49. There was some debate before me as to whether I should determine what I have described as Mr Bright's fourth submission, namely whether on the facts OWBM did succeed in obtaining the permission of Rosneft for the Owners' consumption of the bunkers. I bear in mind that the arbitrators did not express a view about this and that any conclusion I might reach would not be binding on Rosneft. In my judgment, however, it is necessary to do so. The arbitrators have held that if the Sale of Goods Act does not apply, ING has a good claim for payment and that conclusion is challenged by the Owners in this appeal. It is fundamental to the Owners' argument that, even if the Act does not apply, OWBM is in breach; that this breach exposes the

Owners to a claim by Rosneft; and that it affords them a defence to ING's claim for payment, however put. On the view of the contract which I take, that depends on whether OWBM succeeded in obtaining the necessary permission from Rosneft. That issue must therefore be decided.

50. It is clear in my judgment that, at least so far as English law is concerned, Rosneft (and so far as relevant RN-Bunker) did give such permission. Rosneft knew and accepted that OWBAS was not an end user but a trader, that it would contract, either directly or indirectly, with the owner of the vessel to which the bunkers would be delivered, and that the contract with the Owners would authorise them, expressly or by necessary implication, to consume the bunkers immediately. In such circumstances the Owners can be under no liability to Rosneft in the tort of conversion because Rosneft knew and agreed that the Owners would consume the bunkers before they were paid for in accordance with the relevant credit terms. The vessel's consumption of the bunkers was not a wrongful act by the Owners but an act carried out with the permission of the owner of the bunkers being consumed, namely Rosneft. *The Fesco Angara* [2010] EWHC 619 (QB), [2011] 1 Lloyd's Rep 61 is an authority directly in point.

51. This can be analysed either on the basis that Rosneft is bound by the permission in clause H.2 of the OWB terms because a head bailor is bound by the terms in a contract between his bailee and a sub-bailee if he has expressly or impliedly consented to those terms (see cases such as *Morris v C.W. Martin & Sons Ltd* [1966] 1 Q.B. 716) or on the simpler basis that by delivering the bunkers to the vessel (or causing them to be delivered) knowing that they would or might be consumed straight away Rosneft gave permission to the Owners for that to happen and was content to look exclusively to OWBAS as its contractual counterparty for payment. This contractual structure is in my judgment perfectly workable and is the clear result of what the various parties concerned have agreed.

52. Accordingly there is no breach by OWBM of its contract with the Owners.

53. As already indicated, I cannot exclude the possibility that the Owners may have a liability to Rosneft under some system of law other than English law and, if so, that the vessel may be exposed to arrest in some jurisdictions. However, in circumstances where the bunkers were delivered on board the vessel pursuant to an English law contract between Rosneft and OWBAS which by necessary implication authorised the consumption of the bunkers prior to payment, and which contemplated another English law contract between OWBM and Owners which expressly authorised such consumption, I see no reason why the possibility of such a claim should affect the decision in this case. Exposure to claims with the possibility of arrests is one of the risks which shipowners run.

Conclusion

54. For the reasons set out above I conclude that the contract in this case was not one to which the Sale of Goods Act applies.

55. I agree, therefore, with the essential and commendably succinct reasoning of the arbitrators on this issue which is encapsulated in the following paragraph of their award:

> "51. … Even at the time it was entered into – and even in the absence of the [retention of title] clause – both parties to the contract would have anticipated that some or all of the bunkers supplied would be likely to have been consumed and to have lost their identity before the expiry of the 60 days credit period. So, while this was not inevitable, it was likely that, even had the contract initially met part of the definition of "an agreement to sell", this agreement would never mature into a sale, and the presence of the [retention of title] clause merely reinforces this conclusion. As we have previously said in paragraph 47, above –
>
> 'Stripped of all unnecessary detail, the deal between the parties was that OWBM would ensure delivery of the bunkers, the use of which would be immediately available to the Owners, who would pay for them according to OWBM's invoice.'
>
> Such an agreement does quite obviously resemble in some respects a contract of sale, but its terms and their performance do not to any extent rely on property or title or their transfer. As we have previously said, there is in our opinion nothing in this agreement which goes beyond legitimate freedom of contract, and its effectiveness is not governed by the provisions of SOGA, which did not apply to it."

56. For the Owners, Mr Cogley submitted that this reasoning left the nature of the contract unclear. I do not accept this. It is unnecessary to attach a label to the contract, although if a label is sought, the label "bunker supply contract" seems to me to be perfectly adequate. In any event this contract is not a contract of sale within the definition in section 2 of the Sale of Goods Act 1979.

Two further points

57. I should mention for completeness two further points which featured in the argument.

58. The first is that in the end both parties agreed, as they had before the arbitrators, that the issue whether the contract was within the definition of a contract of sale had to be determined by reference to the position as at the date when it was concluded. It was either a contract of sale at that point or it was not. At one stage, however, Mr Bright developed an alternative argument to the effect that even if the contract began as a contract of sale of goods, the Act would apply to an ever diminishing quantity as the bunkers were consumed and, as in the event all of the bunkers were in fact consumed within the 60 day period, by the time payment became due there was no remaining subject-matter to which the Act could apply. According to this argument, the Act was capable of applying to the contract for so long as and to the extent that the bunkers remained unconsumed, but the events which occurred mean that it had ceased to apply on the facts before the expiry of the credit period. I did not understand Mr Bright to persist in this analysis and I would not have accepted it. As Mr Cogley submitted, if the contract as concluded fell within the statutory definition, there was no mechanism whereby the Act would cease to apply as a result of post-contractual events.

59. The second point, which does not arise on the facts of this case, is concerned with the nature of the supplier's obligation upon payment at the end of the credit period in the event that some of the bunkers remain unconsumed. Mr Bright accepted that OWBM would be under an obligation to transfer property in the remaining bunkers at that stage, but submitted that this would not mean that the contract was within the Sale of Goods Act. I accept this. It follows from what I have already said, although these are not the facts of this case.

Obligations equivalent to those in section 12

60. As noted above, it is the Owners' case on appeal that even if the contract is not a contract of sale of goods to which the Sale of Goods Act 1979 applies, terms equivalent to those contained in section 12 must be implied so that OWBM was under an obligation to pass property in the bunkers to the Owners at the time of payment, and this affords the Owners a defence to a claim for payment.

61. Section 12 provides as follows:

> "Implied terms about title, etc
>
> (1) In a contract of sale, other than one to which subsection (3) below applies, there is an implied term on the part of the seller that in the case of a sale he has a right to sell the goods, and in the case of an agreement to sell he will have such a right at the time when the property is to pass.
>
> (2) In a contract of sale, other than one to which subsection (3) below applies, there is also an implied term that—
>
> > (a) the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made, and
> >
> > (b) the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known."

62. I can see no basis on which a term equivalent to section 12(1) should be implied, at any rate if this is intended to impose any obligation on the supplier to pass property in the goods. The reason why the Act does not apply is that the supplier does *not* undertake to transfer title. On the other hand, I have held that as a matter of construction of the contract not only is a right to consume the bunkers given by the supplier, but it is also a condition of the contract that the supplier is in a position to give such permission on behalf of whichever entity in the supply chain is the owner of the bunkers. That is sufficient protection for the Owners.

63. For completeness, it is for the same reason unnecessary to imply into the contract any warranty equivalent to the warranty of quiet possession contained in section 12(2). In any event (1) that warranty is concerned with the buyer's possession and enjoyment

of the goods after the passing of property, whereas the parties here contemplated that by the time when payment became due the bunkers and property in them would have ceased to exist and (2) any breach of such a warranty would not afford the Owners a defence to a claim for payment but would sound only in damages.

Conclusion on the Owners' appeal

64. For the reasons given above the Owners' section 69 appeal against the arbitrators' conclusions (a) to (c) summarised above is dismissed. Accordingly (a) the bunker supply contract is not a contract of sale to which the Sale of Goods Act applies, (b) it is unnecessary for ING to bring its claim within the requirements of section 49 of the Act, and (c) ING's claim to payment is a straightforward claim in debt not subject to any requirement as to the passing of property in the bunkers to the Owners at the time of payment.

ING's cross appeal

65. This conclusion means that it is strictly unnecessary to consider the cross appeal by ING which was contingent on the success of the Owners' appeal. That being so, I will state my conclusions on these issues only briefly.

Breach of section 12(1)

66. As noted above, the cross appeal arises on the assumption that the Sale of Goods Act applies and is a claim to recover either the price under section 49 of the Act or an equivalent sum by way of damages. However, if the Act applies, that can only be because OWBM undertook, in the terms of section 2(1), "to transfer the property in the goods to the buyer". It failed to do so and was therefore (subject to the next two arguments to be considered) in breach of the implied term contained in section 12(1). That would represent a total failure of consideration which, applying *Rowland v Divall* [1923] KB 500, provides the buyer with a defence to a claim for the price. As the arbitrators held, and in the end OWBM did not challenge, the "anti set off" provision in clause I.2 of the OWB terms would not operate to prevent this defence from succeeding. Accordingly some of the detailed arguments advanced by Mr Bright as to why a claim could be brought within section 49 or by way of damages would not avail ING, even if correct on their own terms. That is a further reason to deal with them only briefly.

Implied term as to passing of property

67. The first argument is that on the true construction of the contracts in the chain or by a term to be implied therein property in the bunkers passed to the Owners at the moment of consumption. Therefore, it is said, property in the goods had passed to the Owners and a claim can be made for the price under section 49(1). It is, however, fatal to this argument that the contracts expressly provide that property will not pass until payment in circumstances where the parties contemplate consumption before payment. Accordingly the contracts cannot be construed as providing for the passing of property at the moment of consumption and no such term can be implied which would contradict the express term.

Buyer in possession

68. The second argument is that OWBM was a buyer in possession of the bunkers within the meaning of section 25 of the Sale of Goods Act, and was therefore able to pass good title to the Owners under that section. Section 25(1) provides:

> "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."

69. The requirements to be satisfied for this section to operate were set out by Clarke J in *The Saetta* [1994] 1 WLR 1334.

70. Once again the retention of title clause in the contract between OWBM and the Owners is fatal to the operation of this section. A delivery or transfer by a buyer in possession, here OWBM, cannot have the effect of passing title when the buyer in possession does not purport to pass title by means of the delivery or transfer in question. OWBM did not purport to pass title to the Owners by delivering the goods on board the vessel. Clause H.2 of the OWBM terms made clear that it was not doing so.

Price payable on a day certain

71. Alternatively ING contended that a provision for payment to be made within a fixed period after delivery satisfies the requirement in section 49(2) that "the price is payable on a day certain irrespective of delivery". The effect of a series of first instance decisions, *Stein Forbes & Co v County Tailoring Co* (1916) 86 LJKB 448, *Colley v Overseas Exporters* [1921] 3 KB 302 and *Shell-Mex Ltd v Elton Cop Dyeing Co Ltd* **(**1928) 34 Com Cas 39 (where Wright J said that the phrase meant "a time specified in the contract not depending on a future or contingent event") as well as the Scottish case of *Henderson & Keay Ltd v A.M. Carmichael Ltd* (1956) SLT 58, is summarised in *Benjamin's Sale of Goods* (9th edition) at para 16-027 as follows:

> "It is submitted, on the basis of these decisions, that the better view is that a day can be 'certain' under s.49(2) only if it is fixed in advance by the contract in such a way that it can be determined independently of the action of either party or any third party."

72. On the other hand, as the passage in *Benjamin* goes on to recognise, dicta in the Court of Appeal case of *Workman, Clark & Co Ltd v Lloyd Brazileno* [1908] 1 KB 968, where it was assumed that section 49(2) could apply to instalments of the price

payable under a shipbuilding contract at different stages of construction, cast doubt on this submission.

73. If necessary, I would have held (on this point disagreeing with the arbitrators) that provision for payment to be made within a fixed period after delivery is sufficient to satisfy the requirement in section 49(2). Rightly or wrongly (cf. *Hyundai Heavy Industries Co v Papadopoulos* [1980] 2 Lloyd's Rep 1) the shipbuilding contract in *Workman, Clark* was clearly treated by the Court of Appeal as a contract of sale, and the claim was viewed as a claim for an instalment of the price under section 49(2). I do not see how the tentative view expressed in *Benjamin* can stand with the decision in the case, albeit that the point now in issue does not appear to have been the subject of argument. That conclusion accords also with the comment by Longmore LJ in *Caterpillar (NI) Ltd v John Holt & Co (Liverpool) Ltd* [2013] EWCA Civ 1232, [2014] 1 WLR 2365 at [44] that payment due a fixed number of days after the seller's invoice would satisfy the sub-section, albeit that this was an *obiter* comment in a dissenting judgment. Moreover, as Mr Cogley acknowledged, the consequence of his submission is that OWBM would never be able to sue for the price under section 49: by the time payment becomes due, some or all of the bunkers will have been consumed with the result that property in them cannot be transferred to the Owners so that section 49(1) is not available, while an obligation to pay a fixed number of days after (or even upon) delivery does not satisfy section 49(2). That seems an uncommercial result. Although Mr Cogley canvassed other possible means by which the supplier might get paid, such as an action for specific performance of the obligation to pay or a restitutionary claim, these seem to me to be unnecessarily exotic where goods have been delivered on credit and subsequently consumed. There ought to be a straightforward claim in debt.

74. As it is, however, my own conclusion is doubly *obiter*, in part because the contingent ING cross appeal does not arise and in part because of OWBM's breach of the section 12(1) obligation, so there is little point in pursuing the issue further.

Damages for non-acceptance

75. Finally, as an alternative to its claim to recover the sum due in debt, ING seeks to recover an equivalent sum by way of a claim for damages, either (i) for non-acceptance of the bunkers pursuant to section 50 of the Sale of Goods Act or (ii) for breach of the obligation to pay the agreed sum. The arbitrators rejected the former claim on the simple ground, with which I agree, that the Owners accepted the bunkers. Not only did they accept them, they consumed them in the propulsion of the vessel. Section 50 has no application to that situation.

76. Mr Bright sought to put this claim more broadly, as a claim for damages for non-payment of money. However, if such a claim was made at all before the arbitrators, which is not clear to me, it was not a claim which they were asked to determine by way of preliminary issue and is not, therefore, open to ING on this section 69 appeal. It is therefore unnecessary to consider whether or in what circumstances such a claim can be made as a matter of law.

Conclusion

77. As already indicated, the Owner's appeal is dismissed. In these circumstances the cross appeal by ING does not arise although, if it had, I would have determined it as indicated above – that is to say, in agreement with the arbitrators on all issues save for section 49(2), although that disagreement would not have affected the overall result of the case.