



## PROPERTY, TITLE AND DEBT IN SALE OF GOODS

—M.G. Bridge\*

**Abstract** Recently, the Supreme Court of the United Kingdom in *The Res Cogitans* held that a contract for bunker fuels that allowed for consumption prior to payment and contained a ‘reservation of title’ clause was not a contract of sale under the Sale of Goods Act. By creating a new category of *sui generis* supply contracts, the Supreme Court stripped away the various statutory protections associated with sale of goods rules. This decision is expected to have far-reaching consequences for commercial contracts. This article analyses the decision of the Supreme Court in light of these consequences. While the Indian Supreme Court has not had a chance to deal with this issue, the points raised by this article ought to be accounted for if and when this issue comes up for consideration.

### I. INTRODUCTION

In 2016, the UK Supreme Court in *The Res Cogitans*<sup>1</sup> handed down a judgment that marked a sharp change of direction from that taken by the preceding law and that may prove to have far-reaching consequences. The decision takes issue with the very meaning of a contract of sale of goods and therefore with the received wisdom concerning the coverage of the Sale of Goods Act. A contract that gives the receiver of goods permission to consume them before the property passes from the supplier was held not to be a sale of goods contract but was instead a *sui generis* supply contract falling outside the Sale of Goods Act. Although the two statutes are by no means identical, the UK Sale of Goods Act, 1979 and the Indian Sale of Goods Act, 1930 contain identical provisions for the purposes of the present discussion. If the Indian courts were to go down the same road as the Supreme Court in the United Kingdom, several consequences of the decision in *The Res Cogitans* might also apply in India.

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<sup>1</sup> *PST Energy 7 Shipping LLC v. OW Bunker Malta Ltd. (The Res Cogitans)*, (2016) 2 WLR 1193 : 2016 UKSC 23 at [34].

In *The Res Cogitans*, the court was concerned with a distribution chain, the subject matter of which was bunker fuels. At the head of the chain sat A, which sold the bunkers in question to B, an associate company. B then sold the bunkers to C, which sold them on to a Maltese associate D. Finally, D sold the bunkers to E, a shipowner, whose duty to pay lay at the centre of the litigation. The order for the bunkers came from E and was passed on up the chain to A, which delivered the bunkers directly to E. It was the financial collapse of the companies in the C and D corporate group that precipitated the current litigation because B, unable to obtain payment from C owing to C's insolvent state, had an incentive to take aim instead at E, which had not yet paid for the fuels. Only the contracts between B and C and between D and E were before the court. Both of them contained reservation of title clauses so that the property in bunkers delivered would not pass to the buyer before payment. The B-C contract did not explicitly contain permission for C to onsell the bunkers prior to payment, but impliedly this seems to have been the case. At the end of the chain, E was given permission by D to consume the bunkers in propelling the vessel.

English law either was or was assumed to be the applicable law in all four contracts and English law, like Indian law, subscribes to the doctrine of privity of contract, so that, according to one aspect of that doctrine, a burden cannot be imposed on someone who is not a party to the contract. The only duty to pay that E could owe, therefore, would be to its immediate supplier and not to B. The global character of shipping, however, would not allow E to take shelter behind the privity rule. There lurked the possibility of ship arrest by B as and when *The Res Cogitans* or a sister vessel came into port. This may explain a certain unwillingness on E's part to pay D for the bunkers, when faced with the prospect of a claim by B, a stance that otherwise on its face lacks all merit.

## II. WHAT IS A SALE OF GOODS CONTRACT?

Before we turn to the particular issues raised in *The Res Cogitans*, it is useful to consider the meaning of a sale of goods contract. It is defined in both the UK and the Indian Acts 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.<sup>2</sup> The property means the general property (ownership) and not a special property (possession).<sup>3</sup> Ownership at common law is a very elusive concept. It is mediated through the concept of possession, so that in a very real sense the owner of goods is the person who has the best possessory right. To that proposition, a gloss must be added. A bailee for a term has a better possessory right for the moment than the owner who has bailed the goods, but that possessory entitlement is of finite duration and will cease at the end of the bailment, when the bailor's reversionary entitlement springs to life. The key point, however, is that

<sup>2</sup> Sale of Goods Act 1979, c.54, §2(1) (UK); Sale of Goods Act, No. 3 of 1930, § 4(1) (India).

<sup>3</sup> Sale of Goods Act 1979, c.54, §61(1) (UK); Sale of Goods Act, No. 3 of 1930, § 2(11) (India).

in common law systems ownership is settled between contesting litigants. It is relative in the sense that the task of the court is to determine as between the two disputants which of them has the better possessory title. It is not the concern of the court to determine which of them is the true owner,<sup>4</sup> and the judgment of the court does not debar a third party from later appearing and claiming to have a right superior to those of the two prior disputants. Furthermore, property disputes are located in the law of torts, in particular the tort of conversion, the remedy for which is damages and not the delivery of the disputed goods. Standing to sue is given to those in possession of goods at the time a wrongful act is committed, as well as those with a right to immediate possession, a category designed primarily to deal with owners out of possession at the time of the wrongful act. Standing to sue in the tort of conversion does not turn upon ownership as such.<sup>5</sup> In consequence, it is appropriate not to attach too much significance to the ownership of goods in conversion actions.<sup>6</sup>

It is instructive now to turn to the Sale of Goods Act and see how it deals with property matters. Its treatment of such matters can be broken down into three categories. The first, a contractual one, concerns the seller's responsibility in respect of the *quality* of the property rights that the seller must transfer to the buyer under the contract. The seller will put the buyer at risk of liability in the tort of conversion if a third party has a superior property right in the goods; that liability would arise if the sale and delivery of the goods interfered with the rights of a third-party. In the language of the Act, the seller must have the right to sell the goods to the buyer.<sup>7</sup> Secondly, the Act determines when and subject to what conditions the seller's property rights in the goods are transferred to the buyer. This is referred to in the Act as the passing of property.<sup>8</sup> Thirdly, the Act deals with a number of instances, all connected with contracts of sale, where two or more persons dispute the ownership of goods. A typical case arises in a tripartite relationship, where A, the owner of goods, is deceived by B into transferring possession of them to B, who fraudulently claims to be the owner when dealing with C, from whom a price is extracted. A dispute then erupts between the owner, A, and the bona fide transferee, C. In resolving this dispute, the Sale of Goods Act uses the language of title;<sup>9</sup> the question is which of them has the better title. It is an odd feature of both the UK and Indian Acts that neither actually

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<sup>4</sup> *Webb v. Chief Constable of Merseyside Police*, 2000 QB 427 : (2000) 2 WLR 546; *Costello v. Chief Constable of Derbyshire Constabulary*, (2001) 1 WLR 1437 : 2001 EWCA Civ 381.

<sup>5</sup> *Lord v. Price*, (1874) LR 9 Ex 54.

<sup>6</sup> See generally FREDERICK POLLOCK & ROBERT S. WRIGHT, AN ESSAY ON POSSESSION IN THE COMMON LAW (1888).

<sup>7</sup> Sale of Goods Act 1979, c.54, §12(1) (UK); Sale of Goods Act, No. 3 of 1930, §14(a) (India).

<sup>8</sup> Sale of Goods Act 1979, c.54, §§16-19, 20A-B (UK); Sale of Goods Act, No. 3 of 1930, §§18-25 (India). As a matter of contractual practice, a seller who, pending payment of the price, holds back the passing of property as permitted by a contractual provision, is said to reserve title to the goods. Moreover, a seller in breach of its contractual obligations in §12(1) is often said not to have a good title.

<sup>9</sup> Sale of Goods Act 1979, c.54, §21(1) (UK); Sale of Goods Act, No. 3 of 1930, §27 (India).

imposes on the seller a duty to pass the property in the goods to the buyer. The happening of this event is a feature of contracts that can as a matter of law be classified as sale of goods contracts; if the seller does not transfer the property in the goods or agree to do so, the contract is not one of sale for the purposes of the Sale of Goods Act.

As will be demonstrated below, the decision in *The Res Cogitans* has removed a substantial number of contracts for the supply of goods from the coverage of the Sale of Goods Act. The question now is: what is the significance of this? The original Sale of Goods Act was passed in 1893 as a codification of a body of law largely laid down in nineteenth century cases. Such changes as were made to the existing common law were very minor. The Act and the common law were at that point marching in step. However, subsequently, a number of reforming statutes were passed, the most important of which date to the 1970s and 1990s. Between those reforming statutes, a consolidated UK Sale of Goods Act was passed in 1979. When considering those reforming measures affecting both contract and property issues, it is important to note that they did not mirror an evolving common law. Simply put, there are no common law rule resembling the new provisions that can be applied to those contracts taken out of the reach of the Sale of Goods Act by *The Res Cogitans* ratio. In the UK, certain contracts akin to sale of goods contracts, for example barter contracts, are subject to a statute that mirrors the Sale of Goods Act.<sup>10</sup> No such statute, however, exists to deal with the contracts identified in *The Res Cogitans*. The consequences of this are dealt with below.

### III. TITLE AS A FUNDAMENTAL FEATURE OF SALE

In *Rowland v. Divall*,<sup>11</sup> a seller sold a car that turned out to have been stolen. The buyer, a car dealer, had the car in his possession for two months, and the sub-buyer in turn for another two months, before the theft of the car came to light. The buyer compensated the sub-buyer and then sued to recover the price. Having no right to sell the car, the seller was in breach of its duty under sub-section 12(1). Had the case been treated as a simple breach of condition, the buyer would have been entitled only to damages. He had accepted the goods, either by the passage of a reasonable time, or by the commission of an act inconsistent with the seller's ownership of the car when sub-selling the car. The buyer was nevertheless able to recover the price on the ground of a total failure of consideration. He had derived no benefit from having the car; a benefit for present purposes was regarded as the lawful use of the car. The buyer's recovery, therefore, was restitutionary in character (it would at the time have been called quasi-contractual). In a similar case involving hire-purchase, the court blended the

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<sup>10</sup> Supply of Goods and Services Act 1982, c.29 (UK).

<sup>11</sup> (1923) 2 KB 500.

contractual and restitutionary approaches by awarding damages for breach of warranty in an amount equivalent to the sum of all hire instalments previously paid.<sup>12</sup>

On the facts, the buyer in *Rowland v. Divall* may not have derived any factual benefit from having possession of the car, but in a later case<sup>13</sup> a buyer used the car for his own purposes over a period of nearly eleven months before discovering the defective title of his seller. He rescinded the contract and recovered the price paid as a on a total failure of consideration. The finance company that owned the car was interested only in recovering the unpaid instalments owed by a previous hirer. When later the hirer made those payments, title was fed down the disposition chain as far as the seller in this case. It was too late for that title to be fed to the buyer under the contract of sale, for that contract had already been rescinded. The outcome is hard to justify. Most goods have a finite life span and are sold for use and enjoyment. This is the primary purpose of a car buyer, not the metaphysical sense of being the lawful owner of the car. *The Res Cogitans* concerned bunkers. Suppose they had been the subject of a contract of sale subject to the Sale of Goods Act and suppose that the seller was in breach of its sub-s 12(1) duty but the bunkers were consumed before this fact came to light. The logic of *Rowland v. Divall* would lead us to conclude that the buyer had not received a lawful benefit and therefore could recover the price if paid or refuse to pay it if unpaid. There is no good reason why the buyer in this position should not have to prove its loss in the normal way in a damages action, if as and when the true owner were to bring a claim against it. The modern restitution orthodoxy is that a benefit should be taken into account in total failure of consideration claims only if the claimant has obtained a lawful benefit. This places dogma before practical justice.

Before leaving *Rowland v. Divall*, there is one further issue to consider. The buyer may not have obtained a good title to the goods, but it did obtain the property in the goods from the seller: title and property are not the same.<sup>14</sup> Nevertheless, Atkin LJ stated in *Rowland v. Divall* that there can be no sale at all of goods that the seller has no right to sell.<sup>15</sup> The problem with this contestable dictum is that the seller transferred to the buyer in that case the entirety of his property rights and not only possession, which is merely a special property. Apart from the owner, the seller in possession had it would seem the second best title in the world, which could not be challenged by anyone other than the true owner. At the time of the proceedings in *Rowland v. Divall*, any third party interfering with the buyer's possession, not acting with the authority of the true owner, would be liable in the tort of conversion. It would be no defence to plead the superior title

<sup>12</sup> *Warman v. Southern Counties Car Finance Corpn. Ltd.*, (1949) 2 KB 576.

<sup>13</sup> *Butterworth v. Kingsway Motors*, (1954) 1 WLR 1286.

<sup>14</sup> *Pace Popplewell J in FG Wilson (Engg.) Ltd. v. John Holt & Co. (Liverpool) Ltd.*, 2012 EWHC 2477 (Comm) : (2012) 2 Lloyd's Rep 479.

<sup>15</sup> *Rowland*, (1923) 2 KB 500, 507.

of the third party (the so-called *jus tertii*).<sup>16</sup> For the additional reason that the seller transferred its general property in the car to the buyer, it may properly be said that there had not occurred a failure of consideration. The buyer, of course, is not without a remedy. A breach of condition has occurred and, though it is too late to terminate the contract, a claim still lies for damages for breach of the seller's duty in sub-section 12(1).

The fundamental character of the seller's good title is also evident in the law governing exclusion and limitation clauses. Under the Unfair Contract Terms Act 1977, the seller's obligations under Sec. 12 of the Sale of Goods Act may not be excluded or limited, regardless of whether the contract is consumer or commercial in character. A clause seeking to do so is void.<sup>17</sup> To be distinguished from exclusion is the case of a limited title sale, where seller and buyer agree that the seller is bound to transfer to the buyer only the title that the seller or a third party has. This provision is designed to catch transactions involving trustees in bankruptcy, company liquidators and sheriffs executing judgments. How far it goes beyond such cases is difficult to surmise, particularly because the difference between excluding liability and defining a lesser standard of liability has all the appearance of a distinction without a difference. However that may be, this lesser duty too may not be the subject of an exclusion or limitation clause. The Unfair Contract Terms Act was passed at least in part to release the courts from having to cut down exclusion and limitation clauses with the aid of ultra-fine rules of *contra proferentem* interpretation and of the fundamental breach doctrine. According to the latter, a breach of contract that went to the very heart of the contract could not be protected by an exclusion or limitation clause, no matter how widely the clause was drafted. Curiously, perhaps, the statutory bar on excluding or limiting Sec. 12 duties may be seen as preserving in amber the now superseded doctrine of fundamental breach, in this one instance at least.

#### IV. EVENTS IN *THE RES COGITANS*

We can now return to *The Res Cogitans*. The owners of *The Res Cogitans*, E, ordered bunker fuels from D, the subsidiary of C. This order was passed on by C to B, which relayed the order to A, from whom E obtained the bunkers. Each of the four supply contracts was stated to be one of sale and each contained a clause providing that the property in the bunkers would not pass until payment had been made. The credit period was 30 days for the B-C contract and 60 days for the D-E contract. In the B-C contract, it was provided that C was in possession of the bunkers only as bailee pending payment. Nothing was said about the consumption of the bunkers but there was a finding of fact that B knew the fuels would be passed to a sub-buyer for consumption. According to the D-E contract,

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<sup>16</sup> The rules have now been changed to allow the defence to be pleaded: Torts (Interference with Goods) Act 1977, c.32 §8 (UK).

<sup>17</sup> Sale of Goods Act 1979, c.54, §6(1).

which was the contract playing the primary part in the court's decision, E was given possession of the bunkers as bailee until payment, but as bailee was nevertheless allowed to consume the bunkers for propulsion of the vessel.

In the present proceedings, E claimed that it was not bound to pay for the bunkers since it had not obtained the property in them.<sup>18</sup> This was not an attractive argument to run given E's consumption of the bunkers. E nevertheless was in practical terms in a vulnerable position in the event of a claim for payment being made by B, who had not been paid by C. The doctrine of privity of contract would protect E from a claim by B but not from the inconvenience of having its vessels subject to arrest in other jurisdictions, a matter of some embarrassment whether the courts in those jurisdictions would have recognised B's claim or not.

## V. THE DECISION

From arbitrators to the first instance judge to the Court of Appeal and to the Supreme Court, the unanimous holding was that this was not a sale of goods contract. Consequently, the supplier, D, was entitled to no relief afforded by the Sale of Goods Act. The court was then left to consider what kind of contract the D-E contract was. It was held to be a *sui generis* contract for the supply of goods on bailment terms giving the bailee a licence to consume the goods before payment. A bailment that contemplates no further duty on the part of the bailee, whether to return the goods or deliver them at the bailor's request to a third party, is a strange legal animal. The bailee's special property in this instance looks barely distinguishable from the general property in the goods. In reaching its conclusion, the court dismissed the argument that, at the point of consumption, D's reservation of title clause necessarily was released, permitting the property in the bunkers at the same time to pass to E. Had this argument been successful, the contract could have been treated as a contract of sale of goods. The court also dismissed the argument that the contract was a conditional contract of sale,<sup>19</sup> in the sense that the property would not pass until payment had been made.<sup>20</sup> The Supreme Court, moreover, was resistant to an argument accepted in the Court below, namely, that a *sui generis* contract could sit alongside a sale of goods contract, the former applying to those bunkers consumed before the passing of property and the latter to those fuels still in E's possession when payment was made so that the property could pass. The contract was held to be a single, indivisible one.

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<sup>18</sup> *The Res Cogitans*, (2016) 2 WLR 1072 : 2015 EWCA Civ 1058 at [38].

<sup>19</sup> As argued by Tettenborn when noting the decision of the Court of Appeal: 2016 LMCLQ 24. See §2(3). §§2(5), (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.

<sup>20</sup> *The Res Cogitans*, (2016) 2 WLR 1193 : 2016 UKSC 23 at [29]-[30].

## VI. THE *SUI GENERIS* CONTRACT AND ITS PROPRIETARY INCIDENTS

A *sui generis* supply contract is not subject to the condition in sub-section 12(1) of the Sale of Goods Act that the seller has a right to sell the goods. This did not mean that D gave no proprietary undertaking to E. 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.”<sup>21</sup> This liberty had to be a lawful permission to consume the bunkers. D was not the owner of the bunkers, since it too had acquired them on reservation of title terms, and therefore had to put E in such a position that it would not commit the tort of conversion in taking delivery of and consuming the bunkers. The entitlement of D to give permission was said in outline terms to derive from “the chain of contracts by virtue of which [D] had obtained the bunkers.”<sup>22</sup> This ought to mean that the permission of the owner, A, had been obtained, but also ought to mean that the permission of B and C, succeeding bailors in the chain, had also been obtained. For each bailment, there would have had to be permission for the goods to be consumed by either the immediate receiver or by any subsequent receiver or consumer in the chain.<sup>23</sup> The commission of an act repugnant to the terms of a bailment gives the bailor the right to immediate possession and thus the standing to sue in respect of a tort of conversion.<sup>24</sup> The full articulation of this position is impeded by the fact that only the B-C and D-E contracts were before the court. Nevertheless, there was general evidence before the various courts in this case about prevalent terms in the bunkers trade, from which inferences could be drawn about the terms of those contractual bailments that were not before the court.

The Supreme Court said nothing about the strictness of D’s obligation regarding the lawful permission to consume but there is every reason to believe that it is a strict obligation like its Sale of Goods Act counterpart in sub-section 12(1). The Supreme Court was also silent about the classification of the term:<sup>25</sup> whether it was a condition of the contract or an innominate term, but the close analogy with the contract of sale calls for classification of the term as a condition like the term in sub-section 12(1).<sup>26</sup> The matter of when the necessary permission needed to be obtained was again not considered. A practical approach suggests the date

<sup>21</sup> *The Res Cogitans*, (2016) 2 WLR 1193 : 2016 UKSC 23 at [34].

<sup>22</sup> *The Res Cogitans*, (2016) 2 WLR 1193 : 2016 UKSC 23 at [39].

<sup>23</sup> 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 in the supply chain’: (2016) 2 WLR 1072 : 2015 EWCA Civ 1058 at [36]. D of course could not retrospectively bind A and B though it could bind C by a contractual provision to that effect.

<sup>24</sup> *Fenn v. Bittleston* (1851) 7 Ex 152 : 155 ER 895. A bailor at will would have standing to sue anyway, at least where any interference with goods was a wrongful act towards the bailee.

<sup>25</sup> Or in the Court of Appeal: (2016) 2 WLR 1072 : 2015 EWCA Civ 1058 at [36].

<sup>26</sup> The first instance judge is clear that the term is a condition: 2015 EWHC 2022 (Comm) at [47]-[48] and [62] : (2015) 2 Lloyd’s Rep 563, the breach of which he sees as giving rise to a failure of consideration.



of delivery, for that is when E would need to be protected from liability in conversion for accepting goods on terms permitting consumption.<sup>27</sup>

Since D was not undertaking to transfer a good title in the goods to E, a matter of fundamental importance was, as we have seen in respect of the sale of goods, the fact that the argument that a failure to give effective permission to consume the goods could not in all cases be seen as giving rise to a failure of consideration. Suppose that E has consumed the goods and that, had the contract been one of sale, E would be considered as having accepted the goods and thus relegated to an action for damages. The acceptance provision in the Sale of Goods Act<sup>28</sup> does not apply to *sui generis* contracts, but a similar common law rule of acceptance might be fashioned as part of the laborious project to construct a system of rules for *sui generis* contracts. The invocation of failure of consideration would interfere with confining the claimant to a damages action, just as it did in *Rowland v. Divall*. The first instance judge thought a breach of this term gave rise to a failure of consideration. Thus, E was entitled to a lawful right to use the goods.<sup>29</sup> If this is correct, E could refuse to pay or recover the price whether or not it has been or is facing a claim in conversion by the owner.<sup>30</sup> If the *sui generis* contract has to be treated as a separate entity because the property in the goods is not being transferred to the receiver of the goods, it is far from obvious that the conclusion should be the same as the one fashioned for sale of goods in *Rowland v. Divall*.

## VII. CONSEQUENCES OF THE DECISION

The decision in *The Res Cogitans* is not merely confined to exotic contracts; it affects a very large number of contracts where the seller, delivering the goods on credit terms, protects itself from the consequences of buyer insolvency with the aid of a reservation of title clause. The supply of raw materials and parts to a manufacturing buyer, frequently on an ‘all moneys’ basis so that the property passes only when all invoices for all supplies have been paid, is a case in point. So too is the supply of goods by a wholesaler to a retailer as part of the latter’s stock in trade in order to finance the latter’s cash flow. In the latter case, it would defeat the purpose of both parties if the buyer had to insist on reserving the property in its dealings with consumer customers. Consumer resistance would be a barrier to trade and would cut off the supply of cash to feed payments by the retailer to the wholesaler.

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<sup>27</sup> The recipient may not need protection from the date of the contract since a denial of title is not per se a conversion: Torts (Interference with Goods) Act 1977, c.32 §11(3).

<sup>28</sup> Sale of Goods Act 1979, c.54, §35 (UK); Sale of Goods Act, No. 3 of 1930, §42 (India).

<sup>29</sup> 2015 EWHC 2022 (Comm) at [48] : (2015) 2 Lloyd’s Rep 563, relying ‘by parity of reasoning’ upon *Rowland*, (1923) 2 KB 500 and *Warman*, (1949) 2 KB 576.

<sup>30</sup> In the Court of Appeal, Moore-Bick LJ refers 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: (2016) 2 WLR 1072 : 2015 EWCA Civ 1058 at [38].

In fact, in very many sections of the leading English practitioners' guide,<sup>31</sup> the question of whether in such cases a particular rule of sale of goods applies or not is repeatedly posed. A few of the more important examples may be mentioned here. There is no underlying common law that will replicate the effect of the Sale of Goods Act because the Act had to be amended to achieve the necessary effect.

First, reforms were enacted in the UK Sale of Goods Act in the mid-1990s to counter the rule in Sec. 16 that the property cannot pass in goods until they are ascertained. The problem that had to be addressed concerned buyers who paid for goods either in bulk storage or in the course of bulk carriage when the goods from which they paid were only a part of that bulk. The solution was to give them a tenancy in common of the bulk, so that they acquired an undivided interest in it.<sup>32</sup> It is possible for there to be a bulk from which the *sui generis* receiver has a contractual right to delivery. If that receiver pays all that is owed under the contract, it cannot acquire an undivided property interest under the Sale of Goods Act.

A second example again concerns a mid-1990s reform, designed to prevent commercial buyers from rejecting goods when the seller's breach of condition had trivial consequences.<sup>33</sup> A *sui generis* receiver is not similarly constrained when rejecting the goods for a breach of condition. The condition in question may concern description, satisfactory (formerly merchantable) quality and fitness for purpose.<sup>34</sup> It should not be too difficult to find common law counterparts, but reforming changes made to satisfactory quality pose a problem, which is our third example. To reverse the effect of a particular House of Lords decision,<sup>35</sup> the satisfactory quality term was reformed so that the goods had to be fit for all common purposes in appropriate cases. A fourth example concerns the classification of the common law counterparts to these statutory provisions for use in *sui generis* supply cases. The Sale of Goods Act treats statutory implied terms as either conditions or warranties. The prevailing trend in English contract law, outside the Sale of Goods Act, is to classify contract terms as innominate terms, so that termination rights arise only if the breach produces sufficiently serious consequences. It is an open question whether this trend will apply to *sui generis* implied terms or whether they will shadow the classification of their counterparts in the Sale of Goods Act.

A fifth example concerns exceptions to the rule that a transferor can pass to a bona fide purchaser only such title as he has. The Sale of Goods Act in Sec. 25 provides that a buyer in possession of goods, where the seller has not yet passed the property in the goods to the buyer, may nevertheless pass a good title

<sup>31</sup> BENJAMIN'S SALE OF GOODS (M. Bridge ed., 9th ed., 2015 supplement).

<sup>32</sup> Sale of Goods Act 1979, c.54, §20A (UK); (no Indian equivalent).

<sup>33</sup> Sale of Goods Act 1979, c.54, §15A (UK); (no Indian equivalent)

<sup>34</sup> Sale of Goods Act 1979, c.54, §§ 13-14 (UK); Sale of Goods Act, No. 3 of 1930, §§15-16 (India).

<sup>35</sup> Henry Kendall & Sons v. William Lillico & Sons Ltd., (1969) 2 AC 31 : (1968) 3 WLR 110.

to a bona fide purchaser. Suppose that a *sui generis* receiver is in possession of goods with a limited permission to use them only for consumption, but nevertheless sells them to a third party. That third party will not be protected by Sec. 25 and cannot fall back on any common law exception to the title transfer rule. In England, but not in India, there is a provision in the Factors Act that covers the same ground, and slightly more, than Sec. 25.<sup>36</sup> It is quite possible that this Factors Act provision will come to the aid of the bona fide purchaser from a *sui generis* receiver but by no means assured, given the courts' insistence in the past that the title transfer provisions of the two statutes should be treated as one single code.<sup>37</sup>

### VIII. A SELLER'S REMEDIES

The classification of the contract in *The Res Cogitans* was a matter of no small importance, but the Supreme Court took the opportunity also to clarify the position concerning the right of a seller to sue for the price. The judge at first instance had given leave to appeal on limited grounds. Apart from the issue whether the contract between D and E was one of sale of goods, the only other permissible issue was whether D could bring an action for the price under sub-s 49(1),<sup>38</sup> which requires the property to have passed to E.<sup>39</sup> Issues relating to 'the day certain' head of the price action in sub-s 49(2)<sup>40</sup> and damages under Sec. 50<sup>41</sup> therefore did not go up to the Court of Appeal. In the Supreme Court, however, the question of a seller's ability to sue for the price, a form of debt action, was opened up. Before the court's views are dealt with, a rounder picture of the seller's remedies for breach of a contract of sale of goods by the buyer should be considered.

A buyer in breach of its duty to accept<sup>42</sup> and pay for goods<sup>43</sup> is liable to pay damages for non-acceptance.<sup>44</sup> The buyer will be in breach if performing only one of the two obligations, taking delivery or paying, but the damages section requires the buyer not to have performed both obligations.<sup>45</sup> A buyer who has taken delivery but who declines to pay therefore does not fall within the damages section. The old common law rule was that damages could not be awarded for failure to pay a sum of money, a rule that lay at the heart of a creditor's inability, apart from certain special cases, to recover interest in the absence of a

<sup>36</sup> Factors Act 1889, 52 & 53 Vict. c.45, §9 (UK).

<sup>37</sup> See e.g. *Worcester Works Finance Ltd. v. Cooden Engg. Co. Ltd.*, (1972) 1 QB 210, 220 : (1971) 3 WLR 661.

<sup>38</sup> Sale of Goods Act, No. 3 of 1930, §55(1) (India).

<sup>39</sup> *The Res Cogitans*, (2016) 2 WLR 1072 : 2015 EWCA Civ 1058 at [11].

<sup>40</sup> Sale of Goods Act, No. 3 of 1930, §55(2) (India).

<sup>41</sup> Sale of Goods Act, No. 3 of 1930, §56 (India).

<sup>42</sup> This means taking delivery; it is not the acceptance in s 35 that prevents rejection of the goods.

<sup>43</sup> Sale of Goods Act 1979, c.54, §27 (UK).

<sup>44</sup> Sale of Goods Act 1979, c.54, §50 (UK).

<sup>45</sup> Sale of Goods Act 1979, c.54, §50 (UK); Sale of Goods Act, No. 3 of 1930, §56 (India).

contractual provision. The Supreme Court, nevertheless, following an earlier decision of the House of Lords, made it clear that this prohibition on recovering damages for non-payment no longer applied.<sup>46</sup> A buyer, or a *sui generis* receiver for that matter, should be liable to pay damages for non-payment and these damages should certainly include the sum of the price.

Turning to the seller's action for the price,<sup>47</sup> with its advantages over a damages action,<sup>48</sup> this lies in two instances. The first and more important one, in sub-section 49(1) of the Sale of Goods Act, is where the property in the goods has passed to the buyer. A reservation of title clause necessarily bars such an action. The second instance, in sub-section 49(2), is 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." The language here is the old language of independent covenants.<sup>49</sup> This provision has been fairly dormant for a number of years but has recently sprung to life. Under the old law, the seller in such a case 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 even that it was ready and willing to do so. A seller recovering the price but then failing to deliver would be liable to a buyer bringing an action for damages for non-delivery.

In the Supreme Court, E argued that allowing a seller to recover the price under sub-s 49(2) would allow the seller to have both the price and the goods if the seller had not already delivered. The argument was unsound; in a departure from the old law of independent covenants, the seller had to remain ready and willing to perform its delivery duty.<sup>50</sup> There was however a further difficulty and it turned on the meaning of 'a day certain'. Did this have to be a preordained date, or could it be a date fixed at a specified interval following a floating event, such as 30 days after delivery or after invoice? The Supreme Court in *The Res Cogitans* favoured the latter approach.<sup>51</sup> A day certain is therefore one that can be subsequently be ascertained. If the contracts in *The Res Cogitans* had been treated as sale of goods contracts, the supplier could in fact have sued for the price, contrary to the view expressed in earlier case law.<sup>52</sup>

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<sup>46</sup> *The Res Cogitans*, (2016) 2 WLR 1193 : 2016 UKSC 23 at [48]. See also *Sempra Metals Ltd. v. Inland Revenue Commrs.* 2008 AC 561 : (2007) 3 WLR 354 : 2007 UKHL 34.

<sup>47</sup> Sale of Goods Act 1979, c.54, §49 (UK).

<sup>48</sup> E.g. summary judgment in some cases; absence of any need to prove loss; non-application of rules of mitigation of damages and remoteness of damage.

<sup>49</sup> See *Pordage v. Cole*, (1669) 1 Wms Saund 319 and Sergeant Williams's later notes on the decision in the same report.

<sup>50</sup> See *Otis Vehicle Rentals Ltd. v. Ciceley Commercials Ltd.*, 2002 EWCA Civ 1064 at [16]; *The Res Cogitans*, (2016) 2 WLR 1193 : 2016 UKSC 23 at [34].

<sup>51</sup> *The Res Cogitans*, (2016) 2 WLR 1193 : 2016 UKSC 23 at [45].

<sup>52</sup> *FG Wilson*, 2012 EWHC 2477 (Comm), varied at (2012) 2 Lloyd's Rep 479 : (2014) 1 WLR 2365 : 2013 EWCA Civ 1232.

A further point was taken. The Supreme Court held that a seller's entitlement to sue for the price could not be amplified by contract on the basis of Sec. 55 of the Sale of Goods Act,<sup>53</sup> which provides that "any right, duty or liability arising under a contract of sale of goods by implication of law...it may be negative or varied" by express provision, course of dealing or binding usage. This provision can be relied upon to vary or exclude contract terms but not to amend the provisions of the Act itself.<sup>54</sup> But the court, of the view that the Act itself might impliedly permit an action for the price in circumstances falling outside Sec. 49, relied upon those cases where the risk of loss or destruction of the goods is on the buyer so that a seller unable to deliver or to pass the property in the goods is nevertheless entitled to recover the price.<sup>55</sup> Risk is a special case and hardly a firm base for finding other exceptions to Sec. 49.

## IX. CONCLUSION

At no point in *The Res Cogitans* litigation are the systemic consequences of the decision considered, apart from a passing reference in the Court of Appeal to applying the Sale of Goods Act by analogy.<sup>56</sup> Moreover, the courts involved passed lightly over the many cases, from first instance to House of Lords, where contracts of the kind dealt with in the decision had been treated as sale of goods contracts.<sup>57</sup> Furthermore, the whole exercise of re-characterisation of the contract in *The Res Cogitans* proved ultimately to be unnecessary, given the Supreme Court's views on the availability of a seller's price action and an action for damages for non-payment. The Supreme Court was not bound by the limited permission to appeal given by the first instance judge. The voyage into the parallel universe of *sui generis* contracts proved in the end to be unnecessary. We are left with the unnecessary category of *sui generis* supply contracts, but this redundancy can be dealt with by means of a simple reform so that the Sale of Goods Act captures this type of contract. The following should suffice:

‘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.’

If ever the issue that arose in *The Res Cogitans* were to present itself in Indian courts, they would be well advised not to adopt the same approach to *sui generis* contracts. The views expressed in that case on price and damages actions, however, are to be commended.

<sup>53</sup> Sale of Goods Act, No. 3 of 1930, § 62(India).

<sup>54</sup> *The Res Cogitans*, (2016) 2 WLR 1193 : 2016 UKSC 23 at [52].

<sup>55</sup> *The Res Cogitans*, (2016) 2 WLR 1193 : 2016 UKSC 23 at [57].

<sup>56</sup> *The Res Cogitans*, (2016) 2 WLR 1072 : 2015 EWCA Civ 1058 at [336].

<sup>57</sup> Discussed at length in the Court of Appeal Supreme Court: (2016) 2 WLR 1072 : 2015 EWCA Civ 1058 at [24]-[31].