The "backward tracing" permitted by *Brazil v Durant* is consonant with fundamental principle because it would not permit tracing into the car in that example – and because it is scarcely backward tracing at all. Under *Brazil v Durant*, only assets *to be acquired* in the execution of a transaction may be traced into. Since transactions are by definition intended, it is a tautology – yet true – that a claimant may only trace into an asset acquired before it is paid for where the asset was intended to be acquired in the performance of a transaction: *Relfo*, at [63]; Nolan, ibid., at pp. 85–92; Cutts, ibid., at pp. 397–404. The utility of describing that as backward tracing is questionable. It is more accurate to describe *Brazil v Durant* as deciding that the assets into which a claimant may trace because they "represent" an original asset – or its traceable proceeds – are defined by the scope of the transaction, unlimited by accidents of the order and timing of the events by which the transaction is performed.

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UNCONVENTIONAL "SALES"

IN business, it is desirable to have certain law that makes good commercial sense, and helpful to know what fundamental concepts like "a contract of sale of goods" actually mean. The Supreme Court in *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd. and another ("The Res Cogitans")* [2016] UKSC 22 grappled with precisely this question.

Here, the appellants were owners and managers of a large ship that ran off marine fuel called bunkers. Having consumed a quantity of bunkers without paying their immediate supplier for them, the appellants sought to resist that supplier's action for the agreed price. Unsurprisingly, three arbitrators had rejected the appellants' commercially unattractive arguments that the Sale of Goods Act 1979 barred the immediate supplier's right to sue for the price when it had fallen due.

Having lost the expedited appeals before the High Court and the Court of Appeal, the owners appealed to the Supreme Court, which (with notable speed) upheld the outcome reached by the lower courts. Lord Mance, giving a unanimous judgment, held that "the Owners are simply liable for the price, albeit under a contract sui generis, which is not one of sale" (at [39]).

The issues before the Court were, first, whether the contract between the parties was a "contract of sale of goods" within the meaning of s. 2(1) of the Act, such that the Act applied; and, second, if it was a contract falling within the Act (and not a "*sui generis* transaction"), whether the two circumstances in s. 49 (where property in the goods has passed or where

the price is "payable on a day certain") are an exhaustive statement of when sellers may sue for the price.

The appellants had entered into a bunker supply contract with the respondent suppliers; the contract labelled the parties the "Buyer" and the "Seller", respectively. The "Seller" supplied bunkers on retention of title ("ROT") terms with a 60-day credit period, during which the "Buyer" was contractually entitled to consume (viz. destroy) the bunkers to propel the vessel. When the "Buyer" paid the price, it was to obtain property in the bunkers but, if the "Buyer" consumed them before payment, then a transfer of property was impossible.

On the facts, there was a prior reason why property could not pass: the "Seller" never had property to pass because a ROT clause operated in favour of an unpaid supplier further up the supply chain. The original unpaid supplier had sold the bunkers down a chain of contracts containing ROT clauses. Thus, the last contract in the chain (between the "Seller" and the "Buyer") could not lead to a transfer of property. Had the Act applied, the "Seller" would have been exposed to allegations of breach of the condition as to title implied into the contract by s. 12.

The "Buyer" consumed some (and likely all) of the bunkers before the end of the credit period, and thereby destroyed the retained property of the supplier at the top of the chain. Both parties agreed that the absence of a transfer of property meant that, even if the Act applied, the action for the price under s. 49(1) was not available. The question of whether the 60-day credit period led to a price "payable on a day certain" (within s. 49(2)) was not before the Court, though Lord Mance said, obiter, that these words "can no doubt be construed liberally … but are not of indefinite expansion" (at [50]). Thus, the issue arose whether, if the Act applied, an action for the price was available in cases falling outside s. 49.

As to the first issue of the characterisation of the contract, Lord Mance noted that s. 2(1) defines a "contract of sale of goods" as 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". His Lordship held that the contract "cannot be regarded as a straightforward agreement to transfer the property in the bunkers to the Owners for a price" (at [28]). It was, first, an agreement to permit the "Buyer" to consume the bunkers and it was, second, an agreement to transfer property in unconsumed bunkers.

The price was the indivisible consideration for *all* the bunkers, consumed or unconsumed. Thus, it was incorrect to divide up the contract and conclude, as had the Court of Appeal, that it fell within the Act as regards any unconsumed bunkers (in which, all else being well, property could pass to the "Buyer"). The characterisation of the entire contract could not be dictated by the possibility of a transfer of property in any bunkers remaining, particularly because the parties strongly contemplated the non-transfer of property in bunkers consumed under the contractual licence.

Lord Mance's judgment makes clear that the characterisation of an agreement as one of sale requires scrutiny of the agreement as a unified whole to determine whether the price is the consideration for a transfer or agreement to transfer property in all the contract goods. This approach may be significant for a variety of other agreements, albeit that, where there is no express licence to destroy the goods, it may be harder to establish the non-applicability of the Act.

All this is not to say that the Act was irrelevant to this contract *sui generis*. Lord Mance indicated that the contract "would contain similar implied terms as to description, quality, etc to those implied in any conventional sale" (at [31]). This creates a novel species of contract that does not amount to a (statutory) "conventional sale" despite containing similar terms.

It might be thought regrettable that Lord Mance gave so little guidance on the terms and nature of *sui generis* transactions that falsely appear to be sales. However, it must be remembered that, as well as working backward from the 1979 Act to discern some similar implied terms, courts can work forward from the express terms of the contract to discern what the parties intended. Cutting through the technical questions about whether the Act applied to the supply contract, the essential nature of the bargain was clear: "an admissible modicum of commercial awareness on the court's part" indicated that the licence to consume bunkers was "a vital and essential feature" (at [27]) and it made commercial sense for the "Buyer" to have to pay for that feature.

In the light of Lord Mance's primary conclusion that the Act did not apply, it was not necessary to consider the second issue of the availability of the action for the price outside s. 49. Nonetheless, His Lordship chose, advisedly, to indicate that s. 49 is not an exhaustive statement of when an action for the price lies. Had the issue arisen, Lord Mance would have overruled the "*Caterpillar*" case (*F G Wilson (Engineering) Ltd. v John Holt & Co. (Liverpool) Ltd.* [2013] EWCA Civ 1232; [2014] 1 W.L.R. 2365), in which the Court of Appeal interpreted s. 49 as a bar to actions for the (contractually due) price outside the Act.

Although Lord Mance's conclusion was obiter, it spells the end of a startling incursion into freedom of contract. The interpretation of s. 49 adopted in *Caterpillar* was supported with a dubious appeal to the need to protect buyers of goods subject to ROT clauses. If a buyer of goods in English commercial law needs protection, it is to be found in the terms of the bargain he has struck. Lord Mance recognised the Act's origins in "freedom of contract and trade", but qualified this in the next sentence by saying that courts "should be cautious about recognising claims to the price of goods in cases not falling within section 49" (at [53]).

Limiting his remarks to the instant case, Lord Mance said that there would have been an action for the price by reason of the ROT clause coupled with physical delivery of the bunkers and a transfer of risk to

the "Buyer". That combination (of ROT clauses with physical delivery and the transfer of risk) will not necessarily create a non-statutory action for the price. The significance of that combination, as well as any other circumstances where the action lies outside s. 49, "must be left for determination on some future occasion" (at [57]).

The plain implication of Lord Mance's cautious approach is that some sellers who fall outside s. 49 may still find themselves unable to sue for a price which their contract tells them is due. In view of this uncertainty, the prudent ROT seller will specify a day certain for payment. Lord Mance also viewed with favour the possibility of a claim for damages for non-payment of the price. Although this would lack certain procedural advantages of claiming the price, it will surely feature in litigation resulting from the fresh uncertainty.

Certainty and freedom of contract, then, remain compromised, but this may be a fair price to pay for the speed with which the Supreme Court reached a sensible outcome.

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JURISDICTION OF THE ENGLISH COURTS OVER OVERSEAS HUMAN RIGHTS VIOLATIONS

IN *Lungowe v Vedanta Resources Plc* [2016] EWHC 975 (TCC), the High Court allowed a claim to be heard in England against parent company incorporated in England and its foreign subsidiary in relation to the overseas subsidiary's operations. The judge considered whether the claim against the English-domiciled defendant could be stayed on the basis of *forum non conveniens*, and whether jurisdiction could be established over its foreign subsidiary as a necessary and proper party to the case. The overall analysis of the judgment suggests that (1) the claims against the parent company in relation to the overseas operations of the foreign subsidiary can be heard in the English courts and (2) the existence of an arguable claim against the English-domiciled parent company also establishes jurisdiction of the English courts over the subsidiary even if the factual basis of the case occurs almost exclusively in the foreign state.

The claimants were 1,826 Zambian citizens, who commenced proceedings against Vedanta, an English-based mining corporation, and its indirect Zambian subsidiary, KCM. The claims alleged personal injury, damage to property, loss of income, and loss of amenity and enjoyment of land arising out of the operation in Zambia of the Nchanga Copper Mine by KCM.

The claimants argued that Vedanta breached the duty of care it owed to them to ensure that KCM's mining operations did not cause harm to the