IN THE COUNTY COURT AT BRISTOL **Claim No.K00BS577**

ON APPEAL FROM THE ORDER OF DDJ BATSTONE OF 30 OCTOBER 2023

HHJ Russen KC
25 April 2024

B E T W E E N:

AMANDA SEAFOOD PTE LIMITED
(A COMPANY REGISTERED IN SINGAPORE)

Claimant/Respondent

-and-

SYKES SEAFOOD LIMITED

Defendant/Appellant

Edward Bennion-Pedley instructed by Gordons LLP (Leeds) for the Appellant

James Pearce-Smith instructed by Middletons Solicitors (Warminster) for the Respondent

Hearing Date: 24th April 2024

Judgment

HHJ Russen KC:

Introduction

1. This is my judgment on the appeal of the Defendant ("**SSL**") against the order of Deputy District Judge Batstone ("**the judge**") dated 30 October 2023 which I heard yesterday.

2. The judge's order followed a trial before him on 13 September and his written judgment dated 29 September 2023. By the order he declared "that the Defendant did not acquire title to the Goods pursuant to an Administration Agreement dated 27 January 2023."

3. The "Goods" which form the subject matter of that declaration was a container of frozen prawns which the Claimant ("**ASP**"), a company incorporated in Singapore, had agreed in late 2022 (see below) to sell and export to an English company, Big Prawn Company Limited ("**Big Prawn**") for USD $295,900. The prawns were delivered (to Big Prawn's delivery address identified in the purchase order) on 2 February 2023 but Big Prawn had by then gone into administration on 27 January 2023 and the price was not paid.

4. The "Administration Agreement" mentioned in the declaration was a 'pre-pack' Administration Sale Agreement ("**the ASA**") between Big Prawn (having gone into administration on the date of the agreement), Melton Constable Investments Ltd ("**Melton**", another company in administration), SSL and the joint administrators of the two companies in administration, Benjamin Wiles and Philip Dakin of Kroll Advisory Limited.

5. Under the ASA, SSL acquired the business of Big Prawn – the wholesale and retail supply of prawns and shellfish products – as a going concern. This included 'the Assets" identified in clause 2.1 of the ASA which in turn included 'the Stock'. Subject to the detailed provisions of the ASA, what SSL bought was (to quote from that clause) "*such right title and interest (if any) as [Big Prawn] and Melton as applicable has ……. so far as [Big Prawn] and Melton are entitled to sell the same*." Clause 12 of the ASA expressly excluded assets over which there was a third party reservation of title or alleged reservation of title – '*R.O.T. Assets*' – from the sale. Perhaps more relevantly, given the nature of the argument between ASP and SSL it also excluded '*Third Party Assets*': assets *"…. to which title does not vest in [Big Prawn] for any reason, including those under the provisions of a consignment …. or any similar agreement*."

6. In these proceedings ASP claim that Big Prawn did not have title to the prawns ("**the Goods**"), as at the date of the ASA, which remained with ASP. Accordingly, SSL's refusal to deliver them up and its assertion of a contrary title were wrongful and constituted acts of conversion to be remedied by an order for delivery up and/or damages. ASP put their claim for such retention of title on a number of different bases. First, that the contract between ASP and Big Prawn, initially pleaded to have been made on or about 6 December 2022, had incorporated Big Prawn's standard terms and conditions, and they provided at clause 6(b) for property to pass "*upon Delivery of the Goods*" (if not upon earlier payment for them). By the time they were in fact delivered on 2 February 2023 to the specified delivery address – of "*The Big Prawn Company, Marriott Way, Melton Constable, Norfolk NR24 2BT*" ("**the trading premises**") – that address was not occupied by Big Prawn but instead by SSL. SSL took up occupation of the trading premises on the afternoon of 27 January 2023. Secondly, ASP say the Goods had not been paid for. Thirdly (and quoting from paragraph 13 of the Particulars of Claim), "*the Administrators have confirmed to the Claimant that the Goods were not included in the assets sold to the Defendant under the ASA or at all.*"

7. SSL's Defence (at paragraph 9.2) denied that title to the Goods "*did not, at the time the ASA was executed, vest with the Defendant*." That denial is pregnant with SSL's positive case which is that title had passed (to Big Prawn) well before the date of the ASA and the later delivery of the prawns to the trading premises. SSL's pleaded case is that property (or title) in the prawns had passed on 6 December 2022 when they were loaded on to the ship in Vietnam for export to England or, alternatively, on 23 January 2023 when they reached the UK. SSL admits that the contract between ASP and Big Prawn incorporated Big Prawn's T&C's, with the provision for title to pass no later than delivery to the trading premises, but denies they constituted the entirety of the contract. SSL say that it was agreed between the two companies that, instead, delivery took place on shipment in Vietnam on 6 December 2022 (FOB the YM Wreath at Ho Chi Minh Port).

8. Specifically, paragraph 7 of the Defence says it was agreed between ASP and Big Prawn that Big Prawn, rather than ASP, would arrange for delivery from Vietnam to the London Gateway on a 'Free on Board' basis "*and [ASP's] and [Big Prawn] subsequent conduct constituted a term of the contractual agreement between [ASP] and [Big Prawn]*." That conduct is alleged by SSL to have taken the form of the goods being loaded on to the vessel on 6 December 2022 whereupon they ceased to be under the control of ASP and came under the control of Big Prawn's shipping agents, Edge Worldwide Logistics Limited. SSL add, at paragraph 13 of the Defence, that ASP, therefore failed (on SSL's case) to deliver the prawns to the trading premises but seek to "*rely on that failure to their own advantage*."

9. On the basis that property in the prawns had passed on 6 December 2022, alternatively on 23 January 2023, SSL say that title to the prawns passed to it – as part of the Stock – under the ASA. As at the date of the Defence, 18 May 2023, SSL said that approximately 25% of the prawns had been sold and the remaining 75% either remained in storage or had left storage "*but are subject to complaints by their customers concerning the quality of the Goods*."

10. ASP's Reply intimated that they intended to amend the Particulars of Claim to plead that the contract with Big Prawn was not entered into on or about 6 December 2022 but earlier, on or about 19 October 2022, when ASP issued a sales order to Big Prawn in relation to the prawns and other goods. The Reply also gives details of the invoice issued by ASP under that sales order, on 5 December 2022, which identified a shipment date of 6 December 2022 and a payment date of 21 January 2023. The Reply admits that Big Prawn's T&C's did not constitute the entirety of the contract but they were incorporated by course of dealing between the two companies in 2021 and 2022. The rest of the contractual terms were those set out in the sales order (but not the invoice). The Reply denies that shipment FOB meant that title passed upon the shipping of the goods. It referred to the statement in the sales order "*Payment term: DA 45 days after BL*" ('BL' referring to the bill of lading) to say that this did not support the case for saying that title to the prawns passed to Big Prawn upon acceptance of the documents for the sale. Instead, the contractual terms, as understood by ASP and Big Prawn, showed that the date for payment (which, as an alternative to delivery at the trading premises, governed the passing of title) was independent of such acceptance. The Reply does not admit that the prawns came under the control of Big Prawn or of the

shipping agents upon loading and denies that led to an earlier passing of title than that provided for by the contract. In response to SSL's suggestion that they were seeking to take advantage of the fact that the prawns had not been delivered (on time) to the trading premises, ASP responded by saying that it is SSL who are seeking to gain an advantage by obtaining them "on the cheap" (my summary) when recognition that they *were* included within the Stock under the ASA would have meant a higher price would have been payable by SSL under the ASA.

11. I return below to what the judge had to say about these competing arguments over the contractual position between ASP and Big Prawn but it is first necessary to address the rather strange procedural history of this case.

12. It is necessary to do so because of the way three particular procedural directions influenced the nature of the trial before the judge and the terms of his judgment. By the time of the trial, I think it is fair for me to assume, both parties might have regretted that the first of these directions had been made. It is certainly clear now, on this appeal, that SSL regrets the procedural course the case has taken, because their position on the appeal is that the directions have resulted in the judge not hearing all the relevant evidence (ASP's witnesses not being able to be cross-examined on their understanding of the contract terms) and in him not addressing in his judgment the legal points put to him on the question of title to the Goods passing under the ASA. This is essentially because the claim was allocated to the small claims track.

Procedural Background to the Judgment

13. ASP's claim was issued in the Bristol County Court on 27 March 2023. It came before District Judge Taylor for directions on 22 May 2023.

14. One might have thought that the issues between the parties outlined above - involving arguments about the terms of the contract, as alleged in the Reply, their interplay with the shipment of the prawns on 6 December 2022 and whether, against those terms, that shipment FOB Vietnam governed title and not just risk - were such that the case might have been considered suitable for transfer to the Circuit Commercial Court in Bristol. The price of the prawns was US $295,500. I note the Claim Form curiously stated "Not Applicable" in relation to the value of ASP's claim but, although the Particulars of Claim said that ASP reserved the right to supply particulars of its claim for loss and damage, in respect of its tortious claim, the value of the subject matter of the Goods sought to be delivered up - approaching $300,000 - is plain from both the Particulars of Claim and the Defence.

15. However, DJ Taylor's order dated 22 May 2023 provided that the claim should be "allocated to the Small Claims Track". It also directed that there should be a split trial "and the Court shall first determine whether the Defendant acquired title to the Goods pursuant to an Administration Sale Agreement dated 27 January 2023". Further directions were made in support of that second one. They included standard disclosure, sequential service of witness statements (SSL going first) and the listing of "the issue of title" on the first

available date after 4 September 2023 with a time estimate of one day. These directions, approved by the court, were recited to have been agreed by ASP's solicitors and SSL's counsel attending the hearing.

16. The allocation of claim to the small claims track is puzzling having regard to the provisions of CPR 26.6 and 26.8. The transcript of the hearing before the judge shows that, in refusing an adjournment of the trial on 13 September 2023, the judge said:

> "The sale price of the goods is a little short of $300,00 (so about £250,000) but the parties agreed, nevertheless, I am satisfied from my perusal of the file, that the preliminary issue of liability (that being whether title passed in the goods or not) was to achieve a speedy resolution of the dispute as to liability in connection with these goods which are, by their nature, perishable ….".

17. It may be that the judge was referring only to the recital of agreement between the parties in the order dated 22 May 2023 though (as I explain below when addressing his judgment) he also referred to an email from counsel. That said, the judge did not attribute the allocation to the small claims track to the parties as opposed to their desire for speediness. On the hearing of the appeal before me both ASP and SSL have disowned the idea that the parties agreed the allocation to the small claims track, as opposed to the other directions in that order. Mr Pearce-Smith referred to the reasons for allocation to that track remaining obscure. Mr Bennion-Pedley said that, despite what the judge might have thought, it was not done at the parties' behest or with their consent. I am satisfied, by what counsel said about it, that the email mentioned by the judge did not address allocation to the small claims track. Mr Bennion-Pedley suggested that the court's allocation might have been the result of ASP identifying only a single case of 10kg prawns in their Particulars of Claim, rather than the 2,200 cases actually in issue, though I note the same paragraph in the particiulars clearly stated the sale price of the Goods.

18. I recognise that £10,000 'cap' identified (now) in CPR 26.9(4) and 27.1(2) is not immutable: see PD26 para. 15.1. However, the issues between the parties on the statements of case and the other directions made (compare CPR 27.2) raise an obvious question as to whether the issue of title was straightforward enough to justify a belief that it could be heard and determined within the one day normally allowed for a small claims track trial. I see from the transcript of the trial before the judge that the hearing began at 10.07am and concluded at 3.58pm on 13 September 2023. That hearing did not include the giving of judgment, which was reserved and handed down on 29 September 2023. Neither did it involve all the witness evidence contemplated by the order dated 22 May 2023, though it did include some time spent by the judge in giving his extempore ruling on why he was not prepared to accede to the parties' application to adjourn the trial so that such evidence might be given at a further hearing.

19. What does seem clear, the claim having been allocated to the small claims track, is that the parties did not question that allocation in the period leading up to the trial of the preliminary issue before the judge. I think it is fair for me to assume that there was attraction for them in an order which provided for a hearing date (on a potentially dispositive issue) as early

as only 4 months or so later. I recognise that the shelf life even of frozen prawns (i.e. the remaining 75% identified in the Defence served just before the directions hearing) may be much shorter than the life of the average multi-track claim. However, the proper way to an early resolution in litigation over a perishable subject matter is by putting the claim on the appropriate track and, if the evidence is thought to justify it and no doubt having considered the implications of CPR 25.1(1)(m) in relation to any interim relief, then applying to move up it with directions for an expedited trial. The present appeal being heard 11 months on from the order of May 2023, with SSL contending that nothing meaningful has yet been decided, the parties must have come to regret the claim was put on the wrong track. The reason for me saying this lies in what the judge said in paragraph 13 of the judgment, quoted below.

20. I also say that, at this point of my judgment, noting that the order of HHJ Blohm KC dated 26 January 2024 and granting SSL permission to appeal on 4 grounds but not a fifth, has refused permission to appeal against the judge's decision to refuse the parties' application to adjourn the trial so that further witness evidence might be adduced. In his skeleton argument on the appeal, Mr Bennion-Pedley for SSL made this observation in connection with SSL's hoped-for success on the appeal:

> "It is regrettable that a genuine attempt to litigate this matter in a proportionate and collaborative way has gone so badly wrong, particularly if, as seems likely, the matter must now be remitted back for a hearing."

21. In his skeleton argument Mr Bennion-Pedley also said it was regrettable that Judge Blohm KC had also declined to order that this appeal should proceed by way of a re-hearing, which SSL had argued was the appropriate course to allow the matter to be resolved on a single substantive occasion. It is clear from the terms of the order dated 26 January 2024 that the directions for the hearing of the appeal before me were quite separate from any future "conduct of the claim" in the County Court Business and Property List.

22. However, operating on what I believe to be the reasonably safe assumption that at any re-trial the court would be looking to decide matters by reference to the best evidence then available, it seems to me that such a direction for an appeal by way of re-hearing would probably have involved not only an implicit grant of permission to appeal on that fifth ground but perhaps even the recognition of its soundness. Instead, in my view, what Judge Blohm's order of 26 January 2024 reveals is that a litigant who goes along with an unorthodox litigation procedure – which, even if SSL did not initially suggest it, in this case sees a claim shoehorned into a procedural track to which it plainly did not belong – can only expect so much assistance from the court when that procedure goes wrong. For an appeal to extend beyond a review of the judgment under appeal and involve a re-hearing the court has to be persuaded that the circumstances of the case are such that the interests of justice require it: see CPR 52.21. I can understand why Judge Blohm KC was not so persuaded.

23. Whether or not the issue of title (or property) in the Goods, as at the date of the ASA, should be remitted for trial therefore rests upon SSL's challenge to the judge's substantive decision

– that property did not pass to SSL under the ASA – on the grounds of appeal for which HHJ Blohm KC has given permission. If it is remitted for re-trial, then the refusal of permission on the fifth ground may well not carry lasting significance. And, if it is remitted, then the claim will now proceed on the appropriate track. As noted above, by his order dated 26 January 2024 (and as foreshadowed by the terms of his earlier order dated 29 November 2023 containing directions for the hearing of the application for permission to appeal) Judge Blohm KC directed that the claim is re-allocated to the multi-track and transferred to the Bristol & Property Courts list of the Bristol County Court.

24. Reverting now to the orders made before the trial last September, and the witness evidence contemplated by the parties at the May 2023 directions hearing, the third pre-trial direction which came home to roost at the trial itself was one made, it appears, the day before the trial itself and only thought about by the parties a few days before that.

25. I have not seen the order of District Judge Brown dated 12 September 2023 but it is described in paragraph 6 of the judge's written judgment of 29 September 2023 as follows:

> "C wished to adduce evidence from its two witnesses, the chairman Paul Andriesz and the managing director David Gorman, by video link from locations in Singapore and Vietnam, respectively. By email of 8 September 2023 C's solicitors informed the court that the parties were agreed, subject to the court's approval, that the two witnesses could give evidence remotely. On 12 September 2023 District Judge Brown gave permission for a hybrid hearing with the witnesses attending remotely and the advocates in person but she did not deal with the question whether those two countries had given permission and noted on the file that the issue was to be decided by the trial judge."

26. The judge went on to say that counsel had informed him that both witnesses were in Vietnam. Counsel told him it was not possible to obtain the requisite consent of the foreign court or other authority, for the witnesses' evidence to be given remotely, and he said "*counsel were not able to persuade me that I should proceed nevertheless to take evidence from the two witnesses.*" The judge referred to some judicial guidance local to Hampshire, Wiltshire and the Isle of Wight on this procedural aspect issued by the Designated Civil Judge. What he said about that is consistent with the Chancery Practice Note 2022, issued by the Chancellor on 11 May 2021 and referencing paragraph 4 of Annex 3 to PD32, which identifies the need for a party intending to call a witness by videolink or other remote means from a foreign jurisdiction to obtain any necessary permission from the foreign court or authority "in good time". As the White Book suggests, this statement of best practice should be assumed to apply to civil litigation generally.

27. By 12 September (UK time) or even 8 September 2023 it was probably far too late to obtain permission from the Vietnamese authorities for Mr Andriesz and Mr Gorman to give evidence remotely the following day.

<u>The Judgment</u>

28. I have explained above that the judge refused the parties' informal application to adjourn the trial, so that all the contemplated witnesses could give evidence, and that his refusal is not subject to review by me.

29. His judgment of 29 September 2023 noted that at the start of the trial counsel had expressed surprise that a claim over goods worth nearly $300,000 should be on the small claims track. However, he observed that the court file had revealed that the court had made its order, allocating the claim to that track, on the basis of an email sent to the court that day by Mr Bennion-Pedley which stated that, subject to the court's approval, the parties had agreed directions. I have already noted that Mr Bennion-Pedley does not accept this extended to allocation to the small claims track.

30. The judge made it clear that the small claims track allocation governed his approach to the determination of the issue before him. At paragraph 13 of the judgment, he said:

> "A consequence of the allocation is that the provisions in CPR rule 27.8 apply and I may adapt any method of proceeding at the hearing, which must include the giving of judgment that I consider to be fair, that the hearing is to be informal; and that the strict rules of evidence will not apply. I have had submissions about the carriage of goods by sea, bills of lading and free-on-board contracts and related topics. I do not propose to descend into the detail of that area of the law and consider how the relevant principles apply to enable me to determine the preliminary issue one way or the other. I also do not propose to determine any other issues than the one identified by the Order. During Mr Pearce-Smith's submissions the question arose whether I could determine other issues for example whether title to the Goods passed on 2 February 2023 when they were delivered to Marriott Way. He submitted that I should not because the evidence that the parties had produced was tailored to the preliminary issue which is correct as can be seen from the terms of the Order. Mr Bennion-Pedley submitted that I should determine that issue of title passing on 2 February 2023, assuming I was against him on title passing to D under the ASA, because that might facilitate the resolution of the issues in other phases of the litigation between the parties. In my judgment, it would not be fair to proceed in that way when the parties have prepared their evidence to deal with the single issue identified in the Order and that is what I will confine myself to. In doing so my focus will be on the ASA."

31. In focusing upon the ASA the judge observed that he found the parties' rival witness statements to be of limited assistance. However, he did find the evidence of the only witness to testify, Mr Jay Adams, SSL's Group Services Director (who gave evidence remotely from within the jurisdiction), to be of assistance. In the course of his cross-examination Mr Adams said that SSL did not receive full stock ledgers. The judge had noted certain correspondence that 'the Stock' (within the meaning of clause 1.1 of the ASA) was listed in stock ledgers provided by the administrators to SSL during the negotiation of the ASA. That answer and others from Mr Adams led the judge to conclude that there were documents that SSL should have disclosed (under an order of District Judge Wales dated 1 September 2023) but had not.

32. On that basis, the judge concluded, at paragraph 26 of his judgment that "*the Goods were not identified in the stock report as goods for D to purchase*." At paragraph 30, having reviewed other answers by Mr Adams about an Excel spreadsheet which identified some assets of Big Prawn, the judge noted Mr Adams' answer that "D had never had a stock list which identified the Goods." The judge was satisfied that SSL had also failed to disclose that spreadsheet.

33. However, at paragraph 27 of the judgment the judge did address one spreadsheet, which showed the shipments to Big Prawn by ASP and by other overseas suppliers. He said the shipments by ASP and one of those others, alone, had a combined value of US $697,660. Referring to the £350,000 apportioned to the value of the Stock under the ASA, he said if SSL "*knew that in respect of both those shipments, the documents had been released to their agents and that was the test for the passing of title in the property I would have expected them to have paid much more*."

34. The judge noted Mr Adams' evidence which said that there was no full and complete list of the Stock, that there were other assets not listed on the spreadsheet which SSL was buying as part of the Stock, and which referred to him having had conversations on site with the Administrators about the prawns which led SSL to make a payment to have the container released from the delivery port (the Defence refers to SSL paying £58,918 to the shipping agents and shipping and clearance fees of £7,937) . The judge did not make any express findings about these answers.

35. The judge then turned to what he described as the undisputed facts about the issue of ASP's sales order on 19 October 2022 and Big Prawn's purchase order dated 29 November 2022 (incorporating Big Prawn's T&C's). He referred to certain provisions of Big Prawn's T&C's, including clause 6(b), which provided for property in the prawns to pass upon delivery or earlier payment for them, and clause 6(d) which provided for their delivery at the trading premises.

36. The judge then addressed the material provisions of the ASA. These included the definition of 'the Stock', 'R.O.T Assets', 'Third Party Assets' and 'Supply Contracts' in clause 1.1; the apportionment of £350,000 (of the total £1m consideration payable under the ASA) to the Stock; and also clause 11 addressing 'Contracts'.

37. The judge set out the terms of clause 11.9:

> "The Buyer undertakes with the Seller and the Administrators and each of them to accept delivery or other performance of the Supply Contracts and to pay the relevant suppliers promptly and fully."

38. The definition of Supply Contracts in clause 1.1 is:

> "All of the contracts agreements orders engagements and arrangements (written or oral) of the Business between the Seller and suppliers of the Business for the supply of goods and services to the Seller which have not as at close of business on the Completion Date

been completed (in the case of goods) by delivery or (in the case of services) by performance by the supplier."

39. The Completion Date under the ASA was the date of the agreement, 27 January 2023.

40. The judge then expressed his conclusion and decision that SSL did not acquire title to the prawns pursuant to the ASA. His reasons for this were set out in paragraph 59 of the judgment as follows:

> "My decision is that D did not acquire title to the Goods pursuant to the ASA. In making that decision I favour the submissions of Mr Pearce-Smith over those of Mr Bennion-Pedley. In addition to what I have said above, I state my reasons as follows:
>
> a) The contract between C and BPC for the sale of the Goods to BPC is to be regarded as a *Supply Contract* within the meaning of the ASA because the Goods had not been delivered at the time of the ASA. That being so clause 11.9 of the ASA provides that D would have to pay C *promptly and fully* for the Goods. Accordingly, D cannot have acquired title to the Goods as part of its acquisition of *the Stock*.
> b) It was the expectation of the parties to the ASA that the stock capable of being purchased would have been capable of being identified in a document for the purposes of valuation by Hilco and D making its offer to purchase. I infer from its not having been produced that the stock report dated 20 January 2023 did not identify the Goods as goods that D could offer to purchase. D's own solicitor had been led to believe that there were stock ledgers identifying the Goods, but they failed to materialise.
> c) The fact that Kroll, a party to the ASA considered the Goods not to have been included in the sale to D, is an expression of Kroll's subjective view but it is based on the objective fact that the email reveals and that is the absence of the Goods from BPC's stock list or balance sheet.
> d) If D's contention is correct, and title to the Goods had passed to BPC before the ASA, I would have expected that to have been appreciated by Kroll and factored into the account of the stock that was capable of being purchased by D. As it was, the contract between C and BPC was for the purposes of the ASA an uncompleted contract that D paid less than £1 for on the express understanding that it would pay C for the Goods."

41. Although that paragraph began with the judge saying he favoured the submissions on behalf of ASP, and that his 5 reasons were in addition to that observation, I have already quoted paragraph 13 of the judgment in full where the judge made it clear that he was not determining the issue by reference to the legal argument over the passing of property (or not) prior to the date of the ASA by reference to the contractual position between ASP and Big Prawn, as opposed to the terms of the ASA. I mention this because of the way it has shaped the appeal before me.

42. It was the conclusion in paragraph 59 of the judgment which led to the judge granting the declaration set out in paragraph 1 above. The judge also ordered that each party should bear its own costs of the issue over title.

The Grounds of Appeal and Respondent's Notice

43. SSL's appeal against the judge's decision that property in the Goods had not passed under the ASA on 4 grounds which may be summarised as follows:

    43.1. The judge was wrong to conclude that the allocation of the claim to the Small Claims Track permitted him not to descend into the issues of law raised by the parties over the key question as to whether or not property passed to Big Prawn; and in particular what constituted 'delivery' for the purposes of the contractual relationship between ASP and Big Prawn.

    43.2. As a consequence the judge failed to consider, properly or at all, whether property had passed to Big Prawn prior to the date of the ASA when, had he done so, he would have been bound to conclude that property had passed either when the Goods were consigned FOB to Big Prawn's agent in Vietnam or when ASP released the shipping documents to Big Prawn or when ASP released the Goods to Big Prawn's agents in the UK.

    43.3. The judge's conclusion that the contract between ASP and Big Prawn was a 'Supply Contract' within the meaning of clause 11.9 the ASA was flawed when that had not been argued by ASP, the judge had not invited or heard argument on it and his reasoning that it was such, because the Goods had not been delivered by the date of the ASA, begged the very question which the court was asked to address (but did not do so). Further, clause 11.9 addressed the question of payment and said nothing about title.

    43.4. The judge relied on certain matters of evidence or opinion which were either rnot material to or incapable of supporting his decision. There was no basis for drawing an inference that SSL had failed to disclose a stock ledger or that the ledger did not include the Goods when Mr Adams' evidence that there was no full and complete list of the Stock that SSL were buying. There was no evidential basis for the judge suggesting that, if the Goods were included as part of the Stock, then SSL ought to have paid more for it, or for ignoring the possibility that SSL might have made a good bargain. The evidence of the administrators' opinion that the Goods were not part of the Stock was evidence of subjective intention and inadmissible.

44. Mr Bennion-Pedley submitted that these grounds should lead to the appeal being allowed and the issue over property in the Goods being remitted for a re-trial.

45. I have noted above that HHJ Blohm KC did not grant SSL permission to appeal against the judge's refusal to adjourn the trial before him so that ASP's witnesses might be give testimony and be cross-examined, as opposed to the hearsay evidence of their witness statements being read by the judge when he found those to be of limited assistance.

46. Proceeding, therefore, on the basis that there was nothing wrong in the judge's decision to press on with the trial of the claim over title, it follows that SSL will only succeed in securing a re-trial, on the best evidence then available, by reference to one or more of the suggested errors in his substantive decision.

47. By its Respondent's Notice ASP ask the appeal court to uphold the judge's decision "*for reasons different from or additional to those given by him.*"

48. In his skeleton argument Mr Pearce-Smith (referring to paragraph 59 of the judgment) said:

> "The DDJ decided the preliminary issue in favour of C. In the Decision he expressed preferred the submission of C (which are largely the same as those set out below). However, he did not address those submissions in detail and instead focused on other matters."

49. It is on this basis that counsel's skeleton then sets out ASP's case as to why property in the Prawns did not pass to Big Prawn and therefore did not pass to SSL under the ASA. Those submissions were not set out or addressed by the judge: see paragraph 13 of the judgment.

50. The points made in the Respondent's Notice, and expanded upon by Mr Pearce-Smith in his skeleton argument and oral submissions (primarily by reference to the documentation relating to ASP and Big Prawn of a contractual nature but also the evidence of Mr Adams) are that:

    50.1. the question of if/when property (or title to the Goods passed to BPC depends on the terms of the contract between ASP and Big Prawn;

    50.2. the evidence adduced at trial established that Big Prawn's T&C's were incorporated into the contract with ASP;

    50.3. upon the true construction of the contract between ASP and Big Prawn, property/title to the Goods would not pass until the earlier of:

        (a) the delivery of the Goods to Big Prawn at Marriott Way; and

        (b) payment by BPC for the Goods.

    50.4. the facts which were not in dispute and/or the evidence at trial established that neither of these events had occurred, and hence property/title to the Goods never passed to Big Prawn;

50.5. alternatively if (which ASP deny) delivery to Marriott Way on 2 February 2023 constituted delivery of the Goods to Big Prawn for the purposes of the contract between ASP and Big Prawn (so that property/title to the Goods passed to BPC at that point) this occurred after the formation of the ASA; and

50.6. therefore, on the true construction of the ASA property/title to the Goods did not pass to SSL.

51. Whereas SSL (mindful of Judge Blohm's decision at the permission stage) recognises that, if they can displace the judge's declaration by establishing the errors in his reasoning, there will need to be a re-trial on the point, ASP (while resisting the suggestion of such error) therefore effectively invite me to decide on the evidence which was before the judge the matters that were not decided by him.

My Approach

52. In my judgment, the outcome of this appeal essentially turns upon whether or not the judge's decision can be justified by his analysis of clause 11.9 of the ASA. I say that because it is clear from paragraphs 13 and 59 of the judgment that he did not address the competing arguments over the passing of property in the Goods prior to the date of the ASA by reference to the contract between ASP and Big Prawn. Although Mr Pearce-Smith said that the judge had not addressed those arguments in detail, it is clear that he did not address them at all. In paragraph 13 of the judgment the judge expressly stated he was not going to make a decision upon them for the purposes of determining the issue of title.

53. In my judgment, it is also clear that, if the declaration cannot be supported by reference to clause 11.9, then there will have to a re-trial of the issue over title leading to a judgment which does address those competing arguments (or at least the determinative one(s)).

54. At the outset of the hearing I raised with counsel the distinction drawn by CPR 52.21(1) between a review of the decision under appeal and a re-hearing. I did so because of Mr Bennion-Pedley's mention of him having failed to persuade HHJ Blohm KC to direct that the appeal should proceed by way of a re-hearing and because, in the usual circumstances of the judgment below in favour of ASP resting on a point which neither party had foreseen and argued, ASP's Respondent's Notice inevitably carries with it more of a flavour of "re-trial" than such notices normally do.

55. I indicated my provisional view that, whilst recognising ASP are able to point to the judge having "*favour[ed] the submissions of Mr Pearce-Smith*" before then going on to address his (the judge's) point about clause 11.9, the Respondent's Notice effectively invites me to make findings of fact and law upon which his judgment is silent.

56. As I observed, this is not (or not obviously so on an analysis of the judgment) the usual case of a respondent's notice saying that, although the judge came to the right decision, he should have accepted the respondent's further ground(s) for that decision when instead he either rejected the ground or considered that his other reasons dispensed with the need to address it. Of course, paragraphs 13 and 59 of the judgment contain a strong flavour of the latter option but they do not enable the appeal court to understand the reasons why the other grounds were surplus to requirements for the purposes of the decision reached. The ground upon which the judge's decision rests simply assumes that there was no property-transferring act of delivery to Big Prawn before 27 January 2023. That assumption short-circuits the giving of reasons. The lack of supporting reasons means that the decision that SSL did not acquire property in the Goods cannot be said to be one reached despite other arguments advanced by ASP: the usual stuff of a respondent's notice. Inevitably, therefore, ASP is in the position of asking me, by the Respondent's Notice, to supply all the reasons necessary to support the judge's assumption as to title up to 27 January 2023. That is why I raised with the parties my concern that the Respondent's Notice, supported by Mr Pearce-Smith's skeleton argument, appeared to smack of a re-hearing which the appeal should not be. In saying that, I also recognised that ASP was not asking me to consider any evidence – either in documents, witness statements or a transcript of testimony - which was not before the judge. I recognised, therefore, that ASP were not testing the limits of CPR 52.21(2).

57. Mr Pearce-Smith said his recollection of the hearing before HHJ Blohm KC on 26 January 2024 was that the judge had not ruled out the idea of re-hearing as clearly as Mr Bennion-Pedley suggested. Nevertheless, the language of the order provides no support for a re-hearing (and I have made observations in paragraph 22 above about the possible tension between it doing so and the rejection of the ground of appeal against the judge's refusal to adjourn) and therefore the default position under CPR 52.21 applies.

58. Mr Pearce-Smith submitted that, in any event, the Respondent's Notice was seeking to do nothing more than CPR 52.13(2) expressly recognises, which is to "uphold the decision of the lower court for reasons different from or additional to those given by the lower court." Even though I think a fair description of the grounds in the Respondent's Notice would be to say they are, when read against the judgment, reasons which are "new, entirely alternative to, and such as to displace the need for" the reason given by the judge, I do not suggest that the Respondent's Notice falls outside the language relied upon by Mr Pearce-Smith.

59. However, as I have said, this is not the 'usual' case of what might be described as suggested "add on" reasons advanced under a respondent's notice: a point illustrated by me noting that the combination of the judge saying he favoured Mr Pearce-Smith's submissions and assuming property had not passed to Big Prawn before 27 January 2023 might well indicate that, applying the language of CPR 52.13(2), there is perhaps no scope (or need) at all for the Respondent's Notice. This point is important when it comes to applying the distinction in CPR 52.21 between a review and a re-hearing.

60. In response to me raising the distinction between the two, Mr Bennion-Pedley referred to the notes in the White Book 2024, para. 52.21.1, and in particular the five points made by May LJ in *Dupont de Nemours (EI) & Co v ST Dupont (Note)* [2003] EWCA Civ 1368; [2006] 1 W.L.R. 2793 about the differences between the two. As Mr Bennion-Pedley recognised, the first of those points is that "*the precise meaning and application of "review" and "re-hearing" will depend on the circumstances of the case*." However, he submitted that I was right to suggest that this was not a case of ASP, as respondent, suggesting that the judge had made a mis-step in his reasoning towards an ultimately correct decision but, instead, a case of ASP inviting the appeal court to provide for the first time all of the essential grounds which justify its correctness.

61. Although I recognise that ASP is not urging upon me a re-hearing in "*the fullest sense of the word*" (to use the language of the second point in *Dupont*) and does not seek to rely upon any evidence beyond that contemplated by CPR 52.21(2), I have reached the clear conclusion that it is not appropriate to engage with the points raised by the Respondent's Notice. To make findings on those points would necessarily go beyond a review of the judge's reasoning and amount to something akin to a re-trial, albeit by reference to the evidence fixed as at the date of the hearing below.

62. At the hearing of the appeal counsel did engage with the merits of the key points raised by ASP by reference to the contractual documentation, the witness statements and the transcript of the evidence before the judge (a conditional engagement on Mr Bennion-Pedley's part so far as concerned his express recognition of the need for a re-trial if the appeal succeeds). Even so, to the extent that it was still open to me at the hearing of the appeal to make a decision under 52.21, I am not persuaded that it would be in the circumstances of this appeal be in the interests of justice to expand the appeal beyond a review of the judge's decision. Indeed, the submissions which counsel did make on those points confirmed my initial concern that it would be unfair to do so.

63. As Mr Pearce-Smith's skeleton argument reveals, in urging me to make fresh findings not previously made by the court, the facts are not uncontentious. The facts (or chronology) which the judge recited and said, at paragraph 39 of the judgment, were not in dispute give rise to competing arguments about the significance of others which were not. I also note that the judge did not refer to the release of the shipping documents to Big Prawn's agents on 17 January 2023 upon which (although not pleaded) SSL rely as an alternative event for the passing of title.

64. For example, the parties disagree about the significance of the language of ASP's sales order – "*Payment Term: DA 45 Days after BL*" – and whether that changed the concept of delivery (to the trading premises) under the purchase order and Big Prawn's T&C's. Mr Pearce-Smith urged me to reject Mr Adams' explanation of the language as irrelevant and inadmissible. Of course, as a representative of SSL, Mr Adams had no direct knowledge of the contractual terms between ASP and Big Prawn.

65. Mr Bennion-Pedley, on the other hand, drew my attention to the witness statement of Mr Paul Andriesz, the Chairman of ASP. He relied upon what Mr Andriesz said in his witness

statement about the trading arrangements between ASP and Big Prawn having "*never been subject to a formally documented procedure*" and the release of "*the documents for the goods*" upon the acceptance of the bill of lading. He also pointed to paragraph 5 of the Reply as recognition by ASP that the dealings were not, he submitted, simply in accordance with Big Prawn's Purchase Order and clause 6(b) of its T&C's.

66. On this appeal I cannot act upon SSL's complaint that it was not allowed to ask questions of Mr Andriesz which, as Mr Bennion-Pedley put it, would have been aimed not at undermining his evidence but expanding upon it. However, allowing for the risk that much of the other (suggested) contractual material may be as much about payment as any property-transferring act of delivery, otherwise than as provided for by clause 6(b), the dangers involved in me making original findings on these points, at the appeal stage, are obvious.

67. In that regard, I asked Mr Bennion-Pedley whether any of SSL's grounds of appeal involved not only the contention that the judge's decision was wrong but that reaching it also involved a serious procedural irregularity. Again, I had in mind the provisions of CPR 52.21 – in this case 52.21(3)- which states that, whether or not the decision under appeal was wrong, the court *will* allow an appeal where such an irregularity has produced an injustice. Mr Bennion-Pedley said that certain of the grounds (see the summaries in paragraphs 43.1 and 43.3 above) did involve that contention by reference to the judge not deciding the points put to him and determining the issue on a point on which he had not invited the parties to address him.

68. In my judgment, that is the correct categorisation of those complaints about the judgment which have been made good (and which ASP did not challenge) and, therefore, the application of CPR 52.21(3)(b) is a further reason why it would be wrong to dispose of the appeal by reference to the points taken in the Respondent's Notice. The rival points which were advanced before the judge and rehearsed again on the hearing of the appeal are all properly matters for a re-trial.

69. So too *might be* further arguments raised by SSL's by reference to the point touched upon in paragraph 13 of the judgment and the later observation of Judge Blohm KC, that the (late) delivery of the Goods to the trading premises, on 2 February 2023, was sufficient to pass title to Big Prawn in any event. I mention some aspects of this below.

70. Therefore, it is because there has to be a re-trial of and a decision upon the parties' competing arguments on the points which they had identified for the judge that I have concluded the outcome of this appeal turns only upon a review of his reasoning based on clause 11.9 of the ASA.

71. In focussing upon clause 11.9 as the linchpin of the judgment under appeal I do not ignore the second and third reasons given by the judge in paragraph 59 (the fourth reverts to his analysis of clause 11.9) which are also challenged by SSL. However, those involve observations on the evidence which, as I read them, do not culminate in a definitive conclusion which enables an appeal court to determine whether or not it is erroneous or

not. As I read them, the judge did not say that SSL had not acquired title to the Goods either because they were (so he inferred) missing from a stock report or because that was the administrators' view. In the final paragraph of his skeleton argument, Mr Pearce-Smith said the judge was entitled to find that the extrinsic evidence established that the Goods were not included in the ASA but it is not clear to me that he (the judge) did.

72. SSL contend that the judge's reliance on clause 11.9 of the ASA begged the very question that the judge was asked to determine by reference to the parties' arguments on the contractual position between ASP and Big Prawn.

73. In his skeleton argument, Mr Pearce-Smith did not engage with the clause 11.9 point. In his oral submissions he recognised that the judge was wrong to attempt to dispose of the issue of title by reference to clause 11.9 when the parties had not addressed him on it. However, he said that the finding reached by reference to clause 11.9 was consistent with the submissions he had made to the judge (about property not passing to Big Prawn before 27 January 2023) and which were essentially the same as those now advanced in support of the Respondent's Notice.

Decision

74. In my judgment, the disposal of the preliminary issue by reference to clause 11.9 cannot be upheld.

75. In paragraph 59(a) of the judgment the judge analysed the contract for the sale of the Goods as a 'Supply Contract' within the meaning of clauses 1.1 and 11.9 "*because the Goods had not been delivered at the time of the ASA*." However, not only did the judge not explain why that was so but, at paragraph 13, he eschewed the idea of an explanation. Mr Bennion-Pedley is therefore correct in his submission that the judge assumed the goods had not been "delivered" to Big Prawn, for the purposes of deciding the preliminary issue, without explaining why.

76. The concept of "delivery" for the purposes of identifying a Supply Contract within the meaning of clauses 1.1 and 11.9 of the ASA is not necessarily the same as an act of property-transferring "delivery" for the purposes of the contract between ASP and Big Prawn. In any event, a conclusion that the Goods had not been delivered to Big Prawn (somewhere) before close of business on 27 January 2023, for the purposes of identifying a Supply Contract under ASA, contains no answer to the question whether or not property in them had by then nevertheless already passed to Big Prawn by reference to one of the earlier events relied upon SSL on its analysis of that other contract. The fact that the judge, at paragraph 13 of the judgment, stated that he need not engage with a point (which counsel told me was one initially raised by the judge) about delivery to the trading premises passing property to Big Prawn *after* the date of the ASA highlights the difference between these two distinct questions. Non-payment (to ASP) for the Goods is of course the reason why these proceedings have been brought but, even on ASP's case on the terms of its contract with Big Prawn (i.e. clause 6(b) of Big Prawn's T&C's, if not clause 4 which said payment

was conditional upon delivery) property in the Goods might have passed to Big Prawn upon payment for them prior to delivery (somewhere).

77. I have considered whether it is permissible on this appeal to read into the judge's stated preference for Mr Pearce-Smith's submissions, on the arguments which were presented to him, the conclusion that he did accept ASP's essential point that clause 6(b) of Big Prawn's Purchase Order and T&C's governed the concept of property-transferring delivery – to Big Prawn at the trading premises – and that the Goods were never delivered *to Big Prawn* at those premises (as opposed to SSL). However, that inference cannot be drawn in the face of what the judge said in paragraph 13 (both the point just flagged and generally). It certainly would not be fair to draw the inference against SSL, the appellant, who would still be left in the position of not knowing the reasons why the judge accepted the point and (so it would also have to be inferred) rejected SSL's competing points. Without knowing those reasons the appellant cannot challenge them.

78. I also observed during the hearing, though with much greater hesitation and with me recognising that it has not previously surfaced in pleading or argument, the judge's reliance upon clause 11.9 also raises a question as to where that leads. As the point is not presently an issue between the parties, even though it seems to me to be potentially covered by the issue directed to be tried by the judge, I will say no more than what I said, about it during my exchanges with counsel, repeating as I do my express recognition of the potential flaws in my approach. It is linked to the potential significance of the delivery to SSL after the date of the ASA in respect of which the judge declined SSL's invitation to make a finding (paragraph 13).

79. On the judge's analysis (paragraph 59(d)), SSL paid "*less than £1 for [the contract for the sale of the Goods] on the express understanding that it would pay C for the Goods*." This was a reference to the fact that, under clause 5.1(d) of the ASA, SSL agreed to pay £1 for the 'Supply Contracts' (and 'Customer Contracts') and, under clause 11.9, undertook to the Big Prawn and the administrators to "*accept delivery or other performance of the Supply Contracts and to pay the relevant suppliers promptly and fully*". Those provisions confirm that, as provided for by clause 2.1(i) of the ASA, the benefit of the Supply Contracts was included in the sale to SSL. As with the other Assets sold, including the Stock, this was subject to the proviso "*so far as [Big Prawn] are entitled to sell the same*." In the case of a contract for the supply of goods to Big Prawn which is still to be performed, and not yet resulted in an accretion of its Stock (whether owned by Big Prawn or 'R.O.T. Assets' or 'Third Party Assets' within the meaning of the ASA), I presently read that proviso in relation to Supply Contracts as relating to Big Prawn's ability to assign the benefit of the particular contract rather than to its ownership of the underlying goods. SSL's promise to pay the supplier for the goods (when, as this case illustrates, such payment may be the trigger for ownership passing from the supplier) seems to be consistent with that reading.

80. In circumstances where (adopting the judge's analysis of it as Supply Contract) the contract between ASP and Big Prawn, on both ASP's or SSL's analysis of its terms, provided for property in the Goods also to pass on delivery, there would appear to be scope (on that analysis) for concluding that property in the Goods did pass under the ASA upon their

delivery to the trading premises. If that argument (predicated on that analysis) is a sound one then what has gone wrong, in terms of a failure of contractual performance, is that SSL has not paid ASP for the Goods in accordance with clause 11.9. In other words, it might be said that it is *because* SSL has acquired the Goods under a Supply Contract that it agreed, with the administrators and Big Prawn, to pay for them.

81. That said, Mr Pearce-Smith correctly noted that none of this has been pleaded by SSL. SSL's case is all about property in the Goods passing *before* the date of the ASA. During the hearing I noted, as no doubt the parties have already done, that clause 12.5 of the ASA states that the parties to it do not intend its terms to be enforceable by a third party such as ASP under the Contracts (Rights of Third Parties) Act 1999. Mr Pearce-Smith indicated that if the point were to be taken by SSL – and it is worth repeating that it is one floated by me by reference to a conclusion reached by the judge independently of the submissions made to him – then ASP would wish to consider a potential claim against the administrators to whom gave the promise to pay. If there is anything of substance in the point then it further highlights the shortfalls in the judge deciding the title point by reference to only one contract and not also the other.

82. Clearly, any issue about ASP's entitlement to be paid under clause 11.9, if either party adopts the analysis, is presently outside ASP's pleaded case under the Torts (Interference with Goods) Act 1977.

83. It follows, in my judgment, that the judge's declaration cannot stand by reference to those clauses and, upholding SSL's challenge which rests upon the absence of that necessary substratum, I conclude that the issue of title (at least) needs to be determined at a fresh trial. I also accept SSL's challenges which are essentially based upon a procedural irregularity. The judge did give reasons for his conclusion (as required by CPR 27.8 referred to by him) but they did not address the legal arguments which the parties had identified as the ones which needed to be addressed.

84. It follows that the ordering of the trial of the preliminary issue in May 2023 has proved to be a treacherous shortcut (the risks of which the court must always be mindful when being asked to direct one) though not for reasons foreseen by the parties at that time. This is not a case where the identification of a preliminary issue by the parties has proved not to be as determinative and as cost-efficient as had been hoped. Instead, the issue as identified and argued by them has not yet been determined and its eventual determination will probably involve as much cost, and perhaps even greater delay, than if the whole claim (including the yet-to-be-particularised damages claim) had been listed for a multi-track trial in the usual way.

85. Under the order dated 26 January 2024 this claim is now destined for trial on the multi-track in the County Court list of the Bristol Business and Property Courts. The scope of the issues outlined by counsel's skeleton arguments on this appeal, coupled with the prospect that those witnesses who were unable to give evidence before the judge are likely

to be called at any re-trial, suggests to me that the trial of the preliminary issue would be likely to last at least 2 days, including the time allowed for giving judgment. The hearing of this appeal – starting with the springboard of the judgment below – lasted almost 4 hours, excluding the time spent in writing this judgment. As I have mentioned, there is also the prospect that the arguments over the issue of property in the Goods may have expanded as a result of matters discussed at the appeal hearing.

Disposal

86. I therefore allow SSL's appeal against the Order dated 30 October 2023 and set aside his declaration that SSL did not acquire property in the Goods.
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87. There will need to be a fresh trial of that issue (at least) by reference to all the arguments which the parties identify for the purposes of it being comprehensively determined. In the absence of agreement between them (subject to the court's approval) I will hear the parties further on the next step in the litigation and consequential matters arising out of this judgment.

88. Having regard in particular to the point mentioned in paragraph 79 above and the amendments already contemplated by the Particulars of Claim and Reply (in relation the particularisation of loss and formation of the contract between ASP and Big Prawn) I will address with counsel whether the next trial should be confined to the preliminary issue identified in May 2023. Their submissions on the appeal indicated a recognition that it might be appropriate, given the lack of progress to date, to re-visit its formulation so that it embraces all arguments over the passing of title, even if any consequential issue of loss and damage is postponed.

89. At the conclusion of the hearing yesterday I indicated that I would hand down my judgment on the appeal by email circulation to the parties' solicitors and counsel. As I also indicated would be the position, the handing down is adjourned for the purposes of preserving the time under CPR 52.12 for any further appeal. Accordingly, I will make a direction in relation to the time for filing any appellant's notice seeking permission to appeal from the Court of Appeal (see CPR 52.7) in the order which addresses the other consequential matters.