

IN THE COUNTY COURT AT BRISTOL

Claim No. K00BS577

BEFORE DEPUTY DISTRICT JUDGE BATSTONE

29 September 2023

B E T W E E N:

AMANDA SEAFOOD PTE LIMITED

Claimant

-and-

SYKES SEAFOOD LIMITED

Defendant

JUDGMENT

1. This is my judgment following the trial on 13 September 2023 of a preliminary issue directed by order of District Judge Taylor made on 22 May 2023 ('the Order') which arises in the context of a claim by the Claimant ('C') for an order against the Defendant ('D') for delivery up of a large quantity of frozen prawns the subject of a sale and purchase contract between C and the Big Prawn Company Limited ('BPC') at a price of \$295,900 ('the Goods') and damages or alternatively damages alone plus interest.
2. C is a company incorporated in Singapore whose business includes the sale, export and supply of frozen seafood to retailers and distributors. D is a company incorporated in England and Wales whose business includes the sale and supply of fresh and frozen seafood. BPC is a company incorporated in England and Wales whose business includes the sale and supply of fresh and frozen seafood which carried on business from Marriott Way, Melton Constable, Norfolk NR24 2BT ('Marriott Way'), amongst other places. BPC went into administration on 27 January 2023 and on the same date an Administration Sale Agreement ('the ASA') was made between BPC, an associated company which went into administration on the same day ('Melton'), D and Benjamin Wiles and Philip Dakin, both of Kroll Advisory Ltd ('Kroll'), as joint administrators of BPC and Melton ('the Administrators').

The Order

3. The Order was made in response to the parties submitting a draft consent order for approval by the court. It provided, amongst other things, for allocation to the small claims track and for there to be a split trial so that:

The Court shall first determine whether [D] acquired title to the Goods pursuant to [the ASA] in respect of which the following directions shall apply:

4. The Order went on to set out a timetable for standard disclosure of documents by 3 July 2023 and sequential witness statements and for *the hearing to determine the issue of title* to be listed for one day. This was the hearing listed before me.

The hearing on 13 September 2023

5. The bundle of documents extended to 289 pages and was accessed by me in digital format during the hearing and in paper format while preparing this judgment. The pagination is different; the references I make here are to pages of the paper bundle.
6. 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.
7. At the start of the hearing, I raised this with Counsel for the parties, James Pearce-Smith for C and Edward Bennion-Pedley for D. I read to them guidance issued to judges by His Honour Judge Philip Glen, the Designated Civil Judge for Hampshire, Wiltshire and the Isle of Wight, after reference to there being no difficulty about taking evidence from a witness in a list of countries, not including Singapore or Vietnam, although I was told it was the latter country where the witnesses were located:

In any other case, you should not take evidence from a witness located in another jurisdiction (particularly if they are a national of that jurisdiction) unless the party seeking to call the witness satisfies you that the relevant country has given consent and that any relevant conditions (e.g. those imposed by Bulgaria and Hungary) have been satisfied. It is their problem, not yours!

8. After a short adjournment for instructions to be taken it appeared that the problem had not been solved. I was told that it was not going to be possible for the requisite consents to be obtained in time and Counsel were not able to persuade me that I should proceed nevertheless to take the evidence from the two witnesses. After I allowed a further short adjournment for Counsel to pursue settlement discussions the situation was reached in which the case had not settled and the problem about the overseas witnesses remained. Mr Pearce-Smith invited me to adjourn to allow his witnesses to give evidence or alternatively he invited me to proceed on the basis that he would tender the witness statements as hearsay evidence, noting that CPR rules 31 and 32 do not apply to small claims; that the evidence of D's witness, Jay Adams, would be dealt with in the usual way; and then there would be submissions. Mr Bennion-Pedley invited me to adjourn. In paragraph 5 of his skeleton

argument, he had referred to the parties having *served limited witness evidence* in the statements of Mr Andriez and Mr Adams, *but*, he said, *no live evidence is required*. However, at the start of the hearing he told me that having seen the skeleton argument of Mr Pearce-Smith, he did now wish to cross-examine C's witnesses. He submitted that C relied on a course of dealings to plug the gaps in what he said were the holes produced by the informal relationship between C and BPC. Mr Bennion-Pedley submitted that he had come to court prepared to deal with this in cross-examination of C's witnesses and his questions would be relevant to the delivery argument and to the question why C released the shipping documents for the Goods which were in effect, Counsel submitted, documents of title. Mr Bennion-Pedley recognized that D could have dealt with the point about consent to C's witnesses giving evidence from overseas and it was regrettable that this did not happen. Nevertheless, he submitted that I should adjourn the hearing. It seemed to me clear that the overriding objective would not be furthered by acceding to D's request with the consequence that a full day of court time would be lost when the inability to cross-examine C's witnesses at the hearing before me was entirely the responsibility of the parties in not making the necessary arrangements. After giving a short judgment I refused D's request for an adjournment and at the end of the hearing I acceded to Mr Bennion-Pedley's request for an extension of the time for appealing that decision to 21 days after the handing down of this judgment.

9. Mr Pearce-Smith tendered the witness statements of Mr Andriesz and Mr Gorman, dated 20 July 2023 and 21 July 2023 respectively and both signed beneath a statement of truth in the required form.
10. Mr Bennion-Pedley called D's only witness, Jay Adams, who gave evidence remotely from within the jurisdiction and told me that his witness statement dated 18 August 2023 was true. Mr Adams is D's Group Services Director, and he was present at Marriott Way during the 3 days leading up to the making of the ASA. He witnessed the signature of D's Group CEO, Alan Dale, on the ASA. Mr Adams was cross-examined by Pearce-Smith.
11. I heard submissions, from Mr Pearce-Smith first then Mr Bennion-Pedley and Mr Pearce-Smith in reply. Submissions finished at 3.55pm and I decided to reserve judgment.

The evidence and my approach

12. I should start by saying something about the claim being on the small claims track because at the start of the hearing Counsel expressed surprise that a claim involving goods worth nearly \$300,000 should be on the small claims track. However, the file reveals that the Order, with its provision for allocation to that track, was made in response to an email to the court from Mr Bennion-Pedley of 22 May 2023 which advised that the parties had, subject to the court's approval, agreed directions and asked for the attached to be passed to District Judge Taylor, who made the Order with only slight alterations to the draft.
13. A consequence of the allocation is that the provisions in CPR rule 27.8 apply and I may adopt 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 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 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.

14. The determination of the preliminary issue involves the interpretation of the ASA by reference to well-established rules recently stated by Neil Moody KC, sitting as a judge of the High Court in *Berkeley Homes v John Sisk* [2023] EWHC 2152 (TCC) at [23] where he quoted from a decision of Carr J, as she then was, in 2016:

When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court does so essentially as one unitary exercise by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the [contract], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

15. In paragraph 6 of his statement Mr Andriesz expresses the understanding that I have to determine a legal issue but sets out facts which he understands may be relevant. Mr Gorman agrees with the facts set out in the statement of Mr Andriesz and only adds that he was the person who had most day-to-day dealings with BPC and Will Rash in relation to the Goods, but he kept his colleague fully apprised which was the standard way they operated as a two-man management team.
16. The statement of Mr Adams consists substantially of argument in support of his statements in paragraph 11: *It is clear to me that BPC purchased the Goods* and paragraph 27: *As the Goods had been sold to BPC before the administration they were included in the sale.* Mr Adams then described paying to BPC's agent, Edge Worldwide Logistics ('Edge'), the sum of £58,918.89 in payment of BPC's account *in order to get our hands on the Goods and other stock*, which was then transported to Marriott Way, which D had been granted a licence to occupy. Mr Adams ends his statement with this: *The Claimant's desire to get paid for the Goods is understandable but the Defendant should not have to pay a second time for Goods it has already paid for.*
17. As Mr Bennion-Pedley submitted in writing, the evidence of the witnesses is of limited assistance. I derive the greatest assistance from the documents, in particular the ASA and related documents, and also from the absence of documents. I do however derive assistance from what Mr Adams told me in cross-examination.

The order of 1 September 2023

18. On 1 September 2023 a telephone hearing took place before District Judge Wales who made orders relating to the amendment of C's name in the Particulars of Claim and ordered D by 4pm on 8 September 2023 to:

4.1 Serve a list of documents in its possession or control concerning [D's] acquisition of stock from [the Administrators] under [the ASA] in so far as such documents identify the stock acquired by [D] pursuant to that agreement, including (but not limited to): 4.1.1 the stock reports and/or stock valuation obtained by [the Administrators] on 20 January 2023, as referred to in the [Administrators'] report dated 31 January 2023; 4.1.2 the excel spreadsheet referred to in paragraph 25 of the statement of Jay Adams dated 18 August 2023.

4.2 serve copies of any documents identified in the list of documents referred to in subparagraph 4.1 of this order.

19. The document referred to in paragraph 4.1.1 is the document prepared for the Administrators by Hilco Valuation Services referred to in their SIP16 Statement to Creditors dated 31 January 2023 referred to at p210, in which 'the Group' is BPC and Melton:

The majority of the Group's stock is raw materials, consisting of cooked, chilled and frozen perishable shellfish products, together with other food ingredients, packaging, chemicals used in food production.

Stock remained one of the Group's biggest tangible assets held on the Balance Sheet and as such, a stock valuation was obtained by the proposed joint Administrators on 20 January 2023, from Hilco.

Hilco was provided with the stock report dated 20 January 2023 and provided an In-Situ and Ex-Situ valuation for all stock as follows:

20. A small table follows setting out Hilco's In-Situ valuation of £667,796 and its Ex-Situ valuation of £347,082. The report went on:

The Ex-Situ valuation assumed that a large proportion of stock is sold to existing customers as part of the disposal strategy. Hilco recommended that a core sales team be retained, at least in the short term to identify key customers and try to obtain bulk sales at discounted levels, together with 1 or 2 warehouse staff at each location to assist opening/locking up/viewings/keyholding/ and allowing customers to collect goods.

The offer provided by [D] provided a better return, compared to a wind down of operations and selling stock piecemeal on the open market.

21. The next page of the Administrators' report shows that D's final offer for the stock, valued at a total of £1,014,878, was £350,000, with plant and machinery of £400,000 and goodwill and intangible assets of £250,000 making up the balance of the total consideration paid by D of £1m.

22. Looking back at the previous page of the report, which deals with the valuation of plant and machinery, it can be seen that, at least in that context, the meaning of an In-situ basis of market valuation is described as one: *which is the market value of the assets on the assumption that they remain in place as part of a functioning business.* I note in passing that Hilco's In-situ valuation of plant and machinery was £1,002,400 and its Ex-situ valuation was £452,350, a total of £1,454,750, against which D paid £400,00.

23. The stock report dated 20 January 2023 is an important document because it will have provided an account of the stock which Hilco valued and against which D offered to purchase. It appears to have been a document in the possession or control of D. By email of 21 February 2023 (p273) D's then solicitor, Paul Kelly of KPMG Law, responded to the letter before claim dated 17 February 2023 (p271) from C's solicitor Chris Jolly to D's Group CEO Mr Dale. In the email Mr Kelly puts his client's case that the title documentation to the Goods was released by HSBC, C's bank, to BPC some two weeks prior to BPC entering administration: *Accordingly, title to the Stock passed to BPC well in advance of the date on which [the ASA] was made. Pursuant to the terms of the [ASA], [D] paid valuable consideration for, and acquired good title to, all stock in which BPC had title (irrespective of whether it was in transit), which included the Stock.* Then Mr Kelly said, plainly on instructions:
- Furthermore, the Stock was listed as stock of [BPC] in all stock ledgers provided by the administrators to [D] during negotiations for the assets of BPC prior to completion of the [ASA].*
24. Mr Adams was asked by Mr Pearce-Smith whether, in the light of that email, he accepted that D received stock ledgers and he said: *no, we didn't receive full stock ledgers.*
25. Mr Pearce-Smith took Mr Adams to the order of District Judge Wales I have set out in paragraph 18 above. Counsel put to Mr Adams that no documents have been disclosed to which Mr Adams responded that he would *need to refer to Phillip on that one*, that being a reference to D's solicitor Phillip Feather. Earlier Mr Adams had told me by reference to paragraph 24 of his statement that D had received a stock sheet from Kroll, albeit not a definitive one. In response to the suggestion from Counsel that this had not been disclosed, Mr Adams referred to stock sheets being downloaded in excel documents which D had when it was on site at Marriott Way. Mr Adams apologised, I infer for not being able to be precise, saying that he had *sent a lot of documents across on this one.*
26. I am satisfied that there will have been documents in the possession or control of D that should have disclosed in order to comply with the order of District Judge Wales but were not. In particular, the stock report dated 20 January 2023 should have been disclosed but has not been. I have had no evidence from D explaining why that stock report could not be disclosed and I conclude that the Goods were not identified in the stock report as goods for D to purchase.
27. As regards the spreadsheet referred to in paragraph 25 of his statement, Mr Adams there said: *Kroll did send us a excel sheet showing some of the assets they were aware were held by BPC.* Mr Bennion-Pedley asked him to identify the spreadsheet at p288 and Mr Adams said that it was a list of containers of imports that BPC had purchased which showed whether they were in port, cleared, uncleared, or awaiting a future contract. Asked who supplied the document Mr Adams said: *either the Administrators or ... I'm not sure.* The spreadsheet shows a total of 10 shipments with a combined value of £2,740,592. In the first green shaded row the Goods, against C's purchase order number 3755, are referred to, with dates of shipping and arrival at London, 6 December 2022 and 25 January 2023 respectively, and in the last column on the right: *Released & Awaiting Delivery – Docs with EWL.* Those letters refer to Edge, BPC's agent. In the second row, shaded red, two other purchase orders of C are referred to, 3756 and 3797, each with a value of £292,600, a total of £585,200, and both with arrival dates in London in January and February 2022, well before the ASA. In the last column, against order 3756 appears the words: *Waiting*

*original documents - @Bank and against 3797 appear the words: Waiting original documents to arrive at Bank. Those are the three of C's shipments. In respect of other shipments, by Xintian, CPB and Unima, the one for Xintian which has a delivery date to Felixstowe of 16 January 2023, a few days before the ASA, has in effect the same wording in the last column as for C's purchase order number 3755: Released & Awaiting Delivery – Docs with Grange, the latter being Xintian's agent it appears. The value of the Xintian shipment is \$401,760, which makes a combined value, with C's 3755 shipment, of \$697,660, for those two shipments alone, against which D paid £350,000. I cannot place the date of preparation of the spreadsheet at p288 nor the dates of the release of documents but if, at the date of the ASA, D 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 had to pay much more. In any event it is clear that the spreadsheet at p288 is not a list of the stock that D was purchasing, and Mr Adams admitted that in his evidence, to which he added that *there was no full and complete list of stock we were buying.**

28. Mr Pearce-Smith asked Mr Adams about the excel sheet referred to in paragraph 25 of his statement and responded to the effect that D had some working documents on its management system which showed stock of different types including out of date stock that no one required. When it was suggested that these documents had not been disclosed Mr Adams said that he could not answer that. Mr Pearce-Smith then asked Mr Adams whether such spreadsheets would have been used to form a view about the value of the stock to which he replied to the effect that Mr Dale would have used that to work out the price. Counsel then suggested to Mr Adams that the spreadsheets did not show the Goods as assets of BPC to which Mr Adams replied that they hadn't physically arrived on site. Mr Pearce-Smith then asked: *So they didn't show the prawns as being assets of BPC?* to which the response was: *no, those were not listed.* Mr Pearce-Smith then asked: *many other assets of BPC were listed, and you were buying those as part of the stock?* to which Mr Adams replied: *yes, that's right.*
29. Mr Adams was taken by Counsel to the email of 13 March 2023 (p224) to C's solicitor Chris Jolly from Sam Busby of Kroll writing for and on behalf of Benjamin Wiles, one of the Administrators, in response to Mr Jolly's email of 6 March 2023:

Based upon [BPC's] records in our possession, the container of prawns delivered to [Marriott Way] by your client on 2 February 2023, was not included in the Company's stock list or its balance sheet as at the date of the appointment, 27 January 2023, and was therefore not included in the sale of [BPC's] business and assets to [D] on the same date.
30. In response Mr Adams repeated that D had never had a stock list which identified the Goods.
31. Mr Adams was taken to paragraph 34 of his statement in which he refers to having paid for the Goods and it was put to him that D *never paid for the Goods* to which Mr Adams responded by saying that: *we did assume these were included.* When reminded that D never had a stock list, Mr Adams referred to having had conversations on site with the Administrators and the management team about the Goods having been delivered and not released because of non-payment in connection with which D paid to have the container released from port.

32. Mr Adams was asked about the spreadsheet on the final page of the bundle at p289. He said it was a document he had put together with information from various sources. He told me that the *Port Total of Raw Materials* of £579,353.70 D believed included the Goods. This is plainly not a document prepared by the Administrators providing an account of goods capable of being purchased by D.
33. I am also satisfied that D has not disclosed the excel sheet provided to D by Kroll referred to in paragraph 25 of the statement of Mr Adams.

The contract for the sale of the Goods between C and BPC

34. The facts are as follows and are not in dispute.
35. The sales order (p184) issued by C to BPC is dated 19 October 2022 and provides for the sale of goods to the value of \$2,344,100, including the Goods, by shipments from October 2022 to April 2023 to the port of discharge of Felixstowe, the provision for payment being: Payment term: *DA 45 days after BL*, beneath which is set out details of C's bank account.
36. The purchase order (p185) issued by BPC to C is purchase order number 3755 dated 29 November 2022 specifying a required date of 23 January 2023 for the Goods at the price of \$295,900, details of which are set out. BPC's registered office address of Marriott Way is set out.
37. The second page of the purchase order (p186) sets out BPC's standard terms and conditions ('T&C') on a document which identifies *PO Number: 3755 PO Date: 29/11/2022 Required Date: 23/01/2023* above which appears: *Deliver to: The Big Prawn Company* at Marriott Way.
38. Clause 1 of the T&C defines *Agreement* as being the T&C *including all and any Schedules which are attached including but not limited to a Documentary Letter of Credit, Specifications, Payment Terms or Order*. The Buyer is BPC; the Seller is in this case C; *Delivery* means *the delivery of the Goods as specified and set out in the Schedules*. The document containing the T&C is one of *the Schedules* and, as appears above, provides for delivery to Marriott Way.
39. Clause 2 of the T&C provides that:
The conditions of this Agreement shall supercede all previous arrangements or agreements (whether express or implied) entered into between the Buyer and Seller relating to the Contract. No other terms and conditions (for example any customarily accepted or implied in the trade to which the Contract relates and/or the Seller's own Conditions of Sale) shall apply to the Contract. These Conditions shall be amended only by written agreement between the Buyer acting and the Seller. The word *acting* appears to be the result of error.
40. Clause 6(a) provides:
Unless otherwise stated in the Schedules to this Agreement, the Seller shall be responsible for all insurance and transportation costs (including without limit export and import duties).
41. Clause 6(b) provides:
The property in any Goods shall pass to the Buyer upon Delivery of the Goods or, if earlier, at the time of payment by the Buyer for the Goods.
42. Clause 6(d) provides:

Unless otherwise stated in the Schedules delivery is effected upon the Goods being delivered at the Destination Address stated in the Schedule, which is Marriott Way.

43. C's invoice (p187) is dated 5 December 2022, identifies the vessel and the shipment date of 6 December 2022, contains the container and seal numbers that appear on the Bill of Lading (p238), and provides for a payment date of 21 January 2023.
44. The Goods arrived at London on 25 January 2023.
45. On 27 January 2023 the Administrators were appointed, and the ASA was entered into.
46. On 2 February 2023, D having paid fees due to Edge, the Goods were delivered to D at Marriott Way.
47. C has not received any part of the payment of \$295,900 due from BPC for the Goods.

The ASA

48. Clause 2.1 provides that:

The Seller and Melton shall sell and the Buyer shall buy subject to and on the provisions of this Agreement, such right title and interest (if any) as the Seller and Melton as applicable has in the Business as a going concern including the following Assets, so far as the Seller and Melton are entitled to sell the same: ... (b) the Stock; (c) the benefit of the Customer Contracts (but subject to the burden thereof); ... (i) the Supply Contracts.

49. *Stock* is defined in clause 1.1 as follows:

All the raw materials, stock, including packaging materials and consumable stores but excluding work despatched or invoiced before close of business on Completion and excluding also such of the foregoing as are included in the ROT Assets.

50. *ROT Assets* are defined in clause 1.1 as:

Those assets supplied to the Seller subject to reservation of title or alleged reservation of title.

51. *Customer Contracts* are defined in clause 1.1 as:

All of the contracts agreements orders engagements and arrangements (written or oral) of the Business between the Seller and customers of the Business for the supply of goods and/or services by the Seller prior to the Administration Commencement Date.

52. *Supply Contracts* are defined in clause 1.1 as:

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 or 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.

53. Clause 4 deals with *Excluded Assets* and 4.1 provides:

For the avoidance of doubt only (and so that the absence of any item from the following list shall not, because of such absence, be used as evidence that it was intended to be sold hereunder) it is hereby agreed and declared that the following assets of the Seller are excluded from the sale to the Buyer hereby agreed: ... (n) The Third Party Assets; (o) The ROT Assets; ... (q) Any other asset or right not included in clause 2.1.

54. *Third Party Assets* are defined in clause 1.1 as follows:

Those assets in the possession of the Seller by virtue of leasing, hire, hire purchase, conditional sale agreements, sale and return agreements together with those assets on loan to the Seller or to which title does not vest in the Seller for any reason, including those under the provisions of a consignment stock agreement or any similar agreement and together also with all other assets tangible or intangible which are not owned by the Seller.

55. Clause 5 deals with the consideration of £1m and its apportionment as follows: £400,000 for plant and equipment; £350,000 for *the Stock*; £249,996 for goodwill and the business intellectual property rights; and £1 for each of (i) *the Customer Contracts and Supply Contracts*, (ii) the books and records, (iii) other intellectual property rights, and (iv) work in progress.
56. Clause 11 deals with *Contracts* and 11.9 provides that:
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.
57. Clause 12 deals with *ROT Assets* and 12.1 provides that:
The Buyer shall have no title to or right to possess any of the ROT Assets and shall not hold itself out as the owner of any of the ROT Assets.
58. In the above, *the Business* is the business of *the Seller*, namely BPC, *the Buyer* is D, and *the Completion Date* is the date of the ASA, 27 January 2023.

My conclusion

59. 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.

60. I invite Counsel to agree the form of the order that I should make to reflect my decision and consequential matters and expect to receive that by 4pm on 4 October 2023, unless there is good reason why that is not possible.

William Batstone
Deputy District Judge
29 September 2023