RESERVATION OF TITLE: A PIOUS HOPE

1. INTRODUCTION

IT seems that the substantial and ever spreading ripples created by the case of *Aluminium Industrie Vaassen BV* v. *Romalpa Aluminium Ltd.*[1] may be gradually settling. The circumstances of this perhaps notorious case were that suppliers of raw materials on credit sought, by incorporating elaborate conditions of sale, to protect themselves in the event of the buyer's insolvency. The Court of Appeal in *Romalpa* held that a retention of title clause was effective so that the suppliers were entitled in equity to trace and recover the proceeds of a sub-sale by the buyer.

It is well recognised that the unpaid seller's alternative remedy of proving for the price[2] in the bankruptcy or winding up of the buyer is of very little value indeed. Once fixed security has been realised, preferential creditors have been paid[3] and bank creditors, as floating chargees, have taken their slice of the action, there will rarely be much left for unsecured creditors.

In markets where suppliers are expected to extend credit to their purchasers,[4] once the supplier has delivered the goods, he has no further rights over them of any significance and he is limited to a possibly futile action for the price.[5] The success in the *Romalpa* case of a general condition of sale enabling an unpaid seller to obtain *de facto* priority presented sellers with an opportunity not to be missed. It has been said that in England there then occurred a proliferation of reservation of title clauses like a "dreadful weed."[6] This development alarmed all but those seeking to take advantage of the decision.[7]

1 [1976] 1 W.L.R. 676.

2 Sale of Goods Act 1979, c. 54, s. 49.

3 These include costs of winding up, salaries up to 5 months equivalent, workmen's compensation, CPF contributions and tax. Companies Act Cap. 185, s. 328 as amended.

4 Many of the reported cases, where credit periods of up to 95 days credit are given, indicate the tendency, in days of high interest rates and high competition, for trade credit to be a matter of course. "The small business tends to rely heavily on trade credit extended by its suppliers to finance its operations." (Richard Lim, "Alternative Methods of Trade Financing", Business Times, 15 August 1983). The practice is of course a vicious circle, necessitating the use of financing by factoring of accounts receivable.

5 The unpaid seller's lien is broken once the seller parts with possession. Sale of Goods Act, s. 41. The seller can stop them in transit if the buyer becomes involvent, s. 44.

6 Mr. Muir Hunter Q.C. at an insolvency conference, quoted by I. Davies in [1984] 1 L.M.C.L.Q. 49 at p. 78.

7 For the impact of the case on banks, accountants, factors, etc. see H.C. Rumbelow "The Romalpa Case", 73 L.S. Gaz. 837 and N. Eastaway "Romalpa: Accounting, Tax and Other Financial Implications", (1978) 128 N.L.J. 439. Materials sold for building construction under reservation of title pose special problems for quantity surveyors and others in the construction industry See Sims (1978) 110 Chart. Surv. 260, Wylie (1978) Conv. 37, Hill-Smith (1983) 133 N.L.J. 207, and Knowles (1984) 6 C.Q.S. 475.

Bankers were concerned that extensive reservation of rights to suppliers reduced and rendered uncertain the benefit of floating charges issued to them by buyers as security for banking facilities.

Accountants considered that a true and fair view of a company's affairs would not be given unless the accounts noted that goods were held subject to the reservation of title by suppliers.[8] Practising lawyers wrestled with the practical implications and the problem of drafting the most effective clauses for their supplier clients.[9] Academics wrote articles.[10]

Professor Goode doubted whether "any case decided this century has created a greater impact on the commercial world."[11] Part of that impact is owing to the uncertainty that was created, uncertainty which to some extent has since diminished. Nonetheless the court in one of the latest cases[12] described the relevant area of the law as a "maze if not a minefield." That minefield, in the absence of legislation, is likely to remain substantially uncleared. Though the courts may neutralise one device to secure unpaid suppliers, the ingenuity of draftsmen will no doubt continue to bring new clauses before the courts

8 See the guidance statement promptly issued in September 1976 by the English Consultative Committee of Accountancy Bodies. (See Willott, *Current Accounting Law and Practice,* 1978 pp. 520-22). This recommended that in accordance with the commercial substance of a transaction, if the reservation of title is regarded as having no practical relevance except in the event of the insolvency of the customer, the supplier should enter the transactions as a sale in his accounts and the customer a purchase. If the accounts are materially affected by this accounting treatment, the treatment should be disclosed. A precedent for this accounting treatment is found in hire-purchase where the substance rather than the strict legal form is also recognised. See also *Guidance for Auditors on the Implications of Goods Sold Subject to Reservation of Title* issued jointly in December 1977 by the Institute of Chartered Accountants of England, Scotland and Ireland; and also *Guidance Statement V24* issued by the Consultative Committee in July 1976, referred to therein. No circulars have been issued by the accounting profession on retention of title in Singapore, though general principles of accounting would suggest that the same treatment would apply here. See also the booklet issued by the Institute of Chartered Secretaries and Administrators, London written by Dennis Roberts, entitled *Conditions of Sale-Retention of Title, The Practical Consequences of the Romalpa Case.*

9 Few writers have presumed to publish suggested drafts of extended retention of title clauses. See however examples of clauses in Parris, *Retention of Title on the Sale of Goods* (1982), chapter 3 and at pp. 167-171, suggested drafts in *Australian Encyclopedia of Forms and Precedents,* 1984 supplement at p. 262; and D. Chang, *1979 Law Lectures for Practitioners* at p. 150 (Hong Kong Law Journal Ltd.) Schmitthoff in *The Export Trade,* 7th Edn. (1980) at p. 53 recommends the following as being among the most important clauses which an exporter should embody in his general terms of business; "The seller retains the legal property in the goods until he receives the purchase price in cash and is entitled to the proceeds if the buyer disposes of the seller's property, the buyer holding those proceeds as an agent and trustee for the seller." The second half of the provision beginning "and is entitled etc.," did not appear in earlier editions but was added following the *Romalpa* case.

10 See appendix to this article for a select bibliography of articles. See also Atiyah, *Sale of Goods,* 7th Edn. 1985 at pp. 358-364.

11 The Times, 11 May 1977, quoted by I. Davies, in [1984] 1 L.M.C.L.Q. 49 at p. 52. More recently Goode has said, "the commercial world was shaken to its foundations by a legal earthquake in the shape of the *Romalpa* case". (1984) 100 L.Q.R. 247.

12 Staughton J. in *Hendy Lennox Ltd.* v. *Grahame Puttick Ltd.* [1984] 1 W.L.R. 485 at p. 493. Writers have consistently described this area of the law in similar vein. The Cork Committee report (Insolvency Law and Practice, Report of the Review Committee, June 1982, Cmnd. 8558 at 1587) found it a "difficult and complex subject."

and the "pious hope"[13] of avoiding the general creditors' queue in insolvency proceedings will remain.

The issue has already generated considerable litigation. The *Romalpa* case was followed in 1979 by two further cases in which unpaid sellers were unsuccessful in enforcing retention of title clauses. In *Re Bond Worth Ltd.*[14] man made fibres were sold for weaving into carpets. The conditions of sale provided that the sellers retained equitable and beneficial ownership in the goods and products made from them until payment in full. On resale this beneficial entitlement was to attach to the proceeds of sale. It was held that property in the goods passed to the buyer on delivery and that on a true construction of the contract the buyers granted a floating equitable charge in favour of the sellers as security for payment. Such a charge created by the buyer, a company, not having been registered under the Companies Act, was void.

In *Borden (U.K.) Ltd.* v. *Scottish Timber Products Ltd.*[15] resin was supplied for the manufacture of chipboard. Though the buyer was free to use the resin prior to payment, the contract provided that property was not to pass until the resin was paid for. The Court of Appeal held that once mixed with wood chips in the manufacture of chipboard, the resin ceased to exist and with it the title of the seller. As the chipboard was a new product it could not be implied that the seller had any interest in it. In any event, if a charge could be implied it would be void for non-registration under the Companies Act.

A further four English cases have been reported in 1983 and 1984, namely *Re Peachdart Ltd*., *Clough Mill Ltd.* v. *Martin* which went up to the Court of Appeal, *Hendy Lennox (Industrial Engines) Ltd.* v. *Grahame Puttick Ltd*., and *Re Andrabell Ltd*.[16] It is the purpose of this article to review the current state of the law in the light of these cases, the facts of which are set out below. Reference will also be made to six Irish cases,[17] four of them reported in 1982 and 1983, and to two Scottish cases.[18]

13 Bridge L.J. in *Borden (U.K.) Ltd.* v. *Scottish Timber Products Ltd.* [1979] 3 W.L.R. 672, at p. 681 said that in inserting a clause claiming a right to trace proceeds of sale, "it was a pious hope on the part of the plaintiffs that they were creating for themselves an effective security."

14 [1979] 3 W.L.R. 629.

15 [1979] 3 W.L.R. 672.

16 It is not proposed to repeat citation of these cases in subsequent footnotes. They are reported respectively as follows; *Peachdart* [1983] 3 All E.R. 204, *Clough Mill* [1984] 1 All E.R. 271 and [1984] 3 All E.R. 982 C.A., *Hendy Lennox* [1984] 1 W.L.R. 485 and *Andrabell* [1984] 3 All E.R. 407.

17 *Re Interview Ltd.* [1975] I.R. 385, *Frigoscandia (Contracting) Ltd.* v. *Continental Irish Meat Ltd.* [1982] I.R.L.M. 396, *Sugar Distributors Ltd.* v. *Monaghan Cash and Carry Ltd.* [1982] I.R.L.M. 399, *Kruppstahl* v. *Quitmann* [1982] I.R.L.M. 551, *Re Galway Concrete Ltd.* [1983] I.R.L.M. 402, and *Re Stokes and McKiernan Ltd.* unreported (1978 No. 376 Sp. 12 Dec. 1978) but fully quoted in the *Sugar Distributors* case.

18 *Clark Taylor & Co. Ltd.* v. *Quality Site Development (Edinburgh) Ltd.* 1981 S.L.T. 308 and *Emerald Stainless Steel Ltd.* v. *South Side Distribution Ltd.* 1983 S.L.T. 162. See also the Canadian decisions prior to enactment of legislation similar to article 9 of the Uniform Commercial Code. In *Firestone Tire and Rubber Co. of Canada Ltd.* v. *Industrial Acceptance Corporation* [1971] S.C.R. 357 it was held that when the goods are incorporated with other goods without losing their separate identity and can be removed without injury to the remaining goods, the seller may rely on a clause retaining the legal title, but not upon one retaining only an equitable interest. See also *Regina Chevrolet Sales Ltd.*v.

2. THE LATEST ENGLISH CASES

In *Re Peachdart Ltd*., so as to establish a right to trace proceeds of sale, a lengthy clause in conditions of sale stated that until the seller was paid in full for all leather sold, the relationship of buyer and seller was fiduciary in respect not only of the goods sold but also in respect of other goods in which they may become incorporated or used. If the goods were resold by the buyer "the seller shall have the right to trace the proceeds thereof according to the principles in *Re Hallett's Estate.*"[19] Despite such specific wording the court would have none of it. Vinelott J. did not accept that the buyer was to be a "mere bailee"[20] throughout the whole process of manufacture. Nor did he accept that any re-sale before payment in full was to be made as agent for the supplier. On a true construction of the conditions of sale the parties, he said, must have intended that property would pass to the buyer "at least after a piece of leather had been appropriated to be manufactured into a handbag and work had started on it."[21] This was not a relationship of "bailor and bailee, with a superimposed contract of sale"[22] but one of chargor and chargee. The charge was accordingly void for non-registration.

In *Hendy Lennox (Industrial Engines) Ltd.* v. *Grahame Puttick Ltd.* the simple retention of title clause relating to diesel engines sold for installation in generator sets did not specifically state that the relationship was fiduciary. Nor did it refer to rights over proceeds of sale. Staughton J. was of the view that some bailees and some agents do not occupy a fiduciary position. The facts and circumstances must be carefully examined in each case, he said, to see whether a fiduciary relationship exists. He concluded that there was no fiduciary relationship in this case because the clause did not extend to mixed or manufactured goods, there was no obligation to store in such a way that the goods were clearly the property of the seller, there was no mention of fiduciary ownership, and fiduciary obligations as to proceeds would have to relate to proceeds of sale of the whole of a generator and not merely to the engines supplied.

Furthermore, he said that the one month credit period 'neutralises'[23] any presumption of a fiduciary relationship. Finally, as the conditions gave no express rights over the proceeds of sale, these could only be implied where "necessary to give the contract business efficacy," and only if they could be seen "unambiguously" to be a term which would have been put in if the parties had thought about it.[24] No such terms could therefore be implied that the proceeds should be kept separate and would belong wholly or in part to the seller. As the conditions expressly conferred rights to the goods but not to the proceeds, the

Riddell [1942] 2 W.W.R. 357 and *Ilford-Riverton Airways Ltd.* v. *Aero Trades (Western) Ltd.* [1977] 5 W.W.R. 193. In Australia there is no reported case. In *Ralph McKay Ltd.* v. *International Harvester Australia Ltd*., S. Ct. of Victoria, 9741 of 1982, 11 Nov. 1983, Tadsell J., one of the principal issues was identification of stock through accounting records.

19 (1880) 13 Ch.D. 696, C.A.

20 [1983] 3 All E.R. 204 at p. 210j.

21 *Ibid*., at p. 210g.

22 *Ibid*., at p. 211a.

23 [1984] 1 W.L.R. 485 at p. 499C.

24 *Ibid*., at p. 499 relying on a dictum of Buckley L.J. in *Borden's* case [19811 Ch. 25 at p. 46.

latter must thereby be excluded. Accordingly, Staughton J. held that there was no fiduciary obligation in respect of the proceeds of sale.

The court in *Re Andrabell Ltd.* similarly took the line that whether a fiduciary relationship imposing a duty to account exists between buyer and seller depends on the facts of the case in question. Here the claim to proceeds of sale of airline bags bought for re-sale without further processing did not succeed. The terms of sale, in a, short informal letter, simply reserved ownership to the seller until payment in full. There was no provision for separate storage, nor an express acknowledgement of a fiduciary relationship. Taking into account all the factors, including counsel's claim to trace in respect of the amount owing only and not the whole of the proceeds of resale, it was held that there was no fiduciary relationship between the parties. Accordingly the seller was not entitled to the proceeds of resale, but could only prove in the winding up.

The latest case to be heard at the time of writing is the appeal of *Clough Mill Ltd.* v. *Martin.* This was a claim in respect of a quantity of unused yarn held by the buyer at the time its receiver was appointed. Despite this claim the receiver allowed the buyer to use and dispose of the yarn, so the seller sued the receiver for damages in conversion. Under the contract, ownership of yarn sold was reserved until payment in full or until *bona fide* re-sale. The condition went on to say that if the yarn sold became incorporated in other goods before payment, property in such goods should "remain" with the supplier who, before payment or bona fide sale, was entitled to enter the buyer's premises and recover and resell them. However Judge O'Donoghue at first instance was unable to accept that the buyer was acting as agent for the seller, or in any fiduciary capacity as the buyer was free to use the yarn in its manufacturing process. Property was therefore held to have passed to the buyer on delivery despite the wording of the condition to the contrary. His approach was that in construing the relevant words in the context of the whole contract, the court must look at the purpose of the contractual provision. As the purpose was security for payment, and as property had passed to the buyer, a charge had been created by the buyer which was void for non-registration. The claim in respect of unused yarn accordingly failed.

His decision was, however, overturned on appeal, reconfirming the effectiveness of basic title retention as a security technique, and raising possible hopes for more difficult claims. Accepting that each case was a matter of construction of the individual clause in its contractual context, all three judges of appeal saw no reason why the simple retention of title should not mean exactly what it said. The seller's rights as owner were however exercisable only in accordance with the contract. This they thought raised a particular difficulty that even where a buyer had paid for part of the goods, the wording of the clause apparently entitled the seller to recover and resell *all* the goods. Lord Justice Robert Goff's detailed consideration of this conundrum will be discussed below.

The court concluded that the retention of title was not itself a charge. Even though its undoubted purpose was security for payment, the effect of security was achieved by effectively *retaining* title, and not by the buyer *conferring* over its own property a security interest in favour of the seller. The Court considered that the final sentence of

the clause, which gave the seller property rights over other goods in which the yarn might be incorporated, could in some circumstances constitute a charge. However there was no reason why the latter part of the clause being a charge should require the first part, the simple retention of title to the goods, to be also construed as a charge. The *Clough Mill* appeal therefore re-establishes the earlier position that simple retention of title is generally to be given effect as a continuation of the seller's property rights, and is not a charge. This relatively simple proposition puts the difficulties of the first instance decision behind us. The additional outpouring of high judicial verbiage into an already cloudy pond, however, makes the practising lawyer's task little easier.

The picture then is of repeated litigation at the instance of unpaid sellers who risked giving credit to their customers. Their repeated failure to achieve more than recovery of unused goods still held by the buyer may deter future litigants. But even so the sums involved may be large and the alternative remedy of proving in winding up a hopeless one. And there will always be the (perhaps pious) hope that their individual clauses and special circumstances will provide a remedy. For their legal advisers it will continue to be a difficult decision on whether or not to recommend suit.

A preliminary issue however is whether the relevant standard terms and conditions have effectively been incorporated into the contract of sale.

3. Incorporation of Conditions of Sale

One approach for the receiver or liquidator concerned with the validity of a retention of title clause is to consider whether it is duly incorporated as part of the contract.[25] Here the usual contractual principles apply. For example standard conditions first introduced on the reverse of an invoice may not be duly incorporated [26] if the contract has been concluded before the invoice is issued to the buyer. In *Re Peachdart Ltd.* the point was not argued even though the retention of title clause, in 'microscopic print', appeared on the reverse of the seller's invoice. The receiver presumably accepted that in view of a continuing series of supply contracts the conditions were incorporated in the contract by usage or a course of dealing between the parties.

If the general conditions of sale are duly incorporated it is, of course, generally of no avail for the receiver to argue that the buyer had not in fact read and acceded to the particular reservation of title clause.[27]

To be incorporated as terms of the contract the other party must be notified of the standard conditions of sale. "The more unusual or

[25] The issue has been raised in a number of the retention of title cases including *Romalpa.*

[26] This well established principle appears in cases such as *Olley* v. *Marlborough Court Ltd.* [1949] 1 K.B. 532. See also *Hardwick Game Farm* v. *Suffolk Agricultural* [1969] 2 AC 31, and *George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.* [1983] 1 All E.R. 108.

[27] See for example *L' Estrange* v. *Graucob* [1934] 2 K.B. 394.

unexpected a particular term is, the higher will be the degree of notice required to incorporate it."[28]

Since standard conditions of sale are only generally looked at when a dispute arises,[29] it is significant that a long, consistent course of dealings may incorporate the terms even though the usual steps to incorporate them have not been taken.[30] Difficulties may, however, arise, as in *Bond Worth* where during a long course of dealings, one party seeks to alter the standard terms. "As the other party is reasonably entitled to assume that the course of dealings is continuing on the accustomed terms it seems that special steps would have to be taken to draw his attention to any such alteration."[31]

In the Irish case of *Sugar Distributors Ltd.* v. *Monaghan Cash and Carry Ltd.*[32] a retention of title clause was added to standard terms after about two years trading. After a further fifteen months trading a dispute arose. The Court held that there was no special duty to draw the defendant's attention to the new retention of title clause. It was duly incorporated by inclusion on the face of invoices over fifteen months and the defendants ought reasonably to have known the terms on which the goods were supplied.[33] In another Irish case[34] a common sense approach was taken, holding a retention of title clause to be duly incorporated. Confirmation of order documents issued for each order drew attention in red print to conditions on the reverse written in German. The Court concluded that the buyer must have been aware of these terms[35] and must have expected to find them there as this was the normal practice of German firms. Even though the order confirmation stating the terms was issued only after the order had been placed, as the buyer did not object to the terms but accepted them, the first and all subsequent contracts incorporated the conditions.

The question remains as to whether and to what degree a higher than usual standard of notice is required to incorporate retention of title clauses. While the cases on exemption clauses may require a higher standard of notice, little difficulty seems to have been experienced

28 Treitel, *The Law of Contract,* 6th Edn. (1983) at p. 170 discussing incorporation of exemption clauses. Also *Thornton* v. *Shoe Lane Parking Ltd.* [1971] 2 Q.B. 163, and *Spurling* v. *Bradshaw* [1956] 1 W.L.R. 461 at p. 466. In *Thornton's* case Megaw L.J. said at p. 172, "Where the particular condition relied on involves a sort of restriction that is not shown to be usual in that class of contract, a defendant must show that his intention to attach an unusual condition *of that particular nature* was fairly brought to the notice of the other party." He specifically confirmed this view in the *Romalpa* case, [1976] 1 W.L.R. 629 at p. 693F.

29 In the *Sugar Distributors* case a witness said "that he could not carry on business if he read all the small print on the invoices."

30 See Treitel *ibid*., pp. 170-171 and cases cited by him at note 42 on p. 171.

31 Treitel *ibid*., p. 171. See also *Bond Worth* at p. 644.

32 This and all the principal cases discussed are cited at notes 16 to 18 above.

33 The court distinguished the earlier Irish case of *Western Meats Ltd.* v. *National Ice and Cold Storage Co. Ltd.* [1982] I.R.L.M. 99 where it was held that a businessman offering a specialist service but accepting no responsibility for it must bring it home clearly to the other party.

34 *Kruppstahl* v. *Quitmann, supra.*

35 The principals acting on each side of the negotiations were Germans, and both were accustomed to making contracts in this manner. [1982] I.R.L.M. 551 at p. 555.

in incorporating retention of title clauses.[36] Though the exemption clause cases seem to turn on how unusual the term may be, a perhaps equally significant factor is the importance to the parties of the term itself. Extensive exemption of liability is, of course, of crucial importance. Though passing of title is also important,[37] reservation until payment merely delays the passing of title. As it is not likely to be so significant or unacceptable a term that the buyer finally decides that he can not agree to it, it may be incorporated without much difficulty. In any event it may also be an expected and usual term.

In England it is possible that extended retention of title clauses are now usual.[38] However in Singapore such a clause may in most, if not all trades, rarely if ever be usual. The question would depend on the usage of that particular trade and the exact content of the clause in question. Informal enquiries suggest[39] that although title to goods sold maybe sometimes be reserved to the seller until payment, *Romalpa* style clauses claiming rights over new products, rights to trace proceeds, and rights to assignment of accounts receivable from sub-purchasers are rarely if ever seen in domestic supply contracts in Singapore. Although overseas suppliers may on occasion use *Romalpa* clauses in conditions of sale, in international sales transactions payment in full will generally be effected on the basis of documentary letters of credit. In this case the seller is relying on a fundamentally different scheme for payment, and is not himself giving credit.

The reality is of course that commercial purchasers will rarely read through a seller's lengthy and illegible conditions of sale, and if not brought to the buyer's attention, it is possible that unusual terms may then not be effectively incorporated. Unfortunately where a supplier has a monopolistic position for that commodity or is able to dominate the market, there may be no question of the buyer formally renegotiating the conditions of sale.

One means of countering the seller's standard conditions is for a commercial buyer to respond to an offer based on such conditions by attempting to incorporate his own different set of conditions of purchase. The seller's offer is thereby rejected and a counter-offer is made.[40] If the seller proceeds to invoice the sale without re-incorporating his own standard conditions then he may be taken to have accepted the buyer's conditions. If the seller's invoice does refer to or re-state his own standard conditions, then if the buyer goes ahead with the purchase, he may have accepted the seller's offer on those terms. It seems that once an acceptance can be identified by either

36 Nonetheless in *Romalpa,* Megaw L.J. at p. 693 seemed to expect that a higher standard of notification was required for an unusual clause, as suggested in *Thornton's* case, see note 28 above. We never, of course, generally hear about the Romalpa clauses that are not successfully incorporated and so are not litigated on their substance.

37 See for example *Rowland* v. *Divall* [1923] 2 K.B. 500.

38 In an unreported case, *Robert Home Paper* v. *Rioprint* (Nov. 1978) Tudor-Evans J. said of a reservation of title clause, "I shall assume that it is a usual condition." See I. Davies, [1984] 1 L.M.C.L.Q. 49 at p. 78. Even by the end of 1978, Slade J. in *Bond Worth* said that these clauses were "in quite common use in this country." (at p. 633); and *Benjamin's Sale of Goods,* 2nd Edn. (1981) para. 392 describes their use as "extremely common."

39 Enquiries of lawyers, accountants, factors and the Official Assignee's office.

40 *Hyde* v. *Wrench* (1840) 3 Bear 344.

party, "the last past the post" to have tendered an offer subject to his own conditions, may have won the duel.[41]

Though the set rules of offer, acceptance and counter-offer are still the way to conduct the battle,[42] they may not always provide a solution to the problem of conflicting standard terms. Indeed it has been suggested by Lord Denning[43] that an offer on standard terms for a fixed price may prevail over buyer's terms submitted by way of acceptance, if the new terms are sufficiently different to affect the price and the buyer does not bring them to the seller's attention. Alternatively it may be possible to ascertain the content of the contract by construing the respective terms and conditions together. It may alternatively be concluded that there is no contract at all. Or if the respective terms are contradictory it is suggested that they "may have to be scrapped and replaced by a reasonable implication."[44] This last conclusion of course would be one to delight a receiver or liquidator seeking a way to avoid the operation of a retention of title clause. Suffice it to say that due incorporation of contract terms may be a difficult and crucial preliminary issue.

4. THE VARIOUS TYPES OF CLAIM

The topic of retention of title clauses is complex because each clause must be construed according to its terms and each clause is different. It is dangerous to generalise about the effectiveness of such clauses as their basic content, let alone their wording, may differ radically. They may merely reserve rights over identifiable unused goods still held by the buyer. Or among other things they may claim rights over goods mixed with other similar goods. They may claim rights over new products made with the raw materials supplied. Or they may claim rights over proceeds of sale received by the buyer in respect of the goods.

(1) *Simple Retention Of Title*

Assuming that the standard terms of sale are duly incorporated, it is accepted that a seller of goods may retain title to them together with a right of repossession. Lowe suggests the following example,[45]

> (i) Risk shall pass to the buyer on delivery but the property shall not pass to the buyer until the full price for the goods has been paid and
>
> (ii) If the buyer shall default in payment, or if (being an individual) he commits an act of bankruptcy or if (being a company) a receiver is appointed … the rights of the buyer under this agreement shall terminate and the seller shall be entitled to recover possession of the goods.

41 *B.R.S.* v. *Arthur* v. *Crutchley Ltd.* [1967] 2 All E.R. 285, perhaps modified by *Butler Machine Tool Co. Ltd.* v. *Ex Cell-O Corporation (England) Ltd.* [1979] 1 W.L.R. 401. See also Kasiraja, "Contracting by Correspondence — The Pitfalls and The Pointers" [1981] 2 M.L.J. cxv, Adams, 95 L.Q.R. 481, and Rawlings, 42 M.L.R. 715.

42 In *Butler* v. *Ex Cell-O* Lawton L.J. and Bridge L.J. still thought that "the battle has to be conducted in accordance with set rules," (at p. 969) while Denning M.R. said (at p. 968) that, "In many of these cases our traditional analysis of offer, counter-offer, rejection, acceptance and so forth is out of date."

43 In *Butler* v. *Ex Cell-O* at pp. 968-9.

44 *Ibid*., at p. 969.

45 Lowe, *Commercial Law,* 6th Edn. (1983), p. 128.

Section 19 of the Sale of Goods Act 1979 provides that a seller may "reserve the right of disposal of goods until certain conditions are fulfilled." The obvious condition is of course payment of the price, failing which property in the goods does not pass, "notwithstanding the delivery of the goods to the buyer."[46]

Retention of title clauses such as that set out above are thus generally effective. The unpaid seller is not however entirely immune from the risk of losing the goods. Firstly, the goods will fall into a buyer's bankruptcy if the buyer is not incorporated and the goods are in his possession with the owner's consent such that the buyer is the reputed owner of them.[47]

Secondly the buyer may have sold the goods. If so, even if the sub-buyer can be found, an action may not lie against him as, although the buyer will sell as a non-owner,[48] he may pass a good title as a buyer in possession of the goods with the consent of the seller.[49]

However a simple right to repossess goods sold will generally not constitute an unregistered security so long as legal title has been effectively retained.[50] An example is instalment sales to consumers, generally called conditional sales, in which title passes conditionally upon payment. These are practicable, but in Singapore apparently less attractive to sellers than hire-purchase transactions.[51]

Thus the law of consumer credit has conventionally looked for security to the right to repossess the goods sold. The new dimension added by *Romalpa* in the commercial context is that where the buyer has resold the goods, the original seller may be able to trace and recover in full the proceeds of resale notwithstanding the buyer's insolvency. Another problem for the seller is where the goods are mixed with similar goods, or are used in a manufacturing process and so lose their original identity.

46 Sale of Goods Act s. 19. If the seller "reserves the right of resale" and resells the goods on the buyer's default, the original contract of sale is rescinded, s.48(4).

47 Bankruptcy Act s. 47(1)(b)(iii). See Allcock, "Romalpa and Reputed Ownership", (1981) 131 N.L.J. 942.

48 Sale of Goods Act, s. 21 sets out the basic principle that in a sale by a non-owner the buyer acquires no better title than the seller had.

49 Sale of Goods Act s. 25. See however *Newton's of Wembley Ltd.* v. *Williams* [1965] 1 Q.B. 560 which significantly limits the operation of the section. See also *Re Interview supra,* where in a transaction between associated companies property did not pass to the buyer under s. 25(2) of the 1893 Act. This was so because the buyer had not received the goods in good faith and without notice of the original seller's retention of ownership. A further point is that property may also pass to a sub-purchaser if the buyer is authorised by the conditions of sale to resell. See also *Four Point Garage* v. *Carter* The Times, 19 Nov. 1984, where Four Point sold a car to Freeway, retaining title. Carter had already paid Freeway for the purchase of such a car. Freeway arranged delivery from Four Point direct to Carter, but failed to pay Four Point and went insolvent. It was held that title passed to Carter under section 25(1), even though actual delivery was not given to him by Freeway, the buyer in possession, but by the plaintiff seller, Four Point. Secondly the retention of title clause was not such as to prevent the buyer being entitled to resell the goods.

50 See The Nature of Charges below.

51 See Lee Chin Yen, *The Law of Consumer Credit,* (1980) p. 186 and p. 314.

(2) *Special Problems With Commodities And Raw Materials*

Although in consumer sales and certain commercial sales of fixed plant it is anticipated that the buyer will retain the goods in their original form, this is probably not the case in many commercial purchases. Goods or commodities bought for processing and resale present special problems. Any attempt to retain contractual security over them or the proceeds of their sale without registering a charge[52] is fraught with technical and practical difficulties.

A trade buyer may re-sell items such as commodities or airline bags, without first doing anything to them. He may however have mixed them with similar goods from different suppliers. It now may be impossible to ascertain how many from a particular supplier remain, and how many have been sold and are represented only by the sale moneys.

Raw materials supplied may have lost their original identity by being used in a manufacturing process. They may have become something else entirely. The seller can logically no longer be the owner of the original goods sold, nor can he repossess them as they no longer exist as such.[53]

For the same reason it is hard for the seller to say that he is entitled by proprietary right to the proceeds following resale, for this was not a sale of *his* goods but of something different. The proceeds may represent not only the value of the goods sold, but also value added by processing, and mark-ups obtained in the sub-sale. In addition the sale proceeds have probably been paid into the buyer's bank account and so become mingled with other funds. Since the processing and resale was not wrongful but was contemplated by both parties, the seller has little basis for complaint. These are but some of the problems which a draftsman of an extended retention of title clause has to contend with.

(3) *Claims To Proceeds Of Sale*

The common law recognises a right to trace and claim proceeds of sale. In an action for conversion or for money had and received against a bailee of goods who wrongfully transfers them for value, the owner's common law right to possession of the original asset carries through to the proceeds of sale, if identifiable.[54] However this is not so where the bailee was authorised to resell, which is the case in the usual commercial supply contract.[55] Further, the owner's claim is merely a personal right which, in the buyer's insolvency, only subsists as a right to prove in the winding up or bankruptcy.

Entitlement in full to the proceeds can only be claimed if a right to trace in equity can be proved. If the seller can show a proprietary

52 See Registration of Charges below.

53 See for example, *Bond Worth, Borden, Peachdart, Clough Mill* and *Hendy Lennox*. On the question of whether the goods have lost their separate identity see *Hendy Lennox*.

54 See Goode (1976) 92 L.Q.R. 360, and 528 and his *Commercial Law* (1982) at p. 70 *et seq.*

55 Many of the cases conclude that the buyer is impliedly authorised to resell. See for example *Bond Worth* at p. 514.

right to that specific fund, it will not fall into the insolvency for the general benefit of creditors. To show this equitable right, the seller must show that the buyer held as trustee or fiduciary[56] for him and that he thus has an equitable interest in the property and proceeds.

Immediately following the *Romalpa* case it seemed that a seller retaining title using appropriate wording might with reasonable facility be able to show that the buyer as agent/bailee owed a fiduciary relationship to him and that the proceeds of sale could therefore be traced in equity. Such sellers could thereby, apparently obtain priority over the ordinary creditors even though no charge had been registered.

Partly because the fiduciary relationship in *Romalpa* was conceded, the subsequent cases have not, in the event, justified this expectation. As each case is to be individually decided as a matter of construction of its own particular contractual provisions and on all its facts,[57] it is difficult to draw broad conclusions with any certainty. Although tracing has been allowed in two Irish cases,[58] only in one English case reported since the successful claim in *Romalpa* has a disputed claim been even partially successful. In *Hendy Lennox (Industrial Engines) Ltd.* v. *Grahame Puttick Ltd.*[59] a seller's proprietary claims to diesel engines sold and delivered was held to be transformed into a claim against the proceeds of sub-sale. However this claim was derived from an undertaking given by the defendant in interlocutory proceedings to pay the proceeds into a joint solicitors' account. The decision was based on an implied term of the undertaking and not on any generalised principles of tracing.

So one is now led to ask the question whether the "commercial precipice"[60] to which the *Romalpa* case was said to have led, was but an isolated phenomenon with few long term implications for business transactions. In *Hendy Lennox* Staughton J. noted,[61] "Roskill L.J. in refusing leave to appeal to the House of Lords in *Romalpa* referred to 'a rather simple contract, not altogether happily expressed in the English language, but [which] could not govern any other case.' "

It is proposed now to examine the various types of claim[62] against goods and proceeds that have been or might be made and to consider

56 The essential relationships alternatively canvassed in order to allow a right to trace are bailee, agent or trustee. Pearce, in "A Tracing Paper", (1976) 40 Conv. 277 however concludes that a fiduciary relationship is not necessary, but that the equitable tracing remedy is available to the beneficial legal owner.

57 See *Bond Worth* at p. 662F and *Borden* at pp. 681C and 687D. In *Clough Mill* on appeal Robert Goff L.J. at p. 985g stressed that each case must be carefully read as each decision turns on the particular clause, the different questions for decision and how the matter was presented to the court.

58 See *Sugar Distributors* and *Stokes* v. *McKiernan,* at note 17 above. The Scottish cases (see note 18 above) however both refused the remedy of tracing.

59 [1984] 1 W.L.R. 485 at 497. The plaintiff still only succeeded in claiming £1,236 out of a total claim of £28,988.

60 A phrase used by Chapman in (1976) 121 S.J. 682, quoted along with a number of other hyperbolic epithets in Davies [1984] 1 L.M.C.L.Q. 49 at p. 52.

61 [1984] 1 W.L.R. 485 at p. 498. Templeman L.J. in *Borden* at p. 687D also referred to Roskill L.J.'s comment.

62 The article does not however fully discuss the aspect of assignment to the seller of claims against sub-purchasers. This appeared in the *Romalpa* clause itself and is of importance in the continental jurisdictions. It also has important implications for factors. On the topic generally see Koh Kheng Lian, *Credit and Security in Singapore,* Ch. 12, and see note 69 at p. 97 below.

their prospects for success according to the current "maze or minefield" of the law.

5. Recovery of Original Goods from Buyer

It is conventional law that a seller may retain title and repossess the goods sold, pursuant to a clause such as that set out above.[63] Simple retention of title is generally effective and especially valuable as against the buyer's receiver or liquidator.[64]

Simple claims to recover were conceded in the *Romalpa* case where the purchaser still held unprocessed foil, and in *Re Peachdart Ltd.* for unused leather. In *Hendy Lennox*[65] Staughton J. said, "There is nothing surprising in the concession that the sellers were entitled to repossess the engines." In two Irish cases[66] concerning machinery sold for use by the buyer, title was held to have been successfully retained, thus allowing the seller to repossess.

Some of the cases involving materials supplied for use in manufacture have turned on a broad construction of the contract, that property had in fact passed to the buyer before payment despite express retention of title.[67] The crucial consequence is of course that a claim by the seller to goods, new products or proceeds which now belong to the buyer may constitute a charge, which in the absence of registration will be void.[68]

The *dough Mill* decision at first instance raised a scare that such an approach might defeat claims to recover goods identifiable and unused from the insolvent buyer.[69] But on appeal it was concluded without difficulty that the words of retention meant exactly what they said and that property in the goods had not passed to the buyer. Where clear words of retention are used, it will therefore be hard in future for the receiver to argue that on a true construction of the contract property in the goods passed to the buyer at any time earlier than payment or manufacture.

Nonetheless, in construing the contract the court must look at the documents as a whole and need not necessarily accord full weight to the literal wording of the retention of title. In *McEntire* v. *Crossley*

63 See at note 45 above.

64 See for example *Re Anchor Line* [1937] 1 Ch. 1, *Re Apex Supply Co. Ltd.* [1942] Ch. 108.

65 At p. 492E. See also in *Borden* (at p. 686C and E), Templeman L.J. held that the seller could effectively retain property until incorporation into chipboard, and Buckley L.J. (at p. 687G) held that under the conditions the legal property in the resin initially remained in the plaintiffs.

66 *Frigoscandia (Contracting) Ltd.* v. *Continental Irish Meat Ltd.* and *Re Galway Concrete Ltd.* See note 17 above.

67 In *Bond Worth* property was held to pass on delivery, in *Borden* on manufacture, in *Peachdart* at the latest when appropriated for manufacture. In *Clough Mill* at first instance it was held to pass on delivery, but on appeal it was held to be effectively retained in the terms of the reservation of title clause.

68 Registration, in the case of a company purchaser, will be required under the Singapore Companies Act, section 131. See also The Nature of Charges, below.

69 Davies ([1984] L.M.C.L.Q. 280) has said of the first instance decision in *Clough Mill* that it "prima facie appears to have left little of the *Romalpa* principles still subsisting."

Bros. Ltd.,[70] Lord Herschel L.C. said that in looking at the transaction as a whole "it might be necessary to hold that the property has passed, although the parties have said that their intention was that it should not."

In deciding whether title has been retained, the seller's abdication of control over the goods is arguably significant. It has been suggested that the buyer's right to deal freely with the goods as he pleases is in conflict with retention of title by the seller.[71] In *Hendy Lennox* Staughton J. said,[72] "There are passages in the judgments of the Court of Appeal in *Borden (U.K.) Ltd.* v. *Scottish Timber Products Ltd.* which, if taken out of context, might suggest that an unpaid seller cannot lawfully retain proprietary rights in goods delivered to a buyer, whether or not those goods have been used or altered in the manufacturing process." However, he suggests that these passages were obiter and should be "understood in context."

Again in *Hendy Lennox* the court considered the effect of a credit period on the express retention of title. The sellers admitted that they were only entitled to exercise their rights to repossess the goods if the credit period had expired and the price had not been paid. This raised the question as to whether the sellers had successfully retained the full rights of ownership. Staughton J. concluded that they had. He saw no reason why the plain language of retention of title should not mean what it said, subject to contractual terms limiting the exercise of those rights.[73]

The conclusion of the Court of Appeal in the *Clough Mill* case was in general similar. The mere fact that under the contract the seller is not contractually free to exercise his absolute rights of property over the goods supplied does not necessarily lead one to conclude that the seller is a mere chargee and has no such rights. The contract may have been successful in retaining the seller's title, but the seller must enjoy those rights as limited by the other terms of the contract. Examples of such terms in *Clough Mill* were that the buyer was entitled to consume the yarn in a manufacturing process and to resell and pass a good title. Property in such a case will thus pass on manufacture or resale but until then is successfully reserved to the seller.

However in ascertaining the intention of the parties in construing the contract, Lord Justice Robert Goff came up against one significant difficulty which he dealt with at length. As the clause retained title until all goods supplied under the contract had been paid for, it is possible that the buyer might pay part of the price, but then default. The seller would on the face of it apparently be able to recover and resell *all* the goods sold without allowing for the proportion already paid for, or for any increase in market value. Since this cannot have

70 [1895] A.C. 457 at p. 463.

71 See Allcock, "Retention of Title Clauses", *Law Lectures for Practitioners 1981,* (Hong Kong Law Journal Ltd.) at pp. 38-9. Conventionally reservation of title has been used where for example machinery is to be used by the buyer and not resold. Different considerations may apply where new materials are sold for manufacture and resale.

72 At pp. 492-3.

73 At pp. 491-2. Robert Goff L.J. in *Clough Mill* noted at p. 987e that his approach was consistent with views expressed in both *Hendy Lennox* and *Re Andrabell.*

been intended, did the contract therefore contemplate that the seller's interest was a limited one only and so did not amount to retention of general property; that is, was the seller's interest a charge only?

If the contract was to be effective in reserving general property to the seller, how would it, therefore, deal with the part payment problem? Lord Justice Robert Goff concluded, that the following solution could be found.

> Now, if the contract was still subsisting (instead of having been determined by the seller's acceptance of the buyer's repudiation), it would be perfectly possible to conclude, on the basis of an implied term in the contract, that the seller could only re-sell so much of the material as was necessary to pay the outstanding part of the purchase price, the rest to remain available to the buyer for the purposes of the contract, and that if, contrary to that term, the seller were to sell more than was necessary to pay off the balance of the price, he must account for the surplus to the buyer.

This conclusion simply means that the contract reserves general property in all the goods to the seller only until such time as the buyer has paid for them in full, or the seller has recovered payment (and presumably his expenses) by repossessing and reselling sufficient of the goods. Thus quoting Lord Justice Robert Goff again, "any part payment would be taken into account, and there would be no question of the seller retaining any profits on a re-sale."

If however, he continued, the buyer were insolvent, the terms of the contract would generally lapse with the seller's acceptance of the buyer's repudiation. In this case the seller "could exercise his rights as owner uninhibited by any contractual restrictions. He could therefore sell the material for his own account; though he would, I consider, be bound to repay any part of the purchase price already paid by the buyer which must be appropriated to the goods so sold, because such sum would be recoverable by the buyer on the ground of total failure of consideration... subject to any set-off arising from a cross-claim by the seller for damages for the buyer's repudiation." In support of these conclusions His Lordship prayed in aid certain dicta of Lord Justice Templeman in *Borden's* case, and he subsequently received the concurrence of his less loquatious learned brethren. Thus the Court of Appeal was able to conclude unanimously that there was an effective retention of title which was not in the nature of a registrable charge.

In conclusion, therefore, an unpaid seller of goods or materials for manufacture can generally retain title and recover them on default at any time before processing or resale. But the area is complex, and difficulties may arise where part payment has been made.

Finally, it seems to be essential in order to secure a right to recover goods that full legal title is reserved to the seller. In *Re Bond Worth,* "equitable and beneficial title" only was retained over raw fibres sold for carpet making. Legal title was held in that case to have passed to the buyer on delivery. Slade J. was of the view that if any interest in property were conferred on the seller by the retention of title clause, this must necessarily be by way of mortgage or charge. As the seller's interest in the goods was defeasible on payment of the debt, the reservation of rights over the unprocessed goods was regarded as an equitable charge and was defeated by non-registration.

6. IDENTIFYING MIXED GOODS

As has been said retention of rights over goods, such as machines that the buyer intends to retain and use, are generally effective so long as the goods sold remain identifiable.

Goods bought for resale pose greater problems. Where there are continuing supply contracts it may be difficult to identify which of the goods have been paid for and which the seller is entitled to repossess. This difficulty may be anticipated by using the so called "current account" clause, seen in *Romalpa* and *Borden.* Under these clauses property to goods delivered only passes to the buyer when all sums owing for these and any other goods supplied have been paid in full. All goods are therefore said to be recoverable until all have been paid for. This maximises the seller's security and possibly avoids the problem of identifying which goods in the buyer's warehouse have not been paid for and so are recoverable. However if the buyer at any time clears the outstanding accounts and pays all sums owing, property in all the goods will then pass. If further goods are supplied on credit the seller's rights of repossession will be confined to those only. It may however be difficult to identify them.

Current account clauses have been criticised on a number of grounds.[74] The fact that title is reserved until payment of all sums due, whether or not arising out of that particular contract, strongly suggests that the seller is taking a charge over the goods to secure those obligations.[75] Furthermore, if the value of the goods held by the buyer exceeds the outstanding price of goods still unpaid for, the seller in repossessing all of them makes a windfall profit, a consequence which is obviously objectionable.[76] This would be so unless, as in *Clough Mill,* the clause is interpreted to mean that the right to repossess and resell only continues until the unpaid amount of the price is satisfied

A further problem of identity can occur where there is more than one supplier and the goods have not been kept separate by the buyer. It may then be impossible in some cases for the seller to discharge the onus of identifying his own goods for the purpose of repossession.[77] Although the mixing may not necessarily extinguish his proprietary interest,[78] the consequent difficulties may severely limit the usefulness of the retention of title.

74 The difficulties arise partly because current account clauses are based on European, especially German usage. See Davies [1984] 1 L.M.C.L.Q. 49 at p. 79, Allcock *ibid*., p. 36, and Goodhart and Jones (1983) 43 M.L.R. 489 at p. 508. See also text following note 39 at p. 90 below.

75 See The Nature of Charges below.

76 It has been suggested by Allcock (*op. cit.* p. 37) that a clause retaining title against all liabilities should be drafted so as to entitle the seller to claim either return of the goods or payment of the amount outstanding. In which case the liquidator would choose to pay off the debt, thus avoiding a profit to the seller at the expense of general creditors. While cases such as *Re Andrabell* suggest that restricting the seller's proprietary right to the amount of the unpaid price indicates a charge, this seems less likely since the appeal in *Clough Mill.* See note *52* below.

77 The onus of proving identity falls squarely on the seller. See *Peachdart* [1982] 3 All E.R. 204 at 210fg. On multiple sellers under different Romalpa clauses see Tettenborn 1981 J.B.L. 173.

78 In *Clough Mill* Lord Justice Oliver commented at p. 993a, "English law has developed no very sophisticated system for determining title in cases where indistinguishable goods are mixed or become combined in a newly manufactured article and (to adopt the words of Lord Moulton in *Sandeman & Sons* v. *Tyzack*

7. RECOVERY OF NEW PRODUCTS

A greater difficulty will arise when materials to be sold are to be attached to others, processed into a finished product or used in a manufacturing process with other materials to make entirely new objects. Diesel engines may be mounted in a generator chassis,[79] leather may be made into handbags,[80] or resin,[81] yarn[82] or fibre[83] be processed into chipboard, fabric or carpets.

In common sense a supplier of resin merely retaining title has no right to recover the chipboard made from it as the resin has lost its identity in the manufacturing process. The resin has ceased to exist, whereas an engine can be identified and removed from a generator. However it is hard to formulate or apply any rule of law which effectively leads to a solution of a particular dispute. The rules of the common law in this area are old and inadequately formulated, and have not been taken much further by the recent cases.[84]

In *Hendy Lennox* the court considered whether the seller of diesel engines subject to a simple retention of title clause retained any proprietary rights once the engines had been wholly or partly incorporated into generating sets. These engines remained individually identifiable by serial numbers and could be unbolted and removed from the generator chassis without physical change within several hours. This might be done, for example, when an engine was worn out or broken down. The court held that the engines had not become a different species so as to become the property of the buyer.[85] The seller therefore could effectively retain his proprietary rights. The case fell on one side of

& Branfoot Steamship Co. [1913] A.C. 680 at p. 695) 'the whole matter is far from being within the domain of settled law.'" Where goods of more than one supplier have become indistinguishably mixed, the law suggests that they may have interests in the mass proportionate to their contributions. See Allcock, *ibid*., at pp. 35-6, citing *Spence* v. *Union Marine Insurance Co.* (1868) L.R. 3 C.P. 427. The possibility of common ownership was hinted at in *Borden* at p. 683 B.C. The rules for tracing of mixed goods at common law is clearly summarised by Pearce in (1976) 40 Conveyancer 277 at p. 282. See also Phang, *Import Trust Receipts in Victoria and Singapore,* 1982 at p. 97.

79 *Hendy Lennox.*

80 *Peachdart.*

81 *Borden.*

82 *Clough Mill.*

83 *Bond Worth.*

84 The common law relies extensively on the Roman law concepts of *confusio, accessio* and *specificatio.* See Wickham, "The Struggle for Title," (1960-62) U.W. Aus. L.R. 472 at p. 494, Guest, "Accession and Confusion in the Law of H.P.", (1964) 27 M.L.R. 305, Phang, *Import Trust Receipts in Victoria and Singapore,* 1982 at p. 94, Whittaker, "Retention of Title and Specification", (1984) L.Q.R. 35 and Davies [1984] 1 L.M.C.L.Q. 49 at p. 64. Lord Justice Robert Goff in *Clough Mill* at p. 989g citing Blackstone's Commentaries, (14th edn.) vol. 2 at pp. 404-5, himself commented, "Now it is no doubt true that, where A's material is lawfully used by B to create new goods, whether or not B incorporates other material of his own, the property in the new goods will generally vest in B, at least where the goods are not reducible to the original materials."

85 Staughton J. sitting in Winchester regretted (at p. 487) that "it had not been possible to obtain all the books that might have been desirable." Had this not been so he might more appropriately have concluded that the goods would become the property of the buyer, if at all, not by *specificatio* (the creation of a new species) but by *accessio* (absorption into the greater mass). See *Thompson* v. *Robinson* [1977] 1 N.Z.L.R. 385, Lee Chin Yen, *The Law of Consumer Credit,* p. 262 on accession in hire-purchase cases, and Allcock, *ibid*., p. 49.

the line while grapes, olives or wheat used to make wine, oil or bread,[86] would fall on the other side. Likewise yarn which became carpet, resin which became chipboard and leather made into handbags, all became a new species, so as to deprive a seller of title and of any right to recover the goods.

Draftsmen of conditions of sale have of course anticipated this difficulty, by providing that the seller's rights of property and re-possession extend to any items made out of or consequent upon re-processing of the goods sold. If the current judicial trend is continued it seems that such clauses will probably be doomed to failure. In *Bond Worth,* and *Peachdart* the contract in each case reserved title to the sellers, and also purported to establish certain rights over products made from the goods sold. However claims to rights over new goods were held to be ineffective despite the clear words of each clause so that legal title passed to the buyer on delivery or processing of the goods. The mere 'reservation' or 'retention' of rights over the newly processed or manufactured goods is thus open to close scrutiny and is likely to be ineffective. In good sense a seller cannot 'reserve' property in something he has never owned.[87]

Since new products therefore belong to the buyer, the buyer could grant rights over them to the seller by express contractual stipulation.[88] But the practical reality is that this will be done as security for payment and in the present context it will probably take effect as an equitable charge to secure payment of the price. As in the three cases mentioned non-registration under the relevant legislation will accordingly lead to the security being void, leaving the seller to prove for the price in the buyer's winding up.

However draftmen of conditions of sale should not abandon all hope that a seller may effectively enjoy rights over new products without registration of a charge. The Court of Appeal in *Clough Mill* did not rule out this possibility. Though the issue did not arise directly for decision, Lord Justice Oliver thought it raised "very interesting and, possibly, very difficult questions." The last sentence of the retention clause in that case purported to reserve property in new products to the seller. It was unsuccessfully argued for the receiver that this sentence, if a charge, made the simple title retention in the first sentence a charge also. For this indirect purpose the effect of the last sentence was therefore considered. While holding that the last sentence constituted a charge they said that this conclusion was not inevitable. In the words of Lord Justice Oliver,

> I am not convinced that it necessarily follows that the seller's proprietary interest in a manufactured article must derive from a grant from the buyer.... and though, like my Lord, I prefer to reserve my opinion, I am not sure that I see any reason in principle why the original legal title in a newly manufactured article composed of materials belonging to A and B should not lie where A and B have agreed it shall lie.

86 The Court quoted this illustration from Crossley Vaines on *Personal Property,* 5th Ed. (1973) at p. 430.

87 *Borden per* Buckley L.J. at p. 688.

88 In *Borden*, Bridge L.J. at 684 D.E. said that such stipulations in *Romalpa* were 'presumably effective'; though presumably they might require registration.

And in the words of Lord Justice Robert Goff,

> But it is difficult to see why, if the parties agree that the property in the [new] goods shall vest in A [the supplier], that agreement should not be given effect to. On this analysis, under the last sentence of the condition as under the first, the buyer does not *confer* on the seller an interest in property defeasible upon payment of the debt; on the contrary, when the new goods come into existence the property in them *ipso facto* vests in the seller, and he thereafter retains his ownership in them, in the same way and on the same terms as he retains his ownership in the unused material.

However both Lords Justices concluded that the clause in question was intended to be a charge. They noted that the clause did not take into account the possibility of part payment, nor that the buyer had paid the cost of manufacture and had possibly provided other materials, nor that other materials might have been used which were supplied by other sellers under similar retention of title clauses. While presumably a contractual obligation to account might be implied, in Lord Justice Robert Goff's view, a greater difficulty would arise on termination of the contract by repudiation and acceptance. The seller would then be able to exercise his property rights uninhibited by any contractual limitations to those rights. It cannot have been the parties' intention to allow the seller a windfall profit in this situation, so the clause in question must be read as creating a charge over the new goods.

Whether these dicta will substantially influence the approach of practitioners or the perception of the courts in the future is doubtful. The Court of Appeal suggested that as new products have never belonged to the buyer, an agreement that on manufacture they vest in the seller, does not therefore involve the buyer conferring a charge over his own property in favour of the seller. However the idea is speculative and was not fully considered. Previous commentators have suggested that the seller should only claim ownership of the product after a "new act" has been performed by the buyer. Only if legal title is to pass after the new act is performed will the agreement not create a charge. Allcock[89] traces the principle to Bacon's Maxims, to the effect that property in future goods will only pass at law if there is "some new act or conveyance to give life or vigour to the declaration precedent." New acts suggested in this context are either separate storage or the buyer notifying the seller of manufacture and specifically acknowledging that the new products belong to the seller. Neither sounds a marketable proposition. Each depends on due compliance by the buyer, which is problematical, as incipient insolvents are notoriously unreliable. So it may be futile to attempt to reserve rights over new goods without registration.

Further the other objections to not construing such an attempt as a charge, (namely, the problems of part payment, of overriding the buyer's inputs of work and materials, and of conflicting claims from other *Romalpa* suppliers,) seem equally difficult to deal with by contractual stipulation.

89 See *Lunn* v. *Thornton* (1845) 1 C.B. 379, Hill-Smith, (1980) 130 **N.L.J.** 529, Allcock (1981) 131 N.L.J. 842, and **Davies** [1985] L.M.C.L.Q. 15 at p. 17.

In conclusion therefore reservation of rights over new products remains highly speculative. Only claims in respect of identifiable goods in their original condition have a reasonable prospect of success. However even these are of limited practical value, as little may remain in the buyer's warehouse on its insolvency. Most of what has been supplied has probably been used in manufacture or resold.

A principal limitation on the usefulness of retaining title to goods not sold for the buyer's retention and use is therefore that the seller's title is probably lost when an item is appropriated for manufacture or when used in the manufacturing process. Finally as it must generally be implied that the buyer is free to resell the goods, the seller will probably be deprived of title on resale, if it has not already passed to the buyer.

It is at this stage that the seller may look to any possible rights over the proceeds of sale.

8. Tracing of Proceeds of Sale

In the *Romalpa* case equitable tracing was allowed of the proceeds of sale of unprocessed aluminium foil held in a separate account. The buyer, although empowered to re-sell, was by implication obliged to account in accordance "with the normal fiduciary relationship of principal and agent, bailor and bailee, as expressly contemplated in the second part of the clause." Extensive reliance was placed on ***Re** Hallett's Estate*[90] for the proposition that the buyer resold the goods as agent for the seller and as such owed a fiduciary duty to the seller, thus entitling the seller to trace the proceeds of resale.

Two Irish cases[91] have followed *Romalpa* in allowing tracing of proceeds of sale. The grounds appear briefly to be that the retention of title clauses indicated an intention to create a fiduciary relationship. The buyer reselling on behalf of the supplier to the extent to which he still owed him for the goods, was obliged to account to the vendor for his money.[92]

However in no other reported case since *Romalpa,* despite the apparent widespread usage of *Romalpa* style clauses, has a seller succeeded in tracing proceeds of sale. In *Romalpa* the goods were unprocessed, the proceeds of sale unmixed and the existence of a fiduciary relationship was not contested. If however the receiver or liquidator contests the existence of a fiduciary relationship the seller's claim may be but a 'pious hope'. If the goods were processed prior to resale and the proceeds mixed with other money, the seller may be asking the court to 'trace the untraceable and calculate the incalculable.'[93]

Even the successful claim in *Romalpa,* despite its relative simplicity, seems hard to justify. In *Romalpa,* Mocatta J., at first instance, relied

90 (1880) 13 Ch.D. 696, C.A. On tracing in the present context, see Goode, "The Right to Trace and its Impact in Commercial Transactions", (1976) 92 L.Q.R. 360 and 528.

91 See note 58 above.

92 The obligation to account for the unpaid price only may however indicate a charge. See *Re Andrabell.*

93 Templeman L.J. in *Borden* at p. 686A.

on dicta in *Re Hallett's Estate*. These can be misleading unless carefully read. In that case Sir George Jessel M.R. doubted that there was "any difference between an express trustee, or an agent, or a bailee, or a collector of rents, or anybody else in a fiduciary position." He then said that if a *pure bailee* sells goods bailed the bailor can in equity follow the proceeds. He concluded that "in the case of a *mere bailee* ... you can follow the money." The use of "pure bailee" and "mere bailee", apparently interchangeably, is confusing, and may seem to suggest that a bailor can trace proceeds whatever the nature of the bailment.

Mocatta J. in *Romalpa,* admitting that he found himself "in a most unfamiliar field," decided that the elaborate retention of title clause departed substantially from the debtor/creditor relationship and was intended to create a fiduciary relationship. He felt bound by the dictum in *Re Hallett's Estate* that in the case of a "mere bailee" there is no difficulty in tracing proceeds of sale. The Court of Appeal endorsed his findings.

However the view that trustees, agents and mere bailees can be equally regarded as owing a fiduciary duty is clearly simplistic or even fallacious.[94] A 'pure bailee', one whose obligation is to return goods to the bailor, has an obligation to account and the bailor may trace both at law and in equity if he unlawfully disposes of the goods. But a buyer of goods is not generally obliged to return them to the seller; he may deal with them as his own and sell them, and the seller is not entitled as such to trace the proceeds of sale.[95] If the seller has retained title, the buyer is a bailee of the goods, as he has possession while the seller has property. But he is not a 'pure bailee' like a hirer or carrier who is obliged to return the goods and may not sell them.

What Sir George Jessel in *Re Hallett's Estate* seems to have intended is that a 'pure bailee' may, like a trustee or agent, owe a fiduciary duty. The use of the qualifier 'mere', does no more than indicate that this is so even though a pure bailee is a mortal with lesser obligations than a trustee. However in cases other than 'pure bailments', for example a bailment arising out of a contract of sale, the relationship is usually distinct and the dicta in *Re Hallett's Estate*

94 The area is complex; Shepheard, *Law of Fiduciaries* (1981) has said at p. 25, "it is still common to speak of fiduciary and non-fiduciary agents, even though it seems clear that almost all agents have at least some fiduciary duties." Peter Gibson J. in *Re Andrabell* agreed with Staughton J. in *Hendy Lennox* "that it is implicit in the reasoning of the Court of Appeal in the *Romalpa* case that some bailees and some agents do not occupy a fiduciary position." See *Re Andrabell* at p. 414a. On the need for a fiduciary relationship to establish tracing see Pettit, *Equity and the Law of Trusts,* 5th Edn. 1984 at pp. 448 to 450, Maudsley (1959) 75 L.Q.R. 234 and Goff and Jones, *The Law of Restitution* at pp. 40 to 43. See also Shepherd, "Towards a Unified Concept of Fiduciary Relationships" (1981) 97 L.Q.R. 51. For a local case on the fiduciary duty of disclosure of a stockbroker see *Fearon* v. *Stivin* (1927) 6 F.M.S.L.R. 104.

95 In *Re Brumm* 1942 St. R. Qd. 52 the Queensland Court allowed tracing of the proceeds of resale of sheep as trust property. The seller relied on express terms that the purchaser should hold the sheep "as bailee only and in trust for the vendor," property to pass only on payment. Philip J. regarded the resale as a fraudulent conversion, and accordingly the buyer was bound to account. The principle would seem to have interesting applications where goods are sold for use and retention by the buyer only. A term denying the buyer the right to resell would make resale wrongful. See also *Lupton* v. *White* (1808) 15 Ves. 432, [1803-13] All E.R. Rep. 356, and Goodhart and Jones (1980) 43 M.L.R. 489 at p. 505.

are inapplicable. It is an oversimplification to say that an agent or bailee in the context of sales is *per se* a fiduciary, so that the beneficiary, the seller, may trace the proceeds of a sub-sale.

Staughton J. in *Hendy Lennox* correctly concluded, "It is I think implicit in the reasoning of the Court of Appeal in the *Romalpa* case that some bailees and some agents do not occupy a fiduciary position."[96] He went on to say that there may well be a presumption of a fiduciary obligation, but this proposition has since been doubted.[97] The onus surely falls squarely on the seller to show that "the parties in their contracts used language appropriate to create [a right to trace], expressly or by implication."[98]

Staughton J. went on to decide that an obligation to trace could not be implied in that case. There was no obligation for separate storage, no mention of fiduciary ownership, and the proceeds claimed would have to relate to the proceeds of sale of the generator sets, not just the engines sold, a circumstance not dealt with by the express terms of the contract. Finally the fiduciary relationship was "neutralised by the agreement between the parties that the buyers should have credit for at least one month, and possibly two months. It is not easy to reconcile that with an obligation to keep the proceeds of sale in a separate account."[99] The right to trace was not necessary to give business efficacy and could not be unambiguously implied in the contract, in accordance with the test suggested by Buckley L.J. in *Borden's* case.[1]

In *Re Andrabell Ltd.* Peter Gibson J. reached a similar conclusion that the dicta in *Re Hallett's Estate* "must be understood as referring to persons in a fiduciary position who receive money not for their own account but for another's account. It is not every agent or every bailee to whom he is referring"....[2] "Even if [the buyer] were aptly called a bailee it would not follow that it was a fiduciary obliged to account."[3]

Peter Gibson J. further referred to *Kirkham* v. *Peel*[4] in which Sir George Jessel himself commented on his own dicta in *Re Hallett's Estate.* Here Sir George Jesse! said that these dicta were intended to be "confined to a case of a bailee, ordinarily called a factor, who sells single articles and whose duty is to remit the necessary proceeds to his principal."[5] They had nothing to do with the case of a commission merchant or agent, the person concerned in that case, and presumably even less a buyer reselling on his own account. Peter Gibson J. considered that "The observations of Roskill L.J. in the

96 At p.498E.
97 *Re Andrabell* p. 414a.
98 *Hendy Lennox* at p. 497 F.G. Staughton J. also cited *Boardman* v. *Phipps, per* Lord Upjohn [1967] 2 A.C. 46 at p. 127, "The facts and circumstances must be carefully examined to see whether in fact a purported agent and even a confidential agent is in a fiduciary relationship to his principal. It does not necessarily follow that he is in such a position (see *In re Coomber* [1911] 1 Ch. 723)."
99 At page 499C, referring to similar arguments in *Romalpa* [1976] 1 W.L.R. 676 at p. 689.
1 See *Borden,* p. 688A.
2 At p.413de.
3 At p. 414c.
4 (1880) 43 L.T. 172.
5 Quoted in *Re Andrabell* at p. 413f.

Romalpa case on the fiduciary obligation of a bailee and agent must, I think, similarly be confined to fiduciaries who sell for another's account."[6]

In examining the relationship in *Re Andrabell Ltd.* to see whether it was of a fiduciary nature[7] Peter Gibson J. compared the relationship with that in *Romalpa.* The following factors indicated that there was no fiduciary obligation to account; there was no undertaking to return the goods or otherwise deal with them as directed by the bailor; the seller would have no right to recover the goods during a 45 day credit period; if resold during that period the buyer was free to use proceeds received and need not pay the price until the end of the credit period; an obligation to account could not be implied as the inclusion of other detailed terms for payment would exclude this implication; counsel for the seller was claiming an account not of proceeds but only of the unpaid price (unlike in *Romalpa)* thus indicating a mere debtor/creditor relationship; and finally it was conceded by counsel that the buyer was not obliged to keep the proceeds of sale in a separate account.

Identifying a genuine intention to create a sufficient fiduciary obligation, necessarily and unambiguously implied so as to give the contract business efficacy, is therefore the key to establishing an equitable right to trace proceeds. Mocatta J. in *Romalpa* accepted that the special facts of each case are crucial in deciding whether there is a fiduciary relationship or a simple debtor/creditor relationship. He cited but felt it unnecessary to refer in detail to the case of *Henry* v. *Hammond.*[8] He thus did not apply crucial dicta in that case (since approved in *Bond Worth* and *Re Andrabell Ltd.*[9]), that if a person receiving money "is not bound to keep [it] separate, but is entitled to mix it with his own and deal with it as he pleases," then he is a mere debtor and owes no fiduciary obligation to the seller.

The omission of both courts in the *Romalpa* case to cite a number of cases[10] casts further doubt on the wider validity of the decision.

6 Atp.413j.

7 He approved Staughton J.'s comment that "One therefore has to examine the relationship in each individual case, to see whether it is of a fiduciary nature." *Re Andrabell* at p. 414a. In *Lew Kah Choo* v. *Inter Equipos Navales S.A.,* Civil App. 46 of 1982, 31st January 1984, it was said that a fiduciary duty arose from the relationship that the defendants were the sole distributors in this part of the world of the plaintiff's goods. Breach of that duty entitled the plaintiff to terminate the contract forthwith. See also *Jirna Ltd.* v. *Mister Donut of Canada Ltd.* 40 D.L.R. (3d) 303 where it was held that there was no fiduciary relationship so that a franchisor was not obliged to account to the franchisee for undisclosed commissions received from approved suppliers on products supplied to the franchisee. The Court held that it should give effect to the parties agreement made on an equal footing and at arm's length that "no ... relationship of principal and agent is intended." In *The Borag* [1981] L.L.R. 483 an agreement for management of a ship required the manager to perform his task "with the same zeal, application and energy as if the vessel were his own property" and "to watch over the owner's interests as a dedicated Pater Familias." It was held at first instance that the contract imposed obligations of undivided loyalty of a fiduciary nature. An appeal was allowed on other grounds.

8 [1913] 2 K.B. 515.

9 See *Bond Worth* at p. 659 and *Re Andrabell* at p. 415j. This dictum was applied in *Neste Oy* v. *Lloyds Bank P.L.C.* [1983] 2 L.L.R. 658.

10 Slade J. in *Bond Worth* at p. 524 said "For the purposes of my present decision therefore, it is perhaps unfortunate that the decisions in *In re Nevill; Ex parte White, 6* Ch. App. 397; *Foley* v. *Hill 2* H.L. Cas. 28 and *South Australian Insurance Co. Ltd.* v. *Randell,* L.R. 3 P.C. 101 do not appear to have been cited in argument in either court in the *Romalpa* case."

The principal difficulty is summed up in the following dictum of Slade J. in *Re Bond Worth;*[11] "Where an alleged trustee has the right to mix tangible assets or moneys with his own other assets or moneys and to deal with them as he pleases, this is incompatible with the existence of a presently subsisting fiduciary relationship in regard to such particular assets or moneys". This approach has much to commend it and is a valid indicator of fiduciary obligations.

Another central issue considered by the courts in cases since *Romalpa* is whether the rights reserved to the seller constitute a registrable charge.

9. THE NATURE OF CHARGES

Professor Goode has written,[12] "Reservation of title to goods until payment of price — *e.g.* by the seller under a conditional sale agreement or the owner under a hire-purchase agreement — is intended as a security device, yet it does not constitute security as a matter of law, for what is reserved is merely a right *in re sua.* The seller/owner does not take security on the buyer's asset; he merely stipulates that ownership is not to pass until the full price has been paid."

If anything is reasonably clear, it is that retention of an absolute interest is not a charge by way of security and is not registrable.[13] The mere right of an owner to take possession of his own chattels is not treated in law as a security interest.

A fine line exists however, beyond which a seller's rights will constitute a charge requiring registration. Registration will then be required under the Companies Acts if the buyer is a company, and if not, under the Bills of Sale Act.[14] There is a mass of relevant case law dealing with transactions such as hire-purchase and sale and lease-

[11] At page 659F. Applied in *Neste Oy* v. *Lloyds Bank P.L.C.* [1983] 2 L.L.R. 658. The dictum was relied on by counsel for the receiver in *Clough Mill.* His argument appears to have been that if the sellers effectively retained title, then the buyers must have possession in a fiduciary capacity either as bailees or fiduciary agents. However he said, on this authority the buyer could not be a fiduciary as he was free to use or sell the yarn. Title therefore must have passed to the buyer in a non-fiduciary capacity, namely as owner. Both Robert Goff and Oliver L.J.J. rejected this logic, suggesting that concepts such as bailment and fiduciary duty should be "regarded as the tools of our trade" and "must not be allowed to be our masters." Setting aside these technicalities, they concluded that parties could effectively reserve title to the seller, but accord to the buyer certain liberties to deal with the goods. Pending sale or use the goods remain the seller's, and the buyer is a bailee, though the seller has no right to trace into the proceeds of sale. Thus, while not disapproving the dictum in *Bond Worth,* the Court of Appeal reached its conclusion by means of a less esoteric construction of the contract. It suggested a third alternative, that the seller is a bailor and the buyer a bailee, but owing to the various freedoms accorded to him, not a fiduciary. (Robert Goff L.J. at p. 987d.) The *Bond Worth* dictum remains however a valid indicator of fiduciary obligations.

[12] *Commercial Law,* 1982 at p. 711. Or in Lord Herschell's words in *McEntire* v. *Crossley Bros. Ltd.,* [1895] A.C. 457 at p. 466, "a man does not have a lien on his own property or a charge either."

[13] See for example *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *North Central Wagon Co.* (1888) 13 App. Cas. 554 and *McEntire* v. *Crossley Bros. Ltd.* [1895] A.C. 457. The principle is of course confirmed on appeal in *Clough Mill.*

[14] Companies Act, Part IV Division 8, Bills of Sale Act, s. 10. On hills of sale see Lee Chia Yen, *op.cit.*, pp. 319-323.

back.[15] The courts have to decide whether for example a transaction is not a genuine sale but a loan on security.

In *Re George Inglefield Ltd.*[16] the transactions of sale and mortgage or charge were distinguished. Firstly while a seller can not, by repaying the purchase money to the buyer, get back the goods sold, a mortgagor can pay off the loan and recover the property. An equity of redemption in favour of the mortgagor arises by law and cannot be fettered. Slade J. in *Bond Worth*[17] said "The existence of the [buyer's] equity of redemption is quite inconsistent with the existence of a bare trustee-beneficiary relationship."

Secondly, if a mortgagee realises the subject matter he claims only the amount of the debt due to him plus interest and costs. The balance, if any, is refunded to the mortgagor. If however a seller retaining title repossesses and resells the subject matter, in the absence of special terms, express or implied, he is entitled to the whole proceeds of resale and can keep any profit made.[18] In *Re Andrabell Ltd.* counsel for the seller persisted in claiming an account, not for the whole proceeds, but limited to money owing under the contract. Peter Gibson J concluded that a seller retaining the entire property in the goods should be entitled to an account for all the proceeds of sale. A claim for the unpaid price only, however, indicated a debtor/creditor relationship, "the debt at best being protected by a charge."[19] He pointed out that in *Romalpa* Mocatta J. at first instance had recognised that in that transaction accountability "was for all proceeds of sub-sales and that the purchaser would not even be able to retain for itself the profit upon such sales."[20]

15 See for example cases cited at note 13 above, and *Nugawela* v. *Soon Teck Finance* [1960] M.L.J. 302 and *Kiaw Aik Hang Co. Ltd.* v. *Tan Tien Chong* [1966] M.L.J. 339. See Koh Kheng Lian, *Credit and Security in Singapore,* 1973 pp. 188-191, Lee Chin Yen, *op.cit*., pp. 179-185, Gough *op.cit*., pp. 254-5 and chapter 16 generally.

16 [1933] Ch. 1. On the features of floating charges see *Re Yorkshire Woolcombers Association Ltd.* [1903] 2 Ch. 284, and generally see Farrer, "World Economic Stagnation Puts the Floating Charge on Trial", (1980) 1 Co. Law 83.

17 [1979] 3 W.L.R. 629 at p. 648. This dictum was cited by counsel in *Clough Mill* and referred to by Robert Goff L.J. at p. 989. It was not disapproved, but preceding sentences were distinguished as the contract did not confer rights on the seller but merely retained rights of ownership.

18 See also the novel construction of the Court of Appeal in *Clough Mill* in the text below following note 22. In the Irish case of *Kruppstahl* v. *Quitmann,* the buyer was constituted a trustee of the seller's steel supplied and used, but to the extent only of outstanding indebtedness. As such, this condition was held to be in the nature of a charge. In the two Irish cases where tracing was allowed, *Stokes and McKiernan Ltd.* and *Sugar Distributors Ltd.,* the Court relied on the *Romalpa* case. It was held in both cases that as the purchaser was selling on behalf of the vendor, even though only "to the extent to which money was still owing to the vendor," a right to trace arose. However as the omission to register was not contended for in *Romalpa,* "the decision is therefore not authority for the efficacy of the clause," (Goode, *Commercial Law,* 1982, p. 718) and such a provision may therefore be a charge. It is arguable that counsel opposing the right to trace in the two Irish cases might successfully have argued that the conditions created registrable charges.

19 See *Re Andrabell* at p. 411de, *Benjamin's Sale of Goods,* 2nd Edn. (1981) para. 396, and *Chitty on Contracts,* 25th Edn., (1983) at para. 4207.

20 *Re Andrabell* at p. 412g. Peter Gibson J. at p. 411fg also cited Slade J. in *Bond Worth* ([1979] 3 All E.R. 919 at p. 939) as pointing out that if the seller in that case were to repossess and sell he was only entitled to retain from the proceeds the debt and costs. If the sale were insufficient to discharge these amounts the seller could still recover the balance due from the buyer.

The third factor mentioned in *Re George Inglefield Ltd.* is that if a mortgagee sells the security, he may still claim any balance due from the mortgagor if the sale does not recoup the money advanced. A buyer reselling at a loss, can not of course recover the difference from the seller.[21]

These factors are thus appropriately considered in ascertaining what was the intention of the parties or the purpose of the agreement. "Whether or not the parties intend a transaction of sale or of charge depends entirely on their agreement."[22] This approach is reiterated in many of the recent cases on retention of title.[23]

A new approach was taken, however, by the Court of Appeal in *Clough Mill* in dealing with the second indicator of a charge mentioned above. They did not accept the traditional "owner takes all" solution, but adopted a novel construction of the clause, reading in the presumed intention of the parties as an implied term. They interpreted the contract to mean that the seller could not resell all the goods, but could only sell sufficient to recoup the outstanding price. If he sold more he must account for the surplus. Just as it may be agreed that property passes on payment, it seems that the parties may therefore agree that property in the remaining goods passes after resale of sufficient to pay the price. This does not amount to a charge, but merely a contractual limitation of the seller's rights of ownership. Such an interpretation allows the seller's legitimate claim to recover the price, but avoids a windfall profit. Courts may well interpret retention clauses to reach the same eminently sensible conclusion in the future, a broad conclusion based on the presumed intention of the parties.

In ascertaining the intention of the parties the court is bound to look at the wording of the contract.[24] It must look not merely at the retention of title clause, but at the whole of the contract, in order to discover its substance.[25] "If the words in one part of it point in one direction and the words in another point in another direction, you must look at the agreement as a whole and see what its substantial effect is."[26] Words retaining title may be given effect if that really was the intention of the parties. Or they may be disregarded as being a sham.[27] If so, despite an express retention of title, property may be held to have passed to the buyer at the time of delivery, or on appropriation for manufacture.[28] If this is the case the 'retention' of any rights by the seller pending payment then probably operates, not by way of retention, but as a grant by the buyer of registrable security rights.

The seller's position is more hazardous where he claims new products created out of the goods sold, as 'retention' of rights in something the seller has never owned is likely to be a grant of security

21 See the previous note.
22 Gough *op. cit*., p. 255.
23 For example, *Borden, Bond Worth, Peachdart, Clough Mill, Interview, Kruppstahl,* and *Emerald Stainless Steel* see notes 16 to 18 at p. 65 above.
24 *Bond Worth,* p. 644, question (c).
25 *Bond Worth,* p. 648 G.H.
26 *McEntire v. Crossley Bros. Ltd.* [1895] A.C. 457 at p. 463.
27 On the doctrine of sham see *Snook \ London and West Riding Investments Ltd.* [1967] 2 Q.B. 786, Gough *op. cit*., at pp. 258-9 and 418-9, and Davies [1984] L.M.C.L.Q. 280 at p. 283.
28 See note 71 above. Also *Bond Worth, Borden, Peachdart.*

rights. The seller's legitimate interest must, commercially, be limited to the unpaid price, and is unlikely to include value attributable to the buyer's work, materials and mark-up on re-sale. If the seller does claim these to satisfy other liabilities the intention to create a charge on the goods or proceeds is reasonably clear.[29]

Retention of title to goods in their original form, pending payment or resale, as has been said above, does not constitute a registrable charge.[30] But in ascertaining the intention of parties, property may be held to pass and a charge be granted. This was the view of the court at first instance in *Clough Mill* where the simple retention of title read together with the charge on manufactured goods, was held to be for the purpose of securing payment of the price and was not effective to retain absolute ownership. Accordingly the transaction as a whole was construed to be a charge, and was void for non-registration.[31]

Nevertheless it is not correct to say that pure retention of title intended to secure payment is necessarily ineffective and so constitutes a charge. However Judge O'Donoghue in *Clough Mill* seems to have come near to asserting this. He cited the following dictum from *Bond Worth;*[32] "In my judgment any contract which, by way of security for payment of a debt, *confers* an interest in property defeasible or destructible on payment of such debt... must necessarily be regarded as creating a mortgage or charge as the case may be." This statement was made by Slade J. in discussing a transaction in which it was conceded[33] that property in the fibre passed to the buyer on delivery. The dictum specifically relates to 'conferring an interest' by way of security. For these reasons it should not therefore be applied to the situation where property is effectively retained. Judge O'Donoghue relying on the dictum, however, said[34] that he was attracted to counsel's submission that if a seller of chattels purports to hold back ownership until payment, clearly as security for payment of the price, then the transaction as a whole should be construed as a charge. Such a submission is not a comprehensive statement of the law,[35] and it will probably be necessary to identify further factors in order to indicate a charge.

Judge O'Donoghue indicated one further factor, as strongly suggesting a charge, namely that the right to repossess the yarn only arose on default of payment. He said that this indicated retention of something less than actual ownership.[36] But this view does not

29 See *Borden* pp. 686-8, and Benjamin *op. cit.,* p. 395.
30 See note 13 at p. 86 above.
31 See *Clough Mill* [1984] 1 All E.R. 721 at p.732gh. Also *Bond Worth* concerning issue(e) at pp. 669-70.
32 *Clough Mill* at p. 729.
33 *Bond Worth* p.646F.
34 *Clough Mill* p. 729fg.
35 See text above at note 12. For another view, see at the end of Mocatta J.'s judgment at first instance in *Romalpa* (at p. 683A) where he said, "if property in the foil never passed to the defendants with the result that the proceeds of sub-sales belonged in equity to the plaintiffs, section 95(1) had no application."
36 At p. 727bc. See also the Australian case of *Palette Shoes Proprietary Ltd.* v. *Krohn* (1937) 58 C.L.R. 1, where in a complex exclusive sale agreement the seller was held beneficially entitled to proceeds of sub-sales of shoes supplied. The transaction was not an unregistered bill of sale as it gave the seller no power to seize or take possession of any shoes and was not an assignment of book debts. On this case see Wickham, (1960-62) 5 U.W. Aus. L.R. 472 at

recognise the fact that property may be fully reserved to the seller, although the buyer is contractually entitled to possession until such time as he defaults in payment. This is the situation that applies in conditional sale or hire-purchase transactions, which are not generally construed as charges.[37]

The above comments on the first instance decision in *dough Mill* were written before the appeal was heard. They have since been confirmed by the unanimous decision of the Court of Appeal. It is now clear that absolute ownership may be effectively reserved to the seller even though under the contract the seller can only exercise those rights on the occasion of default. Absolute ownership may be effectively retained as security, and the motive of security does not necessarily defeat the title retention.

The dictum in *Bond Worth* mentioned above was cited by both Lords Justices Robert Goff and Oliver, but was distinguished by them, as in their view title was effectively retained by the contract. As the seller's property interest was *retained* and not *conferred* by the contract it was not a registrable charge. The crucial issue is therefore whether the contract effectively retains title. Courts have tended to construe the whole of a contract very broadly, overriding clear words of retention where they saw fit. Predicting the outcome of a dispute has therefore not been easy. The *Clough Mill* appeal is a decision in favour of effective retention and it may in future be difficult to argue that simple words of retention do not mean what they say.

The recent difficulties with title retention being held to be registrable security have of course arisen from its use to secure payment for raw materials or other items for resale. However, where an item is sold, not for resale, but for use by the buyer, and the buyer agrees not to resell or part with possession of it, this is a clear indication that retention of title is effective and is not a charge.[38] On the other hand reservation of rights over continuing supplies of materials and stock in trade may, coupled with other factors, tend to have an aura of registrable security.

One such factor indicating a charge is where, by a current account clause[39] the seller retains title to *all* goods sold, while any account remains unpaid. Professor Goode, has said,[40] "It is strongly arguable, that, in making the transfer of ownership of goods subject to the performance of other obligations, wholly unconnected with the contract of sale, the seller is taking a charge over the goods to secure those obligations and that such a charge makes the agreement a bill of sale." Other writers have taken the same view.[41] Goodhart and Jones[42]

pp. 485-8 and Chandler (1979) A.L.J. 321. For a more recent Australian case where a seller was given a right to retake possession see *Re Trendent Industries Pty. Ltd.* 1983 A.C.L. Digest 510. As property had passed to the buyer, the right was created by the buyer and so was a bill of sale.

37 See note 13 at p. 86 above.

38 See note 71 above. For example in *McEntire* v. *Crossley Bros. Ltd.* above, the lessee agreed not to "sell, assign sublet or otherwise part with possession" of the machinery. Lord Herschell L.C. was unable to find any terms inconsistent with the agreement that title should not pass, (at pp. 463-4). He contrasted "a very different case from this one," *Coburn* v. *Collins* 35 Ch.D. 373, in which stock-in-trade of a business sold was intended to be dealt in by the buyer.

39 See text above and note 74 above.

40 See Goode, *Commercial Law,* (1982) p. 718.

41 See note 74 above.

42 (1983) 43 M.L.R. 489 at p. 508.

point out that if goods that have been paid for are repossessed and sold under a current account clause because of non-payment of other obligations, on the face of it, the buyer should be able to recover the price paid for them on a total failure of consideration. Since this may not be the intention of the parties, the provision is likely to be an agreement creating registrable security for payment. It is unfortunate, they conclude, that this argument, which is inconsistent with the decision in *Romalpa,* was not raised in that case.[43]

These two commentators were of course writing before the *Clough Mill* appeal. The Court of Appeal has since evolved its own solution to the problem of repossessing goods where some were already paid for. If the contract was subsisting it is implied that the surplus must be refunded. If not subsisting, the price must be repaid on a total failure of consideration. They did not conclude that they were dealing with a charge, merely that the seller's property rights were limited by contract. In *Clough Mill* there were four identical contracts and at the date of appointment of the receiver some part of the purchase price on each was unpaid. Each contract reserved the right to dispose of the material until payment in full for all the material. Material was defined as "the material to which this document relates." Thus transfer of ownership in each contract depended on payment in full under that contract. It was not, as envisaged by the learned commentators quoted above, dependent upon payment of any "other obligation."

In *Clough Mill* practical difficulties would have arisen in seizing all the remaining yarn if some of it had been supplied under a contract whose price was fully paid. That yarn would then have belonged to the buyer and so fallen into the receivership. Had each contract anticipated this problem by delaying passing of title until payment of all other obligations, then the circumstances envisaged by the commentators would have arisen. In the event we do not have the benefit of the Court of Appeal's view on this.

10. Romalpa, A Distinguished Case

How then, despite the successful claim for tracing of proceeds of sale in the *Romalpa* case, have the courts been able to deny a similar remedy to virtually every subsequent claimant? Firstly it has been possible to distinguish *Romalpa,* or to consider the case, but reach a decision on different issues. In *Bond Worth* for example, *Romalpa* was distinguished[44] because in the earlier case full legal title was reserved,

[43] Such a charge over supplies held from time to time prior to resale is likely to be in the nature of a floating charge. See *Bond Worth* pp. 649, 664 and 667. Current account clauses should however, be contrasted with an agreement for general lien over all goods in the seller's possession, including those already paid for but not delivered. (An example of a precedent is in *Australian Encyclopaedia of Forms and Precedents,* Vol. 11, p. 492). Such a clause is valid and is not a charge as the buyer is not granting rights over his own goods in his own possession.

[44] Goodhart and Jones (1980) 43 M.L.R. 489 at p. 507, regard Slade J.'s attempt in *Bond Worth* to distinguish *Romalpa* as "the least satisfactory part of what is otherwise a formidable judgment." In their view the fact that the buyer, Bond Worth, had legal title while the seller retained the beneficial interest, the buyer expressly being constituted as trustee for the seller, must strengthen the argument for a fiduciary relationship. In contrast the situation in *Romalpa* fits less easily into the recognised categories of bailor/bailee or principal/agent.

the fiduciary relationship was admitted, the clause specifically referred to fiduciary ownership and the proceeds of resale were kept separate. In *Peachdart* there were again "vital differences" in the retention of title clause. The approach that *Romalpa* "only provides very limited assistance or guidance"[45] in a particular case leaves the courts plenty of room for manoeuvre, even without going so far as to say that *Romalpa* was actually wrongly decided.

Secondly, as explained above, the courts have tended to regard the relationship of the parties as being that of vendor and purchaser and have chosen not to recognise the existence of an additional fiduciary relationship giving rise to a right to trace.

Thirdly, the courts have sometimes held on a broad construction that property passed on delivery or processing despite express reservation of title until payment. Construing the general purpose of the agreement to be security for payment, the clauses have been held void for non-registration under the relevant statute.[46] While *Clough Mitt* gives some limited comfort to unpaid sellers, the pitfalls are many.

11. Drafting Retention of Title Clauses

In the face of these difficulties one therefore wonders why those who sell on credit do not give up trying to reserve rights and concentrate on stricter credit control. However it may be impossible to deny trade credit, and yet continue in business. It is equally impossible to effectively scrutinise the creditworthiness of customers. The cost of relatively few extra words in small print in the conditions of sale may therefore be a worthwhile speculation.

In the light of the cases what should retention of title clauses include? The answer depends partly on the nature of the trade; whether the buyers will permanently retain the goods; whether goods will be resold as they stand; and whether they are to be mixed or processed into other goods; and if so whether large stocks of raw materials are to be held by the buyer prior to processing. No single draft is therefore appropriate in all cases.[47]

The greatest divide occurs where goods, through processing, cease to be identifiable and become something else entirely. Here rights would have to be granted to the seller over the new products, a provision going well beyond mere retention of title. The effect of such a provision is highly speculative in the absence of registration as a charge.

It is difficult therefore to suggest a universal off-the-peg form of title retention for the use of sellers giving credit. The mass of judicial pronouncements ought to make it possible, however, to collect together

45 Slade J. in *Bond Worth* at p. 662F. In *Clough Mill* at first instance (at p. 729) *Romalpa* was distinguished as in that case there was no evidence that foil was to be used in manufacture, and there was a duty to store the goods separately.

46 See The Nature of Charges above.

47 Parris in his book, *Retention of Title on the Sale of Goods* suggests five different categories of transaction requiring different stated combinations of the clauses which he has drafted in full at pp. 168-171. These clauses were drafted without the benefit of the later decisions on retention of title.

the various elements of an agreement to establish the various claims. Each of the courts dealing with the highly complex and specific facts of the case before it has however spun only a few threads, which may be hard to weave into a satisfactory whole. The following suggestions, if they achieve anything, illustrate the impossibility of doing much more than simple title retention without coming up against significant pit-falls.

(1) *Rights Over Goods and Proceeds*

These terms are intended to enable a seller to recover unprocessed goods in their original form and (more speculatively) to trace the proceeds of their resale on the buyer's insolvency. They are not intended to be complete drafts, but merely descriptions of suggested clauses.[48]

1. Risk is to pass to the buyer on delivery. (Or alternatively, so as to conform to the possibility of possession being restored to the seller as in a "pure bailment", risk to lie with possession or control).

2. The seller is to retain legal and beneficial ownership until,
   — payment in full of all liabilities under the contract,[49]
   — repossession and resale by the seller of sufficient of his goods to satisfy all unpaid liabilities under the contract and the costs of resale,
   — irrevocable mixing of the goods or consumption in manufacturing processes, or
   — bona fide lawful sale by the buyer at market value other than to associated companies.

3.1. The seller may repossess when any liability under the contract is due and unpaid in whole or part. All liabilities become due when any liability under the contract is due and unpaid, and on commencement of any proceeding etc. involving the buyer's solvency.

3.2. When the right to repossess arises the seller may repossess and resell for his own account sufficient only to satisfy all unpaid liabilities and the costs of resale. If any excess is recovered the seller shall not be liable in damages but shall account for the excess to the buyer.

48 But the author and the publisher are not to be held legally liable if they prove to be disastrous.

49 The risk of a 'current account' clause has already been explained. It may therefore be prudent to reserve title against payment for the goods sold under the contract. If continuing orders are supplied under the contract, the clause still has the effect of a current account clause. If however any part of the price already paid for is accounted for by the seller to the buyer following repossession and sale, the clause can hardly be objected to, especially if, as *Clough Mill* suggests, it is not a charge. Continental European sellers sometimes go one step further and retain title until all accounts due from the buyer and all companies in the same group as the buyer have been paid. In addition they may also claim ownership or co-ownership of new products made from the goods. European sellers may also require the buyer to retain title as against sub-purchasers and to require sub-purchasers to impose the same successive obligation on persons to whom they sell. See Pennington (1978) 27 I.C.L.Q. 277 at pp. 280-281.

3.3 The agreement in clauses 1. to 4. is to survive accepted repudiation or other termination of the contract and shall apply in all circumstances.[50]

3.4. The right to repossess includes repossession of any additions to the goods.[51]

3.5. In lieu of repossession the seller is entitled to payment of the amount of all liabilities under the contract.[52]

4. The buyer agrees to allow the seller to enter the buyer's premises at any time without further permission for the purpose of repossessing the goods.[53]

The provisions so far are reasonably straightforward and could stand on their own as a limited means of securing payment on identifiable goods held by the buyer, without a need for registration. Life becomes more complicated if rights to trace proceeds of sale are sought. The following states the fiduciary relationship for this purpose.

5. The relationship between the parties is to be fiduciary so as to entitle the seller to trace the proceeds of sale. On resale by the buyer the seller's title attaches to the proceeds of sale.

It seems unnecessary to state whether the fiduciary relationship is that of bailor/bailee or agency.[54] Defining the extent of the seller's

50 These terms are largely based on the contract in *Clough Mill* and are intended to have the benefit of that decision. Thus the retention of title should be effective and not be held to be a charge, even though it may look like a security interest. The term that the Court of Appeal said was to be implied (that the right of repossession only extends to recovering the unpaid price etc.) is expressly included and is said to survive termination of the contract. It is to be hoped that such a claim by the seller, being limited to recovery of the price and not giving him a windfall may be favourably viewed by the courts. Under 3.1, where the buyer goes insolvent during a credit period, the price immediately becomes due and the right of repossession arises.

51 This avoids the necessity of relying on general principles of accession and gives the advantage to the seller. It does not of course solve the problem of what is an accession and what amounts to a mixing etc. extinguishing the seller's title.

52 These last words are suggested by Allcock, to cover a case where the seller is entitle to repossess all and account for no part of the price. (See note 76 above). As the liquidator will probably choose to pay the outstanding debt, the supplier will be duly protected but will not stand to profit from the insolvency. The alternative entitlement to all outstanding liabilities may of course tend to indicate a charge. Clause 3.5 is probably still worth including even though the *Clough Mill* solution is probably effective in avoiding a charge without it.

53 Hill-Smith in "The Romalpa Clause in Relation to Land", (1983) 133 N.L.J. 207, relying on *Re Morrison, Jones and Taylor Ltd.* [1914] 1 Ch. 50, says that a right of entry will rank as an interest in land and is exercisable against the liquidator or trustee in bankruptcy. The issue of whether it may be necessary to enter a caveat under The Land Titles Act may however arise. See Part XI of Cap. 276, Singapore Statutes, 1970 Rev. Ed.

54 *Benjamin* (1981) at para. 394, says that it is probably essential to state that the buyer holds the goods as bailee for the seller; while in *Re Andrabell* Peter Gibson J. said (at p. 414c) "it does not seem to me to be crucial what juridical label is attached to Andrabell, as, even if it were aptly called a bailee it would not follow that it was a fiduciary obliged to account." As the court must construe the whole of the contract to ascertain the parties' intentions, a mere label will not make the buyer a bailee if he is not in reality a bailee. On sale distinguished from agency and bailment see *Benjamin* (1981) at paras. 47 and 56, and *Fridman's Law of Agency,* 5th Edn. (1983) at pp. 22-25, and for a recent case *P. & R. Potter* v. *Customs & Excise Commissioners,* 1984 L.S. Gaz 3342, (1985) S.T.C. 45 C.A.

rights over the goods and avoiding where possible the language of debtor/creditor seems more important than categorisation.

The conditions should attempt to define so far as possible the fiduciary obligations of the buyer. The following buyer's obligations are generally for this purpose. They should be expressed to subsist unless and until the buyer can conclusively show that all his liabilities, including those not yet due, have been paid.

6.1. To store the goods separately so as to indicate the seller's ownership. Where the buyer holds goods supplied by the seller under this or another contract, and some only of these goods remain the property of the seller, but they are not separately identified or identifiable, it shall be presumed that all goods supplied by the seller under the contract have been resold, processed or otherwise consumed by the buyer on a first in first out basis until the contrary is proved.

6.2. To maintain the goods in good condition and to insure them in joint names against all risks for their full value with an insurance company approved by the seller.

6.3. Not to sell, pledge, charge, allow the creation of a lien over, or otherwise dispose of, use as security or deal with the goods without the seller's authority and other than in accordance with the seller's directions as to terms, price, etc.[55]

6.4. Not to mix the goods or to use them in any manufacturing process, nor in any way to change their identity without the seller's consent.[56]

6.5. Any authority to sell etc. or to mix etc. may be immediately withdrawn by the seller by notice in writing, or terminates automatically on winding up, receivership or insolvency, or on commission by the buyer of any act which would constitute an act of bankruptcy if committed by a natural person.[57]

55 Excluding the right to resell prior to payment is a new departure, and in legal terms is somewhat speculative. It may also be commercially unacceptable as selling the goods may be the only way the buyer can pay the price. The purpose of excluding the right to sell is that in general if a bailee is free to sell, there is no fiduciary obligation, the sale is not wrongful and there is no right to trace the proceeds. Peter Gibson J. in *Re Andrabell* at p. 411g commented on the buyer's freedom to sell without any reference to the seller. See also clause 6.6 below. If the seller could persuade a court that the buyer really was not authorised to resell, then a right to trace following a wrongful sale may arise. See *Lupton* v. *White* at note 95 above.

56 The danger is that on mixing or processing, the goods become something else entirely, and cease to be in an identifiable form. (See *Re Diplock* [1948] Ch. 465). Their proceeds may then cease to be traceable. Furthermore there can be no tracing by claimants who have acquiesced in the wrongful mixing. *(Blake* v. *Gale* (1886) 32 Ch.D. 571).

57 Consent might alternatively be revoked if credit given reaches a stated sum. Termination of consent to sell would enable the seller to apply to the court for an *ex pane* injunction restraining the receiver from selling or parting with, the goods pending a settlement. (See Parris *op.cit.*, at p. 162). Automatic termination of consent to resell looks uncomfortably like the automatic crystallisation of a floating charge, itself a device whose effectiveness is not entirely sure. (See Goode, *Commercial Law* 1982 at page 798 and articles cited by him at note 41. See also Report of the Review Committee on Insolvency Law and Practice, 1982, Cmnd. 8558 at paras. 1570 to 1982). Coupled with a right of repossession of the goods it is also reminiscent of clauses terminating consent to a hirer or lessee's possession in hire-purchase and leasing transactions com-

6.6. Where the buyer is authorised to resell, to sell only for the best possible price, and according to the supplier's directions from time to time, any such resale to be expressly made by the buyer with its sub-buyers not as the seller's agent but as principal.[58]

6.7. To keep full details and inventories of the supplier's goods mixed or used in any process, and of the products made from them and to make this information available to the supplier on request.[59]

6.8. To keep records of resales of the supplier's goods and products made from them, (including details of sub-purchasers[60]) and to make these available to the supplier on request.

6.9. To admit the supplier to the buyer's premises for the purpose of inspection of any goods held in a fiduciary capacity [and on request to deliver up to the supplier any such goods at any time.][61]

6.10. To open a separate account into which to collect and hold the proceeds of sale.

This last provision assists in confirming the fiduciary relationship and if complied with avoids difficulties in identifying payments into and out of the buyer's account.[62] However the right to trace cannot be exercised against a bona fide purchaser for value without notice of the equity.[63] If resale proceeds are paid into the buyer's overdrawn bank account the bank will acquire title to the money free from any right to trace.[64]

6.11. Alternatively to 6.10, at any time on request by the seller, to open a separate account into which to collect and hold the proceeds of sale.[65]

monly seen in Singapore. See *Times Furnishing* v. *Hatchings* [1938] 1 K.B. 775 suggesting that an unequivocal act may be necessary to withdraw consent. An analogy is the need to notify recission of a contract to the other party, except that in an exceptional case of a fraudulent party who has absconded, taking all possible steps such as notifying the police may suffice. *Car & Universal Finance Ltd.* v. *Caldwell* [1965] 1 Q.B. 525.

68 See The Risks of an Agency Style Contract below.

59 See for example *Peachdart* p. 210F. Records tend to affirm the fiduciary relationship and help in identifying what is held in trust for the seller.

60 *Benjamin op. cit.*, at para. 48 says, "The nature of the consignee's obligation to account to the consignor is perhaps the strongest indicator of his position: if he is bound to furnish particulars of his sales and customers, he is probably an agent."

61 The importance of the right of recovery in establishing bailment is discussed in *Peachdart* at pp. 208-9, citing dicta of Templeman J. in Bo*rden.* The words in square brackets should be omitted if clause 3.1 is used as this restricts repossession to default situations.

62 Payments in and out of a running account such as a current bank account, in the absence of express or inferred appropriation, are appropriated on a first in first out basis. (The Rule in *Clayton's Case).* Where a trustee draws on a bank account which contains both his own and trust money, he is however deemed to draw on his own money first, as the presumption is against a breach of trust. *(Re Hallett's Estate* above).

63 *Re Diplock,* above, at 539.

64 See Allcock *op. cit.* at p. 46. A perhaps impracticable solution is to give notice to the bank of the underlying trusts to which the proceeds of sale are subject.

66 Suggested by Allcock *op. cit.* at p. 46.

It may be commercially unacceptable to expect the buyer, perhaps during a fixed credit period, to keep the proceeds of sale in a separate interest bearing account.[66] Apart from the administrative complications, prohibiting the buyer from putting the proceeds back into its business could cause considerable cash flow difficulties. A compromise[67] therefore would be to stipulate that the seller may instead at any time require a separate account to be opened and kept. However to require this when the buyer appears to be in financial difficulty again is not ideal as it could precipitate a cash flow crisis at the most critical time.[68]

6.12. The buyer agrees not to assign to any third party the right to receive the proceeds of resale, and any purported assignment shall be wholly void.[69]

6.13. To assign to the seller all rights to recover proceeds of resale from sub-purchasers.[70]

6.14. Standard fiduciary obligations to disclose all material facts, not to accept bribes or to make secret profits, nor to divulge confidential information.[71]

6.15. To indemnify the seller in respect of any claims made against the seller by the buyer's customers.

7. A standard clause that no indulgence or relaxation in insisting on due compliance with any obligation is to constitute a waiver of that obligation.[72]

66 See comments on this burdensome obligation in *Peachdart* at p. 210e (on which see Davies *op. cit.* p. 62) and *Romalpa per* Roskill L.J. at p. 689.

67 See Allcock *op. cit.* p. 46.

68 Mark Twain said that banks lend you an umbrella and then take it away again when it rains.

69 Under a factoring agreement, the assignment by the buyer of accounts receivable on sub-sale, to a factor giving value and without notice of the supplier's right, may defeat the supplier's rights to trace the proceeds or claim against the sub-purchaser. The effect of the prohibition on assignment in clause 6.12 may preserve the seller's rights, though the law is uncertain. See *Helstan Securities Ltd.* v. *Hertfordshire County Council* [1978] 3 All E.R. 262, and Allcock *op. cit.* p. 46. Under the usual practice of non-notification factoring or accounts receivable financing (on which see Tan Chwee Huat, *Financial Markets and Institutions in Singapore,* 3rd Edn. 1984) the assignment initially is equitable only, in which case the earlier right of the unpaid seller to trace prevails. If however the assignment becames legal or statutory and the factor was, at the time of giving value, without notice of the seller's rights, the factor will secure priority. See Pearce (1976) 40 Conv. 277, [1977] 93 L.Q.R. 324 and 496, McLauchlan (1980) 96 L.Q.R. 90, Allcock (1983) 42 C.L.J. 328, Salinger, (1981) 2 Co. Law 243, Biscoe, *Law and Practice of Credit Factoring,* (1975) at p. 157, and Salinger, *Tolley's Factoring* (1984) Chapter 16. A statutory assignment must be absolute, be signed by the assignor, and must not purport to be by way of charge only. (See Civil Law Act, s. 4(6), based on Supreme Court of Judicature Act, 1873, s. 25(6), and Lee Chin Yen *op. cit.* pp. 111-113).

70 Such an obligation appeared in the original *Romalpa* clause and is common in Europe. See note 62 at p. 74 above, and Pennington, (1978) 27 I.C.L.Q. 277 at p. 281(c).

71 See for example typical provisions in agency and distributorship agreements in Hearn, *Successful Negotiation of Commercial Contracts,* (1979), chapters 2 and 3.

72 For a typical waiver clause, preserving an owner's rights in a hire-purchase agreement, see *Encyclopaedia of Forms and Precedents,* 4th Edn. (1969) Vol. 10 at p. 445, clause 10. On waiver see *Plasticmoda S.P.A.* v. *Davidsons (Manchester) Ltd.* [1952] 1 Lloyd's Rep. 527, and Schmitthoff, *The Export Trade,* 7th Edn. (1980) at pp. 100 to 102). Parris *op. cit.* at p. 168 also suggests a further provision that no agent or employee of the seller is authorised to accept orders on any terms other than the standard terms, nor to vary them; and that previous dealings between the parties are not to vary the standard terms.

Some of the above terms if strictly enforced may be unrealistic and commercially unacceptable. Hidden in the small print and conveniently unread they may perhaps be inoffensively preserved in cold storage by such a clause. If and when the supplier wishes to re-activate them he should make this clear by notice or otherwise that the strict position under the contract is to be restored.[73]

8. A statement in order forms to be signed by the buyer that the standard terms have been read and agreed to and any unusual terms pointed out prior to concluding the contract.

Whether such a statement estops the buyer from challenging due incorporation of unusual terms is doubtful,[74] but at least it provides an extra hurdle for the receiver to surmount, which may be useful to the seller in negotiations with him.

The contractual terms proposed above numbered 1. to 4. proceed on the basis that on repossession the seller will claim only sufficient to recover the outstanding price. If however a seller does not wish to make this concession the following alternative provisions might be added, also making the necessary amendments to terms 2 and 3.

9. If authority to resell is given the buyer is to resell goods on the seller's behalf within 75 days of delivery (or whatever credit period) and to account immediately following sale[75] for the proceeds in full, deducting only any excess over the original sale price, this to be retained by the buyer by way of commission and in defrayment of the costs and expenses of resale.[76]

   In default of sale within that period, the buyer is to redeliver the goods (at buyer's risk and expense) to the supplier's premises, or to account for them to the supplier.[77]

10. Any sums payable under the contract are to be promptly paid, and to be recoverable by action, notwithstanding that property in the goods may remain with the seller.[78]

73 See *Charles Richards Ltd.* v. *Oppenheim* [1950] 1 K.B. 616, and comments of Goff L.J. in *Romalpa* at p. 692EF.

74 *Lowe* v. *Lombank* [1960] 1 W.L.R. 196; 104 S.J. 210.

75 The fact that the credit period was not determinable on resale of the goods by the purchaser indicated a debtor/creditor relationship in *Re Andrabell* p. 416b.

76 To avoid the implication of a charge the buyer must account for the proceeds in full *(Re Andrabell* p. 412g). Clause 9 attempts to do this while allowing retention of markup or profit by way of "commission". Remuneration by commission tends to indicate agency. *(Miller* v. *Newman,* (1842) 4 Man. & G. 646). "Exceptionally an agent may be remunerated by allowing him to keep the surplus over and above a specified price which he is to receive on account of his principal." *Benjamin op.cit.* para. 48 citing *Re Smith, ex p. Bright* (1879) 10 Ch. D. 566 at p. 570 *per* Jessel M.R. It is evidence of a sale if the buyer may resell at a price of his own choosing but must account to the seller for a predetermined price. *Re Nevill, ex parte White* (1871) 6 Ch. App. 387. Discussed in *Bond Worth* at pp. 656-7.

77 The obligation to redeliver is important in establishing a pure bailment. However it may be commercially unsatisfactory for the seller and it may make the transaction one of sale or return. See *Benjamin* (1981) paras. 55 and 324. Also Sale of Goods Act, s. 18 Rule 4.

78 This attempts to make time of payment of the essence (see Sale of Goods Act 1979 s. 10(1)) and to confer a right of action to recover payment independent of Sale of Goods Act s. 49. (See *Chitty op.cit. para.* 4324). This may be useful, as the statutory action for the price depends on property having passed or on the price being payable on a day certain. Furthermore if the agreement is not a sale (see below) a contractual right to recover is valuable.

Clauses 9 and 10, the obligation for payment of the price, though left until last, present not the least of the obstacles to the tracing remedy. It has been said[79] that, "The greatest objection to *Romalpa* being regarded as a fiduciary is that this would involve the company in a seemingly irreconcilable role, that of buyer and trustee at the same time." How can a trustee or agent incur a certain obligation to pay merely the wholesale price of goods? He is not himself a buyer but is selling on his principal's behalf. How can he as a trustee be free to apply the sale proceeds as if it were his own? An agent's obligation is generally to account for the retail proceeds following resale, less his commission and expenses. But given a fixed credit period as in *Romalpa,* if he has failed to resell within that period the 'Romalpa agent' finds himself in the position of having to account for money he has not yet received. If he sells before the end of the credit period he has not, as yet, an obligation to pay the seller. The courts may regard this as indicating a debtor/creditor relationship. These problems of course arise whenever it is sought to trace proceeds of sale.

The term numbered 9 above attempts to deal with the problem. Thus on resale, in order to preserve strict fiduciary appearances, payments should be collected into a separate account, (see para. 6.10) and the buyer should account immediately. In reality these obligations will probably be overlooked and the buyer merely pays up at the end of the 'credit period,' whether or not the goods are resold.

If no fixed credit term is normal in the trade, the buyer should be obliged to resell immediately and account in any event within a reasonable time, or on demand by the supplier, whether or not the obligation to resell has been complied with. This would create similar obligations to those in the Sale of Goods Act 1979 where time of payment is not of the essence unless so stipulated,[80] but may be made so on notice.

(2) *The Risks Of An Agency Style Contract*

All the clauses that have been suggested, are intended to avoid a debtor/creditor relationship. The supplier does not wish to queue up in insolvency proceedings with other creditors but seeks the preferred status of holding a beneficial interest in the goods and proceeds. The conditions might therefore be entitled, not "conditions of sale", but "standard conditions"; the parties not 'seller' and 'buyer', but 'Aluminium Industrie' (i.e. the seller's proper name), and the 'agent', (or perhaps to labour the point 'the fiduciary').

A receiver or liquidator might on this scenario be persuaded that there is a fiduciary relationship owed to the supplier. A court, looking to the form rather than the substance, or to broader policy considerations might also be persuaded not to recognise a sale when it sees one.

But this limited promise carries many risks for the supplier. There might be unforseen tax consequences. Stamp duty might be payable

79 Davies *op. cit.* p. 56.
80 S. 10. See *Charles Rickards Ltd.* v. *Oppenheim* [1950] 1 K.B. 616.

on the documents:[81] It is possible that if a buyer resells as agent for the supplier, the latter as contracting party is liable to the sub-buyer for defects in the goods.[82] However Roskill L.J. in *Romalpa*[83] said that a buyer reselling as agent for the original supplier, as between himself and the sub-purchaser may resell as a principal and not merely on the supplier's behalf. A stipulation that the buyer shall not deal with sub-purchasers as the supplier's agent[84] may therefore be useful to cover the situation.

And what if the buyer despite due diligence is only able to resell at a loss? Under the above terms designed to characterise him as an agent he need only account as agent for what he receives (and may even claim his expenses), so that it is the supplier who suffers the loss. The buyer may also gratefully grasp the opportunity to return unsaleable goods to the supplier.[85] While contractual stipulations could guard against such eventualities these would revive the appearance of a sale and purchase.

More fundamental is that if the transaction is one of agency, then logically the contract is not a sale and the Sale of Goods Act may not apply to the transaction.[86] In any event since property will not pass and if there is no direct obligation for payment of the price on a day certain, there can be no statutory action for the price.[87] The alternative actions under the agency contract will be far less easy and the quick remedy of summary judgement will probably not be available.[88] The consequences are indeed far reaching. Any attempt to swing back towards a sale transaction may prejudice the fiduciary relationship.

81 For accounting and tax purposes the receipts of an agent are technically the receipts of the principal. Since the seller is trying to create a transaction that is not a sale, it may be another form of transaction and so stampable under the Stamp Act, cap. 147. It may be an agreement under hand (Head 3), an assignment by way of security (Head 10), or a declaration of trust (Head 32). If it falls within Head 10 it will be dutiable as a mortgage (Head 46) which could be very expensive. The documents *win* not *be* admissible in evidence unless duly stamped (s. 53) and penalties of four times the duty (s. 47) would be payable for late stamping. If the agreement is for purchase of goods by instalments, and the buyer is not a dealer in goods of that description, the Hire Purchase Act 1969 will apply, provided that the goods are within the narrow range of goods specified in the Second Schedule to the Act. See s. 1 (2) .For recent cases considering the question of agency or sale for VAT purposes see *P. & R. Potter* v. *Customs & Excise Commissioners* 1984 L.S. Gaz 3342, (1985) S.T.C. 45 C.A., *Re Liverpool Commercial Vehicles Ltd.* January/February 1984 Insolvency Law and Practice p. 16, 1985 Feb. Current Law 57. See also Hart and Lewin, "VAT Bad Debt Relief under Retention of Title Contracts", 192 Acct. (No. 5728) 17, and Bertram, *Tax Consequences of Receivership and Liquidation,* Butterworths, London, 1982, Chapter 22.

82 The original seller may be liable to the sub-buyer as undisclosed principal. See *Chitty op. cit*., para. 2251 and *Fridman op. cit.* p. 221. Roskill L.J. in *Romalpa* (at p. 690E) thought it unlikely that a claim such as for breach of warranty of quality would lie against the original seller. Nevertheless as Reynolds suggests, (1978) 94 L.Q.R. at p. 238, the risk involved may make retention clauses less attractive. An indemnity, proposed as clause 6.15 above, would of course be of little avail in the event of the buyer's bankruptcy.

83 At p.690 BC.

84 See suggested clause 6.6 above.

85 It is unlikely that the supplier will avail himself of the opportunity given him by suggested clause 6.3 above to stipulate a resale price. The buyer need therefore only sell for the best possible price. (Clause 6.6). Clause 9 enables him to return unsold goods.

86 See references in note 54 at p.94 above, and Sale of Goods Act s. 2.

87 Sale of Goods Act s. 49.

88 Suggested clause 10 above attempts to give a contractual right of action.

In conclusion, sellers may be able to dress up a contract as a fiduciary transaction so as to enjoy some equitable remedies. But they are unlikely to be able to obtain the advantages and benefits of both fiduciary obligations and sale. The clauses proposed above go about as far as one can in casting a fiduciary glow over a contract of sale. Their efficacy is uncertain as they may be held to be charges. They may well be unacceptable to buyers in the market and so may make the seller's goods unmarketable. It may thus be better to keep to the well charted waters of the simple sale transaction, merely retaining title as suggested in the first four clauses above.

(3) *Drafting Rights Over Mixed Goods and New Products*

Prior to *Clough Mill,* though there have been a few glimmers of hope,[89] claims to goods irrevocably mixed with others or to new products, were almost inevitably doomed to failure as unregistered charges. As discussed above the Court of Appeal, without being in the least specific, raised new hopes. Though newly manufactured goods will generally belong to the buyer the court saw no reason why the parties should not agree that they vest in the seller.

One can envisage that a seller might supply resin agreeing that a proportion of the chipboard made from it is to belong to him and will be received as payment. The idea could perhaps be adapted to the case of an unpaid seller seeking unregistered security over new products by drafting terms as follows;

> A part of the products equal in value to the price of the goods supplied shall on manufacture immediately vest in the seller absolutely and not by way of mortgage. The seller may take possession of and may sell his part of the products if the buyer defaults in payment, or if at any time (either before or after tender of the price), the seller requests delivery of his part of the products in lieu of payment. If the seller does not request delivery but accepts payment in full he will relinquish his title to the buyer.

Possible problems include the situation where another *Romalpa* supplier makes claims over the products. However these rights would probably amount only to an unregistered charge. Then of course it has to be asked whether the proposal itself would create a charge.

The agreement that the seller should be free to call for delivery of his part of the products at any time is intended to fetter the buyer's equity of redemption. As the buyer is not absolutely entitled to tender the price and defeat the seller's proprietary right in the subject-matter, this suggests that it is not a charge.

[89] In *Borden* Buckley L.J. mentioned the possibility of common ownership (p. 688B). It has also been suggested that in the rare case of products made wholly from the supplier's goods title may be effectively retained. See Thornely, (1980) C.L.J. 48 at p. 51, and Benjamin, *Sale of Goods,* 1981, the last sentence of para. 395. However even this limited proposition seems doubtful if there is an input of labour by the buyer and a change of identity. It would seem necessary in this event for the buyer to renounce any interest arising from inputs of labour etc., and even this might be the conferring of an interest by way of a charge. In *Clough Mill* Sir John Donaldson M.R. only went so far as to say (at p. 994c), "If the incorporation of the yarn in, or its use as material for, other goods leaves the yarn in a separate and identifiable state, I see no reason why the appellants should not retain property in it and thereby avoid the application of section 95," that is the need to register.

Another possible factor indicating a charge is the right to the balance of the price if the sale of repossessed goods is insufficient to satisfy the price. Here this indicator of a charge need not always arise. If the seller is unable to repossess the whole of his share of the product, instead of proving for the balance of the price as a debt, he could claim damages for conversion of his products. If however all his products are recovered, but their resale fails to cover the debt and expenses, the position is more difficult.

In *Re Andrabell* it is said that the right to recover the price and costs only and not the whole proceeds, suggests a charge. A different twist to the arrangement would therefore be to agree that the products shall belong to the parties in common in proportion to the amounts in value of materials and manufacturing costs supplied by them, any payment or part payment to reduce or extinguish the seller's interest proportionately. This might entitle the seller to a larger slice of the action than the unpaid price only, which would possibly cover the seller's costs of repossession on insolvency.

The advantage of this variation would be to cut the precise link between the unpaid price and the recovery of the equivalent amount of goods. In being entitled to claim more than the unpaid price, or perhaps less if the product is unsaleable, that link indicating a charge is broken. Nevertheless the device still looks uncomfortably like the conferring of an interest defeasible on payment of a debt, and hence a charge.

Another alternative would be to apply the *Clough Mill* reasoning not just to retention of title of the original goods but to the new products also. It could be agreed that all new products belong to the seller absolutely until either bona fide resale, or payment in full, or until delivery to the seller of sufficient of the new products to discharge the price and the costs recovered, any excess recovered to be accounted for to the buyer.

Yet another approach would be to claim the imperfect assistance of the common law. The contract in tiny print would declare (somewhat unrealistically) that the buyer may not without the seller's consent mix, or process the goods into new products. If the buyer does wrongfully process or mix the goods, the common law shall apply,[90] namely the whole of the new products shall be, both at law and in equity, the property of the seller, unless and until the buyer satisfactorily separates them. If the mixing is accidental then the seller and buyer are to be treated as tenants in common in the mixed whole in proportion to the value of their contribution to it. The agreement could perhaps omit that such interests are defeasible on payment, leaving that to the good sense of the parties. If the agreement thus does not itself confer rights on the seller, but leaves the resolution of property rights to the common law as declared in the agreement, it would be difficult to argue that a charge is created.

Nevertheless all that has been said on claiming rights over new goods is but speculation. The Court of Appeal in *Clough Mill* may

[90] See *Lupton* v. *White* (1808) 15 Ves 432, *Spence* v. *Union Marine Insurance Co.* (1868) L.R. 3 C.P. 427, Phang, *Import Trust Receipts in Victoria and Singapore,* 1982 Chapter 5, and note 78 at p. 78 above.

have unnecessarily raised false hopes more akin to the realms of alchemy than law.

12. Registration of Charges

Another point worth considering is that as it is difficult to avoid creating a charge, might it be practicable for the seller to validate that interest by registration of the charge?

Firstly it can not be assumed that purchasers in Singapore of substantial quantities of goods are necessarily incorporated companies. The failure at the end of 1984 of Chop Hoo Thye, a tinned food merchant, owing in the region of $100 million mainly to banks indicates the scale on which it is possible for unincorporated traders to do business.

If the buyer is not a company, registration would be required under the Bills of Sale Act. But this is probably not a practicable proposition as the required formalities for registration are onerous. As section 5 of the Act requires a schedule of the goods charged, this precludes registration of anything in the nature of a floating or revolving security.

If the buyer is a company, section 131 of the Companies Act requires registration of certain categories of charge. Relevant categories include floating charges, charges on book debts, and charges which if executed by an individual would require registration as a bill of sale.[91] Retention of title clauses falling within any of these categories will be void against the liquidator and any creditor unless registered.[92] Though the charge in question is created by the buyer, the Act enables registration to be effected by the seller as a person interested in the contract document.[93] However registration of each individual contract of sale, the keeping by the company of a charges register[94] and ultimately lodging of a memorandum of satisfaction[95] may be an unacceptable burden and expense for both seller and buyer.

Alternatively a corporate[96] buyer could grant the seller a floating charge over all goods supplied from time to time, over all products made from them, and over the proceeds of their sale.[97] Floating security, however, has many limitations. For example it ranks after creditors with fixed security and after preferential creditors.[98]

91 Companies Act, s. 131(3)(f), (d) and (g).
92 S.131(1).
93 S. 132.
94 S. 138.
95 S. 136.
96 Individuals may not create valid floating charges. Bills of Sale Act, s. 5 etc.
97 *Romalpa* type clauses have of course been held to be floating charges. It is acceptable for the 'prescribed particulars', (Form 34 of the Second Schedule to the Companies Regulations 1984, s. 214) merely to state the amount secured by the charge as all sums from time to time owed by buyer to seller, rather like with an 'all monies' bank debenture; *Gough op.cit. 299.* Fixed charges may be granted over existing goods supplied. If a buyer grants a fixed charge over products to be made in the future, the matter is more difficult. See Pennington, "Fixed Charges over Future Assets of a Company," (1985) 6 Co. Law *9* at p. 18.
98 Companies Act s. 328(4) and s. 226.

The difficult question of priorities will also arise where the buyer has, at an earlier time, issued a floating charge over all its undertaking and assets to secure banking facilities. In this circumstance, taking a fixed charge is more valuable for the unpaid seller than a floating charge. As the lender has, by implication of the floating charge, authorised the company purchaser to deal with its assets notwithstanding the charge, a later fixed charge over some of the assets in the ordinary course of business will have priority over the earlier floating charge.[99] Even where the earlier floating charge expressly restricts the company's authority to create later charges with priority, a later fixed charge will have priority, unless its chargee had notice of the restriction itself.[1] However a later floating charge will generally be postponed to an earlier one as, by the nature of the earlier floating charge, there is no authority for the company to create later floating charges with priority. If the later charge is over part only of the assets comprised in the earlier charge and if the earlier charge gave an express power to create later floating charges ranking first, then the seller will enjoy priority.[2] An express limitation on all later charges with priority is likely to appear in many bank debentures.

Suffice it to say that even if a *Romalpa* seller undergoes the inconvenience of registration, he may find himself in competition with a bank's receiver. The more convenient option of a floating charge is the less likely to secure payment of the price. Registering a fixed charge in respect of each contract may, however, not be a practicable alternative. In any event if the buyer is free to mix, use and sell the goods and treat the proceeds as his own, the transaction may not be in the nature of a fixed charge.

A further point on registration is that the time limit for lodging with the Registrar is "thirty one days after the creation of the charge."[3] Conventionally one looks to the date of the relevant document creating the charge. However at the time of the contract of sale property in the goods is reserved to the seller. Can a buyer "create" a fixed charge over the goods at that time? Not until general property passes to the buyer, probably when the goods are used in manufacturing, is the charge final and complete. Nevertheless it has been held[4] that a fixed charge over goods to be acquired in the future is registrable immediately. Such a charge is "created" at the date of the contract as no further action by the chargor is necessary to activate the charge. The difficulty that may arise, though, is pinpointing the time at which the contract of sale was made. From that time the thirty one days for registration will run. In many cases it will be clear when a letter accepting an offer was posted. In others it will not be at all clear.

99 *Wheatley* v. *Silkstone and Haigh Moor Coal Co.* (1885) 29 Ch. D. 715.

1 *English and Scottish Mercantile Investment Co.* v. *Brunton* [1892] 2 Q.B. 700, C.A. *Quaere* whether noting of the restriction on the particulars delivered to the Registrar of Companies constitutes constructive notice.

2 These dogmatic statements belie the difficulties in the leading cases. See *Re Benjamin Cope & Sons Ltd.* [1914] 1 Ch. 800 and *Re Automatic Bottlemakers Ltd.* [1926] Ch. 421. See Gower, *Modern Company Law*. 4th Edn. (1979) p. 474.

3 Companies Act, s. 131(1).

4 *Independent Automatic Sales Ltd.* v. *Knowles* [1963] 3 All E.R. 27. See Gough, *Company Charges,* 1978 p. 229, and note 97 above.

Registration of retention of title clauses could also potentially cause administrative difficulties for the Registrar of Companies.[5] It is understood that in Singapore the Registrar considers each application to see whether the contract creates a registrable charge, and consequently a small number of title retention clauses have been duly registered. Registration of contracts on a large scale could, however, be a considerable burden for the Registrar.

Nevertheless registration does seem to be necessary from the seller's point of view in order to preserve his priority. It is also desireable on broader policy considerations. In *Bond Worth* [6] Slade J. saw the seller as "attempting to procure the creation in its own favour of what are in substance floating charges over several classes of present and future assets in Bond Worth's possession and control, without giving other creditors of the company the opportunity to acquire notice of such charges by registration." The English Review Committee on Insolvency Law and Practice in its 1982 Report[7] concluded that registration was desireable and should in addition be required in the case of *all* contracts for the sale of goods where title was reserved to the seller.[8] In the meantime the obligation to register only those provisions which constitute charges may be a considerable practical impediment to their effective use. The inconvenience of registering may be commercially unacceptable in a sale transaction. Conflicts with existing bank lenders, and a reduction in the buyer's creditworthiness, inhibiting future bank borrowing may also make registration highly undesirable for the buyer. The existing obligation to register, and any future statutory extension of the obligation to register, may well limit the effective use of retention of title clauses.

13. CONCLUSIONS

In allowing the seller the right to trace the proceeds of sale the *Romalpa* case was wrongly decided. No writer or court yet seems prepared to make such a statement.[9] Perhaps the House of Lords one day will have the opportunity to do so.

5 In Hong Kong the Registrar wrote to The Law Society (letter of 1st April 1980, though the date is not significant) suggesting that suppliers of raw materials reconsider their sale terms in the light of *Bond Worth* and *Borden.* The letter, expressly invited legal advisers to register such charges, and was circulated to all members of The Law Society. However the Registrar in London is "reported to have almost gone through the roof" (see Allcock *op.cit.* p. 51) and immediately following *Romalpa* refused to register contracts conferring a general floating charge (Parris, *op. cit.* p. 777). If a registrar does refuse registration it may be sufficient in order to protect any registrable charge to deliver the prescribed particulars to him. *N.V. Slavenburg's Bank* v. *Intercontinental Resources* [1980] 1 All E.R.955. (See Parris *op.cit.* p. 77).

6 At p671G.

7 Cmnd 8558, H.M. Stationery Office, London. See para. 1639.

8 The reform was not included in the more limited proposals of the 1984 White Paper, A Revised Framework for Insolvency Law, Cmnd. 9175, nor in the Insolvency Bill 1985.

9 Slade J. in *Bond Worth* at p. 662 E.F., thought it "scarcely suprising" that the Courts in *Romalpa* "found little difficulty" in finding a right to trace. Bridge L.J. in *Borden* at p. 681C did not "in any way question the correctness of the decision in Romalpa". In *Hendy Lennox,* at p. 498 D.F., Staughton J. suggests that *Romalpa* would be regarded as wrongly decided unless the decision implies that "some bailees and some agents do not occupy a fiduciary position."

The English and Scottish Courts however have consistently refused to follow this aspect of the case. They have commented that the Court of Appeal in *Romalpa* omitted to consider certain important authorities.[10] Recently, a court has said that the essential dicta in *Re Hallett's Estate,* relied upon in *Romalpa,* do not apply to agents selling on their own account.[11] It is but a short step further to say that *Romalpa* was wrongly decided.

The *Romalpa* case has, in any event, been effectively emasculated by holding that it is confined to its facts and has no wider application.[12] Furthermore the same facts are unlikely to recur as counsel for the receiver or liquidator is now unlikely to concede the essential fiduciary relationship. Finally the obligation to register a charge may render impracticable any attempt to obtain rights over proceeds of materials resold.

The case may, therefore, be of little real importance[13] unless a draftsman of a sales contract achieves a fresh breakthrough. However this seems unlikely. It has been demonstrated above that if conditions of sale include all the elements suggested by the courts as indicating a fiduciary relationship, a strange and unattractive hybrid transaction is created. While a court might hold that a buyer under such a contract owes a fiduciary duty, in good sense, the transaction cannot then also be a sale. Just as the courts have now said that a seller/buyer relationship is not *per se* fiduciary, so conversely if the bailee is a fiduciary the transaction may not be a sale. From this must flow many unpredictable consequences.

Sellers may thus be well advised to satisfy themselves with a simple clause retaining title over identifiable goods in the buyer's possession, and not to risk alarming their customers with more elaborate conditions of sale. An attempt to reserve or confer an interest in goods whose identity has changed, may be doomed to failure if unregistered. A right to trace proceeds of sale is only on firm ground if the buyer is genuinely prohibited from reselling the goods.

One wonders therefore what all the fuss was about. Did the *Romalpa* case really turn conventional insolvency law on its head? Was the flutter in the professional nests of lawyers, accountants and bankers justified?[14]

The case is an interesting example of how the law as perceived by professionals may be more important than the law as it actually is.

10 See *Bond Worth* at p. 661G.

11 *Re Andrabell* at p. 413e.

12 *Bond Worth* at p. 662F, and *Borden* at p. 681C. Robert Goff L.J. in *Clough Mill* (at p. 985g) stressed the need to take care in distinguishing the circumstances of each decided case.

13 Goodhart and Jones have said, (1980) 43 M.L.R. 489 at p. 508, "It seems that *Romalpa* may well be relegated to that limbo of cases treated as decided on 'special facts' and therefore to be ignored."

14 A similar flutter was caused in the offices of conveyancers by the case of *Law* v. *Jones* [1974] Ch. 112, which disturbed the conventionally understood meaning of "subject to contract." The difficulty was laid to rest when in *Tiverton Estates Ltd.* v. *Wearwell Ltd.* [1975] Ch. 146 the Court of Appeal declined to follow its earlier decision. (See Cheshire and Burn, *Modern Law of Real Property,* 13th Edn. (1982) at p. 112). It will now probably need a decision of the House of Lords or legislation to shift what remains of the *Romalpa* case.

We now have the benefit of the decisions of a number of courts, in which the sellers' claims have been almost universally unsuccessful. But one wonders in how many cases receivers and liquidators may have wrongly conceded claims by unpaid sellers on the basis of *Romalpa* clauses? The law as applied by receivers and liquidators is probably that laid down in the receivership and liquidation practice manuals of the large firms of accountants. These may possibly overstate the validity of *Romalpa* clauses if not recently updated.

The furore caused by the case, the quick response to it by the professions, the articles, leaflets and guidance statements so copiously written have perhaps unduly added to the influence of the case. The rash of publicity ensured the proliferation of *Romalpa* clauses and possibly persuaded practitioners that they should be regarded as effective.

The *Romalpa* problem appears to be increasingly arising in Singapore in contracts for the import of goods from overseas.[15] The fear of an unfavourable local precedent confirming the *Romalpa* case should not deter receivers here from the risk of litigation.

However, looking back over the last few years, the *Romalpa* episode does little credit to our system of law. "Like incrustrations on the hull of a ship, points of law tend to grow upon themselves."[16] While lawyers' sophistry may ultimately be defeated by common sense, the cost to the litigants is considerable. If the courts are in reality basing their decisions on unspecified policy considerations,[17] it would

15 Informal enquiries suggest that overseas sellers, especially Italian and German, are increasingly making claims on retention of title clauses in the involvency of Singapore buyers. Claims generally are settled in the receiver/liquidator's favour, but a number of disputed cases are currently outstanding in the local courts. It is clear that the costly burden of proving his case falls heavily upon the seller. Parris, *op. cit.* at pp. 162-3 says that a receiver or liquidator may apply to the court for a summons for directions. His costs will be a first charge on the assets, while the unpaid seller will have to suffer the expense of appearing on the summons. An unpaid seller's first move, he suggests, should be to seek an *ex parte* injunction to restrain the receiver from parting with possession of the goods or proceeds. If the receiver has sold or processed the goods he should take out a writ for damages for detinue and conversion against the receiver personally. This prospect, he says, is likely "to concentrate the mind of the receiver wonderfully." Lowe, [1984] *Litigation* 233 lists the five items of relief that the seller should claim in his writ against the buyer.

16 A comment by Henry Litton Q.C. in an editorial called 'The Sophistry of the Law', bemoaning the tendency for common sense in the law to become swamped by excessive citation of cases and technicality. See (1981) 11 H K.L.J. 289. In *Bond Worth* no less than 26 cases are referred to in the judgment and 65 were cited in argument during a hearing of 16 days. *Clough Mill* took five days at first instance and three on appeal.

17 Templeman L.J. in *Borden* at p. 684 G.H. thought that unsecured creditors, ranking after preferential creditors, receive a raw deal. But he saw no reason, why *Romalpa* creditors "should be favoured as against other creditors such as the suppliers of consumables and services." In *Re Andrabell* at p. 410e counsel for both parties urged the court to take into account "wider considerations," but Peter Gibson J. refused to favour either unpaid sellers or the unsecured creditors. However in *Clark Taylor & Co. Ltd.* v. *Quality Site Development (Edinburgh) Ltd.* [1981] S.L.T. 308 at p. 311 the Scottish Court said that if it were to validate a trust imposed on proceeds of sale "the damage which would be done to the objectives of the law of bankruptcy and of liquidation would be incalculable." In *Clough Mill* the Court of Appeal, in the words of Robert Goff L.J. was "treated to what I understand to be the common form appeal to the merits in cases of this kind," on the one hand suppliers who support tottering manufacturers for the ultimate benefit of banks secured by floating charges, and on the other "liquidators grappling with incomprehensible *Romalpa* clauses." His conclusion however derived "not from sympathy but from an analysis of the clause".

be far cheaper if the courts, or preferably Parliament, could clarify the situation. The atmosphere of uncertainty that pervades as buyers and sellers jockey for advantage is not conducive to the free flow of commercial affairs.

Reservation of title clauses raise many further issues that deserve consideration. There have been many proposals for modernisation of the laws on security over personal property.[18] The English Crowther Committee[19] in 1971 recommended a comprehensive system of filing of security interests. In the context of insolvency law the Cork Committee[20] in 1982 recommended public disclosure by registration of all reservation of title clauses, not merely of those constituting charges. It further proposed[21] a one year moratorium on the right to enforce reservation of title clauses so as to enable the receiver to more successfully sell the business as a whole free of the depredations of suppliers recovering goods sold. In the event the reforms in the Insolvency Bill 1985, before the English Parliament at the time of writing, were limited to a year's moratorium on enforcement following an administration order only.

Other issues include interesting questions as to the proper law of the contract in international sales.[22] To what extent is reservation of title relevant in transactions financed by documentary letters of credit? What are the priorities between the seller and a bank to whom the documents of title have been pledged by the buyer?[23] How does reservation of title affect factoring of accounts receivable?[24] What is the impact of reservation of title clauses on the statutory obligation to distribute the assets *pari passu* on winding up? And what public policy issues arise in this respect?[25] What other techniques for stocking finance are appropriate?[26]

The possible creation of new security rights not apparently requiring registration[27] highlights the vulnerability of the ordinary creditor in

18 See Goode, "The Modernisation of Personal Property Law", (1984) 108 L.Q.R. 234.

19 Report of the Committee on Consumer Credit, cmnd. 4596, at para. 5.7.47. The proposed registration system was to include security interests in all motor vehicles and all other pure personalty except consumer goods. See also para. 5.2.19 proposing a Lending and Security Act.

20 Cmnd. 8558, para. 1639-41.

21 Para. 1650.

22 See for example *Re Interview* above. Schmitthoff, *The Export Trade,* 7th Edn. (1980) proposes a draft choice of law clause at p. 53.

23 A case currently due for hearing in Singapore involves a seller overseas claiming goods under reservation of title, against a bank issuing letters of credit for their import, and claiming that the buyer had pledged the documents of title to it. Assuming the reservation of title is effective, the issue arises that the buyer as a non-owner may not be able to pledge the goods to the bank.

24 On factoring see note 69 at p. 97 above.

25 On the statutory obligation to distribute assets pari passu see Companies Act, s. 300. See also *British Eagle International Airlines Ltd.* \ *Compagnie Nationale Air France* [1975] 1 W.L.R. 758. See also discussion of the relationship between the *Romalpa* and the *Quistclose* lines of cases in (1980) 43 M.L.R. 489. For a recent case see *Carreras Rothman Ltd.* v. *Freeman Mathews Treasure Ltd.* [1984] 3 W.L.R. 1016.

26 See Peden, *Stock-in-Trade Financing,* 1974.

27 The trust concept is versatile. See for example *Re Kay ford Ltd.* [1975] 1 W.L.R. 279, and Farrar (1980) Co. Law 83 at p. 90. It is interesting that the trust receipt device enables an unpaid banker to release documents of title to

insolvency proceedings. All these issues, deserving of further consideration, cannot be dealt with in the course of a single article.[28]

ANDREW HICKS *

the importer, while preserving the pledge and security rights without actual possession, or registration. See *Import Trust Receipts in Victoria and Singapore,* Phang Sin Kat, 1982.

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APPENDIX — PUBLISHED ARTICLES, ETC.

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