

RETENTION OF TITLE – A THORN IN THE SIDE?

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1. Retention of title (“ROT”) disputes give rise to numerous problems including: (a) issues as to the incorporation of clauses; (b) issues as to the construction of clauses, and the related process of characterising or categorising such terms; (c) issues as to which claims an administrator of a company should allow, including claims to the goods supplied, including where the goods have been altered, mixed or manufactured into another form, and claims to proceeds of sub-sales; (d) issues as to impact of such clauses on third parties, in particular sub-purchasers; and (e) practical issues, including office-holder liability and procedural matters.

Policy Arguments

2. Before turning to matters of law and practice it is worth examining some of the policy issues. From an office-holders’ perspective ROT clauses are a thorn in the side. From the suppliers’ perspective they provide some relief in the event of the insolvency of a counterparty.
3. The two points of view were recorded by reference to the arguments of counsel (presumably towards the end of their submissions) in the case of *Clough Mill Ltd v Martin* [1985] 1 WLR 111, 121, by Robert Goff LJ: “We were treated in argument to what I understand to be the common form appeal to the merits in cases of this kind, Mr Henry [counsel for the seller] describing the unfortunate plight of suppliers of goods to manufacturers who, if in a poor financial position, are kept going by the suppliers for the benefit of debenture holders, usually banks, and Mr Blackburne [counsel for the liquidator] describing the difficulties of liquidators grappling with incomprehensible *Romalpa* clauses. I sympathise with both; though I am tempted to observe that the mechanism of the floating charge, upon which secured creditors are content to rely, is perhaps as much open to criticism as the mechanism of the retention of title clause, at which they now express their dismay.” The former point of view is there well-met by Lord Goff’s scepticism about the merits of all-encompassing debentures, including floating charges.
4. The latter point of view was famously encapsulated by Templeman LJ in *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25, 42: “Unsecured creditors rank after preferential creditors, mortgagees and the holders of floating charges and they receive a raw deal: see *Business Computers Ltd. v. Anglo-African Leasing Ltd.* [1977] 1 WLR 578, 580. It is not therefore surprising that this court looked with sympathy on an invention designed to provide some protection for one class of unsecured creditors, namely unpaid sellers of goods: see *Aluminium Industrie Vaassen B.V. v. Romalpa Aluminium Ltd.* [1976] 1 WLR 676, although there is no logical reason why this class of creditor should be favoured as against other creditors such as the suppliers of consumables and services.”
5. Since those seminal cases the Enterprise Act 2002 has revisited the entitlement of floating charge-holders and has subjected them to a “prescribed part” regime, whereby a percentage of the floating charge realisations have to be set aside for the unsecured creditors, up to a maximum of £600,000, so that the plight of the unsecured creditor is no longer so poignant: section 176A of the Insolvency Act 1986. Of course, successful ROT claimants are not unsecured so far as their claims are upheld. They have succeeded in withdrawing retained assets from the insolvent estate altogether.
6. Nevertheless the suppliers are still favoured by the limited legislative interventions which have been made in this context. The Continental view is that ROT provisions are a valuable weapon in the fight against dilatory payment of business accounts (such clauses are widespread throughout the EU and it is no coincidence that the seminal case of *Aluminium Industrie Vaassen B.V. v. Romalpa Aluminium Ltd.* [1976] 1 WLR 676 involved a Dutch precedent clause), and hence the topic appears in article 4 of Directive 2000/35/EC on combating late payment in commercial transactions.

7. Recital (21) of the Directive provides: "It is desirable to ensure that creditors are in a position to exercise a retention of title on a non-discriminatory basis throughout the Community, if the retention of title clause is valid under the applicable national provisions designated by private international law."
8. Article 2(3) defines retention of title as "the contractual agreement according to which the seller retains title to the goods in question until the price has been paid in full."
9. By article 4(1) the UK is subject to a curious requirement (much diluted from the draft Directive): "Member States shall provide in conformity with the applicable national provisions designated by private international law that the seller retains title to goods until they are fully paid for if a retention of title clause has been expressly agreed between the buyer and the seller before the delivery of the goods." The UK government did not consider that this required any changes to legislation (the rest of the Directive is reflected in the Late Payment of Commercial Debts (Interest) Act 1998 (as amended)), but it would constrain an argument that ROT provisions incorporated in a contract governed by the law of another Member State should not be enforced in the UK courts (perhaps on grounds such a public policy of the forum).
10. On 8 April 2009 the European Commission issued a proposal for a re-cast version of the Directive (albeit the ROT provisions would remain the same): COM 2009 126 Final; 2009/0054 (COD).

Incorporation

11. Many ROT disputes will turn on whether the seller has successfully incorporated its standard trading terms, including the ROT clause, into its relationship with the buyer. This threshold question should not be overlooked.
12. The first requirement is that the terms must be contained in a contractual document.
13. The most effective mode of evidencing that an agreement is in writing or has been reduced to writing or otherwise incorporating terms is by obtaining the signature of the other party on a contractual document to that effect. The other modes of incorporation of terms are: (a) taking steps to give reasonable notice of the terms; (b) demonstrating that terms have been incorporated in the parties' overall relationship by a course of dealing; and (c) proving that industry standard terms are reasonably available to each party and are the basis for their relationship. The last named mode is unlikely to apply in ROT cases.
14. The most significant development in incorporation is the development of a principle in the context of incorporation by notice that additional steps are required to draw particular attention to onerous or unusual terms, which in the absence of such further action will not be incorporated. ROT clauses are far from unusual, and it is debatable whether they are onerous. Nevertheless it is not uncommon to see extra steps being taken to draw ROT provisions to customers' attention, such as by bold and/or block capital statements on purchase acknowledgements and invoices.
15. Only one of the various modes of incorporation needs to be satisfied in any particular case, although in some cases the tests will work cumulatively in the same direction. Indeed on one view the various tests exist on a spectrum of possibilities, each evidencing consent to the documentary form of the contract: *SIAT di del Ferro v Tradax Overseas SA* [1978] 2 Lloyd's Rep 470, 490 (Donaldson J); *affd* [1980] 1 Lloyd's Rep 53 (CA).

A Contractual Document?

16. A first hurdle to overcome is whether the document is of a character that one that it could be reasonably expected would contain terms and conditions. Is it a contractual document? This can either be satisfied by actual knowledge of the receiving party that it contains terms or by an objective test: would the reasonable recipient expect it to contain conditions? This is relevant to all modes of incorporation.
17. A distinction has to be drawn between documents which effect or form part of the background to the formation of the contract, and post-contractual documents. The former are an obvious source of terms, whereas a court may conclude that the latter come too late to prove an argument of incorporation. In *Grogan v Robin Meredith Plant Hire* [1996] CLC 1,127, at 1,130 (CA) Auld LJ has drawn this distinction: “A document may have a contractual purpose as a contract making a document or in the execution of an existing contract. Documents such as a time sheet, an invoice or a statement of account are within the latter category. They do not normally have a contractual effect in the sense of the making or the varying of a contract.”
18. That may be an appropriate distinction to draw so far as ‘one off’ arguments about incorporation by signature or notice are concerned. It may go too far if the argument is that incorporation has arisen by a course of dealing or of industry standard terms. In that context both invoices and other administrative documents are often the basis of an argument of incorporation based on the parties’ practice. Whilst not a course of dealing case, a signature on time sheets was one of a number of factors favouring incorporation of the Construction and Plant-Hire Association terms in the earlier Court of Appeal case of *Thompson v T Lohan (Plant Hire) Ltd* [1987] 1 WLR 649, 653 (Fox LJ). In *Grogan v Robin Meredith Plant Hire* [1996] CLC 1,127, at 1,130 Auld LJ expressly doubted the relevance of these post-contractual documents. More cautiously Russell LJ (at 1,131) doubted a time sheet could have contractual effect “taken in isolation.”
19. Accordingly a contractual order form has been held to be contractual documents for the purpose of incorporation: *L’Estrange v F Graucob Ltd* [1934] 2 KB 394 (DC), where Scrutton LJ held that an ‘order form’ was usually a contractual document. In contrast, it may not always be safe to assume that invoices are contractual documents, unless it can be shown that there is a course of dealing or if they provide evidence of reasonable notice of the contractual terms. See *Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd’s Rep 427 below.

Incorporation by Signature

20. Where a party signs a document he gives his assent to all the terms in that document. It is irrelevant whether he has read or otherwise familiarized himself with its contents. The law was succinctly stated by Mellish LJ in *Parker v South Eastern Railway Co*: “In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents.” (1877) 2 CPD 416, 420. Cited with approval in *L’Estrange v F Graucob Ltd* [1934] 2 KB 394, 403 (Scrutton LJ) and 406 (Maugham LJ) (DC).
21. The leading case is still the decision of the Divisional Court in *L’Estrange v F Graucob Ltd* which was emphatically re-affirmed by Moore-Bick LJ in the Court of Appeal in *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, para [43]: “It is an important principle of English law which underpins the whole of commercial life; any erosion of it would have serious repercussions far beyond the business community.”

Incorporation by Reasonable Notice

22. The second alternative route of incorporation is by reasonable notice. This is the principal mode of incorporation for unsigned printed documents. It first came to prominence in the nineteenth century ‘ticket cases’, as the Industrial Revolution and the railway age made standard terms a feature of everyday life. In the leading case of *Parker v South Eastern*

Railway Co (1877) 2 CPD 416, 420 Mellish LJ stated: “Now if in the course of making a contract one party delivers to another a paper containing writing, and the party receiving the paper knows that the paper contains conditions which the party delivering it intends to constitute the contract, I have no doubt that the party receiving the paper does, by receiving and keeping it, assent to the conditions contained in it, although he does not read them, and does not know what they are.”

23. More recently, in *Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd’s Rep 427 the invoices each stated in small print at the bottom: “All business is transacted by the company under the current trading conditions of the [IFF] a copy of which is available on request.” This was, in the words of Bingham LJ, both “clear and legible” and “placed immediately below the price where the eye would naturally light on it.” (at 433). The exporters never requested a copy and none was sent. Having reviewed the authorities Taylor LJ concluded: “it is not necessary to the incorporation of trading terms into a contract that they should be specifically set out provided that they are conditions in common form or usual terms in the relevant business. It is sufficient if adequate notice is given identifying and relying upon the conditions and they are available on request.” (at 433).
24. A more cautious approach was suggested by Hobhouse LJ, who advised businesses who wish to avoid arguments of non-incorporation in *AEG (UK) Ltd Logic Resource Ltd* [1996] CLC 265 as follows: “There are simple procedures which can be followed to ensure that those problems do not arise. The most usual is to ensure that full copies of any conditions, including the latest edition of any conditions, is always sent as a matter of routine to any person with whom they are seeking to do business.”

Incorporation by a Course of Dealing

25. In commercial dealings the courts have long recognised that terms may be incorporated by a course of dealing. Where one party exhibits standard trading conditions on – often the reverse of – documents such as quotations, purchase orders, acknowledgement of order forms and invoices, and the other party does not demur, the relationship will be treated as conducted on that basis. This mode of incorporation is distinct from the signature and notice techniques. Critically it does not depend upon proof of actual knowledge of terms or constructive knowledge of terms by the other party.
26. In *Henry Kendall & Sons v William Lillico & Sons Ltd (on appeal from Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association)* [1969] 2 AC 31 Suffolk game and poultry farmers purchased animal meal from SAPPA, which proved to have a toxic ingredient. In the proceedings which followed a question arose as to the terms of the supply contract between SAPPA and its immediate suppliers, Grimsdale. Grimsdale’s sale notes contained a provision which allocated the risk of latent defects to the buyer. It was found that there had been three or four dealings each month over a three year period between these parties and that the issue of the sale notes had become a matter of routine. SAPPA had received over a hundred sold notes containing the condition without protest. It was held by the Court of Appeal and the House of Lords that these terms were incorporated.
27. In *SIAT di del Ferro v Tradax Overseas SA* [1978] 2 Lloyd’s Rep 470; affd [1980] 1 Lloyd’s Rep 53, 58 between 1967 and 1973 the sellers (or members of the same corporate group) sold cattlefood or corn trade commodities to the buyers subject to the rules of GAFTA, and on each occasion sent a standard form “Tradax confirmation note” which contained the company’s standard “documents clause.” This was signed and returned by the buyers on each of eighty-one occasions, save for the cargo in issue. Donaldson J, whilst accepting that the Tradax documents clause was “draconian” (at 495), held it was incorporated in the eighty-second contract between the parties. On every previous occasion the buyers had signed and therefore accepted the sellers’ confirmation note containing the Tradax documents clause. The sellers were entitled to assume that the buyers had failed to sign and return the confirmation note because of an oversight. Something positive was required to indicate rejection of the clause.

Incorporation of Trade Association Terms

28. In *Eastman Chemical International AG v NMT Trading Ltd* [1972] 2 Lloyd's Rep 25 the plaintiffs had entrusted goods in transit to the defendants. The goods were destroyed by fire caused by negligence. The defendants relied upon the conditions of the Road Haulage Association Ltd ('RHA'). The RHA terms were referred to, but not fully set out in, invoices rendered to the plaintiffs in dealings over a substantial period. Notwithstanding that the invoices were sent by a subsidiary of the defendants, it was held that the previous dealings were sufficient to incorporate them into the contract.
29. More recently, in *Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep 427 the question arose as to the incorporation of the Standard Trading Conditions of the Institute of Freight Forwarders ('IFF') (1981 edn). A consignment of ladies' dresses has been stolen as the result of the admitted negligence of a driver employed by the claimant freight forwarders. The claimant exporters counterclaimed for the value of the goods. The freight forwarders relied on the IFF terms, and in particular a condition which accepted liability for 'wilful neglect or default', but excluded liability for negligence and on a limitation clause based on the gross weight of the goods. Over the course of several years the exporter had received at least 11 invoices each of which referred to the IFF terms. This was held to be sufficient by the Court of Appeal.

Incorporation by Reference

30. It is entirely orthodox common law that a contractual document can incorporate by express reference terms in another document: *Parker v South Eastern Railway Co* (1877) 2 CPD 416.
31. A leading modern example of incorporation by reference of standard industry terms is the decision of the Court of Appeal in *Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep 427, 435. According to Bingham LJ: "whatever the rule in other jurisdictions, the clear rule of English law is that clear words of reference suffice to incorporate the terms referred to." The Court of Appeal unanimously rejected the trial judge's view that all the conditions needed to be set out on the document.
32. The same approach to incorporation by reference of a contractor's own standard terms should ordinarily prevail, but a note of caution is suggested by the decision of the Court of Appeal in *AEG (UK) Ltd Logic Resource Ltd* [1996] CLC 265. The seller's standard form confirmation of order stated in small print on the bottom of the front page: "Orders are subject to our conditions of sale – for extract see reverse." It was common ground that these were the seller's standard terms, but not industry standard clauses. The majority of the Court of Appeal held a particular provision requiring the buyer to bear the cost of transporting goods for repair was not incorporated, because it was not fairly brought to its attention. Whilst Hobhouse LJ was more cautious about this ground for the decision his Lordship was critical of the 'selected extracts' approach: "The extracts which they have chosen to print on the back of their acceptance document are at best highly selective and perhaps more fairly described as misleading. If they are going to quote clauses, then they must recognise that selective and misleading quotes may detract from the incorporation they are seeking to achieve." (at 277).

Unusual and Onerous Clauses

33. In the context of incorporation by notice more recent decisions have shifted the emphasis from the general to the particular. Rather than concentrating on the question whether a body of terms as a whole has been incorporated, the question has been whether a disputed clause is one which can be stigmatized as unusual or onerous, and which therefore requires greater steps to be taken before it is properly incorporated as a contractual term. This shift from the plural to the singular has in effect created a two-stage process for the incorporation of terms by notice. The first step requires "ordinary" reasonable notice for the document in question to be a source of terms. The second requires some further effort to be made to draw attention to terms which are "unusual" or "onerous."

34. The modern authorities draw inspiration from a famous remark of Denning LJ (as he then was) in *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461, 466 that “the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.”
35. The leading case is *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 where Dillon LJ thought there had been a shift in concern from incorporation of terms in a document as a whole, to focus on a particular provision: “More recently the question has been discussed whether it is enough to look at a set of printed conditions as a whole. When for instance one condition in a set is particularly onerous does something special need to be done to draw customers’ attention to that particular condition?” It was a “logical development” of the common law that the modern test should be: “that, if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party.” (at 438-9).
36. Similarly, Bingham LJ thought that to the extent to which the clauses were in common form the defendant could not object. However unusual clauses were different: “The tendency of the English authorities has, I think, been to look at the nature of the transaction in question and the character of the parties to it; to consider what notice the party alleged to be bound was given of the particular condition said to bind him; and to resolve whether in all the circumstances it is fair to hold him bound by the condition in question.”

Does the Interfoto Approach apply to Signed Contracts?

37. The question arises whether the *Interfoto* approach is confined to documentary terms which have been incorporated by notice or whether the principles enumerated in that case apply equally to documents incorporated by signature, or by a course of dealing. In English law the principle was rejected in respect of signed documents by the Employment Appeal Tribunal in *Peninsula Business Services Ltd v Sweeney* [2004] IRLR 49. See also *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] 2 Lloyd’s Rep 161. Contrast *Ocean Chemical Transport Inc v Exnor Craggs Ltd* [2000] 1 Lloyd’s Rep 446.

Application to Retention of Title

38. For a case in which an ROT supplier failed at the first hurdle of incorporation see *P4 Ltd v Unite Integrated Solutions plc* [2006] EWHC 2640 (TCC), paras [43] to [93]: failure to state on face of document: “For conditions, see back.”

Construction and Categorisation

39. Cases raising pure questions of construction involving ROT provisions appear to be rare. The modern approach to construing contracts is applied: *Clough Mill Ltd v Martin* [1985] 1 WLR 111, 115 (Robert Goff LJ): “We have to construe [the clause] as a whole, and in its contractual context.”
40. However, even if the obvious (commercial) purpose of the ROT clause is to provide security (more accurately, quasi-security) for the seller in the event of the buyer’s insolvency, that will not automatically lead to the conclusion that what has been created is a security interest (in the legal term of art sense).
41. More commonly, the issue in ROT cases is one of characterisation or categorisation.

Categories of Clause

42. First, what types of ROT clause or sub-clause are we concerned with?
43. The first choice is between “simple” clauses (title reserved until particular consignment of goods paid for) and the “all moneys” type (where property to all goods supplied is retained until all debts owed to seller are discharged). Virtually all the modern cases deal with the latter type, which has generally been successful where claims to the (unaltered) goods themselves are advanced.
44. Secondly, there are three principal “bolt-on” sub-clauses:
 - (a) a “tracing” clause which lays claim to resale proceeds;
 - (b) a “mixing” or “aggregation” clause which lays claim to the mixed or manufactured product to which the goods supplied have been added;
 - (c) a “following” or “extended” clause, which purports to extend the claim to the goods (or their product) in third party (sub-buyer) hands.
45. These three “bolt on” clauses have achieved only limited success in English law. However, famously, a “tracing” clause was given effect to in the seminal case.
46. In addition, there are various ancillary provisions common in practice:
 - (a) an express termination clause (perhaps automatic on buyer insolvency) or the specification of the payment term as of the essence, so that the sale is terminated and the buyer (or his insolvency practitioner) cannot simply tender the price and retain the goods;
 - (b) provision for the passage of risk (modifying section 20(1) of the Sale of Goods Act 1979 (“SOGA”) either on delivery or before;
 - (c) requirements for separate storage and/or identification of goods as the seller’s (often just “window dressing”);
 - (d) rights of entry onto land for the purposes of taking back possession.

Sales Law

47. Characterisation or categorisation takes place against the background of the legislative provisions.
48. First, the statutory codification of the law of sale: the Sale of Goods Act 1979 (“SOGA”).
49. SOGA section 17(1) provides that it is for the parties to determine when property will pass where goods are agreed to be sold. Section 17(2) is very permissive as to the available evidence, which may include post-formation evidence of intention (contrary to the general rule for the construction of contracts). Under SOGA the “property in the goods” is an abstract concept, which equates to ownership, and is entirely distinct from possession.
50. Section 19(1) then explicitly provides that the seller may “reserve the right of disposal of the goods until certain conditions are fulfilled”, with the remainder of the subsection making it clear that the “right of disposal” equates to the property in the goods.
51. Reservation of title has long been crucial in export and import sales as the remaining subsections make clear: sections 19(2) and (3).
52. The innovation of the *Romalpa* case (*Aluminium Industrie Vaassen B.V. v. Romalpa Aluminium Ltd.* [1976] 1 WLR 676) was that it made it clear that similar reasoning was

possible in all domestic commercial sales, no matter how limited the durability of the items supplied. Thus we have cases involving such transitory items as raw materials for manufacturing (starting with *Romalpa* itself) and foodstuffs (*Re Highway Foods International Ltd* [1995] 1 BCLC 209).

53. The leading House of Lords case (albeit in a Scottish appeal) stressed these statutory underpinnings for legitimate claims to recover the goods supplied, even where the clause was of the “all moneys” type: *Armour v Thyssen* [1991] 2 AC 339.

The Companies Legislation

54. However, since the important decision of Slade J in *Re Bond Worth Ltd* [1980] Ch 228 it has been clear that the most important exercise in characterisation/construction is whether the clause is a genuine *retention* of existing legal (and beneficial) title under the sales legislation, or whether what has been drafted involves the *creation* of a new security interest, usually identified as an equitable floating charge. The latter is, of course, permitted as a matter of law, but if not registered within 21 days of creation is for most purposes void under the companies legislation: Companies Act 2006, section 874 (and predecessors).

Claiming

The Goods

55. The first holding in *Aluminium Industrie Vaassen B.V. v. Romalpa Aluminium Ltd.* [1976] 1 WLR 676 (recovery of unprocessed foil) is sound.
56. The goods themselves can usually be repossessed if they can be identified with sufficient certainty, either because of distinctive packaging or marking, or because that supplier (or even perhaps a number of suppliers) is the only one of those goods to the buyer. The modern “all moneys” clause dispenses with the need to identify particular goods with particular contracts.

Proceeds and Products

57. Both “tracing” and “mixing” clauses, because they lay claim (not just to the original goods) but to the proceeds or products are generally held to cross the line (from retention to creation) because they lay claim to new assets or funds of assets. See *Re Bond Worth Ltd* [1980] Ch 228; *Compaq Computers Ltd v Abercorn Group Ltd* [1991] BCC 484 (“tracing” clauses/proceeds claims).
58. See also *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25; *Re Peachdart Ltd* [1984] Ch 131; *Clough Mill Ltd v Martin* [1985] 1 WLR 111 (“mixing” clauses and products claims). Mixing cases receive some sympathetic dicta in *Clough Mill*, but concerns about a “windfall” to the seller of one ingredient in the product loom large. For a recent case see *Re CKE Engineering Ltd* (Ch D Birm District Registry: decision of HHJ Norris QC: hearing on 14 September 2007).
59. Accordingly the second holding in *Aluminium Industrie Vaassen B.V. v. Romalpa Aluminium Ltd.* [1976] 1 WLR 676 itself (proceeds) looks suspect, but it is worth identifying why?

Bailment

60. Bailment is a red herring. It was conceded in *Romalpa*, but irrelevant in *Bond Worth*, because it is a legal concept and the draftsman there unwisely “retained” only equitable ownership.
61. The better view is that all buyers on ROT terms are bailees for the seller: section 20(3) of SOGA; *Clough Mill Ltd v Martin* [1985] 1 WLR 111, 116 (Robert Goff LJ).

62. The concession on bailment was not the error. It was the leap from there to a fiduciary relationship which was a major problem. Not all (indeed probably very few) bailees are also fiduciaries.

Fiduciary Relationship?

63. It should not be forgotten that the wrongdoer in *Re Hallett's Estate* (1880) 13 Ch D 696 was a solicitor entrusted with investments in documentary form (bonds), a million miles from a manufacturing company buying in foil as a raw material.
64. The law on fiduciary relationships and duties and tracing has developed considerably since 1976, perhaps reaching the twin pinnacles in *Bristol and West Building Society v Mothew* [1998] Ch 1 and *Foskett v McKeown* [2001] 1 AC 102.
65. In summary, it is very difficult now to persuade an English court that what looks like an “arms’ length” commercial sale is consistent with the stringency of the modern fiduciary duties of loyalty and confidence. Even use of the label “fiduciary” in ROT provisions is likely to be closely scrutinised, and obligations to segregate or ring-fence goods, products or proceeds treated with scepticism. Because this is an exercise in characterisation (not pure construction) it is submitted that the courts can look to what the parties did in practice (ignoring the subsequent conduct restriction): compare *Street v Mountford* [1985] AC 809 (leases and licences); *Agnew v IRC (Re Brumark Investments)* [2001] 2 AC 710, para [48] (fixed and floating charges).
66. See Mummery J in *Compaq Computers Ltd v Abercorn Group Ltd* [1993] BCLC 602, 612, stressing the importance of the contractual freedoms of the buyer to deal with goods in negating any fiduciary relationship.
67. Tellingly in *Re BA Peters plc* [2008] EWHC 2205 (Ch) [2008] BPIR 1180 (affd, but not appealed on this ground: [2008] EWCA Civ 1604; [2008] BPIR 1180) Nicholas Strauss QC, sitting as a Deputy High Court Judge, stated: “...it may be that, but for the original decision in the *Romalpa* case, all provisions of this kind would be treated as unregistered charges.” (Judgment of 22 July 2008, para [14])

Associated Alloys

68. In contrast to this analysis the High Court of Australia upheld the second holding in *Romalpa* earlier this decade in *Associated Alloys Pty Ltd v CAN001 452 106 Pty Ltd* (2000) 202 CLR 558, holding that a proceeds sub-clause gave rise to a trust equal to the sums owing to the supplier (over the proceeds of products!), and did not involve the creation of a registrable charge.
69. It is to be doubted whether this analysis would ever be followed in England, but it is likely that attempts will be made in the current downturn. Principally it is likely that the English courts will refuse to recognise a *via media* between genuine retention of title and the creation of a security interest, especially where it would involve an instrumental and unconvincing imposition of a fiduciary relationship on a purely commercial transaction.

Following: Sub-buyers

70. The exceptions to *nemo dat* (as codified in section 21(1) of SOGA) tend to be restrictively construed. Nevertheless many sub-buyers from buyers on ROT terms should be able to pray in aid the buyer in possession exception: section 9 of the Factors Act 1889/section 25 of SOGA. But contrast *Forsythe Int (UK) Ltd v Silver Shipping Co Ltd, The Saetta* [1993] 2 Lloyd's Rep 268.
71. However where both initial agreement to sell and the agreement to sell on to the sub-buyer are both on ROT terms it has been held that the initial supplier can re-possess the goods in the hands of a sub-buyer where neither has paid: *Re Highway Foods Int Ltd* [1995] 1 BCLC 209.

72. It is submitted that this may overlook the express or implied authority conferred on most ROT buyers to sub-sell, as recognised by the second exception in section 21(1) of SOGA. See now *Fairfax Gerrard Holdings Ltd v Capital Bank plc* [2008] 1 Lloyd's Rep 297, para [32] (Waller LJ) and *Re BA Peters plc* [2008] EWHC 2205 (Ch) [2008] BPIR 1180 (affd, but not appealed on this ground: [2008] EWCA Civ 1604; [2008] BPIR 1180) (Judgment of 29 April 2008, paras [87 and 88]).

ROT Clauses in Insolvency Legislation

73. ROT clauses are now encountered in most contracts for the sale of goods. It is a corollary of the fact that the effectiveness or otherwise of such clauses does not in any way turn on whether the particular buyer is a corporate entity or an individual sole trader that insolvency practitioners may be confronted with ROT clauses in either a personal insolvency context or a corporate insolvency context, depending on the type of buyer. The legislation which governs corporate insolvency is far more prescriptive on the topic of ROT clauses than the legislation which regulates personal insolvency procedures.
74. This part of the paper will therefore concentrate on the statutory and other provisions which deal with ROT clauses in corporate insolvency, and chief amongst those are the provisions contained in Schedule B1 to the Insolvency Act 1986 which regulate administrations and Schedule A1 to the Insolvency Act 1986 which regulate the interim moratorium in the case of proposed Company Voluntary Arrangements.
75. Further, and given the ever increasing rise in cross-border insolvencies, brief mention is also made at the end of this part of relevant provisions contained in the EC Regulation and the UNCITRAL Model Law which touch on ROT clauses.

ROT clauses and the Insolvency Act 1986

76. The expression "retention of title agreement" is specifically defined in the Insolvency Act 1986. Somewhat surprisingly, the definition is not contained in section 436 of the Act, which contains a list of definitions for expression appearing in both the corporate and personal parts of the act, but rather in section 251, which applies only to the First Group of Parts relating to Company Insolvency and Companies Winding-Up. The definition is as follows:
- "retention of title agreement" means an agreement for the sale of goods to a company, being an agreement –
- (a) which does not constitute a charge on the goods, but
- (b) under which, if the seller is not paid and the company is wound up, the seller will have priority over all other creditors of the company as respect the goods or any property representing the goods;"
77. ROT clauses are also specifically catered for in Schedule B1 of the Insolvency Act 1986 in relation to company administrations. Indeed, pursuant to paragraph 111(1) of Schedule B1, references in that schedule to a "hire-purchase agreement" are also to be taken as including a reference to "a conditional sale agreement, a chattel leasing agreement and a retention of title agreement".
78. Paragraph 1 of Schedule A1 on the Moratorium where the directors of a company propose a Voluntary Arrangement is in near identical terms to paragraph 111(1) of Schedule B1. Thus, any reference in Schedule A1 to the Insolvency Act 1986 to a "hire-purchase agreement" is taken to include reference to a retention of title agreement.
79. Save for the references to retention of title agreements in section 251, paragraph 111(1) of Schedule B1, and paragraph 1 of Schedule A1, there are no other references to "retention of

title agreements” anywhere in the Insolvency Act 1986. There are however material references to “hire-purchase agreements” in both Schedule A1 and in Schedule B1 (as to which, see below). There are no references to “retention of title agreements” anywhere in the Insolvency Rules 1986.

80. The word “goods” as it appears in the definitions of “retention of title agreement” and “hire-purchase agreement” is not itself defined in the Insolvency Act 1986. As suggested by the authors of *Corporate Administrations and Rescue Procedures*, 2nd Edition, 2004, in the event that a court did require a definition of the term “goods” it may well fall back on the definition contained in section 61(1) of the Sale of Goods Act 1979, which reads:

“goods” includes all personal chattels other than things in action and money, and in Scotland all corporeal moveables except money; and in particular “goods” includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale; and includes an undivided share in goods;”

Moratorium under Schedule A1 / Schedule B1

81. The effect of paragraphs 43(1),(3) & (6) and 44 of Schedule B1 of the Insolvency Act 1986 is that, once an application for an administration order is made or a notice to appoint an administrator has been filed or an administration has taken effect, a supplier of goods under an agreement which incorporates a valid ROT clause is prevented from taking any steps to repossess those goods which are still in the company’s possession, unless the administrator consents or the supplier obtains the leave of the court. For a recent decision in which a supplier sought the court’s consent to repossess goods, see *Fashoff (UK) Ltd v Linton* [2008] EWHC 537 (Ch); [2008] BCC 542. HHJ Toumlin QC, basing himself on the decision of the Court of Appeal in *In re Atlantic Computer Systems* [1992] Ch 505, dismissed the supplier’s application for leave in *Fashoff*.
82. Moreover, once a moratorium under Schedule A1 of the Insolvency Act 1986 has taken effect in relation to a company, a supplier of goods under an agreement which incorporates a valid ROT clause is prevented from taking any steps to repossess those goods which are still in the company’s possession by virtue of paragraph 12(1)(g) of Schedule A1. That paragraph allows for an application to be made to court in order to secure the court’s permission to repossess the particular goods; there doesn’t appear to be a provision which allow for the moratorium nominee to give his consent.

Office-holder’s Liability / Schedule A1 and Schedule B1

83. In order to fulfil one of the statutory purposes of administration as required by paragraph 3(1) of Schedule B1, it is overwhelmingly likely that an administrator will have to realise company assets; often, this will be in the context of a sale of the business, whereby the vast majority of the Company’s assets are sold to a third party. Insofar as either individual goods which the administrator sells, or in the case of a business sale, some of the assets included within the sale, are the subject of a valid ROT clause, such that the company was not actually the owner of the particular asset, there is a clear risk that it would, in selling the asset, commit a wrongful interference with the seller’s goods such as to give rise to liability in tort. The same scenario arises in the case of a liquidator disposing of the Company’s assets in order to perform his own statutory duties (cf *OBG Limited v Allan* [2007] UKHL, [2007] 2 WLR 920).
84. Section 234 of the Insolvency Act 1986 gives some limited protection to officeholders who have disposed of property which is not the property of the company, provided that the officeholder had “reasonable grounds for believing” that he was entitled to dispose of the particular assets (section 234(3) of the Act). As long as any loss or damage suffered by the third party has not been caused by the negligence of the office-holder, then the office-holder will not be liable for any such losses or damage (section 234(4) of the Act). In the event that an office-

holder suspects that a particular class of a company's assets are subject to an ROT clause, the office-holder would thus be well advised to seek legal advice on the issue.

85. It is open to an administrator to make an application to court under paragraph 72 of Schedule B1 to the Insolvency Act 1986 for an order that goods the subject of an ROT clause can be sold by the administrator as if they were not so subject. Such an order will only be made where the court considers that the disposal of the particular assets would be likely to promote the purpose of the administration (paragraph 72(2)(b) of Schedule B1) and that the order specifically requires the net proceeds of sale of those goods to be applied in favour of the ROT seller in order to discharge the liability under the ROT clause (paragraph 72(3) of Schedule B1). Schedule A1 to the Insolvency Act 1986 contains similar provisions which apply in the case that a moratorium is in force in relation to a company under the terms of that Schedule (see paragraphs 20(3), 20(5) and 20(6) of Schedule A1).

EC Regulation on Insolvency Proceedings 2000

86. It is worth noting that, in the event of a cross-border insolvency involving goods situated within a Member State of the European Union, the EC Regulation on Insolvency Proceedings makes specific provision in respect of ROT clauses contained in sale agreements. It does so in two respects.
87. Firstly, pursuant to Articles 4(2)(e) and (f), it is the law of the opening of the insolvency proceedings which will be used to determine both "the effects of insolvency proceedings on current contracts to which the debtor is party" and "the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending".
88. Secondly, Article 7 "Reservation of Title" contains specific rules which cater for the situation where the buyer of an asset has entered an insolvency proceeding. Article 7 is in the following terms:

"7(1) Proceedings not to affect seller's title reservation rights

The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the state of the opening of proceedings.

7(2) Insufficient grounds for rescission or termination

The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the assets sold is situated within the territory of a Member State other than the state of the opening of proceedings."

89. To the authors' knowledge, the provisions of Articles 2 and 7, insofar as they concern ROT clauses, have not been the subject of any judicial scrutiny either in England and Wales or by the European Court of Justice.
90. Article 7(1), which seems most relevant for these purposes, is a curious provision. It appears to contemplate a scenario whereby a supplier in an unspecified country supplies goods under a sale agreement which incorporates a valid ROT clause to a company whose COMI is in England and Wales, and that company prior to the commencement of proceedings, but after taking possession of the goods, has transferred the goods to another Member State, then the supplier's rights are not prejudiced. This raises more questions than it answers. What rights? In which country? How might those rights be affected?

The Cross-Border Insolvency Regulations 2006 / the UNCITRAL Model Law

91. The UNCITRAL Model Law on Cross-Border Insolvency has been in force in England and Wales since 4 April 2006 by virtue of the Cross-Border Insolvency Regulations 2006 (SI 1030/2006). As with the EC Regulation, the UNCITRAL Model Law also contains various provisions which deal with retention of title agreements in situations where office holders have become recognised in a country other than the country of the main proceedings.
92. The UNCITRAL Model Law mirrors Schedules A1 and B1 of the Insolvency Act 1986 insofar as the expression “hire-purchase agreements” includes retention of title agreements (see Article 2(k) of the Model Law).
93. The most material provision in the UNCITRAL Model Law that deals with ROT clauses is to be found in Article 22 – “Protection of creditors and other interested persons”. Article 22(1) comes into play when a foreign representative seeks to avail himself of the provisions of the UNCITRAL Model Law which are contained in Articles 19 and 21 which enable a court to grant substantive relief to the foreign representative. The effect of Article 22(1) is to impose a mandatory requirement on the court to satisfy itself that the interests of a supplier of goods who has the benefit of a valid ROT clause are adequately protected.
94. It is worth noting that Article 22(1) does not, in terms, go so far as to say that an ROT clause will necessarily be upheld or enforced, merely that the particular supplier’s rights must be adequately protected. So, for instance, in a situation where a company is being wound up in a non-Member State of the European Union, but has assets in England and Wales, so much so that the foreign representative seeks and obtains a recognition order in England and Wales, and thereafter seeks relief under Article 21 of the Model Law in relation to those assets, a supplier who claims ownership of those assets under a retention of title clause is likely to be, at a minimum, given notice of a relief application, but will not necessarily be successful in relying on the ROT clause, nor even that the validity or otherwise of the ROT clause will be determined by reference to the law of the *situs* of the assets.

**Professor Gerard McMeel, Guildhall Chambers
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May 2009**

APPENDIX A: STATUTORY MATERIALS

Factors Act 1889 (as amended)

1. Definitions.

For the purposes of this Act—

(1) The expression “mercantile agent” shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods:

(2) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf:

(3) The expression “goods” shall include wares and merchandise:

(4) The expression “document of title” shall include any bill of lading, dock warrant, warehouse-keeper’s certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented:

(5) The expression “pledge” shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability:

(6) The expression “person” shall include any body of persons corporate or unincorporate.

2. Powers of mercantile agent with respect to disposition of goods.

(1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

(2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

(3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

(4) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

...

8. Disposition by seller remaining in possession.

Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

9. Disposition by buyer obtaining possession.

Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner. For the purposes of this section—

(i) the buyer under a conditional sale agreement shall be deemed not to be a person who has bought or agreed to buy goods, and

(ii) “conditional sale agreement” means an agreement for the sale of goods which is a consumer credit agreement within the meaning of the Consumer Credit Act 1974 under which the purchase price or part of it is payable by instalments, and the property in the goods is to remain in the seller (notwithstanding that the buyer is to be in possession of the goods) until such conditions as to the payment of instalments or otherwise as may be specified in the agreement are fulfilled.

Sale of Goods Act 1979 (as amended)

17. Property passes when intended to pass.

(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

...

19. Reservation of right of disposal.

(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled; and in such a case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodian for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie to be taken to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

...

21. Sale by person not the owner.

(1) Subject to this Act, where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Nothing in this Act affects—

(a) the provisions of the Factors Acts or any enactment enabling the apparent owner of goods to dispose of them as if he were their true owner;

(b) the validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

...

24. Seller in possession after sale.

Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

25. Buyer in possession after sale.

(1) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(2) For the purposes of subsection (1) above—

(a) the buyer under a conditional sale agreement is to be taken not to be a person who has bought or agreed to buy goods, and

(b) “conditional sale agreement” means an agreement for the sale of goods which is a consumer credit agreement within the meaning of the Consumer Credit Act 1974 under which the purchase price or part of it is payable by instalments, and the property in the goods is to remain in the seller (notwithstanding that the buyer is to be in possession of the goods) until such conditions as to the payment of instalments or otherwise as may be specified in the agreement are fulfilled.

...

26. Supplementary to sections 24 and 25.

In sections 24 and 25 above “mercantile agent” means a mercantile agent having in the customary course of his business as such agent authority either—

(a) to sell goods, or

(b) to consign goods for the purpose of sale, or

(c) to buy goods, or

(d) to raise money on the security of goods.

Companies Act 2006

860 Charges created by a company

(1) A company that creates a charge to which this section applies must deliver the prescribed particulars of the charge, together with the instrument (if any) by which the charge is created or evidenced, to the registrar for registration before the end of the period allowed for registration.

(2) Registration of a charge to which this section applies may instead be effected on the application of a person interested in it.

(3) Where registration is effected on the application of some person other than the company, that person is entitled to recover from the company the amount of any fees properly paid by him to the registrar on registration.

(4) If a company fails to comply with subsection (1), an offence is committed by—

(a) the company, and

(b) every officer of it who is in default.

(5) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to a fine;

(b) on summary conviction, to a fine not exceeding the statutory maximum.

(6) Subsection (4) does not apply if registration of the charge has been effected on the application of some other person.

(7) This section applies to the following charges—

(a) a charge on land or any interest in land, other than a charge for any rent or other periodical sum issuing out of land,

(b) a charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale,

(c) a charge for the purposes of securing any issue of debentures,

(d) a charge on uncalled share capital of the company,

(e) a charge on calls made but not paid,

(f) a charge on book debts of the company,

(g) a floating charge on the company's property or undertaking,

(h) a charge on a ship or aircraft, or any share in a ship,

(i) a charge on goodwill or on any intellectual property.

861 Charges which have to be registered: supplementary

(1) The holding of debentures entitling the holder to a charge on land is not, for the purposes of section 860(7)(a), an interest in the land.

(2) It is immaterial for the purposes of this Chapter where land subject to a charge is situated.

(3) The deposit by way of security of a negotiable instrument given to secure the payment of book debts is not, for the purposes of section 860(7)(f), a charge on those book debts.

(4) For the purposes of section 860(7)(i), “intellectual property” means—

- (a) any patent, trade mark, registered design, copyright or design right;
- (b) any licence under or in respect of any such right.

(5) In this Chapter—

“charge” includes mortgage, and

“company” means a company registered in England and Wales or in Northern Ireland.

...

870 The period allowed for registration

(1) The period allowed for registration of a charge created by a company is—

(a) 21 days beginning with the day after the day on which the charge is created, or

(b) if the charge is created outside the United Kingdom, 21 days beginning with the day after the day on which the instrument by which the charge is created or evidenced (or a copy of it) could, in due course of post (and if despatched with due diligence) have been received in the United Kingdom.

(2) The period allowed for registration of a charge to which property acquired by a company is subject is—

(a) 21 days beginning with the day after the day on which the acquisition is completed, or

(b) if the property is situated and the charge was created outside the United Kingdom, 21 days beginning with the day after the day on which the instrument by which the charge is created or evidenced (or a copy of it) could, in due course of post (and if despatched with due diligence) have been received in the United Kingdom.

(3) The period allowed for registration of particulars of a series of debentures as a result of section 863 is—

(a) if there is a deed containing the charge mentioned in section 863(1), 21 days beginning with the day after the day on which that deed is executed, or

(b) if there is no such deed, 21 days beginning with the day after the day on which the first debenture of the series is executed.

...

874 Consequence of failure to register charges created by a company

(1) If a company creates a charge to which section 860 applies, the charge is void (so far as any security on the company’s property or undertaking is conferred by it) against—

- (a) a liquidator of the company,
- (b) an administrator of the company, and
- (c) a creditor of the company,

unless that section is complied with.

(2) Subsection (1) is subject to the provisions of this Chapter.

(3) Subsection (1) is without prejudice to any contract or obligation for repayment of the money secured by the charge; and when a charge becomes void under this section, the money secured by it immediately becomes payable.

Appendix B: Sample Retention of Title Clauses

The following sample retention of title clauses are drawn from the reported decisions of the English Courts in this area of the law:

***Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676** (current account / all monies clause upheld at first instance and on appeal; seller also entitled to trace proceeds)

"The ownership of the material to be delivered by A.I.V. will only be transferred to purchaser when he has met all that is owing to A.I.V., no matter on what grounds."

"Until the date of payment, purchaser, if A.I.V. so desires, is required to store this material in such a way that it is clearly the property of A.I.V. A.I.V. and purchaser agree that, if purchaser should make (a) new object(s) from the material, mix this material with (an)other object(s) or if this material in any way whatsoever becomes a constituent of (an)other object(s) A.I.V. will be given the ownership of this (these) new object(s) as surety of the full payment of what purchaser owes A.I.V. To this end A.I.V. and purchaser now agree that the ownership of the article(s) in question, whether finished or not, are to be transferred to A.I.V. and that this transfer of ownership will be considered to have taken place through and at the moment of the single operation or event by which the material is converted into (a) new object(s), or is mixed with or becomes a constituent of (an)other object(s). Until the moment of full payment of what purchaser owes A.I.V. purchaser shall keep the object(s) in question for A.I.V. in his capacity of fiduciary owner and, if required, shall store this (these) object(s) in such a way that it (they) can be recognized as such. Nevertheless, purchaser will be entitled to sell these objects to a third party within the framework of the normal carrying on of his business and to deliver them on condition that - if A.I.V. so requires - purchaser, as long as he has not fully discharged his debt to A.I.V. shall hand over to A.I.V. the claims he has against his buyer emanating from this transaction."

***In re Bond Worth Limited* [1980] 1 Ch. 228** (Slade J held that this clause created an equitable floating charge, which, on the facts of *Bond Worth*, was void against the creditors for non-registration under the Companies Acts)

"(a) The risk in the goods passes to the buyer upon delivery, but equitable and beneficial ownership shall remain with us until full payment has been received (each order being considered as a whole), or until prior resale, in which case our beneficial entitlement shall attach to the proceeds of resale or to the claim for such proceeds.

'(b) Should the goods become constituents of or be converted into other products while subject to our equitable and beneficial ownership we shall have the equitable and beneficial ownership in such other products as if they were solely and simply the goods and accordingly sub-clause (a) shall as appropriate apply to such other products.'

***Borden (U.K.) Limited v Scottish Timber Products Limited* [1981] 1 Ch 25** (the Court of Appeal held that no tracing remedy was available to the seller; after the resin supplied by the seller had been used in the buyer's manufacturing process, the seller's title ceased to exist)

"... (2) Risk and Property. Goods supplied by the company shall be at the purchaser's risk immediately on delivery to the purchaser or into custody on the purchaser's behalf (whichever is the sooner) and the

purchaser should therefore be insured accordingly. Property in goods supplied hereunder will pass to the customer when: (a) the goods the subject of this contract; and (b) all other goods the subject of any other contract between the company and the customer which, at the time of payment of the full price of the goods sold under this contract, have been delivered to the customer but not paid for in full, have been paid for in full."

***In re Peachdart limited* [1984] 1 Ch. 131** (Vinelott J concluded that, once the leather supplied by the seller had been appropriated to a particular handbag, the seller became entitled to a charge, which was void for want of registration)

"(a) The risk in the products shall pass to the buyer. (i) When the seller delivers the products in accordance with the terms to the buyer or its agent or other person to whom the seller has been authorised by the buyer to deliver the products or (ii) if the products are appropriated to the buyer but kept at the seller's premises at the buyer's request and the seller shall have no responsibility in respect of the safety of the products thereafter and accordingly the buyer should insure the products thereafter against such risks (if any) as it thinks appropriate. (b) However the ownership of the products shall remain with the seller which reserves the right to dispose of the products until payment in full for all the products has been received by it in accordance with the terms of this contract or until such time as the buyer sells the products to its customers by way of bona fide sale at full market value. If such payment is overdue in whole or in part the seller may (without prejudice to any of its other rights) recover or resell the products or any of them and may enter upon the buyer's premises by its servants or agents for that purpose. Such payment shall become due immediately upon the commencement of any act or proceeding in which the buyer's solvency is involved. If any of the products are incorporated in or used as material for other goods before such payment the property in the whole of such other goods shall be and remain with the seller until such payment has been made or the other goods have been sold as aforesaid and all the seller's rights hereunder in the products shall extend to those other goods. (c) Until the seller is paid in full for all the products the relationship of the buyer to the seller shall be fiduciary in respect of the products or other goods in which they are incorporated or used and if the same are sold by the buyer the seller shall have the right to trace the proceeds thereof according to the principles in *In re Hallett's Estate*. A like right for the seller shall apply where the buyer uses the products in any way so as to be entitled to payment from a third party."

***Hendy Lennox Limited v Grahame Puttick Limited* [1984] 1 WLR 485** (Staughton J held that the clause was effective to grant a valid proprietary claim to the engines, but not to the proceeds of sale of those engines)

"10. Payment . (i) The terms of payment specified overleaf or as stated on the official quotation and/or acknowledgment of order shall apply and if none be specified then payment in full shall be made at the time when the goods are ready for delivery. Unless the company shall otherwise specify in writing all goods sold by the company to the purchaser shall be and remain the property of the company until the full purchase price thereof shall be paid to the company. In the case of default in payment by the purchaser, the company shall have the right to retake possession of and permanently retain any unpaid for

goods and to revoke all liability of the company to the purchaser on the contract of sale and delivery of such goods. ...”

Clough Mill Ltd v Martin [1985] 1 WLR 111 (the Court of Appeal upheld the *Romalpa* clause)

“Condition 12 – Passing of Title”

"However, the ownership of the material shall remain with the seller, which reserves the right to dispose of the material until payment in full for all the material has been received by it in accordance with the terms of this contract or until such time as the buyer sells the material to its customers by way of bona fide sale at full market value.

"If such payment is overdue in whole or in part the seller may (without prejudice to any of its other rights) recover or resell the material or any of it and may enter upon the buyer's premises by its servants or agents for that purpose.

"Such payment shall become due immediately upon the commencement of any act or proceeding in which the buyer's solvency is involved.

"If any of the material is incorporated in or used as material for other goods before such payment the property in the whole of such goods shall be and remain with the seller until such payment has been made, or the other goods have been sold as aforesaid, and all the seller's rights hereunder in the material shall extend to those other goods."

Pfeiffer GmbH v Arbuthnot Factors [1988] 1 WLR 150 (Phillips J held that the clause, insofar as it applied to the proceeds of sale of the wine, created a charge which was void for want of registration)

"5. Property Reservation

The property reservation serves for the protection of all claims, which occur or which will occur in future from our business relation with our buyer, irrespective of there being a permanent payment account. The goods remain our property until payment has completely been effected for all obligations that occurred from the business relation with the buyer, including interests and costs and the like. The said payment shall be deemed to have been made when cheques and bills of exchange have been met and honoured in full. In case of mixing or production of a new good, we will become the owner, respectively the co-owner of the new product. Pledging or assignment by way of security of our goods before a complete payment has been effected, is not allowed. In case of pledging our goods by a third person or other prejudice of our rights, the buyer has to advise us immediately and has to protect our rights against the third person. The buyer is only allowed to dispose of the goods or to sell them in business operations carried out in due order and as long as there is no delay in payment. All claims that he gets from the sale or due to another legal reason regarding our goods, with all rights including his profit amounting to his obligations towards us, will be passed on to us. On demand the buyer is obliged to notify the assignment of the claim to give us in written all necessary information concerning the assertion of our claims and to deliver us all necessary documents. As long as he meets his obligations towards us, the buyer has the right with the expressly mentioned reserve of revocation at any time, to encash ceded obligations in his own name as our authorised agent and he may dispose of the ceded rights in the framework of business operations carried out in due order. In case of an inefficacy of the cession, we must be regarded as authorized and allowed to encash

the purchase price for the buyer and to make the necessary declaration for a legal business. In case of cash sales, the money that has come from a third person immediately becomes our own due to this, this money has to be separated from other money, it must be booked correspondingly, and must be administered until called for. If the buyer undertakes unusual dispositions, for example, selling-out, assignment by way of security or pledgings, when pledgings are made in his fortune, when he does not honour bills of exchange or he stops payments, all our set terms for payment will become due immediately. In this case the right for a sale of our goods and the abovementioned authorisation for disposal will be cancelled. If the buyer causes delays concerning his obligations, we have the right to take goods that are still in his stocks for our own without having to withdraw from the contract.”

Armour v Thyssen Edelstahlwerke A G [1991] 2 AC 339 (the House of Lords upheld the all-accounts *Romalpa* clause)

"All goods delivered by us remain our property (goods remaining in our ownership) until all debts owed to us including any balances existing at relevant times - due to us on any legal grounds - are settled. This also holds good if payments are made for the purpose of settlement of specially designated claims. Debts owed to companies, being members of our combine, are deemed to be such debts."

In the matter of CKE Engineering Limited (in Administration) [2007] BCC 975 (HHJ Norris QC found that the retention of title clause was valid)

“Condition 16

Until full payment has been received by the Company for all goods whatsoever supplied (and all services rendered) at any time by the Company to the Buyer

(a) property in the goods shall remain in the Company

(b) should the goods.... be converted into a new product whether or not such conversion involves the admixture of any other goods or thing whatsoever and in whatever proportions the conversion shall be deemed to have been effected on behalf of the Company and the Company shall have the full legal and beneficial ownership of the new products....

(c) the Buyer shall be at liberty to sell the goods and the new products..... in the ordinary course of business on the basis that the proceeds of sale shall belong to the Company

(d) the Company may at any time revoke the Buyer's power of sale by notice to the Buyer....

(e) the Buyer's power of sale shall automatically cease

(f) upon determination of the Buyer's power of sale..... the Buyer shall place the goods and the new products at the disposal of the Company.....”