CHAPTER 12

REMEDIES OF THE SELLER

1 ACTION FOR THE PRICE

The seller's right to bring an action for the price is described in s 49 of the Act in rather surprisingly restrictive terms. Section 49 states that he is entitled to do so only in two specified situations:

(1) where, under the contract of sale, the property in the goods has passed to the buyer, and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract (s 49(1));

(2) where, under the contract, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay the price (s 49(2)).

However, there are some other situations where the seller may sue for the price (see paragraph (c) below); so s 49 cannot be regarded as a complete statement of the law.

(a) Where the property has passed to the buyer (s 49(1))

For the seller to be able to sue for the price under this subsection, it is not sufficient that the property has passed to the buyer. The buyer must also have wrongfully neglected or refused to pay the price; and this neglect or refusal will not be 'wrongful' if the price is not yet due under the terms of the contract (eg where the seller has agreed to give credit), or if the seller is in breach of certain obligations on his part (eg where s 28 applies, to be ready and willing to give possession of the goods to the buyer in exchange for the price).

(b) Where the price is payable on a day certain irrespective of delivery (s 49(2))

If the contract stipulates a fixed date for payment, or a date that can be calculated by reference to some objective fact (eg 'seven days after arrival of ship'), irrespective of delivery, the seller can sue for the price even though the property has not passed, and even though no goods have yet been appropriated to the contract. Again, however, the buyer must have wrongfully neglected or refused to pay for the goods. The meaning of the phrase 'a day certain irrespective of delivery' was discussed in Workman Clark & Co Ltd v Lloyd Brazileño (below, p 435).
(c) Where the risk has passed

The draftsman appears to have overlooked the fact that there are some other situations, not covered by s 49, where the seller may sue for the price. The most obvious is where the risk has passed to the buyer before the property has passed and the goods are destroyed or lost in an event covered by the concept of ‘risk’: see Castle v Playford (above, p 332) and Manbre Saccharine Co Ltd v Corn Products Co Ltd (below, p 501).

(d) Other situations

However, in other situations where it might with justice have been held that the price was payable even though neither of the s 49 requirements had been complied with, the courts have held that the seller has only an action for damages for non-acceptance of the goods under s 50. The unsatisfactory consequence may then be, not only that the seller is kept out of his money for a long time, but that he is left with the goods on his hands and the burden of seeing to their disposal. These are cases where the buyer by his own wrongful act has prevented the price from becoming due and payable, such as the two following.

**Stein, Forbes & Co v County Tailoring Co**

(1916) 86 LJKB 448, King’s Bench Division

Stein Forbes contracted to sell sheepskins on CIF terms (see below, p 498) to County Tailoring, ‘Payment: Net cash against documents on arrival of the steamer’. The steamer arrived, but County Tailoring wrongfully refused to take up the documents or to pay the price. Atkin J held them liable in damages but not bound to pay the price.

**Atkin J** held that the defendants had been guilty of breach of contract, and continued: The material question that remains is as to the plaintiffs’ remedy. The plaintiffs have sued only for the price of the goods. Their counsel contended that they were entitled to the price, even though the property in the goods had not passed to the defendants, on the ground that here was a sum certain payable at a fixed time, and that, as the defendants had prevented delivery, they could not rely upon non-delivery. I do not think, however, that the plaintiffs can establish their claim on that footing. This is not the case of a day being appointed for payment of money, and the day happening before the thing which is the consideration for the payment. In such a case, which falls within one of the well known rules in the notes to Pordage v Cole [1669] 1 Wms Saund (1871 ed), 548 at 551, the money can be claimed before performance. Such a case is provided for by the Sale of Goods Act 1893, s 49, sub-s 2. But this is not a case where the price is payable on a day certain irrespective of delivery. On the contrary, it is payable expressly against delivery.

Counsel for the plaintiffs further said that the property had in fact passed to the defendants, and that, upon the plaintiffs being willing to transfer possession, they were entitled to the price. I think that there are many objections to this view. At what time property passes under a contract of sale depends upon the intention of the parties.

[His Lordship read ss 16 and 17, sub-s 1 of the Sale of Goods Act 1893, and continued:]

The Act provides certain rules for ascertaining the intention of the parties unless a different intention appears. Counsel for the plaintiffs contends that, as soon as the goods are unconditionally appropriated to the contract and the seller holds the documents at the disposal of the buyer, the property passes. The value of that proposition depends on the meaning of ‘unconditionally.’ I doubt whether
goods are appropriated unconditionally if the seller does not mean the buyer to have them unless he pays for them. But it seems to me impossible to lay down a general rule applicable to all CIF contracts. The overruling question is, ‘Does the intention of the parties appear in the course of the making and the fulfilment of the contract?’

[His Lordship read s 19 of the Sale of Goods Act 1893, and continued:]

In the present case the goods were shipped at New York on behalf of the plaintiffs, and the bill of lading was taken to the order of the banking firm which financed the transaction for the plaintiffs. On arrival of the ship the plaintiffs had to take up the bill of lading from the bankers, and, as the defendants would not take up the documents, the plaintiffs had to take delivery of the goods from the ship. It seems quite plain that the seller or his banker reserved the *jus disponendi*. It was said that the property passed to the buyer on shipment, and the seller only received his unpaid vendor’s lien. That view seems to me inconsistent with s 19 of the Sale of Goods Act 1893, and with every business probability.

Then it is said that, whatever the original intention may be, at any rate the property passes when there is an appropriation of specific goods, as by the invoice in this case and a tender or willingness to tender. It would be a remarkable intention in a commercial man to keep the property on shipment in order to secure payment, but yet in taking the necessary steps to procure payment by appropriation and tender to part with the property before payment is in fact made. I think that in such cases the ordinary inference to be drawn is that the seller does not intend to part with the property except against payment. It seems to me that this view is confirmed by the provision of s 19, sub-s 3 of the Act.

Unless the property has passed, I do not think that in this case the plaintiffs can sue for the price, and in my opinion it has not passed. The plaintiffs’ claim is, therefore, for damages.

*Colley v Overseas Exporters Ltd*

[1921] 3 KB 302, King’s Bench Division

Colley agreed to sell leather belting to the defendant company on FOB terms (see below, p 494). The contract obliged the buyers to nominate a ship on to which the seller was to make arrangements to load the goods, and provided that the price was to be paid when delivery was made to the ship. The buyers failed to nominate a ship, despite five abortive attempts, and the goods lay on the docks. It was held that the seller could not sue for the price, even though it was due to the buyer’s own default that the event which would have made the price payable under the contract had not occurred.

**McCardie J:** This action is brought... to recover the sum of £985 17s 4d alleged to be due from the defendants to the plaintiff as the price of goods. The only question is whether that liquidated sum is due. No question arises as yet as to damages against the defendants. The case raises a point of legal interest and practical utility as to the circumstances under which the purchase price of goods can be sued for. . .

The defendants committed no deliberate breach of contract; they suffered a series of misfortunes. They failed however to name an effective ship. The plaintiff on his part did all he could to carry out his obligations. Under these circumstances the plaintiff seeks to recover the price of the goods in question. The able argument of Mr Willes for the plaintiff rested on two well-known passages in the judgment of Lord Blackburn in *Mackay v Dick* ((1881) 6 App Cas 251). The first passage is this: ‘I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.’ The second passage is this: ‘It would follow in point of law that the defender having had the machine delivered
Chapter 12 Remedies of the seller

...to him, as by his contract to keep it, unless on a fair test according to the contract it failed to do the stipulated quantity of work, in which case he would be entitled to call on the pursuers to remove it. And by his own default he can now never be in a position to call upon the pursuers to take back the machine, on the ground that the test had not been satisfied, he must, as far as regards that, keep, and consequently pay for it. ‘I will consider later on the facts in Mackay v Dick. The contention of Mr Willes before me was that inasmuch as the defendants’ own fault had here prevented the goods from being put on board they were disabled from saying that the price, which would have been payable if and when the goods had actually been put on board, was not now due to the plaintiff. This is a novel and interesting submission . . .

...The circumstances . . . under which a claim to the price may be made (as distinguished from a claim of damages for breach of contract) are indicated in s 49 of [the Sale of Goods] Act.

[His Lordship read the section, and continued:] Here sub-s 2 of s 49 does not apply, as it apparently did in Workman, Clark & Co v Lloyd Brazileño ([1908] 1 KB 968), where the price was payable by stated instalments on stated dates. The parties before me here made no special agreement as to the payment of the price. Nor can it be said that sub-s 1 of s 49 applies here, for the property in the goods has not in fact and law passed to the buyer . . . Unless therefore the principle involved in the words of Lord Blackburn in the second passage cited from Mackay v Dick applies here the plaintiff will fail. Does the principle go to the extent submitted by Mr Willes? It is well to consider Mackay v Dick. The headnote says: ‘If, in the case of a contract of sale and delivery, which makes acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, the buyer prevents the possibility of the seller fulfilling the condition, the contract is to be taken as satisfied.’ If this headnote be given its full apparent effect then the principle it suggests would be most far reaching and the results extraordinary. The facts in Mackay v Dick must be remembered. Concisely put they were these. By a contract in two letters the seller agreed to sell and deliver at the buyer’s works a digging machine. The price of £1125 was payable after the machine had satisfactorily performed certain tests. If it failed to perform them the buyer was to remove the machine. The machine was actually delivered into the buyer’s possession. Owing however to the buyer’s own default it did not perform the tests. He refused to pay the price, and the seller thereupon brought his action for the £1125. The plaintiff succeeded on the principle stated by Lord Blackburn. It is to be clearly noted that a specific machine was fully deliverable by the seller to the buyer. Apparently the property in the machine actually passed to the buyer . . . Hence I think that the sale and delivery of the machine must in Mackay v Dick be deemed to have been complete, and payment of the price was therefore subject only to the ‘resolutive condition’ imposed by the clause as to the test: see Chalmers’ Sale of Goods, 8th ed, pp 6, 7, and the cases there cited as to resolutive conditions. Default by the buyer as to the test was proved, and thus the seller got his judgment for the price. The actual decision in Mackay v Dick does not therefore aid the plaintiff here. The real question is as to the extent to which the principle indicated by Lord Blackburn in the second passage I have quoted operates to make a price payable which, apart from that principle, would not be payable . . . In my opinion . . . no action will lie for the price of goods until the property has passed, save only in the special cases provided for by s 49, sub-s 2. This seems plain both on the code and on common law principle. I have searched in vain for authority to the contrary. A clear distinction exists between cases where the default of the buyer has occurred after the property has passed and cases where that default has been before the property has passed. To the former cases Mackay v Dick may be applied on appropriate facts. To the latter cases Mackay v Dick does not apply so as to enable the buyer to recover the price as distinguished from damages for breach of contract. To hold that Mackay v Dick applies where the property has not passed would lead to extraordinary results. Here the substantial allegation against the defendants is that their default prevented the plaintiff from passing the property and so entitling him to the price. Just the same default however would, in substance, have been committed if the defendants had repudiated the contract before the goods had been sent from Sheffield. So too every buyer who refuses to take delivery of unascertained
goods and thereby prevents the transference of property in them from the seller commits a similar default. If the ingenious contention of Mr Willes were correct it would be difficult to imagine a case of sale of goods, even though unascertained, to which Mackay v Dick would not apply.

It follows therefore for the reasons given that the plaintiff is not entitled to recover the price of the goods in question. If he desires to claim damages he must amend his writ. On the record at present before me he cannot ask for judgment.

Where by the terms of a contract of sale the price is to be paid by instalments, each payable 'on a day certain', each instalment of the price may be sued for as it becomes due: Workman, Clark & Co Ltd v Lloyd Brazileño [1908] 1 KB 968, CA—a case like Re Blyth Shipbuilding & Dry Docks Co Ltd (above, p 323), where the price of a ship to be built for the buyer was to be paid for by five instalments as the work progressed. In a case like this, we can see again the advantage of an action for the price, in comparison with a mere claim for damages: if the seller cannot sue for instalments of the price, when due, his position will be particularly onerous, as he will be left with an uncompleted ship and no source to look to to maintain his cash-flow.

(e) The right to interest on the price

Section 54 preserves any right that the seller may have, apart from the Act, to claim interest on the price. At common law, interest is payable only if the contract so provides; but the courts now have a wide statutory discretion to award interest in many cases, eg under the Supreme Court Act 1981, s 35A. In practice, interest is regularly awarded in commercial claims for debt. There is now also a statutory entitlement to interest under the Late Payment of Commercial Debts (Interest) Act 1998.

(f) Buyer’s right to reduction of price in consumer contracts

Under s 48C (introduced by the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, implementing Directive 1999/44/EC) a buyer who is a consumer may require the seller to reduce the price by an appropriate amount where goods have been delivered which do not conform to the contract and either it is not possible or practicable to replace or repair the goods or the seller has failed to replace or repair them after being required to do so: see below, p 486.

2 ACTION FOR DAMAGES FOR NON-ACCEPTANCE

The seller may bring an action against the buyer for damages for non-acceptance when the buyer has wrongfully neglected to accept and pay for the goods (s 50(1)). The buyer has a counterpart claim against the seller for damages for non-delivery (s 51(1)). Both sections then go on to state in similar terms the rule as to remoteness of damage which contract lawyers will recognise as the 'first rule' in Hadley v Baxendale (1854) 9 Exch 341: that the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the defendant party’s breach of contract (ss 50(2), 51(2)); and they then
continue with a statement of another well-known formula for the assessment of damages, the 'market price' rule (ss 50(3), 51(3)). For the action for damages for non-acceptance, this reads as follows:

Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept (s 50(3)).

Thus, the statutory rules restate principles which are part of the normal damages rules in the law of contract. But they go only so far: they do not, for instance, mention the 'second rule' in *Hadley v Baxendale*, which deals with claims for 'unusual' losses for which the buyer is deemed to have assumed liability by reason of special facts known to the parties at the time when the contract was entered into. In such cases, we must fall back on the common law.

The 'market price' rule is closely connected with the general principle that a party seeking damages is under an obligation to take steps to mitigate his loss. If, when the buyer refuses to accept the goods, there is a market where other buyers are ready to take them off the seller's hands and to pay the going price for them, he will have discharged his duty to mitigate if he disposes of the goods promptly to such a buyer. Looking at it the other way, if the seller does not do this and he is later able to obtain only a smaller price for the goods—perhaps because they have deteriorated, or because demand has fallen off—the buyer will rightly be able to argue that he should not be liable for the whole of the seller's loss because the opportunity to mitigate was not taken.

Section 50(3) will apply only if there is an 'available market' for the goods in question. (On the concept of a 'market', see RM Goode [1991] LMCLQ 177.) There have been various judicial definitions of this term. It is sufficient to quote one, from the judgment of Jenkins LJ in *Charter v Sullivan* [1957] 2 QB 117 at 128, CA:

I . . . will content myself with the negative proposition that I doubt if there can be an available market for particular goods in any sense relevant to s 50(3) of the Sale of Goods Act [ 1979] unless those goods are available for sale in the market at the market or current price in the sense of the price, whatever it may be, fixed by reference to supply and demand as the price at which a purchaser for the goods in question can be found, be it greater or less than or equal to the contract price.

In that case, the contract was for the sale of a new Hillman car, at a time when the retail price of all such cars was fixed by the manufacturers. The court held that in these circumstances s 50(3) should not be applied, since the price of Hillman cars was not free to fluctuate in response to supply and demand. Since demand for such cars then exceeded the supply available, and the seller had been able to resell the car for the same price within a few days, he had suffered no loss and was held entitled only to nominal damages. This case may be contrasted with *W L Thompson Ltd v Robinson (Gunmakers) Ltd* [1955] Ch 177, where once again the retail price of the car (a 'Vanguard') was fixed by the manufacturers, but at that time the supply of Vanguard cars exceeded the demand. This meant that when the buyer refused to accept the car the seller lost the profit on a sale, and he was awarded this sum as damages for loss of bargain. In *Lazenby Garages Ltd v Wright* [1976] 1 WLR 459, CA, it was held that there is no 'available market' for secondhand cars: the court took the rather surprising view that every secondhand car is a unique article, so that the measure of the seller's loss if the buyer refuses to accept is not reckoned by reference to a market price, but by the actual loss (if any) which the seller has sustained.

Section 50(3) states that the relevant market price is that available at the time of the failure or refusal to accept. It is also established by the cases that a similar test applies in regard to
the place of the relevant market: the court asks whether a market existed for goods of the contract description at the place where the buyer ought to have taken delivery, and uses as a yardstick the price prevailing on that market.

More complicated questions may arise where there is an anticipatory repudiation by the buyer which is accepted by the seller: although, once again, damages are prima facie to be assessed by reference to the market price at the time when the goods ought to have been accepted—ie the time fixed for delivery by the contract (s 50(3)), the seller’s duty to mitigate his loss may well place him under an obligation to resell the goods as soon as possible after he has accepted the buyer’s repudiation, if this takes place against the background of a falling market. (If the seller does not accept the repudiation, of course, he is under no duty to mitigate until an actual breach occurs: Tredegar Iron & Coal Co Ltd v Hawthorn Bros & Co (1902) 18 TLR 716.)

Further difficult issues may be encountered in the case of an international sale, where the buyer’s breach takes place after the goods have been shipped. If there is an available market for such goods ‘afloat’, to which the seller can have recourse, the price on this market will be appropriate; but if there is not, the first possible place where he will be able to dispose of them will be the port of arrival. (Section 50(3) is, after all, only a prima facie rule.) Thus, in Muller, MacLean & Co v Leslie & Anderson (1921) 8 Ll L Rep 328, the contract was for a consignment of padlocks FOB New York, to be shipped to India. The buyers wrongly refused to accept the shipping documents after the goods had been shipped. Damages were awarded to the sellers based on the market price in India at the time of the ship’s arrival.

Where, because there is no available market, s 50(3) does not apply, the court must fall back on the ordinary rules of the law of contract as to the assessment of damages, estimating the seller’s loss as best it can. If he has lost a profit on a retail sale, as in Thompson v Robinson (above), he can claim the amount of that profit. If he has resold to a substitute buyer at a lower price, the resale price will be at least prima facie evidence by which his loss can be calculated.

The seller will also be able to claim as damages the reasonable costs of reselling the goods and any incidental expenses, eg for storage, transport, etc. This is confirmed by s 37(1).

For a critical examination of the market price rule, see JN Adams ‘Damages in Sale of Goods’ (2002) JBL 553. We must remember also that the ‘market price’ formula is only a prima facie rule, which may not always be appropriate. In Bem Dis A Turk Ticaret S/A TR v International Agri Trade Co Ltd [1999] All ER (Comm) 619 a consignment of tapioca was to be shipped from Thailand to Turkey but importation was banned by the Turkish government, and the buyers told the sellers not to load the ship which they had chartered. The sellers successfully sued for the cost of cancelling the hire of the ship. The Court of Appeal rejected an argument that the market price rule should be applied.

### 3 SELLER’S RIGHT TO TERMINATE CONTRACT UPON BREACH OR REPUDIATION BY BUYER

If the buyer wrongfully fails or refuses to perform one or more of his obligations under the contract, this may be a breach or repudiation of the contract which will allow the seller to terminate the contract and treat himself as discharged from further performance. Whether
he can do so or not falls to be determined by normal contract principles. Thus, in *Bunge Corp v Tradax SA* [1981] 1 WLR 711, HL, the buyers were required by a term of the contract to provide a vessel and to give the sellers at least 15 days’ notice of the readiness of the vessel to load. They were four days late in doing so. It was held that this provision as to time was a condition, breach of which entitled the sellers to treat the contract as repudiated. A similar consequence would follow where the buyer is held to have been in breach of an intermediate or innominate term and the breach is regarded as serious.

4 REMEDIES OF AN UNPAID SELLER

(a) Introduction

In addition to the remedies described above, which are simply applications to the law of sale of ordinary principles of the law of contract, the Act confers additional remedies upon a seller who is unpaid. These are set out in s 39(2) as follows:

1. a *lien* on the goods or right to retain them for the price while he is in possession of them;
2. in the case of the insolvency of the buyer, a right of *stopping the goods in transit* after he has parted with the possession of them; and
3. a *right of resale*, as limited by the Act.

Section 39(2) states that an unpaid seller who is still the owner of the goods (ie where the property has not passed to the buyer) has rights analogous to the right of lien and stoppage in transit set out in s 39(1). This confirms that the rights of the seller in such a case are no less than they would be if the property had passed. It is arguable that he would in many circumstances be able to assert such rights anyway, by virtue of the fact that he is the owner of the goods; but the Act removes any doubts which there might be on the point.

The rights described in s 39(1) and elaborated in the rest of Part V of the Act are described as ‘rights against the goods’. In contrast with the seller’s rights to sue for the price and for damages, which are rights to proceed *in personam* against the buyer by way of a money claim in the courts, these rights give the seller powers, in the nature of self-help remedies, which he can exercise directly against the goods. For this reason, they are sometimes referred to as the seller’s ‘real’ remedies.

A seller is an ‘unpaid seller’ for the purposes of s 39 in the circumstances set out in s 38(1). This will be the case:

1. when the whole of the price has not been paid or tendered; or
2. when a bill of exchange or other negotiable instrument has been received by the seller as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

By s 38(2), certain other persons are given the same rights as the seller—an agent of the seller to whom a bill of lading respecting the goods has been indorsed, and a consignor or agent who has himself paid or is directly responsible to the buyer for the price.

The question whether a seller is ‘unpaid’ turns simply upon the *fact* whether payment has been made (or tendered) or not: it is not concerned with the rights and wrongs of the situation, such as whether payment is actually due. A seller who has agreed to allow his buyer
credit is thus an unpaid seller, even during the time when the period for credit is still running. Note also (1) that a seller is ‘unpaid’ so long as any part of the price is outstanding, and (2) that if payment has been tendered, this is treated as equivalent to payment, so that a seller who has refused to accept payment when tendered will lose his unpaid seller’s remedies.

Where the seller has accepted a cheque or other negotiable instrument in payment of the price, the normal understanding is that he receives it as a conditional payment, rather than in satisfaction of the buyer’s obligations. In this case, his remedies as an unpaid seller are suspended while the instrument is current, but revive if the instrument is dishonoured, or if the buyer becomes insolvent.

(b) Unpaid seller’s lien

The unpaid seller’s right of lien is his right, if he is in possession of the goods, to retain possession of them until the price is paid or tendered (s 41(1)). A lien is thus a form of possessory security. As discussed more fully in Chapter 23, it is a right to retain goods which are already in the party’s possession (in contrast with a pledge, which is based on a delivery of possession). Not every unpaid seller may claim a lien. The right arises in the following cases (s 41(1)):

(1) where the goods have been sold without any stipulation as to credit;
(2) where the goods have been sold on credit but the term of credit has expired;
(3) where the buyer becomes insolvent.

The seller may assert his lien even though he is in possession as the buyer’s bailee or agent (s 41(2)).

A seller has a right of lien even though part only of the price is unpaid (s 38(1)(a)); and he may exercise his lien (for the whole price, if appropriate) against part only of the goods, if he has already delivered the rest to the buyer, unless he is held to have waived his lien (s 42).

An unpaid seller loses his lien in three circumstances (s 43(1)):

(1) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods;
(2) when the buyer or his agent lawfully obtains possession of the goods;
(3) by waiver.

In addition, of course, he will lose his lien if the price is paid or tendered to him; but not by reason only that he obtains a judgment for the price (s 43(2)).

Section 43(1) underlines the essential nature of the lien as a right to retain possession: if the unpaid seller parts with the goods, he cannot reassert his lien even if he gets back possession: Valpy v Gibson, below. He may also lose his lien by delivering the goods to a carrier for the purpose of transmission to the buyer, unless he ‘reserves the right of disposal’—a phrase which, as we saw in relation to s 19 (above, p 345), most often refers to a seller who ships goods and takes the bill of lading in his own name.

Valpy v Gibson

(1847) 4 CB 837, Court of Common Pleas

Brown, a merchant in Birmingham, bought cloth from Gibson. Gibson sent the cloth to Leech, Harrison & Co, shipping agents, at Liverpool, in four cases marked for shipment to
Valparaiso, requesting Leech & Co to put them on board as directed by Brown. After the goods had been loaded on to a ship, Brown’s agent, Alison, ordered them to be returned to Gibson to be repacked in eight cases instead of four. Gibson was still in possession of the goods, and unpaid, when Brown was declared bankrupt. It was held that it was too late for Gibson to claim an unpaid seller’s lien.

The judgment of the court (Wilde CJ, Coltman, Maule and Cresswell JJ) was delivered by Wilde CJ: The right which it was contended the defendants had, as vendors in the actual and lawful possession of the goods, on the insolvency of the vendee, cannot, we think, be sustained. The goods being sold on credit, and the complete property and possession having vested in Brown, they became his absolutely, without any lien or right of the vendors attaching to them, any more than on any other property of Brown; and their delivery to the defendants to be re-packed, could not have the effect of creating a lien for the price, without an agreement to that effect. We therefore think there must be judgment for the plaintiffs.

Section 43(1) has to be read in conjunction with s 47, which describes other situations in which an unpaid seller will lose his right of lien. (Section 47 also applies to the unpaid seller’s right of stoppage in transit (below, p 443).) There is a further overlap: s 47 links in also with s 25(1) and the almost identical Factors Act 1889, s 9 (concerning sales by a buyer in possession), which we discussed as an exception to the nemo dat rule (see above, p 381). Section 47 is concerned with the effect on the unpaid seller’s real remedies of a sub-sale or other disposition of the goods made by the buyer. It reads:

1. Subject to this Act, the unpaid seller’s right of lien or retention or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented to it.
2. Where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes it in good faith and for valuable consideration, then
   a. if the last-mentioned transfer was by way of sale, the unpaid seller’s right of lien or retention or stoppage in transit is defeated; and
   b. if the last-mentioned transfer was made by way of pledge or other disposition for value, the unpaid seller’s right of lien or retention or stoppage in transit can only be exercised subject to the rights of the transferee.

Note that in the Act of 1893, s 47 was not divided into subsections; instead, what is now s 47(2) appeared as a proviso to the general rule now stated in s 47(1).

Section 47(2) deals with the position when the seller has delivered or transferred a ‘document of title’ to the buyer. (For the definition of this term, see above, p 380.) It is important to note that the mere fact that the seller has handed a document of title to the buyer will not of itself affect the seller’s rights of lien and stoppage: there must be two ‘transfers’ of the document before s 47(2) can apply.

Mordaunt Bros v British Oil and Cake Mills Ltd illustrates the general proposition stated in s 47(1), while Mount v Jay throws light on the two exceptions referred to in s 47: assent of the seller (s 47(1)), and the transfer of a document of title (s 47(2)(a)); however, on the special facts of the case, the wording of s 25(1) proved to be more appropriate than that of s 47(2) (a).
Mordaunt Bros v British Oil and Cake Mills Ltd
[1910] 2 KB 502, King's Bench Division

BOCM contracted to sell various lots of boiled linseed oil to Crichton Bros, who resold it to Mordaunts. Mordaunts had paid Crichtons all or most of the price of their purchases. Possession remained with BOCM, who had not been paid by Crichtons. Delivery orders had been sent by Crichtons to BOCM, directing BOCM to deliver to Mordaunts an amount of oil appropriate to each contract, which BOCM usually acknowledged and recorded in its books. It was held that these acts did not constitute an 'assent' by BOCM to the resale for the purposes of s 47(1).

Pickford J: It was next argued that the plaintiffs were entitled to succeed by virtue of s 47 of the Sale of Goods Act 1893, on the ground that the defendants had assented to the sales by Crichton Brothers to the plaintiffs. Several cases were cited in which it was held that unpaid vendors had assented to sub-sales so as to preclude themselves from asserting their right of lien. As a matter of fact all those cases related to sub-sales of specific goods. I am not, however, going to decide that s 47 has no application to unascertained goods; but I wish to point out that such acts as presenting to an unpaid vendor delivery orders in favour of sub-purchasers and the entry accordingly of the names of the sub-purchasers in the books of the unpaid vendor may have a different effect according as the goods are specific or unascertained. In the former case it may be more readily inferred that the unpaid vendor has assumed the position of an agent or bailee holding the goods for and on behalf of the sub-purchaser or holder of the delivery order, and the acceptance of the delivery order and entry of the holder's name in the books by the unpaid vendor might in the case of specific goods justify the inference that the unpaid vendor had accepted that position. No such inference could be drawn if the goods were not in existence, and it does not follow that because the inference may be drawn in the case of specific goods it will also be drawn in the case of goods in existence but unascertained. In my opinion the assent which affects the unpaid seller's right of lien must be such an assent as in the circumstances shews that the seller intends to renounce his rights against the goods. It is not enough to shew that the fact of a sub-contract has been brought to his notice and that he has assented to it merely in the sense of acknowledging the right of the purchaser under the sub-contract to have the goods subject to his own paramount right under the contract with his original purchaser to hold the goods until he is paid the purchase-money. Such an assent would imply no intention of making delivery to a sub-purchaser until payment was made under the original contract. The assent contemplated by s 47 of the Sale of Goods Act 1893, means something more than that; it means an assent given in such circumstances as shew that the unpaid seller intends that the sub-contract shall be carried out irrespective of the terms of the original contract.

Now in the circumstances of this case what was the effect of the inquiry by the plaintiffs whether the delivery orders of Crichton Brothers were 'in order' and the defendants' reply that they were? I think some light is thrown on the nature and purpose of this inquiry by the fact that the plaintiffs parted with their money before making the inquiry. Neither party regarded those inquiries as directed to the questions whether the defendants were to hold the oil as agents for the plaintiffs, renouncing any rights they might have to hold the goods till they were paid for by Crichton Brothers, and whether they were prepared to deliver to the plaintiffs, renouncing any rights they might have in respect of them. Whatever might have been the effect of such an inquiry and answer in a case where specific goods were in question, I think in the present case where the goods were unascertained the inquiry and answer amounted to no more than this—that the defendants were ready to carry out the contract between themselves and Crichton Brothers with this modification, that delivery should be made to the plaintiffs instead of to Crichton Brothers, but that the delivery should be subject to all the other terms and incidents of the contract with Crichton Brothers.
Chapter 12 Remedies of the seller

DF Mount Ltd v Jay & Jay (Provisions) Co Ltd
[1960] 1 QB 159, Queen's Bench Division

(For the facts and another part of the decision, see above, p 387. This part of Salmon J’s judgment is concerned with the question of ‘assent’.)

Salmon J: The case raises the familiar problem—which of two innocent persons, the plaintiffs or the defendants, shall suffer for the trickery of a rogue.

The plaintiffs rely first on s 47 of the Sale of Goods Act 1893.

[His Lordship read s 47, and continued:]

There is a proviso to the section, with which I shall deal in a moment. The plaintiffs contend that the defendants assented to the sale or disposition of the 250 cartons by Merrick to the plaintiffs, and thereby lost their right as unpaid sellers to the lien which they would otherwise have had upon the cartons. The defendants contend that if they assented to the sub-sale by Merrick, their assent was not an assent within the meaning of s 47, and rely upon Mordaunt Bros v British Oil and Cake Mills Ltd [above]. It is clear from Pickford J’s judgment in that case that the assent contemplated by s 47 means ‘an assent given in such circumstances as show that the unpaid seller intends that the sub-contract shall be carried out irrespective of the terms of the original contract’ and must be ‘such an assent as in the circumstances shows that the seller intends to renounce his rights against the goods.’ Pickford J held that there had been no such assent on the part of the sellers.

The facts of that case are, however, very different from those of the present case. There the sellers had at no time any reason to doubt the buyer’s ability to pay, and were not informed of the sub-sale until after the sale was effected. Pickford J held that the sellers had assented to the sub-sale merely in the sense that they acknowledged its existence and the right of the sub-buyer to have the goods subject to their own paramount rights under the contract with the original buyer to hold the goods until paid the purchase price.

In the present case the defendants were anxious to get rid of the goods on a falling market. They knew that Merrick could only pay for them out of the money he obtained from his customers, and that he could only obtain the money from his customers against delivery orders in favour of those customers. In my view, the true inference is that the defendants assented to Merrick reselling the goods, in the sense that they intended to renounce their rights against the goods and to take the risk of Merrick’s honesty. The defendants are reputable merchants and I am sure that it was not their intention to get rid of their goods on a falling market through Merrick on the basis that, if he defaulted, they could hold the goods against the customers from whom he obtained the money out of which they were to be paid…. [His Lordship then expressed the view that it was immaterial that the goods were unascertained: see above, p 388.]

[Salmon J also upheld a second argument that Mount was entitled to succeed under s 25(1) (see above, p 387), since Merrick, the first buyer, had received a document of title from Jays and had delivered a second document of title to Mount. It would not have been possible for Mount to rely on the similar provision in s 47(2), however, because the language of s 47(2) is clearly restricted to the case where the same document of title is transferred to the sub-buyer.]

QUESTIONS

1. Is it reasonable to suppose that the draftsman of the Act intended s 25(1) to be construed differently from s 47(2)?
2. Both the cases cited above accept that s 47(2) can apply to a sale of unascertained goods, which have at no stage been appropriated to the contract. Section 39(2) may give some support to this view. But could not Jays have responded to Mount’s demand simply by saying that whatever peaches were still in their hands were their own property, to do what they liked with? Is the decision in Mount v Jay consistent with s 16? (On this point, see the contrasting arguments of AGL Nicol (1979) 42 MLR 129 and RM Goode Proprietary Rights and Insolvency in Sales Transactions (2nd edn, 1989), pp 64–68.)

3. What would have been the position if Jays had become insolvent after Merrick had sub-sold to Mount and the goods had remained unascertained?

(c) Seller’s right to stop the goods in transit

Sections 44–46 set out the second of the unpaid seller’s ‘real’ remedies: to stop the goods if they are still in transit to the buyer, before they have actually reached him. For this remedy to be available, it is not sufficient that the seller should be ‘unpaid’; the buyer must also have become insolvent. (For the definition of ‘insolvent’, see s 61(4), which makes it plain that it is ‘commercial’ or ‘cash-flow’ insolvency that matters, and not the buyer’s asset position. On insolvency generally, see below, Chapter 27.)

In the Act of 1893, the Latin phrase ‘in transitu’ was used. The anglicised version was introduced in 1979.

When a seller delivers possession of the goods to a carrier for transmission to the buyer and does not reserve the right of disposal, he loses his lien (s 43(1)(a)). The right of stoppage enables him to resume possession of the goods, at any time during the period that they are in transit, thus allowing him to exercise rights similar to those that he would have under a lien. Once again, s 39(2) confirms that it is immaterial whether the property in the goods has passed to the buyer or not.

The function of the ‘carrier’ may involve any form of transport: ship, rail, road, air, or a combination of methods.

Section 45 sets out the rules which define the duration of the transit and defines the events in which it will terminate and put an end to the seller’s right of stoppage. These events are:

1. delivery of the goods by the carrier to the buyer or his agent, whether after they have arrived or before they have reached the appointed destination (s 45(1), (2));
2. attornment by the carrier to the buyer or his agent after they have reached the appointed destination (s 45(3));
3. a wrongful refusal by the carrier to deliver the goods to the buyer or his agent (s 45(6)).

A delivery of part of the goods does not prevent the seller from exercising his right of stoppage against the remainder, unless the part delivery indicates an agreement to give up possession of the whole of the goods (s 45(7)).

If the buyer rejects the goods and they remain in the possession of the carrier, the transit is deemed to continue, even though the seller has refused to take them back (s 45(4)).

Section 46 describes how the right of stoppage is effected, and defines the obligations of the carrier and the seller in the circumstances. The seller must either take actual possession of the goods, or give notice of his claim to the carrier or other person who has possession of the goods, either directly to that person or to his principal (s 46(1)–(3)). The carrier must then redeliver the goods to the seller at the latter’s expense (s 46(4)).
Chapter 12 Remedies of the seller

The seller’s right of stoppage is not affected by any subsale which the buyer may have made, unless a document of title has been transferred to the buyer and from him to the subpurchaser, in circumstances which bring into play the provisions of s 47(2) (which has been discussed above, p 440 in the context of the unpaid seller’s lien). The following cases illustrate the exercise of the seller’s right of stoppage.

The Tigress
(1863) 32 LJPM & A 97, Court of Admiralty

Lucy & Son had sold Bushe wheat which was at sea aboard the Tigress, and had endorsed one copy of the bill of lading to Bushe, although they had not been paid. Bushe had become bankrupt while the wheat was still on board. Lucy & Son, purportedly exercising their right of stoppage, directed the master to deliver the wheat to themselves, and tendered payment of the freight. The ship’s master refused to deliver the wheat to Lucy & Co without proof that the wheat belonged to them. It was held that he was wrong to do so: he had to assume that the seller was acting within his rights.

Dr Lushington: ... All that is necessary is for the vendor to assert his claim as vendor and owner. Were it otherwise, were the vendor obliged formally to prove his title to exercise the right of stoppage in transitu, that right would be worthless; for the validity of a stoppage in transitu depends upon several conditions. First, the vendor must be unpaid; secondly, the vendee must be insolvent; thirdly, the vendee must not have indorsed over for value. But the proof that these conditions have been fulfilled would always be difficult for the vendor—often impossible; for instance, whether the vendor is or is not unpaid may depend upon the balance of a current account; whether the vendee is insolvent may not transpire till afterwards, when the bill of exchange for the goods becomes due. And, lastly, whether the vendee has or has not indorsed the bill of lading over, is a matter not within the cognizance of the vendor. He exercises his right of stoppage in transitu at his own peril, and it is incumbent upon the master to give effect to a claim as soon as he is satisfied it is made by the vendor, unless he is aware of a legal defeasance of the vendor’s claim. Such, according to my opinion, is the law as laid down by Lord Campbell, in Gurney v Behrend ((1854) 3 E & B 622). Lord Campbell uses these words: ‘Prima facie the defendants had a right to stop the wheat, for it was still in transitu, and they were unpaid vendors. The onus is on the plaintiffs to prove that they had become the owners, and that the right to stop in transitu was gone.’ Moreover, I find that the indemnity set out as an exhibit to the petition, and stated in the petition to have been presented to the master, recites that Bushe is the holder of the bill of lading, and claims the wheat under it. So that, in fact, the master had full knowledge of all the circumstances at the time. The defendant then further objects thus: assuming the plaintiffs had a right to stop in transitu, and duly asserted that right, yet the master was guilty of no breach of duty in refusing to deliver; he simply is retaining the custody of the wheat for the right owner, as soon as the claim shall be established. Now to this argument I cannot accede; for I think there are cases without number to shew that the right to stop means the right not only to countermand delivery to the vendee, but to order delivery to the vendor. Were it otherwise, the right to stop would be useless, and trade would be impeded. The refusal of the master to deliver upon demand is, in cases like the present, sufficient evidence of conversion—Wilson v Anderton (1830) 1 B & Ad 450. The master may indeed sometimes suffer for an innocent mistake; but he can always protect himself from liability by filing a bill of interpleader in Chancery. For these reasons, I am satisfied that this petition sufficiently shews a prima facie case of such breach of duty as renders the vessel liable in this Court, and therefore the objections must be overruled.
Taylor v Great Eastern Rly Co
(1901) 17 TLR 394, King’s Bench Division

Barnard Brothers sold a quantity of barley to Sanders and consigned it to Elsenham station, where the railway company acknowledged that it was holding the grain to Sanders’ order. Later, when Sanders became insolvent, Barnard Brothers purported to exercise a right of stoppage. But it was held that they could not do so, because the transit had determined when the acknowledgment was issued.

Bigham J: The first question is whether Barnard Brothers were on November 30 entitled to stop the goods as being still in transitu. I am of opinion that they were not. The transitus was over as soon as a reasonable time had elapsed for Sanders to elect whether he would take the goods away or leave them in the defendants’ depot on rent. Such a reasonable time had elapsed, and, having regard to the fact that it was the practice of the defendants to hold goods for Sanders as warehousekeepers at rent when they were not removed after arrival at the stations, I find that, by agreement between Sanders and the defendants, the goods were at the time when Barnards took them away in the possession of the defendants as warehousekeepers for Sanders. I should have been of the same opinion even if there had been no course of business, for I do not think that after service of a notice such as that used in this case it is competent for a consignee by silence indefinitely to fix upon a railway company the onerous responsibilities of common carriers. I am satisfied that, if the defendants had sued Sanders for rent, Sanders could not have successfully resisted the claim. It was argued that the words in the advice note ‘the grain is now held at owner’s sole risk and subject to the usual warehouse charges’ meant that the goods were held by the defendants on account of whom it might concern, and that ‘owner’s’ did not necessarily mean Sanders, but might mean Barnards or any one else who should turn out to be the owners. I do not think there is anything in this point. The advice note is addressed to Sanders for the purpose of affecting him, not for the purpose of affecting any one else, and, moreover, Sanders was the owner of the goods; a right in the vendor to stop in transitu does not prevent the buyer from being the owner of the goods; in fact, it necessarily supposes him to be the owner.

Reddall v Union Castle Mail Steamship Co Ltd
(1914) 84 LJKB 360, King’s Bench Division

Rutherfords sold a bale of goods to Snow, knowing that he was buying for someone in South Africa. Snow instructed Rutherfords to send the goods to the Union Co’s ship Armadale Castle at Southampton, to be marked for shipment to Algoa Bay in South Africa. Rutherfords consigned the bale by rail to Southampton as instructed, where Snow, ‘in anticipation of insolvency’ told the Union Co to ‘stop all shipments’. In consequence, the bale did not leave with the ship, but was kept in storage at Snow’s expense until it was handed to Rutherfords in response to a claim to stop in transit. Reddall, Snow’s trustee in bankruptcy, sued the Union Co in conversion, and was successful: the court ruled that the transit had ceased when the buyers intercepted the goods before they had been loaded.

Bailhache J: I think, upon these facts, the original transit was to Algoa Bay. The cases upon stoppage in transitu are very numerous, and, where the transit is made in stages, difficult to reconcile. I think, however, that it is true to say that, where goods are delivered by the seller or his agent to a carrier, and pass at each successive stage of the transit from the hands of one carrier to another, without the intervention of a forwarding agent, to the destination indicated by the buyer to the seller, the transit continues until that destination is reached. It makes no difference in such a case whether an
Chapter 12 Remedies of the seller

intermediate carrier receives his instructions direct from the buyer or from the seller, provided that those instructions are given to facilitate the transit of the goods upon the journey originally intended and communicated to the buyer.

This does not dispose of the case, because the goods were intercepted at Southampton and the journey to Algoa Bay was stopped. The buyers, not having contracted with the sellers that the goods should go to Algoa Bay, were without their rights in doing this. The defendants thereafter held the goods at rent at the buyers' disposal, and would not and could not have sent them forward to Algoa Bay, or to any other destination, without fresh instructions from the buyers. I think, therefore, that, although the original transit was to Algoa Bay, that transit had been ended at Southampton, and that under the circumstances the pretended stoppage in transitu was too late, and the defendants were wrong in delivering the goods to the sellers. Where the original transitus is interrupted by the buyers, I think the test is whether the goods will be set in motion again without further orders from the buyers; if not, the transit is ended and the right to stop lost.

There will be judgment, therefore, for the plaintiff in this case.

If, when he receives notice of stoppage, the carrier has a lien on the goods for unpaid freight, the seller is liable to pay the freight, and also the costs of redelivery: Booth Steamship Co Ltd v Cargo Fleet Iron Co Ltd [1916] 2 KB 570, CA.

(d) Rescission and resale by the seller

No automatic rescission. Section 48(1) states that, except as provided later in s 48, a contract of sale is not rescinded by the mere fact that an unpaid seller has exercised his right of lien or stoppage. The contract continues on foot, so that if the buyer (or his trustee in bankruptcy) tenders the price and any other moneys owing, he can require that the goods be delivered to him. If the property in the goods has passed to the buyer, it will remain with him notwithstanding the fact that the seller has exercised his right of lien or stoppage. The seller must take some further step in order to terminate the contract and revest the property in himself or vest it in a new buyer.

Section 48 confusingly runs together various issues which are not necessarily related. Subsections (1), (2) and (3) refer to an unpaid seller, but sub-s (4) applies to all sellers; sub-ss (1) and (4) and (it has been held, by implication, also sub-s (3)), are concerned with the question of 'rescission' of the contract of sale—but not sub-s (2); while sub-ss (3) and (4) deal with a seller's right of resale (as explained below), whereas in contrast sub-s (2) is concerned with the effect of a resale, whether rightful or not! We shall do our best to disentangle these questions in the discussion that follows.

When the seller has a right of resale. Section 48(3), (4) sets out the circumstances in which a seller has a right of resale, and the consequences of such a resale. The use of the word 'right' is important. We saw earlier that a seller who continues or is in possession of the goods has the power in certain circumstances to confer a good title upon a second buyer if he resells the goods (s 24; Factors Act 1889, s 8: above, p 377. But those provisions give the seller nothing more than the power to pass a good title: a seller who relies on s 24 or s 8 without more will, at least prima facie, be acting in breach of his contract with the first buyer and liable to him in damages accordingly. If the property has passed to the buyer, he may also be liable to him in tort. However, if the seller resells in exercise of a right to do so, he will not be so liable. In fact, it is only s 48(4) which expressly states that the contract of sale is rescinded when the seller exercises his right of resale, but this was held to be also implicit in s 48(3) in R V Ward Ltd v Bignall (below). The three situations in which s 48 confers such a right are:
(1) where the unpaid seller gives notice to the buyer of his intention to resell, and the buyer
does not within a reasonable time pay or tender the price (s 48(3));

(2) where the seller is unpaid and the goods are perishable (s 48(3));

(3) where the seller expressly reserves the right of resale in case the buyer should make de-
fault (s 48(4)).

**RV Ward Ltd v Bignall**

[1967] 1 QB 534, Court of Appeal

On 6 May Bignall contracted to buy from Wards two cars, a Vanguard estate and a Ford
Zodiac, for a total price of £850, paying a deposit of £25. Later in the same day, he refused to
pay the balance or take delivery of either car. Wards the next day gave notice to him through
their solicitors that if he did not complete the purchase by 11 May they would dispose of the
cars. The Vanguard was later sold for £350, but the Zodiac remained unsold. In this action
Wards sued Bignall, claiming (before the Court of Appeal) the balance of the contract price
less the amount received for the Vanguard, together with certain expenses. The court held
that by reselling the Vanguard, Wards had rescinded the whole contract, so that their only
claim was for damages for non-acceptance, obliging them to bring into account the market
value of the unsold Zodiac, which remained their property. The trial judge had calculated
the damages at £497 10s, but on appeal this was reduced to £47 10s.

Sellers LJ: The question on this part of the appeal is whether, [on the assumption that] the property
passed on the sale, the Zodiac car which has not been [resold] remains the buyer’s property so that
the action of the plaintiffs is for the price, or whether by the sale of the Vanguard the plaintiffs have
rescinded the whole contract on the buyer’s breach of it so that the ownership of the Zodiac reverted
back to the plaintiffs and their remedy is in damages under the statute, or, in effect, damages for non-
acceptance, giving credit for what they have received from the sale of the goods or part thereof.

Subsections (1) and (2) of s 48 speak clearly. Subsection (4) expressly provides: ‘the original contract
of sale is thereby rescinded.’ That was necessary because, where the seller ‘expressly reserves a right
of re-sale in case the buyer should make default,’ a seller who re-sold under such a contract would be
applying and affirming the contract, and his action would be consistent with it. Under subs (3) no such
provision of rescission is necessary, for, if an unpaid seller re-sells, he puts it out of his power to perform
his contract and his action is inconsistent with a subsisting sale to the original buyer. Once there is a
re-sale in accordance with s 48 by an unpaid seller in possession of the contractual goods the contract
of sale is rescinded, whether the re-sale be of the whole of the goods or of part of them, and in this
respect subs (3) and (4) fall into line.

As the property in the goods reverts on such a re-sale, the seller retains the proceeds of sale whether
they be greater or less than the contractual price. The probability in normal trade is that the price would
be less, giving rise to a claim for damages, as for non-acceptance of the goods ….

Subsection (4) makes the resale operate as a rescission and leaves the remedy, if any loss ensues, in
damages. That brings it into harmony with subs (3), which also gives a claim for damages for any loss
occasioned by the original buyer’s breach of contract. If the unpaid seller resells the goods, he puts it
out of his power to perform his obligation under the original contract, that is, to deliver the contractual
goods to the buyer. By the notice to the buyer, the seller makes payment of the price ‘of the essence
of the contract,’ as it is sometimes put. It requires the buyer to pay the price or tender it within a rea-
sonable time.

If he fails to do so, the seller in possession of the goods may treat the bargain as rescinded and resell
the goods. The suit for damages becomes comparable to a claim for damages for non-acceptance
Chapter 12 Remedies of the seller

of the goods where the property never has passed. The property has reverted on the resale, and the second buyer gets a good title. The seller resells as owner. Subsection (2) expressly gives the buyer a good title thereto as against the original buyer.

On this view of the law the plaintiffs cannot recover the price of the Zodiac, which is in the circumstances their property. They can, however, recover any loss which they have sustained by the buyer's default. The parties have sensibly agreed that the value of the Zodiac in May, 1965, was £450. The total contract price was £850, against which the plaintiffs have received £25 in cash and £350 in respect of the Vanguard, and have to give credit for £450 for the Zodiac. To the loss of £25 must be added the sum for advertising, which was admittedly reasonably incurred—£22 10s. The plaintiffs' loss was, therefore, £47 10s.

I would allow the appeal and enter judgment for £47 10s in favour of the plaintiffs in substitution for the award of the deputy judge.

Diplock LJ: Whether or not the property had passed on May 6, 1965, the seller was only liable to deliver upon payment or tender of the balance of the purchase price (see the Sale of Goods Act, s 28) and was entitled until then to retain possession, either by virtue of his lien as an unpaid seller if the property had passed (Sale of Goods Act, s 39(1)), or by virtue of his right to withhold delivery if the property had not passed (subs (2) of the same section). In either case, the unpaid seller has a right to resell the goods if he gives notice of his intention to do so and the buyer does not within a reasonable time pay or tender the price (Sale of Goods Act, s 48(3)). This subsection enables a seller in possession of the goods to make time of payment of the purchase price of the essence of the contract whether the property has passed or not. The seller cannot have greater rights of resale if the property has already passed to the buyer than those which he would have if the property had remained in him.

In this court it has been contended on behalf of the seller that, when an unpaid seller who retains possession of goods the property in which has passed to the buyer exercises his statutory right of resale under s 48(3) of the Sale of Goods Act, he does not thereby elect to treat the contract as rescinded, but remains entitled to recover the purchase price from the buyer although he must give credit for the net proceeds of sale of any of the goods which he has sold. Authority for this proposition is to be found in the judgment of Finnemore J in Gallagher v Shilcock ([1949] 2 KB 765), and the question in this appeal is whether that judgment is right or not.

Finnemore J based his conclusion on his view as to the construction of s 48 of the Sale of Goods Act, and in particular upon the contrast between the express reference in subs (4) of s 48 to the contract being rescinded when goods are resold under an express right of resale and the absence of any reference to rescission in subs (3) of s 48. With great respect, however, I think that that disregards basic principles of the law of contract, and that there is another explanation for the contrast between the two subsections.

Rescission of a contract discharges both parties from any further liability to perform their respective primary obligations under the contract, that is to say, to do thereafter those things which by their contract they had stipulated they would do. Where rescission occurs as a result of one party exercising his right to treat a breach by the other party of a stipulation in the contract as a repudiation of the contract, this gives rise to a secondary obligation of the party in breach to compensate the other party for the loss occasioned to him as a consequence of the rescission, and this secondary obligation is enforceable in an action for damages. Until, however, there is rescission by acceptance of the repudiation, the liability of both parties to perform their primary obligations under the contract continues. Thus, under a contract for the sale of goods which has not been rescinded, the seller remains liable to transfer the property in the goods to the buyer and to deliver possession of them to him until he has discharged those obligations by performing them, and the buyer remains correspondingly liable to pay for the goods and to accept possession of them.

The election by a party not in default to exercise his right of rescission by treating the contract as repudiated may be evinced by words or by conduct. Any act which puts it out of his power to perform thereafter his primary obligations under the contract, if it is an act which he is entitled to do without
notice to the party in default, must amount to an election to rescind the contract. If it is an act which he is not entitled to do, it will amount to a wrongful repudiation of the contract on his part which the other party can in turn elect to treat as rescinding the contract.

Part IV of the Sale of Goods Act, ss 38 to 48, deals with the rights of an unpaid seller both before the property in the goods has passed to the buyer and after it has passed. The mere fact that a seller is unpaid does not necessarily mean that the buyer is in breach of the contract, or, if he is, that his breach is one which entitles the seller to exercise his right to treat the contract as repudiated.

[His Lordship referred to ss 39 and 48, and continued:] If the contract provided for delivery upon a specified date, the seller’s conduct in failing to deliver on that date would put it out of his power to perform one of his primary obligations under the contract if time were of the essence of the contract. It was, therefore, necessary, or at least prudent, to provide expressly that if his failure to deliver were in the mere exercise of a lien or right of stoppage in transitu it did not discharge his liability to deliver the goods upon tender of the contract price, or the buyer’s liability to accept the goods and to pay for them.

Subsection (2) deals with a different topic, videlicet, the title of a new buyer to whom the goods are resold by the seller. If the property in the goods at the time of the resale remained in the seller, the new buyer would obtain a good title at common law and would require no statutory protection. The subsection is, therefore, limited to cases where the property in the goods at the time of resale had already passed to the original buyer, and provides that, where the seller is in possession of the goods in the exercise of his unpaid seller’s lien or right of stoppage in transitu, the new buyer shall acquire a good title, and this is so whether or not the seller had a right of resale as against the original buyer.

Subsection (3) . . . is the provision of the Act which confers ‘a right of resale as limited by this Act,’ referred to in s 39(1)(c). The right dealt with in this subsection is a right as against the original buyer. As a stipulation as to time of payment is not deemed to be of the essence of a contract of sale unless a different intention appears from the terms of the contract (Sale of Goods Act, s 10(1)), failure by the buyer to pay on the stipulated date is not conduct by him which entitles the unpaid seller to treat the contract as repudiated. He remains liable to deliver the goods to the buyer upon tender of the contract price (Sale of Goods Act, s 28). Apart from this subsection, if the unpaid seller resold the goods before or after the property had passed to the original buyer, he would remain liable to the original buyer for damages for non-delivery if the original buyer tendered the purchase price after the resale, and if the property had already passed to the original buyer at the time of the resale he would be liable to an alternative action by the original buyer for damages for conversion. The purpose of the subsection is to make time of payment of the essence of the contract whenever the goods are of a perishable nature, and to enable an unpaid seller, whatever the nature of the goods, to make payment within a reasonable time after notice of the essence of the contract. As already pointed out, an unpaid seller who resells the goods before the property has passed puts it out of his power to perform his primary obligation to the buyer to transfer the property in the goods to the buyer and, whether or not the property has already passed, to deliver up possession of the goods to the buyer. By making the act of resale one which the unpaid seller is entitled to perform, the subsection empowers the seller by his conduct in doing that act to exercise his right to treat the contract as repudiated by the buyer, that is, as rescinded, with the consequence that the buyer is discharged from any further liability to perform his primary obligation to pay the purchase price, and becomes subject to the secondary obligation to pay damages for non-acceptance of the goods. If the contract were not rescinded by the resale the seller would still be entitled to bring an action against the buyer for the price of the goods although, no doubt, he would have to credit the buyer with the proceeds of the resale. If that were the intention of the subsection one would have expected it to provide this in express terms. That it was not the intention is, however, apparent from the words used to define the remedy of the unpaid seller who has exercised his right of resale, videlicet, to ‘recover from the original buyer damages for any loss occasioned by his breach of contract.’ It is, of course, well-established that where a contract for the sale of goods is rescinded...
after the property in the goods has passed to the buyer the rescission divests the buyer of his property in the goods.

Subsection (4) deals with the consequences of a resale by a seller, not necessarily an ‘unpaid seller’ as defined in s 38, made in the exercise of an express right of resale reserved in the contract on the buyer making default. If such an express right were exercisable after the property in the goods had passed to the buyer, its exercise might, on one view, be regarded as an alternative mode of performance of the seller’s primary obligations under the contract, and the resale as being made by the seller as agent for the buyer. It was, therefore, necessary to provide expressly that the exercise of an express power of resale should rescind the original contract of sale. That is, in my view, the explanation of the express reference to rescission in subs (4). The absence of a similar express reference to rescission in subs (3) is no sufficient ground for ascribing to subs (3) a meaning which the actual words of the subsection would appear to contradict and which would, in my view, conflict with the general principles of the law of contract.

In the present case the unpaid seller only resold part of the goods which he had contracted to sell to the original buyer. This makes no difference, however. His primary duty under the contract was to deliver both cars to the buyer. If he delivered only one, the buyer would be entitled to reject it (Sale of Goods Act, s 30(1)). By his conduct in selling the Vanguard on May 24, 1965, the unpaid seller put it out of his power to perform his primary obligation under the contract. He thereby elected to treat the contract as rescinded. The property in the Zodiac thereupon reverted to him, and his only remedy against the buyer after May 24, 1965, was for damages for non-acceptance of the two cars, of which the prima facie measure is the difference between the contract price and their market value on May 24, 1965.

I, too, would allow this appeal, and enter judgment for the plaintiffs for £47 10s instead of £497 10s.

[Russell LJ concurred.]

NOTES

1. The word ‘rescind’ is used in varying senses in different textbooks on the law of contract. In many contexts, it is helpful to distinguish between (1) ‘terminating’ a contract for breach, which discharges the parties from further performance of such primary obligations as are outstanding, but leaves open to the party not in breach his remedy in damages, and (2) ‘rescinding’ a contract (eg for misrepresentation), which has the effect of restoring the parties to their original positions (rescission ‘ab initio’). In s 48 and the judgments in Ward v Bignall the word ‘rescind’ is used as equivalent to ‘terminate for breach’, so far as the contractual position is concerned, but is preferred to ‘terminate’ because the focus is on the destination of the property in the goods. It is made clear that, when a seller validly exercises a right of resale, there is a ‘rescission’ in the sense that the property is revested in him before passing to the new buyer. It follows that if the resale is made for a higher price, the seller may keep it all (Commission Car Sales (Hastings) Ltd v Saul [1957] NZLR 144).

2. We may infer from the judgments in this case the following additional points:

(1) A resale of part of the goods operates to rescind the whole contract.

(2) An unpaid seller’s right of resale is said to be ‘as limited by this Act’ (s 39(1)(c)). But this should not be taken to mean that the right of resale is limited to those cases where he has exercised his right of lien or stoppage in transit. There could, for instance, be a right of resale reserved by the terms of the contract of sale in specified events, as in some of the Romalpa cases (see below, p 452). Alternatively, the buyer could be in breach of his obligation to pay the price on the agreed date, in a case where time has been made of the
essence of the contract. Section 48 does not have the effect of excluding or restricting any right of resale which the seller may have at common law.

(3) Section 48(4) applies whether the seller is an unpaid seller or not.

(e) Effect of resale by an unpaid seller

Section 48(2) states that where an unpaid seller who has exercised his right of lien or retention or stoppage in transit resells the goods, the second buyer acquires a good title to them as against the original buyer. There is a degree of overlap between this provision and s 24 (sale by seller in possession, broadly equivalent to s 8 of the Factors Act 1889: above, p 377), but there are also important differences, which we may list as follows:

(1) Section 24 applies whether the seller is an unpaid seller or not; for s 48(2) to apply, he must be unpaid.

(2) Section 24 applies where the seller 'continues or is in possession of the goods, or of the documents of title to the goods'; s 48(2) applies where an unpaid seller 'has exercised his right of lien or retention or stoppage in transit'. There are plainly circumstances when one only of these requirements will have been met.

(3) Section 24 applies only where the goods or document of title are delivered to the second buyer; there is no such requirement in s 48(2).

(4) Section 24 operates only in favour of a bona fide purchaser who takes without notice; again, there is no such requirement in s 48(2).

(5) Section 24 is expressed to operate for the benefit not only of a sub-buyer, but also someone who takes under a pledge or other disposition of the goods (and, under s 8 of the Factors Act, also someone who has agreed to buy or take under a pledge or other disposition); s 48 applies only to a resale.

NOTE

In the opinion of Lord Diplock in Ward v Bignall, s 48(2) applies—and is needed—only where the property in the goods has passed to the buyer. Where a seller who has retained the property resells the goods, he can confer a good title on the second buyer by virtue of his ownership, and there is no need to invoke s 48(2). The seller may, however, still be liable to the first buyer for breach of contract. Since s 24 also speaks only of a person who has sold goods, we may infer that a person who has retained title to the goods (ie, only agreed to sell them) can confer a good title on a second purchaser by virtue of his ownership and does not need to invoke the provisions of that section.

QUESTION

S agrees to sell to B1 goods which are stored in W’s warehouse. S retains the property in the goods but gives B1 a delivery order addressed to W. Not having been paid by B1, S resells the goods to B2, telling him that he has been let down by a previous buyer, B1. S gives B2 a delivery order. The following day, B1 contracts to sell the goods to X, and endorses his delivery order over to X. Who is entitled to the goods (1) before any delivery order is presented to W; (2) if B2 presents his delivery order to W before X; (3) if X presents his delivery order to W before B2?
(f) Retention of title clauses

It is of course axiomatic that a clause in a contract of sale may stipulate that the seller shall retain the title to the goods until a stated event has happened, and in particular until he has been paid the price; and this may be done even though possession of the goods is given to the buyer: see ss 2(3) and 19(3). The case of Lee v Butler (above, p 382) is an example. The term ‘retention of title clause’ has, however, come to have a special connotation in a commercial context as a result of the landmark decision in the Romalpa case (below). In a typical ‘retention of title’ contract, the buyer is likely to be either a company engaged in the manufacturing or construction industry which buys raw materials or components for the purposes of its business, or a company which acquires the goods with a view to reselling them or letting them on hire or lease to its own customers. (An individual may also buy goods subject to a retention of title—as, indeed, was the case in Lee v Butler—but we shall assume that the buyer is a company, since it is in relation to company buyers that the most interesting (and most complex!) issues arise.) Another point of distinction, in practice, is that cases like Lee v Butler (and similarly in the hire-purchase cases) the goods are normally durables of some type which are to be paid for by instalments; and one of the main risks which the seller wishes to guard against is that the buyer will resell the goods before he has paid the whole of the price: in contrast, the Romalpa cases are concerned with goods—often of a consumable kind—which both parties contemplate may be used up or disposed of in some way before the price is paid, and the main risk for the seller is the buyer’s insolvency.

**Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd**

[1976] 1 WLR 676, Queen’s Bench Division and Court of Appeal

The plaintiffs (AIV), a Dutch company, supplied aluminium foil to Romalpa in England on AIV’s standard terms of trading, parts of which are quoted in the judgment of Mocatta J. Romalpa went into receivership owing AIV £122,239. The receiver had in his possession unprocessed aluminium foil worth £50,000 and £35,152 representing the proceeds of subsales of foil which had been made by Romalpa. It was held (1) that AIV’s claim to the unprocessed foil prevailed over that of the receiver, because AIV had effectively retained title to it; and (2) that AIV was entitled to the money representing the proceeds of subsales on the basis of the doctrine of tracing established in Re Hallett’s Estate (1880) 13 Ch D 696, CA.

**Mocatta J:** The first major issue in this case turns on whether clause 13, in what the plaintiffs say are their general selling terms and conditions for aluminium foil, applied to the transactions done between the plaintiffs and the defendants, in respect of which £122,239 is owing. That clause began with this important reservation of title. The first sentence of the clause reads as follows:

The ownership of the material to be delivered by AIV (that is the plaintiffs) will only be transferred to purchaser when he has met all that is owing to AIV, no matter on what grounds.

I read the remainder of the clause in view of its somewhat elaborate nature and of subsequent issues arising:

Until the date of payment, purchaser, if AIV so desires, is required to store this material in such a way that it is clearly the property of AIV. AIV 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) AIV will be given the ownership of this
(these) new object(s) as surety of the full payment of what purchaser owes AIV. To this end AIV and purchaser now agree that the ownership of the article(s) in question, whether finished or not, are to be transferred to AIV 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 or (an)other object(s). Until the moment of full payment of what purchaser owes AIV purchaser shall keep the object(s) in question for AIV 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 AIV so requires—purchaser, as long as he has not fully discharged his debt to AIV shall hand over to AIV the claims he has against the buyer emanating from this transaction.

If the plaintiffs can establish that clause 13 does apply, as between themselves and the defendants, they are admittedly entitled to succeed on their second claim, the goods in question in the possession of the defendants still being their property. But their first claim, namely, the right to trace, is disputed. I must therefore deal first with the hotly contested point whether clause 13 did apply between the plaintiffs and the defendants.

[His Lordship referred to the course of dealing between the parties, and answered this question in the affirmative. He continued:] Having decided that clause 13 did apply to the many transactions between the plaintiffs and defendants after September 1, 1973, when the defendants took over the aluminium foil business that the partnership had previously conducted with the plaintiffs, I now have to deal with the consequences of that decision as applying to the claims in the action.

In the first place, it is admitted that the plaintiffs are the owners of the remaining unsold aluminium foil held by the receiver, and that they are entitled to an order for its delivery up to them. The real contest arose in relation to the plaintiffs’ right to a charge on the receiver’s account with the [bank] to the extent of £35,152.66 representing, as certified by the receiver, the sum recovered by him from customers of the defendants as a result of AIV materials supplied to the defendants by the plaintiffs. This right the plaintiffs claim on the basis of the principle established in Re Hallett’s Estate (1880) 13 Ch D 696 entitling them to trace the proceeds of the sale of their property sold by the plaintiffs into the receiver’s bank account. It is common ground that the effect of clause 13 is that, while money was owing by the defendants to the plaintiffs, any aluminium foil delivered by the plaintiffs to the defendants, while still in their possession, was held by them as bailees.

It is further common ground that the clause must be read subject to the necessary implication that the defendants were entitled to sell the foil to sub-purchasers. It is curious that this is not said about sales of unmixed foil whilst it is said in the last sentence of the clause about foil mixed with other material. In respect of this, it is to be noted that the defendants were, if required, to assign to the plaintiffs’ their rights against sub-purchasers in respect of the mixed materials sold to them. Notwithstanding the generally far-reaching and somewhat elaborate provisions in clause 13, reserving the plaintiffs’ right of ownership in the goods until nothing was owing from the purchasers, and the admission that the clause had the effect of making the defendants bailees of the goods while in their possession until all money owing had been paid, the argument for the defendants was that once foil had been sold to bona fide purchasers, the relationship between the plaintiffs and the defendants was purely one of debtor and creditor. As against this, the plaintiffs argued that a fiduciary relationship stemming from the bailment continued after sales to third parties, and that in consequence equitable remedies applied, including the right to trace proceeds of the sub-sales. It was not necessary, said the plaintiffs, to find as a prerequisite to the right to trace an express or constructive trust. The equitable proprietary remedy followed as a consequence of the finding that the defendants were bailees.

Having indicated the general nature of the competing arguments, I can go straight to the judgment of Sir George Jessel MR in Re Hallett’s Estate (1880) 13 Ch D 696. Although in that case there had been
breaches of express trust, it is clear from the passages I am about to read that the reasoning was not
founded on this, and that the principle stated applied to much wider circumstances. It is necessary to
make certain fairly extensive quotations. Sir George Jessel MR said, at p 708:

The modern doctrine of equity as regards property disposed of by persons in a fiduciary position is
a very clear and well-established doctrine. You can, if the sale was rightful, take the proceeds of the
sale, if you can identify them. If the sale was wrongful, you can still take the proceeds of the sale,
in a sense adopting the sale for the purpose of taking the proceeds, if you can identify them. There
is no distinction, therefore, between a rightful and a wrongful disposition of the property, so far as
regards the right of the beneficial owner to follow the proceeds. . . .

Pausing there for a moment, it is not, of course, suggested here that there was a wrongful disposition
of the plaintiffs’ property when the defendants sold the foil to bona fide sub-purchasers. . . .

There then follows this passage showing the width of the application of the principle:

Has it ever been suggested, until very recently, that there is any distinction between an express
trustee, or an agent, or a bailee, or a collector of rents, or anybody else in a fiduciary position? I
have never heard, until quite recently, such a distinction suggested. . . . It can have no foundation in
principle, because the beneficial ownership is the same, wherever the legal ownership may be.

There is the following short passage, at p 710:

Now that being the established doctrine of equity on this point, I will take the case of the pure
bailee. If the bailee sells the goods bailed, the bailor can in equity follow the proceeds, and can
follow the proceeds wherever they can be distinguished, either being actually kept separate, or
being mixed up with other moneys.

These passages are clearly most apposite, since they refer to the position of a mere bailee, and were
strongly relied upon by Mr Lincoln. Mr Pickering sought to avoid them by saying that they were obiter or
had in some way been modified in Re Diplock [1948] Ch 465 and that it was necessary that there should
be some express or constructive trust before the equitable doctrine could apply. My attention was not
drawn to any passage in Re Diplock criticising or modifying, in any way, the statements of principle
which I have quoted. Although I fully recognise that in considering this problem I find myself in a most
unfamiliar field, I feel it my duty to follow and apply those statements. Mr Pickering drew my attention to
two authorities as illustrating the simple debtor/creditor relationship, namely, King v Hutton [1900] 2 QB
504 and Henry v Hammond [1913] 2 KB 515. It is unnecessary to refer to these in detail, save to say that
the former makes it clear that the special facts of each case are crucial in determining whether there is a
simple debtor/creditor relationship, although the intention of the parties as ascertained from the terms
of their contract shows that some kind of fiduciary relationship exists. The preservation of ownership
clause contains unusual and fairly elaborate provisions departing substantially from the debtor/creditor
relationship and shows, in my view, the intention to create a fiduciary relationship to which the principle
stated in Re Hallett’s Estate applies. A further point made by Mr Pickering was that if the plaintiffs were
to succeed in their tracing claim this would, in effect, be a method available against a liquidator to a
creditor of avoiding the provisions establishing the need to register charges on book debts: see s 95(1),
(2)(e) of the Companies Act 1948 [Companies Act 2006, s 860(7)(f)]. He used this only as an argument
against the effect of clause 13 contended for by Mr Lincoln. As to this, I think Mr Lincoln’s answer was
well founded, namely, that 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, s 95(1) had no application.

The plaintiffs accordingly succeed. . . .

[The defendants appealed.]

Roskill LJ: . . . Are the plaintiffs entitled to the proceeds of sales to sub-purchasers now held by the
receiver? We were told both by Mr Price and by Mr Lincoln that the receiver received these moneys
after he had entered into his receivership from sales made by the defendants to sub-purchasers before that date. The receiver, properly if I may say so, kept those moneys separate; as we were told that there is no complication arising of those moneys having become mixed with other moneys, because they were always kept separate. There was no suggestion that the sub-sales in question were other than authorised by the plaintiffs or that the sub-purchasers concerned did not acquire a valid title to the several quantities of foil which each of them bought. The sole question is whether, on the facts and on the true construction of the bargain, including the general conditions, between the plaintiffs and the defendants, the plaintiffs are entitled to trace and recover those proceeds of the sub-sales, upon the well-known principles laid down in the judgment of Sir George Jessel MR in *Re Hallett’s Estate* …

The critical question is whether there was a fiduciary relationship between the plaintiffs and the defendants which entitles the plaintiffs successfully to claim these moneys in the way and upon the footing which I have just described. Mr Price strenuously argued that the bargain between the parties was a perfectly ordinary bargain, creating the ordinary contractual relationship of seller and buyer, with the consequence that if the buyers—that is to say the defendants—became insolvent before payment for the goods was made by them to the sellers,—that is, the plaintiffs—the sellers were left with their ordinary contractual or, as he put it, personal remedy as unsecured creditors of the buyers, and that there was no additional proprietary remedy (again to borrow his language) available to them justifying their seeking to trace and recover the proceeds of the sub-sales which had come from the sub-purchasers into the hands of the receiver.

It seems to me clear that, but for the provisions of clause 13—which have to be read in conjunction with the other relevant clauses I have mentioned—this would be the position. The individual contracts were for delivery ex the plaintiffs’ works in Holland, and, apart from special provisions, in English law at least—as already stated, there is no evidence of Dutch law and therefore we must apply English law to these contracts—both property and risk would have passed to the defendants upon such delivery.

But clause 13 plainly provides otherwise. The defendants as sellers were to retain the property in the goods until all—and I underline ‘all’—that was owing to them had been paid…. It is obvious, to my mind, that the business purpose of the whole of this clause, read in its context in the general conditions, was to secure the plaintiffs, so far as possible, against the risks of non-payment after they had parted with possession of the goods delivered, whether or not those goods retained their identity after delivery. I unhesitatingly accept that part of Mr Lincoln’s submission. In the case of unmanufactured goods this was to be achieved by the plaintiffs retaining the property until all payments due had been made, to which were added the special rights given by clause 25. In the case of mixed or manufactured goods, more elaborate provisions were made and indeed were obviously required if the avowed object of clause 13 were to be achieved in the case of the latter class of goods. The plaintiffs were to be given the ownership of these mixed or manufactured goods as ‘surety’ for ‘full payment.’ ‘Surety’ I think in this context must mean, as Mr Lincoln contended yesterday, ‘security.’ This is as between the defendants and the plaintiffs, and it is not necessary to consider how far this provision would protect the plaintiffs against adverse claims, at any rate in this country, by third parties. Further, the clause later provides that until ‘full payment’ is made the defendants shall keep the mixed goods for the plaintiffs as ‘fiduciary owners’—not perhaps the happiest of phrases but one which suggests, at least to an English lawyer, that in relation to mixed or manufactured goods there was produced what in English law would be called a fiduciary relationship in this respect. The clause goes on to give to the defendants an express power of sale of such goods, and the right to deliver them; and adds an obligation upon the defendants, if required by the plaintiffs so to do, to assign (to use English legal language) to the plaintiffs the benefit of any claim against a sub-purchaser so long as the defendants have not fully discharged all their indebtedness to the plaintiffs. …

The burden of Mr Lincoln’s argument was, first, that all goods dealt with in pursuance of clause 13 were, until all debts were discharged, the plaintiffs’ goods which the defendants were authorised to sell on the plaintiffs’ behalf and for the plaintiffs’ account but only within the framework of clause 13. Since the goods were the plaintiffs’, the defendants remained accountable to the plaintiffs for them
Chapter 12 Remedies of the seller

or for their proceeds of sale, so long as any indebtedness whatever remained outstanding from the
defendants to the plaintiffs. Hence the creation of the fiduciary relationship upon which Mr Lincoln
sought to rely. The burden of Mr Price’s argument was, as already stated, that the clause created in
the first part no more than the ordinary debtor/creditor, buyer/seller, relationship, and that nothing
in the second part justified placing additional fiduciary obligations upon the defendants in respect of
unmanufactured goods, referred to in the first part of the clause.

[His Lordship held that clause 13 impliedly authorised Romalpa to sell the unmanufactured, as well as
the manufactured, goods, on terms that they were accountable to AIV for the proceeds of sale. He
continued:]

I see no difficulty in the contractual concept that, as between the defendants and their sub-purchasers,
the defendants sold as principals, but that, as between themselves and the plaintiffs, those goods
which they were selling as principals within their implied authority from the plaintiffs were the plaintiffs’
goods which they were selling as agents for the plaintiffs to whom they remained fully accountable.
If an agent lawfully sells his principal’s goods, he stands in a fiduciary relationship to his principal and
remains accountable to his principal for those goods and their proceeds. A bailee is in like position in
relation to his bailor’s goods. What, then, is there here to relieve the defendants from their obligation to
account to the plaintiffs for those goods of the plaintiffs which they lawfully sell to sub-purchasers? The
fact that they so sold them as principals does not, as I think, affect their relationship with the plaintiffs;
nor (as at present advised) do I think—contrary to Mr Price’s argument—that the sub-purchasers could
on this analysis have sued the plaintiffs upon the sub-contracts as undisclosed principals for, say, breach
of warranty of quality.

It seems to me clear . . . that to give effect to what I regard as the obvious purpose of clause 13
one must imply into the first part of the clause not only the power to sell but also the obligation to
account in accordance with the normal fiduciary relationship of principal and agent, bailor and bailee.
Accordingly, like the judge I find no difficulty in holding that the principles in Hallett’s case are of im-
mediate application, and I think that the plaintiffs are entitled to trace these proceeds of sale and to
recover them, as Mocatta J has held by his judgment.

It is ironic that the starting point for this major modern commercial development was not
a high-powered collaboration between the best brains in the City and the Temple, but a
rather poor translation into English of a document drafted by a Dutch lawyer! It is perhaps
also significant, with hindsight, that this seminal case came before a commercial court in
which some key issues of an equitable nature were not argued. The same cannot be said of
the second leading case in the series, Re Bond Worth Ltd (below), where the hearing lasted
for 15 full days and over 90 authorities were cited in argument. But before looking at Re Bond
Worth, it is necessary to understand something of the way in which companies normally
finance their operations. Most companies depend upon some degree of borrowing in order
to maintain their cash-flow. When a company borrows money, and more particularly when
it borrows it on overdraft from a bank, it is usually required to give security in the form of a
general floating charge to the bank. Such a charge (as is explained more fully below, p 1132)
allows the company to carry on its business without interference from the bank, unless and
until it defaults on the terms of its loan. If that does happen (for instance, if the company’s
overdraft is run up beyond the agreed limit), the bank can move in immediately and take
possession of all of the company’s assets, traditionally by the appointment of a receiver—an
insolvency practitioner whose role it is to enforce the bank’s security, if necessary by selling
up these assets. (More recently, in consequence of a change in the law which came into effect
in 2003, he will probably appoint an administrator rather than a receiver for this purpose:
see below, p 1215.) If we take the case of B, a company manufacturing furniture, which has
given a floating charge to its bank, and suppose that S is a timber firm which is asked to
supply timber to B on credit, it is easy to see that if S simply sells the wood to B and is not paid, and then the bank intervenes by appointing a receiver or administrator (or some other insolvency procedure, such as liquidation, ensues), the bank is in a position to claim the timber as part of B's assets while S, who has supplied the timber which has gone to swell the assets, is a mere unsecured creditor whose debt will rank after that of the bank. The obvious answer to S's predicament is for him to supply the timber to B on terms that it will remain S's property until it has been paid for—ie, to insert a 'retention of title' clause into the contract of sale. The Romalpa case, and several other cases since, have upheld the validity of such a clause—at least where the goods in question remain identifiable as the contract goods, or part of them: Clough Mill Ltd v Martin (below), or where they have been used in a manufacturing process which is reversible (eg motors fitted to air compressors but which can be detached simply by unbolting them: Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd [1984] 1 WLR 485).

But the position becomes more complicated in a number of situations:

1. where the goods have been used in an irreversible manufacturing process (eg resin, in the manufacture of chipboard), so that the original goods have lost their identity: Borden (UK) Ltd v Scottish Timber Products Ltd (below);
2. where the goods have been mixed with other goods, so that, again, it is impossible to determine which are the goods that were sold under the contract in question: Re Andrabell Ltd (below);
3. Where the goods have been affixed to other property of the buyer (eg joinery built into his house, or a new gasket fitted to his motor) so as to become his by accretion;
4. where the goods have ceased to be the property of either seller or buyer, eg by being resold to a customer of B.

In an attempt to meet some of these problems, the draughtsmen have endeavoured to make their retention of title clauses more elaborate. A variety of ancillary clauses have been developed. These include:

1. a provision which requires the buyer (B) to keep the goods separate from other goods, perhaps also stipulating that he shall hold the goods as bailee for the seller (S);
2. a provision which seeks to confer upon S proprietary rights in relation to the proceeds of any sale of the goods made by B to a third party; such a provision may be reinforced by other terms which require B to keep such proceeds separate from other moneys, to hold them on a fiduciary basis, to pay them into a special account, etc;
3. a provision which seeks to extend S's proprietary rights into any goods which may be manufactured by B and which incorporate the goods which S has sold;
4. (a combination of (2) and (3)): a provision which declares that S shall have a proprietary interest in the proceeds of any sale made by B of goods which are the product of such a manufacturing process;
5. (an ‘all moneys’ clause): a stipulation that S shall retain the property in the goods sold (and possibly have some or all of the other rights listed in (2), (3) and (4) above) until S has been paid not only the price of those goods, but all other debts which are outstanding between S and B.

The ingenuity of the draftsman will not necessarily stop there. He will, for instance, almost certainly include a power for S or his agents to enter B's premises and seize the sale goods, and any other goods in which by virtue of the contract S has acquired a proprietary interest.
Chapter 12 Remedies of the seller

Unhappily for many sellers, the precedent set in the Romalpa case ran into difficulties in the very next reported case, Re Bond Worth Ltd (below). Many of the devices suggested above have since encountered similar problems in subsequent test cases. These difficulties stem from the fact that there is a very fine line between a true ‘retention of title’ clause and a provision which creates a charge.

A charge is a proprietary right created by a debtor in favour of another person empowering the latter to look to specified property of the debtor for satisfaction of the debt. (For a full discussion of this concept, see below, p 1131.) Where, under a contract of sale of goods, the seller reserves to himself the entire property in the goods until the price is paid, there is no charge, since the buyer has never owned the property over which the supposed charge could have been created. Where, however, the property first passes to the buyer and he in turn purports to revest it in the seller, or to confer some interest in it on the seller, until the price is paid, all the elements of a charge are likely to be present. It was held in Re Bond Worth Ltd (below) that if the seller purports to reserve to himself an equitable interest in the goods until the price is paid, and meantime to transfer only a bare legal title to the buyer, this may also constitute a charge. And it is almost inevitable, in the nature of things, that where the contract seeks to confer upon the seller a right to look for satisfaction of the price to property which is worth more than that amount (or to a sum of money which exceeds the price which he is owed), the courts will construe the transaction as one involving a charge. So it is likely that this construction will be placed on any contract which attempts to vest in the seller the property in the product resulting from work done by the buyer on the goods, or from some manufacturing process to which they have been subjected, until the price is paid, for it is hardly credible that the parties would have intended that the buyer should abandon to the seller the value which he has added to the original sale goods. In the same way, any claim asserted by the seller against the proceeds of sale of the goods or their product to a subpurchaser will be regarded as a charge. Had an argument along these lines been fully explored in the Romalpa case itself, the outcome (at least as regards the proceeds of sale of the foil) might well have been different.

In principle, there can be no objection to the creation of a charge, as such, in any of these circumstances. But there is a clear practical reason why the parties will not wish to do so. Where the buyer is a company which has already given a floating charge over all of its assets, present and future, to its bank, that charge will almost always include a term which prohibits the company from creating any other charge ranking ahead of that of the bank. If the seller has actual or constructive notice of this term (which under the rules of company law and current practice he will almost certainly be deemed to have), of course any attempt on his part to create a prior charge in his own favour is doomed to fail. And so he will avoid at all costs making any concession that the contract of sale involves a charge. And in so doing, he falls into a second trap; for if the court does hold that there is a charge, it will be void because it has not been registered under the Companies Act. The cases which follow show many examples where a purported reservation of title has been construed as falling on the wrong side of this critical line, and struck down as an unregistered charge.

Re Bond Worth Ltd
[1980] Ch 228, Chancery Division

‘Acrilan’ fibre was supplied by Monsanto to Bond Worth for use in the manufacture of carpets. The contract of sale provided that ‘equitable and beneficial ownership’ of the Acrilan should remain in the sellers until the price had been paid, or until prior resale, in which
case Monsanto’s beneficial ownership was to attach to the proceeds of the resale. It was also stipulated that Monsanto should have the equitable and beneficial ownership in any products made out of the fibre. Slade J held that these provisions were consistent only with the creation of a floating charge, and that the transaction was void for non-registration as a charge under the Companies Act.

**Slade J:** I turn to consider the relevant contracts. In my judgment at least the following points are fairly clear:

1. They were absolute contracts for the sale of goods within the meaning of s 1(2) of the Sale of Goods Act 1893, though this is not to say that they did not comprise other features in addition.

2. The legal title or property in the Acrilan fibre comprised in any one of the contracts passed to Bond Worth when the fibre was delivered to Bond Worth: see s 18, rule 1 of the Sale of Goods Act 1893. In using the term ‘property’ in this context I refer to the general property in the goods (which is the definition given to the word in s 62(1) of that Act) and not merely a special property, such as that possessed by a bailee.

3. The risk in the goods likewise passed to Bond Worth on delivery. This followed not only from s 20 (3) of the Sale of Goods Act 1893, but also from the opening words of sub-clause (a) of the retention of title clause. Thus if, after delivery, the goods had been stolen or destroyed before Bond Worth had had the opportunity to use them in any way, Bond Worth would nevertheless have had to pay the full purchase price for them.

4. Though sub-clause (a) of the retention of title clause provided that ‘equitable and beneficial ownership’ in the goods would remain with Monsanto until full payment for the whole amount of the relevant order had been received or until prior resale, it was manifestly not the intention to confer on or reserve to Monsanto all the rights which would normally be enjoyed by a sui juris person, having the sole beneficial title to property, as against the trustee holding the legal title. Mr Sears, on behalf of Monsanto, expressly conceded and affirmed that Monsanto would not, by virtue of its so called ‘equitable and beneficial ownership,’ have had the right to call for re-delivery of the goods, at any rate so long as Bond Worth was not in default under its payments. Bond Worth, on the other hand, was to have far-reaching rights even before payment to deal with the goods, which would not normally be possessed by a trustee holding the legal title therein on behalf of one sole, sui juris beneficiary.

5. Even during the period before full payment had been received by Monsanto and notwithstanding the provisions relating to ‘equitable and beneficial ownership,’ Bond Worth were to be at liberty to sell all or any part of the goods and to transfer the property therein to a purchaser. The words ‘until prior resale,’ in sub-clause (a) of the retention of title clause, render the implication of such authority to resell inevitable. They go far beyond the provisions of s 25(1) of the Sale of Goods Act 1893 which empower a buyer of goods in possession after sale in some circumstances, even without the authority of his vendor, to resell and pass a good title to a purchaser on a resale, but confer no authority on him to effect such resale, as between him and his vendor.

6. The parties nevertheless intended that if Bond Worth were to resell all or any part of the goods at a time when Monsanto had not yet been paid the full price due under the order, Monsanto’s ‘equitable and beneficial ownership,’ whatever that meant, would attach to the proceeds of sale or to the claim for such proceeds.

7. Even during the period before full payment had been received by Monsanto and notwithstanding the provisions relating to ‘equitable and beneficial ownership,’ Bond Worth were to be at liberty to use the goods for the purposes of manufacture....

8. The parties nevertheless intended that if, by virtue of such last-mentioned use, the goods should become constituents of or be converted into other products, the retention of title clause should attach to such other products as if they had been the original subject matter of the sale....
Thus far, the position would seem to me reasonably clear. The real difficulty arises concerning the meaning and legal effect, if any, of the provisions in the retention of title clause concerning ‘equitable and beneficial ownership.’ If the contracts embody something more than a mere sale, what is this additional feature? What is the nature of the relationship beyond a mere vendor-purchaser relationship between Monsanto and Bond Worth that comes into existence by virtue of the provisions relating to ‘equitable and beneficial ownership’?

In Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd [above, p 452], to which I shall have to refer in greater detail later, it was expressly admitted that the retention of title clause had the effect of making the defendants bailees of the relevant goods while in their possession until all money owing had been paid, …On the different facts of the present case, however, there can be no question of a bailor-bailee relationship, since it is common ground that the property in the Acrilan fibre passed to Bond Worth at latest when it was delivered, while it is of the essence of a bailment that the general property in the goods concerned remains in the bailor, while only a special property passes to the bailee, which entitles him to exercise certain possessory remedies. Nor can the relationship be one of agency, since the documents contain no suggestion that Bond Worth is to be regarded as an agent and the rights which by necessary implication are given to it deal with the goods on its own behalf are quite inconsistent with a principal-agent relationship.

In these circumstances, I think it plain that, if the retention of title clause operated to create any effective rights at all for the benefit of Monsanto, such rights can only have been rights either (i) by way of a trust under which Monsanto was the sole beneficiary or (ii) by way of a trust under which Monsanto had a charge in equity over the relevant assets to secure payment of the unpaid purchase price. No possible third alternative has occurred to me.

[His Lordship examined the authorities, and continued:]

The implicit authority and freedom of Bond Worth to employ the relevant raw materials, products and other moneys as it pleased and for its own purposes during the subsistence of the operation of the retention of title clause were, in my judgment quite incompatible with the existence of a relationship of Bond Worth as trustee and Monsanto as beneficiary solely and absolutely entitled to such assets, which is the relationship asserted.

I have, however, already indicated that this is not my own view of the effect, if any, of the retention of title clause when properly construed, but that such effect, if any, is a declaration of trust by Bond Worth in respect of the relevant assets by way of equitable charge to secure repayment of the moneys from time to time owing in respect of the relevant order. Does the authority and freedom of Bond Worth, to which I have last referred, by itself negative the existence of a valid trust by way of equitable charge? In my judgment, in so far as it might be suggested that the clause operated to create in this manner an immediate specific charge, the answer to this question must be ‘yes.’ It is in my judgment quite incompatible with the existence of an effective trust by way of specific charge in equity over specific assets that the alleged trustee should be free to use them as he pleases for his own benefit in the course of his own business.

There is, however, one type of charge (and I think one type only) which, by its very nature, leaves a company at liberty to deal with the assets charged in the ordinary course of its business, without regard to the charge, until stopped by a winding up or by the appointment of a receiver or the happening of some other agreed event. I refer to what is commonly known as a ‘floating charge’ …Such a charge remains unattached to any particular property and leaves the company with a licence to deal with, and even sell, the assets falling within its ambit in the ordinary course of business, as if the charge had not been given, until it is stopped by one or other of the events to which I have referred, when it is said to ‘crystallise’; it then becomes effectively fixed to the assets within its scope.

Romer LJ in Re Yorkshire Woolcombers’ Association Ltd [1903] 2 Ch 384 gave the following description of a floating charge:

I certainly do not intend to attempt to give an exact definition of the term ‘floating charge’ nor am I prepared to say that there will not be a floating charge within the meaning of the Act, which does
not contain all of the three characteristics that I am about to mention, but I certainly think that if a charge has the three characteristics that I am about to mention, it is a floating charge. (1) If it is a charge on a class of assets of a company present and future; (2) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (3) if you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with.

This description of a floating charge shows that it need not extend to all the assets of the company. It may cover assets merely of a specified category or categories. The third characteristic mentioned by Romer LJ is clearly present in relation to each of the four categories of charged assets in the present case; it was clearly contemplated that until some future step was taken by or on behalf of Monsanto, Bond Worth might carry on its business in the ordinary way in relation to each of these four categories. The second characteristic mentioned by him is likewise clearly present at least in relation to each of the second, third and fourth categories of charged assets; these are ex hypothesi classes of assets which in the ordinary course of business will be changing from time to time.

This much could be said against the existence of floating charges in the present case. As regards the first characteristic mentioned by Romer LJ, the charge on the first category of charged assets is exclusively a charge on present assets of the company, while the charges on the other three categories of charged assets are exclusively charges on future assets of the company. If the charges are looked at separately, they do not comprise classes of mixed present and future assets. Furthermore, the second characteristic mentioned by him is present in relation to the first category of charged assets (the raw fibre) only in the sense that the assets comprised in this category may diminish by being used for the purposes of manufacture or sale; they cannot be increased. I do not, however, think that these points of possible distinction prevent all or any of the four relevant charges from being floating charges within the ordinary meaning of legal terminology. Romer LJ himself disclaimed any intention of saying that there could not be a floating charge within the meaning of the Companies Act which did not contain all the three characteristics that he mentioned.

The critical distinction in my judgment is that between a specific charge on the one hand and a floating charge on the other. Vaughan Williams LJ pointed out in the Woolcombers case that it is quite inconsistent with the nature of a specific charge, though not of a floating charge, that the mortgagor is at liberty to deal with the relevant property as he pleases. He said, at p 294:

I do not think that for a ‘specific security’ you need have a security of a subject matter which is then in existence. I mean by ‘then’ at the time of the execution of the security; but what you do require to make a specific security is that the security whenever it has once come into existence, and been identified or appropriated as a security, shall never thereafter at the will of the mortgagor cease to be a security. If at the will of the mortgagor he can dispose of it and prevent its being any longer a security, although something else may be substituted more or less for it, that is not a ‘specific security’.

When that case went on appeal to the House of Lords, under the name Illingworth v Houldsworth [1904] AC 355, Lord Macnaghten drew the distinction between a specific charge and a floating charge in the following terms:

A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.

In the present case, in my judgment, the respective charges on each of the four categories of charged assets were ambulatory and shifting in their nature, and were intended to hover over them until the happening of an event which caused them to crystallise. The assets comprised in each of the four
Chapter 12 Remedies of the seller

categories were of a fluctuating class, albeit in the case of the first category liable to fluctuate only by diminution. Until a crystallising event occurred, it was clearly not intended that any restriction should be placed on Bond Worth to deal with them in the ordinary course of its business.

Accordingly in the end I answer [the] question by saying that in my judgment the effect of the retention of title clause was to create floating equitable charges over the four categories of charged assets, for the purpose of securing payment of the purchase prices due under the relevant orders, and to constitute Bond Worth a trustee of such assets for the purpose of such security, but for no other purpose. . . .

[Since no particulars of this charge had been registered, it was held void under what is now Part 25 of the Companies Act 2006.]

NOTES

1. In the course of his judgment, Slade J said ([1980] Ch 228 at 248):

In my judgment, any contract which, by way of security for the payment of a debt, confers an interest in property defeasible or destructible upon payment of such debt, or appropriates such property for the discharge of the debt, must necessarily be regarded as creating a mortgage or charge, as the case may be. The existence of the equity of redemption is quite inconsistent with the existence of a bare trustee-beneficiary relationship.

This passage has been frequently quoted in later cases.

2. Although Monsanto, by the terms of the contracts, purported to retain equitable and beneficial ownership in the goods, Slade J held that the contract had to be construed as taking effect in two steps: there was first a sale of the entire property in the fibre to Bond Worth, which was then followed by a security, eo instanti, given back by Bond Worth to the vendor, Monsanto. Bond Worth had therefore created a charge, which brought the transaction within the registration requirements of the Companies Act. Commentators (eg R Gregory (1990) 106 LQR 551) have since queried whether this vital link in Slade J's reasoning has survived the rejection by the House of Lords of the 'scintilla temporis' fiction in the conveyancing case of Abbey National Building Society v Cann [1991] 1 AC 56, HL; but Bond Worth was later followed on this point in Stroud Architectural Systems Ltd v John Laing Construction Ltd [1994] BCC 18.

Borden (UK) Ltd v Scottish Timber Products Ltd
[1981] Ch 25, Court of Appeal

Bordens sold resin to Scottish Timber, on terms that the property in the resin was not to pass to the buyers until payment had been made for all goods supplied to them by Bordens. The resin was bought to be mixed with hardeners and wood chippings and made into chipboard (an irreversible process), and was normally used within two days. Bordens were owed over £300,000 when the buyers went into receivership. They claimed to be entitled to trace their proprietary interest in the resin into the finished chipboard and the proceeds of sale of the chipboard. The Court of Appeal held, however, that the resin ceased to exist as such once it was used in making the chipboard, and that the sellers lost their title to it in consequence.

Buckley LJ: It is common ground that it was the common intention of the parties that the defendants should be at liberty to use the resin in the manufacture of chipboard. After they had so used the resin there could, in my opinion, be no property in the resin distinct from the property in the chipboard
produced by the process. The manufacture had amalgamated the resin and the other ingredients into a new product by an irreversible process and the resin, as resin, could not be recovered for any purpose; for all practical purposes it had ceased to exist and the ownership in that resin must also have ceased to exist.

The [retention of title] condition does not expressly deal with any property in the chipboard, or create any equitable charge upon the chipboard, produced by the manufacture. If any term is to be implied, that must be a term which is necessary to give the contract business efficacy, but it must also be a term which the court can see unambiguously to be a term which the parties would have inserted into their contract had they thought it appropriate to express it. If no such term can be identified, then the court may have to conclude that the contract was inept to achieve any valuable, practical result in that respect.

Is it possible here to imply any term giving the plaintiffs a proprietary interest in the chipboard manufactured by the defendants, or giving the plaintiffs an equitable charge upon that chipboard?

Common ownership of the chipboard at law is not asserted by the defendants; so the plaintiffs must either have the entire ownership of the chipboard, which is not suggested, or they must have some equitable interest in the chipboard or an equitable charge of some kind upon the chipboard. For my part, I find it quite impossible to spell out of this condition any provision properly to be implied to that effect.

It was impossible for the plaintiffs to reserve any property in the manufactured chipboard, because they never had any property in it; the property in that product originates in the defendants when the chipboard is manufactured. Any interest which the plaintiffs might have had in the chipboard must have arisen either by transfer of ownership or by some constructive trust or equitable charge, and, as I say, I find it impossible to spell out of this condition anything of that nature.

Mr Mowbray, in a very valiant argument, has contended that he can achieve his end by relying upon the doctrine of tracing. But in my judgment it is a fundamental feature of the doctrine of tracing that the property to be traced can be identified at every stage of its journey through life, and that it can be identified as property to which a fiduciary obligation still attaches in favour of the person who traces it.

In the present case, in the circumstances that I have described of the resin losing its identity in the chipboard, I find it impossible to hold that the resin can be traced into the chipboard, or to any other form of property into which the chipboard might at any time be converted. Accordingly, it seems to me that the doctrine of tracing is inapplicable to a case such as this. . . .

[Bridge and Templeman LJJ delivered concurring judgments.]

Re Peachdart Ltd
[1984] Ch 131, Chancery Division

Leather was supplied by Freudenbergs to Peachdart to be made into handbags, on terms that until payment of the price the sellers retained ownership in the leather and the right to trace their interest into any proceeds of sale of the leather or of goods made out of it, by virtue of a fiduciary relationship created between the buyer and sellers. Vinelott J held, however, that the sellers’ interest was lost once the leather had been appropriated in the handbag-making process.

Vinelott J: Turning to the partly or wholly manufactured handbags and the proceeds of sale of those sold before the receiver was appointed, Mr Littman’s submission was shortly as follows. It was said that under the terms of the bailment of each parcel of leather supplied by Freudenbergs pending payment in full of the price for that parcel the company as bailee was entitled to use the leather in the manufacture of handbags, a process which involved cutting and shaping and sewing a piece of leather and attaching
to it hinges, handles, clasps and the like, in the course of which the piece of leather would remain identifiable throughout. The thread and attachments which were, it was said (and I do not think it is disputed) of comparatively minor value, then became the property of Freudenbergs as accessories to the leather. Thus the company remained a bailee of the handbags throughout the process of manufacture, and when the company sold the handbag it sold it (as in *Romalpa*) as agent for Freudenbergs, and was accordingly accountable to Freudenbergs as owner for the entire proceeds of sale. Freudenbergs was not entitled to a mere charge. Mr Littman instanced as an analogy a sportsman who having shot a rare animal takes the skin to a leather worker and instructs him to make it into a game bag. There the property in the skin would remain with the sportsman notwithstanding that the skin would undergo many operations and would have thread and other material added to it. He distinguished the *Borden* case on the ground that in that case the resin was inevitably consumed and destroyed as a separate substance when used in the manufacture of chipboard. The title retention clause accordingly did not purport to vest the property in the chipboard in the vendor, and if it had done so the vesting could only have been by way of equitable transfer of something not in existence when the resin was sold.

To my mind it is impossible to suppose that in the instant case, even assuming in Freudenbergs' favour that the company became a bailee of the leather when it was first delivered to it, the parties intended that until a parcel of leather had been fully paid for the company would remain a bailee of each piece of leather comprised in the parcel throughout the whole process of manufacture, that Freudenbergs should have the right until the parcel had been fully paid for, to enter the company's premises and identify and take away any partly or completely manufactured handbag derived from it, and that on the sale of a completed handbag the company would be under an obligation to pay the proceeds of sale into a separate interest bearing account and to keep them apart from their other moneys and not employ them in the trade.

It may be that, as Mr Littman asserts, an expert in the leather trade could identify each handbag whether partly or completely manufactured as made from a skin comprised in a particular parcel of leather. But after a handbag had been sold it would be impossible to do so. There is nothing in the conditions of sale which requires the company to keep a record of handbags sold so as to identify those of which it was a bailee and agent of Freudenbergs. No such records were in fact kept and there is nothing in the evidence which suggests that the parties contemplated that they would be. Indeed on the facts of this case it would be impossible for Freudenbergs now to prove that the handbags sold by the company but not paid for when the receiver was appointed were in fact made out of leather comprised in any of the parcels to which the unpaid invoices relied on by Freudenbergs relate. It seems to me that the parties must have intended that at least after a piece of leather had been appropriated to be manufactured into a handbag and work had started on it (when the leather would cease to have any significant value as raw material) the leather would cease to be the exclusive property of Freudenbergs (whether as bailor or as unpaid vendor) and that Freudenbergs would thereafter have a charge on handbags in the course of manufacture and on the distinctive products which would come into existence at the end of the process of manufacture (the value of which would be derived for the most part from Mr Launer's reputation and skill in design and the skill in his workforce). The charge would in due course shift to the proceeds of sale. That I accept does some violence to the language of clause 11(b) in so far as that clause provides that, 'The property in the whole or such other goods shall be and remain with the seller' (my emphasis). I do not think that those words compel the conclusion that the company was to be a mere bailee throughout the whole process of manufacture until the purchase price of the relevant parcel had been paid, and that on a sale before that time it would be no more than an agent for Freudenbergs. The language is, I think, consistent with the view that once the process of manufacture had started so that in the course of manufacture work and materials provided by the company would result in the leather being converted into (that is incorporated in or used as material for) other goods of a distinctive character the property in those other goods would vest in Freudenbergs only as security for any outstanding balance of the price of the relevant parcel of leather. What the draftsman has done is to elide and I think confuse two quite different relationships, that of bailor and bailee, with
a superimposed contract of sale (or of vendor and purchaser) on the one hand and that of chargor and chargee on the other hand.

Mr Littman conceded, and I think he must concede, that if Freudenbergs had no more than a charge on the partly completed and completed handbags the charge was void for non-registration. It was also void as regards the book debts against the bank, which under the debenture had a prior fixed charge. . . .

NOTES

1. NE Palmer Bailment (2nd edn, 1991), pp 166–168 suggests that Vinelott J perhaps too readily (given the clear wording of the contract) rejected the argument that the leather would remain the sellers’ property after it had been made into handbags. Unlike the resin in the Borden case (above, p 462), which ceased to exist, the leather here was still the dominant constituent in the end-product. However, in the more recent case of Modelboard Ltd v Outer Box Ltd [1993] BCLC 623, it was held that cardboard which had been made into cardboard boxes had ceased to be ‘the goods’ (ie the cardboard) which had been the subject of the original sale, and so it is not likely that this argument would have prevailed. (The result in Peachdart can, however, be justified on other grounds, for there was no provision in the contract requiring either that the handbags made from Freudenberg’s leather should be kept separate from other handbags or that the proceeds of sale of such handbags should similarly be kept separate.)

2. In Chaigley Farms Ltd v Crawford, Kaye & Grayshire Ltd [1996] BCC 957 it was held that livestock which had been delivered by a farmer to an abattoir for slaughter on terms that they should remain the farmer’s property until paid for lost their identity as the contract ‘goods’ when the living animals became carcasses of meat. The case was decided simply on this point: there was no difficulty in identifying the carcasses as those to which the contract related. The judge conceded that he was probably not giving effect to the intention of the parties, but said that there was ‘an inescapable difference between a live animal and a dead one, particularly a dead one minus hide or skin, offal, etc not sold on as butcher’s meat’. This may be contrasted with a New Zealand decision where the opposite conclusion was reached at first instance on similar facts: Re Weddell New Zealand Ltd (1996) 5 NZBLC 104,055. (On appeal, however, the decision was reversed on other grounds: see [1997] 2 NZLR 455.) In another New Zealand decision, Pongakawa Sawmill Ltd v New Zealand Forest Products Ltd [1992] 3 NZLR 304, logs sold to a sawmilling company were held not to have lost their identity and to have remained the seller’s property even after they had been sawn into timber.

**Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd**

[1984] 1 WLR 485, Queen’s Bench Division

Lennox had supplied Puttick with diesel engines under contracts which reserved their title as sellers until full payment of the price. The engines were incorporated into generating sets which would then be sold to Puttick’s customers; but each engine remained identifiable by its serial number and could easily be unbolted from the generating set. Puttick went into receivership at a time when three generating sets were in its possession. Two sets were in a deliverable state and Staughton J held that the property in them had passed to Puttick’s customers, so that Lennox’s claim to the two engines concerned was lost; but since the third set was not in a deliverable state (although its engine had been affixed) he held that Lennox could assert a proprietary claim to retake that engine.
Chapter 12 Remedies of the seller

Staughton J: I am aware that until very recently the radio and radar apparatus on a ship was commonly hired by the shipowner rather than bought by him. No doubt it was attached to the ship; but I do not suppose that it thereby became the property of the shipowner or his mortgagee. Nor in my judgment would an engine which was the property of A become the property of B merely because B incorporated it in a generator set otherwise composed of his own materials.

Those reflections and the facts of this case persuade me that the proprietary rights of the sellers in the engines were not affected when the engines were wholly or partially incorporated into generator sets. They were not like the Acrilan which became yarn and then carpet (the Bond Worth case), or the resin which became chipboard (Borden’s case), or the leather which became handbags (the Peachdart case) . . . . They just remained engines, albeit connected to other things.

Clough Mill Ltd v Martin
[1985] 1 WLR 111, Court of Appeal

Clough Mill, spinners of yarn, sold yarn to Heatherdale, a manufacturer of fabrics, on terms which included the following (as the first and fourth sentences respectively of condition 12):

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 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.

The Court of Appeal held that Clough Mill could claim to be the owner of unused yarn which was in Heatherdale’s possession when it went into receivership.

Sir John Donaldson MR: … Section 95 of the Companies Act 1948 [cf Companies Act 2006, s 874(1)] provides:

(1) … every charge created . . . by a company . . . shall, so far as any security on the company’s property . . . is conferred thereby, be void against the liquidator and any creditor of the company [unless registered] . . .

Accordingly s 95 can only apply if (a) the company creates a charge, and (b) that charge confers a security on the company’s property.

The plaintiff’s demands upon the defendant related solely to unused and unsold yarn and it is quite clear that if the first sentence of condition 12 had stood alone, s 95 would have had no application. The agreement between the plaintiff and the buyer involved the plaintiff retaining property in the goods. It did not involve the buyer conferring a charge on any property, but still less on its own property.

The argument that the object of the exercise was to give the plaintiff security for the price of the yarn does not of itself advance the matter. Just as it is possible to increase the amount of cash available to a business by borrowing, buying on hire-purchase or credit sale terms, factoring book debts or raising additional share capital, all with different legal incidents, so it is possible to achieve security for an unpaid purchase price in different ways, with different legal consequences. The parties have chosen not to use the charging method in relation to unused yarn.

Fortunately we do not have to decide whether the fourth sentence of condition 12 creates a charge to which s 95 of the Act of 1948 would apply. I say ‘fortunately,’ because this seems to me to be a difficult question. 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 plaintiff should not retain property in it and thereby avoid the application of s 95. However, in that situation I should have thought that the buyer was clearly purporting to create a charge on the ‘other goods’ which would never have been the plaintiffs goods. I say ‘purporting,’ because those goods might themselves remain the property of another supplier in consequence of the inclusion of the equivalent of the first sentence of condition 12 in the relevant sale contract. If, on the other hand, the incorporation of the yarn created a situation in which it ceased to be identifiable and a new product was created consisting of the yarn and the other material, it would be necessary to determine who owned that product. If, and to the extent that, the answer was the buyer, it seems to me that the fourth sentence would create a charge.

For present purposes I am content to assume that in some circumstances the fourth sentence of condition 12 would indeed give rise to a charge to which s 95 of the Act of 1948 would apply, but they are not the circumstances which exist in the instant appeal and I see no reason to distort the plain language of the first sentence on the false assumption that the parties must be deemed to have intended that the same legal framework should apply both before and after the yarn was made up into other goods.

There remains one other aspect which creates problems, but again is not, I think, determinative of this appeal. The first sentence of condition 12 retains property in all the material to which the contract relates until the price of that material has been paid in full. Thus if three-quarters of the yarn had been paid for, the plaintiffs would retain ownership of, and have a right to resell, all the material. Such a resale would be likely to realise more than was owed by the buyer. What happens then? I am inclined to think that the word ‘until’ in the phrase ‘reserves the right to dispose of the material until payment in full for all the material has been received’ connotes not only a temporal, but also a quantitative limitation.

In other words, the plaintiff can go on selling hank by hank until they have been paid in full, but if thereafter they continue to sell, they are accountable to the buyer for having sold goods which, upon full payment having been achieved, became the buyer’s goods.

Other cases concerned with retention of title clauses include the following:

(1) Re Andrabell Ltd [1984] 3 All ER 407: In a number of contracts of sale Airborne Accessories Ltd supplied travel bags to Andrabell, a retailer, on terms that ownership should not pass to Andrabell until it had paid Airborne the ‘total purchase price’. When Andrabell went into liquidation, Airborne claimed to be entitled to certain bags which were in its possession and to moneys, allegedly representing the proceeds of sale of bags, which Airborne had paid into its general bank account. In view of the following facts, Peter Gibson J held that no fiduciary relationship had been created:

(a) the passing of the property in the bags was postponed only until full payment was made for the particular consignment, rather than Andrabell’s total indebtedness;
(b) there was no provision requiring the bags to be stored separately;
(c) there was no express acknowledgment of a fiduciary relationship, and no provision that Airborne should have the benefit of the sub-sales;
(d) Andrabell was not constituted Airborne’s agent to resell;
(e) there was no obligation to keep the proceeds of sale separate from other moneys;
(f) the contracts provided for a 45-day period of credit, during which time Andrabell was free to use the proceeds of any subsales in any way that it liked.

In the absence of a fiduciary relationship, he said, the parties had to be treated simply as creditor and debtor, and there was no duty to account. Nor could Airborne claim any of the bags.
QUESTION

Assuming that all the bags in Andrabell’s possession were identifiable as having been supplied by Airborne, why did the claim for return of the bags fail? Could Airborne have succeeded if the contract had been differently worded?

(2) Specialist Plant Services Ltd v Braithwaite Ltd [1987] BCLC 1, CA: The plaintiff company supplied parts and materials for the purposes of repair to a machine owned by Braithwaite. The contract contained a provision that the supplier should be given ownership of the machine ‘as surety for the full payment’ of what the customer owed. This was held to create a charge.

(3) E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd [1988] 1 WLR 150 and Compaq Computer Ltd v Abercorn Group Ltd [1991] BCC 484: In each of these cases goods (respectively wines and computing equipment) were supplied on retention of title terms to a retailer who sold or leased them to customers. The supplier purported to reserve title to the goods, and also a proprietary interest in the moneys representing the proceeds of the subsales and leases, until the price of the goods was paid; and its claim in each case was against these moneys. Since the suppliers’ claim was only in respect of so much of the proceeds as was necessary to satisfy the outstanding price, the court held that the contracts amounted to an equitable assignment of the proceeds by way of charge, which was inconsistent with the fiduciary relationship on which a proprietary claim would be based; and because no charge had been registered, the suppliers could not succeed. (The suppliers also failed on a second ground, namely that the proceeds had been assigned to a factoring house which was held to have priority: see below, p 1010.)

(4) Tatung (UK) Ltd v Galex Telesure Ltd (1988) 5 BCC 325: This case concerned television and video equipment which was sold to a retailer on terms which authorised the goods to be resold or let on hire to customers, but which purported to reserve title in the goods to the suppliers and to confer on them rights to the proceeds of sale or hire of the goods until the purchase price and any other sums owing to the suppliers had been paid. Since the suppliers’ interest in the proceeds was defeasible upon payment of whatever the retailers owed to the suppliers, it was held that the contract created rights by way of security rather than an absolute interest.

(5) Armour v Thyssen Edelstahlwerke AG [1991] 2 AC 339, HL: Here German sellers successfully claimed to have retained title to steel sold and delivered to a Scottish company. It was held that a retention of title clause in standard form was effective (in regard to the original goods, which were identifiable) in Scots law.

(6) Forsythe International (UK) Ltd v Silver Shipping Co Ltd, The Saetta [1993] 2 Lloyd’s Rep 268: The Saetta was owned by Silver and chartered to Petroglobe. Forsythe sold fuel oil to Petroglobe which was delivered into the ship’s bunkers. The sale contract reserved title in the oil to the sellers. When Petroglobe failed to pay the hire charges on time Silver repossessed the ship under a power conferred by a clause in the charterparty, which also provided that any fuel oil on board thereupon became the property of Silver. Clarke J held that the oil still belonged to Forsythe and that in consequence Silver’s act amounted to the tort of conversion as against Forsythe. (He also held that the taking of possession by Silver was not a ‘delivery’ by Petroglobe which would give Silver a good title under s 25(1) (see above, p 390): ‘delivery’ required a conscious, voluntary act on the part of the party making delivery.)
Remedies of an unpaid seller 469

(7) Re Highway Foods International Ltd [1995] 1 BCLC 209. Meat was sold by A to B and resold by B to C. Each contract reserved title to the seller until the price was paid. It was held that the subsale (since, strictly speaking, it was only an agreement to sell) did not confer a good title on C under the Factors Act 1889, s 9: see above, p 389.

(8) In Associated Alloys Pty Ltd v CAN 001 452 106 Pty Ltd (2000) 202 CLR 558 the Australian High Court upheld the effectiveness of a 'proceeds subclause' and ruled that it did not involve the creation of a charge. The clause in question provided that if the buyer should use the goods that were subject to a retention of title provision in a manufacturing or similar process, the buyer should hold ‘such part of the proceeds of such process as relates to the goods’ in trust for the seller, the ‘part’ in question being equal in dollar terms to the amount owing by the buyer to the seller at the time of the receipt of the proceeds. In other words (assuming that no part of the price had been paid), the proceeds of any sale of the product should be held on trust for the seller and the buyer in proportions which reflected the value of their respective inputs. Doubts have been expressed whether an English court would reach a similar conclusion.

NOTE

Retention of title provisions are in widespread use, but in practice they provide sellers with rather less protection that might be expected—not because many cases are taken to court and the provision struck down as an unregistered charge, but for more down-to-earth reasons. Among the major obstacles standing in the way of a seller seeking to assert his title we may list: the difficulty in proving that the retention of title provision was incorporated into the contract of sale; problems of obtaining access to the buyer's premises or other place where the goods are believed to be in order to identify them; the question of distinguishing the seller’s goods from those supplied by others, or those that have been paid for from those that have not; and the risk that the goods may have lost their identity, eg through being used in a manufacturing process, or that they may have been sold. See on these issues Professor S Wheeler Retention of Title Clauses: Impact and Implications (1991).

Reform of the law. It is clear from the cases that the theoretical basis of many of the customary Romalpa terms—at least the more elaborate ones—is unclear, and that much uncertainty would be avoided if this topic were made the subject of clarifying legislation. But views differ as to the best course to be taken.

There are some who argue that the law should be changed so that, regardless of contractual form, all retention of title clauses should be deemed to create a charge and require registration. This would, of course, suit the banks, who would almost always be able to enforce their own charges in priority.

There is a counter-argument which stresses the commercial importance and utility of Romalpa terms, and expresses concern that already much of the protection which sellers have sought to secure for themselves has been whittled away by successive judgments: a simple business need, it is contended, is being thwarted by over-elaborate legal niceties.

It is probably true to say that there is this commercial need, and that it would be wrong to ignore it. Moreover, there is a working 'retention of title' regime in many other EU countries (as evidenced by the fact that German and Dutch plaintiffs feature prominently in the list of English cases cited above), and with the progressive removal of barriers to trade within the Community, it makes little sense for the United Kingdom to be the odd one out.

It would be wrong to say that the government—or, rather, successive governments—have not recognised the need for reform. There have been numerous official reports and
consultation papers published in which the topic has received attention, including the reports of the Crowther Committee (1971) and the Cork Committee (1982), the Diamond Report (1989), and the Law Commission’s *Final Report on Company Security Interests* (2005). All have stressed the need for change, and a variety of solutions have been proposed. But there has been no legislative action, not even for a more limited reform dealing only with buyers who are companies: see the discussion below, at pp 1083, 1122 and 1148. The subject seems doomed to languish indefinitely in a ‘too difficult’ tray on a desk somewhere in the DBERR.

**QUESTION**


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 BV 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.

Do you agree that there is ‘no logical reason’ for this distinction? If so, what attitude should the law take?