

B636 BLAKE, T. B. Retention of title.

Timothy Boyd BLAKE

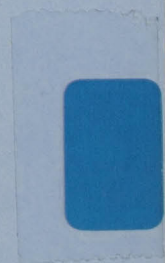
Retention of Title

LL.M. Research Paper
Laws 543 - Business Finance

Law Faculty
Victoria University of Wellington

1991

CLOSED
STACK
AS741
VUW
A66
B636
1991



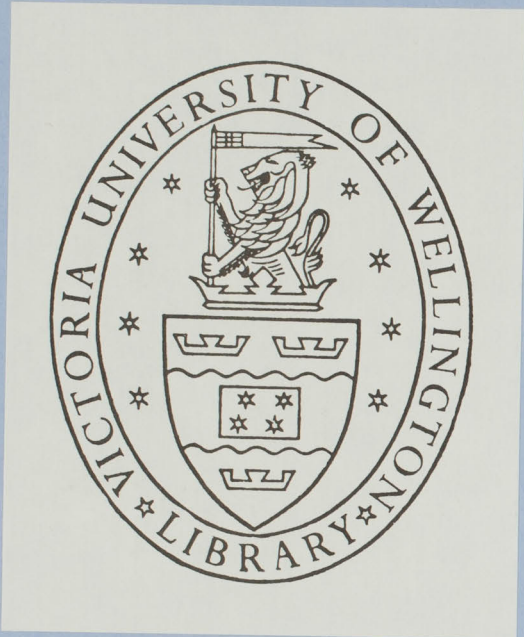


Table of Contents

§ 1. Introduction

§ 2. Registration Legislation

Retention of Title

§ 4. The Conditional Sale and Retention of Equitable Title Only

§ 5. All-Indebtedness Clauses

§ 5.01. Duty to Separate and All-Indebtedness Clauses

Timothy BLAKE LL.B. (V.U.W.)

§ 6. Can a Vendor make a Profit on the Sale of Reclaimed Goods?

LL.M. Research Paper

Laws 543 - Business Finance

Law Faculty

Victoria University of Wellington

1991

§ 9.1. *Aluminium Industrie Vaassen B.V. v Romalpa Aluminium Ltd*

§ 9.02. Was Romalpa Correctly Decided?

§ 9.03. Special features of Romalpa

§ 9.04. The Significance of the Express Duty Upon the Purchaser to Store the Vendor's Goods Separately

§ 9.05. The Significance of the Fact that the Retention of Title Agreement Related to All Debts Between the Parties

§ 9.06. The Significance of the Concession by the Purchaser that it Stood in a Bailment Relationship with the Vendor in Respect of the Goods Supplied

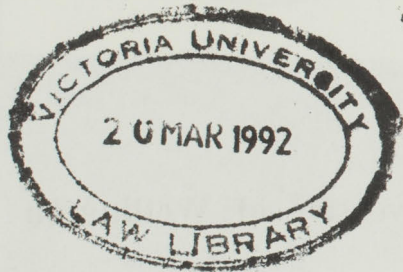


Table of Contents

Table of Contents

- § 1. **Introduction**
- § 2. **Registration Legislation**
- § 3. **The Simple Conditional Sale**
- § 4. **The Conditional Sale and Retention of Equitable Title Only**
- § 5. **All Indebtedness Clauses**
 - § 5.01. Duty to Segregate and All Indebtedness Clauses
- § 6. **Can a Vendor make a Profit on the Sale of Reclaimed Goods?**
- § 7. **Does the Fact of an All Indebtedness Clause Effect the Vendor's Duty to Return Part Payment?**
- § 8. **The Conditional Sale and Tracing**
 - § 8.01. The Conditional Sale and Common Law Tracing
 - § 8.02. The Conditional Sale and the Right to Trace in Equity
 - § 8.03. Conclusions Regarding Tracing and the Conditional Sale
- § 9. **Claims to Proceeds from On-Sale**
 - § 9.01. *Aluminium Industrie Vaassen B.V. v Romalpa Aluminium Ltd*
 - § 9.02. Was *Romalpa* Correctly Decided?
 - § 9.03. Special features of *Romalpa*
 - § 9.04. The Significance of the Express Duty Upon the Purchaser to Store the Vendor's Goods Separately
 - § 9.05. The Significance of the Fact that the Retention of Title Agreement Related to All Debts Between the Parties
 - § 9.06. The Significance of the Concession by the Purchaser that it Stood in a Bailment Relationship with the Vendor in Respect of the Goods Supplied

Table of Contents

- § 9.07. The Significance of the Finding that there Existed a Fiduciary Agency Relationship Between the Parties
- § 9.08. *Romalpa* Compared to Subsequent Cases
- § 9.09. Implications of the Distinction Between *Romalpa* and *Tatung*
- § 9.10. Summary of the *Romalpa* Cases and Claims to Proceeds
- § 10. Claims to New and Processed Goods
- § 11. The *Scintilla Temporis* Principle and *Romalpa* Vendors' Equitable Interests in Future Goods
- § 12. Retention of Title, Accession and Claims to the Sum Products of Affixture
- § 13. The Continued *Romalpa* Clause
- § 14. Some Suggestions Regarding the Drafting of a Retention of Title Contract
- § 15. Retention of Title and the Proposed Personal Property Legislation
- § 16. Conclusion

¹ [1956] 1 W.L.R. 676.

² "The Commercial Realities of Reservation of Title Clause" (1959) J.B.L. 220.

³ See § 3.

⁴ See § 5.

Retention of Title

§ 1. Introduction

*Aluminium Industrie Vaassen B.V. v Romalpa Aluminium Ltd*¹ (*Romalpa*) has been the source of a vast amount of legal writing and controversy over the last fifteen years. The *Romalpa* case and subsequent cases raise many issues of importance to commercial lawyers. This paper will examine some of those issues.

Retention of title agreements are a vital component of business finance. They allow vendors to supply goods on credit and help to protect the vendor's position in the event of the purchaser's default or insolvency. A recent empirical study by Julie Spencer indicates that approximately 60 percent of commercial suppliers in Britain use retention of title clauses.² Of the suppliers that use retention of title clauses, over half retain title to goods supplied until the purchaser has satisfied all debts owing to the vendor. Spencer's study, although not sufficiently comprehensive to be conclusive, tends to validate the enormous legal and commercial attention that retention of title clauses have attracted since the English Court of Appeal's decision in *Romalpa*.

The *Romalpa* case has led to all varieties of retention of title agreements becoming known as *Romalpa* clauses. There are five main varieties of *Romalpa* clause. They are:

- (a) The clause that retains ownership in goods until the goods are paid for. This type of clause will be referred to as simple conditional sales.³
- (b) The clause that retains ownership in goods being sold until the purchaser has discharged all debts to the vendor. This type of agreement will be referred to as all indebtedness clauses.⁴
- (c) The clause that seeks to do either (a) or (b) above and also to claim ownership of the proceeds from the on-sale of goods

1 [1976] 1 WLR, 676.

2 "The Commercial Realities of Reservation of Title Clause" (1989) *JBL*, 220.

3 See § 3.

4 See § 5.

Retention of Title

subject to the agreement.⁵ This type of a conditional sale will be described as a claim to proceeds.

(d) The clause that seeks to do either (a) or (b) and possibly (c) above and also seeks to claim ownership of goods produced from, mixed with, or affixed to the goods supplied.⁶ These types of conditional sales will be described respectively as claims to new goods, claims to mixed goods, and claims to the sum products of affixture.

(e) The clause that seeks to do either (a) or (b) and possibly (c) and or (d) above and also contractually requires the purchaser to insert a Romalpa clause in any on-sale agreement retaining title in the original vendor.⁷ This type of agreement will be referred to as continued Romalpa clauses.

This paper will examine and analyse the law relating to the various types of Romalpa clauses above and will place particular emphasis on recent legal developments and their potential implications for the law relating to retention of title. In discussions of a general nature, simple conditional sales and all indebtedness clauses will be referred to as limited form of Romalpa clauses; claims to proceeds, claims to new goods, mixed goods and the sum products of affixture, and continued Romalpa clauses, will be referred to as extended forms of Romalpa clauses.

A significant feature of the conditional sale is that, as an interest retained rather than an interest granted, it may successfully avoid statutory registration requirements. This section of the paper is therefore followed by a statement of the statutory requirements for registration of interests in goods.⁸ That statement will be followed by a discussion of the limited forms of Romalpa clauses. An important reason why people parting with possession of property may seek to retain a proprietary interest in the property is that, if the property is subsequently wrongly disposed of, the first party may be entitled to a tracing remedy against the funds, mixed goods, or new goods resulting from the disposition. Therefore, this paper

⁵ See § 9.

⁶ See § 10-12.

⁷ See § 13.

⁸ Statutory registration requirements relating to real property and to real estate are not specifically discussed in this paper.

Retention of Title

will discuss the basis of tracing remedies as they pertain to limited forms of Romalpa clauses.

In recent times conditional sale vendors have sought to provide themselves with greater protection than that offered by the common law and equitable principles of tracing. This result has been sought through the extended forms of Romalpa clauses. When these clauses achieve their desired result it is not necessary for the vendor to rely on traditional tracing remedies. As stated, a great deal has been written about retention of title. Much of what has been written focuses on why, in the normal course, a Romalpa vendor's interest in proceeds, new goods, or the sum product of affixture, is limited to a registrable charge. This paper will attempt to focus on when and how a Romalpa vendor can contractually avoid that result.

The conclusion to the paper will be preceded by a discussion of the new personal property security legislation proposed for New Zealand.

§ 2. Registration Legislation

A simple conditional sale is a retained interest, rather than an interest granted by the purchaser. This in itself makes Romalpa clauses of special importance because, as a general proposition, a retained or existing interest will generally have priority over an otherwise equal new or granted interest.⁹ Perhaps more importantly, a retained interest may avoid the wording of the statutory registration requirements given below. Registration of commercial interests or securities is clearly time consuming and to be avoided when possible. Furthermore, in an insolvency, the interests of Romalpa vendors will, rightly or wrongly, often be unregistered. The issue of whether registration legislation applies to the Romalpa vendor's interests then becomes a vital question. If a Romalpa vendor's interest is subject to registration it will be void against the other creditors of the purchaser.

Subsection 102(1) of the Companies Act 1955 (the Companies Act) states:

Where a company creates any charge to which this section applies, it shall be the duty of the company ... to cause a copy of the

⁹ Nemo dat qui non habet.

Retention of Title

instrument by which the charge is created or evidenced to be delivered to the Registrar for registration.

Paragraph 102(1)(c) of the Companies Act states that s 102 applies to:

A charge created or evidenced by an instrument which, if executed by an individual, would require registration under the Chattels Transfer Act 1924:

Section 103 of the Companies Act states:

... every charge to which this section applies shall, so far as any security on a company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the charge is registered ...

Subsection 18(1) of the Chattels Transfer Act 1924 (the Chattels Transfer Act) states that:

Every instrument, unless registered in the manner hereinbefore provided, shall ... be deemed fraudulent and void as against ... the assignee or trustee acting under any assignment for the benefit of the creditors of such person.

Section 2 of the Chattels Transfer Act, defines "Instrument" as including:

... any bill of sale, mortgage, lien, or any other document that transfers or purports to transfer the property in or right to the possession of chattels ...

The fact that s 2 of the Chattels Transfer Act refers to "transfers of rights" and s 102(1) of the Companies Act refers to charges that a company "creates" has the effect that an interest retained, rather than transferred or created, is not subject to registration. Retention of title is an interest retained by a vendor. Whether or not claims to mixed goods, manufactured goods, and proceeds can properly be said to be a retained interest will be discussed in this paper.

§ 3. The Simple Conditional Sale

One form of Romalpa clause is the simple conditional sale. The essence of the conditional sale is that the vendor conditionally retains legal title to goods supplied to a purchaser. If the purchaser fails to satisfy the conditions of the sale agreement the vendor may repossess the goods. As stated, for the purposes of this paper, a simple conditional sale refers to a Romalpa clause that does not expressly extend to all indebtedness and does not expressly claim title to new goods, mixed goods or proceeds.

Retention of Title

The validity of the simply conditional sale was recognised by the common law as long ago as 1868 in *Bateman v Green and King*.¹⁰ In a Romalpa type situation, a simple conditional sale purchaser will generally have authority to on-sell the goods and the vendor will lose title to the goods when they are on-sold.

As a general rule, if a bailor in possession of a particular bailee's goods, with the bailee's consent, mixes the goods with other goods or used the goods in a manufacturing process, subject to any contractual provision to the contrary, the bailee may become co-owner of the new or mixed goods.¹¹ If the mixing or manufacturing occurs without the bailee's consent the bailee may, subject to the Court's discretion, become sole owner of the stock of new or mixed goods.¹² These remedies are not available in every case however,¹³ and will not apply if they are contrary to the intention of the parties as expressed or implied in their agreement.¹⁴

In *Borden (U.K.) Ltd v Scottish Timber Products Ltd*¹⁵ (*Borden*) the vendor supplied resin, subject to retention of title, to the purchaser for use in the manufacture of chipboard. The conditional sale contract did not purport to vest title in manufactured goods in the vendor. The vendor argued that its retention of title to resin created a bailment and a right to trace money it was owed into manufactured goods and proceeds.

Bridge, L.J., held that as the contract was essentially one of sale, and did not purport to create an agency or fiduciary relationship, the purchaser was presumed to have manufactured the new goods on its own account.¹⁶ It would appear from the judgment in *Borden* that when the agreement between the parties is essentially one of sale, the courts will be inclined to presume that the parties do not intend a mixing of goods to result in co-ownership.¹⁷ An alternative view is that counsel for the plaintiff was at fault in *Borden* for failing to argue that co-ownership

¹⁰ (1868) IR 2 Ch 607.

¹¹ *Coleman v Harvy* (1989) 1 NZLR, 723.

¹² *Indian Oil Corp v Greenstone Shipping* (1988) 1 QB 345.

¹³ *Sandeman & Sons v Tyzack and Bandfoot* [1913] AC 680.

For further discussion see: Matthews, P., "Proprietary Claims at Common Law for Mixed and Improved Goods" (1981) 34 *CLP*, 159, 171.

¹⁴ For further discussion of these matters see: Goode, R.M., *Property Rights and Insolvency in Sales Transactions*, 2nd ed, Sweet & Maxwell 1989, 92.

¹⁵ [1981] Ch 25.

¹⁶ *Ibid*, 34-35.

¹⁷ *Ibid*, 45-47.

Retention of Title

ought to result in that case.¹⁸ If this view is accepted, it remains open to argue that the mixing of a vendor's goods subject to a Romalpa clause gives rise to co-ownership.¹⁹ For the purposes of this paper it will be assumed that conditional sales that authorise mixing of goods do not give rise to co-ownership, unless the parties have expressly provided for that result.

§ 4. The Conditional Sale and Retention of Equitable Title Only

*Re Bond Worth Ltd*²⁰ (*Bond Worth*) concerned a purchaser that manufactured carpet and a vendor that sold fibre to the purchaser. The sale agreement contained a retention of title clause. The retention of title clause provided that:

- (a) Equitable and beneficial ownership shall remain with us [the sellers] until full payment has been received ... or until resale, in which case our beneficial entitlement shall attach to the proceeds.
- (b) Should the goods become constituents of or be converted into other products while subject to our equitable and beneficial ownership we shall have the equitable and beneficial ownership in such other products as if they were solely and simply the goods...

The purchaser was placed in receivership. The vendor claimed ownership of the carpet manufactured from fibre supplied. This claim was disputed by the receiver. There was no obligation on the part of the purchaser to segregate fibre supplied by the vendor from other stock. For this reason, and because of the fact that legal title in the fibre had passed to the purchaser, Slade J., held that a bailment relationship was precluded.²¹ Furthermore, his Honour noted that there was nothing in the facts of the case or the wording of the agreement to indicate an agency relationship. Slade J., considered the factual and contractual relationship between the vendor and purchaser.

18 Davies, I., "Reservation of Title Clauses: a Legal Quagmire?" (1984) *Lloyds Maritime & Commercial Law Quarterly* 49, 63-64.
19 Matthews, P., "Proprietary Claims at Common Law for Mixed and Improved Goods" (1981) 34 *CLP*, 159, 184-185.

19 Farrar, J.H., "Romalpa Revisited" (1984) *British Business Law* 62, 63.

20 [1980] Ch 228.

21 *Ibid*, 247.

Retention of Title

The *Bond Worth* case considers the issue of whether it is possible for a vendor to grant legal ownership but retain equitable ownership. Slade, J., held that this was not possible. The vendor's equitable interest must have arisen by way of a grant back from the purchaser and therefore was subject to registration. His Honour's reasoning relies on the *scintilla temporis* principle developed in *Church of England Building Society v Piskor*²² (*Piskor*). This principle holds that the transfer of legal title from a vendor to a purchaser necessarily requires that equitable ownership also passes to the purchaser, at least for an instant in time. If the sale agreement purports to retain equitable ownership in the vendor the equitable ownership must arise by way of a grant back from the purchaser. The theoretical necessity of the vendor's equitable ownership arising as a grant back from the purchaser means that it is subject to registration.

The alternative approach to the *scintilla temporis* principle is the single transaction principle developed in *Re Connolly Brother Ltd (No. 2)*²³ (*Connolly*). This principle holds that when a charge and a transfer of legal title take place simultaneously any beneficial interest the purchaser acquires is limited to an equity of redemption.²⁴ The purchaser does not get equitable title even for an instant in time. The vendor may therefore properly be said to have retained equitable ownership.

In the 1990 case *Abbey National v Cann*²⁵ the House of Lords rejected the *scintilla temporis* principle and held that *Piskor* had been wrongly decided. The single transaction approach was upheld. In *Abbey National* the defendant relied on the approval of a loan for the completion of a real estate purchase. The loan was to be secured by a charge on the real property. The House of Lords held that the purchaser did not, even for an instant in time, acquire unencumbered ownership of the property. The House of Lords approach to the *scintilla temporis* principle is described by Gerald McCormack as "scathing".²⁶

22 [1954] Ch 553.

23 [1912] 2 Ch 25.

24 Gregory, R., "Romalpa Clauses as Unregistered Charges" (1990) 106 *The Law Quarterly Review* 551.

25 [1990] 2 WLR 832.

26 "Retention of Title - An Overview" Unpublished Paper presented to Bell Gully Buddle Weir, Barristers & Solicitors, Wellington, 12 November 1991, 3).

Retention of Title

In the *Bond Worth* case Slade, J., considered the position if *Connolly* was applicable and the single transaction approach followed. His Honour stated that if the single transaction analysis was correct:²⁷

...it might well have followed that the relevant charges were registrable neither under section 91 [of the UK Companies Act 1948] (because it could not have been said that they were created by *Bond Worth*) nor under section 97(1).

His Honour declined to decide the matter definitively however. Roger Gregory argues that the effect of *Abbey National* is that a vendor may pass legal title and retain equitable ownership in goods and the vendor's interest will not subject to registration.²⁸

If Gregory's analysis is correct, the potential effect of *Abbey National* is significant, particularly when a vendor combines retention of equitable ownership with an all indebtedness clause and the goods have been properly segregated. A purchaser may have legal title to goods and, on one view, be said to have paid for the goods.²⁹ Provided some indebtedness remains outstanding the vendor will have a valid charge over the goods. The charge will not be subject to registration, but it will give the vendor priority over the purchaser's unsecured creditors.

§ 5. All Indebtedness Clauses

A conditional sale may specify an event that will give rise to the transfer of title in the goods being sold. That event need not be the payment for the goods.³⁰ In recent years conditional sale agreements have commonly specified that title will not pass until the purchaser has paid all sums owing to the vendor. This type of condition will be referred to as an "all indebtedness clause". An example of the operation of an all indebtedness clause is as follows:

On day one A supplies B with X goods, to the value of \$100, subject to an all indebtedness retention of title clause. On day two B incurs a further debt to A for \$50. On day three B pays A \$100.

²⁷ [1980] Ch 228, 270.

²⁸ "Romalpa Clauses as Unregistered Charges" (1990) 106 *The Law Quarterly Review* 551, 551-552.

²⁹ See § 5.

³⁰ Goode, R.M., *Proprietary Rights and Insolvency in Sales* 2nd ed (1989), 101.

Retention of Title

Title to the X goods will not pass on day three because there is an outstanding \$50 debt.

One view of the above fact situation is that B has paid for the goods. Alternatively, a pool of debt can be said to exist between B and A. B's payment of \$100 can be viewed as partial payment for the X goods and partial payment for the additional \$50 debt.

An all indebtedness clause operates very much like an unregistered securities device.³¹ The clause secures the debt owed to the vendor via a claim against goods in the purchaser's possession. This is despite the purchaser having paid the nominal price for that particular consignment of goods. This has led to suggestions that, under an all indebtedness clause, once the purchase price of the goods is paid the agreement may only operate as a registrable charge in respect of other debts.³² This argument seems to ignore the view that the purchase price for the goods is the payment of all debts. Furthermore, it is clear from the House of Lord's judgment in *Armour v Thyssen Edelstahlwerke AG*³³ (*Armour*) that the English and Scottish courts consider the all indebtedness clause valid in this respect.³⁴ As pointed out in *Armour*, the essential difference between an all indebtedness clause and a security granted by the purchaser is that an all indebtedness clause is the retention of a right rather than the granting of a right.³⁵

§ 5.01. Duty to Segregate and All Indebtedness Clauses

The all indebtedness clause, at least in the form it is commonly used, has the potential to cause serious practical difficulties between parties operating an ongoing account. All indebtedness clauses commonly state that the title to goods supplied shall vest in the purchaser when all debts owing by the purchaser to the vendor have been satisfied. In order that the vendor's proprietary interest can be upheld, it is helpful, if not essential, if goods the vendor retains ownership in are segregated from other goods. A difficulty that may arise with the application of an all

³¹ Goode, R.M. *Commercial Law* (1988) Pelican Books 718.

³² Sweeny, M., "The Rationalisation of the Romalpa Clause" (1987) *The Juridical Review* 63, 71-75.

³³ [1990] 3 WLR, 810.

³⁴ *Ibid*, 816.

³⁵ *Idem*.

Retention of Title

indebtedness clause operating on a ongoing account basis in respect of segregation requirements is demonstrated by the fact situation below.³⁶

The vendor supplies the purchaser with nuts and bolts subject to an all indebtedness clause. The purchaser and vendor do business on a ongoing account basis. The parties have been doing business for 100 days. The purchaser has a large collection of nuts and bolts supplied by the vendor. The nuts and bolts supplied by the vendor are segregated from the purchaser's other stock. On day 101 the purchaser's trading account with the vendor goes into credit. Neither of the parties turns its mind to this. On day 102 further nuts and bolts are supplied by the vendor on credit.

The problem that arises from the above fact situation is as follows. On day 101 all indebtedness between the parties is satisfied and ownership of the nuts and bolts supplied up to that point vests in the purchaser. The purchaser segregates goods supplied by the vendor from other stock. If nuts and bolts supplied by the vendor after day 101 are mixed with nuts and bolts supplied by the vendor before day 101 the purchaser's and the vendor's goods have been mixed. If, as is usually the case, the purchaser is only required to segregate goods supplied by the vendor from other goods, the mixing can be said to be authorised. In order to avoid mixing, the purchaser must segregate goods supplied by the vendor after the purchaser's ongoing account goes into credit. Obviously this will often be a difficult requirement in practice if the parties operate on ongoing account. The parties may often not even be aware that the account went into credit.

It is submitted that the difficulty arising from the fact situation above can be avoided by careful drafting in the Romalpa Clause used. It is open to the parties to a conditional sale agreement to specify the circumstance that will give rise to the transfer of property. A conditional sale agreement may specify that property will not pass until X days after all indebtedness owing to the vendor by the purchaser is satisfied, and that property will only pass if no new indebtedness arises during that period. Given this wording, property would not pass on day 101 in the fact situation above. It would therefore not matter that the purchaser mixed goods supplied by

36 Articles

Retention of Title

the vendor before day 101 with goods supplied by the vendor after day 101.

§ 6. Can a Vendor make a Profit on the Sale of Reclaimed Goods?

Although the facts in *Romalpa* are relatively straightforward, the vendor's legal ownership of the foil, and equitable ownership of the proceeds raises potential difficulties. For instance, suppose the vendor supplies \$2000 worth of foil. The purchaser pays \$1000 of the amount due, and defaults on the remainder. Is the vendor entitled to retake all the foil, or only half of it? If the vendor reclaims all the foil, is the purchaser able to reclaim the \$1000 already paid. If the vendor reclaims only half (\$1000 worth) of the foil, but manages to on-sell it for \$1500, is the purchaser entitled to that \$500 excess. Furthermore, is the purchaser's claim proprietary or personal?

Before attempting to answer such questions it is necessary to establish whether the vendor is seeking to exercise his/her rights pursuant to the sale contract, or whether the sale contract has been rescinded at the vendor's option by the purchaser's non-payment. The common law rules regarding rescission remain applicable in a retention of title situation as the Contractual Remedies Act 1979 does not apply to the sale of goods except as regards misrepresentation and in other miscellaneous situations.³⁷

A vendor is not entitled to unilaterally treat a conditional sale contract as rescinded merely because the purchaser has defaulted on a payment instalment. If the purchaser demonstrates by his/her conduct or statements the he/she intends to abandon the contract, the vendor is entitled to treat the contract as rescinded.³⁸ Furthermore, if the contract expressly or impliedly authorises the vendor to retake possession of the goods in specified situations, and the vendor does so, the contract may be regarded as rescinded.³⁹

³⁷ Section 4 Contractual Remedies Act 1979.

³⁸ *Bloomer v Bernstein* (1874) LR 9, CP 588.
See *Chitty on Contracts*, 26th ed 1989, Sweet & Maxwell, ed
A.G., Guest, para 4904.

³⁹ *Att Gen v Pritchard* (1928) LJKB 561.
See *Chitty on Contracts*, Idem.

Retention of Title

If the contract has been rescinded the vendor may retake the entire stock supplied under that particular contract.⁴⁰ The vendor is not accountable to the purchaser for any additional profit made on the eventual resale of the goods. The vendor must return the \$1000 part payment.⁴¹ If the vendor eventually on-sells the foil at a loss the vendor will have a personal claim for damages against the purchaser for the loss.⁴² The claim may be set-off against the \$1000 part payment.⁴³

If we assume the contract is not rescinded, the fact situation is similar to a hypothetical one in respect of which Goff L.J., states:⁴⁴

...it would be perfectly possible to conclude, on the basis of an implied term in the contract, that the seller could only resell so much of the material as was necessary to pay the outstanding part of the purchase price, the rest to remain available to the buyer for the purpose of the contract, and that if, contrary to that term, the seller were to sell more than was necessary to pay off the balance of the price, he must account for the surplus to the buyer.

And later:⁴⁵

There is another possible solution to this problem. This is that the seller should be able to retain title to the material as trustee, on trust to sell the goods and apply the proceeds of sale, first in discharge of the outstanding balance of the purchase price, and then as to any surplus on trust for the buyer.

An interesting issue arises if the vendor takes back half the foil, but on-sells it for \$1500. In terms of the above cited dicta of Goff L.J., the original purchaser is entitled to the \$500 excess. However, it is less clear whether the purchaser's interest is a personal claim or an equitable proprietary claim. This issue might be important if the vendor also became insolvent. If the purchaser's interest is merely personal then the purchaser stands as an unsecured creditor in respect of that excess. If the purchaser's claim is proprietary, then the purchaser may be able to trace the funds.

40 *Armour* [1990] 3 WLR, 810, 816.

41 *Idem*.

42 *Idem*.

43 *Idem*.

See also, Goodhart, W. "*Clough Mill Ltd v Martin: A Comeback for Romalpa?*" (1986) 49 MLR 96, 97-98.

44 [1985] BCLC 64, 70.

45 *Ibid*, 71.

Retention of Title

In the writer's view, it is difficult to see how the purchaser could have a proprietary interest in the \$500 excess. In a Romalpa situation it is unlikely the contractual agreement would specify the vendor was a fiduciary for the purchaser. Furthermore, if title to the goods was retained, the purchaser only ever had contractual rights and possession in respect of the goods. Therefore it is submitted that any proprietary right the purchaser may have in respect of the \$500 could only arise by virtue of a constructive trust.

§ 7. Does the Fact of an All Indebtedness Clause Effect the Vendor's Duty to Return Part Payment?

A situation may arise where the vendor has sold \$2000 worth of goods under two separate retention of title contracts for \$1000 each, both contracts containing all indebtedness clauses. The purchaser pays the vendor \$1000 but defaults on the remaining \$1000 owed. As both contracts extend to all indebtedness, the vendor is entitled to reclaim all goods supplied under both contracts. The vendor then resells the entire stock, originally sold for \$2000, for \$1500. Sir William Goodhart, Q.C., argues that if the vendor's interest was merely a charge, the vendor is entitled to keep \$1000 of the proceeds from resale, plus the \$1000 part payment by the purchaser, and must account for the \$500 excess from the on-sale to the purchaser.⁴⁶ Goodhart argues that if the vendor had retained full legal title, then reclaimed all the goods supplied, the purchaser would be entitled to treat the first contract as being rescinded because of total failure of consideration. The result of this is that the vendor must refund the \$1000 paid by the purchaser, leaving the vendor \$500 out of pocket.⁴⁷

Goodhart's assertion that the purchaser is entitled to treat the first contract as being rescinded assumes that the purchaser has satisfied his/her obligations under that contract. It is true that the sale price in the first contract was \$1000 and the purchaser has paid the vendor \$1000. The purchaser can still be regarded as being in breach of both contracts for two possible reasons however. First, the earlier contract was for all indebtedness and the purchaser is in breach of the first contract in this

⁴⁶ (1986) 49 *MLR*, 96, 98.

⁴⁷ *Idem*.

Retention of Title

regard as he/she has not paid all indebtedness. Secondly, it is submitted that it is artificial to regard the \$1000 payment by the purchaser as relating to the first contract only unless the parties identified that \$1000 and agree it related to the first contract only. In the absence of identification the \$1000 payment can be regarded as a part payment only in respect of both contracts. The doctrine of total failure of consideration can only be relied on by the non-defaulting party to the contract.⁴⁸ Furthermore, as pointed out by Gerald McCormack, there has not been a total failure of consideration because the purchaser has enjoyed delivery and possession of the goods for a limited period.⁴⁹

It is the writer's view that, in the above situation, the vendor is only obliged to return the purchaser's part payment if, and to the extent that, the vendor makes a profit on the resale of the first consignment of goods. If the part payment was identified by the parties as relating only to the first consignment of goods, then the vendor may be entitled to unilaterally treat the second contract as rescinded for total failure of consideration. This is because the vendor has never received any payment in respect of the second consignment of goods. If the second contract can be regarded as rescinded the vendor would not be liable to account to the purchaser for any profit that might arise from resale of the second consignment of goods.

§ 8. The Conditional Sale and Tracing

A party may retain a proprietary interest in goods in the possession of another. One example of this is the conditional sale. In certain situations the proprietary may allow the first party access to remedies known as tracing if the second party uses the goods in an unauthorised or wrongful manner.

§ 8.01. The Conditional Sale and Common Law Tracing

The term "common law tracing" is perhaps a misnomer. Common law tracing is not an action *per se*. It is a definition of where the common law recognises one party's proprietary interest in goods held by another party.

⁴⁸ *Chitty on Contracts*, 26th ed 1989, Sweet & Maxwell, ed A.G., Guest, para 2058.

⁴⁹ *Reservation of Title* Sweet and Maxwell, 1990, 107-108

Retention of Title

The goods may then be claimed *in specie* via a common law action such as conversion or monies had and received.⁵⁰

Under a simple conditional sale agreement, if the purchaser has on-sold goods with the vendor's authority and then become insolvent, the vendor will not have legal title to the proceeds and will not have expressly claimed an interest in proceeds. The vendor will not be able to trace his/her claim into the proceeds at common law. This is because the purchaser has taken the proceeds on his/her own account. Any common law or equitable interest in the proceeds the vendor has must exist by way of a grant from the purchaser and is subject to registration if it is to be effective against the purchaser's other creditors.⁵¹

This result may be different if the purchaser on-sells without the vendor's consent. In this situation the third party will get good title to the goods by virtue of s 27(2) of the Sale of Goods Act 1908. The fact that the goods have been on-sold without the vendor's consent may give rise to a common law claim against the purchaser in respect of the proceeds from on-sale. The action will lie in conversion and monies had and received.

It was traditionally thought that, despite the action for conversion or monies had and received, the vendor's right to trace at common law would be lost if the purchaser mixed the vendor's money with his/her own money.⁵² In *Len Vidgen Ski & Leisure Ltd v Timaru Marine Supplies Ltd*⁵³ (*Len Vidgen*) Barker J., held that the conversion of goods in a purchaser's possession, subject to a vendor's retention of title, gave the vendor priority to the proceeds from the on-sale of the goods. This was despite the fact that the purchaser mixed the proceeds with its own funds. The mixing of funds was unauthorised. The *Len Vidgen* case has been criticised in this respect. It has been argued that as conversion is a tort action the award in *Len Vidgen* was for damages and should not ranked ahead of other unsecured creditors in priority.⁵⁴

50 Goode. R.M., "The Right to Trace and its Impact on Commercial Transactions" (1976) *LQR*, 360, 369-370.

51 *Idem*.

52 Jones, S.A., "*Clough Mill v Martin*: Further Considerations on Retention of Title Clauses" (1985) *New Law Journal* 271.
A view based on *Re Diplock* (1948) 1 Ch 465, 519-520.

53 [1986] 1 NZLR, 349.

54 Collier, B., *Romalpa Clauses: Reservation of Title In Sale of Goods Transactions*, The Law Book Company, 1st ed, 1989, 80.

Retention of Title

In *Elders Pastoral Ltd v Bank of New Zealand*⁵⁵ (*Elders*) a mortgagee successfully claimed the proceeds from an on-sale of mortgaged property. The mortgagee's claim was given priority over the purchaser's claim to set off money it owed for the mortgaged property against money owed to it by the mortgagor. The mortgage did not expressly prohibit on-sale, nor did it expressly claim proceeds from on-sale. The mortgagee's claim was allowed on the basis of a constructive trust arising from the unconscionability of precluding the mortgagee's interest from the on-sale. The judgment of Barker J., in *Len Vidgen* is not expressed in terms of the constructive trust. His Honour's judgment is consistent with the doctrine of unconscionability however. It is submitted that if the Court or Appeal's reasoning was to be extended to Romalpa situations this would justify future courts following the result in *Len Vidgen*.

At least when proceeds are not mixed, the conditional sale vendor is in a better position to trace if he/she has not consented to a particular on-sale. For obvious commercial reasons, credit purchasers will generally be reluctant to purchase from conditional sale vendors unless they (the purchasers) are free to on-sell. It is submitted that an appropriately worded conditional sale agreement can accommodate both the purchaser's need to on-sell and the vendor's need for protection. The conditional sale agreement would operate in a similar manner to a floating charge, allowing the purchaser to on-sell but only in specified circumstances. The conditional sale agreement could provide that the purchaser was only entitled to on-sell or use the goods provided his/her ongoing account with the vendor was not overdrawn beyond a certain specified amount. The conditional sale agreement might also provide that the vendor was entitled to revoke the purchaser's authority to on-sell or use the goods at any time by giving notice.

§ 8.02. The Conditional Sale and the Right to Trace in Equity

It was traditionally thought that the prerequisites for a successful tracing claim in equity were:⁵⁶

- (a) The claimant had an equitable interest in the property.

⁵⁵ [1989] 2 NZLR 180.

⁵⁶ Sutton, R., "Tracing" (1982) NZLJ 67, 67-71, see particularly discussion of *In Re Hallett's Estate* (1880) 3 Ch 696.

Retention of Title

- (b) The second party held the claimant's property in a fiduciary capacity.⁵⁷
- (c) The second party had dealt with the goods in breach of his/her fiduciary obligations.
- (d) The property was capable of identification.

A successful equitable tracing claim will allow a conditional sale vendor to claim a proprietary interest in the proceeds from the on-sale of his/her goods. The fact that the vendor supplies goods subject to retention of full ownership will generally mean that the vendor had an equitable interest in the property supplied. In a simple conditional sale situation the vendor will not have expressly claimed proceeds from an on-sale. It is submitted that a court would not imply a claim to proceeds in a simple conditional sale situation. In a simple conditional sale situation a purchaser making an authorised on-sale will generally be presumed to be doing so on his/her own account. Therefore, a successful equitable tracing claim in a simple conditional sale situation will generally only be possible if the purchaser has made an unauthorised on-sale.

In order to satisfy the identifiability requirement of a tracing claim in equity, a plaintiff does not have to identify his/her actual property, but he/she must identify goods or proceeds that arose from and represent his/her property.⁵⁸ Therefore, if a fiduciary makes an unauthorised on-sale of another's goods, the other party will be able to claim a charge over the proceeds from the on-sale. The decision in *Re Hallet's Estate* is authority that the claim to proceeds will not be lost should the fiduciary mix the proceeds with his/her own money. If the proceeds are mixed with the fiduciary's money, the mixing will entitle the other party to a charge over the whole mixed fund to the extent of the other party's interest. The charge arises as a result of the fiduciary's misconduct; it is not a charge created or transferred by the fiduciary for the purposes of registration.

⁵⁷ Authority for the view that a pre-existing fiduciary relationship is necessary for tracing in equity may be found in *Chase v Manhattan Bank v Israel-British Bank Ltd* (1981) Ch 105.

For a contrary view see Peace, R., "A Tracing Paper" (1976) *The Conveyancer* 277, 289. This contrary view is supported by the New Zealand Court of Appeal decision in *Elders Pastoral v Bank of New Zealand* [1989] 2 NZLR 108.

⁵⁸ Whittaker, S., "Retention of Title Specifications" (1984) 100 *The New Law Journal* 35, 38.

Retention of Title

The decision in *Re Hallet's Estate* is also authority that if the fiduciary draws funds out of the mixed fund he/she will be presumed to be drawing out of his/her own share of the mixed fund. For instance, if the fiduciary mixes \$1000 of the other party's money with \$1000 of his/her own money and a week later withdraws \$500 from the mixed fund, the fiduciary will be presumed to be withdrawing \$500 of his/her own money. The other party's interest will not be affected. If the fiduciary withdrew \$1500 from the mixed fund instead, and subsequently replaced \$500, the fiduciary will not be presumed to be replacing the other party's money.⁵⁹ In this situation the other party will only retain a charge over \$500 of the mixed fund and will be an unsecured creditor in respect of the fiduciary's other assets, including the money subsequently deposited into the mixed account. If the fiduciary used the \$500 originally withdrawn from the mixed fund to invest in another asset, the other party may be able to trace into the other asset to the extent of \$500, as well as tracing into the mixed fund.⁶⁰

§ 8.03. Conclusions Regarding Tracing and the Conditional Sale

Tracing claims to goods or proceeds may frequently arise when a conditional sale purchaser deals with the vendor's goods in an unauthorised manner. The advantage of an equitable tracing claim over a common law tracing claim is that it is clear a tracing claim in equity will not fail merely because the conditional sale purchaser mixed the vendor's goods or funds with his/her own goods or funds. The advantage of a common law tracing claim is that it does not require a pre-existing fiduciary relationship. In *Elders*, a tracing claim succeeded despite the fact that proceeds were mixed and there was not a pre-existing fiduciary relationship. It is submitted that if *Elders* is regarded as good law then the practical distinction between common law and equitable tracing claims becomes significantly less clear.

Tracing remedies will be a vendor's primary source of redress if a wrong or unauthorised disposition arises from a limited form of Romalpa clause. Extended forms of Romalpa clauses attempt to provide the vendor with contractual protection that is superior to that offered by tracing

⁵⁹ *James Roscoe Ltd v Winder* (1915) 1 Ch 62.

⁶⁰ *Re Oatway* [1903] 2 Ch 356, 359.

Retention of Title

remedies otherwise be available. Except for the discussion of the proposed personal property and security legislation, the remainder of this paper will discuss extended forms of Romalpa clauses and the legal issues that arise from them.

§ 9. Claims to Proceeds from On-Sale

The *Romalpa* case is authority for the proposition that it is possible for a conditional sale vendor and purchaser to effectively agree that the purchaser will take proceeds from on-sale on behalf of the vendor. The *Romalpa* case is also authority for the proposition that the vendor's interest in proceeds need not arise as a registrable interest. The effect of the retention of title clause in *Romalpa* was to put the vendor in a comparatively enviable position. The purpose of this section of this paper is to examine the potential for other conditional sale vendors to follow the result from *Romalpa*.

§ 9.01. *Aluminium Industrie Vaassen B.V. v Romalpa Aluminium Ltd*

In *Romalpa*⁶¹ the plaintiff, Aluminium Industrie Vaassen, supplied aluminium foil to the defendant, Romalpa Aluminium Ltd, under a conditional sale agreement. The conditional sale agreement purported to retain ownership of the foil by the plaintiff until all debts owed by the defendant to the plaintiff had been paid. The retention of title and claim to proceeds purported to apply whether the outstanding debt related to the foil, or to a different matter altogether. The clause was what has become known as an "all indebtedness clause."

The sale agreement clearly anticipated that the foil would be used in a manufacturing process by the defendant. The agreement required the purchaser to transfer ownership in any mixed or manufactured goods, and in the proceeds of sale from any mixed or manufactured goods, to the vendor. The validity of that claim was not directly at issue. The case arose because the defendant on-sold foil in its original form. This had not been expressly anticipated by the conditional sale agreement. The plaintiff

⁶¹ [1976] 1 WLR, 676

Retention of Title

claimed that it was entitled to the proceeds from the on-sales. Roskill L.J., delivering the leading judgment in the Court of Appeal, held:⁶²

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...

The existence of a fiduciary relationship was a critical issue because, if the purchaser had taken proceeds in a fiduciary capacity for the vendor, the vendor's interest in the proceeds could be said to have arisen directly from the sub-purchaser. If the purchaser was a fiduciary of the vendor, it (the purchaser) had not taken the proceeds on its own account, but had taken the proceeds on account for the vendor. If the purchaser had taken the proceeds on account for the vendor, the vendor's interest would not arise as a grant from the purchaser and therefore would not be subject to registration. If the plaintiff's equitable interest in the proceeds existed by way of a grant from the defendant then it would be void under s 95(1) of the U.K. Companies Act 1948 as an unregistered charge over book debts. The Court held that the plaintiff owned the goods, the defendant sold the goods on behalf of the plaintiff, and the plaintiff took equitable ownership of the proceeds directly from the sub-purchaser. Thus the defendant was not granting a charge and registration requirements had no application.

§ 9.02. Was *Romalpa* Correctly Decided?

In *Romalpa* the conditional sale agreement was translated from Dutch to English, and as Roskill L.J., stated, "... it cannot be said that the English translation is happy."⁶³ The contract read:

Until the date of payment, purchaser, if A.I.V. so desires, is required to store this material in such a way that it is clearly the property of A.I.V. A.I.V. and purchaser agree that, if purchaser should make (a) new object(s) from the material, mix this material with (an)other object(s) or if this material in any way whatsoever becomes a constituent of (an) other object(s) A.I.V. will be given the ownership of this (these)new object(s) as **surety** of the full payment of what purchaser owes A.I.V. To this end A.I.V. and purchaser now agree that the ownership of the article(s) in question, whether finished or not, are to be **transferred** to A.I.V. and that this transfer of ownership will be considered to have taken place through and at the moment of the single operation or event by which the material is converted into (a) new object(s), or is mixed with or becomes a constituent of (an)other object(s). Until the moment of

⁶² Ibid, 687.

⁶³ [1976] 1 WLR, 676, 684.

Retention of Title

full payment of what purchaser owes A.I.V. purchaser shall keep the object(s) in question for A.I.V. in his capacity of fiduciary owner and, if required, shall store this (these) object(s) in such a way that it (they) can be recognized as such. Nevertheless, purchaser will be entitled to sell these objects to a third party within the framework of the normal carrying on of his business and to deliver them on condition that if A.I.V. so requires-purchaser, as long as he has not fully discharged his debt to A.I.V. shall **hand over** to A.I.V. the claims he has against his buyer emanating from this transaction. [Emphasis added].

If the defendant was able to transfer ownership of new goods and hand over claims to proceeds it follows that the defendant must have had ownership to give. If the defendant had ownership this would suggest it did not create new goods or take proceeds merely as the plaintiff's fiduciary agent. If the purchaser did take the proceeds as fiduciary agent full title would never vest in the purchaser and the vendor's interest would arise automatically. It would therefore not be necessary or possible for the purchaser to hand over the claims. The Court overcame this difficulty by holding that the purchaser's transfer of ownership was merely a formal transfer of what the vendor already owned.⁶⁴

It was noted by Roskill L.J., that the use of the term "surety" indicates the interest is that of a security.⁶⁵ Such an interest appears to be more in the nature of a charge securing a debt, rather than an indication of retention of title or full equitable ownership. That ambiguous wording was held not to be decisive however.⁶⁶

The manner that the retention of title contract was interpreted in *Romalpa* was contrary to the doctrine of *contra proferentem*. This doctrine is used, mainly in the United States,⁶⁷ when interpreting ambiguous contracts. The doctrine holds that ambiguities in the language or the translation of a contract should be interpreted against the party which selected the language. It is submitted that the words of the contract in *Romalpa* were ambiguous regarding whether the vendor was retaining rights or being granted security. As it was the vendor that selected the language of the contract, the doctrine of *contra proferentem* holds that the ambiguity should be resolved against the vendor; it was not.⁶⁸

64 Ibid, 688.

65 Idem.

66 Ibid, 688-691.

67 *U.S. v Seckinger*, 397 U.S. 203, 216.

68 Prior, R., "Reservation of Title" (1976) 39 *The Modern Law Review* 585, 586-587.

Retention of Title

The agreement in *Romalpa* provided that the purchaser was to pay for goods delivered within fourteen days of invoice. In practice, a seventy-five day credit period was allowed. The defendant subsequently argued that such a credit period was inconsistent with a fiduciary duty to segregate proceeds. In other words, the credit period would, in practice, allow a purchaser to use funds from on-sales in its own day-to-day financing. This argument is described by Roskill L.J., as "formidable",⁶⁹ although it was clearly not decisive. His Honour did not consider it was important whether the credit period was fourteen or seventy-five days,⁷⁰ The significance presumably lay in the mere fact of a credit period.

The credit period in question may be justified on the basis that its purpose is not necessarily to allow the purchaser to use the funds from on-sale for the purchaser's own account, but to allow the purchaser in turn to give credit to sub-purchasers without having to account for money outstanding in the interim to the vendor from its (the purchaser's) own funds.⁷¹

The above arguments questioning the Court's reasoning in *Romalpa* relate only to whether the Court was correct in its application of the law to the facts, not to the correctness or otherwise of any principle of law that the case may reflect. Further to this observation, it may also be noted that the Court of Appeal, in refusing an application for appeal to the House of Lords, indicated that it believed *Romalpa* did not establish any new rule of law.⁷²

§ 9.03. Special features of *Romalpa*

Subsequent case law demonstrates that the particular facts of the *Romalpa* case were vital to the Court upholding the vendor's interest. The material considerations in the *Romalpa* case that may be regarded as special include:

- (a) An express duty upon the purchaser to store the vendor's goods separately.

⁶⁹ [1976] 1 WLR, 676, 689.

⁷⁰ Ibid, 688.

⁷¹ Goode, R.M., *Proprietary Rights and Insolvency in Sales* 2nd ed (1989), 100.

⁷² R.M. Goode, *The Times*, Nov 5, 1977, cited by Bradgate, J.R., "Reservation of Title Ten Years On" *The Conveyancer* (1987) 434.

Retention of Title

- (b) The fact that the retention of title agreement related to all debts between the parties.
- (c) The concession by the purchaser that it stood in a bailment relationship with the vendor in respect of the goods.
- (d) The finding that there existed an agency relationship between the parties.

The above considerations will be discussed in turn.

§ 9.04. The Significance of the Express Duty Upon the Purchaser to Store the Vendor's Goods Separately

In *re Peachdart Ltd*⁷³ it was held that the plaintiff was not entitled to trace proceeds of any on-sale of goods sold under a clause very similar to that in *Romalpa*. The *Peachdart* case was distinguished from *Romalpa*. In *Romalpa* there existed a duty to segregate goods containing the plaintiff's foil from other goods.⁷⁴ In *Peachdart* a duty to segregate was not expressly provided.

The above distinction seems unconvincing in several respects. Firstly, in *Romalpa* the duty to segregate was never complied with, nor expected to be complied with, while the purchaser remained a going concern. Secondly, in *Peachdart*, the plaintiff was virtually the sole supplier of leather, rendering a duty to segregate unnecessary from a practical perspective. Thirdly, in *Peachdart*, evidence was given that a leather merchant could easily distinguish the leather supplied by the plaintiff from other leather, again rendering an express duty to segregate unnecessary in practice and from a non-legal perspective. Fourthly, both cases concerned a claim to proceeds but in neither case was there an express contractual requirement to segregate proceeds. Fifthly, a duty to segregate arises as a result of a trust. If the facts of a case otherwise indicate the existence of a trust, the lack of an express duty to segregate the goods should not prevent the finding of a trust.⁷⁵

McCormack points out that an express duty to segregate is not logically essential as the duty to segregate arises from a fiduciary relationship.⁷⁶ When the issue of fiduciary relationship is in question an

73 [1984] Ch 131.

74 Ibid 138.

75 McCormack, G., *Reservation of Title*, Sweet and Maxwell, 1st ed, 1990, 78.

76 Idem.

Retention of Title

express duty to segregate will clearly be helpful however. Furthermore, it is clear that not all bailment or agency relationships are of a fiduciary character. Therefore an express requirement to segregate will support the proposition that a particular bailment or agency relationship is fiduciary in character.

§ 9.05. The Significance of the Fact that the Retention of Title Agreement Related to All Debts Between the Parties

In the *Romalpa* case Roskill L.J., noted that the retention of title clause related to default of any payment owed by the purchaser to the vendor. His Honour went on to state that this was "... a fact which I regard as of great importance ..."⁷⁷

If the retention of title clause relates only to specific debts the relationship tends to appear as debtor-creditor. It is submitted that an all indebtedness clause tends to put the relationship on a wider footing however. It indicates the relationship is more than mere vendor and purchaser and is therefore consistent with the finding of a fiduciary relationship.

§ 9.06. The Significance of the Concession by the Purchaser that it Stood in a Bailment Relationship with the Vendor in Respect of the Goods Supplied

In *Borden*⁷⁸ the plaintiff argued that, as legal title has been retained, a bailment existed. Thus it was argued that a fiduciary relationship resulted, giving rise to a right to trace against the manufactured chip-board. Bridge L.J., held:⁷⁹

... so long as the business transacted between these parties continued in the ordinary way and resin was delivered for use in the manufacturing process at a time before it could have been paid for, in circumstances in which the plaintiffs clearly had no right to call for its return or to object to its return or to object to its use in the manufacture of chipboard, and where it was never intended that the resin should be recovered, either in its original form or in its altered form or at all, it seems to me quite impossible to say that this was a contract of bailment.

The approach to bailment of Bridge L.J., has been subject to criticism, and is not consistent with the approach of the English Court of Appeal in

⁷⁷ [1976] 1 WLR, 676, 686.

⁷⁸ [1981] Ch 25.

⁷⁹ *Ibid*, 35.

Retention of Title

Clough Mill Ltd v Geoffrey Martin ⁸⁰ (*Clough Mill*). In *Clough Mill* Goff L.J., held:⁸¹

I for my part can see nothing objectionable in an agreement between parties under which A, the owner of the goods, gives possession of those goods to B, at the same time conferring on B a power of sale and a power to consume the goods in manufacture, though A will remain the owner of the goods until they are either sold or consumed. I do not see why the relationship between A and B, pending sale or consumption, should not be in the relationship of bailor and bailee, even though A has no right to trace the property in his goods into the proceeds of sale.

The facts in *Romalpa* may be distinguished from the facts in *Borden* in an important practical sense. In *Borden* the defendants generally only held two days' supply of unused resin. The real purpose of the *Romalpa* clause in *Borden* was not to enable this resin to be returned, but to get title to goods made from the resin.

In *Romalpa* large amounts of the vendor's goods were held by the purchaser for substantial periods. Allowing recovery of the foil was a realistic and primary purpose of the retention of title. It was therefore more commercially realistic to describe the vendors in *Romalpa* as bailees than to describe the vendors in *Borden* as bailees.

Furthermore, in *Romalpa*, unlike *Borden*, the sale agreement expressly stated that the purchasers held the goods supplied in a fiduciary capacity and were under a duty to segregate the vendor's goods from other goods. It is submitted that these requirements must be expressed or implied before a conditional sale purchaser can be held to be a bailee.

It is submitted that the balance of authority suggests that it is possible for parties to a conditional sale to validly stipulate that their relationship is one of bailment.⁸² It is further submitted that a more important issue is whether the bailment in question is of a fiduciary character.⁸³

80 [1985] BCLC 64..

81 *Idem*, 69-70.

82 McCormack, G., *Reservation of Title* Sweet and Maxwell, 1st ed, 1990, 41-43.

83 Farrar, J.H. & Chiah, K.C., *Romalpa Revisited Again* (1985) *JBL*, 160, 162-164

Retention of Title

§ 9.07. The Significance of the Finding that there Existed a Fiduciary Agency Relationship Between the Parties

In the *Borden* case, Bridge L.J., held:⁸⁴

...the most important distinction (between the *Borden* case and the *Romalpa* case) is that the essence of the decision in *Romalpa* was that on the facts found or admitted in *Romalpa* the defendants were selling the plaintiff's material, the aluminium foil, as **agents** for the plaintiffs. [Emphasis added].

The agency relationship that existed in the *Romalpa* case was an unusual one. One reason for this is that the purchaser was held to be an agent vis-a-vis itself and the vendor, but a principal in respect of the sub-purchasers. Roskill L.J., held:⁸⁵

I see no difficulty in the 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.

This statement indicates that the vendor does not incur contractual liability to the sub-purchasers for defects in the foil or for misconduct by the purchaser.⁸⁶

It is submitted that the finding of an fiduciary agency relationship in *Romalpa* is the result of the case rather than a factor leading to the result.⁸⁷ The vendor's equitable interest in the proceeds did not arise from the purchaser. The purchaser took proceeds merely as the vendor's agent, thus the vendor's equitable title was acquired directly from the sub-purchasers. The vendor's interest was therefore not subject to registration as against the other creditors of the purchaser.

If the *scintilla temporis* principle is to remain part of the law in respect of *Romalpa* clauses, there is an argument that the result in the *Romalpa* case will only be followed in situations of fiduciary agency and not in situations of bailment (fiduciary or otherwise) or in situations of non-fiduciary agency. It is clear from the *Romalpa* case that in situations

84 (1981) Ch 25, 38.

85 [1976] 1 WLR, 676, 690.

86 McCormack, G., "Liability of a Romalpa Seller to a Sub-buyer" (1990) *BLR*, 109, 109-110.

87 Farrar, J.H. & Chiah, K.C., *Romalpa Revisited Again* (1985) *JBL*, 160, 162-164.

Retention of Title

of fiduciary agency, the purchaser does not, even for an instant in time, take equitable title to the proceeds. It is open to argument that in the case of a fiduciary bailment or a non-fiduciary agency, the purchaser takes unencumbered title to proceeds for an instant in time.⁸⁸ If this distinction was accepted, a *Romalpa* vendor's interest in proceeds taken by a fiduciary bailee or non-fiduciary agent would arise as a grant and be subject to registration.

§ 9.08. *Romalpa* Compared to Subsequent Cases

Cases subsequent to *Romalpa* that consider conditional sale vendor's claims to proceeds have consistently distinguished the conditional sale agreements they have been faced with from the terms of the conditional sale agreement in *Romalpa*. In the cases following *Romalpa* the respective Courts have not been prepared to accept that the conditional sale agreements they were faced with, read alongside the facts of the respective cases, demonstrated an intention that the respective purchasers took proceeds other than on their own account. In this respect, and from the conditional sale vendor's perspective, the cases that follow *Romalpa* might be regarded as a guide on how not to draft a retention of title clause claiming proceeds.

In *Re Peachdart Ltd*⁸⁹ (*Peachdart*) the vendor supplied leather to the purchaser. The purchaser used the leather in the manufacture of handbags. The sale contract provided that:

- (a) The vendor would retain ownership of the leather supplied until full payment had been received.
- (b) The vendor could enter the purchaser's premises and retake the leather if payment was overdue.
- (c) The vendor's rights also extended to products of which the leather was a constituent.
- (d) The parties were deemed to be in a fiduciary relationship.

The case was distinguished from *Romalpa* on the basis that there was not a duty upon the purchaser to segregate the products supplied by the vendor from other materials.⁹⁰ Vinelott J., held that because of this

88 See § 9.09.

89 [1984] Ch 131.

90 Ibid, 139.

Retention of Title

distinction there could be no bailment or agency relationship.⁹¹ His Honour therefore concluded that the parties must have intended that the purchaser was to manufacture the handbags for its own account.

In *Pfeiffer v Arbuthnot*⁹² (*Pfeiffer*) the retention of title agreement stated:

The goods remain our ... property until payment has completely been effected for all obligations...In case of mixing or production of a new good, we will become the owner ... of the new product ... All claims that he gets from the sale ... regarding our goods, with all rights including his profit amounting to his obligations towards us, will be passed on to us ... In case of cash sales, the money that has come from a third person immediately becomes our own due to this, this money has to be separated from other money...

In *Pfeiffer* the vendor sought to follow *Romalpa* and argued that its title to proceeds was not a charge created by the purchaser. The vendor claimed its interest in proceeds arose directly from the sub-purchasers by virtue of their (the vendor's) retention of title and relationship with the purchaser. The *Pfeiffer* case is of particular interest because of the strong similarities of the facts to the facts in *Romalpa*. Phillips J., distinguished the *Romalpa* case on the basis that the retention of title agreements did not refer to the relationship as being fiduciary in character. Furthermore, unlike in *Romalpa*, the defendant did not concede that it held the goods as bailee. Phillips J., held that the vendor's interest in proceeds existed by way of charge created by the purchaser and was therefore subject to registration.

In *Tatung (UK) Ltd v Galtex Telesure Ltd*⁹³ (*Tatung*) the plaintiff sold electrical goods subject to an all indebtedness retention of title to the defendant. The retention of title clause provided:

...ownership of goods shall remain with the company [the vendor]
... the goods will be held by the buyer as bailee and be stored separately....

The contract further provided:

...the proceeds of resale or other dealing shall in any period preceding payment ... be held by the buyer in a separate account as trustee for the company.

91 Ibid, 142.

92 [1988] 1 WLR 151.

93 (1989) 5 BCC, 325.

Retention of Title

The issue to be decided was whether the vendor's interest in the proceeds arose by virtue of its relationship with the purchaser or whether the interest was created by the purchaser.

The facts were distinguished from *Romalpa* and Phillips, J., held that the purchaser took the proceeds on its own account, the purchaser then becoming trustee over those proceeds in favour of the vendor by virtue of the contractual provisions above.⁹⁴ The vendor's interest therefore arose as a registrable grant from the purchaser. This analysis can be distinguished from *Romalpa* as there the purchaser was the vendor's fiduciary before the proceeds were received and the purchaser took the proceeds as the vendor's fiduciary.

The result in *Tatung* appears particularly harsh on the vendor given that the sale agreement expressly required the vendor to act as bailee in respect of the goods and to hold proceeds from on-sale in a fiduciary capacity. The *Tatung* case may be used to demonstrate the view that courts are very reluctant to conclude that a purchaser took proceeds from on-sales on behalf of a *Romalpa* vendor.

§ 9.09. Implications of the Distinction Between *Romalpa* and *Tatung*

As stated, the facts in *Tatung* are distinguished from *Romalpa* on the basis that in *Tatung* the purchaser held proceeds from on-sales in a fiduciary capacity but did not take the proceeds in a fiduciary capacity. This distinction led the Court in *Tatung* to conclude that the vendor's interest in proceeds arose as a registrable grant from the purchaser. One analysis of this distinction is that it implicitly relies on the now discredited *scintilla temporis* principle. This analysis implies that the purchaser held an unencumbered interest in proceeds for an instant in time and that is why the vendor's interest was held to arise as a registrable grant from the purchaser.

An alternative analysis, preferred by the writer, is that the distinction between *Tatung* and *Romalpa* is based on the different legal implications that arise from a fiduciary bailment as contrasted with a fiduciary agency. In *Tatung* the conditional sale agreement stated that the purchaser was both a bailee and a fiduciary in respect of the vendor. In *Romalpa* the purchaser was held to be a fiduciary agent of the vendor.

⁹⁴ Ibid, 335.

Retention of Title

It is submitted that if a purchaser, who is a fiduciary bailee for a Romalpa vendor, may take proceeds from an on-sale of the vendor's goods. The vendor may have an equitable interest in the proceeds. It is submitted that, in a sense, the purchaser is a party to that transaction. The purchaser has acted as a conduct pipe for the receipt of the funds from the sub-purchaser. Therefore, the vendor's interest can be said to have been created or transferred by the purchaser is subject to registration.

It is further submitted that this analysis can be distinguished from situation of fiduciary agent. By nature, an agent is not an independent party to a transaction.⁹⁵ The agent is merely an extension of the principal. Therefore, a fiduciary agent does not have any independent involvement in the receipt of funds in the fact situation given in the above paragraph. The vendor's interest in proceeds therefore is not created or transferred by the purchaser and is not subject to registration.

The above analysis provides an explanation of the different results in *Romalpa* and *Tatung*. The above analysis also emphasises the importance of a Romalpa clause that claims proceeds expressly requiring the purchaser to take proceeds as the vendor's fiduciary agent.

§ 9.10. Summary of the Romalpa Cases and Claims to Proceeds

Romalpa is a case that is often described as a case peculiar to its facts. This is hardly surprising given that the Court of Appeal refused leave to appeal to the House of Lords on the basis that the case depended on the facts.⁹⁶ Given that the *Romalpa* decision has frequently been distinguished by subsequent courts on the basis of the special features in the facts of that case Berna Collier writes:⁹⁷

One wonders whether the so-called "special features" of the original *Romalpa* case have not been highlighted by courts since 1976 to vindicate a refusal to follow the decision on grounds of principle, without openly declaring the opinion that the case was wrongly decided.

⁹⁵ *Foley v Hill* (1848) 2 HL Cas 28.

⁹⁶ R.M. Goode, *The Times*, Nov 5, 1977, cited by Bradgate, J.R., "Reservation of Title Ten Years On" *The Conveyancer* (1987) 434.

⁹⁷ *Romalpa Clauses: Reservation of Title In Sale of Goods Transactions*, The Law Book Company, 1st ed, 1989, 39.

Retention of Title

The assumption that a conditional sale purchaser takes proceeds on the conditional sale vendor's account is self evidently contrary to normal commercial practice.⁹⁸ It is only in special circumstances that a court will reach the conclusion that the purchaser did not take proceeds from on-sale on his/her own account. The fact is that, in *Romalpa*, the Court did conclude that the parties had intended that the purchaser would take proceeds on account of the vendor. Despite considerable judicial attention, no subsequent judgment has declared that *Romalpa* was wrongly decided. It is the writer's view that these considerations dictate the importance of identifying precisely what were the special factual and contractual features of *Romalpa*. The special features of the conditional sale in *Romalpa* must be identified if future vendors are to be able to successfully claim proceeds from the on-sale of their goods.

§ 10. Claims to New and Processed Goods

Traditionally it was thought that when a purchaser produced goods using materials supplied by a particular vendor, or mixed the vendor's goods with other goods so that the vendor's goods lost their identity, then title in the new goods or stock necessarily vested in the purchaser.⁹⁹ Recent case law suggests that this is a presumption only, and that it is possible for the parties to rebut this presumption by agreement.¹⁰⁰

In *Clough Mill Ltd*¹⁰¹ the vendor carried on business as a spinner of yarn. The vendor supplied yarn subject to retention of title to the purchaser who manufactured fabric. The retention of title contract contains an all indebtedness clause. The purchaser, in receivership, claimed that the all indebtedness nature of the agreement made the vendor's interest subject to registration. Goff L.J., upheld the vendor's retention of title to all yarn supplied despite some of the earlier instalments of yarn having been paid for.

98 *Pfeiffer* [1988] 1 WLR, 151, 159.

99 Atiyah, P.S., *The Sale of Goods* 8th ed, 302.

100 Watts, P., "Tracing at Common Law and Equity" 1990 (106) *The Law Quarterly Review*, 552.

101 [1985] BCLC 64.

Retention of Title

The Court also considered whether the vendor had a claim to manufactured fabric that contained the vendor's yarn incorporated with the vendor's consent. Goff L.J., stated:¹⁰²

...where A's material is lawfully used by B, to create new goods, whether or not B incorporates other material of his own, the property in the new goods will generally vest in B ... But it is difficult to see why, if the parties agree that the property in the goods shall vest in A, that agreement should not be given effect to.

Oliver L.J., expressed a similar view.¹⁰³ These comments are consistent with the statements of Bridge, L.J., in *Borden* that if a conditional sale vendor wished to acquire rights over a manufactured product the vendor could only do so via an express contractual stipulation.¹⁰⁴ In *Clough Mill* the parties were silent regarding which of them owned processed materials. The purchaser had borne the cost of manufacture, therefore ownership of the manufactured goods was presumed to vest in the purchaser.¹⁰⁵

In *New Zealand Forest Products v Pongakawa Sawmill Ltd*¹⁰⁶ (*Pongakawa Sawmill*) logs supplied by the vendor were cut into planks of timber by the purchaser, with the vendor's consent. The retention of title agreement provided that the vendor would retain property in the logs and all products of the logs until all logs were paid for. Henry, J., described the timber as a "product of the logs".¹⁰⁷ The vendor's interest in the logs was upheld and was not subject to registration. The vendor's interest was upheld on the basis of the parties intention.

The conclusion that the goods were processed on the vendor's behalf is one that courts have been reluctant to make, particularly when the processing is significant and involves other party's goods.¹⁰⁸ If the purchaser undertakes processing on his/her own account the vendor's interest has been held to be limited to a registrable charge. It is submitted that the fact that new goods contain ingredients not supplied by the vendor will not necessarily prevent ownership vesting in the vendor on creation, if that is what the parties expressly intended. Provided those ingredients

102 *Ibid*, 72-83.

103 *Ibid*, 77.

104 [1981] Ch 25., 42.

105 *Ibid*, 73.

106 [1991] 3 NZLR 112.

107 [1991] 3 NZLR, 112, 117.

108 *Borden* [1981] Ch, 25, 45-47.

Retention of Title

(not belonging to the vendor) have lost their identity the vesting of ownership in the new item, upon creation, will not constitute an interest transferred or created by the manufacturing purchaser. This is because the purchaser never owns the new item.

If, for instance, a game hunter took a piece of trophy leather to a manufacturer and asked the manufacturer to make a handbag from the leather the hunter could properly claim to retain ownership in the leather despite the leather undergoing a manufacturing process. The game hunter does not ever expect the return of his/her leather because he/she knows it will lose its identity. Furthermore, the hunter's interest in the handbag does not arise because of his/her interest in the leather. The interest in the leather is lost when the leather loses its identity. The reason the supplier retains ownership is that the manufacturer processes the leather as agent for that supplier. The parties intended the second party would make the handbag for the hunter and the parties intended that ownership in the handbag would vest in the hunter upon its creation. The agency relationship reflects the intention of the parties and the commercial reality of the transactions.¹⁰⁹

The intention that a manufacturer produces goods as agent for a particular commercial supplier of components is clearly contrary to ordinary commercial assumptions, particularly when the new goods contain components not supplied by that supplier. If the parties intend that the purchaser shall make new goods on behalf of that supplier the intention must be expressed in a manner that is clear and unambiguous. Otherwise, it is clear from existing cases that the courts will presume that the parties intended the supplier's interest be limited to a charge and thus be subject to registration.

§ 11. The *Scintilla Temporis* Principle and Romalpa Vendors' Equitable Interests in Future Goods

In terms of the *scintilla temporis* principle, the purchaser is deemed for an instant in time to have legal and equitable ownership of the new goods. The *scintilla temporis* principle therefore dictates a theoretical necessity that any interest of the vendor's under the conditional sale agreement

¹⁰⁹ McCormack, G., *Reservation of Title* Sweet and Maxwell, 1st ed, 1990, 85.

Retention of Title

arises as a grant from the purchaser upon the creation of the new goods. If the vendor's interest arises as a grant from the purchaser it is subject to registration.

In the light of the House of Lords rejection of the *scintilla temporis* in *Abbey National* the reasoning above is questionable. Given the rejection of the *scintilla temporis* principle it can be argued that there is not a theoretical necessity that the purchaser had full legal and equitable ownership for an instant in time. Therefore the vendor's equitable ownership of the new goods need not be said to arise as a grant from the purchaser.¹¹⁰ Rather, it may be argued that the vendor's interest arises by virtue of the vendor's retained interest in the goods supplied. If the vendor's interest is not created by the purchaser it is not subject to registration under s 102 of the Companies Act 1955 (s 102).

The above argument becomes conceptually more complex, although not necessarily less valid, when the materials supplied by the vendor are mixed with other materials in the creation of new goods. Taking the facts from *Peachdart*, leather supplied, subject to retention of title, is mixed with cotton and buckles owned by the purchaser in the manufacture of handbags. The retention of title agreement claims that the vendor of the leather retains ownership of handbags manufactured from the leather supplied. At a certain point in time the leather will lose its identity and a new item (a partially or fully manufactured handbag) will be created. If the vendor has an title to the handbag the vendor can be said to have an interest in an item that includes components (cottons and buckles) previously owned by the purchaser. Therefore it may seem curious that the vendor's interest does not arise as a grant from the purchaser. At the moment the handbag was created, the leather, cotton and buckles lost their identity however. Therefore it can be argued that the vendor obtained ownership of the new item by virtue of the retention of title agreement at the moment the new item was created. The vendor has not been granted an interest in the cotton and buckles because the cotton and buckles have lost their identity.¹¹¹ Furthermore, the vendor's interest in the handbag was not granted by the purchaser because, given the rejection of the

¹¹⁰ Reuecamp, W., *Romalpa Clauses Revisited*, Unpublished Paper, Wellington Business Finance Study Group, May 1991, 7.

¹¹¹ For further discussion and a contrary view see: McCormack, G., "Retention of Title - An Overview" Unpublished Paper presented to Bell Gully Buddle Weir, Barristers & Solicitors, Wellington, 12 November 1991.

Retention of Title

scintilla temporis principle, ownership in the handbags never vested in the purchaser. Rather, the vendor's interest arose as a necessary result of his/her relationship with the purchaser.

If the above analysis was upheld, the vendor's equitable interest may be subject to registration under s 102 regardless. The paragraph above argues that the vendor's interest does not arise as a grant from the purchaser. This is not necessarily decisive as s 102 only requires that the vendor's interest be "created by" the purchaser in order that it be subject to registration. Even given the analysis in the above paragraph, the vendor's interest in the handbag arises by virtue of a contract that the purchaser was a party to. It may therefore be argued that the vendor's interest was created by the purchaser for the purposes of s 102.

§ 12. Retention of Title, Accession and Claims to the Sum Products of Affixture

Goods sold subject to retention of title may become attached to other items. Often the Romalpa vendor's goods can be easily removed. If this is the case the fact that they are attached to other goods has no special legal significance. In other situations the doctrine of accession may apply, and the vendor's title may be lost because of the affixture of his/her goods to the purchaser's goods. A.G. Guest states that accession may apply in the following four situations:¹¹²

- (a) If the removal of the vendor's goods from the purchaser's goods would cause serious damage the goods may be said to have become affixed.
- (b) If the vendor's goods have become attached to the purchaser's goods to the extent that both goods have lost their identity accession may apply. This test is difficult to apply in practice and its application is more obvious in relation to processed goods. Situations where one mechanical item is joined to another mechanical item to form a new machine have been held to constitute accession.¹¹³ The legal outcome in this type of

¹¹² "Accession and Confusion in the Law of Hire Purchase" (1964) 27 *MLR* 505, 507-509.

¹¹³ *Hendy Lennox* [1984] 1 *WLR* 485.
Rendell v Associated Finance Pty Ltd (1957) *VR* 604.

Retention of Title

situation may be influenced by the express intention of the parties. In situations that are similar, except to the extent that the parties have expressly stated that accession should apply, the doctrine of accession has been upheld.¹¹⁴

- (c) If the removal of the article supplied by the vendor would destroy the usability of the new utility created accession may apply. However case law indicates that if the purchaser can repair the new utility by replacing the component supplied by the vendor this test will not apply.¹¹⁵
- (d) In the case of land, accession may apply if the nature and purpose of the affixture is permanent.¹¹⁶

Assuming the vendor's goods have become permanently affixed to the purchaser's goods, it does not necessarily follow that ownership of the sum item will vest in the purchaser. Gerald McCormack claims that there is no reason in principle why a Romalpa clause cannot stipulate that, upon attachment, ownership in the sum product will vest in the vendor.¹¹⁷ It is submitted that as a result of this presumption, when a Romalpa contract is silent regarding ownership of a sum product, and permanent affixture occurs, the purchaser will be presumed to have undertaken the affixture for his/her own account.¹¹⁸ Ownership of the sum product will vest in the purchaser. This presumption must be balanced against the general rule that, when attachment occurs, ownership will vest in the party owning the principal asset (the asset of greatest value).¹¹⁹

In *Akron Tyre Co Pty Ltd v Kittson*¹²⁰ a hiree stipulated that it became legal owner of any goods affixed to its vehicles. The hirer fitted tyres to the vehicle but subsequently removed the tyres and on-sold them. The hirer was held liable for conversion because the tyres had become part of the vehicle and the hiree's property upon affixture.

Thomas v Robinson [1977] 1 NZLR, 303.

114 *Akron Tyre Co. Pty. Ltd. v Kittson* (1951) 82 CLR 477.

115 Farrar, J.H., "Romalpa Revisited" (1984) *BBL*, 62

116 *Trust Bank Central Limited v Southdown Properties Limited & Anor*, Unreported, HC CP 59/90 1 May 1990, Robertson J.

117 *Reservation of Title* Sweet and Maxwell, 1st ed, 1990, 48.

118 *Hendy Lennox* [1984] 1 WLR 485.

119 Guest, A.G., "Accession and Confusion in the Law of Hire Purchase" (1964) 27 *MLR* 505, 507.

120 (1951) 82 CLR 477.

Retention of Title

The result in *Akron* is clearly influenced by the fact that the hiree's property provided the substantive part of the sum property. The tyres became part of the van, rather than the van becoming part of the tyres, or the tyres and van losing their identity to form a new item. When the Romalpa vendor supplies the substantive component of a sum item it is submitted that McCormack is clearly correct and the parties can validly stipulate that the Romalpa vendor will become owner of any property affixed to his/her goods. The position may not be the same if the Romalpa vendor claims to retain ownership in a sum item when:

- (a) the purchaser's goods comprise the substantive value of the sum item, or;
- (b) the purchaser's and vendor's contributions are of roughly equal value.

A Romalpa vendor may supply goods that become affixed to more substantive goods owned by the purchaser. For instance, tyres supplied by a Romalpa vendor may be affixed to a vehicle owned by the purchaser. It is difficult to see how the vendor's interest in the vehicle could exist otherwise than as a registrable grant from the purchaser. The vehicle has not lost its identity and it is submitted that the vendor's interest arises as a grant from the purchaser and is subject to registration.¹²¹ Similar situations may arise when a conditional sale vendor's goods become affixed to land. Clearly, a vendor clearly cannot be said to have retained an interest in land because his/her assets become fixtures of the land.¹²²

If goods of roughly equal value belonging to both the Romalpa vendor and purchaser are permanently affixed, the position is analogous to component goods losing their identity in a manufacturing process.¹²³ It is submitted that it is possible, as in the case of manufactured goods, for ownership in the sum product to vest in whoever the parties intend and express ownership to vest in upon affixture. If ownership is to vest in the vendor, the parties must express this in an unambiguous manner in order

121 *Steel & Tube New Zealand Limited v A Barge* unreported decision of the HC, Rotorua Admiralty Jurisdiction AD/88 9 September 1988, Henry, J.

122 *Trust Bank Central Limited v Southdown Properties Limited & Anor*, Unreported, HC CP 59/90 1 May 1990, Robertson J.

123 *Lewis v Andrews and Rowley Pty Ltd* (1956) SR (NSW) 439.

Retention of Title

to overcome the presumption that the purchaser undertook the affixture for his/her own account.

The Romalpa vendor's interest is not a grant from the purchaser and is not subject to registration. The purchaser has not transferred to the vendor an interest in his/her (the purchaser's) goods because the purchaser's goods have lost their identity. The vendor's interest is not a grant from the purchaser because the purchaser never has title in the sum product to give.

§ 13. The Continued Romalpa Clause

In addition, or as an alternative, to claims for proceeds, Romalpa vendors may wish to adopt what is known as a continued Romalpa clause.¹²⁴ The continued Romalpa clause requires the purchaser to include a Romalpa clause in on-sale agreements. Margarita Sweeny points out that this requirement is an onerous expectation upon the purchaser, and if the purchaser fails to include the term in an on-sale agreement, the vendor's only recourse is personal and against the purchaser.¹²⁵ Although Sweeny's view is clearly correct, if the purchaser does include the term as specified in on-sale agreements the vendor's position may be substantially improved. The term in the on-sale agreement could provide that property in the goods would only pass to the sub-purchaser when the sub-purchaser had paid the purchase price for the goods and the purchaser had paid the original vendor for the goods. The clause might provide that if the purchaser became insolvent the vendor could then retake the goods from the sub-purchaser rather than disputing its (the vendor's) claim to proceeds with the purchaser's other creditors. A Romalpa vendor may wish to insure that purchasers did include the specified term in on-sale agreements by requiring personal undertaking from managers of corporate purchasers agreeing to do so.

As far as the writer is aware, there is no authority regarding the validity of continued Romalpa clauses. Furthermore, it is conceptually unclear whether the vendor's interest in goods in the hands of the sub-purchaser can properly be said to be a retained interest, or whether the

¹²⁴ Sweeny, M., "The Rationalisation of the Romalpa Clause" (1987) *The Juridical Review* 63, 94-95.

¹²⁵ *Ibid*, 85.

Retention of Title

interest arises as a grant from the original purchaser. In the writer's view, the vendor's interest can properly be said to be a retained interest. It is submitted that the purchaser's interest in the goods is only possession and a contractual right of on-sale. If the purchaser fails to insert the specified Romalpa clause in an on-sale agreement, the sub-purchaser gets title by virtue of s 27 of the Sale of Goods Act 1908, not as a grant from the purchaser. To hold that the vendor's interest arises as a grant from the purchaser infers that upon on-sale, at least for an instant in time, the purchaser had sufficient title to grant the vendor a charge. This analysis relies on the *scintilla temporis* principle, discredited in *Abby National*. If the vendor's rights exist as a retained interest they are not subject to registration.

§ 14. Some Suggestions Regarding the Drafting of a Retention of Title Contract

The following are suggested clauses that might be included in a conditional sale agreement in order to maximize protection for the vendor.

- (a) The vendor retains legal title to all goods supplied until X days after the purchaser has paid all debts owing to the vendor and title only passes at the end of that time if no new indebtedness has arisen in the interim.¹²⁶
- (b) The purchaser holds the goods as fiduciary bailee while any debts are outstanding.
- (c) The purchaser is required to segregate the vendor's goods from any other goods (including goods that were originally supplied by the vendor but that the purchaser has acquired beneficial ownership of) while any debt is outstanding.
- (d) If, while any debts between the parties are outstanding, the purchaser on-sells the goods, or mixed goods that include the vendor's goods, or any goods that have incorporated the vendor's goods via any manufacturing process or via permanent affixture, the purchaser does so as fiduciary agent for the vendor.
- (e) The purchaser shall segregate any proceeds from any on-sale as described in (d) above, while any debts are outstanding. The

¹²⁶ See § 5.01.

Retention of Title

- proceeds shall be received and held on trust for the vendor until the purchaser pays all debts owing to the vendor.
- (f) Any manufacturing, mixing or affixture process undertaken by the purchaser using the vendor's goods and causing the vendor's goods to lose their identity, shall be undertaken by the purchaser as the vendor's fiduciary agent and bailee. Full legal and beneficial property in any new goods or mass of goods shall vest in the vendor upon its creation until the purchaser pays all debts owing to the vendor.
 - (g) If the purchaser permanently affixes any goods to the vendor's goods, not causing the vendor's goods to lose their identity, the purchaser shall undertake the affixture as the vendor's fiduciary agent and for the vendor's benefit. Full legal and beneficial title to the sum of the affixture shall remain in the vendor.
 - (h) If the purchaser sells any sum goods, that include the vendor's goods and goods affixed (but not permanently affixed) to the vendor's goods, the vendor shall segregate the proceeds on a pro-rata depending on value on component contributions. The purchaser shall segregate a portion of the proceeds relating to the vendor's goods. That portion of proceeds shall be taken and held by the purchaser as the vendor's fiduciary agent until the purchaser pays all debts owing to the vendor.
 - (i) The purchaser is only authorised to on-sell goods belonging to the vendor providing the total debt owed by the purchaser to the vendor does not exceed \$X.
 - (j) The purchaser is obliged to pay the vendor for goods supplied within X days of the goods being received. If the purchaser receives proceeds from the on-sale of the goods within the X days the purchaser is not entitled to use the proceeds for its own purposes.
 - (k) If the purchaser on-sells any goods that are owned by the vendor to any sub-purchaser the purchaser shall make that on-sale subject to title remaining in the vendor (original vendor) until the purchaser (original purchaser) has paid all debts owing to the purchaser. The on-sale agreement shall provide that the original vendor is entitled to retake the goods from the sub-purchaser if the purchaser defaults on his/her indebtedness to the original vendor.

Retention of Title

- (l) The purchaser shall be entitled to pay debts owing to the vendor from funds held on trust for the vendor.
- (m) The vendor has the right to enter the defendant's premises and retake the goods it has supplied if debts are not paid as they fall due.

§ 15. Retention of Title and the Proposed Personal Property Legislation

The law relating to retention of title in New Zealand will be substantially changed if the Personal Property Securities Legislation proposed by the New Zealand Law Reform Commission is enacted. The proposal treats a Romalpa vendor's retained title as a form of security, and requires the vendor's interest to be registered. In this respect the proposed legislation is fundamentally different from commercial law dating back to Roman times as it does not distinguish between sales with conditions subsequent and sales with conditions precedent. Section 4 of the proposed legislation states:¹²⁷

Meaning of security interest

- (1) ...for the purposes of this Act "security interest" means an interest in ... goods ... created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to the form of the transactions and without regard to the identity of the person who has title to the collateral.
- (2) For the purposes of this Act, the reservation of title by a security party or a seller of goods ... is limited in effect to the reservation of a security interest.

It is submitted that it is clear from the above provisions that the proposed legislation would apply to the interest held by a Romalpa vendor.

As a matter of policy the proposed legislation seeks to make all security interests subject to a single national register. A security holder's interest is not avoided for want of registration, but rather an unregistered interest loses priority as against registered interests. Section 8 of the proposed legislation states:

¹²⁷ "A Personal Property Securities Act for New Zealand", *Law Commission Report Number 8*, April 1989

Retention of Title

Except as otherwise provided by this Act, and subject to any other Act or rule of law or equity, a security agreement is effective according to its terms between the parties to it and is enforceable against third parties

Section 14 of the proposed legislation states:

A security interest is perfected when:

- (a) it has attached; and
- (b) all steps required for perfection under this Act have been completed;

regardless of the order in which the attachment and those other steps occur.

As stated, in subjecting a Romalpa vendor's interest to registration, the proposed legislation does not distinguish between a sale with a condition subsequent and a sale with a condition precedent. Retained title is therefore treated in the same way as the interest of other secured creditors such as charge holders. The proposed legislation does recognise the conceptually superior nature of a Romalpa vendor's interest by granting that interest priority over other secured creditors providing the Romalpa clause is properly registered. A vendor's interest arising from a Romalpa clause falls within the proposed legislation's definition of a "purchase money security interest". Section 2 of the proposed legislation states:

"purchase money security interest" means ... a security interest taken in collateral to the extent that it secures payment of all or part of the purchase price of the collateral...

In terms of current legal analysis, a Romalpa vendor's interest is not an interest taken in collateral; it is an interest retained in collateral. Given the definition of security interest in the proposed legislation, a Romalpa vendor's interest is an interest taken in collateral for the purposes of that legislation.

The priority of a Romalpa vendor's interest is governed by s 27 of the proposed legislation. Subsection 27(1) governs the priority of a Romalpa vendor's interest in goods not being inventory or intangible assets. Section 27 of the proposed legislation states:

- (1) A purchase money security interest in collateral, other than intangibles or inventory, or, subject to section 22, its proceeds, has priority over any other security interest in the same collateral given by the same debtor if the purchase money security interest

Retention of Title

is perfected not later than 10 working days after the day on which the debtor ... first obtains possession of the collateral.

Subsection 2 of s 27 covers intangible assets sold subject to retention of title. The effect of s 27(2) is equivalent to s 27(1) except that s 27(2) requires registration within 10 days of the attachment of intangible assets.

Subsection 3 of section 27 relates to inventory, it states:

Except as otherwise provided in subsection (5), a purchase money security interest in inventory or, subject to section 22, its proceeds, has priority over any other security interest in the same collateral given by the same debtor if, before the debtor ... first obtains possession of the collateral,

- (a) the purchase money security interest is perfected; and
- (b) the secured party gives to any other secured party who, at the date of registration of a financial statement in relation to the purchase money security interest, has registered a financing statement containing a description of collateral which includes the same items or is of the same kind, notice that the sender has acquired or expects to acquire a purchase money security interest in inventory of the debtor described by item or kind.

An important difference between the treatment of inventory as opposed to other goods under s 27 is that a vendor's retained title in inventory must be registered before the buyer takes possession rather than within 10 days of possession or, in the case of intangible assets, 10 days of affixture. It is submitted that this difference is of particular practical importance in the case of vendors that supply goods on a regular and ongoing basis to purchasers who in turn on-sell at a high turnover rate. If a vendor in this situation was not required to register its interest until 10 days after delivery the vendor would, in practice, not ever bother to register the interest until the purchaser fell into financial difficulty. This is because the purchaser will often have on-sold any particular consignment of goods within 10 days of delivery. In this situation other creditors of the purchaser would not have the opportunity of discovering the vendor's interest.

Subsection 3 of s 27 will require Romalpa suppliers of inventory to notify the parties holding a floating charge over the purchaser's inventory of their (the vendors') interest. It is submitted that this procedural requirement is onerous. Furthermore, it appears to the writer that there is no overwhelming policy justification why this onus should fall on the Romalpa vendor.

Retention of Title

The proposed legislation improves the position of the Romalpa vendor to the extent that the legislation makes it clear a Romalpa vendor's claim to proceeds is potentially valid. The Romalpa vendor's position is weakened to the extent that its claim to proceeds will have a lower priority than other creditors with a properly registered interest in the proceeds.¹²⁸

Section 32 of the proposed legislation gives priority to registered Romalpa vendors over new or mixed goods if the goods supplied become mixed or processed into new goods. If the goods of more than one Romalpa vendor are mixed, subsection 2 of s 32 provides the Romalpa vendors' security interests will rank equally and in proportion according to the ratio of the cost of the goods supplied by each vendor.

§ 16. Conclusion

The focus of post *Romalpa* decisions has been to distinguish cases on the basis on the wording in the relevant contractual terms. It is submitted that careful contractual drafting can overcome the courts' resolve to construe contractual ambiguities against Romalpa vendors who claim that proceeds were taken, or new were created, on their (the vendor's) behalf.

Regardless of contractual drafting, courts in future cases may refuse to allow claims that proceeds were taken on behalf of the Romalpa vendor, or new goods were created on behalf of the Romalpa vendor, if the facts of the particular case are not consistent with the claim. In *Romalpa* the vendor supplied a substantial portion of the purchaser's stock and the purchaser held the stock supplied by the vendors for substantial periods of time. These factors may have influenced the Court to accept that the relationship was one of fiduciary agency. If these factors did not exist in a future case a court might conclude that a contractual designation of fiduciary agency merely masked the true nature of the transaction. A court would therefore be entitled to ignore that contractual designation.¹²⁹

The case law relating to retention of title will lose some of its importance if the proposed personal property and security legislation is passed. In the writer view, the Romalpa cases will remain significant however. This is because of the extent that they help to fully explain the nature of important legal concepts such as bailment and agency.

¹²⁸ See subsection 5 and 6 of s 27.

¹²⁹ *Re George Inglefield Ltd* [1933] Ch 1, 17.

Bibliography

- Atiyah, P.S., *The Sale of Goods* Pitman Books, 8th ed.
- Battersby, G. & Preston, A., "The Concept of 'Property' 'Title' and 'Owner' used in the Sale of Goods Act 1893" (1972) 35 *The Modern Law Review* 268.
- Bradgate, J.R., "Reservation of Title Ten Years On" (1987) *The Conveyancer* 434.
- Christou, R., "Retention of Title" (1990) *The Solicitors Journal* 1494.
- Collier, B., *Romalpa Clauses: Reservation of Title In Sale of Goods Transactions*, The Law Book Company, 1st ed, 1989.
- Davies, I., "Reservation of Title Clauses: a Legal Quagmire?" (1984) *Lloyds Maritime & Commercial Law Quarterly* 49.
- Davies, I., "Romalpa clauses: Further Developments" (1984) *Lloyd's Maritime and Commercial Law* 280.
- Dukeson, S., "Sale of Goods: Reservation of Title clauses" (1985) *New Zealand Law Journal* 283.
- Farrar, J.H. & Chiah, K.C., "Romalpa Revisited Again" (1985) *The Journal of Banking Law*, 160.
- Farrar, J.H., "Romalpa Revisited" (1984) *British Business Law* 62.
- Goode. R.M., *Property Rights and Insolvency in Sales Transactions*, 2nd ed, Sweet & Maxwell 1989.
- Goode, R.M. *Commercial Law*, Pelican Books (1982).
- Goode. R.M., "the Right to Trace and its Impact on Commercial Transactions" (1976) *Law Quarterly Review*, 360.
- Goodhart, W. "Clough Mill Ltd v Martin: A Comeback for Romalpa?" (1986) 49 *The Modern Law Review* 96.
- Goodhart, W. & Jones, G., "The Infiltration of Equitable Doctrine into English Commercial Law" (1980) 43 *The Modern Law Review* 489.
- Gregory. R., "Romalpa Clauses as Unregistered Charges" (1990) 106 *The Law Quarterly Review* 551.
- Guest, A.G., "Accession and Confusion in the Law of Hire Purchase" (1964) 27 *The Modern Law Review*, 505.
- Hicks, A.R., "Reservation of Title: Taking Stock" (1986) 130 *The Solicitors Journal* 402.

Bibliography

- Jones, S.A., "A Maze if not a Minefield" (1985) *New Law Journal* 224.
- Jones, S.A., "*Clough Mill v Martin*: Further Considerations on Retention of Title Clauses" (1985) *New Law Journal* 271.
- Matthews, P., "Proprietary Claims at Common Law for Mixed and Improved Goods" (1981) 34 *Current Legal Problems*, 159.
- McCormack, G., "Retention of Title - An Overview" Unpublished Paper presented to Bell Gully Buddle Wier, Barristers & Solicitors, Wellington, 12 November 1991.
- McCormack, G., *Reservation of Title* Sweet and Maxwell, 1st ed, 1990.
- McCormack, G., "Effective Reservation of Title and Priorities" (1990) *Journal of Business Law* 314.
- McCormack, G., "Reservation of Title: the House of Lords Speaks out with a Scottish Accent" (1991) *Lloyd's Maritime and Commercial Law* 154.
- McCormack, G., "Incorporating a Retention of Title Clause into a Sale of Goods Contract" (1989) *The Solicitors Journal* 1052.
- McCormack, G., "Liability of a Romalpa Seller to a Sub-buyer" (1990) *The Business Law Review* 109.
- McCormack, G., "Hire-Purchase, Reservation of Title and Fixtures" (1989) *The Conveyancer* 275.
- McCormack, G., "Reservation of Title: the Controversy Continues" (1989) *Lloyd's Maritime and Commercial Law* 198.
- McCormack, G., "All Liabilities Reservation of Title Clause and Company Charges" (1987) *The Conveyancer* 275.
- McLean, J., "Reservation of Property - 'All Sums'" (1991) *International Company and Commercial Law Review* 29.
- Mullan, K., "Satisfaction Guaranteed or No Deal?" (1990) *Journal of Business Law* 231.
- Peace, R., "A Tracing Paper" (1976) *The Conveyancer* 277, 289.
- Prior, R., "Reservation of Title" (1976) 39 *The Modern Law Review* 585.
- Reuecamp, W., *Romalpa Clauses Revisited*, Unpublished Paper, Wellington Business Finance Study Group, May 1991.
- Scragg, R., "Romalpa Clauses and Section 2 of the Chattles Transfer Act" (1987) *Cantabury Law Review* 283.
- Spencer, J., "The Commercial Realities of Reservation of Title Clause" (1989) *Journal of Business Law*, 220.

Bibliography

Sweeny, M., "The Rationisation of the Romalpa Clause" (1987) *The Juridical Review* 63.

Watts, P., "Tracing at Common Law and Equity" 1990 (106) *The Law Quarterly Review* 552.

Whittaker, S., "Retention of Title Specifications" (1984) 100 *The New Law Journal* 35.

Ziegel, J.S., "British Chattel Security Law: A New Deal ?" (1987) 131 *The Solicitors Journal* 209

Chitty on Contracts, 26th ed 1989, Sweet & Maxwell, ed A.G., Guest.

"A Personal Property Securities Act for New Zealand", *Law Commission Report Number 8*, April 1989

VICTORIA
UNIVERSITY
OF
WELLINGTON

A Fine According to Library
Regulations is charged on
Overdue Books.

LIBRARY

LAW LIBRARY

WEDT 93/181
PLEASE RETURN BY
15 JUL 1993
TO W.U. INTERLOANS

VICTORIA UNIVERSITY OF WELLINGTON LIBRARY

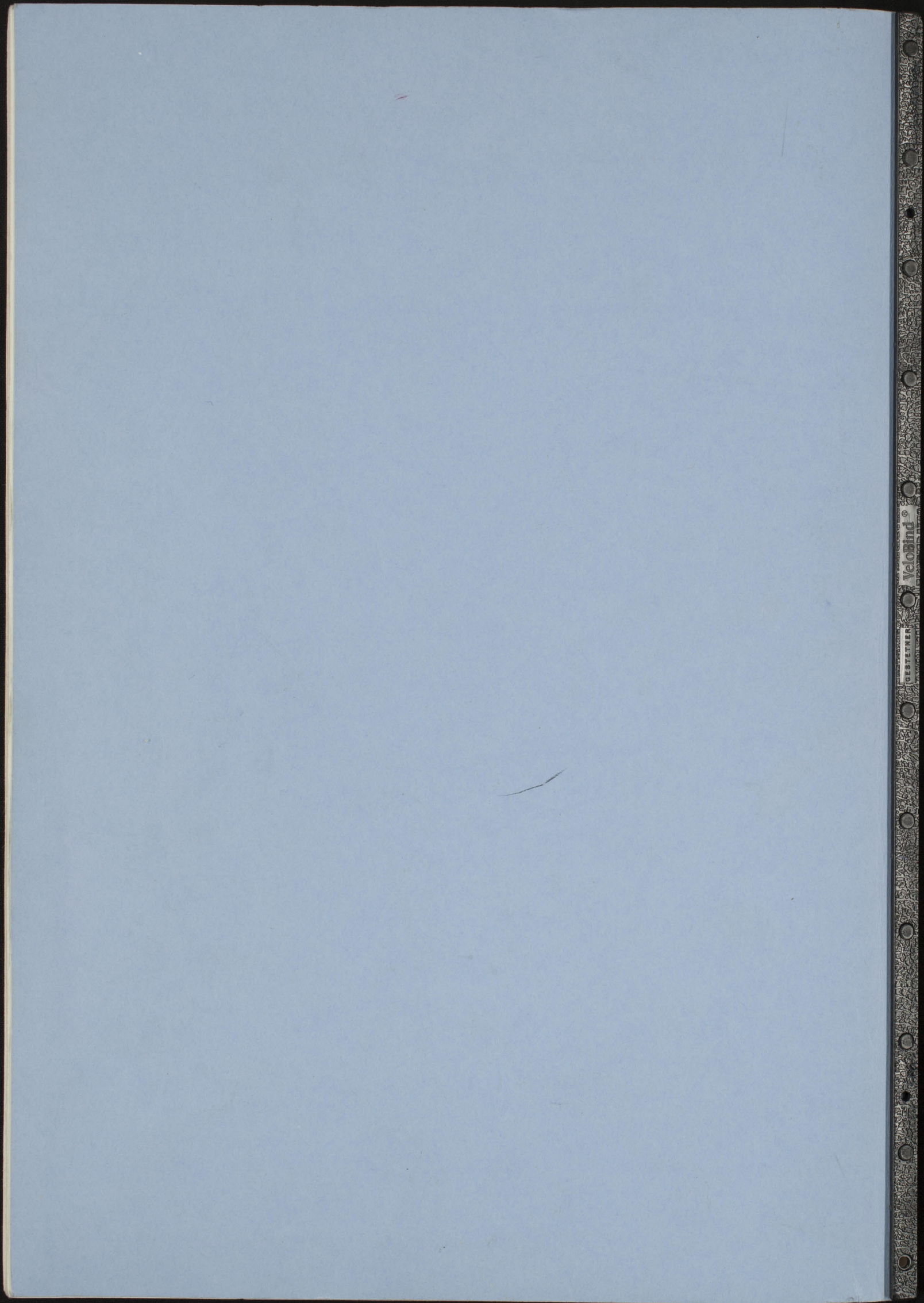


3 7212 00325835 5

AS741
VUW
A66
B636
1991

r
Folder
Bl

Blake, Timothy
Boyd
Retention of
title



GESCHENK
Velobind®