The case of clough mill ltd law commercial essay

Law

It is now generally known for sellers to supply goods to their customers on credit terms. This, however, means that credit involves risk that the debtor will default in payment. The buyer fails to pay because he is unable to do so, normally because of financial difficulties, and if the buyer is insolvent, the seller's personal claims will often be worthless. What retention of title has to do is whether the seller can retain title in goods sold by the seller to the buyer until the buyer fulfils a certain condition, which is often payment for the goods. By asking whether a seller can retain title in goods, means whether the seller can retain ownership or property in the goods. We will look at this in more detail. A retention of title clause (also called a Romalpa clause in some jurisdictions[1]) is a provision in a contract for the sale of goods that the title to the goods remains vested in the seller until certain obligations (usually payment of the purchase price) are fulfilled by the buyer. In order to secure themselves, sellers often use retention of title clauses. This clause is particularly important for sellers in situations where the solvency of the buyer is in question. In other words, it would be most probable for sellers to enter retention of title clauses where it appears that the buyer is insolvent. Often, a retention of title clause is referred to as a ' conditional agreement'. It involves reservation of property, and under a typical consumer conditional sale it will be assumed, as in the case of hire purchase, that the debtor will retain the goods, unaltered. Section 17 of the Sales of Good Act 1979 states that where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. However, in Section 19(1) of the Act, where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the

contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled; and in such a case, notwithstanding the delivery of the goods to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller is fulfilled. Roots of this come from the case of Aluminum Industrie Vaassen BV v Romalpa Aluminum Ltd [1976]. The plaintiffs, a Dutch company which manufactured aluminium foil in Holland, sold quantities of foil to the defendants, an English company carrying on business in England. Clause 13 of the general selling terms and conditions which governed the individual contracts provided: 'The ownership of the material to be delivered by [the plaintiffs] will only be transferred to [the defendants] when [they have] met all that is owing to [the plaintiffs]. Until the date of payment [the defendants could be required] to store this material in such a way that it is clearly the property of [the plaintiffs].' Clause 13 then continued with elaborate provisions to deal with cases in which, after delivery, the foil had been mixed with other material by the defendants for the purpose of creating new 'objects'. The clause provided that in those circumstances the ownership of any such objects was to be transferred to the plaintiffs as 'surety' for 'full payment' and until full payment had been made the defendants were to keep the mixed goods for the plaintiffs as 'fiduciary owner'. The defendants were also given an express power of sale over such 'mixed' goods on condition that, so long as the defendants had not fully discharged their indebtedness to the plaintiffs, they were, on request, to assign to the plaintiffs the benefit of any claim against sub-purchasers. Subsequently the defendants got into serious financial difficulties and a receiver was appointed by the debenture holders. At the date of his

appointment the defendants were indebted to the plaintiffs for over £122, 000. Following his appointment, the receiver certified that £35, 152 was held by him representing the proceeds of sale of unmixed aluminium foil supplied by the plaintiffs to the defendants and sold by the latter to third parties. The plaintiffs claimed that, by virtue of cl 13 of the general conditions, they were entitled to that sum in priority to the secured and unsecured creditors. There were therefore, four conditions: Firstly, the foils should remain in the seller's property until he is paid. Secondly, the foil should be kept separate. Thirdly, the buyer can use the foil to manufacture goods but the seller shall have title to the goods produced with the foil. And finally, in case the goods manufactured have been sold by the buyer, the income will rest for the seller. In the case, the buyer became insolvent and the Court held that there was a fiduciary relationship between the buyer and the seller so that when the buyer sold the goods, he did so as the seller's agent. This means that even when he sold it, he sold it as the agent of the buyer so that the buyer is always the owner of the goods. Professor Goode wrote : ' It is doubtful whether any case decided this century has created a greater impact on the commercial law'. And it rapidly became common for sellers to include similar clauses, which have become known as retention of title, or ' Romalpa' in their contracts of supply. This case has not been overulled or followed. However, one can notice that this case was not followed subsequently – probably it has been impliedly overulled. It would appear from subsequent cases that a retention of title clause that does no more than reserve title until the seller is paid would be effective. Such a clause is often referred to as a simple Romalpa clause. However, a full fledged romalpa clause will seek to retain the seller's title to the goods sold, claim title to any products

manufactured from raw materials supplied by the seller, claim proceeds from the sale of either sale of raw materials or sale of finished goods. An example is when a seller sells leather to the buyer, where property will pass until payment. The buyer uses the leather to make leather bags. If the seller claims property in the leather bags, it does not make commercial sense, since the price may have increased, or other materials may have been used in the production of the bags. The leather may also have been processed so that it has different characteristics as to when it was sold. The Romalpa case actually wanted to reach that far. Therefore, the Romalpa case was challenged by the case of Clough Mill Ltd v Geoffrey Martin, in which the seller supplied yarn to the buyer, a company which made fabric. The contract of sale provided that the seller retained title to all the goods supplied under that particular contract until the whole of the contract price was paid. The buyer was required to store the seller's yarn separately from its own until it was paid for. The parties anticipated that the buyer would use the yarn in its business before paying for it, and the clause therefore provided that the seller was to be the owner of the new products made from its yarn, and have rights over the products similar to those over the yarn. The buyer went into receivership and when the seller claimed to be entitled to recover yarn it had supplied and not been paid for, the receiver argued that the clause did not retain property, but allowed property to pass to the buyer subject to a charge back to the seller. The essence of the argument was that the purpose of the clause was to provide the seller with a security against non-payment. In Re Bond Worth Ltd, Slade J said that ' any contract which, by way of security for payment of a debt, creates an interest in property defeasible on payment of such debt, must necessarily be regarded

as creating a charge’. The receiver argued that the contract of sale gave the buyer extensive rights which were inconsistent with the seller still owning the yarn. These arguments were rejected by the court of appeal, which emphasised that the purpose of the contract is not conclusive of its effect. The simple clause in Clough Mill only protects the seller so long as he can identify the goods in his property under the retention of title clause. Therefore, if the goods are so altered that they become a different item, they will be irrevocable. Moreover, it would seem that if a seller has a charge in the manufactured goods, it would be theoretically interesting. But the problem is that one will not be able to register a charge, because Romalpa clauses are not traditionally registered. Therefore, a charge may have no effect whatsoever. However, Professor Bradgate is of the opinion that Romalpa clauses may well work if they are properly drafted. But anyway, it will not be able to extend to cases where they are not identifiable. The limit would thus be identification and detachability. There are a number of cases that are of this view. For example, in the case of Compact Computers v Abercoin Group Ltd, it was held that a seller’s interest in the proceeds of sale can only be a charge. However, the issue is that since Romalpa charges are not registrable and cannot be registered, the seller will not be able to enforce the charge. Also, in the case of Pheiffer v Arbuthurst Factors, it was held that when there is a sub-sale by the buyer of the goods supplied by the seller, the buyer does not sell in the capacity of the seller’s agent. In Model Board Ltd V Outer Board, it was held that as soon as the goods supplied have started to be used for the production of another good, the goods become mixed. It was held that once the seller’s goods get mixed, the seller’s interest in them can only be a charge. And as it has been seen, this cannot

be put into practice. The Romalpa Clause remains an anathema to many, the revolutionary effect that the device was to have had on established commercial sales practice has proved to have been of relatively short duration. In the case of Re Weldtech Ltd, this fact was once again demonstrated. Weldtech Equipment has been supplied with welding equipment by a German Company, Ess, subject to a reservation of title clause. The latter provided that if the company sold the goods the right to receive the purchase price was automatically transferred to Ess on completion of the sale of the goods by the company and that this transfer was effected for the purpose of securing the claims of Ess against the company, but did not affect the company's payment obligations. The company went into liquidation and the question arose as to whether moneys which had been received by the company belonged to Ess. This liquidator argued that in so far as Ess's standard conditions of sale attempted to transfer the right to receive the sale price to Ess it constituted a charge created by the company over its book debts and was void against the liquidator under s 395 of the Companies Act 1985. It was held that the provision in the contract between Ess and the company transferring to Ess the right to receive payment for any goods supplied by Ess and sold by the company, created a charge over book debts and since the charge had not been registered, it was void against the liquidator of the company pursuant to s395. The importance of this case is that it confirms that the Romalpa clause, in so far as a claim related to the proceeds of subsale, amounts to a registrable charge on book debts for the purpose of the Companies Act. In this respect, the euphoria surrounding the original Romalpa case seems but a distant echo and one is forced to conclude that the decision of the Court of

Appeal in that case has virtually been relegated, for all extensive purposes. Nevertheless, although Hoffmann J agreed with the analysis of Phillips J in the Tatung case, there is one significant distinction between the two situations. In the Tatung case, the buyer was expressed to hold the goods as a bailee and although given a power of subsale, any proceeds realised were to be maintained in a separate account by the buyer as a trustee on behalf of the seller. The present case contained no such express proceeds clause but merely purported to assign any claims the buyer might have against sub-buyers for the proceeds. However, such claims were clearly only intended to operate should the original buyer default in making payment. It therefore appears that the seller is in a ‘ no win’ situation, for if he attempts to expressly render the buyer a fiduciary, such rights will be deemed to be conferred by the contract and thus be registrable under the Act, while if no such right is expressed there is deemed to be no basis for construing a fiduciary relationship. Further, it is submitted that Hoffmann J may have placed too much reliance on the word ‘ securing’, for it must be remembered that the clause was a rather crude translation from the German original. In this context, such a right of assignation usually amounts to no more than a procedural device designed to give the seller direct recourse against a third party subpurchaser should the buyer default. However, as the sellers were content not to be represented at the hearing, the conclusions of Hoffman J were, perhaps, understandable and, in the light of recent English authority on the subject, almost inevitable. It is hoped that it is not too long before a seller has the temerity to the point of the fiduciary nature of the Romalpa clause before the House of Lords and the commercial community can at last benefit from a definitive exposition of the law in this area. However, for the

time being, at any rate, it is safe to conclude that the Romalpa notion is effectively dead and buried. This was implied in the case of Hendy Lennox Ltd v Grahame Puttick Ltd, per Staughton J where the law of reservation of title was described as ‘ a maze if not a minefield’. The only remaining problematic area appears to be in respect of mixed goods.