Commercial Law Concentrate: Law Revision and Study Guide (6th edn)
Eric Baskind

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4. Retention of title clauses

Eric Baskind, Senior Lecturer in Law, Liverpool John Moores University Visiting Research Fellow, Oxford Brookes University

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Abstract

Each Concentrate revision guide is packed with essential information, key cases, revision tips, exam Q&As, and more. Concentrates show you what to expect in a law exam, what examiners are looking for, and how to achieve extra marks. This chapter focuses on retention of title clauses, also known as reservation of title clauses, in sale of goods contracts. It explains how retention of title (or *Romalpa*) clauses are especially useful in cases where the buyer becomes insolvent and then stresses the importance of properly incorporating a retention of title clause into the contract of sale. The chapter examines the 1976 *Romalpa* case and its influence on retention of title cases. It considers 'all-liabilities' clauses in contracts of sale of goods and concludes by discussing criticisms against retention of title clauses and how, in practice, they might fail. The chapter discusses the 2014 Court of Appeal decision in *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd*, which illustrates the dangers of retention of title clauses, which can leave buyers somewhat unprotected, and how a degree of balance was reintroduced by the Supreme Court in *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another* [2016].

Keywords: retention of title clauses, reservation of title clauses, contracts, sale of goods, Romalpa clauses, all-liabilities clauses, charges, registration

Key facts

- Retention of title clauses are also known as **reservation of title** clauses.
- They are also often referred to as ***Romalpa*** clauses after the leading case of ***Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd (1976)***.
- They can enable a seller to deliver goods to a buyer on the terms that the seller retains ownership of the goods until the buyer has paid the price.

- These clauses are especially useful in cases where the buyer becomes insolvent.
- As with any contractual provision, a retention of title clause must be properly incorporated into the contract. If it has not been properly incorporated, then it will have no contractual force and will be invalid.
- Recent case law has highlighted the unintended consequences of retention of title clauses.

Introduction

Businesses frequently sell their goods by offering credit terms to their trade customers. Often, these customers will wish to pay for these goods only after they have sold them to their own customers. The problem for the seller is what happens to their goods in the event that their customer is unable to pay, possibly because of insolvency. The seller will want to know whether they have any rights over these goods entitling them to recover them or their value, and, in the event of the buyer's insolvency, whether they have any priority over any of the other **creditors**.

As we saw in Chapter 3, 'Passing of property and risk', property in the goods will pass to the buyer under **ss 16–18 of the Sale of Goods Act 1979** (hereafter referred to as the **SGA**), that is, *unless the parties have agreed otherwise*. One way sellers might be able to protect themselves is by inserting a clause into their contracts to the effect that no property in the goods will be transferred to the buyer until the goods have been paid for. However, this might not be what a seller wants. After all, unless their customers are permitted to sell the goods, they may not be in a position to pay the price. Therefore, sellers need a way of permitting their customers to sell their goods whilst protecting their own position in the event that their customer becomes insolvent. This can be achieved by inserting into their contracts of sale a **retention of title** clause.

Retention of title clauses

As we saw in Chapter 3, 'The transfer of property in specific goods' and 'The transfer of property in unascertained goods', pp 42–43, 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 (**s 17(1) SGA**).

Section 19(1) SGA goes even further than this and provides that 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 are fulfilled. In this context, the most obvious condition a seller would want to impose would be a condition that reserves to themselves property in the goods until payment has been made.

The combination of **ss 17(1)** and **19(1) SGA** therefore opens the doors to sellers to insert into their contracts **retention of title** clauses.

A **retention of title** clause will typically be invoked in the event of the buyer's insolvency where the buyer has yet to make full payment to the seller for goods bought. It is not, of course, necessary for the buyer to become insolvent before such a clause can be invoked: it can be invoked whenever the buyer owes money to the seller beyond the terms that were agreed in the contract.

Responsibility for identifying and proving title to goods under a **retention of title** clause falls solely on the seller of the goods and not the administrators dealing with any insolvency (***Blue Monkey Gaming Ltd v Hudson and others (2014)***).

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The unintended consequences

It is important to appreciate that although there are clear benefits to sellers incorporating **retention of title** clauses into their contracts of sale, there are also dangers. ***FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd (2014)*** illustrates how sellers can be denied a claim for the price under the contract by virtue of a **retention of title** clause. This is because, although the goods may be in the physical possession of the buyer, since the seller has retained ownership of them until payment they cannot bring an action for the price under **s 49(1) SGA** because that remedy is only available where property in the goods has passed to the buyer. Furthermore, the court held that **s 49(1)** provided an exclusive (rather than a permissive) remedy for the price and, whilst acknowledging the existence of conflicting earlier Court of Appeal authorities on the point, held that no claim for the price could be brought unless **s 49** applied, which it did not in this case. This left the seller without any effective remedy against the buyer, which is quite ironic given that the entire purpose of the **retention of title** clause was to provide the seller with protection. Sellers should, therefore, consider the effect of **s 49(2)** and make the price payable on a day certain, irrespective of delivery, so as to ensure that they do not fall foul of the protection they thought they had secured when incorporating a **retention of title** clause into their contract of sale. This will be discussed further in Chapter 9 ('Action for the price', p 139). The decision in ***FG Wilson*** was disapproved by the Supreme Court in ***PST Energy*** discussed below.

Looking for extra marks?

In ***Mitsubishi Corp RTM International Pte Ltd v Kyen Resources Pte Ltd (2019)***, the Singapore High Court, although not having to decide on whether or not actions for the price could be sustained outside of the Singapore Sale of Goods Act, expressed the view that it would have been slow to adopt, without greater reflection, the radical change in the law brought about by ***PST Energy***.

Another unintended consequence of a retention of title clause is that it could cause the entire transaction to fall outside the **SGA**, resulting in the seller failing to secure the advantages intended by such a clause and not being able to sue for the price under **s 49 SGA**, as well as the buyer losing the benefit of the **SGA**'s implied terms. In ***PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another (the 'Res Cogitans') (2016)***, PST Energy and another, the owners and managers of the vessel *Res Cogitans* (the 'Owners'), ordered a quantity of marine fuel (known as 'bunkers') from OW Bunker. The contract provided for payment 60 days

after delivery and included a clause under which property was not to pass to the Owners until payment for the bunkers had been made. It also entitled the Owners to use the bunkers for the propulsion of the vessel from the moment of delivery. In a series of transactions, OWB obtained the bunkers from its parent company, OWBAS, which in turn obtained the bunkers from Rosneft, which obtained them from RNB. OWBAS subsequently became insolvent. ING Bank became the assignee of OWB's rights against the Owners.

p. 62 ↵ The Owners used all of the bunkers for the vessel's propulsion without making payment to OWB, which did not make payment to OWBAS, which in turn did not make payment to Rosneft. Rosneft paid RNB and demanded payment from the Owners, asserting that it remained the owner of the bunkers. The Owners commenced arbitration against OWB and ING, seeking a declaration that they were not bound to pay for the bunkers or damages for breach of contract on the grounds that OWB had been unable to pass title to them, owing to the application of **ss 2(1)** and **49 SGA**. The arbitrators determined that OWB did not undertake to transfer property in the bunkers to the Owners under the contract and that the Owners therefore remained liable to pay OWB/ING. Males J agreed, and the Court of Appeal dismissed an appeal by the Owners. A further appeal to the Supreme Court was also dismissed. Lord Mance gave the only judgment, with which the other Justices agreed. Three issues had to be determined by the Supreme Court:

1. ***Was the contract a contract of sale within the meaning of s 2(1) SGA***?

   We saw from Chapter 1 that **s 2(1) SGA** defines a contract of sale of goods as one 'by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price'. It was OWB's case that this was a contract of sale within that definition. However, bunkers' suppliers know that they are for use prior to payment being made. OWB's contract with the Owners therefore could not be regarded as a straightforward agreement to transfer the property in the bunkers to the Owners for a price under **s 2(1) SGA**. It was a *sui generis* agreement with two aspects: first, to permit consumption prior to any payment being made and without any property ever passing in the bunkers consumed; and second, if and so far as bunkers remained unconsumed, to transfer the property in the bunkers remaining to the Owners in return for the Owners paying the price for all of the bunkers, whether consumed before or remaining at the time of payment. Lord Mance went on to explain that even if the contract were to be analysed as a contract of sale, in that it contemplated the transfer of property in any bunkers unused at the date of payment, OWB could not owe any obligation to transfer property in bunkers consumed *before* payment. It would cease to be a contract of sale if and when all such bunkers were consumed before payment.

2. ***If the contract was not a contract of sale within the meaning of s 2(1) SGA, was it subject to any implied term that OWB would perform or had performed its obligations to its supplier, in particular by paying for the bunkers timeously?***

   Lord Mance held that OWB's only implied undertaking as regards the bunkers which it permitted to be used, and which were used by the Owners in propulsion prior to payment, was that OWB had the legal entitlement to give such permission. No other implied undertaking was necessary.

3. ***Should the Court of Appeal decision in FG Wilson (2014) be overruled?***

   It will be recalled that in ***FG Wilson*** the Court of Appeal held that where goods are delivered under a contract of sale but title is reserved pending payment of the price, the seller cannot enforce payment by an action for the price. **Section 49(1) SGA** enables an action ↵ for the price where the seller has

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transferred property, with or without delivery, and the buyer has failed to pay the price due. The question here is whether **s 49** excludes any claim to recovery of a price outside its express terms, noting that **s 49(2)** relaxes only partially the strictness of **s 49(1)**. Lord Mance stated that courts should be cautious about recognising claims to the price of goods in cases not falling within **s 49**, although this leaves at least some room for claims for the price in other circumstances. For example, the price may be recovered in respect of goods undelivered which remain the seller's property but are at the buyer's risk and are destroyed by perils of the seas or by fire. His Lordship declined to set the precise limits for the circumstances in which the price may be recoverable outside **s 49**. He stated that had the contract between OWB and the Owners been one of sale, he would have overruled ***FG Wilson*** on this point, holding that **s 49** is not a complete code of situations in which the price may be recoverable under a contract of sale. In the ***Res Cogitans***, however, the price was recoverable by virtue of its ***express terms*** in the event which had occurred, namely, the complete consumption of the bunkers supplied.

Looking for extra marks?

An unsuccessful attempt to extend the principles in ***PST Energy*** to a case involving a claim for food poisoning at an all-inclusive catering holiday was made in ***Wood v TUI Travel plc, t/a First Choice (2018)***, where the tour operator sought to rely upon the case in support of the contention that there was no intention to transfer any property in the food until the precise moment it was placed in the customer's mouth and thereby destroyed. Burnett LJ was unconvinced by the reliance on ***PST Energy***, explaining that the conclusion reached by the Supreme Court depended upon the relationship between the retention of title clause and the liberty to consume fuel in which property had not already passed. But for the retention of title clause, the problem would not have arisen and, had the contract had been a straightforward one for the sale of fuel oil with no such clause, property in the bunkers would have passed on delivery. Consequently, in the absence of any express agreement to the contrary, when customers order a meal, property in the meal transfers to them when it is served.

Revision tip

A simple **retention of title** clause will provide that no property in the goods sold will pass to the buyer until paid for. Or, to put this the other way round, property in the goods sold will remain with the seller until paid for.

In the simplest of cases, provided the **retention of title** clause has been properly incorporated into the sale contract, an unpaid seller will be able to recover the goods sold. This is because the property in the goods will not have passed to the buyer. This type of retention of title clause is often referred to as a 'simple retention' clause and permits the seller to recover unaltered goods sold but not paid for. It does not attempt to create any other kind of security.

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Revision tip

A simple **retention of title** clause ought to cause little difficulty for the unpaid seller. Difficulties usually arise with these clauses when the seller attempts to secure more extensive remedies against the buyer, especially where these greater remedies create a charge. We will consider these circumstances in the following discussion:

The *Romalpa* case (*Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd*) (1976)

This case requires careful consideration because of its influence in **retention of title** cases.

A sold aluminium foil to R. The **contract of sale** contained an extensive retention of title clause, which provided that:

- ownership of the foil would only be transferred to the buyer when they had met all that was owing to the sellers;
- goods manufactured by the buyer from the seller's foil would become the property of the seller as surety for full payment;
- until full payment had been made, the sellers would keep such articles in their capacity of **fiduciary** owners for the sellers, and they had the power to sell such articles to third parties in the normal course of their business.

The sheer breadth of this clause is remarkable. A regularly sold foil to R on credit terms. For this reason, R will likely have owed A money at any given time. The first of the bulleted terms noted above indicates that, in this situation, property in the foil will never pass to R. The retention of title clause also meant that A was entitled to the proceeds of sale of goods sold by R to their own customers. It is this latter point that has proven to be the most controversial.

When R became insolvent, they owed A more than £120,000. They also had foil worth around £50,000 in stock and around £35,000 held in a separate bank account representing the goods sold using A's foil. The Court of Appeal held that the sellers were entitled to recover the £35,000 proceeds of sale and also the remaining stock of foil.

Looking for extra marks?

The proposition in ***Romalpa*** that the seller may be entitled to the proceeds of sale has been criticised in subsequent cases (see, e.g. ***Re Weldtech Equipment Ltd (1991)***, ***Compaq Computer Ltd v Abercorn Group Ltd (1991)***, and ***Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd (1988)***). In these cases, the seller's claims to the proceeds of resale were held to be void as an unregistered charge. Phillips J went further in ***Tatung (UK) Ltd v Galex Telesure Ltd (1989)***, suggesting that ***Romalpa*** was wrongly decided as the seller's interest should have been held to be a charge.

The decision in ***Romalpa*** has been said to have turned on its own facts. One important point to note is that R's counsel conceded that they owed **fiduciary** obligations to A.

p. 65 ↵ It is important to emphasise that although the proceeds of sale claim succeeded in ***Romalpa***, such claims are unlikely to succeed again in the future, for reasons including:

1. As noted earlier in ***Romalpa***, the buyer's counsel conceded that there was a **fiduciary relationship** between the buyer and the seller. This was followed by a further concession that the buyer held the goods manufactured from the foil as **bailee** for the seller and that the seller was a **fiduciary** owner of the goods. These concessions are unlikely to be made in future cases and it is, in any event, doubtful that the relationship involved a bailment or even that a fiduciary relationship existed on the facts.
2. If all proceeds of sale are paid into a separate bank account (which should be the case if there is a **fiduciary relationship** between buyer and seller), then it would appear to frustrate the commercial reality of business. Any buyer is likely to need the money from the proceeds of their sales for their own business, and therefore paying such monies into a separate bank account would not likely be the intention of the parties. Furthermore, if the buyer did hold the foil in a **fiduciary** capacity, he ought to have kept it entirely separate from his own goods.
3. The basis of a **fiduciary relationship** would mean that the seller would have been entitled to all the proceeds of sale, which might be more than they were in fact owed. On the other hand, if the seller was only entitled to recover the amount they were actually owed by the buyer from the proceeds of sale, then this would have required registering as a charge. But is it really likely that either of the parties would have intended that the seller should receive a sum greater than they were actually owed?

All-liabilities clauses

An 'all-liabilities' (or 'all-monies') clause goes further than a simple **retention of title** provision and provides that a buyer will not get ownership in the goods bought until all monies or liabilities owed to the seller have been satisfied. As noted earlier in the ***Romalpa*** case, where a buyer makes regular purchases from a seller, the buyer is likely to owe money to the seller at any given time. A seller who has an all-liabilities clause would argue that this means that even where a buyer has paid in full for a particular delivery of goods, they would

not own them if they still owed money in respect of another consignment of goods. The question is, do such clauses create a charge and are they therefore void if not registered? The House of Lords in ***Armour v Thyssen Edelstahlwerke AG (1991)*** held that an all-monies clause did not create a charge. Lord Keith explained:

> I am ... unable to regard a provision reserving title to the seller until payment of all debts due to him by the buyer as amounting to the creation by the buyer of a right of security in favour of the seller. Such a provision does in a sense give the seller security for the unpaid debts of the buyer. But it does so by way of a legitimate retention of title, not by virtue of any right over his own property conferred by the buyer.

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Looking for extra marks?

You should explain that the House of Lords in ***Armour v Thyssen*** only considered the position of goods that remain unpaid and missed the opportunity to consider whether a seller could recover goods that had earlier been paid for.

Attacks against retention of title clauses

Clearly, the unpaid seller will be pleased that they incorporated a **retention of title** clause into their contract, but this comes at the expense of other unsecured **creditors**. The ways in which these clauses have been attacked are as follows.

The goods sold have been incorporated into manufactured goods

This situation would occur where the buyer has used the goods in the manufacture of finished products, such as where the seller sells leather and the buyer uses this to manufacture handbags. The handbags are not the same goods as sold and therefore cannot be said to be the property of the seller. The question is: can the seller reclaim the finished goods?

Re Peachdart Ltd [1984] Ch 131

The sellers (S) sold leather to P, who used it in the manufacture of handbags. S's sale contract stated that ownership of the leather and of any mixed goods using this leather would remain with S until full payment had been received. P went into receivership owing S money for the leather bought. It was held that although S could reserve title over the leather they sold, they could not do so over the finished goods as the leather sold had changed its identity once it had been made into handbags.

In the following cases, the courts have held that, as in ***Re Peachdart***, the goods sold lost their identity when made into finished products:

- ***Re Bond Worth Ltd (1980)***—man-made fibre used in the manufacture of carpet;
- ***Borden (UK) Ltd v Scottish Timber Products Ltd (1981)***—resin used in the manufacture of chipboard;
- ***Modelboard Ltd v Outer Box Ltd (1993)***—sheets of cardboard used in the manufacture of cardboard boxes.

p. 67 ↵ Whether or not goods sold have changed their identity and therefore can no longer be said to be the property of the seller will be a matter of fact in each case. These cases can be contrasted with ***Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd (1984)***.

Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd [1984] 1 WLR 485

Staughton J held that a diesel engine sold by the sellers who had reserved title until it had been paid for, and which had been incorporated by the buyer into a generating set, could be reclaimed by the seller upon the buyer going into receivership. This was because it had remained an engine throughout and could be easily identified by its serial number as belonging to the sellers and dismantled with relative ease from the finished generating set.

The retention of title clause was void because it created a registrable charge

Some cases have argued that certain **retention of title** clauses might create a charge which, if unregistered, will be void. It is clearly impracticable to register all sales where a retention of title clause exists and, even if registered, it would still rank behind other (pre-)registered charges. *However, in the main, retention of title clauses are not security interests and do not need registering.* They do not give the seller the kind of security usually demanded by commercial lenders such as banks (which need registering). The intention behind a **retention of title** clause is merely to prevent *title* passing to the buyer before they have paid the price and not to assert continuing property rights in the goods.

Re Bond Worth Ltd [1980] 1 Ch 228

A retention of title clause, where property passes to the buyer only on payment and which refers to 'equitable and beneficial ownership', creates a floating equitable charge granted by the buyer in favour of the seller, which as such was registrable and was void for non-registration.

In ***Re Peachdart***, the sellers could also have had a charge over the handbags, including any proceeds of sale, but because the charge had not been registered pursuant to (the then) **s 95 of the Companies Act 1948**, it was void. Accordingly, the sellers had no priority over the debenture holder and other **creditors** in respect of the proceeds of sale.

A situation might arise where a retention of title clause seeks to protect not only the goods sold but also, where the buyer uses these goods to manufacture finished goods ↵ which they then sell on, an interest in the property of those finished goods. This situation was considered by the Court of Appeal in ***Clough Mill Ltd v Martin (1985)***, where it held that no registrable charge arises in the case of a simple **retention of title** clause where the seller merely seeks to reserve title in goods sold until they have paid, but that it was possible that a registrable charge would be created in relation to the interests a seller might claim in the finished manufactured goods that their buyer then sold on. This latter point did not arise in the ***Clough Mill*** case as the claim was not formulated on these grounds.

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Looking for extra marks?

You should note the potential hidden danger of creating a charge and explain that, as a result, these clauses should be drafted so as not to create a charge registrable under **s 859A of the Companies Act 2006**. In cases where the seller needs to assert a continuing property interest in their goods, then those rights will need to be registered under **s 859A**, failing which they will be invalid as against a liquidator or other **creditors**.

As pointed out in ***Clough Mill***, **retention of title** clauses would not ordinarily require registering. This is simply because such clauses merely act to prevent property in the goods sold passing to the buyer until payment has been made. This means that the buyer in such circumstances does not own the goods and therefore is quite unable to grant a charge or mortgage over them.

Conclusion

It is fair to conclude that although **retention of title** clauses can be very effective in protecting the unpaid seller, especially where the goods sold can be identified and recovered, clauses that seek to claim the proceeds of sale must now be considered to be extremely speculative. The problem with proceeds of sale clauses is that they are likely to be construed as charges that will be void unless registered. Even then, they face others (e.g. factoring companies) taking priority over them.

As Andrew Hicks notes in his article '*Romalpa* is dead' (1992) 13(11) *Competition Law* 217, 'in the absence of any unexpected intervention by the Court of Appeal this aspect of the process of drafting terms of sale will be more in the realms of alchemy than science and the resulting small print may not be worth the paper that it is written on'.

Recent case law has highlighted the unintended consequences of **retention of title** clauses.

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Key cases

CASE	FACTS	HELD/PRINCIPLE
Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd [1976] 1 WLR 676	The sellers sold quantities of aluminium foil to the buyer. Amongst the terms of the retention of title clause was that property in the goods would not pass to the buyer until all monies owing had been paid. When the buyer later went into receivership, they still had in their possession about £50,000 worth of foil and the receiver recovered from sub-buyers about £35,000, representing the price of finished goods made from the foil and resold to them.	The £50,000 worth of foil still belonged to the sellers by virtue of the retention of title clause. That part of the claim was uncontroversial. However, the Court of Appeal also held that the sellers could claim the £35,000 proceeds of sale on the ground that the buyer was a mere bailee of the seller's foil, which they had sold with the seller's implied authority, and therefore had to account to them in equity. Mocatta J held (at first instance) that no registrable charge arose in these circumstances. Unfortunately, this was not further argued on appeal.
Armour v Thyssen Edelstahlwerke AG [1991] 2 AC 339	The sellers sold steel to the buyer for use in its manufacturing process. The contract of sale contained a condition that the steel remained the property of the sellers after delivery until all debts were paid. Receivers were appointed to the buyer's business and a dispute arose as to the ownership of the steel.	The House of Lords held that a condition in a contract reserving title in the seller after delivery until all debts whatsoever are paid is valid, enforceable, and does not create a charge.
Borden (UK) Ltd v Scottish Timber Products Ltd [1981] 1 Ch 25	The seller supplied resin to the buyer to be used in the manufacture of chipboard. The sale contract stated that property in the resin was to pass when all goods supplied to the buyer had	The Court of Appeal held that where a product, such as resin, is used in a manufacturing process pursuant to the intention of the parties, and on such use becomes irreversibly part of a new product, it ceases to exist as such and so does the owner's title to it. As a consequence, the initial product is no longer

CASE	FACTS	HELD/PRINCIPLE
	been paid for. The manufacturing process was such that the resin could no longer be recovered. After manufacturing the chipboard, the buyer became insolvent without having paid for the resin. The seller claimed against the buyer's receiver a sum in respect of the unpaid resin.	identifiable and an interest in it cannot be traced into the new product. Further, if a charge had arisen, then it would have been void as against the liquidator and the buyer's creditors.
p. 70 ↵ ***FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd [2014] 1 WLR 2365***	Wilson was a manufacturer and seller of generators and parts. Wilson's standard terms included a **retention of title** clause providing that title to the purchased goods did not pass until Holt had paid in full. When Holt failed to pay a number of invoices, Wilson brought proceedings for the price.	The Court of Appeal held that a claim for the price under the contract meant a claim falling within **s 49 SGA**. Wilson could not have a claim for the price independently of that section. Wilson's claim had to comply with the condition in **s 49(1)** that property in the goods had to have passed to Holt. The court observed that if an action for the price could be maintained whenever the obligation to pay had arisen, **s 49** would be largely otiose, which indicated that the section was intended to specify the only circumstances in which a seller could maintain an action for the price. Thus, unless Wilson could establish that property in the goods had passed to Holt, it would have no claim for the price. That was an inherent result of a **retention of title** clause, and it showed the dangers, as well as the benefits, of such clauses. As title in the goods had not passed to Holt, Wilson did not have a valid action for the price. This could have been avoided by the seller stipulating that the price is payable on a day certain irrespective of delivery, thereby bringing it within the scope of **s 49(2)** and giving it an entitlement to bring an action for the price. **Section 49(2) applies irrespective of whether or not delivery has been made or title has passed.**
Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd [1984] 1 WLR 485	The sellers sold a diesel engine to the buyer, who used it in the manufacture of a generating set. The sellers had reserved title in the engine until it had been paid for. When the buyer went into receivership, the sellers sought to recover the engine. The receiver argued that property in the engine	Staughton J held that the engine could be reclaimed by the sellers. This was because it had remained an engine throughout, could be easily identified by its serial number as belonging to the sellers, and could be dismantled with relative ease from the finished generating set. If the goods sold have merely been incorporated by the buyer into other goods, then a seller with an appropriate retention of title clause will be entitled to recover the goods sold provided they can still be identified and dismantled from the finished goods without damaging those goods.

CASE	FACTS	HELD/PRINCIPLE
	had passed to the buyer when they incorporated it into the generating set.	
p. 71 ↵ ***PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another (the 'Res Cogitans') [2016] UKSC 23***	PST Energy and another, the owners and managers of the vessel *Res Cogitans* (the 'Owners'), ordered a quantity of marine fuel (known as 'bunkers') from OW Bunker. The contract provided for payment 60 days after delivery and included a clause under which property was not to pass to the Owners until payment for the bunkers had been made. It also entitled the Owners to use the bunkers for the propulsion of the vessel from the moment of delivery. In a series of transactions, OWB obtained the bunkers from its parent company, OWBAS, which in turn obtained the bunkers from Rosneft, which obtained them from RNB. OWBAS subsequently became insolvent. ING Bank became the assignee of OWB's rights against the Owners. The Owners used all of the bunkers for the vessel's propulsion without making payment to OWB, which did not make payment to OWBAS, which in turn did not make payment to Rosneft. Rosneft paid RNB and demanded payment from the Owners, asserting that it remained the owner of the bunkers. The Owners commenced arbitration against OWB and ING, seeking a declaration that they were not bound to pay for the bunkers, or damages for breach of contract, on the grounds that OWB had been unable to pass title to them, owing to the application of **ss 2(1)** and **49 SGA**.	Three key issues had to be determined by the Supreme Court: 1. *Was the contract a contract of sale within the meaning of* **s 2(1) SGA 1979***?* **Section 2(1) SGA** defines a contract of sale of goods as one 'by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price'. However, as bunkers are typically used prior to payment being made, OWB's contract with the Owners could not be regarded as a straightforward agreement to transfer the property in the bunkers to the Owners for a price. It was a *sui generis* agreement, with two aspects: first, to permit consumption prior to any payment being made and without any property ever passing in the bunkers consumed; and second, if and so far as bunkers remained unconsumed, to transfer the property in the bunkers remaining to the Owners in return for the Owners paying the price for all of the bunkers, whether consumed before or remaining at the time of payment. Lord Mance explained that even if the contract were to be analysed as a contract of sale, in that it contemplated the transfer of property in any bunkers unused at the date of payment, OWB could not owe any obligation to transfer property in bunkers consumed before *payment. It would cease to be a contract of sale if and when all such bunkers were consumed before payment.* 2. *If the contract was not a contract of sale within the meaning of* **s 2(1) SGA**, *was it subject to any implied term that OWB would perform or had performed its obligations to its supplier, in particular by paying for the bunkers timeously?* Lord Mance held that OWB's only implied undertaking as regards the bunkers which it permitted to be used, and which were used by the Owners in propulsion prior to payment, was that OWB had the legal entitlement to give such permission. No other implied undertaking was necessary.

CASE	FACTS	HELD/PRINCIPLE
p. 72		↵ 3. ***Should the Court of Appeal decision FG Wilson (2014)*** *be overruled?* It will be recalled that in ***FG Wilson***, the Court of Appeal held that where goods are delivered under a contract of sale but title is reserved pending payment of the price, the seller cannot enforce payment by an action for the price. **Section 49(1) SGA** enables an action for the price where the seller has transferred property, with or without delivery, and the buyer has failed to pay the price due. The question here is whether **s 49** excludes any claim to recovery of a price outside its express terms. Lord Mance stated that courts should be cautious about recognising claims to the price of goods in cases not falling within **s 49**, although this leaves at least some room for claims for the price in other circumstances. For example, the price may be recovered in respect of goods undelivered which remain the seller's property but are at the buyer's risk and are destroyed by perils of the seas or by fire. His Lordship declined to set the precise limits for the circumstances in which the price may be recoverable outside of **s 49**. He stated that had the contract between OWB and the Owners been one of sale, he would have overruled ***FG Wilson*** on this point, holding that **s 49** is not a complete code of situations in which the price may be recoverable under a contract of sale. In ***Res Cogitans***, however, the price was recoverable by virtue of its express terms in the event which had occurred, namely, the complete consumption of the bunkers supplied.
Re Bond Worth Ltd [1980] 1 Ch 228	The buyer, a carpet manufacturing company, purchased man-made fibre from the sellers, which they used in the manufacture of carpets. The conditions of sale included a retention of title clause. The buyer went into receivership when a large sum of money was owing to the sellers under various contracts containing the retention of title clause.	A retention of title clause, where property passes to the buyer only on payment and which refers to 'equitable and beneficial ownership', creates a floating equitable charge granted by the buyer in favour of the seller, which, as such, was registrable and was void for non-registration.

CASE	FACTS	HELD/PRINCIPLE
p. 73 ↵ ***Re Peachdart Ltd [1984] Ch 131***	The sellers (S) sold leather to P, who used it in the manufacture of handbags. S's sale contract stated that ownership of the leather and of any mixed goods using this leather would remain with S until full payment had been received. P went into receivership owing S money for the leather bought.	Vinelott J held that although S could reserve title over the leather they sold, they could not do so over the finished goods, as by then the leather sold had changed its identity once it had been made into handbags. The judge also held that the parties must be presumed to have intended that once P had appropriated the leather so that it became unrecognisable, a charge over the finished goods or their proceeds should arise. In this case, such a charge arose in relation to the manufactured handbags and the proceeds of the handbags which had been sold. However, as the charge had not been registered, it was void under **s 95 of the Companies Act 1948**.

Key debates

Topic	**Title and transformation: who owns manufactured goods?**
Author/ academic	Duncan Webb
Viewpoint	Discusses the historical doctrines on the *retention of title to manufactured goods when the manufacturer and owner of raw materials are different people. Discusses cases for transfer of ownership when raw materials have been transformed into finished goods.*
Source	[2000] *Journal of Business Law* 513
Topic	***Romalpa* is dead**
Author/ academic	Andrew Hicks
Viewpoint	Discusses the entitlement of sellers to claim the proceeds of sale and asks whether the effects of ***Romalpa*** are dead in this regard.
Source	(1992) 13(11) *Company Lawyer* 217
p. 74 ↵ **Topic**	**Retention of title clauses and claims for the price**
Author/ academic	Ewan McKendrick

Topic	**Title and transformation: who owns manufactured goods?**
Viewpoint	Discusses the Court of Appeal decision in ***FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd (2014)*** on whether a seller could bring an action for the price under **s 49 SGA** relating to goods sold under a contract containing a retention of title clause. Discusses why the seller could not satisfy **s 49** as property in the goods had not passed to the buyer owing to the retention of title clause, thus demonstrating that retention of title clauses can prove disadvantageous for sellers.
Source	(2014) Aug/Sep *Building Law Monthly* 1
Topic	***Res Cogitans***: **a sale is not always a sale, says the Supreme Court**
Author/ academic	Turlough Stone
Viewpoint	Comments on the Supreme Court judgment in ***PST Energy 7 Shipping LLC v OW Bunker Malta Ltd (2016)*** on whether bunker supply contracts were contracts for sale of goods if they included a retention of title clause permitting the purchaser to use up the bunkers before paying the supplier.
Source	(2016) 13(4) *International Corporate Rescue* 252

Exam questions

Problem question

George sells 100,000 litres of milk each month to Dave's Bakeries Ltd, which it uses in the manufacture of bread and cakes that it sells through a number of retail shops. Dave's Bakeries Ltd also buys milk from several other suppliers. A clause in the contract between George and Dave's Bakeries Ltd provides:

> Goods are supplied on the condition that the supplier shall retain legal and equitable ownership of them until full payment has been received by them for all sums owing. Any money from the sale of the goods shall be paid into a separate bank account, noting on it the supplier's name. All goods shall be clearly labelled as belonging to the supplier until all sums owing have been paid.

Dave's Bakeries Ltd has now gone into administration owing £20,000 to George. In total, it owes in excess of £1 million to other suppliers. It has 50,000 litres of milk stored in its cold stores and £10,000 worth of bread and cakes in its freezers. £5,000 is left in the company's general bank account and £1,000 in the specially designated account in accordance with the contract.

Advise George.

p. 75

Essay question

Eleanor Timber Supplies Ltd (ETS) sells timber to its customers, some of whom are regular customers while others just make a single purchase. ETS's terms require payment within 30 days of the date of delivery. Some of ETS's customers resell the timber, but others use it to manufacture various goods, which they then store for subsequent sale.

Although ETS has written terms of sale, they do not include a retention of title clause.

Advise ETS why it ought to incorporate a retention of title clause into its standard terms of sale and what protection such a clause might provide.

Online resources

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- multiple-choice questions *<https://iws.oupsupport.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-4-multiple-choice-questions?options=showName>*;
- key facts checklists *<https://iws.oupsupport.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-4-key-facts-checklists?options=showName>*;
- interactive flashcards of key cases *<https://iws.oupsupport.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-4-interactive-flashcards-of-key-cases?options=showName>*;
- problem question guidance *<https://iws.oupsupport.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-4-problem-question-guidance?options=showName>*;
- outline answers to essay questions *<https://iws.oupsupport.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-4-outline-answers-to-essay-questions?options=showName>*.

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