THE COURT OF APPEAL

Appeal No. 2014/1329

Ryan P.
Irvine J.
Hogan J.

In the Matter of

BHT Group Limited (in liquidation)

- and -

In the Matter of Sections 99 and 231 of the Companies Act 1963

Between/

Unitherm Heating Systems Limited

Applicant/Respondent

- and -

Kieran Wallace as official liquidator of BHT Group Limited (in liquidation)

Respondent/Appellant

JUDGMENT of Ms. Justice Irvine delivered on the 29th day of July 2015

1. This is an appeal against the judgment of the High Court (Peart J.) delivered on 2nd April, 2014, and is one which concerns the legal effect of what is commonly described as a "proceeds of sale clause" that formed part of the standard conditions of sale of the respondent, Unitherm Heating Systems Ltd. ("Unitherm"). The appeal is brought by the official liquidator of BHT Group Ltd. ("BHT"), with whom Unitherm had traded for many years. While the background to the relationship between Unitherm and BHT is not disputed and is set out in the judgment of Peart J., I will nonetheless summarise it here for ease of reference.

Background
2. Unitherm has been involved in the design and supply of heating systems in Ireland since 2004. In the course of its business, it supplied goods to BHT, which in turn sold these on to third parties. BHT carried on a retail business supplying heating and plumbing products to both trade and end user customers from approximately 40 locations throughout Ireland under various business names and various legal entities, including Brooks, Heat Merchants, and Tubs and Tiles.

3. It is not disputed that prior to the commencement of that relationship in March 2007, Unitherm set out in writing, for the benefit of BHT, its standard conditions of sale. These are referred to in some detail later in the judgment.

4. The manner in which business was conducted was that the customer would engage with BHT regarding their plans and possible requirements. These would later be forwarded by BHT to Unitherm, which would prepare a quotation. That might or might not involve Unitherm making a site visit. Unitherm would then prepare a quotation on the headed notepaper of BHT, or on joint headed notepaper, and this would then be presented by BHT to the customer. BHT was obliged to offer the goods to the customer at the price quoted by Unitherm. If the customer accepted the quotation, BHT would then raise a purchase order for the goods from Unitherm, and this would specify the address to which the goods were to be delivered. Unitherm would then invoice BHT for the amount that had been set out in the original quotation less an agreed discount, the size whereof was dependent upon the nature of the goods supplied. That discount represented BHT's profit on the transaction. It is accepted that such goods as were delivered to BHT were stored in a manner that allowed them to be clearly identified as those of Unitherm.

5. The price quoted by Unitherm for what are described as "Commissioning Goods" included a commissioning service to be supplied by Unitherm. This involved an attendance at the customer's site by a servant or agent of Unitherm, who would carry out an inspection to ensure that the goods had been correctly installed and were functioning appropriately. This service, which was only provided in respect of "Commissioning Goods" that had been paid for in full, entitled the customer to the benefit of an extended warranty in respect of those goods.

6. Unitherm went into examinership on 16th February, 2012, and on 20th April, 2012, Mr. Kieran Wallace was appointed as liquidator. On the 20th April, 2012, with court approval, the liquidator sold certain assets of BHT to a company by the name of Washglade Limited ("Washglade"). At that time, Unitherm was owed €107,761.14 in respect of goods which had been supplied and invoiced to BHT. €13,853.49 of the aforementioned sum was in respect of goods which had been delivered to BHT and which were still physically present on its premises at the time of the asset sale. The liquidator accepted that these goods were the subject matter of a valid retention of title clause, and Washglade accordingly discharged that sum to Unitherm. That left a balance of €93,907.65 remaining due in respect of goods that had been supplied by Unitherm to BHT but which had later been sold on to third parties before the appointment of the liquidator. In each instance the customer had paid BHT for the goods.

7. By letter dated 28th September, 2012, Unitherm, through its solicitors, Denis McSweeney, sought confirmation that the said sum of €93,907.65 had been received by BHT from its customers and called upon the liquidator to discharge the same within 14 days.

8. In a series of letters commencing in October 2012, Messrs A & L Goodbody, on behalf of the liquidator, expressed themselves satisfied that Unitherm's standard conditions of sale had created a charge in favour of Unitherm over funds received by BHT in respect of goods which it had supplied and which had been paid for by its customers. Given that this charge had not been registered in the Companies Registration Office in accordance with s. 99 of the Companies Act 1963, they maintained that the charge was void as against the official liquidator.

9. By letter dated the 29th January, 2013, Denis McSweeney wrote to Messrs A & L Goodbody maintaining that Unitherm was entitled to payment of the aforementioned sums on the grounds that Unitherm had, allegedly by agreement, entered into a fiduciary relationship with BHT. As to the effect of Unitherm's standard terms and conditions of sale, the following was asserted:

> *"In respect of our clients clause, we dispute entirely your view that this is a charge and you will note in particular that the parties expressly agreed the existence of a fiduciary relationship between the buyer and our client, that goods are held by the Buyer as trustee for our client and that although the buyer is entitled to sell the goods to third parties, in the normal course of its business, the proceeds of any such sale shall be held in trust for our client. Further the Buyer assigned the benefit of any claim it had against a third party arising from such sale to our client absolutely. It is clear that the clear terms agreed by our client and BHT Group Limited are such that a charge was not created by these clauses and as such it is wrong and unlawful for your client to simply dismiss our client's claim as void on the basis set out in your correspondence."*

10. As a result of the impasse between the parties, Unitherm, by motion returnable before the Court on 15th July, 2013, sought the Court's directions on a number of matters. In essence, the Court was asked to conclude that the proceeds of sale clause created a trust over the said monies in favour of Unitherm, such that it was entitled to trace those proceeds of sale into the accounts of the BHT. The relief sought was destined to establish the entitlement of Unitherm to be paid in priority to any other unsecured creditor.

11. In his judgment in the High Court, Peart J. stated that the resolution of the controversy at hand depended upon whether or not the parties were fiduciaries by reason of the relationship of principal and agent. If they were not, then the proceeds of sale clause created a registrable charge.

12. Having considered the evidence and the submissions of the parties, he proceeded to reject the liquidator's arguments and concluded that BHT owed a fiduciary duty to Unitherm arising out of the relationship of principal and agent which, he was satisfied, existed between the parties. At paragraph 50 of his judgment he said:-

> "I am therefore satisfied that the proceeds of sale clause in this case is not a charge requiring registration under s. 99 of the Act of 1963, and that in relation to the proceeds of any re-sale of the applicant's goods to third parties, which have been received by the respondent either as examiner or liquidator, he is obliged to hold in trust for the applicant the amount of such proceeds of re-sale less the amount of the discount to which the company was entitled under the agreed terms, and to pay same to the applicant, in priority to ordinary creditors. Under equitable principles the applicant is entitled to trace such proceeds, since it appears that such proceeds received have not been kept in a separate bank account as required."

13. Subsequently, by order dated 30th April, 2014, the Court went on to declare that the official liquidator held the proceeds of sale of the goods on trust for Unitherm and that it was entitled to a full account and inquiry in order to enable it to trace the €93,907.65 that had been received by BHT from the sale of the goods.

14. By notice of appeal dated 23rd July, 2014, the liquidator sought an order reversing and setting aside the order of the High Court and, in its place, a declaration that Unitherm stands as an unsecured creditor of BHT in the sum of €93,907.65.

15. The grounds of appeal may conveniently be summarised as follows:-

> (i) that the High Court judge erred in law and in fact in concluding that BHT, as agent on behalf of its principal Unitherm, was acting in a fiduciary capacity when it sold Unitherm's goods such that Unitherm was entitled to seek to trace into the account of BHT the sum of €93,907.65 received in respect of the sale of such goods; and
>
> (ii) that the High Court judge erred in law and in fact in failing to conclude that the proceeds of sale clause, on the facts of the present case, created a charge in favour of Unitherm over the book debts of BHT and, as such, required registration under s.99 of the Companies Act 1963.

16. Because the judgment of the High Court is concerned with the contractual as well as the trading arrangements between Unitherm and BHT, prior to summarising the submissions of the parties I will set out the relevant clauses in Unitherm's standard conditions of sale:

> "STANDARD CONDITIONS OF SALE
>
> In these conditions, "the Company" means; Unitherm Heating Systems Ltd and Alpha Therm Ireland Ltd.
>
> "The Buyer" means the person or persons seeking a quotation, or entering into, or offering to enter into any contract for the purchase of goods and services from the Company.
>
> "11(a) The property in the goods shall not pass to the Buyer until the price of the goods shall have been wholly paid and until all other sums whatsoever which are due from the Buyer to the company whether under this contract or howsoever otherwise shall have been paid in full without any reduction or deferment on account of any dispute or cross claim whatsoever.
>
> 11(b) Pending the payment of all sums aforesaid and the passing of property in the said goods:
>
> > (i) A fiduciary relationship shall exist between the Buyer and the Company and the Buyer shall hold the said goods as trustee for and on behalf of the Company and shall return the same to the Company on demand.
> >
> > (ii) The Buyer hereby licenses the company and its agents to enter into any premises on which the goods or any of them may be situate for the purpose of inspecting and taking an inventory of the said goods and/or repossessing the said goods.
> >
> > (iii) If the buyer (being an individual) commits an act of bankruptcy or (being a company) has a Receiver appointed to all or part of its assets or a petition presented or a resolution passed for the winding up of the Buyer, the right of the Buyer to retain possession of the goods shall automatically cease and the goods shall be returned to the Company immediately.

(iv) The Buyer shall store the goods separately from goods belonging to the buyer or third parties so as to be clearly identifiable as being the goods of the Company.

(v) The buyer shall be entitled to sell the goods to third parties (other than to a subsidiary or holding company of the Buyer within the meaning of section 155 of the Companies Act 1963 or to an associated company within the meaning of section 102 of the Corporation Tax Act 1976) in the normal course of the Buyer's business (but not otherwise) but the proceeds of any such sale shall be held by the buyer on trust for the Company (to be lodged in a separate account by the Buyer) and the Buyer is hereby deemed to have assigned to the Company absolutely the benefit of any claim (including the right to trace the said goods or the proceeds thereof) which the Buyer has against any such third party arising from such sale.

(vi) If the Buyer mixes or incorporates the goods with any other goods then if the goods used in such mixture or incorporation are capable of being identified the Company shall be entitled to dismantle or separate its goods from any other goods comprised in such mixture or incorporation notwithstanding that such dismantling or separation may cause damage to or destruction of those other goods. Where the Company's goods mixed or incorporated as aforesaid are no longer capable of being identified the ownership of the product of such mixing incorporation shall be and remain in the Company subject to a charge in favour of the Buyer in respect of the value of the other goods comprised in the product of such mixing or incorporation.

(vii) Where goods are worked or cut without the addition of any other goods the property in such goods shall remain in the Company. "

17. To complete the picture as to the contractual relationship between the parties, it is important to note that, whilst not so stated in the standard conditions of sale, the agreed credit terms, as per the letter of Mr. Declan Kissane of the 23rd February, 2006, gave BHT 60 days within which to pay Unitherm for the goods which it supplied.

18. Also of some factual significance is that BHT never created the separate account, envisaged by clause 11(b)(v) of the Standard Conditions, for monies received following the onward sale of Unitherm's goods to its customers. However, it is to be noted that in the course of the examinership, a period during which Unitherm continued to commission and provide warranties in respect of Commissioned Goods sold by BHT, Mr. Kissane, by letter dated 7th March, 2012, wrote to BHT/ Heat merchants as follows: –

> "We appreciate the future in relation to Heat Merchants is currently unclear but it is important you understand any monies collected for goods, supplied by us, should be set aside in accordance with the terms of our Standard Terms and Conditions of Sale. We cannot be expected to cover warranty from material we have not been paid for."

19. It is not disputed that this was the first occasion on which Unitherm had made reference to this term of the agreement.

Submissions on behalf of the liquidator

20. The submissions of the liquidator commenced with a statement of concern as to the difficulties that would be faced by liquidators in general in distributing the assets of an insolvent company if the judgement of the High Court and Unitherm's right to trace the funds in question was to be upheld by this Court. Mr. Fanning B.L., counsel for the appellant, also laid some emphasis on the adverse consequences that such a result would have on other creditors in the liquidation.

21. Counsel submitted that the High Court judge was wrong to conclude that Unitherm and BHT were fiduciaries based on the existence of a principal and agent relationship. Firstly, there was nothing in the contract that referred to either party as being a "principal" or "agent". Secondly, the contract permitted the onward sale of the goods by BHT in the "normal course of its business". BHT was selling on its own account and was not stated to be selling on Unitherm's behalf. It was to be inferred from this provision that BHT, when selling on, was doing so for its own account and not as a fiduciary on behalf of Unitherm. Further, this was the commercial reality of the situation as was evidenced by the contractual documentation. Thirdly, BHT had passed title in the goods to the customer, a fact belatedly accepted by counsel for Unitherm in the course of the appeal. Hence, BHT and the customer had contracted with each other and each accordingly enjoyed rights deriving from that contract. The existence of such a contract was evident from the fact that, under clause 11(b)(v), BHT had assigned to Unitherm the benefit of any rights it had against the customer arising from that contract for sale.

22. Not only was there nothing in the contract upon which to hinge a principal and agent relationship, there was nothing, counsel submitted, in the business dealings between Unitherm and BHT to counter the fact that the relationship between them had all of the hallmarks of a normal seller buyer relationship. The true relationship had to be ascertained from the contractual terms and the manner in which the parties conducted their business. The true nature of that relationship could not be changed by the use of labels such as "fiduciary" and "trustee".

23. Insofar as counsel for the respondent had asserted that BHT might equally be considered to be a fiduciary on the basis that it was selling Unitherm's goods as trustee in possession under a power of sale, counsel for the appellant made four principal submissions: firstly, that this was not consistent with counsel for the respondent's acceptance in the course of his submissions that BHT had good title when selling on the goods to its customer in the normal course of its own business; secondly, that the contractual terms do not state that BHT was selling as a trustee in possession; thirdly, that clause 11(b)(v) of the standard conditions of sale did not support such a proposition; and, fourthly, that the contractual documentation was inconsistent with the sale by BHT as trustee on behalf of Unitherm.

24. Counsel for the appellant accepted that Unitherm retained title to its goods under a valid retention of title clause while they remained in BHT'S possession and payment had not been received. That was why Unitherm was paid €13,853.49 in the course of the liquidation for goods still in BHT's possession and for which Unitherm had not received payment. However, once it was accepted that BHT had sold on those goods in the course of its business and that the customer had paid BHT, the only question the Court had to decide was on what basis those monies were held by BHT. Were the funds received impressed with a trust such that they should be considered to be the property of Unitherm or had Unitherm's interest in the goods been replaced by a charge in their favour over the monies received for those or any other goods?

25. On the facts of this case, counsel submitted that the evidence was against a finding that the monies were held on trust for Unitherm. No separate account had been set up over the six years of the business relationship. No inquiry had ever been made by Unitherm as to the existence of such an account, not to mind the manner of its management. The first inquiry concerning the

existence of such an account had been made in the course of the receivership. Neither was there anything in Unitherm's standard conditions of sale which specified the rights that it might have as trustee in respect of the funds in any such designated bank account.

26. Even if there had been such an account and it had been operated as per the standard terms and conditions of sale, it would, counsel submitted, have contained within it BHT's profit margin on the sale of the goods to which Unitherm had no entitlement. That being so it was impossible for Unitherm to argue that those monies were held for it on trust by BHT. Further, insofar as the Court, in order to circumvent this legal obstacle, had implied a term into the contract to provide that the monies which were to be paid into that bank account were to be the proceeds of the sale of the goods less BHT's profit thereon, counsel submitted that there was no legal basis upon which the High Court judge was entitled to imply such a term.

27. Counsel submitted that most of the recent decisions concerning proceeds of sale clauses, even where the proceeds of the sub-sale were to be kept in a separate account on an alleged "trust" for the seller, had concluded that such clauses created a charge over the account in favour of the seller to the extent of the amount outstanding because the buyer's profit margin was included therein and the buyer was not obliged to account to the seller for this sum. He relied principally upon the decision of Murphy J. in *Carroll v. Bourke* [1990] 1 I.R. 481 to argue that clause 11 created a charge in favour of Unitherm over the book debts of BHT which required registration under s. 99 of the Companies Act 1963, in default whereof the charge was void against the liquidator.

28. Counsel further submitted that the 60 day credit period which was afforded to BHT was not compatible with Unitherm having an interest in the actual proceeds of sale. It had to be inferred that the monies received by BHT from the onward sale of the goods could be used as BHT liked during that period.

Submissions on behalf of Unitherm

29. Mr. Hussy S.C., counsel on behalf of the respondent, submitted that the result of the appeal was dependent upon the nature of the relationship between Unitherm and BHT prior to liquidation. Resolution of that issue would determine the nature and extent of Unitherm's rights in respect of the monies received by BHT from the onward sale of its goods. In that regard, he maintained that any difficulties that the liquidator might have as a result of this Court upholding the decision of the High Court were immaterial. What the Court had to decide was the rights of the parties as they existed immediately prior to liquidation. In this regard, he relied on the decision of Lord Herschell L.C. in *McEntire v. Crossley Brothers* [1895] A.C. 457.

30. Counsel submitted that the High Court judge was correct in concluding that the relationship between Unitherm and BHT was that of principal and agent. He had correctly found that BHT was under a fiduciary duty to Unitherm in respect of the monies received from the onward sale of its products and that, until such time as Unitherm had been paid, the goods remained its property. Insofar as they had been sold on to third party customers, BHT was acting only as an agent on its behalf. That status, he maintained, was consistent with the standard conditions of sale which required the proceeds received to be held on trust and lodged to Unitherm's separate account. He placed reliance upon, *inter alia*, the decision of the English Court of Appeal in *Aluminium Industrie Vaasen B.V. v. Romalpa Aluminium Limited* [1976] 1 W.L.R. 676, *("Romalpa")*, as well as the decisions in *Re Hallett's Estate* (1880) 13 Ch. D. 696 and *Re WJ Hickey Ltd* [1988] I.R.126 (*"Hickey"*).

31. In discussion with the Court, counsel for the respondent accepted that, if this was the true nature of the relationship between Unitherm and BHT, it followed that the customer, once he or she had paid for the goods, had a contractual relationship with Unitherm. While this, he agreed, was not obvious from the standard conditions of sale, he submitted that the description of "Buyer" in the definition section could encompass not only BHT but also the ultimate customer. The fact that clause 11(b)(v) provides that BHT, following the onward sale of Unitherm's goods, is stated to have assigned to Unitherm any rights which it had against "such third party arising from such sale" was not, he submitted, fatal to the existence of a relationship of principal and agent.

32. In supporting the conclusions of the High Court judge as to the existence of a principal and agent relationship between the parties, counsel relied strongly upon what he urged the Court to be the relatively unique manner in which the parties conducted their business, details whereof referred to earlier in this judgment.

33. Having heard the submissions made by the liquidator and cognisant, perhaps, of some concerns expressed by members of the Court as to whether the relationship between Unitherm and BHT could in truth have been one of principal and agent, counsel went on to submit that Unitherm's claim to a fiduciary relationship with BHT was not dependent on the existence of an agency relationship between the parties. That was the hole into which the relationship had been "pegged" by Peart J. He submitted that BHT was in fact selling Unitherm's goods as trustee in possession in pursuance of a power of sale and that this was an argument which had been made by him in the High Court. That being so, the relationship fell within one of the categories which, as Murphy J. had stated *in Carroll*, would point to the existence of a fiduciary duty.

34. As to how that argument fitted with the fact that clause 11(b)(v) permitted BHT to sell the goods to third parties "in the normal course of the buyer's business", counsel submitted that these words did not refer to BHT's general manner of selling as a distributor. The words "normal course of the buyer's business" in the present context, counsel submitted, related to its normal manner of doing business with customers concerning Unitherm's products, and this was unique in that Unitherm fixed both the price at which the goods would be sold to customers as well as BHT's profit margin thereon.

35. Accordingly, counsel submitted that the bundle of rights that Unitherm had enjoyed and which had previously been attached to the goods prior to their onward sale by BHT then attached to the funds received. The monies were impressed, to the extent of BHT's liability to Unitherm, with a trust in its favour. This was clear, he submitted, from clause 11(b)(v), which states that the "proceeds of any such sale shall be held by the Buyer on trust for the Company". The contractual terms did not, he submitted, evince an agreement that BHT, in return for the right to sell the goods to its customers, had granted Unitherm a charge over the funds received to the extent of the monies outstanding in respect of the supply of the said goods. He did however agree that, as had been held by the High Court judge, it was implicit from the agreement that Unitherm's right to the monies received by BHT was limited to the sum received less the profit margin due to BHT.

36. Finally, counsel submitted that there was nothing in the wording of the standard conditions of sale from which it could be inferred that Unitherm, following the onward sale of the goods by BHT, was to be granted a charge over the sums received to the extent of BHT's liability in respect of the purchase of such goods.

Discussion

37. It is beyond doubt that the leading authority on proceeds of sale clauses at the time of the High Court judgment was that of Murphy J. in *Carroll*, a case in which the Court concluded that the relevant proceeds of sale clause did not create a fiduciary

relationship between the buyer and seller but rather confined the seller to a charge over the funds received in respect of the resale of its goods, which required registration.

38. In reaching a contrary conclusion in the present case, the High Court judge distinguished not only the contractual provisions in both cases but also the manner in which the respective parties had conducted their business and, on that basis, found that the relationship of principal and agent existed.

39. For the purposes of considering the distinction drawn by the High Court judge between the two cases, I will briefly summarise the facts in *Carroll.*

40. In *Carroll*, the plaintiff, a well-known tobacco company, had supplied goods to the defendants ("Bourkes") as retailers. Those companies had gone into liquidation. The contract between the parties contained a reservation of title clause which provided that no property in the goods would pass until all sums due to the plaintiff had been discharged. It also gave the defendants the right to resell the goods to a third party on their own account, but not as agents for the plaintiff. Further, the contract included a proceeds of sale clause which required the defendants to "hold all monies received from such sale or other disposition in trust for the company ("Carrolls") and undertake to maintain an independent account of all sums so received and on request [to] provide all details of such sums and accounts". No such account was ever established, a fact that the High Court judge concluded was probably known to Carrolls.

41. In the course of the liquidation an issue arose as to the plaintiff's rights in respect of the proceeds of sale of the goods sold on by the defendants to third parties. The plaintiff argued that these were impressed with a trust in its favour, thus entitling it as a beneficiary standing in a fiduciary relationship with the defendants to trace such proceeds into any other property acquired therewith by the trustees.

42. Murphy J. set out the basic legal principles as follow ([1990] 1 I.R. 481, 483):-

> "The issue in the present case relates to the right of Carrolls in respect of the proceeds of sale of the goods supplied by it. In this context too the basic legal principles are well established. Where a *trustee* or other person in a fiduciary position disposes of property the proceeds of sale are impressed with a trust which entitles the beneficiary or other person standing in the fiduciary relationship to trace such proceeds into any other property acquired therewith by the trustee … Whether fiduciary obligations are imposed on one party or another depends in part upon the character in which they contract and partly on the nature of the dealings in which they engage. Obviously one would be slow to infer that a vendor and purchaser engaged in an arms length commercial transaction undertook obligations of a fiduciary nature one to the other. On the other hand if one postulates that in any context one person is selling the goods of another the assumption of fiduciary obligations in relation to the sale and in particular the proceeds thereof might well be appropriate. It seems to me that the question must be asked: how does a party come to sell property of which he is not the owner? Is he selling as a trustee in pursuance of a power of sale? Is he selling as the agent of the true owner? Does the sale constitute a wrongful conversion? If any of those questions were answered in the affirmative it seems to me that the law would impose a trust on the proceeds of sale which would confer on the true owner the right to recover those proceeds from the actual seller or, if the proceeds were no longer in the seller's hands, to trace them into any other property acquired with them."

43. Murphy J. concluded that it was clear from the terms of the contract that it was envisaged that the defendants would sell on the goods on their own account and not as an agent for Carrolls. Accordingly, he could see no basis upon which to find a fiduciary duty. If such an obligation was to be found, it had to be established by reference to the actual bargain or in the conditions of sale. He was satisfied that the parties intended that the property would pass to the sub-purchaser who would become the full owner.

44. In coming to that conclusion, Murphy J. considered the following facts to be material. Firstly, the contract anticipated that, on the onward sale, the sub-purchaser would become full owner. Secondly, the clause specifically provided that Bourkes were not selling on as an agent of Carrolls, and this being so, they could not be considered a fiduciary. Thirdly, Bourkes could set their own price for the onward sale of the goods. This meant that, following their sub-sale, they were not necessarily going to be replaced by assets of equal value. Fourthly, while Bourkes were contractually obliged to place the monies received in respect of the onward sale of the goods into a separate account, no such account had been established, a fact which Murphy J. inferred was known to Carrolls. Fifthly, the contract provided for a four week credit period, a facility the purpose of which Murphy J. stated was uncertain if Bourkes were not free to use the proceeds during that period. Murphy J. analysed how that arrangement "properly implemented" would work given that the sums of money credited thereto, assuming that the goods were resold at a marked-up price, would be in excess of the amounts due by Bourkes to Carrolls. That being so, Carrolls, if entitled to have recourse to that account for the purposes of discharging monies due to them, would not be entitled to the entire fund which suggested to Murphy J. that the rights of the seller bore all of the characteristics of a mortgage or charge. The charge so created required registration under s. 99 of the Companies Act 1963 and in the absence of such registration was invalid.

45. In the course of his judgment, Murphy J. stressed the importance of looking beyond the contractual terms themselves and warned that the attachment of labels to the dealings of the parties was not determinative of their legal status. The rights of the parties and the nature of the transaction which they were engaged in had to be determined by reference to a consideration of the document as a whole as well as the obligations and rights which it imposed on the parties. Murphy J. expressed himself satisfied that the true nature of the relationship between the Carrolls and Bourkes was one of debtor/creditor and the fact that the proceeds of sale were dealt with by Bourkes in the ordinary course of their business supported that conclusion.

Judgment of the High Court

46. In the High Court, Peart J. found that the relationship between Unitherm and BHT was that of principal and agent rather than that of creditor and debtor. He did so by distinguishing the facts of the present case from those in *Carroll*. The factors he relied upon may be summarised as follows: –

> (i) The contractual terms were different. In *Carroll,* the contract expressly provided that in the event of the sale of goods by Bourkes that they should "act on their own account and not as agent for Carrolls". The clause in Unitherm's standard conditions of sale, whilst providing that BHT was entitled to sell the goods to third parties "in the normal course of the buyer's business", also provided in an earlier clause that, pending the payment of all sums and the passing of property in the said goods, "a fiduciary relationship shall exist between the buyer and the company and the buyer shall hold the said goods as trustee for and on behalf of the company and shall return the same to the company on demand". The monies so received were also to be placed in a separate account.

(ii) The manner in which Unitherm and BHT traded was very different to the manner in which Carrolls traded with Bourkes. The High Court judge placed emphasis on the following aspects of the dealings between Unitherm and BHT which he felt were indicative of the existence of a principal/agent relationship: –

(a) That the customer's plans were sent by BHT to Unitherm so that it might provide a quotation.

(b) That Unitherm prepared a quotation for the customer/third party on BHT headed notepaper or alternatively on jointly headed notepaper.

(c) That the price of the goods when sold to the customer was fixed by Unitherm rather than BHT. In Carroll, Bourkes were free to sell on to the customer at whatever price they wished.

(d) That Unitherm's profit on the onward sale to the customer was fixed by Unitherm at a percentage of the price which it had quoted for the goods.

(e) That in respect of certain categories of goods, Unitherm provided a commissioning service to the customer.

47. Two matters caused the High Court judge some difficulty when considering whether or not the relationship of principal and agent existed. Firstly, BHT had been granted a credit facility of 60 days, a term considered to be a strong indicator against the existence of a trust over the monies received from the onward sale of the goods given that it implies that the buyer is free to use those monies during the currency of that period. However, the High Court judge concluded that such a clause could be equally consistent with an opportunity being afforded to the buyer to obtain a purchaser for the goods before having to pay the seller, and thus the existence of such a term did not necessarily exclude the possibility of a principal and agent relationship. Secondly, there was the fact that the monies that were to be placed in a separate bank account would be in excess of what was due to the seller because of the mark-up on the onward sale. Such circumstances were normally indicative of the seller having a charge over the monies in that account to the extent only of its outstanding liabilities. To overcome such an inference, the High Court judge concluded that it was open to him to imply into the contract a term that the trust would only apply to that portion of the monies received which were due to the seller.

Decision

48. As was stated by Mummery J. in *Compaq Computer Ltd v. Abercorn Group Ltd.* [1993] B.C.L.C. 602, the seller's aim in insisting on a retention of title clause or a proceeds of sale clause is to prevent the goods and the proceeds of sale of its goods from becoming part of the assets of an insolvent buyer, available to satisfy the claims of the general body of creditors.

49. However, as was made clear by Murphy J. in *Carroll*, it does not follow that, just because the seller has such an objective in mind, the protection which it seeks will be achieved. The court must consider the character in which the parties contracted and the nature of the dealings in which they engaged, apart from the contractual provisions themselves, in order to ascertain how the position of the seller was secured. It must also ensure that the substance of the scheme of registration prescribed by s. 99 of the 1963 Act is preserved and that this scheme is not circumvented or manipulated by artificial characterisations of the buyer/seller relationship.

50. What is not in dispute is that Unitherm, as the unpaid seller, must establish a fiduciary relationship between itself and BHT affecting the proceeds of sale by BHT of the goods in question in order to enjoy an equitable right to trace the monies received in respect of the onward sale into a mixed fund.

51. That being so, it is necessary to consider, firstly, whether the High Court judge was correct in finding that Unitherm and BHT traded as principal and agent such as to create such a fiduciary obligation on the part of BHT in respect of the monies received for the said goods from its customers. If not, it is necessary then to consider the alternative submission made in the course of this appeal which is that BHT sold Unitherm's goods as trustee in possession, thus impressing the monies received in respect of their onward sale with a trust in favour of Unitherm. These questions must be answered in response to the liquidator's submissions that the extent of Unitherm's security is a charge on the book debts of BHT which is void for want of registration.

52. Given that the proceedings in the High Court were decided upon the basis of agency, I will firstly consider whether the High Court judge was correct in reaching that conclusion which he did as to the existence of a fiduciary duty arising from a relationship of principal and agent.

Principal and agent

53. Having considered carefully the evidence available on affidavit as to nature of the relationship between Unitherm and BHT, including the contractual obligations deriving from Unitherm's standard conditions of sale and the 60 day credit agreement with BHT, I regret to say that I am not satisfied that the relationship between Unitherm and BHT was that of principal and agent.

54. Looking firstly to Unitherm's standard conditions of sale in support of the existence of such a relationship, the language and wording of those conditions, presumably prepared by Unitherm's legal advisors, is not demonstrative of an intention on the part of Unitherm to trade with BHT as its agent. The words "principal" and "agent" are not to be found anywhere in the document. Unitherm is described as the "seller" and BHT the "buyer". An agent does not buy goods from its principal but makes a contract for sale which contractually binds its principal and the customer. Further, clause 11(b)(v) of these Standard Conditions permits BHT to sell the goods to third parties "in the normal course of the buyer's business". That clause is not consistent with the conclusion that BHT was selling as agent on Unitherm's behalf and is, in my view, consistent only with BHT selling on its own account.

55. The same clause also provides that BHT, on the sale of Unitherm's goods to its own customers, is deemed to have assigned to Unitherm the benefit of any claim which it had against a customer. In my view, such a provision is incompatible with BHT selling as an agent on Unitherm's behalf. If BHT was selling as an agent, it could have no contractual rights against the customer which it might assign to Unitherm. Further, if BHT had sold as agent for Unitherm, Unitherm would be the contracting party and could sue the customer on its own behalf without the need for any such assignment.

56. Not only are the standard conditions of sale inconsistent with the existence of a fiduciary duty based upon a relationship of principal and agent but the conditions are devoid of the type of obligations that a court might expect to see if an agency relationship had existed between the parties. For example, there is no term which prohibits BHT competing with its principal, Unitherm, or one requiring BHT to comply fully with its directions.

57. Given that an agent acts as an intermediary to conclude a contract between the principal and the customer, if such an agency relationship existed, that should have been apparent from the documentation referable to the trading arrangement between Unitherm,

BHT and the customer. Samples of the relevant documentation were exhibited in these proceedings. These demonstrate that BHT raised purchase orders from Unitherm and, consistent with that, Unitherm invoiced BHT/Heat Merchants as its customer. While quotations in respect of the price of goods required by customers were sent to the customer in the name of BHT, and sometimes on notepaper bearing the joint names of Unitherm and BHT, the fact of the matter is that it was BHT, solely, that invoiced the customer in respect of the supply of those goods, and it did so on its own behalf. None of the documentation exhibited is consistent with BHT and Unitherm being in anything other than an arms length vendor and purchaser or creditor and debtor relationship insofar as the onward sale of the goods by BHT was concerned.

58. Neither am I satisfied that the features identified by Peart J. concerning the manner in which Unitherm and BHT conducted their business were necessarily indicative of an agency relationship. For my part, all of those features which he identified in the course of his judgment are equally characteristic of ordinary commercial practice in the industry in question. For example, it does not necessarily follow that just because the supplier insists on fixing the retail price for the onward sale of its goods, and thereby fixes the retailer's profit margin, the relationship between the parties should be considered to be one of principal and agent. That type of condition, I suspect, is likely based on market considerations such as the price at which the seller believes it will sell the maximum amount of product. If the mark-up is left to the discretion of the retailer, then that could adversely affect the supplier's sales opportunities and is, in reality, simply a form of resale price maintenance. While clauses of this kind can sometimes give rise to legitimate competition law concerns, it has nonetheless been recognised that a seller has a legitimate interest in prescribing or controlling the price at which the product will ultimately be sold on to the consumer. It does not on that account make the buyer an agent of the seller.

59. Further, supplier warranties and/or commissioning or ongoing service agreements exist without the supplier necessarily becoming the contracting party with the customer.

60. BHT's entitlement to a fixed credit period is also inconsistent with an agency relationship. In circumstances where the contract would be between Unitherm and the customer, there would be no reason why the monies received by the agent would not be passed on immediately to the principal. Any agreement whereby the buyer is expressly or impliedly empowered to use the proceeds of sale for its own use would be inconsistent with such a relationship. Why should BHT be entitled to use Unitherm's monies for its own benefits within a specific period?

61. While the High Court judge concluded that credit facilities of this nature also serve the purpose of allowing the purchaser to find a buyer before they need to pay the seller, in this instance, according to the evidence, it was the existence of a customer that led BHT to order the goods from Unitherm in the first place. Further, it would have been open to Unitherm to agree that payment by its agent would be deferred until such time as BHT had received the price of the goods from the customer, but that was not the nature of the clause provided. Accordingly, to my mind, the existence of the fixed credit period in the present case is inconsistent with the existence of a fiduciary relationship based upon agency.

62. While there was an obligation on BHT to keep the monies received in respect of the onward sale of Unitherm's goods in a separate bank account, it never did so and the monies concerned were lodged to its trading account and used in the normal course of its business. Had the standard conditions of sale included a clause that the net proceeds of sale received by BHT had to be placed in a separate bank account and no credit facilities afforded to BHT, then, in the absence of all of the other evidence which points in favour of a normal debtor/creditor relationship, one might perhaps consider the possibility that BHT was acting as agent on behalf of Unitherm. However, the fact of the matter is that Unitherm queried the existence of this account for the first time on 7th March, 2012, in the course of the receivership and over six years after the parties had commenced their trading relationship. Further, over all of that period Unitherm had afforded BHT a sixty day credit period. Taken together, when added to all of the other indicators in favour of a normal debtor/creditor relationship, these facts are, in my view, inconsistent with the existence of an agency agreement.

63. However, even if the bank account had been set up in accordance with the standard conditions of sale, the clause required BHT to put all of the monies received, including its own, - call it commission or profit - into that account. On the face of it, the clause gives Unitherm a right to funds which belong to BHT, and this is inconsistent with the clause being in furtherance of an agency agreement. In *Carroll*, Murphy J. considered that such an arrangement had the characteristics of a charge made in favour of the seller given that it would be a fund to which it might have recourse for the discharge of the monies outstanding to it, even though it would not be entitled to the entirety of the monies in that fund.

64. Faced with the difficulty, Peart J. stated that he could imply a term into the clause which would confine BHT to the obligation to lodge into a separate account only that portion of the resale proceeds due to Unitherm. Such a term could, however, only be implied into the contract where it was necessary to give effect to the presumed intention of the parties.

65. Clause 11(b)(v) provides that "the proceeds of any such sale shall be held by the buyer on trust for the company". Would an officious bystander, with knowledge of the business dealings between the parties and sight of the aforementioned clause, if asked about the agreement between the parties, have stated "Oh, of course" it was clear that the parties intended that only that portion of the proceeds of sale as reflected BHT's liability to Unitherm should be placed in that account. The answer, I believe, is a resounding no. Neither is the imposition of an implied term necessary to give business efficacy to a relationship which, on the standard conditions of sale and the documentation as a whole as well as the manner in which the parties did business, is fully consistent with one of debtor and creditor.

66. The clause which he sought to imply into the standard terms and conditions was one that was in direct conflict with the words of the clause, which specifically provides that all proceeds of sale be lodged into the account. Further, there was no evidence that such a term reflected the true intention the parties, and it was in conflict with Unitherm's own letter of 7th March, 2012, requiring that any monies collected for goods sold to third parties ought to be set aside for its benefit.

Trustee in possession

67. Rather belatedly in the course of the appeal hearing, having argued in favour of an agency relationship, counsel for the respondent sought to disengage somewhat with that argument in favour of a fiduciary relationship based on an assertion that BHT had sold Unitherm's goods as trustee in possession, thus allowing Unitherm to claim that the proceeds of sale were held by BHT in trust on its behalf.

68. Critical to an analysis as to whether BHT might be considered to have sold to customers as trustee in possession is the answer to the question as to when and in what manner the title to Unitherm's goods passed to the ultimate customer.

69. Of course, a seller such as Unitherm may agree with a buyer that it will reserve title or suspend the passing of title until such time as it receives payment for its goods. Title will pass in such circumstances when the parties intended to pass, as is provided for in s.17

of the Sale of Goods Act 1893 which provides as follows:-

> "(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case."

70. In this case, it is clear from clause 11 of the standard conditions of sale that it was agreed that, while Unitherm's goods remained in BHT's possession and at a time when they had not been paid for, the title to those goods remained with Unitherm. It was in these circumstances that Unitherm was paid €13,853.49 in the course of the liquidation as the goods concerned remained in BHT's possession and for title to pass the purchase price had to be paid.

71. As to when and if title passes to the buyer, it becomes a more complicated question where the buyer is permitted to effect a sub-sale of the goods but the contractual terms maintain that title is nonetheless to remain with the seller. In this case, Unitherm permitted BHT to sell the goods. However, it sought to overcome the risk of non-payment by BHT by the inclusion of clause 11; whereby, it sought to retain title in respect of all goods supplied to BHT while any invoice remained un-discharged as well as a right to ownership of the proceeds of sale received by BHT in respect of the onward sale of the goods. In support of this provision, it also provided that the "proceeds of any such sale" would be held on trust for it by BHT. That it is possible to legally so provide is not in dispute. As Mc William J. stated in *Frigoscandia (Contracting) Ltd. v. Continental Irish Meat Ltd.* [1982] I.L.R.M. 396 at p.398:-

> "The parties to a contract can agree to any terms they wish and, amongst others, they can agree that the property in the goods shall not pass to the purchaser until all the instalments of the purchase price have been paid. See *McEntire v. Crossely Brothers*, [1895)]AC 457 at 463; and s.17 of the Sale of Goods Act, 1893. The court has to decide what was the intention of the parties as shown by the provisions of the whole agreement."

72. It has to be said that the intention of the parties is more easily determined in cases where, like in *Frigoscandia*, the Court was only concerned with ascertaining the true relationship between the seller and the buyer and where there has been no onward sale to a third party. However, there is now a significant body of case law in support of the proposition that, if the buyer, as was the position of BHT in the present case, is permitted to resell the goods, it is usual for it to do so on its own account unless there is very clear evidence to the contrary. If the buyer is truly selling on its own account, it has taken the legal and beneficial title in the goods from the seller by agreement. Accordingly, regardless of the use of words such as "trustee" or "fiduciary" in the conditions of sale, no fiduciary duty will be deemed to exist with the parties being considered to be in a relationship of debtor and creditor.

73. In general, most recent authorities have tended to treat "proceeds of sale" clauses as giving rise to charges which require registration and the courts have been reluctant to infer the existence of a fiduciary relationship between parties who, as Murphy J. described in *Carroll*, appear to be engaged in arms length commercial transactions as vendors and purchasers.

74. Counsel for Unitherm challenged the liquidator's arguments that BHT had granted Unitherm a charge over the money it received from the sub-sale by reference to the decisions in *Hickey*, *Romalpa* and *Armour and another v. Thyssen Edelstahlwerke A.G.* [1991] B.C.L.C. 28 ("Armour"). I will deal with each of these in turn as I do not believe they provide adequate support sufficient to defeat the liquidator's submissions.

75. In *Hickey*, the receiver of the company (the buyer) applied to the High Court for directions concerning the ownership of goods sold and delivered by the respondent to the company but for which it had not been paid. The contract contained a reservation of title clause stating that no property in the goods would pass until full payment had been received. Until then, the buyer was obliged to hold the goods on trust for the respondent in a manner which enabled them to be identified. The buyer was, as was the case with BHT, permitted in the normal course of business to sell the goods to a third party, in which case the proceeds of such sale were to be held by the buyer in trust for the respondent in a manner which enabled them to be identified as such. However, it is of vital significance to note that, at the time of the court application, the goods remained in the buyer's possession and had not been the subject matter of resale to a third party.

76. The applicant maintained that the words "in trust" in the latter provision indicated that the legal estate in the goods had in fact passed to the buyer and that the only interest retained by the respondent was one by way of charge only.

77. Barron J. rejected that submission stating that he saw no reason why the seller could not impose a contractual term whereby the property in the goods sold would not pass until they had been paid for. In so doing, he referred to the judgment of McWilliam J. in *Frigoscandia* noted earlier in this judgment

78. He emphasised s.17 of the Sale of Goods Act 1893 and the right of the unpaid seller to protect himself, noting that there was nothing foreign to the law of the sale of goods in the seller seeking to postpone the date of the passing of the property in the goods agreed to be sold. He went on to conclude that there was nothing in the clause under consideration from which it could be inferred that the property had passed to the company and that it had assigned back an equitable interest in the goods by way of charge. The words "no property in any goods shall pass" had to be given their literal meaning.

79. In order for him to conclude that a charge had been created, the applicant would have to have been in a position to prove that all of the property had passed to the company and that it had assigned back to the respondent an equitable interest in the goods by way of charge so that, consequently, the respondent had no more than a charge in respect of the value of the goods supplied. However, this could not be established because the entirety of the property never passed by virtue of the retention of title clause. By way of contrast, in the present case this is what the liquidator alleges occurred, not in the course of the supply contract but at the time of the onward sale of Unitherms's goods in the normal course of its business.

80. I view the decision in *Hickey* as of little value because, at the time of the application, the buyer still had the goods and had not sold them on to a third party, unlike in the present case were BHT has sold on the goods in the course of its own business. The Court did not have to concern itself with the nature of the relationship between the buyer and the seller in the context of the onward sale of the goods and the "proceeds of sale" clause. When Barron J. referred to the fact that no charge could be created where legal ownership never passed, he was doing so in the context of the retention of title clause and not the proceeds of sale clause. Accordingly, this judgment is entirely consistent with the position adopted by the liquidator in the present case. In respect of the retention of title clause, it has been accepted that Unitherm retained title over all goods for which it had not been paid whilst they remained in BHT's possession. The liquidator never sought to make the case made by the receiver in *Hickey*, hence the payment to Unitherm of the sum of €13,853.49 in respect of such goods which remained in the possession of BHT, which had not been paid for as

of the date of the liquidation.

81. As for Unitherm's reliance upon the decision of the House of Lords in *Armour*, the same is misplaced as the decision is on all fours as that in *Hickey*. In that case, a German steel manufacturing company, the appellant, sold steel strips to a Scottish engineering company. The contract contained a standard reservation of title clause to the effect that title would not pass to the buyer until all debts had been paid. The Scottish company went into receivership while in possession of the appellant's goods and for which goods payment had not been made. The receiver maintained that the company was the owner of the goods as it was entitled to take possession of them and sell them on. The receiver argued that the relevant clause had created a charge in favour of the seller but the property in the goods had passed to the Scottish company. The Court (Lord Keith disagreed on the basis that in order for the Scottish company to have created a security over the goods in favour of the appellant, it would have to have ownership and possession of the goods. However, the contract of sale said that property in goods was not to pass until all debts due had been paid. It was agreed that the company would receive possession but would not acquire the property until those debts were discharged. As the company had not paid for the goods and they were still in its possession, it had no interest of any kind to create a subordinate right in favour of the appellant.

82. This decision is of little import to the present case as at all times the liquidator has accepted that BHT had not acquired title to any of the goods which remained in its possession and which had not been paid for as of the date of liquidation, hence the payment of €13,853.49 discharged in respect of those goods. The decision does not in any way consider the consequences for the relationship between buyer and seller where the contract permits the buyer the right to sell on the goods to its own customers in the normal course of its business whilst providing that the proceeds of any such sale shall be held in trust by the buyer for the seller.

83. In *Romalpa*, a Dutch company sold aluminium foil to the defendant, an English company. Some of these goods were sold on to third parties. However, the terms and conditions of sale were different to those in the present case. There were two parts to the relevant clause in that case. The first was a straightforward retention of title clause which stated that title in the goods would only pass to the purchaser when it had met all of its outstanding liabilities to the plaintiff and that, until the date of payment, the purchaser would store its goods in such a way that they could be identified as being the property of the plaintiff. The second part of the clause was a complicated one which dealt only with the legal consequences for the parties in the event that the plaintiff's goods became mixed with other goods and either remained upon the purchaser's premises or were sold on to third parties. That clause specifically provided that, until the moment of full payment, the purchaser would remain the fiduciary owner of those goods notwithstanding its right to sell them on to third parties. The clause is indeed not unlike that contained at 11(b)(vi) of the standard conditions of sale in this case. Further, that second clause stated that until full payment was received the purchaser would keep the mixed goods in its capacity as fiduciary owner.

84. At the date of liquidation €35,000 was in the receiver's possession referable to aluminium which had been sold on by the defendant to third parties. These were monies recovered by the receiver which he placed in a separate account. The defendant accepted that the effect of clause 13 was to make it bailee of the material supplied by the plaintiff until all debts were paid; but, once the goods had been resold, the receivers maintained that the relationship between the plaintiff and defendant was purely that of debtor and creditor and that, in the absence of an express constructive trust, the plaintiff was not entitled to avail of the equitable remedy of tracing.

85. Mocatta J., at first instance, held that the relevant clause showed an intention to create a fiduciary relationship between the parties and that the plaintiff was entitled to follow the proceeds of the sub-sale.

86. In dismissing the defendant's appeal, the English Court of Appeal concluded that the purpose of the clause was to secure the plaintiff, in the event of insolvency, against the risk of non-payment after it had parted with the possession of, but not the legal title to, the material delivered. In order to give effect to that purpose, there had to be implied into the first part of the clause, in addition to the undoubted power to sell to a sub-purchaser, an obligation on the defendant to account in accordance with the normal fiduciary relationship of principal and agent, bailor and bailee, as expressly contemplated in the second part of the clause. Accordingly, the plaintiff was entitled to trace the proceeds of the sub-sales. The reason why such an implied term was introduced was that the clause in question made no mention of the rights of the parties in the event of the purchaser proceeding to resell the plaintiff's goods in circumstances where they had not become mixed with other goods. Thus, it was decided to imply into the first part of the clause, which was no more than the standard retention of title clause which normally exists between seller and buyer, contractual obligations based upon the stated intention of the parties in the second half of the clause relating to the onward sale and/or control over mixed goods.

87. The decision in *Romalpa* clearly provides some support for Unitherm's contention that clauses such as clause 11 of it's standard conditions of sale can, depending upon the nature of the relationship between the buyer and the seller, contractually achieve a scenario whereby the equitable title to the goods at all times remains with the unpaid seller while the legal title passes to the buyer, who eventually holds the proceeds of onward sale in trust for the seller.

88. It is undoubtedly the case that the decision in *Romalpa* has not been favoured in recent times, and, certainly in this jurisdiction, it would appear to have been replaced by the remarkably clear and purposeful guidance giving by Murphy J. in *Carroll* as to how the nature of contractual relations should be determined. However, leaving that decision to one side for the moment, I am in any event convinced that *Romalpa* can be distinguished on its facts from the present case such that it should not be viewed as a relevant authority to guide the Court in this case.

89. The contractual arrangements between the parties in the two cases are significantly different. In *Romalpa*, the conditions of sale were entirely silent as to the purchaser's right to resell goods which had not been mixed with other goods or otherwise engaged in a manufacturing process. There was no equivalent provision to that which is contained a clause 11(b)(v) of the present contract. The Court had to imply a term into the first part of the clause permitting the purchaser to sell the goods to third parties. The Court then had to decide upon the nature of the relationship between the parties at the time of the onward sale of the goods and the rights which flowed as a result of that conclusion. The Court determined the nature of the relationship between the seller and the purchaser at the time of the onward sale by reference to the expressed intention of the parties in relation to the onward sale of mixed goods. Given the ongoing fiduciary duty expressed to exist in respect of those goods in the second part of the clause, this duty was imported into the first part of the clause and as a result the Court concluded that the buyer and seller were in a fiduciary relationship for the purposes of the onward sale of the defendant's goods. Roskill L.J. concluded that the buyer, when it sold on the plaintiff's tinfoil, did so with its implied authority, as its agent, and remained fully accountable to it.

90. In stark contrast to those facts, clause 11(b)(v) of Unitherm's standard conditions of sale specifically provide for the onward sale of non-mixed goods. There is nothing in that clause stating that ownership of the goods remains with the seller notwithstanding the right of BHT to sell them on to its own customers. Further, the clause states that BHT will sell the goods on in the normal course of

its own business. Unlike in *Romalpa*, it does not state that BHT at that point holds the goods or sells them in its capacity as a fiduciary and, in my view, BHT cannot, on the facts of this case, be considered to have been acting as agent for Unitherm for the reasons already referred to earlier in this judgment. I am quite satisfied that this clause was never intended to provide a basis upon which Unitherm might maintain that BHT was selling in a fiduciary capacity either as trustee in possession or as agent on Unitherm's behalf.

91. The cases are also different insofar as the receiver, in *Romalpa*, unlike the liquidator in the present case, did not argue in favour of the creation of a charge which was void for want of registration. In my view, it is likely that this argument was not advanced because there was no "proceeds of sale clause" covering the onward sale of non-mixed goods to the defendant's customers. That being so, there was no clause to construe as one which might potentially be viewed as creating a charge requiring registration.

92. A third point of difference between the two cases is the fact that, in Romalpa, the receiver had placed the proceeds of sale in a separate account such that they had never been mixed with any other monies; whereas, in the present case, the monies received from the sub-sales had been mixed and used by BHT in the normal course of its business, a factor which the liquidator maintains is material to establishing the true nature of the relationship between the parties.

93. As was pointed out by counsel on behalf of the appellant, there have been a great number of decisions since *Romalpa* which have cast doubt upon the approach taken by the Court in that case, which paid little attention to the manner in which the parties actually conducted their business. The court must look carefully, as was advised by Murphy J. in *Carroll*, at the particular circumstances of the case to identify the rights intended to be given to the seller, and, when those are examined thoroughly, it is usually clear that the Buyer, in return for the right to sell the goods on to its own customers, has granted to the seller a charge over the monies received in respect of their onward sale.

94. McCann and Courtney, *Companies Acts 1963-2009*, (Dublin, 2010) in dealing with proceeds of sale clauses in the context of s.99 of the Companies Act 1963 provide the following helpful commentary:

> "*Proceeds of sale* clause: In some cases it has been held that a clause which purports to retain the proceeds of a sub-sale of goods until the purchase price has been paid, will not be regarded as a registerable charge provided that it satisfies all or some of the following criteria:
>
> (a) it expressly creates a fiduciary relationship between the seller and the buyer;
>
> (b) it stipulates that in any sub-sale the buyer is to be regarded as acting for and on behalf of the seller;
>
> (c) it imposes a duty on the buyer to keep the proceeds of any sub-sale separate from the buyer's other moneys; and
>
> (d) it requires the buyer to account for such proceeds to the seller."

95. Most recent decisions, as is stated by the aforementioned authors, have leaned against the view that a clause in the above terms is successful in retaining title such as to entitle the seller to trace monies received by the purchaser following the resale of the goods. The greatest indicator in favour of title passing to the purchaser, regardless of the existence of a retention of title clause, is an agreement between the parties that the purchaser may sell on the goods in the course of its own business, an undisputed right of BHT in the present proceedings. If, on the one hand, Unitherm had retained full legal and beneficial title to the goods, the Court could not find that BHT had created a charge on the goods in favour of Unitherm as it is not legally possible for the buyer to charge in favour of the seller a title or interest which the buyer has not got. On the other hand, if on the true construction of the agreement the legal title to the goods has passed from the seller to the buyer, the Court may conclude that the legal consequences of the agreement is that the position of the seller is in fact secured by a charge created in his favour over the goods by the buyer.

96. Accordingly, the fact that BHT was specifically permitted to sell on the goods in the course of its own business is a strong indication that it was not acting as a fiduciary on Unitherm's behalf.

97. Looking at clause 11(b)(v), can it realistically be argued that BHT sold Unitherm's goods as trustee in possession? This is not what the clause states. To the contrary, clause 11(b)(v) specifically provides that the buyer is entitled to sell the goods to third parties in the normal course of the "buyer's business". These are standard terms and conditions imposed by Unitherm on all of its customers. The condition permits each such "buyer" to sell to its customers in the manner which is normal for it when dealing with its customers. Indeed, the use of the words "buyer" and the "sale of goods to third parties" would tend to support the liquidator's submission that title to the goods passed to BHT with the seller's agreement when it effected the sub-sale of those goods to its customers. That this is correct seems to be borne out by the final element of clause 11(b)(v); whereby, BHT, following the sale to the customer, was deemed to have assigned to Unitherm the benefit of any claim which it might have against the customer arising from such sale.

98. Another factor which tends to favour a conclusion that the buyer is providing security to the seller in respect of its unpaid account by way of a charge is a clause which provides that the totality of the monies received from the sub-sale of the goods should be kept in a separate account on an alleged "trust". This is so because the purchaser is only obliged to account to the seller for the monies in that account to the extent of the sum remaining due to the seller. The only monies that could be held on trust are those that represent the seller's interest in those goods. It is for this reason that clauses of this type and nature have been deemed to have the characteristics of a charge over the monies placed in such an account; the same having been granted by the buyer in return for the proprietary interest in the goods which, up to the point of re-sale, had remained with the seller. This is precisely the nature of the security which was afforded to Unitherm by BHT under clause 11(b)(v). In my view, the fact that Unitherm required BHT to hold the entirety of the sum received following the resale of the goods is consistent with the liquidator's submission that the clause created a charge in favour of Unitherm over those monies in respect of the sums then outstanding.

99. A clause similar to that in the present case was considered by Mummery J. in *Compaq Computer Ltd v. Abercorn Group Ltd* [1993] B.C.L.C. 602. There, the seller required the buyer to account for the full proceeds of the resale of its goods. The Court took the view that the seller was not entitled to retain out of the proceeds more than what was sufficient to discharge the unpaid price of the goods. The seller's right accordingly amounted to a limited interest in the proceeds by way of security.

100. While it is true to say that in the present case clause 11 requires that the monies received by BHT be placed in a separate account, a feature often considered to support the existence of a fiduciary duty, such an account was never opened. Further, at no stage prior to the receivership had Unitherm sought to establish that any such account existed or that the proceeds received in respect of the resale of its goods were directed to that account. However, even if this account had been established, insofar as it

was intended to ring fence 100% of the proceeds recovered on the resale of the goods, the clause would not have been consistent with BHT holding the monies as a fiduciary on Unitherm's behalf for the reasons just stated. The existence of the clause is not inconsistent with an agreement that Unitherm should have a charge over the monies received to secure repayment of any monies that remain outstanding.

101. Some assistance in this regard is to be found in the decision of Phillips J. in *E. Pfeiffer Weinkellerei-Weineinkauf G.m.b.H. & Co. v. Arbuthnot Factors Ltd* [1988] 1 W.L.R. 150. There the plaintiff, a German wine exporter, sold wine to an English importer on terms that included a property reservation clause which provided that the goods remained the plaintiff's property until they had been paid for, but which permitted the importer to sell the goods in the meantime. The conditions of sale were not materially dissimilar to those in the present case in that the rights of the importer arising from the onward sale were to vest in the plaintiff and the monies received from the onward cash sale of the wine, which was stated to become the plaintiff's money once received, was to be separated from other monies held by the importer. The importer failed to pay the plaintiff for all sums due, and the plaintiff brought an action claiming beneficial ownership of the funds referable to each sub-sale. The importer had entered into a factoring agreement pursuant to which it had assigned to the defendant, absolutely, the debts which it was owed from sub-purchasers and had warranted that "no reservation of title by any third party would apply to all or any part of the goods sold." The plaintiff, in its action, claimed to be the beneficial owner of the proceeds of each sub-sale that had been entered into by the importer and that the defendant's title to the debts assigned under the factoring agreement was subordinate to its prior equitable title. It accordingly sought an order that the defendant account to it for the monies received under the assignments made pursuant to the factoring agreement. In its defence, the defendant claimed that any interest which the plaintiff had over the proceeds of the sub-sales was in the nature of a charge on the importer's property which was void for want of registration against the defendant under the provisions of the Companies Act 1948.

102. In his judgment, Phillips J. stated that, where a buyer was permitted to sell on a suppliers goods in the normal course of his business before paying the seller for them, the normal implication was that he was doing so for his own account and not as a fiduciary who was obliged to account to the seller for all the proceeds of sale; that the "property reservation clause" set out comprehensively the nature of the interest which the plaintiff was to have by way of security in respect of debts created by sub-sales; and that its terms were inconsistent with the existence of such a fiduciary relationship. Further, he held that the clause in question had created an equitable assignment in favour of the plaintiff over the monies owed by the sub-purchaser to the importer up to the amount of any outstanding indebtedness of the importer to the plaintiff and that this constituted a charge requiring registration under s.95 of the Companies Act 1948 (i.e., the equivalent of our s. 99 of the 1963 Act).

103. Another factor which has been deemed to be a strong indicator against the existence of a fiduciary relationship is an agreement whereby the purchaser is provided with a period of credit. *Re Andrabell Ltd.* [1984] 3 All E.R. 407 is a decision on point. There, the plaintiff supplied travel bags to a company on terms which provided that ownership of the goods would not pass until such time as the total purchase price had been paid to the plaintiff. The buyer was afforded 45 days credit. The bags were sold by the buyer in the normal course of its business, and the proceeds of sale were paid into its general bank account where they became mixed with monies belonging to the company. The buyer went into liquidation, and the plaintiff contended that, since the bags had not been paid for, the Court should conclude that the bags had been delivered to the buyer under a contract of bailment which had an implied term that the buyer was to account to the plaintiff in respect of the proceeds of sale of the bags in accordance with the normal fiduciary relationship of bailor and bailee.

104. While the facts in *Andrabell* were somewhat different from those in this case, insofar as Unitherm's standard conditions of sale did specify that the monies received in respect of the onward sale of the goods would be placed in a separate account and that a fiduciary relationship was deemed to exist between the parties, the decision is nonetheless of assistance. In concluding that the parties were not in a fiduciary relationship, the Court emphasised that the company was not selling as agent for the plaintiff or on the plaintiff's account and it was to be inferred from the fixed 45 day period of credit that the company was free during that period to use the proceeds received from the sale of the bags as it liked and that was not compatible with the plaintiff having an interest in the proceeds of sale.

105. The question I have to ask myself is whether the parties agreed that BHT would be trustee of the proceeds of sale. In that regard, in order for the seller to be entitled to the type of proprietary interest in the proceeds of sale as is contended for by Unitherm, the legal title to the proceeds of sale must vest in the buyer while their beneficial ownership vests in the seller. However, if the buyer is expressly or impliedly empowered to use the proceeds of sale as its own money, then it will not be considered to be a trustee of the proceeds but will be deemed to be in a normal creditor-debtor relationship with the seller.

106. In the present case, a 60 day period of credit was afforded to BHT to discharge its liabilities to Unitherm. That facility was agreed further to a letter of Mr. Declan Kissane dated 9th March, 2007, written on Unitherm's behalf. It must be inferred from such a facility that Unitherm was content that BHT could use monies received by it in respect of the resale of Unitherm's goods as it wished during the credit period to support its day-to-day commercial operations. If it were otherwise, how would BHT manage its day-to-day finance? Would it not face an acute cash flow problem?

107. I do, of course, recognise that, in terms of deciding upon the nature of the relationship between BHT and Unitherm, regard can only be had to business efficacy against the backdrop of the contractual provisions agreed to and, where there are obvious competing considerations, the question must be answered in light of what both parties agreed to rather than on a unilateral view taken from the point of view of the buyer. That said, however, for reasons earlier stated in this judgment, I do not believe it can realistically be inferred that the credit period in this case may have been agreed so that BHT could source a customer and conclude a sale after which it would hold the monies received exclusively in trust for Unitherm until the end of the sixty day period. Such an agreement would make no commercial sense. If the monies received from the sub-sale were intended to replace Unitherm's prior interest in the goods, why did the clause not provide for immediate payment of monies received by BHT in respect of the onward sale of those goods, given that BHT as trustee thereof would not have been entitled to use the money for its own purposes during the remaining period of credit?

108. Accordingly, I am of the view that the terms of credit are completely at odds with Unitherm's contention that BHT sold its goods as trustee in possession such that it was intended that it would hold the proceeds of sale on trust on its behalf.

Conclusions

109. In conclusion, clause 11 of Unitherm's standard conditions of sale, that being the foundation stone upon which its claim is based, was clearly designed with the objective of securing its interests, so far as was possible, against the risk of non-payment after it had parted possession with its goods to any of its customers such as BHT.

110. It is accepted that the retention of title clause in the conditions of sale operated between Unitherm and BHT as intended in

relation to the supply contract. It is clear from those conditions and from the manner in which the parties traded that while Unitherm's goods remained in BHT's possession and payment therefore remained outstanding, title did not pass and was not intended to pass, hence the payment of €13,853.49 to Unitherm in respect of goods which fell into that category in the course of the liquidation.

111. As to the proceeds of sale clause and the relationship between the parties when BHT sold Unitherm's goods to its customers, I am satisfied that the relationship at that stage was always intended to be one of creditor and debtor. The parties did not intend that BHT would act as fiduciary on behalf of Unitherm either as its agent or as bailee in possession of its goods with a power of sale.

112. As to agency, in my view, the High Court judge was wrong in concluding that the evidence supported a finding that the parties had entered into such a relationship. Such a relationship is not evidenced in the standard conditions of sale, the documentation concerning the supply contract, or the contracts for the resale of the goods, or by the conduct of the parties themselves.

113. As to a fiduciary relationship built upon a relationship of bailment, a relationship not considered by the High Court judge, I can find no evidence to support a conclusion that the parties intended that BHT would sell Unitherm's goods as bailee in possession. Again, this relationship is not to be found in the terms and conditions of sale, the contractual provisions, the trading documentation, or the manner in which the parties conducted their business.

114. Against such a finding are:-

(i) BHT's right to sell to it's customers in the course of its own business;

(ii) credit terms of 60 days;

(iii) the standard conditions of sale which sought to impress the entirety of the purchase monies received, including BHT's profit margin, with a trust, the latter being monies to which it had no legal or beneficial entitlement;

(iv) the fact that no separate account was ever created for the purchase monies; and

(v) the "all sums due" nature of the retention of title clause.

All of these are characteristics of a charge made in favour of the seller over a fund to which it might have recourse for the discharge of any monies outstanding.

115. Regardless of some differences in the underlying facts between the two cases, I am satisfied that the transaction whereby BHT sold Unitherm's products to its customers was in substance the same as that with which the Court was concerned in *Carroll*. In this regard, I differ with respect from the conclusion reached by Peart J. in the High Court. That being so, I am satisfied that in substitution for the right of property which Unitherm had enjoyed in its goods until the point in time when BHT proceeded to resell them, BHT granted to Unitherm a charge in its favour over the proceeds of sale of those goods. That charge was one which required registration under s. 99 of the Companies Act 1963, and in the absence of such registration is invalid and void as against the liquidator.

116. Accordingly, for my part, I would allow the appeal.