Neutral Citation: [2014] IEHC 177

THE HIGH COURT

RECORD NUMBER 2012 No. 91 C0S

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

AND

KIERAN WALLACE AS THE OFFICIAL LIQUIDATOR OF BHT GROUP LIMITED (IN LIQUIDATION)

RESPONDENT

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 2nd DAY OF APRIL 2014:

1. The applicant company ("the applicant") has carried on business since 2004 in the design and supply of heating systems throughout Ireland. In addition it provides training and support to installers of such systems.

2. During the course of business, it supplied goods to BHT Group Limited (In Liquidation) ("the company") which the company in turn would sell on to third parties.

3. On the 16th February 2012 the company went into examinership. On the 20th April 2012 the respondent was appointed as liquidator, and on the same date an asset sale agreement was entered into with Harleston Limited, through its subsidiary Washglade Limited whereby the assets of the company were purchased for value.

4. By this time a sum of €107,761.14 was due and owing to the applicant for goods sold and delivered. This amount was reduced by a payment to the applicant by Washglade in the sum of €13,853.49 in respect of some of its goods which were still physically on the company's premises at the time of the asset sale, and over which the applicant had the benefit of a retention of title clause. Those goods were clearly identifiable as belonging to the applicant company, and no issue arose as to the applicability of the relevant part of the retention clause.

5. The balance of €93,907.65 remains due, but in respect of goods supplied to the company and which had already been sold on to third parties before the appointment of the liquidator.

6. The liquidator does not accept that the applicant is entitled to any priority or tracing in respect of that balance of €93,907.65 based upon the proceeds of sale clause within the retention of title clause. The applicant submits that the company held the goods as agent of the applicant, and hence as a fiduciary, entitling the applicant to trace the proceeds of sale in accordance with the equitable principles in *Re Hallett's Estate* (1880) 13 Ch.D.696, C.A. The liquidator on the other hand submits that the legal effect of the proceeds of sale clause is to create a charge which is registrable under section 99 of the Companies Act, 1963, and in so far as it has not been so registered, the charge is void as against the liquidator – the net effect being therefore that the applicant is an ordinary creditor in the liquidation with no special priority over the other ordinary creditors.

7. The retention of title clause appears at Clause 11 of the Standard Conditions of Sale. It states as follows:

> *"(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.*
>
> *(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 licences the company and its agents to enter onto any premises on which the goods or any of them may be situation 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 companies 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.

(c) *the risk of damage to the goods shall pass to the buyer on delivery*". [Emphasis added]

8. While I have set forth the entire of paragraph 11, it is Clause 11(b)(v) which is relevant for the purpose of the present argument. It is common case that no separate bank account was opened by the company into which the proceeds of any re-sale ought to have been placed in order to prevent sums due to the applicant becoming mixed with other sums in the company's own bank accounts, even though this was required under the terms and conditions.

9. Declan Kissane of the applicant company has stated in his grounding affidavit that at all times the applicant relied on the company's obligation to maintain a separate bank account in respect of payments received, and had no reason to suspect that this term of the agreement had not been complied with. The Receiver does not accept that the applicant had no reason to suspect that no separate account had been opened, and notes that it was not until the 7th March 2012 that the applicant first wrote to the company seeking confirmation that a separate bank account had been opened, even though the company had exceeded its credit limit six months previously. In that letter, Mr Kissane stated to the company that "*it is important that you understand that 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*". He states that there was no requirement on the applicant under those terms and conditions to seek out such a confirmation, and that it was a condition to which the company agreed and was obliged to adhere to even in the absence of such a confirmation. The first time he learned that the company had not maintained any separate bank account as required under the terms of the agreement was when his solicitor received a letter from the solicitors acting for the official liquidator dated 12th February 2012, and in which it was stated that, subject to confirmation from KPMG, it was understood that the company never operated a separate bank account as required under the retention of title clause, and it was denied also that during the course of the examinership, the examiner, who had no involvement in the day to day running of the business, had any responsibility for the lodgement of monies into any particular bank account.

10. On the 7th March 2012, Mr Kissane wrote to the company in relation to a particular customer project at Castlegar, Co. Galway stating that in relation to a heating system supplied to the customer, he would, in order to assist the company in receiving payment for the goods supplied, organise that their engineer would commission the system, even though payment had not been received, and that following the system being commissioned it would be covered by the manufacturer's warranty. However, he went on to state:

> *"We appreciate the future in relation to Heatmerchants [the company] 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 for material we have not been paid for."*

11. During the course of the examinership between February 2012 and April 2012, the applicant continued to provide product, and to commission same and ensure that it was covered by the manufacturer's warranty. The applicant was paid by the examiner for the cost of commissioning. But Mr Kissane says that he continued to operate on the understanding that there was a separate bank account in respect of the proceeds of sale, and that he therefore was protected against the possibility of a liquidator being appointed. It is safe to assume, I think, that he must have considered that his prospects of getting paid what was owing would be enhanced by his continuing to supply product to the company, so that the company in turn would have a greater chance of coming out of examinership and survive.

12. He was later informed by letter dated 1st May 2012 from the liquidator's solicitor that, despite his request, no separate account was ever opened by the company, and that any account to which he was seeking to trace monies received from customers in respect of the applicant's product was one where the majority of the funds did not relate to the proceeds of sale of such product. In so far as the applicant had maintained in its correspondence with the liquidator that the proceeds of sale clause created a fiduciary relationship between the parties, the liquidator's solicitors stated that it has been held by the Irish Courts that the imposition of such a relationship created a charge over property, and as such, it had to be registered as a charge against the company pursuant to Section 99 of the Companies Act, 1963 within 21 days of its creation, otherwise it was void. The applicant's view in this regard as expressed in correspondence was that since the company never owned the goods in question (not having paid for them) the company could never have created a charge over the product supplied to it. Mr Kissane states that he is advised that in the light of the terms agreed between the parties, and the manner in which trade between them was conducted, Clause 11 does not amount to a charge requiring to be registered under Section 99 of the Act of 1963, and that the clause must be seen in the context of the overall trading relationship between the parties and the terms and conditions.

Legal submissions:

13. Dominick Hussey SC for the applicant relies firstly on *Aluminium Industrie Vaasen BV v. Romalpa Aluminium Limited* [1976] 2 All ER 552. In Romalpa, there was a retention of title clause which covered goods supplied to the company but not sold by the date of the liquidation, as well as goods supplied, and which became, in a process of manufacture, mixed with other goods to create new objects. In addition the clause went on to provide that "*Nevertheless, purchaser will be entitled to sell these [new] objects to a third party within the framework of the normal carrying on of his business and to deliver them on condition that – if [the seller] so requires – the buyer, as long as he has not fully discharged his debt to [the seller], shall hand over to [the seller] the claims he has against his buyer emanating from the transaction*".

14. However, it happened that some of the goods supplied by the plaintiff came within neither of these categories of goods i.e. they were neither unsold and remaining with the defendant company at the date of liquidation, nor mixed with other goods in the manufacture of other objects. They had simply been sold on to sub-purchasers in the same form as when supplied. In *Romalpa* it was concluded that having regard to the clause read as a whole, there must be implied into the clause a power to sell goods on to a sub-

purchaser, but not on the defendant's own account, but rather for the account of the plaintiff, until such time as all monies due to the plaintiff were paid. It was held that the defendant was selling on as agent for the plaintiff company since the ownership in the goods had not passed to the defendant, and accordingly that a fiduciary relationship existed, meaning that the defendant remained accountable to the plaintiff, who in turn had a right to trace the proceeds of sale and recover the monies, by way of the application of the principles in *Re Hallett's Estate*.

15. I note in the judgment of Mocatta J. at first instance that a submission made on behalf of the defendant in the case was that "*if the plaintiffs were to succeed in their tracing claim this would, in effect, be a method available against a liquidator to a creditor of avoiding the provisions establishing the need to register charges on book debts*" i.e. the equivalent in this jurisdiction of the need to register a charge coming within the ambit of Section 99 of the Act of 1963. Mocatta J. however agreed with the submission made by the plaintiff against that argument, namely that "*if the property in the foil never passed to the defendants with the result that the proceeds of sub-sales belonged in equity to the plaintiffs, section 95 (1) [of the English Act] had no application*". It is important to note, I feel, that in Romalpa there was a concession made by the liquidator that there was a relationship of bailor/bailee between the parties. It was on the basis of such concession that the fiduciary relationship arose, rather than any conclusion reached by the court that on the facts of Romalpa such a fiduciary relationship arose.

16. Mr Hussey refers also to the judgment of Barron J. in *W.J.Hickey Limited (in Receivership)* [1988] 1 IR 126 which concluded that where the retention clause specifically stated that the property in the goods is not to pass until some future date i.e. until they are paid for, then under the provisions of s.1 of the Sale of Goods Act, 1893 the transaction is an agreement to sell and not a sale as such, since "*the transfer of the property in the goods is to take place at a future time*". In such circumstances, where the property in the goods had not passed, Barron J. could find no basis for construing the clause in a way that all the property in the goods passed to the company, and that it in turn assigned back to the seller an equitable interest in the goods by way of charge. He went on to say that in so far as there were cases where a charge was found to have been created, there had been a clear assignment back to the seller of such an interest, and he instanced *In re Interview Limited* [1975] I.R. 382. In that case the relevant retention clause included the following:

> *"with respect to a case of re-sale of the goods … in any condition whatsoever … the purchaser agrees to assign and assigns to the supplier, at the conclusion of the supply contract and effective up to the time of payment of all debts owing by the purchaser to the supplier, any claims against the purchaser's customers which may have arisen or arise in future from the re-sale, by way of security, and undertakes [etc] ……"* . [emphasis added]

17. Kenny J. was in no doubt that this clause, particularly given the inclusion of the phrase "*by way of security*", was not an absolute assignment of the property in the goods, but rather an assignment by way of security, and as such was a charge which was void unless registered under Section 99 of the Act of 1963. He stated:

> *"In my opinion, it follows that, as the terms for deliveries abroad were not registered under s. 99 of the Act of 1963, they are void against any creditor in so far as they created an obligation to assign or gave a charge on the debts owing to Interview and arising out of sales of goods delivered …".*

18. I pause for convenience to note that Clause 11 (1) of the terms and conditions under consideration in the present case includes within sub-clause (v) thereof:

> *"… 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".*

19. This clause is in very similar terms (though notably absent are the words "by way of security") to that considered by Kenny J. in *In re Interview Limited*, and which Barron J. considered distinguished it from the facts in *In re W.J. Hickey Limited (in Receivership)* where he found no charge to have been created since there was no such assignment within the retention clause in that case. I will come back to that matter.

20. Mr Hussey, taking the clause in its entirety in the present case, and taking into account also the particular course of trading between the parties as described in the affidavit of Mr Kissane, has urged that the clear intention of the parties was that until such time as the goods were paid for the property in the goods would remain with the company. He submits that in so far as the goods are sold on to the end user, the company was acting only as the agent of the applicant, that status being consistent with and supported by, the requirement within the terms and conditions that the proceeds of such sale be held on trust for the applicant and lodged to a separate account. As such, it is submitted, there was a fiduciary relationship in existence in respect of the proceeds of sale, and that the clause therefore does not constitute a charge over the assets of the company registrable under section 99 of the Act of 1963.

21. Rossa Fanning BL for the respondent Receiver argues the contrary case, namely that the clause does indeed comprise a charge on the book debts of the company, and as such was required to be registered under s. 99 if it is not to be held to be void as against the liquidator. He relies upon the judgment of Murphy J. in *Carroll Group Distributors Limited v. G. and J. F. Bourke Limited (in voluntary liquidation)* [1990] 1 I.R. 481.

22. In that case the plaintiff supplied tobacco products to the defendant company's shops which in turn sold them on to its customers. As part of the agreed trading terms the defendant companies were allowed four weeks credit, and there was also a reservation of title clause. After the defendant companies went into liquidation, the plaintiff recovered unsold product from the defendants' premises, but an issue arose as to the plaintiff's entitlement to trace the proceeds of sale of product sold to customers into the general bank accounts of the defendants. The defendants had been required under the terms and conditions to keep a separate bank account into which only the proceeds of sales to customers were be lodged, but did not do so. The plaintiff was aware that no such separate account had been opened. The clause also specifically provided that in the event of any sale to customers the defendants were acting on their own account and not as agent for the plaintiff. Murphy J. was satisfied accordingly that no fiduciary relationship was imposed by law, and if there was such a relationship between the parties such that the proceeds could be traced under the equitable principles in *Re Hallett's Estate "it must be found in the actual bargain or the trust created in respect of the proceeds by the agreement contained in the conditions of sale"*. In so concluding the learned judge stated at page 484:

> *"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. If the new asset was acquired partly with such proceedings and partly with other monies provided by the seller then the right of the true owner would be to a charge on the new asset or mixed fund to the extent of the proceeds of sale of his property. This is the rule enunciated in In re Hallets Estate. Knatchbull v. Hallett (1880) 13 Ch.D 696." [emphasis added]

23. The agreement in *Carroll* made it clear that in so far as product is sold on to a customer by the company, it was acting on its own account and not as agent of Carrolls. The company could sell on the product at whatever price it chose, either at a loss or at a profit. Carrolls had no control over that price "*so that the goods would not be immediately or necessarily replaced by assets of equal value*". Murphy J. was of the view that it was clear that on such a sale on to the customer the property in the goods would pass to the customer.

24. The retention of title clause was an "all sums" clause in the sense that ownership of the property remained with Carrolls until all sums due by the company to Carrolls shall have been discharged, and not simply until the amounts payable in respect of the particular goods delivered on any particular consignment shall have been discharged. As in the present case, no separate bank account was opened even though the conditions of sale required that this be done. However, Murphy J. was satisfied that it was probable that Carrolls was aware that no such steps had been taken. As with the present case, the proceeds of sale of the goods supplied to customers together with any other income received by the company were paid into the general bank account, so that there was more in that account than represented any amounts owing to Carrolls. In that regard, Murphy J. stated:

"If one ignores the particular facts of the case and simply analyses the bargain made between the parties it is clear that such an arrangement properly implemented would result in a bank account with sums of money credited thereto which would probably be in excess of the amounts due by Bourkes to Carrolls. This would arise partly from the fact that the goods would be resold at a marked up price and partly from the fact that the proceeds of sale would include some goods the cost price of which had been discharged and some of which it had not. In other words the bank account would be a fund to which Carrolls could have recourse to ensure the discharge of the monies due to it even though it would not be entitled to the entire of that fund. Accordingly the fund agreed to be credited would possess all the characteristics of a mortgage or charge as identified by Romer L.J. in In re George Inglefield Ltd. [1933] Ch.1 at pages 27 and 28."

25. Murphy J. went on to refer to the judgement of McWilliam J. in *Frigoscandia (Contracting) Ltd v. Continental Irish Meat Ltd* [1982] I.L.R.M. 396 in which McWilliam J. stated, in the context of a standard retention of title clause i.e. not a proceeds of sale clause, that the conclusion that a retention of title clause must be treated as creating a mortgage or a charge over the goods, could not have general application to these types of clauses, and that "each *case must depend on its own facts*". Murphy J agreed with that observation, and stated:

"the rights of the parties and the nature of the transaction in which they are engaged must be determined from a consideration of the document as a whole and the obligations and rights which it imposes on both parties. This is a principle of general application. Not infrequently efforts have been made to treat a document which is in truth a lease as a licence by so describing it. The description may be a material consideration but clearly it cannot be decisive. Specifically in relation to mortgages registrable under the Companies Acts it has been held that it is the substance of the transaction as ascertained from the words used by the parties and the context in which the document is executed that determines registrability under the Companies Acts (see In re Kent and Sussex Sawmills Ltd [1947] Ch. 177]. It seems to me that the bargain between the parties insofar as it relates to the transaction subsequent to a sale by Bourkes is in substance – though not in terms – the same as that which existed in In re Interview Ltd [1975] I.R. 382 in that Bourkes were creating or conferring a charge on the proceeds of sale in substitution for the right of property which Carrolls had previously enjoyed. The charge so created required registration under s. 99 of the Companies Act, 1963, and in the absence of such registration was invalid."

Conclusions:

26. The resolution of the controversy at hand depends upon whether the applicant and the company were fiduciaries by reason of a relationship of principal and agent. If they were not, then the proceeds of sale clause is a registrable charge. This seems clear, and consistent with the approach of Murphy J. in *Carroll*, where, as already set forth, he stated:

"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".

27. It is clear from the authorities opened on this application that whether or not a fiduciary relationship exists between the parties does not depend simply upon what is stated in the terms and conditions agreed between the parties. As stated by Murphy J. in *Carroll,* parties often attach a label to a transaction, yet their relationship may not in truth be consistent with that label. A relationship of agency cannot be brought into existence in law simply by stating in the agreement that the relationship is one of principal and agent. As Lord Templeman in a different context stated in *Street v. Mountford* [1985] A.C. 809:

"The manufacture of a five pronged instrument for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade".

28. In *Carroll*, Murphy J. noted that the retention clause in that case specifically provided that in the event of a sale on of the products to a third party, the companies in question would act on their own account "*and not as agent for Carrolls*". It is hardly surprising that in such circumstances he was unable to conclude that a fiduciary relationship existed, even though, if the clause had said the opposite i.e. that they were 'sold as agent', it would not necessarily mean that a relationship of agency existed as a matter of law. Other factors militating against the existence of a fiduciary relationship in that case included that there was a four week credit period provided for, the purpose of which was uncertain if in fact the companies were not free to use the proceeds during the

period of credit as they wished. As against that however the clause did provide that the monies should be held in trust and in "an independent account". No such account was in fact opened, and Murphy J. seemed satisfied that Carrolls were probably aware of that fact.

29. The submissions made to me proceeded to an extent on the basis that there was a conflict between the judgment of Barron J. in *W.J.Hickey Limited*, and that of Murphy J. in *Carroll*. I do not see any conflict in fact. Each was dealing with different facts and can be distinguished. Specifically, Barron J. drew attention to the fact that where a charge had been found to have been created by the retention clause there had been a clear assignment of such an interest from the buyer back to the seller, and he gave *In re Interview Limited* as an example of such a case where the clause provided inter alia that *"the purchaser agrees to assign and assigns to the supplier …… any claims against the purchaser's customers … by way of security …"*. In *Carroll*, as I have said, the clause was clear in stating that in any sale on to a third party, the companies acted on their own account and not as agent, and it did not therefore matter that in Carroll, as in W.J.Hickey Limited, there was no clear assignment back to the seller of an equitable interest. So, different cases have different facts and circumstances, and it is not the case that these two decisions are in any way in conflict. Every case must be examined on its own facts and surrounding circumstances in order to conclude whether the clause creates a registrable charge, or instead is such as to create a fiduciary relationship. In passing I would again point to the fact that in *Romalpa* the Court of Appeal, and Mocatta J. at first instance, were able to proceed on the basis of a concession by the defendant that a relationship of bailor/bailee existed between the parties.

30. I should refer to the fact that in *Carroll*, Murphy J. referred to the fact that the companies could sell the goods on at below cost or indeed on credit terms, and considered that these terms were consistent with the companies dealing with the goods on their own account and not as agents of Carrolls.

31. In some cases, much has been made of the fact that the allowance by the seller to the buyer of a credit period is inconsistent with a relationship of, say, principal and agent, since it implied that during that credit period even where the goods had been sold on and paid for by the end user, the company was free to use those proceeds of sale for its own use, as otherwise the credit period was of no benefit. I do not think that this is necessarily so. A credit period also allows the buyer a period of time in which to actually find a customer to purchase the goods. At the end of the credit period the buyer is obliged to pay the seller regardless of whether or not a third party purchaser or end user has in turn bought and paid for the goods. In other words, it is not always the case that the buyer will have re-sold and been paid for the goods, and has those funds available to use as he wishes during the entire of the agreed credit period. Accordingly, I do not believe that the existence of a credit period (and it is to be noted that one was agreed between the parties in the present case – i.e. 60 days) necessarily or in all cases rules out the existence of a principal/agent relationship. It may of course be one of several indicia pointing against such a relationship, but it alone will not in all cases do so.

32. The Courts in the United Kingdom have been reluctant to find a fiduciary relationship to exist, and the majority if not all such cases since *Romalpa* have concluded that the proceeds of sale clauses have amounted to a registrable charge. I instance two such cases to which I was referred, namely *Tatung (UK) Ltd v. Galex Telesure Ltd* [1989] 5 B.C.C. 325, and *Compaq Computer Ltd v. Abercorn Group Ltd* [1993] BCLC 602. To these I would add the judgment of Peter Gibson J. in *Re Andrabell Ltd (in liq.)* [1984] 2 All ER 407 which has a helpful clarity about it for anybody having difficulty understanding the vagaries of the various decisions in this area, and reconciling them. He concurs with the view expressed by Straughton J. in *Hendy Lennox (Industrial Engines) Ltd v. Grahame Puttick Ltd* [1984] 2 All ER 152, that *"one therefore has to examine the relationship in each individual case to see whether it is of a fiduciary nature"*. But certainly it is not the case that there can never be a fiduciary relationship created by such clauses. I do not read these judgments as concluding that there can no longer be any circumstances in which a seller and buyer can be in the position of fiduciaries. Neither are the cases in this jurisdiction to that effect. Both *W.J.Hickey Ltd,* and *Carroll*, foresee that such a relationship can arise in particular cases.

33. It is necessary therefore to examine the terms and conditions in the present case, and also consider the manner in which the parties conducted their business, in order to arrive at a conclusion as to whether their relationship was in truth one of principal and agent. If it was, then a fiduciary relationship existed, and the applicant would be entitled to the reliefs sought.

34. The company (that is, the BHT Group) is a retailer, including as part of the Heatmerchants Group, which operates throughout Ireland from over 40 branches. It supplies heating and plumbing products not only to the trade, but also to end-user customers.

35. The following features seem to me to be particularly significant in pointing to the existence of an agency relationship, rather than one of debtor and creditor, and therefore to a fiduciary relationship. They distinguish this case from cases such as *Carroll* and others where a charge has been found to have been created by the retention clause, and where goods were simply supplied by a wholesaler to a retailer for onward sale in the normal way, at a price controlled and set by the buyer, not the seller.

36. The applicant supplied heating systems and related products to the company from March 2007. In addition, the applicant provided commissioning services in respect of some of the goods, such as heating boilers, pumps and so forth, and provided a warranty also, upon such commissioning. The terms and conditions under which the parties were to do business were provided by the applicant prior to the commencement of business between them. A letter dated 23rd February 2006 enclosing the applicant's standard terms and conditions, also gave details of applicable discount rates on prices, a system of rebate based on annual purchases, and also a 60 day credit period. This letter drew particular attention to the existence of the retention of title clause contained within the terms and conditions, but otherwise was silent as to the details of same. A further letter dated 9th March 2007 again made such references, and made the point also that the applicant does not deal directly with the end-users, and stated: *"we are pleased to be able to put this business through Heatmerchants upon receipt of official order numbers".*

37. Mr Kissane has stated that it was a term of the parties' agreement and the practice between them that prior to ordering goods from the applicant, the company would send the customer's plans to the applicant. If necessary a representative of the applicant would attend at the customer's site and carry out a survey and consider the customer's plans. Thereafter, it was the applicant who prepared the quotation for the goods, but on the company's letter-head (that is, Heatmerchants letter-head), and in which the applicant set and specified the price which the customer would pay to the company e.g. Heatmerchants.

38. Thereafter, if the quoted price was accepted by the customer, the applicant would supply the goods to the company at one of its retail locations. It would in due course invoice the company for the price quoted to the customer, less an agreed discount rate. The discount represented what Heatmerchants would make out of the transaction. It was percentage-based, and based on prices dictated by the applicant.

39. When the goods were delivered to the company they were never mixed with any other goods as part of some manufacturing process. They were by agreement stored separately from the company's other goods, and were at all times readily identifiable through the use of unique serial numbers and other distinguishing features. This modus operandi was in place from March 2007 until the

company went into liquidation in April 2012. Once the goods were supplied to the end-user, the applicant would commission the equipment in so far as that was necessary, and provide any necessary warranties. This involved a servant or agent of the applicant attending at the end-user's premises, inspecting the method and manner of installation of the heating system in order to make sure that it was correctly installed and working properly. Mr Kissane has averred also that it was part of the agreement between the parties that these commissioning services were normally not undertaken until such time as the goods had been paid for, and neither was the warranty extended to cover the goods until payment had been made. But I have referred to the fact that exceptionally during the examinership, Mr Kissane agreed with the examiner that he would commission systems and extend the warranty, even though he had not been paid for the goods.

40. In an ideal world, the company would be paid the full quoted price by the end-user upon installation, and the company would then discharge its own invoice from the applicant, which was the end-user price as quoted, less the agreed discount.

41. This modus operandi is a far cry from a situation where, for example in the *Carroll* case, Carrolls supplied cigarettes to a shop which in turn sold them on to the customer. In that scenario, Carrolls did not dictate, or otherwise control the price at which the goods were sold on to the customer. The shop could sell the cigarettes at a profit or at a loss, as they themselves decide. It could not be said that a relationship of principal and agent, or bailor and bailee existed between those parties, even if the retention clause stated that the shop was the agent of Carrolls in relation to the goods.

42. Other features of the retention clause in the present case are consistent with an agency relationship, such as the requirement to store the goods separately, to hold the sale proceeds in trust and in a separate bank account. The terms stated that a fiduciary relationship would exist between the parties, that they would be held as trustee for the seller, and that the buyer had to return them on demand. All these are consistent with, though not themselves determinative of, an agency relationship, notwithstanding that in another scenario, they would not be sufficient for a court to conclude that an agreement which in reality created a charge, was nevertheless not such an agreement, but was one which created a fiduciary relationship. It is the substance and reality of the parties' relationship that must be considered, and not merely the words used.

43. It has been stated in some of the cases (for example in *Re Andrabell Ltd* [1984] 3 All ER 407) that the existence of an agreed credit period is inconsistent with a fiduciary relationship. I can see what is meant by that, but I do not consider that it is so in all cases. Those who have considered that it points away from a fiduciary relationship make the point that the purpose of a credit period is to ease pressure on the cash-flow of the buyer since he can use the monies generated by the sale on to third parties during that period of credit. That cannot be assumed to be the only purpose of a credit period. In some cases, a credit period allows some lead time between the supply of the goods and the finding of the eventual purchaser, or to allow a period of time for the buyer to get paid by the sub-purchaser. It cannot be presumed that the credit period is simply a period in which the buyer can retain the money received in the re-sale, and at the end of the credit period pay same over. There is nothing to stop the buyer paying the seller ahead of the expiration of the credit period where he has been paid earlier by the sub-purchaser. The credit period can be seen as a period agreed during which the seller may not seek to be paid, whether the goods have been sold on or not. It should not necessarily be seen as a term which automatically deprives the relationship of the character that of principal and agent. I do agree that in any particular case it may well add support to arguments that a charge has been created, but it is just one of perhaps several features which will have to be considered and weighed up. In the present case it is just one feature of the terms and conditions under which the parties traded, but I do not think that when the overall trading relationship which I have described above is taken account of, it can trump all the other indicators of a principal/agent relationship, and therefore the existence of a fiduciary relationship.

44. As I have said already, there has certainly been a marked reluctance on the part of courts in the UK to recognise a fiduciary relationship since Romalpa, including where there is a requirement to keep all proceeds of re-sale in a separate account. In so far as such decisions indicate that under English law a retention of title clause will not be considered to create a fiduciary relationship, such decisions are not binding here. I have already stated my view that the decision of Barron J. in *W.J.Hickey Ltd* and that of Murphy J. in *Carroll* are not in conflict and can be readily distinguished one form the other. They co-exist comfortably, each having its own facts. Murphy J. in *Carroll* clearly states that if any of the three questions which he posed were to be answered in the affirmative, then a fiduciary relationship will exist. That is the law in this jurisdiction, and I have no reason to depart from that decision.

45. It is clear that how the question is answered will depend on the special facts of each particular case under consideration. I consider that while the requirement to lodge all the proceeds of a re-sale into a separate account may, when combined with all the other facts of the case, indicate a charge and not a fiduciary relationship, one must in the present case understand that the parties expressly agreed that while the end-user would be invoiced with the full amount, the applicant would invoice the seller only for that amount less an agreed discount. In this way, the amount of the company's profit on any transaction was set by the applicant. It seems clear, giving business efficacy to the clause, that what was to be lodged to a separate account was the amount due to the applicant on foot of its invoice to the company, rather than the greater amount paid by the end-user to the company. I see no conflict arising in this regard with other decisions I have been referred to. The fiduciary relationship existing by virtue of this course of dealing between these particular parties determines that it was this portion of the re-sale proceeds which were to be held in trust and not the entire re-sale proceeds, and in so far as this is not specifically provided for in the retention clause, I would be prepared to imply such a term, just as in *Romalpa* a necessary term was implied in order to give business efficacy to that agreement, particularly in the light of the wording of Clause 11(a) of the terms and conditions which makes it clear that the purpose of the retention of title was to protect the applicant in respect of monies "*which are due from the Buyer to the Company*". It is not inconsistent with that fiduciary relationship that the company was required to lodge into a separate account that part of the re-sale price which is clearly due and owing to the applicant, and which was the subject of the applicant's own invoice to the company. The discount agreed was effectively the agent's commission on the sale, since it had no input into the price charged to the ultimate consumer.

46. I should also refer to the existence within the retention clause in the present case of the following part of Clause 11(b)(v) to which I referred earlier when discussing the judgment of Barron J. in *W.J.Hickey Ltd*:

> *"… 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".*

47. Barron J. stated that cases where a charge had been found to exist were cases where, as in *In re Interview Ltd*, there was an assignment of rights back to the seller. I have already referred to the fact that in In re Interview Ltd the assignment back included the phrase "*by way of security*" - a phrase absent from the clause in the present case. That is enough to distinguish it from the remarks of Barron J. and the grasp of *In re Interview Ltd*. But in any event, in the present case where, taking into account the trading relationship, and the terms and conditions I am satisfied that no charge is created for the purpose of s. 99 of the Act of 1963, the existence of this assignment of rights clause, as with the credit period provision, is insufficient to disturb that conclusion. All the

cases to which I have been referred have had factually distinguishing features. None of the decisions can have general application. But a consideration of them assists the Court in how to approach the often difficult task of deciding, not what the parties intended the position to be, but what the agreement, combined with their actual modus operandi, should mean as a matter of law. As stated by Mocatta J. in *Romalpa* at page 557: " *[it is made] clear that the special facts of each case are crucial in determining whether there is a simple debtor/creditor relationship, although the intention of the parties as ascertained from the terms of their contract shows that some kind of fiduciary relationship exists."*

48. In so far as the liquidator argues that it would be impossible, or even unreasonably burdensome and costly to have to try at this stage to identify completed sales, and sales for which payment has been received, in order to 'trace' the fund over which the applicant's rights in equity exist, this is not an argument which should hold sway in order to disentitle the applicant to its reliefs. The principles from *In Re Hallett's Estate* make no such exception. I note that at p. 796 Jessel MR stated:

> *"But … where a trustee has mixed the money with his own, there is this distinction, that the cestui que trust, or beneficial owner, can no longer elect to take the property, because it is no longer bought with the trust money simply and purely, but with a mixed fund. He is, however, still entitled to a charge on the property purchased, for the amount of the trust money laid out in the purchase; and that charge is quite independent of the fact of the amount laid out by the trustee, using the word 'trustee' in the sense I have mentioned, as including all persons in a fiduciary relation, the right to the charge follows. That is the modern doctrine of equity."*

49. He then goes on to state that he had never heard it suggested that there was any distinction for these purposes between *"an express trustee, or an agent or a bailee, or a collector of rents, or anybody else in a fiduciary position"*. The 'charge' referred to must not be confused with one requiring registration for the purposes of s. 99 of the Act of 1963, but is rather one arising by virtue of equitable principles.

50. 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. I will hear the parties as to the precise terms in which this Court's order should be drawn and perfected in order to give effect to my conclusions.