ROMALPA CLAUSES

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[**Sec 1**] ***INTRODUCTION***

[**1.1**] I have been asked to speak on the protection of receivables

[**1.2**] Some important ways of protecting receivables are:

> (i) retention of title/Romalpa clauses coupled with, *inter alia*, a licence to enter premises and seize goods and to an account in respect of the *proceeds* of goods sold. *This aspect cannot be emphasized enough*, as will be more fully appreciated when the recent High Court case of *Associated Alloys* (2000) 202 CLR 588 is discussed;
> *(ii)* directors' guarantees;
> *(iii)* a charge, whether fixed or floating, and which has been duly registered in accordance with *Corporations Act* requirements;
> *(iv)* tightly drafted payment clauses;
> *(v)* the contractual entitlement to inspect financial records, so that the vendor has access to information regarding the solvency of the purchaser so that it can decide to eg supply but only on the basis of cash on delivery; or reduce payment terms from say 60 days to 30 days; to appoint a receiver or perhaps to wind up the purchaser.

[**Sec 2**] ***ROMALPA CLAUSES***

[2.1] *Thesis*

Romalpa clauses were originally received enthusiastically by courts. However, doctrinal difficulties inherent in them, especially where goods are provided by the purchaser to third parties; and tensions between the aim of such clauses (to give priority to vendors if the purchaser becomes insolvent) and the policy of the Corporations Act in the event of insolvency (to treat all creditors equally) has led the courts to uphold same where possible , although narrowly construe same.

The above tensions play out such that these clauses are more likely to be upheld where the goods have not been on-sold/on–consigned; and where there is no receiver/ liquidator. This policy clash has also led to recent changes to the Corporations Act , set out in para [2.12] below.

Like any general statement, this one cannot cover the field, and there are cases that fall either side of it.

Careful drafting is required to ensure that such clauses achieve their purpose.

[2.2] ***ROAD MAP***

I will first traverse the nature of a Romalpa clause and its doctrinal conundrum; then analyse cases in support of my thesis; then, in no particular order, deal with topical issues as regards such clauses.

[2.3] ***NATURE OF A ROMALPA CLAUSE AND ITS INHERENT DOCTRINAL CONUNDRUM***

[**2.3.1**]

Romalpa clauses rely on two basic mechanisms: they seek to reserve property in goods in the seller until payment; and (often) seek expressly to create in the seller proprietary rights over assets into which the goods might be transferred or with which they might be mixed. [1]

In *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 2 All ER 552, the dispute related to the conditions of sale of a Dutch company which provided for the retention of title by the vendor, even if its goods were subsequently mixed or incorporated into other goods, and that the purchaser had to account for the proceeds of sale of such goods. The court held that the clause did not constitute a registrable charge and was effective to give the supplier the right not only to the goods that were still in the buyer's possession but also to the proceeds of goods that had been resold.

In that case, Roskill LJ articulated the concept that the seller and buyer between themselves were principal and agent and that if property was retained by the seller and the buyer (who is lacking in title) disposes of the goods to a third party, the buyer sells to the third party as agent for the seller.

But this analysis does not accord with the intention of the parties.[2]

[**2.3.2**] *Clash with priorities when company in liquidation*

When the *Romalpa* case was decided, it was well received but as the cases have developed, the clash between such clauses and the statutory order of priorities in the context of insolvency, has come into sharper focus; and where such clauses clash with legislation relating to priorities, courts may refuse to give effect to them: Kirby J in his dissenting judgment in *Associated Alloys Pty*

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[1] As noted by Gageler in *Retention of Title Clauses* (1989) Vol 2 Journal of Contract Law, p 34.

[2] As noted by Professor Everett in ' Romalpa Clauses: The Fundamental Flaw' (1994) 68 *The Australian Law Journal* 404 at 407.

Ltd v ACN 001 452 106 Pty Ltd (In Liquidation) and Another (2000) 202 CLR 588, 615 [62] and [66].

[**2.3.4**] *Romalpa clauses rendered void when buyer can destroy or resell goods*

Once the buyer is entitled to resell the goods or use them such that they lose their independent existance, that militate against a finding that the real intention of the parties is retention of title by the seller. Accordingly, a ROT clause may fail, because ownership will pass to a third party.

An example is afforded by *CSR Limited v Casaron Pty Ltd & Ors* (2002) QSC 21. The ROT clause provided:

> *"By applying for credit with CSR, you agree that... we own the goods until they are paid for. Goods supplied to you remain our property until we receive payment for all amounts you owe to us. If your account is in default we have the right to enter your premises (or the premises of any associated company or agent) to retake possession of the goods, without liability for trespass or damage. If you resell the goods, or if you sell products manufactured using the goods, then you must keep the proceeds of the sale in a separate, identifiable account until we have been paid in full."*

The goods were absorbed into a construction or manufacturing process. It was held that once the goods which were supplied had been used in the process of manufacture, then the title of the seller under the Romalpa clause ceased to exist; but that the seller could still maintain an action in debt for the contract price. [3]

[2.3.5]

The "crucial question" identified by the EWLC in their Consultation Paper is how far the clause may reach without becoming a charge that must be registered if it is to be valid in the event of the buyer's insolvency.

[**2.4.1**] W*here the seller delivers the goods to the buyer not to the sub-buyer, Romalpa clauses generally upheld*

W Hanson (Harrop) Ltd v Rapid Civil Engineering Ltd & Usborne Developments Ltd (1987) 38 BLR 109

> *"Hanson was the supplier of timber to Rapid, a building contractor, pursuant to a contract containing a simply expressed Romalpa clause*

[3] When materials sold are incorporated into the fabric of a buildings, they become part of the realty: *Hobson v Gorringe* [1897] 1 Ch 182. Thus, the vendor's ownership may well be extinguished despite the terms of a Romalpa clause.

> *that property not pass until payment was made in full. Usborne was a development company engaged to develop the site and was not a party to the contract. A dispute arose when Rapid went into receivership and goods delivered by Hanson onto the building site remained unpaid but had been used by Usborne which was then sued by Hanson for conversion. Judge Davies in awarding damages for conversion found that because of a retention of title clause in the agreement between Hanson and Rapid, there was no sale but an agreement to sell, and although there had been delivery, there had been no transfer of property by Hanson because no payment was made."* [4]

Re Highway Foods International Limited (in administrative receivership) Mills & Another v C Harris (Wholesale Meat) [1995] 1 BCLC 209 followed *Hanson*

> *"Harris was a supplier of meat to Highway, who in turn "sub-sold" and delivered the meat to Kingfry. As between Highway and Harris, there were standard terms and conditions on the invoices containing a Romalpa clause and the sub-sale between Highway and Kingfry, contained Highway's terms and conditions of sale and included another version of the Romalpa clause. A dispute arose when Harris claimed possession of the meat or to the proceeds of the sub-sale to Kingfry. By its receivers, Highway argued that title to the meat passed to Kingfry on delivery of the meat and therefore Harris was not entitled to claim a proprietary interest in the proceeds of the sub-sale of the meat. Further it was argued that even if Harris had an interest in the proceeds, it was a security interest and such an interest was void against the receivers for want of registration under s 395 of the Companies Act 1985. The Court held that the contract between Highway and Kingfry was not a sale but an agreement for sale under which title was not to pass until Highway had been paid in full. Further the Court concluded that if goods are sold subject to retention of title clause and the purchaser then sells the goods onto a sub-purchaser, also subject to a retention of title clause, and delivers the goods to the sub-purchaser, then unless and until the sub-purchaser has paid the price of the goods or satisfies such other conditions as may have been stipulated by the buyer for the passing of property to the sub-purchaser, the seller would be entitled to claim title to the goods as his property in the hands of the sub-purchaser."* [5]

[2.4.2] W*here the seller delivers the goods directly to the sub-buyer for reasons of commercial convenience, Romalpa clause may yet be upheld*

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[4] The summary is that of Layton J in *Hardy Wine Co Ltd v Tasman Liquor Traders Pty Ltd (In liq)* **[**2005] SASC 398 para [49].

[5] The summary is that of Layton J in *Hardy Wine Co Ltd v Tasman Liquor Traders Pty Ltd* **(**In liq) **[**2005] SASC 398 para [50].

Hardy Wine Company Ltd v Tasman Liquor Traders P/L (in liq) [2006] SASC 168 (Full Court)

(Class discussion)

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[**2.5**] *Romalpa clauses on reverse of invoices may be inferred into the contract for sale even if not provided for in the standard trading terms of the purchaser*

In *Barrymores Pty Ltd v Harris Scarfe Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2001] WASC 210, the receivers pointed to Harris Scarfe's standard trading terms which did not provide for any Romalpa clauses, and contended that the clauses on the reverse of the relevant invoices formed no part of each contract for sale.

The court rejected this argument, noting that contractual terms may be inferred from the business relationship of parties if four requirements are satisfied:

(1) the terms previously used must be identifiable (usually by reference to contractual documents);
(2) those previous occasions must be sufficiently numerous and frequent;
(3) the conduct must be consistent enough to constitute a regular course of dealing;
(4) which raises the reasonable expectation that the same terms should be included in the subsequent contract.

[**2.6**] *One way to read down Romalpa clauses: conclude that they create an unregistered charge and thus fall foul of the Corporations Act*

Section 262(1) CA provides that the provisions of Chapter 2K relating to the giving of notice in relation to the registration of, and the priorities of, charges apply in relation to certain charges (whether legal or equitable) over the property of a company eg (a) a floating charge on the whole or a part of the property, business or undertaking of the company; (b) a charge on a personal chattel; (c) a charge on a book debt.

The list is long.

A Romalpa clause may be caught by s 262(1), s 263(1) and s 266(1) of the *Corporations Act*, and thus be void as against the liquidator as having created unregistered charges: *Associated Alloys Pty Ltd v Metropolitan Engineering & Fabrication Pty Ltd* (1998) 16 ACLC 1633 and Professor Everett's article in 68 ALJ 404; and para [78] of *Noel Guthrie as the liquidator of ULT Ltd (Receiver Appointed) (In Liq) -v- Radio Frequency Systems Pty Ltd* [2000] WASC 152.

Drafters of Romalpa clauses have risen to this challenge by stipulating that moneys are held in trust (which is not a charge): see the *Amalgamated* case below, where this drafting technique was accepted as valid.

[**2.7**] *Where goods mixed by purchaser with other goods and on-sold to third parties: Romalpa clause purporting to create a charge over the "proceeds" of the sale held not to encompass a charge on book debts, but only over moneys actually received; and no implied entitlement to an account to determine what was in fact received*

[**2.7.1**]

In *Associated Alloys Pty Ltd v ACN 001 452 106 (in liq)* (2000) 171 ALR 568, the seller delivered steel under three invoices, and the buyer used the steel, together with other steel supplied by the seller (such other steel being outside of the scope of the litigation), to manufacture steel products which the buyer later sold to an overseas company.

The buyer later went into liquidation, but by then had only partially paid the seller.

Two of the invoices included the following clause:

> “[1] It is expressly agreed and declared that the title of the subject goods/product shall not pass to the [buyer] until payment in full of the purchase price. The [buyer] shall in the meantime take custody of the goods/product and retain them as the fiduciary agent and bailee of the [seller].
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> [2] The [buyer] may resell but only as a fiduciary agent of the [seller]. Any right to bind the [seller] to any liability to any third party by contract or otherwise is, however, expressly negatived. Any such resale is to be at arms length and on market terms and pending resale or utilisation in any manufacturing or construction process, is to be kept separate from its own, properly stored, protected and insured.
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> [3] The [buyer] will receive all proceeds whether tangible or intangible, direct or indirect of any dealing with such goods/product in trust for the [seller] and will keep such proceeds in a separate account until the liability to the [seller] shall have been discharged.

> [4] The [seller] is to have power to appropriate payments to such goods and accounts as it thinks fit notwithstanding any appropriation by the [buyer] to the contrary.
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> [5] In the event that the [buyer] uses the goods/product in some manufacturing or construction process of its own or some third party, then the [buyer] shall hold such part of *the proceeds* of such manufacturing or construction process as relates to the goods/product in trust for the [seller]. Such part shall be deemed to equal in dollar terms the amount owing by the [buyer] to the [seller] at the time of the receipt of such proceeds.

[**2.7.2**]

Relying on sub-clause 5, the seller sued, *inter alia*, for a declaration that the buyer held *upon trust* for the seller a specified sum of money, paid by the sub buyer, in respect of the steel supplied under the three invoices. Ie the seller claimed to be entitled to enforce against the book debts the trust of proceeds which it alleged had arisen in its favour.

In construing sub-clause 5, the High Court considered the critical question to be whether the phrase 'the proceeds' was limited merely to the funds comprised in payments made by the third party to the buyer or whether it also included the debt owed to the buyer by the third party, ie the book debts, of the buyer.

[**2.7.3**]

The High Court held that the phrase 'the proceeds' described *only* the moneys received in discharge of a debt, and that it did *not* include the *right* to sue for the payment of that debt (such a right being a chose in action): (at 576-577). [6]

[**2.7.4**]

The High Court (at 581-2) noted that each invoice under which the seller supplied steel to the buyer constituted a separate contract and thus each such contract gave the buyer a period of credit, during which it was entitled to *withhold* payment of the invoice price. The question this provoked, said the High Court, is whether this term is inconsistent with the intention to constitute a trust of the proceeds for the benefit of the seller, which might be received by the buyer during the period of credit.

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[6] Prof Ong, in a with respect learned article in [2000] BondLRev 12; (2000) 12(2) Bond Law Review 148, has critiqued the judgment, noting that in *William Brandt's Sons & Co v Dunlop Rubber Company Limited* [1905] AC 454 Lord Macnaughten (with whom the Earl of Halsbury LC concurred) included book debts in the phrase 'the proceeds' (at 455).

[**2.7.5**]

The High Court then said (at 582) that there was implied into the contracts a term that upon the receipt by the buyer of the relevant 'proceeds' (and thus upon the constitution of a trust of part of those proceeds under the Romlapa clause), the obligation in debt is discharged, ie the obligation in debt is overtaken and replaced by the buyer's obligation as trustee under the Romalpa clause. Once the relationship of debtor and creditor was transformed into one of trustee and beneficiary, the buyer's obligation to pay the price was discharged by performance.

However, the seller / beneficiary still could not call upon the proceeds for the period of credit.

The High Court held that the proceeds sub-clause was 'an agreement to constitute a *trust* of future-acquired property' (at 583) and thus not a *charge* within the meaning of section 9 of the *Corporations Law*. Therefore, not being a charge, the proceeds sub-clause was not a registrable charge within the meaning of section 262 of the *Corporations Law* and thus not void as against the liquidator of the buyer.

[**2.7.6**]

In the ultimate analysis, the seller failed in its claim to equitable relief by tracing "proceeds" into the buyer's book debts over which the seller claimed a trust or charge in its favour, because it failed to proove that payments received by the buyer from the third party were "proceeds" within the meaning of the relevant sub-clause. It was only when "proceeds" were received that the sub-clause operated to constitute the trust in respect of payments made by the buyer to the seller. The seller, their Honours said (202 CLR 588, 612), "had failed to prove an essential fact in issue, namely the receipt of 'proceeds' by the buyer. Without proof of this threshold fact no trust relationship can arise under the proceeds sub-clause between the seller and buyer".

[**2.7.8**]

Their Honours refused to allow the sellers an account as a way of identifying whether any "proceeds" had been received by the buyer, because, said their Honours, before a party can be ordered to account, a liability to account must be established, and "the seller's failure to prove that the buyer was a fiduciary, owing trust obligations to the seller, denies its claim to this remedy" (202 CLR 588, 613).

[**2.7.9**]

Rondo Building Services P/L v Casaron P/L & Anor [2003] QCA 78 is one of the few cases that have applied *Associated Alloys*, and is important because it is a unanimous judgment of an appellate court.

The Romalpa clause was similar to that in *Associated*.

Rondo supplied its steel framework used in the construction of partitions, walls, ceilings in office buildings and the like, to Casaron. Mr Dance was the managing director of Casaron and guaranteed its debt to Rondo.

[**2.7.10**]

Rondo sued Mr Dance on his guarantee, and he argued, based on *Associated*, that once even a small fraction of the moneys had been received by Casaron, the debt was discharged, and replaced with a trust , and hence there was nothing for the guarantee to apply to.

[**2.7.11]**

That ingenious argument was rejected because the Court did not accept that the parties intended that receipt by the buyer of only a small fraction of the proceeds would have the effect of completely discharging the buyer's obligation to pay the price ; and additionally the relevant clause required the "entire proceeds" from sales by the buyer to be held in a separate trust account; and the ROT clause was expressed to apply until payment of the price. This difference to the wording in the clause in *Associated* was "decisive."

Until that is done, held their Honours on appeal, "the buyer cannot claim to be discharged by performance in accordance with that clause."

[**2.8**]

Their Honours on appeal noted that in *Associated Alloys*, the High Court held that the burden of proving the constitution of the trust lay on the seller (202 CLR 588, 613); but noted further that it was the seller that was asserting that the trust had been constituted.

In *Rondo*, the the buyer's guarantor was asserting the trust. Their Honours were not considering a case in which it was alleged that the buyer had discharged the debt by performance. On the contrary, the seller there was claiming to be entitled to enforce against the book debts the trust of proceeds which it alleged had arisen in its favour. When, as in this case, the second defendant claims that the buyer has discharged its indebtedness by performance, he is bound to prove as an element of that defence that the buyer complied with the requirements of the relevant clause not only by receiving proceeds but also, in the case of a provision like cl 17, by holding them in a separate account. Only to the extent that this is proved to have been done can the buyer or its guarantor claim to have discharged the debt that arose from the contract of sale. Matters of discharge are always to be pleaded and proved by the party relying on them: cf *Young v Queensland Trustees Ltd* (1956) 99 CLR 560, 567-570, referred to above. The decision in that case was concerned specifically with discharge by payment; but payment is the form of performance by which the obligation to pay a debt is discharged, and the same rule would, in my opinion, apply here."

Another hurdle in the way of vendors where the purchaser is in financial difficulty: leave of the Court may be required to proceed against a company subject to a deed of company arrangement or where a receiver has been appointed

Summary of principles

Should a secured creditor, owner or lessor, as the case may be, require assistance from the Court in order to realise or otherwise enforce its rights in relation to the property in which it has an interest, then leave will be required under s 444E *CA* .

However, there is a presumption that leave will be granted to a secured creditor in respect of a suit against a company subject to a Deed of Company Arrangement ("DCA"), or against a company which has has a receiver appointed, unless their interests would otherwise be adequately protected under the relevant DCA.

Corporations Act (2001)

440C: During the administration of a company, the owner or lessor of property that is used or occupied by, or is in the possession of, the company cannot take possession of the property or otherwise recover it, except:

(a) with the administrator's written consent; or

(b) with the leave of the Court.

440D(1) During the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with, except:

(a) with the administrator's written consent; or

(b) with the leave of the Court and in accordance with such terms (if any) as the Court imposes."

Section 444E provides that until a Deed of Company Arrangement terminates, a person bound by it cannot, *inter alia*, begin or proceed with a proceeding against the company or in relation to any of its property without leave of the court. Section 444E(4) defines "property" for the purposes of that provision as including "property used or occupied by, or in the possession of" the company.

Hodgson J [7] in *J & B Records Ltd v Brashs* (1995) 36 NSWLR 172 [8] was required to determine whether whether a supplier of goods under Romalpa

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[7] As HH was prior to elevation to the NSW Court of Appeal.

clause to a company that was later placed under administration and then executed a Deed of Company Arrangement, required leave to begin or proceed with an action under s 444E(3). The plaintiff (which had supplied the goods) argued that leave was unnecessary as it was the owner of them.

His Honour said (181):

> *"...I have come to the view that s 444D(2) and (3) do not have the effect of removing the requirement for secured creditors and owners or lessors to obtain the leave of the court under s 444E(3) in respect of court proceedings to enforce their rights as secured creditors or owners or lessors, where those persons are creditors with claims arising on or before the day specified in the deed, and where these claims are associated with the security or property.*
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> *There is some force in the submission...that this would have the result of setting up a scheme which, to some extent, would encourage self-help and resort to extra-curial enforcement or recovery procedures, which is somewhat contrary to the trend of legislation and judicial decisions in recent times. However, I think the preferable view is that those three sections were intended to set up something of a code relating to court proceedings in relation to matters concerning claims arising on or before the day specified in the deed; so that the court which is overseeing the administration of the deed will have general control of such proceedings, either by way of applications for leave under s 444E, or applications for orders limiting actions by owners or secured creditors under s 444F. In deciding whether to give leave under s 444E to a secured creditor or owner, and if so on what conditions, a court will have regard to the circumstance that under s 444F a secured creditor or owner will be restrained from extra-curial action only if the court is satisfied their interests will be adequately protected."*

In the circumstances, leave was held to be unnecessary as the cause of action was based on an undertaking given by the administrators after the day specified in the deed.

Roder Zelt-Und Hallenkonstruktionen GMBH v Rosedown Park Pty Ltd (1995) 17 ACSR 153 [9]

Roder had agreed to sell goods to Rosedown with payments to be made in instalments after delivery. There was a dispute whether the contract provided that title to the goods be retained by Roder until the purchase price was paid in full. The goods were delivered but payments fell into arrears. Subsequently the second respondent (Eustace) was appointed administrator of Rosedown.

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[8] The case summary is almost word for word that of Robert Smith J in the *Harris Scarfe* case.

[9] The case summary is almost word for word that of Robert Smith J in the *Harris Scarfe* case.

Roder claimed possession of the goods but the claim was rejected. Roder then commenced proceedings claiming possession, leave to proceed under s 440C and other orders. Leave was granted and the proceedings were stood over for trial. Rosedown's creditors later resolved that Rosedown enter into a Deed of Company Arrangement and that was done.

At trial, von Doussa J, having set out (at 172) the passage above from *J & B Records Ltd v Brashs Pty Ltd* expressed his agreement with those conclusions and then turned to the facts of the case before him. His Honour noted that the essential rights which Roder was seeking to enforce were its rights as owner of the goods, which rights existed before the appointment of the administrator. He went on to say:

> *"For the purposes of s 444E(3) , insofar as remedies are now sought against Rosedown (eg for declaratory relief, delivery up and damages for wrongful detention) this action is obviously a 'proceeding against the company'. Insofar as additional or other relief is sought against Mr Eustace this action is one 'in relation to any of its property': see s 444E(4). So a precondition to the pursuit of this action is leave under s 444E(3)."*

In the *Harris Scarfe* case,it was noted thar the definition of "property" for the purposes of s 444E is much wider than the definition in s 9 of the *Corporations Act* which applies to s 440D.

[**2.9**] *Undertakings by receiver of company to whom goods have been sold subject to a Romalpa clause to hold money in a separate account*

An undertaking by a receiver to hold moneys from the sale of sale of goods subject to a Romalpa clause in a separate account pending the outcome of litigation, constitutes an agreement by them to hold such moneys on trust: *Chattis Nominees,* supra*; cf Sheahan v Hertz* (1995) 16 ACSR 765, 768 per King CJ. The undertaking supersedes the retention of title clause, at least in respect of goods actually sold, and places a fiduciary obligation upon the receivers to account for the proceeds as if they were trustees ***:*** *Puma Australia Pty Ltd v Sportsman's Australia Limited (No 2)* [1994] 2 Qd R 159); appl. in *Barrymores Pty Ltd v Harris Scarfe Ltd (Administrators Appointed) (Receivers and Mangers Appointed)* [2001] WASC 210 at para [102].

[**2.10**] *Receiver can be liable in conversion in respect of goods subject to a Romalpa clause*

The following is a paraphrase, without citations, of the principles gathered by Roberts Smith J in *Barrymores Pty Ltd v Harris Scarfe Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2001] WASC 210 paras [94] and [95].

(a) A receiver who deals with property beyond his authority may be held liable in conversion.

(b) A receiver is not able to sell goods which the company has brought under a contract providing for retention of title by the vendor until they have been paid for in full.

(c) Where a receiver refuses to deliver up goods the subject of a valid ROT clause the receiver will be liable to the owner in conversion and exemplary damages may be awarded.

(d) Since conversion involves dealing with goods in a manner repugnant to the immediate right to possession of the person who has the property or the special property in them , the plaintiff must therefore show an immediate right to possession at the time of the act of conversion.

[**2.11**] *Pro forma Romalpa / reservation of title clause*

The clause in the *Harris Scarfe* case, which trumped the receivers, provided as follows:

"3. Reservation of Title

3.1 3.1 Title to the Goods passes to you when you pay the full purchase price in accordance with clause 1.

3.2 3.2 Until title to the Goods passes to you under clause 3.1 and without prejudice to any of our rights, you must not encumber or otherwise charge the Goods, you possess the goods as bailee only and you acknowledge that we are entitled to maintain an action for the proceeds of sale of any of the Goods by you.

3.3 3.3 If you do not pay the full purchase price when due, we may enter the premises where the Goods are situated at (sic) and repossess them, you must deliver up the Goods to us or our agent if so directed by us and you indemnify us against any claim, damages, liability, cost, expense or payment which we suffer, incur or become liable for in respect of the exercise of our rights under this clause.

3.4 3.4 Notwithstanding the foregoing, you may sell the goods to a third party in the ordinary course of business."

[**2.12**] **Corporations Act Sec 442C**

"Property subject to a lien or pledge

(1) If:

(a) a company is under administration; and

(b) property of the company is subject to a lien or pledge; and

(c) the administrator disposes of the property by way of sale;

then:

(d) if the net proceeds of sale equals or exceeds the total of the debts secured by:

(i) the lien or pledge; and

(ii) any other security over the property, where the debt secured by the security has a priority that is equal to or higher than the priority of the debt secured by the lien or pledge;

the administrator must:

(iii) set aside so much of the net proceeds as equals the total of those debts; and

(iv) apply the amount so set aside in paying those debts; or

(e) if the net proceeds of sale fall short of the total of the debts secured by:

(i) the lien or pledge; and

(ii) any other security over the property, where the debt secured by the security has a priority that is equal to or higher than the priority of the debt secured by the lien or pledge;

then:

(iii) the administrator must set aside the net proceeds; and

(iv) the administrator must apply the amount so set aside in paying those debts in order of priority, on the basis that if the amount is insufficient to fully pay debts of the same priority, they must be paid proportionately; and

(v) if any of those debts is not fully paid--so much of the debt as remains unpaid may be recovered from the company as an unsecured debt.

Property subject to a retention of title clause

(2) If:

(a) a company is under administration; and

(b) property is used or occupied by, or is in the possession of, the company; and

(c) another person is the owner of the property; and

(d) the property is subject to a retention of title clause under a contract (the ***original contract***); and

(e) the administrator disposes of the property by way of sale;

then:

(f) if the net proceeds of sale equals or exceeds the total of:

(i) so much of the purchase price, or other amount, under the original contract as remains unpaid; and

(ii) if there are one or more securities over the property--the debts secured by the securities;

the administrator must:

(iii) set aside so much of the net proceeds as equals that total; and

(iv) apply the amount so set aside in paying that total; or

(g) if the net proceeds of sale fall short of the total of:

(i) so much of the purchase price, or other amount, under the original contract as remains unpaid; and

(ii) if there are one or more securities over the property--the debts secured by the securities;

then:

(iii) the administrator must set aside the net proceeds; and

(iv) the administrator must apply the amount so set aside in paying those debts in order of priority, on the basis that if the amount is insufficient to fully pay debts of the same priority, they must be paid proportionately; and

(v) if any of those debts is not fully paid--so much of the debt as remains unpaid may be recovered from the company as an unsecured debt.

[**2.13**] Resources/ further reading

(i) *Romalpa Clauses and the Issues Concerning (i) The Meaning of 'the Proceeds' Received by the Buyer; (ii) The Buyer's Credit Period; and (iii) The Charge/Trust Dichotomy in Relation to 'the Proceeds'* - [2000] BondLRev 12; (2000) 12(2) Bond Law Review 148**,** Denis SK On **(**Viewed Austlii 12th May 2009)

(ii) *Registration of Security Of Security Interests : Company Charges and Charges other Than Land (A Consultation Paper)* [2002] EWLC 164(6) (14 June 2002)

http://www.bailii.org/ew/other/EWLC/2002/164(6).html

(iii) *Benjamin's Sale of Goods* (5th ed. [5] - [151])

(iv) Atiyah's *Sale of Goods* (10th ed. 470 – 471)

(v) Hanbury and Martin, *Modern Equity* (15th ed. 1997 632)

(vi) D S K Ong, *Trusts Law in Australia,* (2nd ed, The Federation Press 2003)

End note / biographica

Sydney Jacobs holds a Masters of Laws from Cambridge University , practices in the commercial/equity area and has written Damages in a Commercial Context, (LBC 2000) ; now published as a looseleaf service known as Commercial Damages (Thomson, 2008) and co-authored Injunctions: Law and Practice (loose-leaf, Thompson 2005).

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