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Abstract
A Romalpa clause is used by a seller of goods who does not wish to transfer ownership thereof to the buyer until the latter has paid for those goods or, very often, for all of the goods that have been delivered to the buyer. However, the contract of sale will often provide that the risk of loss, damage or destruction to the goods will pass to the buyer upon their delivery to the buyer and not upon the transfer of the title thereto. The basis for this retention of title by the seller is s 20 of the Sale of Goods Act 1896 (Qld) which allows the parties to a contract for the sale of specific goods to decide when the property therein is to pass to the buyer.

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Romalpa Clauses, Sale of Goods Act

ROMALPA CLAUSES

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A Romalpa clause is used by a seller of goods who does not wish to transfer ownership thereof to the buyer until the latter has paid for those goods or, very often, for all of the goods that have been delivered to the buyer. However, the contract of sale will often provide that the risk of loss, damage or destruction to the goods will pass to the buyer upon their delivery to the buyer and not upon the transfer of the title thereto. The basis for this retention of title by the seller is s 20 of the *Sale of Goods Act* 1896 (Qld) which allows the parties to a contract for the sale of specific goods to decide when the property therein is to pass to the buyer. The seller benefits from this type of clause because it gives the seller priority of title to the goods over all the mortgages and charges of the buyer's assets as these securities will not operate on goods that do not belong to the buyer. On the other hand, the buyer also benefits in that, but for the protection given by the Romalpa clause, the seller may not be willing to supply the goods to it.

The main opponents of the Romalpa clause are the debenture holders of the buyer because these chargees are the intended losers if the Romalpa clause is effective to remove the seller's goods from the scope of their floating charges. More often than not, the real contest in a Romalpa clause situation is fought between the seller and the debenture holders of the insolvent buyer. Because there is no official register of Romalpa clauses which prospective lenders to the buyer may search, there is no way for them to ascertain whether or not goods in the possession of the buyer do in fact belong to the buyer. The potential prejudice to such prospective lenders lies in the fact that some assets within the apparent ownership of the buyer, and included nominally in charges given to the lenders, may nevertheless be beyond the reach of these charges because these assets may be owned by sellers under Romalpa clauses. It is perhaps to protect the lender against the undiscoverable 'Romalpa clause' seller that the courts have frequently shown hostility to the clause, denying its purported effect in many instances.

Although the seller's conditional retention of title is simple in principle, various forms of the Romalpa clause have projected a number of issues:

(i) Does the buyer resell the goods as agent for the seller?
(ii) What is the significance of the seller giving the buyer a period of credit?

(iii) Does the purported retention of title amount to the creation of a mere charge in favour of the seller?

(iv) What is the nature of the seller's right to repossess and resell the goods where the buyer defaults on its payments?

(v) What is the position where the seller's goods are mixed with other goods in the course of manufacture by the buyer?

(vi) What is the position where there are several sellers whose goods are used in manufacture, and each one of these sellers claims the exclusive ownership of the manufactured compounds pursuant to their respective contracts with the common buyer?

Does the buyer resell the goods as agent for the seller?

In *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd*[1] the plaintiff (seller) supplied aluminium foil to the defendant (buyer) on terms that the ownership of the foil - whether or not the buyer should later mix it with other material - was to remain in the seller until all debts owed to it by the buyer had been paid. There was an implied power given to the buyer to resell the unmixed foil and an express power to resell the mixed foil. The buyer went into receivership whereupon the seller claimed to repossess the unsold and unmixed foil as well as the proceeds of sale of the unmixed foil that the buyer had resold to sub-purchasers. The buyer admitted that the effect of the clause was that the unsold and unmixed foil in its possession was still owned by the seller. However, the buyer strenuously denied that the proceeds of the resales also belonged to the seller. The issue thus became whether the implied power to resell the unmixed foil was a power given to the buyer to sell for its own account or whether it was a power to sell for the account of the seller. If the power given to the buyer was to sell for the account of the seller, then it would follow that the proceeds from such sales would belong to the seller. On the other hand, if the buyer's power was to sell for its own account then the proceeds of sale so derived would belong to the buyer.

But there was one anomaly asserted by the seller. Although the seller insisted that the buyer sold the aluminium foil as its agent, the seller refused to accept that this entailed contracts of sale between the seller and the sub-purchasers. Although the seller demanded the benefits of the contracts of resale, it rejected the view that it was liable to the sub-purchasers on those contracts. The seller was happy to claim the proceeds from the contracts of resale but it disclaimed any other connection with those contracts. The English Court of Appeal vindicated the seller's paradox, declaring:[2]

> I see no difficulty in the contractual concept that, as between the defendants and their sub-purchasers, the defendants sold as principals, but that, as between themselves and the plaintiffs, those goods which they were selling as principals within their implied authority from the plaintiffs were the plaintiffs' goods which they were selling as agents for the plaintiffs to whom they

1 [1976] 1 WLR 676.

2 Ibid at 690 per Roskill LJ.

> remained fully accountable. If any agent lawfully sells his principal's goods, he stands in a fiduciary relationship to his principal and remains accountable to his principal for those goods and their proceeds. A bailee is in like position in relation to his bailor's goods. What, then, is there here to relieve the defendants from their obligation to account to the plaintiffs for those goods of the plaintiffs which they lawfully sell to sub-purchasers? The fact that they so sold them as principals does not, I think, affect their relationship with the plaintiffs; nor (as at present advised) do I think - contrary to Mr. Price's argument - that the sub-purchasers could on this analysis have sued the plaintiffs upon the sub-contracts as undisclosed principals for, say, breach of warranty of quality.

Quite apart from the self-contradiction inherent in the conclusion that although the buyer was reselling to the sub-purchasers as the seller's agent, there was somehow no contract between the seller and the sub-purchasers, there were four additional difficulties raised by that conclusion.

First, the buyer had the right - unhindered by the seller - to fix the price at which the goods were to be resold. If, as the court appeared to think, the buyer was merely reselling as the seller's agent, then why did the seller not have the right to determine the price of the goods it was supposed to be selling through the agency of the buyer?

Secondly, there was a provision for the buyer, so long as it owed any money to the seller, and if required by the seller, to assign the buyer's claims against the sub-purchasers to the seller. Again, if the seller was selling to the sub-purchasers through the agency of the buyer, then the seller would have direct contractual claims against the sub-purchasers, and the buyer would have no claims to assign to the seller.

Thirdly, if the buyer was merely selling as agent for the seller, then the seller should have been able to retain for itself the profits derived from the resales. Yet there was nothing in the contract to prevent the buyer from using the profits made from the resales. The buyer was in the business of selling aluminium foil and aluminium products for its own account. Its reason for existence was to make profits for itself, and not for those from whom it purchased aluminium foil with which to operate its business.

Fourthly, if the proceeds of the resales belonged to the seller, then the buyer would not have been permitted to pay the seller from those proceeds. But it was not denied that the buyer could have done so. Indeed, it is difficult to understand how the buyer would have operated its business if it had been debarred from using the money derived from the resales. The seller's right against the buyer was that the buyer should pay it within the period of credit allowed by the seller. The seller's right was not, and was not asserted to be, the right to be paid from money other than the proceeds of the resales.

The significance of the seller giving the buyer a period of credit.

It would seem that if the seller gives the buyer a period of credit then the buyer should be able to use the proceeds of the resales during this period. Otherwise, the buyer would derive no advantage from the credit period. So, the contractual right to a period of credit should preclude the possibility that the buyer was reselling for the account of the seller only. Indeed, for example, if the seller sells goods to the buyer for $1,000 with a credit period of 30 days, and the buyer resells those goods for $1,200 within 10 days of receiving them from the seller, then the buyer should be able to pay the seller the sum of $1,000 from the sum of $1,200 which the buyer has received from the sub-purchaser. But this would not be possible if the sum of $1,200 received from the sub-purchaser were to be regarded as the seller's own money. Yet, if the buyer were specifically accountable to the seller for the proceeds of the resale, then the buyer, although it had the sum of $1,200 in its hands, would have to find *another* sum of $1,000 with which to pay the seller. Thus, unless the credit period is held to exclude the possibility that the buyer resells merely as the seller's agent, then, in the example given here, the seller would, even during the credit period, be entitled to claim the sum of $1,200 as a specific fund.

The seller's alleged right to make such a claim against the buyer, even during the credit period, is unavoidably inconsistent with the buyer's contractual right to the credit period. Pursuant to their contract, the buyer's right to a period of credit in respect of the original sale thus makes it legally impossible for the buyer to resell the goods merely as the seller's agent.

The seller's alleged right to the specific proceeds of the resale is additionally absurd because, even making the first absurd assumption that the seller is entitled to demand such proceeds from the buyer during the credit period, the seller will not be able to use these proceeds even after getting them from the buyer since the seller's title to the goods or the proceeds from their resale will vest in the buyer as soon as the buyer pays the seller the original purchase price within the contractual period of credit. Upon such payment by the buyer, and pursuing the consequences of the seller's absurd line of reasoning, the seller will then have to *return* the proceeds of the resale to the buyer as a specific fund.

The buyer's argument in *Romalpa*[3] that the credit period precluded the possibility of an agency in favour of the seller, was acknowledged by Roskill LJ to be 'formidable',[4] but as nonetheless invalid in view of the seller's contractual right to retain title to the goods until all the buyer's debts to it had been paid. Nevertheless, this rejected argument using the existence of a

3 [1976] 1 WLR 676, at 689.
4 Ibid.

credit period to negative the buyer's role as the seller's agent did succeed in two later decisions: *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd*[5] and *Re Andrabell Ltd (in liq)*.[6] In *Re Andrabell Ltd*,[7] Peter Gibson J had no hesitation in saying:[8]

> ...The inference to be drawn from such credit provision for a fixed period not determinable on the resale of the goods by Andrabell[9] must be that Andrabell was free to use the proceeds of sale effected within that period as it thought fit. It is hard to reconcile this provision with Airborne's claim[10] to have an interest in the proceeds of sale...

Because of the destructive effect a credit period can have on a retention of title clause, it would be advisable for the seller to include a provision that the credit facility should not negative the seller's retention of title. Such a provision was found to be effective for the seller in *Puma Australia Limited v Sportsman's Australia Limited*,[11] where it read:[12]

> The Purchaser and the Company agree that the provisions of this Clause[13] apply notwithstanding any arrangement between the parties under which the Company grants the purchaser credit.

But, in any event, in *Puma Australia Limited*[14] the parties had expressly agreed that the buyer would sell the goods as agent for the seller only. However, the ramifications of the agency in *Puma*[15] were not mentioned either in the contract or in the judgment of the court. For example, would the agency result in contracts of sale between the seller and the sub-purchasers, and would the buyer be able to pay the seller from the proceeds of the resales?

Does the purported retention of title amount to the creation of a mere charge in favour of the seller?

In some cases the courts have interpreted the seller's attempt to retain title as nothing but an attempt to secure payment for its goods so that, although expressed as a retention of the seller's title, the clause would be construed as creating a floating charge over the goods in favour of the seller. Since the parties in fact never intended to create a charge, the charge so artificially found to exist would invariably not have been registered, with the

5 [1984] 1 WLR 485.
6 [1984] 3 All ER 407.
7 Ibid.
8 Ibid at 416.
9 The buyer.
10 The seller's claim.
11 Supreme Court of Queensland, No 346 of 1990. Unreported Judgement of Moynihan J delivered on 7th December 1990.
12 Ibid at 5.
13 The clause retaining the seller's title to the goods it delivered to the buyer.
14 See n 11.
15 See n 11.

consequence that it would be void against the buyer's liquidator or official manager.[16] Pioneering this radical reconstruction of the retention of title clause is the decision of Slade J in *In re Bond Worth Ltd.*[17] There the buyer was a manufacturer of carpets and the seller supplied fibre to it. The fibre was supplied to the buyer on condition that until each order had been fully paid for, the fibre therein was to remain in the 'equitable and beneficial ownership'[18] of the seller, and the proceeds of any resale of the fibre or of the sale of any compound of which the fibre was a constituent were to belong to the seller until the buyer had made the relevant payments. Slade J held that because 'the whole purpose of the retention of title clause was to afford Monsanto[19] security for the payment of purchase price under each relevant order'[20] the seller's 'rights must necessarily have been rights by way of mortgage or charge'.[21] Slade J declared that the clause purporting to retain title in the seller merely created in favour of the latter floating charges[22] over the fibre supplied, and that, as these company charges had not been registered, they were relevantly void.[23] It is suggested that Slade J adopted a circumlocutory and unconvincing approach. To say that the parties intended to create charges where they had expressly purported to retain title in the seller was to rewrite the contract for the parties. Slade J would not have needed to rewrite the contract if he had ruled that the buyer's right to use the fibre for its own purposes was inconsistent with the seller's purported retention of title thereto so that the seller's title would cease as soon as the fibre had become part of the carpet. The buyer was a manufacturer and seller of carpets. It did not carry on its business as the seller's agent. There was no necessity for Slade J to make the parties intend to create floating charges when their contractual language showed that nothing was further from their minds than the creation of such charges. However, the reasoning of Slade J in *In re Bond Worth Ltd*[24] was followed in *Re Peachdart*[25] In the latter case, the seller sold leather to the buyer (a manufacturer of handbags) on condition that property in the leather was to remain in the seller until all leather delivered for sale to the buyer had been fully paid for. The buyer was contractually permitted to resell the leather and to sell any handbags made therefrom on condition that the proceeds of any such resales and sales were to belong to the seller until all the leather delivered for sale to the buyer had been fully paid for. It might be thought that if Romalpa clauses were generally judicially acceptable, then this would have been a clear case to

16 *Corporations Law* 1990, section 266. The English counterpart [*Companies Act* 1985 (UK), section 395, formerly *Companies Act* 1948 (UK), section 95] is wider because there non-registration makes the charge void against the liquidator and all of the chargor company's creditors.

17 [1980] 1 Ch 228.

18 Ibid at 235.

19 The seller.

20 [1980] 1 Ch 228 at 248.

21 Ibid.

22 [1980] 1 Ch 228 at 268.

23 [1980] 1 Ch. 228 at 271.

24 [1980] 1 Ch 228.

25 [1983] 3 All ER 204.

exemplify such acceptance. But it was not to be so. The buyer in this case, as did the buyer in the *Romalpa*[26] case, admitted that title to the unused goods on its premises remained in the seller. However, the buyer in this case, unlike the buyer in *Romalpa*,[27] succeeded in refuting the seller's claim to the proceeds from the sales of the handbags. Rejecting the seller's reliance on *Romalpa*,[28] Vinelott J said that he found it 'impossible to suppose'[29] that the buyer was obligated to place all the proceeds from the sales of the handbags into a separate trust account for the seller, thus disabling itself from using the money from the sales to operate its own business. If the buyer did have such an obligation, then the commercially impossible situation would arise where the buyer could make and sell handbags but could not use the money from the sales of these handbags. Vinelott J decided that this impossible supposition was to be avoided and therefore 'the parties must have intended'[30] that as soon as work began on the raw leather to make it into a handbag the title to that leather would be transferred from the seller to the buyer. Whereupon, despite the clearly contrary language used by the parties, the seller's ownership of the leather would be transformed into a mere charge over the handbag that was being made. When the handbag was sold, the charge would then be transferred onto the proceeds of its sale.[31] The judge admitted that this construction of the relevant clause would do 'some violence'[32] to its actual wording but he supported what he considered to be the evident purpose of the clause (to provide security to the seller for the buyer's payments) against its literal object (to retain title in the seller until all the leather had been paid for). As soon as Vinelott J concluded that there was only the intention to create charges over the handbags, the seller's submission was doomed because the charges never in fact having been intended by the parties to be charges, were not registered as company charges so that they were relevantly void. Perhaps, instead of rewriting the parties' contract, Vinelott J might have held only that the parties clearly intended the buyer to sell the handbags for its own account, without taking the additional and unnecessary step of asserting that the parties intended to transform the seller's title into a mere charge. Nonetheless, *Peachdart*[33] and *Bond Worth*[34] do serve to emphasise that the courts are sometimes prepared to exhibit inordinate ingenuity in their determination to avoid the possibly unjust commercial result of the Romalpa clause, namely, giving the seller the benefit, but not the burden, of the resales made by the buyer. However logically incongruous, this line of judicial reasoning appears to be gathering strength because in

26 [1976] 1 WLR 676.
27 Ibid.
28 Ibid.
29 [1983] 3 All ER 204 at 210.
30 Ibid.
31 Ibid.
32 Ibid.
33 [1983] 3 All ER 204.
34 [1980] 1 Ch 228.

Borden (UK) Ltd v Scottish Timber Products Ltd and Others,[35] two[36] of the three Lords Justices in the case stated, *obiter*, that any interest acquired by the seller where it failed to retain title despite purporting to do so contractually would be regarded as a mere charge which, for lack of registration, would be relevantly void.

What is the nature of the seller's right to repossess and resell the goods where the buyer defaults on its payments?

The House of Lords has ruled in *Armour v Thyssen Edelstahlwerke AG*[37] that if a seller reserves title to itself, and also the right to repossess and resell the goods it has supplied in the event of the buyer's payment becoming overdue then, despite the contract of sale with the buyer, the seller may retain the proceeds of any resale made by it pursuant to its power to repossess and resell. However, the actual decision of the House was restricted to the situation where the buyer had not paid *any* part[38] of the purchase price for the goods liable to repossession and resale. Presumably the buyer's obligation to pay the original purchase price is discharged if the proceeds of the seller's resale equal or exceed the original purchase price plus the seller's expenses.

Importantly, the House of Lords in *Armour v Thyssen Edelstahlwerke AG*[39] expressly left open the question of what the position would have been if the buyer, unlike the buyer in that case, had already *partially* paid for the goods purportedly made liable to repossession and resale by the seller.[40] The House adverted to the 'interesting discussions'[41] of this issue by the Court of Appeal in *Clough Mill Ltd v Martin*.[42] In that case Robert Goff LJ said that the outcome of the issue would depend on whether, at the time of the seller's repossession, the contract had been terminated by the repudiation of the buyer which had been accepted by the seller.[43] If the contract had not so terminated, then the repossession and resale of the goods by the seller would be done pursuant to that contract. If the contract remained in force, then there would be an implied term[44] therein that the seller would be entitled to repossess and resell only so much of the goods as would recoup to it the debt owed to it by the buyer. If the seller resold more goods than were necessary to discharge the buyer's indebtedness to it, then the seller would have to account to the buyer for the surplus.

35 [1981] 1 Ch 25.
36 Ibid at 44-45 per Templeman LJ and at 46-47, per Buckley LJ.
37 [1991] 2 AC 339.
38 Ibid at 353 and 354.
39 [1991] 2 AC 339.
40 Ibid at 353.
41 Ibid.
42 [1984] 3 All ER 982.
43 Ibid at 987-988.
44 Ibid at 988 (per Robert Goff LJ) and at 993 (per Oliver LJ, concurring with Robert Goff LJ).

On the other hand, if the buyer had, for example, repudiated the contract through its insolvency, and that repudiation had been accepted by the seller, then the contract would have been terminated. In that event, according to Robert Goff LJ in *Clough Mill Ltd v Martin*,[45] the seller would be freed from the contract and therefore from the implied term so that it would, by virtue of its continuing ownership of the goods, be entitled to repossess the goods, resell them, and retain all the proceeds of the resale, and not be restricted to reselling only so much of the goods as would recoup to it the money owed to it by the buyer.[46] However, even though the seller in this situation would be uninhibited by contract, it would still have to repay to the buyer the amount of money which it had received from the buyer as part of the original purchase price for the goods. This obligation of the seller to repay the buyer would be based, not upon the terminated contract, but upon the total failure of consideration on the part of the seller, the latter having repossessed the goods.[47]

What is the position where the seller's goods are mixed with other goods in the course of manufacture by the buyer?

Two situations have to be distinguished: the first situation is where the seller contractually purports to retain title to the goods but does not contractually purport to acquire exclusive ownership of any compound of which those goods are a constituent; the second situation is where the seller purports to claim contractually exclusive ownership of both the original goods and any compound of which those goods are a constituent.

Where the seller purports to retain title to the goods delivered but omits to claim contractually the exclusive ownership of any subsequently manufactured compound of which those goods are only a constituent, then the position appears to be settled: the seller's title to the goods is lost by being used in the manufacture of the compound, the latter belonging to the buyer. The authority for this proposition is *Borden (UK) Ltd v Scottish Timber Products Ltd and Others*,[48] a decision of the English Court of Appeal. There the seller purported to retain title to its resin which it sold to the buyer, a manufacturer of chipboard. The seller, when the buyer went into receivership, claimed a declaration that it owned the chipboard to the extent that the latter consisted of the seller's resin.[49] The seller's claim was rejected by the Court of Appeal which held that once the resin had been used to manufacture the chipboard, the resin ceased to exist as resin, so that the seller's title thereto 'simply disappeared'.[50] It should be reiterated that the

45 [1984] 3 All ER 982.
46 Ibid at 988 (per Robert Goff LJ) and at 993 (per Oliver LJ, concurring with Robert Goff LJ).
47 Ibid.
48 [1981] 1 Ch 25.
49 Ibid at 27.
50 [1981] 1 Ch 25, at 35 per Bridge LJ. Templeman LJ, at 44 and Buckley LJ at 46 decided to the same effect.

Court of Appeal was dealing with a case where the contract did not purport to give the seller exclusive ownership of the compound, and the seller's claim to a proportionate part of the chipboard was purportedly founded on the principles of equitable tracing.

But suppose the different case of the seller and the buyer agreeing to a contractual provision giving the seller the exclusive ownership of the compound. Would such a provision be effective? This question was also discussed in *Clough Mill Ltd v Martin*.[51] Where the manufactured compound merely comprised goods respectively owned by the seller and the buyer, both Robert Goff LJ[52] and Oliver LJ[53] could see no reason in principle why the respective owners of the original goods could not effectively agree to give the seller exclusive title to the new product. Having made this concession, Robert Goff LJ then proceeded to impair its effect by requiring the parties to express this intention in extraordinarily unmistakable language. Despite the parties in the case having used very clear language to express their intention that ownership of the compound would vest in the seller,[54] Robert Goff LJ nevertheless declared, *obiter*, that he found it 'impossible to believe'[55] that, in the event of the termination of the contract, the parties would have intended the seller to obtain 'the windfall'[56] of the full value of the new product upon resale by the seller, without any accounting to the buyer for any surplus over the balance of the original purchase price that remained unpaid by the buyer. With respect, this line of reasoning is not compelling for the simple reason that a court should not refuse to believe that the parties intended an extraordinary result if such a result was clearly agreed to between them. In any event, if the seller should purport to retain, on resale, any surplus over the unpaid balance of the original purchase price, equity may well regard the retention of this surplus as a forfeiture of the buyer's property (for the seller would be purporting to obtain more than the original purchase price plus its expenses) and compel the seller to recoup the surplus to the buyer.

What is the position where there are several sellers whose goods are used in the buyer's manufacture, and each one of those sellers claims the exclusive ownership of the manufactured compounds pursuant to their respective contracts with the common buyer?

In *Clough Mill Ltd v Martin*,[57] Robert Goff LJ, with Oliver LJ concurring,[58]

51 [1984] 3 All ER 982.
52 Ibid at 989.
53 [1984] 3 All ER 982 at 993.
54 [1984] 3 All ER 982 at 984-985.
55 [1984] 3 All ER 982 at 990.
56 Ibid.
57 [1984] 3 All ER 982.
58 Ibid at 993.

simply described such a scenario as 'not at all sensible',[59] and that, to avoid such a situation, he would 'do violence to the language'[60] used by the parties to deem them to have merely created a charge in favour of the seller.[61] Such a charge would then be relevantly void for lack of registration. It is suggested that this approach serves only to defeat the clear intention of the parties by forcing them to intend what they never intended. It avoids the question instead of answering it. It is suggested that, as the buyer has agreed that the sellers should each have exclusive ownership of the manufactured compounds, any material or labour contributed by the buyer to their manufacture would not give the buyer any share in such compounds. But what are the rights of the sellers whose goods have been used to produce the compounds? Obviously, although their contracts with the buyer would retain for them title to their respective goods immediately before the manufacture of the compounds, the contracts would not be able to give to each seller the exlusive ownership of the compounds. It is suggested that the sellers would own each compound in the proportion that the value of their respective materials bears in relation to the total value of that compound. This result is achieved by applying the equitable principle of tracing various individually owned assets into the compound formed by an admixture of those assets. This principle of proportionate ownership was established by the decision of the House of Lords in *Sinclair v Brougham.*[62]

However, it should be noted that if these compounds are subsequently sold by the sellers to other buyers, then a number of situations will have to be distinguished. *First*, if the sales of these compounds are made pursuant to the original contracts, then any surplus obtained by the sellers from these sales over the original contract prices (plus the sellers' expenses) will have to be returned to the original buyer. *Secondly*, if the sales of these compounds to other buyers are made *after* the termination of the original contracts by the sellers' acceptance of the common buyer's fundamental breach of those contracts, then two possibilities within this situation will have to be considered. The first possibility is that the original common buyer has not paid *any* part of the respective original purchase prices. In this situation, because the original contracts have been terminated, the common buyer cannot claim any surplus produced by the sales but the sellers because of the total failure of the consideration respectively promised by them, will have to return to the original common buyer the value of any components contributed by that buyer to the manufacture of the compounds. The second possibility that may arise in the event of the sellers' selling the compounds to other buyers *after* the termination of the original contracts, is that the original common buyer has *partially* paid the respective original purchase prices. In this situation, again because the original contracts have been terminated, the common buyer cannot claim any surplus produced by the sales but the

59 [1984] 3 All ER 982 at 990.
60 Ibid.
61 Ibid.
62 [1914] AC 398.

sellers, because of the total failure of the consideration respectively promised by them and because the buyer has partially paid the original purchase prices, will have to return to the original common buyer not only the value of any components contributed by that buyer to the manufacture of the compounds but also the partial payments that have been made by the original common buyer.