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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'

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Abstract
[extract] The High Court's decision in Associated Alloys has authoritatively established for Australia the basic principle that, where the contracting parties specifically state in their contract that they intend to create a trust for the benefit of the seller, as opposed to creating a charge in favour of the seller, a court will not transmute the parties' expression of an intention to create a trust into an intention on their part to create a charge, unless there is something else in their contract or in its surrounding circumstances to indicate that they are nevertheless intending to create a charge. However, although the High Court demonstrated that the seller and the buyer had not intended to create a charge, it did not quite demonstrate its conclusion that the seller and the buyer had intended to create a trust for the benefit of the seller, as opposed to their having merely intended to create an unsecured debt owed by the buyer to the seller. The High Court did not quite clear the hurdle which obstructed its conclusion that the seller and the buyer had intended to create a trust of the proceeds for the benefit of the seller, that hurdle being the express contractual provision of a credit period to the buyer.

Keywords
romalpa clauses, proceeds, contract law, Associated Alloys Pty Ltd v ACN

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'

*By Denis SK Ong**

In *Associated Alloys Pty Ltd v ACN 001 452 106 (in liq)*[1] (hereinafter *Associated Alloys*), the High Court examined, in relation to *Romalpa Clauses,* the following matters:

(i) the meaning of the phrase, 'the proceeds', which appeared in the contract made between the seller and the buyer;
(ii) the impact, on the seller's claim to equitable ownership of the relevant part of 'the proceeds', of the period of credit given in the contract by the seller to the buyer with respect to the debt incurred by the buyer to the seller under the contract; and
(iii) the issue of whether the seller's claim to equitable ownership of the relevant part of 'the proceeds' amounted to a claim of a *trust* of those proceeds for the seller's benefit or, on the contrary, amounted to no more than a claim of a *charge* on those proceeds in favour of the seller.

In *Associated Alloys*[2] the seller and the buyer were in dispute over the legal implications of three invoices which had been issued by the seller to the buyer in respect of goods supplied by the seller to the buyer. Two of those three invoices expressly[3] included the following clause:[4]

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1 (2000) 171 ALR 568.

2 (2000) 171 ALR 568, at 572. The paragraph numbers, the words within square brackets, and the emphasis are all supplied in the joint judgment of Gaudron, McHugh, Gummow and Hayne JJ.

3 Because the High Court ultimately decided against the claim made by the seller, it found it unnecessary to determine whether the relevant clause had been implied in that invoice from which it had been literally omitted: *Associated Alloys* (2000) 171 ALR 568, at 585 (per Gaudron, McHugh, Gummow and Hayne JJ).

> [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].
>
> [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.
>
> [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.
>
> [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.*

Under the three invoices the seller supplied steel to the buyer which used the steel so supplied, 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 (hereinafter the third party).

However, when the buyer later went into liquidation, it had by then paid the seller only a part of the amount owed by it to the seller under the three invoices.

The seller sued, *inter alia*, for a declaration that the buyer's liquidator and/or the buyer held *upon trust* for the seller a specified sum of money in respect of

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4 (2000) 171 ALR 568, at 572. The paragraph numbers, the words within square brackets, and the emphasis are all supplied in the joint judgment of Gaudron, McHugh, Gummow and Hayne JJ.

the steel supplied under the three invoices.[5] In submitting that such a trust had been constituted, the seller relied on subclause 5[6] (hereinafter the proceeds subclause) of the relevant clause of the contract.

The High Court[7] held that in order for the seller to succeed, it had to overcome several hurdles. Two of such hurdles were:[8]

> the ascertainment of the meaning of the proceeds subclause, involving the determination of the meaning of the phrase 'the proceeds' in that subclause; and
>
> the determination of the question whether the trusts intended to be created by the proceeds subclause were in fact constituted in the circumstances.

(i) The meaning of the phrase 'the proceeds' in the proceeds subclause in the contract.

In construing the proceeds subclause, the High Court observed:[9]

> The critical question remains whether the phrase 'the proceeds' is limited merely to the funds comprised in payments made by the third party to the buyer or whether it also includes the obligations in debt owed to the buyer by the third party, that is, the choses in action, or book debts, of the buyer.

The High Court answered this question by deciding[10] that the phrase 'the proceeds' should bear that meaning which Sir George Jessel MR had, in the High Court's view, given to it in *In re Hallett's Estate,*[11] namely, that it 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).[12] However, for two reasons, it is suggested that Sir George Jessel in

5 (2000) 171 ALR 568, at 584.

6 (2000) 171 ALR 568, at 571.

7 This is a reference to the joint judgment of Gaudron, McHugh, Gummow and Hayne JJ.

8 (2000) 171 ALR 568, at 573.

9 (2000) 171 ALR 568, at 574 (per Gaudron, McHugh, Gummow and Hayne JJ).

10 (2000) 171 ALR 568, at 576.

11 (1880) 13 Ch D 696, at 708-709.

12 (2000) 171 ALR 568, at 576-577.

Hallett[13] did not *confine* the phrase 'the proceeds' to the *payment* received in discharge of the debt incurred by a purchaser in the purchase of property, but would have used that phrase to include the *right* to receive such payment from the purchaser. The first reason why Sir George Jessel would not have so confined that phrase is that in *Hallett*[14] the fraudulent solicitor merely happened to have received payment from the purchaser for his unauthorised sale of his client's bonds, and it was thus entirely appropriate for Sir George Jessel to have described the payment so received as the proceeds of the bonds.[15] But it is not legitimate to extract, from this *ad hoc* description of the receipt of the payment of the purchase price of the bonds as the receipt of 'the proceeds', the inference that if the fraudulent solicitor had in the circumstances *not* yet been paid for the bonds, Sir George Jessel would then have concluded that the sale of the bonds had *not* produced *any* proceeds, notwithstanding that the solicitor would then still have had a chose in action against the purchaser, namely, a right to sue for the payment of the purchase price.

If the High Court is correct in its view that in *Hallett*[16] Sir George Jessel would have decided that, if the fraudulent solicitor had not received payment for the sale of the bonds, then the sale of those bonds would have produced *no proceeds*, it would follow that the solicitor's defrauded client would, in that event, *not* have been *able* to trace her bonds in equity, notwithstanding that the solicitor would have had a *right* to recover the price of the bonds from the purchaser. Such a result would have failed to recognise that a chose in action is itself an item of property, and that it is therefore a traceable asset. If a chose in action is a traceable asset, then there is no reason why it cannot constitute proceeds.

The second reason for thinking that Sir George Jessel would have included in the phrase 'the proceeds' a chose in action acquired against a buyer of property for payment of the purchase price is that he allowed the solicitor's defrauded client to trace the payment received by the solicitor, which the solicitor had paid into

13 Ibid.
14 Ibid.
15 Ibid at 708.
16 Ibid.

his personal account, into that personal account,[17] namely, Sir George Jessel held that the defrauded client was entitled to trace her money into the solicitor's *chose in action*[18] against the bank. That chose in action against the bank was a debt[19] owed by the bank to the solicitor. So, in *Hallett*[20] the relevant part of the bank's common law obligation in debt to the fraudulent solicitor constituted, in equity, the traceable proceeds of the sale of the bonds. The relevant part of the chose in action against the bank, notwithstanding that it was merely a debt owed by the bank, and not the payment of a debt by the bank, continued to be the proceeds of sale of the client's bonds. Thus, there is no reason to suppose that Sir George Jessel would have denied the status of 'proceeds' to a chose in action acquired against a buyer for payment of the purchase price. There is no distinction in principle between a debt owed by a bank to its customer and a debt owed by a buyer of goods to the seller. The right respectively to sue for the payment of each of such debt is a chose in action. If a chose in action in debt against a bank is capable of constituting proceeds, so too should a chose in action in debt against a buyer of goods.

In support of its view that the phrase 'the proceeds' excluded debts owed to the buyer by the third party in respect of steel products sold by the buyer to the third party, the High Court said:[21]

> …The concluding sentence of the proceeds subclause would be strained if the phrase 'the proceeds' were to include book debts.…

The concluding sentence of the proceeds subclause referred to 'the time of the receipt of such proceeds'.[22] There is no conceptual incongruity in describing the buyer as receiving the proceeds of sale when it received the *right* to sue for the payment of the purchase price of the steel products which it sold. The *right* to sue for such payment is a chose in action. A chose in action is property,[23] and it is therefore

17 Ibid.

18 *Foley v Hill* (1848) 2 HLC 28; 9ER 1002. See also *Summers v The City Bank* (1874) LR 9 CP 580, at 587 (per Lord Coleridge CJ).

19 Ibid.

20 (1880) 13 Ch D 696.

21 (2000) 171 ALR 568, at 577.

22 (2000) 171 ALR 568, at 572.

23 *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306; *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, at 574 (per Lord Goff).

capable of being held in trust. Since a chose in action is property, there is no conceptual foundation for the High Court's view that a chose in action against a buyer of goods to obtain the payment of the purchase price of those goods does not constitute the proceeds of sale of those goods.

In further support of its narrow interpretation of the phrase 'the proceeds' in the proceeds subclause, the High Court said:[24]

> …In the event that a debt were subject to conditions, it may prove to be difficult to determine when the buyer is in 'receipt' of that *intangible obligation.* …

Since all obligations are necessarily intangible, the High Court's use of the phrase *'intangible obligation'*[25] is problematic.

Perhaps the High Court thought that the parties intended to exclude *intangible proceeds* from the phrase 'the proceeds'. Yet, in subclause 3[26] of their contract, the parties specifically referred to:[27]

> …all *proceeds* whether tangible *or intangible,…*

There is nothing in the relevant clause to suggest that the parties intended 'proceeds' in subclause 3 to *include* intangible proceeds, but anomalously intended 'proceeds' in subclause 5 (the proceeds subclause) to *exclude* intangible proceeds (as the book debts owed to the buyer by the third party would have been). Thus, the intangible nature of any chose in action acquired by the buyer against the third party in respect of the steel products sold by it to the third party would not, merely by reason of its intangibility, preclude that chose from inclusion in the phrase 'the proceeds' in the proceeds subclause.

Finally, in support of its narrow interpretation of the phrase 'the proceeds' in the proceeds subclause, the High Court declared:[28]

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24 (2000) 171 ALR 568, at 577. Emphasis added.
25 Ibid. Emphasis added.
26 (2000) 171 ALR 568, at 572.
27 Ibid. Emphasis added.
28 (2000) 171 ALR 568, at 577. The square brackets and the words therein are supplied in the joint judgment of Gaudron, McHugh, Gummow and Hayne JJ.

> …Moreover, to attempt to equate a chose in action, 'in dollar terms', to a sum of money, namely, 'the amount owing by the [buyer] to the [seller] at the time of the receipt of such proceeds', is, at the very least, conceptually problematic. …

Why? A credit bank balance is measurable in dollar terms, and it is a chose in action against the bank.[29] What can the conceptual problem be in equating a chose in action to a sum of money? There is no such conceptual problem. *In re Diplock*[30] says so. If such a conceptual problem existed, then tracing money into a bank account, given that a bank account with a credit balance is merely a chose in action against the bank, would be conceptually problematic, which is clearly not the law.[31]

It is suggested that, contrary to the High Courts' determination,[32] the phrase 'the proceeds', found in the proceeds subclause, was *not* intended by the seller and the buyer to be restricted to payments made to the buyer, but was intended by the parties to include book debts (choses in action) acquired by the buyer in respect of the steel products sold by it to the third party. Indeed, in *William Brandt's Sons & Co v Dunlop Rubber Company Limited*[33] Lord Macnaghten (with whom the Earl of Halsbury LC concurred) conspicuously included book debts in the phrase 'the proceeds'.[34]

(ii) ***Is the buyer's express contractual right, to withhold payment to the seller during the period of credit, a right which precludes any obligation in the buyer to hold, during that period of credit, in trust for the seller, the proceeds received by the buyer?***

The High Court noted that each invoice under which the seller supplied steel to the buyer constituted a separate contract[35] between the seller and the buyer. Each invoice, and therefore each such contract, expressly gave to the buyer a period of credit, namely a period during which the buyer was expressly entitled to

29 *Foley v Hill* (1848) 2 HLC 28; 9 ER 1002.
30 [1948] 1 Ch 465, at 522-523.
31 *In re Hallett's Estate* (1880) 13 ChD 696.
32 (2000) 171 ALR 568, at 577.
33 [1905] AC 454.
34 Ibid at 455.
35 (2000) 171 ALR 568, at 581.

withhold payment of the invoice price for the steel supplied by the seller to the buyer under that invoice.[36]

The High Court then articulated the following issue:[37]

> …The question that arises is whether this term[38] is inconsistent with the intention to constitute a trust [of the proceeds for the benefit of the seller]. That is, whether the purported liberty of the buyer not to pay the seller [during the period of credit] is consistent with the obligation [of the buyer] to create [for the benefit of the seller] a trust of 'proceeds' which might be received by the buyer *during the period of credit.*[39]…

To answer its own question, the High Court examined the rules governing the recognition of an implied term in a contract. The court accepted the five conditions, for the implication of a contractual term, laid down by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*[40] (hereinafter *BP Refinery).* In order for a contractual term to be implied the following five conditions must be satisfied by that term:[41]

> (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) *it must not contradict any express term of the contract.*

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36 Ibid.

37 (2000) 171 ALR 568, at 581-582.

38 The express provision in the contract by which the seller was obligated to allow the buyer a period of credit.

39 Emphasis added.

40 (1977) 180 CLR 266, at 283 (per Lord Simon in delivering the advice of the majority of the Privy Council). The High Court in *Associated Alloys* (2000) 171 ALR 568, at 582, noted that the five conditions for the implication of a contractual term, enunciated by the Privy Council in *BP Refinery,* were repeated with approval by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, at 347.

41 *BP Refinery* (1977) 180 CLR 266, at 283; *Associated Alloys* (2000) 171 ALR 568, at 582. Emphasis added.

Purporting to apply these five conditions, specified by the Privy Council in *BP Refinery*,[42] the High Court in *Associated Alloys*[43] implied a term into the contract made between the seller and the buyer as follows:[44]

> …An implied contractual term arises, as a matter of business efficacy, that *upon the receipt by the buyer* of the relevant 'proceeds' (and thus [upon] the constitution of a trust of part of those proceeds), *the obligation in debt is discharged*. The express term in the agreement…which provides for a *period of credit* within which *the debt* need not be paid by the buyer is, in turn, incorporated as an express term of the trust. This term thereby prescribes the period within which the seller, *as beneficiary*, cannot call upon the trust property (if the trust is constituted during the credit period). The implied term thus provides one means of discharging the debt by performance. No relevant inconsistency arises between this implied term and the express term in the agreement providing for a period of credit for the buyer.

It is suggested that the term purportedly implied by the High Court into the contract made between the seller and the buyer could not, consistently with authority and principle, have been so implied, for the following reasons:

(i) The implied term would, if it was introduced, contradict an express term of the contract. It was an express term of the contract that the buyer was *entitled* to *withhold* payment to the seller within the credit period.[45] This express term was *not* made subject to any contingency, so that the buyer's entitlement *not* to pay the seller within the credit period was to apply even if the buyer received the relevant proceeds *within* the credit period. However, in specifically contradicting this express term, the term implied by the High Court *obligated* the buyer to pay the seller *within* the credit period in the event that the buyer received the relevant proceeds within that period, namely, the implied term would then *compel* the buyer to pay the seller *within* the credit period by constituting, for the benefit of the seller, a

42 Ibid.
43 (2000) 171 ALR 568.
44 Ibid at 582. Emphasis added.
45 (2000) 171 ALR 568, at 581-582.

trust of the relevant part of those proceeds. Such a trust was to be constituted *upon*[46] the buyer's receipt of those proceeds, in immediate discharge of the buyer's 'obligation in debt'[47] to the seller, notwithstanding that such an *obligatory* payment of the debt by the buyer would then occur *within* the credit period, being precisely that period within which the buyer was *expressly* entitled by the contract to *withhold* payment of the debt to the seller. Therefore, the implied term purportedly recognised by the High Court in *Associated Alloys*[48] infringed the specific prohibition contained in the fifth condition enumerated in *BP Refinery*,[49] namely, that the implied term must *not* contradict any express term of the contract.

(ii) The High Court reasoned that integral to the implied contractual term which would make the buyer a trustee of the relevant part of the proceeds for the benefit of the seller was the incorporation, as an express term of that trust, of the express contractual term which provided for a *period of credit* within which *the debt* did not have to be paid by the buyer.[50] This contractual provision to the buyer of a credit period was specifically recognised by the High Court as the stipulation of a period within which 'the *debt* need not be paid by the buyer'.[51] Thus, the High Court recognised that the seller and the buyer expressly intended the credit period to apply *only* to the payment of the *debt* owed by the buyer to the seller. It may be noticed that the High Court held that, by virtue of the term which it implied into the contract, the *trust* of the proceeds for the benefit of the seller would be created at the precise moment that the buyer's 'obligation in *debt* is *discharged*'.[52] Therefore, at the moment that the buyer's debt is discharged, namely, at the moment that the buyer becomes a trustee of the relevant part of the proceeds for the benefit of the seller, the credit period in relation to

46 (2000) 171 ALR 568, at 582.
47 Ibid.
48 (2000) 171 ALR 568, at 582.
49 (1977) 180 CLR 266, at 283.
50 (2000) 171 ALR 568, at 582.
51 Ibid. Emphasis added.
52 Ibid. Emphasis added.

the now non-existent debt will itself cease to exist. This means that the credit period ceases to exist at the moment of the creation of the trust of the relevant part of the proceeds for the benefit of the seller. Since, on the High Court's own reasoning, the trust for the seller would arise only at the moment that the credit period ceased to exist, namely, at the moment that the *debt* was paid, it is conceptually problematic to do what the High Court purported to do,[53] namely, to incorporate the former *credit period*, which existed only in relation to the discharged *debt*, 'as an express term of the *trust*'.[54] In short, because the credit period in relation to the payment of the *debt* ceased to exist at the moment of the *payment* of that debt, it was impossible to *incorporate* that non-existent credit period into the trust which, on the High Court's view, arose only upon the payment of the debt, namely, only upon the extinguishment of the credit period. The credit period could not have been 'incorporated as an express term of the trust'[55] at the very moment that that credit period ceased to exist by virtue of the *payment* of the *debt*.

(iii) In purporting to imply the contractual term which would have provided for the creation of a trust of the relevant part of the proceeds for the seller, the High Court attempted to transform the express contractual provision of a credit period, being a credit period given to the buyer only in relation to the payment of its *debt*, into an implied contractual provision of a period which operated to postpone the seller's enjoyment of the proceeds held for its benefit under the *trust* which, in the High Court's view, was to have been *substituted* for that debt. '[T]he seller, as beneficiary [of the trust], cannot call upon the trust property'[56] during 'the credit period'[57] if the trust is constituted during 'the credit period'.[58] Since there was no question that, if there was to be a trust for the benefit of the seller, the seller would be the sole absolute beneficial owner

53 Ibid.
54 Ibid. Emphasis added.
55 Ibid.
56 Ibid.
57 Ibid.
58 Ibid.

of the trust property (being the relevant part of the proceeds), it is difficult to discover the conceptual foundation for the High Court's view that the buyer, *as trustee*, was entitled, 'during the credit period',[59] to refuse to transfer the trust property to its sole absolute beneficial owner, being the seller.

It would have been conceptually more compelling for the High Court to have held, even though it specifically held to the contrary,[60] that the buyer's express contractual entitlement to a period of credit precluded any trust for the benefit of the seller of any part of the proceeds received by the buyer in respect of the buyer's sale of the steel products to the third party, irrespective of whether such proceeds comprised only the payments received by the buyer from the third party, or whether such proceeds comprised not only the receipt of such payments but also the buyer's *right* to sue the third party for such payments.

(iv) The Charge/Trust dichotomy

The High Court held that the proceeds subclause was 'an agreement to constitute a *trust* of future-acquired property'.[61] That subclause was thus, in the High Court's view, not a *charge* within the meaning of section 9 of the *Corporations Law*. Therefore, not being such a charge, the proceeds subclause was not a registrable charge within the meaning of section 262 of the *Corporations Law*.[62] So the non-registration of the non-registrable proceeds subclause did not make it void as against the liquidator of the buyer,[63] given that section 266(1) of the *Corporations Law* did not apply to interests that were not registrable charges within the meaning of the section 262 of the *Corporations Law*.[64] It is

59 Ibid.

60 Ibid.

61 (2000) 171 ALR 568, at 583. Emphasis added.

62 Ibid.

63 Ibid.

64 Kirby J disagreed with this conclusion of the majority of the members of the High Court (Gaudron, McHugh, Gummow and Hayne JJ). He held that the proceeds subclause constituted, at the most, an unregistered (but registrable) charge on a

> suggested that the High Court has thus vindicated the view that if the parties to a contract expressly state that they intend to create a *trust*, and if there is nothing in their contract, or in the circumstances surrounding that contract, to indicate that they intend to create a *charge*, then their specific expression of an intention to create a trust should not be transmuted by a court into a contrary specific intention to create a *charge.*
>
> After the High Court held that the proceeds subclause was apt to express the parties' intention to create a trust of the relevant part of the proceeds for the benefit of the seller, notwithstanding[65] the buyer's express contractual entitlement to a period of credit, it proceeded to determine the question whether, *on the facts of the case*, the seller was able to prove that the buyer *had* received any proceeds, within the meaning of the proceeds subclause, 'under any particular invoice'.[66] The seller conceded that it was unable to prove any such receipt by the buyer.[67] In the light of this concession by the seller, the High Court determined that, although the seller and the buyer had *intended* the buyer to hold in trust for the benefit of the seller the relevant part of the proceeds *received* by the buyer, no such trust had been constituted because no such *receipt* had been proved by the seller.[68] Consequently, the seller was refused the relief which it sought.[69]

Conclusion

The High Court's decision in *Associated Alloys*[70] has authoritatively established for Australia the basic principle that, where the contracting parties specifically state in their contract that they intend to create a *trust* for the benefit of the seller, as opposed to creating a *charge* in favour of the seller, a court will not

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book debt. In his view, the most that could have been said for the seller in respect of the proceeds subclause was that it created an unregistered charge on a book debt, so that that subclause, being unregistered, was void as against the liquidator of the buyer: (2000) 171 ALR 568, at 595-596.

65 (2000) 171 ALR 568, at 581-582.

66 (2000) 171 ALR 568, at 584.

67 Ibid.

68 (2000) 171 ALR 568, at 584-585.

69 (2000) 171 ALR 568, at 585.

70 (2000) 171 ALR 568.

transmute the parties' expression of an intention to create a trust into an intention on their part to create a charge, unless there is something else in their contract or in its surrounding circumstances to indicate that they are nevertheless intending *to create a charge*.

However, although the High Court demonstrated that the seller and the buyer had *not* intended to create a *charge*, it did not quite demonstrate its conclusion that the seller and the buyer *had* intended to create a *trust* for the benefit of the seller, as opposed to their having merely intended to create an unsecured *debt* owed by the buyer to the seller.[71] The High Court did not quite clear the hurdle which obstructed its conclusion that the seller and the buyer had intended to create a trust of the proceeds for the benefit of the seller, that hurdle being the express contractual provision of a credit period to the buyer.

It is suggested that the seller and the buyer, in expressly agreeing to give the buyer a period of credit in respect of the payment of its *debt* to the seller, had intended to make the seller only an *unsecured* creditor of the buyer, and had not intended to make the buyer a trustee of the proceeds for the benefit of the seller. The mere failure of the seller and the buyer to create a trust for the benefit of the seller did not result in the creation of a *charge* for the benefit of the seller. Because the parties had attempted to create a *trust* and had intended *not* to create a *charge* (since there was nothing in their contract or in its surrounding circumstances which indicated that they had intended to create a charge), and because their attempt to create a trust should have failed, but only because of its inconsistency with the buyer's express contractual right to a credit period, the result produced *by the contract*, at the time that it was entered into, should have been that the seller was intended by the parties to be merely an *unsecured* creditor of the buyer.

71 Ibid at 581-582.