"The effects of retention of title clauses when sellers attempt to assert rights in products or proceeds are unnecessarily complex and technical. The law needs radical reform." Discuss.

Contracts for the sale of goods and services are generally governed by the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982 which both help to assist in the determination as to when title to property will pass. Thus, it is made clear under section 17 of the 1979 Act that title to goods will generally pass from the seller to the buyer once it can be shown that both parties had intended for it to pass. This is usually ascertained by looking at the facts and circumstances of each individual case and thereby considering when the parties intended for the title to pass by reviewing the contract and the parties conduct. Consideration must also be give to the presumptions in section 18 of the 1979 Act, however, in certain instances since these will specify when the property will in fact pass. The property must, however, be ascertained at the time in which the contract was created, yet these rules can be excluded by the parties which can be done through the incorporation of a retention of title clause into the contract. The implementation of such clauses is important in ensuring that the seller is not left in an unsecure position if the buyer defaults on payment or later becomes insolvent. Essentially, it is clear that retention of title clause provide greater protection to sellers than that which would otherwise be provided to them which is integral in ensuring that both parties have confidence that they are to be afforded with the adequate protection in which they require when entering into sale of goods contracts.

Accordingly, a retention of title clause is a provision that is contained in a contract for the sale of goods which therefore stipulates that the title to the goods will remain vested in the seller until certain obligations have been fulfilled by the buyer. This can

be seen in the case of ***Aluminium Industrie Vaasen v Romalpa Aluminium Ltd***[1] where it was found that although a retention of title clause contradicts the rule of law it may be included into a contract for the sale of goods so that any future problems that occur can be resolved by stipulating that title to goods will not pass until the seller has been paid for the goods by the buyer. There is much difficulty and complexity that arises in relation to these types of clauses, nonetheless, and although they are intended to protect the seller, the effectiveness of such clauses will pretty much depend upon the actions of the buyer. This has been identified by Bristow when he stated that; "the effectiveness of the clause will often depend on what the buyer has done with the goods."[2] This is because, if the goods have been mixed, a retention of title clause will no longer be enforceable and the seller and the buyer will both hold joint title in the goods. If the goods can be separated, however, the title will in fact remain with the seller as shown in ***Hendy Lennox (Industrial Engines) Ltd v Graham Puttick Ltd,***[3] yet this will often be very difficult to establish and so it will most likely be the case that the seller and the buyer will acquire title to the goods in circumstances such as this.

This clearly highlights the problems that arise in relation to such clauses and it seems as though they are capable of being undermined to a large degree. In accordance with this, it is evident that the seller's rights are being violated since the worthiness of these clauses will ultimately depend upon the actions of the buyer which is wholly illogical and likely to lead to a great deal of unfairness. Furthermore, as has also been pointed out; "a retention of title clause is likely to be defeated if

[1] [1976] 1 WLR 676
[2] C Bristow., 'Retention of Title in Construction Projects' <http://www.collyerbristow.com/Fileserver.aspx?oID=1385&lID=0> [Accessed 01 December 2011].
[3] [1984] All ER 152

admixture or annexation has occurred."[4] This is because, where admixture occurs the buyer will be found to have combined or mixed the goods with other goods in a manufacturing process that is irreversible and where annexation occurs, the goods will have become fixed to a piece of land and the title in the goods will therefore become that of the property owner. This will be the case regardless of whether they have been paid for or not which is highly detrimental to the seller. Arguably, it is clear that where these two situations arise, a retention of title clause will not be capable of being enforced which demonstrated how worthless such clauses are in the majority of instances. In some situations, nonetheless, a retention of title clause will be capable of consisting of a charge in the land if the goods have been attached to the land, yet this will depend upon the wording of the clause as shown in ***Clough Mill Ltd v Martin.***[5] Because of this, it will again be very difficult to establish and it seems as though reform to this area is needed so that greater clarity can be provided as to when a retention of title clause will be enforceable.

This is because, it appears that once goods have lost their identity, title to them through a retention clause will also be lost and the seller will no longer be provided with the protection that was intended to be provided by the use of a retention of title clause. Hence, as shown in the case of ***Borden (UK) Ltd v Scottish Timber Products Ltd***[6] the retention of title clause was ineffective on the basis that the resin had been used in the process of manufacturing. Thus, it was thereby noted by Sealey and Hooley in light of the decision in this case that; "retention of title clauses have been held ineffective once the goods have lost their identity."[7] This is likely to

[4] Ibid.
[5] [1984] 3 All ER 982
[6] [1981] Ch 25
[7] L S Sealey and R J A Hooley., *Commercial Law: Text, Cases and Materials,* (4th edn OUP Oxford, 2008) 323.

prove problematic and it seems as though a radical recall of the law within this area if sellers are to be provided with greater protection and retention clauses are to be considered effectual. This is because even where retention clauses are considered to be a charge where the goods have been mixed, as shown in the case of ***Re Peachdart***[8] the goods could not be recovered where the sellers had failed to register the clause as a charge. Therefore, it seems that unless the retention clause has in fact been registered as a charge, the ability to change the clause into a charge once the goods have been mixed will be unattainable. In effect, as expressed by Tillson; "courts are inclined to regard reservation of title clauses as a way of establishing a charge that must be properly registered so as to become security for payment for the goods."[9]

Although this is effectuated so as to ensure that unregistered charges cannot be created as shown in the case of ***Re Bond Worth***[10] it seems that many problems arise because of this since the retention of title clause has widely been accepted as a "risk prevention measure by the seller, rather than as a remedy which the law makes available upon breach by the buyer."[11] Consequently, in view of this, it is important that such clauses can be enforced in all instances as it would be highly detrimental for a seller to be disadvantages where a retention of title clause was in fact used, yet where the buyer was in breach of his obligations. This was signified in the more recent case of ***Armour and Another v Thyssen Edelstahlwerke AG***[12] where the validity of title retention clauses was highlighted. Here, it was held that the consignment of goods should not pass to the purchaser where all the sums had not

[8] [1983] All ER 204
[9] J Tillson., *Law Express: Consumer and Commercial Law,* (1st edn Longman, 2010) 118.
[10] [1979] 3 All ER 919
[11] M Furmston and J Chuah., *Commercial and Consumer Law,* (1st edn Longman, 2010) 285.
[12] [1990] 3 All ER 48

been paid in full since the clause that was created gave rise to a retention title clause and was thereby intended to have been created in order to create security: “this security was clearly accessory in its nature since it is both distinct from, and in addition to, the obligation to make payment which may relate to a debt completely unconnected with the contract.”[13] Essentially, it seemed as though the courts were trying to make it clear that an interest in the property could be inferred from the circumstances and that the facts of the individual case must be given consideration, yet as argued by Avery; “the judgment in ***Thyssen*** may, in practice, create significant problems where the commercial relationship between two parties operates on a running credit account basis.”[14] He further stated that; “If the logic of ***Thyssen*** were to be followed to its natural conclusion, ownership of any goods delivered by the vendor to the purchaser might not pass until all goods, including those ordered but not yet delivered, have been paid for.”[15] Arguably, this would again create problems and it is manifest in view of the case law within this area that a radical overhaul of the law is needed since there is much inconsistency and imprecision that exists and unless greater clarity is provided the law surrounding retention of title clauses will remain in a state of disarray.

Overall, it is clear in light of the above case law and judicial decisions that the effects of retention of title clauses when sellers attempt to assert rights in products or proceeds are unnecessarily complex and technical which is largely due to the inconsistency that exists within this area of the law. Thus, although such clauses are intended to provide security to sellers, it seems as though they are somewhat ineffective given the fact that the actions of the buyer will be the determinative factor

[13] [1990] 3 All ER 48
[14] B Avery., ‘Retention of Title Revisited’ (1991) 141 *New Law Journal* 537, Issue 6500.
[15] Ibid.

as to whether they are enforceable or not. This is quite absurd and it seems as though greater clarity to this area of the law is needed so that sellers can be confident that the implementation of retention of title clause will protect them if the buyer breaches any of his obligations, such as the requirement to make the full payment. Nevertheless, because of the different circumstances that arise in sale of goods contracts, it seems as though much complexity will be likely to transpire since it is unclear whether clauses such as this should be rendered effectual in situations whereby the buyer and the seller have a running credit contract. In view of this the law clearly does need radical reform so that greater precision can be provided as to when retention clauses will be effective and less ambiguity will ensue as a result. Whether any changes will ever be made remains to be seen but it is inevitable if greater protection is to be provided to the parties in a sale of goods contract.

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