"RETAINING" TITLE TO MIXTURES AND MANUFACTURED GOODS: A PRINCIPLED RE-APPRAISAL

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INTRODUCTION

It is, of course, trite law that the inclusion of a retention of title clause in a contract for the sale of goods renders the contract an agreement to sell rather than a sale[1] and property in the goods does not pass until the stipulated condition has been met.[2] As such, if the purchaser of the goods becomes insolvent whilst the price remains unpaid the supplier, having retained ownership in the goods supplied, can retake the goods ahead of the purchaser's other creditors. The supplier will also have the ability to sue for damages for breach of the agreement to sell although typically this right will be worthless as the purchaser will not have the funds necessary to satisfy a judgment debt.

So much is well settled. But the issue becomes more complicated where the goods which have been supplied are mixed with other goods. For example, a manufacturer might mix together raw goods which have been supplied to its premises but which still have not been paid for, producing a completely new species of goods as a product. If the supplier of the raw goods included a retention of title clause in the agreement to sell, does it have greater rights over the new product than the manufacturer's other creditors? Is the answer to that

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[1] Sale of Goods Act 1908 (NZ), s. 3(4) and Sale of Goods Act 1979 (UK), ss. 2(4) and 2(5).

[2] Sale of Goods Act 1908 (NZ), s. 3(5) and Sale of Goods Act 1979 (UK), s. 2(6).

question any different if the clause stipulated not only that the supplier retained ownership in the raw goods, but also that it would own any new goods created from the raw goods unless and until the raw goods are paid for?

These are by no means new questions and they have been considered judicially before now. However, it will be suggested in this article that the conclusions which the courts have arrived at cannot withstand theoretical assault. In particular, the orthodox position that is that where a supplier of raw goods retains title in those goods until they are paid for it has no proprietary interest in a new species of goods created from those raw goods, will be challenged. Second, the orthodox conclusion that the inclusion of a retention of title clause which purports to retain to the supplier full title to any newly created species involves the creation of a charge which is void as against the liquidator and creditors of the purchaser company if it is not registered, will be disputed.

Before proceeding with the theoretical analysis it is perhaps convenient at this juncture to mention a point of nomenclature. In the balance of the paper reference to a 'simple' retention of title clause indicates a clause which makes the passing of property conditional upon payment of the price of the goods. This is to be distinguished from a 'products' retention of title clause which purports to 'retain' for the supplier title to any new products which may be created from the raw goods being supplied. It is perhaps also useful to notice that where a products clause is incorporated in a contract for the sale of goods the contract will usually also include a simple clause. The intended effect of this symbiosis is to ensure that the supplier is protected against the insolvency of the purchaser both whilst the raw goods remain unused as well as after they have been utilised in a manufacturing process such that they comprise an irreducible part of a newly manufactured product. The question which must be considered is whether these clauses can achieve their intended effect?

To facilitate the theoretical re-appraisal just promised it is pertinent to delineate and analyse separately three distinct scenarios. The first is where goods have been supplied subject to a simple retention of title clause and, prior to payment for the goods, they are mixed with other goods of the same species. The second and third scenarios are those which have already been mentioned and which are the focus of this article. These are the situations where goods are sold subject to a simple retention of title clause and the goods are mixed with other goods to create an entirely new species, and, finally, where a new product is created from the goods supplied but in addition to a simple clause the supplier has also included a products clause in the contract.

MIXING GOODS OF THE SAME SPECIES

Where a purchaser has obtained possession of goods supplied subject to a simple retention of title clause the issue of the ownership of those goods is determined by the retention of title clause: property will not pass until the price is paid and in the interim title remains with the supplier. However, it is a common commercial practice, particularly where raw goods are supplied to a manufacturer, for goods of the same species to be stored together even although the goods have been supplied by different parties, some of whom have employed simple retention of title clauses. The question then is, who owns the mixture?

The answer to that question depends upon two levels of analysis. First, if the goods are of such a nature that it is possible to identify to whom each belongs then the retention of title clause operates as if there had been no mixing and the goods continue to belong to each supplier just as they had prior to being congregated. Thus, for example, if antique chairs which have been supplied subject to a simple retention of title clause are placed in a warehouse pending payment along with several plastic moulded chairs, it is clearly possible to determine which chairs belong to each supplier and so the retention of title clause ensures that the antique chairs continue to belong to the person who supplied them.[3]

If this identification is no longer possible after the mixing then it is necessary to move to the second level of analysis. As an example of a situation where this will be necessary consider the case of a purchaser of grain who buys grain from two separate suppliers each of whom includes a simple retention of title clause in the contract of sale. If the purchaser then stores all of the grain in the same storage silo it will not be possible to identify positively which supplier supplied each individual grain and as such each of the suppliers is precluded from recovering its share of the grain without potentially converting grain belonging to the other supplier.

(a) Roman Law: Confusio and Commixtio

The rules which the law developed to deal with this circumstance have their *incunabula* in Roman law where an unfortunate distinction was drawn between

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[3] *Smith* v. *Torr* (1862) 3 F. & F. 505; 176 E.R. 227.

fluid mixtures and mixtures of goods of an arid nature. [4] In the case of fluid mixtures the doctrine which applied was known as the doctrine of *confusio*, whereas where the goods mixed were of an arid character the doctrine of *commixtio* applied. The distinction was drawn on the basis that liquids were inseparable once mixed, but arid goods could be separated since each particle retains its physical integrity despite the mixing.

However, as Professor Birks has persuasively argued, the distinction really is illusory.[5] In a case falling within the doctrine of *confusio* it was thought that, given the inseparability of the mixed goods, there had to be co-ownership of the resultant mass.[6] On the other hand, where a case of *commixtio* occurred the goods were separable. Therefore, it was thought, they could each be returned to their original and rightful owners and so continued ownership was considered appropriate. But the distinction between *confusio* and *commixtio* does not help the analysis at all. The real issue is not the separability of the goods but rather whether it is possible to identify to whom each belongs. As Professor Birks has explained:

> "The Roman attempt to relate the legal results to the objective physical realities within the mixture can be rejected. It can be criticised from the standpoint of modern physics, and, given the evidential impossibility of returning even a *commixtio* of, say, unmarked sheep literally to the status quo so that each owner has exactly the sheep he started with, it can be condemned as creating differences which do not reflect material factual distinctions."[7]

(b) Common Law

At certain stages in the development of the common law in England this unfortunate distinction was nevertheless considered useful. In *Colwill* v. *Reeves,* Lord Ellenborough C.J. applied the concept of *commixtio* to furniture, stating that:

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[4] Birks, "Mixing and Tracing: Property and Restitution" (1992) 45 *C.L.P.* 69, at 71-78.

[5] *Ibid.*, at 75-83.

[6] Thomas, *Textbook of Roman Law* (North-Holland Publishing Company, 1976) at 169; and Lee, *The Elements of Roman Law* (4th.ed., Sweet & Maxwell, 1956) at 133-134.

[7] Birks, "Mixtures" in Palmer & McKendrick (eds.) *Interests in Goods* (1993) at 449, 458.

> "If a man puts corn into my bag, in which there is before some corn, the whole is mine; because it is impossible to distinguish what was mine from what was his. But it is impossible that articles of furniture can be blended together so as to create the same difficulty. The goods in question remained distinct ... ."[8]

As has just been mentioned, it is misleading to equate separability with identifiability. To return to an example used earlier, if moulded plastic chairs supplied by one party are placed beside antique chairs supplied by another it is still possible to determine which of each of the two suppliers owns each particular chair but this is not simply because the chairs are separable and it is definitely not, as Lord Ellenborough suggested, because the chairs are furniture rather than some other species of goods. It is because it is possible to identify with certainty which chairs were supplied by each supplier. If that process of identification were not possible, for example if moulded chairs were mixed with identical moulded chairs from another source, the fact that they are separable items is irrelevant. The problem still lies in identifying which chairs belong to each supplier.

Happily, as the common law developed in England it appears to have recognised the difficulties inherent in applying the distinction between cases of *confusio* and *commixtio*. In its stead the common law adopted the concept of a distinction between mixing which occurred by tortious misconduct and mixing which was accidental or consensual. In *Buckley* v. *Gross* there was an accidental mixing of tallow from two sources due to its melting in the heat of a fire. Blackburn J. stated that:

> "Probably the legal effect of such a mixture would be to make the owners tenants in common in equal portions of the mass, but at all events they do not lose their property in it." [9]

In *Spence* v. *Union Marine Insurance Co. Ltd.* the identifying markings on several (arid) bales of cotton were accidentally obliterated when the ship transporting them to Liverpool was wrecked at sea. Bovill C.J. held:

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[8] (1811) 2 Camp. 575; 170 E.R. 1257 at 576; 1257; see also *Smith* v. *Torr supra.* n.3 at 506, 227.

[9] (1863) 3 B. & S. 566; 122 E.R. 213 at 576; 216.

> "We need not discuss the distinction sometimes made between commixtio and confusio, apparently upon the ground that it is possible to separate the individual solid particles, but not the liquid; because in cases like the present, it is impracticable, and for all business purposes therefore impossible, to distinguish the particles, in respect of ownership."

Having thus recognised the practical impossibility of determining who owned each of the remaining bales by reference to original ownership, he held that the several contributors to the mass of bales co-owned the bales in shares based proportionately on the number of bales which each had originally supplied:

> "The goods being before they are mixed the separate property of the several owners, unless, which is absurd, they cease to be property by reason of accidental mixture, when they would not so cease if the mixture were designed, must continue to be the property of the original owners; and, as there would be no means of distinguishing the goods of each, the several owners seem necessarily to become jointly interested, as tenants in common, in the bulk."[10]

Where the mixing was not accidental nor by consent the common law held that full ownership vested in the innocent party. For example, in *Warde* v. *Æyre* Coke C.J. stated that:

> "[I]f I. S. have a heape of corn [*sic*], and I. D. will intermingle his corne with the corne of I. S. he shall here have all the corne, because this was so done by I. D. of his own wrong." [11]

However, Staughton J. recently had cause to reconsider this 'penal' rule in

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[10] (1868) L.R. 3 C.P. 427 at 438; see also *Re Stapylton Fletcher Ltd.; Re Ellis, Son & Vidler Ltd.* [1994] 1 W.L.R. 1181 at 1198.

[11] (1614) 2 Bulst. 323; 80 E.R. 1157 at 323; 1157; see also *Lupton* v. *White* (1808) 15 Ves. 432; [1802-13] All E.R. Rep. 356, and *Spence* v. *Union Marine Insurance Co. Ltd. supra.* n.10 at 437-438, and *Sandeman & Sons* v. *Tyzack and Branfoot Steamship Co. Ltd.* [1913] A.C. 680 at 694-695.

The Ypatianna.[12] The defendant was to transport crude oil for the plaintiff on board the vessel *The Ypatianna*. Absent the consent of the plaintiff, the defendant mixed the plaintiff's oil with oil of its own which was already in the tanks of *The Ypatianna*. The plaintiff relied on *Warde* v. Æyre to argue that since there was no consent to the mixing the whole of the cargo must belong to it. Staughton J. refused to come to this conclusion. He explained that the penal rule had been somewhat ameliorated by the concession made by the courts that the wrongdoer would be entitled to have his property returned if he could prove to the satisfaction of the court that a particular part of the mass belonged to him and not the innocent party.[13] The penal rule therefore did not need to be applied in its fullest strictures and, in light of the fact that none of the authorities were binding on him, Staughton J. held the rule he considered most appropriate to be:

> "Where B wrongfully mixes the goods of A with goods of his own, which are substantially of the same nature and quality, and they cannot in practice be separated, the mixture is held in common and A is entitled to receive out of it a quantity equal to that of his goods which went into the mixture, any doubt as to that quantity being resolved in favour of A. He is also entitled to claim damages from B in respect of any loss he may have suffered, in respect of quality or otherwise, by reason of the admixture.
> Whether the same rule would apply when the goods of A and B are not substantially of the same nature and quality must be left to another case."[14]

Thus, where it is possible to calculate the contributions of the parties these will prevail and there will be a tenancy in common in the proportions of those contributions.

It is therefore no longer necessary to consider whether a particular mixing occurred by accident, by consent or by a tortious act. This approach received

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[12] *Indian Oil Corp. Ltd.* v. *Greenstone Shipping S.A. (Panama) (The Ypatianna)* [1988] 1 Q.B. 345.

[13] *Lupton* v. *White, supra* n.11; *cf., Armory* v. *Delamirie* (1722) 1 Str. 505; 93 E.R. 664.

[14] *Indian Oil Corp. Ltd.* v. *Greenstone Shipping S.A. (Panama) (The Ypatianna) supra.* n.12 at 370-371.

the *imprimatur* of the Court of Appeal of New Zealand in *Coleman* v. *Harvey* where Cooke P. quoted from Staughton J.'s judgment in *The Ypatianna* and concluded that the same principle should apply to consensual mixing. [15]

The common law has thus reached the position where the commingling of goods of the same species will give rise to a tenancy in common of the resultant mixture with each of the contributors sharing ownership in proportion to their respective contributions. This is so whether the goods mixed are of an arid or fluid nature and the reason for the mixing is only relevant insofar as a tortfeasor cannot benefit from its own wrongdoing. This conclusion has recently been approved by the House of Lords in *Mercer* v. *Craven Grain Storage Ltd.* [16] All five of the Law Lords were of the opinion that the *commixtio* of grain from several sources had the result that "title must have remained in the growers from time to time interested in the mix in proportion to their respective tonnages" and this conclusion was so clear that citation of authority was unnecessary.[17]

Similarly, in New Zealand the Court of Appeal adopted this approach in *Good* v. *Bruce*.[18] In that case butter-fat from various different suppliers had been placed in bulk storage by a co-operative dairy company in such a way that the identity of each supplier's property was lost. The Court of Appeal held the mass was co-owned by the contributing suppliers. The more recent case of *Ahead Group Ltd. (in rec.)* v. *Downer Mining Ltd.* in the High Court of New Zealand is also instructive in this regard. [19] Here, crushed metal was supplied to be used to cover the purchaser's timber yard. The metal was supplied subject to a simple retention of title clause and was delivered whereupon it was compacted into the surface of the yard. The purchaser was unable to pay for the

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[15] [1989] 1 N.Z.L.R. 723 at 726-727 *per* Cooke P.

[16] Unreported, House of Lords, 17th. March, 1994, Lords Templeman, Goff, Browne-Wilkinson, Mustill and Lloyd.

[17] *Ibid., per* Lord Templeman (Lords Browne-Wilkinson and Mustill concurring); see also *per* Lord Lloyd (Lord Goff concurring) and the decision of the Court of Appeal, unreported, 12th. February, 1993, Russell L.J. and Simon Brown L.J.

[18] [1917] N.Z.L.R. 514 at 521 (*per* Edwards J.) and 535 (*per* Stout C.J. and Cooper J.); *cf.*, at 541, 543, 546-547 (*per* Denniston J. and Chapman J. *dissentient*).

[19] Unreported, High Court of New Zealand, Auckland; 26th. August, 1991, C.P. 1304/91 *per* Wylie J.

metal and so the supplier attempted to recover possession. On hearing an application for an interlocutory injunction to prevent the supplier from so doing, Wylie J. held that the injunction ought to be granted as there was an arguable case that:

> "[T]here has been such a degree of mixing that no removal of consequence could safely be effected without there being a risk of removal of the plaintiff's property. If that be the case there is an intermixture of property of two persons resulting, as I see it, in the loss of the sole right of ownership reserved by the Romalpa clause to the defendant and in its place substituting an ownership in common according to the respective contributions of the plaintiff and the defendant."[20]

An interesting point deserves mention before consideration is given to the other two scenarios mentioned earlier. That is that whilst the common law is prepared to accept that co-ownership results where goods are commingled and thereby lose their identifiability, the common law nevertheless refuses to accept that a mixture of monies ought to be co-owned. The rules of tracing are currently set against such a conclusion. [21] It is neither possible nor necessary to reconsider that topic in this article but it is suggested that insofar as there is an inconsistency with the analysis above it is the rules of tracing which are theoretically flawed and which require reconsideration rather than the concepts just discussed. [22]

As will probably be clear from the last comment there is no quarrel with the legal principles which have been developed in response to the question of ownership of a mixture of homogeneous goods. They have been traversed here because they provide an important and useful background to the suggestions which will be made in respect of mixtures of heterogeneous goods.

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[20] *Ibid.* at 7-8 citing *Smurthwaite* v. *Hannay* [1894] A.C. 494 and *Sandeman & Sons* v. *Tyzack and Branfoot Steamship Co. Ltd. supra.*n.11. It bears noting here that the case ought perhaps have been decided pursuant to the principles applicable to fixtures but this does not appear to have been argued.

[21] Birks, *supra.*n.4 at 79-81.

[22] *Cf.*, Cooke, "Review and Notices" (1992) 108 *L.Q.R.* 334 at 337.

MIXING GOODS OF DIFFERING SPECIES TO PRODUCE A NEW PRODUCT

The position which has been just been discussed is only applicable where goods of the same species have been commingled. In such a situation the goods lose their identifiability in the sense that it is no longer possible to identify who supplied them, but the common law has always considered this to be very different to the situation where raw goods are mixed with goods of another species to produce a completely new species of goods or where goods are worked such that they become a completely new species of goods.

(a) Existing Law

The common law has always maintained, and again it draws on Roman law here, that where a new species of goods has been created those goods belong to the manufacturer.[23] In *Thorogood* v. *Robinson* a quantity of lime was produced by the plaintiff by burning chalk which he had dug from the defendant's land. Holt C.J. held that the chalk which had been dug up:

> "[H]ad been converted into an article of a different species; and, when a person makes wine, oil or bread out of another's grapes, olives or wheat, it belongs to the new operator, who is only to make satisfaction to the former proprietor for the materials which he has so converted."[24]

More recently, in *Clough Mill Ltd.* v. *Martin* Robert Goff L.J. stated the law as follows:

> "[I]t is no doubt true that, where A's material is lawfully used by B to create new goods, whether or not B incorporates other material of his own, the property in the new goods will generally vest in B, at least where the goods are not reducible to the original

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[23] See, *e.g.*, Thomas at 174-176 and Lee at 134-135 & 142-143, *supra*.n.6.

[24] (1845) 6 Q.B. 769; 115 E.R. 290 at 771; 290-291; see also Blackstone, *Commentaries on the Laws of England*, 15th ed., by Christian (1809) Book II, 404.

materials."[25]

The central reason for this approach flows from the fact that the original goods have disappeared, whether by combination or reaction with other goods or by being worked so as to create an entirely new species. As such, even although the supplier has included a simple retention of title clause it is not possible to identify the original goods within the new product. As Bridge L.J. put it in *Borden (U.K.) Ltd.* v. *Scottish Timber Products Ltd.*:

> "[T]he doctrine expounded by Sir George Jessel M.R. [in *Re Hallett's Estate*[26]] contemplates the tracing of goods into money and money into goods ... It is at the heart of [the] argument [for the supplier] that the same applies to a mixture of goods with goods .... Now I can well see the force of that argument if the goods mixed are all of a homogenous character .... But a mixture of heterogeneous goods in a manufacturing process wherein the original goods lose their character and what emerges is a wholly new product, is in my judgment something entirely different."[27]

The right to trace goods is traditionally thought to depend upon the continued existence of the goods being traced and so the disappearance of the supplier's raw goods is thought to prevent it from tracing into the newly created product. [28] As further support for the legal conclusion that ownership in the new product vests in the manufacturer it is also often pointed out that this avoids a windfall being conferred upon the supplier who, after all, only retained title to the original raw goods. Since the supplier could have taken rights in the product but has chosen not to do so, such rights will not be beneficently conferred. [29]

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[25] [1985] 1 W.L.R. 111 at 119; see also *Borden (U.K.) Ltd.* v. *Scottish Timber Products Ltd.* [1981] 1 Ch. 25, and *International Banking Corp.* v. *Ferguson Shaw & Sons* 1910 S.C. 182.

[26] (1880) 13 Ch. D. 696, 708-711.

[27] *Supra.* n.25 at 41.

[28] *Re Diplock; Diplock* v. *Wintle* [1948] 1 Ch. 465 at 521; see also *Re Goldcorp Exchange Ltd. (in receivership): Kensington* v. *Liggett* [1994] 3 N.Z.L.R. 385 at 408, and Goode, "Ownership and Obligation in Commercial Transactions" (1987) 103 *L.Q.R.* 433 at 446.

[29] *Borden (U.K.) Ltd.* v. *Scottish Timber Products Ltd. supra.* n.25 at 42.

Another reason which is frequently called in aid is the belief that use of the raw goods in a manufacturing process must in and of itself involve a transfer of title to the manufacturer because it would be inconsistent for title to remain with the supplier whilst the manufacturer has the right to consume those goods in a manufacturing process.[30] Finally, at an evidential level, courts are quick to point to the fact that if the newly created product were to be comprised of goods from several suppliers it would be necessary to quantify the proportions of the product to which each supplier would be entitled. Such an enquiry would, it is said, require the courts to unearth the unearthable, trace the untraceable and calculate the incalculable.[31]

(b) Problems

Despite the arguments which are advanced in support of the orthodox position it is not without problems.

(1) Drawing distinctions

For example, it has just been seen that the law currently distinguishes between cases where goods of the same species have been mixed and cases where goods of distinct species are combined to produce a new species of goods. It is therefore fundamental, particularly given the commercial setting within which these doctrines inevitably operate, that it be possible to determine under which doctrine a particular case will fall – for a supplier the distinction can mean the difference between a co-ownership interest in mixed goods or no interest whatsoever in a newly created product. Yet the line is not clear.

Of course, there are cases that clearly fall either side of the line. A mixture of grain with grain of a similar quality will clearly result in a co-ownership interest, and mixing resin with woodchips to produce chipboard will, under the current law, mean the supplier loses its security interest. But in other cases it is not so clear which doctrine is applicable. Several tests have been experimented with at various times in an attempt to differentiate the two situations. It appears to be readily accepted that a refashioning of the raw goods does not necessarily alter their identity and if such is the case the rule for newly created products

[30] See, *e.g.*, *Borden (U.K.) Ltd.* v. *Scottish Timber Products Ltd. ibid.* at 41, and *Re Bond Worth Ltd.* [1980] Ch. 228 at 266, and *South Australian Insurance Co.* v. *Randell* (1869) L.R. 3 P.C. 101 at 107-108, and Muir, "Recent Developments in 'Reservation of Property' Clauses" (1985) 13 *A.B.L.R.* 3 at 24.

[31] *Borden (U.K.) Ltd.* v. *Scottish Timber Products Ltd. supra.* n.25 at 44 *per* Templeman L.J., and 42 *per* Bridge L.J.

cannot be applied.[32] Thus in *Pongakawa Sawmill Ltd.* v. *New Zealand Forest Products Ltd.* the Court of Appeal of New Zealand accepted that logs which had been processed into sawn timber (with by-products of bark, chips and sawdust) were still essentially the same "goods" and as such were still liable to be re-possessed by the supplier under its retention of title clause. [33] There had been no alteration in the fundamental character of the goods and hence title could not be argued, under the orthodox position, to have passed to the manufacturer. Richardson J. stated that:

> "If notwithstanding any permitted work the goods retain their original character and so continue to answer the description 'the goods', in which case the property in the goods does not pass from seller to buyer until those conditions are fulfilled, s.21 [of the Sale of Goods Act 1908 (NZ)] authorises the reservation of a right of disposal. .... Whether goods worked on retain their identity must depend on the nature and extent of the work permitted to be done and actually done .... Importantly the processing simply modified the form of the logs which as sawn timber retained its essential character." [34]

The court found support for its view in the similarity of the case to *Armour* v. *Thyssen Edelstahlwerke A.G.* where steel was supplied and part of it had been cut into sheets.[35] The House of Lords there held that title had not thereby passed as the steel was still essentially in the same form as that in which it was supplied.

However, neither of these cases provide much guidance as to exactly when a "refashioning" ends and a "change of substance" begins. It has been suggested

[32] Bell, *Modern Law of Personal Property in England and Ireland* (Butterworth, 1989) at 70.

[33] [1992] 3 N.Z.L.R. 304.

[34] *Ibid.* at 309; see also at 308, and *New Zealand Forest Products Ltd.* v. *Pongakawa Sawmill Ltd.* [1991] 3 N.Z.L.R. 112 at 115, and *Anonymous* (1560) Moo. K.B. 18; 72 E.R. 411.

[35] [1991] 2 A.C. 339.

that the nature of the work done will be important, [36] but of itself this does not advance the pursuit of a clear or commercially practicable test very far at all. In *Borden* the point at which the change occurs was held to be "as soon as the resin was used in the manufacturing process" [37] and in reliance upon this counsel for the purchaser in *Pongakawa* [38] argued that title to the raw goods passed to the purchaser as soon as processing began. The approach of the court in *Pongakawa* recognises that at any one point in time the constituent parts of a product may not have changed so fundamentally as to have disappeared, but may still have begun to be used in the manufacturing process.[39]

Other tests are available. Alternative tests include ascertaining whether the product is a substance which is chemically different from the previous one, and the test of reversibility as it was developed by the Justinian school of Roman jurisprudence,[40] which was applied in *International Banking Corp.* v. *Ferguson Shaw & Sons.*[41] However, as Matthews has shown, both the chemical change test and the reversibility test are defective. [42] This really only leaves the substance test[43] which is difficult to apply in a practical setting as it is subject to several, often incompatible, factors.[44]

(2) Using goods in manufacturing processes

As mentioned earlier, one of the reasons often advanced in support of the orthodox legal position in this area is the belief that it is inconsistent with the supplier's continued ownership that the purchaser be permitted to use the

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[36] *Modelboard Ltd.* v. *Outer Box Ltd.* [1992] B.C.C. 945 at 953, and *Pongakawa Sawmill Ltd.* v. *New Zealand Forest Products Ltd. supra.*n.33 at 309.

[37] *Borden (U.K.) Ltd.* v. *Scottish Timber Products Ltd. supra.*n.25 at 35.

[38] *Pongakawa Sawmill Ltd.* v. *New Zealand Forest Products Ltd. supra.*n.33.

[39] *Cf.*, *Re Bond Worth Ltd. supra.*n.30 at 237.

[40] See Whittaker, "Retention of Title and Specification" (1984) 100 *L.Q.R.* 35 at 40, and Lee, *supra.*n.6 at 134-135.

[41] *Supra.*n.25.

[42] Matthews, "'Specificatio' in the Common Law" (1981) 10 *Anglo-Am. L.R.* 121 at 123-124.

[43] *Ibid.* at 125-126.

[44] Hicks, "When goods sold become a new species" [1993] *J.B.L.* 485 at 488-490.

supplied goods in a manufacturing process. This is simply not so, as the Court of Appeal of New Zealand has recently accepted:

> "[I]n principle to allow the buyer to work on and use goods is not necessarily inconsistent with an intention that title shall not immediately pass to the buyer."[45]

Moreover, the argument really misses the point in this context as it focuses too heavily upon retention of title to the original goods rather than upon the issue of ownership of the new product. Argument about when (or whether) title to the original goods was lost is relevant but it does not assist terribly much in deciding who has title to the newly created goods.

(c) A New Approach

(1) The inability to trace

As mentioned above, the orthodoxy holds that title to a product newly created from goods supplied subject to a simple retention of title clause vests in the creator of that product as the supplier's original goods have disappeared and so cannot be traced. Obviously enough, there are two steps in this argument and in order to be clear each will be discussed in turn.

The first step is that title to the original goods has disappeared once they have been consumed in the manufacturing process. Parris has argued that this is not the case but in support of his argument he cites cases which dealt with the commingling of homogeneous rather than heterogeneous goods. [46] It seems patent that once a new species has been created title to its original constituent parts must surely have disappeared [47] – the resin cannot even be separated from the chipboard, let alone retain an independent title! This was conceded by counsel in *Borden* but Bridge L.J. made it very clear that he thought no other position tenable:

> "[T]here is no doubt that as soon as the resin was used in the manufacturing process it ceased to exist as resin, and accordingly

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[45] *Pongakawa Sawmill Ltd.* v. *New Zealand Forest Products* 30 *Ltd. supra.*n.33 at 309.

[46] Parris, *Effective Retention of Title Clauses* (Collins,1986) at 88, quoting from *Buckley* v. *Gross supra.*n.9 at 576; 216.

[47] *Borden (U.K.) Ltd.* v. *Scottish Timber Products Ltd.* [1979] 2 Lloyd's Rep. 168 at 170.

> title to the resin simply disappeared. So much is conceded by [counsel] for the [supplier]."[48]

As such the newly created product must have a new title of its own. But this step does not necessarily validate the second level of the orthodox argument, which relies upon the traditional understanding that it is not possible to trace goods once they have disappeared. In so doing the orthodox theory relies upon a misunderstanding of what, it is suggested, is the true conceptual nature of tracing.

Professor Birks has recently pointed out that the concept of tracing does not solely concern the following of *things*. Instead, he suggests, it involves the following of the *value* of things:

> "Time and again we fall into the habit of speaking as though what is traced is a thing. We talk of tracing money or tracing property. But that must be wrong. There is no question of the physical thing surviving in the substitute. The very notion of substitution excludes that. The £1,000 is not in the watercolour [for which it was hypothetically substituted]. We should try to think of tracing value, not things .... Tracing is no more than the means of finding out where at any relevant moment value is located."[49]

Whilst it is agreed that it is clearly incorrect to conceive tracing as merely involving the following of things it is respectfully suggested, that instead of understanding tracing as the following of value it is better to conceive of it as the following of *rights*. For example, a beneficiary under a trust has an equitable interest in the trust property and can trace that interest into other property which the trustee may (properly or otherwise) substitute for the trust property. The beneficiary traces his or her *rights* to enjoy the benefits of the trust property into the new property, and thereby obtains an equitable ownership interest in the newly obtained property. That equitable ownership interest gives the beneficiary the right to enjoy any value which that property may possess or attain. Thus, by tracing his or her rights in the original trust property the beneficiary has, as Birks suggests, in effect traced the value of that

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[48] *Borden (U.K.) Ltd.* v. *Scottish Timber Products Ltd. supra.* n.25 at 35.

[49] Birks, *supra.* n.4 at 85-86.

property into the new property. However, whilst it may perhaps be a purely semantic point, it seems to me to provide for a better conceptual understanding of tracing to speak of following rights in or to things rather than merely the value of those things. The *value* of property can be adequately represented by a mere charge over the new property which the trustee acquires, but if one thinks of tracing as following the beneficiary's *rights* in the original trust property into the new property one can fully explain why an equitable ownership interest, rather than merely a charge, can be claimed.

Once this conception of tracing is accepted it is no longer impossible to trace goods which have disappeared *in specie* because it is still theoretically possible to trace the rights which used to exist in those goods. Even if one does not accept the understanding of tracing which I have suggested and one opts instead for Birks' conception of tracing value, the value of the lost goods can still be traced into the newly created product. As Birks puts it, "value has the capacity to survive independently of both form and substance".[50]

Therefore, in terms of the question of a supplier's interest in goods newly created from raw goods which it has supplied subject to a simple retention of title clause, it can be argued that the supplier has the ability to trace its retained ownership rights into the newly created product. In advancing his theory of tracing Birks made this tentative suggestion:

> "The *specificatio* consumes the resin, but not its value now inhering in the new product. The law as declared by the Court of Appeal appears to deny me any entitlement in the chipboard, for in *Borden (U.K.) Ltd.* v. *Scottish Timber Products Ltd.* the court thought it impossible to trace beyond the point at which the raw material ceased to exist in the new product. But can that be right? We are talking about a right which depends on the tracing of value, not on tracing things."[51]

Although he did not outline his reasoning, Judge Rubin arrived at a similar decision at the trial court level in *Borden*, holding that "there is no reason why the tracing remedy should not extend both to the chipboard and its proceeds of

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[50] *Ibid.* at 98.

[51] *Ibid.* at 98.

sale".[52]

A second point about the principles of tracing must be mentioned here as it is crucial to the development of a principled theory in the area of newly manufactured products. The point concerns the difference between the ability to trace rights at common law and in equity. Traditionally these jurisdictions have developed separately and as such they have evolved differing pre-requisites for the application of their tracing principles. The difference was based on the arbitrary difference between whether a plaintiff held common law title to goods or merely had an equitable (beneficial) interest in the property concerned. Where the former was the case the process of tracing was unable to see beyond clear substitutions [53] so that where the goods to be traced became mixed with other goods tracing was considered impossible. So far as equity was concerned this position was impractical and caused injustice and so equity developed rules which provided (artificial) methods for determining whether, and to what extent, the rights of one or other contributor were still subsisting in the mixture or had been dissipated. [54]

A retention of title clause ensures retention of full and absolute ownership to the goods until payment is received. This is common law ownership and as such is theoretically subject to the common law rules as to tracing. These rules would seem to baulk at the idea of being able to trace into a mixture, let alone being able to trace into a mixture where the goods themselves cannot be recognised as subsisting in their original form.

It is only possible to sketch the general direction of a response to this problem here. It is believed that the answer to the problem lies in the notion that law and equity have become substantively fused in certain areas. [55] This fusion has occurred by way of an intermingling of law and equity over time with a

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[52] *Borden (U.K.) Ltd.* v. *Scottish Timber Products Ltd. supra.*n.47 at 171.

[53] *Taylor* v. *Plumer* (1815) 3 M. & S. 562; 150 E.R. 721, and *Banque Belge Pour L'Etranger* v. *Hambrouck* [1912] 1 K.B. 321.

[54] See, *e.g.*, *Re Diplock; Diplock* v. *Wintle supra.*n.28; *Re Oatway; Hertslet* v. *Oatway* [1903] 2 Ch. 356; *James Roscoe (Bolton) Ltd.* v. *Winder* [1915] 1 Ch. 62; *Clayton's Case* (1817) 1 Mer. 572; 35 E.R. 781.

[55] See Maxton, *New Zealand Law Society Seminar: Equity Update* (1993) at 1-13, and Maxton, "Some Effects of the Intermingling of Law and Equity" 5 *Canta. L.R.* 299.

measure of cross-fertilisation between the two as each developed. [56] Whilst it is clear that the rules of tracing have not yet clearly 'fused,' [57] it is suggested that such fusion is long overdue. It is believed that this assertion can be justified if one considers the difference in potency between tracing at law and tracing in equity, a difference which cannot be logically sustained. A person who has full and absolute (and hence legal) ownership of goods has, as one of the bundle of rights which such a position entails, the right to split the legal from the equitable ownership, thereby creating a trust. It is absurd that where the legal owner of goods has not created an equitable interest therein he or she may not trace his or her rights in the goods into a mixture, but the beneficial owner of the goods would be able to do so if a trust had been created over the goods. There seems no good reason for saying that the techniques of tracing which have been developed in the equitable jurisdiction should not also be employed in the legal jurisdiction now that the two jurisdictions have begun to fuse substantively.

It ought to be mentioned that this argument is based on common sense and the fact that there is no logical reason, other than the accidents of history, to maintain the separation between the principles of tracing at law and in equity. But this argument is *not* based on any idea of there being a putative equitable interest in all absolute legal interests. As Professor Goode has pointed out:

> "Where legal and beneficial ownership are in the same person there is no separate equitable interest, for the existence of such an interest depends on a division between management and enjoyment."[58]

(2) Co-ownership

If the supplier can trace the rights which it retained in the supplied goods into the newly created product what does this mean for ownership of the product? The rights which are traced are proprietary and therefore ought to be recognised

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[56] Maxton, *New Zealand Law Society Seminar: Equity Update* (1993) at 3.

[57] *Ibid.* at 11.

[58] Goode, *Commercial Law* (2nd.ed. Penguin, 1995) at 59; see also *Commissioner of Stamp Duties* v. *Livingston* [1965] A.C. 694 at 712, and Gray, "Equitable Property" (1995) 48 *C.L.P.* 157 at 162-166; *cf.*, Oakley, "The Prerequisites of an Equitable Tracing Claim" (1975) 28 *C.L.P.* 64 at 73 *et seq.*

in some form of proprietary interest in the product. However, that does not establish exactly what form of proprietary interest should be recognised. There are two likely candidates. First, the supplier could be recognised as having a charge over the product to the value of the goods which were absorbed into the creation thereof. Alternatively the supplier could obtain co-ownership of the newly created product.

If one takes the line, which is suggested, that the nature of tracing is to follow rights, then it becomes fairly obvious that the latter is the more appropriate proprietary interest to recognise. The rights of ownership include the right to enjoy the benefit of property and this entails the right to benefit if the market value of the property increases along with the concomitant 'right' to suffer if the market value drops. As such, if the supplier traces its rights in the raw goods into the product then, on this rights-based conception of tracing, an ownership interest must arise. A charge is for a static value and as such cannot fully reflect the rights which the supplier retained in the raw goods and has traced into the newly manufactured product. A co-ownership interest in the product ensures that the ownership rights which are traced are properly reflected in the supplier's proprietary interest in the product.

Alternatively, if one takes Birks' line and follows value rather than rights then the enquiry becomes slightly more complex, and it is suggested, needlessly so. The difficulty lies in the fact that if it is only the value of the supplier's raw goods which are traced into the newly created product, then arguably this can be adequately represented merely by a charge. However, it is still possible to conclude that a form of co-ownership is in fact the preferable proprietary option if one argues that the ownership of a chattel entails a bundle of rights and the value of the chattel is simply the conglomeration of those rights. Then, on Birks' conception of tracing, to trace the raw goods into the newly manufactured product will involve tracing the rights which constitute the value of the raw goods supplied. As such, albeit by a more tortuous route, one reaches the same conclusion: the more appropriate of the two possible proprietary interests is co-ownership between the supplier and the creator.

As mentioned earlier, the understanding of tracing as following of rights is to be preferred because it avoids the need for such argument and gets straight to the heart of the matter, thereby more properly reflecting the true conceptual nature of tracing. It is, of course, true that rights are valuable and therefore have value, but it is better to understand that it is the rights in the raw goods which are being followed rather than merely the value of the goods themselves. In quantifying those rights resort will obviously have to be had to the value of the rights, but a singular reference to the monetary value of the goods being traced may fail to fully explain the results of tracing because it loses sight of the nature of the rights which are being followed.

In the end therefore, whichever approach is taken, the result is the same: the newly created product is a chattel and, as with the raw goods, a bundle of rights attaches thereto. The question which the law must answer is, which of the rights is to be bestowed upon the supplier and which upon the creator? If the supplier is able to trace his rights in the raw goods into the product then co-ownership is the most appropriate form of proprietary interest for the supplier to receive. A charge over the products is merely security for a certain value and does not entail the rights that ownership does so it would not provide the supplier with full recognition of the rights which it preserved using the simple retention of title clause.

However, if co-ownership of the product is to be the method used to give vent to the rights which the supplier has traced, then it is also necessary to decide upon what basis the co-ownership shall exist. One possibility would be a co-ownership of the product between the supplier and the creator on the basis that the supplier owns the product to the value of the goods which it supplied. However, this looks suspiciously like a charge. In order to remain true to the reasoning which supports co-ownership it must be ownership of a proportion of the product.

In order to discuss the method by which the proportions of ownership would be calculated it is useful to start with a basic model of the value of the product. Creation of the product will have involved both the costs of the raw goods which have been consumed and of the labour required for the manufacture. The market price of the product is, of course, set externally from the parties as a matter of supply and demand. The difference between the market price and the total production costs determines the profit which the manufacturer receives. It is therefore possible to say that a proportion of the market price [59] of the product represents the raw materials, another proportion reflects the labour and the remaining proportion is the profit of the creator. However, the simplicity of this model belies the fact that the market price of a particular species of product will fluctuate with time and it is entirely possible that such fluctuation will occur between the time of the agreement to sell the raw goods and the time at which

[59] Birks, *supra*.n.7 at 457: "proportions are to be determined by value", and at 466-467; *Gill & Duffus (Liverpool) Ltd.* v. *Scruttons Ltd.* [1953] 1 W.L.R. 1407 at 1415; *Sandeman & Sons* v. *Tyzack and Branfoot Steamship Co Ltd. supra*.n.11 at 700-701.

the product is created. If, for example, the market price of the particular product increases during that time span, then the size of the proportion of the product which represents the raw goods used will also be correlatively increased. In such a circumstance the supplier of the raw goods would appear to receive a windfall in that it now owns goods with a value higher than it agreed to sell the raw goods for. This, however, is no real surprise when one considers the basic principles of retention of title.

It is useful here to step back for a moment from the question of ownership of newly created products and consider the basic situation under an agreement to sell goods entered into subject to a simple retention of title clause where the goods remain identifiable and the price of the goods is not paid. Pursuant to the clause the supplier has retained title to the goods and is entitled to their return if the price is not paid. However, the supplier has also entered into an agreement to sell the goods and so it cannot simply retake possession of the goods whenever it chooses. The right to repossess only arises if and when the purchaser repudiates the agreement to sell and the supplier accepts that repudiation. Typically a sale of goods subject to a retention of title clause will allow the purchaser a period of credit. If the price remains unpaid after this period has elapsed the purchaser will have repudiated the contract and the supplier can accept the repudiation by retaking (or demanding) possession of the goods. But if, between the date of the initial agreement and the date of repudiation, the market price for the goods has increased to a level where the current market value of the goods exceeds the price which the purchaser had agreed to pay for them, it is necessary to decide whether the supplier must account to the purchaser for that difference in value.

On this issue two views exist. The first was adequately expressed by Lord Donaldson M.R. in *Clough Mill Ltd.* v. *Martin*:

> "I am inclined to think that the word 'until' in the phrase 'reserves the right to dispose of the material until payment in full for all the material has been received' connotes not only a temporal, but also a quantitative limitation. In other words, the [supplier] can go on selling hank by hank until they have been paid in full, but if thereafter they continue to sell, they are accountable to the [purchaser] for having sold goods which, upon full payment having been achieved, became the [purchaser's] goods."[60]

[60] *Supra.* n.25 at 126.

Similarly, in the High Court of New Zealand Barker J. has expressed the opinion that:

> "If there is a surplus, it could well be that, under the contract, it belongs to the [purchaser] rather than to the [supplier]." [61]

The second view was endorsed by Robert Goff L.J. in the *Clough Mill* case:

> "[The supplier] can *during the subsistence of the contract* only resell such amount of the material as is needed to discharge the balance of the outstanding purchase price; and if he sells more he is accountable to the buyer for the surplus. *However, once the contract has been determined, as it will be if the buyer repudiates the contract and the seller accepts the repudiation,* the seller will have his rights as owner (including, of course, his right to sell the goods) uninhibited by any contractual restrictions; though any part of the purchase price received by him and attributable to the material so resold will be recoverable by the buyer on the ground of failure of consideration, subject to any set off arising from a cross-claim by the plaintiff for damages for the buyer's repudiation." [62]

In the same case Oliver L.J. agreed, holding that after the purchaser has repudiated and the supplier has repossessed the goods and sold them elsewhere:

> "[H]e does so not as a mortgagee who must account to the liquidator for any balance over and above the purchase price but as the owner of goods in respect of which no further contractual rights are exercisable by the buyer. If there is a shortfall, he may prove in the liquidation for damages for breach of contract. But *at no stage after the acceptance of the buyer's repudiation is the liquidator entitled to re-establish the contract and to defeat the seller's proprietary right in the subject matter by tendering the*

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[61] *Len Vidgen Ski & Leisure Ltd.* v. *Timaru Marine Supplies (1982) Ltd.* [1986] 1 N.Z.L.R. 349 at 364.

[62] *Supra.*n.25 at 118 (emphasis added).

price." [63]

With respect, the second view is the better as it gives proper recognition to the fact that the supplier has retained *title* to the goods and has not merely taken a charge over them. Holding title to goods involves a bundle of rights, the most fundamental of which is the right to enjoy the benefit of the goods. As such, when the supplier retains title to the goods he retains the right to enjoy any increase in the market value of the goods. Further, to suggest that the supplier is under some duty to account to the purchaser, as a mortgagee is to his or her mortgagor, would import notions of a duty to sell the goods at a time when the best price possible can be obtained. Such a duty would be wholly inconsistent with the fact that the supplier has retained *title* to the goods and should therefore in no way be under any obligations to the purchaser in respect of those goods once the contract has come to an end. Thus, once the supplier has accepted repudiation of the contract it is entitled to retain any profit which may arise as a result of a resale of the goods concerned.

To return, therefore, to the context of the supplier's co-ownership interest in a newly created product, the co-ownership of a proportion of that product has the same effect. The apparent windfall, where fluctuations in the market value of the product cause that proportion to be worth more than the price at which the raw goods were to be sold, is entirely legitimate in that by retaining title the supplier retained the right to enjoy full ownership rights and it is these rights which are traced into the product. As it was put recently in *Modelboard Ltd.* v. *Outer Box Ltd.*:

> "It is true that in such a case as the present so to read the contract leads to an odd result in that, on the happening of an event which entitles the [supplier] to take possession of the products, the [supplier] might find himself entitled to a windfall, if it exercised that right, which it would deny itself if it simply permitted the [purchaser] to sell the goods pursuant to its power of sale. However, the possibility of the [supplier] enjoying such a windfall could not exist unless the [purchaser's] right to complete the contract by payment had been extinguished. The envisaged situation is no odder than that which would obtain in relation to unprocessed board should the market value of the unprocessed

[63] *Ibid.* at 122 (emphasis added).

board have risen in the meantime."[64]

It is also worth remembering that if the market value of the product decreases instead of increasing over the same time span then the value of the supplier's proportion of the product will drop below the price which initially was to be paid and the supplier will be left to sue for the remainder as a personal debt which will rank *pari passu* with all the other unsecured creditors in a liquidation. The imposition of a charge over the product to the value of the price of the raw goods would ensure that the supplier did not receive any increase in the value of the product but it would also provide the supplier with an unfair proportion of the value of the product in the event that the market price for the product has dropped below the level it was at when the agreement to sell the raw goods was first entered into.

Thus, it is suggested that the most "appropriate"form of proprietary interest for the supplier to receive is co-ownership of the product in proportion to the value of the product which is attributable to the raw goods supplied. [65] This also leaves the creator of the goods with a co-ownership interest in the product which would be calculated by reference to the proportion of the value of the product which its labour represents. Initially it may seem unusual that labour should manifest itself in a proprietary form – certainly Marx would be surprised! – but it can be explained in at least two ways. First, the product is a bundle of rights which the law must attempt to distribute. It is not illogical that the labour responsible for the creation of those rights should justifiably lead to receipt of some of those rights. Second, if the supplier is to trace its ownership rights into the new product, the raw goods do not represent the whole of the product and so the supplier ought not to receive ownership of the whole of the product. It is eminently sensible that ownership of the product be shared between the supplier and the creator in shares which reflect their respective contributions to its creation.

There is some support for this position in the case law. The best example is the decision of the Court of Appeal of New Zealand in *Good* v. *Bruce*. [66] This case concerned the production of butter and other dairy products from the

[64] *Supra.* n.36 at 952-953.

[65] See *Aquaculture Corp.* v. *New Zealand Green Mussel Co Ltd.* [1990] 3 N.Z.L.R. 299 at 301, and *Mouat* v. *Clark Boyce* [1992] 2 N.Z.L.R. 559 at 566.

[66] *Good* v. *Bruce supra.* n.18.

butter-fat of numerous suppliers. The court held that title in the butter-fat was not intended to pass to the co-operative dairy company immediately and that as a result the company co-owned the resultant butter with the suppliers of the butter-fat.[67] The reasoning of the court is, with respect, somewhat threadbare and hence perhaps should not be relied upon without reference to the principles discussed above. Professor Goode has also given his *imprimatur* to the argument that where goods are mixed so as to create a new product the product is co-owned.[68] It is unfortunate, however, that in support of this proposition he cites *Farnsworth* v. *Federal Commissioner of Taxation*which involved the mixing of fruit but did not involve the creation of a new species of goods at all.[69] Goode goes on to suggest that where the mixing involves no goods except those of the supplier the creator of the product will own the product. [70] With respect, it is difficult to understand why the creator should have full title to a product arising from labour expended on someone else's goods, but it must share ownership of the product where it incorporates goods of its own in the manufacturing process. The better approach is, as has been suggested above, one which guarantees co-ownership in both cases.

Hence, it is suggested that where goods are sold subject to a simple retention of title clause and prior to payment they are mixed with goods of a different species to produce a new product, the orthodox presumption that the creator wholly owns that product should be abandoned in favour of a more equitable presumption of co-ownership. The supplier, in effect, gains 'retained' title to the new product. Like the orthodox presumption, this is of course able to be altered by express or implied agreement between the parties.

(3) Advantages of the 'heterodox' approach

Aside from the fact that the approach which has just been suggested is based more soundly in legal principle than the orthodox approach, it has added practical value in that it avoids the necessity to draw the problematic distinction between the creation of a new product and mixing of goods of the same species.

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[67] *Ibid.* at 521 (*per* Edwards J.), and 535 (*per* Stout C.J. and Cooper J.); *cf.*, 541, 543, 546-547 (*per* Denniston and Chapman JJ. *dissentient*).

[68] Goode, *Proprietary Rights and Insolvency in Sales Transactions* (2nd.ed., Sweet & Maxwell, 1989) at 92.

[69] (1948) 78 C.L.R. 504.

[70] Goode, *supra*.n.68.

If the heterodox presumption of co-ownership is applied then there will be co-ownership of a newly created product just as there is co-ownership where goods are mixed without losing their identity as a species. Whilst the Court of Appeal did not express the matter in quite this way, this can be seen from an examination of *Coleman* v. *Harvey.*[71] Briefly, the facts of this case were that Harvey supplied silver coins to Coleman to be refined, along with other source material belonging to Coleman, into ingots. Harvey was to have the right to 166 kilograms of the fine silver which it was expected would be produced, and Coleman was to retain the excess. The refinement process was completed but Coleman disposed of the resulting ingots in the ordinary course of business and so Harvey sued in conversion. It is very difficult to determine whether the case involved the creation of a new species of goods because it is clear that the ingredients were mainly silver and the result of the process was fine silver (from which one might infer no change in species) but it is also clear that the product was an accumulation of fine and pure silver whereas the ingredient coins certainly were not (from which one could infer a change in substance). Cooke P. analysed the case as if there were no change in species. He considered the chemical destruction of the coins to be inconsequential to the essence of the transaction. Thus, applying the rules discussed earlier in respect of mixtures of goods of the same species, he decided that:

> "Until the company performed its contract to appropriate to Mr. Harvey specific ingots, he should be treated as having a proprietary interest in any silver to which his coins contributed. *Until then he had a share as a co-owner of each ingot in the proportion of his total contribution to the refined silver.*"[72]

Had the court approached the matter as involving the creation of a new species this conclusion would not have been open on the orthodox reasoning, although it would have been available if the heterodox approach which has been suggested were applied. It will therefore be clear that adoption of the heterodox presumption will reduce the difficulty faced by courts in determining whether a case has or has not involved the creation of a new species because, in terms of the result which will be reached in individual cases, the difference would no

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[71] *Supra.* n.15.

[72] *Ibid.* at 726 (emphasis added).

longer be of such great consequence.

(4) Potential objections to the heterodox approach

Having established that it is possible for the law to accommodate the notion of a supplier tracing its rights in raw goods into a product which has been newly manufactured from them, a question still remains as to whether the supplier ought to be permitted to do so. Objection might be levelled at the approach suggested on the grounds that it will generally be obvious that the goods sold are destined for use in a manufacturing process and yet, despite the opportunity to incorporate a products clause into the contract, the supplier chose to make no mention of ownership of the product in the agreement to sell. As Bridge L.J. concluded in *Borden*:

> "If a seller of goods to a manufacturer, who knows that his goods are to be used in the manufacturing process before they are paid for, wishes to reserve to himself an effective security for the payment of the price, he cannot rely on a simple reservation of title clause." [73]

The objection, however, is not without answer. The fundamental response is that by use of a simple retention of title clause the supplier has retained its full legal rights in the goods supplied and is theoretically entitled to trace those rights into the newly created goods. There is no proper justification for thwarting those rights on policy grounds. Professor Goode has pointed out that:

> "[A] seller who sells goods without reserving title or taking security for the price cannot complain of his status as an unsecured creditor, for if he has intentionally given up his proprietary rights before the buyer's bankruptcy there is no reason why these should be restored to him gratuitously by the law upon such bankruptcy."[74]

But this does not accurately represent the position of the supplier who does reserve title to the goods supplied. It has, in contradistinction to the unsecured

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[73] *Borden (U.K.) Ltd.* v. *Scottish Timber Products Ltd. supra.*n.25 at 42.

[74] Goode, "Ownership and Obligation in Commercial Transactions" (1987) 103 *L.Q.R.* 433 at 440.

creditors, taken a form of security which permits it to claim ownership rights in the product ahead of the unsecured creditors. If the supplier cannot follow the rights which it has carefully reserved in the raw goods into the product then the manufacturer would be free to use the goods as soon as they arrive, thereby rendering nugatory the security which the retention of title clause was clearly intended to provide. It is also relevant to consider the possibility that the supplier might not have been aware at the time the contract was entered into that the goods would be consumed in a manufacturing process prior to payment. It should not suffer the loss of all security when it has taken steps to secure payment of the price against the goods supplied – steps which exceed any of those taken by the unsecured creditors. Furthermore, few would argue that the supplier should not receive an interest in the product where the consumption of the goods was wrongful, as for example in the unusual case where raw goods are supplied on terms which preclude their use until payment but which are used nonetheless. In these circumstances most would agree that the wronged supplier ought to be able to claim a proprietary interest of some sort in the product. In light of the decision in *The Ypatianna* a similar conclusion ought to follow where the mixing is foreseen or even consensual. [75]

Further objection might be taken with the analysis which I have proffered on the basis that in the particular circumstances of a case it may well be difficult to quantify the contributions of each party and there will therefore be difficulty in arriving at the correct proportions for co-ownership. As Bridge L.J. put it in *Borden*:

> "[A] most intractable problem could, and in many cases would, arise in quantifying the proportion of the value of the manufactured product which the tracer could claim as properly attributable to his ingredient." [76]

However, this is really only an evidential matter for the parties to prove in each case and it should not be allowed to negate the application of the heterodox approach *ab initio*. As Davies has pointed out:

> "[I]f the *Borden* decision is seen as authority for the proposition

[75] *Indian Oil Corp. Ltd.* v. *Greenstone Shipping S.A. (Panama) (The Ypatianna) supra.*n.12.

[76] *Borden (U.K.) Ltd.* v. *Scottish Timber Products Ltd. supra.*n.25 at 42.

> that the problem in quantifying values and appropriate ratios makes it impossible for there to be any tracing into proceeds of a manufactured article, then *such a proposition is far too wide*." [77]

It ought also to be remembered that there are methods available for dealing with evidential problems. It is possible at times to presume that a contribution occurred,[78] and where a contribution is proven to have occurred but it is difficult to ascertain its level the courts have been known to "cut the Gordian knot" and make presumptions as to the level of the contribution from a particular supplier.[79] It also bears remembering that whilst *The Ypatianna* eviscerated the 'penal' rule, it did not discard it altogether and so where 'intractable' evidential difficulties arise, rebuttable presumptions may still be made against a tortious mixer.[80]

(5) Accession and fixtures

In theory, the analysis developed above lends itself to cover even the smallest addition to a large object whereby the inferior chattel loses its identity and becomes a part of the dominant chattel. If the inferior chattel can be removed without causing serious injury to either of the chattels concerned then each of the chattels continues to belong to its owner as before.[81] However, where the inferior chattel cannot be so removed, the orthodox doctrine of accession provides that the inferior chattel accedes to the dominant chattel and title in the

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[77] Davies, "Reservation of title clauses: a legal quagmire?" [1984] *L.M.C.L.Q.* 49 at 61 (emphasis added).

[78] *Spence* v. *Union Marine Insurance Co. Ltd. supra.*n.10 at 439; and *Buckley* v. *Gross supra.*n.9 at 574-575; 216.

[79] *Spence* v. *Union Marine Insurance Co. Ltd. ibid.*; see also *Sandeman & Sons* v. *Tyzack and Branfoot Steamship Co. Ltd. supra.*n.11 at 695, and *Flavenc* v. *Bennett* (1809) 11 East. 36; 103 E.R. 917, and *Liggett* v. *Kensington* [1993] 1 N.Z.L.R. 257 at 263, and Birks, *supra.*n.4 at 82-83, and Birks, *supra.*n.7 at 466-467; alternatively the parties may agree: see, *e.g.*, *Jones* v. *Moore* (1841) 4 Y. & C. 351; 160 E.R. 1041.

[80] *Indian Oil Corp. Ltd.* v. *Greenstone Shipping S.A. (Panama) (The Ypatianna) supra.*n.12 at 370-371, and *Armory* v. *Delamirie supra.*n.13.

[81] See *Thomas* v. *Robinson* [1977] 1 N.Z.L.R. 385 at 391.

inferior chattel thereby passes to the owner of the dominant chattel. [82] If the goods were supplied subject to a retention of title clause and the heterodox analysis were applied it would require that the dominant chattel be co-owned in proportion to the values contributed. This would be a laudable result in that it would remove the difficult distinction between the creation of a new species of goods and accession, [83] but it could have the effect of rendering the commercial world a mess of co-ownerships of chattels in minute percentages. Alternatively, it may practically be the case that where such small additions are made the inferior goods are not generally supplied subject to retention of title clauses and so the problem would not arise.

This point requires closer consideration than is possible here but it might be necessary to concede that accession remain a distinct doctrine due to its commercial necessity. [84] It could simply operate as an exception to the general rule which I have suggested. By way of brief example, it is useful to recall Bridge L.J.'s question of counsel in *Borden*: can the manufacturer of cattle cake who sells it to a farmer, who in turn feeds it to his cattle, claim that the cow is a 'mixed fund' if the cake was initially sold subject to a retention of title clause?[85] Counsel conceded that it could not do so and attempted to distinguish this scenario from the ability to trace raw materials into products on the basis that the cattle cake is consumed. Naturally Bridge L.J. pointed out that this distinction is illusory since raw materials are also consumed in the manufacturing process, but his Lordship overlooked the possibility that his example could be explained as an instance of accession which could operate as an exception to the heterodox approach which counsel was also advancing.

It would likewise be possible to argue that fixtures fall under the general approach suggested. However, the law relating to fixtures has arisen in

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[82] *Ibid.*, and *Zahnrad Fabrik Passau GmbH* v. *Terex Ltd.* 1986 S.L.T. 84, and *Hendy Lennox (Industrial Engines) Ltd.* v. *Grahame Puttick Ltd.* [1984] 1 W.L.R. 485; *cf.*, Matthews, "Proprietary Claims at Common Law for Mixed and Improved Goods" (1981) 34 *C.L.P.* 159 at 171-185.

[83] See Birks, *supra.*n.7 at 449-450.

[84] McCormack, "Mixture of Goods" (1990) 10 *Legal Studies* 293 at 294-298, Davies, "Reservation of title clauses: a legal quagmire?" [1984] *L.M.C.L.Q.* 49 at 65-67, Birks, *ibid.*, Palmer, *Bailment* (2nd ed., Law Book Company, 1991) at 162-163; Goode, *supra.*n.68 at 89-90.

[85] *Borden (U.K.) Ltd.* v. *Scottish Timber Products Ltd. supra.*n.25 at 41.

response to specific problems in the context of real property, [86] and it is therefore probably also best understood as an exception to the general principle. Again, it is beyond the scope of this article to consider that point in any great depth.

EMPLOYMENT OF A PRODUCTS CLAUSE

It is perhaps not surprising that the legal position is different again where a supplier has supplied raw goods subject to a contract which includes both simple and products retention of title clauses and the goods are consumed in a manufacturing process prior to payment. In *Clough Mill Ltd.* v. *Martin* Oliver L.J., whilst formally reserving his opinion, stated that he could not see "any reason in principle why the original legal title in a newly manufactured article composed of materials belonging to A and B should not lie where A and B have agreed that it shall lie." [87] Thus, the basic position is that where it has included a products clause in addition to a simple clause the supplier can, pursuant to the products clause, claim title to any new product created from its raw goods.

(a) Not Registrable Charges

However, this relatively simple conclusion is complicated, to the point of confusion, by the statutory requirement that a charge created by a company will be void as against the liquidator and creditors of that company unless it is registered. [88] This is of particular concern in the present context in that if a products clause is held to be a charge and it has not been registered then the supplier will have effectively lost its security against the purchaser's insolvency. The question therefore is whether or not a products clause is a charge?

Despite the disarming simplicity with which the question may be stated, the

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[86] As to which see Goode, *supra* n.68 at 89; Cooper, "Romalpa Clauses and Mortgages" (1991) 5 *B.C.B.* 281, Dukeson, "The ROT continues" [1993] *N.Z.L.J.* 197, Dukeson, "The ROT subsides (gradually)" [1994] *N.Z.L.J.* 122, *Whenuapai Joinery (1988) Ltd.* v. *Trust Bank Central Ltd.* [1994] 1 N.Z.L.R. 406, *Lockwood Buildings Ltd.* v. *Trust Bank Canterbury Ltd.* [1995] 1 N.Z.L.R. 22.

[87] *Supra* n.25 at 124.

[88] Companies Act 1985 (UK), s.396, and Companies Act 1955 (NZ), ss. 102 & 103 (still in force despite the 1993 Company Law Reforms in New Zealand: see Companies (Registration of Charges) Act 1993 (NZ), ss. 3 & 4).

orthodox answer is less clear and is not simply explained. It is well settled that a simple clause does not constitute a registrable charge. [89] This is simply because a charge involves the charger, as owner of the goods to be charged, granting the chargee an equitable security right over the goods. Where the supplier of goods has incorporated a simple retention of title clause but the purchaser has not paid for those goods:

> "[N]o question of any charge by the buyer requiring registration under section 95 of the Companies Act 1948 can arise because a company can create a charge only on its own property and if it never acquires property in the goods the subject of an agreement for sale it cannot charge them."[90]

Thus, where a products clause is incorporated in the agreement to sell alongside a simple clause there is no charge whilst the goods remain unused. However, once the goods have been consumed in a manufacturing process and a new species of goods has been created the new goods have a title which is separate and distinct from those of the various constituent raw goods. In these circumstances a products retention of title clause begins to bear something of the semblance of a charge in that it records an agreement between the parties as to where title in the product will vest. This, however, is also precisely why the products clause is not a charge. The clause records a decision between the parties as to where title in the new product will vest *ab origine*. It is therefore not possible to say, as must be said if a charge is to be found, that one party has conferred upon the other proprietary rights over goods which he or she owns.

In *Clough Mill* both Robert Goff L.J. and Oliver L.J. accepted, albeit obiter, that a products clause does not necessarily constitute a registrable charge. As Robert Goff L.J. put it:

> "[T]he buyer does not *confer* on the supplier an interest in the property defeasible upon payment of the debt; on the contrary when the new goods come into existence the property in them ipso

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[89] See, *e.g.*, *McEntire* v. *Crossley Bros. Ltd.* [1895] A.C. 457, *Armour* v. *Thyssen Edelstahlwerke A.G. supra.*n.35, *Len Vidgen Ski & Leisure Ltd.* v. *Timaru Marine Supplies (1982) Ltd. supra.*n.61 at 352, *Peerless Carpets Ltd.* v. *Moorhouse Carpet Market Ltd. (in rec.)* (1992) 4 N.Z.B.L.C. 102, 747 at 102, 754.

[90] *Supra.*n.25 at 122 *per* Oliver L.J.

> facto vests in the [supplier pursuant to the products clause], and the [supplier] thereafter retains its ownership in them, in the same way and on the same terms as the [supplier] retains its ownership in the unused material."[91]

However, having come to this conclusion his Lordship proceeded to suggest that in the case at hand that could not have been the intention of the parties. He pointed out that upon determination of the contract the product would be owned by the supplier and that ownership would be indefeasible because the contractual terms would have ceased to apply. As a result the creator could no longer obtain title to the product by paying the price of the raw goods. His Lordship was unable to believe that the parties could really have intended this to be the case. As a result he suggested, obiter, that the parties must actually have intended the products clause to create a charge over any products created, even although it does violence to the language used by the parties to say so.[92]

This conclusion is problematic for a number of reasons. First, Robert Goff L.J. approached the interpretation of the products clause from the basis that the parties cannot really have intended to pass full title in the product to the supplier and therefore a charge must have been intended. With respect, it is clear that the retention of title clause is employed as a form of security, but it is also clear that the particular form of security chosen and recorded in writing in the contract cannot properly be ignored in favour of a global consideration of the substance of what was being attempted. [93] As Lord Watson put it in *McEntire* v. *Crossley Brothers Ltd.*:

> "[I]t is entirely beyond the function of a Court to discard the plain meaning of any term in the agreement unless there can be found within its four corners other language and other stipulations which necessarily deprive such term of its primary significance."[94]

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[91] *Ibid.* at 119 (emphasis original), and see at 124 *per* Oliver L.J..

[92] *Ibid.* at 120.

[93] See, *e.g.*, *Re Bond Worth Ltd. supra.*n.30 at 245, and *Clough Mill Ltd.* v. *Martin ibid.* at 115, 121, 123, 125; *cf.*, Davies, *Effective Retention of Title* (Fourmat, 1991) at 81.

[94] *Supra.*n.89 at 467; see also Bridge, "Form, Substance and Innovation in Personal Property Security Law" [1992] *J.B.L.* 1 at 2.

The second problem with the approach suggested by Robert Goff L.J. lies in the theoretical methodology required to justify it. In order to say that a charge has been created it is necessary to accept that title to the product vests in the creator, even if only for a *scintilla temporis*, in order that the creator is then capable of granting the supplier a proprietary interest in the product. [95] At first blush it is rather surprising to find that this must be what the parties intended when they wrote a contract saying that title to any products created from the raw goods supplied will belong to the supplier. More importantly however, the concept of property vesting in one place for a *scintilla temporis* and then moving elsewhere has arisen in other areas of the law and has been rejected for its artificiality. In the context of contracts which purport to assign future property for consideration both the Court of Appeal of New Zealand [96] and the House of Lords[97] have held, rejecting arguments based around the *scintilla temporis* concept, that the property belongs beneficially to the assignee as soon as it comes into existence. [98] The situation where goods are supplied pursuant to, *inter alia*, a products clause is directly analogous in that it too involves a contract concerning property which has not yet come into existence. Once the product has been created, ownership thereof ought to vest directly in the supplier as the products clause stipulates. In this way, property in the product never vests, not even for a *scintilla temporis*, in the manufacturer and so no registrable charge has been created.

(b) Potential Problems

If these arguments are accepted there remain at least three difficulties which need to be overcome. First, the courts refuse to accept that the supplier can own the product *and* be owed the price of the raw goods supplied [99] so whilst the contract remains on foot the supplier's title in the product has to remain defeasible upon payment of the initially agreed price of the raw goods. This is

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[95] See, *e.g.*, *Re Bond Worth Ltd. supra.*n.30 at 253-256.

[96] *Hadlee* v. *Commissioner of Inland Revenue* [1991] 3 N.Z.L.R. 517 (point not taken on appeal to the Privy Council: [1993] 2 N.Z.L.R. 385).

[97] *Abbey National Building Society* v. *Cann* [1991] 1 A.C. 56.

[98] *Hadlee* v. *Commissioner of Inland Revenue supra.*n.96 at 519-520 *per* Cooke P, and at 526-528 *per* Richardson J.

[99] *E.g.*, *Modelboard Ltd.* v. *Outer Box Ltd. supra.*n.36 at 953.

thought by some to provide support for the argument that a products clause must be construed as a registrable charge. [100] However, the fact that the value of the product is likely to be greater than that of the raw materials supplied and that the supplier's title in the product will therefore be defeasible at a price below its market value does not derogate from the simple principle that the parties have agreed that title in the newly created product will only pass to the creator when a certain sum of money has been paid. It is trite law that there is no requirement in the law of contract for the consideration in a contract to be "adequate".[101]

A second issue which arises if the *scintilla temporis* approach is not adopted revolves around the fact that if the supplier is endowed with title to the product and the creator then becomes insolvent without having paid for the raw goods the supplier will receive a windfall of the value of the labour of the creator and perhaps also raw goods belonging to the creator. However, this policy objection can be responded to in several ways. First, it must be reiterated that the parties have clearly provided for this result and therefore policy considerations should not enter into the analysis. However this ignores the reality that they will enter into the minds of judges and that they therefore require some thought. Many arguments can be mounted using implied terms to compensate for the value of goods supplied by the creator and for the value of any labour which the creator may have supplied. However, these arguments tend to become rather complex once the contract has been cancelled, and it is only at that point the supplier's title in the product becomes indefeasible. It is, of course, possible to argue that the implied duty to compensate is a secondary right [102] which only arises after cancellation but all such arguments are inconsistent with the language and form of the contract which the parties have chosen to enter into, in that they ignore the concept of the supplier receiving full title to the product. A claim for compensation might also be made as a matter of *quantum meruit* [103] although

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[100] See, *e.g.*, *Tatung (U.K.) Ltd.* v. *Galex Telesure Ltd.* (1989) 5 B.C.L.C. 325 at 333, and *Compaq Computer Ltd.* v. *Abercorn Group Ltd.* [1991] B.C.C. 484 at 498, and *Modelboard Ltd.* v. *Outer Box Ltd. ibid.* at 952-953.

[101] See, *e.g.*, *Thomas* v. *Thomas* (1842) 2 Q.B. 851.

[102] *Cf.*, *Photo Production Ltd.* v. *Securicor Transport Ltd.* [1980] A.C. 827 at 848-850 *per* Lord Diplock.

[103] As to which see Burrows, Finn, Todd, *Cheshire & Fifoot's Law of Contract* (8th NZ ed., Butterworths, 1992) at 756-759; and Furmston, *Cheshire, Fifoot and Furmston's Law of*

such a claim would probably fail on the basis that the contract expressly provides that the supplier will receive title to the product which legally requires that it will receive the benefit of the creator's labour and goods. As such there has been no unjust enrichment in the juristic sense.[104]

In recognition of the windfall point Professor Goode has argued that a products clause is not a registrable charge where it provides for co-ownership between the supplier and the creator rather than sole ownership by the supplier of the raw goods.[105] With respect, such a response to the problem is wholly illusory in theoretical terms as the parties are free to decide how ownership of the newly created product will be vested *ab origine*. The precise manner in which they do so ought to have no bearing whatsoever on the question of whether the clause constitutes a registrable charge. Furthermore, on the analysis suggested above, a co-ownership products clause would do nothing more than simply re-state the common law position.

In New Zealand if the courts consider it unjust for the supplier not to compensate the creator for the matters outlined above there remains the possibility of providing relief under the Contractual Remedies Act 1979 (NZ). Section 9 of that Act allows the court to give such relief as "is just and practicable".[106] This power has been interpreted very broadly by the courts [107] as

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Contract (12th.ed., Butterworths, 1991) at 669-672.

[104] Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors" (1989) 68 *Can. Bar. Rev.* 315 at 342; *cf.*, *New Zealand Forest Products Ltd.* v. *Pongakawa Sawmill Ltd. supra.*n.34 at 116-117.

[105] Goode, *supra.*n.68 at 97-99; and see *Kruppstahl A.G.* v. *Quitmann Products Ltd.* [1982] I.L.R.M. 551; *cf.*, de Lacy, "Anglo-Irish Retention of Title: The Current Position" (1987) 22 *Irish Jurist* 212 at 218-220.

[106] Section 9(1) of the Contractual Remedies Act 1979 (NZ).

[107] See *Newmans Tours Ltd.* v. *Ranier Investments Ltd.* [1992] 2 N.Z.L.R. 68, and *Coxhead* v. *Newmans Tours Ltd.*, unreported, Court of Appeal of New Zealand, CA 341/91, 7th.April, 1993, and *Thomson* v. *Rankin* [1993] 1 N.Z.L.R. 408; *cf.*, Coote, "Remedy and Relief under the Contractual Remedies Act 1979 (NZ)" (1993) 6 *J.C.L.* 141, and Walker, "Section 9 of the Contractual Remedies Act 1979: Opening Pandora's Box" (1994) 7 *Auckland University Law Review* 527, and Coote, "The Changing New Zealand Law of Damages in Contract" – a paper presented at the Sixth Annual Journal of Contract Law Conference, *The Changing Law of Contract*, 14th. & 15th. August, 1995 in Auckland, New Zealand.

"a valuable instrument for achieving justice." [108] As such it could probably be used in these circumstances. Such an order remains illegitimate in theory, however, as the parties have agreed in advance how the situation ought to be disposed of. Thus, in theory, the position is no different to that in the United Kingdom where there is no equivalent to the Contractual Remedies Act. However, if the courts wish to enter into policy considerations then at least in New Zealand it is possible to give vent to these via the Contractual Remedies Act, rather than by illegitimately holding products clauses to be registrable charges.

The final issue which deserves brief mention here concerns the not uncommon position where a manufacturer uses raw goods in its process which have been supplied by more than one supplier. If some or all of the suppliers have supplied the raw materials subject to products clauses which purport to retain to each supplier full title in any product created from the goods an obvious problem arises. In fact, in *Clough Mill* Robert Goff L.J. considered this to be a major problem in recognising products clauses as valid and enforceable where they had not been registered as charges. [109] His Lordship was of the opinion that this problem was best dealt with by considering each clause to be a charge. Although it is not made clear he presumably thought that this would avert the problem because the charges could somehow be ranked using the normal rules of priority. It is suggested that a better solution to the problem of multiple suppliers, all of whom employ products clauses, is to recognise all of the suppliers as co-owners of the product (to the exclusion of the creator) in the proportions which their respective contributions to the product bear to one another. This does not give complete effect to the parties' intentions but these were at variance anyhow and the approach suggested does give greater effect than does the approach of Robert Goff L.J. to the intention of the suppliers that the products clauses do not constitute registrable charges.

CONCLUSION

In *Hendy Lennox (Industrial Engines) Ltd.* v. *Grahame Puttick Ltd.* Staughton J. expressed his belief that:

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[108] *Thomson* v. *Rankin ibid.* at 411 *per* Cooke P.

[109] *Supra.* n.25 at 120.

> "[T]his area of the law is presently a maze if not a minefield, and one [has] to proceed with caution for every step of the way." [110]

With respect, the author is in agreement with this comment entirely and it is hoped that this article has travelled some of the way toward mapping out at least a part of that minefield.

In sum, it has been suggested that there is no theoretically valid justification for the orthodox position that where raw goods are processed so as to create an entirely new product, title in that product must vest in the creator. Instead, it is suggested that a better approach is to recognise that the creator and supplier together co-own the product in proportion to their respective contributions to its creation. This is a more theoretically sound approach and it has additional value in that it conforms to the current approach in cases where goods are mixed but do not lose their identity as a species. In addition to these points the currently favoured belief that employment of a products clause will involve the creation of a registrable charge which will therefore be void as against liquidators and creditors if it remains unregistered, has been challenged. Instead, full effect ought to be given to such clauses and the title to any products must vest in the parties as the products clause stipulates.This may appear to be a harsh conclusion at times but it is the theoretically correct solution and it is what the parties agreed to when they entered into the agreement to sell!

[110] *Supra.*n.82 at 493.