

THE HIGH COURT

Record No. 2016/2426P

BETWEEN

COMANS WHOLESALE

PLAINTIFF

AND

J. DONOHUE BEVERAGES LIMITED (IN RECEIVERSHIP)

AND

ANDREW O'LEARY AND KIERAN WALLACE

AND THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

DEFENDANTS

JUDGMENT of Ms. Justice Murphy delivered on the 8th day of October, 2019

1. This case comes before the court on a preliminary issue as to the meaning and effect of a retention of title clause contained in a contract for the sale and supply of drinks and beverages made between the plaintiff, Comans Wholesale, and the first defendant, J. Donohue Beverages Limited (In Receivership).
2. Pursuant to a deed of appointment of receiver dated 3rd November, 2015, the governor and company of the Bank of Ireland appointed Kieran Wallace and Andrew O'Leary as receivers to the first defendant. These receivers identified and returned goods to the plaintiff, to the value of €51,910.85 which goods had not yet been paid for, or resold by the company. They were returned pursuant to the retention of title clause. The plaintiff claims an additional €334,362.58 being the proceeds of sale of its goods by the first defendant during the period of 1st July, 2015 to 13th November, 2015, for which the plaintiff has not been paid. It claims entitlement to this sum pursuant to the retention of title clause.
3. It is the plaintiff's case that the retention of title clause in the contract constitutes a trust, so that the above sum is held by the first defendant on trust for the plaintiff. It is also contended that the existence of the trust gives the plaintiff the right to trace the proceeds of sale. Alternatively, the plaintiff contends that, in the event that the retention of title clause is held to create a charge rather than a trust, then the charge is a charge within the meaning of ss. 408 and 409 of the Companies Act 2014, such that it does not require registration in the CRO in order to be effective.
4. Bank of Ireland, the fourth defendant, contends that having acquired ownership of all debts of the company, both present and future, it has a competing claim to the relevant proceeds and therefore has a vested interest in the outcome of these proceedings. The receivers contend that the retention of title clause constitutes a charge and not a trust, and that such charge to be effective, required registration under s. 99 of the Companies Act. The Bank contends that since the charge was not registered, it is consequently void against creditors of the first defendant company. It is further contended by Bank of Ireland that it obtained and registered charges over the first defendant's assets, and is therefore entitled to the proceeds of sale, unless the plaintiff can assert a valid and enforceable right to them.

5. The agreed facts are those as set out in the amended statement of claim dated 28th March, 2017.

Agreed facts

6. The plaintiff is a private unlimited company with its registered office situate at Belgard Road, Tallaght, Dublin 24.
7. The first defendant is a limited liability company in receivership with its registered office situate at Railway Stores, Templeshannon, Enniscorthy, Co. Wexford.
8. The second and third-named defendants are sued in their capacity as joint receivers of the first defendant, J. Donohue Beverages Limited. Their address is at KPMG Restructuring, 1 Stokes Place, St. Stephen's Green, Dublin 2.
9. The fourth-named defendant is a bank, having its registered office situate at 40 Mespil Road, Dublin 4.
10. Between 1st July, 2015 and 13th November, 2015 the plaintiff supplied and sold drinks and related goods to the first defendant, subject to 'Comans General Conditions of Sale and Supply'. Clause 9 of these conditions provides as follows: -

"9.1 Notwithstanding delivery, or the passing of risk in and to the Goods, title to the Goods shall not pass to the Customer until all Invoices for the Goods are discharged to Comans in full in either cash or cleared funds, together with all other costs and expenses due and any other monies owed by the Customer for any other reason howsoever arising.

9.2 Until such time as title to the Goods passes to the Customer the Customer shall hold the Goods as Comans fiduciary agent and shall: (a) keep the Goods marked and stored separately from other goods so as to be identifiable as the property of Comans; (b) keep the Goods properly stored, protected and insured to their full market value; (c) give to Comans such information relating to the Goods as Comans shall from time to time require; (d) allow Comans to enter unto the Customer's premises for the purpose of inspecting the Goods at any time; (e) deliver the Goods up to Comans upon demand and if the Customer fails to do so, Comans shall be entitled to enter upon the Customer's premises or any other premises where the Goods are stored in order to retake possession of the Goods. This entitlement shall continue to subsist following termination of the Contract for any reason and is without prejudice to any accrued rights of Comans.

9.3 Until title in the Goods has passed to the Customer the Customer shall not be entitled to pledge, create a lien over or charge in any way whatsoever the Goods and if the Customer does so, all monies owing to Comans shall immediately become due and payable.

9.4 The Customer may (unless Comans revokes permission) in the ordinary course of its business resell the Goods at the full market price even though title has not

passed provided the Customer holds in a fiduciary capacity on trust for Comans from the proceeds of such resale a sum equal to the Price of the Goods under the Contract ('Comans' Proceeds') and keeps Comans' Proceeds separate from any monies of the Customer and third parties in a separate bank account clearly denoted as an account containing monies deposited for the benefit of Comans and in the case of tangible proceeds, properly stored, protected and insured.

9.5 The provision of clause 9 shall be without prejudice to the obligation of the Customer to purchase the Goods."

11. By a charge created on 9th April, 2015 and registered in the Companies Office on 23rd April, 2015, the first defendant company granted a charge to the bank over, *inter alia*, all monies and/or obligations which now are, or at any time may, become due or owing to the security holder by the company, on any account and all the other liabilities whatsoever of the company to the security holder whether actual or contingent and whether as principal debtor, guarantor, surety or otherwise. The court notes that in his affidavit dated 6th October, 2017, Michael Martin avers on behalf of the bank, that the bank acquired ownership of all of the debts of the company, both present and future, pursuant to a debt purchase agreement entered into on 20th March, 2006.
12. By a further charge created on 27th August, 2015, the first defendant company granted, *inter alia*, a charge to the bank over the book debts of the company, together with a floating charge over the undertakings and/or property of the company.
13. On or about 4th November, 2015, the bank appointed the second and third-named defendants as receivers of the first defendant company.
14. On or about 6th November, 2015, pursuant to clause 9.1 of the general provisions of the sale agreement, and by agreement with the receivers, the plaintiff recovered possession of all goods supplied and sold by it to the company, which had not yet been paid for or resold by the company, to the value of €51,910.85.
15. By letter dated 25th November, 2015, the plaintiff wrote to the receivers, seeking confirmation that all monies received by them from any resale of the goods by the first defendant, were being put into a separate account, to be held on trust for and on behalf of, the plaintiff. Following the commencement of these proceedings, solicitors for the receivers, the second and third defendants, notified the plaintiffs' solicitors that pursuant to a debt purchase agreement, all of the debts of the company, both past and future, had been acquired by the bank. The effect of this debt purchase agreement is that the book debts of the company have become the property of the bank.
16. The plaintiff alleges that wrongfully and in breach of the provisions of clause 9.4 of the general conditions of sale, the defendants have retained all proceeds of the sale of goods supplied and sold by the plaintiff to the first defendant between 1st July, 2015 and 13th November, 2015. The price of these goods which have not been paid for, but which were resold by the company, prior to the appointment of the receivers, is in the sum of

€334,362.58. The plaintiff claims that the sum is held, on trust for, or on behalf of the plaintiff, in the defendant company's premises. To date, the defendants have failed and/or refused to pay the said sum, or any part thereof, to the plaintiff.

17. It is agreed between the parties that contrary to clause 9.4, no designated account was, ever set up, and/or operated by the first defendant, for the purpose of holding the proceeds of sale for the benefit of the plaintiff.

The proceedings

18. A plenary summons issued on 16th March, 2016.
19. On 5th May, 2016, a memorandum of appearance was entered on behalf of the first, second and third defendants.
20. A statement of claim was issued on 19th May, 2016.
21. On 16th January, 2017 by order of Cross J., the governor and company of the Bank of Ireland was joined as co-defendant, and the plaintiff was given liberty to amend its statement of claim.
22. An amended plenary summons was issued on 26th January, 2017.
23. An amended statement of claim was issued on 28th March, 2017.
24. On 5th April and on 11th May, 2017, solicitors for the plaintiff wrote to the defendants, seeking their respective defences. Despite further demand and an extension of time to deliver defences up to the 4th July 2017, defences were not delivered.
25. On 5th July, 2017, the plaintiff issued a notice of motion for an order pursuant to Order 27 of the Rules of the Superior Courts, for judgment in default of defence.
26. On 6th October, 2017, the bank issued a notice of motion, seeking an order pursuant to Order 25 of the Rules of the Superior Courts, directing that the following be tried as a preliminary issue:-

“Whether the purported retention of title clause that the Plaintiff is seeking to rely on is void as against the creditors of J. Donohue Beverages Limited (In Receivership) (including, for the avoidance of doubt, the Governor and Company of the Bank of Ireland) for want of registration under section 99 of the Companies Acts 1963 (as amended) (now section 409 of the Companies Act 2014.)”
27. By order made on 27th November, 2017, the court directed the trial of the preliminary issue, in the terms set out above.

Relief sought by the plaintiff in the main proceedings

28. The plaintiff submits that by reason of the breach of contract, and/or breach of trust, and/or breach of fiduciary duty by the defendants, it has suffered and sustained significant loss and damage. In the alternative it is submitted that the defendants have

been unjustly enriched by the retention of the above sum, to the detriment of the plaintiff, and in consequence of which, the plaintiff submits, it is entitled to restitution.

29. The plaintiff seeks the following reliefs: -

- (a) A declaration that the defendants hold the sum of €334,362.58 on trust for or on behalf of the plaintiff;
- (b) An order directing the defendants to pay to the plaintiff the sum of €334,362.58;
- (c) Accounts and enquiries;
- (d) All necessary consequential orders, directions and reliefs;
- (e) Damages for breach of contract and/or breach of trust and/or breach of fiduciary duty;
- (f) Further or in the alternative, restitution for unjust enrichment;
- (g) In the alternative to the reliefs sought at (a) to (e) above, a declaration that the plaintiff is entitled to a charge over the book debts of the company to the value of €334,362.58;
- (h) Interest;
- (i) Further and other relief; and
- (j) Costs.

Trust or charge?

30. Thomas Courtney in *'The Law of Companies'* (4th Ed., Bloomsbury, 2016) at para. 20.057, discusses charges in the context of retention of title clauses. He notes that certain retention of title clauses have been held by the courts to constitute charges requiring registration. He further notes that retention of title clauses were of concern to unsecured creditors, who often found that assets that they thought were available to them were, in fact, still owned by the persons who supplied them to the company. He continues as follows: -

"The immediate relevance of retention of title clauses to company law is that the courts have been asked on many occasions to determine whether the vendor of goods actually retained ownership in them, or whether title in the goods passed to the purchaser company which then created a charge over the goods. Where the purchaser company created a registrable charge over goods the charging retention of title clause must be registered pursuant to s 409 of the Act. Where such charges are not registered, they will be void as against the company's liquidator and creditors. The assets which are the subject of the retention of title clause will then be available to meet the claims of the Revenue Commissioners and the company's unsecured creditors."

31. Two decisions were opened to the court which encapsulate the law on this preliminary issue. The first is a decision of Murphy J. in *Carroll Group Distributors Ltd v G&JF Bourke Ltd* [1990] ILRM 285. In that case, the plaintiff tobacco company supplied goods to the defendant company. Both companies carried on retail business. The goods supplied to the defendant were to the value of £54,517.26. The contract of sale contained a retention of title clause, which specified that no title in the goods would pass, until such time as the sums due to the plaintiff were discharged: -

"...the customer [Bourkes] shall hold all monies received for such sale or other disposition in trust for the company [Carrolls] and undertake to maintain an independent account of all sums so received and on request shall provide all details of such sums and accounts."

32. The defendant retained the right to re-sell the goods on to a third party on their own account, provided they held all monies received in trust for the plaintiff, in an independent bank account. The defendant subsequently went into liquidation. At the commencement of the liquidation, the liquidator, with the assistance of a representative of the plaintiff, identified goods to the value of £7,376.70 which had been supplied by the plaintiff and which remained in the possession of the defendants. It was agreed that the plaintiff was entitled to those goods in accordance with the retention of title clause. This reduced the amount owed to the plaintiff to £47,140.56. The plaintiff argued that a fiduciary relationship existed between the parties, such that this sum was to be held on trust for the plaintiff, and that the plaintiff was entitled to trace the proceeds into property which had been acquired by the defendants, in their capacity as trustees.

33. Murphy J. held at p483-484' that the issue of whether fiduciary obligations could be said to have been imposed, depended on the nature of the dealings between the parties, and the circumstances in which they contract. In his view, one would be slow to infer that a vendor and purchaser who engaged in an arm's length commercial transaction, undertook such fiduciary obligations. He was prepared to accept, however, that different considerations may apply where one party is selling the goods of another, on the assumption that fiduciary obligations apply, in relation to both the sale and the proceeds of sale. In order to ascertain whether or not such obligations arise, Murphy J. posed the following test: -

"It seems to me that the question must be asked: how does a party come to sell property of which he is not the owner? Is he selling as a trustee in pursuance of a power of sale? Is he selling as the agent of the true owner? Does the sale constitute a wrongful conversion? If any of those questions were answered in the affirmative it seems to me that the law would impose a trust on the proceeds of sale which would confer on the true owner the right to recover those proceeds from the actual seller or, if the proceeds were no longer in the seller's hands, to trace them into any other property acquired with them."

34. On the facts of the *Carroll* case, which bear a number of similarities to this case, Murphy J. ultimately concluded that that the arrangement between the parties, had created a

charge which required registration under s. 99, of the Companies Act, and that the absence of such registration rendered the charge void. He did not find that a fiduciary relationship had been created, and dismissed the plaintiff's claim. Murphy J. reached his conclusion based on a number of factors: the fact that the defendant were permitted to sell the goods in the ordinary course of business; the fact that the account in which proceeds were to be held had not been set up, and even if it had been, it would have contained an amount in excess of what was owed; and the fact that it was the substance of the transaction that determined registerability under the 1963 Act, and not the labels that the parties may attach to it.

35. The court observed on the last point, that though such labels may be a material consideration, they were not decisive. In the circumstances, the court considered that there was nothing wrongful about the sale of goods by the defendants to the sub-purchaser, who would become the lawful owner of the goods. The court stated that not only was such envisaged under the agreement, but that such was "*positively anticipated*" in the conditions under which the goods were sold to the defendants by the plaintiff company.
36. The second material decision opened to the court was that of Irvine J. of *Unitherm Heating Systems Limited v Kieran Wallace as official Liquidator of BTH Group LTD* [2015] IECA 191. This was the defendant's appeal from a decision of the High Court holding that the plaintiff's retention of title clause created a trust. Unitherm, the respondent, designed and supplied heating systems to the appellant, BHT Group Limited. The appellant company supplied heating and plumbing products and sold them on to third parties. The respondent applied its standard conditions of sale to the agreement. Part of these conditions was that the appellant be given a period of credit of sixty days to find a sub-purchaser, and that the proceeds of any sub-sale be held in trust for the respondent. The appellant went into examinership in February, 2012, and in April, 2012, a liquidator was appointed to the company. At that time, the respondent was owed €107,761.14 in respect of goods which had been supplied and invoiced to the appellant. €13,853.49 of this sum was in respect of goods which had been delivered and which were still physically present on the appellant's premises at the time of liquidation. The liquidator accepted that these goods were the subject matter of a valid retention of title clause, and the amount was duly discharged to the respondent. This left a balance of €93,907.65 in respect of goods which had been supplied by the respondent company, which goods had been sold on to third parties before the appointment of a liquidator.
37. The respondent submitted that it was entitled to payment of this sum, as it argued that a fiduciary relationship existed with the appellant, which gave rise to the creation of a trust. The respondents also submitted that they had a right to trace the proceeds of sale into the accounts of the appellant. It was argued by the appellant that the standard conditions of sale had created a charge in favour of the respondent, in respect of goods which it had supplied, and which goods had been paid for by customers of the appellant. The appellant submitted that because the charge had not been registered in accordance with s. 99, that the charge was void as against the official liquidator. In the High Court, Peart J. concluded

that the case was distinguishable from the *Carroll* decision, such that a fiduciary duty was owed to the respondent, and that the proceeds of sale were held in trust for the company. He also held that the respondent was entitled to a full account and inquiry, in order to enable it to trace the monies that had been received by the appellant from the sale of goods.

38. On appeal, Irvine J., in delivering the majority judgment, overturned this decision. She held that the relationship was always intended to be that of creditor/debtor, and that the objective of the clause was to secure the respondent's interest against the risk of non-payment. In her view, the clause was specifically designed for the business in which the respondent was engaged. She stated that most recent authorities tended to treat clauses of this nature as giving rise to charges, which required registration. She observed that in such cases, the courts have been reluctant to infer the existence of a fiduciary relationship.
39. Irvine J. identified the following factors as influencing her decision: the appellant's right to sell the goods in the ordinary course of business; the credit period that was afforded to the appellant; that the standard conditions of sale sought to impress all monies received for the sale with a trust; and that no separate account had been set up. Irvine J. considered relevant the fact that the wording of the standard conditions of sale referred to "seller" and "buyer", as opposed to "principal" and "agent". She was also of the view that the agreement seemed to be void of standard obligations which may be expected in an agency arrangement, such as a provision which prevented the agent from competing with its principal. The clause provided that upon the sale of the respondent's goods, the appellant was deemed to have assigned to the respondent the benefit of any claim which it had against the customer, which Irvine J. regarded as being incompatible with the appellant acting as an agent of the respondent.

Submissions on behalf of the plaintiff

40. The plaintiff submits that the provision of the general conditions of the sale and supply of goods amounts to a trust, and that the first defendant was acting in its capacity as a fiduciary or trustee, of the plaintiff. The plaintiff submits that the arrangement specified at clause 9.4 has a number of features to support this contention: -
 1. The fact that the plaintiff grants permission to resell the goods which is revocable;
 2. The fact that the plaintiff requires the goods to be resold at "*the full market price*" and thereby controls or dictates the price of the goods that can be fixed by the company;
 3. The fact that the right to resell the goods is not an unfettered right, but is conditional upon the agreement of the company to hold a sum of money in a "*fiduciary capacity*" and "*on trust*";
 4. The fact that the sums are to be held in such "*fiduciary capacity*" are only equivalent to the cost price at which the goods were purchased from the plaintiff,

and do not include additional sums paid to the customer by the third party in the way of a profit margin; and

5. The express requirement to keep those sums in a separate account on deposit for the benefit of the plaintiff.

41. The plaintiff submits that the only monies to be put into the separate account was the portion equivalent to the cost price of the goods, rather than the entire sum received for the sale. The plaintiff submits no attempt is being made by it to capture an additional sum over which it has no entitlement, and that the fiduciary arrangement applies only in respect of the proceeds of sale, and not to the goods generally. The plaintiff submits that the principle difficulty for Murphy J. in the *Carroll* case was the fact that all of the proceeds of sale stood to be subject of the clause, due to the manner in which the clause was devised. The plaintiff suggested to the court that if the plaintiff in that case had sought only the amount owed, rather than the entire proceeds of sale, that there existed the potential for the court to have reached a different outcome.

42. The plaintiff also submits that in *Carroll*, there was an express disavowal of agency within the agreement, such that the defendant was to act on its own account, and not as an agent of the plaintiff. The plaintiff submits that such a provision is not featured in its contract with the first defendant in the present case.

43. The plaintiff submits that in the *Unitherm* decision, the clause expressly stated that the buyer was deemed to have assigned to the company the benefit of any claim, including the right to trace goods and proceeds, so that the respondent was permitted to pursue the sub-purchaser. The plaintiff submits, as an important feature which distinguishes its claim from that of *Unitherm*, that they do not have a chose in action, such that they do not have a right to pursue the sub-purchaser, in the event that the first defendant does not receive payment for the sale of the goods to a third party.

44. The plaintiff submits that it is clearly and expressly set out by the inclusion of the phrase "*to the benefit of*", that it was agreed that the sum was to be held in a separate account, for the plaintiff's benefit. The plaintiff submits that the sum was not to be utilised by the first defendant, as part of its general trading funds, for the duration of the credit period. The plaintiff submits that a credit facility, like the credit facility of sixty days that was afforded in *Unitherm*, would be of benefit to the parties in the present case, particularly if they are to be engaged in an ongoing business relationship, where the defendant is granted a period of time in which to find a seller, to whom it can contract the goods. The plaintiff submits that the inference that was drawn by Irvine J., that the credit facility was a strong indicator against a fiduciary arrangement, cannot be applied to the present case, as the phrase "*to the benefit of*" was absent from the clause in *Unitherm*.

45. The plaintiff submits that the argument was not advanced in *Unitherm* as to whether it was possible to have a discrete fiduciary obligation, quite apart from the nature of the general over-arching relationship of the parties. On foot of this observation, the plaintiff queries whether it is indeed necessary to examine the over-arching relationship between

the parties, in order to determine this preliminary issue. The plaintiff submits that there is nothing to stop parties who are engaged in a commercial setting, from reaching a more nuanced agreement; whereby goods are permitted to be sold, but that a portion must be retained for the benefit of the seller, and the fiduciary obligation is confined only to the cost price of the goods. The plaintiff submits that the main benefit of having such an arrangement is to ensure that the seller is guaranteed its money back, and that it would not have to rank with other credit-holders.

46. The plaintiff submits that the first defendant was obliged to keep the sum in a separate bank account that was clearly denoted as being for its benefit. The plaintiff submits that in *Unitherm*, the bank account was never opened, despite the contractual obligation that was on the appellant to do so. The plaintiff submits that at no prior stage had the respondent sought to establish that the account existed, or that proceeds had, in fact, been lodged into the account. The plaintiff submits that had the account been opened, the clause would not have been consistent with the appellant holding the money on a fiduciary basis, because an amount in excess of the sum due would have been in the account.
47. The plaintiff also submits that any interest that might accrue on that money would also belong to the plaintiff.

Submissions on behalf of the third defendant

48. The defendant submits that the law is well-established, and that it is clear from the case law that the retention of title clause creates a charge rather than a trust. The defendant submits that the registerability of charges of this nature is unaltered by the coming into effect of the 2014 Act on 1st June, 2015. The defendant submits that at no stage did the plaintiff seek to register any charge with the Companies Registration Office pursuant to s. 409, and that the charge is therefore void for non-registration.
49. The defendant submits that the plaintiff's attempts to distinguish the present case from the case law represents an inherent misunderstanding of those cases, and of the rationale applied by the courts. The defendant submits that in both *Carroll* and *Unitherm*, the court found that the facts indicated that the parties were exercising the rights of a charge, which required registration. The defendant submits that the facts are almost on all fours with those of *Unitherm*, and that the terms and conditions in *Unitherm*, and Irvine J.'s ruling thereon, apply with equal force to the general conditions of the present case. The defendant submits that the similarities with *Unitherm* are as follows: that the vendor's conditions provided for the extension of credit to the purchaser; that the purchaser was licensed to sub-sell the goods in the normal course of business; that a fiduciary or trust relationship was stated to exist with regard to proceeds; and that the purchaser was required to place the proceeds in a separate account.
50. The defendants submit that the five factors asserted by the plaintiff (as set out in para. 40 of this judgment) do not, individually or collectively, provide any basis to warrant a distinction being made, nor, it is submitted, do they permit the court to make a finding that the proceeds were held under a trust, rather than a charge. The defendant considers

each of these factors in detail in its submissions, which the court proposes to summarise as follows.;

51. Firstly, the defendant submits that it is clear under the Sale of Goods Act that the parties are free to stipulate their own conditions in relation to passage of title, and/or the withdrawal or cessation of any possessory right, conferred upon the purchaser. The defendant submits that it follows that the licence given for the purchaser to enter into a sub-sale might be conditional on such terms as the parties see fit. However, the defendant submits that the mere fact that the authority to sell might be revoked, does not provide any legal basis for taking the view that a trustee/beneficiary relationship was in existence, nor, it is submitted, does it provide weight to the contention that when sold, the proceeds of such goods were to be held in trust. The defendant submits that revocability is inherent in retention of title clauses generally and that in *Unitherm*, the right of the purchaser to retain possession of the goods automatically ceased, if the purchaser committed an act of bankruptcy; if a receiver was appointed; or if a petition/resolution was passed to have the company wound up. The defendant submits that in those circumstances, the goods were required to be returned.
52. Secondly, the defendant submits that the fact that the first defendant had authority to re-sell the goods at full market price does not distinguish this clause from the case law as, it is submitted, in *Unitherm*, the buyer was permitted to sell the goods "*in the normal course of the buyer's business*". The defendant submits that it is the normal course of business of a trader to sell goods at the best price reasonably achievable, and that it is unlikely for the buyer's decision to re-sell the goods at a particular price to be motivated by other concerns. The defendant accepts that by the terms of the license to sell, the buyer may be restricted in how any such sub-sale is to take place. Here, the defendant submits that there was a restriction that the goods might only be sold to third parties, being parties other than a subsidiary or holding company of the buyer, or to an associated company. The defendants submit that in *Unitherm*, sub-sale to related companies was prohibited. The defendant submits that it was never suggested or decided, that such a restriction might lead to a finding by the court that the retention of title clause constituted a trust, and not a charge.
53. Thirdly, the defendant submits that there is no factual distinction between the general conditions in the present case and those in *Unitherm*. The defendant submits that clause (b) of the agreement in *Unitherm* specifically referred to the fact that the proceeds of sale "*shall be held by the buyer on trust for the Company (to be lodged in a separate account by the buyer)*", yet the court proceeded to hold that that arrangement created a charge, and not a trust.
54. Fourthly, the defendant submits that the fact that the proprietary interest is limited in amount underlines the debtor/creditor relationship that is implicit in the clause. The defendant submits that this is powerful evidence that the relationship was not that of trustee/beneficiary, and it is submitted that the attempted distinction by the plaintiff fails

to understand the guiding principles of how a trustee relationship is distinguished from a security relationship.

55. Fifthly, the defendants submit that the requirement that the monies be kept in a separate account was a matter specifically addressed in *Unitherm*. The defendants draws the court's attention to the passage of that judgment where Irvine J. held that the requirement that the monies be kept in a separate account was a feature which often supported the existence of a fiduciary duty.
56. The defendants submit that there is a need to examine the substance of the transaction rather than the labels which the parties may attach to it. It is submitted, as averred to in the affidavit of Mr Michael Martin, that there is no evidence that the parties had intended that the company would sell the plaintiff's goods as trustee in possession, and that such a relationship is not found in the terms and conditions of sale, the contractual provisions, the trading documentation, or the manner in which the parties conducted their business.
57. The defendant submits that if a trusteeship was in existence, that there would be an obligation on the defendant to account for the entire proceeds of sale, rather than a portion thereof. The defendant also submits that the non-creation of the separate bank account is fatal to the plaintiff's claim and is sufficient evidence for the court to find that it constitutes a charge and not a trust. The defendants submits that this situation could have been overcome by the creation of an arrangement, which arrangement created a charge on the day it was entered into in order to encompass an ongoing contractual relationship, on terms to be agreed upon by both parties.
58. The defendant submits that a purported entitlement to trace is quite different to the normal incidences of a trustee/beneficiary relationship, and that this has been highlighted in title clause creates a charge, and not a trust.

Registerable or non-registerable?

59. The plaintiff has maintained an alternative argument that Sections 408 and 409 of the Companies Act 2014 are now the relevant sections in relation to the registration of charges created by companies and that if the court were to find that the retention of title clause, in fact, creates a charge, it is a charge which is excluded from registration requirements under s. 408 of Companies Act 2014. The plaintiff submits that what is owed is either "cash" or "money credited to the account of a financial institution or deposit", so that it comes within the scope of excluded charges under ss. (a) or (b) of s. 408(1).
60. Section 408 provides

“(1) In this part –

‘charge’, in relation to a company, means a mortgage or a charge, in an agreement (written or oral), that is created over an interest in any property of the company (and in section 409(8) and sections 414 to 421 includes a judgment mortgage) but

does not include a mortgage or a charge, in an agreement (written or oral), that is created over an interest in –

- (a) Cash,*
- (b) Money credited to an account of a financial institution, or any other deposits,*
- (c) Shares, bonds or debt instruments,*
- (d) Units in collective investment undertakings or money market instruments, or*
- (e) Claims and rights (such as dividends or interest) in respect of any thing referred to in any of paragraphs (b) to (d);*

'property', in relation to a company, includes any assets or undertaking of the company.

409. (1) Every charge created, after the commencement of this section, by a company shall be void against the liquidator and any creditor of the company unless either the procedure set out in –

- (a) subsection (3) – the 'one-stage procedure', or*
- (b) subsection (4) – the 'two-stage procedure',*

With respect to the charge's registration is complied with."

61. The defendant submits that the plaintiff's alternative argument has no regard for the genesis of s. 408, or of the detailed commentary on s. 408, in particular that of Thomas Courtney. The defendant submits that this argument represents an unconvincing attempt to understand the operation of the clause. The defendant submits that the plaintiff is getting a charge over a chose in action, namely the right to payment by the ultimate customer, in respect of the price of the goods, which has a monetary value. However, the defendant submits that the charge represented in clause 9 is not a charge over "cash" or "money credited to an account of a financial institution or other deposits", on the basis that, it is submitted, the agreement created a charge over future proceeds of sale. The defendant submits that such future proceeds may or may not be cash. The defendant submits that clause 9.4 is expressed to deal with the proceeds of re-sale by the company, and that such proceeds exist in the first instance as a chose in action, which may or may not be turned into cash or a bank transfer.
62. The defendant submits that clause 9.4 therefore represents a charge, not only over the contingent possibility of there being cash, but also over all phases of the proceeds during their realisation. The defendant submits that on this basis it is a charge over property, including property which is not excluded from the definition, and must therefore be registered pursuant to s. 409(1), or be void against the liquidator and any creditor of the company.

63. The relevant extract from Courtney's *The Law of Companies*' (4th Ed., Bloomsbury, 2016) is as follows: -

"(i) Charges over cash

20.048 A charge over an interest in 'cash' does not require to be registered under s. 409(1) of the Act because 'cash' is one of the classes of property that is excluded by s. 408(1)(a). The Act does not define 'cash' but its ordinary dictionary meaning is money in coins or notes in any currency. An example of where a charge might be taken over cash is a floating charge over the entire of a company's undertaking and assets where the company is, say, a shop which would include the cash in the cash register or sale. If that floating charge were not registered, while it may be void as against the liquidator and any creditor in respect of other property, it would validly secure the cash.

*20.049 'Cash' must be distinguished from choses in action that may be subsequently converted to cash. Accordingly, book debts are not cash and neither are the proceeds of the future sale of a property. While both book debts and the proceeds of the future sale of the property may be realised, ultimately, as cash, until they are realised they are not cash and charges over book debts and the proceeds of sale of a property are registrable. Under the prior Companies Act, while a charge on land was registrable, it had been held in *Re Kum Tong Restaurant (Dublin) Ltd; Byrne v AIB Ltd [1978] I.R. 446* that a charge over the proceeds of sale of the land was not registrable (although in practice such charges were often registered). A charge on the proceeds of sale of land can arise where, pending the sale of a business premises and the proposed purchase of another, a lender advances bridging finance to the company to enable it to purchase the other property. The lender's security will often be to require a solicitor to give an undertaking to hold the proceeds of sale on trust for the lender until the existing premises is sold. Now, a charge on the proceeds of sale of land is registrable as it will fall to be a 'charge' as defined by s. 408(1) and while charges over 'cash' are excluded, the proceeds of sale of property are not 'cash' and since they do not come within the other heads of exclusion, such a charge is registrable." (Emphasis added)*

(ii) Charges over money credited to a bank account or other deposit

20.050 Section 408(1)(b) of the Act excludes from the definition of registrable charge an interest in 'money credited to an account of a financial institution, or any other deposits'. Accordingly, the classic charge over a deposit or other account in a bank or financial institution, will be enforceable as against a liquidator or other creditor without being registered."

64. In consideration of the plaintiff's alternative submission, the court is of the view that the charge did, in fact, require registration. The language of s. 408 stipulates that charges that do not require registration are those that create an interest over cash, and the court

is persuaded by the submission of the third defendant that the charge over future proceeds may or not be cash.

65. The court's decision is further influenced by the fact that no bank account was created in which to hold any future proceeds and no steps appear to have been taken by the plaintiff to establish that the account was created. It appears that the plaintiff did not fully anticipate or pre-existing jurisprudence. The defendant submits that in such instances, the vendor usually grants terms which are more consistent with a relationship of debtor/creditor: the purchaser is not obliged to pay for the goods until the expiry of the agreed credit period; and that the vendor's entitlement to the proceeds is generally limited by the amount of the debt owing on the goods; that the vendor seeks to maintain a proprietary right to a particular value equivalent to the debt outstanding, rather than to the entire proceeds (which, in their submission, is precisely what a charge is).

Decision

66. Two issues stand to be determined by this court. The first issue is whether clause 9.4 of the general conditions creates a charge. Secondly, if the court does find that a charge has been created, the issue arises as to whether it is a charge that requires registration under the Companies Act 2014.
67. On the basis of the facts presented to this court, and on an analysis of the relevant case law, this court takes the view that the arrangement created a charge. The court is not persuaded that the charge falls within the notable exceptions under ss. 408 and 409. The consequence of this finding is that the charge is void for non-registration.
68. In the course of both its oral and written submissions, the plaintiff has made a valiant, yet unsuccessful, attempt to distinguish this case from the relevant case law. The plaintiff raised a number of factors which it believed distinguished the case, in an effort to persuade the court that it is entitled to the relief sought in its plenary proceedings. The court notes that there are in fact, some linguistic and factual differences between the retention of title clauses that were at issue in the *Carroll* and *Unitherm* cases. Notwithstanding those differences, the same conclusion was reached, namely, that the clause created a charge and not a trust. The court observes that the decision of Irvine J. in *Unitherm* is the most recent authority on the issue, and this recent reiteration of the law indicates that in continuing contracts for the sale of goods the actual relationship between buyer and seller is that of creditor/debtor in which retention of title clauses offer potential security to the seller by way of charge over the proceeds of sale. Retention of title clauses in such contracts do not establish a relationship of principal/agent from which a trust might be inferred.
69. In the course of its submissions, the plaintiff sought to distinguish its retention of title clause from those of *Carrolls* and *Unitherm*. Namely, that its retention of title clause does not possess the right to pursue the sub-purchaser, in the event of non-payment, unlike the respondent did in *Unitherm*. Its requirement that the defendant hold the proceeds of sale of its products in a separate designated account is limited to the sale price due to it and does not include any profit achieved by the first defendant. While there

are differences in the wording of the three retention clauses under consideration, those differences do not alter the essential characteristics and purpose of those clauses, which is to provide security for payment of monies due in the context of an ongoing commercial contractual arrangement. Just as in the *Carroll* case, where Murphy J. looked at the facts of the arrangement rather than the labels attached to it, to determine the effect of the retention of title clause, this court has on the facts of this case which in broad terms mirror the facts in *Carrolls*, concluded that this retention of title clause creates a charge, and not a trust.

70. As to the plaintiff's alternative submission, that the charge does not require registration to be effective, the court is of the view that the charge did, in fact, require registration. The language of s. 408 stipulates that charges that do not require registration are those that create an interest over cash and money credited to an account of a financial institution, or any other deposits. The court is persuaded by the submission of the third defendant and the analysis of Courtney set out above, that the charge over future proceeds is not cash within the meaning of Section 408.
71. Had a bank account been set up to hold the proceeds of sale of the plaintiff's goods, then the exception at s.408(1)(b) could well have applied. However in common with the retention of title clauses in the *Carroll* and *Unitherm*, no such arrangement was put in place, nor was it insisted upon by the plaintiff, perhaps in recognition of the logistical difficulties of administering and overseeing such an arrangement.
72. For the foregoing reasons the court holds that the plaintiff's retention of title clause in its contract with the first defendant created a charge and not a trust. The charge is not one which comes within the exceptions specified in s.408 (1) of the Companies Act 2014, and therefore required to be registered in order to be effective against the receivers and creditors of the first defendant company.