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IN COMMERCIAL TRANSACTIONS

By IWAN DAVIES

Title retention by a seller of land is not a particularly new phenomenon in England. The English mortgage can theoretically be characterised as a transfer of property to a proviso for retransfer or redemption on payment of the debt.[1] The 1970s however, saw the increasing development of transactions producing a similar commercial result in personality namely that of security financing. Finance leasing[2] and credit factoring agreements[3] are an aspect of this phenomenon and together with retention of title clauses by sellers of goods[4] underline what is a feature of our insolvency law which is the low ranking of unsecured creditors.[5]

Although the *pari passu* principle of distribution between creditors remains a cardinal principle of English insolvency law[6] the position has become precarious for unsecured creditors because "security devices abound"[7] and secured creditors are entitled to have recourse to their security before anyone on the insolvency of the debtor.[8] It follows that there are occasions when there will be little left to distribute to the unsecured creditors and this is especially the case since the number of

preferential claims on insolvency have increased over the last few years:

> "The legislature seems to have taken the view that every time a new law or duty is imposed or a new employment right given it must in some measure be made preferential."[9]

Moreover, a trade creditor may be very seriously prejudiced if he supplies costly goods and receives no payment for them as a result of the liquidation of a customer, especially that of a major customer. This is often referred to as the "ripple-effect" phenomenon[10] because the insolvency of the customer may affect the trading ability of the creditor to such an extent that it eventually leads to the creditor's own liquidation. Furthermore, the extent of the problem is masked by the statistical data available[11] which is inadequate in at least two respects: first, no mention is made of the estimated assets of the insolvent; secondly, the amount or division between secured and unsecured creditors of the distribution of assets is also not shown.

The quest in recent years has been for greater security among creditors and absolute title financing is only one aspect of this trend.[12] Reservation of title clauses, finance leasing agreements and especially factoring with



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