



# Recovery of goods - Retention of Title clauses explained

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## A briefing from our Dispute Management team

**A retention of title clause represents contractual protection used by a supplier of goods to protect themselves against the buyer's default on payment or the buyer's insolvency.**

Such clauses have become commonplace in standard trading terms and general sale of goods contracts since the landmark 1976 case known as [Romalpa](#). This case established a right in English Law for a supplier to retain and assert his title to the goods supplied and to assert a tracing claim against the proceeds of sale of any goods sold and not paid for. This right survives the buyer's insolvency.

### Development of Retention Clauses

Since the Romalpa case, a large body of cases has developed the law in this area, which has left many uncertain about the extent of clauses permissible and the enforceability of some types of retention clauses.

Retention clauses fall into 2 basic categories: the 'simple' clause and the 'extended' clause. A simple clause merely reserves the suppliers title to particular goods until they are paid for. An extended clause reserves the same rights as the simple clause, and may also purport to secure the price of all goods supplied, or all moneys due; and/or it may lay claim to the proceeds of sale and/or the final product of a manufacturing process.

The Courts are willing to uphold simple retention clauses in most cases, provided the basic ingredients of the claim (discussed below) can be evidenced, namely incorporation, validity, identification. However, the Courts have proven to be hostile towards the enforcement of extended retention of title clauses, which have been viewed as a method of a supplier taking more out of a business than they are putting in;

to the detriment of the general body of unsecured creditors (i.e. reselling goods without accounting for part-payments already received or claiming products of greater value than the goods supplied).

The issue of retention clauses arises most often when one party in a supply chain enters into a formal insolvency process. It is therefore useful to re-cap whether a retention clause is effective in these circumstances. The key aspects are as follows:

### Incorporation

Contractual conditions must be brought to the notice of the party to be bound by them before or at the time when the contract is made. If they are not communicated to the buyer until after the contract is concluded, they will be of no effect. If the party tendering the document did what was reasonably sufficient to give the other party notice of the conditions, and if the other party knew that there was writing or printing on the document, but did not know it contained conditions, then the conditions will become the terms of the contract between them.

The question whether the party tendering the document has done all that was reasonably sufficient to give the other notice of the conditions is a question of fact in each case, in answering which, a Court must look at all the circumstances and the situation of the parties.

Conditions may be incorporated by a "[course of dealing](#)" between the parties where each party has led the other reasonably to believe that he intended that their rights and liabilities should be ascertained by reference to the terms of a document which had been consistently used by them in previous transactions.

It is for the supplier to establish that his retention clause forms part of the contract with the buyer ([John Snow & Co Ltd v DBG Woodcroft & Co Ltd \[1985\] BCC 54](#)).

### Validity

Where a retention clause amounts to a charge over a company's property, unless the charge is registered at Companies House it will be void against an administrator or liquidator. A retention agreement is

defined by section 251 Insolvency Act 1986 as an agreement for the sale of goods to a company which **does not constitute a charge** on goods but under which if the supplier is not paid and the company is wound up, the supplier will have priority over all other creditors of the company with regard to the goods supplied. To fulfil this Insolvency Act definition requires that the goods were supplied under an agreement for sale (not contracts for work and materials), that legal title must have been reserved to the supplier, and title must be reserved in all circumstances not just administration and receivership.

Suppliers like the all encompassing security of extended retention clauses, but the Courts are hostile to upholding their validity because they can fall into the grey area between successful retention clauses, and unregistered charges. To be a valid retention clause, the security must, on behalf of the supplier, retain a proprietary interest in his own property, which is not the case when the supplier attempts to retain title in manufactured products (discussed below).

Generally the Courts are more likely to hold a simple retention clause as valid, as simple clauses tend to only retain proprietary interests in the suppliers own property rather than, for example, manufactured goods (which will amount to a registerable charge). Where a clause contains both a simple and an extended retention clause, depending on the remaining terms of the contract, if the extended retention clause is held to be invalid, the simple retention clause may still bind the purchaser.

### Identification and mixing

It is a fundamental principle of making a retention of title claim, that the supplier must be able to identify their goods to establish a successful claim to require return of the goods it supplied. Any supplier claiming under a retention clause must (if they have established the retention clause was incorporated in the contract) be able to positively state the process by which they can identify each item over which they are claiming ownership and title. If identification cannot be achieved (either conclusively or on the balance of probabilities), then the claim will fail.

The supplier faces greater difficulties where the goods supplied have been mixed or otherwise used in a manufacturing process. Where a supplier attempts to claim retention of title over a product mixed with other materials supplied by third parties, this may be construed as an attempt to create a charge over the finished product which unless registered at Companies House will be void against an Administrator or Receiver. The reason for this is because the supplier is seeking a proprietary interest in property of the Company or property of a third party in addition to their own property, rather than retaining a proprietary interest in solely their own property.

Therefore where the retention clause includes an attempt to retain title in mixed manufactured products it will be void against an administrator unless registered as a charge at Companies House.

### Buyer insolvency

On entering into an insolvency process (e.g. Liquidation, Administration or Receivership), the duly appointed insolvency practitioner (IP) will want to identify all goods belonging to the insolvent company that can be sold for the benefit of creditors. This will necessarily include a review of supplier terms and identification of goods subject to retention clauses.

Once the IP has been placed on notice of the possibility of a retention of title claim, unless the claim can be conclusively rejected, it would not be advisable for the IP to sell those products that remain the subject of an unresolved retention of title claim. Any sale of those goods when on notice of an unresolved retention of title claim could result in personal liability for the office holder in the tort of conversion.

An IP will usually only deal with goods subjected to unresolved retention of title claims subject to the agreement of the relevant supplier.

### Conclusion

This is a complex and continually developing area of law, where it will be important to ensure that contractual terms are clear, and do not form void unregistrable charges. Suppliers must act quickly and they should ensure that where possible their goods are marked and identifiable, and this will then speed up the process of resolving retention claims following a supply chain insolvency.

### More information

To discuss your individual requirements, please contact Paul Caldicott or Andrew Davies in our Dispute Management team:



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