



LITIGATION AND DISPUTE RESOLUTION

Retention of Title Clauses in the Context of the COVID-19 Crisis

by **Jill Callanan, Clare Dowling**

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The current COVID-19 pandemic has resulted in potentially severe economic consequences being faced by many businesses. Sellers of products may be concerned as to whether their customers will continue to be in a position to adhere to credit terms for payment of goods supplied. In the event of non-payment, sellers may find themselves placing greater reliance on the terms of the contract which is in place with their customers.

Businesses, whether the seller or the buyer, should take the opportunity to review the terms of their current contracts to identify the entitlement of the seller to retain title to goods where they are not paid for in full, i.e. a retention of title (ROT) clause.

Such a clause, if valid, will mean for the seller the difference between being entitled to seek the return of specific unpaid goods in the buyer's possession or simply being ranked as an unsecured creditor with little or no chance of achieving a dividend in the event an insolvency situation occurs.

What is a ROT clause?

A ROT clause, simply stated, is a clause that prevents ownership of goods passing to the customer until the seller has been paid in full. Without a valid ROT clause, title in the goods will usually pass on delivery of the goods.

A valid ROT clause

Typically, there are two main types of ROT clauses: a 'simple' clause, the purpose of which is to reserve title in specific goods supplied until those goods are paid for in full; and an 'all sums due' clause, which usually provides that the seller retains title to any and all goods supplied until **all** outstanding monies owed to the seller have been discharged.

A typical ROT clause will usually:

- Be incorporated into the agreement
- Provide that the seller retains legal and beneficial title to the goods until full payment has been received
- Give the seller the right to enter the customer's premises to retrieve the goods upon non-payment in accordance with the agreement
- Oblige the customer to store the goods separately from those belonging to the customer or a third party
- Oblige the customer to mark the goods as belonging to the seller
- Prohibit the customer from fixing the goods to property without the seller's consent
- Enable the customer to check that goods are appropriately marked and stored
- Specify the trigger events enabling the seller to enforce the ROT clause

Problems which can arise:

Although in theory a ROT clause is quite straightforward, in practice they have been increasingly drafted in such a manner that it creates a risk that such a clause can be deemed to have created a charge over the goods, rather than simply retaining title. Where it is found that a charge has been created, this can lead to problems as a valid charge is subject to certain registration requirements. Some examples are outlined below:

All sums due clause. As mentioned above, this clause reserves title in all goods supplied to the customer until the customer has settled all outstanding invoices from the seller. This avoids the need to be able to identify specific goods at the customer's premises relating to specific unpaid invoices.

If used, this should be in a separate subclause from the basic ROT clause. This means that if the all sums due clause was ever held to be invalid as an unregistered charge by a court, there is a possibility of severing the clause so as not to invalidate the rest of the ROT clause.

Mixed goods clause. This purports to allow the seller to claim an interest where the goods supplied under the contract are likely to lose their identity due to being used in the manufacture of another product. However, there is a strong likelihood that an attempt to reserve rights in new goods that belong to the customer would be deemed to be a charge by the courts and not a valid ROT clause.

Proceeds of sale clause. This allows the seller to claim the proceeds of any subsequent sale of the goods. There is a risk that this clause would be deemed to be a charge and it is advisable to avoid, where possible.

Conclusion

It is important that sellers have a carefully drafted ROT clause in their contracts, which takes account of the nature of the goods being supplied and the relationship between the parties.

It is also advisable to ensure that the ROT clause is properly incorporated into the contract with the customer by ensuring that the customer is aware of the clause and has accepted it at the outset of the relationship or ensuring that all correspondence confirms that all goods supplied are subject to the ROT.

If your customer is in financial difficulty, act quickly to recover your goods (while ensuring that you are adhering to the terms of the ROT clause). Thereafter, if the customer does go into liquidation, receivership or examinership, notify the liquidator, receiver or examiner as soon as possible, identifying the goods in question.

If drafted and incorporated correctly, having a valid ROT may mean that you will at least be able to recover something as opposed to little or nothing as an unsecured creditor in an insolvency situation.

Should you require further information in relation to any of the matters raised in this article please contact Jill Callanan (jcallanan@lkshields.ie) or Clare Dowling (cdowling@lkshields.ie).

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