



GUIDANCE Note

Retention of title - to goods, materials and plant/equipment

This guidance is intended to inform Members of the issues, risks surrounding circumstances in which parties can legitimately seek to retain title/ownership to/of their goods, materials and plant until payment has been made.

Retention of title: how it works in practice

There are limited circumstances in which you can legitimately seek to recover goods, materials, plant and other items supplied by you. You will need to consider:

- Is the business in possession of the items insolvent?
- Do you have a ROT clause included in the contract?
- Do you have legitimate access to the location in order to recover the items in question?

1. Title/ownership of goods

Title is the word used to refer to ownership of goods or other possessions.

Without a retention of title clause ('ROT clause'), the standard position is that title to goods generally passes upon delivery (not payment).

Most standard form construction contracts and parties' terms and conditions will therefore expressly deal with the issue of title seeking to clarify or reverse the above position.

a. Goods only contracts

The starting position under the s.17 Sale of Goods Act 1979 is that property or title in materials will normally pass when the parties intend it to pass. So where there is a contract in place, you look to the contract to determine the parties' intention. If the contract is unclear the conduct of the parties and the circumstances of the case should be considered and there is a high risk that the natural presumption will be in favour of ownership passing on delivery rather than payment.

SGA 1979, s.25 states that if a main contractor who buys or agrees to buy goods and who, with the consent of the sub-contractor, takes possession of them and then passes them on to an employer in good faith, and that third party has no knowledge of any conditions relating to the sale of the materials (e.g. a ROT clause in the sub-contract), the title in them can pass to the employer and the sub-contractor will be unable to recover them - even if the title in them had not passed from the sub-contractor to the main contractor, because the main contractor had not paid for them.

SGA 1979 only applies where the contract in question relates to the supply of goods only (e.g. supply orders from wholesalers and manufacturers).

Many sale of goods only contracts therefore contain a ROT clause which states that property in materials supplied will not pass to the buyer until they have been paid for.

A contract for supply and installation would therefore normally qualify as a contract for the transfer of goods within the meaning of the Supply of Goods and Services Act 1982 (SGSA 1982). Therefore, the above provisions do not apply where the supplier/sub-contractor is contracted to supply and install the materials.

b. Supply and install contracts

Under the SGSA 1982 title will pass when the parties intended it to pass. If the contract is unclear the conduct of the parties and the circumstances of the case should be considered and there is a high risk that the natural presumption will be in favour of ownership passing on delivery rather than payment.

As a result, title in materials will only pass to the employer, even if it has paid for them in an interim valuation, where title has passed from the sub-contractor to the main contractor.

Therefore, if the main contractor does not have title to the materials or goods it cannot pass it to the employer.

If the sub-contract in question states under a ROT clause that transfer of ownership of materials only occurred once payment had been made to the sub-contractor, the fact that the main contract provides that ownership passes to the employer once the employer has paid is irrelevant as ownership has not yet passed to the main contractor. The unpaid sub-contractor is entitled to remove its materials from the site.

However, neither the above legislation or a ROT clause, will work where the goods or materials have been incorporated into the works.

2. What does a ROT clause do?

In essence, a ROT clause provides that title to the goods does not pass to the buyer until payment has been made.

You can take a number of steps to reduce your risk in relation to payment and ownership of goods:

- carry out checks on the client's financial status to determine how likely insolvency is before agreeing to enter into the contract
- seek advance payment for the goods – usually requires either an advanced payment bond and/or a vesting deed (which we can supply in favourable terms);
- sometimes it may be appropriate to enter into a contract with the employer directly
- agree to only short payment periods or milestone payment periods, in the contract with the contractor
- ROT clause

Most supply only goods, materials or plant businesses use standard written terms and conditions which include a ROT clause. The aim of a ROT clause is to reserve ownership or title in the goods to the seller (e.g. a sub-contractor) until the price is paid in full, even though the goods have been delivered to the buyer (i.e. to the contractor on site).

A ROT clause may provide some financial protection in the event of main contractor insolvency, if the goods remain unincorporated, accessible, safely stored and readily identifiable.

Whilst most standard form contracts allow for payment in respect of materials delivered but not yet incorporated into the works due to the amount of materials that a contractor will have to purchase in advance in reality main contractors and clients are not in favour of paying goods not yet installed, especially where they consider them delivered unduly early.

3. Incorporation into the works

A ROT clause will generally be ineffective once the goods/materials have been incorporated into the fabric of the building or asset/affixed to the land and/or have been incorporated or mixed with other goods.

In the vast majority of instances goods used within the engineering services sector are incorporated into the fabric of buildings and therefore, once installed, title will pass regardless of a ROT clause. This is because goods/materials are no longer identifiable as the goods of the seller when they are combined so that new goods/built-assets are created.

On the other hand, where goods are kept separately, and are identifiable as the seller's, a ROT clause is likely to be effective.

4. How can a supplier/sub-contractor protect itself?

A Member seeking to include a ROT clause in its contract should ensure it:

- Is included within the contract – it is not effective if included on the invoice issued post-contract;
- Is clear, unambiguous
- Passes risk of loss or damage to the client upon delivery
- Makes the client responsible for insuring the goods at that point
- Retains legal (and *beneficial*) title to the goods until full payment has been received
- Gives you the right to enter/access the site/building/location to recover the goods
- Obliges the client to store the goods separately from those belonging to itself or others
- Obliges the client to mark/identify the goods as belonging to you
- Prohibits the client from fixing the goods to property, without your written consent
- Enables you to check that goods are appropriately marked and stored
- Specifies the trigger events enabling you to enforce the ROT clause

5. JCT

a. Materials on site

The JCT contracts provide that interim payments may include the value of materials brought to site prior to their incorporation into the works, provided they are not brought on to site prematurely and that they are adequately protected.

Materials placed on site cannot be removed without the consent of the employer and when payment has been made for the materials in an interim valuation they become the property of the employer, but the contractor remains responsible for loss or damage to them.

JCT main contracts try to dictate the issue of title by requiring the contractor to include relevant provisions in the sub-contracts stating that the sub-contractor shall not deny that the materials are the property of the employer when the value of them has been included in an interim payment.

However, if this is not done in the sub-contract, it has no effect and a suitable ROT clause in the sub-contract will defeat this main contract provision.

b. Materials off site

The JCT contracts also provide for payment in respect of materials stored off site, and title to pass to the employer, provided certain conditions are met known as 'Listed Items' - 'Listed Items' are those materials included in a list in the contract documents which the employer is prepared to include in interim payments when stored off site.

- the listed items must be in accordance with the contract
- the contractor must provide proof that the materials are vested in the contractor and that they are covered by an insurance policy which covers them against loss or damage caused by specified perils such as fire, flooding, etc until they are delivered to the site

- at the place of storage the listed items are clearly marked as being for inclusion at the relevant project and that they are being held to order of the employer. In addition, the materials must be set aside from other materials and clearly and visibly marked so that they can be easily identified from other materials. These provisions are so that in the event of an insolvency the employer has a chance of obtaining the goods for which it has paid
- if required in the Contract Particulars the contractor must also provide a bond from an approved surety. The intention of the bond is to enable the employer to obtain financial recovery of the amount it has paid to the contractor if it is unable to obtain the relevant goods (e.g. if the supplier has reclaimed them under its own retention of title clause)

The contractor retains liability for loss or damage to the materials and for the cost of handling, storage and insurance until they are delivered to the site.

6. NEC

Payment is dealt with in section 5 but the relevant clauses do not specifically mention payment for materials on or off site. Rather, the amount due at each payment or assessment date is the 'Price for Work Done to Date' plus other amounts to be paid to the contractor, less any amounts to be paid by or retained from the contractor. Whether the contractor is entitled to be paid for materials on or off site depends on the respective definitions contained in the main pricing option selected for the project.

For example: under option B (priced contract with bill of quantities), the price for work done to date is the quantity of work which the contractor has completed for each item in the bill of quantities multiplied by the rate, and a proportion of any lump sums corresponding to the completed work. In order for the contractor to be paid for unfixed materials, they would normally form part of method-related charges

The NEC's treatment of title in goods and materials is also different. The main contract states that where the contractor has title to plant and materials, such title passes to the employer when they are brought on site. The corresponding NEC sub-contract states that whatever title the sub-contractor has to plant and materials on site, such title passes to the employer. This means that on insolvency of the contractor, the employer has good title to the materials on site.

Again, if the sub-contract does not contain the relevant clauses, and the alternative contract has a ROT clause, title will remain with the sub-contractor (until the materials are incorporated into the works).

7. Summary

Consider the retention of title position both up and down stream and make sure it is unambiguous that if a ROT clause exists, it is actually part of the final contract. Be aware that:

- If access to site is prohibited or restricted, you will risk criminal charges and trespass by forcing entry. Even if you do have access, recovering goods which belong to you and are not yet paid for, but which have been incorporated into the fabric of a building may cause criminal damage.
- If you can't tell your own goods from other similar goods at the site premises, you can't take them back.
- If the business you are trying to recover the goods from is insolvent and that business ascertains that you have been paid for some of your goods, or for some instalments, but not others, they may claim that the specific goods you are trying to take back have been paid for, so the insolvent business now owns those. Unless you can prove the liquidator wrong, you can't take those goods.
- Recovering goods from a business in a formal insolvency process without permission risks breach of the Insolvency Act for which you risk legal action being taken against you by the insolvency practitioner.
- If your retention of title clause is valid, log it with the insolvency practitioner and take, or threaten to take, legal action straightaway. There is no incentive for a liquidator to deal with your claim unless they know that they will have to incur legal costs if they don't. Don't let the liquidator stall

you – creditors who know their rights and pursue them vigorously are more likely to recover their goods than those who delay.

- Insolvency practitioners are unlikely to defend your claim if it is valid – legal costs will reduce the assets available for creditors, and they are liable for your damages if you win so they may expedite your claim as part of the broader process.
- If you succeed, you become a secured creditor and can take possession of the goods if they are not paid or obtain plant rental payments in priority to unsecured creditors. If the debtor becomes insolvent, you rank higher in the pecking order when a liquidator is paying out than you would as an unsecured creditor.
- Such claims are complex, expensive and rarely succeed. Even if you successfully argue you have a charge over the goods, the charge is likely to be unenforceable because it has not been registered at Companies House.
- You will need a more sophisticated retention of title clause if, for example, the buying business has:
 - sold your goods
 - processed them in some way
 - incorporated them into the fabric of a building
- An 'all monies' provision in your retention of title clause means you retain ownership of all your goods until all monies owed to you by the debtor have been paid – as long as the debtor owes you some money, you can take back the goods you find at the debtor's site (provided you supplied them) whether or not those particular goods have been paid for – we can supply such a clause on request.



Title and risk

1. Risk in the Goods will pass to the Client on delivery.
2. Title to the Goods will pass to the Client once the Seller has received payment in full for all debts owed by the Client to the Seller (including payment for the Goods) at any given time under this or any other Agreement between the Seller and the Client.
3. Until title to the Goods has passed to the Client, the Client will:
 - 3.1. hold the Goods as bailee for the Seller;
 - 3.2. store the Goods separately from all other material in the Buyer's possession;
 - 3.3. take all reasonable care of the Goods and keep them in reasonable condition;
 - 3.4. insure the Goods: (i) with a reputable insurer (ii) from the date of delivery (iii) against all risks (iv) for an amount at least equal to the Price (v) noting the Seller's interest on the policy;
 - 3.5. ensure that the Goods are clearly identifiable as belonging to the Seller;
 - 3.6. not remove or alter any mark on or packaging of the Goods;
 - 3.7. inform the Seller as soon as possible if it becomes subject to any of the events set out in clause *[reference to clause setting out termination events for Seller's right to terminate]*;
 - 3.8. provide the Seller such information concerning the Goods as the Seller may request from time to time.
4. **[Notwithstanding clause 3, the Buyer may use or resell the Goods in the ordinary course of its business until such time as it becomes aware or ought reasonably to have become aware that an event specified in clause *[reference to clause setting out termination events for Seller's right to terminate]* is or is likely to occur.]**
5. If, at any time before title to the Goods has passed to the Buyer, the Buyer informs the Seller, or the Seller reasonably believes, that the Buyer has or is likely to become subject to any of the events specified in clause *[reference to clause setting out termination events for Seller's right to terminate]* and the Goods remain in the possession **[or control]** of the Buyer, the Seller may (without limiting any of the Seller's other rights and remedies):
 - 5.1. require the Buyer **[at the Buyer's expense]** to redeliver the Goods to the Seller; and
 - 5.2. if the Buyer fails to do so promptly, enter any premises where the Goods are stored and repossess them.



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