



Guidance document GD 04

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## MCRMA ADVICE ON RETENTION OF TITLE CLAUSES

### INTRODUCTION

Construction projects always involve a large number of different parties, including contractors, sub-contractors and suppliers. Goods may pass to many buyers long before the original seller encounters a problem; it can be a difficult task to decide who actually owns the goods and ownership will often pass at an early stage and before the goods are paid.

People tend to assume that title (or ownership) in goods will not pass to a purchaser until the goods in question have been paid for. Unless otherwise stated in a contract for the sale of goods title passes from the seller to the purchaser when the parties intend it to pass, which is normally upon delivery (section 17, Sale of Goods Act 1979).

Given the high incidence of insolvency currently being experienced in the construction industry, coupled with a greater inclination amongst parties to contracts to seek to enforce contractual provisions, many purchasers and suppliers of goods are now paying close attention to the terms they enter into. It is important to be aware of the underlying law, and it is imperative to ensure that retention of title clauses and off site materials agreements are carefully drafted to ensure that title and risk in goods and materials passes when the parties wish it to occur.

### WHAT IS RETENTION OF TITLE CLAUSE?

A retention of title clause is a provision in a contract for the sale of goods which means that the seller retains legal ownership of the goods until certain obligations are fulfilled by the buyer – and states that ownership of goods does not pass from a seller to a buyer unless and until the seller is paid for those goods.

The main purposes of retention of title clauses are to ensure that where goods are supplied on credit, if the buyer subsequently goes into bankruptcy, the seller can repossess the goods.

## DIFFERENT TYPES OF RETENTION OF TITLE

### 1 Simple retention of title clause

*The property in all materials and goods supplied by the company shall pass to the client only when the client has properly made payment in full to the company for the materials and goods for which the client seeks title ..”*

An express term to this effect will override the common law position and will be effective to retain title until payment is made for the same.

### 2 All monies clause

This type of clause retains ownership until payment of ALL AMOUNTS owed by the buyer to the seller is paid. This type of clause renders it unnecessary, in the event of insolvency, to reconcile invoices with specific goods to establish what has been paid for

### 3 Proceeds of sale clause

Rarely accepted; this caters for situation when goods supplied to buyer are sold on. This clause will entitle the supplier to claim the proceeds of the sale. Case law has suggested that this could amount to a charge, and to be effective, would have to be registered at Companies House.

## WHAT ABOUT AN INNOCENT PURCHASER?

Section 25 of the Sale of Goods Act 1979 aims to protect an innocent sub-buyer who buys goods from someone who does not own them. The following points should be noticed:

- For example, if a contractor orders materials from a sub-contractor which are delivered to the site, and the employer pays the contractor for the materials, believing that ownership would then pass, but the contractor fails to pass the payment down to the sub-contractor prior to becoming insolvent, title may in certain circumstances pass to the employer without the sub-contractor receiving payment for the materials.

- An important point to note is that Section 25 of the Sales of Goods Act provides that where a seller delivers goods to a purchaser and a third party then purchases the goods in good faith and is unaware of the seller's title to the goods, the third party will take title to the goods. However, there have been cases involving similar circumstances where the sub-contractor is deemed to have title to the materials and the employer is left 'out of pocket'.
- This does not apply to a contract where the seller also installs the materials and goods, i.e. a subcontract for the supply and installation of the materials in question.

### **FIXING TO THE LAND OR 'ANNEXATION'**

Annexation is where the materials have become fixed to the land and it has particular relevance to the construction industry as a retention of title clause is likely to be defeated by annexation.

- Annexation occurs when the materials become the property of the land owner, regardless of whether they have been paid for. The supplier cannot remove the materials.
- However, at which point materials become affixed can be a difficult issue to determine. This would depend on the facts of the case and the degree and object of annexation.
- Factors such as the degree of damage that removal would cause should be considered.

**NOTE:** A retention of title clause is defeated once materials are fixed to the land.

### **SUMMARY**

- Ensure that you have a suitable drafted retention of title clause in your terms and conditions of sale.
- Ensure that your terms and conditions prevail over those conditions imposed by your customer (i.e. the purchase order)
- Seek payment upfront before delivery to the site by using suitable vesting procedures in your valuation

- If you are concerned about the liquidity of your customer do not hesitate to inform his employer that you have not been paid and bring attention to your retention of title clause.
- Please note that the legislation is different in Scotland.
- MCRMA advises that if anyone is in any doubt about the caveats or small print contained within industry or company documentation then they should seek professional legal advice before proceeding with any proposal.

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