



Claiming under Retention Of Title

How suppliers should use retention of title clauses when a customer goes into liquidation or receivership

By Tom Murray



A retention of title (ROT) clause, put simply, is a clause which prevents ownership of goods which have been sold passing to the customer until the supplier has been paid in full. While such clauses are common in today's business world, it is surprising how poorly suppliers fail to use them effectively in practice.

There are three aspects a seller must ensure that his ROT claim will be successful: (a) that he has an effective ROT clause, (b) that the ROT clause has been properly incorporated into contracts with the purchaser, and (c) that he can identify the goods which are the subject of his claim.

The ROT Clause

There are two broad types of ROT clauses: a "simple" clause where the seller retains title in goods delivered until they have been paid for and an "all-monies" clause where the supplier retains title until the price of the goods and any other amount owed by the buyer to the supplier has been paid.

The most effective type of clause is an "all-monies" clause, as he will not need to identify goods which have been supplied against specific unpaid invoices. Such clauses should be drafted by a solicitor.

Incorporation of Clauses into Standard Terms of Trade

For a retention of title clause to be valid it needs to be incorporated into your standard terms of trade. Incorporation is a legal term which, in this context, means that the seller's terms of trade have been accepted by the buyer. An effective way of doing this would be to have every new customer complete a credit application form which specifically refers to the suppliers terms of trade.

In the period leading up to the purchase both parties may have received copies of each other's terms. This will lead to a dispute over whose terms of trade prevails, and this dispute is commonly known as the "battle of the forms". As a general rule the party sending the last contractual document prior to delivery of the goods will succeed in incorporating its terms.

Identification

Assuming the supplier has a legally effective ROT clause which has been properly incorporated, the last hurdle which he has to overcome is to show that he can identify the goods which were supplied. This task can be difficult for a supplier of goods to prove that the goods were actually supplied by him, as the buyer may have purchased them from a different supplier. A supplier will not succeed in a claim if the goods in question have been irreversibly incorporated into the finished product or have been used in the production process.

Dealing with the Receiver/Liquidator

A receiver is appointed by a debenture holder, normally a bank, and he has a duty to collect in and preserve the assets. A liquidator is generally appointed by a special meeting of creditors. For the rest of this article references to Receivers may be considered to also include Liquidators. Receivers should deal with ROT claims on a fair and equitable basis. However, some Receivers may make life difficult for suppliers, as it is common for receivers to be remunerated on the levels of realisations which they achieve, and returning goods to suppliers under retention of title claims reduces the value of realisations.

When suppliers are notified of a Receiver's appointment they should promptly gather together all of the relevant documentation, such as invoices, delivery notes and acceptance of terms of trade, and visit the customer's premises. Upon arrival, they should ask to see a member of the Receiver's staff and explain to the staff member that they are a creditor wishing to enforce their retention of title claim, and that they either wish to take the goods away or enter into an arrangement with the Receiver for him to pay for them.

As a matter of practice, most insolvency staff will allow suppliers onto the premises to conduct an inventory of the supplier's goods. During the inventory count it is important that suppliers point out how they are able to identify items which have been supplied. Suppliers should have an insolvency staff member

sign the inventory sheets and give him a copy.

Negotiating a Settlement

After the inventory count the supplier should promptly write to the Receiver enclosing copies of his terms of trade together with evidence that they have been incorporated. He should also send copies of the unpaid invoices. The supplier should seek the return of the goods or seek the Receiver's personal undertaking that he will pay for the goods.

The receiver will carefully consider the suppliers claim in conjunction with his solicitors. Even if the supplier has a valid claim the Receiver may attempt to attack the claim, while making an offer to pay for the goods which he holds. The offer to pay for the goods will generally be less than the invoice value of the goods.

At this stage the supplier should make a commercial decision. The factors influencing this decision include: the possible damage to the market place if the goods are sold below cost, the costs of collecting/re-furbishing the goods and the costs of litigating – not all of which would be recoverable even if the supplier won any subsequent court action.

Conclusion

Suppliers should review whether they are using the ROT clauses commonly found in their standard terms and conditions carefully. A little bit of preparation can save a lot of aggravation and cost subsequently.

Tom Murray is a partner with Friel Stafford Corporate Recovery www.liquidation.ie

In association with The Institute of Certified Public Accountants in Ireland



The Institute of Certified Public Accountants in Ireland is a statutory accountancy body, with almost 5,000 members and students. CPAs are active in practice and in management of all areas of the private and public sectors.

For further information on how a CPA can help you, contact us at 01 6767353 or www.cpaireland.ie