

# Insight

*Insight* provides practical information on topical issues affecting the building, engineering and energy sectors.

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Who owns those goods? Unpicking the mess in a construction context



## Who owns those goods? Unpicking the mess in a construction context

The insolvency of Carillion has placed into sharp relief the difficulties faced by those both up and down the contractual chain for a construction project when one part of that chain becomes insolvent and the ultimate supplier of goods and materials on site has not been paid.

The contractual chain for even a modest construction project is often lengthy. As such, whoever originally supplied the goods being battled over may be removed from the events on the construction site itself. Quite often, then, the first, and most difficult, question to answer in the immediate aftermath of any insolvency is the apparently simple one: “Who owns those goods?” Is it the ultimate supplier who has not been paid, the subcontractor who is storing the goods off site, the contractor who is storing the goods on site or perhaps the employer into whose building the goods have been incorporated?

Only after the question of ownership has been answered can the next questions be addressed: “Can I get them back?”, “Am I simply an unsecured creditor?”, and/or “how do I get paid for them?” In this Insight, we examine the key considerations parties need to bear in mind if they are unfortunate enough to be faced with a Carillion-type situation and need an answer to the question: “Who owns those goods”?

### Are the goods fixed to the land?

The first point to establish is whether the goods in question have been fixed to the land. If they are fixed to the land then the title in them will pass to the landowner (who may not be the employer).<sup>1</sup> Known as the *quicquid plantatur* rule, this principle has its origins in Roman law when it was evolved to prevent buildings being needlessly knocked down.

How do you determine what constitutes “fixed” for these purposes? First you need to look at both the degree of annexation and also the object of the annexation.<sup>2</sup> Something that is not attached at all but is resting on its own weight (which is not excessive) is unlikely to be fixed to the land. Where there is a degree of annexation (i.e. the goods aren’t simply loose on the site), the burden of proof as to ownership shifts away from the landowner and on to the party trying to prove the goods are theirs.

Examples of how difficult it can be to determine whether something is “fixed” are numerous. In *Lictor Anstaldt v Mir Steel UK Ltd*<sup>3</sup> the Court looked at whether a Hot Strip Steel Mill was attached to the land in circumstances where it could be removed but only by removing the roof and where removal would be a “very lengthy and expensive process”.<sup>4</sup> The Judge noted that as well as it being an extremely difficult removal process,

the purpose of the annexation was to allow the site to become a functioning steel mill for up to 50 years. It was held that the Hot Strip Mill was a fixture.<sup>5</sup>

In contrast, sheet piling intended to be removed from the ground on completion of the works was not a fixture. Likewise, a two-ton crane sitting on a track bolted to the floor remained a chattel in *Blower v Alta*.<sup>6</sup>

However, determining whether something is fixed is likely to get more complex as technology gets ever more advanced. As Richard Davis points out in his book *Construction Insolvency*:

*“Modern Building techniques and new technology, especially computers, are likely to challenge the criteria of a fixture as time goes by. In the Canadian case of Credit Valley Cable v Peel (1980) 27 O.R. (2d) 433, for example, it was held that television cable installed in conduits within an apartment building was not a fixture because it was not for the permanent enjoyment of the building but was merely a service to the residents.”<sup>7</sup>*

If there is a degree of annexation of the goods in question it is therefore worth digging out the case law to see if there is any useful guidance that may, or may not, fit with the precise circumstances.

### Unfixed materials

If the materials remain unfixed but on the site, then who do they belong to? This will depend on the following:

- 1 Is the contract one for purely the sale of goods or one for goods and services?
- 2 If the contract is a sale of goods contract, has the employer (or whoever has possession of the goods) bought the goods in good faith?
- 3 What does the contract say (if applicable)?
- 4 If there is a “retention of title” provision somewhere in the chain is it likely to work?

*Is the contract purely a sale of goods contract?*

A contract for the supply of goods only, as opposed to goods and services, will be governed by the Sale of Goods Act 1979 (the “SGA”). Contracts for goods and services are governed by the Supply of Goods and Services Act 1982 (the “SGSA”). The difference can be crucial because the SGA provides more protection than the SGSA to someone who has bought the goods in good faith and without notice of any lien or other right of the original seller (as to which see further below).<sup>8</sup> As a starting point, then, it is important to identify which contracts in the chain are purely goods contracts and which are for services as well.

*Have the goods been bought in good faith by the employer / a third party?*

Section 25 of the SGA<sup>9</sup> provides that, if someone has bought goods in good faith and without notice of any lien or other right of the original seller in respect of the goods, then title will transfer to the sub-purchaser. This right is an exception to the rule *nemo dat quod non habet* (no person can give what he does not have) but only applies in the context of pure goods contracts.

A classic example is where the original supplier has supplied goods to a contractor who has not paid for them and they are now on the site (although not yet installed). The employer has paid the contractor for the goods. However, the contractor becomes insolvent without paying the ultimate supplier. If the employer has paid for them in good faith and did not have notice of any retention of title clause that may be in the contract, then title will have passed and the employer will not have to pay the supplier again for the goods.

The case of *Archivent Sales & Developments Ltd v Swathclyde RC*<sup>10</sup> involved ventilators. The Defendants paid the ventilator contractor for the ventilators but the contractor went into receivership before paying the Claimant. It was held that the Defendants had acted in good faith and consequently title had passed to the Defendants.

For contracts where goods are supplied along with services the position is slightly different. The Supply of Goods and Services Act 1982 provides:

*"2.— Implied terms about title, etc.*

*(1) In a [relevant contract for the transfer of goods], other than one to which subsection (3) below applies, there is an implied condition on the part of the transferor that in the case of a transfer of the property in the goods he has a right to transfer the property and in the case of an agreement to transfer the property in the goods he will have such a right at the time when the property is to be transferred*

*(3) This subsection applies to a [relevant contract for the transfer of goods] in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the transferor should transfer only such title as he or a third person may have.*

*(4) In a contract to which subsection (3) above applies there is an implied warranty that all charges or encumbrances known to the transferor and not known to the transferee have been disclosed to the transferee before the contract is made."* [Emphasis added]

As you can see, there is no equivalent protection in the SGSA to section 25 of the SGA.

Thus where there is a supply of goods and services contract (rather than purely a supply of goods contract) the buyer may have less protection where he buys in good faith than he would if the contract was purely a supply of goods contract. In such circumstances title may not pass to the employer because of the *nemo dat quod non habet* rule. In other words, his contract may say that title passes when he pays the contractor for the materials but in fact title remains with the original supplier due to a retention of title clause as the Contractor cannot transfer good title if he never had it in the first place.

As such it is crucial to look at the entire contractual chain in order to ascertain who has title.

*What do the applicable contracts say?*

The terms of the contract for the supply of those goods, along with services if applicable, now become key. If there is a contract in writing then the first step is to check the provisions within the relevant contracts governing when title in the goods passes, as well as checking for any retention of title clauses further down the chain.

*What do the standard form construction contracts provide for?*

Standard form construction contracts all have slightly different provisions as to when title passes in the goods supplied and delivered to site.

For example, the JCT Design and Build Sub-Contract Conditions, 2011 Edition, states that:

*"2.15.1 Site Materials shall not be removed from storage on or adjacent to the Main Contract Works except for use on the Main Contract Works without the Contractor's consent, which consent shall not be unreasonably withheld or delayed;*

*2.15.2 Where ... the value of any Site Materials has been included in an Interim Payment under which the amount properly due to the Contractor has been paid to him by the Employer, they shall upon such payment become, and the Sub-Contractor shall not deny that they have become, the Employer's property;*

*2.15.3 If the Contractor pays the Sub-Contractor for any Site Materials before their value is included in any Interim Payment under the Main Contract, they shall upon payment become the Contractor's property;*

*2.15.4 Nothing in this clause 2.15 shall operate so as to affect any vesting in the Contractor of property in any Listed Items required under clause 4.15.2.1 of the Main Contract Conditions."*

Immediate questions arising are: (1) has the employer paid for the goods in an Interim Payment and (2) are the goods Listed Items? The problem in respect of Interim Payments is whether the goods have been sufficiently identified in any application for payment or Payment Notice. If the payment is only one lump sum with no further breakdown, establishing the goods have been paid for can be good.<sup>11</sup>

If the items are Listed Items then special conditions apply which will also need to be checked.<sup>12</sup>

The JCT Design and Build Contract similarly provides that title for materials and goods passes when their value has been included in an Interim Payment (for goods on site).<sup>13</sup>

For goods off site, title in any Listed Items will pass once their value has been included in an Interim Payment.

The NEC3, in contrast, provides for title to pass on delivery to site rather than on payment. Under clause 70.1, title to off-site materials passes to the employer on the supervisor marking them “as for this contract”.<sup>14</sup> Title to off-site materials will pass to the employer if they are marked by the Supervisor, the contract identifies them for payment and the Contractor has prepared them for marking as the Works Information requires.

As set out above, payment may not get the employer title if there is a retention of title provision further down the chain where the contract is not a pure goods contract.

*Is there an express retention of title provision in the supplier's contract?*

There may also be a retention of title clause (sometimes known as a *Romalpa* clause<sup>15</sup>) in the contractual chain whose terms need to be considered. Retention of title clauses come in a number of different forms, with the simplest being the most likely to work.<sup>16</sup> The key forms are as follows:

- 1 A provision that the seller retains title until the goods are paid for (a “Basic Retention of Title Clause”);
- 2 An “all monies” form of retention of title where goods are supplied on a rolling basis but title remains with the supplier until all the goods are paid for;
- 3 A proceeds of sale clause which asserts a claim over any monies over goods that have been sold on but not yet paid for;
- 4 A mixed goods clause which attempts to claim title of goods which have been incorporated into other goods (i.e. mixed).

Since *Romalpa* it has been clarified that (3) will not work to give the supplier any security in the context of an insolvency unless a charge has been registered over the goods.<sup>17</sup> Likewise (4) will not be effective once the goods are mixed since they are a new product against which the supplier cannot claim title.<sup>18</sup> Even a Basic Retention of Title Clause will fail if the goods are mixed or if it is a

goods only contract and the ultimate purchaser has bought them in good faith.

However, a Basic Retention of Title Clause can still be a valuable tool especially where it is combined with a licence to enter a property and retake the goods if payment is not forthcoming.

### So what happens after the insolvency event has occurred?

Self-help remedies are not uncommon in the immediate aftermath of an insolvency event and are one of the reasons that, for the employer, securing the site is a top priority.

However, those thinking of self-help remedies need to be sure that they own the goods. That can be difficult to establish.

They also need to be aware that if they enter a third party's land they may well be committing trespass if they don't have the right to enter the property to retake possession. It is not uncommon for retention of title clauses to expressly allow re-entry to a property to take possession but those seeking to exercise that right need to be careful that: (1) the contract they have is with the landowner where the goods are held; and (2) the goods have not been purchased in good

faith, attached to the land or mixed so that title in them no longer rests with the supplier. If title has transferred then the party removing the goods may be liable in conversion.

If there is no right to re-enter to take possession, then there is a range of other remedies available although they may take time to pursue. For example, it may be possible to get an order for delivering up or a restraining order to prevent the Liquidators or Administrators from parting with the proceeds of sale.<sup>19</sup> If the goods have been integrated into the construction site but have not been paid for and were the subject of a retention of title provision, then it may be the supplier has a claim for conversion. Suppliers who have title may also want to argue that any goods that are subject to a retention of title clause are held on trust for them allowing them to stand

ahead of unsecured creditors in the insolvency.

As for insolvency practitioners, well they are faced with the unenviable task of trying to establish who does own those goods, often in circumstances where information is distinctly lacking.

**Claire King, Partner  
Fenwick Elliott**

### Footnotes

1. See *Simms v London Necropolis Co* [1885] 1 TLR 584 (Div Ct) and *Tripp v Armatage* 150 ER 1597 (1839) 4 M & W 687 (Ct of Exch). See also Michael Mendelblat, “Retention of title and vesting clauses – do they provide security of goods?”, July 2016 SCL Paper, D190. There appears to be only one exception to this rule. That is, “where a builder works on another's land by mistake and the owner stands back and accepts the benefit without alerting the builder to his mistake, the owner can be liable to compensate the builder; *Ramsden v Dyson* (1866) L.R. 1 H.L. 129.” See Richard Davis, *Construction Insolvency, Security, Risk and Renewal in Construction Contracts* (Sweet & Maxwell), 6th Edition, Section 7-003.
2. See *Blackburn J in Holland v Hodgson* (1871-1872) L.R. 7 C.P. 328 at 334-335; see also Richard Davis, Section 7-004.
3. [2014] EWHC 3316 (Ch).
4. See paragraph 118.
5. See Richard Davis, Section 7-004, and *March Construction Ltd v Queenstown Car Parking Ltd* [2010] NZHC 1537.
6. (1983) 50 A.R. 66.
7. See Richard Davis, *Construction Insolvency*, page 282.
8. See Catherine Piercy and Aileen McErlean “Whose Plant is it anyway?” in *Construction Law*, 24 February 2017.
9. Section 25 (1) of the SGA 1979.
10. (1985) 27 B.L.R. 98.
11. See Michael Mendelblat, “Retention of title, vesting clauses and contractor insolvency”, on Practical Law's Construction Blog.
12. Pursuant to Clause 2.22 of the JCT Design and Build Contract 2011, where the value of Listed Items has been included in an Interim Payment then title will vest in the Employer.
13. See Clause 2.21.
14. See Richard Davis, *Construction Insolvency*, page 291.
15. Named after the famous *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676.
16. For a detailed and extremely helpful overview of this complex area see Michael Mendelblat, “Retention of title and vesting clauses – do they provide security of goods?”, July 2016 SCL Paper, D190.
17. See *Re Bond Worth Ltd* [1980] Ch 228. Otherwise following an insolvency the charge will be ineffective for lack of registration pursuant to the Companies Act 1996.
18. See Michael Mendelblat's further commentary on this and see also *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25.
19. See Richard Davies on *Insolvency*, Chapter 7-015.

Should you wish to receive further information  
in relation to this briefing note or the source  
material referred to, then please contact:

**Claire King**  
**Partner**

cking@fenwickelliott.com.  
Tel +44 (0)20 7421 1986

**Fenwick Elliott LLP**

Aldwych House  
71 - 91 Aldwych  
London WC2B 4HN

[www.fenwickelliott.com](http://www.fenwickelliott.com)

