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## 13. Retention of title

Dealing with an insolvent's goods that are subject to a retention of title clause, including verifying the validity of the clause

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## Introduction and key information

### 13.1 Introduction

A retention of title clause, also referred to as a 'reservation of title' or 'Romalpa clause', is a form of security used by a supplier of goods as protection against the possibility of the buyer's default or insolvency <sup>1</sup>. The clause generally provides that

ownership of the goods does not pass until the goods are paid for, though that will depend on the terms of the contract.

1. *Aluminium Industrie Vaassen v Romalpa Aluminium* [1976] 2 All ER 552

## 13.2 The legal background

Ownership of goods passes between the supplier and the purchaser when the parties to the contract intend it to <sup>1</sup>, and, in determining the timing of the transfer of ownership, regard should be given to the terms of the contract, the conduct of the parties and the circumstances of the case <sup>2</sup>.

Further, in a contract for the sale of specific goods (or where goods are subsequently appropriated to the contract), the supplier can reserve the right of disposal until certain conditions are met <sup>3</sup>.

1. section 17(1) of the Sale of Goods Act 1979

2. section 17(2) of the Sale of Goods Act 1979

3. section 19(1) of the Sale of Goods Act 1979

## 13.3 Effect of a retention of title clause in relation to an insolvency

A supplier's claim under a retention of title clause to any unused goods will be valid against any subsequently appointed liquidator or trustee, provided the clause has been incorporated into the contract. Where the goods subject to a clause have been sold to a third party, good title may be given to the third party, either by operation of law <sup>1</sup> or where a licence or agency to sub-sell has been granted by the supplier.

1. section 25(1) of the Sale of Goods Act 1979

## 13.4 Official receiver to consider validity of a supplier's claim to goods under a retention of title clause

In view of the official receiver's duty to protect and to realise the assets of the insolvent for the benefit of creditors, it is important that they are completely satisfied on all aspects of a retention of title claim before deciding that the clause is valid and allowing the supplier to remove goods or have the proceeds of their sale. A summary of the principal matters to be considered in deciding the validity of a claim is given below at paragraph 13.20.

## 13.5 Sale pending or goods sold when claim discovered

Where the official receiver has seized goods as the property of the insolvent and subsequently becomes aware of a possible claim, he should not sell the goods before deciding upon the validity of the claim. The official receiver must be completely satisfied that the claim is invalid before disposal of the goods takes place. If the official receiver were to sell goods subject to a claim, he could be liable in damages to the supplier. The statutory protection <sup>1, 2, 3</sup> would not be available to the official receiver if the goods were sold. If the official receiver accepts the claim, the goods should be returned to the supplier as quickly as possible, but he must pay any costs incurred by the official receiver in relation to the seizure. Where the official receiver becomes aware of a claim after the goods have been sold, he should, once satisfied that the claim is valid, pass the net proceeds of sale to the supplier which will be the total amount to which the supplier is entitled in these circumstances.

1. section 234(3)

2. section 234(4)

3. section 304(3)

## 13.6 Consequences of wrongly dealing with goods subject to a valid claim

Where the official receiver wrongly deals with goods subject to a valid claim, the remedy will be a claim for damages for wrongful interference with the goods. The claim will usually be for the market value of the goods, that is normally the amount of the unpaid invoices. Liability will arise if there is a refusal to return the goods or a disposal of the goods after the right to sell has been terminated, which will be the date of the insolvency order unless the contract provided for an earlier date. Providing any loss or damage resulting from the official receiver's seizure or disposal of the goods is not caused by their own negligence, the supplier's claim cannot exceed the invoice value of the goods.

## 13.7 Protection of property subject to claim

The official receiver should ensure that property subject to a claim is protected. When considering insurance of the goods, the official receiver should remember that the risk passes with the ownership of the goods unless there is a contrary agreement between the parties.

# Types of retention of title clauses

## 13.8 Wording of a basic clause

The wording of the clause in a contract will vary considerably. The simplest type of clause has the sole intention of retaining ownership over the goods supplied under a contract of sale until payment is made for those goods. It could be worded: "Title in the goods shall not pass to the customer until they have been paid for in full". Such a clause cannot be construed as creating a charge and therefore does not require registration as a charge under either the Companies Acts or the Bills of Sale legislation.

## 13.9 All sums or current account clause

An "all sums" clause or "current account" clause is where the supplier seeks to retain ownership of the goods delivered to the insolvent until all debts have been paid and any other obligations have been met by the insolvent. This type of clause might be considered to be a charge and the Official Receiver should consider the guidance at paragraph when dealing with such a clause.

## 13.10 Tracing, prolonged or proceeds of sale clause

A "tracing", "prolonged" or "proceeds of sale" clause is one where the supplier seeks to retain ownership of the goods delivered until the full purchase price for those goods has been paid. If the insolvent sells the goods, the supplier may acquire ownership of the proceeds of sale or debts owed by the sub-buyer(s), but this depends upon the existence of a fiduciary relationship or a validly registered charge (see paragraph 13.41).

## 13.11 Aggregation or enlarged clause

An "aggregation" or "enlarged" clause, is one where the supplier seeks to retain ownership of the goods delivered until the full purchase price has been paid by the insolvent, but if the goods are manufactured into some other property, with or without the addition of other goods, the supplier could acquire the ownership of the resulting property or a proportionate part of it equal to the contribution made to the manufacturing process by the original goods. This will occur where there is a

fiduciary relationship (see paragraph 13.41) or the contract expressly provides for the ownership of the finished goods to vest in the supplier. In the latter case a charge is likely to have been created, which in the case of a company purchaser would require registration under the Companies Acts to be effective, and in the case of an individual may be void (see paragraphs 13.47 to 13.48).

## 13.12 Combined clauses

It is possible for a supplier to combine several types of clause, and if the official receiver decides that one part of the clause is invalid, the supplier may still be entitled to recover goods under another element of the clause. For example, the clause may refer to retention of title of goods supplied and may also seek the power to trace the sale proceeds of goods. The tracing element of the clause may fail due to non-registration of the clause as a charge or bill of sale or because it is void in the case of an individual as a charge over future acquired chattels, but the supplier may still be able to recover goods with the insolvent at the date of the insolvency order.

# Enquiries to be made by the Official Receiver

## 13.13 Considering whether goods are subject to a valid retention of title clause

In any insolvency in which goods have been or may be recovered, the official receiver should make enquiries to ensure that the goods are not subject to a clause. In addition to seeking information from the director(s) or bankrupt, the official receiver should where possible examine the contractual documentation (for example, sales invoices) relating to the goods. If the official receiver's enquiries do not reveal the existence of any retention of title clause, and they have no reason to suspect that one might exist, they can assume that the goods are the insolvent's property.

## 13.14 Ask the supplier to substantiate claim

If a supplier contacts the official receiver to claim goods on the insolvent's premises, the official receiver should ask them to substantiate their claim unless already in possession of information that confirms the validity of the claim.

## 13.15 Resolving a supplier's claim generally

Where the official receiver is put on notice of a claim to goods or moneys under their control, he should try to resolve the matter as quickly as possible. If the supplier can clearly establish their rights to the goods, failure to hand them over might lead the official receiver to incur a liability under the Torts (Interference with Goods) Act 1977.

## 13.16 Use of questionnaire

The official receiver may obtain the information required by requesting the supplier to complete and return the questionnaire in [Annex A](#) to this chapter. The questionnaire is intended to assist the official receiver and so can be amended to obtain the information appropriate for the insolvency concerned. It may be considered desirable to give the supplier a fixed time in which to respond, especially where goods remain on the insolvent's premises or are in storage, to obtain a prompt response. Whilst this may put pressure upon the supplier to respond it should not be assumed that no response means the supplier has no claim.

## 13.17 Information from the directors or bankrupt

At an early stage in the proceedings the official receiver should seek the views of the director(s) or the bankrupt as to whether any supplier has a valid claim to goods or monies under the official receiver's control. In addition their comments should be sought on when the supplier informed the insolvent of the claim, whether the director(s) or bankrupt accepted the claim and details of the date of supply of the goods relating to the claim. The official receiver may also wish to seek the assistance of the director(s) or bankrupt in identifying the goods which are subject to the claim.

## 13.18 Insolvent's records

Whenever possible the official receiver should identify any documentation relating to the supplier from amongst the insolvent's records. It may be that an examination of the main documents will allow the official receiver to dismiss the supplier's claim without the need for detailed correspondence with the supplier, perhaps on the basis that the claim has not been incorporated into the contract. Apart from the accounting records, a supplier's catalogue or price list and any correspondence between the insolvent and the supplier may provide useful information.

# Matters to be considered in assessing the validity claim

## 13.19 Considering a claim from a supplier

The following guidance is to assist the Official Receiver in assessing the validity of a retention of title clause. In applying the guidance, the Official Receiver should, of course, consider the value of the goods claimed and limit or increase the considerations accordingly. In some cases, where the goods are of a significant value, it might be appropriate to seek legal advice.

## 13.20 Specific matters to be considered when assessing validity of a claim

The official receiver needs to be satisfied on each of the following before accepting a claim from a supplier:

- that the wording of the clause extends to cover the goods or monies being claimed
- that the clause has been incorporated into the contract
- where the supplier is claiming goods, that they can conclusively be identified as having been provided by the supplier claiming them. Where proceeds of sale are claimed then the monies must represent the proceeds of sale of the items which incorporated the goods from the supplier or the proceeds of sale of the goods themselves
- where the clause attempts to claim goods supplied or the proceeds of their sale, but is not an 'all sums' clause, that the goods supplied relate to an unpaid invoice; and
- where the clause is an 'all sums' or multi-purpose clause, whether or not the arrangements create a registerable charge and, if so, that it has been registered with the Registrar of Companies or under the Bills of Sale legislation, for companies and individuals respectively

## 13.21 Extent of the clause

The official receiver should carefully consider the wording of the clause. They should be satisfied that the terms of the clause mean that the supplier retains legal title to the goods or that he is entitled to claim the proceeds of sale of goods sold prior to the insolvency. If the clause goes beyond permitting the supplier to recover unused/unsold goods supplied then a charge is likely to have been created.

## 13.22 Incorporation of clause

Under the general law of contract the offer made by one party has to be accepted by the other before there is a valid contract. Therefore the official receiver should ensure that the clause was notified to the insolvent prior to the supplier accepting the insolvent's offer. The clause may be valid despite being introduced after the contract was made if the insolvent agreed to it being part of the contract and if there was further consideration by the insolvent in respect of the agreement to amend the contract terms. The clause will be effectively incorporated into the contract if:-

- it is in contractual documentation signed by the insolvent; or
- it is contained in an unsigned document which, prior to entering into the contract the insolvent knew contained contract terms even though he was not aware of their effect; or
- it was in a document the terms of which the supplier had done all that was reasonably necessary to draw to the attention of the insolvent prior to entering into the contract. It is not necessary for the insolvent to have actual knowledge that the document contained the contractual terms for a clause to be effective and since retention of title clauses are common, such a clause need not have been specifically drawn to the attention of the insolvent.

## 13.23 Method of informing the buyer of the clause

Ideally the terms of business should have been sent to the insolvent prior to entering into any contract (or made clear in any conversation during which the contract was entered into) as well as appearing on all documents. However, this will very rarely be the case and the method used by the supplier to inform the insolvent of their terms of business will vary. The terms may have been notified by the supplier before trading began or in the acknowledgement of the order, quotation, catalogue or price list. Usually the offer to enter into a contract will be an order by the insolvent and the contract will be entered into on the despatch of the acknowledgement of order or despatch of the goods themselves by the supplier.

## 13.24 Conflict of the terms of the businesses

If the supplier purported to accept the insolvent's offer (based upon the insolvent's terms of business) but the supplier's terms of business conflict with those of the insolvent, then there will not have been an unconditional acceptance of the insolvent's offer but instead the supplier will have made a counter offer. If the insolvent then proceeded with the transaction he should be treated as having accepted the supplier's terms of business and the clause will be part of the contract

<sup>1</sup>. Any changes to the contract terms may be made in writing or orally regardless of the method used to enter into the contract.

## 13.25 Contract made verbally

The official receiver should try to establish whether there was any mention of the supplier's terms of business during the conversation. A short statement should be taken from the person who ordered the goods on behalf of the insolvent if the official receiver considers that it may be difficult to resolve the matter with the supplier based upon the evidence of the relevant person. If there was no mention of the clause during the conversation in which the contract was made and there was no subsequent agreement of both parties that the clause should be part of the contract's terms, with additional consideration being provided by the insolvent, the supplier's claim should be rejected. However, where there have been regular transactions between the insolvent and the supplier, the official receiver should apply the terms of business of previous contracts to the contract which is subject to the claim of the supplier where it is shown that the parties intended these to apply (but see also (d)).

## 13.26 Clause on the invoice only

If the clause is contained in the terms of business on the supplier's invoice and was not previously agreed by the insolvent and the supplier, the clause should be rejected by the official receiver. This is because the contract was made prior to the invoice being sent to the insolvent. However, the official receiver should ensure that the invoice was not delivered to the insolvent prior to the delivery or collection of the goods (ie prior to the supplier's acceptance of the insolvent's offer) as in this case the clause will have been incorporated into the contract. The clause might also be valid if there was an agreement between the parties after the contract had been entered into, but only if the insolvent provided new consideration for the introduction of the clause as a term of the contract. Where there have been regular transactions between the insolvent and the supplier, the official receiver should apply the terms of business of the preceding contract to the contract which is subject to the claim of the supplier, provided the parties intended that the same terms of business were to apply. Therefore the official receiver should accept a claim on this basis if the clause was notified to the insolvent on an invoice relating to the preceding contract, even though the clause may not have been validly incorporated into the contract to which the invoice relates.

## 13.27 Alteration of terms of business

The official receiver should make enquiries to see whether either the insolvent or the supplier have changed their terms of business during the period when the contracts were made for the goods. If they have, the official receiver should ascertain the

details of the changes, the date(s) of those changes and the manner in which the other party was informed of the changes. The official receiver should then ensure that the new terms of business regarding retention of title have been incorporated into the contracts for the goods being claimed.

## 13.28 Identification of goods - generally

The goods being claimed must be identified as those supplied by the supplier claiming them. The best method of identification is where the goods have serial numbers referred to on the unpaid invoices, or if the goods are marked with the name of the supplier. Where the goods cannot be identified in such a way, the official receiver should make enquiries to ascertain whether the insolvent obtained the same goods from other suppliers. If so, they need to be satisfied that the goods being claimed are the actual goods supplied by the supplier claiming them. The insolvent's records and papers may be useful in seeing whether the insolvent has dealt with more than one supplier for similar goods in the past and the assistance of the company director(s) or bankrupt should also be sought where necessary.

## 13.29 Allowing supplier access to inspect the goods for identification purposes

The supplier should be allowed access to the insolvent's premises to inspect the goods held with a view to identifying those which he considers are subject to their claim. The supplier should not of course be allowed to remove any goods until the official receiver is satisfied that the claim is valid. An inventory of the goods held by the insolvent should be made by the official receiver and where possible this should include serial numbers or identifiable markings of those goods thought to be subject to a claim. If the official receiver disposes of goods and the supplier raises objections, perhaps by legal action, there will then be detailed information available to defend the allegations.

## 13.30 Clause relating to goods used in manufacturing process

Raw materials sold subject to a clause cease to be caught by it once the goods have lost their identity if the clause was drafted only to retain ownership in the goods until payment was made for them <sup>1</sup> but not where the clause seeks to retain ownership of the finished product <sup>2</sup> It may be possible for the supplier to retain title to the goods supplied even if they have been used in a manufacturing process, provided the goods are still identifiable, in their original form and easily removable <sup>2</sup>. Where a clause seeks to retain title to goods which have lost their identity, the supplier's claim

is likely to be invalid unless the clause has been registered as a charge under the Companies Act 2006 for a company or under the Bills of Sale Act 1878, for an individual.

1. Borden (UK) Limited v Scottish Timber products Limited [1979] 3 All ER 961)

2. Re Peachdart Limited ([1983] 3 All ER 204)

3. Hendy Lennox (Industrial Engines) Limited v Grahame Puttick Limited [1984] 2 All ER 152

## 13.31 Retaining ownership once goods manufactured

The supplier may have become the owner of a new product manufactured by the insolvent where it incorporates the supplier's goods, provided the supplier and the insolvent agreed to this as part of the contract terms. However where the insolvent would have been entitled to the goods on the payment of the outstanding amount of the invoice, a charge is likely to have been created.

## 13.32 Sale by supplier of manufactured goods

Where the supplier is entitled to the manufactured goods, he will have a duty to take reasonable care to obtain a proper price for the goods on disposal. The official receiver should, when the goods are handed over to the supplier, request that any surplus made on the sale is passed to the liquidator or trustee.

## 13.33 Goods fixed to land

Where the goods being claimed have been fixed to land, the goods become fixtures and are deemed to be part of the land. (Generally a fixture must have an actual connection with the property, not just be brought into contact with it, but should not be part of the original building). The rights in goods will normally be lost when they are fixed to land.

## 13.34 Identification of goods which are movable and estimated by weight, number or measure

Where goods which are moveable and are estimated by weight, number or measure (also known as 'fungible' goods) (for example grain) are mixed with those of the insolvent (or other suppliers), the supplier may have stipulated in the contract that the mixed goods will be held by the parties as tenants in common. Whether or not

such a term appears in the contract, the official receiver should permit the supplier to remove the proportion of the goods which he supplied that are amongst the mixed goods provided:-

a) the supplier's goods have been mixed with identical goods and so have not lost their identity; and

b) that the official receiver is satisfied on the validity of all other aspects of the claim. It will also be necessary to take account of any goods that had previously been removed from the bulk in order to calculate the supplier's share.

## 13.35 Goods or sale proceeds claimed relate to an unpaid invoice

Except where there is an 'all sums' clause, the official receiver should ensure that the goods or sale proceeds subject to the claim relate to an invoice for which full payment has not been made, otherwise the claim should be rejected. This is a matter for the supplier to prove. Where there has been regular business between the insolvent and the supplier, payments on account may have been made. The official receiver should usually apply the monies paid by the insolvent to discharge the invoices in date order starting with the earliest invoice. However, if the monies were clearly allocated to a particular invoice, then it is those goods that were paid for.

## 13.36 Partly paid invoices

Where a claim relates to a partly paid invoice, the manner in which the official receiver should proceed depends upon the terms of the contract. Where title has passed the supplier will only be able to prove in the insolvency for the price of the goods. Where there has been a part payment for goods the official receiver should ensure that the contract provides for the supplier to retain title to the goods until the supplier received payment in full for those goods. Where title has not passed to the insolvent and the supplier seeks to recover the goods, he should give credit for any part payment, but he may be able to off-set any sums so paid against amounts otherwise owed to them by the insolvent.

## 13.37 Where the supplier has commenced legal proceedings in respect of the debt

Where the contract for the purchase of specific goods provides that title in the goods does not pass until payment is made, the official receiver should treat the goods as the property of the supplier if payment has not been made (assuming the claim is valid in all other respects). This will be the case even if the supplier has claimed,

sued or obtained judgment for the sum owed prior to the insolvency order. However, where the contract provides that the insolvent has failed to pay the debt and the supplier has a choice of terminating the contract and recovering the goods or seeking to recover the debt, the commencing of an action for the debt will have passed title in the goods to the insolvent, unless there was an agreement to the contrary. Conversely, where the supplier decided to recover the goods in such circumstances, he will have been precluded from taking legal action.

## 13.38 Rejecting claims generally

Whenever a supplier's claim to goods or the proceeds of their sale is rejected, the official receiver should ensure that the supplier is recorded as an unsecured creditor of the insolvent.

# Additional matters to be considered for 'all sums' clauses and multipurpose clauses

## 13.39 'All sums' clause

An 'all sums' clause is sometimes referred to as an 'all monies' clause or a 'current account' clause. In such a clause the supplier will stipulate that the title to the goods supplied under any contract with the insolvent will not pass until all sums due under any contracts have been paid. Where the official receiver is satisfied that such a clause exists, he will not need to ensure that the goods being claimed relate to an unpaid invoice as the supplier may have a valid claim to any goods which he supplied which are still with the insolvent at the date of the liquidation or bankruptcy

<sup>1</sup>. The supplier will not have a claim to goods which were contracted for on a date prior to there being a nil balance or a balance in favour of the supplier on the insolvent's account. The reason for this is that the title of those goods will have passed to the insolvent at the time that no monies were due to the supplier. An 'all sums' clause does not always constitute the creation of a charge <sup>2</sup> but once such a clause attempts to recover the proceeds of sub-sales then it will do and so should be registered <sup>3</sup>.

1. Aluminium Industrie Vaassen BV v Romalpa Aluminium Limited [1976] 2 All ER 552 and Armour and another v Thyssen Edelstahlwerke AG [1990] 3 All ER 481

2. Clough Mill Limited v Martin [1985] 1 WLR 111

3. Compaq Computer Limited v Abercorn Group Limited [1991] BCC 484

## 13.40 Right to trace proceeds of sale

Where a supplier tries to claim the proceeds of sale of goods which were received by the insolvent and mixed with the insolvent's money prior to the insolvency, then the supplier needs to show that he had a fiduciary relationship with the insolvent (or that the proceeds of the sale were subject to a charge on book debts that has been registered).

## 13.41 Fiduciary relationship

A fiduciary relationship is one where the insolvent holds the goods and any proceeds of sale for the benefit of the supplier and must account to the supplier for any sale proceeds. A fiduciary relationship will not arise in a contract for sale unless there is specific agreement between the parties creating one. It is necessary to look closely at the relationship that existed between the parties and not merely the labels attached to the relationship in the contractual documentation. It may be that the actions of the parties are inconsistent with a fiduciary relationship so that it should be inferred that the relationship has not been established. An example of this is the giving of a fixed period of credit. If there was a fiduciary relationship, it is likely that there will not be a charge created <sup>1</sup>. Generally, where the contract allows the insolvent to treat either the goods supplied under it, the products incorporating goods supplied, or the proceeds of sale of either of these as their own, it is unlikely that a fiduciary relationship will exist. If there is no fiduciary relationship, a clause seeking to claim the proceeds of sale may create a charge which would be void <sup>2</sup> if not registered in accordance with the Companies Act for a company <sup>3, 4, 5, 6</sup> or the Bills of Sale Act 1878, for an individual. Alternatively it may be avoided by the trustee as a general assignment of book debts <sup>7</sup>.

1. Re: Andrabell Limited [1984] 3 All ER 407

2. Companies Act 2006 section 859H

3. Companies Act 2006 section 859A

4. E Pfeiffer Weinkellerei- Weineinkauf GmbH & Co v Arbuthnot Factors Limited [1987] 3 BCC 608

5. Tatum (UK) Limited v Galex Telesure Limited and others [1989] 5 BCC 325

6. re Weldtech Equipment Limited [1991] BCC 16

7. section 344

## 13.42 Conditions to be satisfied in respect of an 'all monies' clause

In addition to the considerations outlined elsewhere in the chapter, the official receiver should satisfy themselves that, in respect of an 'all monies' clause, all of the following terms were part of the contract before agreeing to pass the sale proceeds of the goods to the supplier:-

- that the passing of the title to the goods was postponed until all the indebtedness to the supplier was discharged rather than on the full payment being made for a particular consignment
- that the insolvent was selling the goods on behalf of the supplier eg as agent or bailee. If the insolvent had to refer to the supplier prior to disposal of the goods, the insolvent will be a bailee of the supplier since a bailee cannot normally resell without the consent of the bailor. If the contract does not prevent the resale of the goods then there will not normally be a fiduciary relationship
- that the supplier indicated to the insolvent that the goods were to be stored in a manner which manifested the supplier's ownership of the goods
- that there was an express acknowledgement in the contract of a fiduciary relationship and provision that the supplier should obtain the benefit of monies paid to the insolvent on the sub-sale of the goods
- that there was an obligation on the insolvent to keep the sale proceeds of the goods in a separate account. Where the proceeds of sale were paid into a separate bank account prior to the winding up or bankruptcy order, the supplier will have a claim to the funds and if there was a fiduciary relationship between the insolvent and the supplier, the supplier will have a right to trace any proceeds of sale that have been mixed with the insolvent's funds. However, he will have no such right where the insolvent's bank account is overdrawn, as the monies are no longer identifiable
- that no credit period has been incorporated into the contract. If a credit period was specified it can be inferred that within that period the insolvent was free to use the sale proceeds, which defeats the supplier's claim to those proceeds (even where the monies were placed in a separate account)

## Retention of title or charge?

### 13.43 Deciding whether the clause is a charge

A charge may be expressly created by a company or individual but it is more usual for the granting of a charge to be implied from the terms of the contract to supply goods.

## 13.44 Examples of circumstances which create a charge

Examples of the circumstances where a charge will be created in favour of the supplier are where the clause:-

- attempts to retain 'equitable and beneficial ownership' of goods for the supplier <sup>1</sup>. This should be interpreted as a charge securing a debt, since the term 'equitable ownership' means the insolvent as the legal owner holds the goods for the supplier in a trust-like fashion until payment is made for them
- seeks to retain title to goods supplied once they have lost their identity in the manufacturing process of the insolvent
- seeks to claim the proceeds of sale of the goods or the proceeds of sale/debts owed by sub-purchasers unless a fiduciary relationship exists. A claim to the proceeds of sale where no fiduciary relationship exists will be invalid against a liquidator or trustee unless registered as a charge or bill of sale <sup>2</sup>. Furthermore, in the case of an individual, it may well be void to the extent that it purports to cover after acquired chattels

1. Re: Bond Worth Limited ([1979] 3 All ER 919)

2. section 344

## 13.45 Where a charge has been created

In the case of a company, a charge should have been registered under in line with the provisions of the Companies Act, otherwise it is void against the liquidator. In the case of an individual the charge, to the extent that it covers future acquired chattels, is likely to be void <sup>1</sup>. If the Bill is not void it will require registration under the Bills of Sale legislation to be effective against a trustee in bankruptcy.

1. Bills of Sale Act (1878) Amendment Act 1882 Section 5

## 13.46 Registration of clause which is a charge (companies only)

In the case of a company; if a charge has been created by the clause, particulars and the charge instrument must be delivered to the Registrar of Companies within 21 days of creation (although the court may allow registration out of time) if the clause is to be valid against the liquidator <sup>1,2</sup>. Where the official receiver encounters a registered clause he should check the timing of the registration and consider its priority with any other charges, before accepting the supplier's claim.

1. Companies Act 2006 section 859A

## 13.47 Registration of clause which is a bill of sale (individuals only)

A bill of sale will be created where an individual transfers personal chattels to another but retains possession of those chattels. A bill of sale should be registered under the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882. It should be noted that a bill of sale over future acquired chattels may be void.. Where the official receiver encounters a registered bill of sale, he should check its validity by ensuring that the bill of sale:-

- a) is in the format of the Schedule to the Bills of Sale Act (1878) Amendment Act 1882, where it is a security bill under Section 9 of that Act (ie. personal chattels were transferred to the supplier to secure the bankrupt's indebtedness);
- b) was registered within seven days of creation (or such longer period as the court may have allowed); and
- c) has been re-registered every five years. Where the official receiver does encounter a validly registered clause he should also consider its priority with any other charges before accepting the supplier's claim.