



## Getting Your Goods Back

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### A Practical Guide to Retention of Title for Sellers

A retention of title (“ROT”) clause in your terms and conditions is a form of security over the goods you deliver to your customers but if it isn’t drafted or used properly it won’t be worth the paper it is written on.

This guide will help you identify the different types of ROT clauses, how they work and when they should be used. It will also give you practical advice on what to do in an insolvency situation if you need to enforce your ROT.

#### What is ROT?

It is a clause in your contracts or standard terms and conditions that allows you to retain ownership of goods you sell until a condition of the contract is fulfilled. The condition is usually payment. It gives you security over the goods and therefore priority over other creditors of the buyer in the event the purchase becomes insolvent.

It has to be express and in writing so the best place to put that is in your terms and conditions/contracts.

#### Types of clause

##### Simple ROT

“The goods delivered remain the property of the seller until they are paid for”

This allows you to retain title to goods delivered until payment for those particular goods is made.

##### All Monies Clause

“The seller remains the owner of the goods until such time as these and all other sums owed by the buyer to the seller are paid in their entirety”

This allows you to retain title to goods delivered until payment of any outstanding amount due from the buyer is made. So, if you made a delivery of goods in February you wouldn’t simply retain title over those goods until those goods are paid for but also for any prior outstanding balance due from the buyer.

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### Limitations

- **Trading Relationship:** “The Buyer can sell the goods in the ordinary course of business”. This is a clause usually included in terms and conditions alongside the ROT clauses. If the ordinary course of business of the buyer is to sell the goods on before payment becomes due, and you know about it, it is likely to make the ROT clause unenforceable.
- **Nil Balance:** Title can only be retained in respect of goods delivered since there was a nil (or credit) balance on the buyer’s account.
- **Perishable Goods:** This type of clause is not much use where goods delivered are likely to perish before payment is due to be made e.g. flowers. If security is important you need to get it elsewhere e.g. Director PG.
- **Mixed Goods:** Where goods supplied are mixed with other goods, then unless your goods are separately identifiable and can be removed without causing damage to the other goods they have been mixed with, you will lose your right to retain title. Further, if you supply goods in the knowledge that they will be mixed or altered before payment is due, it is likely to be deemed that ownership has passed to the buyer despite an ROT clause. **Here are some examples:**
  - You supply flour to a baked goods manufacturer. They make cakes with your flour. Your ROT clause is no longer effective. You don’t own the cakes and your goods are no longer identifiable.
  - You supply plain white A4 sized envelopes to your customer who is supplied with an identical product by other suppliers and all the supplied envelopes are not marked up or stored separately. Your ROT clause is no longer effective as you will not be able to identify which are your white envelopes and which are those of the other suppliers.
  - You supply own branded shoelaces to a sports shoe manufacturer. The laces are stored in the box with the shoes or are laced into the shoe. Your ROT clause is effective. Your laces are branded and although they have been mixed with other goods they are identifiable and can be removed without causing damage to other goods.

### Proceeds of Sale

*“The buyer hereby assigns to the seller the proceeds due from any selling on of the goods delivered until such time as payment is made for the goods”.*

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### Mixed Goods clauses

*“The seller shall acquire joint property in the new products which are the result of processing and/or mingling the goods with goods owned by others. The extent of such joint property is calculated in the proportion of the invoice value of the goods delivered by the seller to the invoice value of the other goods.”*

Both the Proceeds of Sale clause and the Mixed Goods clause are not strictly ROT clauses as you don't retain title but they give you an interest in the mixed goods or proceeds of sale of mixed goods if your ROT has fallen away. Beware though, these types of clauses constitute a charge over the goods and in order to be effective, a charge must be registered at Companies House so that other suppliers have notice that goods belonging to the buyer are encumbered.

### Other Relevant Clauses

In order for a retention of title clause to be effective there a number of other things that you also need to include in your terms and conditions

#### Re-entry

Retaining title is no use unless you have the right to go into the buyer's premises to get the goods back and you have to specifically put that right in your terms and conditions

#### Mark up

You can also include a right not only to go in and get the goods but also that the buyer separately marks the goods as yours whilst they are in his possession. You can also include a right to have access to the goods to check that they have been properly marked.

#### Risk and Insurance

Although you want to hold onto title once the goods have been delivered, you should still want risk to pass to the buyer once the goods are in his possession so that he is responsible for them and for him to insure them against any loss or damage. You will need to provide for this in your terms and conditions. You can also provide for the buyer to prove the goods are insured by providing you with a copy of the insurance certificate or even noting your interest on the policy.

#### Ordinary Course of Business

It is common to have a clause which allows the buyer to be able to deal with the goods in the ordinary course of business alongside the ROT clause. However, beware the problems that can arise (see case study below) which means you may want to place conditions on the operation of that clause.

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### Insolvency

If the buyer goes bankrupt or into administration or some other form of insolvency procedure but payment from the buyer is not yet due, you will want to accelerate payment terms so that you can get your goods back under the retention of title clause.

You can make a provision in your terms and conditions for the contract with the buyer to be terminated immediately upon insolvency and for payment for any goods to become immediately due and payable. This will enable you to enforce your ROT clause as soon as that insolvency event arises.

In addition you should have provision for the Insolvency Practitioner to give you an inventory of the goods held by the buyer and to deliver those goods up to you.

### Case Study

Seller (S) sells goods to buyer (B) with all monies ROT clause in terms and conditions. There is also a term that B is able to deal with goods in the ordinary course of business and that upon insolvency of B, S has the right to immediately terminate the contract. B's ordinary course of business is to sell the goods on quickly to third parties. B goes into administration. S does not give notice to terminate and does not immediately enforce the ROT clause. B sells on the goods it has been supplied by S that should be subject to ROT.

S tries to enforce the ROT and it goes to court. The judge would not uphold the ROT clause because it was inconsistent with the ability of B to deal with the goods in the ordinary course of business.

### Lessons Learnt?

- Provide for immediate termination and payment of balance of monies without need to give notice
- Act quickly (see below)
- Qualify the ordinary course of business clause to say it only applies while B is solvent
- Qualify the ROT clause to say that it applies to goods not yet sold

### Insolvency

If you have provided properly for an insolvent event in your terms and conditions or payment was due at the time of insolvency and you have properly notified the Insolvency Practitioner (IP) then you should have a valid and enforceable ROT clause.

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You won't be able to recover your goods without the consent of the IP or the permission of the court. However, where the IP has been put on notice of a valid ROT claim, they cannot then sell the goods without leave of the court.

You need to act quickly to put the IP on notice of your claim before the goods are sold on. Notice should include evidence of the ROT clause forming part of the contract between you and the buyer, a schedule of the goods supplied which are the subject of the ROT clause and monies owed and an explanation of how the goods can be identified. Make sure all your paperwork is up to date so there is no delay in providing it to the IP. You should also promptly arrange a visit to identify the goods – take photos and an inventory. Get the inventory signed by the Insolvency Practitioner.

If the goods have been mixed or altered to the extent that the ROT clause is no longer valid you could form an "ROT Club" where the sellers of the other goods that have been mixed with yours (who also have valid ROT clauses) "club" together to recover the mixed goods – provided it is possible to prove that all the goods came from one or other of you. Using the cake example above you could club together with the butter, eggs and sugar suppliers to exert retention of title.

### Remedies for Breach

If the Insolvency Practitioner has sold the goods to a third party in breach of a valid ROT clause that has been properly notified then, provided the trading relationship isn't such that you have permitted or acquiesced in the sale, you can claim delivery up of the goods from the third party or alternatively claim the monetary value of the goods sold.

You may also have a claim for the value of the goods from the Insolvency Practitioner you can claim the value of the goods from them.



### Emma Emery

Partner

+44(0)845 274 6888

[emma.emery@freeths.co.uk](mailto:emma.emery@freeths.co.uk)