Hold onto your assets, it's going to be a rough ride

Contractors should ensure that ownership of materials supplied does not pass before they are paid for, warns Ian Pease

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Desperate times often lead to desperate actions. As a newly qualified construction lawyer in the early 1990s I experienced this at first hand when we took out an injunction to prevent a sub-contractor forcibly detaching its plumbing works from a project during the last recession. Given the problems that all parties in the construction industry are now facing it would not be unusual to see the return of these tactics.

Possession is nine-tenths of the law

The trite law, of course, is that under contracts for the sale of ascertained goods the property passes to the buyer at such time as the parties to the contract intend (s17 Sale of Goods Act (SGA) 1979). In relation to building contracts, the starting position is that property will usually pass no later than when the materials are delivered to site (s18 SGA 1979), whether or not the supplier has been paid. Hence this gives rise to the imperatives on the seller's part, particularly in difficult times when insolvency of the buyer may be an issue, to have its terms apply and, more specifically, to have as part of its standard conditions a retention of title clause (a *Romalpa* clause, named after *Aluminium Industrie Vaassen v Romalpa Aluminium* [1976]). Such a clause, providing for the legal ownership of the materials to remain with the seller until payment is made, may be effective against a contractor's liquidator and, if it is, it will mean that the developer will not have obtained ownership either.

Only as strong as the weakest link

A *Romalpa* clause has its limits and needs careful drafting. Its effect may not extend beyond the time the materials are incorporated into the works (see *Tripp v Armitage* [1839]). As such, even if the sub-contractor in my injunction example above had been skilled enough to incorporate its terms (containing a *Romalpa* clause) into the contract, that may still not have enabled it to legally repossess the materials from the site by the stage that the radiators etc had been installed into the building (see *Borden (UK) v Scottish Timber* [1981]). This remains the case even if subsequently the employer 'un-fixes' them from the property (*Lyde v Russell* [1830]).

However, as alluded to above, the use of retention of title as a method of protection has an added complication in the case of building contracts: the chain of supply and installation. Goods will invariably have been supplied to a sub-contractor who in turn will have supplied and installed them in the building under a sub-contract. Hence all the way down the supply chain one has to trace the passing of ownership, for each participant can only transfer that which they themselves have acquired. In *Dawber Williamson v Humberside County Council* [1980] the result of this tracing of ownership was that ownership of the unfixed materials had not passed. This conclusion resulted from a provision in the sub-contract that merely 'deemed' the sub-contractor to have notice of the main contract's terms (where there was a vesting clause).

Out of site, but not out of mind

The particular details of *Dawber Williamson* have been addressed by the Joint Contracts Tribunal (JCT) in the 2005 Contract Clause 3.9.2. relating to sub-letting:

> 3.9 It shall be a condition of any sub-letting to which clause 3.7 or 3.8 applies that:
>
> [...]
>
> 3.9.2 The sub-contract shall provide:
>
> (1) that no unfixed materials and goods delivered to, placed on or adjacent to the Works by the subcontractor and intended for them shall be removed, except for use on the Works, unless the Contractor has consented in writing to such removal (such consent not to be unreasonably delayed or withheld) and that:
>
> (1) where, in accordance with clauses 4.10 and 4.16 of these Conditions, the value of any such materials or goods has been included in any Interim Certificate under which the amount properly due to the Contractor has been paid to him, those materials or goods *shall be and become the property of the Employer and the sub-contractor shall not deny that they are and have become the property of the Employer*;
>
> (2) if the Contractor pays the sub-contractor for any such materials or goods before their value is included in any Interim Certificate, such materials or goods shall upon such payment by the Contractor be and become the property of the Contractor.
>
> [Emphasis added.]

Section 25(1) of the Sale of Goods Act 1979

Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

The use of retention of title as a method of protection has an added complication in the case of building contracts: the chain of supply and installation.

However, the general principle remains that property will only pass under the JCT's vesting (clauses 2.24 and 2.25) when the main contractor has acquired good title either by payment, by a provision in the subcontract, or by qualifying under the provisions of s25(1) SGA 1979. For this latter situation see *Archivent Sales and Developments Ltd v Strathclyde Regional Council* [1985] and in particular *P4 Ltd v Unite Integrated Solutions plc* [2006], discussed below.

Excuse me, can I have my tower crane back?

Of course, the sub-contractor will not only be concerned about the materials it supplies that are destined for the finished works. It will also want to guard the position of its contractor's equipment, as this may become attached to the land during the course of the project so that, should the employer become insolvent, those items do not fall into the liquidator's hands.

While it can be argued that equipment is analogous to 'trade fixtures' in landlord and tenant law and hence remains the contractor's property, any prudent contractor would want the matter expressly covered in its contract, allowing the equipment's removal and expressly agreeing that property is not to pass. Of course, if the plant is being supplied by a sub-contractor then it may find that the main contract does not deal with these matters and so the employer may not be bound. Under those circumstances the contractor may have to rely on the general law.

There is case law holding that even if property has passed to the employer it is implied that, on completion of the project, it re-vests in the contractor (*Hart v Porthgain Harbour Co Ltd* [1903]). More specifically, *Cosslett (Contractors) v Mid-Glamorgan County Council* [1998] may assist. Here, unhelpfully from the contractor's point of view, the contract provided that its plant on site would be 'deemed to be the property of the Employer'. The Court, considering that phrase in the context of the contract, found it to be insufficiently clear to give rise to a passing of property in the plant. Furthermore, the provision purporting to allow the employer to subsequently sell the plant amounted to a floating charge that was void against the liquidator for want of registration.

As such, while each individual case will depend on the wording of the contracts and the actions of the parties, contractors will generally find the courts favourably disposed to retention of title in plant. This is in contrast to the more precarious position on materials supplied to the main contractor with the consent of the sub-contractor. If the main contractor then delivers them to the employer, the latter will probably obtain good title if it receives them in good faith without notice that the sub-contractor's retention of title clause (see s25(1) SGA 1979).

The fax of life

The most recent instance of this occurred in *P4 Ltd v Unite Integrated Solutions plc*. The facts, briefly, were that Unite entered into a sub-contract with Tudor (on DOM/2 standard terms). Clause 21.4.5.1 provided that when unfixed materials and goods were delivered to the site those materials and goods 'shall not be removed except for use on the Works unless the Contractor has consented', and became the property of the employer (clause 21.4.5.2) or the contractor (clause 21.4.5.3) when payment was made. Tudor in turn contracted with a supplier of electrical equipment (P4). P4 claimed that it had contracted on its standard terms, which contained a *Romalpa* clause. The equipment was supplied to the works but never paid for, Tudor eventually going into liquidation. P4 sued Unite in tort for conversion of its property. Unite retorted, initially with a claim for summary judgment (see [2006] BLR 150). It alleged that, under s25(1) SGA 1979, Tudor's disposition and delivery of the goods to Unite under the terms of the sub-contract (DOM/2) had passed title to them. The summary judgment application was unsuccessful as the court decided there were substantial factual differences between the parties.

Subsequently a full trial of the issues took place. It turned out that there was a series of orders and invoices over a period of several months before Tudor eventually went into a creditors' voluntary arrangement, having met only one of P4's several invoices.

The first setback for P4 was on the question of the incorporation of its terms and conditions (including its *Romalpa* clause) into the contract with Tudor. The quotations were faxed and the terms, being on the back of the order, were omitted from that tender, and not referred to on its face. P4 therefore lost the 'battle of the forms', and that was fatal to its case. This is proof that having watertight terms is of no use if lax procedures are followed at time of offer and acceptance.

The Court went on to consider the position if there had been a *Romalpa* clause in place, and found that:

> Unite would have been protected by [s25(1) SGA 1979] on the basis of the provisions of clause 21.4.5 of the sub-contract... Property in the relevant materials and goods did vest in Unite.

The facts of *P4* are not unusual and they point out the limits of retention of title clauses (even assuming that the clause becomes incorporated) where there is a situation such as those envisaged by s25(1) SGA 1979.

We have all heard of *caveat emptor*, but this proves there should be a *caveat vendor* rule as well. ■

While each individual case will depend on the wording of the contracts and the actions of the parties, contractors will generally find the courts favourably disposed to retention of title in plant.

Aluminium Industrie Vaassen v Romalpa Aluminium
[1976] 1 WLR 676

Archivent Sales and Developments Ltd v Strathclyde Regional Council
[1985] 27 BLR 98

Borden (UK) v Scottish Timber
[1981] Ch 25, CA

Cosslett (Contractors) v Mid-Glamorgan County Council
[1998] Ch 495, CA

Dawber Williamson v Humberside County Council
[1980] 14 BLR 70

Hart v Porthgain Harbour Co Ltd
[1903] 1 Ch 690

Lyde v Russell
(1830) 1 B & Ad 394

P4 Ltd v Unite Integrated Solutions plc
[2006] EWHC 2640 (TCC)

Tripp v Armitage
(1839) 4 M & W 687

The Joint Contracts Tribunal 2005

Materials and goods on-site
2.24 Unfixed materials and goods delivered to, placed on or adjacent to the Works and intended for them shall not be removed except for use on the Works unless the Architect/Contract Administrator has consented in writing to such removal, such consent not to be unreasonably delayed or withheld. Where the value of any such materials or goods has in accordance with clauses 4.10 and 4.16 been included in any Interim Certificate under which the amount properly due to the Contractor has been paid by the Employer, such materials and goods shall become the property of the Employer.

Materials and goods off-site
2.25 Where the value of any Listed Items has in accordance with clause 4.17 been included in any Interim Certificate under which the amount properly due to the Contractor has been paid by the Employer, those items shall become the property of the Employer and thereafter the Contractor shall not, except for use upon the Works, remove or cause or permit them to be moved or removed from the premises where they are.