

The background features abstract, overlapping green geometric shapes, primarily triangles and polygons, in various shades of green, creating a modern and dynamic visual effect.

LAWS4210

Commercial Law

Reservation of title and
Personal Property Securities

Reservation of title

- ▶ Reservation of title/retention of title/Romalpa clauses
- ▶ The SGA allows the parties to determine in their contract when property is to pass;
- ▶ Parties can provide that property will pass only when payment is made even though the buyer may have possession of the goods. (s 22)
- ▶ Provides protection for an unpaid seller without the need to take security over the property.

Reservation of title

- ▶ See also s 24
- ▶ **Reservation of right of disposal**
- ▶ (1) If there is a contract for the sale of specific goods, or if goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of the disposal of the goods until certain conditions are fulfilled.
- ▶ (2) In such a case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee, for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

Reservation of title

- ▶ Issues arise as to whether the seller who has reserved title still retains those rights if the goods have been mixed or used up or incorporated as fixtures.
- ▶ This depends in part on the drafting of the clause and also on the doctrines of specification (raw material is altered to produce output of a different identity), commingling (mixing together of goods which belong to 2 or more owners) and accession (property becomes attached to the property of another).

Reservation of title

- ▶ *Aluminium Industrie Vassen BV v Romalpa Aluminium* [1976] 1 WLR 676.
- ▶ The contract provided that until full payment was made by the buyer to the seller the buyer would hold as “fiduciary owner” but was entitled to sell the objects in the normal course of business to third parties subject to handing over to the seller the claims against the subsequent buyers.

Reservation of title

- ▶ The contract also provided that if the buyer used the goods to manufacture new objects or if the goods were mixed with other goods then the seller would be given ownership of the new objects as surety for the payment.
- ▶ The buyer company went into receivership owing the seller £122,000. The receiver held £50,000 of unused aluminium foil and £35,000 which was the proceeds of sub-sales.

Reservation of title

- ▶ The issue of the foil still in possession of the buyer company was easily resolved in favour of the seller.
- ▶ Could a power of sale be implied into the contract in relation to the unmixed foil as there was no express power in the contract although there was an express power in relation to mixed goods?
- ▶ The receiver (buyer) argued that once the goods were sold to sub-buyers there was no more than creditor-debtor relationship.

Reservation of title

- ▶ Roskill LJ said that the buyers were selling as agents for the seller. They were in a fiduciary relationship and not only was it necessary to imply the power to sell but also the obligation to account in accordance with the normal fiduciary relationship of principal and agent and bailor and bailee.

Reservation of title

- ▶ The principles of tracing laid down by Jessel MR in *Re Hallet's Estate* (1880) 13 Ch D 696 were applied.
- ▶ Where property is disposed of by a fiduciary (whether the disposal was rightful or wrongful) the beneficial owner can follow the proceeds.

Reservation of title

- ▶ If the proceeds have been used to buy something else the beneficial owner has the right to elect to take the property purchased or to hold it as security for the amount of trust money laid out in the purchase.
- ▶ Where a trustee has mixed the money with his own the beneficial owner can no longer simply take the property but is still entitled to a charge on the property purchased for the amount of trust money laid out for the purchase.

Reservation of title

- ▶ *Chattis Nominees Pty Ltd v Norman Ross Homeworks Pty Ltd (Receiver appointed) (In Liq)* (1992) 28 NSWLR 338.
- ▶ Contract provided that ownership was retained in goods supplied until payment was made for the goods and for all other goods. It also provided that if goods were sold by the customer prior to payment and if they become constituents of other goods then the proceeds of sale would be the property of the seller.

Reservation of title

- ▶ What was the effect of the provision that the proceeds of sale would be the property of the seller? Did it make the buyer a fiduciary in respect of the proceeds of sale with the result that those proceeds became a fund held in trust for the seller?
- ▶ Seller was not entitled to trace proceeds of sale of goods which had already been sold.
- ▶ In order to establish that a fund is to be held for another person it is necessary to find a trust or fiduciary relationship.

Reservation of title

- ▶ Cohen J did not think it was necessary to give business efficacy to the contract to imply a term that the buyer would keep the proceeds separate from its other funds. It was not necessary because the funds could be received as the property of the seller but kept with its own funds and remain a debt.
- ▶ There is no trust relationship if there is no obligation to hold the moneys in a separate account.

Reservation of title

- ▶ All moneys aspect of the clause
- ▶ Does this have the effect of creating a charge when it extends beyond the moneys due on the particular sale transaction?
- ▶ Held not to create a charge.

Reservation of title

- ▶ *Associated Alloys Pty Ltd v Metropolitan Engineering and Fabrications Pty Ltd* (1996) 20 ACSR 205 and (2000) 202 CLR 588
- ▶ Standard reservation of title and contract also provided that if the purchaser used the goods in a manufacturing process then the purchase would hold the part of the proceeds as relates to the goods in trust for the vendor. Such part shall be deemed to equal in dollar terms the amount owing by the purchaser to the vendor at the time of the receipt of such proceeds.

Reservation of title

- ▶ Products were made from steel and the court held that the seller had no continuing property in the derived products because the original goods had gone out of existence (process of manufacture - specification) and had also passed to third parties.
- ▶ The proceeds (equal in dollar terms to the amount owing by the buyer to the seller) were nevertheless subject to a trust in favour of the seller.

Personal property securities (*Revision*)

- ▶ The *Personal Property Securities Act 2009* (Cth) passed in December 2009 establishes a single national law to govern security interests in personal property. The aim of the PPSA is to allow “*for more certain, consistent, simpler and cheaper arrangements for personal property securities for the benefit of all parties.*” (EM)

Personal property securities (*Revision*)

- ▶ There were more than 70 Commonwealth, State and Territory laws relating to company charges, bills of sale, ships mortgages, motor vehicle securities, crop liens, stock mortgages and most other securities affecting tangible and intangible personal property rights. The PPSA 2009 was intended to rationalise these.
- ▶ The *Personal Property and Securities (Corporations and Other Amendments) Act 2010* (Cth) received Royal Assent on 6 July, 2010. The bulk of the Act entered into force on 30 January, 2012. This Act amends the *Corporations Act 2001* (Cth) to ensure consistency with PPSA 2009.

Personal property securities (*Revision*)

- ▶ Australian PPS law reform has been influenced by developments in Canada, The United Kingdom, New Zealand and the United States as well as the work of United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT).

Personal property securities

- ▶ The PPSA adopts a functional approach to security interests - any right or interest in personal property that in substance secures performance of an obligation will be a security interest for the purposes of the legislation regardless of its form or who has title to the secured property.
- ▶ *It is a system of priorities, not of title*
- ▶ **Meaning of security interest**
- ▶ S 12(1) A ***security interest*** means an interest in relation to personal property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property).

Personal property securities

- ▶ S 12 (2)
- ▶ For example, a ***security interest*** includes an interest in relation to personal property provided by any of the following transactions, if the transaction, in substance, secures payment or performance of an obligation:
 - (a) a fixed charge;
 - ▶ (b) a floating charge;
 - ▶ (c) a chattel mortgage;
 - ▶ **(d) a conditional sale agreement (including an agreement to sell subject to retention of title);**
 - ▶ (e) a hire purchase agreement;
 - ▶ (f) a pledge;
 - ▶ (g) a trust receipt;
 - ▶ (h) a consignment (whether or not a commercial consignment);
 - ▶ (i) a lease of goods (whether or not a PPS lease);
 - ▶ (j) an assignment;
 - ▶ (k) a transfer of title;
 - ▶ (l) a flawed asset arrangement.

Personal property securities

- ▶ Section 12(2)(d) a conditional sale agreement (including an agreement to sell subject to retention of title)
- ▶ Contract for the sale of goods subject to a retention of title (RoT) clause (also known as a *Romalpa clause*) is now a security interest within the meaning of the PPSA.
- ▶ A seller can still use an RoT clause but now, in order to protect their interest, the seller will need to comply with the provisions of the PPSA. Claiming title in goods alone is no longer sufficient protection of the seller's interest because the legislation imposes a 'priorities system' on parties in relation to goods in which there is a security interest as defined.

Retention of Title (RoT) and PPSA

- ▶ A Seller relying on an RoT will need to establish that they have a **valid and perfected security interest** over the goods in question: *Re Gelpack Enterprises Pty Ltd (in liq)* [2015] NSWSC 1558.
- ▶ For a discussion of the impact of the PPSA on the RoT arrangements under general law, particularly the consequence of not ‘perfecting’ such an interest under the PPSA, see *Warehouse Sales Pty Ltd (in liq) & Lewis and Templeton v LG Electronics Australia Pty Ltd* [2014] VSC 644 at [37] - [40] (*unreported judgment*).

Retention of Title (RoT) and PPSA

Warehouse Sales Pty Ltd (in liq) & Lewis and Templeton v LG Electronics Australia Pty Ltd [2014] VSC 644:

37. The PPSA provides for a priority regime, not a title regime. Under s 273 of the PPSA ownership or title to personal property is not determinative and as a consequence a retention of title (“ROT”) financier’s ownership interest is replaced by a simple security interest. A ROT supplier must protect that ‘security interest’ by taking possession of the personal property (e.g. a pledge under pre-PPSA law) or by obtaining a signed security agreement that covers (describes the collateral) and perfecting that security interest by registration of a financing statement on the PPSR. The consequences of non-perfection are that the security interest is ineffective against third parties, and on insolvency a security interest (title) vests in an administrator or liquidator. In other words, it is ineffective in the event of insolvency.
38. Because the ownership or title interest is merely a security interest, non-perfection also results in loss of priority because of PPSA s 55. A further consequence is that a transferee or buyer can take free of the security interest such as under s 43 because of non-registration and, also, under s 46 which provides that a buyer (transferee) takes free of a security interest given by the seller who sells personal property (mainly inventory) in the ordinary course of business of selling personal property of that kind. This is similar to but not the same as the idea of extinguishment under the old *Chattel Securities Act 1987* (Vic).
39. A buyer can also take free of a security interest given by a seller in circumstances where the ROT supplier’s security agreement (supply agreement) authorises the sale of inventory in the ordinary course of the buyer’s business: s 32(1) PPSA. This authorisation is equivalent to the concept of the floating charge whereby the chargor could, until crystallization, sell inventory in the ordinary course of business free of the charge.
40. Under the old law, inventory and book debts from the sale of personal property owned by the chargor were floating charge assets (circulating assets) and were thus available on insolvency to pay priority creditors. Retention of title assets were not available to a liquidator as they were not assets of the insolvent entity.

Personal property securities

- ▶ Perfection of security interests - see s 21
- ▶ A security interest will generally be perfected if it is attached and
 - ▶ In respect of any type of collateral, it is effectively registered or the secured party has possession of the collateral (other than as a result of seizure of repossession) or
 - ▶ For certain kinds of collateral the secured party has control of the collateral.

Personal property securities

- ▶ In *Central Cleaning Supplies (Aust) Pty Ltd v Elkerton* [2015] VSCA 92, the court held that a credit application in respect of a sale and supply of cleaning equipment was held to incorporate an RoT clause by the terms of the agreement. Acceptance of the terms were held to be binding once the seller supplied the equipment and provided the 30-day credit which the buyer had requested. The agreement was expressed to cover all further supplies of equipment. It was therefore held that a 'security agreement' came into force at the time of the first supply of equipment which did 'provide for the grant of a security interest' in relation to all future supplies of equipment. This construction was relevant because it meant that the agreement fell within the PPSA definition of a 'transitional security agreement' under s.307 PPSA and could therefore be enforced even though it had not been registered. (See further Part 9, PPSA for transitional arrangements).