

OWNERSHIP OF MATERIALS: A SCOTTISH/ENGLISH DICHOTOMY

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Materials are a critical element within the construction industry yet the conditions and legality surrounding their ownership remains an area of uncertainty. The difficulty in ascertaining ownership is often found in the instances of payment, delivery and complex contractual relationships. Additionally, the nature of the construction industry whereby raw materials are purchased within a supply chain and are incorporated into the fabric of buildings or goods often creates further confusion. The importance of ownership is most apparent in the instances of disputes or insolvencies, both of which are regular occurrences within the construction industry and also in the management of a project with respect to cashflow and programme. This research aims to evaluate current law regarding ownership of materials in Scotland through the undertaking of a literature review which establishes the prevailing legal structure to inform the position and stance of Scots Law in relation to ownership of materials. Conclusions and recommendations propose it is imperative that parties are aware of current law surrounding the intricate matter regarding ownership of materials in Scots Law.

Keywords: insolvency law, liquidation, ownership, sale of goods, Scotland.

INTRODUCTION

Materials are the fundamental ingredient to a construction project. However, ascertaining who holds ownership of materials can be decidedly difficult within the numerous and complex contractual arrangements of the construction industry. Construction projects are a multidisciplinary process due to the nature of the 'product' and industry as a whole. One single project can involve many disciplines and the creation of several interfaces between each of the parties involved, resulting in a complex supply chain and the development of many contractual relationships. The importance of contractual relationships is crucial when asserting the rights attached to each party to administer the contracts effectively and in resolving disputes, should they arise. Disputes are recognised as a consistent and regular occurrence within the construction sector, arising from numerous and varied situations. Research by Malleson (2013) reveals there is a market trend which indicates the level of disputes has increased over the last few years and both industry bodies and disciplines believe construction disputes will continue to increase. The litigious atmosphere of the construction industry is magnified in times of decreased availability of work due to an unstable economic climate. As a consequence of the recent economic situation, a number of firms had entered into insolvency proceedings and members of the construction industry are continuing to protect themselves against the risks associated with liquidation. Beale and Mitchell (2009) confirm that insolvency is a prominent

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and threatening occurrence within the present day construction sector and advise it is imperative that those involved within a project protect themselves regarding the payment and ownership of materials.

Additionally, payment of materials has a direct effect upon cashflow within a project. Cashflow is paramount in construction projects and is frequently documented as being directly linked to delayed programmes, having an impact upon project delivery and contributing to a deterioration in working relationships. A reduction in cashflow for any one project also has an effect on other projects the Contractor may have running concurrently within his business. The certainty of payment for materials is therefore of crucial concern for cashflow purposes and overall management of a project and a business.

The legal conditions surrounding payment of materials is determined by a number of factors. Variables include whether the materials are located on or off site, fixed or unfixed to the works, and both when possession and ownership of property is transferred and who retains that ownership at the various stages of the process. The determination of these points differs dependent on the legal perspective and structure prevalent within the country where work is taking place. The intricate details and legal requirements regarding ownership of materials is one such matter whereby the legal difference between English and Scots Law becomes apparent. Thus, construction works are not only accountable to a contract but also to the common law and system in place within the country and transactions must adhere to the relevant protocols and legislation.

With consideration to the foregoing, this research will focus upon the often contentious subject area concerning ownership of materials within the legal context of Scotland with an aim to evaluate current Scots law practice.

EVALUATION

Scots Law

Scots Law is fundamentally derived and deduced from the laws and doctrines of ancient Rome. The legal structure within Scotland is of a deductive nature based upon the institutional writers who adopted Roman law which Walker (1982) identifies as being constituted of three separate principles; the laws of persons, things and actions. This is in contrast with the inductive legal system practiced within England whereby case law and judgements accumulated over many years form a chain of judicial precedents which determine current practice, largely based upon the most recent court decision.

Within Roman law there was a distinction and difference established between 'things' and 'actions,' or correspondingly, sale and hire. The division of these legal principles was reflected in the practice of separate contracts for each component, which Connolly (1999) argues becomes problematic within the context of building or construction works, as it poses the question of whether the contract will be a contract of hire, purchase and sale, or both. A contract of sale relates to the purchase of goods and is regulated by the Sale of Goods Act 1979 (Uff, 2009). Section 2 (1) of the Act defines a sale of goods as 'A contract by which the seller transfers or agrees to transfer the property in goods to the buyer.' Interestingly, this definition does not specify payment or delivery as determining factors that would constitute a sale. The implied notion is that of intention, whereby the seller 'agrees to transfer the property.' Also notable within this condition is the absence of any services; the contract is for the sole

purpose of the purchase and sale of goods. The separation of contracts of hire and sale does not explicitly accommodate for all possible transactions that could occur. For example, a contract of hire may result in the production of 'goods' yet a contract of sale may not have necessarily occurred. An attempt to remedy this situation was made with the introduction of the Supply of Goods and Services Act 1982. Scots Law was accommodated by the Sale and Supply of Goods Act 1994 which contained provisions for matters relating to the Scottish legal system.

Ownership of Materials

The intricate nature of construction contracts in Scotland as a developed form of Roman principles is distinctive in respect of hire and sale; however, there is historically an absence of particulars relating to the ownership of materials. The question of whether ownership and title to materials passes upon payment, delivery or intention is a matter in which much deliberation is present, yet which can only be ascertained by thoroughly investigating each circumstance.

The complication of ownership with regards to delivery is dependent on the type of contract used. A contract of sale, or supply only contract, would allow for property in goods to pass upon delivery, but the nature of a construction contract is not that of only sale. The combined hire, or supply of services creates an effect in which delivery alone cannot allow transfer of ownership. Within the Scottish judicial precedent of *Seath and Co v. Moore* [1886] 13 R 57 HL Lord Watson stated;

'Materials provided by the builder...although intended to be used in the execution of the contract, cannot be regarded as appropriated to the contract or as 'sold' unless they have been affixed to or in a reasonable sense made part of the corpus.'

Evidently, this case displays that sale and hire must both be considered complete to allow for the transfer of ownership. The ruling indicates that in addition to delivery, there is a condition that labour and incorporation of the materials must have taken place. Bell (1899) reaffirms that '...the articles sent are merely the materials, the act of delivery seems not to complete till the work be performed'.

With respect to intention, Section 6, 11B (1) of the Supply of Goods and Services Act 1982 introduced implied terms to facilitate the right to transfer title; 'In a contract for the transfer of goods...there is an implied term on the part of the transferor that...he has a right to transfer the property.' This condition reinforces the terms expressed within the Sale of Goods Act 1979 which specified the seller 'agrees' to transfer title, thus supporting the notion of intention and agreement to transfer. Additionally, the Supply of Goods and Services Act 1982 also implied a term to allow for 'quiet possession of goods,' whereby, the Purchaser, or Employer, is legally permitted to possess the goods without interference from other parties, including claims for ownership.

Regarding payment, Murdoch and Hughes (2008) inform that the general consensus at common law is that ownership of materials transfers to the Employer when materials are incorporated into the works, whether or not payment has taken place. As this matter is complicated by the varied contractual relationships within the construction industry, it is prudent to establish the relationship and whether payment within the supply chain alters, or indeed constitutes, the transfer of ownership.

Contractual Relationships

The contractual relationships effective within a project play a vital role in ascertaining who owns title in goods and subsequently who, therefore, has the authority to transfer those goods. Furst and Ramsey (2006) note in the traditional structure of a project there is an Employer, Contractor and one or more Sub-contractors. Any or all of the parties mentioned can be involved in further relationships with Suppliers. Common law recognises the difference between the role of a Sub-contractor, who provides both goods and labour, and a Supplier, who supplies only goods. This complex supply chain creates numerous contractual relationships where parties are not necessarily in direct contract with one another. Murdoch and Hughes (2008) explain that historically, the legal doctrine concerning Privity of Contract would not allow a third party with no contractual relationship to enforce contract terms. Within construction contracts, it is regular practice that Employers and Sub-contractors have no contractual relationship. However, the Contract (Rights of Third Parties) Act 1999 has sought to remedy the situation.

The traditional Employer and Contractor relationship typically involves the Employer engaging with the Contractor to carry out the works inclusive of supply, a relatively straight forward relationship. The Employer can also enter into a contract of purchase and sale with a Supplier for an item to be incorporated into the works and contract another party to install or incorporate that item. A Contractor can then in turn procure either; the services of a sub-contractor, supply of materials and services from a sub-contractor, or the supply of goods from a Supplier. The distinction between each of these roles and relationships is crucial when deliberating who rightfully holds ownership to materials. Adriaanse (2010) considers that issues regarding ownership of materials are most likely to arise in the relationships Contractors have with Sub-contractors and Suppliers. He proposes the difficulty predominantly lies within the likelihood that the Contractor does not acquire the right to the goods which lawfully prohibits him in turn to sell on to a third party, e.g., the Employer. Failure to obtain ownership is a circumstance known as the 'nemo date' rule which Adriaanse (2010) explains means that 'a person cannot give better title than he or she has.' In the event of a Contractor purchasing goods from a Supplier, Section 25 of the Sale of Goods Act 1979 states ownership rights to the goods are specified to have passed;

'Where a person having agreed to buy goods obtains, with the permission of the seller, possession of the goods...the delivery and transfer by that person...of the goods...receiving the same in good faith...right of the original seller of the goods.'

Transfer of ownership is conditional upon 'good faith' and there can be no reproach on the basis of a retention of title clause.

Successful application of Section 25 is demonstrated in the case of *Archivent Sales and Developments Ltd v Strathclyde Regional Council* [1985] SLT 154. Strathclyde Regional Council had employed R.D. Robertson (Builders) Ltd as the Contractor for the construction of a school. Robertson had engaged in a supply-only contract with Archivent for the purchase of multiple ventilators which contained a retention of title clause stipulating that property in the goods would not pass to the customer until payment had been received in full. Robertson took possession of the goods which had been delivered to site by Archivent. Strathclyde Council certified and made payment to Robertson for the goods, unaware of any title reservation clause. In accordance with their contract, payments for materials within an interim certificate become property of the Employer. Robertson received payment from Strathclyde Council but did not pay

Archivent for the supply of the ventilators before going into receivership. Archivent, the Supplier, requested return of the materials, or payment, from Strathclyde Council. Presiding Lord Mayfield held that in terms of the contract between the Supplier and Contractor, the intention for ownership to pass was upon payment in accordance with a sale of goods contract. However, the possession of the materials by the Contractor, who acted as a 'mercantile agent' not out with the regular and accepted practice of construction transactions and subsequent delivery to the Employer, was evidence enough to satisfy that ownership had transferred to Strathclyde Council. Section 25 of the Sale of Goods Act 1979 prevailed over a retention of title clause in this instance and as had occurred previously in the case of *Thomas Graham and Sons Ltd v Glenrothes Development Corporation* [1968] SLT 2. Lord Mayfield's judgement made much reference to this case and of particular interest was Lord President Clyde's statement declaring;

'Section 25 is a statutory recognition of an exception to the general rule that only an owner of goods can transfer the property in them. The section enables an apparent owner to transfer someone else's goods to a third party in certain specific circumstances.'

This statement highlights that the Sale of Goods Act 1979 acknowledges there may be substantial reasoning in favour of the third party for ownership to transfer depending on the particulars of the case. The nature of some transactions, such as those performed in construction, allows an agent to effectively assume ownership thus enabling them to transfer the title of those goods.

The cases demonstrate the importance of ascertaining who holds ownership to materials if a party becomes insolvent. MacQueen and Thomson (2012) define insolvency as 'the inability to meet obligations as they fall due because total liabilities exceed total assets.' This definition encompasses the various different forms of insolvency; administration, receivership and liquidation, which are all subject to the Insolvency Act 1986. Essentially, a company or person is insolvent if they are unable to finance their obligations and there are also repercussions for parties they are involved with as found in the case of *Archivent Sales and Developments Ltd v Strathclyde Regional Council* [1985]. Watt (2010) reaffirms that when Liquidators become involved, recovery of goods or money becomes challenging and exceedingly unlikely, therein lies the risk within the construction industry and the importance of realising who retains ownership of goods.

State of Materials

In addition to the complexities surrounding contractual relationships, a further consideration is the circumstances in which an ownership dispute is occurring, i.e. whether the goods or materials supplied have been transformed or incorporated into the works or where they are located or stored at the time their ownership is debated.

Materials that have been incorporated into the fabric of the building under common law are considered property of the Employer and ownership is deemed to have transferred. Payment for the materials need not have taken place as Watt (2010) confirms that incorporation regardless of payment is sufficient for ownership to transfer. Conversely, in the event that materials are on site but have not yet been incorporated into the works, the situation becomes more complex and requires further investigation to determine whether ownership has indeed passed from a Supplier or Sub-Contractor to the Contractor or Employer, or whether it has been retained. As demonstrated in the cases of *Archivent Sales v Strathclyde Regional Council* [1985]

and *Thomas Graham and Sons Ltd v Glenrothes Development Corporation* [1968], a Supplier is unable to claim ownership of the materials if they have been included within an interim payment certificate. In the event of a Contractor's insolvency and in spite of a reservation of title clause, the Supplier will have no claim for unfixed materials on site if they have been included within main contract payments. Brewer (2004) advises that in this situation the Supplier or Subcontractor remain very much 'at risk for the value' of those unfixed materials which have been paid under the Employer and Contractor main contract, yet no payment has been received by those bearing the risk.

Contrary to the aforementioned cases, an important decision in England which illustrates the differences between English and Scots Law, took place in the case of *Dawber Williamson Roofing Ltd v Humberside County Council* [1979] 14 BLR 70. The decision resulted in amendments to the Joint Contracts Tribunal (JCT) standard forms of contract to provide security for Employers in disputes regarding ownership of materials. A supply and fix contract existed between the subcontractor Dawber Williamson Roofing and Taylor and Coulbeck, the Contractor, who were employed by Humberside County Council. Dawber Williamson had been prevented from commencing works as the project was behind schedule, but nonetheless Dawber supplied and delivered to site the roofing slates required in preparation to begin. Taylor and Coulbeck applied and received payment for the roofing slates from Humberside Council prior to their liquidation, although Dawber had not received any payment for the materials they had supplied. Upon knowledge of Coulbeck's liquidation, Dawber sought to retrieve the slates from the site, from which Humberside refused them access on the argument that the slates were now their property following their inclusion in the interim payment certificate of the main contract. Dawber maintained that the supply and fix contract did not entail 'selling' the materials to the contractor, and until they had been fixed to the structure and paid for, then ownership remained with them. Humberside relied on the defence that the main contract terms were incorporated into the subcontract. Furmston (2012) details it was held that the nemo date rule applied in this case as the contractor could not transfer property of the materials to Humberside Council as they had never acquired title in the first instance and secondly, Humberside's argument regarding the main contract terms becoming effective within the subcontract were insufficient as there was no privity of contract established between Dawber and Humberside. Dawber were successful within this landmark case in English Law which instigated amendments to JCT standard forms of contracts to provide a level of security for Employers who would otherwise bear the risk for materials that they had paid for, but which had not yet been incorporated into the works. The revised terms stated that once materials or goods are delivered to site by a Subcontractor and included within the main contract interim certificates, the Subcontractor shall not 'deny that good title has passed to the employer' (Brewer, 2004).

When materials are located off site on premises not belonging to the Employer, common law in Scotland dictates that property to the materials will not have passed. *Stirling County Council v Official Liquidator of John Frame Ltd* [1951] SLT 37 is the leading and most prominent case which expressly determined Scots Law regarding this scenario. John Frame Ltd were employed by Stirling Council for construction works in a housing scheme. Due to limited space on site Frame stored, with the knowledge and permission of Stirling Council and their Architect, materials in a locked storage container in their yard, off site. Upon Frame's liquidation, Stirling

Council attempted to retrieve the materials on the basis that Condition 5 of their contract expressed that 'From the time they are placed upon the site... all materials delivered by the Contractor for the execution of the works, shall become and be the absolute property of the Employer.' Sheriff-Substitute Walker held that a building contract was not one of sale, and as such the Sale of Goods Act 1979 was not applicable, and moreover the title of the goods had not passed in this instance. With regards to Condition 5, he declared it was not enforceable and was in his opinion 'remarkable' and 'under reference to some foreign system of law,' to which the legal system of England is the supposed inference. He further added it was 'conclusive' that Condition 5 was not applicable and furthermore, that Stirling County Council had not acquired any title to the materials. Upon appeal, Sheriff-Principal Black agreed the contract was not one of sale and disputed the pursuer's argument that the materials were 'constructively on site' to establish that there are two distinct stages which must be adhered to in order for property of the material to transfer. These stages consist of possession by placing materials on the site and delivery by incorporation into the works. He proceeded to explain that in storing the materials off site, they were subject to the control of the Contractor and could not be considered as being 'delivered for the execution of the works' in any manner. The Sheriff-Principal was very much in agreement with the Sheriff-Substitute in all matters concerning this case. The Employer and pursuant, Stirling County Council, were unsuccessful and did not receive recompense upon the Contractor's insolvency for materials paid for and located off site on the basis that delivery to site had not taken place. This case was significant within Scots Law regarding payment for materials off site and caused the Royal Institution of Chartered Surveyors Scotland to advise this issue to be particularly highlighted to their clients upon the first payment certificate, as (Bowles and Gow, 1992) inform that payments from local authorities at that time were being made for up to 90% of the value of materials with no knowledge of who held ownership. However, the Regulations and practice by many remained unchanged after the case ruling.

Ownership of materials that have undergone transformation, or have been included within a manufacturing process to become another product entirely, are subject to the specifics of each case. Webb (2000) professes that law courts have 'consistently' maintained that once a transformation has occurred, the original goods are non-existent and consequently, the claim to title or property for them is 'extinguished'. An example demonstrating Webb's declaration would be the much referred to case of *Aluminium Industrie Vaassen BV v Romalpa Aluminium* [1976] 2 All ER 552 whereby a contract of sale existed between a Dutch Supplier of aluminium foil to an English Purchaser with the intention of using the foil within a manufacturing process. The Purchaser took possession and used a quantity of the foil within the process, however, before providing full payment for the goods the Purchaser became insolvent. The appointed Receiver sold both mixed and unmixed materials upon the insolvency and the pursuer argued that ownership had not passed in the goods as full payment had not been received. It was held that title had not passed. However, the unmixed foil that had been sold was now the property of the new buyers and the pursuer could claim the proceeds of the sales.

A further demonstration that goods cease to exist due to being irretrievably mixed and transformed within *Borden (UK) Ltd v. Scottish Timber Products Ltd* [1979] 3 WLR 672 in which the retention of title clause was rendered ineffective as the resin supplied had been incorporated into chipboard and was considered to no longer exist.

Conversely, this line of argument was not successful within another Scottish case, that of *Armour v Thyssen Edelstahlwerke AG* [1989] SLT 182. In this case, Thyssen retained ownership on the basis that title had not passed as the materials had been worked upon, but they were not irretrievably transformed. Therefore, if small changes have occurred to the goods there may be grounds for retaining ownership, if, however, substantial changes have taken place or other goods have been mixed, there is little chance of retaining title as a new product has been made (Hicks 1993).

Preventative Measures

Accepted practice in construction is to eliminate or mitigate risks and financial losses which align with the sentiments of Vella (2009) who advises that each contractual party should do everything within their power to ensure there is effective security and protection within their transactions to continually reduce their exposure to risk. There are options available to the contractual parties to accommodate for ownership of materials and provide a level of protection for themselves in the event of any party's insolvency whilst maintaining effective management of the project.

A retention of title clause serves the purpose of delaying the transfer of ownership until certain criteria have been fulfilled, namely payment, which Morse (1993) suggests protects the supplier of goods from insolvency of the purchaser. Once materials or goods have been incorporated into the works, a retention of title clause no longer applies. The distinction between Sub-contractor and Supplier is important within the contractual arrangement as a Sub-contractor may present a claim without a retention of title clause, whereas a Supplier may only claim in the event of a retention of title clause. The most secure situation for a Supplier is, as Beale and Mitchell (2009) propose, to refrain from delivery unless full payment has been received or ensure the retention of title clause is applicable. In order for the clause to be effective the direct customer and any third party, such as the Employer, must be aware that a retention of title clause is in operation. As demonstrated within *Archivent Sales v Strathclyde Regional Council* [1985] a retention of title clause will not protect an unpaid Supplier if the third party purchases the materials in good faith with no prior knowledge of the clause. This, however, can only be effective to an extent, or be subject to conditions, as the ruling of *Aluminium Industrie Vaassen v Romalpa* [1976] established. The intricate nature of construction contracts and the supply chain has enabled a necessity for clauses such as a retention of title to provide a level of assurance and security. Bradgate (1987) believes the main complication is, in fact, the legal systems and their struggle of 'reconciling the several decisions on the subject.'

In order to transfer ownership prior to delivery, the Employer in Scotland may enter into a Contract of Purchase, separate from the main contract which becomes a contract of sale only and, therefore, subject to the Sale of Goods Act 1979. The finished goods purchased using a contract of this type are omitted from the main contract and the contract sum is adjusted accordingly by deducting the value of the purchased goods informs Frame (2011). According to MacRoberts (2008), Contracts of Purchase are particularly appropriate on occasions where a specialist may require payment for manufacturing or restoring products within his own premises. Some goods in construction are manufactured entirely off site and brought to site for installation or erection only. Steelwork and pre-fabricated forms of construction rely upon either; a separate Contract of Purchase and Sale, or the Contractor allows for the financial burden of these items until they are delivered to site and eligible for inclusion in interim payments.

Another option, specific to English Law and JCT standard contracts, is the provision for off-site materials or goods bonds which incorporate a defined schedule of 'listed items' whereby payment for those items is conditional upon transfer of ownership to the Employer. However, MacRoberts (2008) cautions that these terms are not applicable in Scots Law, as it cannot be displayed that title to the materials or goods has indisputably transferred. The Scottish Building Contracts Committee have accommodated for this within their contracts.

As a final option, again specific to English Law, Vesting Certificates are commonly used to transfer the title in materials or goods and provide protection to the owner. Materials and goods are separately identified and securely stored in facilities off site. Struckmeier (2009) warns that Vesting Certificates are not applicable in Scots Law as they will not have the same validity. Evidence of applying English law sentiments within Scotland where they have no jurisdiction or foundation within Scots Law can be found in Sherriff-Substitute Walker's comment in the case of *Stirling County Council v Official Liquidator of John Frame* [1951] whereby he remarked the contract condition was in reference to some 'foreign system of law.'

CONCLUSION

The legal structure prevalent within Scotland has been established and investigated to determine the nature of construction contracts and subsequently, the conditions applicable to the transfer of ownership of materials in Scots Law. Ownership of goods transfers upon incorporation into the works or delivery as was determined with a degree of finality in the landmark judicial precedent of *Stirling County Council v Official Liquidator of John Frame* [1951]. Such transactions in Scotland are subject to either the Sale of Goods Act 1979 or Sale and Supply of Goods Act 1994. The options and risks for each party have been explored in addition to the conditions which constitute a transfer in ownership.

In the construction industry, and indeed in each country where construction operations are taking place, it is imperative that upon entering a contract for construction works that all parties are aware of their responsibilities and entitlements. Attention to the contract conditions and to the prevailing legal structure and current law is essential to fully protect parties against any instances of material ownership dispute which are most likely to arise in instances of insolvency. The complex and intricate nature of the construction industry which trades in high value transactions and investments, combined with high instances of insolvencies and disputes in an adversarial atmosphere, results in little room for error and it is essential that those involved are fully aware of the legalities surrounding ownership of materials.

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