

Remedial Procedures with Romalpa Clauses

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Even properly drafted Romalpa clauses are not free of problems when it comes to recovery action.

Properly drafted "all monies" Romalpa (Retention of Title) clauses in a supply contract enable credit managers to regain possession of goods which have not been on-sold if the original buyer is in default.

But if the amount received for the goods repossessed doesn't cover the credit extended or the cost of taking possession is uneconomic, can you, the seller, sue the original buyer for the total price of the goods?

This depends on whether you fulfil all three conditions of section 50 (1) of the Sale of Goods Act (Qld). This requires that:

- there is a contract of sale;
- property in the goods has passed to the buyer; and
- the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract,

before the seller may take action against the buyer for the price of the goods.

If the goods have not been paid for property has not passed to the buyer (so the second condition has not been met).

However section 50(2) can provide relief if there is a contract of sale.

There is a divergence of opinion as to whether or not a contract containing a Romalpa clause is a **contract of sale**.

This difference of opinion surfaced in *Puma Australia Pty Ltd v. Sportsman Australia Ltd*.

One judge doubted that such a contract was a contract of sale within the meaning of the Sale of Goods Act as title may never be transferred to the buyer: another considered it was a contract of sale simply by virtue of the fact that the passing of title was subject only to the condition that the buyer made payment.

The implications for suppliers of goods are significant. In the case of *Style Finnish (Qld) Pty Limited v Abloy Security Pty Limited* it was said that if a supplier is unable to sue for price, his claim may only be one of unliquidated damages for breach of contract. The difference in the causes of action means a difference in the remedial procedures available to the seller. If a seller cannot sue for the

price then he may not be able to issue proceedings for a liquidated debt and obtain default or summary judgment but rather, must go through the lengthier process of suing for unliquidated damages for breach of contract. Delays and costs may also be encountered if suppliers have to replead their existing claims for monies owed.

The question also raises issues as to whether or not the supplier can rely upon the statutory demand provisions and deemed insolvency of a company under the Corporations Law to wind up the buyer when his claim may only be an unliquidated claim for damages.

There are many suppliers whose terms of supply may not be sufficient to meet any objections from a defaulting buyer who takes this position.

All suppliers should consider the terms and conditions of supply which they presently use and if necessary, seek advice on these issues. There are means available to suppliers to avoid the unforeseen consequences that the inclusion of a Romalpa clause may have in contracts for the supply of goods.

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