**Answer Guidance for Chapter 11 Practice Questions**

**1. George sells 100,000 litres of milk each month to Dave’s Bakeries Ltd, which uses it in the manufacture of bread and cakes, which it then sells through a number of retail shops. Dave’s Bakeries Ltd also buys milk from several other suppliers. A clause in the contract between George and Dave’s Bakeries Ltd provides:**

***Goods are supplied on the condition that the supplier shall retain legal and equitable ownership of them until full payment has been received by them for all sums owing. Any money from the sale of the goods shall be paid into a separate bank account noting on it the supplier’s name. All goods shall be clearly labelled as belonging to the supplier until all sums owing have been paid.***

**Dave’s Bakeries Ltd has now gone into administration, owing £20,000 to George. In total, it owes in excess of £1million to other suppliers. It has 50,000 litres of milk stored in its cold stores and £10,000 worth of bread and cakes in its freezers. £5,000 is left in the company’s general bank account and £1,000 in the specially designated account in accordance with the contract.**

**Advise George.**

Introduction

This is a typical problem question dealing with retention of title clauses. You will need to discuss the following:

Incorporation

Has the clause been incorporated into the contract? If not, it will have no effect. In this case, it appears that it has been appropriately incorporated in the contract.

What kind of retention of title clause is it?

You should then discuss the kind of retention of title clause that appears in the question (i.e. simple, all-monies, etc) and the consequences of that kind of clause.

Does the clause require registration?

In *Clough Mill Ltd v Martin* [1985] 1 WLR 111,the Court of Appeal confirmed that no registrable charge arises in the case of a simple retention of title clause where the seller merely seeks to reserve title in the goods sold until he is paid. This is because, with a simple retention of title clause, property in the goods does not pass to the buyer until he has paid for them. Consequently, until payment, the buyer does not own the goods and is simply unable to create a charge over the seller’s own goods. As Oliver LJ put it in the *Clough Mill* case, ‘a company can create a charge only on its own property and if it never acquires property in the goods... it cannot charge them.’

On the other hand, a charge will be created where there is a contract which, by way of security for the payment of a debt, confers an interest in property defeasible or destructible upon payment of such debt, or appropriates such property for the discharge of the debt (*Re Bond Worth Ltd* [1980] 1 Ch 228). Any charge created by a company is void if not registered. Even if registered, they face others taking priority over them.

Have the goods sold been mixed or incorporated into manufactured goods so as to change their identity?

Where the buyer uses the seller’s goods in the manufacture of other products there is nothing to prevent the parties from agreeing that property in the finished goods belongs to the seller until paid for. This is simply a matter of agreement. In this type of situation, the seller will have ownership of the finished goods because the parties have agreed that he does and not as a result of a reservation of title. A party can only *reserve* title in goods where that party originally had title, as *Re Peachdart Ltd* [1984] Ch 131 demonstrates. In that case, the sellers sold leather to Peachdart who then used it in the manufacture of handbags. The contract provided that ownership of the leather and of any mixed goods using this leather would remain with the sellers until full payment had been received. Peachdart went into receivership owing money to the sellers for the leather bought. It was held that although the sellers could reserve title over the leather it sold, it could not do so over the finished goods. The leather sold had changed its identity once it had been made into handbags and could no longer be said to be the same goods that were sold by the sellers and belonging to them. Whether or not the goods sold have lost their identity is a question of fact. If they have, then, as in *Re Peachdart*, the goods sold will have lost their identity when they were made into finished products and therefore cease to be the property of the seller.

However, even where the goods have been incorporated into finished products, it does not necessarily mean that they have changed their identity. In *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 1 WLR 485 the sellers sold a diesel engine to Puttick who used it in the manufacture of a generating set. The sellers had reserved title in the engine until it had been paid for. When the buyers went into receivership, the sellers sought to recover the engine. The receiver argued that property in the engine had passed to the buyers when it incorporated it into the generating set. Staughton J held that the engine could be reclaimed by the sellers because it had remained an engine throughout and could easily be identified by its serial number as belonging to them and could be dismantled with relative ease from the finished generating set. Therefore, if the goods sold have merely been incorporated by the buyers into other goods, then a seller with an appropriate retention of title clause will be entitled to recover the goods sold, provided they can still be identified and dismantled from the finished goods without damaging those goods.

**2. Critically analyse the relationship between the transfer of property and the transfer of risk. Consider whether it was necessary for the draftsman of the SGA 1979 to fix risk with property.**

Introduction

You should first explain what is meant by the transfer of property (i.e. ownership) in the goods and the difference between that and possession.

Transfer of property in specific goods and in unascertained goods

You should then explain the difference between the transfer of property in specific goods and the transfer of property in unascertained goods.

Specific goods

With specific goods, you should firstapply s 17(1) SGAwhich provides that property in specific or ascertainedgoodswill transfer to the buyer when the parties to the contract intend it to pass. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case (s 17(2)). Where the parties fail to make clear their intentions as to when property in the goods will be transferred to the buyer (which in consumer cases is quite likely to be the norm as these parties are unlikely even to direct their thoughts to this question) you will need to consider the Rules contained in s 18.

Unascertained goods

In the case of a contract for the sale of unascertained goods, no property in them can be transferred to the buyer unless and until the goods are ascertained (s 16 SGA). This is the case even if the parties agree otherwise. You should mentioned that s 16 is, of course, subject to s 20A which was added by the Sale of Goods (Amendment) Act 1995 and is concerned with undivided shares in goods forming part of a bulk. Since property in the goods cannot be transferred to a buyer until the goods are ascertained, it is important to understand when goods will become ascertained. In *Re Wait* [1927] 1 Ch 606 the Court of Appeal stated that the goods will become ascertained when they are identified as the goods to be used in the performance of the contract.

Passing of risk

In this context, risk means the risk of theft, loss, or damage to the goods, but not the risk of non-payment.

In terms of which party has the risk, this will depend on whether or not the buyer deals as a consumer.

When the buyer deals as a consumer

Where the CRA 2015 applies the question of the passing of risk is different. Section 29 provides that the goods remain at the trader’s risk until they come into the physical possession of the consumer or a person identified by the consumer to take possession of the goods. The position is different if the goods are deliv­ered to a carrier who is commissioned by the consumer to deliver the goods and who is not a carrier the trader named as an option for the consumer. In such a case, the goods are at the consumer’s risk on and after delivery to the carrier al­though this does not affect any liability of the carrier to the consumer in respect of the goods.

This not only reflects which party a typical consumer buyer would expect to be re­sponsible for the goods purchased from a trader until physical possession has been transferred, but also the commercial reality of a trader being in the better (or only) position to insure the goods until such time.

When the buyer does not deal as a consumer

When the buyer does not deal as a consumer, then unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer. When the property in them is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not (s 20(1) SGA). Again, you should also make reference to s 32(1)–(3) regarding risk when the delivery of the goods is to a carrier. Delivery to a third party carrier is prima facie delivery to the non-consumer buyer and risk will pass then.

Conclusion

Unless otherwise agreed, the goods remain at the seller's risk until the property (ownership) in them is transferred to the buyer. Once the property in them has been transferred to the buyer they are then at the buyer's risk whether or not the buyer has possession of them. In other words, property in the goods and the risk are transferred together. This means that a buyer might have to bear the risk of loss even if the seller has possession of the goods. Thus, when a buyer deals as a consumer, risk only passes to him on delivery of the goods; and when a buyer does not deal as a consumer, risk ordinarily passes to him as soon as the property in the goods passes to him even if the seller retains possession of them. The distinction between property and possession cannot be over-emphasised. This means that, for example, if the goods are destroyed whilst at the buyer's risk, he will not be able to claim for non-delivery and must still pay the price. Therefore, the sensible, well-advised buyer will consider the question of insurance to cover this problem.

There are two other things to note about risk where the buyer does not deal as a consumer. First, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault (s 20(2)) and, secondly, nothing in s 20 will affect the duties or liabilities of either seller or buyer who acts as a bailee or custodier of the goods of the other party (s 20(3)). Neither a bailee nor a custodier actually owns the goods they possess. Parties are frequently bailees of goods. For example, a buyer who buys goods on a sale or return basis is merely a bailee of the goods until such a time he either returns the goods or otherwise causes the property in them to pass to himself under s 18 Rule 4.