

INSOLVENCY INSIGHTS

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EDITION 4



WELCOME TO THE FOURTH EDITION OF OUR INSOLVENCY INSIGHTS MAGAZINE!

The Government's spend is at an all-time high and the pound has fallen to its lowest level in 16 years. To say we are living in volatile times may be an understatement, but are there some green shoots of recovery? Looking at the recent Insolvency Service statistics, it suggests that the trend for corporate insolvencies has slowed, however personal insolvencies have begun to gain momentum, primarily driven by an increase in Debt Relief Orders. The cost-of-living crisis is still prominent in our economy and, whilst there has been an edge towards this easing, we have seen the Government make some unpopular decisions that can affect people in different ways. As previously indicated, a recovering economy will present opportunities, but it remains crucial to closely monitor clients, spot early warning signs, and act quickly to recover debts.

In this edition of Insolvency Insights, we discuss contentious insolvencies and the creditors responsibilities throughout the procedure, as well as Retention of Title Claims and if they're helpful in insolvency situations. Our sector experts have also made their predictions for 2025, as well as touched on the General Market Sentiment for Deals this year and any predicted trends in the Forensic Accounting and Valuation Services space.

We have a guest feature from Eddie Flanagan, Partner in the Debt and Asset Recovery team at Shakespeare Martineau, discussing how the problem of getting paid has been, and continues to be, a vexatious issue for many creditors, and what they should do about it.

We hope you find this resource useful. If, upon reading, you have any insolvency related questions or wish to discuss your specific circumstances, please let us know.

Additionally, if you'd like to collaborate or be featured in an upcoming edition, please do reach out – we'd love to hear from you.

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Retention of Title Claims:
What are they and could they be helpful in an insolvency scenario?



Understanding Contentious Insolvency



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RETENTION OF TITLE CLAIMS: WHAT ARE THEY AND COULD THEY BE HELPFUL IN AN INSOLVENCY SCENARIO?

Retention of Title (“ROT”) is where the seller of physical goods attempts to protect itself against non-payment by retaining ownership of those goods until payment is received, even after the goods have been delivered.

There are two types of ROT clause:

Simple clause

The goods supplied under a specific invoice remain the property of the seller until all such goods on the invoice have been paid.

All monies clause

This holds that all goods supplied by the seller remain theirs until such time that all sums due to the seller have been paid. If the purchaser has at some point in time cleared all debts to that seller, then title to all those goods supplied prior to that date will pass to the purchaser.



you supply, the goods may have been converted, so cannot be claimed or the goods may no longer be held by the company, as the title may have been passed to another party. Your legal advisers will be able to advise you on whether you still have a claim.

How do ROTs impact landlords?

A landlord can enforce on their arrears against assets that are left at their premises, often referred to as Commercial Rent Arrears Recovery (“CRAR”). Therefore, you need to act quickly, ensure you have a valid ROT and seek legal advice where necessary. Take the opportunity to liaise with the Insolvency Practitioner (“IP”) and get out on site as soon as possible. They will ensure you are given the opportunity to view your goods to establish if they are identifiable and recoverable. If you are unsure on your position, you could seek assistance from an independent IP.

So, can a ROT be a helpful tool?

There are many benefits of having a valid ROT clause. At the very least, it can be used as a negotiating tool with an IP. Remember, the IP wants to realise the assets for the benefit of the estate and storage of the goods come at a cost, so there is a cost benefit analysis for the IP to consider.

It is an excellent way to legitimately reduce the amount owed to you by an insolvent company, but requires a proactive approach and an IP who allows you access to identify the goods in question.

If you supply goods and do not have a ROT clause, it could be a worthwhile move to incorporate them into your T&Cs.

As ever, if you are unsure about ROT clauses and their impact, feel free to get in touch.



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In an administration, a seller cannot repossess goods even if there is a ROT clause in their contract with the company in administration.

If a buyer enters into an insolvency process the impact can be significant on a seller who has contracted with them to provide goods. If the contract between the parties contains a ROT clause then, depending on the insolvency process being entered into by the buyer, the seller may have a right to reclaim possession of the goods.

What happens when a company enters administration?

In an administration, a seller cannot repossess goods even if there is a ROT clause in their contract. This is an important point for a seller as the company is protected by the administration moratorium. The only way that a seller can repossess goods is if the administrator consents to it or an order is made by the Court. This restriction also applies during the pre-administration period once a notice of intention to appoint an administrator has been filed in Court, creating an interim moratorium.

What happens when a company enters liquidation?

In liquidation the existence of a ROT clause means that the seller may have a course of action to reclaim the goods. If an ROT clause is not present, then the seller will rank as an unsecured creditor.

Seek legal advice

ROTs are a complex area of law, so you should seek legal advice when dealing with ROTs. There is much case law about the validity of clauses, when it was brought to the customer’s attention and the enforcement of a ROT. Depending on what

UNDERSTANDING CONTENTIOUS INSOLVENCY

It is common for a debtor to give their creditors the perception that they have no assets of value and are therefore unable to pay. The debtor may use this as a technique to dissuade creditors from starting formal insolvency proceedings, on the basis that there would be no benefit to the creditors, and instead the debtor may influence them to write off the debt.

It is of course true that in some cases there are no readily available assets to meet amounts owed to creditors. Assets may be subject to security and any funds in the debtor’s bank account may have long since been spent. However, that does not always mean that it isn’t possible for an Insolvency Practitioner to find funds or assets which have been diverted to another person and then to recover them.

Contentious insolvency usually involves an Insolvency Practitioner making use of legal rights to make recoveries in formal insolvency proceedings. There are various routes set out in the Insolvency Act 1986 alongside the law which exists outside of any insolvency procedure. These routes have the general purpose of restoring the financial position of the debtor company or individual, such that it is back to where it would have been, if there had not been a diversion of assets. Insolvency Practitioners have the ability to issue a claim at Court, where ultimately a judge makes a decision. In fact, in the majority of cases a settlement is agreed between the parties, which reduces the risk and the legal costs on both sides.

Transaction at undervalue

A transaction at undervalue refers to a claim which often arises within insolvency proceedings. As the name suggests, it occurs when the debtor has entered into a transaction where the value received by them is significantly less than the value given away. It can also happen when the debtor makes a gift to someone else. An example might be a business transferred to another entity without adequate consideration, or assets being moved away from the debtor via a deed of trust.

Any such claim issued at Court will have to be proved by the Insolvency Practitioner. However, if a family member or associate of the debtor has benefitted from the transaction, the elements to be proved may be fewer. The Insolvency Practitioner can challenge transactions which took place prior to the date of formal insolvency; the period applicable will depend on the purpose of the transaction and whether the debtor is an individual or an incorporated entity.

Preference

Another common situation is a preference, where something happens which leaves a creditor, surety or guarantor of the debtor in a more favourable position than they would otherwise have been in. An example could be repaying a debt or loan to one creditor whilst other creditors are not paid.

In order to demonstrate that a preference has taken place, it will be necessary to show that the debtor had a desire to prefer that person. Where the reason involved a genuine commercial need, this may exclude a transaction from constituting a preference. If there is a connection between the debtor and the person

who benefitted from the preference, then it will be presumed that there was a desire to prefer that person unless shown otherwise.

Wrongful and fraudulent trading

Creditors who feel aggrieved about their unpaid debts often accuse debtor companies of insolvent trading. It is not prohibited by law to trade whilst insolvent, and it is quite normal for start-up businesses to have more debts than assets. Many of these businesses successfully become profitable and hugely solvent after a period of time.

A problem arises where it was evident to a director, or should have been evident, that the company would be unable to avoid a formal insolvency procedure. The director could be pursued personally for wrongful trading unless they took every step to reduce the loss to creditors to the lowest possible amount in the circumstances.

Where a company has been operating with the intent of defrauding creditors or for any other fraudulent purpose, there may be a claim for fraudulent trading. As well as the directors, any other person who knew and was a party to the fraud could be prosecuted.

Breach of duties by directors

The Companies Act 2006 sets out a number of duties that apply to company directors. Directors are stewards of the assets of the company and also have general fiduciary duties. Where they do not act in accordance with their duties, which could include participating in some of the actions above, there could be a claim against them relating to the loss caused by their actions. This could be the case even where a director did not receive a direct benefit.

The role that creditors can play

Creditors can perform an important role in assisting Insolvency Practitioners by providing information about how the insolvent debtor operated and what assets might exist. Documentary evidence can be particularly useful when Insolvency Practitioners are building a picture of what happened prior to the start of the formal insolvency process. Creditors may wish to provide funding to investigate or pursue claims, to cover costs such as professional fees and Court fees.

Every situation is different and the law is subject to many nuances which are developing over time. Where readers are concerned about the actions of an insolvent debtor, they would be well advised to seek assistance from an insolvency professional.



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OUR SECTOR PREDICTIONS FOR 2025

As we approach 2025, businesses and individuals across various sectors are gearing up for a year of challenges and opportunities shaped by changes in taxation, economic stability, and evolving market dynamics. Our experts have shared their predictions for the year ahead, offering insights to help you plan strategically and adapt to the shifting landscape.

General Market Sentiment for Deals

The main Capital Gains Tax ('CGT') rate change on 30 October 2024 provides an opportunity for transactions to refocus on commercial drivers rather than immediate tax implications. This is welcome after the rumours of significant CGT rate increases prior to the Budget.

However, the upcoming changes in CGT Business Asset Disposal Relief will impact transactions for those shareholders who still have their £1m lifetime allowance. From 6 April 2025, the CGT rate will rise from 10% to 14% for assets qualifying for Business Asset Disposal Relief, with a further increase to 18% planned for April 2026. While some deals are being expedited to avoid these changes, it is crucial to ensure that the wider commercial aspects of the deal remain in focus. Business owners looking to pass down their companies to the next generation should also revisit their plans in light of the changes to Inheritance Tax rules from April 2026.

We anticipate a rise in deal activity during 2025 as businesses adapt to greater stability in tax, inflation, and interest rates, at least in the short term. Shareholders considering an exit within the next 1-3 years may accelerate their plans to leverage the current known economic environment. Buyers, including corporates and private equity firms, are expected to remain active, supported by significant funds ready for deployment. However, rising Employers NIC and the national minimum wage are likely to influence deal values or structures as acquirers seek to mitigate potential risks to future profitability, which underpins their investments. These dynamics will vary across sectors, with cost-sensitive industries feeling the impact more acutely.

Manufacturing

Manufacturers must adopt a proactive approach to remain competitive in 2025. Strategic planning and robust contingency measures will be essential to navigate potential disruptions. The rapid integration of AI and other technological advancements will be a critical differentiator, as businesses that fail to invest in innovation risk falling behind competitors.

Rising employer costs, including increased NIC contributions, will present significant challenges for businesses with large workforces. Geopolitical developments and a shift towards more protectionist trade policies could further complicate global trade dynamics. Manufacturers may wish to adapt their strategies to account for potential tariffs and shifts in trade relationships.

Hospitality and Leisure

We see different parts of the hospitality and leisure sector having a mixed 2025. For instance, the hotel market seems to be booming, with travel rising to pre-Covid levels and room rates continuing to increase, especially in bigger cities. This has fuelled the valuations of hotels and suggests that the year could see further M&A activity in this industry.

On the other hand, the most recent Budget has not favoured the restaurant and bar trade. With already wafer-thin margins and some businesses only seeing normal trade 3 to 4 days a week, due to increased remote working, the Budget changes to National Insurance for corporates mean a further squeeze on profitability. Overcoming this will require businesses to become more efficient and to entice customers during quiet periods. Additionally, operators will need to control staffing and stock-holding costs to meet erratic demand.

Property and Construction

The property and construction sector faces a mixed outlook for 2025. While not as heavily impacted as hospitality and leisure by recent Budget measures, it remains vulnerable to broader economic trends. Instability in the job market could reduce activity in new builds and corporate lettings, indirectly affecting house prices. The Office for Budget Responsibility (OBR) has forecast slow growth in this sector, highlighting its sensitivity to economic pressures.

The political focus on building housing is welcome. If funding is available, the challenge will be whether there is enough capacity in the market to achieve these goals. Innovative funding approaches will be necessary to support the sector. The sector's historical resilience has helped it weather economic storms, and businesses that adapt effectively could emerge stronger, benefiting from reduced competition and their own resilience.

Transport and Logistics

Transport and logistics businesses are likely to face continued challenges in 2025, with insolvencies expected to rise, particularly if fuel prices remain high. There are also raised concerns regarding expected US tariff changes from President Trump, triggering shipping costs to already double. Therefore, creating a worry that prices will increase and remain higher for longer.

The sector must also contend with pressures stemming from increased Environmental, Social, and Governance (ESG)

compliance expectations. Managing emission levels and minimising environmental impact will be critical to staying competitive and meeting stakeholder demands.

Partnering with ESG specialists can help businesses identify areas for improvement, reduce carbon footprint, and enhance overall performance. Companies that proactively address these challenges will be better positioned to thrive in an increasingly sustainability-focused market.

Retail

The retail sector is facing another tough year in 2025, with many of the same challenges continuing to weigh on the industry. Trading conditions remain difficult, and staying successful will require real effort. Physical store numbers are shrinking as retailers seek ways to improve efficiency and adapt to changing shopping habits.

Rising Employer NIC and financial pressures are also affecting retail business margins. Inflation has edged up again this month, prompting shoppers to become savvier with their spending. Retailers are relying on busy shopping periods to boost sales, using tactics like refurbishment and fresh offerings. However, the decline in high street stores creates a cycle of reduced foot traffic, which further challenges the sector.

Despite these struggles, some bright spots exist. The beauty and personal care market, as well as healthcare and supplements, continue to thrive. Retailers offering strong products, running efficient operations, and maintaining customer satisfaction can still succeed. Moderate growth is possible for 2025, but much depends on inflation cooling off and interest rate cuts boosting consumer confidence.

Forensic Accounting and Valuation Services

2025 is shaping up to be a busy year for valuation work. Succession planning and inheritance tax are hot topics, with more valuations being requested in anticipation of tax rule changes. The business property relief changes are driving activity, with clients seeking to get ahead of potential impacts.

Employee Ownership Trusts (EOTs) are also in focus, as new rules require trustees to ensure shares are transferred at market value. This makes accurate valuations critical to avoid overpayment or scrutiny from HMRC.

In forensic and dispute work, developments in the group litigation arena, with notable cases concluding, are expected. Shareholder and investor disputes, increased regulation around litigation funding, and group claims will remain prominent. Topics such as "secret commissions," international trade disputes, ESG, and AI or cyber-related issues will feature prominently. Pension disputes, professional negligence cases, and privilege claims against shareholders are also set to keep forensic experts busy.

Fraud will be a significant focus, particularly with the new "failure to prevent fraud" offence, which may ripple into M&A activity, causing reputational damage and potential warranty claims.

Looking ahead, 2025 promises to be a pivotal year across sectors. From navigating tax changes to embracing technological advancements and geopolitical shifts, preparation will be key. We are here to provide expert guidance to help you make informed decisions and achieve strategic goals. Whether in financial distress, planning an exit, or considering future-proofing your business, our team is ready to assist every step of the way.



WIND THEM UP!

OUR GUEST AUTHOR ARTICLE

Petition at your peril? Throughout the history of commerce, the problem of getting paid has been, and continues to be, a vexatious issue for many creditors. Such frustration and often righteous indignation culminates in a wish for immediate and impactful action.

Whilst most are familiar with the court process of seeking a judgement, more aggressive creditors may wish to make more of an impact on their wayward debtors. This can lead them to seek the threat of annihilation of their debtor/former customer.

What methods are used?

In the case of an individual

That threat can take the form of a statutory demand. With an individual this generally allows 21 days for them to pay or if they dispute the matter, they can apply to set the statutory demand aside. We will return to that process later. If the debtor does nothing, then the creditor can issue a bankruptcy petition. That will then result in a hearing.

In the case of a company

Like an individual a statutory demand can be served which again should be complied with, within the 21 day period. However, there is a more nuclear weapon in the form of what is known as a Sec 123 (e) demand, referring to the section within the Insolvency act 1986. This can take a letter format and if well drafted should lay out the details of the debt and the circumstances that lead the creditor to consider that the debtor is insolvent. Again, it should seek a date for payment, however that can be much shorter than the 21 days in the formal demand. If no response or an unsatisfactory response is received, then the creditor can move forward by issuing a winding up petition.

The issue and advertisement of this can have catastrophic impact on the corporate debtor. Banks have been known to freeze accounts. With a company there is no procedural method to set aside. Unlike an individual who can apply to set aside, a company cannot do this. A company will need to either injunct the issue of a winding up petition, or if they hear of the petition later, the advertisement of same.

Disputes and their impact on both processes

The objective of this article is to raise awareness as to the risk a creditor may be exposing themselves to, when commencing recovery by way of these two distinct processes. To illustrate the point, we refer to the corporate process, because although the processes are mutually exclusive, the judicial scrutiny of same is broadly similar.

The most illustrative case concerning risk to a creditor, is Cannon Screen Entertainment v Handmade Films (Distributors) Ltd. 1988. The judgement of Warner J still resonates through the years. The background leaves you feeling that you have some sympathy for the creditor Handmade. They issued invoices for payment and whilst they received a response, they did not



receive a defence or denial. They then issued demands. Cannon sought an injunction to prohibit the presentation of a petition. On the morning of the hearing Cannon produced an affidavit with a defence that ran to 28 pages and 53 paragraphs. At that stage, the parties agreed there was a dispute, and the petition should not proceed. The only matter for Warner J was costs of the proceedings.

Whilst the innocent reader may think Cannon should have paid the costs because of their lateness in furnishing the details of the dispute, the judge emphatically disagreed. He stated "*there is nothing improper in a creditor who has no notice of a substantial defence to his claim serving a statutory demand, but to my mind he does that at his own risk, because the normal course for a creditor to adopt, if he wants to enforce a debt by proceedings is to issue*". He then awarded costs to Cannon the debtor. The question in such cases then turns to whether costs should be awarded on a standard (the normal basis) or an indemnity basis being the much harsher version. As stated in New Law Journal:

'The ordinary principles apply, as set out in Excelsior Commercial v Industrial Holdings [2002] EWCA Civ 879, [2002] All ER (D) 39 (Jun) (and, most recently, in Siegel v Pummell [2015] EWHC 195 (QB), [2015] All ER (D) 143 (Feb)), in which Waller LJ said: "Is there something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs?"

With individuals, the Insolvency 2016 rules have similar effect in that the court can set aside if there is a substantial dispute, a counterclaim or set off. Furthermore, they have a wide discretion to set aside where the court is convinced on other grounds that it is appropriate to set aside.

Whilst creditor clients may wish to impose the harshest proceedings on their debtor customer, such actions can have prohibitive consequences in terms of adverse costs and a waste of time, effort, and legal costs, which will only add to the loss incurred.

It is therefore appropriate to pause for thought before petitioning.



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NEED ADVICE?

The Menzies Creditor Services team can advise on the best way for you to protect your position when one of your debtors enters, or is approaching, insolvency proceedings. Utilising our extensive experience and expert insights, we work in collaboration with you, drawing upon our industry and insolvency sector knowledge, to improve your financial outcome.

For further information on our creditor services offering, please get in touch.



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