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# 3HR Legal Weekly

## Commercial

### Jumping the Queue: Retention of Title

The most compelling reason for the taking of security is that it separates secured from unsecured creditors in the event of the debtor's insolvency. The latter creditors normally receive on average a very modest (or, more often, no) dividend when the debtor's assets are distributed. Secured creditors, however, do not have to queue for their dividend payments and can avail themselves of their security rights before the debtor's assets are distributed.

#### Retention of Title

It is a contractual provision by which, in its simplest form, the passing of title in goods sold is made conditional on payment of the full purchase price by the buyer.

There are a number of transactions involving the retention of title that are not classified by the current law as security but that serve the same economic function. The principal forms are the finance lease, the hire purchase contract and various types of conditional sale agreement.

A well drafted retention of title clause will provide many advantages.

First, they do not have to register their retention of title clauses in order to assert them against third parties. Second, so far as the buyer has not acquired rights to the goods sold, even a pre-existing mortgage or charge granted to another creditor will not attach to the goods sold under retention of title, which means that the trade creditor will have priority over such earlier creditors in respect of the goods sold and be able to assert their proprietary rights in the event of the buyer's insolvency.

Credit can be provided by anyone. If you are supplying goods on credit, then you are a creditor and should be concerned with how to enhance the security of your position.

For further discussion, please contact 3HR Legal.

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## Employment

### Are you calculating your employees' holiday pay correctly?

Following on from our Employment Law Update seminar last week and the Employment Tribunal's decision in **Loch and others v British Gas Trading Ltd and another**, we now know that workers' holiday pay must be calculated to include all elements of normal remuneration, including commission.

The Employment Appeals Tribunal (EAT) decision in **Bear Scotland Ltd v Fulton and others** has already confirmed that non-guaranteed overtime that a worker is required to carry out should be included in the calculation of holiday pay. This new case extends the required payments further.

#### How should employers calculate holiday pay?

Average earnings must be calculated to include non-guaranteed overtime and commission payments, as well as incentive and productivity-linked bonuses, shift allowances, call-out payments and travel time payments which exceed expenses incurred.

Unfortunately, we have not been given clear guidance on how to calculate holiday pay but there will be a further tribunal hearing looking at this point. We are therefore left in the meantime with the guidance from the EAT in **Bear Scotland** that holiday pay should be calculated on the basis of the employee's average earnings in the 12 weeks preceding the annual leave.

It is still not clear whether voluntary overtime should be taken into account (i.e. overtime that the employer is not obliged to offer, and which, if offered, the worker is not required to do).

#### What should employers do now?

Whilst the decision by the Tribunal in the **Loch v British Gas** case is not binding, this decision is a warning that employers must change their systems to ensure that holiday pay is correctly calculated going forward to ensure that they are compliant with the Working Time Regulations. Employees may claim an unlawful 'deduction' from wages if their employer has failed to pay the correct amount of holiday pay.

Employers should look to implementing computer software which automatically calculates the correct holiday pay by taking into account the earnings of the employees over the preceding 12 weeks.

If you would like advice on how these decisions affect you or your business, please get in touch.

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